

IN THE SUPREME COURT OF THE STATE OF NEVADA

MELVIN MCCALL,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK; AND THE HONORABLE
DAVID B. BARKER, DISTRICT JUDGE,
Respondents,
and
THE STATE OF NEVADA,
Real Party in Interest.

No. 57739

FILED

FEB 15 2011

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

ORDER DENYING PETITION

This original petition for a writ of mandamus asks this court to direct the respondent district court to strike provisions from the guilty plea agreement that the real party in interest has proffered to petitioner. In particular, petitioner complains that the proffered guilty plea agreement contains provisions that are not included in the form written plea agreement set forth in NRS 174.063 and therefore are illegal and also violate public policy. On this basis, petitioner asserts that the district court had a legal duty to strike the offending provisions from the proffered guilty plea agreement.

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, 637 P.2d 534 (1981). A writ of mandamus will not issue, however, if petitioner has a plain, speedy and adequate remedy in the ordinary course of law.

See NRS 34.170. Further, mandamus is an extraordinary remedy, and it is within the discretion of this court to determine if a petition will be considered. See Poulos v. District Court, 98 Nev. 453, 455, 652 P.2d 1177, 1178 (1982); see also State ex rel. Dep't Transp. v. Thompson, 99 Nev. 358, 360, 662 P.2d 1338, 1339 (1983). We are not convinced that our intervention is warranted at this time for three reasons.

First, petitioner has an adequate remedy at law to the extent that he challenges the lawfulness and enforceability of terms in the plea agreement. If he accepts the State's offer, he may challenge the validity of provisions in the agreement on the grounds that they violate state or federal law either on direct appeal, if appropriate, or through post-conviction proceedings.¹ Cf. Sparks v. State, 121 Nev. 107, 110 P.3d 486 (2005) (considering challenge to validity of failure-to-appear provision in guilty plea agreement); Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995) (considering challenge to validity of waiver of post-conviction remedies as part of plea agreement); Cruzado v. State, 110 Nev. 745, 879 P.2d 1195 (1994) (considering challenge to validity of waiver of right to appeal in guilty plea agreement), overruled on other grounds by Lee v. State, 115 Nev. 207, 985 P.2d 164 (1999).

Second, several of petitioner's substantive challenges are speculative as he has not signed the agreement and entered a guilty plea and the State has not attempted to enforce the challenged provisions in

¹We note that petitioner has no right to a plea bargain. Weatherford v. Bursey, 429 U.S. 545, 561 (1977). If petitioner feels that the terms offered by the State are not acceptable, he is free to reject them and proceed to trial. See U.S. v. Hare, 269 F.3d 859, 862 (7th Cir. 2001).

the manner that petitioner fears. Addressing those concerns now would require this court to render an advisory opinion, which we will not do. See Applebaum v. Applebaum, 97 Nev. 11, 12, 621 P.2d 1110, 1110 (1981) (“This court will not render advisory opinions on moot or abstract questions.”).

Third, we have rejected the argument that provisions in a guilty plea agreement are “contrary to Nevada law merely because [they are] not included in the statutory form agreement set forth in NRS 174.063.” Sparks, 121 Nev. at 111, 110 P.3d at 488 (explaining that because statute requires only substantial compliance with form agreement, Legislature clearly intended to allow modifications to form agreement). The district court therefore had no duty under the law to strike provisions of the guilty plea agreement merely because they are not included in the statutory form agreement.

Because petitioner has not demonstrated that our intervention is warranted, we

ORDER the petition DENIED.²

Cherry, J.
Cherry

Gibbons, J.
Gibbons

Pickering, J.
Pickering

²We deny petitioner’s motion for a stay.

cc: Hon. David B. Barker, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk