


IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL JAMES SMITH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51754

FILED

ORDER OF AFFIRMANCE

MAR 26 2009
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

This is a proper person appeal from an order of the district court denying a motion for a new trial. Eighth Judicial District Court, Clark County; Elizabeth Gonzalez, Judge.¹

On March 17, 2008, the district court convicted appellant, pursuant to a jury verdict, of burglary (Count 1), burglary (Count 2), possession of a stolen vehicle (Count 3) and possession of a stolen vehicle (Count 4). The district court sentenced appellant to serve four terms of 16 to 72 months in the Nevada State Prison. Counts 1 and 2 were imposed to run consecutively; counts 3 and 4 were imposed to be served concurrently with the other counts. Appellant filed a notice of appeal from the judgment of conviction in the district court, and appellant's direct appeal is pending in Docket No. 51104.

¹Judge Gonzalez signed the written order denying the motion. Visiting Judge Robert Rose presided over the hearing on the motion and orally denied the motion.

On April 29, 2008, appellant filed a proper person motion for a new trial in the district court. The State opposed the motion. On July 3, 2008, the district court denied the motion. This appeal followed.

In his motion, appellant claimed that he should receive a new trial due to newly discovered evidence. Appellant claimed that during the Faretta canvass to determine his competence to represent himself, he did not disclose that he was a paranoid schizophrenic and as such he should not have been allowed to represent himself. See Faretta v. California, 422 U.S. 806 (1975). Appellant also claimed that his standby counsel and the district court judge tried to make him lose at trial, that the district court erred in denying his motion for a continuance, and that a secret photo lineup the police conducted with a witness violated his rights.

NRS 176.515(3) provides that a motion for a new trial based upon newly discovered evidence may be made within 2 years after the verdict or finding of guilt. NRS 176.515(4) provides that a motion for a new trial based upon any other grounds than newly discovered evidence “must be made within 7 days after the verdict or finding of guilt or within such further time as the court may fix during the 7-day period.” In order to prevail on a motion for a new trial based on newly discovered evidence:

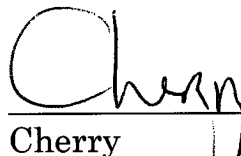
(1) the evidence must be newly discovered; (2) it must be material to the defense; (3) it could not have been discovered and produced for trial even with the exercise of reasonable diligence; (4) it must not be cumulative; (5) it must indicate that a different result is probable on retrial; (6) it must not simply be an attempt to contradict or discredit a former witness; and (7) it must be the best evidence the case admits. Callier v. Warden, 111 Nev. 976, 988, 901 P.2d 619, 626 (1995) (citing Sanborn v. State, 107 Nev. 399, 406, 812 P.2d 1279, 1284-85 (1991)).

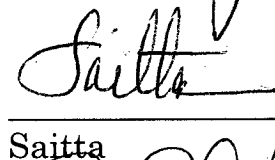
This court will not disturb the decision of the district court to deny a motion for a new trial based upon newly discovered evidence absent an abuse of discretion. McLemore v. State, 94 Nev. 237, 241, 577 P.2d 871, 873 (1978).

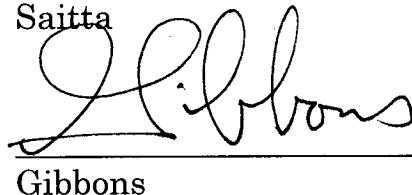
We conclude that appellant's motion was properly denied. The majority of appellant's claims were not evidentiary and therefore, not within the scope of a motion for new trial based on newly discovered evidence. Also, appellant failed to demonstrate that his claim concerning a secret photo lineup satisfied the test for a motion for new trial based on newly discovered evidence. Therefore, we conclude that the district court did not abuse its discretion in denying the motion.

Having reviewed the record on appeal and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975). Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Elizabeth Gonzalez, Eighth Judicial District, Dept. 11
Hon. Robert E. Rose, Visiting Judge
Michael James Smith
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk