

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 MONICA
TRUJILLO, DISTRICT JUDGE
Respondent,
and
BRANDON ALEXANDER MCGUIRE,
Real Party in Interest.

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CASE NO:

D.C. NO: C-16-319756-1

**EMERGENCY MOTION UNDER NRAP 27(e) AND
PETITION FOR WRIT OF MANDAMUS OR,
IN THE ALTERNATIVE, PROHIBITION**

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

KATHLEEN HAMERS
Deputy Public Defender
Nevada Bar #009049
Clark County Public Defender
309 S. Third Street, #226
Las Vegas, Nevada 89155
(702) 455-3375

AARON D. FORD
Nevada Attorney General
Nevada Bar # 007704
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Petitioner

Counsel for Real Party in Interest

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I. Routing Statement

This matter is neither presumptively assigned to the Nevada Supreme Court nor to the Nevada Court of Appeals, pursuant to Rule 17 of the Nevada Rules of Appellate Procedure (NRAP).

II. Relief Requested

The State requests this Court correct the trial court's arbitrary and capricious decision to strike the victim from testifying in this case and vacating the district court's order.

III. Issue Presented

Whether the district court arbitrarily and capriciously abused its discretion

when it granted the defense's motion to strike the victim from testifying because no specific address of the victim was filed.

IV. Statement of Facts and Procedural History

Real Party in Interest Brandon McGuire ("Defendant McGuire") is scheduled for jury trial on July 27, 2021 at 11:00 a.m. Defendant McGuire is charged with two counts of Sexual Assault with Use of a Deadly Weapon for acts that occurred on or about March 11, 2004. In the Indictment, the victim, Evelyn Hicks, was listed as a witness "c/o CCDA, 200 Lewis Avenue, LV, NV 89101.

There was lengthy pre-trial litigation in this case. Among the things that Defendant McGuire filed on March 26, 2020, was a Motion to Compel Compliance with NRS 174.234. Although all trial were halted at the time due to the Covid-19 pandemic and Administrative Order 20-01, the State did reply that the statute requires providing a last known address not less than 5 judicial days before trial.

Defendant McGuire's case was continued throughout the pandemic until his recent trial setting. On July 19, 2021, the parties announced ready at a calendar call to proceed to trial. On July 21, 2021, at the Central Calendar Call, it was announced that trial would commence on July 27, 2021. Following the Central Calendar Call, Defendant McGuire filed a Motion to Strike Witnesses for Failure to Comply with NRS 174.234. On the same day, the State responded to the Motion and filed its own affidavit from its investigator about the efforts that were taken to locate the victim

so that she could testify at trial. Included in the investigator's affidavit is a pronouncement that to date, she still is not sure that the victim has an address or residence. PA 31-31.

On July 26, 2021, the district court heard arguments regarding Defendant McGuire's Motion to Strike Witnesses. Despite the State's position that it still has no address for the victim, the district court agreed to have her testimony stricken because she was not properly noticed.

V. 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, 874 P.2d 778, 780 (1994); Low v. Crown Point Mining Co., 2 Nev. 75 (1866). 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, 78 P.2d 750, 751 (1978); Ham v. Eighth Judicial District Court, 93 Nev. 409, 412, 566 P.2d 420, 422 (1977); see also, Goicoechea v. District Court, 96 Nev. 287, 607 P.2d 1140 (1980); Cunningham v. District Court, 102 Nev. 551, 729 P.2d 1328 (1986).

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, 874 P.2d at 781; Silver Peaks Mines v. Second Judicial District Court, 33 Nev. 97, 110 P. 503 (1910).

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, 637 P.2d 534, 536 (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.”).

b. The District Court Acted Arbitrarily and Capriciously by Granting the Defendant's Motion to Strike Witnesses

Extraordinary relief is warranted in this case to correct the district court's arbitrary and capricious decision to grant the Defendant's motion that effectively prohibits the victim from testifying in her own case. An abuse of discretion occurs

if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason. Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). "An arbitrary or capricious exercise of discretion is one 'founded on prejudice or preference rather than on reason,' or 'contrary to the evidence or established rules of law.'" State v. Dist. Ct. (Armstrong), 127 Nev. 927, 931–32, 267 P.3d 777, 780 (2011). "[M]anifest abuse of discretion does not result from a mere error in judgment, but occurs when the law is overridden or misapplied, or when the judgment exercised is manifestly unreasonable or the result of partiality, prejudice, bias or ill will." Id.

The district court's striking of the witness in the instant case was an arbitrary and capricious exercise of discretion. NRS 174.234 sets forth certain obligations for parties in a criminal proceeding regarding the notice of witnesses:

1. Except as otherwise provided in this section, not less than 5 judicial days before trial or at such other time as the court directs:
 - (a) If the defendant will be tried for one or more offenses that are punishable as a gross misdemeanor or felony:
 - (1) The defendant shall file and serve upon the prosecuting attorney a written notice containing the names and last known addresses of all witnesses the defendant intends to call during the case in chief of the defendant; and
 - (2) The prosecuting attorney shall file and serve upon the defendant a written notice containing the names and last known addresses of all witnesses the prosecuting attorney intends to call during the case in chief of the State

In addition to the notice requirement, NRS 174.234(3) establishes a continuing duty

to file and serve the opposing party if new addresses become available. Pursuant to the statute, such information should be provided “as soon as is practicable after the party obtains the information.” NRS 174.234(3)(a). Precluding a deficiently noticed witness should only be the result of a party acting in bad faith. Turner v. State, 136 Nev. Adv. Op. 62, 473 P.3d 438 (Oct. 1, 2020).

The requirements of NRS 174.234 are not absolute, and any deficient notice should go towards a possible continuance and not exclusion of the witness’s testimony. Dossey v. State, 114 Nev. 904, 907, 964 P.2d 782, 784 (1998). In Dossey, this Court determined that disclosing the witness’s place of employment but not the witness’s name was sufficient notice “because the defense could have discovered the witness’s identity with minimal and reasonable efforts.” Id. Additionally, “[F]ailure to endorse a witness constitutes reversible error only where the defendant has been prejudiced by the omission.” Jones v. State, 113 Nev. 454, 473, 937 P.2d 55, 67 (1997).

In this particular case, the matter had gone to grand jury where the victim had testified. The discovery clearly indicates the identity of the victim. This is not a case where the defendant could be prejudiced by being surprised by an unknown or undisclosed witness. The victim has always been noticed in this case, but due to her living circumstances, the State has been unable to provide the address called for in NRS 174.234.

Moreover, the circumstances in this case do not show any bad faith on the part of the State. The investigator's affidavit makes it is clear that the victim does not have a stable residence. PA 31-32. As such, the State could not provide an updated address. The listing of her address simply is not practicable given her living situation. However since the State had managed to gain service on the victim, it has even offered to arrange for Defendant's counsel to conduct a pretrial with the victim. PA 28. The State has literally sought to go above and beyond its obligations, yet the district court has imposed the most severe punishment possible by precluding the victim's testimony.

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 from striking the State's witness and allowing the victim to testify at a future jury trial.

Dated this 26th day of July, 2021.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney

BY */s/ Alexander Chen*

ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539
Office of the Clark County District Attorney

NRAP 27(e) CERTIFICATE

1. Counsel for Petitioner: Chief Deputy District Attorney Alexander Chen, Office of the Clark County District Attorney, 200 Lewis Ave., Post Office Box 552212, Las Vegas, Nevada 89155, (702) 671-2750.
2. Counsel for Real-Party-in-Interest: Clark County Public Defenders Kathleen Hamers, 309 S. Third Street, Las Vegas, NV. 89155, (702) 455-3375.
3. Facts showing the existence and nature of the claimed emergency: On July 26, 2021, the Honorable Monica Trujillo granted Defendant McGuire's motion to have the victim stricken from testifying. Following the district court's ruling, the State requested a stay of the trial, but the district court denied the request for stay. The State requests this Court's review.
4. The Honorable Monica Trujillo and all counsel listed in paragraphs 1-2 were notified of this emergency motion and writ petition by electronic service.

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 and 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 1,789 words and 163 lines of text.
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 26th day of July, 2021.

Respectfully submitted

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

BY */s/ Alexander Chen*

ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539
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

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 26th day of July, 2021.

BY */s/ Aleander Chen*

ALEXANDER CHEN

Chief Deputy District Attorney

Nevada Bar #010539

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 26, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

KATHLEEN HAMERS
Deputy Public Defender

ALEXANDER CHEN
Chief Deputy District Attorney

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

JUDGE MONICA TRUJILLO
Email: ElliottT@clarkcountycourts.us

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

AC//ed