IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE JOHN S. MCGROARTY, DISTRICT JUDGE,
Respondents,
and
MARCUS DURWOOD MCANALLY, JR.,
Real Party in Interest.

No. 38274

FILED

MAR 28 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER DENYING PETITION

This is an original petition for a writ of prohibition or alternatively, a writ of mandamus, challenging a district court's ruling on a pretrial motion as to jury instructions.

Petitioner, the State of Nevada ("State"), contends that the district court acted in excess of its authority or in an arbitrary or capricious manner when it rendered a ruling on an issue raised by the State. Marcus McAnally ("McAnally"), the real party in interest, was indicted by a grand jury on thirteen counts of falsifying records by a public officer. In instructing the grand jury on the elements of the offense, the State used the definition of a public officer contained in NRS 169.164. Approximately ten months later, McAnally filed a motion to dismiss the indictment on the basis that he did not qualify as a "public officer" as defined to the grand jury. The State argued that McAnally's motion was barred because the proper mechanism to challenge indictments is by a

petition for a writ of habeas corpus, filed within twenty-one days of the indictment. The district court agreed that the motion was time-barred.

Shortly before the scheduled trial date, McAnally renewed his motion to dismiss, citing new authority. During arguments on this motion, McAnally raised the argument that the State should be bound by the same definition of public officer it presented to the grand jury. The district court denied the motion to dismiss but reserved ruling on which definition of public officer would be given to the jury until after presentation of the evidence. The State then moved for a decision on whether it would be allowed to use the broader definition of "public officer" found in NRS 193.019. McAnally argued that changing the definition would materially alter the indictment and that such a modification was prohibited under State of Nevada v. Chamberlain.[1] Without expressing its rationale, the district court ruled that the State could not use the desired definition and offered to dismiss without prejudice. The State declined this offer and instead asked for a stay to file this petition.

The State asks this court to issue a writ prohibiting the district court from carrying out its ruling or alternatively, to issue a writ mandating that the desired instruction be given. We decline to issue either writ since we find that such extraordinary relief is not warranted under these facts.

A writ of prohibition "arrests the proceedings . . . when such proceedings are without or in excess of the [rendering court's] jurisdiction."[2] A writ of prohibition "is not a writ of right, but one of sound

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[1]6 Nev. 257 (1871).

[2]NRS 34.320.

judicial discretion, to be issued or refused according to the facts and circumstances of each particular case."[3] This court held that a writ of prohibition is an extraordinary remedy which should be used "only in cases of extreme necessity" – when no other remedies are available.[4] This court recently reiterated that writs of prohibition "[do] not serve to correct errors."[5]

Likewise, mandamus is an extraordinary remedy and it is within the discretion of this court whether a petition will be entertained.[6] A writ of mandamus is available to compel the performance of an official act.[7] If petitioners do not have a "plain, speedy, and adequate remedy in the ordinary course of law", a writ of mandamus is available to control an arbitrary or capricious exercise of discretion.[8]

Under NRS 172.095(2), the State was required to "inform the grand jurors of the specific elements of any public offense which they may consider as the basis of the . . . indictments." Under NRS 173.075, "[t]he

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[3]Walcott v. Wells, 21 Nev. 47, 51, 24 P. 367, 368 (1890).

[4]Id.

[5]Mineral County v. State, Dep't of Conserv., 117 Nev. ____, ____, 20 P.3d 800, 805 (2001).

[6]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).

[7]See NRS 34.160 which provides in part that "a writ may be issued . . . to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station."

[8]NRS 34.170. See also Round Hill General. Imp. Dist. v. Newman, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981).

indictment . . . must be a plain, concise and definite written statement of the essential facts constituting the offense charged." The State provided the grand jury with written and oral instruction of the offense on which McAnally was ultimately indicted and with the definition of public officer. The State contends that the instruction defining public officer was surplusage, and that any error in the definition is therefore harmless. We disagree. We conclude that the district court did not act without or in excess of its jurisdiction in rendering a decision on an issue properly before it. We further conclude that the district court properly held that the State was bound by the definition of public officer given to the grand jury since we agree that being a public officer is a required element of the offense for which the State sought an indictment. Finally, we conclude that the State had other remedies readily available and therefore neither writ is appropriate. Accordingly, we

ORDER the petition DENIED.

_____, J.
Young

_____, J.
Agosti

_____, J.
Leavitt

cc: Hon. John S. McGroarty, District Judge
Clark County District Attorney
Kirk T. Kennedy
Clark County Clerk