

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES MCNAMARA,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK; AND THE HONORABLE
JENNIFER P. TOGLIATTI, DISTRICT
JUDGE,
Respondents,
and
THE STATE OF NEVADA,
Real Party in Interest.

No. 60680

FILED

SEP 27 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *R. Malone*
DEPUTY CLERK

ORDER DENYING PETITION

This original petition for a writ of mandamus or prohibition requests this court to order the district court to dismiss an indictment due to alleged deficiencies in the grand jury proceedings. In particular, petitioner complains that the State's service of a notice of intent to seek an indictment by facsimile transmission was inadequate under NRS 172.241 and the State failed to present exculpatory evidence to the grand jury as required by NRS 172.145(2). Having considered the petition and supporting documents and the State's answer, we conclude that petitioner has failed to demonstrate that the district court manifestly abused its discretion or exercised its discretion in an arbitrary or capricious manner or exceeded its jurisdiction. See NRS 34.160; NRS 34.320; Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981).

Petitioner argues that service of the notice of intent to seek an indictment by facsimile transmission was inadequate because NRS

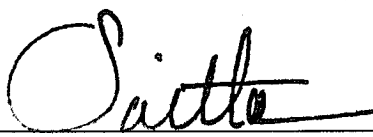
172.241(2) requires personal service. We disagree. NRS 172.241(2) requires that “reasonable notice” shall be served “upon a person whose indictment is being considered by a grand jury” and “[t]he notice is adequate if it: (a) [i]s given to the person, the person’s attorney of record, or an attorney who claims to represent the person.” Nothing in the plain language of the statute requires personal service upon the person who is the subject of the indictment. Where, as here, personal service is not required, NRS 178.589(1) provides that a person represented by counsel may be served with any motion, notice or other legal document by facsimile transmission if “(a) [t]he document is transmitted to the office of the attorney representing the person; and (b) [t]he facsimile machine is operational and is maintained by the attorney representing the person or the employer of that attorney.” See also EDCR 7.26(a)(3) (permitting service of “an order or other paper” on the party or party’s attorney by facsimile transmission). Petitioner does not contend that the facsimile transmission failed to meet the requirements of subsection 1(a) or (b). Therefore, we conclude that extraordinary relief is not warranted on this ground.


Petitioner next argues that the State failed to present exculpatory evidence during the grand jury proceedings as required by NRS 172.145(2). He specifically points to the victim’s preliminary hearing testimony, which he argues is inconsistent with her grand jury testimony and shows that the charged offense of kidnapping did not occur. Having carefully considered the challenged testimony, we conclude that any conflict between the victim’s preliminary hearing and grand jury testimony does not explain away the kidnapping charge, see Lay v. State, 110 Nev. 1189, 1198, 886 P.2d 448, 453 (1994) (concluding that

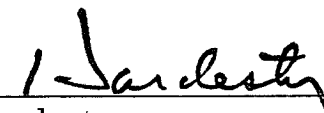
inconsistent statement of witness did not “explain away [a criminal] charge” within meaning of NRS 172.245(2) (alteration in original)). Accordingly, extraordinary relief is not warranted on this ground.

Having concluded that petitioner failed to demonstrate that the district court exceeded its jurisdiction, manifestly abused its discretion, or exercised its discretion in an arbitrary or capricious manner, we

ORDER the petition DENIED.


_____, J.
Saitta


_____, J.
Pickering


_____, J.
Hardesty

cc: Hon. Jennifer P. Togliatti, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk