

IN THE SUPREME COURT OF THE STATE OF NEVADA

CITY OF LAS VEGAS,
Appellant,
vs.
HAZEM AFIFI,
Respondent.

No. 51360

FILED

OCT 02 2008

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

ORDER OF REVERSAL AND REMAND

This is an appeal from an order of the district court granting a petition for a writ of habeas corpus, or, in the alternative, writ of mandamus, or, in the alternative, writ of prohibition. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

The City charged Hazem Afifi in municipal court with five misdemeanor counts. The trial was scheduled to begin in municipal court on June 28, 2007. However, on that date, the City verbally moved to continue the trial due to the unavailability of a witness, Officer Dahl. Afifi objected to the continuance for the record, but stipulated that the City had a good faith basis under Bustos¹ for seeking the continuance and waived the formality of having the prosecution file an affidavit or testify to the factual matters supporting the continuance.² The municipal court granted the continuance and reset the trial for September 12, 2007.

¹Bustos v. Sheriff, 87 Nev. 622, 491 P.2d 1279 (1971).

²See Hill v. Sheriff, 85 Nev. 234, 452 P.2d 918 (1969); Bustos, 87 Nev. 622, 491 P.2d 1279.

Although Officer Dahl was still not present on September 12, 2007, the City indicated that it was prepared to proceed with trial. Afifi objected and moved to dismiss the charges against him based on the improper grant of the earlier continuance. Afifi argued that because the City had identified Officer Dahl as an essential witness and requested a continuance based on his unavailability, the City should not be permitted to proceed without him. The municipal court heard initial argument regarding the motion to dismiss, continued the trial to permit the parties to brief their arguments, and conducted a full hearing on the motion to dismiss.

The City asserted that although it only identified Officer Dahl on June 28, 2007, as being unavailable, Officer Shumacher was also unavailable on that date. The City further asserted that, had the court required it to satisfy the requirements of Bustos, the prosecutor would have testified that both officers were essential witnesses who would have provided similar testimony and their absence would substantially impair their ability to proceed to trial. The City argued that because both officers were essential witnesses and Officer Shumacher was present on September 12, 2007, Officer Dahl's continued unavailability on that date did not negate the good cause for the continuance. The City further argued that because it was ready to proceed to trial with Officer Shumacher on September 12, 2007, dismissal of the charges was not warranted. The municipal court found that although the City should have referenced the absence of Officer Shumacher as well as Officer Dahl when requesting the continuance, the City's request for a continuance was made in good faith. The municipal court denied the motion to dismiss.

Afifi filed a petition for a writ of habeas corpus, or, in the alternative, writ of mandamus, or, in the alternative, writ of prohibition in the district court arguing that the municipal court improperly denied his motion to dismiss. The district court conducted a hearing on the petition and determined that the City's continuance should not have been granted because Officer Dahl was not a critical witness. The district court granted extraordinary relief, directed the municipal court to dismiss all charges against Afifi and prohibited the municipal court from taking any further action in the case against Afifi. This appeal followed.

A writ of habeas corpus may be prosecuted to inquire into a claim that a person is "unlawfully committed, detained, confined or restrained of his liberty."³ A writ of mandamus is available to compel the performance of an act that the law requires "as a duty resulting from an office, trust or station" or to control an arbitrary or capricious exercise of discretion.⁴ A writ of prohibition "arrests the proceedings of any tribunal, corporation, board or person exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person."⁵ A writ of mandamus and a writ of prohibition may issue only where there is no plain, speedy, and adequate

³NRS 34.360.

⁴NRS 34.160; Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981).

⁵NRS 34.320.

remedy at law.⁶ This court reviews “a district court’s grant or denial of writ relief for an abuse of discretion.”⁷

The City argues that the district court should not have entertained Afifi’s petition for extraordinary relief because Afifi did not demonstrate that habeas relief was warranted and, if he was convicted, he had a plain, speedy and adequate remedy by way of an appeal. We agree.

This court has held that a pretrial petition for a writ of habeas corpus is an appropriate avenue for challenging the grant of a continuance in violation of the requirements of Hill and Bustos.⁸ Here, however, Afifi’s petition challenged the denial of his motion to dismiss, arguing that Officer Dahl’s failure to appear at the next scheduled trial date undermined the City’s assertion that Officer Dahl was an essential witness and negated the good faith basis for the prior continuance. The denial of a motion to dismiss is a discretionary ruling that is not properly challenged in a pretrial writ of habeas corpus.⁹ Additionally, because Afifi waived the requirements of Bustos in the municipal court and conceded that the City had a good faith basis for seeking the continuance, he was precluded from challenging the validity of the City’s motion for a continuance. Further, the municipal court’s order denying Afifi’s motion to dismiss is an intermediate order that can be challenged on direct

⁶NRS 34.170; NRS 34.330.

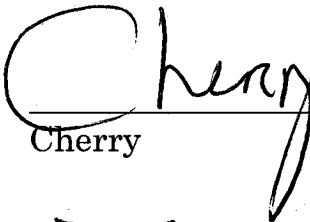
⁷Koller v. State, 122 Nev. 223, 226, 130 P.3d 653, 655 (2006).

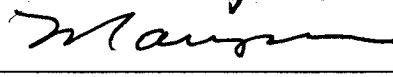
⁸See State v. Nelson, 118 Nev. 399, 403-04, 46 P.3d 1232, 1234-35 (2002); Sheriff v. Blackmore, 99 Nev. 827, 830, 673 P.2d 137, 138 (1983).

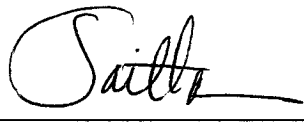
⁹See Nelson, 118 Nev. at 403, 46 P.3d at 1234-35.

appeal, in the event Afifi is convicted.¹⁰ Therefore, we conclude that the district court abused its discretion by entertaining and granting the petition for extraordinary relief.¹¹ Thus, the order granting the writ must be reversed and the writ must be vacated. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.


_____, J.
Cherry


_____, J.
Maupin


_____, J.
Saitta

cc: Hon. Kenneth C. Cory, District Judge
Las Vegas City Attorney
William B. Terry, Chartered
Eighth District Court Clerk

¹⁰See NRS 177.045; see also Creps v. State, 94 Nev. 351, 354-56, 581 P.2d 842, 844-45 (1978) (affirming the denial of a motion to dismiss that was based on an alleged improper grant of the State's motion for a continuance).

¹¹In light of this conclusion, we decline to address the City's other assignments of error.