

IN THE SUPREME COURT OF THE STATE OF NEVADA

ERIC ROGER ALPERT,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK; AND THE HONORABLE
DOUGLAS W. HERNDON, DISTRICT
JUDGE,
Respondents,
and
THE STATE OF NEVADA,
Real Party in Interest.

No. 61468

FILED

NOV 29 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY R. Malme
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. Petitioner asserts that District Attorney Steve Wolfson has a conflict of interest under RPC 1.9 based on his firm's prior representation of the petitioner and that conflict should be imputed to the Clark County District Attorney's Office. We disagree and therefore deny the petition.¹

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

¹The 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.

See Poulos v. District Court, 98 Nev. 453, 455, 652 P.2d 1177, 1178 (1982); see also State ex re. 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 that discretion, it will not serve to control the proper exercise of 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, 603-04, 637 P.2d 534, 536 (1981). “An arbitrary or capricious exercise of discretion is one founded on prejudice or preference rather than on reason, or contrary to the evidence or established rules of law.” State v. Dist. Ct. (Armstrong), 127 Nev. ___, ___, 267 P.3d 777, 780 (2011) (citations omitted).

Petitioner contends that the district court acted arbitrarily or capriciously when it denied petitioner’s motion to disqualify the Clark County District Attorney’s Office. Petitioner argues that the district court erred in determining that the conflict between petitioner and the district attorney should not be imputed to the entire district attorney’s office and that the conflict would not create an appearance of impropriety.

Petitioner fails to demonstrate that the district court acted arbitrarily or capriciously because the district court based its decision on

established law. In Collier, we held that 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. at 310, 646 P.2d at 1221; 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"); 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.").

Petitioner contends that this case is different than the situation presented in Collier, because the conflicted attorney in this case is the district attorney. Petitioner argues that the district attorney is the head of the office, his name is on every pleading, and he is in charge of policy making for the office. See NRS 173.045; NRS 252.070(1). While the district attorney is responsible for deciding the overall policy of the office, consistent with NRS 252.070(1), it is the deputies appointed by the district attorney who handle the day-to-day operations of the divisions of the office

and make decisions regarding specific cases. Further, even though the district attorney's name appears on every document filed with the court, it is clear that the district attorney is not personally handling all of the cases filed by the district attorney's office, and that these cases are instead being handled by the deputy who is also listed on every document. Therefore, the district court did not act arbitrarily or capriciously in exercising its discretion.

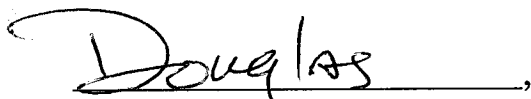
Petitioner further contends that the screening procedures in place at the Clark County District Attorney's Office were inadequate and untimely. Petitioner failed to make this argument in the district court below, and therefore, failed to demonstrate that the district court acted arbitrarily or capriciously in exercising its discretion.²


Finally, petitioner argues that the district court acted arbitrarily and capriciously by denying his motion without holding an evidentiary hearing as required by Collier, 98 Nev. at 311, 646 P.2d at 1221. Because petitioner was not challenging the screening procedures in place at the district attorney's office, petitioner fails to demonstrate that an evidentiary hearing was necessary to resolve a factual issue. The district court based its decision to deny the motion on all of the facts and circumstances necessary to make the decision including the briefs and affidavits filed by the parties. Id. Therefore, the district court did not act


²We note that the screening procedures in place appear to be adequate and timely.

arbitrarily and capriciously by denying the motion without an evidentiary hearing. Accordingly, we

ORDER the petition DENIED.³


_____, J.
Douglas


_____, J.
Gibbons


_____, J.
Parraguirre

cc: Hon. Douglas W. Herndon, District Judge
McDonald Adras LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

³We deny the motion to stay the trial as moot.