

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL HAYS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52266

FILED

JUL 24 2009

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

ORDER OF AFFIRMANCE

This is a proper person appeal from a district court order denying a petition for a writ of mandamus in a open meeting law matter. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

In June 1999, appellant Michael Hays was convicted, pursuant to a guilty plea, of child abuse and neglect with substantial mental injury. The district court sentenced Hays to serve a prison term of 43 to 192 months, suspended execution of his sentence, and placed him on probation for a period not to exceed five years. In 2004, Hays's probation was revoked and he was remanded into custody. In 2006, after holding a hearing on whether to certify Hays to the parole board, the psychological review panel determined that Hays was a "high-risk to re-offend" and refused to certify him. Hays then filed a writ petition in the district court challenging the panel's compliance with Nevada's open meeting law. The district court denied the writ. Hays appealed, and this court vacated the order denying his petition and remanded the matter to the district court for the court to determine whether a videotape of the panel proceedings existed, and if so, for the court to review the videotape with the parties' input before ruling on the matter. As directed, the videotape of the panel proceedings was received into evidence and reviewed by the district court. However, the videotape was deemed by the court to "contain no record of

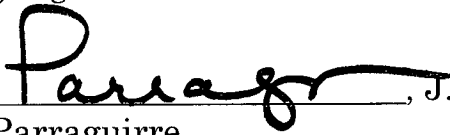
the proceedings due to an apparent malfunction.” The district court subsequently denied Hays’s writ petition and the instant appeal followed.

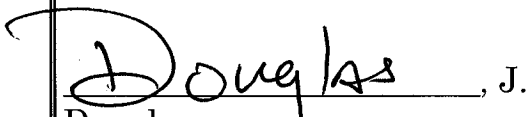
This court reviews a district court’s decision to grant or deny a petition for a writ of mandamus for an abuse of discretion. DR Partners v. Bd. of County Comm’rs, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000). A writ of mandamus is generally available to compel the performance of an act that the law enjoins as a duty resulting from an office, trust, or station, NRS 34.160, or to control a manifest abuse of discretion. Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981). Mandamus is an extraordinary remedy, and the decision as to whether a petition will be entertained lies within the court’s discretion. Kussman v. District Court, 96 Nev. 544, 545, 612 P.2d 679, 679 (1980).

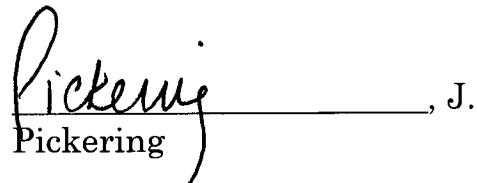
On appeal, Hays implies that the malfunctioning videotape of the panel proceedings demonstrates that the panel violated Nevada’s open meeting law based on the absence of a recording of the proceedings. As Hays concedes, however, under Nevada’s open meeting law, if a public body makes a good faith effort to record the proceedings, “but is prevented from doing so because of factors beyond the public body’s reasonable control,” that failure does not constitute a violation of the open meeting law. NRS 241.035(6). In this case, Hays fails to demonstrate, or even argue, that there was not a good-faith effort to record the panel proceedings. Likewise, he makes no argument that the videotape malfunction resulted from factors within the panel’s control. As such, we conclude that the malfunctioning videotape of the proceedings does not, in and of itself, constitute a violation by the panel of Nevada’s open meeting laws. NRS 241.035(6). Hays makes no other argument in support of his contention that the open meeting law was violated, thus, we conclude that he has not demonstrated that any violation of these laws has occurred.

Hays further argues that the district court abused its discretion in denying him writ relief based on his claim that judicial review cannot be properly completed in this case because of an “absence of the record”—specifically, the videotape of the panel proceedings. We conclude that this argument lacks merit. When Hays filed his writ petition in the district court, it was his burden to create a record demonstrating that extraordinary relief was warranted for the district court’s review. See generally Pan v. Dist. Ct., 120 Nev. 222, 228, 88 P.3d 840, 844 (2004). The malfunctioning videotape raises no presumptions regarding whether the panel violated Nevada’s open meeting law, and Hays otherwise failed to demonstrate that extraordinary relief was warranted. Accordingly, we conclude that the district court properly denied Hays’s petition for mandamus relief and we

ORDER the judgment of the district court AFFIRMED.¹


Parraguirre


Douglas


Pickering

¹Hays also argues that he was not subject to the panel’s review under NRS 213.1214 and this court’s holding in Stockmeier v. Psychological Review Panel, 122 Nev. 534, 540-41, 135 P.3d 807, 811 (2006), because he is not a sex offender. Because Hays failed to submit this particular argument to the district court, he has waived this argument on appeal, and thus, we will not consider it in resolving this appeal. Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

cc: Hon. Jackie Glass, District Judge
Michael Hays
Attorney General Catherine Cortez Masto/Las Vegas
Eighth District Court Clerk