IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Petitioner,
vs.
THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF STOREY, AND THE HONORABLE JAMES E. WILSON, DISTRICT JUDGE,
Respondents,
and
ERIC BRIAN PIERSON,
Real Party in Interest.

No. 55585

ORDER DENYING PETITION

This is an original petition for a writ of mandamus or prohibition challenging district court orders directing the State to obtain a victim's prior medical records and precluding the State's expert from testifying at trial. First Judicial District Court, Storey County; James E. Wilson, Judge.[1] We conclude that the State is not entitled to relief, as it failed to comply with, and did not immediately challenge, the district court's orders. Accordingly, we deny the State's petition for extraordinary relief.

[1]On March 10, 2010, we addressed the State's challenge to the district court's order that provided for an independent psychological evaluation of the victim, and denied that petition because it appeared that the victim had already undergone an independent evaluation. State v. Dist. Ct. (Pierson), Docket No. 55585 (Order Denying Petition in Part and Directing Answer, March 10, 2010).

Procedural history

In December 2007, the Storey County District Attorney filed a criminal complaint charging real party in interest Eric Brian Pierson with battery and sexual assault. In preparation for trial, the State notified Pierson that it intended to offer the expert testimony of psychologist Dr. Joann Lippert to testify as to the emotional and psychological impact of domestic violence. Subsequently, in February 2009, Pierson filed a motion requesting an independent psychological evaluation of the victim. The district court initially denied Pierson's motion, but granted leave for Pierson to produce evidence that the victim's mental or emotional state may have affected her veracity. After Pierson supplemented his motion, the district court authorized the evaluation and ordered the State to provide defense expert Dr. Thomas Bittker with all relevant records impacting the victim's medical and psychological status. In September 2009, Pierson provided medical and psychological releases to the State for the victim to sign and return to Dr. Bittker. Thereafter, the State advised the victim not to sign the releases based on privilege and maintained that it had no other relevant records to provide to Dr. Bittker. Two weeks later, Dr. Bittker conducted a psychiatric assessment of the victim without the aid of the requested documents.

In October 2009, Pierson filed a motion to dismiss the charges against him, alleging that the State violated the district court's order by refusing to provide the victim's medical records to him and Dr. Bittker. The State opposed Pierson's motion, asserting that the records were privileged, and that the State could not produce documents that it does not have. The district court entered an order denying Pierson's motion to dismiss and ordered the trial to proceed. The order provided that the

State did not carry out its affirmative duty to inform the victim of the consequences of her failure to produce the medical records. The order also provided that the State must present the victim with the consent forms and that if she refused to sign them, the case against Pierson might be dismissed. The district court further ordered the prosecuting attorney to show cause for her failure to inform the district court that she could not comply with its order.

The State filed a motion for clarification of the order for the release of the victim's medical and psychological records. Subsequently, the district court clarified its previous order by concluding that if the victim's medical records were not provided to the court in camera by January 15, 2010, the court would reconsider whether the testimony from Dr. Lippert, the State's expert, would be allowed. The district court also noted that it would be fundamentally unfair to allow the State's expert to testify and not allow Pierson an opportunity for a psychological evaluation in the preparation of his case.

In January 2010, Pierson filed a renewed motion to dismiss, alleging that the State violated the district court's orders. The following month, the district court entered an order denying Pierson's renewed motion to dismiss; however, the district court reiterated that the State would not be permitted to present expert psychological or psychiatric testimony in its case-in-chief or rebuttal because the State failed to produce the victim's medical records.

Additionally, Pierson served subpoenas on two of the victim's medical providers, demanding production of the victim's medical records. The State filed a motion to quash the subpoenas, arguing that the records were privileged, the subpoenas were overbroad, and that an in camera

review was required by the district court. In February 2010, the district court entered an order granting the State's motion to quash the subpoenas, concluding that the victim's medical records were no longer relevant because the State would not be permitted to present expert psychological or psychiatric testimony.[2] This petition followed.

Standard of review

"Writ relief is an extraordinary remedy that will only issue at the discretion of this court." State of Nevada v. Dist. Ct. (Anzalone), 118 Nev. 140, 146, 42 P.3d 233, 237 (2002). "Both mandamus and prohibition are extraordinary remedies, and are only appropriate when a plain, speedy and adequate remedy at law is not available." State v. Dist. Ct. (Romano), 120 Nev. 613, 617, 97 P.3d 594, 597 (2004), overruled on other grounds by Abbott v. State, 122 Nev. 715, 727, 138 P.3d 462, 470 (2006); see also NRS 34.170 and 34.330. "Petitions for extraordinary relief are not meant to control discretionary acts, 'unless discretion is manifestly abused or is exercised arbitrarily or capriciously.'" Romano, 120 Nev. at 618, 97 P.3d at 597 (quoting Anzalone, 118 Nev. at 147, 42 P.3d at 237-38).

