IN THE SUPREME COURT OF THE STATE OF NEVADA

MARIO CAMACHO,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE J. CHARLES THOMPSON, DISTRICT JUDGE,
Respondents,
and
THE STATE OF NEVADA,
Real Party in Interest.

No. 61084

FILED

JUL 17 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DENYING PETITION

This original petition for a writ of mandamus challenges a district court order denying a motion to disqualify the Clark County District Attorney's Office from prosecuting petitioner. At this court's direction, the State filed an answer to the petition. Having considered the petition and answer, we are not convinced that our intervention is warranted.[1]

Mandamus is an extraordinary remedy, and the decision to entertain a petition for a writ of mandamus rests within our discretion.

[1]Petitioner alternatively seeks a writ of prohibition. Because he has not demonstrated that the district court lacked jurisdiction or acted in excess of its jurisdiction, see NRS 34.320, prohibition is not available.

12-22495

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 have indicated that mandamus is the appropriate vehicle for challenging attorney disqualification rulings. See Collier v. Legakes, 98 Nev. 307, 646 P.2d 1219 (1982). But "[t]he disqualification of a prosecutor's office rests with the sound discretion of the district court," id. at 309, 646 P.2d at 1220, and "while mandamus lies to enforce ministerial acts or duties and to require the exercise of discretion, it will not serve to control the proper exercise of that discretion or to substitute the judgment of this court for that of the lower tribunal," id. at 310, 646 P.2d at 1221. Accordingly, where the district court has exercised its discretion, a writ of mandamus is available only 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).

Petitioner asserts that District Attorney Steve Wolfson has a conflict of interest under RPC 1.9 based on his former law firm's representation of petitioner in a prior criminal case that resulted in a conviction. The primary question in this case under RPC 1.9 is whether the two cases are substantially related.[2] Petitioner argues that the two cases are substantially related because the prior conviction may be used by the State as an aggravating circumstance to seek the death penalty, as other matter evidence at sentencing, or as prior bad act evidence. We disagree.

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[2]The rule also applies where the cases are "the same." The cases clearly are not the same, and petitioner has not asserted otherwise.

To determine whether two cases are substantially related, this court has adopted a three-part test that requires the district court to

> "(1) make a factual determination concerning the scope of the former representation, (2) evaluate whether it is reasonable to infer that the confidential information allegedly given would have been given to a lawyer representing a client in those matters, and (3) determine whether that information is relevant to the issues raised in the present litigation."

Nevada Yellow Cab Corp. v. Dist. Ct., 123 Nev. 44, 52, 152 P.3d 737, 742 (2007) (quoting Waid v. Dist. Ct., 121 Nev. 605, 610, 119 P.3d 1219, 1223 (2005)). "[A] superficial resemblance between the matters is not sufficient; 'rather, the focus is properly on the precise relationship between the present and former representation.'" Id. (quoting Waid, 121 Nev. at 610, 119 P.3d at 1223); see also Model Rules of Prof'l Conduct R. 1.9 cmt. 3 ("Matters are 'substantially related' for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter."). The party seeking disqualification bears the burden of proving that the cases are substantially related. Waid, 121 Nev. at 610, 119 P.3d at 1222.

We are not convinced that petitioner met his burden. The arguments he presents are speculative. And, more importantly, the prior case's relevance for the purposes asserted by petitioner is based on the fact of conviction; thus, there does not appear to be any reason that confidential information that could have been obtained in the prior representation would be relevant to issues raised in the pending

prosecution. For these reasons, we cannot say that the cases are substantially related.[3]

Even if petitioner had met his burden, we further conclude that the district court did not act arbitrarily in refusing to impute the conflict to the District Attorney's Office. As we held in Collier v. Legakes, vicarious disqualification of an entire prosecutor's office based on an individual lawyer's former-client conflict is required only "in extreme cases where the appearance of unfairness or impropriety is so great that the public trust and confidence in our criminal justice system could not be maintained without such action." 98 Nev. 307, 310, 646 P.2d 1219, 1221 (1982); accord State v. Pennington, 851 P.2d 494, 498 (N.M. 1993) (observing that "great majority of jurisdictions have refused to apply a per se rule disqualifying the entire prosecutor's staff solely on the basis that one member of the staff had been involved in the representation of the defendant in a related matter" so long as the disqualified staff member "is isolated from any participation in the prosecution"). Petitioner has not challenged in his petition the sufficiency of the screening measures put in place by the District Attorney's Office to preclude Mr. Wolfson's direct or indirect participation in this case.[4] And we are not convinced that this is

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[3]The District Attorney's Office understandably chose to impose screening measures in this case out of an abundance of caution. Nothing in our decision precludes the District Attorney's Office from maintaining those screening measures regardless of whether Mr. Wolfson has a personal conflict under RPC 1.9 in order to avoid any appearance of impropriety.

[4]Citing Ciaffone v. District Court, 113 Nev. 1165, 945 P.2d 950 (1997), overruled in part by Leibowitz v. District Court, 119 Nev. 523, 78 P.3d 515 (2003), petitioner asserts that Nevada law does not allow lawyer

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an extreme case that would warrant vicarious disqualification despite a sufficient screen, see Collier, 98 Nev. at 310, 646 P.2d at 1221, particularly since the prior representation was not in the same case and was approximately seven years ago.

Petitioner suggests that the district court failed to exercise its discretion when it denied the motion without an evidentiary hearing. Like the district court, we are not convinced that an evidentiary hearing was warranted in this case. Cf. id. at 311, 646 P.2d at 1221 (concluding that district court effectively failed to exercise its discretion when it granted motion to disqualify prosecutor's office without an evidentiary hearing or hearing argument from the prosecution and based solely on an appearance of impropriety rather than consideration of all the facts and circumstances). Because the district court considered all papers and exhibits submitted in support of and in opposition to the motion and

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screening where RPC 1.10 imputes an individual lawyer's disqualification to the lawyer's firm and he argues that this rule "applies even more so to the district attorneys." Petitioner is mistaken for two reasons. First, because this case is governed by RPC 1.11, RPC 1.10 is not applicable. Model Rules of Prof'l Conduct R. 1.11 cmt. 2 ("Rule 1.10 is not applicable to the conflicts of interest addressed by this rule. . . . Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers."). Second, RPC 1.10 (formerly SCR 160) has been amended since Ciaffone and now allows lawyer screening in certain situations where the rule applies. RPC 1.10(e). As Collier indicates, screening is appropriate in cases that are subject to RPC 1.11. 98 Nev. at 310, 646 P.2d at 1221.

exercised its discretion, and because petitioner has not demonstrated that the district court acted arbitrarily or capriciously in exercising its discretion, mandamus does not lie. Cf. Collier, 98 Nev. at 310-11, 646 P.2d at 1221. Accordingly, we

ORDER the petition DENIED.[5]

Saitta, J.

Pickering, J.

Hardesty, J.

cc: Chief Judge, The Eighth Judicial District Court
Hon. J. Charles Thompson, Senior Judge
Special Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

[5]We deny the motion to stay the proceedings below as moot.