

IN THE SUPREME COURT OF THE STATE OF NEVADA

CORNELIUS E. ROGERS,
Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK, AND THE HONORABLE
JENNIFER TOGLIATTI, DISTRICT
JUDGE,
Respondents.

No. 44179

FILED

APR 21 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER GRANTING PETITION IN PART

This is an original petition for a writ of prohibition or mandamus. Petitioner Cornelius E. Rogers asserts that the State's notice of intent to seek death fails to specify facts in support of the alleged aggravating circumstances and that the district court abused its discretion when it refused to strike the notice. The State has charged Rogers by information with, among other felonies, the first-degree murder of Julie Holt in March 2001. Rogers is correct that the State's notice is defective under SCR 250 in regard to four of the five alleged aggravators, and we therefore grant relief. We decline to address Rogers's other challenges to the notice.

The Nevada Constitution grants this court the power to issue writs of mandamus and of prohibition.¹ This court may issue a writ of mandamus to compel the performance of an act which the law requires as a duty resulting from an office, trust, or station or to control a manifest

¹Nev. Const. art. 6, § 4.

abuse of or arbitrary or capricious exercise of discretion.² It may issue a writ of prohibition to arrest the proceedings of any tribunal exercising judicial functions in excess of its jurisdiction.³ Neither writ issues where the petitioner has a plain, speedy, and adequate remedy in the ordinary course of law.⁴ This court considers whether judicial economy and sound judicial administration militate for or against issuing either writ.⁵ Mandamus and prohibition are extraordinary remedies, and the decision to entertain a petition lies within the discretion of this court.⁶

We conclude that extraordinary relief is appropriate here. As discussed below, the district court manifestly abused its discretion in regard to four alleged aggravating circumstances in denying Rogers's motion to strike the State's notice. Rogers further contends that he will not have an adequate remedy at law because this court in a direct appeal will likely not consider the issue now raised if he is convicted but does not receive the death penalty.⁷ He asserts two ways that he will be prejudiced

²See NRS 34.160; Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981).

³See NRS 34.320; Hickey v. District Court, 105 Nev. 729, 731, 782 P.2d 1336, 1338 (1989).

⁴See NRS 34.170; NRS 34.330; Hickey, 105 Nev. at 731, 782 P.2d at 1338.

⁵See State v. Babayan, 106 Nev. 155, 175-76, 787 P.2d 805, 819 (1990).

⁶Hickey, 105 Nev. at 731, 782 P.2d at 1338.

⁷See, e.g., Schoels v. State, 114 Nev. 981, 990, 966 P.2d 735, 741 (1998) (declining to reach the merits of a challenge to aggravating circumstances raised by an appellant not sentenced to death).

even if he is not sentenced to death. First, he is less likely to receive a sentence allowing parole in a capital case, where the other sentencing options are death and life without parole, than in a noncapital case, where the other option is simply life without parole.⁸ Second, the State will be able to prosecute him before a death-qualified jury, which is more likely both to convict and to impose a harsher sentence. The State does not take issue with these assertions. Finally, judicial economy and sound judicial administration militate for issuing a writ. SCR 250 imposes specific charging requirements on prosecutors in capital cases, and Rogers shows that the State has violated these pretrial requirements. It is more economical and just to remedy the violation now than to try to do so after a conviction, whether or not Rogers receives a death penalty.

The State's notice largely failed to comply with SCR 250(4)(c), which provides:

No later than 30 days after the filing of an information or indictment, the state must file in the district court a notice of intent to seek the death penalty. The notice must allege all aggravating circumstances which the state intends to prove and allege with specificity the facts on which the state will rely to prove each aggravating circumstance.

The notice here alleged five aggravating circumstances. In regard to the first circumstance, it stated:

The murder was committed by a person who was previously convicted of a felony involving the use or threat of violence to the person of another. [NRS 200.033(2)] The evidence of this

⁸See NRS 200.030(4) (setting forth the possible penalties for first-degree murder).

aggravating circumstance will consist of documentary proof and/or testimony concerning prior convictions of the defendant. The defendant was convicted in the State of California in 1986 of, inter alia, Robbery, Forcible Rape, and Oral Copulation with a Person under Fourteen with Force, in Case No. A633738. A copy of the Abstract of Judgment in that case is attached The defendant was convicted in the State of Nevada in 1993 of Attempt Robbery with Use of a Deadly Weapon in Case No. C111865. A copy of the Judgment of Conviction in that case is attached

This part of the notice adequately alleged specific facts that the State will rely on to prove this aggravating circumstance.

However, in regard to the second alleged aggravator, the notice simply stated:

The murder was committed while the person was engaged in the commission of, or an attempt to commit, a robbery, and the person charged killed the person murdered or had reason to know that lethal force would be used. [NRS 200.033(4)] The evidence of this aggravating circumstance will consist of testimony and physical evidence arising out of the aggravated nature of the offense itself.

The notice used identical language for the third and fourth aggravators except that it alleged burglary and kidnapping, respectively, rather than robbery. For the fifth aggravator, the notice stated: "The murder was committed by a person to avoid or prevent a lawful arrest, [NRS 200.033(5)] The evidence of this aggravating circumstance will consist of testimony and physical evidence arising out of the aggravated nature of the offense itself." Thus, in regard to these last four aggravating circumstances, the notice alleged no supporting facts and did no more than track the statutory language in NRS 200.033(4) and (5).

The State notes that the notice of intent to seek the death penalty under SCR 250(4)(c) requires "less factual development" than the later notice of evidence in aggravation under SCR 250(4)(f). This observation, while accurate, does not justify providing no facts in the notice under (4)(c), which still expressly requires the State to "allege with specificity the facts" it will use to prove each aggravator. The notice here failed to do this in regard to the last four alleged aggravators. Phrasing a charged aggravator in conclusory statutory terms does not allege with specificity the relevant facts and is completely inadequate.⁹

The State further asserts that Rogers "will not necessarily be prejudiced" by delayed notice of the penalty phase evidence and that "it is important to allow the State ample time to properly develop the facts" underlying the aggravators. It also contends that this court's "precedent has found flexibility in the SCR 250 notice scheme," but the 1985 opinion that it cites actually predates SCR 250.¹⁰ Finally, the State cites an opinion by the North Carolina Supreme Court for the proposition that notice requirements for capital aggravators, as opposed to enhancements of noncapital offenses, should be eased.¹¹ In effect, without providing any good cause for its failure to comply with the requirements plainly set forth

⁹Cf. Lemberes v. State, 97 Nev. 492, 497, 634 P.2d 1219, 1222 (1981) (stating that an information that charges an offense solely in conclusory statutory language "does not provide adequate notice of the charges to the accused"), overruled on other grounds by Funches v. State, 113 Nev. 916, 922-23, 944 P.2d 775, 778 (1997); Sheriff v. Standal, 95 Nev. 914, 916-17, 604 P.2d 111, 112 (1979) (same regarding an indictment).


¹⁰Rogers v. State, 101 Nev. 457, 705 P.2d 664 (1985).

¹¹State v. Hunt, 582 S.E.2d 593 (N.C. 2003).

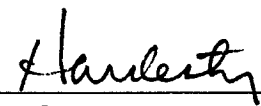
in SCR 250(4)(c), the State is simply asking this court to disregard those requirements. We decline to do so.

The notice of intent to seek the death penalty filed by the State failed to comply with SCR 250(4) in regard to the second, third, fourth, and fifth aggravating circumstances alleged, and the district court manifestly abused its discretion in not granting Rogers's motion to strike the State's notice in regard to those four circumstances. Therefore, we

ORDER the petition GRANTED IN PART AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS directing the district court to strike the last four aggravating circumstances alleged in the State's notice of intent to seek the death penalty.¹²


_____, J.
Rose


_____, J.
Gibbons


_____, J.
Hardesty

cc: Hon. Jennifer Togliatti, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

¹²We also vacate the stay imposed by our order of November 17, 2004.