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Summary of State v. Bayard, 119 Nev. Adv. Op. No. 29

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***State v. Bayard*, 119 Nev. Adv. Op. No. 29 (June 26, 2003).¹**

Criminal Law – Appeals – Evidence

Summary

Expedited appeal from an order of the Second Judicial District Court, State of Nevada, granting a motion to suppress evidence of narcotics obtained by searching defendant after arrest for two minor traffic violations.

Disposition/Outcome

Affirmed. The narcotics were excluded from evidence because they were a product of unlawful search and seizure in violation of Defendant's state constitutional rights.

Factual and Procedural History

The Defendant Rico Shountes Bayard was stopped by Reno Police Officer Ty Sceirine after committing two minor moving traffic violations. Bayard turned left onto a two-lane thoroughfare and, instead of turning into the closest lane to the center line, he drove immediately to the outside lane, which was an illegal left turn. The Defendant, Bayard, then changed lanes abruptly, the second moving violation. Officer Sceirine followed Bayard and noticed a pedestrian waving at his vehicle. He then turned on his lights and pulled Bayard over. Bayard showed Officer Sceirine his identification and politely asked why he had been pulled over. The Officer instructed Bayard to step out of the vehicle, at which point Bayard informed the officer he had a concealed weapon, which he produced, along with a valid concealed weapon permit. Bayard further consented to a search of his person, which revealed \$116.00 in cash.

After the search, Bayard was arrested, rather than merely cited, for the minor traffic violations. During the booking procedure, Bayard was strip searched. Bundles of cocaine and marijuana fell out of Bayard's underwear during this search. Bayard was subsequently charged with (1) trafficking in a controlled substance (cocaine), (2) possession of a controlled substance for the purpose of sale (marijuana), and (3) possession of a controlled substance for purpose of sale (cocaine). After an arraignment and preliminary hearing, Bayard filed a motion to suppress the evidence based upon the allegedly illegal arrest, relying on NRS 171.1771.²

Judge Brent T. Adams of the Second Judicial District Court granted the motion on the grounds that the Defendant's arrest violated NRS 171.1771. The State appealed the district court's decision.

¹ By Melanie Koep.

² NRS 171.1771 provides: "Whenever any person is detained by a peace officer for any violation of a county, city or town ordinance or a state law which is punishable as a misdemeanor and he is not required to be taken before a magistrate, the person shall, in the discretion of the peace officer, either be given a misdemeanor citation, or be taken without unnecessary delay before the proper magistrate. He shall be taken before the magistrate when he does not furnish satisfactory evidence of identity or when the peace officer has reasonable and probable grounds to believe he will disregard a written promise to appear in court." As an initial matter, the Court noted the Defendant incorrectly relied upon this statute since it had previously been ruled that it did not apply to traffic violations, but stated, over argument of the State that the Court found irrelevant, NRS Chapter 484 was the applicable chapter, dealing specifically with traffic laws.

Justices Robert Rose, William Maupin and Mark Gibbons of the Nevada Supreme Court,, *per curiam*, affirmed the District Court’s decision, holding: (1) under NRS 484.795, an officer has discretion to arrest an individual *or* issue a citation for violating the Nevada traffic code; (2) that discretion is abused if exercised in an unreasonable manner; (3) an unreasonable arrest violates Article 1, Section 18 of the Nevada Constitution; and (4) in this instance, the arrest was unreasonable where no special circumstances were present, and use of the “fruits” of the improper arrest violated the Nevada Constitution.

Discussion

The United States Supreme Court previously considered the question of whether it is constitutional for a police officer to arrest a defendant, without a warrant, for a misdemeanor traffic violation. The Court held (in a heavily debated 5-4 decision) “if an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.”³ The Supreme Court went on to state, however, that individual state legislatures can restrict arrests for minor offenses, suggesting this was the appropriate course of action for state legislatures to take because they could take into account practical considerations for individual offenses without implicating broader principles.

