

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JACK LEAL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 74050

FILED

SEP 11 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Jack Leal appeals from a judgment of conviction, entered pursuant to a guilty plea, of multiple transactions involving fraud or deceit in the course of an enterprise or occupation. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

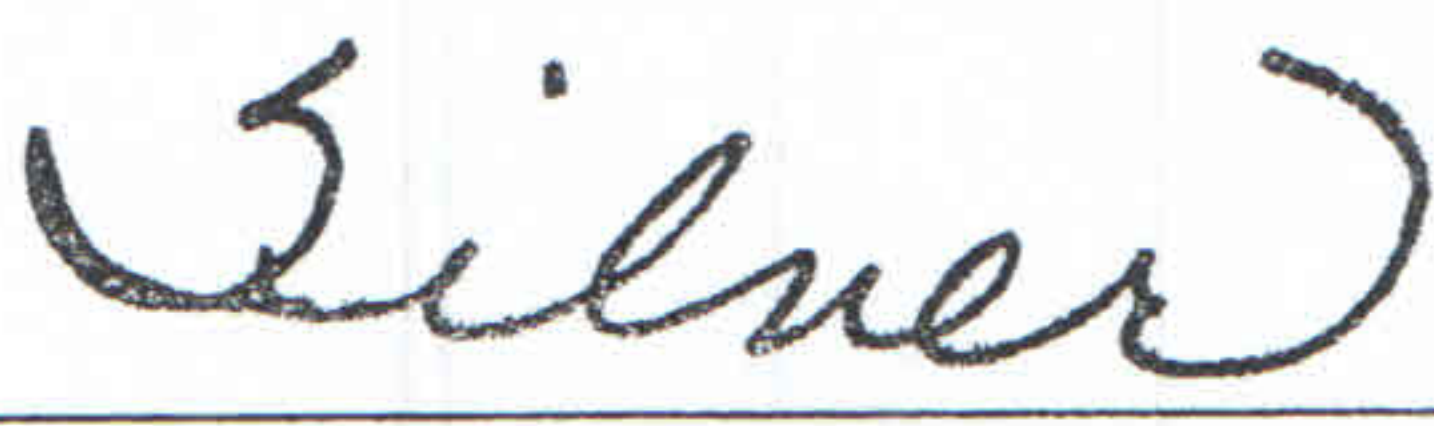
First, Leal argues the district court erred by failing to hold an evidentiary hearing or failing to inquire into the nature or materiality of his breach of the plea agreement. We disagree.


The parties agreed in the guilty plea agreement that if Leal paid full restitution to the victims in this case by the sentencing date, the State would not oppose probation. If Leal failed to pay the full restitution amount by the sentencing date, the State could argue for imprisonment. Leal failed to pay the full restitution amount by the sentencing date. Here it was apparent the defendant was to blame for the breach of the plea agreement; therefore, no evidentiary hearing was necessary to determine who was to blame. *Villalpando v. State*, 107 Nev. 465, 467-68, 814 P.2d 78, 80 (1991). Accordingly, the district court did not err by failing to hold an evidentiary hearing or otherwise inquire into the nature or materiality of the breach of the plea agreement.

Second, Leal argues the district court abused its discretion by denying his motion to withdraw counsel due to a conflict of interest. Leal claims it was a conflict of interest for his counsel to represent both him and his codefendant in this case. Specifically, he claims his counsel should have been able to withdraw at sentencing, after making an oral motion, because he and his codefendant had conflicting defenses as to why they did not pay the restitution in full.

Leal failed to demonstrate the district court abused its discretion by denying his motion to withdraw counsel. First, it does not appear Leal made an appropriate motion to withdraw based on the local rules. *See* EDCR 7.40(b). Second, Leal waived any current or potential conflicts of interest by signing two different waivers regarding actual and potential conflicts of interest. *See* RPC 1.7(b); *see also* *Ryan v. Eighth Judicial Dist. Court*, 123 Nev. 419, 430, 168 P.3d 703, 710 (2007). Finally, Leal failed to demonstrate there was a conflict of interest because the fact his codefendant did not also pay the restitution was not a defense to his breach of the guilty plea agreement. *See* RPC 1.7(b)(3). Leal and his codefendant were jointly and severally liable for the restitution and the restitution was required to be paid in full by the sentencing hearing.

Having reviewed the claims raised on appeal, we
ORDER the judgment of conviction AFFIRMED.¹


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

¹In light of this order, we deny Leal's motion for bail pending appeal.

cc: Hon. Michael Villani, District Judge
Mueller Hinds & Associates
Attorney General/Carson City
Attorney General/Las Vegas
Clark County District Attorney
Eighth District Court Clerk

EXHIBIT

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S. CT. CASE NO.: 74050
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Clerk of Supreme Court
**APPELLANT'S PETITION
FOR REVIEW**

Appellant, JACK LEAL, by and through the law firm of MUELLER, HINDS & ASSOC., CHTD., hereby files this Petition for Review by the Supreme Court under NRAP 40B. This Petition is made based on the following memorandum of points and authorities and any subsequent pleadings and arguments.

