

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

ADRIAN POWELL,

Appellant,

v.

STATE OF NEVADA,

Respondent.

Docket No. 79037

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**APPELLANT'S OPENING BRIEF**

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**NRAP 26.1 DISCLOSURE**

The undersigned counsel of record certifies that the following are persons and entries as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualifications or recusal.

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## **JURISDICTIONAL STATEMENT**

### **A. Basis for Supreme Court's or Court of Appeal's Jurisdiction:**

This appeal is from a Judgment of Conviction via a Guilty Plea Agreement, which was filed on July 31, 2018, and appellate jurisdiction in this case derives from Nevada Rules of Appellate Procedure (4)(b), and NRS 177.015(3)-(4). AA 019.

**B. The Filing Dates Establishing the Timeliness of the Appeal:**

Judgment of Conviction Filed: 07/31/2018

Notice of Appeal Filed: 06/14/2019

**C. Assertion that Appeal is From a Final Order or Judgment:**

This Appeal is from a Judgment of Conviction in a Criminal Matter; thus, jurisdiction is proper before this Court.

## **ROUTING STATEMENT**

This appeal is appropriately assigned to the Supreme Court pursuant to NRAP 17(b)(2)(A) because it is a direct appeal from a judgment of conviction based on a jury verdict on a category A felony.

### **STATEMENT OF ISSUES PRESENTED FOR REVIEW**

- I. DID THE DISTRICT COURT ABUSE ITS DISCRETION IN NOT HOLDING AN EVIDENTIARY HEARING ON THE MOTION TO WITHDRAW THE GUILTY PLEA?**
- II. DID THE DISTRICT COURT ERR IN NOT GRANTING THE MOTION TO WITHDRAW THE GUILTY PLEA?**

### **STATEMENT OF THE CASE**

The State charged Adrian Powell with Conspiracy to Commit Robbery (2 counts), Burglary while in Possession of a Firearm (2 counts), First Degree Kidnapping with Use of a Deadly Weapon (3 counts), Robbery with Use of a Deadly Weapon (7 counts), Unlawful Taking of a Vehicle. AA1-8. On July 31, 2018, Powell entered a plea to Counts 1 and 8 (Conspiracy to Commit Robbery), Counts 2 and 9 (Burglary While in Possession of a Deadly Weapon, Counts 3 and 13 (First Degree Kidnapping with Use of a Deadly Weapon), Counts 4, 5, 6, 7, 10, 11 and 14 (Robbery with Use of a Deadly Weapon). AA18. The State retained the right to argue, including for consecutive time between the counts, but the State agreed not to seek a life sentence on any count. AA18-19. The State agreed not to file on 10 separate events. AA19.

Prior to sentencing, Powell filed a Motion to Withdraw his guilty plea. AA33. The district court heard on the motion, but denied the motion without an evidentiary hearing. AA71-90.

### **STATEMENT OF FACTS**

Powell entered a plea of guilt to most of the counts in the Indictment on the second day of trial. AA34. Prior to the Court sentencing Powell, he asked the district court to allow him to withdraw his plea. AA34. Powell contended that he did not receive effective assistance of counsel with regard to the entry of his plea, and the diligence of his counsel in insuring that Powell was fully informed regarding the case against him. AA34.

As part of the plea negotiations, the State agreed not to file charges against Powell on ten separate, uncharged events. AA34. However, that attorney did not have discovery on those other events at the time he advised Powell regarding the offer, as co-defendant counsel confirmed that the State did not even provide discovery on the uncharged events to attorneys until after Powell entered his plea. AA34, 42, 35. Counsel therefore advised client about a deal where the State was using as leverage cases that the attorney knew nothing about. Subsequent counsel reviewed discovery related to those ten cases and found that there was nothing in those police reports tying the defendant to the crimes contained in the reports.

Further, prior to trial, counsel had limited contact with Powell, visiting Powell only twice during the entire course of his representation. AA42. Prior counsel did not review discovery with Powell, instead counsel merely handed Powell bits and pieces of the discovery, without any explanation. AA42. On the second day of trial, with Powell sitting in the court room unprepared and having had no meaningful contact with his counsel on a case carrying life sentence charges, counsel told Powell that if he did not take the deal he was going to “spend the rest of his life in prison.” AA42. The attorney told Powell that he could have had a deal for a three to eight year sentence if it were not for the uncharged cases against the defendant. AA42. The attorney then told Powell that despite what the guilty plea agreement said, Powell would get a sentence of six to fifteen years, and when Powell told his attorney he had concerns that may not be true, counsel became angry. AA43.

Powell filed a motion to withdraw his guilty plea, pre-sentencing, and the district court heard argument, but did not set an evidentiary hearing to determine what counsel told Powell, and how the uncharged cases factored into counsel’s advice. Instead, the district court denied the motion. The court indicated that it was “mere speculation” that what prior counsel did or did not tell Powell and that the plea was knowing and voluntary. AA78-79. However, Powell indicated that but for counsel using the other cases to pressure him into a deal, he would not



necessarily entered a plea. AA43. It was paramount to establish the substance of conversations between counsel and Powell.

### **SUMMARY OF ARGUMENT**

The district court should have held an evidentiary hearing to determine what counsel advised Powell regarding the plea negotiations and to determine if counsel's advise was proper, and led to Powell having a clear understanding of the position that he was in with regard to the plea negotiations.

### **ARGUMENT**

#### **I. THE DISTRICT COURT ABUSED ITS DISCRETION IN NOT HOLDING AN EVIDENTIARY HEARING ON THE MOTION TO WITHDRAW THE GUILTY PLEA.**

Standard of Review: This Court reviews a lower court's decision to deny an evidentiary hearing for an abuse of discretion. *See Hargrove v. State*, 100 Nev. 498, 686 P.2d 222 (1984).

In Nevada, a district court may grant a defendant's pre-conviction motion to withdraw a guilty plea for any "substantial reason" if it is "fair and just." *Woods v. State*, 114 Nev. 468, 475, 958 P. 2d 91, 95 (1998) (citing *State v. District Court*, 85 Nev. 381, 385, 455 P.2d 923, 926 (1969)). *See also Stevenson v. State*, 131 Nev. \_\_\_, \_\_\_, 354 P.3d 1277, 1281 (2015). To determine whether the defendant

advances a substantial, fair, and just reason to withdraw a guilty plea, the district court must consider the totality of the circumstances surrounding the defendant's plea. *Woods*, 114 Nev. at 475, 958 P. 2d at 95-96 (1998). In *Stevenson v. State*, the Nevada Supreme Court noted that fair and just reasons include reasons such as a defendant establishing that there are "circumstances which might lead a jury to refuse to convict, notwithstanding technical guilt," or the defendants becoming aware of some collateral consequences. *Id.*

A criminal defendant may withdraw his guilty plea if, under the totality of the circumstances, the court finds that he did not enter that plea voluntarily, knowingly, and intelligently. *Woods*, 114 Nev. at 475, 958 P.2d at 95-96 (1998); *Crawford v. State*, 117 Nev. 718, 722, 30 P. 3d 1123, 1125-26 (2001); *Baal v. State*, 106 Nev. 69, 787 P.2d 391 (1990). The guidelines for voluntariness of guilty pleas require that the record affirmatively show that the defendant entered his plea understandingly and voluntarily. See *Heffley v. Warden*, 89 Nev. 573, 574, 516 P.2d 1403, 1404 (1973). A "knowing" plea is one entered into with a full understanding of the nature of the charge and all the consequences of the plea. *Boykin v. Alabama*, 395 US 238 (1969) Moreover, a plea agreement is construed according to what the defendant reasonably understood when he entered the plea. *Statz v. State*, 113 Nev. 987, 993, 944 P.2d 813, 817 (1997).

A defendant who enters a guilty plea based on the advice of counsel may withdraw his plea by demonstrating that counsel performed ineffectively. *Nollette v. State*, 118 Nev. 341, 348-49, 46 P.3d 87, 92 (2002); *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). A defendant is entitled to an evidentiary hearing on any claims that are not belied by the record. *Byford v. State*, 123 Nev. 67, 68-69, 156 P.3d 691, 692 (2007).

In this case, the district court erred when it refused to hold an evidentiary hearing to determine the substance of counsel's advice regarding the uncharged cases, as well as the possible sentence the deal carried, and whether or not Powell understood the nature of the pending trial. The State argued that Powell was never told that the charges WERE going to be filed against him, just that they would not if he took the deal. That is somewhat disingenuous. First, it stands to reason that if the charges are being used as incentive to take a plea, then what is pregnant in the contention that the charges will not be filed is that they COULD be. Second, the State does not know what counsel told Powell regarding that leverage. The district court stated that it was speculation what counsel did or did not say to Powell during plea discussions. This is precisely why the district court should have held an evidentiary hearing. Powell makes allegations that his counsel's performance was ineffective, and that but for that ineffectiveness, Powell would not have taken the plea. The record does not belie that Powell's attorney did not

speak to him fully about the discovery in the charges against him prior to trial. The record does not belie that counsel rarely spoke to his client prior to trial. The record does not belie that Powell walked into his trial woefully underprepared and without any meaningful conversations with his counsel such that he understood his defenses, or understood the problems in the case. This is all the bare minimum of what an attorney should do for a client before leading them to trial.

The record also does not belie that neither Powell nor his lawyer had information regarding the ten charges being used as leverage. The record does not belie that the lawyer told him those charges were a reason to take the plea. Powell has met the threshold for an evidentiary hearing, and the district court abused its discretion in failing to hold a hearing to determine what counsel's advice was so that it could determine how that advice impacted Powell.

### **CONCLUSION**

The district court erred in failing to hold an evidentiary hearing. Powell asks that Court remand this case back for an evidentiary hearing.

Respectfully submitted,

By: /s/Monique McNeill  
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Nevada Bar # 9862

## **CERTIFICATE OF COMPLIANCE**

1. I hereby certify that this brief complies with the formatting requirement of NRAP 32(a)(4), the typeface requirement of NRAP 32(a)(5) and the type style requirement of NRAP 32(a)(6) because:

X This brief has been prepared in a monospaced typeface using Word with Times New Roman, 14 point, which does not contain more than 10 ½ characters per inch.

2. This brief does exceeds the page or type limitations found in NRAP32(a)(7) because it contains 2,256 words.
3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires that 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 sanction in the event that the accompanying brief is not in conformity with requirements of the Nevada Rules of Appellate Procedure.

Dated this 18<sup>th</sup> Day of October, 2019.

/s/Monique McNeill  
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### **CERTIFICATE OF SERVICE**

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 18<sup>th</sup> day of October 2019 via Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

MONIQUE MCNEILL

STEVEN WOLFSON

I further certify that I served a copy of this document, via United States Postal Service to ADRIAN POWELL at the Nevada Department of Corrections.

Dated this 18<sup>th</sup> Day of October, 2019.

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