

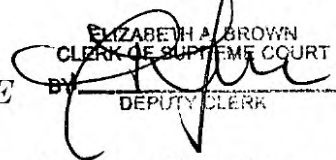
IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
SHELTON ALPHONSE,
Respondent.

No. 87201

FILED

SEP 22 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting, in part, a pretrial petition for a writ of habeas corpus and dismissing certain counts charged against respondent. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

Respondent Shelton Alphonse was charged with 19 counts of various crimes, including first-degree kidnapping with the use of a deadly weapon, robbery with the use of a deadly weapon, battery with intent to commit robbery, assault with a deadly weapon, ownership or possession of a firearm by a prohibited person, possession of a credit or debit card without the cardholder's consent, and possession of a document or personal identifying information. One week before the justice court preliminary hearing, Alphonse filed a notice of nonappearance pursuant to *State v. Sargent*, 122 Nev. 210, 214, 128 P.3d 1052, 1054 (2006) (holding that NRS 178.388 does not require a defendant's presence at the preliminary hearing and that, as a result, the justice court lacks authority to compel the defendant to appear). The State then subpoenaed Alphonse to appear, emailing the subpoena to the detention center where Alphonse was being held but not notifying Alphonse's counsel. At the preliminary hearing, counsel's objections to Alphonse's presence in the courtroom were overruled, and two of the witnesses made in-court identifications of Alphonse as the perpetrator of certain of the alleged crimes.

Alphonse was bound over for trial in the district court, where he filed a pretrial habeas petition asserting that the subpoena was improper and that, under *Sargent*, the justice court otherwise lacked jurisdiction to require his presence. The district court issued the writ, to which the State failed to file a return. At the hearing on the habeas petition, the district court declined to treat the State's failure to file a return as an admission of the merits and instead reviewed the matter substantively, concluding that the justice court clearly erred in forcing Alphonse to appear at the hearing, based on *Sargent* and NRS 178.388, which error was exacerbated by the justice court's failure to allow counsel time to file a motion to quash or otherwise respond to the subpoena. As the in-court identifications were made based on Alphonse's improper presence in court, while he was wearing jail clothes and in chains, and as the witnesses otherwise recounted difficulties in describing their surroundings during the incidents, the court found that not only were the identifications tainted, but so would be any identifications by those witnesses at a future trial, and dismissed the 9 counts related to the tainted identifications.

The district court thereafter allowed the State to raise its arguments against the writ in a motion for reconsideration. After another hearing, the court denied reconsideration, again noting its concerns with the failure to notify counsel of the subpoena but determining that, even if the subpoena was proper, the justice court lacked jurisdiction to bring Alphonse into the courtroom after counsel's objection because the State made no showing that it could not identify Alphonse by other means, per *Sargent*. The State appealed.

In *Sargent*, this court concluded that, despite the State's desire to use an in-court identification to establish identity, the justice court lacked authority to compel a defendant's presence. 122 Nev. at 215-16, 128 P.3d at 1055-56. Explaining that "there is no reason why the State cannot use

an alternate form of identification such as the use of photographic evidence or a police line-up,” the court went on to note that, “[i]f the State must have the defendant’s presence at the hearing, there is no reason why the State cannot subpoena him to appear.” *Id.* at 215-16, 128 P.3d at 1055. Here, noting the State’s failure to notify counsel of the subpoena, the justice court’s failure to allow counsel time to challenge the subpoena, and the State’s failure to assert why other means could not be used to establish identity, the district court ultimately concluded that the justice court improperly compelled Alphonse’s presence in the courtroom, such that the in-court identifications were tainted and habeas relief was appropriate. Having reviewed the record on appeal, as well as the requested transcripts,¹ *see* NRS 34.575(3), we conclude that the district court did not commit substantial error in granting Alphonse habeas relief under these circumstances. *See Sheriff v. Shade*, 109 Nev. 826, 828, 858 P.2d 840, 841 (1993) (reviewing a district court’s determination regarding a pretrial habeas petition for substantial error); *Hill v. State*, 124 Nev. 546, 550, 188 P.3d 51, 53 (2008) (reviewing for procedural error). We therefore

ORDER the judgment of the district court AFFIRMED.



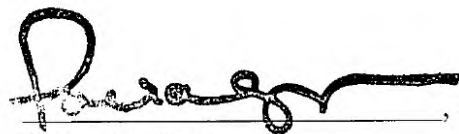
, J.

Herndon



, J.

Lee



, J.

Parraguirre

¹On the day it filed its notice of appeal, the State requested the preparation of transcripts from the August 2, 16, 23, and 28 hearings. We have considered those transcripts, which were attached to its reply in support of its motion to stay, as well as the district court’s September 7, 2023, order denying the State’s motion for reconsideration.

cc: Hon. Kathleen E. Delaney, District Judge
Attorney General/Carson City
Clark County District Attorney
Clark County Public Defender
Eighth District Court Clerk