IN THE SUPREME COURT OF THE STATE OF NEVADA

DARYL LINNIE MACK, BY AND THROUGH VIOLA MACK, AS NEXT FRIEND,
Petitioner /Appellant,
vs.
THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE, AND THE HONORABLE ROBERT H. PERRY, DISTRICT JUDGE,
Respondents,
and
THE STATE OF NEVADA; MICHAEL BUDGE, WARDEN OF THE NEVADA STATE PRISON; AND GEORGE CHANOS, ATTORNEY GENERAL OF THE STATE OF NEVADA
Real Parties in Interest /Respondents.

No. 46306

FILED

FEB 0 3 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER DENYING PETITION AND DISMISSING APPEAL

This is an original petition for a writ of habeas corpus. Petitioner Viola Mack (petitioner) wishes to act as a "next friend" on behalf of her son, Daryl Linnie Mack (Mack), who has abandoned a habeas challenge to his murder conviction and sentence of death. On November 23, 2005, we entered an order imposing a stay on the proceedings below and directing an answer from the State. The State filed its answer on December 14, 2005.

Petitioner couches her petition as one for mandamus relief and alternatively as one for habeas relief. She also asks this court to consider it as an opening brief on appeal from the district court's dismissal of Mack's habeas petition, and she has filed a notice of appeal. The State has

moved to dismiss the appeal. This court has recognized the possibility of next friend standing to seek a writ of habeas corpus, citing the section of the Nevada Constitution that provides that district courts have the power to issue such writs "'on petition by, or on behalf of any person' who is held in custody or has suffered conviction in their districts."[1] Petitioner invokes no authority for next friend standing in mandamus proceedings or in an appeal.[2] We therefore consider this petition only as an application for habeas relief, and we grant the State's motion to dismiss the appeal.

Mack received a bench trial in 2002, was convicted of first-degree murder, and was sentenced to death. This court affirmed his conviction and sentence.[3] Mack filed a post-conviction habeas petition in the district court challenging his conviction and sentence. In December 2004, Mack's two counsel, Marc Picker and Scott Edwards, raised questions regarding his competency and moved for his psychological evaluation. At a hearing on the matter in May 2005, counsel informed the district court that Mack wished to withdraw his petition and allow his execution to go forward. Pursuant to the court's order, two psychiatrists examined Mack.

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[1]Calambro v. District Court, 114 Nev. 961, 969, 964 P.2d 794, 799 (1998) (quoting Nev. Const. art. 6, § 6, cl. 1) (emphasis added in original).

[2]NRS 34.170 provides that a writ of mandamus "shall be issued upon affidavit, on the application of the party beneficially interested." (Emphasis added.) This court entertains an appeal only where the appeal is brought by an aggrieved party. See NRS 34.575; NRS 177.015; Whitley v. State, 79 Nev. 406, 413-14, 386 P.2d 93, 97 (1963); Valley Bank of Nevada v. Ginsburg, 110 Nev. 440, 446, 874 P.2d 729, 734 (1994).

[3]Mack v. State, 119 Nev. 421, 75 P.3d 803 (2003).

The first was Thomas Bittker, M.D., who reviewed the affidavits of Picker and Edwards, reviewed Mack's prison medical and psychiatric records beginning with his incarceration in 1995, and interviewed Mack. In his written report, Dr. Bittker concluded that Mack "is suffering from a psychotic disorder which is currently incompletely treated and is influencing his decision to relinquish further appeals." Ole Thienhaus, M.D., also reviewed Mack's prison medical records and interviewed him. In his report, Dr. Thienhaus concluded that Mack's "psychotic disorder is so well controlled that there is no evidence that he is out of touch with reality" or "is unable to advise his attorney as to his preference in pursuing further appeals."

In July 2005, the district court held an evidentiary hearing, and both psychiatrists' reports were entered into evidence. The court also heard testimony from Dr. Thienhaus, who testified consistently with his report. Dr. Bittker failed to appear, and the record does not show why. However, Dr. Thienhaus was questioned extensively in regard to Dr. Bittker's diagnoses. At the end of the hearing, the court took the matter under advisement.

The district court subsequently ordered that a third psychiatrist evaluate Mack. Melissa Piasecki, M.D., did so in September 2005. Dr. Piasecki reviewed Mack's prison medical records, spoke with his attorney Picker, and interviewed Mack. She concluded in her report that Mack "was competent to waive further appeals."

