

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID COIL,
Appellant,
v.
THE STATE OF NEVADA,
Respondent.

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Case No. 74949

RESPONDENT'S ANSWERING BRIEF

**Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County**

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DAVID COIL,

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v.

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RESPONDENT’S ANSWERING BRIEF

**Appeal from Judgment of Conviction
Eighth Judicial District Court, Clark County**

ROUTING STATEMENT

This appeal is presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(1), because it is an appeal from a judgment of conviction based on a plea of guilty.

STATEMENT OF THE ISSUES

- I. Whether Appellant waived his right to trial and did not challenge his guilty plea below.
- II. Whether Appellant knowingly and voluntarily entered his guilty plea.

STATEMENT OF THE CASE

On September 27, 2016, David Coil (hereinafter “Appellant”) was charged by way of Information with one count SEX TRAFFICKING OF A CHILD UNDER 18

YEARS OF AGE (Category A Felony – NRS 201.300.2a1- NOC 58004); four counts SOLICITING PROSTITUTION (Category E Felony – NRS 201.354 – NOC 55102); one count PANDERING (Category C Felony – NRS 201.300.1 – NOC 51000) and one count ATTEMPT SEX TRAFFICKING OF A CHILD UNDER 18 YEARS OF AGE (Category B Felony – NRS 200.300.2a, 193.330 – NOC 58005) for acts committed on or between October 16, 2015, and August 23, 2016. Appellant's Appendix ("AA"), at 1-3. On September 27, 2016, Appellant waived his right to a preliminary hearing. AA 4-9. On September 29, 2016, Appellant pled not guilty and invoked his right to a speedy trial. A jury trial was set for November 28, 2016, but due to several continuances regarding discovery Appellant waived his right to a trial within 60 days. AA 17.

On January 18, 2017, Appellant was referred for a competency evaluation and the court found Appellant competent on February 22, 2017. AA 22, 25. On Jun 20, 2017, Appellant filed a Motion to Replace Public Defender for Cause and Defendant's Motion for Dismissal and Habeas Corpus for Untimely Trial Over 60 Days. The State did not respond. AA 28. On July 2, 2017, the court denied Appellant's Pro Per Motion to Replace Public Defender for Cause and Defendant's Motion for Dismissal and Habeas Corpus for Untimely Trial Over 60 days. AA 45.

On July 24, 2017, Appellant expressed his desire to represent himself and the court conducted a Faretta canvass to see if Appellant was able to represent himself.

Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, (1975); AA 49-50. During the canvass, however, Appellant decided to withdraw his request and move forward with counsel. AA 56. Appellant again requested to represent himself on September 18, 2017. AA 63-64. On September 25, 2017, the court conducted another Faretta canvass and Appellant withdrew his request for a second time. AA 73.

Trial began on September 26, 2017, and the State filed an Amended Information the same day.¹ On September 28, 2017 before the third day of trial began, Appellant decided to plead guilty to all charges alleged in the in the Amended Information. On November 8, 2017, Appellant was sentenced as follows:

- Count 1 [Sex Trafficking a Child Under 18]- LIFE with the eligibility for parole after serving a minimum of sixty (60) months;
- Count 2 [Soliciting Prostitution]- Maximum of thirty (30) months with a minimum parole eligibility of twelve (12) months concurrent with count 1; suspended and placed on probation for an indeterminate period not to exceed three years, with only condition being serve three-hundred sixty four (364) days in the Clark County Detention Center;
- Count 3 [Soliciting Prostitution] - Maximum of thirty (30) months with a minimum parole eligibility of twelve (12) months, concurrent with count 2; suspended and placed on probation for an indeterminate period not to exceed three years, with only condition being serve three-hundred sixty four (364) days in the Clark County Detention Center;
- Count 4 [Soliciting Prostitution]- Maximum of thirty (30) months with a minimum parole eligibility of twelve (12) months concurrent with count 3; suspended and placed on probation for

¹ The Amended Information did not add additional charges. The State changed the language in the first count to reflect the statute and switched count 6 and 7 to make it clearer for the jury to understand. AA 79.

an indeterminate period not to exceed three years, with only condition being serve three-hundred sixty four (364) days in the Clark County Detention Center;

- Count 5 [Soliciting Prostitution]- Maximum of thirty (30) months with a minimum parole eligibility of twelve (12) months concurrent with count 4; suspended and placed on probation for an indeterminate period not to exceed three years, with only condition being serve three-hundred sixty four (364) days in the Clark County Detention Center;
- Count 6 [Attempt Sex Trafficking of a Child Under 18]- Maximum of one hundred eighty (180) months with a minimum parole eligibility of seventy-two (72) months, consecutive to count 5; with four hundred forty three days credit for time served.

AA 193-96. Count 7 regarding pandering was dismissed, and Appellant was also required to register as a sex offender within 48 hours of release from custody. AA 194, 199. The aggregate sentence was life with parole eligibility after serving a minimum of one hundred thirty-two (132) months. The Judgement of Conviction was filed on December 13, 2017. AA 198-200.

On January 17, 2018, Appellant filed a Notice of Appeal. On November 5, 2018, Appellant filed the instant Opening Brief. The State responds herein.

STATEMENT OF FACTS

Appellant was charged by way of Amended Information with one count SEX TRAFFICKING OF A CHILD UNDER 18 YEARS OF AGE (Category A Felony – NRS 201.300.2a1- NOC 58004); four counts SOLICITING PROSTITUTION (Category E Felony – NRS 201.354 – NOC 55102); one count PANDERING (Category C Felony – NRS 201.300.1 – NOC 51000) and one count ATTEMPT

SEX TRAFFICKING OF A CHILD UNDER 18 YEARS OF AGE (Category B Felony – NRS 200.300.2a, 193.330 – NOC 58005) for acts committed on or between October 16, 2015, and August 23, 2016. AA 75-77. On September 28, 2017, Appellant plead guilty to all charges as alleged. AA 162. Before accepting Appellant's plea, the court canvassed Appellant regarding his understanding of the charges:

THE COURT: Sir, do you understand the proceedings 10 that are happening here today?

DEFENDANT: Yes.

THE COURT: Sir, have you received a copy of the Amended Information in your case?

DEFENDANT: Is that what it was?

MR. MATSUDA: Yeah.

DEFENDANT: Yes. Yes, I did.

THE COURT: So do you know the charges that you're facing in this case?

DEFENDANT: Yes, ma'am.

THE COURT: And as to all of those charges, how do you plead?

DEFENDANT: Guilty.

THE COURT: And sir, are you making this plea freely and voluntarily?

DEFENDANT: Yes.

AA 163. Additionally, the court canvassed Appellant regarding the consequences of his plea and waiver of rights:

THE COURT: Do you understand if you enter this plea, you are waiving your constitutional rights to a trial by an impartial jury that's free of excessive pretrial publicity prejudicial to your defense?

DEFENDANT: Yes.

THE COURT: Do you understand you would be waiving your constitutional right to confront and cross-examine any witnesses that would testify against you?

DEFENDANT: Yes.

THE COURT: You would be waiving your constitutional right to subpoena witnesses to testify on your own behalf.

DEFENDANT: Yes.

THE COURT: You would be waiving your constitutional right to testify in your own defense?

DEFENDANT: Yes.

THE COURT: You would be waiving your right to appeal this conviction with the assistance of an attorney, either appointed or retained, unless specifically reserved in writing and agreed upon? So you're waiving your right to appeal this conviction?

DEFENDANT: Oh, yes.

THE COURT: You're waiving your right to a direct appeal of any challenge based upon -- hold on -- you're waiving your right to a direct appeal of this conviction, including any challenges based upon reasonable constitutional, jurisdictional or other grounds that challenge the legality of these proceedings. Do you understand that? You're waiving your right to an appeal in this case.

DEFENDANT: Yes.

AA 172-73. Appellant was then canvassed regarding the factual basis for the charges:

THE COURT: Sir in regards to count 1, are you pleading guilty to because in truth and in fact on or between October 16th of 2015 and August 23rd of 2016, here in Clark County, Nevada, you did willfully, unlawfully and feloniously induce, cause and/or recruit and/or obtain and/or maintain IP, a child under 18 years of age to engage in prostitution and/or to enter in any place within the state in which prostitution is practiced, encouraged or allowed for the purpose of sexual conduct or prostitution? Did you do that?

DEFENDANT: Yes.

THE COURT: In regards to count 2, did you on or -- is it true and in fact on or between October 16th of 2015 and 2 August 6th of 2016, here in Clark County, you willfully and up lawfully solicited IP, a minor, by word, gesture or any other means to engage in sexual conduct, to wit: By touching and/or rubbing your penis with her hands and her bare genital opening for a fee in the amount of \$200? Did you do that?

DEFENDANT: Yes.

THE COURT: Sir, in regards to count 3, here in Clark County, you did on or between October 15th, 2015 and 10 August 6th of 2016 willfully and unlawfully solicit IP, a minor, by word, gesture or any other means to engage in sexual conduct, that being touching and/or rubbing your penis for a fee of \$100?

DEFENDANT: Yes.

THE COURT: Are you pleading guilty to count 4 because in truth and in fact on or about October 15th of 2015 and between August 6th of 2016, here in Clark County, you did willfully and unlawfully solicit IP, a minor, by word, gesture or any other means to engage in sexual conduct, that being touching and/or rubbing your penis for a fee of \$100?

DEFENDANT: Yes.

THE COURT: And in regards to count 5, are you pleading guilty because in truth and in fact on or between October 15th of 2015 and August 6th of 2016, you did willfully and unlawfully solicit IP, a minor, in Clark County by word, gesture or any other means to engage in sexual conduct, that being touching and/or rubbing of your penis for a fee of \$100?

DEFENDANT: Yes.

THE COURT: And are you pleading guilty because -- to count 6 because in truth and in fact, on or between August 22nd of 2016 and August 23rd of 2016, here in Clark County, 8 you did willfully, unlawfully and feloniously attempt to induce, cause or recruit Tiff, a person you believed to be a 10 child under the 18

of age [sic] while you having the specific intent that Tiff engage in prostitution?
DEFENDANT: Yes.
THE COURT: And in regards to count 7, are you pleading guilty because in truth and in fact on or between August 22nd of 2016 and August 23rd of 2016, here in Clark County, you did willfully, unlawfully and feloniously induce O. Deeds to unlawfully become a prostitute and/or to continue to engage in prostitution?
DEFENDANT: Yes.

AA 167-169. Due to Appellant's affirmations, the court accepted Appellant's plea as freely and voluntarily entered and set a sentencing date.

At sentencing, Appellant apologized for his actions, the State dismissed the charge for count 7, and the court sentenced Appellant to an aggregate sentence of life with parole eligibility after serving a minimum of one hundred thirty-two (132) months. AA 188, 194-195.

SUMMARY OF THE ARGUMENT

Appellant's claims are inappropriate for review on direct appeal because Appellant failed to challenge the validity of his guilty plea by filing a motion to withdraw guilty plea or commencing a post-conviction proceeding. Therefore, this Court should not address the merits of Appellant's claims.

Additionally, Appellant entered his plea knowingly and voluntarily. Appellant decided to plead guilty to all offenses in the Amended Information on the third day of his trial. Appellant does not get to choose what charges he pleads guilty to.

Furthermore, during canvassing Appellant admitted to committing the act of sex trafficking. The court canvassed Appellant regarding his understanding of the charges, the consequences of his plea, his waiver of rights, and the factual basis for his charges. Based on his affirmation the court accepted his plea. Therefore, Appellant knowingly and voluntarily entered his plea and this Court should affirm the Judgment of Conviction.

ARGUMENT

I.

APPELLANT WAIVED HIS RIGHT TO TRIAL AND DID NOT CHALLENGE HIS GUILTY PLEA BELOW.

A claim challenging the validity of a guilty plea may not generally be raised on direct appeal. See Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986).

Generally, challenges to the validity of a guilty plea must be raised in the district court in the first instance by either filing a motion to withdraw the guilty plea or commencing a post-conviction proceeding pursuant to NRS chapter 34. Bryant, 102 Nev. at 272, 721 P.2d at 367-68 (1986), superseded by statute as stated in Hart v. State, 116 Nev. 558, 562 N.3, 1 P.3d 969, 971 n.3 (2000) and holding limited by Smith v. State, 110 Nev. 1009, 1010 n. 1, 879 P.2d 60-61 n.1 (1994); see also O'Guinn v. State, 118 Nev. 849, 851-52, 59 P.3d 488, 489-90 (2002).

