

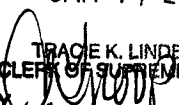
IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
ARNOLD JESSIE PETKOVSEK,
Respondent.

No. 49278

FILED

JAN 17 2008

TRACE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying the State's petition for a writ of certiorari, or in the alternative, a writ of mandamus. Fifth Judicial District Court, Nye County; John P. Davis, Judge.

On August 1, 2006, the State filed a criminal complaint in the justice court, alleging that respondent Arnold Jessie Petkovsek had committed sexual assault by inserting his finger into a three-year-old child's rectum. Petkovsek conditionally waived his preliminary examination so that he could seek a competency hearing in the district court. The district court ordered Petkovsek to submit to a psychological evaluation and two psychologists subsequently found Petkovsek competent to stand trial. On October 19, 2006, the district court remanded Petkovsek's case to the justice court. A copy of the order of remand was hand-delivered to the Nye County District Attorney.

On remand, the justice court entered an order setting Petkovsek's preliminary hearing for November 16, 2006. At the start of the hearing, the State requested a one-week continuance so that it could



08-01466

present the testimony of a missing material witness. Petkovsek objected to the continuance based on the State's failure to meet the requirements of District Court Rule 14 and the Hill and Bustos cases,¹ which require that a motion for a continuance be sworn and certain factors be presented to the court. The justice court determined that the State had not shown good cause for a delay, denied the State's motion for a continuance, and ordered Petkovsek discharged from custody. The justice court did not dismiss the State's complaint. However, in a written order discharging Petkovsek, the justice court found that the State had been "consciously indifferent" to Petkovsek's rights.

On December 14, 2006, the State filed a second criminal complaint in the justice court, which it later amended. The State alleged that Petkovsek had committed the offenses of lewdness with a child under 14 years of age and sexual assault by inserting his finger into a three-year-old victim's rectum. Petkovsek moved to dismiss the complaint. He argued that the State was merely recharging the offense that it had alleged in its first complaint, jeopardy had attached to the offense when the justice court determined that the State acted with conscious indifference to his rights, and the State's attempt to recharge this offense was unconstitutional. Although the justice court did not dismiss the

¹Hill v. Sheriff, 85 Nev. 234, 452 P.2d 918 (1969), limited by Sheriff v. Marcos, 116 Nev. 188, 995 P.2d 1016 (2000); Bustos v. Sheriff, 87 Nev. 622, 491 P.2d 1279 (1971).

State's second amended complaint, it ordered Petkovsek discharged from custody.

On February 8, 2007, the State filed a petition for a writ of certiorari, or in the alternative, a writ of mandamus in the district court. The State asked the district court "to issue a writ of certiorari, or alternatively, a writ of mandamus informing the lower court that it has exceeded its jurisdiction and that therefore its judgment should be vacated and this matter set for preliminary hearing." The district court found that the justice court had not exceeded its jurisdiction, determined that the justice court had performed all of its required duties, and declined to issue a writ.

The State now appeals from the district court's order denying the writ petition. The State contends that (1) the justice court exceeded its authority by finding that the State had behaved with conscious indifference to Petkovsek's rights, (2) the State's actions did not constitute conscious indifference, and (3) Petkovsek did not suffer prejudice and jeopardy did not attach. We conclude that the district court did not abuse its discretion by denying the State's writ petition.²

A writ of certiorari is available when an inferior tribunal has exceeded its jurisdiction and there is no appeal or other plain, speedy, and

²See DR Partners v. Bd. of County Comm'rs, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000) ("A district court's decision to grant or deny a writ petition is reviewed by this court under an abuse of discretion standard.").

adequate remedy at law.³ Upon receiving a petition for a writ of certiorari, the court conducts an inquiry to determine whether the inferior tribunal acted in excess of its jurisdiction.⁴ The inquiry ends if the court determines that the tribunal acted within its jurisdiction, even if the tribunal's decision was incorrect.⁵ For purposes of a writ of certiorari, "any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of stare decisis, are in excess of jurisdiction."⁶

NRS 171.196(2), DCR 14, and our decisions construing this statute and rule clearly vest the justice court with the authority to deny a motion to continue, dismiss a felony complaint, and discharge a defendant when the State has failed to comply with the procedural rules for showing good cause.⁷ Because the justice court acted within its jurisdiction when it

³NRS 34.020(2).

⁴Goicoechea v. District Court, 96 Nev. 287, 289, 607 P.2d 1140, 1141 (1980).

⁵Id.

⁶Attorney General v. Steffen, 112 Nev. 369, 375, 915 P.2d 245, 249 (1996) (quoting In re Berry, 436 P.2d 273, 280 (1968) (internal quotation omitted)).

⁷See Marcus, 116 Nev. 188, 995 P.2d 1016; McNair v. Sheriff, 89 Nev. 434, 514 P.2d 1175 (1973); Bustos, 87 Nev. 622, 491 P.2d 1279; State v. Austin, 87 Nev. 81, 482 P.2d 284 (1971); Maes v. Sheriff, 86 Nev. 317, 468 P.2d 332 (1970); Hill, 85 Nev. 234, 452 P.2d 918.

denied the State's motion for a continuance and discharged Petkovsek from custody, the State was not entitled to certiorari relief.

A writ of mandamus is available to compel the performance of a duty enjoined by law or to control a manifest abuse of discretion by a lower tribunal.⁸ Like the writ of certiorari, a writ of mandamus will not issue if the petitioner has a plain, speedy, and adequate remedy at law.⁹

The State had the burden of showing good cause before seeking the continuance.¹⁰ The good cause showing can be satisfied by an affidavit that complies with DCR 14¹¹ or, in certain emergency situations, by presenting sworn testimony that complies with DCR 14.¹² "What constitutes 'good cause' is not amenable to a bright-line rule. The justices' court must review the totality of the circumstances to determine whether 'good cause' has been shown."¹³

Here, the justice court found that the State had adequate notice of the preliminary hearing, failed to show that any attempts were made to secure the presence of the missing witness, and did not follow the

⁸NRS 34.160; Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981).

⁹NRS 34.170.

¹⁰McNair, 89 Nev. at 436, 514 P.2d at 1175.

¹¹Hill, 85 Nev. at 235-36, 452 P.2d at 919.

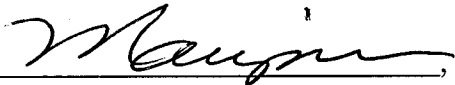
¹²Bustos, 87 Nev. at 624, 491 P.2d at 1280-81.

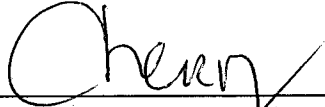
¹³Sheriff v. Terpstra, 111 Nev. 860, 863, 899 P.2d 548, 550 (1995).


procedural rules for requesting a continuance. Under these circumstances, the justice court's decision to deny the State's motion for a continuance was not a manifest abuse of discretion. And having denied the motion, the justice court was not required to perform any other duties in this matter. Accordingly, the State was not entitled to mandamus relief.

Having concluded that the district court did not abuse its discretion by denying the State's writ petition, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Maupin


_____, J.
Cherry


_____, J.
Saitta

cc: Hon. John P. Davis, District Judge
Attorney General Catherine Cortez Masto/Carson City
Nye County District Attorney/Pahrump
Nye County District Attorney/Tonopah
Earnest, Gibson & Kuehn
Nye County Public Defender
Nye County Clerk