IN THE SUPREME COURT OF THE STATE OF NEVADA

Kwame Anir Saafir, Appellant	)	
	)	
	)	Case No: 81946
V.	)	
	)	District Court Case No:
State of Nevada et al,	)	J-18-342106-P2
Respondents	)	
	)	Dept. No: D
	)	
_____	)	

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Elizabeth A. Brown
Clerk of Supreme Court

MOTION TO WITHDRAWAL AS COUNSEL

COMES NOW Nicholas Shook, Esq., and pursuant to the Nevada Rule of Professional Conduct ("NRPC") 1.16 and Nevada Supreme Court Rule ("SCR") 46, move to withdraw as attorney for the above named Appellant, Kwame Anir Saafir.

Upon information and belief, Appellant's last known address and telephone number is as follows:

Kwame Anir Saafir
1027 S. Rainbow Blvd
Las Vegas, Nevada 89145
702.351.9927

Docket 81946 Document 2021-22040

This motion is based upon the following Points and Authorities which have been communicated to the Appellant.

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS AND RELEVANT BACKGROUND

On August 12th, 2020, the Appellant received a District Court Order appointing general guardianship over his daughter (Appendix Vol 3 - Exhibit J). In hopes of appealing the final judgment, Appellant filed a notice of appeal to the Supreme Court of Nevada Pro Se on October 7th, 2020 (Appendix Vol 1 - Exhibit A). Grounds for Appellants Pro Se appeal included a violation of his 5th, 6th, and 14th Amendment Constitutional rights. After further review, this Court placed this appeal in the pro bono program on November 30, 2020.

On January 27, 2021, the undersigned counsel agreed to represent Appellant above-captioned case. After discussing the case with Appellant, the undersigned counsel realized that any appeal would be solely based on the transcripts as the written record did not contain reasonable appealable claims.

Transcript requests from the District Court were initially ordered on May 27, 2021, and finally produced on July 6, 2021, in order to determine

whether any appealable claims were present. Upon receiving the requested transcripts and thoroughly reviewing them, the undersigned counsel believes that there are no colorable claims in the instant case upon which the Appellant can appeal on.

Nearly all of Appellant's claims stem from how he refused to partake in domestic violence classes included in his case plan by the District Court over a domestic violence conviction in 2018. Appellant believes that because he is innocent, he does not have to take these classes. However, as of today, this charge has not been reversed and remanded and still remains as part of his record. The following address his claims on appeal below and why the undersigned counsel does not believe he has a claim.

1. **Appellant does not have a sixth amendment right to counsel claim in a civil proceeding concerning guardianship. Appellant did not qualify for any special circumstances which would grant that right.**

In his Notice of Appeal (Appendix - Exhibit A), Appellant claims a sixth amendment violation because "Judge Teuton ordered the attorney that had already been assigned to me by the court and was already representing me to step down from representing me" (Exhibit A p. 3). However, Appellant is not guaranteed a right to counsel in the instant case.

Unlike in criminal proceedings where a defendant has a guaranteed right to counsel, the Constitution does not require the appointment of counsel in every parental termination proceeding. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 32 (1981). Here in Nevada, this Court has emphatically agreed with the Lassiter case and declared that there is no absolute right to counsel in termination proceedings exists in Nevada. In re Parental Rights as to N.D.O., 115 P.3d 223, 225 (Nev. 2005). Appellant repeatedly mentions the precedent set forth Danforth v. State Department of Health Welfare, 303 A.2d 794 (Me. 1973) (Appendix Vol 2 - Exhibit E p. 161), however, this right to counsel is from Maine, does not apply to Nevada law, and only applies to the termination of parental rights, which is more strict than the guardianship which is appealed here.

Additionally, statutory law on parental rights and termination never guarantees the right to counsel. Both NRS 432B.420(1) and NRS § 128.100(3) give the Court an option, at their discretion, to appoint counsel, but each statute uses the word "may" and not "must" pertaining to the right of counsel.

