

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Petitioner,

vs.

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

Respondents,

and
AARON WILLARD FRYE,
Real Party in Interest.

Electronically Filed
Jul 10 2018 08:17 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

CASE NO:

D.C. NO: C-18-331986-1

PETITION FOR WRIT OF MANDAMUS

COMES NOW, the State of Nevada, Petitioner, by STEVEN B. WOLFSON, District Attorney, through his Chief Deputy, ELIZABETH MERCER, and submits this Petition for Writ of Mandamus. This Petition is based on the following memorandum and all papers and pleadings on file herein.

Dated this 9th day of July, 2018.

Respectfully submitted,

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

BY */s/ Elizabeth Mercer*

ELIZABETH MERCER
Chief Deputy District Attorney
Nevada Bar #010681
Office of the Clark County District Attorney

**MEMORANDUM OF
POINTS AND AUTHORITIES**

ROUTING STATEMENT

This appeal is appropriately retained by the Supreme Court pursuant to NRAP 17(a)(1) and NRAP 17(a)(14) because it invokes the original jurisdiction of the Supreme Court and raises as a principal issue a question of statewide public importance.

ISSUE PRESENTED

Whether the district court arbitrarily and capriciously abused its discretion: (1) when it granted a motion for extension of the pretrial petition for writ deadline finding that attorney's negligence in ascertaining whether the Grand Jury Transcripts were filed constituted good cause to overcome the procedural bar; and, (2) when it determined that it still retained jurisdiction to extend the deadline, even after it passed.

PROCEDURAL HISTORY

Defendant was arraigned on the Indictment on May 17, 2018 at which time Defendant invoked his right to a trial within 60 days. Petitioner's Appendix, 56.¹ The Court stated that counsel had 21 days from the filing of the transcripts or

¹ Petitioner's Appendix is hereinafter referred to as "PA."

Defendant's arraignment (whichever occurred last) to file any Pretrial Petition. Id. The State reserved all procedural objections to the Court's ruling. Id.

The transcripts were filed on May 22, 2018. PA, 1. Thus, based upon the Court's ruling, Defendant's deadline for filing the Writ would have been June 12, 2018. On June 12, 2018, the date that Defendant's deadline expired, defense counsel filed a Motion for Extension of Writ Deadline in which she alleged that she was not served with the transcripts of the Grand Jury proceeding and only discovered their existence on June 10. PA, 59. Rather than filing her Motion on June 10, she waited until June 12, 2018 to file said Motion and did not seek an Order to shorten time. She allowed it to be calendared in the ordinary course. The State filed its Opposition on June 20, 2018. The Motion was not heard until June 22, 2018, ten (10) days *after* the expiration of Writ deadline. On that date, the Court granted Defendant's motion despite the fact that no good caused existed, and despite the fact that the Court lacked jurisdiction over the proceeding.

ARGUMENT

I.

THE STATUTORY DEADLINES FOR FILING A WRIT ARE JURISDICTIONAL.

NRS 34.700, in pertinent part, provides:

1) Except as provided in subsection 3, a pretrial petition for writ of habeas corpus based on alleged lack of probable cause or otherwise challenging the court's right or jurisdiction to proceed to the trial of the criminal charge may not be considered unless: (a) The petition and all

supporting documents are filed within twenty-one (21) days after the first appearance of the accused in the District Court. . . .

3) The Court may extend, for good cause, the time to file a petition. Good cause shall be deemed to exist if the transcript of the preliminary hearing or of the proceedings before the grand jury is not available within 14 days after the accused's initial appearance and the court shall grant an ex parte application to extend the time for filing a petition. All other applications may be made only after appropriate notice has been given to the prosecuting attorney.

Furthermore, NRS 34.710 specifically states,
A district court shall not consider any pretrial petition for habeas corpus:

(a) Based on alleged lack of probable cause or otherwise challenging the court's right or jurisdiction to proceed to the trial of a criminal charge unless a petition is filed in accordance with NRS 34.700.

Several decisions have interpreted this provision and have recognized that it must be followed strictly. In Sheriff v. Jensen, 95 Nev. 595 (1979), the defendant was charged via criminal complaint in Justice Court with one count of embezzlement. Jensen, 95 Nev. at 595. The defendant failed to appear at his scheduled preliminary hearing. Id. The Justice of the Peace treated the defendant's failure to appear as a waiver of the hearing. Id. The court then ordered the defendant held to the charge in District Court based upon the attached affidavits. Id. at 596. In District Court, the defendant then filed a pretrial writ of habeas corpus challenging the lack of a preliminary hearing. The writ was filed 31 days after the defendant's initial appearance in District Court. The District Court granted the writ due to the

improper procedure that occurred in the lower court. The State filed an opposition based upon the writ's failure to be filed in a timely manner. Our Supreme Court then reversed the District Court based upon the writ being untimely without even reaching the merits of the pretrial writ of habeas corpus. The Court held that "[t]he requirements of the statute are mandatory, and where, as here, the requirements are not complied with, the petition is neither cognizable below nor reviewable here." Id. citing Sheriff v. Toston, 93 Nev. 394 (1977) (Court noted that it did not reach merits of pretrial writ where the writ fails to follow mandatory filing requirements so it was not "cognizable").