Dated this 28th day of September, 2018

/s/ Lester M. Paredes III, Esq.
Lester M. Paredes III, Esq.
Nevada Bar Number 11236
Attorney for Appellant

MEMORANDUM OF POINTS AND AUTHORITIES

The succinct and precise basis for this Petition is as follows:

- 1) Appellant was accused at sentencing of materially breaching the guilty plea agreement at sentencing for failing to pay the restitution in full, but Appellant was not at fault, objected, proffered the reasons and the lower court should have held an evidentiary hearing to determine the nature and cause of the alleged breach under Gamble v. State, 95 Nev. 904 (1979), et al. The Court of Appeals denied this claim and erred in doing so, contradicting the holding of Gamble v. State, 95 Nev. 904 (1979).
- 2) At sentencing, Appellant's counsel moved to withdraw due to a current, material and fatal conflict of interest. Petitioner's attorney represented Appellant and his codefendant through their entry of the guilty plea agreement, but subsequently, Appellant's codefendant was ordered by the court to stay away from Appellant due to her attack on Appellant, thereby impeding both Appellant and codefendant from selling the co-owned property they were going to use to pay the restitution in full. The Court of Appeals found that such a motion need to be filed in accordance with EDCR 7.40(b), the restitution was joint and several and that the waiver of conflicts of interest included any "potential" conflicts. This is, of course,

an absurd result and at odds with common sense and Petitioner's right to due process.

A. Factual Statement

Appellant made the mistake of buying encumbered properties and selling them as-is to prospective buyers, *caveat emptor*. For that, Appellant was facing over a dozen criminal charges and accepted a plea to one of them and agreed to pay everything back and if so, the State would not oppose probation.

At the beginning of the sentencing hearing, Mr. Weiner, then-attorney for Applicant and his codefendant Jessica Garcia, raised a conflict of interest issue at a bench conference and on the record:

The – well, as an initial matter, Your Honor, just to address what we discussed at the bench, the ongoing conflict waivers – the dispute between [the codefendants] began after the change of plea but before sentencing. If you want to put on the record, I contacted the bar ethics hotline. They recommended that I withdraw based on what's going on here. I did. I will make that motion. I do understand that the Court's going to insist that we go forward today and that's certainly the Court's right to do but –

The Court: Well, is the conflict the fact that your client thought that Ms. Garcia was going to pay this off? Is that the conflict?

Mr. Wiener: Well, no, it wasn't that they were paying it off. They were supposed to be working together. Then they had a no contact order so they couldn't. So they're now basically pointing at each other saying this is – she's saying this is his fault, he's saying that's her fault. That's an antagonistic defense. I mean I should not be –

The Court: Well, it's – that related – it's not a defense to the case –

Mr. Weiner: Well—

The Court: - because if it says why –

Mr. Weiner: - in terms of sentencing.

The Court: -- restitution wasn't paid and this is joint and several which means if one –
Mr. Weiner: Correct.
The Court: doesn't pay the other owes the full amount. ...

With respect to Applicant's good faith efforts to pay restitution, there was no dispute that Applicant had recorded a lien in the State's favor for over \$600,000. Applicant had relied on his codefendant to work on selling the property at first, but had since intervened, the home was valued by the assessor at over one-million dollars. Further, codefendant Jessica Garcia was subject to a domestic violence no contact order with respect to Applicant and that was the cause for the delay. Applicant had even presented the State with a letter from the real estate agent showing that the property had been actively marketed.

B. Argument

a. The District Court Erred by Permitting the State to Breach the Plea Agreement without Holding an Evidentiary Hearing under *Gamble v. State*, 95 Nev. 904 (1979), etc., to Determine Blame for the Breach

At the first sentencing hearing, the State argued for imprisonment, falsely accusing Appellant of doing nothing to pay the restitution when in fact Appellant had been trying to sell a piece of property that the State had already tied up the property in civil litigation.

This Court held in *Gamble v. State*, 95 Nev. 905 (1979) and *Villalpando v. State*, 107 Nev. 465 (1991), held that an evidentiary hearing is required where the

State alleges a defendant breached the agreement unless the defendant is “obviously to blame” for the breach of the agreement. See Sparks v. State, 121 Nev. 107, 111 (2005) (citations omitted). “When the State enters into a plea agreement, it is held to the most meticulous standards of both promise and performance with respect to both the terms and the spirit of the plea bargain.” See Sparks v. State, 121 Nev. 107, 110 (2005) (citations omitted).

