

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAYSHAWN BAILEY,)	No.
)	(DC No. 2017-00017)
Petitioner,)	Electronically Filed
v.)	Jan 12 2021 08:41 a.m.
)	Elizabeth A. Brown
)	Clerk of Supreme Court
THE EIGHTH JUDICIAL DISTRICT)	
COURT OF THE STATE OF NEVADA,)	
COUNTY OF CLARK, THE)	
HONORABLE MICHELLE LEAVITT,)	
DISTRICT COURT JUDGE,)	
)	
Respondent,)	
)	
THE STATE OF NEVADA,)	
)	
Real Party in Interest.)	
)	

PETITION FOR WRIT OF PROHIBITION/MANDAMUS

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IN THE SUPREME COURT OF THE STATE OF NEVADA

JAYSHAWN BAILEY,)	No.
)	(DC No. C-20-347887-1)
Petitioner,)	
v.)	
)	
THE EIGHTH JUDICIAL DISTRICT)	
COURT OF THE STATE OF NEVADA,)	
COUNTY OF CLARK, THE)	
HONORABLE MICHELLE LEAVITT,)	
DISTRICT COURT JUDGE,)	
)	
Respondent,)	
)	
THE STATE OF NEVADA,)	
)	
Real Party in Interest.)	

PETITION FOR WRIT OF PROHIBITION/MANDAMUS

COME NOW the Petitioner, JAYSHAWN BAILEY, by and through his counsel KATHLEEN M. HAMERS, Chief Deputy Public Defender, and respectfully petitions this Honorable Court for a Writ of Mandamus ordering

This Petition is based upon the Memorandum of Points and Authorities,

DATED this 11th day of January, 2021.

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEFENDER

By /s/ Kathleen M. Hamers
Kathleen M. Hamers, #9049
Deputy Public Defender

[illegible]

Kathleen M. Hamers, being first duly sworn, deposes and says:

1. That affiant is an attorney duly licensed to practice law in the State of Nevada and is the Deputy Clark County Public Defender assigned to represent JAYSHAWN BAILEY in this matter.

2. That JAYSHAWN BAILEY authorized me to file the instant motion together with a Petition for Writ of Prohibition/Mandamus.

/s/ Kathleen M. Hamers
KATHLEEN M. HAMERS
Nevada Bar #9049

SUBSCRIBED and SWORN to before me

This 11th day of January, 2021.

/s/ Carrie M. Connolly,
No: 94-2602-1, Exp. 10-11-21
NOTARY PUBLIC in and for said
County and State

POINTS AND AUTHORITIES

ROUTING STATEMENT

“Rule 17: Division of Cases Between the Supreme Court and the Court of Appeals.” Subsection (b) of Rule 17 provides that certain cases shall “presumptively” be heard and decided by the court of appeals. “Pretrial writ proceedings challenging discovery orders or orders resolving motions in limine are presumptively assigned to the court of appeals.” NRAP 17(b)(14). Although this matter arises from a pre-trial writ, it does not involve a discovery order or a motion in limine. Accordingly, this case is not presumptively assigned to the Court of Appeals.

I.

STATEMENT OF THE ISSUES

Can a medical examiner opine that a case is a homicide based on “suspicious circumstances” and investigatory information rather than medical expertise as a basis for probable cause for murder?

STATEMENT OF FACTS

FACTUAL ALLEGATIONS AND PROCEDURAL HISTORY

Jayshawn Bailey is charged with one count of murder. A preliminary hearing took place on April 1, 2020. The State presented two witnesses, Dr. Christina Di Loreto and Detective Ryan Jaeger. Jayshawn called 911 to

report a dead body in the sewer near his home. On January 19, 2020, he reported that he saw two people put something in the sewer about a month ago. He said that he opened the sewer two weeks later and saw a body inside. A couple weeks later, his conscience got to him, so he called police. App 31-32.

At the time that police recovered the body, the decedent in this case had lived nearby and been reported missing. App at 46. Detectives interrogated Jayshawn Bailey on January 21, 2020, and numerous times on January 21, 2020.

An autopsy was conducted on January 20, 2020. App at 24. The medical examiner was unable to discover any fatal traumatic injury or toxicological cause of death. App at 22-24. However, based on “suspicious circumstances,” investigative information and the Defendant’s statements she nevertheless determines the manner of death to be homicide. App at 24.

Petitioner filed a Pre-trial Petition for Writ of Habeas Corpus on May 18, 2020, asking the District Court to dismiss the Indictment based on the State’s introduction of inadmissible “expert” opinion evidence that was outside the medical examiner’s area of expertise. App 1-68. That Petition was denied on June 17, 2020. App 85-87. Trial is currently set to commence in the District Court on January 25, 2021.

WHY WRIT OF MANDAMUS SHOULD ISSUE IN THIS CASE

A. IT IS THE PROPER REMEDY

Under NRS 34.170 “A Writ of Mandamus shall issue in all case where there is not a **plain, speedy and adequate remedy** in the ordinary course of law.”¹ Generally this means that a Writ of Mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust or station² or to control an arbitrary or capricious exercise of discretion.³ Additionally mandamus is the appropriate remedy where there is an important issue of law which requires clarification.⁴ In this case, Mandamus is appropriate to compel the District Court to grant Mr. Bailey’s Pre-trial Petition for Writ of Habeas Corpus, an act that the law requires.

In this case, Jayshawn Bailey does not have a plain, speedy and adequate remedy in the ordinary course of law for the District Court’s erroneous denial of his Petition for Writ of Habeas Corpus.

¹ Emphasis added.

² See NRS 34.160

³ See Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601 (1981).

⁴ See Redeker v. Dist Ct, 122 Nev. 164, 167, 127 P.2d 520, 522 (2006) *holding limited on other grounds by* Hidalgo v. Dist Ct, 124 Nev. 330, 341, 184 P.3d 369, 377 (2008)

The District Court's decision to allow Jayshawn Bailey's case to proceed to trial where the probable cause determination was made based on improper expert opinion evidence was clearly erroneous.

B. DENIAL OF JAYSHAWN BAILEY'S PETITION FOR WRIT OF HABEAS CORPUS WAS CLEARLY ERRONEOUS.

I. Applicable Law

The Writ of Habeas Corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless action. Its preeminent role is recognized by the admonition that: 'The Privilege of the Writ of Habeas Corpus shall not be suspended.'" Harris v. Nelson, 394 U.S. 286, 290-91, 89 S.Ct. 1082 (1969).

Further, "the basic purpose of the writ is to enable those unlawfully incarcerated to obtain their freedom..." Johnson v. Avery, 393 U.S. 483, 485; 89 S.Ct. 747 (1969). Since 1912, the Nevada Supreme Court has recognized that the writ of habeas corpus is the plain, speedy and adequate remedy by which to determine the legal sufficiency of the evidence supporting a grand jury indictment. *See for example* Eureka County Bank Habeas Corpus Cases, 35 Nev. 80; 126 P. 655 (1912); Ex parte Stearns, 68 Nev. 155; 227 P.2d 971 (1951); and, Ex parte Colton, 72 Nev. 83; 295 P.2d 383 (1956).

II. Probable Cause Standard

During preliminary hearing proceedings, the State must elicit sufficient evidence demonstrating probable cause that a crime was committed and that the accused was likely the perpetrator. Sheriff v. Miley, 99 Nev. 377, 379; 663 P.2d 343, 344 (1983). If the magistrate determines that evidence establishes probable cause that the defendant committed an offense, the magistrate binds the defendant over to the district court and may admit the defendant to bail. See NRS 171.206. On the other hand, if the evidence does not establish probable cause, the magistrate must discharge the defendant. Id.

At the preliminary hearing stage, probable cause to bind a defendant over for trial “may be based on ‘slight,’ even ‘marginal’ evidence because it does not involve a determination of guilt or innocence of an accused.” Sheriff v. Hodes, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980). The State is required to present sufficient evidence “to support a reasonable inference that the accused committed the offense.” Sheriff v. Milton, 109 Nev. 412, 414, 851 P.2d 417, 418 (1993), quoting Kinsey v. Sheriff, 87 Nev. 361, 363, 487 P.2d 340, 341 (1971).

Additionally, the evidence received at a preliminary hearing must be legal, competent evidence. Goldsmith v. Sheriff, 85 Nev. 295, 303; 454

P.2d 86, 91 (1969). No other type of evidence may be considered, as the rules of evidence require the production of legal evidence and the exclusion of whatever is not legal. Id. (quoting People v. Schubert, 71 Cal.App.2d 733, 163 P.2d 498 (1945)). Due process requires adherence to these rules of evidence. Id. There is not one rule of evidence for the trial of cases and another rule of evidence for preliminary examinations—the rule for the admission or rejection of evidence is the same for both proceedings. Id. The rule which requires less evidence at a preliminary examination, or even slight evidence, merely goes to the quantum, sufficiency or weight of evidence and not to its competency, relevancy, or character. Id. In this case, inadmissible expert opinion evidence was admitted at preliminary hearing.

III. Inadmissible Expert Opinion Evidence

An expert can only render opinions on matters within their area of expertise. The medical examiner's area of expertise in this case, is medical examination. She testified to her medical degree and the numerous autopsies she had performed over the last few years. App. at 15. Her opinions must be limited to those based on her medical expertise. In this case, Dr. Di Loreto testified that she found no fatal traumatic injury, no natural disease and no toxicological cause of death. App. at 24. Her

determination that the manner of death in this case was homicide was based on “suspicious circumstances such as an intent to hide the body from view.” Id. She explained that she made the determination that the manner of death was a homicide based on unspecified investigative information and a photograph of where the decedent was found. App. at 28.

In this case, Dr. Di Loreto’s opinion as to manner of death, homicide, based on “suspicious circumstances” and investigative information was improper. It is unclear if she relied on statements made by the Defendant in forming her opinion. She testified both that she did rely on his statement, App. at 24, and that she did not, App. at 28. An opinion based on statements made by the defendant is likewise not within the scope of her medical expertise. The medical examiner’s opinion testimony that the manner of death in this case was homicide is outside her area of expertise and should not have been admitted.

In response to Petitioner’s arguments, the State erroneously relied on two cases. App. at 76.

First, the Cooper case, a 2019 Unpublished Opinion where this Court upheld the District Court decision to allow a deputy coroner’s testimony opining that the manner of death was homicide and not an accident. Cooper v. State, 454 P.3d 720 (2019) Unpublished Opinion. That case has no

relevance here. This Court was very clear that the only challenge being made to the coroner's testimony in that case was to "at most, two of the three *Hallmark* requirements" and analysis was limited accordingly. Id at 3. The analysis was limited to the qualification and assistance requirements. Id. The challenge and thus analysis and holding, did not address whether the opinion was within the scope of the coroner's expertise and is not applicable here. Indeed, the Cooper opinion notes that expert testimony must be within the scope of that witness' expertise, as is always the case. Id at 2. The testimony given by Dr. Di Loreto in this case was outside her area of expertise as it was based on suspicious circumstances and statements, not medical evidence and it should not have been admitted.

Second, the State relies on the California Supreme Court's determination in Mercado, that a medical examiner may rely on hearsay information without violating the Confrontation Clause. People v. Mercado, 156 Cal. Rptr. 3d 804 (2013), App. at 76. That analysis is also inapplicable here. In that case, the issue was whether the medical examiner could rely on hearsay information to form an opinion, not whether the opinion was outside the scope of the medical examiner's expertise. Here, the issue is not whether the medical examiner can receive hearsay information, in order to render an opinion. If the medical examiner was rendering an opinion based on hearsay

information, but that information was medically relevant and helpful to an opinion within that witnesses expertise, then the analysis in Mercado may be useful. That is not the case here. Here Dr. Di Loreto is making a determination based on suspicion circumstances or statements, not any medical evidence at all, no matter the source of that evidence. The issue is whether the opinion itself, the manner of death being homicide when based on suspicion or a perceived intent to hide the body, is within the scope of the medical examiner's expertise. It is not.

CONCLUSION

For the foregoing reasons, Mr. Bailey's Petition for Writ of Habeas Corpus should have been granted and the Information charging Jayshawn Bailey with murder should have been dismissed. Petitioner prays that this Honorable Court issue a Writ of Mandamus directing the lower court to dismiss the Information.

DATED this 11th day of January, 2021.

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEFENDER

By /s/ Kathleen M. Hamers
Kathleen M. Hamers, #9049
Deputy Public Defender

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)(6) because:

This writ has been prepared in a proportionally spaced typeface using Times New Roman in 14 size font.

2. I further certify that this writ complies with the page or type-volume limitations of NRAP 21(d):

Proportionately spaced, has a typeface of 14 points or more and contains 11 pages which does not exceed the 15 page limit.

3. Finally, I hereby certify that I have read this 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 writ complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), 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 11th day of January, 2021.

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEFENDER
By: /s/ Kathleen M. Hamers
KATHLEEN M. HAMERS, #9049
Attorney for PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 11th day of January, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
STEVEN B. WOLFSON

KATHLEEN HAMERS

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

Honorable Michelle Leavitt
District Court, Department XII
200 Lewis Avenue
Las Vegas, NV 89101

BY /s/ Carrie M. Connolly
Employee, Clark County Public
Defender's Office