DEMITRI ARI GEE, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 85987

March 21, 2024 545 P.3d 90

Appeal from a judgment of conviction, pursuant to a guilty plea, of driving under the influence resulting in substantial bodily harm. Eighth Judicial District Court, Clark County; Mary Kay Holthus, Judge.

Affirmed in part, vacated in part, and remanded.

McAvoy Amaya & Revero, Attorneys, and *Michael J. McAvoy-Amaya* and *Timothy E. Revero*, Las Vegas, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Karen Mishler*, Chief Deputy District Attorney, Clark County, for Respondent.

Before the Supreme Court, Stiglich, Pickering, and Parraguirre, JJ.

OPINION

By the Court, Stiglich, J.:

The issues in this appeal are twofold. First, under *Nied v. State*, 138 Nev. 275, 509 P.3d 36 (2022), and its progeny, we reiterate that an order of restitution must be based on competent evidence. Second, we address whether a defendant's restitution obligation to the State of Nevada Victims of Crime Program (Victims of Crime) should be offset by the amount the defendant's insurance provider paid to the victim for the same losses. Because appellant Demitri Gee challenged the amount requested for Victims of Crime and the State failed to present evidence to support it, we conclude that the district court abused its discretion by ordering restitution not supported by competent evidence. Further, we conclude that the district court abused its discretion by failing to evaluate whether the award to Victims of Crime needed to be offset by the compensation provided to the victim through Gee's insurance. Accordingly, we vacate the $9,940 in restitution that was awarded to Victims of Crime but otherwise affirm the judgment of conviction. We remand for further proceedings as to restitution and instruct the district court to determine what, if any, portion of the $9,940 should be offset by the payment from Gee's insurance.

FACTS AND PROCEDURAL HISTORY

Gee was driving while intoxicated when he lost control of his vehicle and spun into other lanes of traffic. Gee's truck collided with a car carrying driver Patricia Allen and passenger Alcie Allen. After the collision, Gee exited his truck and fled the scene. The Allens were severely injured. They both required surgery and endured several months of pain and suffering during which they were unable to work.

As a result of the collision, Gee was charged with two counts of driving under the influence resulting in substantial bodily harm and one count each of failing to stop at the scene of a crash involving death or personal injury, unlawfully crossing a divided highway, and operating a motor vehicle without security. Gee and the Allens entered into a civil settlement agreement, and the Allens received pecuniary compensation through Gee's insurance. Subsequently, Gee and the State executed a guilty plea agreement. By the terms of the agreement, the State agreed to make no recommendation at sentencing and to dismiss the counts brought against Gee except one count of driving under the influence resulting in substantial bodily harm. The plea agreement included language that Gee agreed "to pay restitution as determined by Parole and Probation" and that he "underst[ood] that, if appropriate, [he] will be ordered to make restitution to the victim of the offense to which [he is] pleading guilty and to the victim of any related offense which is being dismissed or not prosecuted pursuant to this agreement."

At Gee's sentencing hearing, the State requested as restitution $9,940 paid to Victims of Crime to reimburse payments made to Mr. Allen for lost wages, $30.99 for medical equipment that Mr. Allen bought, and $3,880.40 for Mrs. Allen. Gee acknowledged that he received bank documents and receipts supporting the $3,880.40 amount for rideshare costs, medical bills, and the insurance deductible, and restitution request forms for the $3,880.40 and $30.99 amounts. Gee did not object to these amounts. However, he challenged the $9,940 amount requested. Gee indicated that he had not received supporting documentation for that amount and that he had already compensated the Allens through his insurer. Gee asserted that the Allens had collectively received $300,000 through the civil settlement and that Gee's insurance paid for their medical costs. The district court instructed the State to provide documentation related to the challenged amount and ordered a status check on the issue.

Before the status check was held, and without further notice to the parties, the district court entered a judgment of conviction. Gee was fined $2,000 and sentenced to serve a prison term of 8-20 years. The district court ordered him to pay restitution as requested by the State in the amount of $30.99 to Mrs. Allen and $3,880.40 to Mrs.

Allen.[1] The district court also ordered Gee to pay the challenged amount of $9,940 to Victims of Crime. Gee appeals the judgment of conviction, challenging only the $9,940 in restitution awarded to Victims of Crime.

DISCUSSION

Gee argues the district court erred by entering a judgment of conviction with an amount of restitution that was not based on competent evidence. He also argues the district court should have offset the restitution award by the amount that his insurance paid the Allens. It is for the district court at sentencing to "set an amount of restitution for each victim" when "restitution is appropriate." NRS 176.033(3). We review a district court's restitution determination for an abuse of discretion. *Nied*, 138 Nev. at 277, 509 P.3d at 39. We conclude the district court abused its discretion both because the award was not based on competent evidence and because it failed to evaluate whether an offset was required.

The district court abused its discretion by entering the judgment of conviction and awarding restitution that was not based on competent evidence

Gee first argues the district court erred by awarding $9,940 in restitution that was not supported by competent evidence. Specifically, he contends that the State failed to provide documentation to support the amount, such as receipts, copies of checks, or other paperwork documenting lost wages. Gee argues that he was ultimately prevented from effectively challenging the restitution award because the district court entered the judgment of conviction ordering restitution before the State provided evidence to support the challenged award. We agree.

"A sentencing judge generally has wide discretion when ordering restitution pursuant to NRS 176.033(3) but must use reliable and accurate information in calculating a restitution award." *Id.* (internal quotation marks omitted). "A defendant is not entitled to a full evidentiary hearing at sentencing regarding restitution," but a defendant "is entitled to challenge restitution sought by the state and may obtain and present evidence to support that challenge." *Martinez v. State*, 115 Nev. 9, 13, 974 P.2d 133, 135 (1999).

In *Nied*, "the State was required to present evidence at sentencing to prove the amount of restitution" because Nied challenged the amount stated in the presentence report for the victim's medical costs. 138 Nev. at 277, 509 P.3d at 39-40. The district court's award of restitution appeared to be based on the figure recommended in

[1]The $30.99 amount was requested for Mr. Allen yet awarded to Mrs. Allen in the judgment of conviction. We have considered Gee's argument on this issue, and we find no error.

the presentence report. *Id.* at 277, 509 P.3d at 39. However, when the victim provided testimony and documents relating to his medical costs, his calculations conflicted with the total amount recommended in the report. *Id.* at 277-78, 509 P.3d at 39-40. Thus, we determined the award was not supported by competent evidence. *Id.* at 277, 509 P.3d at 40.

Based on the scant evidence provided here, we conclude the district court did not use reliable and accurate information to award $9,940 in restitution. The only evidence in the record to support the amount requested for Victims of Crime was the presentence investigation report (PSI) and an email from the State. The PSI indicated that Victims of Crime had approved $9,660 for the lost wages of one of the victims but that no payment had been issued. The State emailed Gee and informed him the State was trying to confirm what, if any, amount Victims of Crime had paid out to the victims. At the sentencing hearing, the State requested $9,940. It described this conflicting figure as "the most current amount," compared to the amount listed in the PSI. At that point, the State orally confirmed that the amount had now been paid to Mr. Allen. The State did not provide any supporting documentation.

Gee challenged the amount. Under *Nied*, the State needed to present evidence to support the amount that Gee challenged. Although the district court ordered the State to provide copies of the supporting documents for the $9,940 amount and scheduled a status check to reassess the request and propriety of the restitution award, it ultimately entered the judgment of conviction that included the $9,940 award before holding the scheduled status check. We conclude the district court's award to Victims of Crime was not based on competent evidence because the State did not present evidence to support the basis for the challenged amount awarded. Therefore, we conclude that the district court abused its discretion by awarding the $9,940 in restitution.

We reiterate that restitution awards must be supported by competent evidence. An argument such as the one the State implies here, that Gee agreed to pay *any* restitution amount as determined by Parole and Probation simply because of the language in the guilty plea agreement, is unavailing. Such an interpretation is unsustainable given the requirement that restitution awards be supported by competent and reliable evidence under *Nied* and *Martinez*.

We further reiterate that a judgment of conviction must include a final and specific determination as to restitution and may not purport to reserve such a determination for later. A judgment of conviction with a restitution award that "does not specify its terms," including the obligation's dollar amount, "is not a final judgment." *Whitehead v. State*, 128 Nev. 259, 262-63, 285 P.3d 1053, 1055 (2012). However, once the judgment is entered with the specified restitution amount, the judgment is final. Thus, we hold that a district court should not enter a judgment of conviction until the evidence supporting restitution has been reviewed and the amount to award has been determined.

The district court abused its discretion by failing to evaluate whether the award to Victims of Crime needed to be offset by the amount paid by Gee's insurance

Gee argues that the district court was required to offset restitution awarded to Victims of Crime by the amount the Allens already recovered from his insurance. We agree that the district court needed to assess whether an offset was required.

"[A] district court must offset the defendant's restitution obligation by the amount the defendant's insurer paid to the victim for losses subject to the restitution order." *Nied*, 138 Nev. at 280, 509 P.3d at 41. *But see Martinez*, 115 Nev. at 12, 974 P.2d at 135 (concluding "[a] defendant's obligation to pay restitution to the victim may not, of course, be reduced because a victim is reimbursed by" the *victim's own* insurer). The amount "offset is limited to the portion of the payments intended to compensate the victim for costs recoverable as restitution; thus, any portion directed to pay attorney fees or excludable damages such as pain and suffering should not be credited against the restitution." *Nied*, 138 Nev. at 280, 509 P.3d at 41-42. As we emphasized in *Nied*, "restitution is intended to compensate the victim for costs and losses caused by the defendant." *Id.* at 275, 509 P.3d at 38. However, there is a risk of double recovery when there is both a restitution order compensating the victim and a civil settlement compensating the victim through the defendant's insurance. *Id.* at 280, 509 P.3d at 42. Accordingly, in requiring restitution to be offset by the amount provided by the defendant's insurance, we concluded that "the primary purpose of restitution" is "to make the victim whole," but to do so "without giving the victim a windfall or double recovery." *Id.*

In this matter, Victims of Crime compensated Mr. Allen for his lost wages, and Victims of Crime then sought reimbursement for that compensation from Gee through restitution. Victims of Crime exists "to assist victims of violent crimes through a period of financial hardship which arises when their assailants are judgment proof or unknown." *State, Victims of Crime Fund v. Barry*, 106 Nev. 291, 293, 792 P.2d 26, 27 (1990). However, when "the victims are no longer suffering financial hardship and have recovered full economic compensation for their losses, fundamental fairness dictates in favor of full reimbursement [from the victims] to . . . [Victims of Crime]." *Id.* Victims of Crime has statutory subrogation rights such that it can seek reimbursement from victims it has compensated. When a victim accepts an award from Victims of Crime, "[t]he State of Nevada is immediately subrogated in the amount of the award to any right of action or recovery the [victim] may have against any party." NRS 217.240(1). Further, when the victim obtains recovery from any source "for damages caused by the crime," the victim must "promptly notify the Director of the source and amount of that recovery, and shall promptly pay . . . the Department." NRS 217.240(2).

Here, there was no dispute that the Allens received money from Gee through a civil settlement. However, it was unclear what amounts within that settlement payment were awarded for what purposes. It was also uncertain whether and what amount Victims of Crime issued to Mr. Allen for lost wages. Because the district court short-circuited the process by entering the judgment of conviction before holding the status check, we do not know whether the award to Victims of Crime was proper. For instance, if Mr. Allen received compensation for lost wages from the settlement with Gee, then Victims of Crime would need to exercise its subrogation rights to seek reimbursement from Mr. Allen. The disputed issues would have been resolved at the status check. However, because the hearing was not held, it is unclear if Gee already paid for Mr. Allen's lost wages through the civil settlement. To avoid a potential double recovery for the victim and duplicate payment by the defendant, we hold that restitution awards to Victims of Crime must be offset by compensation victims receive from a defendant, or in this case, a defendant's insurer, when both payments cover the same losses. Accordingly, we conclude the district court abused its discretion by awarding restitution without assessing if the award to Victims of Crime duplicated recovery from Gee's insurance.[2]

CONCLUSION

We emphasize that a judgment of conviction must include a final and specific determination as to restitution and may not purport to reserve such a determination for later. Before entering a judgment of conviction—a final judgment—a district court must review the evidence and state the amount of restitution it will order. In addition, restitution awards to the Victims of Crime Program must be offset by compensation victims receive through the defendant's insurer when the payments cover the same losses. Therefore, a district court must evaluate whether a civil settlement and a restitution award to Victims of Crime would compensate victims for the same losses and thus whether an offset is needed. Here, the district court abused its discretion by awarding an amount that was not based on competent evidence and by failing to evaluate whether the settlement

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[2]We have considered Gee's remaining arguments, including that the judgment of conviction was not served on him or counsel, and we find no error. Gee also argues that a release of claims in a civil settlement is a complete bar to restitution. However, because he made this argument after the judgment of conviction was entered, it is not properly before us in this appeal.

from Gee's insurer and the award to Victims of Crime duplicated Mr. Allen's recovery. Therefore, we vacate the $9,940 award of restitution and remand for further proceedings for the district court to determine what, if any, portion of the $9,940 should be offset by the payment from Gee's insurance. We affirm the judgment of conviction as to the sentence and the other two restitution awards that were not challenged on appeal. Accordingly, we affirm in part, vacate in part, and remand the matter to the district court.

Pickering and Parraguirre, JJ., concur.

ROBERT M. DRASKOVICH, Appellant/Cross-Respondent, *v.* LAURINDA F. DRASKOVICH, Respondent/Cross-Appellant.

No. 84998

March 21, 2024 545 P.3d 96

Appeal and cross-appeal from a district court decree of divorce. Eighth Judicial District Court, Family Division, Clark County; Bryce C. Duckworth, Judge.

Reversed in part, vacated in part, and remanded.

The Pariente Law Firm, P.C., and *John Glenn Watkins* and *Michael D. Pariente*, Las Vegas, for Appellant/Cross-Respondent.

Law Offices of F. Peter James, Esq., and *F. Peter James*, Las Vegas, for Respondent/Cross-Appellant.

Before the Supreme Court, Cadish, C.J., and Stiglich and Pickering, JJ.

OPINION

By the Court, Cadish, C.J.:

In this divorce case, we consider whether a law firm, established by one spouse before the marriage and incorporated under a different name during the marriage, constitutes that spouse's separate property. We hold that the district court erred in determining that the law firm was entirely community property because the uncontested evidence demonstrated that, even after incorporation, it was a continuation of the spouse's original, separate property law practice, and thus, the presumption of community property does not properly apply. Further, because the district court refused to award alimony based in part on its erroneous community property determination, we necessarily vacate that ruling and remand for further proceedings consistent with this opinion.

FACTS AND PROCEDURAL HISTORY

Appellant/cross-respondent Robert Draskovich has been practicing criminal law since 1997. At the time he and respondent/cross-appellant Laurinda Draskovich married in 2012, he was a partner at Turco & Draskovich (T&D) with a 65% ownership stake in the firm. At T&D, Robert and the only other partner were paid separately for the work they each performed, and each partner maintained his own staff and clients, although they shared a bank account and paid taxes together. Laurinda brought no significant financial assets to the marriage and was a homemaker throughout the marriage.

In December 2018, T&D dissolved, and the next month, Robert incorporated the Draskovich Law Group (DLG) as his wholly owned corporation. Robert later offered uncontested testimony that DLG was "the very same practice" as his share of T&D. Robert kept the same office location, as well as his clients, staff, assets, and practices, after the incorporation and stated that he changed only the letterhead and the name stickers on the firm vehicles to match the name change of the firm. By the time Robert and Laurinda began divorce proceedings in 2022, DLG was worth approximately $1,210,000.

At trial, DLG was the primary asset in dispute. To analyze the value of DLG, Robert and Laurinda jointly retained a forensic accountant. The accountant determined the present value of DLG, but neither party asked her to determine the historic value of the practice. The accountant also noted during trial that she could not provide any valuation for a separate property share of DLG because neither party had engaged her to allocate the separate and community property interests.

After a two-day trial, the district court concluded that DLG was community property. The district court relied on the date of DLG's incorporation to find that DLG was acquired during the marriage and was thus presumptively community property under NRS 123.220. The district court then concluded that Robert had failed to overcome the community property presumption because he had not offered clear and convincing evidence regarding the value of any separate property interest in DLG, rendering the entire practice community property.

The district court also considered and rejected Laurinda's request for rehabilitative and periodic alimony. While the district court found that some factors supported alimony, the court did not award alimony at least in part because the court determined that the share of community assets distributed to Laurinda would provide sufficient support through passive income. Robert now appeals, and Laurinda cross-appeals.

During oral argument before this court, Laurinda's attorney conceded that T&D was separate property with a community property component and that had the divorce occurred in 2018, it would have been Laurinda's burden to show a community property share of T&D. Robert's counsel conceded during oral argument that DLG almost certainly did contain some community property interest subject to at least some apportionment.

DISCUSSION

Robert and Laurinda ask this court to consider DLG's status and the question of alimony, and we therefore consider only those two issues in this opinion and do not opine on the rest of the district court's judgment. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (declining to consider issues not properly raised by the parties). We first address the division of DLG's value. In this, we consider the proper character of DLG as separate or community property. Concluding that Robert brought the business into the marriage with him, we hold that DLG is Robert's separate property, and the community property presumption does not apply. Yet, because the business may have grown owing to community resources, Laurinda must be given an opportunity to show a community portion of DLG by clear and convincing evidence such that the district court may have to apportion DLG between the separate and community property interests. Finally, we consider the question of alimony and conclude that, given the change in circumstances concerning the parties' community property, alimony must be reconsidered.

DLG represents the continuation of T&D and is Robert's separate property

"When reviewing a district court's determination of the character of property, this court will uphold the district court's decision if it was based on substantial evidence. However, we will review a purely legal question, such as the application of a presumption, de novo." *Waldman v. Maini*, 124 Nev. 1121, 1128, 195 P.3d 850, 855 (2008). We therefore review the district court's factual classification of DLG with deference but review the application of the community property presumption to DLG de novo.

With limited exceptions, Nevada law provides that "[a]ll property, other than that stated in NRS 123.130, acquired after marriage by either spouse or both spouses, is community property . . . ." NRS 123.220. We have held that any property acquired during the marriage is presumptively community property, and the spouse claiming such property as their separate property must prove their interest by clear and convincing evidence. *Pryor v. Pryor*, 103 Nev. 148, 150, 734 P.2d 718, 719 (1987). This presumption and burden also apply to entities created during the marriage from mixed community and separate funds. *See Moberg v. First Nat'l Bank of Nev.*, 96 Nev. 235, 237, 607 P.2d 112, 114 (1980) (presuming property purchased during the marriage with funds of uncertain origin was community property). By contrast, any property a spouse brings into a marriage, along with the "rents, issues and profits thereof," is that spouse's separate property. NRS 123.130; *see Smith v. Smith*, 94 Nev. 249, 251, 578 P.2d 319, 320 (1978).

Caselaw from this court and from California, which this court often looks to for principles of community property, shows that the date of incorporation is not the decisive factor in determining a property's character. Rather, the court must look to the totality of the circumstances to determine whether a business is an asset acquired during the marriage and thus presumptively community property, or merely a continuation of a pre-marriage enterprise and thus separate property. *Schulman v. Schulman*, a case involving a husband who owned a wholesale meat processor as a sole proprietorship for approximately 40 years before his marriage, is illustrative. 92 Nev. 707, 709, 558 P.2d 525, 526 (1976). Four years after marrying and continuing to run his business as a sole proprietorship, the husband incorporated the business, received all shares of the newly incorporated business, and undertook operations expansions, but the essential nature and character of the business remained unchanged. *Id.* at 709, 558 P.2d at 526-27. We concluded apportionment between separate and community interests was necessary. *Id.* at 716-17, 558 P.2d at 530. In determining that the underlying business remained the husband's separate property, this court implicitly determined that the date of incorporation alone did not dictate the character of the property.

California has likewise declined to consider an act of incorporation as dispositive, opting instead to consider the essential character of the business in dispute. Take, for instance, *In re Marriage of Koester*, where a husband operated his business as a sole proprietorship before the marriage and incorporated the operation during the marriage. 87 Cal. Rptr. 2d 76, 79 (Ct. App. 1999). The court reasoned that the incorporation represented a mere change in "form or identity" and thus did not represent the acquisition of new property; all customers and accounts receivable were the same before and after the incorporation. *Id.* at 80. The court concluded that "[t]o say . . . that an asset was 'acquired' by the community . . . because some aspect of corporate formation took place during the marriage is to elevate semantics over substance." *Id.* at 81.

Here, in determining that DLG was community property, the district court relied exclusively on the fact that DLG was incorporated during the marriage. The district court deemed this single fact dispositive and characterized DLG as entirely community property by applying the community property presumption. That analysis was incorrect. We now expressly hold that district courts must consider the totality of the circumstances when determining whether a business represents the continuation of a pre-marriage enterprise.

The parties do not contest the salient circumstances present in this case. Robert testified that he operated functionally the same business before and after the change from T&D to DLG. All his assets, staff, pay, and clients remained the same when he practiced at T&D and at DLG. Robert remained in the same office location. His testimony established that he only changed the letterhead on his papers and the name on the firm vehicles to match the new name. As in *Schulman* and *In re Marriage of Koester*, this is unrebutted evidence that DLG was a continuation of Robert's interest in T&D—a mere change in form or identity of his share in T&D—rather than a new property acquisition. DLG is thus his separate property under the totality of the circumstances, and the district court erred by instead relying on the date of incorporation alone to apply the community property presumption. We therefore reverse the portion of the divorce decree pertaining to the DLG interests and remand for further proceedings as instructed below.

Laurinda bears the burden to show a community portion of DLG

Robert's business is likely not presently worth the same amount as it was at the time of his marriage to Laurinda in 2012. A business can increase in value over time from separate property input or from community property input. Where an increase in the value of a property stems from both, "that increase should be apportioned between separate and community property." *Johnson v. Johnson*, 89 Nev. 244, 246, 510 P.2d 625, 626 (1973). The "rents, issues, and profits" of separate property presumptively remain separate. *Smith*, 94 Nev. at 251, 578 P.2d at 320. Therefore, when a spouse claims that the increase in value of separate property is partially attributable to the community, that spouse must show clear and convincing evidence of the community share. *Kelly v. Kelly*, 86 Nev. 301, 310, 468 P.2d 359, 365 (1970) (citing, inter alia, *Barrett v. Franke*, 46 Nev. 170, 208 P. 435 (1922)) ("Appellant has therefore not proven by clear and satisfactory proof these assets were purchased with community funds or credit or acquired by . . . community toil or talent."); *see also Sprenger v. Sprenger*, 110 Nev. 855, 858, 878 P.2d 284, 286 (1994) ("Transmutation from separate to community property must be shown by clear and convincing evidence.").

Here, Robert brought the business into the marriage, so it is his separate property, and any increase in its value over time is also presumed to be separate. *See Smith*, 94 Nev. at 251, 578 P.2d at 320. This means Laurinda bears the burden of showing by clear and convincing evidence that a portion of any increase to his practice's value over the course of the marriage belongs to the community. The community is entitled to that portion of the property "purchased with community funds or credit or acquired by . . . community toil or talent." *Kelly*, 86 Nev. at 310, 468 P.2d at 365. Laurinda can demonstrate this by showing that Robert's active work as an attorney at the firm during the period of the marriage increased the value of the firm in some way. *See Sly v. Sly*, 100 Nev. 236, 240, 679 P.2d 1260, 1263 (1984) (citing *Ormachea v. Ormachea*, 67 Nev. 273, 297, 217 P.2d 355, 367 (1950)) (noting that "[t]he labor and skills of a spouse belong to the community"). If, on remand, Laurinda meets her burden to make such a showing, the district court must then apportion the property between separate and community interests, an undertaking Robert conceded in oral argument would likely be necessary should DLG be classified as his separate property.

Because the district court mischaracterized DLG as entirely community property, it did not determine whether Laurinda had provided clear and convincing evidence of a community share of DLG such that an apportionment between separate and community interests of the firm would be necessary. On remand, we instruct the district court to follow *Kelly v. Kelly* and permit Laurinda to provide clear and convincing evidence, if she has such, that any part of DLG's value can be attributed to "community toil or talent" (or other community sources) and determine whether apportionment of DLG's value between separate and community interests is appropriate.

We necessarily vacate and remand as to alimony in light of the changed community property circumstances

"The decision of whether to award alimony is within the discretion of the district court." *Kogod v. Cioffi-Kogod*, 135 Nev. 64, 66, 439 P.3d 397, 400 (2019). The court should ultimately award such alimony "as appears just and equitable." NRS 125.150(1)(a). Central to the district court's determination to deny alimony in this case was its finding that Laurinda would be able to earn a passive income of more than $3,000 per month based on the liquid assets she received from community property. *See Kogod*, 135 Nev. at 74-75, 439 P.3d at 406 (requiring district courts to consider the passive income generation capacity from community property when awarding alimony).

As detailed, the district court must reconsider its community property determination with respect to DLG. The court will therefore need to revisit its alimony analysis following its decision as to any distribution to Laurinda for DLG's value. For that reason, we vacate and remand the district court's alimony determination for further consideration in light of the changed circumstances surrounding DLG.

CONCLUSION

Courts must consider the totality of the circumstances when determining whether a disputed business interest represents a new acquisition or purchase subject to the community property presumption or merely the continuation of a spouse's preexisting enterprise and thus separate property, subject to a subsequent apportionment. Under the totality of the circumstances in this case, DLG's incorporation alone does not show that it was a newly acquired community property business, and the undisputed evidence makes clear that DLG is simply a continuation of Robert's pre-marriage legal practice. Thus, DLG is Robert's separate property, though on remand Laurinda may show by clear and convincing evidence that growth in the business during the marriage is attributable to community resources and apportionment is appropriate. The district court's application of the community property presumption to DLG based solely on the fact of DLG's incorporation during the marriage was, therefore, legal error. Because the district court erred in concluding that DLG was community property and applying the community property presumption, we reverse the portion of the decree dividing DLG interests as community property. In addition, we vacate the portion of the decree denying alimony. We remand for further proceedings consistent with this opinion.

Stiglich and Pickering, JJ., concur.

IN THE MATTER OF I.S., A CHILD AS DEFINED BY NRS 62A.030.

I.S., APPELLANT, *v.* THE STATE OF NEVADA, RESPONDENT.

No. 86035

March 28, 2024 545 P.3d 109

Appeal from a district court order affirming and adopting a juvenile master's recommendations to adjudicate appellant a delinquent child and to impose formal probation conditions. Second Judicial District Court, Family Division, Washoe County; Bridget E. Robb, Judge.

Affirmed.

Evelyn Grosenick, Public Defender, *John Reese Petty*, Chief Deputy Public Defender, and *Katherine C. Maher*, Deputy Public Defender, Washoe County, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Christopher J. Hicks*, District Attorney, and *Shelly K. Scott*, Chief Deputy District Attorney, Washoe County, for Respondent.

Before the Supreme Court, CADISH, C.J., and PICKERING and BELL, JJ.

