

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

ANTHONY CLARKE,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

No. 80130

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**RESPONDENT'S ANSWERING BRIEF**

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**RESPONDENT'S ANSWERING BRIEF**

I. **STATEMENT OF THE CASE**

Anthony Clarke, hereafter “Clarke,” was charged by information with Burglary, a violation of NRS 205.060. Joint Appendix, hereafter “JA,” Volume 1, 1-3. The State further alleged that Clarke had been previously convicted of petty larceny at the time he committed the crime. *Id.*

Pursuant to negotiations, Clarke agreed to plead guilty to the sole count of the information; in exchange, the parties agreed to stipulate to a recommended sentence of 12 to 36 months. *Id.*, 4-9. On August 21, 2019, Clarke pled guilty pursuant to the agreement after a thorough canvass. *Id.*, 11-18.

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On October 11, 2019, the Washoe County Public Defender filed a motion requesting that Clarke be permitted to represent himself, accompanied by an affidavit. *Id.*, 20-25. The same day, Clarke's appointed counsel also filed a motion requesting a hearing pursuant to *Young v. State*, 120 Nev. 963 (2004). *Id.*, 26-33. An evidentiary hearing pursuant to *Young*, was held on October 23, 2019, the day that had been scheduled for Clarke's sentencing. *Id.*, 34-65. On October 24, 2019, the district court entered an order granting Clarke's request to represent himself. 2 JA 82-86.

On November 1, 2019, Clarke filed a petition for writ of habeas corpus in proper person. *Id.*, 88-94. That same day, Clarke filed a motion to dismiss the charges against him, as well as a motion to withdraw his guilty plea. *Id.*, 95-96; 97-100. The State opposed Clarke's motions, and responded to his petition for writ of habeas corpus, observing that it was untimely. *Id.*, 101-111; 113-117; 118-122.

On November 21, 2019, the district court entered its order denying Clarke's motion to withdraw his guilty plea. *Id.*, 128-131. On November 25, 2019, the parties appeared for sentencing. *Id.*, 144-162. Clarke was sentenced to a term of 28-96 months, with credit for 136 days served in custody. *Id.*, 163-164. This appeal followed.

## II. STATEMENT OF THE FACTS

Because he pleaded guilty, many of the facts underlying Clarke's crimes undoubtedly fall outside the record. The State charged him with Burglary, and specifically pled that he entered the Taste of Chicago restaurant, with the intent to commit larceny. 1 JA 1-2. In his plea agreement, Clarke acknowledged that factual basis, indicated that he understood the negotiations, and agreed that pleading guilty was in his best interest. *Id.*, 4-9. At arraignment, he was represented by Deputy Public Defender Lorena Valencia. Appointed counsel recited the terms of the plea negotiations in Clarke's presence. *Id.*, 13. Prior to conducting the plea canvass, the district court placed Clarke under oath. *Id.* The district court then conducted a thorough canvass, and Clarke indicated that he understood all of his constitutional rights, yet still wished to plead guilty. *Id.*, 14-17. The district court found that Clarke's plea was entered freely, knowingly, and intelligently. *Id.*

Prior to this case, Clarke had represented himself in California in 1990, and in the Second Judicial District Court in 2017. *Id.*, 22. His counsel moved to withdraw from representation based on Clarke's desire to represent himself. *Id.*, 23. During the hearing pursuant to *Young v. State*, *supra*, Clarke told the district court that he intended to withdraw his plea

and go to trial. *Id.*, 38-39. He stated that he wanted to represent himself because “I have no representation, even though I had a warm body next to me.” *Id.*, 47. He also complained that he did not have an attorney present during his initial appearance immediately following his arrest. *Id.*, 48. A *Faretta* canvas was conducted. *Id.*, 50-59. During the canvass, he told the district court that he did not want standby counsel. *Id.*, 52. He told the judge that if standby counsel were appointed, “I wouldn’t want them from this office.” *Id.*, 53. During that same hearing, the district court set a date for imposition of judgment and sentencing that was 30 days away. *Id.*, 57.