The Supreme Court indicated that states have more freedom to interpret their individual constitutions. As such, each state has the ability to expand the rights of individual citizens in connection with its specific state laws.⁴

In Nevada, NRS 484.795 provides for certain traffic situations in which an officer *must* make an arrest and provides *discretion* in other situations to either make an arrest or issue a citation.⁵ Although the Nevada Legislature has not banned warrantless arrests for minor traffic violations, an officer’s decision to arrest in such situations must be made based upon his reasonably exercised discretion.⁶

The Nevada Supreme Court held that individuals in Nevada have a right to be free from unlawful searches and seizures under Article 1, Section 18 of the Nevada Constitution. The court adopted the test set out in *State v. Bauer*, 36 P.3d 893 (Mont. 2001) for determining the proper exercise of police discretion. This test provides that a warrantless arrest for a traffic offense is valid under the state constitution where the “officer’s exercise of discretion [is] reasonable.” *Id.* at 896. The Nevada Supreme Court found reasonableness requires probable cause that a traffic offense has been committed, along with circumstances that require immediate arrest. These circumstances are those found in the mandatory arrest provisions of NRS 484.795,

³ *Atwater v. Lago Vista*, 532 U.S. 318 (2001).

⁴ *Osburn v. State*, 44 P.3d 523, 525 (Nev. 2002). *See also*, *Arkansas v. Sullivan*, 532 U.S. 769, 772 (2001); *Zale-Las Vegas, Inc. v. Bulova Watch Co.*, 80 Nev. 483, 502, 396 P.2d 683, 693 (1964).

⁵ Mandatory arrests must be made when the driver fails to show proper identification, when the officer has reasonable grounds to believe the individual will not appear to answer the citation or when the driver is charged with driving under the influence. NRS 484.795(1), (4). The discretionary portion of the statute provides that when arrest is not mandatory, the officer may, in his discretion, issue a citation or take the person, without unnecessary delay, before a magistrate.

⁶ The Court defined discretion as “power to act in an official capacity in a manner which appears to be just and proper under the circumstances,” *Black’s Law Dictionary* 419 (5th ed. 1979), and further “the capacity to distinguish between what is right and wrong, lawful or unlawful, wise or foolish, sufficiently to render one amenable and responsible for his acts. *Id.*

along with other probable cause a police, leading a officer to believe that other criminal activity is “afoot.”

In this case, Bayard was cooperative with the police officer, showed valid identification, admitted to carrying a concealed weapon for which he had a valid permit, allowed a search of his person, did indicate he would fail to appear to answer the citation and was not arrested for driving under the influence. Accordingly, the discretionary arrest provisions are at issue. The Court held, based upon Bayard’s cooperation, there was no legitimate reason for subjecting him to the humiliation of a full arrest and, accordingly, the officer did not use reasonable discretion in making his arrest. The officer was not permitted to arrest Bayard on a “hunch” or “whim” that Bayard was engaged in other illegal activity which might be discovered through further searches.

The Court affirmed the District Court’s order granting suppression of the narcotics evidence because it was discovered only after the illegal arrest and subsequent unlawful search and seizure of Bayard. The Court, however, limited its ruling in this case to the discretionary provisions of NRS 484.795.

Conclusion

NRS 484.795 governs an officer’s ability to either arrest an individual or issue a citation for traffic violations. While this statute contains both mandatory and discretionary provisions, this case is limited to the discretionary provision. While an officer has the discretion to arrest an individual in a traffic situation, that discretion is limited and must be exercised reasonably. If an officer abuses this discretion in making an arrest, the arrest violates Article 1, Section 18 of the Nevada Constitution. The District Court’s decision in suppressing the evidence based upon an unreasonable and illegal arrest was affirmed because Officer Sceirine abused his discretion in arresting Bayard, who was otherwise cooperative and not in violation of any provision of NRS Chapter 484 that would require his arrest in lieu of a citation.