

IN THE SUPREME COURT OF THE STATE OF NEVADA

GEORGE KIM MITCHELL,
Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK, AND THE HONORABLE
DONALD M. MOSLEY, DISTRICT
JUDGE,

Respondents,

and

THE STATE OF NEVADA,
Real Party in Interest.

No. 40974

FILED

NOV 21 2003

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

ORDER GRANTING PETITION

In his petition for prohibition or mandamus,¹ George Kim Mitchell requests that we order the district court to dismiss charges of first-degree kidnapping, robbery and extortion now pending before that tribunal. These charges, which were previously the subject of a Criminal Information filed in the district court that was dismissed before trial, are contained in an indictment along with new charges of sexual assault and lewdness. We grant petitioner relief and instruct the district court to dismiss the charges of first-degree kidnapping, robbery, and extortion set forth in the indictment.

¹See NRAP 21(a).

FACTUAL AND PROCEDURAL BACKGROUND

Following petitioner's arrest on July 1, 2000, the State filed a criminal complaint in justice court charging him with first-degree kidnapping, robbery, and extortion. A magistrate bound petitioner over for trial in district court on the three charges, the State filed a Criminal Information reflecting the charged offenses, and the district court arraigned petitioner and set the matter for trial. Thereafter, petitioner filed numerous applications for trial continuances, arising mainly from disagreements with his appointed counsel. None of the delays were occasioned by any action or inaction by the prosecution, until the actual trial date, June 19, 2001.

At the time set for the commencement of trial, the State sought a continuance, stating it had received new information from the victim regarding factually-related sexual assaults allegedly perpetrated by petitioner and wanted time to file additional charges and join them in the Information. This was in part designed to spare the victim an additional appearance before a second trial jury on the new charges. Petitioner objected and the district court denied the continuance because petitioner had been in custody for a year and based upon its finding, the State's purpose for the continuance, to file new charges, did not constitute good cause. The State informed the district court it would not precede without the new charges. After a rather extended and heated colloquy, the district court dismissed the Information and ordered petitioner released.

Shortly thereafter, the State presented evidence to a grand jury on the sexual assault charges, as well as the first-degree kidnapping, robbery and extortion charges. The State filed an indictment in the district court on June 27, 2001, charging petitioner with thirteen counts of

criminal misconduct: six counts of sexual assault with use of a deadly weapon, four counts of open or gross lewdness, first-degree kidnapping with use of a deadly weapon, robbery with use of a deadly weapon, and extortion with use of a deadly weapon. The indictment was prosecuted before another department of the Eighth Judicial District. During the prosecution of the indictment, petitioner requested and received two more continuances and filed additional applications for relief, which were the subject of three prior proceedings before this court. The previous appellate proceedings are outlined in pertinent part below.

Petitioner's first appeal to this court alleged that the district court erred in denying his motion to dismiss the indictment and release him from custody. We dismissed that appeal on jurisdictional grounds by unpublished order.² Petitioner also filed a motion to transfer the indictment case back to the judicial department that resolved the original case in district court.³ We likewise dismissed petitioner's appeal from the district court's denial of that application.⁴ On January 31, 2002, petitioner filed a pre-trial petition for writ of habeas corpus claiming the State exercised "conscious indifference" to his procedural rights by refusing to proceed with the June 19, 2001 trial. At the evidentiary hearing on petitioner's pre-trial writ, the district court found that petitioner did not suffer any prejudice to his defense based on the State's motion for

²Mitchell v. State, Docket No. 38150 (Order Dismissing Appeal, October 2, 2001).

³From department fourteen to department eight of the Eighth Judicial District.

⁴Mitchell v. State, Docket No. 39059 (Order Dismissing Appeal, March 13, 2002).

continuance. Additionally, the district court found that the State did not demonstrate “conscious indifference” because it did not exercise any impropriety in making its motion. Based on the totality of the circumstances, the district court denied petitioner’s writ and allowed the case to proceed. Petitioner appealed. We dismissed this third appeal on jurisdictional grounds, again via unpublished order.⁵

The district court set a trial date for March 31, 2003. Petitioner now petitions this court for either a writ of prohibition or a writ of mandamus, alleging the district court should dismiss the reinstated charges of first-degree kidnapping, robbery and extortion. The district court vacated the trial date pending this court’s decision on petitioner’s writ application.

DISCUSSION

“A writ of mandamus is available to ‘compel the performance of an act [that] the law [requires] as a duty resulting from an office, trust or station.’”⁶ Under NRS 34.320, a writ of prohibition is the counterpart of the writ of mandate and “[i]t arrests the proceedings of any tribunal, corporation, board or person exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person.” Neither mandamus nor prohibition will issue when the petitioner has a plain, speedy and adequate remedy in the

⁵Mitchell v. State, Docket No. 39724 (Order Dismissing Appeal, October 8, 2002).

⁶Kirkpatrick v. Dist. Ct., 118 Nev. 233, 240, 64 P.3d 1056, 1058 (2003) (quoting NRS 34.160).

ordinary course of law.⁷ Additionally, prohibition and mandamus are extraordinary remedies, and whether a petition will be entertained is entirely within the discretion of this court.⁸

In the present case, petitioner requests that this court grant his petition because the State violated his procedural rights. Specifically, petitioner asserts the State exercised “conscious indifference” in asking for a continuance at the outset of trial and then refusing to proceed when the district court denied the application, which prejudiced petitioner because he was ready to proceed with trial.⁹ Therefore, petitioner argues the State should not be able to proceed against him on the charges of first-degree kidnapping, robbery and extortion dismissed by the first district court judge. The State argues that petitioner’s numerous continuance motions caused delays in the case, and the State did not request the continuance in bad faith or with “conscious indifference” to petitioner’s rights.

We have held the State is barred from a second prosecution where the district court has dismissed the original proceeding due to the prosecutor’s willful failure to comply with the procedural rules, or

⁷See NRS 34.170.

⁸Barnes v. District Court, 103 Nev. 679, 681, 748 P.2d 483, 485 (1987).

⁹There was some dispute over this at the hearing during which the original Criminal Information was dismissed. Counsel for the defense announced ready, but the deputy district attorney related a conversation with opposing counsel earlier in the day in which defense counsel was purported to state that she was not ready to try the case. The district court was entitled to accept defense counsel’s representation in open court, although the State legitimately called it into question.

conscious indifference to procedural rules affecting a defendant's rights.¹⁰ In McNair v. Sheriff, we concluded that it is the duty of the district court to determine whether the prosecutor's behavior shows "willful failure" or "conscious indifference" and the prosecutor bears the burden of justifying delay when he moves for a continuance.¹¹

We conclude that, despite petitioner's responsibility for numerous delays in the case, the State was obligated to proceed to trial on June 19, 2001, given petitioner's incarceration for over one year awaiting trial on the then pending charges of first-degree kidnapping, robbery, and extortion. Additionally, we conclude the State's failure to proceed prejudiced the petitioner's right to a speedy trial under Hill v. Sheriff,¹² where we held the State must make a motion for continuance in good faith and not for delay. The State was ready to try the three original charges and simply refused to proceed in any respect absent vacation of the trial; *i.e.*, it refused to proceed only in the wake of the district court's denial of the State's motion to continue.¹³ We stress that the State's motion to continue was not sought for non-readiness on the original charges. Accordingly, the State demonstrated a clear disregard of procedural rules and failed to meet its burden to justify the delay in proceeding. This

¹⁰See Sheriff v. Simpson, 109 Nev. 430, 433, 851 P.2d 428, 431 (1993); McNair v. Sheriff, 89 Nev. 434, 438, 514 P.2d 1175, 1177 (1973).

¹¹89 Nev. at 438, 514 P.2d at 1177.

¹²85 Nev. 234, 236, 452 P.2d 918, 919 (1969).

¹³Which we now stress was within its exercise of proper discretion.


pattern of events thus constitutes conscious indifference to petitioner's rights.¹⁴


In light of the above, we grant petitioner's writ as to the first-degree kidnapping, robbery, and extortion charges.

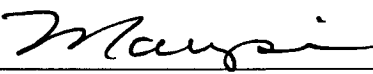
CONCLUSION

The State's refusal to proceed against petitioner on the first-degree kidnapping, robbery and extortion charges prejudiced petitioner. Therefore, we grant petitioner's writ as to those charges. Accordingly, we

ORDER the petition GRANTED AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the district court to dismiss the charges of first-degree kidnapping, robbery, and extortion against petitioner.


_____, J.
Rose


_____, J.
Leavitt


_____, J.
Maupin

¹⁴In so ruling, we recognize that the motion to continue to protect the victim was well intentioned. However, the refusal to proceed to trial when ready, and when the district court committed no abuse of discretion in denying a continuance, was uncalled for. The explanation that the defense might, at some time in the future, assert double jeopardy at a separate trial on the new charges was without merit. Again, while the State was attempting a salutary gesture to the alleged victim, it should have proceeded to trial upon denial of its motion.

cc: Hon. Donald M. Mosley, District Judge
Clark County Public Defender
Clark County District Attorney David J. Roger
Clark County Clerk