The district court considered that report at a hearing on October 25, 2005. The court and the prosecutor also canvassed Mack at length to determine if his request to withdraw his habeas petition was knowing and voluntary. The court determined that Mack was competent, was acting voluntarily, and understood the consequences of his decision.

The court ruled from the bench that it would grant his request, and on November 9, 2005, it entered a written order dismissing Mack's petition.

Among the exhibits that petitioner has submitted to this court is a letter from psychologist Ronald Roesch, Ph.D., to her counsel. Dr. Roesch critiques the evaluations done by the three psychiatrists, faulting them particularly for not administering psychological tests to ascertain whether Mack was minimizing psychopathology. However, the letter is dated November 18, 2005, so it was not part of the record before the district court, and petitioner has not explained why it should be considered here.[4]

In order to pursue a habeas petition on Mack's behalf as a next friend, petitioner must meet two requirements. She must adequately explain why Mack cannot appear on his own behalf to prosecute the action.[5] And she must show that she is truly dedicated to Mack's best interests.[6] A next friend "has the burden 'clearly to establish the propriety of his status and thereby justify the jurisdiction of the court.'"[7]

We are unpersuaded by the State's argument that petitioner has failed to adequately plead that she is truly dedicated to Mack's best

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[4]Cf. NRAP 21(a) (providing that petitions for mandamus or prohibition must contain "any order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition") (emphasis added); Hooper v. State, 95 Nev. 924, 926, 604 P.2d 115, 116 (1979) (stating that an appellate court cannot consider matters outside the record that was made in the lower court).

[5]See Calambro, 114 Nev. at 969, 964 P.2d at 799.

[6]Id.

[7]Id. (quoting Whitmore v. Arkansas, 495 U.S. 149, 164 (1990)).

interests. The critical question therefore is whether petitioner has met her burden to clearly establish why Mack cannot act on his own behalf. She alleges that Mack cannot do so because he is incompetent.

To decide if a condemned habeas petitioner is competent to withdraw his petition, a court must determine whether the petitioner "'has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises.'"[8] A person condemned to death is sane if "'aware of his impending execution and of the reason for it.'"[9] "The trial court resolves conflicting evidence at a competency hearing, and this court will sustain the trial court's findings when substantial evidence supports them."[10]

Petitioner advances a number of reasons for concluding that the district court erred and that Mack is incompetent. Her primary arguments are based on Mack's involuntary medication and his claim of innocence. She also alleges that the district court failed to conduct an adequate evidentiary hearing and that Mack's counsel refused to make the case that he is incompetent. And she stresses Mack's history of mental illness, the examining psychiatrists' failure to administer psychological tests, and Mack's alleged intent to commit suicide via his execution. None of petitioner's points warrants relief.

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[8]Id. at 971, 964 P.2d at 800 (quoting Rees v. Peyton, 384 U.S. 312, 314 (1966)).

[9]Id. (quoting Demosthenes v. Baal, 495 U.S. 731, 733 (1990)).

[10]Id.

We treat her last three points first. First, Mack's history of mental illness is, of course, material to the question of his competency. But the district court, like the examining psychiatrists, was informed of and considered Mack's history of mental illness in making its decision. Petitioner has not pointed to any part of this history that the district court failed to consider. Second, assuming psychologist Dr. Roesch's letter deserves any consideration at all here (since it was not presented to the district court), it has little weight. Dr. Roesch criticizes the psychiatrists for not administering psychological tests, but he never examined Mack, while all three psychiatrists interviewed Mack directly. This letter does not cast any significant doubt on the unequivocal conclusions by two of the psychiatrists that Mack is competent. Third, whether Mack would like to commit suicide is not relevant, as long as he is competent. He has been duly convicted of first-degree murder and sentenced to death. His execution will be on that basis, which is lawful and dependent on neither his desire nor his reluctance to die.

As for the adequacy of the evidentiary hearing, the district court did not limit Mack's counsel's presentation of evidence. Dr. Bittker failed to appear at the hearing, but petitioner does not allege and the record does not show that this failure is attributable to the district court or the State. The doctor's report was admitted at the hearing, and as the State points out, petitioner has not specified "what, if anything, Dr. Bittker could have contributed beyond his report if he had appeared." Moreover, despite Dr. Bittker's failure to testify, the district court did not make its decision at the end of the evidentiary hearing but ordered a third evaluation of Mack before finding him competent.

Next, Mack's counsel admittedly refrained from directly opposing his position that he was competent to withdraw his petition.