OPINION

By the Court, CADISH, C.J.:

The district court affirmed and adopted a juvenile court master's recommendations to adjudicate appellant I.S. a delinquent and place I.S. on formal probation despite Juvenile Services' recommendation for informal supervision. In doing so, the court rejected I.S.'s argument that NRS 62C.200(1)(b) creates an unconstitutional prosecutorial veto by requiring the district attorney's written approval before informal supervision may be ordered notwithstanding that NRS 62C.230(1)(a) gives a juvenile court authority to dismiss a petition without prejudice and refer the child to a probation officer for informal supervision. I.S. maintains on appeal that NRS 62C.200 is inconsistent with the separation of powers doctrine.

As I.S. is no longer under supervision, we first address whether this appeal is moot. Because I.S. is under 18 and his record has not been sealed, collateral consequences of the underlying adjudication remain, and thus, we conclude that this appeal is not moot. As to the merits, we conclude that NRS 62C.200(1) does not create a separation of powers issue because the court's ability to dismiss a petition without prejudice and refer a juvenile to informal probation is not a sentencing decision in nature, and thus, the statute does not encroach on the court's sentencing discretion. We therefore affirm.

FACTS AND PROCEDURAL HISTORY

The Washoe County District Attorney filed a juvenile delinquency petition against appellant I.S., charging I.S. with the unlawful acts of possessing a schedule I controlled substance and placing graffiti on or otherwise defacing property. If I.S. had been charged with the same unlawful acts in the adult criminal justice system, the drug possession would have been charged as a felony and the graffiti act would have been charged as a gross misdemeanor. The Washoe County Department of Juvenile Services (Juvenile Services) filed a dispositional report, recommending the petition be dismissed and I.S. be referred to juvenile probation for informal supervision. Juvenile Services indicated the informal supervision should require I.S. to complete 100 hours of a work program or community service and a youth development program, and that I.S. should be required to pay restitution.

During the plea entry hearing, I.S. "freely, knowingly and voluntarily admitted to the allegations contained in the Petition." At the subsequent dispositional hearing, Juvenile Services recommended the informal sanctions outlined in its dispositional report. Meanwhile, the State argued I.S. should proceed to formal adjudication. In response, I.S. argued that NRS 62C.200(1)(b)'s requirement of prosecutorial consent before a juvenile court may dismiss a petition and send a juvenile to informal supervision under NRS 62C.230 unconstitutionally violated the separation of powers between the executive and judicial branches of government. The parties then briefed whether the court should sever the language in NRS 62C.200(1)(b) as an unconstitutional prosecutorial veto.

In his opening brief before the juvenile master, I.S. asserted that NRS 62C.200(1)(b) unconstitutionally infringed on the juvenile court's sentencing discretion by requiring the prosecutor's written consent to dismissal of a petition and referral of the juvenile to informal supervision as a prerequisite to the juvenile court taking such action. I.S. argued the juvenile court's sentencing discretion was invoked when I.S. admitted to both counts in the petition and entered a plea. Therefore, I.S. contended, the prosecutorial-consent portion of NRS 62C.200(1)(b), as incorporated in NRS 62C.230, unconstitutionally conditioned the juvenile court's exercise of its sentencing discretion upon prosecutorial approval.

In opposition, the State first argued that the juvenile court, unlike adult criminal courts, is a creation of statute and only possesses the jurisdiction specifically provided for it in Title 5 of the Nevada Revised Statutes. Second, the State argued that *In re Steven Daniel P.*, 129 Nev. 692, 309 P.3d 1041 (2013), disposed of the very separation of powers argument presented by I.S. Third, the State posited that I.S.'s case was distinguishable from *State v. Second Judicial District Court (Hearn)*, 134 Nev. 783, 432 P.3d 154 (2018), on which I.S. relied, in part because, unlike the veterans court program at issue there, NRS 62C.200 and NRS 62C.230 allow for resolution without any court involvement.

The juvenile master entered findings and a recommendation wherein she determined that NRS 62C.230(1) grants the juvenile court sentencing power, which is then unconstitutionally limited by NRS 62C.200(1)(b)'s requirement for written prosecutorial approval. The juvenile master recommended the district court decline to follow the portion of the statute requiring the prosecutorial consent. On the State's objection, the district court reversed the master's recommendations, finding NRS 62C.200(1)(b) did not violate the separation of powers doctrine. The district court pointed to the limited statutorily prescribed jurisdiction of the juvenile court and how the juvenile statutes allow for resolution of a juvenile's alleged violations of criminal laws without any court involvement.

On remand, the juvenile master recommended adjudicating I.S. guilty of the two charges, deeming him a ward of the court, and placing him on formal probation. The master found I.S. subject to the same conditions of probation and supervision outlined in the dispositional report, some of which I.S. had already completed, and recommended I.S. participate in a program and pay restitution. With no timely objection filed, the district court entered an order affirming and adopting the juvenile master's recommendations. This appeal followed.

DISCUSSION

The appeal is not moot because an adjudication of juvenile delinquency creates a presumption of collateral consequences

After I.S. appealed, the juvenile court entered an order adopting the juvenile master's recommendation that I.S. was no longer subject to juvenile probation supervision pending the final closure of the matter. I.S. acknowledges that his appeal may have become moot because he is no longer subject to juvenile probation supervision. "The question of mootness is one of justiciability." *Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010). Therefore, an actual controversy must be present at all stages of the proceeding. *Id.* Within the context of criminal cases, we have recognized that such a controversy still exists even after the sentence is completed due to "disabilities or burdens" resulting from a conviction. *See Martinez-Hernandez v. State*, 132 Nev. 623, 626, 380 P.3d 861, 864 (2016) (quoting *Carafas v. LaVallee*, 391 U.S. 234, 237 (1968)). Thus, a habeas petitioner possesses a "substantial stake" in the judgment of conviction that survives satisfaction of the petitioner's resultant sentence. *Id.* (quoting *Carafas*, 391 U.S. at 237); *see also id.* at 627, 380 P.3d at 864 ("[I]n instances where collateral consequences of a conviction exist, a habeas petition challenging the validity of a judgment of conviction does not become moot when the petitioner, who was in custody at the time the petition was filed, is released from custody subsequent to the filing of the petition.").

We conclude that the same reasoning applies in juvenile delinquency adjudications. Collateral consequences may continue from a juvenile delinquency adjudication even where the juvenile is no longer subject to supervision, including that a juvenile record may appear on subsequent presentence investigation reports and could impact a judge's sentencing decision. Thus, there is a presumption of collateral consequences of such an adjudication that prevents a challenge to that adjudication from becoming moot at the completion of juvenile supervision. However, after the juvenile's record is sealed, *see* NRS 62H.140 (addressing the sealing of juvenile records, which generally occurs when the juvenile reaches age 18), a juvenile delinquency adjudication no longer carries a presumption of collateral consequences. *See* NRS 62H.030(3)(b) ("The following records and information may be opened to inspection without a court order: . . . [r]ecords which have not been sealed and which are required by the Division of Parole and Probation for preparation of presentence investigations and reports pursuant to NRS 176.135 or general investigations and reports pursuant to NRS 176.151 . . . ."). Here, I.S. is still a minor, so his record could be included in presentence investigation reports addressing any subsequent juvenile delinquency matters involving I.S. Because collateral consequences of this adjudication are presumed to remain, I.S.'s appeal is not moot.

NRS 62C.200(1)(b)'s requirement for prosecutorial consent, as incorporated in NRS 62C.230, does not violate the separation of powers doctrine

Consistent with his argument below, I.S. argues that NRS 62C.200(1), as incorporated in NRS 62C.230, creates an unconstitutional prosecutorial veto because it conditions the juvenile court's sentencing powers on the approval of the district attorney. The State argues that the statute does not create a separation of powers problem because the juvenile court is not exercising its sentencing discretion when it dismisses a petition without prejudice, and unlike the district court in adult criminal cases, the juvenile court's authority is not derived from the constitution and is instead limited to the authority expressly prescribed to it by statute. We agree with the State.

We review the constitutionality of a statute de novo. *State v. Second Jud. Dist. Ct. (Hearn)*, 134 Nev. 783, 786, 432 P.3d 154, 158 (2018). "Because statutes are presumed to be valid," I.S. bears the heavy burden of demonstrating that NRS 62C.200(1)(b)'s requirement for prosecutorial consent as incorporated in NRS 62C.230 is unconstitutional. *Aguilar-Raygoza v. State*, 127 Nev. 349, 352, 255 P.3d 262, 264 (2011); *Douglas Disposal, Inc. v. Wee Haul, LLC*, 123 Nev. 552, 557, 170 P.3d 508, 512 (2007). Under NRS 62C.230, "[i]f the district attorney files a petition with the juvenile court, the juvenile court may . . . [d]ismiss the petition without prejudice and refer the child to the probation officer for informal supervision pursuant to NRS 62C.200." NRS 62C.200(1) provides that a child against whom a complaint has been made "may be placed under the informal supervision of a probation officer if:"

> (a) The child voluntarily admits participation in the acts alleged in the complaint; and
> (b) The district attorney gives written approval for placement of the child under informal supervision, if any of the acts alleged in the complaint are unlawful acts that would have constituted a gross misdemeanor or felony if committed by an adult.

