

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOSEPH WARREN, JR.,
Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK; AND THE HONORABLE
RICHARD SCOTTI, DISTRICT JUDGE,
Respondents,
and
THE STATE OF NEVADA,
Real Party in Interest.

No. 73963

FILED

MAR 21 2018

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

ORDER DENYING PETITION

This is an original petition for a writ of certiorari or, in the alternative, a writ of prohibition or mandamus. We ordered the State to file an answer to the petition. We subsequently ordered Joseph Warren, Jr., to file a status report.

In his request for certiorari, Warren seeks an order vacating a district court order of remand. Warren asserts the district court lacked jurisdiction to hear an appeal from a justice court order finding a lack of probable cause to support felony charges. Warren has failed to demonstrate the district court exceeded its jurisdiction. Because the justice court order dismissed all charges against Warren, it was a final judgment from which the State could appeal. *See* NRS 177.015(1)(a). Therefore, we deny the petition for a writ of certiorari. *See* NRS 34.020(2).

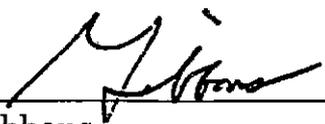
In the alternative, Warren also seeks a writ of prohibition that vacates the order of remand and prohibits the district court from taking further action in the case, or a writ of mandamus that directs the district

court to vacate the order of remand and deny the State's appeal on its merits.

We have considered the petition and all documents filed in this matter, and we are not satisfied this court's intervention by way of extraordinary writ is warranted at this time. See NRS 34.160; NRS 34.170; NRS 34.320; NRS 34.330; NRAP 21(b)(1); *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004) ("Petitioner[] carr[ies] the burden of demonstrating that extraordinary relief is warranted."). Notably, Warren informs this court that as of December 19, 2017, the State has not filed any documents or placed the case on calendar in justice court. Warren notes this is consistent with the fact the State agreed the charges in the underlying case would be dismissed as part of the negotiations in another district court case. Accordingly, we also deny Warren's alternative requests for a writ of prohibition or writ of mandamus, and we

ORDER the petition DENIED.


_____, J.
Tao


_____, J.
Gibbons

SILVER, C.J., dissenting:

Despite the disturbing underlying facts of this criminal case, I believe this court is constrained to grant the petitioner's writ with instructions to the district court to reverse its decision granting the State's appeal on the merits, and I would mandate dismissal of the State's appeal.

Although the supreme court has not previously ruled on this issue, I believe under these facts the district court lacks jurisdiction to entertain the State's underlying appeal. Therefore, I respectfully dissent.

On March 6, 2017, the State filed a criminal complaint against the petitioner in justice court in case 17F03940X and held a preliminary hearing on April 20, 2017. After the preliminary hearing, the justice of the peace took the matter under submission and filed findings of facts and conclusions of law dismissing the justice court case on May 4, 2017. The State did not proceed to the grand jury; instead, it simultaneously elected to file a motion for leave to file an information by affidavit in the district court in case number C323426 and *appeal* the justice of the peace's dismissal of its complaint in the case before the court.

Then, on June 5, 2017, in case C323426, a different district court judge denied the State's motion for leave to file an information by affidavit in the district court, finding the State failed to meet the requirements of NRS 173.035. Thereafter, on June 28, 2017, the appellant filed his motion to dismiss the appeal in district court in this case, arguing that the district court lacked jurisdiction to entertain the State's appeal. The State countered that it did have jurisdiction, while arguing that the justice of the peace's dismissal of the case was arbitrary and capricious mandating reversal.

On July 27, 2017, the district court denied petitioner's motion to dismiss, explaining that the justice court's dismissal was a final judgement for purposes of NRS 177.015, and that it had jurisdiction to consider the State's appeal from justice court. On August 17, 2017, the district court reversed the justice court and *remanded the case back to justice court with no instructions, but presumably for the justice of the peace*

to consider its legal rulings and find probable cause existed based on the district court's evidentiary rulings.

On September 13, 2017, petitioner filed this Writ of Certiorari, or in the Alternative, Writ of Prohibition or in the Alternative Writ of Mandamus. Although the State filed an answer in this matter, ultimately petitioner and the State entered into negotiations in another criminal case by which petitioner pleaded guilty to those felony charges and stipulated to prison time. In exchange for petitioner's plea of guilty in the other case, the State agreed not to proceed on this underlying case in justice court.

While I acknowledge that based on the status checks it appears that the State is not moving forward in justice court and is honoring its negotiations with petitioner, I believe that our intervention is still warranted. I feel compelled to write a dissent because the issue regarding jurisdiction is of statewide importance and our court will continue to see this type of procedural irregularity in the future if not addressed. *See Badger v. Eighth Judicial Dist. Court*, 132 Nev. ___, ___, 373 P.3d 89, 93 (2016) (granting a writ petition challenging the denial of a motion to dismiss where the issue involved a unsettled and recurring question of law); *Lund v. Eighth Judicial Dist. Court*, 127 Nev. 358, 364, 255 P.3d 280, 284 (2011) (noting writ relief may be appropriate to clarify an issue of statewide importance).

