

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case Nos. 53159 & 55759

Electronically Filed
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Elizabeth A. Brown
Clerk of Supreme Court

Norman Keith Flowers,

Appellant,

v.

The State of Nevada,

Respondent.

**Reply to State's Opposition to Appellant's Motion to
Reinstate Appeals**

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A. The legal authority supports reinstatement of the appeals.

Appellant agrees with the State's legal authority. All of the cases cited by the State stand for the proposition that a **knowing and voluntary** waiver of appellate rights is enforceable. "This court has determined that a **knowing and voluntary** waiver of the right to appeal made pursuant to a plea bargain is valid and enforceable." *Blalark v. State*, 112 Nev. 795, 976 (1996) (citing *Cruzado v. State*, 110 Nev. 745, 747 (1994)) (emphasis added). A knowing and voluntary waiver is enforceable; however, 1) Flowers did not waive his appellate rights, he voluntarily dismissed his appeals (App. 243, 272); 2) his decision to withdraw the appeals was not knowing and voluntary because it was part of a plea agreement that was coercive and has since been invalidated.

The State treats the voluntary dismissal of the appeals as something independent of the plea agreement. It was not. The appeals in this case were voluntarily dismissed "pursuant to a Guilty Plea Agreement filed in District Court Case No. C216032." App. 272. In the order dismissing the appeals, this Court noted the motion to dismiss

was made “pursuant to a plea agreement in another case.” App. 287.

But for the plea agreement, the appeals would not have been dismissed.

This Court already determined that there was a *Cripps* violation with regards to that plea agreement. App. 477. *See Cripps v. State*, 122 Nev. 764 (2006) (holding that judges are precluded from involvement in plea negotiations due to the inherent risk of coercion). This Court cited the improper statements of the trial court in securing the plea and held, “These statements violated *Cripps*’ bright-line rule precluding judges from participating in the ‘formulation or discussions of a potential plea agreement.’” App. 477. This Court continued, “And the statements may reasonably be viewed as having been a material factor affecting Flowers’ decision to plead guilty....” *Id.*

On remand, the district court concluded that the *Cripps* violation, the improper statements made by the trial court, was a material factor affecting Flowers’ decision to enter into the plea agreement. App. 498. Having determined that the plea was invalid, the court allowed Flowers to withdraw it. App. 499. The State did not appeal the district court’s finding. As such, the State has waived any claim that the plea agreement was valid.

Flowers' decision to withdraw his appeals was part and parcel of the plea agreement. It is axiomatic that an agreement made pursuant to a plea deal is not valid when the underlying plea deal is determined to be invalid. *See Jones v. U.S.*, 167 F.3d 1142, 1144 (7th Cir. 1999) (“A waiver of the right to appeal does not completely foreclose review. We have recognized that the right to appeal survives where the agreement is involuntary....”). *See also U.S. v. Puentes-Hurtado*, 794 F.3d 1278, 1284 (11th Cir. 2015) (holding a waiver that is part of a guilty plea “is unenforceable if the plea itself is involuntary”); *U.S. v. Wenger*, 58 F.3d 280, (7th Cir. 1995) (“Waivers of appeal must stand or fall with the agreements of which they are a part.”). The coercive plea agreement here has been vacated. Therefore, Flowers' agreement to withdraw his appeal, which was part of the plea deal, has also been vacated and the appeals should be reinstated.

B. The State will not be prejudiced if this Court reinstates the appeals.

The State claims it would be prejudiced by the reinstatement of the appeals at this time. However, briefing on the consolidated appeals has already been completed. Flowers is not asking for leave to file a new

opening brief or raise new issues for relief. Rather, both appeals are ripe for a decision on their merits by this Court.

As to the State's concerns regarding post-conviction litigation, such concerns are premature. No post-conviction petition or motions are currently pending on this case. The State's claim that it would be prejudiced by new post-conviction proceedings is speculative. Such arguments can be raised when and if Flowers pursues post-conviction relief. Speculative harm does not constitute prejudice and should not be a basis for denying Flowers' current motion for relief.

It is Mr. Flowers, not the State, who is prejudiced here. He agreed to dismiss his appeals as part of a coercive plea agreement. Since the plea deal has been invalidated, Mr. Flowers should be restored to the position he was in prior to entering into the coercive agreement. Mr. Flowers' right to due process of law, and notions of fundamental fairness, dictate that the appeals be reopened.

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C. Prayer for relief

For the reasons stated herein and in the previously filed Motion,
Mr. Flowers respectfully requests this Court reinstate his appeals.

Dated this 11th day of May, 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 11th day of May, 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 11th day of May, 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 May 11, 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:

Charles Thoman
Clark County District Attorney's Office
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