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IN THE SUPREME COURT OF THE STATE OF MONTANA

No. OP 24-0087

CLARK RYAN RAMSEY,

Petitioner,

v.

YELLOWSTONE COUNTY JUSTICE COURT,
HON. J. COLLEEN HERRINGTON, Presiding,

Respondent.

**STATE'S RESPONSE TO PETITION FOR
WRIT OF SUPERVISORY CONTROL**

In compliance with this Court's February 15, 2024 Order, and Rule 14(3) of the Montana Rules of Appellate Procedure, the State of Montana responds to Petitioner Clark Ryan Ramsey's Petition for Writ of Supervisory Control (Petition).

BACKGROUND

The State filed a motion for leave to file a complaint and a supporting affidavit (Motion for Leave) alleging that Ramsey committed forgery and solicitation of the misuse of confidential criminal justice information (CCJI), both misdemeanors, based on the manner in which he acquired CCJI about a victim in a criminal case in which Ramsey represented the defendant. (Resp't's App. A.) In the motion, the State explained that Ramsey represented Justin Kalina in a case in which Jessica Foote was an associate and witness (Case 1). (*Id.* at 2.) Law enforcement also investigated an unrelated allegation Kalina made against Foote (Case 2). (*Id.*)

The State alleged that during Ramsey's representation of Kalina, Ramsey requested information from the prosecutor in Case 1 that had been gathered in Case 2 and could be exculpatory in Case 1. (Resp't's App. at 2.) In response, the prosecutor told Ramsey that she did not believe the information from Case 2 was exculpatory but that she would send Ramsey the report on the investigation when it was completed. (*Id.* at 3.) The prosecutor later sent Ramsey the report. (*Id.*) It indicated that a cell phone extraction had been done on Foote's phone, which contained text messages between Kalina and Foote. (*Id.*)

Ramsey did not contact the prosecutors involved in Case 1 or 2 to obtain the cell phone download. (*Id.*) Instead, Ramsey submitted an altered version of a form that had been created by the Yellowstone County Sheriff's Office to facilitate

the dissemination of CCJI to defendants or their attorneys in pending cases. (*Id.*) The document is labeled “REQUEST FOR COPIES.” (Resp’t’s App. E, Ex. 1-2.) The form contains a section labeled “ACKNOWLEDGMENT OF RECEIPT OF CONFIDENTIAL CRIMINAL JUSTICE INFORMATION UNDER MCA SECS 44-5-103, 303.” (Resp’t’s App. A at 5; Resp’t’s App. E, Exs. 1-2.) Below that, the form states, “(This information will only be provided to Defendants in pending Court actions or Attorneys who have been retained to represent a Defendant in a Court action.).” (*Id.*) The person signing the form has to acknowledge that they are receiving CCJI and that they are responsible for restricting dissemination of the information. (*Id.*) The form then contains a section requiring the person signing the form to certify, “I AM THE DEFENDANT” or “I REPRESENT THE DEFENDANT.” (Resp’t’s App. A at 4; Resp’t’s App. E, Ex. 1.)

Ramsey changed the language on the form to say “I REPRESENT THE VICTIM,” and then changed the term “defendant” in the subsequent statement to “victim.” (Resp’t’s App. A at 4; Resp’t’s App. E, Ex. 2.) Ramsey filled in the case information for Case 2 even though he did not represent the defendant in that case. (Resp’t’s App. at 4.)

The Motion for Leave explained that the Yellowstone County Evidence Department disseminated the CCJI from Case 2 to Ramsey without noticing the alteration Ramsey made to the form. (Resp’t’s App. A at 5.) The Motion for

Leave stated that, as an attorney representing Kalina, who was the alleged victim in Case 2, Ramsey “may have been authorized” to receive the information he obtained from the Evidence Department. (*Id.* at 6.) But, the State explained that, pursuant to Mont. Code Ann. § 44-5-303, Ramsey would only have been able to receive the CCJI with the permission of the prosecutor. (Resp’t’s App. A at 5-6.) If he had made that request, the prosecutor would have reviewed the records and redacted private information to protect Foote’s privacy. (*Id.* at 6.) Instead of seeking the permission of the prosecutor, Ramsey obtained the CCJI by submitting an altered form to the sheriff’s office. (*Id.*)

The justice court granted the State’s Motion for Leave to file the complaint. (Resp’t’s App. B, C.) Ramsey subsequently filed a motion to dismiss and a brief in support. (Pet’r’s App. A.) The brief in support contained factual assertions, but no evidence was attached to support the assertions. (Pet’r’s App. A, Brief.) Ramsey argued that the charges should be dismissed because the State lacked probable cause. (*Id.* at 4-10.) Ramsey relied on factual assertions that were not supported by any evidence. (*See id.*) Ramsey argued that he was entitled to the evidence he obtained from the altered form under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), and *United States v. Bagley*, 473 U.S. 667, 676 (1985), because it was impeachment evidence. (Pet’r’s App. A, Brief at 8-9.) He argued that he was therefore “authorized by law” to receive the information and could legally receive the CCJI under Mont. Code

Ann. § 44-5-303(1). (Pet’r’s App. A, Brief at 8-9.) Ramsey asserted that the State’s key witness, Barb Marker, had passed away. (*Id.* at 10.) Ramsey also argued that it would be inappropriate for the jury to decide whether he was entitled to seek the information because that is a question of law. (*Id.* at 11-12.)

Ramsey did not raise any argument based on the United States or Montana Constitutions, except for arguing that he had a constitutional right to seek discovery for Kalina’s case. (*See generally* Pet’r’s App. A, Brief.) He also did not raise a prosecutorial misconduct argument. (*Id.*)

In response, the State argued that because the justice court had already found that probable cause existed and granted the State’s Motion for Leave to file the complaint, the State did not bear any further burden until trial. (Resp’t’s App. D at 2-4.) As a result, the State argued that Ramsey’s motion to dismiss should be denied. (*Id.*) The State also explained its position regarding Ramsey’s ability to obtain the CCJI. The State said that Ramsey “may have been entitled to the CCJI at issue[,]” but “the way he went about obtaining it was fraudulent.” (*Id.* at 4-5 (emphasis in original).) The State argued that Ramsey’s ability to access the evidence another way was irrelevant to the question of whether he committed the charged offenses. (*Id.* at 5.) As a result, the State argued that the jury would not need to make a legal determination. (*Id.* at 8-9.) The State also argued that to have obtained the CCJI lawfully, Ramsey needed to request it from the prosecutor,

which he did not do. (*Id.* at 6.) The State argued that Marker's death did not affect the outcome of this case because it was Ramsey's mental state that was at issue, not Marker's. (*Id.* at 8.)

The justice court held a hearing on the motion to dismiss on February 2, 2024. (Pet'r's App. C at 2.) At the start, the court noted that no exhibits were attached to the motion to dismiss, so the court did not have any evidence it could rely on. (*Id.* at 2.) The State explained that it was relying on the facts contained in the affidavit supporting its Motion for Leave. (*Id.* at 3.) The court noted that those were the only facts it could rely on. (*Id.*) Ramsey agreed that the probable cause determination should be made based on the affidavit and stated that the facts that were necessary were sufficiently before the court. (*Id.* at 4.)

Because Ramsey had not provided any evidence, and a finding of probable cause had already been made based on the affidavit, the court denied Ramsey's argument that the case should be dismissed based on a lack of probable cause. (*Id.* at 5.) The court also rejected Ramsey's argument that the jury would be improperly required to make a legal determination, explaining that the jury would only be required to make findings of fact. (*Id.* at 6.)

The court questioned Ramsey about his claim about Marker's death, and the court observed that the argument seemed more appropriate for a motion to suppress than a motion to dismiss. (*Id.* at 6.) Ramsey's counsel stated that he was just

raising the issue because the State might have difficulty admitting their evidence without Marker. (*Id.* at 7.) The court determined that did not establish a ground to dismiss and denied the argument. (*Id.* at 7-8.) Because the court had rejected all of Ramsey's claims in his motion to dismiss, the court denied the motion. (*Id.* at 8.)

The court also discussed a motion to disqualify Ramsey's counsel, Joel Thompson, based on a letter he wrote that the State could use as evidence in the trial. (*Id.* at 8-16.) After discussing the letter, the court reserved ruling on the motion to disqualify until the status hearing the next week. (*Id.* at 16.)

The court held a status hearing on February 9, 2024. (2/9/24 Tr., filed in this matter with this Court on 2/13/24.) At the start of the hearing, the court noted that upon reviewing the record, it had discovered that the Motion for Leave had not been notarized and the exhibits to which it referred had not been attached. (*Id.* at 4.) The court gave the State until 4 p.m. that day to cure the deficiencies. (*Id.* at 4, 6-8.) The court also denied the motion to disqualify Thompson based on the court's conclusion that the letter would only be used as impeachment evidence and the evidence might be admissible through other means. (2/9/24 Tr. at 5-6.)

Later that day, the State moved to amend and filed a notarized version of the Motion for Leave and attached the two versions of the form as exhibits. (Resp't's App. E.) The court allowed the filing of an amended complaint to cure the deficiencies. (Resp't's Apps. F-G.)

Ramsey filed a Petition for Writ of Supervisory Control in response.

ARGUMENT

I. The standard for supervisory control

This Court has supervisory control over all other courts in Montana and may, on a case-by-case basis, supervise another court through a writ of supervisory control. *Tipton v. Mont. Thirteenth Judicial Dist. Court*, 2018 MT 164, ¶ 9, 393 Mont. 59, 421 P.3d 780 (citing Mont. Const. art. VII, § 2(2); M. R. App. P. 14(3)). Supervisory control is an extraordinary remedy, appropriate when the normal appeal process is inadequate, when the case involves purely legal questions, *and*: (1) the lower court is proceeding under a mistake of law and is causing a gross injustice; (2) constitutional issues of statewide importance are involved; or (3) the lower court has granted or denied a motion for substitution of the judge in a criminal case. *Tipton*, ¶ 9. This Court is reluctant to exercise the extraordinary remedy of supervisory control. *Potter v. District Court of the Sixteenth Judicial Dist.*, 266 Mont. 384, 388, 880 P.2d 1319, 1322 (1994).

II. Supervisory control is inappropriate because Ramsey has an adequate remedy on appeal.

This Court does not grant writs of supervisory control where a defendant has an adequate remedy of appeal. *Hartman v. Mont. Nineteenth Judicial Dist.*

Court, OP 20-0017, 2020 Mont. LEXIS 163 (Mont. Sup. Ct. Jan. 15, 2020); *Hubber v. Mont. Second Jud. Dist. Ct., Hon. Robert Whelan*, OP 24-0114, 2024 Mont. LEXIS 203 (Mont. Sup. Ct. Feb. 27, 2024). In *Hartman*, this Court denied a writ of supervisory control in which the petitioner challenged the adequacy of the charging documents. This Court noted that the sufficiency of the charging documents could be reviewed on appeal and concluded that the petitioner had an adequate remedy of appeal. *Hartman*, 2020 Mont. LEXIS 163, * 2.

Like *Hartman*, Ramsey has an adequate remedy of appeal. He argues that the charges against him should be dismissed because his conduct did not constitute the two offenses charged. But, like all defendants, he can challenge the sufficiency of the evidence at trial and, if convicted, on appeal. In the meantime, this Court should not apply the extraordinary remedy of supervisory control to reconsider the justice court's finding that probable cause exists to support the charges.

III. Supervisory control is not appropriate because the justice court is not proceeding under a mistake of law causing a gross injustice.

A. The court was not proceeding under a mistake of law when it determined that probable cause had been established.

The determination of whether a charging document “is supported by probable cause is left to the sound discretion of the trial court.” *State v. Dunfee*, 2005 MT 147, ¶ 31, 327 Mont. 335, 114 P.3d 217. Because the determination is

discretionary, it does not present a purely legal issue and is not appropriate for a writ. *Norman v. Eighteenth Jud. Dist. Ct.*, OP 23-0168, 2023 Mont. LEXIS 313, *4 (Mar. 16, 2023) (“A petition for writ that does not raise an issue that is purely one of law but involves a matter of discretion fails to satisfy the standards for supervisory control.”).

Further, the court did not abuse its discretion when it determined probable cause had been established. An affidavit in support of a motion to file an information or a complaint need not make out a prima facie case that the defendant committed the offense. “A mere probability” that the defendant “committed the offense is sufficient.” *State v. Elliot*, 2002 MT 26, ¶ 26, 308 Mont. 227, 43 P.3d 279.

The facts alleged in the State’s Motion for Leave established a probability that Ramsey committed forgery, which is committed when a person issues or delivers a document or other object with the purpose to defraud knowing it has been thus made or altered. Mont. Code Ann. § 45-6-325(1), (1)(b). The facts alleged that Ramsey altered a form provided by the Yellowstone County Sheriff’s Office to enable defendants and defense counsel to obtain discovery, and he used the altered form to obtain CCJI about a witness, Foote, from an investigation of Foote, so that he could use that evidence against Foote in his representation of Kalina. (Resp’t’s App A.) Based on the facts alleged, it was probable that Ramsey altered and submitted the form with the purpose to defraud, establishing the elements of forgery.