Discussion

In the instant case, a plain, speedy and adequate remedy at law was available to the State had it formally challenged the district court's orders below to provide medical and psychological records of the victim to the real party in interest. Further, the State has failed to demonstrate that the district court acted arbitrarily or capriciously or manifestly abused its discretion in ordering the State to produce the

[2]The parties are familiar with the facts and we do not recount them further except as is necessary for our disposition.

victim's medical and psychological records after the State failed to comply with its orders. Under these circumstances, we consider entertainment of writ relief unnecessary. Accordingly, we deny the State's petition for writ of mandamus or prohibition.

The district court has the power "[t]o compel obedience to its lawful judgments, orders and process, and to the lawful orders of its judge out of court in an action or proceeding pending therein." NRS 1.210(3). The district court ordered the State to proffer to the defense all relevant records affecting the victim's medical and psychological status. Later, the district court determined that the State did not carry out its affirmative duty to inform the victim of the consequences of her failure to produce her medical records and ordered the prosecuting attorney to show cause for her failure to inform the district court that she could not comply with its order. Subsequently, the district court ordered an in camera inspection of the victim's medical records, which never occurred because the victim's medical records were never produced.

The State did not obey any of the district court orders to produce the victim's medical records, nor did the State immediately challenge these orders. "It was incumbent upon the State to either comply with the district court's orders, or demonstrate–immediately upon discerning that its ability to comply with the district court's order would be problematic–why it could not proffer [the victim's medical records] in a timely fashion." Schlafer v. State, 115 Nev. 167, 174, 979 P.2d 712, 717 (1999). Because the State failed to produce the victim's medical records, the district court ordered that the State would not be permitted to present expert psychological or psychiatric testimony in its case-in-chief or

rebuttal.[3] Therefore, because the district court has the authority to exclude evidence if the State fails to abide by a discovery order, we conclude that the district court did not manifestly abuse its discretion in deciding to exclude the State's expert. See NRS 1.210(3) (stating that the district court has the power "[t]o compel obedience to its lawful . . . orders"); Braunstein v. State, 118 Nev. 68, 72, 40 P.3d 413, 416 (2002) (providing that "[t]he trial court's determination to admit or exclude evidence. . . is a decision within its discretionary authority and is to be given great deference. It will not be reversed absent manifest error.").

We conclude that our intervention by way of extraordinary remedy is not warranted. Accordingly, we

ORDER the petition DENIED.

_____, C.J.
Douglas

_____, J.
Cherry

_____, J.
Saitta

_____, J.
Gibbons

_____, J.
Hardesty

_____, J.
Parraguirre

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[3]At no time did the State raise, and we therefore do not consider, whether the district court has the authority to order the State to provide medical and psychological records of an adult victim in a sexual assault prosecution.

cc: Hon. James E. Wilson, District Judge
Storey County District Attorney
O'Mara Law Firm, P.C.
Storey County Clerk

PICKERING, J., concurring:

The victim submitted to examination by a defense psychiatrist after the State filed its petition for extraordinary writ relief. This obviated the issue of how, if at all, Abbott v. State, 122 Nev. 715, 138 P.3d 462 (2006), applies to independent medical examinations of adult sexual assault victims by defense experts. The only remaining issue is the district court's February 9, 2010, order[1] which, by its terms, prohibits the State from "present[ing] expert psychological or psychiatric testimony in its case-in-chief or on rebuttal."

The district court based its February 9 order on the State's failure to submit the victim's post-assault counseling records for in camera review. As a sanctions order imposing a blanket prohibition on psychological or psychiatric testimony from the State, I submit this order goes too far: The State did not have the victim's counseling records, or the right to insist that she provide them voluntarily for pretrial, in camera inspection by the court. Cf. People v. Hammon, 938 P.2d 986, 992-93 (Cal. 1997). As an order prohibiting the State from calling its designated psychological expert, Dr. Lippert, however, the order is unexceptionable. While Dr. Lippert may not have had the counseling records themselves, her report states that she interviewed both the victim and the victim's counselor in arriving at her opinions—and the report goes well beyond the

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[1]Several different judges have presided over various proceedings in this case in the district court.

psychopathology of domestic violence victims, generally, to analyze this victim, in particular, and her expected testimony. But see Cordova v. State, 116 Nev. 664, 669, 6 P.3d 481, 485 (2000) ("[a]n expert may not comment on a witness's veracity"). In effect, Dr. Lippert had access to the victim's counseling records, while the defense did not. The district court did not abuse its discretion in rectifying this imbalance by refusing to allow the State to call Dr. Lippert and rejecting the State's proposed solution of limiting Dr. Lippert to domestic violence matters, generally. Cf. State v. Dist. Ct. (Romano), 120 Nev. 613, 623, 97 P.3d 594, 601 (2004) (holding, in the related context of independent medical examinations, that "when the victim refuses to submit to a psychological examination by a defendant's expert, both the State and the defendant would be restricted to the use of generalized testimony submitted by non-examining experts"), overruled as too restrictive in Abbott, 122 Nev. at 718, 138 P.3d at 464.

Besides asking to present Dr. Lippert as if she had not had access to the victim and the victim's counselor, the State did not propose a general expert on domestic violence psychopathology. The broader exclusion stated in the February 9 order thus is not before us in a concrete way and, as an interlocutory order, it may yet be revised depending on what transpires in the district court. I therefore concur in the denial of extraordinary writ relief.

Pickering, J.

Pickering