

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT WILLIAM HOUGH,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK, AND THE HONORABLE
MICHAEL CHERRY, DISTRICT
JUDGE,
Respondents,
and
THE STATE OF NEVADA,
Real Party in Interest.

No. 40447

FILED

MAY 15 2003

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

ORDER GRANTING PETITION

This original petition for a writ of mandamus challenges an order of the district court denying a motion for an independent psychiatric examination of Susannah Holder, the alleged victim of sexual assault.

This court held in Washington v. State¹ that “[t]he trial judge should order [a psychiatric] examination if the defendant presents a compelling reason for such an examination.”² Nevertheless, this court upheld the trial court’s denial of post-trial motions for psychological examination of the complainant to determine whether she was a pathological liar.³ Although the complainant admitted to perjury, the district court found that her testimony was sufficiently corroborated, she

¹96 Nev. 305, 608 P.2d 1101 (1980).

²Id. at 307, 608 P.2d at 1102.

³Id. at 307-08, 608 P.2d at 1103.

had been subjected to extensive cross-examination, and that it was reasonable for the judge to determine that an examination was not necessary.⁴ Thus, the district court exercised its discretion in determining that the defendant had not demonstrated a compelling need for the examination.

Similarly, in Colley v. State,⁵ this court upheld the district court's denial of a defense motion for an order appointing a psychiatrist to examine both the adult victim and an "amply corroborated" prosecution witness.⁶ Colley is particularly noteworthy because, unlike most cases where victim examination has been at issue, the victim was an adult rather than a child. Thus, the district court judge has discretion in cases involving both child and adult complainants.⁷

Many of the cases that have dealt with the issue of court-mandated psychiatric examinations of victims have involved defendants that requested the examinations to question the credibility or competency of the complainant.⁸ Here, the request is being made not only to question the credibility and competency of the complainant, but also because

⁴Id.

⁵98 Nev. 14, 639 P.2d 530 (1982).

⁶Id. at 16-17.

⁷Id. See also Koerschner v. State, 116 Nev. 1111, 13 P.3d 451 (2000).

⁸See, e.g., Allen v. State, 283 N.E.2d 557 (Ind. Ct. App. 1972); Kitchen v. State, 607 S.W.2d 345 (Ark. 1980); State v. Manning, 291 A.2d 750 (Conn. 1971).

Holder's credibility and competency are indicative of her capacity to consent — an essential element of the charged offense of sexual assault.

Capacity to consent was the basis for a requested psychiatric examination in State v. Doremus.⁹ There, a Nebraska appellate court considered whether the trial court erred in denying a defendant's motion for independent psychiatric examination of a victim where the victim was moderately retarded.¹⁰ A fundamental issue at trial was whether the victim had the requisite capacity to resist or consent to physical contact.¹¹ The state had been permitted by the trial court to offer expert evidence that the victim lacked that capacity.¹² The Nebraska Court of Appeals held that the court abused its discretion in denying the defendant's motion for independent psychiatric examination.¹³

The New Mexico Court of Appeals considered compelled pre-trial examination of a victim in a case where mental anguish was an element of the charged offense. In State v. Garcia,¹⁴ the trial court had denied a defendant's request for pre-trial examination of the victim.¹⁵ The denial was based on the trial judge's assertion that he lacked authority to

⁹14 N.W.2d 649 (Neb. Ct. App. 1994).

¹⁰Id. at 651-52.

¹¹Id. at 652.

¹²Id. at 650-51.

¹³Id. at 654.


¹⁴613 P.2d 725 (N.M. Ct. App. 1980).

¹⁵Id. at 726.

order such an examination.¹⁶ The appellate court disagreed, noting that the examination was necessary to prove the existence of an essential element of the charged offense.¹⁷

Hough has demonstrated a compelling reason for such an examination — to refute the existence of an essential element of the charged offense. Accordingly, we

ORDER the petition GRANTED AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the district court to allow an independent psychological examination.


_____, J.
Leavitt


_____, J.
Becker

cc: Hon. Michael A. Cherry, District Judge
Michael J. Amador Sr.
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

¹⁶Id. at 727.

¹⁷Id. at 729.

SHEARING, J., dissenting:

I would deny the petition for a writ of mandamus. A writ of mandamus is an extraordinary remedy only available to compel the performance of an act which the law requires as a duty resulting from an office, trust, or station.¹ This court has long held that a writ of mandamus may be used to compel a board or tribunal to exercise judgment and make a decision, when the court has a clear, present legal duty to act, but should not be used to correct errors where action has already been taken.² Mandamus will not lie to control discretionary action.³

In this case the district court has made a determination. In Koerschner v. State, this court reaffirmed the position that the decision to grant a psychological examination of a victim is within the sound discretion of the district court.⁴ The overriding judicial question is whether a compelling need exists for such an examination.⁵ It is for the district court to determine whether there is a compelling need, not for this court.

Hough has not shown a compelling need for a psychiatric examination. I believe it to be an outrage that the

¹NRS 34.160, Harvey L. Lerer, Inc. v. District Court, 111 Nev. 1165, 1168, 901 P.2d 643, 645 (1995).

²State ex rel. Hetzel v. Board of Commissioners of Eureka County, 8 Nev. 309, 310 (1873); Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981).

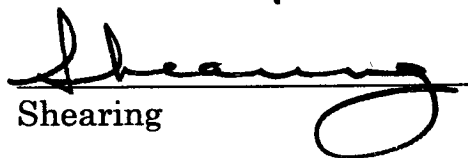
³Round Hill, 97 Nev. at 603, 637 P.2d at 536.

⁴116 Nev. 1111, 1115, 13 P.3d 451, 454 (2000).

⁵Id., at 1116, 13 P.3d at 455.

victim should be required to undergo a psychiatric examination in this situation. She has testified extensively about her psychological problems and Hough has been provided the names and reports of all doctors who had previously treated her. Hough was a licensed marriage and family therapist. The victim was referred to him for treatment because of the psychological problems she was having. He proceeded to diagnose and "treat" her, and, in the process, allegedly violated her trust and sexually assaulted her. I can see no reason why he should be allowed to further subject her to examination.

The State has made a compelling argument that the court has no authority to grant a psychological examination of the victim. I would be inclined to deny the writ on that basis, but that is a decision that should be made by the en banc court. For the purposes of this petition, it should be denied for all of the traditional reasons we deny extraordinary writs.

 J.
Shearing