IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Petitioner,
vs.
THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE; AND THE HONORABLE WILLIAM A. MADDOX, DISTRICT JUDGE,
Respondents,
and,
JOHN THOMAS KEPHART,
Real Party In Interest.
_____/

No. 73389

ANSWER AGAINST ISSUANCE OF REQUESTED WRIT

JEREMY T. BOLSER
Washoe County Public Defender
Nevada State Bar Number 4925
JOHN REESE PETTY
Chief Deputy
Nevada State Bar Number 10
350 South Center Street, 5th Floor
P.O. Box 11130
Reno, Nevada 89520-0027
(775) 337-4827
jpetty@washoecounty.us

Attorneys for Real Party in Interest

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ANSWER AGAINST ISSUANCE OF REQUESTED WRIT

The Court has directed the Real Party in Interest to file an answer against issuance of the requested writ.

Background:

This writ petition concerns whether the district court got it wrong in striking (or excluding the use of) a prior misdemeanor conviction for domestic battery for the purpose of felony enhancement. The 2010 misdemeanor conviction in question (entered in the Justice Court of Union Township, Humboldt County) is found at pages 28 through 42 of the Petitioner's Appendix (PA) (Exhibit 2 to Kephart's Objection to Admission of Prior Convictions as a Felony Enhancement and Motion to Dismiss). It is insightful to review the district court's impression of this exhibit.

Looking at Exhibit 2 the court first observed that the language on the criminal complaint, originally stating that the charge was for domestic battery, with one prior conviction within seven years, had been "scratch[ed] out" and replaced with "'first offense.'" PA 64-65.[1] Next the court said that the following pages had similar scratch outs.

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[1] See PA 31 ("1st offense").

PA 65.[2] Finally, the court noted that the judgment of conviction was for a first-time domestic battery, followed by punishment commensurate with a first time domestic battery offense. *Id.*[3] The court concluded, "So it's pretty clear that *everybody* in that courtroom considered this to be a first offense." *Id.* (italics added).[4]

Drawing from his personal experience as a former prosecutor, former defense counsel and current judge, the district court judge said that in situations like this a "written plea agreement is not going to be prepared." PA 89.[5] He concluded that the lack of evidence of a plea agreement cannot be held against the defendant. *Id.* See also PA 104 (Order) ("Had there been a written plea agreement, this decision would have been an easy call, but there wasn't one. This Court observes that

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[2] See PA 32 (striking allegation of prior misdemeanor offense); and PA 37 (plea memorandum changed to reflect "Misdemeanor Domestic Battery 1st offense").

[3] See PA 29-30 (judgment for "Domestic Battery—1st offense" and the imposition of a suspended county jail sentence, a fine, and money assessments).

[4] See PA 40 (Admonishment of Rights) (stating only that "the State will use this conviction, and any other prior conviction from this or any other state which prohibits the same or similar conduct, to enhance the penalty for any subsequent offense."). This general language does not state that the next offense will be a felony third offense, and there is no other language suggesting that result upon the happening of another domestic battery offense.

[5] See also PA 88 (providing a standard scenario for these types of cases).

proper person Defendants do not typically prepare plea agreements.") Accordingly, the district court ruled that this 2010 misdemeanor conviction for a first-time domestic battery could not be used for felony enhancement purposes.

The State now seeks a writ of prohibition or mandamus against an exercise of discretion by the district court. The request for a writ of prohibition is easily disposed of. A writ of prohibition is inapplicable here because the district court had jurisdiction in the criminal case to hear, consider, and rule upon Mr. Kephart's motion. See *Goicoechea v. Fourth Judicial Dist. Court*, 96 Nev. 287, 289, 607 P.2d 1140, 1141 (1980) (a writ of prohibition will not lie "if the court sought to be restrained had jurisdiction to hear and determine the matter under consideration."). Additionally, even if the district court erred—and it did not err—a writ of prohibition "does not serve to correct errors; rather its purpose is to prevent courts from transcending the limits of their jurisdiction in the exercise of judicial power." *Mineral County v. State, Dep't. of Conserv.*, 117 Nev. 235, 243, 20 P.3d 800, 805 (2001) (footnote omitted). Because the district court had jurisdiction to rule on the motion, the request for a writ of prohibition should be denied. This

Court's focus should be on whether the State has presented a compelling need for a writ of mandamus.

Regarding the request for a writ of mandamus, the State asserts that the prosecutor in Humboldt County "agreed *only* to treat Kephart's second domestic battery conviction as a first offense for purposes of sentencing on the second conviction, and *did not* agree that his prior convictions could not be used as a future sentencing enhancement." Petition for Writ of Mandamus or Prohibition (Petition) at 7 (bold print omitted, italics added). But the district court judge below made clear that the record did not affirmatively show any sort of conditional agreement on the part of the prosecutor in Humboldt County; and that neither the prosecutor nor defense counsel "got a copy of the actual record," and that based on his experience it was unlikely any enhancement consequence was discussed beyond "'Look, we'll give you a second first.'" PA 87-89. In sum, the State's predicate for writ relief is not supported by the record.

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Memorandum of Points and Authorities Against Issuance of the Requested Writ

Standard of Review

A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from the office, trust or station; or to control a manifest abuse of discretion or which has been exercised in an arbitrary or capricious manner. *Stromberg v. Second Judicial Dist. Court*, 125 Nev. 1, 4, 200 P.3d 509, 511 (2009). Because "[m]andamus will not lie to control discretionary action, unless discretion is manifestly abused or is exercised arbitrarily or capriciously," this Court reviews the district court's order under a manifest abuse of discretion standard. *Office of Washoe County Dist. Atty. v. Second Judicial Dist. Court*, 116 Nev. 629, 635, 5 P.3d 562, 565 (2000) (citing *Round Hill General Imp. Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981)). "An arbitrary or capricious exercise of discretion is one founded on prejudice or preference rather than on reason, or [is] contrary to the evidence or established rules of law." *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 931-32, 267 P.3d 777, 780 (2011) (internal quotation marks and citations omitted); *Nev. Dep't. of Pub. Safety v. Coley,* 132 Nev. Adv. Op. 13, 368 P.3d 758,

760 (2016) ("An exercise of discretion is considered arbitrary if it is founded on prejudice or preference rather than on reason and capricious if it is contrary to the evidence or established rules of law.") (internal quotation marks omitted). "Manifest abuse of discretion does not result from a mere error in judgment, but occurs when the law is overridden or misapplied, or when the judgment exercised is manifestly unreasonable or the result of partiality, prejudice, bias or ill will." *Armstrong,* 127 Nev. at 932, 267 P.3d at 780 (internal quotation marks, alteration, and citation omitted).

Discussion

Because writs of mandamus are extraordinary remedies, this Court has "complete discretion whether to consider them." *Cote H. v. Eighth Judicial Dist. Court*, 124 Nev. 36, 39, 175 P.3d 906, 908 (2008); *Grace v. Eighth Judicial Dist. Court,* 132 Nev. Adv. Op. 51, 375 P.3d 1017, 1019 (2016) ("[I]t is within the discretion of this court to determine if a petition will be considered.") (internal quotation marks and citation omitted, alteration in the original).

Whether this Court wants to entertain the current writ rests on whether this Court believes that the settled legal propositions set out in

the book-end cases of *State v. Smith*, 105 Nev. 293, 774 P.2d 1037 (1989) and *Speer v. State*, 116 Nev. 677, 5 P.3d 1063 (2000) need clarification and whether the instant writ petition provides a suitable vehicle for such clarification.[6]

State v. Smith

"In 1986, after her second arrest for drunk-driving, Smith pleaded guilty to a charge of first-offense driving under the influence." 105 Nev. at 295, 774 P.2d at 1038. In 1987, in a new DUI case, she filed a motion "arguing that the State could not use the 1986 conviction to enhance her 1987 charge into a third-time, felony offense." *Id.* When Smith pleaded guilty in 1986, "the Reno city attorney informed the district court judge that 'the defendant is going to be changing her plea to guilty to first time DUI.'" *Id.* at 298, 774 P.2d at 1040. The court accepted her plea and "'based on the negotiations had between the attorneys' imposed a sentence commensurate with that indicated for first-time drunk-driving offenders." *Id.*

[6] Both of these cases deal with the use of prior misdemeanor DUI convictions for felony enhancement purposes but their reasoning was discussed below and considered applicable to the domestic battery statute.

Based on these facts this Court concluded that "the record indicates that Smith understood that the State would treat her as a first offender in connection with the 1986 charge." *Id.* at 298, 774 P.2d at 1041. This Court added that "[n]othing in the record indicates that, in 1986, the State advised Smith that after receiving treatment as a first-time offender, the 1986 conviction would thereafter revert to a second offense in the event of further drunk-driving convictions." *Id.* And this Court indulged the assumption that Smith's 1986 guilty plea "was induced, at least in part, by the knowledge that a first-time offense, for purposes of minimizing criminal penalties for future drunk-driving convictions, was preferable to a second offense." *Id.*

In *Smith* this Court concluded that "the use of Smith's 1986 drunk-driving conviction in order to enhance her 1987 charge to felony status would violate the *spirit* of the plea bargain entered into in 1986 between Smith and the Reno city attorney." *Id.* at 299, 774 P.2d at 1041.

