

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
Clerk of Supreme Court

ANTHONY CLARKE,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 80130

Dist. Court No. CR19-1352

Appeal from a Guilty Plea
Second Judicial District Court, Washoe County
Honorable David Hardy, District Court Judge

APPELLANT'S REPLY BRIEF

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1 **LEGAL ARGUMENT**

2 In its answering brief, the State fails to demonstrate that Mr. Clarke is
3
4 not entitled to reversal in this matter.

5 **I. WHETHER THE DISTRICT COURT ERRED BY**
6 **DENYING APPELLANT’S REQUEST TO REINSTATE**
7 **COUNSEL AT THE SENTENCING HEARING.**

8 As set forth in the opening brief, the district court’s denial of Mr.
9 Clarke’s request for counsel amounts to reversible error unless the State can show
10 that the request was made for a bad faith purpose. “[I]n the absence of
11 extraordinary circumstances, an accused who requests an attorney [post-trial] is
12 entitled to have one appointed, unless the government can show that the request is
13 made for a bad faith purpose.” *Menefield v. Borg*, 881 F.2d 696, 701 (9th Cir.
14 1989). The State makes no such showing, and indeed no allegation that Mr.
15 Clarke’s request for counsel at sentencing was made in bad faith. Mr. Clarke was
16 entitled to have counsel reappointed to assist him at sentencing.
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21 Relying on *Arajakis v. State*, 108 Nev. 976, 843 P.2d 800 (1992), the
22 State argues that the district court was correct in denying Mr. Clark’s request for
23 counsel because he did not request counsel until the day of sentencing. The State,
24 however, reads *Arajakis* too broadly. The court in that case did not specifically
25 adopt a “cut-off” time in which to assert the right to counsel. Rather, the court was
26 focused on whether the request was a delaying tactic. Specifically, the court noted
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1 that until the sentencing hearing, “Arajakis proceeded in proper person without
2 standby counsel.” *Arajakis*, 108 Nev. at 979, 843 P.2d at 802. Moreover, the court
3
4 noted that the request was, in fact, a “last-minute request at the sentencing hearing
5 for a continuance to obtain counsel.” *Id.*

6
7 Mr. Clarke did not request a continuance, and unlike the defendant in
8 *Arajakis*, Mr. Clarke had standby counsel. The *Arajakis* court reiterated a previous
9 holding by the court that, “a request for self-representation may be denied upon a
10 showing of dilatory intent.” 108 Nev. at 981, 843 P.2d at 803 (quotations and
11 citations omitted). It is clear from the record that Mr. Clarke realized at sentencing
12 that he needed assistance from his standby counsel, and that is when he requested
13 her help. JA 149. The State can point to nothing that demonstrates a dilatory intent
14 or a bad faith purpose to support the denial of counsel.

15
16 Indeed, the lengthy sentence that Mr. Clarke received confirms his
17 belief that he was in need of assistance from counsel and shows the prejudice that
18 he suffered by the denial of counsel, a showing that is not even required, because
19 the deprivation of counsel at sentencing is not subject to a harmless error analysis.

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22 [W]hen a defendant is denied counsel during sentencing, the
23 Supreme Court has uniformly found constitutional error without any
24 showing of prejudice. *See Cronin*, 466 U.S. at 659. *See also Chapman*
25 *v. California*, 386 U.S. 18, 23, 17 L. Ed. 2d 705, 87 S. Ct. 824 & n.8,
26 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967) (recognizing that
27 the right to counsel is “so basic to a fair trial that [its] infraction can
28 never be treated as harmless error”).

1 *Robinson v. Ignacio*, 360 F.3d 1044, 1056 (9th Cir. 2004).

2 In sum, there has been no allegation or showing that Mr. Clarke's
3 request for the reappointment of his counsel at sentencing was made in bad faith,
4 for an improper purpose, or for the purpose of delay. It was, therefore, reversible
5 error for the district court to deny the request.
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8 **II. WHETHER THE DISTRICT COURT ERRED BY**
9 **DENYING APPELLANT'S PRE-SENTENCING MOTION**
10 **TO WITHDRAW HIS GUILTY PLEA.**

11 The State argues that the district court did not err by denying Mr.
12 Clarke's motion to withdraw his guilty plea based on the totality of the
13 circumstances, because, in the State's view, Mr. Clarke "understood what he was
14 doing and the consequences of his guilty plea." RAB 12. However, Mr. Clarke
15 asserted that he was given conflicting information as to whether a lineup would be
16 conducted, whether a lineup had been conducted and what impact this should have
17 on his decision to enter a guilty plea. JA 097-99. The district court noted that
18 there were logical inconsistencies in Mr. Clarke's argument, and that Mr. Clarke
19 had been represented by different public defenders when he waived his preliminary
20 hearing and when he entered his guilty plea. JA 131. All of these facts, when
21 considered together, point to someone who does not understand what he is doing
22 or the consequences of a decision to plead guilty.
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1 Moreover, as previously argued, given that his motion was made prior
2 to sentencing there would have been no prejudice to the State had the district court
3 allowed Mr. Clarke to withdraw his plea. Accordingly, the district court should
4 have granted the motion. *Mitchell v. State*, 109 Nev. 137, 141, 848 P.2d 1060,
5 1062 (1993) (holding that the appellant presented a fair and just reason to withdraw
6 her plea where, *inter alia*, the State would not be prejudiced, and only a minor
7 amount of money was involved).

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11 **III. WHETHER APPELLANT’S SENTENCE SHOULD BE**
12 **REVIEWED IN LIGHT OF AMENDMENTS TO NRS**
13 **205.060.**

14 The State misunderstands Mr. Clarke’s argument with respect to NRS
15 205.060. Mr. Clarke conceded in the opening brief that the controlling statute at
16 the time of his offense was the previous version of NRS 205.060, i.e., the
17 undifferentiated statute.

18
19 Mr. Clarke does not argue that the changes made to the statute apply
20 retroactively to his case, rather, he argues that the Legislature’s decision to adopt
21 a differentiated statute should be considered along with his deprivation of counsel,
22 and the egregiousness of the sentence imposed.

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25 The Legislature recognized that it makes no sense to sentence an
26 individual to the same term of confinement whether that individual broke into a
27 home or walked into a business and took money out of a tip jar. The two offenses
28

1 are of staggeringly different scale, and the statute now reflects that difference.
2 Unfortunately for Mr. Clarke, that statute did not differentiate at the time of his
3 offense, but as previously noted, the subsequent change in the statute provides
4 additional reason to reverse this matter.
5

6 The term that the State agreed to recommend, of 12 to 36 months, is
7 exactly what Mr. Clarke would be facing under the current statute. Additionally,
8 the prosecutor noted at sentencing the amount of money taken was minimal, and
9 immediately returned to the victim. JA 156.
10

11 The imposition of a sentence of 28 to 96 months is an example of the
12 issues that the Legislature addressed by amending the statute. Mr. Clarke urges
13 this court to consider that even though the sentence was legal at the time imposed,
14 it would be outside the statutory range today, a fact which weighs in favor of
15 granting Mr. Clarke the relief he seeks.
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19 **IV. WHETHER THE DISTRICT COURT ABUSED ITS**
20 **DISCRETION AT SENTENCING.**

21 While acknowledging the wide discretion allowed the district court in
22 pronouncing sentence, Mr. Clarke nonetheless argues that that discretion was
23 abused in this case. An abuse of discretion can occur where “the district court’s
24 decision . . . exceeds the bounds of law or reason,” *Crawford v. State*, 121 Nev.
25 744, 748, 121 P.3d 582, 585 (2005) (footnote omitted) (*quoting Jackson v. State*,
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1 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001), or “fails to give due consideration
2 to the issues at hand.” *Patterson v. State*, 129 Nev. 168, 176, 298 P.3d 433, 439
3 (2013) (citations omitted).
4

5 As discussed above, given that Mr. Clarke pleaded guilty to taking
6 \$35 from a tip jar in a business establishment, to punish him with the same sentence
7 he could have received for breaking into a home exceeds the bounds of law and
8 reason, particularly in light of the fact that the legislature has amended the statute
9 so that it more fairly achieves the burglary statute’s purposes.
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11

12 CONCLUSION

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14 Based upon the foregoing, appellant Anthony Clarke respectfully
15 requests that this Court reverse the conviction entered below.

16 Respectfully submitted this 27th day of January 2021.

17
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1 **CERTIFICATE OF COMPLIANCE**

2 I hereby certify that I have read this appellate brief, and to the best of
3 my knowledge, information, and belief, it is not frivolous or interposed with any
4 improper purpose. I further certify that this brief complies with all applicable
5 Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires
6 every assertion in the brief regarding matters in the record to be supported by the
7 reference to the page and volume number, if any, of the transcript or appendix
8 where the matter relied on is to be found. I understand that I may be subject to
9 sanctions in the event that the accompanying brief is not in conformity with the
10 requirements of the Nevada Rules of Appellate Procedure.
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1 I hereby certify that this brief complies with the formatting
2 requirements of NRAP 32(a)(4)-(6) because the brief has been prepared in a
3 proportionally spaced typeface using Microsoft Word in Times New Roman 14. I
4 further certify that this brief complies with the page or type-volume limitations
5 because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is
6 proportionately spaced, has a typeface of 14 points or more and does not exceed
7 15 pages.
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11 Dated this 27th day of January 2021.
12
13

14 Respectfully submitted,

15 /s/ Tracie K. Lindeman

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that this document was filed electronically with the
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11 and correct copy thereof, postage pre-paid, addressed to:
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