The Grand Jury transcripts in this case were filed on May 22, 2018 (PA, 1). As such, based upon the Court's ruling at the time of the initial arraignment, the time for filing a Petition for Writ of Habeas Corpus began to run on that date.² Thus, based upon the first improper extension of the deadline which occurred at Initial Arraignment, the time for filing a Petition for Writ of Habeas Corpus expired June 12, 2018.³ The Motion to extend the deadline was filed on June 12, 2018 (PA, 58).

² Technically, the time for filing the Writ should have begun to run on the date of initial arraignment. See, NRS 34.700, May 17, 2018.

³ Rule 1.14. Time; judicial days; service by mail.

(a) In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, **the day of the act, event or default from which the designated period of time begins to run must not be included. The last day of the period so computed must be included**, unless it is a Saturday, a Sunday, or a non-judicial day, in which event the period runs until the end of the next day which is not a Saturday, a Sunday or a non-judicial day, or, when the act to

Because defense counsel did not obtain her extension prior to the expiration of the deadline, the District Court lost jurisdiction over any pretrial petition, including over the ability to extend the deadline. Furthermore, counsel failed to show good cause for her failure to file the Petition and/or Motion for Extension in a timely fashion.

Defense counsel apparently urges this Court to extend her time for filing a Petition for Writ of Habeas Corpus because good cause exists due to her allegedly not being served with the transcripts. The fact that defense counsel was not aware that the transcripts were filed, standing alone, cannot constitute good cause. Good cause is deemed to exist when the transcripts are not filed within 14 days of a defendant's initial arraignment. See, NRS 34.700(3); EDCR 3.40(5) ("Ex parte applications for extensions of the 21-day period of limitation for filing writs of habeas corpus will only be entertained in the event that the transcript of the preliminary hearing or of the proceedings before the grand jury is not available within 14 days after the defendant's initial appearance. *Such ex parte applications must be accompanied by an affidavit of the defendant's attorney that counsel has examined the file in the Office of the Clerk of the Court and that the transcript of the*

be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. The County Clerk shall memorialize and maintain in a written log all such inaccessible days. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and non-judicial days must be excluded in the computation.

preliminary hearing or of the proceedings before the grand jury has not been filed within the 14-day period of limitation. Applications for extensions of time to file writs of habeas corpus must be for not more than 14 days. Further extensions of time will be granted only in extraordinary cases.”).

In Hathaway v. State, 119 Nev. 248, 71 P.3d 503, (2003), the court reasoned that a claim that was made reasonably available to the petitioner during the statutory period should be timely raised. When reasonable means are made available to the petitioner it cannot be said that good cause exists as a means to overcome the procedural bar; see also, Crump v. Warden, 113 Nev. 293, 304, 934 P.2d 247, 253 (1997)(attorney error—including ignorance or inadvertence—does not rise to the level of ineffective assistance of counsel and further, does not constitute good cause because the petitioner must “bear the risk of attorney error.”).

As discussed, a showing of good cause for the Petition and/or Motion for Extension has not been shown. More specifically, Ms. Levin should not have been relieved of her obligation to use due diligence in ascertaining the filing date and availability of the Grand Jury transcripts. Ms. Levin could have taken any number of steps to determine whether the grand jury transcripts were filed such as: (1) calling chambers to inquire; (2) checking Odyssey to see if the transcripts were filed; (3) going to the Court Clerk’s office to review the Court file; and, (4) calling the State and asking about the status of the transcripts. There were many reasonable means of

ascertaining the transcripts in a timely fashion. Negligence does not, and should not constitute “good cause” for purposes of extending a Pretrial Petition for Writ of Habeas Corpus deadline. See, Hathaway v. State, 119 Nev. 248, 71 P.3d 503, (2003).

Ms. Levin should not have been relieved of her obligations to comply with the strict requirements of NRS 34.700 and NRS 34.710 simply because she allegedly was not served with the transcripts. If defense counsel is required by EDCR 3.40(5) to physically go to the Court Clerk’s office and inspect the file prior to obtaining an *ex parte* Order granting an extension of time based upon the lack of filing of Transcripts, certainly “good cause” requires it. Defendant’s time for filing a Pretrial Petition for Writ of Habeas Corpus expired on June 12, 2018. No good cause existed warranting the extension of time to file a Pretrial Petition for Writ of Habeas Corpus. The District Court abused its discretion in granting an extension under these circumstances.