Both the United States Constitution and the Nevada Constitution contain separation of powers provisions requiring the "discrete treatment of the three branches of government." *Comm'n on Ethics v. Hardy*, 125 Nev. 285, 292, 212 P.3d 1098, 1103 (2009); *Hearn*, 134 Nev. at 786, 432 P.3d at 158; *see* Nev. Const. art. 3, § 1(1). "But 'Nevada's Constitution goes one step further; it contains an express provision prohibiting any one branch of government from impinging on the functions of another.'" *Hearn*, 134 Nev. at 786, 432 P.3d at 158 (quoting *Hardy*, 125 Nev. at 292, 212 P.3d at 1103-04); *see* Nev. Const. art. 3, § 1(1). Our caselaw supports the proposition "that charging decisions are within the executive realm and sentencing decisions are inherently judicial functions." *Hearn*, 134 Nev. at 786, 432 P.3d at 158. Once a court has been granted sentencing discretion, it "cannot be conditioned upon the prosecution's approval without running afoul of the separation of powers doctrine." *Id.* at 787, 432 P.3d at 158.

In *Steven Daniel P.*, this court analyzed the plain language of the statutes at issue here. 129 Nev. 692, 309 P.3d 1041 (2013). There, the juvenile court dismissed a juvenile delinquency petition and referred the juvenile to informal supervision without the written approval of the district attorney. *Id.* at 695, 309 P.3d at 1043. Applying the statutes, we concluded "that written approval is required from the district attorney before the juvenile court can place a juvenile under informal supervision when the juvenile has allegedly committed an unlawful act that would be a gross misdemeanor or a felony if committed by an adult." *Id.* at 697, 309 P.3d at 1044. Further, relying on *State v. Barren*, we concluded the juvenile court's discretion to dismiss the petition and refer Steven for informal supervision was expressly limited by statute. *Id.* at 700, 309 P.3d at 1046 (citing *State v. Barren*, 128 Nev. 337, 341, 279 P.3d 182, 184 (2012) ("[T]he juvenile court system is a creation of statute, and it possesses only the jurisdiction expressly provided for it in the statute." (quoting *Kell v. State*, 96 Nev. 791, 792-93, 618 P.2d 350, 351 (1980)))). While the State posited that the juvenile court's dismissal and referral without the written approval of the district attorney usurped the legislative and executive power provided under the separation of powers doctrine, we did not conduct a separation of powers analysis, instead relying on our conclusion that the court had exceeded its statutory authority to reverse. *Steven Daniel P.*, 129 Nev. at 700, 309 P.3d at 1046.

In *Hearn*, we analyzed Nevada's separation of powers doctrine within the context of a district court's decision to assign a criminal defendant to the veterans court program. 134 Nev. at 787, 432 P.3d at 159. At the time, NRS 176A.290(2) required the stipulation of the prosecuting attorney before a district court could assign an eligible defendant to veterans court if the offense charged or the defendant's prior convictions involved the use or threatened use of force or violence. *Id.* at 783-84, 432 P.3d at 156. We held the prosecutorial-consent element constituted a prosecutorial veto, which violated the Nevada Constitution's separation of powers doctrine. *Id.* at 788, 432 P.3d at 159. We characterized assignment to the veterans court program as "a statutorily approved alternative to entering a judgment of conviction and imposing a term of incarceration." *Id.* at 787, 432 P.3d at 159. In analyzing the application of the separation of powers doctrine in this context, we stated "the principle gleaned is that once a defendant's guilt has been determined, the prosecutor's charging discretion is complete and the judiciary's sentencing discretion, if any, is all that remains." *Id.*

Applying that reasoning in the juvenile context, we conclude that a juvenile court's decision to dismiss a petition without prejudice and refer a juvenile to informal supervision is not a sentencing decision, as it does not involve imposition of a period of detention or imposition of requirements under the supervision of the court with consequences to be imposed by the court if they are not satisfied. 6 Wayne R. LaFave, Jerold H. Israel, Nancy J. King & Orin S. Kerr, *Criminal Procedure* § 26.1(a), at 863 (4th ed. 2015) (categorizing sentencing options into five categories: "capital punishment, incarceration, community release (probation), intermediate sanctions [(typically a combination of incarceration and probation or a suspended term of incarceration)], and financial sanctions"); *see Sentencing*, Legal Information Institute, https://www.law.cornell.edu/wex/sentencing (last visited Feb. 14, 2024) ("A criminal sentence refers to the formal legal consequences associated with a conviction. Types of sentences include probation, fines, short-term incarceration, suspended sentences, which only take effect if the convict fails to meet certain conditions, payment of restitution to the victim, community service, or drug and alcohol rehabilitation for minor crimes. More serious sentences include long-term incarceration, life-in-prison, or the death penalty in capital murder cases."). NRS 62C.230 does not implicate the juvenile court's sentencing discretion because it permits the juvenile court to simply dismiss the petition with a referral for informal supervision without entry of judgment or any further involvement or supervision of the juvenile court. *Hearn* is distinguishable because the assignment of a criminal defendant to a program like veterans court is a procedure that occurs in lieu of a defendant being sentenced to a term of incarceration and the district court maintains involvement in the case after it assigns a defendant to veterans court. If the defendant is not successful in their completion of the program, which is supervised by the court, the district court may enter a judgment of conviction and impose an appropriate sentence. *See* NRS 176A.290(2)(b). Alternatively, if the defendant is successful in their completion of the program, the district court may then discharge the defendant and either dismiss the proceedings or set aside the judgment of conviction. *See* NRS 176A.290(3)(a).

Conversely, when a juvenile court exercises its discretion under NRS 62C.230 to dismiss a petition, there is no further involvement from, or supervision by, the juvenile court. Should a juvenile fail to comply with the requirements of informal supervision, the onus is on the district attorney to refile the petition if the juvenile is to face formal adjudication. *See* NRS 62C.200(6) ("The district attorney may not file a petition against the child based on any acts for which the child was placed under informal supervision unless the district attorney files the petition not later than 180 days after the date the child entered into the agreement for informal supervision."). NRS 62C.230 provides no mechanism for a juvenile court to directly formally adjudicate a juvenile as delinquent if they fail to complete all terms of informal supervision. Permitting the juvenile court to dismiss a petition without prejudice and refer a juvenile to informal supervision under NRS 62C.230 without the written approval of the district attorney would be analogous to permitting the juvenile court to accept a plea bargain from a juvenile without the district attorney's involvement in the bargaining for and acceptance of a plea. *Cf. People v. Andreotti*, 111 Cal. Rptr. 2d 462, 465, 469, 471 (Ct. App. 2001) (determining that a trial court could not defer entry of judgment without the State's consent because it would be an unconstitutional infringement on the State's ability to plead and prosecute a case). Further, unlike the situation addressed in *Hearn*, which pertained to the district court's authority as set forth in the constitution, the juvenile court is entirely a creature of statute, and its authority is expressly limited to that provided to it by the Legislature. *Barren*, 128 Nev. at 341, 279 P.3d at 184. For this reason, and because dismissal and referral of a juvenile for informal supervision under NRS 62C.230 does not constitute an exercise of the juvenile court's sentencing discretion, we conclude that the prosecutorial-consent requirement of NRS 62C.200(1)(b), as incorporated in NRS 62C.230, does not violate the separation of powers doctrine.

CONCLUSION

We conclude that I.S.'s appeal is not moot because, like an adult criminal conviction, a formal adjudication of juvenile delinquency carries with it a presumption of collateral consequences until the juvenile reaches age 18 and/or their juvenile record is sealed. We also conclude that NRS 62C.230's incorporation of NRS 62C.200(1)(a)'s prosecutorial-consent requirement does not violate the separation of powers doctrine. When a juvenile court exercises the option to dismiss a petition under NRS 62C.230, it is not exercising its sentencing discretion. Rather, the option to dismiss a petition without prejudice and refer a juvenile to informal supervision under NRS 62C.230 is more akin to a charging decision. Therefore, the requirement for the written approval of the district attorney before a juvenile court can dismiss a petition at this stage is not an unconstitutional prosecutorial veto and does not run afoul of the separation of powers doctrine. We therefore affirm the order of the district court.

Pickering and Bell, JJ., concur.

DEVA ONE SMITH, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 86156

March 28, 2024 545 P.3d 716

Appeal from a judgment of conviction, pursuant to a jury verdict, of two counts of possession of a visual presentation depicting sexual conduct of a person under sixteen years of age. Second Judicial District Court, Washoe County; Barry L. Breslow, Judge.

Reversed and remanded.

Evelyn Grosenick, Public Defender, and *Kathryn Reynolds*, Chief Deputy Public Defender, Washoe County, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Christopher J. Hicks*, District Attorney, and *Jennifer P. Noble*, Chief Appellate Deputy District Attorney, Washoe County, for Respondent.

Before the Supreme Court, Herndon, Lee, and Bell, JJ.

OPINION

By the Court, Bell, J.:

This appeal raises issues regarding the scope of a valid search warrant. Under Nevada law, an affidavit may be incorporated into a warrant to establish probable cause, but that affidavit cannot expand the scope of the search and seizure permitted under the warrant's specific language. Absent an exception, officers must search only the places authorized on the face of the warrant. Further, if exigent circumstances allow the warrantless seizure of a cell phone, police may not search the data on that cell phone unless a new warrant is obtained or exigent circumstances independently justify the search of the data.

