

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JESSICA VITALE,
Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK; AND THE HONORABLE
CAROLYN ELLSWORTH, DISTRICT
JUDGE,

Respondents,

and

THE STATE OF NEVADA,
Real Party in Interest.

No. 74123

FILED

DEC 01 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

JESSICA VITALE,
Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK; AND THE HONORABLE
CAROLYN ELLSWORTH, DISTRICT
JUDGE,

Respondents,

and

THE STATE OF NEVADA,
Real Party in Interest.

No. 74558 ✓

ORDER DENYING PETITIONS

Docket No. 74123:

Docket No. 74123 is an original petition for a writ of mandamus or, in the alternative, a writ of prohibition seeking an order requiring the district court to order the district attorney to disclose who at the district attorney's office obtained Jessica Vitale's medical records without her consent or a court order and what legal authority was used by that person.

Because the petition Vitale filed in Docket No. 74558 indicates she now knows who sought her medical records and the legal authority upon which that person asserts they relied, we conclude our intervention by way of extraordinary writ is not warranted, and we deny the petition in Docket No. 74123. See NRS 34.160; NRS 34.320.

Docket No. 74558:

Docket No. 74558 is an original petition for a writ of mandamus or, in the alternative, a writ of prohibition seeking an order requiring the district court to vacate its discovery order and disallow the use of Vitale's medical records at trial, and to impose the sanction of dismissal of the information or, alternatively, removal of the district attorney from the prosecution.

A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust, or station, NRS 34.160, or to control a manifest abuse or arbitrary or capricious exercise of discretion, *Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981). A writ of prohibition may issue to arrest the proceedings of a district court exercising its judicial functions, when such proceedings are in excess of the jurisdiction of the district court. NRS 34.320. Neither writ will issue if petitioner has a plain, speedy and adequate remedy in the ordinary course of law. NRS 34.170; NRS 34.330. Petitions for extraordinary writs are addressed to the sound discretion of the court, see *State ex rel. Dep't of Transp. v. Thompson*, 99 Nev. 358, 360, 662 P.2d 1338, 1339 (1983), and the "[p]etitioner[] carr[ies] the burden of demonstrating that extraordinary relief is warranted," *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).

The record before this court indicates on March 28, 2017, the Clark County District Attorney's Office faxed a subpoena from the Clark County grand jury commanding the University Medical Center (UMC) custodian of records to appear before the grand jury on April 4, 2017, and to bring "any and all medical records for Jessica Vitale . . . treated on 4/7/2013 to present."¹ A Custodian of Medical Records Certification was issued the next day indicating the complete records for Vitale were provided pursuant to the subpoena.² Although the subpoena did not identify the statute under which the records were being sought, the certification indicated the records were released in accordance with NRS 629.061. Vitale was ultimately charged by way of information with driving under the influence resulting in substantial bodily harm.

Several months later, Vitale filed a discovery motion requesting the district court to order the State to explain how it obtained her medical records. The State opposed the motion and Vitale filed a reply. Vitale subsequently filed an original petition for a writ of mandamus in this court seeking the same relief. *See Vitale v. Dist. Court*, Docket No. 74123.

Shortly thereafter, Vitale filed a motion in the district court seeking dismissal of the information or disqualification of the district attorney from prosecuting her based on allegations the district attorney illegally obtained, disseminated, and used her medical records without her consent. Vitale argued NRS 629.061 did not authorize the release of her medical records. The State opposed the motion, arguing NRS 629.061 was

¹It appears Vitale's case was continued in justice court for more than three years.

²In an opposition filed in the district court, the State asserted it provided the medical records to Vitale's counsel on April 5, 2017.

not pertinent because it sought release of the records under NRS 629.065. Vitale filed a reply to the opposition. Although Vitale informs this court the district court found the entire medical records were discoverable by the district attorney and can be used at trial, Vitale does not inform this court of the basis for the court's ruling.

On November 30, 2017, Vitale filed the instant petition and an emergency motion to stay her trial. Vitale argues the district court's discovery ruling allowing the district attorney to use her privileged and confidential entire medical treatment records at trial is a manifest abuse of discretion. Vitale asserts the district attorney's policy of obtaining privileged and confidential entire medical treatment records by subpoena, and making the subpoena return to the district attorney instead of the clerk of the court with the records under seal violates NRS 52.335. Vitale also argues the release of her medical records under either NRS 629.061 or NRS 629.065 was improper.

Initially, we note Vitale can continue to challenge the admission of her medical records at trial and she can challenge the district court's discovery and evidentiary rulings on appeal in the event she is convicted. *See* NRS 177.015(3); NRS 177.045. Therefore, she has a plain, speedy, and adequate remedy at law, and this court's intervention by way of an extraordinary writ is not warranted. Moreover, even if we agreed with Vitale's assertion that writ review is warranted because the issues presented involve the release and use at trial of medical records, for the reasons discussed below, we conclude Vitale has failed to demonstrate our intervention is warranted.

We agree with Vitale that her medical records could not be released to either the district attorney or the grand jury under NRS 629.091.

However, release of her medical records to the district attorney could have been proper under NRS 629.065. NRS 629.065(1) requires a healthcare provider, upon request, to "make available to a law enforcement agent or district attorney the health care records of a patient which relate to a test of the blood, breath or urine of the patient if" the patient is suspected of driving while under the influence and the records would aid in the related investigation. Further, patient records obtained under NRS 629.065 can be used in a criminal proceeding against the patient. NRS 629.065(3).

Pointing to the language in the subpoena requesting "any and all medical records" and the custodian of records' certification stating the medical records were released in accordance with NRS 629.061, Vitale argues the record demonstrates the medical records were requested and released under NRS 629.061. We do not agree the record precludes a finding that the documents were requested pursuant to NRS 629.065. Although the custodian of records' certificate indicates the medical records were released in accordance with NRS 629.061, we note the certificate appears to be issued on a form order and the subpoena did not identify the statute under which the records were sought.

Vitale also argues NRS 629.065 does not authorize a law enforcement agent or the district attorney to receive all of a person's medical treatment records. NRS 629.065(1) requires the healthcare provider to limit the inspection of the records to those portions that "pertain to the presence of alcohol or a controlled substance, chemical, poison, organic solvent or another prohibited substance," to the extent possible. Although the release of the medical records must be limited to the extent possible, release of all of the patient's medical records would be permissible if they all fell within the purview of the statute.

Because the subpoena demanded the custodian of records to bring or provide "any and all medical records" and did not specify the statute under which the records were sought, the district attorney potentially sought more medical records than he was authorized to receive and the custodian of records could not have known of the statutory limitations he or she was subject to and may have released more medical records than were permitted by NRS 629.065(1). However, we conclude Vitale has failed to demonstrate our intervention based on this argument is warranted. Specifically, we note the record before this court does not include a copy of the medical records released to the district attorney and Vitale does not argue the medical records that were released do not "pertain to the presence of alcohol or a controlled substance, chemical, poison, organic solvent or another prohibited substance." NRS 629.065(1).

Although we conclude Vitale has failed to demonstrate our intervention is warranted, we are troubled by the subpoena's broad demand for her medical records and the lack of citation to statutory authority for the release of those records. We therefore urge the district attorney to ensure that all future subpoenas that include a demand for medical records under NRS 629.065(1) be carefully drafted to prevent the potential for improper disclosure of medical records.

Vitale also argues NRS 629.065 did not apply in her case because the hospital never tested her blood, rather it was the police who did the testing. Vitale has not demonstrated our intervention based on this argument is warranted. The fact the police tested Vitale's blood did not mean the hospital did not also test her blood, or perform other tests on her breath or urine. Vitale has not provided this court with any documentation to support her assertion that her blood was not tested by the hospital, nor

does she assert the records released do not "relate to a test of the blood, breath or urine." NRS 629.065(1).

Finally, Vitale argues issuance of the subpoena by the district attorney with a return to the district attorney or the grand jury violated NRS 52.335. We conclude our intervention based on this argument is not warranted because NRS 52.335 does not appear to be applicable. NRS 52.335(1) states that it applies to copies of medical records delivered pursuant to NRS 52.325, which pertains to medical records released pursuant to a subpoena issued by the court. NRS 629.065(1), however, appears to permit the district attorney to request the records directly from the health care provider. And, unlike NRS 52.335, which, with some exceptions, requires the medical records to be kept sealed in the custody of the clerk, NRS 629.065(2) requires the records to be made available for inspection at a place within the depository and requires the healthcare provider to provide a copy of the records to the law enforcement agent or district attorney upon request and payment for the copy. Further, "[a] prosecuting attorney may issue subpoenas subscribed by the prosecuting attorney for witnesses within the State, in support of the prosecution or whom a grand jury may direct to appear before it, upon any investigation pending before the grand jury." NRS 174.315(1). And a subpoena may command the person to whom it is directed to produce documents. NRS 174.335(1).

Because NRS 629.065 authorizes the district attorney to request, and the healthcare provider to release, at least some medical records and permits the use of those records at a criminal trial, and because Vitale has not demonstrated her medical records that were released do not fall within the purview of NRS 629.065, we conclude she has failed to

demonstrate the district court manifestly abused its discretion by ruling the district attorney can use her medical records at trial. Therefore, we conclude Vitale has failed to demonstrate this court's intervention by way of extraordinary writ is warranted, and we

ORDER the petitions DENIED.³

Silver, C.J.
Silver

Tao, J.
Tao

Gibbons, J.
Gibbons

cc: Hon. Carolyn Ellsworth, District Judge
Law Offices of John G. Watkins
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

³In light of this order, we deny Vitale's emergency motion for a stay.