

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 RICHARD SCOTT,
DISTRICT JUDGE

Respondent,

and

JENNIFER LYNN PLUMLEE,
Real Party in Interest.

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CASE NO:

D.C. NO: C-20-346852-A

**PETITION FOR WRIT OF MANDAMUS OR,
IN THE ALTERNATIVE, PROHIBITION**

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PROHIBITION.DOCX

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I. Routing Statement

This matter is presumptively assigned to the Supreme Court because pursuant to NRAP 17(11) and NRAP 17(12), the matter raises an issue of first impression involving the Nevada Constitution, and the matter also raises a question of statewide public importance.

II. Relief Requested

The State requests this Court vacates Judge Scotti's arbitrary and capricious decision to reverse a lawful conviction because the deputy district attorney who tried the case also serves in the Nevada Legislature.

III. Issue Presented

Whether the District Court erred in holding that a deputy district attorney who handled a misdemeanor prosecution violated the Separation of Powers Clause of the Nevada Constitution.

IV. Procedural History and Statement of the Facts

Real Party in Interest Jennifer Plumlee (hereinafter “Plumlee”) was arrested in the instant case on September 19, 2018 for Driving Under the Influence of an Intoxicating Liquor and Failure to Maintain Lane. She was released from custody shortly thereafter.

After a number of requested continuances by Plumlee, the misdemeanor trial was eventually scheduled for July 17, 2019. At that time, the State requested a continuance due to the unexpected absence of an essential witness, Trooper Greg Luna. The State requested a continuance pursuant to the established case law set forth in Bustos v. Sheriff. Plumlee filed a Motion to Dismiss the case based upon the witness’ absence, which was heard and denied on two occasions.

Finally on October 7, 2019, the Justice Court again denied Plumlee’s Motion to Dismiss and held a trial on the charges. Plumlee was convicted of both the Driving Under the Influence and Failure to Maintain Lane misdemeanor charges.

Following her conviction, she properly appealed her case to the District Court,

via her attorney Craig Mueller, Esq. District Court Judge Richard Scotti is the judge responsible for ruling on misdemeanor appeals. Plumlee only raised two issues on appeal: (1) whether the Justice Court erred in granting the State's continuance, and (2) whether the evidence of the intoxilyzer results was properly admitted.

On July 16, 2020, the District Court denied Plumlee's appeal by affirming the convictions. Surprisingly, on July 22, 2020, Mr. Mueller filed a Motion to Reconsider. Although the Motion to Reconsider tacked on her prior argument on appeal regarding the State's continuance, the bulk of the Motion to Reconsider asked Judge Scotti to consider a newly raised argument that Plumlee's convictions should be vacated because the deputy district attorney who handled the case, Melanie Scheible, also serves as a part-time Senator in the Nevada Legislature. Deputy District Attorney Scheible was first elected to represent Congressional District 9 in November of 2018.

The State filed a written objection to the Motion to Reconsider because Plumlee was now raising issues that were never pursued at any stage of the proceedings. Judge Scotti decided to entertain the Motion to Reconsider, so he placed the matter back on calendar for August 27, 2020. At that hearing, Judge Scotti informed the State that he wanted additional briefing about whether Plumlee had waived her separation of powers argument, and whether Deputy District Attorney Scheible's prosecution of the case violated the separation of powers clause

of the Nevada Constitution.

On September 14, 2020, the State filed its Opposition to the Motion to Reconsider addressing the issues concerning Judge Scotti. Plumlee filed her reply on September 18, 2020, and the matter was heard by Judge Scotti on October 15, 2020. Following arguments of the parties, only as to the separation of powers issue, Judge Scotti indicated that he wished to take the matter under advisement.

On November 9, 2020, via a minute order, Judge Scotti reversed his prior ruling by vacating Plumlee's convictions on the grounds that her due process rights were violated when she was prosecuted by a deputy district attorney that serves in the Legislature.

On November 17, 2020, the State sought to get clarification on two grounds that were unclear from the district court's minute order. The State also requested a stay of the proceedings so that it could seek a petition for a writ of prohibition and/or mandamus from the Nevada Supreme Court. On November 18, 2020, an Order was filed vacating the conviction and remanding the case for a new trial. On December 15, 2020, a new Minute Order was filed seeking to address the State's request for clarification. The district court also denied the issuance of a stay of the Order. The State now seeks a petition of writ of prohibition, or alternatively a writ of mandamus, vacating Judge Scotti's order.

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Argument

a. Standard of Review

Standard for Prohibition

Nevada Revised Statute 34.320 states:

The writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board or person from exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person.

A writ of prohibition does not serve to correct errors; its purpose is to prevent courts from transcending the limits of their jurisdiction in the exercise of judicial but not ministerial power. Olsen Family Trust v. District Court, 110 Nev. 548, 551 (1994); However, “a writ of prohibition must issue when there is an act to be ‘arrested’ which is ‘without or in excess of the jurisdiction’ of the trial judge.” Houston Gen. Ins. Co. v. District Court, 94 Nev. 247, 248 (1978).

The object of a writ of prohibition is to restrain inferior courts from acting without authority of law in cases where wrong, damage, and injustice are likely to follow from such action. Olsen Family Trust, 110 Nev. at 552.

Standard for Mandamus

The court may issue a writ of mandamus to enforce “the performance of an act which the law enjoins as a duty especially resulting from an office . . . or to

compel the admission of a party to the use and enjoyment of a right . . . to which he is entitled and from which he is unlawfully precluded by such inferior tribunal.” NRS 34.160; Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603-04 (1981).

“[B]ecause a writ of mandamus is an extraordinary remedy, the decision to entertain a petition for the writ lies within [this Court’s] discretion.” Gonzalez v. Eighth Judicial Dist. Court, 129 Nev. 215, 217, 298 P.3d 448, 449–50 (2013). Mandamus may issue to correct discretionary action if it is manifestly abused or is exercised arbitrarily or capriciously. Office of the Washoe County DA v. Second Judicial Dist. Court, 116 Nev. 629, 635, 5 P.3d 562, 566 (2000). “A writ of mandamus is available to compel the performance of an act that the law requires ... or to control a manifest abuse or arbitrary or capricious exercise of discretion.” State v. Eighth Judicial Dist. Court (Armstrong), 127 Nev. 927, 931, 267 P.3d 777, 779 (2011). “The writ is appropriate when ‘there is not a plain, speedy and adequate remedy in the ordinary course of law.’” State v. Eighth Judicial Dist. Court in & for Cty. of Clark, 134 Nev. 104, 105, 412 P.3d 18, 21 (2018) (quoting NRS 34.170).

This Court has previously recognized that the State is prohibited from appealing a final judgment in a criminal case, and therefore has no remedy in law to challenge most district court rulings. Id. at 106, 412 P.3d at 21. See also NRS 177.015(3) (“The defendant only may appeal from a final judgment or verdict in a criminal case.”); (Armstrong), 127 Nev. at 931, 267 P.3d at 780 (“The instant

petition challenges the district court's exercise of discretion, and the State has no other remedy at law because it cannot appeal the final judgment in a criminal case...we exercise our discretion to consider [the petition's] merits.”).

An abuse of discretion occurs if the court’s decision is “arbitrary or capricious or if it exceeds the bounds of law or reason.” State v Hambright, 388 P.3d 613, 619 (Kan. Ct. App. 2017). A judicial action will constitute an abuse of discretion if the action is “(1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact.”) State v. Montiel, 122 P.3d 571, 575 (Utah 2005). (*followed in Nevada by Foster v. State*, 396 P.3d 150 (2017 Unpublished, Case No. 72608).

b. Judge Scotti erred in considering a new issue not previously raised

As a principle matter, Judge Scotti erred by considering a newly raised issue and then vacating a conviction based upon the new issue. The District Court, which in this case was acting as the appellate court, was to first examine whether any objection to the deputy’s involvement in the case had been waived. The longstanding rule is that failure to preserve an error is forfeited on appeal, even when the error that has been deemed structural. Jeremias v. State, 134 Nev., Adv. Op. 8, 412 P.3d 43, 48 (2018).

Plumlee suddenly argued for the first time in a Motion to Reconsider that the Deputy District Attorney should not have been allowed to handle this case. While Appellant never objected to this matter, it should and would have failed as a matter of law.

c. Judge Scotti acted arbitrarily and capriciously and exceeded his jurisdiction in reversing the convictions on separation of powers grounds

Judge Scotti arbitrarily and capriciously ruled that by holding a seat on the Legislature, a Deputy District Attorney is violating the separation of powers clause in the Nevada Constitution. Article 3, § 1(1) states “The powers of the Government of the State of Nevada shall be divided into three separate departments, --the Legislative, --the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in cases expressly directed or permitted in this constitution.”

