

ORIGINAL

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

FILED

JUN 22 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

CASE NO: 73963

FILED

NOV 09 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY J. Hendrix
DEPUTY CLERK

RECEIVED
LAS VEGAS DEPT. OF
CLERK OF SUPREME COURT
JUN 11:17

JOSEPH WARREN, JR.,

Petitioners,

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA, IN
AND FOR THE COUNTY OF CLARK, AND
THE HONORABLE RICHARD SCOTT
DISTRICT JUDGE

Respondents,

And

THE STATE OF NEVADA,

Real Party In Interest.

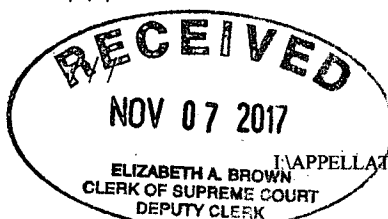
**ANSWER TO PETITION
FOR WRIT OF MANDAMUS**

COMES NOW, the State of Nevada, Real Party In Interest, by STEVEN B. WOLFSON, District Attorney, through his Chief Deputy, KRISTA D. BARRIE, on behalf of the above-named respondents and submits this Answer to Petition for Writ of Mandamus in obedience to this Court's order filed October 13, 2017 in the above-captioned case. This Answer is based on the following memorandum and all papers and pleadings on file herein.

///

///

///



18-23840

I:\APPELLATE\WPDOCS\SECRETARY\WRITS\WARREN, JOSEPH JR., 73963, ST'S ANSW.PET.WRITMAND-PROHIB.DOCX

17-902330

Dated this 2nd day of November, 2017.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY /s/ Krista D. Barrie
KRISTA D. BARRIE
Chief Deputy District Attorney
Nevada Bar #010310
Office of the District Attorney

MEMORANDUM OF
POINTS AND AUTHORITIES
QUESTION PRESENTED

Is this Court's extraordinary intervention warranted to reverse the district court's finding that it had jurisdiction to hear an appeal of a justice court order dismissing a case?

STATEMENT OF THE CASE

Petitioner Joseph Warren ("Petitioner") had several cases pending at the time he filed his Petition for Writ of Mandamus. In addition to the instant case, Petitioner has two other open cases: (1) Case No. C-16-313900-1 regarding crimes occurring on February 18, 2016; and (2) Case No. C-17-322850-1/17F04527X for crimes occurring on April 14, 2016. Petitioner's Appendix ("PA") 194.

The instant Petition relates to justice court case no. 17F03940X, which was ultimately assigned two different district court case numbers: (1) Case No C-17-

323608-A before district court Judge Scotti for the State's appeal and Petitioner's Motion to Dismiss; and (2) Case No. C-17-323426-1 before district court Judge Cadish for the State's Motion to File an Amended Information. PA 188-89, 213, 249.

In this case, Petitioner was charged by way of Criminal Complaint with First Degree Kidnapping (Category A Felony - NRS 200.310, 200.320), Sexual Assault (Category A Felony - NRS 200.364, 200.366), Battery with Intent to Commit Sexual Assault (Category A Felony - 200.400.4), and two counts of Open or Gross Lewdness (Gross Misdemeanor – NRS 201.210) on March 6, 2017. PA 005-06. Petitioner pleaded not guilty to the aforementioned charges on March 9, 2017. PA 241.

On April 20, 2017, the preliminary hearing in this case was held. PA 130. The justice court took the matter under advisement and subsequently dismissed the case on May 4, 2017 via written order after concluding that certain evidence could not be considered for the probable cause determination. PA 130, 119.

On May 10, 2017, the State filed its Notice of Appeal of the justice court's order, and the appeal was assigned to district court Judge Scotti under Case No. C-17-323608-A. PA 002, 249. On this same date, the State also filed a Motion for Leave to File Information by Affidavit in the district court the case had been assigned to track to – district court Judge Cadish, Case No. C-17-323436-1. PA 188.

On May 24, 2017, Petitioner negotiated his other two cases and unconditionally waived his right to a preliminary hearing in Case No: 17F04527X pursuant to those negotiations. PA 191.

On May 26, 2017, Petitioner filed an Opposition to the State's Motion for Leave to File Information by Affidavit. The district court heard argument on June 5, 2017, and ultimately denied the State's Motion for Leave to File Information by Affidavit. PA 188-89.

On June 13, 2017, Petitioner executed a Guilty Plea Agreement in Case No. C-17-323820-1/17F04527X, pleading guilty to one count of Attempt Sexual Assault (Category B Felony – NRS 200.364, 200.366, 193.330 – NOC 50119). PA 204.

