

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Petitioner,

vs.

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

Respondents,

and

BARRY NEWPHER,
Real Party in Interest.

BARRY NEWPHER,
Petitioner,

vs.

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

Respondents,

and

THE STATE OF NEVADA,
Real Party in Interest.

No. 52832

FILED

JUN 03 2009

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

No. 53074

ORDER GRANTING PETITION IN DOCKET NO. 52832 AND DENYING

PETITION IN DOCKET NO. 53074

These are consolidated petitions for writs of mandamus or prohibition.

On April 16, 2008, Barry Newpher was found guilty, pursuant to a jury verdict, of two counts of sexual assault of a minor under the age of 14 years. On June 20, 2008, three days before the scheduled sentencing

hearing, Newpher filed a motion to set aside the jury's verdict in the district court. Newpher contended that the prosecutor committed misconduct by including prejudicial statements made by the victim's mother on an audio CD admitted as a trial exhibit documenting a recorded interview with the victim. Newpher claimed that the prosecutor intentionally failed to inform him and the court that the mother's statements were included on the recording and provided to the jury during deliberations. The district court ordered a response and the State opposed the motion. On July 29, 2008, the district court conducted a hearing on the motion, determined that Newpher had a transcript of the recording as well as a copy of the CD, and stated, "I cannot find that the defense was unaware of what was on Exhibit 2." The district court also found that there was no intentional misconduct committed by the prosecutor. Nevertheless, because "no one really intended that the prejudicial statements by [the victim's mother] were to go to the jury," the district court granted a mistrial, set aside the jury verdict, and ordered a new trial. The district court did not enter an order memorializing its findings.

On November 26, 2008, the State filed the instant petition for a writ of mandamus or prohibition in this court challenging the district court's oral pronouncement (Docket No. 52832). On January 12, 2009, Newpher, with the assistance of counsel, filed his own petition for a writ of mandamus or prohibition in this court challenging the district court's decision to order a new trial and not enter a judgment of acquittal (Docket No. 53074). We conclude that the district court exceeded its authority and instruct the district court to reinstate the jury verdict.

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. See NRS 34.160; see also Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981). A writ of mandamus is an extraordinary remedy, and it is within the discretion of this court to decide whether a petition will be entertained. See Poulos v. District Court, 98 Nev. 453, 455, 652 P.2d 1177, 1178 (1982). Further, a writ of mandamus will generally not issue if the petitioner has “a plain, speedy, and adequate remedy in the ordinary course of law.” See NRS 34.170. A 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. See NRS 34.320.

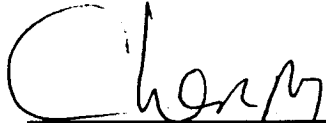
First, NRS 175.381(2) provides that a motion to set aside the verdict “must be made within 7 days after the jury is discharged or within such further time as the court may fix during that period.” A trial court may “set aside the verdict and enter a judgment of acquittal if the evidence is insufficient to sustain a conviction.” NRS 175.381(2). In this case, Newpher filed his motion more than two months after the jury’s verdict and thus the motion was untimely and should not have been entertained by the district court. Additionally, there was no allegation, let alone a finding by the district court, that the evidence presented by the State was insufficient to sustain a conviction. Therefore, we conclude that the district court exceeded its authority under NRS 175.381(2) by setting aside the verdict.

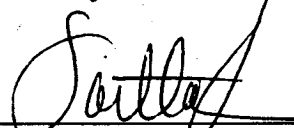
Second, NRS 176.515(1) provides that “[t]he court may grant a new trial to a defendant if required as a matter of law or on the ground of newly discovered evidence.” A motion based on “newly discovered evidence may be made only within 2 years after the verdict or finding of


guilt,” NRS 176.515(3), and the district court must find that the evidence was, in fact, “newly discovered; material to the defense; such that even with the exercise of reasonable diligence it could not have been discovered and produced for trial; non-cumulative; [and] such as to render a different result probable upon retrial.” Funches v. State, 113 Nev. 916, 923-24, 944 P.2d 775, 779-80 (1997). “A motion for a new trial based on any other grounds [than newly discovered evidence] must be made within 7 days after the verdict or finding of guilt or within such further time as the court may fix during the 7-day period.” NRS 176.515(4). The district court has broad discretion to grant or deny a timely motion for a new trial. See Servin v. State, 117 Nev. 775, 792, 32 P.3d 1277, 1289 (2001).

We note that Newpher insisted below and again in his writ petition in this court that his motion was to set aside the jury verdict and not a motion for a new trial; his motion requested acquittal only. Nevertheless, the district court granted a new trial after setting aside the verdict. Even if Newpher’s motion could be construed as a motion for a new trial, we conclude that the district court exceeded its authority. The district court specifically found that the challenged portion of the audio CD was not newly discovered evidence. Additionally, Newpher conceded in his motion that he discovered that the challenged statements were included on the audio CD prior to the return of the jury’s verdict. Therefore, the statements made by the victim’s mother did not provide a basis for a new trial within the purview of NRS 176.515(1). And finally, as noted above, Newpher’s motion was filed more than two months after the jury returned its verdict, and therefore, was untimely even if considered within the meaning of NRS 176.515(4). Accordingly, we

ORDER the petition GRANTED IN DOCKET NO. 52832 AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the district court to reinstate the jury verdict, and ORDER the petition DENIED IN DOCKET NO. 53074.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Third Judicial District Court Dept. 3, District Judge
Robert Bruce Lindsay
Lyon County District Attorney
Attorney General Catherine Cortez Masto/Carson City
Lyon County Clerk