The record does not indicate that Appellant challenged the validity of his guilty plea in district court. This failure to petition for withdrawal of his guilty plea bars consideration of an attack regarding the validity of the plea. Therefore, failure

to preserve this issue below results in a waiver of the argument on appeal. Dermody v. City of Reno, 113 Nev. 207, 210-11, 931 P.2d 1354, 1357 (1997); Guy v. State, 108 Nev. 770, 780, 839 P.2d 578, 584 (1992), cert. denied, 507, U.S. 1009, 113 S. Ct. 1656 (1993); Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991). Therefore, Appellant's claims are not appropriate for review on direct appeal from the judgement of conviction, and this Court should not address it. Bryant, 102 Nev. at 272, 721 P.2d at 368.

II. APPELLANT KNOWINGLY AND VOLUNTARILY ENTERED HIS GUILTY PLEA

In Nevada, a guilty plea is presumptively valid, particularly where it is entered into with the advice of counsel. Jeziarski v. State, 107 Nev. 395, 397, 812 P.2d 355, 356 (1991). Defendants have the burden of proving that they did not enter their pleas knowingly or voluntarily. Bryant v. State, 102 Nev. 268, 271, 721 P.2d 364, 367 (1986) (superseded by statute, on other grounds, by Hart v. State, 116 Nev. 558, 1 P.3d 969 (2000)); see also Wynn v. State, 96 Nev. 673, 675, 615 P.2d 946, 947 (1980).

In determining whether a guilty plea is knowingly and voluntarily entered, the court will review the totality of the circumstances surrounding the defendant's plea. Bryant, 102 Nev. at 271. The trial court must personally address a defendant at the time he enters his plea in order to determine whether he understands the nature of

the charges to which he is pleading. Id.; State v. Freese, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000). However, determining whether the plea was knowingly and voluntarily entered is not contingent on the plea canvass alone, as the court “will not invalidate a plea as long as the totality of circumstances, as shown by the record, demonstrates that the plea was knowingly and voluntarily made and that the defendant understood the nature of the offense and the consequences of the plea.” Freese, 116 Nev. at 1105. When applying the “totality of circumstances” test, the most significant factors for review include the plea canvass and the written guilty plea agreement. See Hudson v. Warden, 117 Nev. 387, 399, 22 P.3d 1154, 1162 (2001).

In this instant case, Appellant claims that he is not guilty of sex trafficking, but “facilitating” sex trafficking. AOB 12. Appellant does not contest the other six charges he plead guilty to. Additionally, Appellant claims that his plea was not knowingly and intelligently entered. AOB 16.

Appellant was not charged with facilitating sex trafficking. Appellant was charged with Sex Trafficking of a Child under 18 Years of Age (Category A Felony – NRS 201.300.2a1- NOC 58004) because he did willfully, unlawfully, and feloniously induce, cause, and/or recruit and/or obtain and/or maintain, IP, a child under eighteen years of age, to engage in prostitution and/or to enter any place within this State in which prostitution is practiced, encouraged or allowed for the purpose

of sexual conduct or prostitution. AA 76. Appellant does not get to choose what crimes he pleads guilty to.

In Righetti, the Defendant was charged with murder under three theories, and plead guilty to murder, but only to two of the three theories alleged. Righetti v. Eighth Judicial Dist. Court, 388 P. 3d 643, 644 (2017). Defense did not notify the State of Defendant's position, and the State was not aware that the Defendant was only pleading guilty to certain theories. Id. The district court initially accepted the plea, but once the miscommunication surfaced the court revoked its acceptance and set the matter for trial. Id. at 645. In response, Defendant sought a Writ of Prohibition or Mandamus to enforce his plea. Id. The Nevada Supreme Court held that the district court properly revoked its acceptance of Defendant's guilty plea. Id. at 649. The Court reasoned that the State has an almost exclusive right to decide how to charge a criminal defendant, and while a criminal defendant has a statutory right to tender a guilty plea, he does not have a right to plead guilty a la carte to avoid the State's charging decisions. Id. at 647 citing Parsons v. Fifth Judicial Dist. Court, 110 Nev. 1239, 1244, 885 P.2d 1316, 1320 (1994), overruled on other grounds by Parsons v. State, 116 Nev. 928, 936, 10 P.3d 836. 841 (2000).

Like Righetti, Appellant had the choice to either go to trial or plead guilty to the negotiated charges as alleged. Furthermore, if Appellant wanted to be charged with facilitating sex trafficking, he could have offered it as an instruction at trial, yet

he chose to plead guilty. “A guilty plea is more than a confession that the accused did various acts. It is an admission that he committed the crimes charged against him.” United States v. Broce, 488 U.S. 563, 570, 109 S. CT. 757, 102 L. Ed. 2d. 927 (1989). A defendant who makes a counseled and voluntary guilty plea admits both the acts described in the indictment and the legal consequences of those acts. Righetti, 388 P. 3d at 648 quoting United States v. Allen, 24 F.3d 1180, 1183 (10th Cir. 1994). Furthermore, Appellant admitted to committing the act of sex trafficking during his plea canvass:

THE COURT: Sir in regards to count 1, are you pleading guilty to because in truth and in fact on or between October 16th of 2015 and August 23rd of 2016, here in Clark County, Nevada, you did willfully, unlawfully and feloniously induce, cause and/or recruit and/or obtain and/or maintain IP, a child under 18 years of age to engage in prostitution and/or to enter in any place within the state in which prostitution is practiced, encouraged or allowed for the purpose of sexual conduct or prostitution? Did you do that?

DEFENDANT: Yes.

AA 167. Therefore, it was proper to charge Appellant with sex trafficking a minor under 18 years of age. Additionally, Appellant’s claim that he did not knowingly and voluntarily enter his plea is belied by the record. Appellant chose to plead guilty to all charges in the Amended Information. AA 162. In response, the court canvassed Appellant:

THE COURT: Sir, do you understand the proceedings that are happening here today?

DEFENDANT: Yes.

THE COURT: Sir, have you received a copy of the Amended Information in your case?

DEFENDANT: Is that what it was?

MATSUDA: Yeah.

DEFENDANT: Yes. Yes, I did.

THE COURT: So do you know the charges that you're facing in this case?

DEFENDANT: Yes, ma'am.

THE COURT: And as to all of those charges, how do you plead?

DEFENDANT: Guilty.

THE COURT: And sir, are you making this plea freely and voluntarily?

DEFENDANT: Yes.

AA 163. Furthermore, Appellant acknowledged that he understood the rights he was giving up and the consequences of his plea:

THE COURT: Do you understand if you enter this plea, you are waiving your constitutional rights to a trial by an impartial jury that's free of excessive pretrial publicity prejudicial to your defense?

DEFENDANT: Yes.

THE COURT: Do you understand you would be waiving your constitutional right to confront and cross-examine any witnesses that would testify against you?

DEFENDANT: Yes.

THE COURT: You would be waiving your constitutional right to subpoena witnesses to testify on your own behalf.

DEFENDANT: Yes.

THE COURT: You would be waiving your constitutional right to testify in your own defense?

DEFENDANT: Yes.

THE COURT: You would be waiving your right to appeal this conviction with the assistance of an attorney, either appointed or retained, unless specifically reserved

in writing and agreed upon? So you're waiving your right to appeal this conviction?

DEFENDANT: Oh, yes.

THE COURT: You're waiving your right to a direct appeal of any challenge based upon -- hold on -- you're waiving your right to a direct appeal of this conviction, including any challenges based upon reasonable constitutional, jurisdictional or other grounds that challenge the legality of these proceedings. Do you understand that? You're waiving your right to an appeal in this case.

DEFENDANT: Yes.

AA 172-73. This Court should affirm Appellant's Judgment of Conviction because Appellant knowingly and voluntarily entered his plea. Moreover, a casual inspection of the record does not demonstrate that Appellant suffered prejudice or a miscarriage of justice. Martinorellan, 131 Nev. at ___, 343 P.3d at 594. To the contrary, Appellant's claims are belied by the record. Hargrove, 100 Nev. at 503, 686 P.2d at 225. The record demonstrates that Appellant chose to plead guilty to all charges in the Amended Information. He also admitted to committing the act of sex trafficking. This was not a negotiated sentence; Appellant's conviction was the result of his own acts. The plea canvass establishes that Appellant knew the consequences of entering a guilty plea and knowingly and voluntarily entered his plea. Accordingly, this Court should deny Appellant's claims.

///

///

CONCLUSION

WHEREFORE, the State respectfully requests that Appellant's Judgment of Conviction be AFFIRMED.

Dated this 5th day of December, 2018.

Respectfully submitted,

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BY */s/ Steven S. Owens*

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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 using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points or more, contains 3,609 words and 16 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.

Dated this 5th day of December, 2018.

Respectfully submitted

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BY */s/ Steven S. Owens*

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 5th day of December, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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