

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Petitioner,
vs.
THE SIXTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
PERSHING; AND THE HONORABLE
MICHAEL MONTERO, DISTRICT
JUDGE,
Respondents,
and
NICKOLAS MARK ANDREWS,
Real Party in Interest.

No. 58125

FILED

JUN 08 2011

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

ORDER GRANTING PETITION IN PART

This original petition for a writ of certiorari or, alternatively, a writ of mandamus or writ of prohibition challenges an order of the district court precluding petitioner from impeaching the real party in interest's expert forensic psychiatrist during sentencing with evidence developed during a Petrocelli¹ hearing and a district court order striking petitioner's notice of appeal regarding that matter.

According to the submissions before us, the real party in interest Nickolas Mark Andrews was charged in Humboldt County with two counts of attempted murder or, alternatively, discharging a firearm in an occupied building. Those incidents occurred on May 20 and May 27, 2006 (hereinafter referred to as the Humboldt incidents). Approximately

¹Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

two hours after the May 27, 2006, incident, Matthew Hutchinson shot to death George Moritz in Pershing County. Andrews was alleged to have aided and abetted Hutchinson in Moritz's murder. Prior to the trial for Moritz's murder, Andrews filed a motion in limine to preclude petitioner (the State) from introducing the Humboldt incidents as prior bad act evidence. After a Petrocelli hearing, the district court denied the motion in limine, concluding that the Humboldt incidents were admissible. Andrews proceeded to trial on burglary and first-degree murder relating to Moritz's death. The jury found Andrews guilty of burglary but was unable to reach a verdict as to the murder charge. Andrews is currently awaiting retrial for Moritz's murder.

Subsequently, Andrews entered a plea pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), to two counts of discharging a weapon in an occupied structure related to the Humboldt incidents. Several months later, Andrews entered an Alford plea to voluntary manslaughter with the use of a deadly weapon regarding Moritz's murder. At the sentencing hearing in the Moritz case, the State attempted to cross-examine Andrews' forensic psychiatrist regarding her opinion that Andrews was intoxicated at the time of Moritz's murder and that Andrews was amenable to community supervision; the expert apparently was unaware of the circumstances of the Humboldt incidents but only knew that Andrews had pleaded guilty. In its cross-examination, the State attempted to impeach the expert with the district court's order allowing the admission of the Humboldt incidents in the Moritz case. Andrews objected, arguing that his plea agreement in the Humboldt case precluded the State from using those incidents in the murder prosecution. In this, Andrews pointed to the following language in his written plea agreement:

“[T]he District Attorney and I agree to the following: . . . (4) that my plea of Guilty pursuant to Alford may not be used to establish that the acts were committed at all in later civil or criminal proceedings related to the same set of facts as set forth in the Amended Information. In any subsequent civil or criminal proceeding related to the same set of facts as set forth in the Amended Information, the facts would have to be proven independent of and without reference to my plea herein.”

The district court agreed with Andrews, concluding that the Humboldt incidents could not be used if they were not independently proven in the murder trial. The State filed a timely notice of appeal, to which Andrews objected on the grounds that the State had no right to an interlocutory appeal. The State countered, arguing that it could appeal the district court's decision under NRS 177.015 because the matter involved the suppression of evidence. The district court agreed with Andrews and struck the notice of appeal. This original writ petition followed.

Petitioner argues that the district court manifestly abused its discretion or exceeded its jurisdiction by precluding it from cross-examining Andrews' expert with the facts and circumstances of the Humboldt incidents and striking the notice of appeal related to that decision. See NRS 34.160; NRS 34.320; Hickey v. District Court, 105 Nev. 729, 731, 782 P.2d 1336, 1337-38 (1989); Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981). The State further argues that it has no plain, speedy, and adequate remedy in the ordinary course of the law. NRS 34.170; NRS 34.330; Hickey, 105 Nev. at 731, 782 P.2d at 1338. We grant the petition in part.

Considering the record before us, the State has not demonstrated that the district court manifestly abused its discretion in

precluding the State from examining Andrews' expert with the facts and circumstances of the Humboldt incidents. We therefore deny the petition as to that issue.


We conclude, however, that the district court exceeded its authority in striking the notice of appeal. Although a notice of appeal is filed in the district court, NRS 177.075(1), that court has no authority to take any action regarding that notice or to determine this court's jurisdiction. See NRS 177.155 ("The supervision and control of the proceedings on appeal shall be in the appellate court from the time the notice of appeal is filed with its clerk, except as otherwise provided in this title."); NRAP 3(a)(3) (providing that district court clerk must file notice of appeal and transmit it to supreme court despite any perceived deficiencies); NRAP 3(g) (requiring district court clerk to "immediately forward" notice of appeal to supreme court upon its filing).² We therefore grant the petition as to that issue.

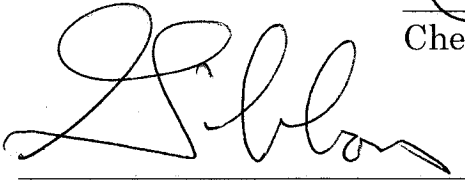
Accordingly, we

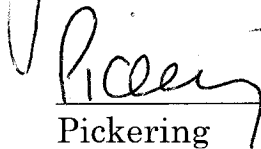
ORDER the petition GRANTED IN PART AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the district court to vacate its order striking the State's notice of appeal. The district court is further directed to reinstate the notice of

²We express no opinion regarding whether the district court's evidentiary ruling is appealable. See State v. Shade, 110 Nev. 57, 63, 867 P.2d 393, 396 (1994) (explaining that NRS 177.015(2) allows State to appeal from order granting motion to suppress, which is "a request for the exclusion of evidence premised upon an allegation that the evidence was illegally obtained" generally in violation of constitutional provision such as Fourth Amendment, not exclusion of evidence for evidentiary reasons).

appeal and transmit the notice of appeal and required documents to this court.³


_____, J.
Cherry


_____, J.
Gibbons


_____, J.
Pickering

cc: Hon. Michael Montero, District Judge
Pershing County District Attorney
Marc Picker
Pershing County Public Defender
Pershing County Clerk

³We lift the stay granted in this matter on April 21, 2011.