IN THE SUPREME COURT OF THE STATE OF NEVADA

THERESA ANNE RISTENPART, DEPUTY PUBLIC DEFENDER, WASHOE COUNTY PUBLIC DEFENDER'S OFFICE,
Petitioner,
vs.
THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE, AND THE HONORABLE PATRICK FLANAGAN, DISTRICT JUDGE,
Respondents,
and
THE STATE OF NEVADA,
Real Party in Interest.

No. 55668

FILED

JUL 28 2011

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

ORDER GRANTING PETITION

Washoe County Deputy Public Defender Theresa Anne Ristenpart petitions this court for writs of certiorari and mandamus to direct the district court to vacate its order holding her in contempt for her actions as defense counsel for Doyle Chase Barnett.

Barnett was charged with burglary after leaving a Raley's supermarket with goods for which he had not paid. In the parking lot outside the store, Barnett said he'd forgotten his wallet. Before trial, the prosecution filed a motion in limine to exclude the statement by Barnett to the effect that "I forgot my wallet" as hearsay. District Judge Flanagan, who presided over the pretrial, trial and contempt proceedings, granted the prosecution's motion and instructed Ristenpart not to put the statement in front of the jury without first establishing an applicable hearsay exception.

Barnett's defense was that the State could not prove the requisite intent. Integral to that defense was proof that he intended to pay for the items he took from the store but that he'd left his wallet outside with a friend, Thomas Button. Skirting the order in limine, Ristenpart referred to and asked questions about Barnett's wallet throughout trial. Specifically, Ristenpart referred to the wallet in her opening statement and closing argument and asked State witness Joey Robles what Barnett had told him during the incident. Testimony from defense witness Button violated the order, if Ristenpart elicited the testimony deliberately:

> Q. And what happened after [Barnett] peeked his head out of the door?
>
> A: He asked me for his wallet.

Then, after an objection was sustained:

> Q: And did you look towards the door?
>
> A: Yes, I did.
>
> Q: And what did you see?
>
> A: I saw [Barnett] barely out the door asking for his wallet.

The court offered the prosecution a mistrial, but the offer was declined. During trial, the court said it did not hold Ristenpart responsible for Button's statements, although these statement later became part of the basis for the contempt order.

After the jury returned its verdict, the court sua sponte issued an order to show cause why Ristenpart should not be held in contempt. Judge Flanagan presided over the show cause hearing and issued a contempt order finding that Ristenpart had violated the in limine order by placing the statement "I forgot my wallet" in front of the jury. The court specified the instances during trial in which it found Ristenpart had

violated the in limine order. The court ordered Ristenpart to pay $250 to Washoe Legal Services and announced its intention to publish the order to all the Second Judicial District Court bench and forward the order to the State Bar of Nevada. However, the court stayed the order of contempt pending resolution of this petition.

In her petition, Ristenpart asks for writs of mandamus and certiorari directing the district court to vacate the contempt order. Among other things, she argues that the district court manifestly abused its discretion in concluding that she violated the in limine order and in holding her in contempt. This court ordered an answer, which the Washoe County District Attorney's office filed on behalf of the respondents and real party in interest.

STANDARD FOR WRIT RELIEF

A contempt order is reviewable by original writ, Pengilly v. Rancho Santa Fe Homeowners, 116 Nev. 646, 647, 5 P.3d 569, 569 (2000), the grant or denial of which is entrusted to the discretion of this court. State ex rel. Dep't Transp. v. Thompson, 99 Nev. 358, 360 n.2, 662 P.2d 1338, 1339 n.2 (1983); Nev. Const. art. 6, § 4. A writ of certiorari may issue when a lower tribunal has exceeded its jurisdiction, NRS 34.020(2), while 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." State v. Dist. Ct., 116 Nev. 374, 379, 997 P.2d 126, 130 (2000); NRS 34.160. In the context of a writ of certiorari, "jurisdiction" has a "broader meaning than the concept of jurisdiction over the person and subject matter: it includes constitutional limitations." Watson v. Housing Authority, 97 Nev. 240, 242, 627 P.2d 405, 406-07 (1981). This court may consider the merits of the underlying argument for the writ and then issue

the type of writ most suited to any relief it may grant. See Marshall v. District Court, 108 Nev. 459, 466, 836 P.2d 47, 52 (1992). Writs of mandamus and certiorari shall issue only when there is no "plain, speedy and adequate remedy in the ordinary course of law." NRS 34.170; NRS 34.020(2).

DISCUSSION

Precedent limits our review to the statements the district court found contemptuous. Eaton v. City of Tulsa, 415 U.S. 697, 698-99 (1974); Houston v. Dist. Ct., 122 Nev. 544, 555, 135 P.3d 1269, 1275-76 (2006) (holding that contempt orders must specifically set forth the contemptuous statements or actions). "Whether a person is guilty of contempt is generally within the particular knowledge of the district court, and the district court's order should not lightly be overturned. A writ of mandamus is available to control a manifest abuse of discretion . . . ." Pengilly, 116 Nev. at 650, 5 P.3d at 571; Mack-Manley v. Manley, 122 Nev. 849, 859, 138 P.3d 525, 532 (2006).

