

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case Nos. 53159 & 55759

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Elizabeth A. Brown
Clerk of Supreme Court

NORMAN KEITH FLOWERS,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

MOTION TO REINSTATE APPEALS

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RELIEF SOUGHT

Norman Flowers, Appellant, seeks an order reinstating his direct appeal from his judgment of conviction in criminal case number 06C228755, dated February 12, 2009, from the Eighth Judicial District Court. *See* Appendix (“App.”) 64-65. Mr. Flowers filed an appeal from the judgment of conviction (docket number 53159) and from the denial of his motion for a new trial (docket number 55759). App. 66, 174. This Court previously consolidated those appeals. App. 202. The appeals were dismissed pursuant to a guilty plea agreement in a separate criminal case (number 05C216032). App. 287. That guilty plea agreement was recently vacated as being involuntary and in violation of this Court’s holding in *Cripps v. State*, 122 Nev. 764, 137 P.3d 1187 (2006). *See* App. 474-78, 479, 480-501. Mr. Flowers’ decision to dismiss his appeals was part and parcel of the involuntary plea agreement. Mr. Flowers now seeks to vacate the order dismissing his appeals and have his appeals reinstated.

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STATEMENT OF FACTS

A. Current Case (06C228755)

On December 13, 2006, Norman Flowers was arrested and charged in the Eighth Judicial District with burglary, murder, sexual assault, and robbery, in case number 06C228755. *See* App. 1-3. On October 22, 2008, he was convicted of all but the robbery charge following a jury trial. *See* App. 8-9. For the murder charge, the jury sentenced him to life imprisonment without the possibility of parole and the court sentenced Flowers on the remaining charges. The judgment of conviction was issued on January 16, 2009. *See* App, 60-61. Flowers filed a timely notice of appeal on January 26, 2009. App. 62-63. Due to an error on count three of the original judgment, an amended judgment of conviction was issued on February 12, 2009. App. 64-65. Flowers filed an amended notice of appeal. App. 66-67. The appeal was docketed at number 53159. Counsel for Mr. Flowers filed an opening brief arguing the following claims for relief:

- A. The district court violated Flowers' constitutional rights by allowing the State to introduce unrelated prior bad act testimony.

- B. The district court violated Flowers' constitutional rights by allowing testimony to be introduced in violation of *Crawford v. Washington* and *Commonwealth v. Melendez-Diaz*.
- C. The district court violated Flowers' constitutional rights by admitting as evidence a statement given by Flowers to detectives following invocation of his right to remain silent and right to counsel.
- D. The district court violated Flowers' constitutional rights by admitting gruesome photographs from the autopsy.
- E. The district court violated Flowers' constitutional right to present evidence by precluding Kinsey from testifying that the victim told him she was seeing someone named "Keith."
- F. The prosecutor committed misconduct by commenting on Flowers' right to remain silent.
- G. There is insufficient evidence to support the conviction.
- H. The judgment should be vacated based upon cumulative error.

See App. 68-118. The State filed an answering brief addressing all of the issues on their merits and Flowers filed a reply brief. *See* App. 119-164, 181-201.

On March 5, 2010, Flowers filed a Motion for New Trial Based Upon Newly Available Evidence with the district court. App. 165-168. The court denied the motion, and Flowers filed a timely notice of appeal. *See* App. 172, 174-175, 179-180. That appeal was docketed at

number 55759. Upon motion by Flowers, this Court consolidated the appeals in docket numbers 53159 and 55759. *See App.* 176-178, 202. The opening brief in docket number 55759 raised a single issue: “The district court erred by denying Flowers’ Motion for a New Trial.” *App.* 203-214. The State filed an answering brief and Flowers filed a reply brief. *See App.* 215-233, 234-242. Briefing was thus fully completed in both docket 53159 and docket 55759.

B. Related Case (05C216032)

On June 7, 2005, Norman Flowers was arrested and charged in the Eighth Judicial District with murder and related offenses in criminal case number 05C216032. On June 10, 2011, Flowers pleaded guilty, pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), to two counts of first degree murder in exchange for two, concurrent sentences of life imprisonment without the possibility of parole. *See App.* 243-251. As part of the plea deal, and as reflected in the Guilty Plea Agreement, Flowers also agreed to withdraw both of his appeals in the current case (numbers 53159 and 55759). *See App.* 243, 259. Pursuant to the plea agreement, Flowers filed a Motion to Voluntarily Dismiss Appeals in the current case on June 13, 2011. *App.* 272. On September 28, 2011,

this Court issued an order dismissing the appeals in the current case, at docket numbers 53159 and 55759. App. 287.

Norman Flowers subsequently sought to withdraw his *Alford* plea, but the district court denied his request. *See* App. 291. Flowers filed a direct appeal with this Court alleging that his plea was involuntary. The appeal was docketed at case number 59250. This Court affirmed the district court's denial of the motion to withdraw. *See* App. 291. Flowers then filed a Petition for Writ of Habeas Corpus (Post Conviction) alleging that his plea was not entered into voluntarily because the district court improperly pressured Flowers into taking the plea deal in violation of this Court's ruling in *Cripps v. State*, 122 Nev. 764, 137 P.3d 1187 (2006). *See* App. 289-432. The district court denied the petition and Flowers appealed. *See* App. 433-441, 442-473. The post-conviction appeal was docketed at number 70933.

On July 12, 2017, this Court issued an Order of Reversal and Remand. App. 474. This Court found that comments made by the trial court during the plea negotiations "violated *Cripps*' bright-line rule precluding judges from participating in the 'formulation or discussions of a potential plea agreement.'" App. 477 (citing *Cripps v. State*, 122

Nev. 764, 770; 137 P.3d 1187, 1191 (2006)). On March 19, 2018, following the remand, the district court conducted an evidentiary hearing and found the *Cripps* violation had a material impact on Flowers' decision to enter into the plea agreement. *See* App. 480-501. As a result, the court permitted Mr. Flowers to withdraw his *Alford* plea. App. 479, 498-499. The State has not appealed that ruling.

Mr. Flowers is now seeking to have his appeals in the current case reinstated.

GROUND FOR REINSTATEMENT OF APPEAL

- A. Mr. Flowers' appeals should be reinstated because they were originally dismissed pursuant to a guilty plea agreement that has since been declared involuntary and coercive.**

Mr. Flowers withdrew his appeals as part of a plea agreement.

This Court concluded that comments made by the trial court during the plea negotiations were in violation of *Cripps*. The district court further concluded that the *Cripps* violation directly affected Flowers' decision to enter into the plea agreement. Consequently, the *Alford* plea has been withdrawn. Notions of logic and fundamental fairness dictate that Flowers' appeals also be reinstated because he only withdrew the

appeals as part of the improper and coercive plea deal, which has now been vacated.

Flowers pleaded guilty on June 10, 2011 at the calendar call for case number 05C216032. *See* App. 252-271. Prior to Flowers entering into the plea agreement, the trial court made several improper comments during the court proceedings, including:

- “And once we walk out the door, there’s no negotiation, we’re going to trial.” (App. 254)
- “There won’t be another negotiation. Do you understand? No chance.” (App. 254)
- “There is no chance that you’re going to get a better offer than today.” (App. 255)
- “No deals once I leave this room.” (App. 255)

Shortly thereafter, Flowers agreed to enter an *Alford* plea. *See* App. 258.

Part of the plea agreement included the following language: “Defendant agrees to withdraw his appeal in SC Case Nos. 53159 and 55759.” App. 243. *See also* App. 259 (“And the Defendant is withdrawing his appeal under Supreme Court Case Numbers 53159 and 55759.”). On June 13, 2011, in accordance with the plea deal,

Flowers filed a motion with this Court asking for his appeals to be dismissed. *See* App. 272-284. On September 28, 2011, this Court issued an order dismissing the appeals pursuant to the plea agreement. App. 287.

Mr. Flowers spent the next six years attempting to withdraw his guilty plea via motion, direct appeal, and petition for writ of habeas corpus (post-conviction). *See* App. 289-432. On July 12, 2017, this Court issued an order of reversal and remand on Flowers' post-conviction appeal in criminal case number 05C216032, Supreme Court docket number 70933. *See* App. 474-478. This Court held the trial court's statements endorsed the plea offer and "violated *Cripps*' bright-line rule precluding judges from participating in the 'formulation or discussions of a potential plea agreement.'" App. 477 (citing *Cripps v. State*, 122 Nev. 764, 770; 137 P.3d 1187, 1191 (2006)). This Court continued, "And the statements may reasonably be viewed as having been a material factor affecting Flowers' decision to plead guilty considering his decision not to accept the negotiations before the district court's statements and the filing of a presentence motion to withdraw the guilty plea days later." App. 477.

Upon remand, the district court held an evidentiary hearing at which Mr. Flowers and one of his former attorneys testified. App. 480-501. The district court agreed there was a *Cripps* violation and further concluded that the trial court's improper statements were a material factor affecting Flowers' decision to plead guilty. App. 498. Consequently, the court allowed Flowers to withdraw his plea. App. 479, 499. The State has not appealed and that case has been reset for a trial.

The question of whether the plea deal in which Flowers agreed to dismiss his appeals was coercive and involuntary has already been decided. As has been recognized, the trial court improperly interfered with the plea negotiations and this had a material impact on Flowers' decision to enter into the plea agreement. That plea agreement, which was the basis for Flowers dismissing his appeals, has been vacated. This constitutes good cause to reinstate his appeals. Failing to do so would result in Mr. Flowers continuing to suffer from the *Cripps* violation. The only way to correct the trial court's improper interference in the plea negotiations is to restore **all** of the rights Mr. Flowers was denied as a result of the coerced plea agreement. That includes both his

right to trial in case number 05C216032, which has already been done, and his right to a direct appeal in the current case, case number 06C228755.

CONCLUSION

Appellant Norman Flowers respectfully requests this Court vacate the order dismissing the appeals docketed at 53159 and 55759, and order the appeals reinstated.

Dated this 18th day of April, 2018.

Respectfully submitted,

RENE L. VALLADARES
Federal Public Defender

/s/ CB Kirschner
C.B. KIRSCHNER
Assistant Federal Public Defender

VERIFICATION

Pursuant to NRAP 21(a)(5), and under penalty of perjury, the undersigned declares that she is counsel for the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of her own knowledge except as to those matters stated on information and belief and as to such matters she believes them to be true. Petitioner personally authorized undersigned counsel to commence this action.

Dated this 18th day of April, 2018.

Respectfully submitted,

RENE L. VALLADARES
Federal Public Defender

/s/ CB Kirschner
C.B. KIRSCHNER
Assistant Federal Public Defender

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition 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), as required by NRAP 21(d) because:

This petition has been prepared in a proportionally spaced typeface using Microsoft Word in Century, 14 point font: or

This petition has been prepared in a monospaced typeface using Word Perfect with Times New Roman, 14 point font.

Dated this 18th day of April, 2018.

Respectfully submitted,

RENE L. VALLADARES
Federal Public Defender

/s/ CB Kirschner

C.B. KIRSCHNER

Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2018, I electronically filed the foregoing with the Clerk of the Nevada Supreme Court by using the appellate electronic filing system.

I served a true and accurate copy of the foregoing by placing it in the United States mail, first-class, postage pre-paid, addressed to:

Steve Wolfson
Clark County District Attorney
200 Lewis Avenue
Las Vegas, NV 89101

Adam Laxalt
Office of the Attorney General
100 N. Carson Street
Carson City, NV 89104

I further certify that I have mailed the foregoing document by first-class mail, postage pre-paid, or have dispatched it to a third party commercial carrier for delivery within three calendar days, to the following people:

Norman Flowers
#39975
High Desert State Prison
P.O. Box 650
Indian Springs, NV 89070

/s/ Dayron Rodriguez _____
An Employee of the
Federal Public Defender, District of
Nevada