On June 15, 2017, Judge Scotti set a briefing schedule for the State's pending Appeal in Case no. C-17-323608-A. PA 246. The State filed its Opening Brief in accordance with this briefing schedule on June 28, 2017. PA 109. Also on June 28, 2007, Petitioner filed a Motion to Dismiss Appeal. PA 104. Following that motion, on July 12, 2017, Petitioner filed a Notice of Hearing of Motion to Dismiss Appeal. PA. 166. On July 13, 2017, Petitioner filed his Answering Brief. PA 173.

On July 27, 2017, Judge Scotti denied Petitioner's Motion to Dismiss, explaining that the justice court's dismissal was a final judgement for purposes of NRS 177.015 and the State, therefore, was able to appeal that dismissal to the district court, and that the district court had jurisdiction to consider the appeal. PA 236.

On August 17, 2017, Judge Scotti heard oral argument on the State's appeal. PA 249. The district court found that NRS 171.196(6) did not bar the introduction of hearsay during the preliminary hearing, and that probable cause had been presented to bind over Petitioner. PA 259. As such, the district court reversed and remanded the case to justice court. PA 256. In response to Judge Scotti's ruling, Petitioner requested a stay, but the district court denied this request. PA 260.

Petitioner filed the instant Petition for Writ of Certiorari, or in the Alternative, Writ of Prohibition, or in the Alternative Writ of Mandamus on September 13, 2017. This Court ordered an answer to the Petition and denied Petitioner's emergency motion for stay on October 18, 2017. The State answers as follows.

STATEMENT OF FACTS

Jeri Dermanelian, a Sexual Assault Nurse Examiner, testified at preliminary hearing that on March 1, 2017, she saw a patient by the name of K.E. PA 133. Dermanelian testified that K.E. told her she had been sexually assaulted. Id. While there was an objection to hearsay regarding K.E.'s statements to Dermanelian, the justice court ruled that the statements were offered for the purposes of medical diagnoses or treatment. Id. K.E. stated that she was walking to her fiancé's house when she stopped to have a cigarette. Id. An unknown male, later determined to be Petitioner, approached her and asked for a cigarette. Id. Petitioner then forced her into the bathroom, forced his finger into her vagina, and then forced his penis into

her vagina. Id. Petitioner attempted to use a garbage bag as a condom, but it came off and he ejaculated into K.E.'s vagina. Id. Petitioner also forced K.E. to smoke methamphetamine. Id.

A full forensic sexual assault kit was completed on K.E. and she was told this would result in a criminal investigation. Id. at 134. A buccal swab was taken from K.E., as well as vaginal and cervical swabs. Id. at 135. The kit was sealed and sent to the Las Vegas Metropolitan Crime Lab. Id. Dermanelian testified that K.E. said her last consensual intercourse was on February 27, 2017, with her fiancé. Id. at 134. K.E. also tested positive for marijuana and amphetamines. Id.

The State also admitted the 9-1-1 call from the victim. Id. at 138. The justice court admitted the audio of the 9-1-1 call, but denied the admission of the accompanying transcript. Id. at 140.

The State also admitted three DNA reports by stipulation of the parties. The first DNA report, dated May 17, 2006, was a buccal swab from Petitioner's prior conviction that was used to compare DNA evidence collected from K.E. during the sexual assault examination. Id. at 138-39. The second and third DNA reports were dated March 5, 2017, and compared Petitioner's DNA with the sexual assault kit from K.E. Id. at 139. According to this examination, the vaginal sperm fraction and the cervical sperm fraction were both consistent with Petitioner. Id. Moreover,

Petitioner could not be excluded as the deduced partial minor contributory in the cervical epithelial fraction. Id.

ISSUE PRESENTED

Whether this Court's extraordinary intervention is warranted to reverse the district court's finding that it had jurisdiction to hear the appeal of a justice court's order dismissing a case.

STANDARD FOR EXTRAORDINARY RELIEF

This Court may issue a writ of mandamus to compel the performance of an act which the law requires as a duty resulting from an office, trust, or station or to control a manifest abuse of or arbitrary or capricious exercise of discretion. NRS 34.160; Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981). This Court may issue a writ of prohibition to arrest the proceedings of any tribunal exercising judicial functions in excess of its jurisdiction. NRS 34.320; Hickey v. District Court, 105 Nev. 729, 731, 782 P.2d 1336, 1338 (1989).

