

IN THE SUPREME COURT OF THE STATE OF NEVADA

FILED

AUG 21 2018

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

S. CT. CASE NO.: 74050

ELIZABETH A. BROWN
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**APPELLANT'S APPLICATION
FOR BAIL PENDING APPEAL**

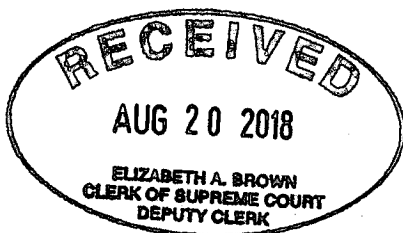
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CLERK OF SUPREME COURT

Appellant, JACK LEAL, by and through the law firm of MUELLER, HINDS & ASSOC., CHTD., hereby applies to this Court for bail pending appeal under NRSP 8(e), NRS 177.095 et sez., 178.4873-488. This Application is made based on the following memorandum of points and authorities and any subsequent pleadings and arguments.

Dated this 8th day of August, 2018

/s/ Lester M. Paredes III, Esq.

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



MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTS AND PROCEDURAL HISTORY

Applicant made a huge mistake and took responsibility for selling the properties, but added that he “didn’t explain it correctly, I guess, what we were selling. We did transfer title to them. We did sell them the properties. It wasn’t as if we just took their money and ran and –.” Applicant essentially sold the properties as is and did not tell them that they were encumbered, as opposed to misrepresenting them as unencumbered.

The first Criminal Complaint was filed Sep. 30, 2016, alleging fourteen counts of criminal conduct ranging from theft to racketeering, and 14 counts of criminal forfeiture. Applicant waived his right to a preliminary hearing on April 11, 2017, an Information was filed on April 18, 2017, charging one count of Multiple Transactions Involving Fraud or Deceit in Course of Enterprise or Occupation, NRS 205.377, and filed a GPA on April 24, 2017.

The GPA set forth eleven victims that were owed restitution totaling \$694,420, excluding anything already recovered which would be forfeited to the State. Applicant was required to pay restitution in full prior to sentencing, jointly and severally with codefendant Jessica Garcia. The State would not oppose probation and a suspended sentence of 36 to 90 months in prison if the restitution

was paid, but would regain the right to argue if not. The \$157,105.17 the State seized was to be applied to the restitution balance. Applicant also agreed to execute and file a lien in favor of the State of Nevada, Office of the Attorney General in the amount of \$600,314.83 against the home located at 1024 Santa Helena Ave., Henderson, NV 89002, with the proceeds of the sale to be applied against the restitution requirements.

The GPA signed by Applicant purported to waive the right to appeal except based on “reasonable constitutional, jurisdictional or other grounds that challenge the legality of the proceedings and except as otherwise provided in subsection 3 of NRS 174.035.” Attached to the GPA was a Conflict-of-Interest Waiver, signed by Applicant and his attorney and a copy of “Rule 1.7. Conflict of Interest: Current Clients.”

a. Sentencing Hearing

At the first setting for the sentencing hearing on August 17, 2017 the State argued to the court for a sentence of imprisonment of 60 to 180 months in prison. The facts according to the State was that Applicant and his codefendant bought encumbered properties and then fraudulently sold them to the victims by misrepresenting them as unencumbered. The State also argued that Applicant had done nothing until a week before sentencing and that the property is valued at \$580,000 but on the market for 1.2 million dollars. (See AA at 120-121.)

i. Conflict of Interest

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. ...

(AA at 124-1125.)

b. Applicant's Good Faith Efforts to Pay Restitution

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. (AA at 121.) 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. (Id.) 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. (AA at 121-122, 124.) Applicant had even presented the State with a letter from the real estate agent showing that the property had been actively marketed. (AA at 126.)

c. Victim Impact Statements and Court's Reaction

The victim impact statements were powerful and moving given the absence of the restitution. For example, Irene Segura testified that the money taken was for her orphaned grandson's college fund. (AA at 128.) Ms. Segura explained to the court that twelve years ago she gave a victim impact statement at the sentencing of the murderers of her son and the father of her grandson. (AA at 128.) The money was saved for her grandson's college fund because she "scrimped and saved and cut back on every possible expense" she could think of including dining out, vacations and getting a new car. (AA at 129.)

It is apparent from the transcript that the Court became angry with Applicant. The court informed a representative from the Department of Parole and Probation, "P &P," that the program they use to make recommendation was "broken," that Applicant had time to sell the house but they "stabbed [the victims] in the back and I'm not standing for it." (AA at 137-138.) The court then pronounced

the sentence against codefendant Garcia for whom he issued a no bail bench warrant for failing to appear, "if she's here within a week she may get the similar sentence. If she's out and about and trying to avoid prosecution that's going to tell me she's not taking this serious and I'm going to max her out. I'm not mad –

Mr. Weiner: Understood, Your honor.

The Court: -- at you, Counsel. You did your job. You got 11 felonies down to 1 so I mean you should be commended because you did a good job for them but these people need to pay the price.

(AA at 138-139.)

The Court entered a Judgment of Conviction, AA at 140-141, sentencing Applicant to 72-180 months in prison with zero days credit for time served. (AA at 141.)

d. Appellant's Motion for Bail Pending Appeal

While Appellant's appeal was pending, Appellant filed a motion in district court to allow bail pending appeal. That motion was denied. This motion follows.

II. ARGUMENT

a. NRS 178.488(3) and NRS 177.145 Permit Application for Bail

NRS 178.488(3) permits this Court to allow bail pending appeal. See NRS 178.488(3) (2013). Under NRS 177.145 application may be made to the Nevada Supreme Court where application to the court below has been made and denied. See NRS 177.145(2) (2013). Here, Appellant applied to the district court and that application was denied, thus this Application is eligible for adjudication.

b. Applicant is a Good Candidate for Supervised Release

If permitted by the district court, Applicant would have testified that he moved to Clark County in 2013 and has lived here since. Applicant has been in real estate since 2009 and completed 350 real estate transactions without problems before these types of caveat emptor transactions. Admission to bail would also help Applicant pay restitution. Finally, Applicant is not a threat to the community or flight risk or the State would have never conditionally agreed to probation for Applicant. If the Court desires to inquire further, Applicant welcomes the opportunity to prove his bail worthiness. Therefore, the Court should admit Applicant to bail.

c. Applicant's Appeal is not Frivolous

i. The District Court Erred by Sentencing Applicant to Prison without Holding a Hearing Under Gamble v. State, 95 Nev. 904 (1979)

The first issue Applicant raised in his appeal was that Applicant had the right to show the district court he was not at fault for the purported breach of the guilty plea agreement under Gamble v. State, 95 Nev. 904 (1979).

The State and Applicant entered into an agreement which contained the following clauses:

6. Should I, Jack Leal, pay restitution in full at or before the time I am sentenced in the present case, the State will not oppose the imposition of a term or probation not to exceed a term of five years, with a suspended 36-to-90 month term of imprisonment;

7. Should I, Jack Leal, fail to pay restitution in full at or before the time I am sentenced in the present case, the State will retain the right to argue for the imposition of imprisonment.

(AA at 89:18-22.)

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

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, Applicant 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 Applicant was not asking a good faith asking price for the home valued at seven figures. (See, generally, AA at 118-139.) Applicant 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. (Id.)

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 case should be remanded for an evidentiary hearing to determine whether Applicant is to blame for the failure to pay the restitution and whether that constitutes a material breach. The State could have given Applicant more time, removed the lien or offered to allow Applicant to transfer title under the civil case that the State had started and noticed a lis pendens. Instead, the State misrepresented to the court the reasons for failing to pay the restitution and insisted on imposing a prison sentence. (Compare AA at 121 ("And the house is on the market. It's valued about [sic] \$580,000. That's what the last recorder entry notes and they have it on the market for 1.2 million dollars. Now they dropped it to one million dollars. There's no real effort to make restitution in this case."), and AA at 122 ("Defense counsel sent me the title assessment just yesterday and it shows a bunch of liens on this property."), with AA at 125 ("We have a print out from the Clark County Assessor's website for the 2017-2018 year that values the property at \$1,032,044.00), and AA at 122 ("There's two Republic garbage -- Republic Waste [indiscernable] for \$256.00 each. I have a copy of it right here from Fidelity Title.") The lower court, perhaps blinded by its anger, (see AA at 139 "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 Applicant’s good faith efforts were insufficient under the letter or spirit of the guilty plea agreement.

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

Counsel for Applicant moved the court to withdraw based on a conflict of interest at the sentencing hearing. (AA at 124.) At the time, counsel for Applicant was also counsel for his codefendant. (Id.) Given that Applicant 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 Applicant’s codefendant failed to cooperate to pay the restitution and had a been involved in a domestic violence incident with Applicant.

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 Applicant would be materially limited by the lawyer’s responsibilities to Applicant’s codefendant, i.e., Applicant and Applicant’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 Applicant was sentenced, the conflict had ripened into an unwaivable conflict under NRPC 1.7(b)(3). At sentencing, Applicant and his codefendant had been required to pay restitution, but it was not paid due to Applicant’s codefendant’s malfeasance and domestic violence restraining order against her. In order to explain why he could not pay restitution, Applicant 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 Applicant and his codefendant, was in an awkward place. He could not throw Applicant’s codefendant under the proverbial bus by, for

instance, showing the court evidence of that codefendant's domestic violence against Applicant. 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 court found that the lower court erred by requiring the Applicant to show he was prejudiced by his lawyer's conflict of interest.

The district court erred and Appellant should be admitted to bail pending appeal based on the fact that Defendant is not a flight risk, is not a danger to the community, and the appeal in this matter is meritorious. NRS 178.488 grants that "Bail may be allowed pending appeal unless it appears that the appeal is frivolous or taken for delay." NRS 178.488(1) (2015).

III. CONCLUSION

Applicant's Motion should be granted for the foregoing reasons.

Dated this 19th day of April, 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 APPLICATION FOR BAIL PENDING APPEAL** was made this ~~19th of April,~~ ^{13 of August} 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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