The general premise behind the separation of powers doctrine is to prevent one branch of government from encroaching on the powers of another branch. Clinton v. Jones, 520 U.S. 681, 699 (1976). This Court has previously considered what constitutes legislative, executive, and judicial powers: “Legislative power is the power of law-making representative bodies to frame and enact laws, and to

amend and repeal them...The executive power extends to the carrying out and enforcing the laws enacted by the legislature...'Judicial Power'...is the authority to hear and determine justiciable controversies. Judicial power includes the authority to enforce any valid judgment, decree, or order." Galloway v. Truesdell, 83 Nev. 13, 19 (1967).

The Nevada Constitution does not contain any specific provisions concerning incompatible public offices that would prohibit legislators from holding positions of public employment with the local government. Further it is relevant to point out that a Deputy District Attorney is a mere "public employee" and not a "public officer" as used in the Nevada Constitution. *See State ex rel. Mathews v. Murray*, 70 Nev. 116, 120-21 (1953). Public officers are created by law not simply created by mere administrative authority and discretion. Second, the duties of a public officer must be fixed by law and must involve an exercise of the sovereign functions of the state, such as formulating state policy. Univ. & Cmty. Coll. Sys. V. DR Partners, 117 Nev. 195 200-06 (1953). Since a Deputy District Attorney is a "public employee," the separation of powers doctrine as listed in Article 3 §1 is not applicable.

With the separate bodies of government in mind, the Nevada Constitution does place certain specified limitations on its membership. Article 4 § 4 states that Senators shall be chosen from the qualified electors of their respective districts and

that no Senator shall serve more than 12 years. Article 4 § 6 grants each House the authority to determine the qualifications of its own members. Article 4 § 8 specifically prohibits a member of the Legislature from accepting an appointment to a civil office of profit while serving. Article 4 § 9 makes certain federal officers ineligible for serving in the Legislature. Clearly, of all the restrictions and qualifications set forth in the Nevada Constitution, there is no limitation that constitutionally prohibits a legislator that works as an employee for an executive agency.

Under Nevada's Constitution, the legislature is also responsible for establishing certain county officers, including the District Attorney's Office. Article 4 § 32. As required by the Constitution, NRS Chapter 252 was the legislature's conveyance of policymaking authority on the principal prosecutor. NRS 252.070 is the legislative enactment that allows the district attorney to appoint deputy district attorneys that work under the elected district attorney. Notably, NRS 252.070(1) explicitly states, "The appointment of a deputy district attorney must not be construed to confer upon that deputy policymaking authority for the office of the district attorney or the county by which the deputy district attorney is employed." NRS 252.070(1) makes it clear that a deputy district attorney only serves under the district attorney, and does not hold a public office by virtue of prosecuting cases.

What Judge Scotti clearly misconstrues is that the Deputy District Attorney was violating the separation of powers clause simply because her *employer* is part of the executive branch. A Deputy District Attorney is a public employee rather than a person holding the public office of an executive branch agency, thus the separation of powers does not apply.

Not only does NRS 252.070 indicate there is a difference between the elected district attorney and a mere deputy, but other cases have indicated the legal difference as well. For instance in Price v. Goldman, this Court made it clear that deputy district attorneys do not have the authority to authorize wire intercepts. 90 Nev. 299, 301 (1974). Relying upon the specific enumerated reasons, this Court agreed that ‘district attorney’ is not synonymous with everyone that works for the district attorney.

The Nevada Constitution does not contain any specific provisions concerning incompatible public offices that would prohibit legislators from holding positions of public employment with the local government. This Court has previously made the distinction between a public officer (i.e. the district attorney) and the district attorney’s employees. “A public office is distinguishable from other forms of employment in that its holder has by the sovereign been invested with some portion of the sovereign functions of government.” State ex rel. Mathews v. Murray, 70 Nev. 116, 120-21 (1953). Second, the duties of a public officer must be fixed by

law and must involve an exercise of the sovereign functions of the state, such as formulating state policy. Univ. & Cmty. Coll. Sys. V. DR Partners, 117 Nev. 195, 200-06. Since a Deputy District Attorney is only a “public employee,” the separation of powers doctrine as listed in Article 3 §1 is not applicable.

Specifically, for district attorneys this Court has held that the separation of powers was not applicable to the exercise of certain powers by a county’s District Attorney. Lane v. Second Jud. Dist. Ct., 104 Nev. 427, 437 (1988). In citing NRS 252.110, which sets forth the powers inured to the district attorney, the Court indicated that the district attorney is not an office created via the Nevada State Constitution, thus the separation of powers doctrine is inapplicable.