Here, officers had a valid warrant for Appellant Deva One Smith's residence only; however, officers seized Smith's cell phone from his person while outside the residence. Under the circumstances, the imminent destruction of evidence exigency justified the seizure. Yet no other exigent circumstance allowed for the subsequent forensic search of the cell phone. Because officers failed to obtain a warrant to search the cell phone, the search of that device violated Smith's Fourth Amendment rights. Therefore, we conclude that the district court erred in denying Smith's motion to suppress the evidence found on the phone. As a result, we reverse the judgment of conviction.

FACTS AND PROCEDURAL HISTORY

Law enforcement first became aware that Deva Smith might possess child pornography during an investigation of another individual, Brandon Navarette. Law enforcement discovered Navarette was sharing images of child sex abuse with others through text messages. One number Navarette messaged belonged to Smith. Based on subsequent investigation of Smith, officers sought a search warrant for Smith's electronic devices.

The detective seeking the warrant authored a declaration supporting probable cause. The declaration explained the investigation of Smith, including how officers had matched the number from the Navarette investigation to Smith and what images the officers believed Smith possessed. The declaration submitted by the detective asserted law enforcement had probable cause to believe Smith possessed child pornography on a phone or computer in his possession, vehicle, or apartment.

The warrant signed by the justice of the peace incorporated the declaration of probable cause by reference. The warrant permitted officers to search Smith's apartment and seize any evidence of child pornography and electronic devices that could contain child pornography. The warrant also authorized the forensic search of any "of the above-mentioned devices" to determine if the devices contained child pornography. The warrant provided a detailed description of Smith's apartment. The warrant did not authorize a search of Smith's person or his vehicle.

When officers arrived at Smith's apartment building to execute the warrant, they encountered Smith outside the building. Officers informed Smith of the warrant, asked Smith to open the door to avoid damage from breaking it down, and told Smith he was not under arrest. Officers also seized Smith's cell phone from his person while Smith remained outside the apartment. The next day, a detective conducted a forensic search of the phone. The detective found text exchanges between Navarette and Smith, including child pornography. Officers did not seek a warrant authorizing the forensic search prior to conducting the search of Smith's phone.

Before trial, Smith challenged the admissibility of the texts and pictures from his phone, arguing officers had obtained them in violation of his constitutional rights. The district court found the photos admissible, ruling that the incorporated statement of probable cause in the declaration expanded the scope of the search authorized by the warrant and, alternatively, that the officers reasonably believed in good faith that their actions were consistent with the warrant.

At trial, the texts and photos comprised the bulk of the State's case against Smith. The jury convicted Smith of two counts of possession of a visual presentation depicting sexual conduct of a person under sixteen years of age. Smith now appeals his conviction.

DISCUSSION

Smith challenges the admissibility of the texts and photos recovered from his cell phone, arguing that the evidence was obtained in violation of his constitutional rights and must therefore be suppressed. Because we agree with Smith and reverse on the search and seizure issue, we need not reach the other issues Smith raises.

A motion to suppress presents mixed questions of law and fact. *State v. Beckman*, 129 Nev. 481, 485, 305 P.3d 912, 916 (2013). We review the district court's findings of fact for clear error, but we review application of the law de novo. *Somee v. State*, 124 Nev. 434, 441, 187 P.3d 152, 157-58 (2008).

Both the United States and the Nevada Constitutions protect citizens from unreasonable searches and seizures. U.S. Const. amend. IV; Nev. Const. art. 1, § 18. A search is per se unreasonable unless performed pursuant to a valid warrant or subject to an exception to the warrant requirement. *State v. Lloyd*, 129 Nev. 739, 743, 312 P.3d 467, 469 (2013). The government may not use evidence procured by an illegal search against a defendant, and courts accordingly may suppress illegally obtained evidence. *Segura v. United States*, 468 U.S. 796, 815 (1984).

In determining whether suppression is appropriate, we consider the State's three arguments as to why the evidence was properly obtained. First, the State asserts that the probable cause affidavit addressed a search of Smith's person, and the affidavit was incorporated into the warrant, so the incorporated affidavit expanded the warrant to cover the search and seizure of Smith's cell phone.[1] Second, the State contends that the officers were relying in good faith on the warrant when they seized the cell phone from Smith's person and then searched it. Third, the State argues that exigent circumstances justified the seizure and subsequent search of Smith's cell phone. We disagree with the State's arguments, except to conclude that exigent circumstances warranted the initial seizure of the phone, though not the subsequent forensic search.

A probable cause affidavit cannot expand the scope of the warrant to authorize the seizure of Smith's cell phone found on his person outside his apartment

To be valid, a warrant must contain a statement "particularly describing the place to be searched, and the persons or things to be

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[1]We note that the detective in this case filed a declaration under penalty of perjury rather than an affidavit witnessed by a judge or notary. Such a declaration satisfies NRS 53.045 calling for an affidavit. We use the terms interchangeably here.

seized." U.S. Const. amend. IV; Nev. Const. art. 1, § 18 (substantially similar language). A valid search warrant may only be issued on a showing of probable cause. *State v. Allen*, 119 Nev. 166, 170, 69 P.3d 232, 234 (2003). When a magistrate issues a warrant, Nevada law permits the statements in support of probable cause to be incorporated by reference. NRS 179.045(6)(b). The issue presented in this case is whether the incorporation of a probable cause affidavit may broaden what can be searched or seized beyond the four corners of the search warrant. We conclude it cannot.

The United States Court of Appeals for the Ninth Circuit has concluded that incorporation of a declaration or affidavit cannot broaden the scope of a search warrant. In *United States v. Sedaghaty*, 728 F.3d 885, 895 (9th Cir. 2013), federal agents obtained a warrant to search for and seize documents related to a single incident of tax fraud. Officers searched Sedaghaty's home and seized materials related to alleged terrorist activity in addition to tax documents. *Id.* The Ninth Circuit rejected the government's argument that an incorporated probable cause affidavit discussing Sedaghaty's alleged terrorist involvement expanded the scope of the warrant. *Id.* at 914-15. The court held that the warrant clearly contemplated only tax documents and officers should have sought another warrant for material related to terrorist activity. *Id.* Because seizure of the materials related to terrorism was beyond the scope of the warrant, officers violated the Fourth Amendment. *Id.* at 915. The court warned that allowing an affidavit to expand the scope of a warrant "would permit a kitchen sink probable cause affidavit to overrule the express scope limitations of the warrant itself." *Id.* at 913. In reaching such a conclusion, the Ninth Circuit aligned with other federal circuit courts that also disapproved of allowing probable cause affidavits to expand the scope of warrants. *See United States v. Kaye*, 432 F.2d 647, 649 (D.C. Cir. 1970); *Doe v. Groody*, 361 F.3d 232, 241 (3d Cir. 2004); *United States v. Angelos*, 433 F.3d 738, 746 (10th Cir. 2006).

The Ninth Circuit's reasoning is persuasive. The United States and Nevada Constitutions require that warrants state with particularity the place, person, and thing to be searched or seized. To allow a probable cause affidavit to effectively control the scope of a warrant would render the particularity requirements meaningless. We also cannot endorse an interpretation of the law that "would elevate the author of the incorporated probable cause affidavit over the judge issuing the warrant." *Sedaghaty*, 728 F.3d at 914. Thus, we conclude that an incorporated probable cause affidavit cannot broaden a warrant's narrower description of those places or persons to be searched or of the items to be seized, as doing so would violate the particularity requirements of both the United States and Nevada Constitutions.

In order to search Smith's person, officers needed to get a warrant authorizing a search of Smith's person, absent an applicable exception to the warrant requirement. The existing warrant, by its clear terms, only authorized the search and seizure of items inside Smith's apartment. The warrant cannot be broadened to include Smith's cell phone on his person because Smith was not inside the apartment—the particularly described place to be searched authorized by the magistrate. Thus, Smith's phone could not be seized pursuant to the existing warrant.

Good faith reliance does not apply when officers improperly exceed the scope of the warrant

Although Smith's phone was seized outside the scope of the warrant, suppression is not automatic. Evidence obtained from a deficient warrant is generally not subject to suppression "where the officer executing the warrant has an objective good-faith belief that the warrant is valid." *State v. Kincade*, 129 Nev. 953, 957, 317 P.3d 206, 209 (2013). This means courts will generally not suppress evidence when officers reasonably and in good faith believed that their warrant was valid, even if a reviewing court later determines that it was invalid.

Even if relying on a warrant, an officer must still "have a reasonable knowledge of what the law prohibits" when acting in their official capacity. *Allen*, 119 Nev. at 172, 69 P.3d at 236 (quoting *United States v. Leon*, 468 U.S. 897, 919 n.20 (1984)). This includes knowing that the warrants must particularly describe "the place or places to be searched, and the person or persons, and thing or things to be seized." Nev. Const. art. 1, § 18; *see also* U.S. Const. amend. IV. An officer cannot, therefore, rely in good faith upon a valid warrant to save its invalid execution. *See United States v. Rowland*, 145 F.3d 1194, 1208 n.10 (10th Cir. 1998) ("The *Leon* good-faith exception will not save an improperly executed warrant.").