Speer v. State

Mr. Speer pleaded guilty to driving under the influence. At sentencing the State offered two prior convictions "for the same or

similar conduct within the preceding seven years." 116 Nev. at 678, 5 P.3d at 1064. One of the prior convictions was a 1996 misdemeanor offense and the other was a 1991 felony offense. "The 1996 offense was treated as an unenhanced 'first offense' pursuant to a plea agreement; however, *the parties agreed* that the conviction *would not* be treated as a 'first offense' for all purposes and that Speer's next offense would be treated as a felony." *Id.* (italics added). The district court allowed the use of both prior convictions for felony enhancement purposes. *Id.*

Smith controls; Speer is inapplicable

Speer is factually distinguishable. There the record affirmatively demonstrated that the parties had agreed that one of the earlier offenses would be treated as an unenhanced "first offense" but not for all purposes; specifically the parties also agreed that despite being treated as a first offense in that case, it could be used to enhance to a felony Mr. Speer's "next offense." The record in this case reveals no such agreement.

In contrast, the record in this case is in line with *Smith*. As in *Smith*, here the prosecutor informed the court that Mr. Kephart would be pleading to a first-time domestic battery (and the complaint and

other documents were "scratched out" to reflect that agreement). As in *Smith*, the court imposed a sentence commensurate with that indicated for a first-time domestic battery offenders. And as in *Smith*, nothing in the record indicates that in 2010 the prosecutor advised Mr. Kephart that after receiving treatment as a first-time offender, the 2010 conviction would thereafter revert to a second offense in the event of further domestic battery convictions. Finally, as in *Smith* here this Court can indulge the assumption that Mr. Kephart's 2010 guilty plea was induced, at least in part, by the knowledge that a first-time offense, for purposes of minimizing criminal penalties for future domestic battery convictions, was preferable to a second offense. In fact, the record reflects Mr. Kephart's belief that any subsequent offense would be treated as a second-time misdemeanor offense.[7]

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[7] See PA 72-73 (testimony of Mr. Kephart) ("My understanding of the negotiations is they didn't want to take it to trial, so they offered me a first domestic battery ... ."); 73 ("I was under the understanding that [a subsequent domestic battery] would be a second."); 82-83 ("[The prosecutor] just told me that they wanted to drop it down to a first, because they didn't want to take it to trial, because they felt there wasn't enough evidence to convict me in a trial. So they're like, 'Well, we'll give you a first on this.' And I'm like. 'All right. I'll [*sic*] will take a first.' ... ."); 85 ("They just gave me a plea bargain instead of going to trial over it for a first.")

Smith controls; Speer is inapplicable and the district court's order was correct. Because the district court's order was correct there is little that this writ could add to this Court's *Smith/Speer* misdemeanor enhancement jurisprudence. And because the district court's order was a correct application of the law, this writ petition should be denied.

Conclusion

Neither *State v. Smith* nor *Speer v. State* need clarification. The district court judge did not manifestly abuse his discretion. The writ petition should be denied.

Dated this 27th day of September, 2017.

By: *John Reese Petty*
JOHN REESE PETTY
Chief Deputy

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this answer complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because: This answer has been prepared in a proportionally spaced typeface using Century Schoolbook in 14-point font.

2. I further certify that this answer complies with the page- or type-volume limitations of NRAP 32(a)(7) because it is proportionately spaced, has a typeface of 14 points and contains a total of 2,301 words. NRAP 32(a)(7)(A)(i), (ii).

3. Finally, I hereby certify that I have read this answer, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this answer complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the petition regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied upon is to be found. I understand that I may be subject to sanctions in the event that the accompanying petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 27th day of September 2017.

/s/ John Reese Petty
JOHN REESE PETTY
Chief Deputy, Nevada State Bar No.10

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on 27th day of September 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Joseph R. Plater, Appellate Deputy
Washoe County District Attorney's Office

I further certify that I have on this date, emailed a copy of this document to:

The Hon. William A. Maddox
Senior District Court Judge

John Reese Petty
John Reese Petty
Washoe County Public Defender's Office