In Sparks, the defendant entered into a guilty plea agreement that gave the State the full right to argue if he either committed a new criminal offense or failed to appear at his sentencing hearing. Id. The defendant in Sparks did not offer a reason for the apparent breach of the agreement, instead argued that the clause was unenforceable; the Supreme Court of Nevada disagreed and affirmed the judgment of conviction.

Here and unlike in Sparks, Appellant made good faith efforts to pay the restitution before the imposition of sentence, gave reasons why the sale of the property had not been completed to that end and rebutted the State’s claim that Appellant was not asking a good faith asking price for the home valued at seven figures. Appellant complied with all the terms as best as he could and was hindered by his co-defendant and the actions of the State, i.e., requiring the placement of the lien on the property and the initiation of the lawsuit.

The State's actions in this case are particularly troubling. To both require the sale of a property to pay restitution and at the same time require that a lien be placed on the same property is akin to requiring a defendant to appear at a sentencing hearing while blockading them in their home.

The district court, perhaps blinded by its anger, ("I'm not mad --... at you Counsel. You did your job. ... These people need to pay the price."), did not meticulously hold the State to its end of the bargain and require them to make a showing that Appellant's good faith efforts were insufficient under the letter or spirit of the guilty plea agreement.

b. The District Court Erred by Denying Motion to Withdraw Counsel with an Unwaivable Conflict under Clark v. State, 108 Nev. 324 (1992)

Counsel for Appellant moved the court to withdraw based on a conflict of interest at the sentencing hearing. At the time, counsel for Appellant was also counsel for his codefendant. Given that Appellant and his codefendant were accused as coconspirators in a fraudulent scheme, it is not apparent how such a conflict could have been waived in the first place, much less at sentencing after Appellant's codefendant failed to cooperate to pay the restitution and had a been involved in a domestic violence incident with Appellant.

Nevada Rules of Professional Conduct, Rule 1.7, provides:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) The representation of one client will be directly adverse to another client;
or

(2) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) The representation is not prohibited by law;

(3) The representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) Each affected client gives informed consent, confirmed in writing.

NRPC 1.7 (2006).

Here, under NRPC 1.7(a), the conflict of interest clearly existed prior to and through sentencing. The concurrent conflict of interest existed from the inception of the case because there was a "significant risk the representation" of Appellant would be materially limited by the lawyer's responsibilities to Appellant's codefendant, i.e., Appellant and Appellant's codefendant could at trial point the finger at the other as to who misrepresented unencumbered status of the properties that were sold.

Whether the waiver was proper prior to sentencing turns on the actual defenses of the parties, but by the time Appellant was sentenced, the conflict had ripened into an unwaivable conflict under NRPC 1.7(b)(3). At sentencing, Appellant and his codefendant had been required to pay restitution, but it was not paid due to

Appellant's codefendant's malfeasance and domestic violence restraining order against her. In order to explain why he could not pay restitution, Appellant needed zealous counsel to point out that the failure was due to circumstances outside of his control including the actions of his codefendant. However, he did not have unconflicted counsel and zealous representation.

At sentencing, counsel for Appellant and his codefendant, was in an awkward place. He could not throw Appellant's codefendant under the proverbial bus by, for instance, showing the court evidence of that codefendant's domestic violence against Appellant. Counsel was told by bar counsel to move to withdraw but the court ignored the mandate of bar counsel and substituted its own flawed judgment for that of experienced ethics professionals. This was an abuse of discretion. See Wilmes v. Reno Mun. Ct., 59 P.3d 1197, 118 Nev. 831 (2002) (district attorney representing municipal court in mandamus action not an abuse of discretion).

Every defendant has the constitutional right to assistance of counsel unhindered by conflicting interests. U.S. Const. Amend. VI; Hollaway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173 (1978); Clark v. State, 108 Nev. 324, 326 (1992). In Clark, the Court found that where an actual conflict of interest which adversely affects a lawyer's performance will result in a presumption of prejudice to the defendant. Id. (citations omitted). The Clark, the court found that the lower court

erred by requiring the appellant to show he was prejudiced by his lawyer's conflict of interest.

The court abused its discretion by denying Appellant's motion to withdraw due to a conflict of interest. The case should be remanded for a new sentencing hearing with either a reasonable time to close the sale of the million dollar home, or to permit the State to seize the property and sell it for restitution per their civil complaint for forfeiture.

I. CONCLUSION

The Court of Appeals erroneously and in conflict with the United States Constitution, prior decisions of this Court, denied Appellant/Petitioner relief and the Court should grant this Petition for Review.

Dated this 28th day of September, 2018

By:

/s/ Lester M. Paredes III, Esq. _____

Lester M. Paredes III, Esq.
Nevada Bar Number 11236
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing **APPELLANT'S PETITION FOR REVIEW** was made this 28th of September, 2018, upon the appropriate parties hereto by electronic filing using the ECF system which will send a notice of electronic filing to the following and/or by facsimile transmission to:

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