Neither writ issues where the petitioner has a plain, speedy, and adequate remedy in the ordinary course of law. NRS 34.170; NRS 34.330; see also Hickey, 105 Nev. at 731, 782 P.2d 1336, 1338 (1989). This Court has previously emphasized the "narrow circumstances" under which mandamus or prohibition are available and has cautioned that extraordinary remedies are not a means for routine correction of

error. State v. District Court (Riker), 121 Nev. 225, 112 P.3d 1070 (2005). The purpose of a writ of mandamus or prohibition is not simply to correct errors. Id.

ARGUMENT

I. **THIS COURT'S EXTRAORDINARY INTERVENTION IS NOT WARRANTED TO REVERSE THE DISTRICT COURT'S FINDING THAT IT HAD JURISDICTION TO HEAR THE APPEAL OF A JUSTICE COURT'S ORDER.**

Petitioner asks this Court to exercise extraordinary intervention and reverse a district court's finding that it had jurisdiction to consider an appeal of a justice court order. In support of this request, Petitioner argues that the district court exceeded its jurisdiction in hearing the State's appeal, that the district court erred in not dismissing the appeal as duplicative and for lack of a case or controversy, and that the justice court correctly ruled that NRS 171.196(6) barred admission of hearsay at Petitioner's preliminary hearing. Petitioner's Writ ("PW") at 16, 20, 21, and 23. These arguments all fail, and the Petition for Writ of Mandamus should be denied.

As an initial matter, Petitioner is not entitled to this Court's extraordinary intervention because he has an adequate remedy at law. For example, Petitioner can challenge the probable cause determination in a Pre-trial Petition for Writ of Habeas Corpus. Moreover, following the resolution of his case, Petitioner could bring his claim on direct appeal without suffering irreparable harm. See Calvin v. State, 122 Nev. ___, 147 P.3d 1097, 1099 (2006) (where the defendant's pre-trial writ of mandamus, challenging the constitutionality of NRS 178.400, was denied and the

defendant later pleaded guilty, the defendant raised his constitutional claim on direct appeal without prejudice). Since Petitioner has adequate remedies available at law, this Petition should be denied.

Moreover, Petitioner's arguments all fail. First, Petitioner erroneously asserts that the district court lacked jurisdiction to consider the State's Appeal. However, the district court had jurisdiction under NRS 177.015 and Sandstrom v. Second Judicial District Court, 121 Nev. 657, 119 P.3d 1250 (2005). NRS 177.015 states, in relevant part:

The party aggrieved in a criminal action may appeal only as follows:

1. Whether that party is the State or the defendant:

(a) To the district court of the county from a final judgment of the justice court.

NRS 177.015.

In Sandstrom v. Second Judicial District Court, 121 Nev. 657, 119 P.3d 1250 (2005), the Nevada Supreme Court ruled that NRS 177.015 vests jurisdiction in the district court from a dismissal by a justice court of a misdemeanor. The Court ruled that a dismissal by the lower court is a final judgement and the plain language of the statute allowed for an appeal.

Despite the plain language of this statute, Petitioner argues that neither NRS 177.015 nor Sandstrom apply in this case. PW at 18. This is without merit. The only

argument made by Petitioner in opposition to the plain language of the statute is to point out that Sandstrom was a misdemeanor case whereas this case deals with felonies. This argument does not overcome the statutory language that the party aggrieved in a criminal action, whether the State or the defendant, may appeal to the district court from a final judgment of the justice court. Nothing in the statute makes a distinction between misdemeanor and felony cases, and Sandstrom did not expressly exclude felony cases from its analysis. The State's Notice of Appeal was filed within the statutory time period. As such, the plain language of NRS 177.015 provides the State the right to appeal from a final judgment of the justice court and Petitioner's contention to the contrary is incorrect.¹

Second, Petitioner takes issue with the district court's denial of his motion to dismiss the State's appeal based on alleged rule violations. Petitioner claims that the State improperly pursued both an appeal and the motion to file an Information by

¹ Moreover, NRS 173.035(2) provides the State with the remedy of seeking leave to file an Information by Affidavit. In the instant case, the State chose to pursue both options, each of which has very different consequences. If the State's motion seeking leave to file an information by affidavit in front of Judge Cadish were granted, the case at issue would have been set for trial in district court and the justice court's order would not have been addressed. Similarly, at the time Judge Scotti considered the appeal from the justice court, the State noted if the court granted the appeal, the justice court's Order would be vacated and the case sent back to the justice court for further proceedings. Therefore, both NRS 177.015 and NRS 173.035(2) provided the court with authority to decide the State's issues through two separate procedural mechanisms.