The following exchange occurred:

THE COURT: So we’ll either go to sentencing without an attorney and you’ll represent yourself, or you’ll go to trial representing yourself.

THE DEFENDANT: Your Honor?

THE COURT: Yes, Mr. Clarke?

THE DEFENDANT: I was actually coerced in the lower court to sign this agreement, and I was threatened through email.

*Id.*, 60-61.

The district court then asked counsel for the State to leave the room. *Id.*, 61. The proceedings continued, and Clarke stated that he did not get discovery until after he entered his plea. 2 JA 69-70. When the district

court inquired as to what Clarke believed constituted coercion, Clarke offered the following:

I asked the attorney of record to see if I can keep the negotiation down from a B felony burglary to a C, and the State attorney sent me this back threatening me—I took it as a threat, that if I didn't accept the deal they would take it to second degree burglary in an email. So I signed and I entered a plea on the 21<sup>st</sup>.

2 AA 71.

Ultimately, the district court granted Clarke's motion for self-representation, and appointed the Washoe County Public Defender as stand by counsel. *Id.*, 82-86.

In Clarke's motion to withdraw his guilty plea, he admitted that both he and Deputy Public Defender Kendra Bertschy thought waiving the preliminary hearing was a good idea, but claimed that at the time, he erroneously believed he had been identified in a lineup. *Id.*, 98. He admitted to taking money from the restaurant, but claimed he did so in retaliation for being called a racial epithet. *Id.*, 100.

In its response, the State observed that Clarke's version of events attendant to his waiver of preliminary hearing was inconsistent with Reno Justice Court procedures. *Id.*, 105. The district court denied Clarke's motion to withdraw his plea, noting that during the *Young* hearing, defense counsel asserted that there was no indication in the file that Clarke had ever

been advised regarding the existence of a lineup, and that despite opportunities, he never mentioned the question of a lineup until after his plea, on the date set originally set for sentencing. *Id.*, 129-130. It reasoned that no lineup could possibly have been conducted, and “it is difficult to understand how Mr. Clarke, who has significant experience with law enforcement, would have believed he was identified in a lineup when he never participated in one.” *Id.*, 131. The district court further found that Clarke admitted it was he who entered the restaurant and took money, and that Clarke was immediately chased and held by the owner of the restaurant. It added that the events were captured on surveillance video. *Id.*, 131.

Sentencing occurred on November 25, 2019. Clarke had a Deputy Public Defender Lorena Valencia present as standby counsel. *Id.*, 145. Clarke proceeded without asking for counsel. He informed the district court that he contested various portions of the presentence investigation report, claiming it was “not me” regarding four felony convictions. *Id.*, 148. He contested the number of times he had been incarcerated. *Id.*, 149. It was only then that he told the court, “I’d like to invoke my right to counsel, Ms. Valencia.” *Id.*, 149. The district court declined, telling Clarke “we’ve gone past that. And when I had the *Faretta* canvass, I was very clear. You

may proceed on your own behalf as you requested.” *Id.* Clarke then proceeded to inform the judge regarding additional objections to information contained in the PSI. *Id.*, 150. He then told the court that he admitted guilt and told the court he had a “drug problem.” He apologized to the victims and to his family. *Id.*, 151. He told the court that he had “never had a program,” but then told the court he had “successfully completed one in Los Angeles County.” *Id.*, 152. After the State presented argument, Clarke argued that the victim did not have to chase him, and that the video showed him giving back the money. He also claimed he had \$600 on his person at the time he took money from the victim’s tip jar, and that the victim had actually stolen money from him. *Id.*, 157-158. The district court then pronounced sentence.

### III. ROUTING STATEMENT

Because this appeal involves a conviction entered as a result of a guilty plea, it is presumptively assigned Court of Appeals. NRAP 17 (b).

### IV. STATEMENT OF THE ISSUES

- A. Where Clarke waived his right to counsel after a *Faretta* canvass 30 days prior to sentencing, whether the district court erred by declining Clarke’s request for counsel once the sentencing hearing had begun.
- B. Where a thorough plea canvass was conducted, and Clarke’s explanation was incredible, whether the district court erred by denying Clarke’s pre-sentencing motion to withdraw his guilty plea.

C. Whether the 2019 amendments to NRS 205.060 should be retroactively applied to Clarke's case.

D. Whether the district court abused its discretion at sentencing.

V. SUMMARY OF ARGUMENT

In this case, Clarke entered a restaurant and stole money from a tip jar. There were multiple eyewitnesses, and surveillance video captured the crime. In this appeal, Clarke argues that this Court should overlook his request to represent himself, despite a valid *Faretta* canvass. But Clarke's change of heart came after the sentencing hearing had already begun, and the district court did not abuse its discretion in declining to grant his request for counsel.

Clarke claimed he wanted to withdraw his guilty plea because of some confusion regarding whether he was identified in a lineup. Yet the district court appropriately reasoned that Clarke himself would know whether he had participated in a lineup. Moreover, there was no issue of identification in this case, as Clarke committed the crime in front of multiple eyewitnesses and was detained at the scene.

Clarke's assertion that Assembly Bill 236 somehow supports a change in his sentence is unsupported by the bill's language and basic principles of statutory interpretation. Additionally, the district court did not abuse its discretion at sentencing, and the sentence was within statutory limits.

## VI. ARGUMENT

### A. The District Court Properly Declined to Reinstate Counsel After Clarke's Valid Waiver.

#### 1. Standard of Review

This Court reviews a district court's decision to deny appointment of counsel for an abuse of discretion. *Arajakis v. State*, 108 Nev. 976, 843 P.2d 800 (1992).

#### 2. Discussion

Clarke argues that the district court erred by declining to reinstate counsel during his sentencing hearing. In support of this contention, he cites *Robinson v. Ignacio*, 360 F.3d 1044, 1056 (9th Cir. 2004). In that case, the defendant waived trial counsel, and represented himself. After the jury found him guilty, Robinson for asked for specific appointed attorney to represent him at sentencing. He requested the appointment of counsel one week prior to the scheduled sentencing and reiterated the request in open court. *Id.* The Nevada state court declined to appoint counsel based on his prior waiver of counsel to represent him at trial. *Robinson*, 360 F. 3d 1044, 1048. The 9th Circuit found that because Robinson timely requested counsel represent him at sentencing, the trial court's denial of appointed counsel violated his Sixth Amendment right to counsel. *Id.*, 1061.

The facts of this case can easily be distinguished from *Robinson*. Clarke had thirty days to reconsider his decision to represent himself at sentencing, but he chose not to. He waited until the sentencing hearing had already begun, mid-argument, to change his mind. These circumstances are very similar to those in *Arajakis v. State*, 108 Nev. 976, 843 P.2d 800 (1992). In that case, Arajakis represented himself at his own request during jury trial. Like Clarke, Arajakis did not request that counsel represent him until the day of the sentencing hearing, and the district court denied his request. *Id.*, 108 Nev. 976 at 979-980. The Nevada Supreme Court upheld the district court's decision, observing that Arajakis waited five weeks after the jury's verdict to retract his request to represent himself, and concluding that Arajakis "failed to act with sufficient diligence when he requested counsel for his sentencing on the day of the sentencing hearing, almost one and one-half months after the conclusion of the trial, and that therefore the district court acted within its discretion when it denied his motion for a continuance to obtain counsel." *Id.* at 982.

Clarke acknowledges that *Arajakis* is good law, but attempts to distinguish the case by arguing that "standby counsel was literally standing by, and any delay in the proceedings would have been brief." *Id.*, 6. However, there is no support in the record for this assertion. Stand-by

counsel may or may not have needed more time to ensure effective representation at sentencing. Moreover, under *Arajakis*, whether the proceedings would have been delayed is not dispositive. Though the sentencing was set 30 days from his *Faretta* hearing, Clarke did not just wait until sentencing to try to rescind his valid waiver, he waited until the middle of the hearing to attempt to retract his waiver of counsel.

