

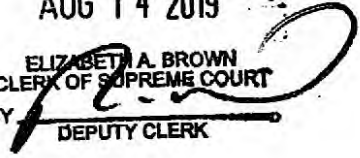
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MEGHAN ANNE SMITH,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK; AND THE HONORABLE
KERRY LOUISE EARLEY, DISTRICT
JUDGE,
Respondents,
and
THE STATE OF NEVADA,
Real Party in Interest.

No. 77123-COA

FILED

AUG 14 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER DENYING PETITION

This original petition for a writ of mandamus¹ challenges a district court order denying Meghan Anne Smith's motion to dismiss her indictment pursuant to the Double Jeopardy Clause. Smith argues the district court did not properly apply the second prong in the new test set forth in *Thomas v. Eighth Judicial District Court*, 133 Nev. 468, 402 P.3d 619 (2017), for determining whether the Double Jeopardy Clause prohibits a retrial after a defendant's request for a mistrial. Smith seeks an order directing the district court to grant her motion and dismiss her case with prejudice based on a double jeopardy violation.

A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust, or

¹Although the petition is titled "Petition for Writ of Mandamus/Prohibition," Smith only argues for mandamus relief.

station, NRS 34.160, or to control a manifest abuse or arbitrary or capricious exercise of discretion, *Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981). A writ of mandamus will not issue, however, if petitioner has a plain, speedy, and adequate remedy in the ordinary course of law. NRS 34.170. Further, mandamus is an extraordinary remedy, and it is within the discretion of this court to determine if a petition will be considered. *See Poulos v. Eighth Judicial Dist. Court*, 98 Nev. 453, 455, 652 P.2d 1177, 1178 (1982); *see also State ex rel. Dep't of Transp. v. Thompson*, 99 Nev. 358, 360, 662 P.2d 1338, 1339 (1983). "Petitioner[] carr[ies] the burden of demonstrating that extraordinary relief is warranted." *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).

Because the issue presented is a legal issue and "sound judicial economy supports consideration of [this] issue[] before a second jury trial," we exercise our discretion to intervene by way of extraordinary writ. *Thomas*, 133 Nev. at 471, 402 P.3d at 623-24.

On the eve of Smith's trial, the district court conducted a hearing regarding the introduction of certain evidence at trial. The court determined the evidence constituted a prior bad act and would not be admissible at trial "unless and/or until another foundation for [the evidence] was laid at trial, [and] the State was ordered not to refer to the [evidence] at trial until a proper legal foundation, if any, at trial could be laid." The next day, the prosecutor referenced the inadmissible evidence during her opening statement. Smith objected and moved for a mistrial. The prosecutor argued there was a misunderstanding about what the court's ruling was and the prosecutor believed the argument made in the opening statement was appropriate. The district court found the prosecutor "committed improper conduct" by referencing evidence the court had

previously ruled was inadmissible. The district court, however, also ruled that the misconduct was not willful. Nevertheless, the district court concluded the improper conduct "caused prejudice to [Smith] that could not be cured by means short of a mistrial." The district court granted Smith's motion for a mistrial and a retrial was scheduled.

Prior to her retrial, Smith filed a motion to dismiss the indictment on the basis that a retrial would violate the Double Jeopardy Clause. Smith subsequently supplemented her motion, noting the Nevada Supreme Court had recently issued an opinion in *Thomas* that modified the standard for courts to use when evaluating a double jeopardy claim following the granting of a defendant's motion for a mistrial. The State opposed the motion and supplemental motion to dismiss, and the district court heard argument. The district court found the first and third prongs in the *Thomas* test were met, but the second prong had not been met, and it denied the motion. Smith claims the district court misapplied the second prong.

In *Thomas*, the Nevada Supreme Court broadened the protections of the Double Jeopardy Clause under the Nevada Constitution and held that a court should consider three prongs when evaluating a double jeopardy claim following a defendant's motion for a mistrial. The second prong requires the court to consider whether

[the improper conduct or actions of the prosecutor] is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial.

Thomas, 133 Nev. at 475, 402 P.3d at 626. "[W]hether a prosecutor 'knows' or 'intends' his conduct to be improper and prejudicial should generally be

measured by objective factors,” including “the situation in which the prosecutor found himself, the evidence of actual knowledge and intent and any other factors which may give rise to an appropriate inference or conclusion.” *Id.* at 476, 402 P.3d at 627 (quotation marks omitted).

Here, the district court found, “The State’s decision not to properly address its evidentiary issues prior to trial, however misguided that decision may have been, was not, in this Court’s view, intentional conduct which the prosecutor knew to be improper and prejudicial.” The district court, therefore, determined the prosecutor’s conduct did not meet the second prong of the *Thomas* test and denied the motion to dismiss.

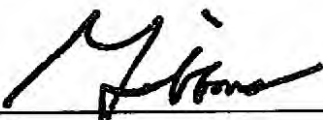
We agree with Smith that the district court analyzed the wrong actions when determining whether the second prong of the *Thomas* test was met. The prosecutor’s conduct that was at issue in considering the second prong was not whether the prosecutor intentionally delayed addressing evidentiary issues prior to trial. Rather, it was whether the conduct that resulted in a mistrial—the prosecutor’s reference to a thirty-day residency requirement—was intentional. Nevertheless, we conclude the record is sufficient to determine that the second prong of the *Thomas* test cannot be met and, therefore, double jeopardy does not bar reprosecution.²


As noted above, the record demonstrates that on the day before trial, the district court conducted a lengthy hearing at which several arguments were made regarding the admission of evidence. The district court clearly denied the State’s request to take judicial notice of a specific date. The district court also ordered that the prosecution could not use

²The real party in interest argues the district court erred by finding the first and third prongs of the *Thomas* test had been met. Because we determine the second prong of the test cannot be met, we need not address these claims.

certain evidence until a proper legal foundation, if any, could be laid at trial for introduction of the evidence. What was less clearly resolved, however, was whether the State would be permitted to reference a statutory thirty-day residency requirement. Because this issue was not clearly resolved, the record supports the district court's determination that the misconduct by the prosecutor for referencing the thirty-day residency requirement was not willful. Under these circumstances, we conclude the record cannot support a finding that the misconduct "taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial." *Id.* at 475, 402 P.3d at 626. Therefore, we conclude the second prong of the *Thomas* test cannot be met. Accordingly, we conclude Smith has failed to demonstrate mandamus relief is warranted, and we

ORDER the petition DENIED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Kerry Louise Earley, District Judge
Clark County Public Defender
Attorney General/Las Vegas
Clark County District Attorney
Eighth District Court Clerk