

IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS DUCLOS,
Appellant,

vs.

R. BRUCE BANNISTER, MEDICAL
DIRECTOR, NEVADA DEPARTMENT
OF CORRECTIONS,
Respondent.

No. 49027

FILED

JAN 28 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from a district court order denying a petition for a writ of mandamus. Sixth Judicial District Court, Pershing County; John M. Iroz, Judge.

Appellant is an inmate with the Nevada Department of Corrections. He filed an original petition for a writ of mandamus in the district court seeking an order compelling the medical director of the Department of Corrections to administer interferon, a drug used to treat Hepatitis C, to him.

Appellant argued in the district court that the administration of interferon is a necessary treatment and that without it he has one to three years to live. He further argued that the medical director has a duty to administer interferon and that mandamus is appropriate since withholding interferon violates the Eighth Amendment of the United States Constitution. In addition to his constitutional argument, appellant cited three Nevada statutes, which he claims impose duties upon the medical director to treat him with interferon. These statutes are NRS 200.495, which criminalizes certain neglect of patients; NRS 212.020, which imposes criminal penalties on those who are willfully inhumane or oppressive to a prisoner; and NRS 449.720, which recognizes and

enumerates specific patient's rights. In support of his petition, appellant appended his affidavit, a memorandum written by Karen Gedney, M.D., the Senior Physician for the Department of Corrections, a letter from Lindsay Lightfoot, LCSW to appellant's public defender, and a psychological evaluation performed on appellant by Bill Davies, Ph.D.

Respondent filed an answer to the petition, contending that writ relief was not warranted and defending his medical decisions. Respondent appended to his response the affidavit of Karen Gedney, M.D., a copy of Medical Directive #219, a document containing guidelines for treating Hepatitis C prepared by respondent, and a copy of the same memorandum written by Dr. Gedney that was attached to appellant's petition. The Gedney memo provided by respondent is virtually identical to appellant's copy except that appellant's copy of the memo is missing one sentence included in the memo submitted by respondent. The sentence that is deleted from the memo supplied by appellant is as follows: "[a] decision to treat his Hepatitis C again [with interferon] would be problematic especially if the patient continued with his substance abuse." Appellant's memo appears to be an alteration of the memo supplied to the court by respondent. The sentence in question is the last sentence of the fourth full paragraph of the memo. The spacing between the fourth and fifth paragraphs of the memo supplied by appellant is larger than between all other paragraphs of the memo. The spacing between these same paragraphs of the memo supplied by respondent is identical to the spacing between all other paragraphs of the memo.

Appellant filed a reply to the medical director's response and therein claimed, among other things, that the memo he appended to his petition was supplied to him by the Hopes Clinic in Las Vegas in the same

condition as he supplied it to the court. The district court ultimately entered an order that denied appellant's petition without a hearing. Appellant appeals from that order.

A writ of mandamus is available to compel the performance of an act that the law especially enjoins as a duty resulting from an office, trust or station¹ or to control a manifest abuse of discretion.² Mandamus will not issue when a plain, speedy, and adequate remedy at law exists.³ Mandamus is an extraordinary remedy, and the decision as to whether a petition will be entertained lies within the discretion of this court.⁴ A district court's decision to grant or deny a petition for a writ of mandamus is reviewed by this court under an abuse of discretion standard.⁵

In denying the petition, the district court determined that appellant is not entitled to mandamus relief because he has a plain, speedy, and adequate remedy at law. Appellant disagrees, asserting the narrow view that a civil action, if successful, would provide him only with money damages, and that an award of damages is inadequate to address his grievance. Respondent points out that, within the context of a civil

¹NRS 34.160.

²Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981).

³NRS 34.170.

⁴Kussman v. District Court, 96 Nev. 544, 612 P.2d 679 (1980).

⁵DR Partners v. Bd. of County Comm'rs, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000).

action, appellant may seek an injunction to compel the medical director to administer interferon to appellant. We agree. Even were we to conclude that appellant has established (1) a duty on the part of respondent to administer interferon, (2) the medical necessity of the administration of interferon, (3) that he will die without interferon treatment, and (4) that the medical director was willfully and deliberately indifferent to appellant's medical care, writ relief would not be appropriate because appellant has a speedy and adequate alternate remedy available to him. Specifically, appellant may file an action seeking to compel respondent to provide him with interferon treatment.

Moreover, even if this court were to conclude that appellant lacked a plain, speedy and adequate remedy, we conclude that appellant has failed to establish that the district court abused its discretion in denying him the relief he seeks. Appellant contends that the district court abused its discretion when it concluded that the Eighth Amendment does not require that his petition be granted. A prison physician's conduct violates the Eighth Amendment when the physician "act[s] with 'deliberate indifference to [an inmate's] serious medical needs.'"⁶ In order to establish deliberate medical indifference, the district court correctly recognized that appellant must show that the deprivation is serious and that the medical officer was deliberately indifferent.⁷ The district court

⁶Bender v. Regier, 385 F.3d 1133, 1137 (8th Cir. 2004) (quoting Estelle v. Gamble, 429 U.S. 97, 104 (1976)).

⁷Farmer v. Brennan, 511 U.S. 825, 834 (1994)).

properly concluded that appellant has not established deliberate indifference to his medical needs.⁸

Appellant has provided no direct medical evidence from any source indicating that he is an appropriate candidate for interferon treatment. Moreover, he has provided no direct medical evidence from any source to support his claim that he will expire without interferon treatment. The record suggests that the rate of success with interferon treatment is only between fifteen and fifty percent and that treatment is not without significant risks, including nausea, anemia, depression and decomposition of the liver. The district court concluded that a large number of medical factors must be taken into account in determining whether interferon treatment is appropriate, and this conclusion is supported by substantial evidence.⁹ As noted by the district court, the Department of Corrections has developed written guidelines set forth in its Medical Directive #219 to determine the appropriate treatment for an inmate infected with the Hepatitis C virus. The district court found that

⁸We need not address whether the three statutes relied upon by appellant—NRS 200.495, NRS 212.020 and NRS 449.720—impose certain duties upon the medical director and may assume for the purpose of this analysis that all three apply to the director. These statutes generally require the director to provide appellant with care as indicated by his condition.

⁹See NOLM, LLC v. County of Clark, 120 Nev. 736, 100 P.3d 658 (2004) (noting that this court will not set aside a district court's findings of fact unless they are clearly erroneous or not supported by substantial evidence); State, Emp. Security v. Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986) (defining substantial evidence as evidence that "a reasonable mind might accept as adequate to support a conclusion") (quoting Richardson v. Perales, 402 U.S. 389, 401 (1971)).

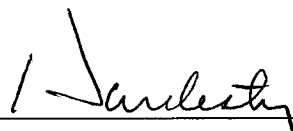
the medical director had carefully followed these guidelines when he determined that appellant was not a candidate for interferon treatment.

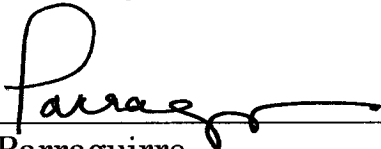
Appellant also makes the naked assertion that the medical director's decision was based solely upon a desire to save money, but he has offered no evidence to support this assertion. Instead, a review of the record reveals that appellant suffers from a variety of maladies including arthritis, HIV, Hepatitis C, alcoholism, and a history of drug abuse with methamphetamines. Dr. Gedney's memo, as provided by respondent, states that a decision to treat appellant's Hepatitis C with interferon again would be problematic. Her affidavit states that her conclusion is based upon appellant's medical and treatment history and her opinion that appellant does not meet the treatment criteria of Medical Directive #219. These assertions have not been contradicted by any other medical evidence. We therefore perceive no abuse of discretion on the part of the district court in concluding that the medical director's decision does not constitute deliberate medical indifference.¹⁰


¹⁰Additionally, as noted by the district court, there was a significant difference between the copy of the Gedney memo offered by appellant and that offered by respondent. Appellant denies that he is responsible for the redaction contained in the copy he provided. We note that having held no hearing, the district court was unable to definitively evaluate appellant's credibility, but notwithstanding that, the court's characterization of appellant's explanation as highly implausible is based upon a reasonable inference drawn from all the available evidence and as such is within the court's sound discretion to make. See Young v. Nevada Title Co., 103 Nev. 436, 441, 744 P.2d 902, 904 (1987) (noting that the trier of fact has the sole duty to evaluate the credibility of witnesses and to assign weight to their testimony). We also note that the court's ultimate decision to deny the petition was made without regard to the court's opinions regarding appellant's candor.

Based on the reasons outlined above, we conclude that the district court did not abuse its discretion in denying appellant's petition. Accordingly, we affirm the district court's order.

It is so ORDERED.¹¹


_____, J.
Hardesty


_____, J.
Parraguirre


_____, Sr. J.
Agosti

cc: Hon. John M. Iroz, District Judge
Thomas Duclos
Attorney General Catherine Cortez Masto/Carson City
Pershing County Clerk

¹¹The Honorable Deborah A. Agosti, Senior Justice, participated in the decision of this matter under a general order of assignment entered on December 19, 2007.