**B. The District Court Properly Denied Clarke’s Motion to Withdraw His Guilty Plea.**

**1. Standard of Review**

“This court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.”

*McConnell v. State*, 125 Nev. 243, 250, 212 P.3d 307, 312 (2009).

**2. Discussion**

NRS 176.165 allows a defendant who has pleaded guilty, but not been sentenced, to petition the district court to withdraw his plea. “[T]he district court must consider the totality of the circumstances to determine whether permitting withdrawal of a guilty plea before sentencing would be fair and just.” *Stevenson v. State*, 131 Nev. 598, 354 P.3d 1277 (2015).

In denying Clarke’s motion to withdraw her guilty plea, the district court considered the totality of the circumstances, including the plea canvass, his reasons to withdraw his plea, and the relevant context

surrounding entry of his plea. The guilty plea memorandum also demonstrates that Clarke understood what he was doing and the consequences of his guilty plea. The district court properly found that Clarke's motion was not supported by a credible basis, because his claims regarding the existence of a line up made no sense. It observed that Clarke would know whether he had participated in a lineup. Additionally, Clarke pled guilty after a thorough canvass. Identity was not a genuine issue in his case, because Clarke took the money in front of multiple eyewitnesses. Thus, the totality of the circumstances demonstrates that the district court did not abuse its discretion in denying Clarke's motion to withdraw his guilty plea. *See State v. Freese*, 116 Nev. 1097, 1106, 13 P.3d 442, 448 (2000) ("A defendant's comprehension of the consequences of a plea, the voluntariness of a plea and the general validity of a plea are to be determined by reviewing the entire record and looking to the totality of the facts and circumstances surrounding the plea," including "the circumstances surrounding the execution" of the plea.); *Mitchell v. State*, 109 Nev. 137, 141, 848 P.2d 1060, 1062 (1993) ("A district court may not simply review the plea canvass in a vacuum, conclude that it indicates that the defendant understood what she was doing, and use that conclusion as the sole basis for denying a motion to withdraw a guilty plea."); *Stevenson*

*v. State*, 131 Nev. 598, 354 P.3d 1277 (2015) (“the district court must consider the totality of the circumstances to determine whether permitting withdrawal of a guilty plea before sentencing would be fair and just.”).

C. Changes Made to NRS 205.060 Via Assembly Bill 236 Do Not Retroactively Apply to Clarke’s Sentence.

1. Standard of Review

This Court reviews questions of statutory interpretation *de novo*.  
*State v. Catanio*, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004).

2. Discussion

Clarke appears to contend that legislative changes made to Nevada’s burglary statutes, made after the date of his crime, should be retroactively applied to his sentence. In making this argument, he appears to rely on Assembly Bill 236, passed during the 2019 Nevada legislative session. See Assembly Bill 236, available at <https://www.leg.state.nv.us/App/NELIS/REL/80th2019/Bill/6419/Text>. However, this reliance is misplaced. Section 137 (2) of the AB 236 expressly provides that the provisions relevant to penalties contemplated by the bill did not become effective until July 1, 2020.

Absent contrary indication by the Legislature, statutes are generally prospective in application. See *Convention Properties v. Washoe Co. Assessor*, 106 Nev. 400, 402, 793 P.2d 1332, 1333 (1990) (there is a general

presumption in favor of prospective application in absence of legislative intent clearly manifested to the contrary); *State ex rel. State Bd. Of Equalization v. Barta*, 124 Nev. 612, 622, 188 P.3d 1092 (2008) (recognizing that regulations and statutes operate prospectively, absent clearly manifested retroactive intent); *State v. Merolla*, 100 Nev. 461, 686 P.2d 244 (1984) (statutes must generally be construed to have only prospective effect, unless a contrary legislative intent is clearly indicated by the express terms of the statute). *See also Hassett v. Welch*, 303 U.S. 303, 58 S. Ct. 559, 82 L.Ed. 858 (1938); *Shepley v. Warden*, 90 Nev. 93, 518 P.2d 619 (1974).

More support for the State's position can be found in Assembly Bill 3, passed during the second special session of 2020. Section 8 of that bill made a portion of AB 236 retroactive by requiring that a person sentenced after July 1, 2020 be subject to the probation terms contemplated by AB 236. *See* Assembly Bill 3, available at <https://www.leg.state.nv.us/App/NELIS/REL/32nd2020Special/Bill/7142/Text>. Had AB 236 been retroactive in application, there would have been no need for AB 3 to include such a provision. Furthermore, the legislative history of AB 236 supports the position that the bill is not retroactive. The minutes of the Assembly Committee on Judiciary dated March 8, 2019, reflect that

Assembly Judiciary Committee Chair Steve Yeager, and the Advisory Commission on the Administration of Justice Chair, Justice James Hardesty, presented AB 236 to the Assembly Judiciary Committee. Legislative minutes notate that during the March 8, 2019, meeting Assemblywoman Sarah Peters asked the presenters about retroactive application of AB 236 and Assemblyman Yeager answered:

Generally speaking, it would not be retroactive. The effective date of the bill, whenever it is effective, means that it would apply to any sentencing that happened after that date. We would not be going back and looking at prior sentences. Although, from a fairness perspective, we may want to do that as a Legislature. It becomes extraordinarily difficult to do, particularly in the context of making sure victims had their day and had their say, to go back and undo some of that. It would just apply going forward.

See Minutes of the Meeting of the Assembly Committee on Judiciary, March 8, 2019, p. 20; available at <https://www.leg.state.nv.us/Session/80th2019/Minutes/Assembly/JUD/Final/403.pdf>. AB 236 does not operate to shorten Clarke's sentence.

Additionally, Clarke concedes that he committed his offense on March 2, 2019, before changes to the burglary statute became effective, and that retroactive application of laws is generally disfavored absent clearly expressed legislative intent. He also suggests that the district court departed from the recommendation of the parties because it observed that

the restaurant owner had to pursue Clarke and detain him following the burglary. But this account is consistent with the PSI's factual synopsis, which Clarke has moved to transmit.

#### D. The District Court Did Not Abuse Its Discretion At Sentencing.

##### 1. Standard of Review

This Court has consistently afforded the district court wide discretion in its sentencing decision. *See Houk v. State*, 103 Nev. 659, 747 P.2d 1376 (1987). The Court will refrain from interfering with the sentence imposed "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976). Moreover, a sentence within the statutory limits is not cruel and unusual punishment where the statute itself is constitutional, and the sentence is not so unreasonably disproportionate as to shock the conscience. *See Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (*quoting Culverson v. State*, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979)).

##### 2. Discussion

The sentence imposed in this case was within statutory limits. Although Clarke suggests that the district court improperly relied on argument that

the restaurant owner had to chase and detain him, nothing in the record establishes this account was inaccurate. To the contrary, it is consistent with the factual synopsis contained in the PSI. Moreover, Clarke disputed this version of events on the record.

The record makes clear that the district court’s primary consideration in deciding a sentence greater than the stipulated sentence was Clarke’s extraordinary and extensive criminal record. During the sentencing hearing, the district court inquired regarding Clarke’s prior felony convictions. The Division advised that Clarke had 10 prior felonies, and that this substantial criminal history was the basis for its 36 to 96 month sentencing recommendation. 1 JA 154. The district court also noted that Clarke had 47 prior criminal convictions. *Id.*, 155. It explained that “...the Division is asking that I remove him from our community because after 47 times it’s just too many.” *Id.*, 156. There is no evidence that the district court relied upon impalpable or highly suspect evidence in deciding Clarke’s sentence.

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VII. CONCLUSION

Based on the foregoing, the State respectfully asserts that the judgment of the district court should be affirmed.

DATED: December 28, 2020.

CHRISTOPHER J. HICKS  
DISTRICT ATTORNEY

By: Jennifer Noble  
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**CERTIFICATE OF COMPLIANCE**

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Georgia 14.

2. I further certify that this brief complies with the page limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it does not exceed 30 pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in

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the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: December 28, 2020.

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I hereby certify that this document was filed electronically with the Nevada Supreme Court on December 28, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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