In this case, the warrant was valid; Smith does not contest its validity. Nevertheless, a reasonable officer would have looked at the warrant and understood that the scope of the search was limited to Smith's apartment. The officers improperly executed the warrant by seizing Smith's phone from his person outside his apartment, when Smith's person was not authorized by the warrant as a place the officers could search. The good faith exception does not apply to this improper execution of a valid warrant. *See id.* The officers cannot claim a good faith belief that the warrant covered Smith's person because they are required "to have a reasonable knowledge of what the law prohibits" when acting in their official capacity. *Allen*, 119 Nev. at 172, 69 P.3d at 236 (quoting *Leon*, 468 U.S. at 919 n.20). Thus, they should have known that they could not take Smith's phone from his person under the warrant as written because

Smith's person was not a place to be searched. The good faith exception cannot apply to this case, where officers improperly executed a valid warrant by seizing an item from a person not particularly described in a valid warrant.

The imminent destruction of evidence exigency justifies the seizure of the cell phone from Smith, but the forensic search is unjustified

Finally, since neither the warrant nor a good faith reliance on the warrant covers the seizure of Smith's phone, we next address whether officers operated under another valid exception to the warrant requirement. *See Lloyd*, 129 Nev. at 743, 312 P.3d at 469 (a search is reasonable if performed subject to a valid exception to the warrant requirement). Warrants are not required under exigent circumstances; "[t]he exigent circumstances exception to the warrant requirement applies where the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." *Byars v. State*, 130 Nev. 848, 854, 336 P.3d 939, 943 (2014) (internal quotation marks omitted). One exigent circumstance courts have long recognized occurs in situations where a suspect may imminently tamper with or destroy evidence if that evidence is not immediately seized. *Howe v. State*, 112 Nev. 458, 466-67, 916 P.2d 153, 159-60 (1996); *see also Cupp v. Murphy*, 412 U.S. 291, 296 (1973).

The United States Supreme Court has recognized that an officer may secure a cell phone without a warrant to prevent the destruction of evidence contained on that device. *Riley v. California*, 573 U.S. 373, 388 (2014) (recognizing the "sensible concession" that officers could seize defendants' cell phones to prevent the destruction of evidence while seeking a warrant). The Court emphasized that the exception applied only to the physical seizure of the cell phone; the digital search of the phone's contents must be authorized by a warrant or justified under a new warrant exception. *See id.* at 390 (stating that generalized concerns about a "remote-wipe" did not justify the search of a cell phone's contents). If officers seize a cell phone subject to an exigency, officers must obtain a warrant to search its contents absent some separate exigency. *Id.* at 403 (stating that "what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant").

Here, officers were justified in seizing Smith's phone, even without a warrant, under the imminent destruction of evidence exigency. When Smith encountered officers executing the search warrant on his apartment, he was alerted to their investigation. At that point, Smith could have deleted or destroyed crucial evidence had he retained physical possession of the phone. Thus, we conclude that the seizure of Smith's phone was proper due to exigent circumstances.

The forensic search of Smith's phone the next day, however, was not justified by exigent circumstances. The warrant that officers possessed did not cover the forensic search because that warrant authorized the forensic search only of the devices seized from Smith's apartment, and this device was not seized from Smith's apartment. The officers did not seek a separate warrant authorizing their forensic search of Smith's cell phone, and no exigency existed justifying the search a day after the phone was seized. *See id.* at 402 (contemplating particular exigencies that would justify the warrantless search of a cell phone's contents, including "to pursue a fleeing suspect, and to assist persons who are seriously injured or are threatened with imminent injury"). The two-step justification required in *Riley*, one exigency for the seizure and another warrant or exigency for the search, was not met here because officers had no warrant or justification for the forensic search. Thus, exigent circumstances cannot justify the admission of the evidence obtained from Smith's cell phone.

Suppression is appropriate in this case because the search of Smith's cell phone violated his constitutional rights

Without a valid warrant or some exception to the warrant requirement, a search is per se unreasonable. *Lloyd*, 129 Nev. at 743, 312 P.3d at 469. The government may not benefit from evidence obtained through violation of an individual's right to be safe from unreasonable searches and seizures. *Beckman*, 129 Nev. at 491, 305 P.3d at 919 (citing *Florida v. Jardines*, 569 U.S. 1, 11-12 (2013)). Suppression is justified when "the challenged evidence is in some sense the product of illegal governmental activity." *Segura*, 468 U.S. at 815 (quoting *United States v. Crews*, 445 U.S. 463, 471 (1980)).

Officers had to obtain the evidence legally to use it against Smith. The incorporated affidavit of probable cause cannot expand the scope of the warrant itself. *See Sedaghaty*, 728 F.3d at 913-14. Further, officers could not have relied in good faith on the valid warrant they held when improperly executing that warrant. *See Rowland*, 145 F.3d at 1208 n.10. Finally, no exigent circumstances justified the forensic search of Smith's cell phone after officers seized it. *See Riley*, 573 U.S. at 402. The government's activity was a per se unreasonable search and illegal. The government then used that illegally obtained evidence against Smith to secure his conviction. Suppression of the evidence from the cell phone is required to ensure that the government does not benefit from the evidence it obtained illegally.

CONCLUSION

The district court erred when it denied Smith's motion to suppress the evidence obtained from his cell phone. The warrant itself did not cover the search of Smith's person, officers could not have searched Smith's person in good faith reliance on the warrant, and exigent circumstances did not justify the forensic search of the cell phone, though exigency likely did support the seizure of the phone from Smith. With no warrant or justification for the search of Smith's cell phone, the officers violated Smith's constitutional rights when they obtained material from his cell phone and that evidence was used to secure his conviction. Thus, we conclude that suppression of the evidence obtained from Smith's phone is necessary, and the district court erred in failing to suppress the photos and messages from the cell phone. We therefore reverse the judgment of conviction and remand for further proceedings consistent with this opinion.

Herndon and Lee, JJ., concur.

CHRISTOPHER KABEW, Petitioner, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE MICHELLE LEAVITT, District Judge, Respondents, and THE STATE OF NEVADA, Real Party in Interest.

No. 86982

March 28, 2024 545 P.3d 1137

Original petition for a writ of mandamus challenging a district court order denying a motion to set aside a judgment of conviction.

Petition granted.

Darin F. Imlay, Public Defender, and *Cherae Muije*, Deputy Public Defender, Clark County, for Petitioner.

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Alexander Chen*, Chief Deputy District Attorney, Clark County, for Real Party in Interest.

Before the Supreme Court, Stiglich, Pickering, and Parraguirre, JJ.

OPINION

By the Court, Stiglich, J.:

Petitioner Christopher Kabew pleaded guilty to attempted residential burglary and was placed on probation. As a term of probation, Kabew had to successfully complete a substance abuse treatment program. Kabew did so and moved the district court to set aside the judgment of conviction under NRS 176A.240(6)(a). The district court denied the motion and honorably discharged Kabew from probation.

In this original proceeding, we consider a district court's discretion when resolving cases under NRS 176A.240(6)(a). That statute provides that when a defendant fulfills the terms and conditions of probation pursuant to a substance abuse treatment program (drug court), a district court "[s]hall discharge the defendant and dismiss the proceedings or set aside the judgment of conviction, as applicable, unless the defendant" has either a prior felony conviction or previously failed a specialty court program. We hold that the statute does not afford district courts any discretion to deny a motion to set aside the judgment of conviction when the defendant meets the statutory requirements. Accordingly, we grant the petition.

FACTS AND PROCEDURAL HISTORY

The State charged Kabew with stalking and attempted residential burglary. Kabew pleaded guilty to attempted residential burglary—a category C felony—pursuant to plea negotiations. In exchange for Kabew's guilty plea, the State agreed to dismiss two other cases and to not oppose probation with drug court as a condition. The district court entered a judgment of conviction, imposing a suspended sentence of 12-36 months and placing Kabew on probation for a period not to exceed 24 months. In addition to the general terms of probation, the district court imposed special conditions, including that Kabew enroll in and complete the drug court program. The conviction was Kabew's first felony conviction.

Kabew successfully completed the drug court program. Accordingly, Kabew requested that the case be dismissed under NRS 176A.240(6)(a), which provides that upon a defendant's "fulfillment of the terms and conditions" of drug court, the district court "[s]hall discharge the defendant and dismiss the proceedings or set aside the judgment of conviction" unless the defendant has a prior felony conviction or previously failed to complete a specialty court program. The district court declined to dismiss the case but permitted the parties to brief the issue. In response, Kabew filed a motion to set aside the judgment of conviction. Kabew argued that the use of the word "shall" in NRS 176A.240(6)(a) required the district court to set aside the judgment of conviction. The State argued that the motion should be denied for two reasons. First, the State asserted that reading NRS 176A.240(6)(a) as mandatory would unconstitutionally usurp the district court's discretion in setting aside a judgment of conviction. Second, the State asserted that setting aside the judgment of conviction went against the "spirit" of the guilty plea negotiations.

After hearing argument, the district court orally denied the motion without explanation. The district court entered a written order summarily denying the motion and honorably discharging Kabew from probation. This petition for a writ of mandamus followed.

DISCUSSION

We elect to entertain the petition

Kabew seeks a writ of mandamus to compel the district court to enter an order setting aside the judgment of conviction. A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office or to control a manifest or arbitrary or capricious exercise of discretion. NRS 34.160; *Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981). It is within our discretion to determine if a petition for extraordinary relief will be considered.

