

IN THE SUPREME COURT OF THE STATE OF NEVADA

SAMMIE NUNN,

#1226304,

Appellant,

v.

STATE OF NEVADA,

Respondent.

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CASE NO.: 80121

E-FILE

REPLY TO RESPONDENT'S ANSWERING BRIEF

**Appeal from a Denial of a Motion to Withdraw a Guilty Plea
Eighth Judicial District Court, Clark County**

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STATEMENT OF ISSUES

- I. WHETHER THE DISTRICT COURT ERRED IN DENYING APPELLANT HIS MOTION TO WITHDRAW HIS GUILTY PLEA BASED UPON THE TOTALITY OF CIRCUMSTANCES.**
- A. THE COURT HAD JURISDICTION TO CONSIDER THE VALIDITY OF APPELLANT'S GUILTY PLEA ON APPEAL.**
- B. THE ARGUMENT(S) WHICH ARE RAISED IN THIS APPEAL WERE ALL RAISED BEFORE BY MOTION(S) IN DISTRICT COURT.**

- II. WHETHER THE DISTRICT COURT ERRED WHEN IT ACCEPTED DEFENDANT'S STIPULATION TO REVOCATION OF PROBATION WITHOUT ADEQUATE GROUNDS AND WITHOUT CONSIDERATION OF THE MITIGATING EVIDENCE.
- III. WHETHER CUMULATIVE ERROR REQUIRED REVERSAL OF APPELLANT'S CONVICTION.
- IV. CONCLUSION

ARGUMENT

- I. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED APPELLANT'S MOTION TO WITHDRAW A MANIFESTLY UNJUST GUILTY PLEA.

- A. THE COURT HAD JURISDICTION TO CONSIDER THE VALIDITY OF APPELLANT'S GUILTY PLEA ON APPEAL.

The State of Nevada in Respondent's Answering Brief (hereinafter RAB), argued that the Court did not have jurisdiction to consider the issue of Appellant's invalid guilty plea, claiming that Appellant's Notice of Appeal: . . . "did [not] designate the judgment or order or part thereof appealed. NRAP 3(c)(1)(B)." (RAB, p. 8)

Appellant submits the Notice of Appeal directly stated this was an appeal of the Judgment of Conviction. It directly appealed the validity of the conviction by guilty plea. The State clearly had notice of Defendant's objective in appealing the conviction which was the result of a guilty plea. The State was not prejudiced by any alleged lack in the Notice of Appeal.

Appellant submits it is undisputed that any conviction based upon an invalid plea of guilt must be considered invalid and unjust. Appellant had raised the invalidity of his guilty plea by a direct motion in District Court and pursuant to NRS 177.015(4), such a motion is appealable. *See, Hargrove v. State*, 100 Nev. 498, 502 (1984). Appellant therefore submits the Supreme Court has jurisdiction to consider the denial of that motion which alleged his guilty plea was invalid.

B. THE ARGUMENT(S) WHICH ARE RAISED IN THIS APPEAL WERE ALL RAISED BEFORE BY MOTION(S) IN DISTRICT COURT.

The State claimed that Appellant has raised new issues on this Appeal which were not raised before and therefore they are therefore not properly before the Court. *State v. Taylor*, 114 Nev. 1021 (1998). (RAB, p. 11) For example, the State cited Appellant's original argument on ineffective assistance of counsel in which Appellant had argued that the Court erred in denying Appellant's Motion to Withdraw because

Appellant did not fully understand his plea. (RAB, p. 14) (See also, O.B. 14)

This was not a new claim on appeal. This claim had been raised in the pretrial Motion to Dismiss and to Withdraw Counsel. (See, A.A. 38-49) (See, O.B. 14) The State wrongly presumes that the mere affirmations by a defendant during the plea canvas, that he understood most of his rights and that he had services of counsel were alone sufficient to establish his waiver was knowing and intelligent. *Patton v. Warden*, 91 Nev. 1, 530 P.2d 107 (1975).

There exists substantial case law that the mere incantations of proper responses to a standard plea canvas is insufficient to establish a plea is voluntary. *See, for example, Wilkins v. Bowersox*, 145 F.3d 1006 (8th Cir.1998). The Court must look to the totality of circumstances to determine if a plea was voluntary. *See, Freese v. State*, 116 Nev. 1097, 13 P.3d 442 (2000), *McConnell v. State*, 125 Nev. 243, 212 P.3d 307 (2009). Looking at the totality of circumstances, Defendant submits his plea was not a knowing and intelligent waiver of his rights.

II. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT ACCEPTED APPELLANT'S "STIPULATION" TO REVOCATION OF HIS PROBATION AS PART OF A PLEA NEGOTIATION.

It is respectfully submitted that Appellant was compelled to "stipulate" to

revocation as part of his plea negotiations. The Court erred because it did not consider meaningful existing mitigation evidence that would have been grounds for not automatically revoking his probation by stipulation.

Defendant submits, as in any plea negotiation, the Court had a duty to scrutinize the fairness of the terms of the negotiation to determine if the negotiated settlement was fair and just and then decide whether the negotiated settlement was overreaching in any way, or violated due process, or was otherwise unfair. It is respectfully submitted the Court had the duty and the power to reject an unfair plea agreement. *See, Federal Rules of Criminal Procedure* § 11(c)(4) allowing a court to reject a plea agreement in certain cases. *See also*, NRS 174.035, and the ABA Standards: The Function of a Trial Judge, § 4.1, 4.2.

The Court in this case, without any scrutiny of the agreement or apparently any awareness of possible mitigating circumstances, merely rubber-stamped the stipulation which resulted in the Defendant's revocation of probation. There was no hearing in this case where the Appellant could have presented mitigating evidence. Since revocation of probation is not supposed to be automatic, it is respectfully submitted that the District Court abused its discretion by not requiring an adversary hearing where the Defendant could have exercised his constitutional right to

subpoena witnesses, *Chambers v. Mississippi*, 410 U.S. 284 (1973). Defendant was denied his right to confront and cross examine witnesses against him, as guaranteed by the Sixth Amendment.

Defendant had a liberty interest in getting a fair hearing at a revocation hearing. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). The denial of his constitutional rights to a fair due process hearing should be considered reversible error.

III. THE CUMULATIVE ERROR REQUIRES REVERSAL OF APPELLANT'S CONVICTION.

It is respectfully submitted Appellant demonstrated cumulative error in this case. The State claims there were not "multiple errors" in this case which require relief. (RAB, p. 19) Appellant however submits that the District Court abused its discretion in two different ways and each of those abuses of discretion should be considered separate error that should be cumulated for review.

The State cites *Mulder v. State*, 116 Nev. 1, 17, 992 P.2d 845, 855 (2000), for the relevant factors to consider in evaluating any claim of cumulative error: "(1) whether the issue of guilt was close; (2) the quantity and character of error; and (3) the gravity of the crime(s) charged." *Id.* 17 (RAB, p. 20)

The State argued because the Defendant pled guilty the issue of guilt wasn't

close. (RAB, p. 20) That argument wrongly presumes the plea is valid. The State does admit the Defendant's category B crimes were serious felonies. (RAB, p. 20) It is respectfully submitted the abuses of discretion were each of great enough significance that the errors should be cumulated.

CONCLUSION

Appellant respectfully submits the Court should carefully consider all the prior pleadings, including all pretrial motions, Appellant's Opening Brief and Appellant's Reply Brief as well as Respondent's Answering Brief and find that the District Court erred when it denied Defendant's Motion to Withdraw His Guilty Plea.

Nothing in Respondent's Answering Brief, such as the argument this Court had no jurisdiction, should cause this Honorable Court to do anything other than issue an Order reversing Appellant's conviction and remanding the case to the District Court for further proceedings. The Defendant should have been allowed to withdraw his plea under the totality of circumstances. This is especially true because the State would not have been prejudiced. *Hart v. State*, 116 Nev. 558 (2000).

DATED this 1st day of October, 2020.

Respectfully submitted,

//s// Terrence M. Jackson

Terrence M. Jackson, Esquire

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 comply 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 1,225 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 1st day of October, 2020.

Respectfully submitted,

/s/ Terrence M. Jackson

TERRENCE M. JACKSON, ESQ.

Counsel for Appellant, *Sammie Nunn*

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 1st day of October, 2020, I served a copy of the foregoing: Sammie Nunn'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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