This court has previously affirmed a State's challenge to a justice court's finding of a lack of probable cause at a preliminary hearing, where the challenge is made by way of a motion for leave to file an information by affidavit or by seeking an indictment before a grand jury. *See Moultrie v. State*, 131 Nev. ___, 364 P.3d 606, 613-14 (Ct. App. 2015) (affirming the district court's decision granting a motion for leave to file an

information by affidavit after the justice court erroneously found that the State did not meet its burden of proof for *felony* charges where the justice of the peace dismissed the justice court case). In contrast, here a different district court denied the State's motion to amend by information under the facts of this case and the State chose not to proceed alternatively to the grand jury for a probable cause determination. Instead, the State *appealed* the justice of the peace's determination to dismiss *felony and gross misdemeanor* charges because the State's evidence was insufficient to meet the probable cause standard.

NRS 177.015 provides that the State may appeal a *final judgment* of the justice court. Further, in *Sandstrom v. Second Judicial Dist. Court*, 121 Nev. 657, 660, 119 P.3d 1250, 1253 (2005) our supreme court clarified stating, "[w]e conclude, however, that NRS 177.015(1)(a) does indeed authorize the State to appeal from an order granting a motion to dismiss a *misdemeanor criminal complaint*." (Emphasis added). But, *Sandstrom* specifically addressed criminal misdemeanor appeals and, in my view, *Sandstrom* simply does not extend to appeals regarding a justice court's dismissal of felony or gross misdemeanor charges after a justice of the peace finds insufficient evidence for a determination of probable cause.

Game over? No! The State can still proceed against a criminal defendant by utilizing two different routes to continue its prosecution of a defendant on the same charges. The Nevada Supreme Court has held, "Pursuant to NRS 178.562(2), if a defendant is not bound over, the state may: (1) seek leave to file an information by affidavit in the district court, pursuant to NRS 173.035(2); or (2) seek an indictment by a grand jury." *State v. Sixth Judicial District Court In & For County of Humboldt*, 114 Nev. 739, 743, 964 P.2d 48, 50 (1998). But, NRS 177.015, *Humboldt*, and

Sandstrom do not provide for an appeal of a justice court's determination finding insufficient evidence presented by the State because the justice court's dismissal of felony or gross misdemeanor charges at a preliminary hearing is not a *final judgment*.

Here, the State did alternatively proceed, albeit unsuccessfully, in district court on its motion to file an information by affidavit. The State did not alternatively proceed to the grand jury but clearly had the option to do so. Glaringly absent from Nevada jurisprudence is what the State did here: appeal a dismissal of a criminal complaint charging both felonies and gross misdemeanors for lack of probable cause.

I believe that the State's option following alleged egregious magistrate error is provided for by NRS 173.035, which allows the State to proceed against a defendant by filing an information by affidavit. In fact, the Nevada Supreme Court in *Humboldt* stated, "this court has held that NRS 173.035(2) is 'a safeguard against *egregious error* by a magistrate in determining probable cause, not a device to be used by a prosecutor to satisfy deficiencies in evidence at a preliminary examination, through affidavit.'" 114 Nev. at 741-42, 964 P.2d at 49, *quoting Cranford v. Smart*, 92 Nev. 89, 91, 545 P.2d 1162, 1163 (1976); *see also Moultrie*, 131 Nev. at ___, 364 P.3d at 610-11 (discussing egregious error). Furthermore, nothing prevented the State from presenting this case to the grand jury and, ultimately, filing an indictment against the defendant on these charges.

Therefore, for the foregoing reasons, I do agree with petitioner that under the facts of this case, the district court lacked jurisdiction to consider the State's appeal of the justice court's dismissal for lack of probable cause because of the procedural vehicle the State utilized here. Perhaps the Nevada Supreme Court or this court will clarify or extend

Sandstrom to allow for not only misdemeanor appeals filed by the State, but also felony or gross misdemeanor appeals filed by the State after dismissal by a justice of the peace. But, until *Sandstrom* is clarified or extended, I do not believe that existing law allows for this procedural type of appeal.

Because I believe existing law grants the State two “bites at the apple” already, and not three, I respectfully dissent. Accordingly, I would grant petitioner’s writ with instructions to the district court to dismiss the State’s appeal in this case with additional instructions ordering the State to dismiss the erroneously remanded case of 17F03940X currently pending in justice court as the district court had no jurisdiction to consider the appeal on the merits, nor did it have the authority to reverse and remand the case after the justice of the peace dismissed it.¹


_____, C. J.
Silver

cc: Hon. Richard Scotti, District Judge
Special Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

¹Dismissing the pending case in justice court should be a mere ministerial act for the State since I note petitioner pled guilty and has been sentenced to prison per negotiations in his other criminal case. Thus, by dismissing the underlying case in justice court, the State would be fulfilling its promise based on the agreement between the parties. I note that as of the date of filing this order, the underlying case remains pending in justice court.