In 2004, then Secretary of State Dean Heller also broached this topic in two different ways. First, he sought an advisory opinion from the Nevada Attorney General on whether the separation of powers clause of the Nevada Constitution was applicable to local governments. 2004 Nev. Op. Atty. Gen. No. 03 (Nev.A.G.), 2004 WL 723329. Attorney General Brian Sandoval issued his opinion that local government employees could dually serve as members of the Nevada Legislature, and that such service did not violate Article 3, § 1 of the Nevada Constitution’s separation of powers clause.

Attorney General Sandoval went on to explain Nevada’s “long-standing practice of local government employees serving in the Nevada State Legislature.”

He pointed to examples such as Assemblywoman Ruth Averill, who was the second woman ever elected to the Nevada State Legislature. Assemblywoman Averill was a school teacher that went on to serve on the Assembly Committee on Judiciary as well as the Assembly Committee on Education.

In finding authority for the dual service of people like Assemblywoman Averill, Attorney General Sandoval relied on California laws that held the separation of powers doctrine does not apply to local government employees. People ex rel. Attorney General v. Provines, 34 Cal. 520 (1868). The California court distinguished that the constitution set up the State government but not local and county governments. This decision was reaffirmed in California and is adopted in a majority of other jurisdictions. Mariposa County v. Merced Irrig. Dist., 196 P.2d 920, 926 (Cal. 1948). It should be noted that California was an appropriate state to draw from given that Nevada's Constitution was largely modeled after California's State Constitution. See Aftercare of Clark County v. Justice Court of Clark County, 120 Nev. 1, 82 P.3d 931 (2004). Attorney General Sandoval concluded his advisory opinion by stating the following: "Further, it is the opinion of this office that the constitutional requirement of separation of powers is not applicable to local governments. Accordingly, absent legal restrictions unrelated to the separation of powers doctrine, a local government employee may simultaneously serve as a member of the Nevada Legislature."

The second way that Secretary of State Heller sought clarification on this issue followed the advisory opinion in a petition for writ of mandamus that he sought challenging state government employees who also serve on the Legislature. Heller v. Legislature of the State of Nevada, 120 Nev. 456 (2008). The Court in Heller echoed and affirmed the language in Article 4, § 6 that only the Legislature has the authority to judge its members' qualifications. *Id.*, at 468, 93 P.3d at 755.

In denying the petition for writ of mandamus, the Nevada Supreme Court further held that it would be in violation of the Separation of Powers Doctrine to judicially legislate who is eligible to serve in the Nevada Legislature, given that such a function lies with the Legislature itself. Article 4 § 6.

The Legislature is given deference in determining who is qualified to be a member of the Legislature. As seen in Heller, the Supreme Court of Nevada refused to address this issue on the merits because to address the issue presented would in itself be a violation of the separation of powers. The Legislature was given the specific authority in the constitution to qualify their members, and the supreme court said that “by asking us to declare that dual service violates the separation of powers, the secretary urges our own violation of the separation of powers”. Heller at 459.

In this case, the district court arbitrarily vacated a righteous prosecution on the sole grounds that the Separation of Powers Clause was violated. It vacated a conviction and ordered that the case start anew without Deputy District Attorney

Scheible's involvement. In misconstruing the Nevada Constitution, and the authorities cited, the district court exceeded its authority and in its own way violated the separation of powers doctrine. Since the Legislature was granted this power in the Nevada Constitution, this authority cannot be usurped by the Judicial branch of the government without violating the separation of powers article of the Constitution.

CONCLUSION

Based on the foregoing, the State requests this Court to grant the petition and direct the clerk of this Court to issue a writ of mandamus and/or prohibition vacating the District Court's granting of the appeal and reinstating the misdemeanor conviction.

Dated this 18th day of December, 2020.

Respectfully submitted,

STEVEN B. WOLFSON
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BY */s/ Alexander Chen*

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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 18th day of December, 2020.

BY */s/ Alexander Chen*

ALEXANDER CHEN

Chief Deputy District Attorney

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Office of the Clark County District Attorney

CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this writ 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)(9) because this writ has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this writ complies with the page or type-volume limitations of NRAP 21(d) because, excluding the parts of the writ exempted by NRAP 32(c)(2), it is either proportionately spaced, has a typeface of 14 points of more, contains 3,246 words.
3. **Finally, I hereby certify** that I have read this appellate writ, 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 brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 21, which requires every assertion in the writ regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 21st day of December, 2020.

Respectfully submitted

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BY */s/ Alexander Chen*

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on December 18, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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I further certify that I served a copy of this document by electronic emailing a true and correct copy thereof to:

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

AC/jg