The State need not provide direct evidence of Ramsey’s “purpose to defraud.” Rather, a defendant’s mental state is rarely proven by direct evidence and can be inferred from his actions and the facts and circumstances connected with the offense charged. *State v. Bay*, 2003 MT 224, ¶ 16, 317 Mont. 181, 75 P.3d 1265. Further, whether a defendant had the requisite intent is a question of fact for the jury. *State v. Tichenor*, 2002 MT 311, ¶ 21, 313 Mont. 95, 60 P.3d 454. The court correctly denied the motion to dismiss this charge.

Ramsey’s reliance on *State v. Patterson*, 75 Mont. 315, 243 P. 355 (1926), is misplaced. In *Patterson*, this Court held that there was insufficient evidence to convict the defendant of uttering a fraudulent check with the intent to defraud another of personal property. Patterson had issued a postdated check and informed the recipient that he did not have sufficient funds in his bank at that time but that he would when the check arrived. *Id.* at 316. This Court found the evidence to be insufficient because there was no misrepresentation or evidence that Patterson intended to defraud the recipient of the check at the time he issued the check. *Id.* at 316-17. In contrast, there is evidence here from which a juror could infer that when Ramsey altered a form in a way that could easily be overlooked and used it for a purpose for which it was not intended, he had the purpose to defraud.

The facts alleged in the Motion for Leave also established a probability that Ramsey solicited the misuse of CCJI. Solicitation is committed under Mont.

Code Ann. § 45-4-101(1) if, “with the purpose that an offense be committed, the person commands, encourages, or facilitates the commission of that offense.” The person solicited need “not know of the criminal purpose of the solicitation or of the criminal nature of the conduct solicited.” *State v. Ray*, 267 Mont. 128, 138, 882 P.2d 1013, 1019 (1994). A person commits the misuse of the CCJI if the person who is entitled to directly access the criminal justice information network purposely or knowingly disseminates information from the network to a person who is not authorized to receive it. Mont. Code Ann. § 45-7-601(1), (1)(b).

The facts alleged here established a probability that Ramsey facilitated the misuse of CCJI when he presented an altered form that caused the sheriff’s office staff to provide him with CCJI to which he was not entitled. The fact that Ramsey may have been entitled to some of the information, if the prosecutor or a court had determined that he was entitled to it, does not negate the fact that he was not entitled to obtain it from the sheriff’s office without the permission of the prosecutor. The evidence alleged was sufficient to establish a probability that Ramsey solicited the misuse of CCJI.

Because the justice court did not abuse its discretion in determining that probable cause had been established, the court did not commit a mistake of law when it denied Ramsey’s motion to dismiss. After probable cause was established, additional factual determinations were within the province of the jury and could

not be decided before trial. *See Tichenor*, ¶¶ 21-23; *Elliot*, ¶¶ 32-37; *Ray*, 267 Mont. at 139, 882 P.2d at 1019.

B. After a court grants leave to file the charging document, the State has no further burden of proof until trial.

After a district court grants leave to file a charging document, the court has found probable cause, and the State does not have any additional burden of proof until trial. *Tichenor*, ¶¶ 22-23. In *Tichenor*, the defendant filed a pretrial motion to dismiss in which he argued that he lacked the requisite intent to be convicted of stalking and he could not be convicted of burglary because he had permission to enter the apartment. *Tichenor*, ¶ 20. The district court denied his motion concluding that it was the role of the jury, not the court, to judge the facts, and the facts could not be judged before trial. *Id.* This Court affirmed, holding that whether Tichenor had the requisite intent to be convicted of stalking or was lawfully in the apartment were questions of fact that had to be resolved by the jury at trial. *Tichenor*, ¶ 21. This Court also noted that the district court had already granted the State's motion for leave to file an information and had thus found that the State had probable cause to bring the charges. *Tichenor*, ¶ 22. This Court explained that “[t]he State had no further burden of proof with regard to these charges until trial.” *Id.*

This Court reaffirmed that the State does not have any burden of proof after a court has found probable cause to file the charging documents in *State v.*

McWilliams, 2008 MT 59, 341 Mont. 517, 178 P.3d 121. *McWilliams* moved to

dismiss his charges for issuing bad checks, arguing that his checks were deferred deposits, rather than bad checks. *McWilliams*, ¶ 30. The district court and this Court rejected *McWilliams*'s statutory arguments. *McWilliams*, ¶¶ 20, 23-24.

