SUPREME COURT OF THE STATE OF NEVADA

BRENDAN DUNCKLEY,

Appellant,

vs.

THE STATE OF NEVADA, and JACK PALMER, Warden,

Respondents.

Case No. 59957

APPELLANT BRENDAN DUNCKLEY'S OPENING BRIEF

Appeal from Denial of Motion to Withdraw Guilty Plea
Second Judicial District

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I. STATEMENT OF JURISDICTION

On June 3, 2011, the District Court conducted an evidentiary hearing. (AA 226-346.) On December 29, 2011, the District Court entered its Order Denying Motion to Withdraw Guilty Pleas and Findings of Fact, Conclusions of Law, and Judgment. (AA 353-367.) On December 30, 2011, Mr. Dunckely timely filed his Notice of Appeal. (AA 348-368.) Pursuant to NRS 177.015(1)(b) and *Passanisi v. State*, 108 Nev. 318, 321-22, 831 P.2^{d} 1371, 1373 (1992), this Court has jurisdiction over Mr. Dunckley's appeal.

II. STATEMENT OF ISSUES

Whether The District Court Erred In Denying Mr. Dunckely's Motion To Withdraw His Guilty Plea Because At The Time He Entered His Plea He Believed That Probation Was Available To Him, But In Fact, The Legislature Had Amended NRS 201.230 To Eliminate Probation.

III. STATEMENT OF THE CASE

On July 12, 2007, the State filed in the Second Judicial District Court an Information against Mr. Dunckley charging as follows: Count I Sexual Assault on a Child a violation of NRS 200.366; Count II Lewdness With a Child Under the Age of Fourteen Years a violation of NRS 201.230; Count III Statutory Sexual Seduction a violation of NRS 200.364 and 200.368; Count IV Sexual Assault a violation of NRS 200.366 (AA 1-4.) On February 28, 2008, the State

filed against Mr. Dunckley in the District Court an Amended Information charging as follows: Count I Lewdness with a Child Under the Age of Fourteen Years a violation of NRS 201.230; Count II Attempted Sexual Assault a violation of NRS 193.330 being an attempt to violate NRS 200.366 a felony. (AA 5-8.)

On March 6, 2008, Mr. Dunckley pleaded guilty to Count I Lewdness with a Child Under the Age of Fourteen Years a violation of NRS 201.230; Count II Attempted Sexual Assault a violation on NRS 193.330 being an attempt to violate NRS 200.366, pursuant to a Guilty Plea Memorandum in the District Court. (AA 16-31.) District Judge Connie J. Steinheimer accepted Mr. Dunckley's guilty pleas and set sentencing for August 5, 2008, sufficient time to allow Mr. Dunckley the opportunity to attend counseling sessions so that he would be able to show he was a likely candidate for probation. *Id.*

On August 11, 2008, the District Judge entered Judgment against Mr. Dunckley as follows: Count I, Lewdness with a Child Under the Age of Fourteen, NRS 200.230 – imprisonment in the Nevada Department of Prisons for the maximum term of Life with the minimum parole eligibility of 10 years; Count II, Attempted Sexual Assault, NRS 193.330 and NRS 200.366 – imprisonment in the Nevada Department of Prisons for the maximum term of One Hundred Twenty Months with the minimum parole eligibility of 24 months

for Count II to be served concurrently with sentence imposed in Count I with credit for four days' time served. (AA 32-33.)

Mr. Dunckely appealed the judgment. (AA 90-93.) On May 8, 2009, the Nevada Supreme Court entered an Order of Affirmance of the Judgment. *Id.*

On July 21, 2009, Mr. Dunckley filed his Petition for Writ of Habeas Corpus (Post Conviction). (AA 94-170.) On March 3, 2010, Mr. Dunckely filed his Motion to Withdraw Guilty Plea. (AA 187-201.) On March 23, 2010, Mr. Dunckely filed his Supplemental Petition for Writ of Habeas Corpus. (AA 219-225.) On June 3, 2011, the District Court conducted oral argument on the Motion to Withdraw Guilty Plea and an evidentiary hearing on the Petition and Supplemental Petition for Writ of Habeas Corpus. (AA 226-346.) On December 29, 2011, the District Court entered its Order Denying Motion to Withdraw Guilty Pleas and Findings of Fact, Conclusions of Law, and Judgment. (AA 353-367.)

On December 30, 2011, Mr. Dunckely filed his Notices of Appeal. (AA 348-368.)

IV. STATEMENT OF FACTS

On February 28, 2008, the State filed against Mr. Dunckley in the District Court an Amended Information charging as follows: Count I Lewdness with a Child Under the Age of Fourteen Years a violation of NRS 201.230;

Count II Attempted Sexual Assault a violation of NRS 193.330 being an attempt to violate NRS 200.366 a felony. (AA 5-8.) Accordingly to the Amended Information, Count I occurred "on or between the 14th day of August A.D., 1998, and the 13th day of August A.D., 2000, or thereabout...." (AA 5, lines 23 – 25.)

On March 6, 2008, Mr. Dunckley pleaded guilty to Lewdness with a Child Under the Age of Fourteen Years and Attempted Sexual Assault. (AA 16-31.) The District Court accepted Mr. Dunckley's guilty pleas. *Id.* Both Mr. O'Mara and the State informed the District Court as follows:

> **Mr. O'Mara**: Your honor, there's been negotiations with the district attorney's office to set this out five to six months so that Mr. Dunckley can get sexual offender therapy during that period of time. And basically the D.A. is giving him every opportunity to try to qualify for probation and to do the things that will be beneficial for him to present to you at sentencing. So she's allowed for a five- to six-month extension so that he can get those type of therapy classes, and so we'd ask for that type of time before sentencing.
>
> **Ms. Viloria**:Your Honor, my agreement is just to see if this defendant is worthy of any type of grant of probation, whether he can earn it or not. I want to see what he does between now and then.
>
> So I do not object to any type of continuance that Mr. O'Mara is asking for to set out the sentencing date.

(AA-27-28.) The District Court set sentencing for August 5, 2008, sufficient time to allow Mr. Dunckley the opportunity to attend counseling sessions so that he would be able to show he was a likely candidate for probation. (AA 29.)

Mr. Dunckely complied in all respects with his end of the plea agreement – he attended all counseling sessions and obtained the Psychosexual Evaluation/Risk Assessment which found that Mr. Dunckely "DOES NOT REPRESENT A HIGH RISK TO REOFFEND SEXUALLY...." (AA 75-89; *capitalization in original* at p. 85.)

Nonetheless, during sentencing, the District Court made the following statement about Mr. Dunckley's request for probation as provided in his Guilty Plea Memorandum:

> The Court: .... I know you plead to something that allows for a lesser offense, but it does not allow for probation.

(AA 60.) The District Court was exactly right: in 1997 the Nevada Legislature amended NRS 201.230 to eliminate probation as a sentencing option.

V. SUMMARY OF ARGUMENT

Because probation was not available but the face of the record shows that Mr. Dunckely thought it was, Mr. Dunckely was deprived of due process and must be allowed to withdraw his guilty plea.

VI. ARGUMENT

A. Mr. Dunckley did not knowingly or intelligently plead guilty because at the time of his plea Mr. Dunckley believed that probation was an option when as a matter of law probation was not an option.

1. Standard of Review:

This Court evaluates whether or not a defendant knowingly and intelligently entered a plea by the abuse of discretion standard. *Bryant v. Smith*, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986), limited on other grounds by *Smith v. State*, 110 Nev. 1009, 879 P.2d 60 (1994). In addition, this Court follows the doctrine of lenity, whereby this Court interprets criminal statutes liberally and construes inconsistencies or ambiguities in the defendant's favor. *Washington v. State*, 117 Nev. 735, 30 P.3d 1134 (2001).

2. Argument:

In 1969 in *Boykin v. Alabama*, 395 U.S. 238, 242 (1969), the United State Supreme Court recognized that "[a] plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." This Court agrees. In *Little v. Warden*, this Court held as follows:

> Because of the gravity of a defendant's decision to plead guilty, due process demands that the face of the record reveal that a defendant knew at the time of the entry of the guilty plea that probation was not an option or that the defendant would be serving actual time in prison.

117 Nev. 845, 848, 34 P.3d 540, 545 (2001) *citing Boykin v. Alabama*, 395 U.S. 238, 243-44 (1969)(*Emphasis added.*). In the present case, Mr. Dunckley was deprived of his right of due process because the face of the record reveals that Mr. Dunckley believed that probation was an available option when he pleaded

guilty to Lewdness with a Child Under the Age of Fourteen Years.

In 1997 through AB 280, the Nevada Legislature substantially amended NRS 201.230 by elevating lewdness with a child under the age of 14 years from a category B felony with a sentence of two to ten years to a category A felony with a sentence of ten to life. NRS 193.130(2)(a) expressly provides three types of sentence for a category A felony: "Death or imprisonment in the state prison for life with or without the possibility of parole may be imposed...." In addition, in 1997 through SB 5, the Nevada Legislature further amended NRS 201.230 by deleting, among other sections, section 6, which up until then provided that

> [a] person convicted of violating any of the provisions of subsection 1 must not be released on probation unless a psychologist licensed to practice in the State of Nevada or a psychiatrist licensed to practice medicine in the State of Nevada certifies that the person so convicted is not a menace to the health, safety or morals of others.

The clear intent of the Nevada Legislature was to eliminate probation as an option under NRS 201.230. Indeed, as this Court has repeatedly held, "[w]here a statute is amended, provisions of the former statute omitted from the amended statute are repealed." *McKay v. Board of Supervisors of Carson City*, 102 Nev. 644, 730 P.2^{d} 438, 442 (1986).

Mr. Dunckely concedes that NRS 176A.110(3)(j) suggests that probation might still be available. However, "where there is a conflict between one

statutory provision which deals with a subject in a general way and another which deals with the same subject in a specific manner, the latter will prevail." *Knowles v. Holly*, 513 P.2d 18, 21 (Wash. 1973). In this case, NRS 201.230, the specific statute, eliminated probation as an option, but NRS 176A.110(3)(j) the general statute, purported to return it. NRS 201.230 governs and provides that probation was not available. Indeed, even this Court agrees. After all, in 1997, Chief Justice Shearing, in *Scott E. v. State*, 113 Nev. 234, 931 P.2d 1370, 1375 (1997), described NRS 201.230 as "a non-probational felony with a life prison sentence."

Because probation was not available, but the face of the record states clearly that Mr. Dunckely thought probation was available, Mr. Dunckely was deprived of due process and must be allowed to withdraw his guilty plea.

VII. CONCLUSION

For the foregoing reasons, Mr. Dunckley requests this Court to overturn the district court's denial of his request to withdraw his guilty plea.

VIII. CERTIFICATE OF COMPLIANCE.

1. I hereby certify that this brief 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) because this brief has been

prepared in a proportionally spaced typeface in Word in 14 point times new roman font.

2. I further certify that this brief complies with the page- or type-volume limits of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed 30 pages.

3. Finally 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 NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

I hereby certify that pursuant to NRS 239B.030, no social security

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numbers are contained within this document.

DATED: June 25, 2012.

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By: /s/ Robert W. Story .

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IX. CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on June 25, 2012. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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I declare under penalty of perjury that the foregoing is true and correct

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