In the instant case, the District Court provided the appellant with two counsels. The first was relieved after the appellant refused to communicate

with his appointed counsel. On 11-13-2018 (Appendix - Exhibit B), the District Court Judge forwarned Appellant that he did not have the right to counsel.

> THE COURT: Do you understand you are not entitled to have an attorney represent you?
> MR. SAAFIR: I understand that.
> THE COURT: Do you understand that?
> MR. SAAFIR: Okay. (Appendix Vol 1 - Exhibit B p. 18).

The District Court Judge later informed the Appellant that his attorney could not represent him if he did not cooperate with her. Appointed counsel had stated that Appellant refused to talk to any members of her staff which resulted in a breakdown of communication. Towards the end of the hearing, the presiding judge gave the appellant three weeks to communicate with his attorney, and if he did not, then the presiding judge would not require the appointed counsel to represent him. (Appendix Vol 1 - Exhibit B p. 23-26).

On December 11, 2018 (Appendix - Exhibit C), Appellant and Appellant's appointed counsel had informed the presiding Judge that the two had not talked since the last hearing. (Appendix p. 31). After discussing that there was still a breakdown in communication between her and the appellant, the pressing Judge relieved the appointed counsel. The court ultimately has the discretion to appoint counsel in guardianship cases, and

there was clear good cause because Appellant was adequately warned he could lose counsel and still did nothing. During the Adjudicatory hearing on January 24, 2019 (Appendix Vol 2 - Exhibit D), Appellant agreed to represent himself pro se and did not further request counsel from this Court. When Appellant states that "the attorney was taken from me," (Appendix Vol 3 - Exhibit G, p. 5) he did not consider the lack of communication that the District Court relied upon to dismiss his first attorney.

Appellant then later requested counsel and received Attorney McManis. Again this was discretionary and not mandatory and Attorney McManis represented Appellant to the end of the matter. This analysis is discussed in the next section below.

2. **Appellant may have an "ineffective assistance of counsel" claim against Attorney McManis, but that remedy is not an appeal.**

Appellant asserts that he has ineffective assistance of counsel claim against Attorney McManis because he insisted on attending all hearings and never consented to Attorney McManis appearing in court without him.

Generally, ineffective assistance of counsel does not apply in civil cases and furthermore, ineffective assistance of counsel is not a basis for appeal or retrial. MacCuish v. United States, 844 F.2d 733, 735 (10th

Cir.1988). If a client's chosen counsel performs below professionally acceptable standards, with adverse effects on the client's case, the client's remedy is not a reversal, but rather a legal malpractice lawsuit against the deficient attorney. Id. at 735–36; Link v. Wabash R.R. Co., 370 U.S. 626, 634 n. 10, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962). ("[W]e find no support ... for the proposition that the right to an ineffective-assistance-of-counsel argument exists in civil cases."); see also Nicholson v. Rushen, 767 F.2d 1426, 1427 (9th Cir. 1985), there is generally no right to the effective assistance of counsel in civil cases. See Garcia v. Scolari's Food & Drug, 125 Nev. 48, 57 n.7, 200 P.3d 514, 520 n.7 (2009))

The remedy for ineffective assistance of counsel is not this appeal, but perhaps a legal malpractice lawsuit. There is nothing in the Court record in the instant case that can provide fodder for an "ineffective assistance of counsel" claim like emails between him and his attorney.

The undersigned counsel has explained to Appellant that a more fruitful approach would be to focus on winning an appeal against the original counsel who neglected to appeal his 2018 domestic violence conviction. Appellant would have to demonstrate that under the Strickland test: (1) that counsel's performance was deficient, and (2) that the deficient performance

prejudiced the defense. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064. If Appellant can establish that an attorney-client relationship existed when he sent the email to his criminal case counsel asking for a withdrawal of his plea and for the counsel to appeal the conviction, he might have a chance.

3. **Appellant does not have a fifth amendment claim against incrimination for his 2018 Domestic Violence conviction because his crime was not appealed when asked by the District Court. Furthermore, the District Court did not abuse its discretion by taking judicial notice of a guilty plea.**

In the January 24th hearing, the District Court clearly explained what can and cannot constitute a 5th Amendment right against self-incrimination:

> THE COURT: ... the rules are, each time she asks you a question, if the question could incriminate you, then you can invoke the Fifth Amendment privilege against self-incrimination.
> MR. SAAFIR: All right.
> THE COURT: If it's a question about something that you've already been convicted of, then you cannot be incriminating yourself because you've already been convicted. Do you understand. So you can't issue a blanket, I'm invoking the Fifth Amendment. It has to be specific to the questions that's being asked. (Appendix Vol 1 - Exhibit D p. 63).

There was nothing improper about the District Court's orders.

According to Baxter v. Palmigiano 96 S.Ct. 1551 (1976), the fifth amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them. Under Baxter, the opposing party can't simply point to the silence and claim victory in their civil case, nor can they assert a blanket fifth amendment privilege and must assert the privilege toward particular questions. Warford v. Medeiros 160 Cal.App.3d 1035, 1045.

The 2018 Domestic Violence charge has a unique angle because Appellant at the time could have appealed the case. According to McCarthy v. Arndstein, no person shall be compelled in any criminal case to be a witness against himself, and this extends to compelling a person to testify in a civil case when that compelled testimony would later be used against him in a criminal case. 266 U.S. 34, 35 (1924).

During the adjudicatory hearing on January 24, 2019, Appellant told the court that he is pleading the 5th and refuses to answer questions related to a 2018 and 2014 domestic violence cases. The District Court Judge explained to the Appellant that if he is going to invoke the 5th, then he has the right to determine what the answer would've been and make a decision based upon what the answer would've been. Exhibit D and Baxter.

Appellant had originally thought that the 2018 Domestic Violence conviction was being appealed, and therefore he would not be required to answer any questions related to the case because that would be detrimental to him. The presiding Judge was persuaded and gave the appellant three weeks to present evidence whether the 2018 conviction was being appealed or not. (Appendix Vol 2 - Exhibit D)

Three weeks later during the disposition hearing on February 12, 2019, (Appendix Vol 2 - Exhibit E) the presiding judge allowed the appellant to present evidence that his 2018 domestic violence conviction was being appealed. The transcript shows that there was no appeal pending for the 2018 domestic violence case, and the Appellant had actually appealed the 2018 conviction pro se, but he appealed it on February 5th, 2019 (two weeks after the adjudicatory trial). Because the 2018 domestic violence conviction was not appealed during the time of the adjudicatory trial of January 24, 2019, there was no 5th amendment violation because there was a final judgment that the Court could take judicial notice of.

The District Court did not err by taking judicial notice of Appellant's plea and since the conviction as of today still stands, did not err by including domestic violence classes in Appellant's case plan.

Does the undersigned counsel believe that Appellant was innocent in the events that transpired during the 2018 Domestic Violence charge? Yes. However, the record shows that Appellant pleaded “no contest” to this charge. And while the appeal can proceed at this Court, no reversal and remand of the charges have been issued. The appropriate course of action would have been to complete the domestic violence classes anyway, even though Appellant was innocent because completing those classes is a much shorter timeline than appeal. The District Court mentions this course of action in the November 19, 2019 hearing. Appendix Vol 3, Exhibit H. Unfortunately as it pertains to guardianship and the Protective Capacity Family Assessment policy the District Court relied upon, the District Court did not abuse its discretion by using that plea to order domestic violence classes.

4. **Appellant does not have a justiciable due process claim for not receiving adequate notice for a hearing in 2018.**

In order to successfully establish a prima facie case for a procedural due process violation, a plaintiff must show that: (1) there has been a deprivation of the plaintiff’s liberty or property, and (2) the procedures used

by the government to remedy the deprivation were constitutionally inadequate. “At the core of procedural due process jurisprudence is the right to advance notice of significant deprivations of liberty or property and to a meaningful opportunity to be heard.” Abbott v. Latshaw, 164 F.3d 141, 146 (3d Cir.1998).

While Appellant has evidence that he was not served with proper notice while in jail of the first hearing about his child and subsequent hearings, which is a constitutional violation, U.S. v. McGlory, 202 F.3d 664, 673 (3d Cir. 2000), this hearing did not have a material effect on the guardianship order on appeal. Namely, that Appellant refused domestic violence classes because he believes he is innocent. This exact fact scenario has been talked about in nearly every hearing (Exhibits B-H). If the 2018 Domestic Violence case is overturned, Appellant should be able to restore his parental rights (Section 7 below).

The undersigned counsel would like to note to this Court however that Appellant’s problems are a failure of our criminal justice system, specifically the cash bail system, which would have allowed Appellant to not be held in custody pending charges on his 2018 Domestic Violence case. Without the cash bail system, Appellant could have successfully attended the first

hearing and may have been able to argue that his daughter not be placed in the custody of the State. Today, the daughter lives with the Appellant's mother in a safe home where the Appellant can visit her.

5. **Appellant does not have a double jeopardy claim. Double Jeopardy does not apply to civil cases, and it certainly does not apply to domestic violence classes for a domestic violence charge that is still on Appellant's record.**

Appellant claims that he has a "double jeopardy" claim because being asked to partake in domestic violence classes as part of a case plan to show that he is a reasonable father is another form of punishment from his 2018 domestic violence charge. After searching for case law, the undersigned counsel has found none. Double jeopardy does apply in successive criminal appeals, U.S. v. One Assortment of 89 Firearms, 104 S.Ct. 1099 (1984), but being asked to take domestic violence classes when a conviction is part of the record does not constitute any double jeopardy violation.

6. **The District Court did not abuse its discretion by not staying the timeline for NRS 432B.590(4).**

The Constitution does not ordinarily require a stay of civil proceedings pending the outcome of criminal proceedings. Federal Sav. & Loan Ins. Corp. v. Molinaro, 889 F.2d 899, 902 (9th Cir.1989) The decision whether to stay civil proceedings in the face of a parallel criminal proceeding should be made "in light of the particular circumstances and competing interests involved in the case." Id.

In determining whether a stay of a civil proceeding is appropriate to accommodate a party's Fifth Amendment privilege against self-incrimination in a parallel criminal proceeding, the need for a stay is far weaker when no indictment has been returned, and as a general rule preindictment requests for a stay are denied because there is less risk of self-incrimination and more uncertainty about the effect of a delay on the civil case. Aspen Financial Services v. Dist. Ct., 289 P.3d 201 (Nev. 2012).

Here in this Court, the Nevada Rules of Appellate Procedure, Rule 8 reads that a stay can happen pending the resolution of a tangential appeal. Perhaps this Court will use Appellant's pending criminal appeal as a reason to grant his Motion for Extension of Time. But the fact remains that the District Court did not err by including the domestic violence classes in the case plan. The District Court gave plenty of notice to Appellant including the

November 19, 2019 hearing where the judge plainly told Appellant that “time is running out.” Appendix Vol 3, Exhibit H p. 229.

This Court should note that Appellant, instead of asking for a stay, accelerated his own timeline by asking for a Guardianship hearing, which is the final judgment upon which the instant case is appealed from. From the most recent hearing in the record on July 14, 2020, Appendix Volume 3 Exhibit I:

> Mr. Saafir: I -- what -- what I’m asking is this because going forward with the termination proceedings would’ve been a final judgment, and that would’ve been appealable. But the -- the…
> The Court: So I just want to make sure. I mean, I -- I’m not gonna change it from guardianship. But are you really suggesting…
> Mr. Saafir: No No.
> The Court: … that you want to roll the dice on a TPR? (Appendix p. 240)

7. **There is still good news, Appellant’s child lives with his mother in a stable home where he can visit her. Furthermore, should he win his appeal on the 2018 Domestic Violence charge, he can petition to restore his parental rights.**

Above all else, the undersigned counsel acknowledges that it is important that Appellant be reinstated parental rights. If Appellant is successful in his appeal of the 2018 Domestic Violence charge which was

the but-for reason the District Court elected for Appellant to attend domestic violence training, he can subsequently file a petition for the restoration of parental rights. NRS 432B.5908.

The undersigned counsel believes that Appellant did not fully understand the circumstances of his "nolo contendre" plea in the 2018 Domestic Violence case. If this case can be reheard with a new evidentiary hearing and the Appellant can win a reversal with his innocence, the undersigned counsel will be available to work with Appellant to restore his parental rights.

II. ANALYSIS FOR WITHDRAWAL

Consistent with Rule 46 of the Nevada Supreme Court Rules, and specifically, Rule 1.16 of the Rules of Professional Conduct, there is at least one ground that supports this Motion to Withdraw as an attorney for the above-named Appellant. Such grounds include:

1. Rule 1.16(b)(1): Withdrawal can be accomplished without material adverse effect on the client

2. Rule 1.16(b)(6): The representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client

3. Rule 1.16(b)(7): Other good cause for withdrawal exists

In the instant case, the undersigned counsel listened and looked into the Appellant's claims and did not find anything appealable. No material adverse effect will occur if this Court grants undersigned counsel's request as undersigned counsel has advised Appellant to drop the appeal. Furthermore, the undersigned counsel will file a Motion for Extension of Time to ask this court to give Appellant additional time to file an appeal if he disagrees with the undersigned's analysis.

To be asked to continue this appeal would be placing the undersigned counsel in a position to make arguments they do not believe in. This would be a tremendous waste of precious Court resources and an injustice to all parties involved. The undersigned counsel deeply appreciates the Court's willingness to place appeals dealing with termination rights in the pro bono program.

Conclusion

Counsel has complied with all requirements to withdraw as counsel for this case. As such, an order allowing Counsel to withdraw is appropriate. The relief requested in this motion is sought in good faith and not for the purposes of delay. Based upon the foregoing, moving Counsel respectfully requests this Honorable Court grant this motion, thereby permitting

undersigned counsel to withdraw as counsel of record for Kwame Anir Saafir.

Dated this 29th day of July 2021.

Respectfully submitted,

Nicholas Shook, Esq.
Nevada Bar No. 13400
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that I am Nicholas Shook, the named attorney for the Appellant. On July 29, 2021, I electronically filed the preceding Appellants' Motion for Extension of Time via this Court's electronic filing system. All parties in the instant case have registered with the electronic filing system of this Court.

Dated this 29th day of July 2021.

Nicholas Shook, Esq.
Nevada Bar No, 13400
Attorney for Appellant

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	)	Dept. No: D
	)	
_____	)	

MOTION TO EXCEED EXCESS PAGES FOR MOTION TO WITHDRAW

COMES NOW Nicholas Shook, Esq., to request this Court a Motion to Exceed Excess Pages for his Motion to Withdraw from 10 to 18 pages. NARP 27(d)(2).

The undersigned counsel wants to highlight to this Court that he did a thorough review of Appellant's claims. And as pro se attorney he did not take the privilege of representing Appellant lightly. Appellant levied many claims in his opening brief and the undersigned counsel feels he owes a duty to this Court and Appellant to answer each claim discussed in meetings with the client and upon reading the record.

Docket 81946 Document 2021-22040

While this Court generally disfavors long motions, the undersigned counsel requests this 8 page extension of the page limit because the motion to withdraw is akin to the Appellant's Brief, specifically with regards to how the undersigned does not believe in the arguments made in the Appellant's Brief. Briefs, unlike motions have a much larger page limit that this motion is well within.

The undersigned counsel respectfully requests an 8 page enlargement for this motion.

Dated this 29th day of July 2021.

Respectfully submitted,

Nicholas Shook, Esq.
Nevada Bar No. 13400
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that I am Nicholas Shook, the named attorney for the Appellant. On July 29, 2021, I electronically filed the preceding Appellants' Motion for Extension of Time via this Court's electronic filing system. All parties in the instant case have registered with the electronic filing system of this Court.

Dated this 29th day of July 2021.

Nicholas Shook, Esq.
Nevada Bar No, 13400
Attorney for Appellant