

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
JOSHUA CROFT,
Respondent.

No. 87193

FILED

AUG 14 2024

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order granting a pretrial petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Joseph Hardy, Jr., Judge.

The State charged respondent Joshua Croft by criminal complaint with attempted robbery and two counts of robbery of a victim 60 years of age or older. The preliminary hearing was continued twice because Croft was not transported from federal custody to the justice court. At the third scheduled preliminary hearing, a newly assigned prosecutor moved for a continuance because a necessary witness, Detective Shawn Izzo, was not present. The prosecutor informed the justice court that Det. Izzo was a necessary witness to prove identity and link Croft to the crimes. If present, Det. Izzo would have testified he collected a buccal swab from Croft for DNA testing and observed a police officer collecting a key fob from Croft.

The prosecutor testified that he learned about Det. Izzo's role in collecting the buccal swab the day before the third scheduled preliminary hearing and contacted Det. Izzo to secure an oral promise to appear at the hearing the next day. Det. Izzo told the prosecutor he could not appear due to a family emergency. The justice court concluded that the State failed to exercise due diligence in securing Det. Izzo's presence, denied the motion to continue, and dismissed the case. The State then obtained a grand jury

indictment. Croft filed a pretrial petition for a writ of habeas corpus, arguing that the State acted with conscious indifference to Croft's procedural rights and was therefore barred from seeking an indictment. The district court agreed and dismissed the indictment with prejudice. See *Maes v. Sheriff*, 86 Nev. 317, 319, 468 P.2d 332, 333 (1970) (explaining that a renewed prosecution "is not allowable when the original proceeding has been dismissed due to the willful failure of the prosecutor to comply with important procedural rules"). The State appealed.

"A pretrial writ of habeas corpus may issue when a district attorney acts in a willful or consciously indifferent manner with regard to a defendant's procedural rights." *Sheriff v. Roylance*, 110 Nev. 334, 337, 871 P.2d 359, 361 (1994). We review the district court's decision for substantial error. *Sheriff v. Shade*, 109 Nev. 826, 828, 858 P.2d 840, 841 (1993). But the district court's determination regarding conscious indifference is one of fact, *State v. Lamb*, 97 Nev. 609, 611, 637 P.2d 1201, 1202 (1981), which we will not disturb if supported by substantial evidence in the record, *Roylance*, 110 Nev. at 337, 871 P.2d at 361.

The State does not engage in willful or conscious indifference when it attempts to comply with procedural rules but is thwarted by circumstances outside of its control. See, e.g., *Sheriff v. Simpson*, 109 Nev. 430, 433-34, 851 P.2d 428, 431 (1993) (concluding that the State did not exhibit conscious indifference where the prosecutor failed to subpoena a necessary witness but sent an investigator to attempt personal service once aware of the oversight); *Phillips v. Sheriff*, 93 Nev. 309, 310-11, 565 P.2d 330, 331 (1977) (concluding that the State did not act in a consciously or willfully indifferent manner where its case was dismissed in justice court due to the unavailability of a witness who fled the jurisdiction). Likewise,

willful or conscious indifference is not shown simply because the State is remiss in its duties. *See, e.g., Downey v. Sheriff*, 88 Nev. 14, 15, 492 P.2d 989, 990 (1972) (concluding that the State did not exhibit conscious indifference where prosecutor's affidavit in support of motion for continuance contained inaccurate facts due to a lack of diligent preparation).

Although some evidence supports the district court's determination that the prosecutor mishandled the case, the evidence of willful or conscious indifference is not substantial. The prosecution was not at fault for the first two continuances. As to the third setting, the district court found that the State had the DNA report and knew that Det. Izzo was involved with the discovery of the key fob before the third scheduled preliminary hearing and concluded that the State should have subpoenaed Det. Izzo. *Cf. Joseph John H. v. State*, 113 Nev. 621, 623, 939 P.2d 1056, 1058 (1997) (finding "it significant that the state failed to use proper legal means to compel the victim's attendance, and failed to use informal means of compulsion until immediately before the hearing was scheduled to begin"). Significantly, however, a subpoena would have been futile as Det. Izzo could not attend the hearing due to a family emergency.

Despite the State's perplexing failure to identify Det. Izzo as a necessary witness until the day before the hearing, we conclude that this negligence does not amount to willful failure or conscious indifference to Croft's procedural rights. *Compare Lamb*, 97 Nev. at 610-11, 637 P.2d at 1202-03 (finding no conscious indifference where case dismissed due to prosecutor's failure to subpoena witness and discuss testimony before preliminary hearing), and *Johnson v. Sheriff*, 89 Nev. 304, 305, 511 P.2d 1051, 1051-52 (1973) (finding no conscious indifference where prosecution's

failure to produce evidence corroborating accomplice testimony resulted in dismissal of criminal complaint), *with Watson v. Sheriff*, 93 Nev. 236, 237-38, 562 P.2d 1133, 1133 (1977) (concluding that prosecutor demonstrated indifference where he engaged in outrageous behavior resulting in delay of the case, including allowing the case to languish for over nine months due to animosity between the district attorney and the magistrate). Therefore, we conclude that the district court substantially erred in dismissing the indictment. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

Stiglich, J.
Stiglich

Pickering, J.
Pickering

Parraguirre, J.
Parraguirre

cc: Hon. Joseph Hardy, Jr., District Judge
Attorney General/Carson City
Clark County District Attorney
Hill Firm
Eighth District Court Clerk