This Court also rejected *McWilliams*'s argument based on the analysis in *Tichenor*. *McWilliams*, ¶¶ 31-32. This Court explained that prosecutors have “broad discretion to determine whether to prosecute an offender and what offense to charge.” *McWilliams*, ¶ 29. When the motion to file an information and the affidavit provide probable cause to believe an offense has been committed by an identified suspect, the court shall grant leave to file the information. *McWilliams*, ¶ 31. The probable cause determination “is left to the sound discretion of the trial court.” *Dunfee*, ¶ 31. As in *Tichenor*, this court noted that probable cause was established in *McWilliams* after the court issued an order granting leave to file the information. After that, the State did not have any burden of proof. *McWilliams*, ¶ 32.

Similar to *Tichenor* and *McWilliams*, the justice court in this case correctly denied Ramsey's motion. Ramsey's motion rested entirely on the argument that there was not probable cause to support the charges. (Pet'r's App. A.) The State's affidavit in its Motion for Leave set out facts that the State alleged established probable cause that Ramsey had committed forgery and solicitation of the misuse of CCJI. (Resp't's App. A.) Based on the State's affidavit, the court found probable cause to believe Ramsey committed those offenses, requiring the court to

grant leave to file the complaint. *See McWilliams*, ¶ 31. After that, the State did not have any burden of proof until trial.

Although probable cause had already been found and the State had no burden to provide additional proof, the court gave Ramsey the opportunity to present evidence to support his motion to dismiss. (2/2/24 Tr. at 3-4.) Ramsey declined to provide any evidence, agreeing that the determination of probable cause should be based on the facts in the affidavit. (*Id.* at 4.) The district court denied Ramsey's motion to dismiss because Ramsey failed to provide any additional evidence and probable cause had already been established. (*Id.* at 5.) That decision was consistent with *Tichenor* and *McWilliams*, and Ramsey has failed to demonstrate that it was a mistake of law.

IV. Additional arguments and facts raised for the first time in Ramsey's Petition do not establish that constitutional issues of statewide importance are involved or that the justice court is proceeding under a mistake of law.

Ramsey alleges constitutional violations and raises a prosecutorial misconduct claim for the first time in his Petition. (Pet. at 1, 15-17.) He also attaches a transcript from another case from another court, an email sent between counsel, and a motion to disqualify him as counsel in the other case, and he relies on those documents in his statement of the case. (Pet. at 3; Pet'r's Exs. D-F.) None of those

claims or documents were before the justice court in this case. As a result, the State has not had an opportunity to respond to those claims or documents in the trial court.

“Generally, a reviewing court can consider only those issues that are properly preserved for its review.” *State v. Akers*, 2017 MT 311, ¶ 12, 389 Mont. 531, 408 P.3d 142 (citation and quotation marks omitted). A petitioner seeking supervisory control cannot meet his burden to demonstrate that the lower court is proceeding under a mistake of law by relying on arguments and information that were not before the lower court. *See State ex rel. B.I. v. Eighth Judicial Dist. Court*, OP 08-0224, 2008 Mont. LEXIS 522 (Mont. Sup. Ct. May 21, 2008) (noting it was not clear a party petitioning for supervisory control had raised the claim in the trial court). Accordingly, the information and arguments not presented in the justice court should not be considered in this proceeding.

A petitioner also cannot attempt to establish that constitutional issues of statewide importance are at issue simply by citing constitutional provisions in a petition for writ of supervisory control that were not raised in the lower court. Indeed, Ramsey’s failure to cite constitutional provisions in the justice court demonstrates that no constitutional issues of statewide importance are at issue.

Further, Ramsey’s attempt to rely on information that is not in the record demonstrates that his additional claims raise factual issues not appropriate for supervisory control. *See Weimer v. Mont. Eleventh Jud. Dist. Ct.*, OP 22-0422,

2022 Mont. LEXIS 745 (Mont. Sup. Ct. Aug. 9, 2022) (denying writ of supervisory control because Weimer had not established purely legal questions).

CONCLUSION

Ramsey's Petition should be denied because he has not established that he does not have an adequate remedy of appeal, that the justice court is proceeding under a mistake, or that constitutional issues of statewide importance are at issue.

Respectfully submitted this 13th day of March, 2024.

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By: /s/ Mardell Ployhar
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this response is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 3,954 words, excluding caption, signatures, certificate of compliance, certificate of service, and any exhibits.

/s/ Mardell Ployhar

MARDELL PLOYHAR

CERTIFICATE OF SERVICE

I, Mardell Lynn Ployhar, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Petition for Writ to the following on 03-13-2024:

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