IN THE SUPREME COURT OF THE STATE OF NEVADA

DIPAK KANTILAL DESAI,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE VALERIE ADAIR, DISTRICT JUDGE,
Respondents,
and
THE STATE OF NEVADA,
Real Party in Interest.

No. 61230

FILED

DEC 21 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER GRANTING PETITION IN PART

This original petition for a writ of mandamus or prohibition challenges an order of the district court denying petitioner Dipak Kantilal Desai's pretrial petition for a writ of habeas corpus challenging the sufficiency of the indictment. Desai argues that the charges alleged in the indictment fail to give him sufficient notice to defend against the State's allegations. 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).

For the reasons discussed below, the district court should grant the petition for a writ of habeas corpus with respect to the count alleging racketeering (Count 1). It should also permit the State to amend the counts alleging criminal neglect of patients (Counts 4, 8, 11, 14, 18, 21, and 24) and performance of an act with reckless disregard to persons (Counts 3, 7, 10, 13, 17, 20, and 23) to reduce the number of theories of liability alleged and resolve ambiguity regarding how Desai engaged in the remaining theories. Our decision does not affect the remaining counts

of the indictment that allege insurance fraud (Counts 2, 5, 6, 9, 12, 15, 16, 19, 22, and 25), theft (Count 26), and obtaining money under false pretenses (Counts 27 and 28), which Desai does not challenge in this petition. It further does not affect the murder count charged in a separate indictment.

Desai contends that the charging document is inadequate. Specifically, he contends that the counts alleging the performance of an act with reckless disregard to persons are impermissibly vague as each count charges three defendants with seven alternative theories of liability. The criminal-neglect-of-patient counts allege eight alternative means, including one that the defendants directly or indirectly caused the harm by "methods unknown." In addition, each defendant is charged as a principal, aider and abettor, and coconspirator. Desai contends that the numerous alternatives permit the State to alter its theory of prosecution. Moreover, as the counts are based on a statute that does not specifically define the prohibited conduct, the indictment should have a more particular statement of facts. He also contends that the racketeering count is defective as the charge omitted elements of the offense, included an alternate theory that did not charge an offense under the statute, and failed to allege sufficient facts to indicate which defendant performed what acts regarding each theory of criminal liability.[1]

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[1]Desai also contends that facts adduced before the grand jury do not support many of the alternative theories. These claims concerning whether the State produced sufficient evidence to support the allegations in the indictment are not appropriate grounds for extraordinary relief. See Kussman v. District Court, 96 Nev. 544, 545-46, 612 P.2d 679, 680 (1980) (providing that this court's review of a pretrial probable cause determination through an original writ petition is disfavored).

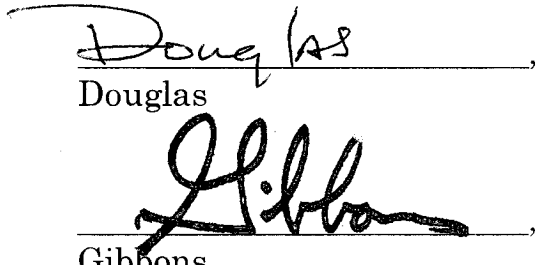
Both the United States and Nevada Constitutions require an indictment to allege a criminal offense in a manner that is sufficient to put the defendant on notice of the nature of the offense charged and the essential facts constituting the offense "in order to permit adequate preparation of a defense." Jennings v. State, 116 Nev. 488, 490, 998 P.2d 557, 559 (2000); see NRS 173.075(1) ("The indictment or the information must be a plain, concise and definite written statement of the essential facts constituting the offense charged."). To that end, this court has held that a charging document "which alleges the commission of the offense solely in the conclusory language of the statute is insufficient." Sheriff v. Levinson, 95 Nev. 436, 437, 596 P.2d 232, 233 (1979); see Earlywine v. Sheriff, 94 Nev. 100, 575 P.2d 599 (1978). Instead, the indictment must include "'a statement of the acts constituting the offense in ordinary and concise language'" and put the defendant on notice of the State's theory of prosecution. Viray v. State, 121 Nev. 159, 162, 111 P.3d 1079, 1082 (2005) (quoting Jennings, 116 Nev. at 490, 998 P.2d at 559). Where one offense may be committed by one or more specified means, an accused must be prepared to defend against all means alleged. See State v. Kirkpatrick, 94 Nev. 628, 630, 584 P.2d 670, 671-72 (1978).

We conclude that extraordinary relief is warranted because the challenged allegations are not sufficiently plain, concise, and definite for the following reasons. First, the criminal-neglect and reckless-disregard counts charge each defendant as a principal, aider and abettor, and coconspirator and further list numerous acts of aiding and abetting, which allege that the defendants aided and abetted each other as well as aided and abetted other unnamed individuals to commit the reckless or negligent acts. Barren v. State, 99 Nev. 661, 668, 669 P.2d 725, 729 (1983)

(noting that an indictment may charge a defendant as both a principal and as an aider and abettor provided that it contains "additional information as to the specific acts constituting the means of aiding and abetting so as to afford the defendant adequate notice to prepare his defense"). The allegations list numerous acts taken as principals and aiders and abettors but fail to specifically identify what acts are attributed to each defendant. Therefore, these counts are insufficiently precise as to "who is alleged to have done what." State v. Hancock, 114 Nev. 161, 165, 955 P.2d 183, 185 (1998) (internal quotations omitted). Second, the racketeering count fails to allege necessary elements and is inadequately pleaded. The alternative theory charged pursuant to NRS 207.400(1)(a) is incomplete as it omits the essential element concerning the use of proceeds to acquire real property or interest in another enterprise. In addition, the use of disjunctive language severed the description of racketeering activity, a necessary element of the previous alleged theories under NRS 207.400(1)(a)-(d), (j) (prohibiting acts done in conjunction with racketeering activity) into a separate theory of the offense, which was not sufficient to plead any violation of NRS 207.400 in and of itself. Lastly, even if the allegations of racketeering activity are interpreted as relating to each alleged theory under NRS 207.400(1)(a)-(d), (j), those allegations are inadequately pleaded as the first alternative act (causing and/or pressuring employees to falsify patient records) fails to allege a crime related to racketeering. Accordingly, we

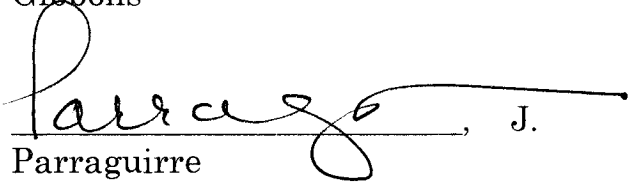
ORDER the petition GRANTED IN PART AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the district court to grant the pretrial petition for a writ of habeas corpus with respect to the racketeering count. The district court

should permit the State to amend the patient-neglect and reckless disregard counts to narrow the breadth of those charges and provide more detail as to how Desai engaged in the remaining theories.



_____, J.
Douglas

_____, J.
Gibbons



_____, J.
Parraguirre

cc: Hon. Valerie Adair, District Judge
Wright Stanish & Winckler
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk