

IN THE SUPREME COURT OF THE STATE OF NEVADA

DUSTIN RABER,
Petitioner,

vs.

THE THIRD JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF LYON,
THE HONORABLE ROBERT E. ESTES,
DISTRICT JUDGE AND THE
HONORABLE LEON ABERASTURI,
DISTRICT JUDGE,
Respondents.

No. 51099

FILED

APR 15 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER GRANTING PETITION IN PART AND DENYING IN PART

This is an original petition for a writ of mandamus challenging a district court's decision to refuse to consider petitioner's request to apply for treatment pursuant to NRS 484.37941.

Petitioner Dustin Raber seeks a writ of mandamus directing the district court to consider his application to participate in a treatment program pursuant to NRS 484.37941 and to allow him to begin treatment. A writ of mandamus is available to compel the performance of an act which the law requires "as a duty resulting from an office, trust, or station" or to control an arbitrary or capricious exercise of discretion. NRS 34.160; see Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981). A writ of mandamus will not issue, however, if a petitioner has a "plain, speedy and adequate remedy in the ordinary course of law." NRS 34.170. The decision to entertain an extraordinary writ petition lies within the discretion of this court, and "[t]his court considers whether judicial economy and sound judicial administration militate for or against issuing the writ." Redeker v. Dist. Ct., 122 Nev.

164, 167, 127 P.3d 520, 522 (2006). We conclude that extraordinary relief is warranted in this case.

On July 24, 2007, petitioner Dustin Raber pleaded guilty to a third-offense DUI. In the guilty plea agreement, the State agreed not to oppose Raber's application for treatment pursuant to NRS 484.37941. On October 15, 2007, Raber appeared before the district court for sentencing. The district court refused to consider his application for treatment stating, "All right. But I'll tell you straight up, we're not going to do that." The district court indicated that it wanted a presentencing report to be prepared prior to sentencing and continued Raber's sentencing hearing until December 10, 2007. On December 10, 2007, Raber and the State stipulated to the withdrawal of Raber's guilty plea, and the district court subsequently entered a stipulation and order for the withdrawal that plea. This original petition for a writ of mandamus followed.

In his petition, Raber contends that the district court abused its discretion by refusing to consider the merits of his application for treatment pursuant to NRS 484.37941. We agree. Pursuant to this court's recent decisions in Stromberg v. Dist. Ct., 125 Nev. ___, 200 P.3d 509 (2009) and Savage v. Dist. Ct., 125 Nev. ___, 200 P.3d 77 (2009), we conclude that the district court abused its discretion when it failed to consider the merits of Raber's application for treatment. In Stromberg, this court reiterated that third-offense DUI offenders entering pleas after July 1, 2007, may apply for treatment pursuant NRS 484.37941. 125 Nev. at ___, 200 P.3d at 510. In Savage, this court determined that because the plain language of NRS 484.37941 gives rural offenders the right to apply for treatment, the district court was obligated to consider the merits of the petitioners' applications for treatment. 125 Nev. at ___, 200 P.3d at 82. We also concluded that the district court had jurisdiction to order the

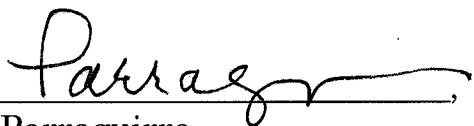
Department of Parole and Probation to supervise offenders diverted to treatment under the statute. *Id.* at ___, 200 P.3d at 83-84.

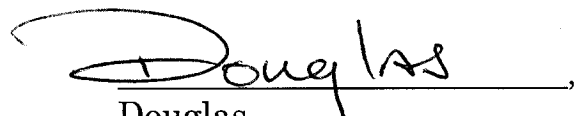
Raber entered his guilty plea on July 24, 2007. Therefore, he is entitled to apply for treatment pursuant to NRS 484.37941, and the district court abused its discretion by refusing to consider the merits of his application for treatment.

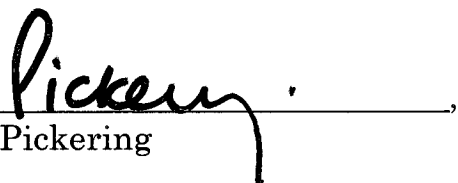
We further note that while the district court is required to consider the merits of Raber's application for treatment, it is not required to grant the application as that decision is left to the district court's discretion pursuant to the plain language of the statute. NRS 484.37941(3). We therefore deny that portion of Raber's petition requesting a writ directing the district court to place him in the diversion program.

For the foregoing reasons, we

ORDER the petition GRANTED IN PART AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the district court to consider Raber's request to plead guilty and apply for treatment pursuant to NRS 484.37941.


Parraguirre J.


Douglas J.


Pickering J.

cc: Hon. Leon Aberasturi, District Judge
Hon. Robert E. Estes, District Judge
Marc P. Picker
Attorney General Catherine Cortez Masto/Carson City
Lyon County District Attorney
Lyon County Clerk