IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LARRY GENE TILCOCK,
Petitioner,
vs.
THE STATE OF NEVADA; THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND CLARK COUNTY DISTRICT ATTORNEY,
Respondents.

No. 86849-COA

FILED

DEC 08 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER GRANTING PETITION

In this original petition for a writ of mandamus, Larry Gene Tilcock challenges a vexatious-litigant determination and pre-filing injunction order entered in district court case number 98-C-149186.

Tilcock was determined to be a vexatious litigant in 2014, and the district court entered a pre-filing injunction. The pre-filing injunction: (1) enjoins Tilcock, or anyone acting on his behalf, from filing any action that arises out of or materially involves his conviction in this case "and/or his resulting custody status" without first obtaining leave of the court; (2) orders the clerk of the Eighth Judicial District Court to refuse any filings except for a petition for permission to file court papers unless those filings are accompanied by a district court order granting Tilcock leave to file; (3) explains that proposed filings will not be set for hearing but transmitted to the chambers for screening of the merits; (4) explains that leave will be granted when the proposed filing meets five specific criteria; and (5)

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provides that if no action is taken on a proposed filing within 30 days, the petition for leave to file is deemed rejected without the need for judicial action unless the court orders otherwise.

A challenge to a vexatious-litigant determination and pre-filing injunction may be raised in an original petition for a writ of mandamus. *See Jones v. Eighth Judicial Dist. Court*, 130 Nev. 493, 497, 330 P.3d 475, 478 (2014). In evaluating the district court's exercise of discretion, this court considers: (1) whether the petitioner received reasonable notice of and an opportunity to oppose the vexatious-litigant determination and pre-filing injunction; (2) whether the district court has created an adequate record for review of the vexatious finding and whether there were less onerous sanctions than a pre-filing injunction to curb repetitive and abusive activities; (3) whether the actions identified by the district court at step two show the petitioner to be vexatious, which requires a finding that the filings were without arguable factual or legal basis or were filed with the intent to harass; and (4) whether the restrictive order is narrowly tailored to address the specific problem and sets forth an appropriate standard by which any future filings will be measured. *Id.* at 499-500, 330 P.3d at 479-80. Because the vexatious-litigant determination is discretionary, this court must determine whether the district court arbitrarily or capriciously exercised or manifestly abused its discretion. *Id.* at. 500-01, 330 P.3d at 480. We conclude that the district court's order does not support a vexatious-litigant determination.

The order finding Tilcock to be vexatious failed to adequately identify the specific filings that were without arguable factual or legal basis

or which were filed with the intent to harass. It is insufficient to simply list every filing by a litigant in making a vexatious-litigant determination. As noted in *Jones*, the purpose of the vexatious finding and any subsequent restrictive order "must be to curb vexatious litigation, not just litigiousness." *Id.* at 500, 330 P.3d at 480. In support of its determination, the district court's order merely lists Tilcock's prior pleadings, indicates each was denied, and indicates the denials were affirmed on appeal. This bare list suggests the district court improperly conflated frivolous claims with unsuccessful claims. Under these circumstances, we conclude that the vexatious-litigant determination was not supported by an adequate record.

We further conclude that the sanction imposed, the pre-filing injunction, was not narrowly drawn in this case. *Jones* specifically requires that any restrictive order be "narrowly drawn to address the specific problem encountered" and that the district court consider any sanctions available that are less onerous than a restrictive order. *Id.* (quoting *Jordan v. State ex rel. Dep't of Motor Vehicles & Pub. Safety*, 121 Nev. 44, 61-62, 110 P.3d 30, 43-44 (2005)). For example, if the problem is the repeated filing of the same claim or type of claim, *Jones* states the injunction should be limited to pleadings raising such claims or types of claims. *Id.* Or if the problem is that a litigant has filed abusive petitions challenging the judgment of conviction, the injunction should bar only abusive challenges to the judgment of conviction. Not only did the district court's order fail to support its determination that Tilcock was vexatious, but it also failed to identify any less restrictive alternatives or find that none were available.

While the restrictive order did provide an adequate measure for how future filings would be considered, the pre-filing injunction in this case included troubling language that "[a]ny Petition for Leave of Court to Permit Filing of Court Papers will be deemed rejected, without the need for judicial action, on the 30th day after the date of each filing, unless the Court orders otherwise." This is problematic because a litigant or reviewing court would have no means of ascertaining whether the district court received the document, considered it, or exercised its discretion regarding the filing of a proposed document. And the failure to require an affirmative ruling unfairly impedes litigants such as Tilcock, who also seek an order directing the district court to file a pro se petition for a writ of habeas corpus that they claim they submitted, from meeting their burden when seeking extraordinary relief in the appellate courts to establish that they have in fact submitted the pleading for filing. *See Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004) ("Petitioners carry the burden of demonstrating that extraordinary relief is warranted."). The district court must provide some manner of informing the litigant and creating a record that a document was rejected for filing.

Finally, the State argues Tilcock's petition should be dismissed based upon the equitable doctrine of laches. To determine whether laches should bar Tilcock's petition, "we must determine whether (1) there was an inexcusable delay in seeking the petition; (2) an implied waiver arose from petitioners' knowing acquiescence in existing conditions; and[ ] (3) there were circumstances causing prejudice to respondent." *Buckholt v. Second*

Judicial Dist. Court, 94 Nev. 631, 633, 584 P.2d 672, 674 (1978), *overruled on other grounds by Pan*, 120 Nev. 222, 88 P.3d 840.

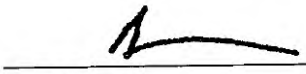
The State argues that Tilcock has not demonstrated justifiable delay, an implied waiver arose from his knowing acquiescence, and the State would be prejudiced if it had to retry him. We are not persuaded. First, laches is an affirmative defense, and the State, not Tilcock, bears the burden of establishing it. *See Harris v. State*, 130 Nev. 435, 440-41, 329 P.3d 619, 623 (2014). Second, the State's argument that it would be prejudiced is limited only to the possibility of having to retry Tilcock, which would only be a possibility in one type of potential pleadings: a postconviction petition for a writ of habeas corpus challenging the validity of a conviction. *See* NRS 34.724(2)(b) (providing a postconviction habeas petition is the exclusive vehicle in which to challenge the validity of a conviction). The State does not claim it would be prejudiced if Tilcock were challenging, for example, the computation of time he has served, the correction of a clerical error, or that his sentence is illegal, yet pleadings raising any of these claims are also precluded by the pre-filing injunction. Additionally, this asserted prejudice does not arise from any delay in challenging the pre-filing injunction and, thus, does not support the State's request to dismiss Tilcock's petition. Accordingly, we deny the State's request to dismiss the petition based upon the equitable doctrine of laches.

For the foregoing reasons, we conclude the district court manifestly abused its discretion in determining Tilcock was a vexatious litigant and by entering the pre-filing injunction against him. The district court must vacate its finding and injunction and file any postconviction

petition that Tilcock has submitted for filing. However, nothing in this order should be read to preclude the district court from conducting further vexatious-litigant proceedings and imposing sanctions that meet the stringent requirements of *Jones*. Accordingly, we

ORDER the petition GRANTED AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the district court to VACATE ITS VEXATIOUS-LITIGANT FINDING AND PRE-FILING INJUNCTION.

_____, C.J.
Gibbons



_____, J.
Bulla

_____, J.
Westbrook

cc: Chief Judge, Eighth Judicial District Court
Larry Gene Tilcock
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk