

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTONIO MIXON,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

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Elizabeth A. Brown
Clerk of Supreme Court

Case No. 78900

District Ct. Case No. C-17327439-1

FAST TRACK RESPONSE

Routing Statement: This appeal is presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(1).

1. Name of party filing this fast track response:

The State of Nevada

2. Name, law firm, address, and telephone number of attorney submitting this fast track response:

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3. Name, law firm, address, and telephone number of appellate counsel if different from trial counsel:

Same as (2) above.

4. Proceedings raising same issues. List the case number and docket number of all appeals or original proceedings presently pending before this court, of which you are aware, which raise the same issues raised in this appeal:

None.

5. Procedural history. Briefly describe the procedural history of the case only if dissatisfied with the history set forth in the fast track statement.

On October 25, 2017, Appellant, Antonio Lee Mixon (hereinafter “Mixon”) was charged by way of Information with the following: Count 1 – Battery By A Prisoner (Category B Felony – NRS 200.482(2)(f)); and Count 2 – Possession or Control of Dangerous Weapon or Facsimile By An Incarcerated Person (Category B Felony – NRS 212.185(c)). Appellant’s Appendix (“AA”) 11-13. On November 1, 2017, Mixon pleaded not guilty to the charges contained in the Information. III AA 626. On January 2, 2018, Mixon’s trial commenced. IV AA 790. On the same day, the Court declared a mistrial. IV AA 832. On September 19, 2018, Mixon filed a Motion for Expert Witness, requesting a fingerprint expert. II AA 361-368. The State filed an Opposition on September 26, 2018. II AA 371-374. On October 9, 2018, Mixon filed a Reply. II AA 375-379. On October, 11, 2018, the Court granted Mixon’s Motion. III AA 615. On March 5, 2019, Mixon requested a trial continuance to have the shank tested for fingerprints. III AA 620. The Court

instructed the State to prepare a stipulation between Mixon and The State regarding chain of custody for the shank. *Id.* The Court also set the matter for a status check on April 4, 2019. *Id.* On March 18, 2019, The State filed a Motion to Increase Bail. III AA 515-519. On March 26, 2019, prior to the status check, Mixon pleaded guilty pursuant to a Guilty Plea Agreement (“GPA”) to an amended charge of Attempt Possession or Control of Dangerous Weapon or Facsimile by An Incarcerated Person (Category C Felony – NRS 212.185(c), 193.330). III AA 538-545.

On April 5, 2019, Mixon filed a Motion to Withdraw Plea (hereinafter “Motion”). III AA 546-550. The State filed an Opposition on April 25, 2019. III AA 551-573. Mixon filed a Reply on May 16, 2019. III AA 574-574. On May 21, 2019, the district court denied Mixon’s Motion. III AA 624. On that same date, Mixon was sentenced to 12 to 30 months of imprisonment in the Nevada Department of Corrections. *Id.* The Order denying Mixon’s Motion was filed on June 5, 2019. III AA 589. A Judgment of Conviction was filed on May 28, 2019. III AA 599. Mixon filed a Notice of Appeal on May 23, 2019. III AA 595-598.

6. Statement of the facts. Briefly set forth the facts material to the issues on appeal only if dissatisfied with the statement set forth in the fast track statement (provide citations for every assertion of fact to the appendix, if any, or to the rough draft transcript):

On December 4, 2015, Mixon, struck Senior Correctional Officer D. Ontiveros in the abdomen with a rock, while Mixon was incarcerated at High Desert State Prison. IV 799-817. After being struck, Senior Correctional Officer Ontiveros

approached Mixon, at which time Mixon removed a prison made weapon, commonly referred to as a “shank” from his shoe. IV AA 806-807. Senior Correctional Officer Ontiveros removed his oleoresin capsicum spray and ordered Mixon to get on the ground. Mixon dropped the weapon and was placed in restraints. IV AA 809-810. Mixon later exclaimed “you’re lucky you had that mace or I would have stuck your bitch ass.”

7. Issues on appeal. State concisely your response to the principal issue(s) in this appeal:

Mixon has failed to establish the district court abused its discretion in denying his Motion. As such, this Court should affirm the district court’s denial of Mixon’s Motion to Withdraw Guilty Plea.

8. Legal Argument, including authorities:

I. APPLICABLE LAW

Pursuant to NRS 176.165, a defendant can file a motion to withdraw a guilty plea before sentencing. “On appeal from a district court’s denial of a motion to withdraw a guilty plea, this court ‘will presume that the lower court correctly assessed the validity of the plea, and [] will not reverse the lower court’s determination absent a clear showing of an abuse of discretion.’” *Riker v. State*, 111 Nev. 1316, 1322, 905 P.2d 706, 710 (1995) (quoting *Bryant v. State*, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986)).

A guilty plea is presumptively valid. *Wynn v. State*, 96 Nev. 673, 675, 615 P.2d 946, 947 (1980). However, “a district court may grant a defendant's motion to withdraw his guilty plea before sentencing for any reason where permitting withdrawal would be fair and just.” *Stevenson v. State*, 131 Nev. Adv. Op. 61, 354 P.3d 1277, 1281 (2015). “The district court must consider the totality of the circumstances to determine whether permitting withdrawal of a guilty plea before sentencing would be fair and just.” *Id.* at 1281.

This Court gives deference to the district court’s factual findings “so long as they are supported by the record.” *Id.*

II. THE DISTRICT COURT CORRECTLY DENIED APPELLANT’S MOTION TO WITHDRAW HIS GUILTY PLEA

On appeal, Mixon alleges the district court abused its discretion and “did not complete the required analysis” by failing to specifically address the issue of whether the State coerced Mixon’s guilty plea by increasing his bail. Mixon’s bail was never increased. Rather, the State filed a Motion to Increase Bail which was never heard by the district court.¹ To the extent Mixon alleges the district court abused its discretion by failing to specifically address the issue of whether the State coerced Mixon’s guilty plea by *filing* a Motion to Increase Bail, such claim is without merit

¹ By seeking to negotiate his case and subsequently pleading guilty, the need for the State to address bail became moot.

as the district court specifically heard Mixon make this claim repeatedly throughout oral arguments on his Motion. IV AA 970, 972-973.

Additionally, Mixon raised this issue in his original Motion, which the district court specifically stated it had read. IV AA 969. Mixon alleged in his Motion that the State did not comply with the Court's order to prepare a trial stipulation regarding chain of custody for the shank. III AA 546-550. Rather, the State filed a Motion to Increase Bail and somehow forced Mixon to resolve his case without fingerprint evidence. However, Mixon's claims were without merit.

First, Mixon failed to articulate how the State's filing of a Motion to Increase Bail demonstrated the State did not intend to comply with the Court's order and somehow forced Mixon to resolve his case, which is not surprising considering Mixon's claim was absolutely absurd. The State fully intended to send Mixon a stipulation regarding chain of custody. However, Mixon reached out to the State seeking an offer, which he conceded in his Motion, prior to the stipulation being sent to Mixon. III AA 546-548. By Mixon seeking to negotiate his case and subsequently pleading guilty, the need for the State to send Mixon a *trial* stipulation became moot.

Additionally, the shank had yet to be tested for fingerprint evidence. Thus, the State could not have possibly withheld evidence from Mixon that the State never had. To the extent Mixon alleged he was unable to present this evidence at trial, such claim was also without merit. Mixon had the opportunity to have the shank tested

for fingerprints and present such evidence a trial instead of pleading guilty. *See Stevenson* 354 P.3d at 1281 (affirming the denial of a motion to withdraw plea where defendant argued, in part, his plea should be withdrawn because he did not see evidence that he knew about, prior to pleading guilty). However, by pleading guilty he waived this right, which he specifically acknowledged he understood. III AA 540-541. Mixon had previously exercised his right to trial in the instant case. Thus, he was well aware how to exercise this right if he wished to proceed to trial again.

Further, by signing his GPA, Mixon attested that his plea was voluntarily made and that he understood the rights he was giving up. III AA 541. Additionally, the Court thoroughly canvassed Mixon regarding the entry of his plea and Mixon acknowledged that he understood the nature of the charges against him and was voluntarily pleading guilty. IV AA 959-961. Mixon confirmed that he had read and understood the GPA and that he did not have any questions. IV AA 960-961. Mixon also stated he was not coerced into making this decision and understood the consequences of his plea. IV AA 959-960. Finally, Mixon acknowledged that he was pleading guilty because in truth and in fact he had committed the crime charged. IV AA 960.

Turning to Mixon's assertion that the State insisted Mixon plead guilty, such claim was contradicted by Mixon's own statement that he sought an offer from the State, as well as Mixon's GPA and subsequent canvass. III AA 546-548; IV AA

959-960. As discussed above, Mixon attested that he was not coerced into making this decision and was pleading guilty because in truth and in fact he had committed the crime charged. IV AA 959-960.

After hearing oral arguments and reading Mixon's Motion, both of which addressed this issue, the district court found that that Mixon's plea was "knowing and voluntary and freely entered" *and* that Mixon "was aware of whatever evidentiary concern there was prior to entering the plea." Simply because the district court did not use the word "totality of the circumstances" in its ruling, does not mean the totality of the circumstances were not considered. IV AA 973. It's clear by the district court's ruling that it not only took into consideration Mixon's claim that he was coerced into entering his plea, but also the totality of the circumstances surrounding Mixon's evidentiary concerns. Thus, Mixon's claim that the district court "did not complete the required analysis" and address his claim is without merit. As such, the district court did not abuse its discretion by denying Mixon's Motion.

9. Preservation of issues. State concisely your response to Appellant's position concerning the preservation of issues on appeal:

The State does not dispute Appellant's position on preservation of issues.

CONCLUSION

Based upon the arguments presented above, the State requests the Court affirm the District Court. Mixon cannot demonstrate the District Court abused its discretion when denying his Motion.

Respectfully submitted,

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By: /s/ Chelsea Kallas

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VERIFICATION

1. **I hereby certify** that this fast track response complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the style requirements of NRAP 32(a)(6) because this fast track response has been prepared in a proportionally spaced typeface using Microsoft Word 2016 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(h)(2) because it is proportionally spaced, has a typeface of 14 points or more, and contains 2915 words.
3. **Finally, I recognize that** pursuant to NRAP 3C I am responsible for filing a timely fast track response and the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track response, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track response is true and complete to the best of my knowledge, information, and belief.

DATED the 24th day of September, 2019.

AARON D. FORD
Attorney General

By: /s/ Chelsea Kallas
CHELSEA KALLAS (Bar No. 13902)
Deputy Attorney General

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 24th day of September, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as Follows:

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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

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By: /s/ A. Reber
Employee of the Office of the
Attorney General