In the Supreme Court of the State of Nevada

David Coil,

Appellant,

v.

The State of Nevada,

Respondent.

Supreme Court Case No.: 74949

Appeal from Judgment of Conviction of Eighth Judicial District Court, Clark County, in Case No.: C318335

Appellant David Coil's Reply Brief

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NRAP 26.1 Disclosure

As required by NRAP 26.1, undersigned certifies that there are no persons or entities as described in 26.1(a) that must be disclosed.

Introduction

This direct appeal challenges a conviction from a guilty plea entered mid-way through a jury trial for which David Coil received a life sentence with parole eligibility after eleven years. In the opening brief (OB) and addendum (ADD), Coil argued that this Court can consider the validity of his guilty plea on direct appeal despite that he did not move to withdraw his guilty plea below because the errors clearly appear from the record and involve questions of law as applied to the undisputed facts of this case. ADD 13–14. On the merits, Coil argued that his guilty plea is invalid because: (1) his actual conduct did not satisfy the elements of sex trafficking or attempt sex trafficking, OB 12–17; (2) the district court improperly denied Coil the right to represent himself at trial, ADD 14–22; and (3) the district court failed to ensure that Coil understood the true nature of the charges he pleaded guilty to, and it advised Coil of the Constitutional rights he was giving up only *after* it accepted his guilty plea, ADD 22–27.

In the answering brief (AB) and response to the addendum (RA), the state argues that Coils claims are inappropriate for review on direct appeal, so this Court should decline to consider them on their merits. AB 9–10, RA 1–2. Alternatively,

that: (1) Coil's plea was knowingly and intelligently made because he admitted to the charges as alleged in the amended information, AB13–15; (2) by pleading guilty, Coil forfeited his right to challenge the denial of his right to self-representation; even if not forfeited, Coil cannot show prejudice because "there was no trial," RA 2–4; and (3) the guilty plea canvass shows Coil understood the nature of the charges he pleaded guilty to and was advised of the rights he was giving up by doing so. RA 6–7.

Reply

I. This court can review the validity of Coil's guilty plea on direct appeal.

In the addendum, Coil represented that "[t]his Court will generally not review a plea-validity challenge that is raised for the first time on direct appeal unless: (1) the error clearly appears from the record, or (2) the challenge rests on legal rather than factual allegations. *Bryant v. State*, 102 Nev. 268, 272, 721 P.2d 364, 368 (Nev. 1986), *superseded by statute on other grounds as stated in Hart v. State*, 116 Nev. 558, 562, 1 P.3d 969, 971 (2000); *Smith v. State*, 110 Nev. 1009, 1010 n.1, 879 P.2d 60, 60 n.1 (1994)." ADD 13. The state responds that Coil misreads *Bryant*, which holds that "challenges to the knowing and voluntary nature of a guilty plea are factual in nature, not purely legal, and will no longer be permitted on direct appeal." RA 2.

The state ignores that Coil cited *Bryant*—which did severely limit review of guilty pleas on direct review—in conjunction with *Smith v. State*, which held that the rule announced in *Bryant* "cannot be applied without exception." *Smith v. State*, 110 Nev. 1009, 1014 n.1, 879 P.2d 60, 63 (1994). The state also ignores that this Court has used language almost identical to Coil's to describe the limited circumstances under which this Court will consider the validity of a guilty plea for the first time on direct review: "Generally, we will not review a plea-validity challenge that is raised for the first time on appeal. There are exceptions to this rule in cases where: (1) the error clearly appears from the record; or (2) the challenge rests on legal rather than factual allegations." *O'Guinn v. State*, 118 Nev. 849, 852, 59 P.3d 488, 490 (2002).

In *Smith*, because the plea canvass revealed that the guilty plea was the result of coercion, this Court set aside the guilty plea notwithstanding that the defendant failed to file a motion to withdraw his guilty plea below. The Court reasoned that "where the error clearly appears from the record, it is a waste of judicial resources to require the defendant to start the process of review anew." *Smith*, 110 Nev. at 1014 n.1, 879 P.2d at 63, n.1. Like in *Smith*, this record reveals that Coil's guilty plea was involuntary: it was coerced by the improper denial of his right to self-representation. Also, that the canvass on the true nature of the charges and the elements of these offenses and the constitutional rights that Coil

was giving up by pleading guilty was insufficient. Coil's claims do not rely on out-of-court statements, exchanges, or events that require further evidentiary development. Here, as in *Smith*, it would be a "waste of judicial resources to require [Coil] to start the process anew" because the complained-of errors clearly appear from the record, the authenticity of which the state does not dispute, and require a straightforward application of law to the undisputed facts of this case. This Court should therefore address Coil's claims in this direct appeal.

II. Coil's guilty plea to sex trafficking and attempt sex trafficking was not knowingly made where his actual conduct did not satisfy the essential elements of these offenses.

As explained in the opening brief, Coil cannot have committed sex trafficking without having obtained some kind of benefit. OB 12–16. Because Coil's conduct was limited to arranging the females' presence at a particular place, his conduct amounted to facilitating sex trafficking (a category B felony carrying 1–6 years) instead of actual or attempted sex trafficking (a category A felony carrying five years to life). At trial, the state theorized that Coil profited by receiving bragging rights. AA 088. On appeal, the state does not attempt to explain how Coil's actual conduct satisfies the elements of sex trafficking. It argues simply that Coil was charged with sex trafficking and not facilitating sex trafficking and he "does not get to choose what crimes he pleads guilty to." AB

11. If Coil "wanted to be charged with facilitating sex trafficking, he could have offered it as an instruction at trial" rather than pleading guilty. AB 12.

But there is no indication that Coil was aware that his actual conduct arguably did not satisfy the elements of sex trafficking because he did not know what the elements of that offense were. There is zero indication that Coil knew that the state would need to prove that he received some tangible benefit from the women's activities in order to convict him of sex trafficking and that without it, he would be guilty of only facilitating sex trafficking and facing a lesser sentence. Although it is true that Coil did not have a right to plead guilty to the lesser offense of facilitating sex trafficking and avoid trial on the more serious charges without the state's consent, the trial court should have ensured that he understood the elements of the crimes he was pleading guilty to, especially where there was a real probability that his actual conduct could not sustain a conviction on the two most serious charges.

The Eighth Circuit's decision in *Rinehart v. Brewer* is persuasive. 561 F.2d 126 (8th Cir. 1977).[3] There, the defendant pleaded guilty to second-degree murder despite that there was a probability that he would have been found guilty of the lesser crime of manslaughter based on the facts of the case. *Id.* at 130–132. The

[3] This Court has previously discussed *Rinehart* in an unpublished disposition where it declined to apply it based on the facts of that case. *Mack v. State*, 126 Nev. 735, 367 P.3d 795 (2010) (unpublished).

record revealed that the trial court "made no attempt to ascertain whether the defendant understood the law in relation to the facts or the nature of the charge against him." *Id.* at 131. Importantly, the trial court failed to ensure that the defendant knew that the state would be required to prove specific intent to kill to sustain the second-degree murder conviction, and it was clear that the defendant was not aware of the lesser crime of manslaughter or its elements. The *Rinehart* court concluded that these deficiencies, coupled with the defendant's age, inexperience, and communication difficulties rendered his plea unknowing and involuntary. *Id.* at 131. As in *Rinehart*, this record reveals that the district court made no attempt to ascertain whether Coil understood the law in relation to the facts or the true nature of the sex trafficking charges. In addition, Coil repeatedly stated that he did not understand the elements of these offenses. *See, e.g.*, AA 054–55. Also like in *Rinehart*, here, there was a real probability that Coil would have been acquitted on the sex trafficking charges and instead convicted of only lesser charges—a possibility the record suggests Coil knew nothing about.

The state's reliance on *Righetti v. Eighth Judicial District Court* is beside the point. 133 Nev. Adv. Op. 7, 388 P.3d 643 (2017). There, the defendant was charged with first-degree murder under three theories and attempted to enter a guilty plea to only two of the three, thereby eliminating several of the grounds on which the state could seek the death penalty. *Id.* at 644. The district court declined

to accept the defendant's guilty plea because the state did not consent to the defendant entering a plea to an amended charge. The defendant then sought a writ of mandamus directing the district court to enforce his plea. This Court affirmed, holding that the defendant could not undercut the state's charging decision by pleading guilty to only some of the theories alleged without the state's affirmative consent. *Id.* at 647. But Coil does not claim that he had a right to be charged with facilitating sex trafficking in lieu of actual or attempted sex trafficking (or to pick which theory of sex trafficking to plead guilty to) in order to prevent the state from trying him on the more serious charges. Instead, he claims that he was obviously unaware of what essential elements the state would need to prove to convict him of sex trafficking, which is apparent due to the fact that his actual conduct does not satisfy the elements of this offense. Also, that the probable outcome at trial would likely have been a conviction for the lesser offense of facilitation—something the record shows Coil also had no knowledge of.

This Court should find that Coil's plea to the sex trafficking and attempt sex trafficking counts was not knowingly made because the record shows that Coil did not understand the law in relation to the facts or the true nature of these charges where his actual conduct did not satisfy the elements of these offenses and there was a real probability that he may have been convicted of a lesser charge of which he was never made aware. *Rinehart*, 561 F.2d at 130–32.

III. The district court's repeated denial of Coil's right to self-representation rendered his guilty plea involuntary and thus invalid.

A. Coil's self-representation claim goes to the voluntariness of his guilty plea and is therefore not waived or forfeited.

The state argues that Coil's self-representation claim is "independent of whether [he] voluntarily entered his plea" and is therefore precluded by his guilty plea, which waived any right to appeal events occurring before it. AR 3. This is not so, but Coil could have been clearer in the addendum to the opening brief that the argument is that the district court's improper denial of his repeated requests for self-representation rendered his guilty plea *involuntary* and thus invalid. Instead, the analysis focused on why, under this Court's case law, the district court's denial of Coil's requests for self-representation was error, resulting in an invalid guilty plea. ADD 15–22; *but see* RA 2 (recognizing that Coil is challenging the "validity of his guilty plea because he was deprived of self-representation . . .").

The Ninth Circuit has held that the improper denial of a request for self-representation renders a subsequent guilty plea involuntary and thus invalid. *United State v. Hernandez*, 203 F.3d 614 (9th Cir. 2000), *overruled on other grounds by Indiana v. Edwards*, 554 U.S. 164 (2008). The *Hernandez* court considered a plea-validity challenge raised for the first time on direct review because "the trial court's denial of Hernandez's self-representation request is on the record, there [was] no factual dispute about what the court said, and there is no

need for any further factual information." 203 F.3d at 620. Consistent with *Smith*, this Court should find the *Hernandez* court's reasoning persuasive and employ a similar approach here. As in *Hernandez*, the district court's denial of Coil's self-representation request is on the record, there is no dispute about what the court said, and there is no need for any further factual information.

On the merits, the *Hernandez* court concluded that the trial court improperly denied Hernandez's right to self-representation. 203 F.3d at 625–26. The Court also concluded that this denial rendered Hernandez's guilty plea invalid. In doing so, the Court relied on well-established Supreme Court precedent that "a guilty plea is involuntary if it is the product of threats, improper promises, or other forms of wrongful coercion." *Brady v. United States*, 397 U.S. 742, 754–55 (1970). Also, that "the denial of a defendant's Sixth Amendment right to conduct his own defense is a structural error—an error that undermines the integrity of the trial mechanism itself." *Hernandez*, 203 F.3d 614, 626 (citing *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984); *Arizona v. Fulminante*, 499 U.S. 279, 310 (1990); *Neder v. United States*, 527 U.S. 1 (1999)). The district court's denial of Hernandez's request to represent himself left him only with a choice "between pleading guilty and submitting to a trial the very structure of which would be unconstitutional," thus depriving him "of the choice between the only two constitutional alternatives—a plea and a fair trial." *Id.* at 626–27. "For this

reason," the court concluded that the district court "'imposed unreasonable constraints' on Hernandez's decisionmaking," rendering Hernandez's guilty plea involuntary. *Id.* at 627 (internal citation omitted). Although not bound by this authority, this Court should find the Ninth Circuit's analysis persuasive and apply a similar approach here.

Because Coil's self-representation claim goes to the voluntariness of his guilty plea, the state's argument that Coil forfeited his right to assert it by pleading guilty fails. RA 2–3. Additionally, Coil did not enter into any plea agreement with the state, much less one in which he acknowledged and agreed to waive any claim relating to the deprivation of constitutional rights that occurred before entering his plea. Nor did the district court advise him that he was giving up these rights before accepting his guilty plea. AA 162–170. For these reasons, and because the district court's denial of Coil's request for self-representation is in the record, this Court should address Coil's self-representation claim on the merits.

B. The district court improperly denied Coil's request for self-representation.

The state's response to the merits of Coil's self-representation claim is thin: it argues that Coil's request was "equivocal" because it was conditioned upon the court issuing a continuance so that he could prepare and he ultimately "withdrew" his request. RA 4.

It does not appear that this Court has explicitly addressed whether a self-representation request can be conditioned on a request for a continuance yet unequivocal, but, as explained in the opening brief, it has consistently examined the denial of a defendant's request for a trial continuance so that he can represent himself as a denial-of-self-representation claim. ADD 17 (citing *Lyons v. State*, 106 Nev. 438 796 P.2d 210 (1990)); *See also Guerrina v. State*, 134 Nev. Adv. Op. 45, 419 P.3d 705, 708–09 (2018) (analyzing denial of continuance so that defendant could proceed pro se as claim for denial of right to self-representation). These cases address the issue as a timeliness one, not in terms of whether a request for self-representation is rendered equivocal if it is conditioned on a request for a continuance.

The state does not assert that Coil's request was untimely even though Coil argued extensively in the addendum that it was timely. ADD 15–21. Consistent with the above authority, this Court should treat Coil's request for a continuance so that he could represent himself as a timeliness issue and decline to find that it rendered his request equivocal. And, for the reasons explained in the addendum, it should deem Coil's request as timely because he provided reasonable cause to justify its timing: he had grown increasingly dissatisfied with his attorney, was never offered substitute counsel, was not told that his previous request made one

week before the prior calendar call was tardy, and commissary was not delivering envelopes. ADD 17–21.

Additionally, because Coil's request was made well before the trial started, the district court had a smaller measure of discretion whether to grant or deny the request. *Lyons*, 106 Nev. at 446, 796 P.2d at 215. Thus, even were the above not sufficient to establish reasonable cause, the district court nonetheless abused its discretion in denying Coil's request. The record reveals that only moments before Coil moved to represent himself a second time, counsel for the state and the defense were discussing a fourth trial continuance to accommodate the state's trial schedule—something the district court seemed to have no problem with. ADD 18. The trial had previously been continued multiple times due to repeat discovery issues over which Coil had no control and repeatedly voiced his objection. ADD 18. Coil had never been offered substitute counsel, the case had been pending for less than one year, trial was expected to last only three–four partial court days and consist of only a handful of witnesses, and the jury still could have been called off. ADD 18–21. Any inconvenience to the court or the state was thus minimal and paled in comparison to the weighty interest Coil had in representing himself, particularly in light of his documented dissatisfaction with his counsel's investigation and preparation for trial.

Nor does it matter that Coil ultimately "withdrew" his request to represent himself before the Court formally ruled on it. The Ninth Circuit confronted a strikingly similar situation in *United States v. Farias*, 618 F.3d 1049 (9th Cir. 2010), and its analysis is persuasive here. There, the defendant requested to represent himself but backed off of his request after the district court made clear during the *Faretta* canvass that, "if he chose to proceed pro se, he would be expected to proceed to trial the following day, with less than twenty-four hours to prepare." *Id.* at 1054, 55. The Ninth Circuit ruled that this amounted an outright denial of the defendant's right to proceed pro se, rejecting the government's argument that the defendant's equivocation in the midst of the *Faretta* colloquy amounted to an abandonment of his request and deprived the district court of an opportunity to rule on it. *Id.* at 1053–54. This Court should employ a similar approach here and find that Coil's withdrawal of his request—made in direct response to the district court's comments that he would be expected to proceed to trial the very next day—did not render his request equivocal.

In sum, Coil's self-representation claim goes to the voluntariness of his guilty plea, so it has not been waived or forfeited. Coil unequivocally asserted his right to self-representation and his "withdrawal" of that request based on the district court's denial of a continuance so that he could prepare in order to meaningfully represent himself did not render his request equivocal. Coil's request

was timely under the facts presented here. Even if it were not, Coil provided reasonable cause to justify its timing. The improper denial of Coil's right to self-representation renders his guilty plea involuntary and therefore invalid.

IV. Coil's guilty plea was not knowingly made where the district court failed to ensure that he understood the true nature of the charges he pleaded guilty to and failed to advise him of the constitutional rights he was giving up until after it formally accepted his guilty plea.

The state argues that Coil understood the true nature of the charges against him because the court asked him if he knew the charges he was facing in this case and Coil answered that he did and pleaded guilty, which is all that is required under this Court's decision in *Hanley v. State,* 97 Nev. 130, 624 P.2d 1387 (1981). RA 5–6.

This Court has replaced *Hanley*'s formally structured analysis for reviewing the constitutional validity of a guilty plea with an approach that focuses on the state of the record as a whole. *Bryant*, 102 Nev. 268, 721 P.2d 364. Contrary to the state's assertion, the cases that have followed suggest that this Court does more than simply review the plea canvass to see if the defendant pleaded guilty to the charges contained in the indictment or information to ascertain whether he knew the true nature of the charges against him. *See e.g., Id.* at 273–74, 368–69 (upholding guilty plea where defendant admitted he had previously discussed the elements of the offense with his attorney and the record showed defendant was aware that fraudulent intent was an element of the crime charged because this issue

was "prominently and frequently raised prior to the entry of Bryant's plea with his obvious knowledge"); *Id.* at 274–76, 369–70 (affirming denial of motion to withdraw guilty plea where defendant acknowledged discussing elements of the offense with his attorney; information included detailed accusations of how defendant defrauded the victim out of $3,500; and defendant allocuted as to the $3,500 that the victim "was to receive and did not receive"); *Woods v. State*, 114 Nev. 468, 475, 958 P.2d 91, 96 (1998) (rejecting plea-validity challenge where the record showed that "the district court personally engaged Woods regarding the elements of the offense with which he was charged"); *State v. Freese*, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000) (guilty plea was knowingly made where defendant signed written plea agreement describing the rights that he was waiving and adequately advising him of the elements of the charges and defendant acknowledged that he had read and understood the agreement).

Unlike *Bryant*, *Woods*, and *Freese*, Coil never acknowledged having discussed the elements of the offenses to which he pleaded guilty with his attorney. He received the amended information to which he pleaded guilty—which revised the state's theory as to the most serious charge—on the morning of trial. AA 076. Immediately before entering his plea, he expressed confusion regarding the amended information. AA 163. There is no written plea agreement describing the nature of the charges or the elements of each offense and the district court never

personally engaged with Coil to ensure that he understood them. And unlike the above cases, the proceedings leading up to the guilty plea canvass here demonstrate that Coil did not understand the true nature of the charges against him, rather than provide support for the contention that he did. AA 054–55.

Finally, the state argues that Coil's plea was knowingly made because the district court eventually advised him of the constitutional rights he was giving up. RA 6–7. According to the state, it is of no moment that the trial court failed to advise Coil about the bulk of the rights he was giving up until *after* it had already accepted his plea. AA 162–67 (portion of plea canvass before court formally accepted plea).[5]

This Court's cases suggest that the relevant inquiry is what the defendant knew and understood *before* he entered his guilty plea, not after. *See, e.g, Crawford v. State*, 117 Nev. 718, 725, 30 P.3d 1123, 1127, n.8 (Nev. 2001) (analyzing oral exchanges made immediately before district court called for defendant's plea), *abrogated on other grounds by Stevenson v. State*, 131 Nev. Adv. Op. 61, 354 P.3d 1277 (2015); *Palmer v. State*, 118 Nev. 823, 831 n.30, 59 P.3d 1192, 1198, n.30 (remanding "to the district court to determine whether Palmer knew, *prior to pleading guilty*, that he would be subject to lifetime

[5] Before accepting Coil's plea, the court advised him that he was giving up "certain constitutional rights." AA 164. The Court did not explain what those rights were until after accepting the plea.

supervision). Additionally, Coil was not told, after being advised of the constitutional rights he was giving up, that he could withdraw the guilty plea that the court had already deemed knowingly and voluntarily entered, nor was he asked if he still wished to plead guilty. This could have remedied any confusion.

This Court has "strongly encourage[d] district courts to conduct thorough plea canvasses, affirmatively eliciting a complete understanding of the nature of the charge to which a defendant is pleading guilty on the record at the time of the plea hearing itself." *Bryant*, 102 Nev. at 276, 721 P.2d at 370. Coil pleaded guilty, mid-way through a jury trial and with no negotiation with the state, to a charge carrying a life sentence. He did so where there were readily apparent, legitimate questions about whether the conduct alleged by the state satisfied the elements of that offense. On these facts, the guilty plea that resulted from the district court's hurried, out-of-order, and incomplete plea canvass—similar to its handling of Coil's request for self-representation—should not be permitted to stand.

Coil requests that this Court vacate his conviction and sentence.

Dated this 27th day of March, 2019

/s/ Todd M. Leventhal

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Certificate of Compliance

1. **I certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements or NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in Times New Roman Font, Size 14.

2. **I certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7)(A)(ii) because it contains 5,015 words, which is within the 7,000-word limit for reply briefs.

3. **I 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 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 if this brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 27th day of March, 2019

/s/ Todd M. Leventhal

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