Poulos v. Eighth Jud. Dist. Ct., 98 Nev. 453, 455, 652 P.2d 1177, 1178 (1982); *State, Off. of the Att'y Gen. v. Just. Ct. of Las Vegas Twp. (Escalante)*, 133 Nev. 78, 80, 392 P.3d 170, 172 (2017). A writ of mandamus will not issue when there is a plain, speedy, and adequate remedy at law. NRS 34.170.

Kabew asserts that this court should entertain the petition for three reasons. First, Kabew has no adequate remedy at law because the district court's order is not appealable. Second, this petition presents an issue of statewide importance affecting numerous successful drug court participants who are entitled to have their convictions set aside. Finally, the district court failed to perform an act required by law because NRS 176A.240(6)(a) is mandatory. We agree and exercise our discretion to entertain the petition because Kabew does not have an adequate remedy at law to challenge the district court's order and the interpretation of NRS 176A.240(6)(a) is an important issue requiring clarification that would provide needed guidance to lower courts. *Escalante*, 133 Nev. at 80, 392 P.3d at 172.

The district court improperly denied the motion to set aside the judgment of conviction

Entertaining the merits of this writ petition requires us to interpret NRS 176A.240. Questions of statutory construction are reviewed de novo. *Escalante*, 133 Nev. at 80-81, 392 P.3d at 172; *Hobbs v. State*, 127 Nev. 234, 237, 251 P.3d 177, 179 (2011). We look first to the statute's plain language. *Id.* When the plain language is clear and unambiguous, we will give effect to the clear meaning and "enforce the statute as written." *Id.*

NRS 176A.240(6)(a) imposes a duty to act and affords district courts no discretion

Kabew argues that NRS 176A.240(6)(a) is mandatory because it uses the word "shall," and therefore, the district court failed to perform an act (setting aside the judgment of conviction) required by law. In the State's view, NRS 176A.240(6)(a) is discretionary, and the district court did not manifestly abuse its discretion in denying the motion to set aside the judgment of conviction.

NRS 0.025(1)(d) provides that "'[s]hall' imposes a duty to act" unless "otherwise expressly provided in a particular statute or required by the context." Consistent with that definition, we generally construe "shall" as mandatory. *Thomas v. State*, 88 Nev. 382, 384, 498 P.2d 1314, 1315 (1972); *see also Goudge v. State*, 128 Nev. 548, 553, 287 P.3d 301, 304 (2012) ("This court has explained that, when used in a statute, the word 'shall' imposes a duty on a party to act and prohibits judicial discretion and, consequently, mandates the result set forth by the statute.").

Under NRS 176A.240(1), the district court has discretion to make the successful completion of a substance use disorder program a condition of a defendant's terms of probation. NRS 176A.240(6) provides two outcomes after a defendant successfully completes a substance abuse treatment program as a condition of probation. Those outcomes depend on whether the defendant has previously been convicted of a felony or failed a specialty court program. If the defendant has no prior felony conviction and has not previously failed a specialty court program, subsection 6(a) provides that the district court "*[s]hall* discharge the defendant and dismiss the proceedings or set aside the judgment of conviction." (Emphasis added.) But if the defendant has previously been convicted of a felony or failed a specialty court program, subsection 6(b) provides that the district court "*[m]ay* discharge the defendant and dismiss the proceedings or set aside the judgment of conviction." (Emphasis added.)

Clearly, the use of "shall" and "may" in the two subsections indicates that the Legislature used "shall" in subsection 6(a) to differentiate between defendants based on their history when it comes to felony convictions and specialty court programs. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012) ("[W]here the document has used one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea."). Because the statute uses "shall" with respect to defendants with no prior felony convictions or failed efforts in a specialty court program and "may" with respect to repeat offenders and those who previously failed to complete a specialty court program, the Legislature clearly intended to remove a district court's discretion under subsection 6(a) while affording a district court discretion under subsection 6(b). Reading the word "shall" in NRS 176A.240(6)(a) as discretionary would thwart, not further, that legislative objective. We therefore interpret the word "shall" by its ordinary meaning as provided in NRS 0.025(1)(d).

The State concedes that the statute's plain language demonstrates that the Legislature worded it so as to remove judicial discretion. Nevertheless, the State urges us to disregard the plain meaning and construe the statute as discretionary because the decision to set aside a judgment of conviction is a judicial function. When a statute intrudes on the functions of the judicial branch, this court may construe the statute as directory rather than mandatory. *State v. Am. Bankers Ins. Co.*, 106 Nev. 880, 883, 802 P.2d 1276, 1278 (1990) ("When statutory provisions 'relate to judicial functions, they should be regarded as directory only.'" (quoting *Waite v. Burgess*, 69 Nev. 230, 234, 245 P.2d 994, 996 (1952))).

In *Goudge v. State*, this court considered whether district courts had discretion to release a defendant from lifetime supervision after the defendant satisfied the statutory requirements for release under NRS 176.0931. 128 Nev. at 552, 287 P.3d at 303. The State argued that "determining punishments is within the purview of the district court." *Id*. Accordingly, the State asserted "that divesting a district court of discretion in this context renders the role of the judiciary meaningless with regard to determining whether convicted sex offenders are ready to be released from lifetime supervision." *Id*. at 553-54, 287 P.3d at 304. This court disagreed and concluded that "reading the statute as mandatory does not encroach upon the judicial function." *Id*. at 554, 287 P.3d at 304. This court explained that when the Legislature uses the mandatory word "shall" to limit the extent of a punishment, "the district court must comply with the Legislature's mandate." *Id*.

We find the reasoning in *Goudge* applicable to this case. Construing NRS 176A.240(6)(a) as mandatory does not "usurp" a judicial function. "[T]he [L]egislature, within constitutional limits, is empowered to define crimes and determine punishments . . . ." *Schmidt v. State*, 94 Nev. 665, 668, 584 P.2d 695, 697 (1978). And this court has recognized that "it is within the Legislature's power to completely remove any judicial discretion to determine a criminal penalty by creating mandatory sentencing schemes." *Mendoza-Lobos v. State*, 125 Nev. 634, 640, 218 P.3d 501, 505 (2009). Because the Legislature defines the framework of the specialty court programs, it is within the Legislature's authority to define the outcome for a probationer who successfully completes one of those programs. In NRS 176A.240(6)(a), the Legislature has provided certain probationers a benefit based on their successful completion of a drug court program. Where a defendant has satisfied the terms and conditions of probation and met the requirements under NRS 176A.240(6)(a), the district court lacks discretion to deny the motion to set aside the judgment of conviction. Accordingly, we decline the State's invitation to eschew the provision's plain meaning and thus interpret the statutory language as written. In doing so, we elect to abide by the legislative mandate contained in NRS 176A.240(6)(a) because it serves the legitimate goal of providing first-time felons who have not previously failed to complete a drug court program an opportunity to reenter society without the impediments of a felony conviction.

Kabew is entitled to have the judgment of conviction set aside pursuant to NRS 176A.240(6)(a)

We next consider the district court's denial of Kabew's motion in this case. The State does not dispute that Kabew met the statutory requirements provided in NRS 176A.240(6)(a). Instead, the State argues that interpreting NRS 176A.240(6)(a) as mandatory goes against the "spirit" of Kabew's guilty plea agreement because the plea agreement did not contemplate NRS 176A.240(6)(a) and prosecutors will be dissuaded from negotiating plea agreements.[1] Neither argument is relevant to interpreting the statute. *See Platte River Ins. Co. v. Jackson*, 137 Nev. 773, 778, 500 P.3d 1257, 1262 (2021) (explaining that this court "may not adopt an interpretation contrary to a statute's plain meaning merely because we 'disagree[ ] with the wisdom of' the Legislature's policy determinations" (alteration in original) (quoting *Anthony v. State*, 94 Nev. 338, 341, 580 P.2d 939, 941 (1978))).

Moreover, we find the State's policy concerns to be inconsequential in light of NRS 176A.240(7), which provides that a discharge and dismissal under the statute is not a conviction for public or private purposes "but is a conviction for the purpose of additional penalties imposed for second or subsequent convictions or the setting of bail." Thus, the statute allows a successful first-time drug court participant to reenter society without the conviction on their public record, while ensuring that the conviction nonetheless can be used for enhancement purposes if that person reoffends. Having decided that NRS 176A.240(6)(a) removes judicial discretion under the facts presented in this case, we conclude the district court failed to perform a duty required by law.

CONCLUSION

We hold that NRS 176A.240(6)(a) removes judicial discretion in cases where a defendant fulfills the terms and conditions of probation pursuant to a drug court program and satisfies the statutory requirements. Because Kabew satisfied those conditions and met both requirements under NRS 176A.240(6)(a), the district court had no discretion to deny the motion to set aside the judgment of conviction. Accordingly, we conclude that the district court failed to perform a duty required by law. Therefore, we grant the petition and direct the clerk of this court to issue a writ of mandamus directing the district court to enter an order setting aside the judgment of conviction.

Pickering and Parraguirre, JJ., concur.

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[1]Notably, NRS 176A.240 was in effect when Kabew entered his guilty plea. 2019 Nev. Stat., ch. 633, § 22, at 4391; 2019 Nev. Stat., ch. 633, § 137(2), at 4488 (providing that the law became effective on July 1, 2020); *see also Smith v. State*, 38 Nev. 477, 481, 151 P. 512, 513 (1915) (noting that "[e]very one is presumed to know the law").