In their answer to the writ petition, the respondents concede that, "with all due respect to Judge Flanagan, portions of his contempt ruling cannot be defended as written" and amount only to "ordinary attorney misconduct." This concession and the statements the answer does defend were explored in detail at oral argument, where the State identified five statements by Ristenpart it was prepared to defend as contemptuous. Of these five statements, however, two were not cited by Judge Flanagan as the basis for the contempt order. Although the court can consider these statements as context, United States v. Lumumba, 794 F.2d 806, 811 (2d Cir. 1986), they cannot themselves serve as the basis for upholding the contempt citation when Judge Flanagan did not identify

them as contemptuous in his contempt order. Eaton, 415 U.S. at 698-99; Houston, 122 Nev. at 555, 135 P.3d at 1275-76. This leaves as the only non-conceded, arguable bases for the contempt order the responses elicited from defense witness Button, reprinted above, and Ristenpart's allusion, in closing argument, that Barnett made an "offer to pay for something, continual offers to pay." However, even as to these, the respondents' defense of the contempt order is equivocal.

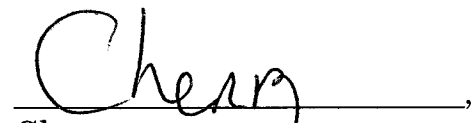
A contempt order issued to punish violation of an order requires proof beyond a reasonable doubt that the conduct was contemptuous. Hicks v. Feiock, 485 U.S. 624, 631-32 (1988); City Council of Reno v. Reno Newspapers, 105 Nev. 886, 893-94, 784 P.2d 974, 979 (1989). An attorney is responsible for instructing witnesses not to refer to evidence that has been ruled inadmissible. See Lamb v. State, 127 Nev. ___, ___, 251 P.3d 700, 708 (2011) (citing People v. Warren, 754 P.2d 218, 224-25 (Cal. 1988)). In an ordinary case, the responses Ristenpart elicited from Button would qualify as the basis for the contempt citation the district court imposed. However, at oral argument, counsel for the respondents represented that at trial Judge Flanagan gave Ristenpart "a pass" on these statements, declaring that Button, not Ristenpart, was to blame for them; the record supports these representations. And as for the references in closing argument to "offers to pay," Ristenpart justifies it by pointing to the State's interrogation of Robles, where the State, not Ristenpart, asked if Barnett was "allow[ed] . . . to try to pay with the credit card [Robles] found."

Ordinarily this court would defer to a district court's judgment in contempt findings. However, a contempt order cannot stand when so many of the grounds have been conceded by the State to be non-

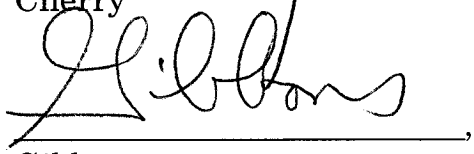
contemptuous. Further compounding matters is that the district court's order does not allot punishment to the individual violations. Therefore, this court has no sound basis for parceling punishment. We also note that it is not clear whether the order holding Ristenpart in contempt was circulated to the other judges in the Second Judicial District Court or if that portion of the order was stayed by the district court.

Accordingly, we

ORDER the petition GRANTED AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the district court to vacate the contempt order and either to refrain from circulating the contempt order to the judges of the Second Judicial District Court and the State Bar of Nevada or, to the extent that the district court has already circulated the contempt order, to forward copies of this order to the judges of the Second Judicial District Court and the State Bar of Nevada. We deny the petition for a writ of certiorari.



_____, J.
Cherry



_____, J.
Gibbons

cc: Hon. Patrick Flanagan, District Judge
Washoe County Public Defender
Washoe County District Attorney
Washoe District Court Clerk

PICKERING, J., concurring in part and dissenting in part:

In the unusual circumstances of this case, I concur with my colleagues in the issuance of the writ except as to the three statements that Judge Flanagan identified as contemptuous that the State defends on appeal. Given the district court's authority to discipline contempt, Pengilly v. Rancho Santa Fe Homeowners, 116 Nev. 646, 650, 5 P.3d 569, 571 (2000), the context in which the three defended statements arose, United States v. Lumumba, 794 F.2d 806, 811 (2d Cir. 1986), and the need for district courts to control the conduct of lawyers who appear before them to avoid graver dilemmas, Glover v. Dist. Ct., 125 Nev. ___, ___, 220 P.3d 684, 692 (2009) (mistrial over defendant's Double Jeopardy objection); see United States v. Young, 470 U.S. 1, 13 (1985) (discussing problems with the "invited response" doctrine), I would uphold the contempt order, at minimum, as to the statement Ms. Ristenpart elicited from witness Button, after the State's objection was sustained, about Barnett asking for his wallet. Since the contempt order cites numerous statements as the basis for the punishment it imposes, most of which have been removed by concession, I would issue the writ but remand for the district court to redetermine and allot punishment, if appropriate, as to the violation(s) that survive.

Pickering, J.
Pickering