II.
THE COURT CANNOT RETROSPECTIVELY EXTEND THE WRIT
DEADLINE

Moreover, the Court cannot retrospectively grant an extension for filing a writ. A request to extend the period to file a writ must be requested prior to the Court losing jurisdiction pursuant to NRS 34.700. Because the bar in NRS 34.700 is a jurisdictional bar, the Court cannot retrospectively retain jurisdiction over a petition, once that jurisdiction has already been lost. This principle is supported by Eighth

Judicial District Court Rule (EJDCR) 3.50, which states in part, “the court for cause shown may at any time in its discretion, with or without motion or notice, order the period enlarged if request therefore is made *before the expiration of the period originally prescribed* or as extended by a previous order. EJDCR 3.50(a) (emphasis added). The Court rules clearly require that any request to enlarge a period should be requested before the expiration of the period has ended. Additionally, EJDCR 3.50(a) goes on to state that “[*the court*] may not extend the time for taking any action under Rule 3.40, except to the extent and under the conditions stated therein.”(emphasis added)

Rule 3.40 governs writs of habeas corpus and states that ex parte extensions on the 21 day period of limitation *will only be granted where the preliminary hearing or grand jury transcript is not prepared within 14 days after the defendant’s initial appearance*. EJDCR 3.40(3). The rule goes on to state that the applications must seek only an additional 14 days and that “further extensions of time will be granted only in extraordinary cases.” This comports with NRS 34.700(3) which places similar requirements by statute. In the present case, the transcript was filed within 7 days of Defendant’s arraignment. Thus, Defendant would not have been entitled to an extension of time, even if it were requested at the time of his first appearance in District Court as the request would have been premature, and the granting of an extension is premised upon late filing of transcripts. Moreover, the fact that a Court

may not retrospectively extend a deadline once that deadline is passed, is also supported by several Nevada Supreme Court cases.

In Riverside Casino Corporation v. J.W. Brewer Company, 80 Nev. 153, 390 P.2d 232 (1964), an appeal was raised, the deadline for filing of which was September 4. On September 9 the court ordered that the defendant could have up to and including September 9 in which to docket its appeal and file its records on appeal. See id. at 157, 390 P.2d at 234. Although the issue was not specifically addressed, the Court noted in a footnote that after September 4, the court lost the jurisdiction to extend the time to file the appeal. See id. at n.2. Similarly, in Landmark Plaza, Inc. v. Deligatti, 80 Nev. 48, 389 P.2d 81 (1964), the court noted that where the appellant had 40 days from the filing of the notice of appeal to docket the record of appeal, “the district court was empowered within the 40-day period to extend the time to no more than 90 days.” See id. at 50-51, 389 P.2d at 82. However, the Court went on to note that “*under this provision the district court could have extended the time . . . but not having done so within the 40-day period the lower court lost jurisdiction to extend the time.*” See id., 389 P.2d at 82-83 (emphasis added).

The Court even more specifically addressed a similar issue in Craig v. Harrah, 65 Nev. 294, 195 P.2d 688 (1948), where the defendant filed a motion for an extension of time to file the bill of exceptions more than four months after the

expiration of the twenty day statutory time period given to file the bill of exceptions. See id. at 299, 195 P.2d at 691. The Court stated that, “This court, obviously, has no jurisdiction to grant such extension to operate retroactively.” See id. The Court stated, “In the absence of any extension of time, either by stipulation of the parties or by the court in which the action was tried, or a judge, referee or judicial official thereof, or a justice of the supreme court, *before the time for filing had expired*, any court or judicial officer . . . would have *lost jurisdiction and would have no power to extend such time after the statutory time has expired.*” See id. at 300-301, 195 P.2d at 690-91 (emphasis added). The State recognizes of course that these are civil cases; however, although these are civil cases, they specifically address jurisdictional issues based both on court rules and statutes and find that once the time has passed, the Court cannot retroactively extend jurisdiction.

CONCLUSION

The district court in this case was in error and abused its discretion. This was an arbitrary and capricious act without any basis in the law, warranting extraordinary intervention by this Court. Accordingly, the State requests that this Court GRANT this petition for a writ of mandamus directing the district court to vacate its Order extending Defendant’s deadline to file his Pretrial Petition for Writ of Habeas Corpus.

///

Dated this 9th day of July, 2018.

Respectfully submitted,

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

BY */s/ Elizabeth Mercer*

ELIZABETH MERCER
Chief Deputy District Attorney
Nevada Bar #010681
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 89155-2212

AFFIDAVIT

I certify that the information provided in this mandamus petition is true and complete to the best of my knowledge, information and belief.

Dated this 9th day of July, 2018.

BY */s/ Elizabeth Mercer*

ELIZABETH MERCER
Chief Deputy District Attorney
Nevada Bar #010681
Office of the Clark County District Attorney

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on July 9th, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM PAUL LAXALT
Nevada Attorney General

PANDORA L. LEVEN
Deputy Public Defender

ELIZABETH MERCER
KRISTA D. BARRIE
Chief Deputy District Attorney

I further certify that service of the above and foregoing was made this 9th day of July, 2018, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

JUDGE KERRY EARLY
Eighth Judicial District Court, Dept. IV
Regional Justice Center, 16th Floor
200 Lewis Avenue
Las Vegas, Nevada 89101

BY /s/ J. Garcia
Employee, District Attorney's Office

KDB/Elizabeth Mercer/jg