affidavit. Nevada District Court Rules (DCR) 13(7), 18(1), and 19, prohibit the refilling of identical motions to different district court judges except upon the consent in writing of the judge whom the application or motion was first made. However, the motions filed in this case do not qualify as a "motion once heard and disposed of" (DCR) 13(7), DCR 18(1), or DCR(19) because, as Judge Scotti explained:

What happened here is after the preliminary hearing determination by Judge Bennett, I believe the District Attorney sought an information by affidavit and requested from Judge Cadish that that be granted. Judge Cadish, according to the minutes that I reviewed, Judge Cadish held that hearsay testimony by a detective is not sufficient under NRS 173.035 which is the statute authorizing Information by affidavit. But Judge Cadish did not rule that hearsay is inadmissible in a preliminary hearing and she did not interpret the statute that is at issue here. At least not based on the minutes, which is statute NRS. 171.196(6).

PA 250. Therefore, because the Motion for Leave to File an Information by Affidavit in front of Judge Cadish dealt solely with whether the State could file an Information by affidavit, and the Appeal to Judge Scotti dealt primarily with the hearsay analysis used by the justice court in its written order dismissing the State's case, the issues were not duplicative nor previously litigated. PA 251. Thus, the district court did not err in hearing the State's Appeal.

Petitioner also asserts that the State's Appeal should have been dismissed because it is moot. This is simply incorrect. Although the Nevada

Supreme Court has frequently refused to determine questions presented in purely moot cases, this is not the case here. Martinez-Hernandez v. State, ___ 131 Nev. ___, ___, 380 P.3d 861, 863 (2016). A moot case is one which seeks to determine an abstract question which does not rest upon existing facts or rights. Id. Here, this case is not included in the Guilty Plea Agreement as a case to be dismissed.² PA 252. Moreover, the district court noted that there was a live controversy because there was not an order of dismissal by any judge and there had not been a stipulation for dismissal filed or a representation in that case by any of the parties that the case is to be dismissed. PA 252-54. Therefore, at the time Judge Scotti and Judge Cadish made their rulings, there were active issues pending and the State's Appeal was not moot.

Finally, the justice court erred in its application of NRS 171.196(6) during the preliminary hearing, and Petitioner's argument regarding NRS 171.196 is incorrect.

² Petitioner attempts to confuse the issue by arguing that this case was to be dismissed under negotiations in his other cases based on defense counsel's statements at the waiver of the preliminary hearing. Although defense counsel did orally include this case when Petitioner unconditionally waived his right to a preliminary hearing, the State has explained that this was a misstatement and, as discussed supra, this case was not included in the written Guilty Plea Agreement. PA 252. Moreover, even assuming arguendo that this case had been included in those negotiations, Petitioner had not been sentenced at the time of Judge Scotti's decision on the State's Appeal so there was not a final judgment in the other case and Petitioner could have sought to withdraw his plea. PA at 254.

In this case, the justice court concluded that the legislation amending NRS 171.196(6) essentially negated all other hearsay exceptions to a victim's statements; this conclusion was incorrect. Rather, NRS 171.196(6) is an expansion of the already well-settled hearsay exceptions in the Nevada Revised Statutes. NRS 171.196(6) states:

6. Hearsay evidence consisting of a statement made by the alleged victim of the offense is admissible at a preliminary examination conducted pursuant to this section only if the defendant is charged with one or more of the following offenses:

(a) A sexual offense committed against a child who is under the age of 16 years if the offense is punishable as a felony. As used in this paragraph, "sexual offense" has the meaning ascribed to it in NRS 179D.097.

(b) Abuse of a child pursuant to NRS 200.508 if the offense is committed against a child who is under the age of 16 years and the offense is punishable as a felony.

(c) An act which constitutes domestic violence pursuant to NRS 33.018, which is punishable as a felony and which resulted in substantial bodily harm to the alleged victim.

NRS 171.196(6) (emphasis added).

