IN THE SUPREME COURT OF THE STATE OF NEVADA

GEOVANNY TORRES,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND, THE HONORABLE ELIZABETH GOFF GONZALEZ, DISTRICT JUDGE,
Respondents,
and
THE STATE OF NEVADA,
Real Party in Interest.

No. 52746

ORDER DENYING PETITION

This original petition for a writ of prohibition, mandamus, or certiorari challenges the district court's acceptance of an amended indictment charging petitioner with conspiracy to commit murder or attempted murder, murder with the use of a deadly weapon, and attempted murder with the use of a deadly weapon.

Petitioner was tried and convicted on the original indictment in 2000, and this court upheld the judgment of conviction in 2003. Petitioner then sought and was denied post-conviction habeas relief. But in a subsequent post-conviction petition, the district court granted petitioner relief and ordered a new trial. Thereafter, the State filed a motion to amend the indictment to include specific intent language within the aiding and abetting theory supporting the murder and attempted murder charges. Petitioner filed a motion to dismiss the indictment on the ground that it alleged three alternative theories in support of the murder and attempted murder charges but the grand jury was not instructed that

to be culpable under two of the theories—aiding and abetting and co-conspirator liability—petitioner had to have the specific intent to commit the underlying crimes, consistent with decisions issued by this court after petitioner's first trial. See Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002); Bolden v. State, 121 Nev. 908, 124 P.3d 191 (2005), overruled on other grounds by Cortinas v. State, 124 Nev. ___, 195 P.3d 315 (2008). The district court denied the motion, leading to this original proceeding.

Because a petition for an extraordinary writ is addressed to the court's sound discretion, State ex rel. Dep't Transp. v. Thompson, 99 Nev. 358, 360, 662 P.2d 1338, 1339 (1983); Poulos v. District Court, 98 Nev. 453, 455, 652 P.2d 1177, 1178 (1982), the threshold issue is whether we should exercise that discretion and consider the petition. 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," NRS 34.160, or to control an arbitrary or capricious exercise of discretion. See Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981). Its counterpart, the writ of prohibition, may issue to arrest the proceedings of a district court exercising its judicial functions, when such proceedings are in excess of the jurisdiction of the district court. NRS 34.320. This court will not entertain a petition for either writ when the petitioner has a plain, speedy, and adequate remedy at law. NRS 34.170 (mandamus); NRS 34.330 (prohibition). For that reason, this court generally has not reviewed pretrial challenges to the sufficiency of an indictment by way of a writ petition. See Kussman v. District Court, 96 Nev. 544, 545-46, 612 P.2d 679, 680 (1980). But this court has, however, considered such petitions when the case "involves only a purely legal issue." Ostman v. District Court, 107 Nev. 563, 565, 816 P.2d 458, 460 (1991). Because petitioner represents that he is not challenging the

sufficiency of the evidence to support the indictment but instead challenges the legal sufficiency of the indictment, we have exercised our discretion and considered the merits of the petition.

Petitioner argues that the State failed to properly instruct the grand jury on the specific intent elements of the aiding and abetting and co-conspirator theories and that that failure renders the indictment fatally defective. See NRS 172.095(2) ("Before seeking an indictment, or a series of similar indictments, the district attorney shall inform the grand jurors of the specific elements of any public offense which they may consider as the basis of the indictment or indictments."). We conclude that petitioner has not demonstrated that this court's intervention is warranted for two reasons.

First, to the extent that petitioner suggests that the lack of specific intent language in the original indictment means that the grand jury was not properly informed of the elements of the offenses it was asked to consider for purposes of NRS 172.095(2), we are unwilling to make that leap. Absent transcripts of the grand jury proceedings, we cannot conclude that the prosecutor failed to comply with NRS 172.095(2) because, as indicated in Gordon v. District Court, 112 Nev. 216, 225, 913 P.2d 240, 246 (1996), the elements may be explained to the grand jury separate from the indictment.[1]

Second and perhaps more importantly, we are not convinced that the original indictment lacked the applicable intent elements. In particular, the indictment returned by the grand jury in 1999 recited at

---

[1]Petitioner does not assert that the indictment is insufficient under NRS 173.075.

the beginning of the murder and attempted murder counts that the defendants "willfully, feloniously, without authority of law, and with premeditation and deliberation, and with malice aforethought" killed Alfonso Lazaro and attempted to kill Eduardo Rojas. The charges then specified the alternative theories of liability—directly committing the felony by shooting the victims, aiding and abetting each other in shooting the victims, and conspiring with each other to murder or attempt to murder the victims. The preliminary language at the beginning of each charge—"willfully, feloniously, without authority of law, and with premeditation and deliberation, and with malice aforethought"—applied to each theory and adequately stated the intent required for each theory. Cf. Langley v. State, 84 Nev. 295, 297, 439 P.2d 986, 987-88 (1968) (concluding that indictment that omitted word "premeditation" but alleged that defendant acted "willfully, unlawfully, feloniously and with malice aforethought" was sufficient to charge offense of attempted murder).

Having considered the petition and concluded that it lacks merit, we

ORDER the petition DENIED.

Cherry, J.

Cherry

Saitta, J.

Saitta

Gibbons, J.

Gibbons

cc: Hon. Elizabeth Goff Gonzalez, District Judge
Karen A. Connolly, Ltd.
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk