

IN THE SUPREME COURT OF THE STATE OF NEVADA

ENCARNACION AGUILAR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40072

FILED

DEC 05 2003

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of level-three trafficking in a controlled substance. The district court sentenced appellant Encarnacion Aguilar to serve a prison term of 10 to 25 years.

Aguilar first contends that the district court erred in allowing the State to amend the information to change the name of the individual whom Aguilar allegedly sold the cocaine to. The State amended the information after the jury had been empanelled and sworn, but before opening arguments. Aguilar concedes that he did not object to the amendment or seek a continuance in order to prepare a different defense. Additionally, Aguilar concedes that the amendment did not charge a new or different offense. However, Aguilar argues that the amendment of the

information amounted to plain error because the amendment was a material change that substantially prejudiced the defense.¹ We disagree.

“The court may permit an indictment or information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.”² In this case, the information was amended to change the name of the individual whom Aguilar sold the cocaine to from M. Alberto, an agent with Nevada Division of Investigation, to J. Gotbub, an agent with the Drug Enforcement Agency. In its motion to amend the information, the State alleged that the amendment was needed “merely to correct a clerical error in the name of the agent.” For the first time on appeal, Aguilar alleges that he was prejudiced by the amendment because his defense would “likely have been quite different had he known he would be facing allegations involving a different person than he thought might testify.”

We conclude that the amendment to the information did not prejudice Aguilar's substantial rights. Although the State corrected the name of the individual whom Aguilar allegedly sold the drugs to, the name change arose from a clerical error, not from a fundamental change in the

¹See NRS 178.602 (“Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.”).

²NRS 173.095(1).

State's theory of the case.³ Further, despite his allegation, Aguilar knew Gotbub might testify prior to the amendment of the information because he was listed as a witness on the original information and Gotbub testified at the preliminary hearing. Additionally, Aguilar has failed to explain how his defense theory of mistaken identity would have been "different" had the original information named Gotbub. Finally, we note that the State presented overwhelming evidence that Aguilar sold the cocaine at issue. In particular, four eyewitnesses -- three of whom were undercover law enforcement agents -- identified Aguilar as the individual who sold the cocaine. Additionally, evidence was admitted showing that the vehicle and cellular phone used in the transaction belonged to Aguilar. Finally, a videotape showing Aguilar engaging in the drug transaction was admitted into evidence. Accordingly, we conclude that the district court did not err in allowing the State to amend the information.

Aguilar next contends that reversal of his conviction is warranted because his constitutional right to a speedy trial was violated. We disagree.

Again, we note that Aguilar failed to preserve this issue for review by objecting in the proceedings below.⁴ This court may

³See generally Alford v. State, 111 Nev. 1409, 906 P.2d 714 (1995) and Barren v. State, 99 Nev. 661, 669 P.2d 725 (1983) (reversing the appellant's conviction because the charging documents permitted the State to change the theory of the case without affording sufficient notice to the defense).

⁴See Anderson v. State, 86 Nev. 829, 834, 477 P.2d 595, 598 (1970).

nevertheless address an assigned error if it was plain and affected the appellant's substantial rights. We conclude that no plain error occurred here and that Aguilar's right to a speedy trial was not violated.

The Sixth Amendment to the United States Constitution provides, in part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."⁵ In determining whether a defendant's Sixth Amendment right to a speedy trial was violated, this court considers four factors: the "[l]ength of [the] delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."⁶

First, although the length of the delay -- 235 days between arraignment and trial -- warrants further inquiry, the delay was not so long as to be presumptively prejudicial.⁷ Second, most of the delay was attributable to the defense: defense counsel moved to continue the trial, Aguilar then switched attorneys, and new defense counsel again moved to

⁵See also NRS 178.556(1) (providing that the district court may dismiss an indictment or information if the defendant has not postponed the trial and the trial is not held within sixty days after the arraignment).

⁶Barker v. Wingo, 407 U.S. 514, 530 (1972).

⁷Middleton v. State, 114 Nev. 1089, 1110, 968 P.2d 296, 310-11 (1998) (holding that a 2 1/2 year delay did not give rise to a finding of presumptive prejudice, especially when the appellant was responsible for most of the delay).

continue the trial on two separate occasions.⁸ Further, the single continuance sought by the State was needed to secure the attendance of a witness, which is a valid and justifiable reason to seek a delay.⁹ Although Aguilar argues that he should not be held responsible for the fact that his defense counsel was not prepared,¹⁰ Aguilar chose to change attorneys and we cannot attribute that delay to the State.¹¹ Finally, we conclude that Aguilar was not prejudiced by the delay. Although Aguilar notes that he was in custody during the delay period, as we have previously discussed, there was overwhelming evidence against Aguilar, and there is no allegation in this case that valuable witnesses or evidence were lost as a

⁸Aguilar has not provided the transcripts of the pretrial proceedings for this court's review. We note that it is the responsibility of counsel to provide documents or transcripts necessary to resolve an appeal. See NRAP 28(e), 30(b); Greene v. State, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980). We have therefore relied on the district court minutes, as neither party has questioned the accuracy of those minutes.

⁹See Barker, 407 U.S. at 531 ("a valid reason, such as a missing witness, should serve to justify appropriate delay").

¹⁰To the extent that Aguilar argues that his trial counsel was ineffective in seeking a continuance without his consent, we note that Aguilar may seek relief in the district court by filing a post-conviction petition for a writ of habeas corpus alleging ineffective assistance of counsel.

¹¹See Brinkman v. State, 95 Nev. 220, 223, 592 P.2d 163, 164-65 (1979).

result of the delay.¹² We therefore conclude that Aguilar's right to a speedy trial was not violated.

Having considered Aguilar's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.

Becker, J.
Becker

Shearing, J.
Shearing

Gibbons, J.
Gibbons

cc: Hon. Jessie Elizabeth Walsh, District Judge
Robert M. Draskovich, Chtd.
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

¹²Cf. Barker, 407 U.S. at 534 (concluding that "prejudice was minimal" despite the fact that the appellant spent 10 months in jail prior to trial because no evidence was lost due to the delay); State v. Fain, 105 Nev. 567, 779 P.2d 965 (1989) (holding that a 4 1/2 year delay did not violate the appellant's right to a speedy trial because no specific witness, piece of evidence, or defense theory was lost due to the delay).