It is clear based on the plain language of the statute that this addition is meant to be an expansion of the existing law prohibiting hearsay. S. Nev. Homebuilders Ass'n v. Clark Cty., 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (quoting Charlie Brown Constr. Co. v. Boulder City, 106 Nev. 497, 502, 797 P.2d 946, 949 (1990))

("When interpreting a statute, this court must give its terms their plain meaning, considering its provisions as a whole so as to read them 'in a way that would not render words or phrases superfluous or make a provision nugatory.'"). Statutory language should not be read to produce absurd or unreasonable results. Anthony Lee R. v. State, 113 Nev. 1406, 1414, 952 P.2d 1, 6 (1997) (citing Alsenz v. Clark Cty. School Dist., 109 Nev. 1062, 1065, 864 P.2d 285, 286 (1993)). NRS 171.196(6) states that *hearsay evidence* of a statement by a victim is admissible. This means that evidence that would otherwise not fall under the already well settled hearsay exceptions is also admissible in these enumerated situations. If the justice court's logic were to be followed, there would be no hearsay exceptions available for victim's statements in all but the fewest of cases (not even murder cases and there would be no ability to bring in excited utterances, dying declarations, or present sense impressions to name just a few well-established hearsay exceptions.

Moreover, there is no public policy reason or logic to the legislature narrowing the admissibility of a victim's statements. Rather, the legislature was expanding the ability of the State to bring in statements of particularly vulnerable victims. The origins of the bill were that hearsay (meaning statements that do not otherwise fall into an exception) would be allowed in all cases. In its ruling, the justice court cited statements made by the Attorney General, however, this statement makes it clear that the bill was created to expand the ability of victim statements to come into

preliminary hearings:

This is a victim-centered bill. It is focused on enumerated offenses. Certain victims will only have to face the accused when the constitutional Confrontation Clause is applicable in the proceeding. . . . Thirty-six states allow hearsay evidence at preliminary hearings. Hearsay evidence is allowed at federal grand jury and preliminary hearings.

PA 127. The Attorney General was not saying that thirty-six states only allow hearsay evidence in cases involving certain charges at preliminary hearing, but rather that thirty-six states allow hearsay evidence to be admitted regardless of whether an applicable exception applies. The reason NRS 171.196 was amended as opposed to new exceptions being added was, under the bill as initially written, hearsay *would not apply at all* in preliminary hearings. It was then tailored in a narrower fashion, adding to the list of exceptions already in the Nevada Revised Statutes.

As the district court concluded, but for the justice court's reading of the new exceptions to hearsay in NRS 171.196(6), all the evidence presented by the State at the preliminary hearing would have been admitted. PA 259. The district court explained:

You got to look at the legislative history here because if you look at the fact of 171.196(6) in a vacuum it does seem to support Defendant's position. But you can't look at it in a vacuum you got to look at it in the context of NRS Chapter 51 which sets forth numerous instances in which there are exceptions to the hearsay rule... If you look at the legislative history here, the goal of this statute was ultimately to, at least a significant goal of the statute was

to reduce the times when victims would have to face their accuser at the preliminary hearing without violating the confrontation clause.

PA 258-59.³ The district court found that if all the evidence was admissible, then probable cause had been shown to hold Petitioner to answer in district court to Counts one, two, and three of the Criminal Complaint.

For all these reasons, this Court's extraordinary intervention is not warranted to reverse the district court's decision that it had jurisdiction to consider an appeal of a justice court's order or its related findings. As such, the Petition should be denied.

CONCLUSION

Based on the foregoing Answer to Petition of Writ of Mandamus, the State respectfully requests this Court DENY Petitioner's for Writ of Mandamus and REMAND the case to justice court for further proceedings consistent with district court Judge Scotti's Order.

///

³ The justice court stated in its Findings of Fact and Conclusions of Law that: "The traditional requirements relating to hearsay statements would be satisfied by the statements at issue here. For example, K.E.'s statements to Dermanelian constitute 'statements for purposes or medical diagnosis or treatment' under NRS 51.115. Moreover, K.E.'s statements during her 9-1-1 call constitute 'present-sense impressions' and also 'excited utterances.'" PA 123-24.

Dated this 2nd day of November, 2017.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY /s/ Krista D. Barrie
KRISTA D. BARRIE
Chief Deputy District Attorney
Nevada Bar #010310
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that service of the above and foregoing Petition for Writ of Mandamus, was made this 2nd day of November, 2017, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to the attorney of record and other involved parties as listed below.

ADAM PAUL LAXALT
Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701

THE COURT OF APPEALS OF THE
STATE OF NEVADA
201 South Carson Street, Suite 250
Carson City, Nevada 89701

JONELL THOMAS
MELINDA SIMKINS
Chief Deputy Special Public Defenders
330 South 3rd Street, Suite 800
Las Vegas, Nevada 89155

JUDGE RICHARD SCOTTI
Eighth Judicial District Court, Dept. II
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89101

BY /s/ E. Davis
Employee, District Attorney's Office