IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Petitioner,
vs.
THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE, AND THE HONORABLE SCOTT N. FREEMAN, DISTRICT JUDGE,
Respondents,
and
LUIS ALBERTO RESCALVO,
Real Party in Interest.

No. 91146

ORDER GRANTING PETITION

This original petition for a writ of mandamus challenges a district court order denying petitioner the State of Nevada's motion to amend the information.

The State charged real party in interest Luis Rescalvo via information with driving under the influence of alcohol with a prior felony conviction for driving under the influence, in violation of NRS 484C.110 and NRS 484C.410. A week before trial, the State moved to amend the information. Critically, the State sought to change the theories of liability on the information from "while under the influence of intoxicating liquor or drugs rendering him incapable of safely driving or exercising physical control" to "while under the influence of intoxicating liquor; and/or while having a concentration of alcohol of 0.08 or more in his blood; and/or within two hours after driving said vehicle, did have a concentration of alcohol of

0.08 or more in his blood." Five days before trial, the parties appeared in district court and Rescalvo objected to the State's motion to amend the information. The district court denied the State's motion to amend the information, and this writ petition followed.

We elect to entertain the petition

A writ of mandamus is an extraordinary remedy available to compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of discretion. *Int'l Game Tech., Inc. v. Second Jud. Dist. Ct.*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008); NRS 34.160. Such extraordinary relief may be available where there is no plain, speedy, and adequate remedy in the ordinary course of law. NRS 34.170; *Smith v. Eighth Jud. Dist. Ct.*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). Writ relief is purely discretionary for this court. *Smith*, 107 Nev. at 677, 818 P.2d at 851. Because the State has no plain, speedy, and adequate remedy, *see* NRS 177.015; *State v. Eighth Jud. Dist. Ct. (Taylor)*, 116 Nev. 374, 379-80, 997 P.2d 126, 130 (2000), we elect to exercise our discretion and entertain the petition for a writ of mandamus.

The district court abused its discretion

The State argues the district court manifestly abused its discretion in denying its motion to amend the information. *See* NRS 173.095 (the court may permit amendment of the information any time before verdict or finding "if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced."). We review the district court's denial of the State's motion to amend the information for an abuse of discretion. *Viray v. State*, 121 Nev. 159, 162, 111 P.3d 1079, 1081 (2005).

The proposed amendment does not charge an additional or different offense

The State argues that the proposed amendment, which would add the per se theories that an illegal amount of a controlled substance was found in Rescalvo's blood, does not allege a new or different offense because the subsections of the DUI statute set forth alternative means of committing a single offense. Under Nevada law, a trial court may allow the information to be amended "at any time before verdict or finding *if no additional or different offense is charged*" and the defendant is not prejudiced. NRS 173.095(1) (emphasis added).

The State relies on *State v. Eighth Judicial District Court (Taylor)* to argue that the per se theories should not be considered an additional or different offense. 116 Nev. 374, 378, 997 P.2d 126, 129 (2000) (concluding that amending the information to add theories of aiding and abetting murder, and felony murder, "did *not* amount to the charging of additional or difference offenses" as they were "merely alternative theories of the mental state required for first degree murder" (emphasis added)). Rescalvo rebuts that the theories are separate violations or offenses, pointing to two cases. First, Rescalvo asserts that this court determined in *Byars v. State* that a per se violation of NRS 484C.110 was a separate violation from driving a vehicle while impaired. 130 Nev. 848, 862, 336 P.2d 939, 948-49 (2014). A plain reading of NRS 173.095(1), however, indicates that the inquiry is not whether the proposed amendment alleges a new or different *violation*, but instead whether it is a new or different *offense*. Second, Rescalvo asserts that in *Williams v. State* this court evaluated a predecessor of NRS 484C.110 and stated, "each of these subsections defines a separate offense for the purposes of double jeopardy analysis." 118 Nev.

536, 549, 50 P.3d 1116, 1124 (2002). We find Rescalvo's reliance misplaced because *Williams* ultimately concludes that the subsections constituted alternative means of committing an offense. *Id.* at 550, 50 P.3d at 1125. Further, in *Dossey v. State*, this court evaluated a predecessor of NRS 484C.110 for redundant convictions analysis and concluded that the legislature intended the subsections of the DUI statute to define alternative means of committing a single offense. 114 Nev. 904, 909, 964 P.2d 782, 785 (1998).

Here, the subsections of NRS 484C.110 track the statutory language evaluated by this court in *Dossey*. We conclude that the two per se violations—having a BAC of 0.08 or having a BAC of 0.08 within two hours of driving—and the under-the-influence violation should be considered alternative means of committing the single offense of driving under the influence according to NRS 484C.110(1). Thus, the two additional per se theories do not constitute additional or different offenses that preclude permitting amendment of the information under NRS 173.095(1).

Rescalvo received adequate notice of the proposed amendment

The State asserts that the failure to amend the information earlier was an "oversight" and avers that the district court manifestly abused its discretion by denying their pretrial motion to amend the information. And the State argues that Rescalvo had notice, and thus his substantial rights would not have been impacted by the amendment, because: (1) Rescalvo knew that the blood alcohol result would be utilized by the State, as evidenced by the notices of expert witness where the blood analysis results were attached as exhibits; (2) Rescalvo twice filed motions to suppress the blood alcohol evidence; and (3) Rescalvo's notice of post-

driving drinking filed pursuant to NRS 484C.110(5) is available to counteract a charge theory of having a BAC of 0.08 or more within two hours of driving. The district court is permitted to allow the information to be amended "at any time before verdict or finding if no additional or different offense is charged *and if substantial rights of the defendant are not prejudiced.*" NRS 173.095(1) (emphasis added); *see also Jennings v. State*, 116 Nev. 488, 490, 998 P.2d 557, 559 (2000) (concluding that district court erred in allowing amendment of an information during trial where amendment did not charge an additional or different offense but did prejudice the defendant's substantial rights).

We understand the district court's valid concern that, because the motion was "so close to trial," the amendment would be a "violation of [Rescalvo's] due process rights and that he would not be able to properly prepare for trial based upon the newly asserted State's theory of prosecution." And, although this case presents a close call, we find the State's argument persuasive.

The State must give adequate notice to the accused of the various theories of prosecution. *Taylor*, 116 Nev. at 377, 997 P.2d at 129; *see Koza v. State*, 104 Nev. 262, 264, 756 P.2d 1184, 1185 (1988) (explaining that lack of notice of the prosecutions' intent to proceed on alternative theories deprives defendants of the ability to properly defend against the accusations and denies them of their fundamental rights). This court has explained, however, that while it does not condone the State's failure to amend the charging document to reflect the theories under which it intends to proceed, due process is nonetheless satisfied when the defendant has

actual knowledge of the prosecution's intent to proceed on those theories. *Koza*, 104 Nev. at 264, 756 P.2d at 1185-86.

In *Taylor*, the district court determined that the defendant's substantial rights would be violated if the State amended the information to include a theory of felony murder. 116 Nev. at 379, 997 P.2d at 129. We determined the court manifestly abused its discretion because the defendant was not prejudiced as he had notice of the felony murder theory in the criminal complaint and information. *Id.* at 379, 997 P.2d at 129-30.

Unlike in *Taylor*, the complaint did not provide notice by including some elements of the per se theories. However, Rescalvo's notice of post-driving drinking (commonly called the "last gulp" defense) pursuant to NRS 484C.110(5), in combination with the multiple expert witness notices and motions to suppress on the blood draw results, clearly indicates the State and Rescalvo were both preparing for per se theories based on the blood alcohol evidence. Post-driving drinking is an affirmative defense that is only useful to defend against one of the per se theories. Overall, the record, including the notice of post-driving drinking, indicates Rescalvo was aware the State would seek to pursue the per se theories, such that Rescalvo sought to properly raise this affirmative defense. Thus, we conclude that Rescalvo had adequate notice that the State would seek to prosecute him using the per se theories given his notice of post-driving drinking. The district court manifestly abused its discretion in determining that Rescalvo's substantial rights would be violated if the State were permitted to amend the information to include the per se theories.

We therefore conclude that writ relief is warranted. For these reasons, we

ORDER the petition GRANTED AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the district court to grant the State's motion to amend the information.

_____, J.
Stiglich

_____, J.
Cadish

_____, J.
Lee

cc: Hon. Scott N. Freeman, District Judge
Attorney General/Carson City
Washoe County District Attorney
Larry Dunn & Associates
Washoe District Court Clerk