However, they raised the initial concerns over Mack's competency and informed the district court that they had serious doubts as to his competency. As a result, the district court ordered the evaluations of Mack and decided the issue. Furthermore, the court acted cautiously and deliberately before making its decision. Petitioner does not demonstrate that the court overlooked any material matter or was misled in some way as a result of the constraints experienced by Mack's counsel.

We turn now to petitioner's primary arguments. First, the record shows that Mack receives monthly intramuscular shots of haloperidol, an antipsychotic medication. Petitioner contends that the record "contains no sufficient evidence that the involuntary medication of Mr. Mack is necessary, medically appropriate, or in his best medical interest." However, petitioner carries the burden in this matter, not the State. She is required to establish that administration of the medication is not only improper but also somehow supports her claim that Mack is incompetent. She fails to do either. She points to nothing in the record that indicates that administration of the medication is inappropriate. In fact, the record shows that the medication improves Mack's mental status.

As a consequence, petitioner is led to an argument that is really at odds with her overall position. She contends that it is impermissible to medicate Mack to render him competent to be executed. This contention deserves consideration, of course, only if Mack is indeed competent. And if he is, Mack himself can raise this issue, leaving petitioner with no standing to act on his behalf as a next friend. Therefore, we will not address this issue in the context of a next friend petition.

Finally, petitioner stresses that Mack professes that he is innocent of the murder in this case. She asserts that he does so probably

because he holds a delusional belief in his innocence. She argues, therefore, that he cannot be executed because the Eighth Amendment prohibits the execution of a person who is not aware of the punishment he is to suffer and why he is to suffer it. We conclude that the record supports the district court's finding that Mack is aware of his situation. A delusional belief is not a necessary or even a likely inference to be drawn from Mack's denial of guilt. Many persons deny guilt after they have been convicted. A few, of course, are innocent. Most are probably deliberately lying for one reason or another. The point is, they are not necessarily delusional. And even if a person's denial of guilt involves a degree of self-denial, the person can still be competent. Here, for example, even if Mack has repressed his memory of the murder or persuaded himself that he did not commit it, that does not mean he is unable to understand that he is to be executed and why he is to be executed. On the contrary, the record shows that he knows he will be put to death if he drops his habeas challenge. It also shows that he knows he is to be executed because he was convicted of murder. Whether or not he really believes that his murder conviction was mistaken, he can still appreciate his situation and the consequences of his decision.

The district court considered the reports of three psychiatrists who examined Mack. Two of the three psychiatrists determined that Mack was competent. The district court also held an evidentiary hearing and thoroughly canvassed Mack. A next friend "has the burden 'clearly to establish the propriety of his status and thereby justify the jurisdiction of the court.'"[11] Petitioner does not meet this burden, and substantial

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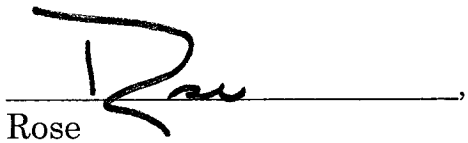
[11]Calambro, 114 Nev. at 969, 964 P.2d at 799 (quoting Whitmore, 495 U.S. at 164).

evidence supports the district court's finding that Mack was competent. There are no grounds for extraordinary intervention by this court. Accordingly, we lift the stay imposed by our order of November 23, 2005, dismiss the pending appeal, and

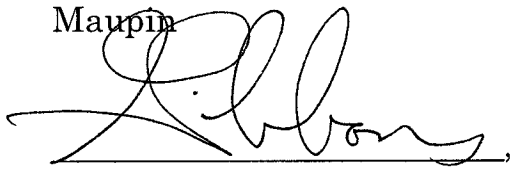
ORDER the petition DENIED.[12]



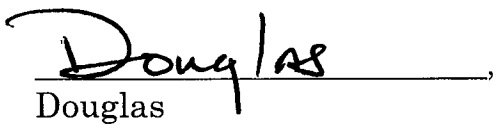
_____, C.J.
Rose

_____, J.
Becker

_____, J.
Maupin



_____, J.
Gibbons



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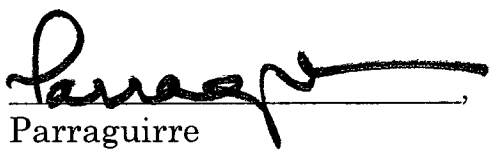
Douglas



_____, J.
Parraguirre

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[12]The Honorable James W. Hardesty, Justice, did not participate in the decision of this matter.

cc: Hon. Robert H. Perry, District Judge
Federal Public Defender/Las Vegas
Attorney General George Chanos/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk