IN THE SUPREME COURT OF THE STATE OF NEVADA

TONEY A. WHITE, III	)	Electronically Filed Nov 07 2019 02:55 p.m. Elizabeth A. Brown Clerk of Supreme Court
	)	
Appellant,	)	
	)	**CASE NO.: 78483**
v.	)	
	)	**E-FILE**
STATE OF NEVADA,	)	
	)	
Respondent.	)	
	)	

REPLY TO RESPONDENT'S ANSWERING BRIEF

Appeal from a Denial of Post-Conviction Relief
Eighth Judicial District Court, Clark County

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STATEMENT OF ISSUES

I. DEFENDANT MADE A DEMAND FOR SELF-REPRESENTATION THAT WAS NEVER ADEQUATELY ADDRESSED BY THE *FARETTA* CANVAS.

. . .

II. IN APPROPRIATE CASES, WHEN INEFFECTIVE ASSISTANCE OF COUNSEL IS CLEAR, IT MAY BE RAISED ON DIRECT APPEAL.

III. THE DEFENDANT'S GUILTY PLEA WAS UNKNOWING AND INVOLUNTARY UNDER THE TOTALITY OF CIRCUMSTANCES.

IV. THE DEFENDANT'S MERE RECITATION OF PROMPTED ANSWERS DURING THE GUILTY PLEA CANVAS WAS INSUFFICIENT TO ESTABLISH THE DEFENDANT'S PLEA WAS "KNOWINGLY AND INTELLIGENTLY" GIVEN.

V. THE MERE FACT THAT DEFENDANT'S SENTENCE OF 20 YEARS TO LIFE, WAS WITHIN THE STATUTORY SENTENCING RANGE ESTABLISHED BY THE LEGISLATURE DID NOT INSULATE THAT SENTENCE FROM ATTACK AS CRUEL AND UNUSUAL PUNISHMENT, IN VIOLATION OF THE EIGHTH AMENDMENT.

VI. CUMULATIVE ERROR COMPELS REVERSAL OF THE CONVICTION AND THE SENTENCE OF THE DEFENDANT.

. . .

. . .

ARGUMENT

I. DEFENDANT EXPRESSED A SUFFICIENT REQUEST TO PROCEED *PRO PER* SO THAT THE COURT HAD A CONSTITUTIONAL DUTY TO FULLY CANVAS HIM ON HIS RIGHTS UNDER *FARETTA*.

Defendant submits even a tentative request invoking *Faretta* rights must be adequately canvassed. The mere fact the Defendant phrased his motion in the alternative by asking for new counsel or to represent himself is not dispositive of the question of whether the court nevertheless had a duty to inquire if he wished to represent himself.

The State suggests that because he was given new counsel, there was no reason to even inquire if he wished to 'represent' himself. (Respondent's Answering Brief, *hereinafter* RAB, p. 9,10) Defendant respectfully submits this is incorrect. It is respectfully submitted the court had such a duty to inquire and therefore erred.

II. INEFFECTIVE ASSISTANCE OF COUNSEL MAY BE RAISED ON DIRECT APPEAL.

While typically post-conviction is considered a better mode for raising ineffective assistance claims, it is not the exclusive remedy. The reasons for favoring post-conviction over direct appeal is that it provides the opportunity for an evidentiary hearing on disputed facts. Defendant respectfully submits there was in

this case clear evidence on the record, which established ineffective assistance of counsel. A defendant, especially an in-custody defendant, should not be precluded from raising ineffective assistance on direct appeal when there exist facts on the record justifying such a claim.

The case law cited by the State including *Corbin v. State,* 111 Nev. 378 (1995) and *Pellegrini v. State,* 117 Nev. 860 (2001) (RAB p. 11) do not expressly limit the right to direct appeal for ineffective assistance of counsel in all cases. In this case, ineffectiveness of counsel was readily apparent because of counsel's failure to protect the Defendant's rights before the guilty plea. That fact made an evidentiary hearing unnecessary. *See, Pellegrini, Id.* 883. *See also, Mazzan v. State,* 100 Nev. 74, 80 (1984).

Finally, Defendant submits failure to consider this claim on appeal would likely result in a "fundamental miscarriage of justice." *Mazzan v. Warden,* 112 Nev. 838, 842 (1996)

III. THE DEFENDANT'S GUILTY PLEA WAS UNKNOWING AND INVOLUNTARY UNDER THE TOTALITY OF CIRCUMSTANCES.

The State cites boiler plate law suggesting the Defendant's plea was "presumptively valid." *Baal v. State,* 106 Nev. 69, 72 (1990), *Molina v. State,* 120 Nev. 185 (2004) and argues that the District Court correctly assessed the validity of

the Defendant's plea. *Riker v. State,* 111 Nev. 1316 (1995) (RAB p. 11).

The State however ignored the totality of facts in the Defendant's Petition which established that Defendant was not competent to enter a valid plea. The record shows that Defendant was clearly not communicating in a meaningful way with his counsel. (A.A. pgs. 52 - 62)

The record also shows the Defendant definitely had <u>some</u> level of mental health impairment. He was, or had been, receiving psych medication. (A.A. p. 5) He was canvassed about that fact during the guilty plea hearing. The State suggested that this admission that he had been on psychiatric medicine(s) was non-problematic, citing the transcript from the plea hearing:

THE COURT: "and <u>you don't think</u> it's affected your ability to enter your plea today?"

THE DEFENDANT: "No." (GP canvas, A.A. 508)

The State insisted from this one word answer by the Defendant, that despite his lengthy history, the Defendant's prior mental health was not a relevant issue as to his ability to enter a knowing, voluntary plea. (RAB p. 19)

While at the time of his plea hearing the Defendant may have been able to answer the court's simple canvas questions with a "yes" or a "no," any objective analysis of his actual mental capacity to understand his full legal rights would suggest

that his own subjective belief of his mental understanding was greatly exaggerated. His actual ability was most likely seriously compromised by the medicine(s) he was taking.

Any waiver of fundamental rights must not just be voluntary but also "knowing" and "intelligent." *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973) The court clearly erred in finding Defendant's plea was voluntary and intelligent.

IV. DEFENDANT'S PURPORTED FACTUAL ADMISSIONS DURING THE GUILTY PLEA WERE MERELY REGURGITATING ANSWERS PROMPTED BY THE COURT OR PROSECUTOR.

The State argues in their Respondent's Brief the Defendant had conceded a factual basis for the charges against him existed by admitting to the allegation in the Amended Indictment. (A.A. p. 498-500) (RAB p. 25)

A careful reading of the plea hearing establishes that the Defendant merely acknowledged the court's leading questions with monosyllabic 'yeses or yeah' to almost all of the questions. Consider the series of leading questions or prompts by the court or prosecutor or defense counsel. With the exception of one question that the prosecutor suggested, the court asked the following questions.

Consider this relevant excerpt from the plea canvas:

THE COURT: Did you willfully, unlawfully and feloniously conspire with

Kevin Wong, Amanda Sexton and Marland Dean to commit a robbery by Mr. Wong, Sexton, and Marland Dean committing the acts set forth in Counts 2 through 7, said acts being incorporated by reference as through set forth fully herein?

THE DEFENDANT: Yeah.

THE COURT: So, you conspired with them to commit the robbery?

THE DEFENDANT: Yeah.

THE COURT: And Count 2, did you willfully, unlawfully and feloniously enter, with the intent to commit a robbery, the residence occupied by Marlene Burkhalter and/or Jason Cliff, located at 950 Seven Hills Drive, Henderson, Clark County, Nevada? Did you possess or gain possession of a firearm and/or a baton during the commission of the crime and/or before leaving the structure?

THE DEFENDANT: Yeah.

. . .

THE COURT: As to Count 3, the First Degree Kidnapping with Use of a Deadly Weapon, did you willfully, unlawfully and feloniously seize, confine, inveigle, entice, decoy, abduct, conceal, kidnap, or carry away Marlene Burkhalter, a human being, with the intent to hold or detain her against her will

and without her consent for the purpose of committing robbery with the use of a deadly weapon, a baton and/or firearm?

THE DEFENDANT: Yes.

THE COURT: Okay.

MR. SCHWARTZER: And, Your Honor, I would just ask that he state that that was done by either himself or a person with him knowingly put handcuffs on Ms. Burkhalter. (Emphasis added)

THE COURT: Okay. Is that what happened?

THE DEFENDANT: Yeah.

THE COURT: Did you do it or one of your co-conspirators do it?

THE DEFENDANT: Co-conspirator.

THE COURT: And the handcuffs were placed on her?

THE DEFENDANT: Yeah.

THE COURT: And she was taken to another room?

THE DEFENDANT: No.

THE COURT: Where was she taken?

MR. SCHWARTZER: She was - she wasn't - it was just - it's under the detained theory, Your Honor.

THE COURT: I thought she said she moved.

MR. SANFT: Just moved from the living room to the kitchen table.

THE COURT: Okay. She was moved from the living room to the kitchen table?

THE DEFENDANT: Yeah.

THE COURT. Okay. And as to Count 4, the First Degree Kidnapping with Use of a Deadly Weapon, did you willfully, unlawfully and feloniously, seize, confine, inveigle, entice, decoy, abduct, conceal, kidnap, or carry away Jason Cliff, with the intent to hold or detain Mr. Cliff, against his will and without his consent, for the purpose of committing a robbery with the use of a deadly weapon, a baton and/or firearm?

THE DEFENDANT: Yes.

THE COURT: What did you do as to Mr. Cliff?

THE DEFENDANT: Helped my co-defendant handcuff him. (Emphasis added)

THE COURT: You helped your co-defendant handcuff him?

THE DEFENDANT: Yeah. (A.A. p. 500-501)

The Defendant was asked several more leading questions by the court and he responded "Yeah" to each question. The only non-leading question he was asked was "what did you do to Mr. Cliff?" The Defendant had already been suggested the answer to that question by the prosecutor, Mr. Schwartzer. (A.A. p. 500)

That question by the prosecutor was an attempt to establish a factual basis for

the *Alford* decision which otherwise would not exist. Following the prosecutor's leading question, then the court's leading question, the Defendant then "admitted" he "helped" his co-defendant handcuff him. (A.A. p. 501) (Emphasis added)

This admission was however inconsistent with the prosecutor's suggestion that he admit that he knowingly himself or by a person with him put handcuffs on Ms. Burkhalter, (Emphasis added), not Mr. Cliff.

It should be noted Defendant's admissions were vague and he never gave any details on how he "helped" put handcuffs on either Ms. Burkhalter or Mr. Cliff. No facts on the record establish how he "helped" put handcuffs on anyone. The Defendant submits therefore the State is incorrect in stating there was an adequate factual basis for the *Alford* plea.

V. DEFENDANT'S SENTENCE OF TWENTY YEARS TO LIFE WAS EXCESSIVE AND DISPROPORTIONATE IN VIOLATION OF THE EIGHTH AMENDMENT.

Defendant resubmits his arguments made in the Opening Brief with the additional argument that even the State of Nevada recognized that the original sentence proposed by the Department of Probation and Parole of thirty (30) years to life was too harsh. (A.A. p. 122-123) (RAB p. 31) Defendant submits the life sentence the Defendant faces, if he is not given parole, is disproportionate and overly harsh.

Defendant submits even a reduction of that sentence eliminating the life sentence on the long end of the sentence might remove the cruel and unusual nature of the sentence. Defendant therefore respectfully urges this Honorable Court to remand this case to District Court for re-sentencing consistent with the Eighth Amendment.

VI. CUMULATIVE ERROR REQUIRES REVERSAL OF DEFENDANT'S CONVICTION.

The State characterized all the Defendant's many legal and factual claims in his post-conviction for habeas corpus as non-meritorious, stating that: "Appellant has not asserted any meritorious claims of error and, thus, there is no error to cumulate." *United States v. Rivera,* 900 F.2d 1462 (10th Cir.1990) (RAB p. 33)

Defendant cannot deny the tautology that if all his claims were non-meritorious, they should not be cumulated. However, Defendant submits that many of his claims, or at least some of his claims, have merit. The merit of those particular claims must be cumulated.

Consider such cases as *United States v. Dado,* 759 F.3d 550 (6th Cir.), *cert. den.,* 135 S.Ct. 510 (2014) and *Mak v. Blodgett,* 970 F.2d 614 (9th Cir.1992) and *Rodriguez v. Hake,* 928 F.2d 534 (2d Cir.1991). Each of these cases applied the principle of cumulative error(s).

Applying the Nevada standards of cumulative error as articulated in *Mulder v.*

State, 116 Nev. 1 (2000) (RAB p. 33), Defendant submits that (1) the issue of Defendant's guilt was close, (2) there were multiple significant errors, and (3) the gravity of the crime was great.

CONCLUSION

For all the reasons raised in all prior pleadings, including the Opening Brief and in this Reply Brief, Defendant submits his counsel was ineffective under *Strickland* because he did not provide effective assistance of counsel and the Defendant was prejudiced thereby.

Defendant submits therefore his Petition for Writ of Habeas Corpus should have been granted. The case should be remanded, the plea should be rescinded, the sentence overturned and the case reset for further proceedings consistent with the Petition being granted.

DATED this 7th day of November, 2019.

Respectfully submitted,

//s// *Terrence M. Jackson*

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Reply to Respondent's Answering Brief complies with the formatting requirements of NRAP 32(a)(4), the type-face requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because:

[X] This brief has been prepared in a proportionally spaced typeface using WordPerfect X7 in Times New Roman style and in size 14 font with 3.0 spacing for the Brief and 2.0 spacing for the citations.

2. I further certify that this brief does 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:

[X] Proportionately spaced, has a typeface of 14 points or more and contains 1,991 words, which is within the word limit.

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 7th day of November, 2019.

Respectfully submitted,

/s/ Terrence M. Jackson

TERRENCE M. JACKSON, ESQ.

Counsel for Appellant, *Toney A. White, III*

CERTIFICATE OF SERVICE

I hereby certify that I am an assistant to Terrence M. Jackson, Esq., am a person competent to serve papers and not a party to the above-entitled action and on the 7th day of November, 2019, I served a copy of the foregoing: Toney A. White's Reply to Respondent's Answering Brief as follows:

[X] Via Electronic Service (*eFlex*) to the Nevada Supreme Court and to the Eighth Judicial District Court, and by U.S. mail with first class postage affixed to the Petitioner/Appellant as follows:

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