ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

GENE ANTHONY ALLEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

CASE NO.: 41274

FILED

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An Appeal From A Judgment of Conviction

In A Criminal Case

Eighth Judicial District Court

The Honorable John S. McGroarty Presiding

APPELLANT'S OPENING BRIEF

WILLIAM J. TAYLOR, ESQ.
Nevada Bar No. 5521
723 South Third Street
Las Vegas, NV 89101
Phone: (702) 380-4199
Fax: (702) 380-4191

DAVID J. ROGER, ESQ.
Clark County District Attorney
Nevada Bar No. 477
200 South Third Street
Las Vegas, NV 8915
(702) 455-4711

FRANKIE SUE DEL PAPA, ESQ.
Nevada Attorney General
Nevada Bar No. 192
100 North Carson Street
Carson City, NV 89701
(775) 684-1265

Counsel for Appellant
GENE ANTHONY ALLEN

Counsel for Respondent
THE STATE OF NEVADA

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A Whether the District Court erred in denying Allen's Motion to Withdraw his Plea of Guilty prior to sentencing.

B Whether Allen was denied effective assistance of counsel in the entry of his guilty plea.

II STATEMENT OF THE CASE

A Nature of the Case:

This is an appeal from the denial of a Motion to Withdraw a Plea of Guilty in a criminal case. The Defendant plead guilty to one count of Sexual Assault with a Minor under 14 years of age and one count of Lewdness with a child under 14 years of age. The Defendant was sentenced to a minimum of five (5) years and a maximum of twenty (20) years on the first (1st) count. He was sentenced to a minimum of ten (10) years and a maximum term of life on the second (2nd) count. Both counts are running concurrently. (J. Conv. at 1-2, App. at 110-111.)

B Course of Proceedings:

Defendant was arraigned and plead not guilty to numerous counts of sexual assault and lewdness with a minor. On September 18, 2002, after one witness testified, the Court adjourned the proceeding regarding an issue concerning a defense expert. The parties then negotiated possible case settlement.

Later that same day, Allen agreed to plead guilty. The Court questioned Allen concerning his understanding of the guilty plea agreement, but the Court apparently failed to recognize that the Defendant was not completely certain about the agreement into which he was entering. It was close to 6:00 p.m., and it had been a very long day for the Court and parties involved. A brief excerpt of some of the questions and answers between the Court and the Defendant are as follows:

THE COURT: Now, Sir, do you understand these negotiations are

binding on me? I can't change them.

THE DEFENDANT: Yes. I understand that.

THE COURT: And that either side may withdraw from the negotiations if I do not follow this ple agreement?

THE DEFENDANT: I don't understand that, Sir.

(Rep. Tr. Jury Trial - Guilt. Plea Agr. At 61, App. At 69.)

Later on, the Court attempted to explain to the Defendant that he was not eligible for parole or probation on Count I, when the State noted that Allen was not on probation for Count I or II, because he was stipulating to a prison term on Count II. The court tried to explain this, and the Defendant responded as follows:

THE DEFENDANT: Probation?

THE COURT: Right.

MR. BANKS: You are not eligible.

THE DEFENDANT: Right.

THE COURT: And do you understand, this is the important thing?

THE DEFENDANT: It's been a long day.

(*Id.* at 63, App. at 71.)

Despite these discrepancies in communication between everyone in Court that day, as well as the obvious fact that the guilty plea was not knowingly, voluntarily, and intelligently made by Allen, the Court accepted his plea of guilty. A little more than one month later, prior to sentencing, Allen expressed his desire to withdraw his plea and represent himself.

On December 5, 2002, the lower Court conducted a hearing as to whether Allen could represent himself and to address whether he should be allowed to withdraw his plea. The Court ruled that the Defendant could represent himself;

however, the Motion to Withdraw his guilty plea was ultimately denied. (State's Opp'n Def.'s Mot. Withdr. Guilt. Plea at 3, App. at 78.)

On April 1, 2003, the Court formally denied Allen's request to withdraw his plea, and the Court sentenced the Defendant accordingly. The Judgment was reduced to writing on April 7, 2003. This appeal therefore follows. (J. Conv. at 1-2, App. at 110-111.)

III STATEMENT OF THE FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW[1]

Allen is charged with committing acts of sexual assault and lewdness with eight- (8-) year old Janna Taylor. Beginning on her eighth (8th) birthday and continuing until she was approximately eleven (11), Taylor alleges that wshe was assaulted by her step-father, Defendant Allen. Taylor claimed that Allen would climb into bed with her and insert his penis into her mouth, vagina, and anus. This abuse allegedly ended when Taylor moved to Colorado. When she moved, Taylor reveal her claims of sexual abuse from Allen. Dr. Monica Knuesel examined Taylor and reported that she did not have a hymen.

Allen previously plead guilty to sexual assault in 1992, when he kissed a nine-year old girl and fondled her vagina. He received probation for that offense.

IV ARGUMENT

A Whether the District Court Erred in Denying Allen's Motion to Withdraw his Plea of Guilty

The question of a defendant's guilt or innocence is not included with a motion to withdraw a plea of guilty. Kercheval v. U.S., 274 U.S. 220 at 224 (1927); Hargrove v. State, 100 Nev. 498 at 502, 686 P.2d 222 (1984); State v.

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[1] Allen takes the factual summary from the State's Opposition below, as the facts are essentially not in dispute for the purposes of addressing the related issues.

Dist. Ct., 85 Nev. 381 at 385, 455 P.2d 923 (1969).

The validity of a defendant's guilty plea must be challenged, in the first instance, in the sentencing court by way of a motion to withdraw the plea or by way of a petition for post-conviction relief. Bryant v. State, 102 Nev. 268 at 272, 721 P.2d 364 (1986). "[T]he test is essentially factual in nature, and is thus best suited to trial court review in the first instance." *Id.*

The Nevada Courts have clearly outlined the manner in which a plea agreement can be withdrawn: "[T]he burden [is] on the defendant to establish that his plea was not entered knowingly and intelligently" or that it was the product of coercion. *Id.*; Gardner v. State, 91 Nev. 443 at 446-47, 537 P.2d 469 (1975). The decision of the trial court to allow a defendant to withdraw his guilty plea "is discretionary and will not be reversed unless there has been a clear abuse of that discretion." Bryant at 272; State v. Adams, 94 Nev. 503 at 505, 581 P.2d 868 (1978); State v. District Court, at 385; .

"[A]n order denying a post-conviction motion to withdraw a plea of guilty is appealable as an order 'refusing a new trial' within the meaning of NRS 177.015." Hargrove at 502.

A challenge to a guilty plea on the grounds that the record does not affirmatively show that it was knowingly and voluntarily made raises "constitutional questions which [the Nevada Supreme Court] has the power to address eve if raised for the first time on appeal." White v. State, 99 Nev. 760 at 761, 670 P.2d 576 (1983).

The record in the reporter's transcript of Jury Trial - Guilty Plea Agreement clearly reflects that Mr. Allen was not wholly aware of that into which he was entering. During the discussion colloquy between the Court and Mr. Allen, the State, through Deputy District Attorney Craig Hendricks, or one of Mr. Allen's

two (2) attorneys, Steven M. Immerman or Jeffrey M. Banks, both from the Public Defenders Office, either interrupted or had to explain something or some aspect of the Judge's statements to Mr. Allen. This, in and of itself, does not establish that his plea was not entered willingly and intelligently. However, when this is read in light of the fact that the case was "negotiated" at the beginning of a jury trial, at the end of a long and clearly trying day for Mr. Allen, it becomes rather obvious that the plea was not knowingly and voluntarily entered by the Defendant.

The State may respond that it is objectively reasonable for a criminal Defendant to understand statements made by the Court and the attorneys present and appreciate the nature and extent of the circumstances surrounding his guilty plea. However, the real test of whether a plea is voluntary and intelligent must turn on the facts and circumstances of each particular case. Taylor v. Warden, 96 Nev. 272 at 274, 607 P.2d 587 (1980). Thus, "[a] guilty plea induced by a mistaken belief that a binding plea agreement had been made is invalid even if it is the defendant's own attorney who is responsible for the defendant's mistaken belief." U.S. *ex rel. Thurmond* v. Mancusi, 275 F.Supp 508 at 516 (E.D.N.Y. 1967). "There is little merit in the ... contention that a subjective test of what the defendant believed ... is too difficult to apply. The state of a man's mind, like most other issues of fact, is decided on the basis of reasonable inferences drawn from the known surrounding facts and circumstances." U.S. *ex rel. Thurmond* at 518. After all, "the [whole] test [of whether a plea was voluntarily entered] is essentially factual in nature ..." Bryant at 272.

Allen asserts that his plea was the product of coercion by his attorneys and a misunderstanding of the very evidence that was to be used against him. The District Court, at the very least, should have taken into account Allen's statement of mind not only during the pre-hearing itself, but also during the entire time the

Court interacted with this Defendant. The Court conducted a Faretta canvass on Mr. Allen to determine if he could represent himself on his motion to withdraw his guilty plea. While the judge determined that he was able to do so, he memorized the points made by counsel, Ms. Jennifer Boulton, to be available to Mr. Allen should he need counsel for his motion.

Mr. Allen thereafter engaged in a valiant, yet somewhat pathetic, attempt to use appropriate legal authorities to withdraw his guilty plea. These effort were to no avail, and the Court denied his motion to withdraw his guilty plea.

It is ultimately the responsibility of the District Court to establish a record which affirmatively demonstrates that a criminal defendant's pleas is knowingly and voluntarily entered. The law is clear: if a defendant does not knowingly and voluntarily enter into the plea agreement, then the Court must set aside the agreement. Ramsey v. State, 99 Nev. 264, 661 P.2d 1292 (1983).

In this case, the record does not even remotely indicate a knowingly and voluntarily entered plea agreement. The Court erred in not granting the Defendant's proper person motion to have his guilty plea withdrawn.

The Nevada Revised Statutes contain specific provision regarding the acceptance and withdrawal of guilty pleas. NRS 174.035 precludes the Court from accepting a guilty plea "without first addressing the defendant personally and determining that the plea is made voluntarily and with an appropriate understanding of the nature of the charge and the consequences of the plea."

NRS 176.165 allows a motion to withdraw a plea of guilty to be made "only before sentence is imposed or imposition of sentence is suspended." The statute, however, creates an exception to this rule by allowing the trial court to permit a defendant to withdraw his guilty plea after sentencing in order "to correct manifest injustice."

B Whether Allen was Denied Effective Assistance of Counsel in the Entry of his Guilty Plea

Allen contends that it is manifestly unjust for his plea of guilty to **not** be withdrawn, based on the above cited authorities. It is axiomatic that a guilty plea lacks the required voluntariness and understanding if entered on advice that fails to meet the minimum standard of effectiveness derived from the Sixth Amendment. Boyle v. Warden, 95 Nev. 888 at 890, 603 P.2d 1068 (1979).

"To demonstrate ineffective assistance of counsel, a convicted defendant must show both that his counsel's performance was deficient and that the deficient performance prejudiced his defense." Iaea v. Sunn, 800 F.2d 861at 864 (9th Cir. 1986); Strickland v. Washington, 466 U.S. 668 at 687 (1984). This two-part test "apples to challenges to guilty pleas based on ineffective assistance of counsel." Hill v. Lockhart, 474 U.S. 52 at 58 (1985).

To meet the first part of the test, a defendant who enters his guilty plea upon the advice of counsel must show that counsel's advice was not within the range of competence demanded of attorneys in criminal cases. *Id.* at 56. "[C]ounsel have a duty to supply criminal defendants with necessary and accurate information." Iaea at 865. To meet the second part of the test, the defendant "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill at 59.

To begin with, Defendant's trial counsel was not within the range of competence, because of the fact that counsel apparently had not even reviewed the discovery, or important parts of discovery, until meeting in the Judge's Chambers before the case went to trial! Additionally, trial counsel, according to Mr. Allen, focused almost exclusively on the defense expert's witness and his anticipated testimony. Moreover, there is no information whatsoever from the file that any

type of investigatory work was completed on the alleged victim, or her propensity for truthfulness or lack of truthfulness. All of these inadequacies led to counsel's advice of accepting the plea offer submitted by the state. Counsel's advice was below the level of competence demanded of criminal defense attorneys in such serious cases, and therefore, counsel's deficient performance clearly meets the first prong of the Strickland Test. Additionally, had counsel communicated *proper* discovery to their client, and had counsel throughly investigated this case, as was required by any reasonably competent attorney, Mr. Allen contends he never would have accepted the plea agreement submitted to him by the state. Based on this analysis, it is clear that Mr. Allen was denied effective assistance of counsel when he entered his plea of guilty.

C Evidentiary Hearing

When "something more than a naked allegation has been asserted, it is error to resolve the apparent factual dispute without granting the accused an evidentiary hearing." Gamble v. State, 95 Nev. 904 at 907, 604 P.2d 335 (1979); Collins v. Warden, 91 Nev. 571 at 573, 540 P.2d 93 (1975); Vaillancourt v. Warden, 90 Nev. 431 at 432, 529 P.2d 204 (1974).

Thus, "when a prisoner's allegations of a coerced plea are based on alleged occurences entirely outside the record, an evidentiary hearing is required." U.S. v. Espinoza, 841 F.2d 326 at 328 (9th Cir 1988).

Allen's guilty plea lacks the required voluntariness and understanding, because it was entered in reliance on advice and representation that failed to meet the minimum standards of effectiveness derived from the Sixth Amendment. Boyle at 890.

Defendant Allen's counsel was ineffective for the following reasons:

a. Allen Asserts that he was not advised that the numerous dismissed

counts against him could be used by the sentencing judge in this matter.

b. Defense counsel did not obtain discovery before trial.

c. Gregory Denue, Court appointed counsel at the time of trial, did not advise Allen that, were he to accept the last minute plea offer from the State, that the State would nonetheless be able to use information or allegations concerning the remaining counts against him for sentencing. Allen asserts that he was completely unaware of this possibility, which would have caused him to refuse the plea agreement.

d. Moreover, counsel did not even have adequate discovery prior to the time of trial! The State makes reference in its trial court opposition to Defendant's Motion to Withdraw Guilty Plea that the defense attorneys "met with representatives of the State before trial to review the State's file." (State's Opposition to Defendant's Motion to Withdraw Guilty Plea, December 30, 2002, pages 5-6; Appendix at pages 80-81.) In other words, the State is claiming that defense counsel's "reviewing" of the file immediately before trial with representatives of the State was sufficient to allow them to adequately prepare for Mr. Allen's trial.

This Court must remember that the plea negotiations, which Mr. Allen asserts were foisted upon him at a very late hour after a jury had been impaneled to hear the charges against him, were entered into by his attorney, who obviously had not adequately prepared for Mr. Allen's defense.

We have to agree with Mr. Banks or Mr. Immerman's knowledge that the facts of this case are not relevant. What is relevant is that these issues were

brought before the Court prior to the time of sentencing, yet the judge nevertheless denied Mr. Allen's Motion to Withdraw Guilty Plea, claiming that it was done "knowingly and voluntarily".

Based on the cumulative effect of all the facts set forth herein, it would be fundamentally unfair not to allow Mr. Allen to withdraw his plea.

V CONCLUSION

Based on the foregoing, this Court should remand Allen's case and order that his previously entered plea of guilty be withdrawn.

DATED this 9 day of December, 2003.

Respectfully Submitted By:

WILLIAM J. TAYLOR, ESQ.
Nevada Bar No. 5521
723 South Third Street
Las Vegas, NV 89101
Phone: (702) 380-4199
Fax: (702) 380-4191
Attorney for Appellant

. . .

VI CERTIFICATE OF COMPLIANCE

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 N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanction in the even that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate procedure.

DATED this 9 day of December, 2003.

WILLIAM J. TAYLOR, ESQ.
Nevada Bar No. 5521
723 South Third Street
Las Vegas, NV 89101
Phone: (702) 380-4199
Fax: (702) 380-4191
Attorney for Appellant

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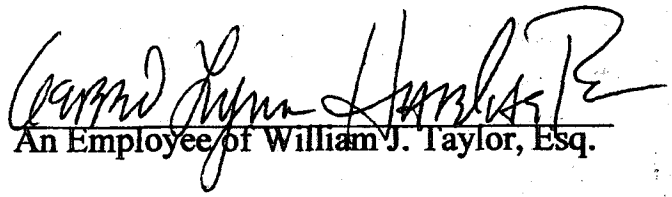
. . .

VII CERTIFICATE OF MAILING

In accordance with N.R.A.P. 25 (1)(d), I hereby certify that I served a copy of the foregoing Opening Brief and Appellant's Appendix on the 8th day of December, 2003, by depositing the same in the United States mail, first-class postage affixed thereto, and addressed as follows:

DAVID J. ROGER, ESQ.
Clark County District Attorney's Office
Appellate Division
200 South Third Street
Las Vegas, NV 89155

FRANKIE SUE DEL PAPA, ESQ.
State of Nevada, Attorney General
100 North Carson Street
Carson City, NV 89701



An Employee of William J. Taylor, Esq.