IN THE SUPREME COURT OF THE STATE OF NEVADA

BRYAN DRYDEN, Appellant, vs. THE STATE OF NEVADA, Respondent.	SUPREME COURT NO: 83233 DISTRICT COURT NO: C-18-334955-1

APPELLANT'S OPENING BRIEF

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1. NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that there are no persons or entities that must be disclosed as persons or entities as described in NRAP. 26.1(a). The following parties have appeared in this case:

FOR PLAINTIFF, THE STATE OF NEVADA:

A. Genevieve Craggs, Esq.

B. Bryan A. Schwartz, Esq.

FOR DEFENDANT/PETITIONER, BRYAN WARREN DRYDEN:

A. Tony L. Abbatangelo, Esq.

B. Marisa Border, Esq.

C. Kambiz Shaygan-Fatemi

THE VEGAS LAWYERS

TABLE OF AUTHORITIES

THE VEGAS LAWYERS

JURISDICTIONAL STATEMENT

On July 8, 2021, the Hon. Mary K. Holthus, denied the Appellant's motion to withdraw his guilty plea. Thereafter, on October 2, 2021, Judge Holthus sentenced Appellant to, among other things, sixty (60) to two hundred and forty (240) months incarceration; further ordering that Appellant's sentence, in this case, run concurrent to a sentence imposed on the Appellant in a 2009, second-degree murder conviction, docketed as 09-C258241.

Jurisdiction is authorized pursuant to N.R.S. § 177.015 (1)(b).

ROUTING STATEMENT

This case is presumptively retained by the Supreme Court to "hear and decide" since it involved a postconviction appeal that involve a challenge to a judgment of conviction pursuant to NRAP 17(b)(3).

STATEMENT OF ISSUE

Whether the District Court committed error by denying the Appellant's motion to withdraw his guilty plea, which ruling contravenes both established judicial precedent and unrebutted, record testimony.

STATEMENT OF THE CASE

Appellant, Bryan Dryden, was indicted on September 19, 2018, for one count of sexual assault with a deadly weapon in violation of N.R.S. §§ 200.364, 200.366, 193.165. **(Appx. No. 1).** On November 5, 2018, your undersigned was appointed

as the Appellant's trial counsel in that matter. As a culmination of long-term negotiations, your undersigned reached a plea agreement with the government on the Appellant's behalf. And on November 5, 2019, Appellant pled guilty to one count of attempted sexual assault in violation of N.R.S. §§ 200.364, 200.366, 193.33.

After the Appellant's November 2019 change of plea, on March 2, 2020, he filed a motion with the district court to withdraw his guilty plea.[1] Appellant's dual motions argued that: 1) your undersigned had unduly coerced him into accepting the plea deal by offering him compensation in the form of a television and a pair of sneakers; and 2) that your undersigned had suborned perjury by telling the Appellant to lie to secure the district court's approval of the plea agreement. Appellant's motion collaterally argued that he had had inadequate contact and interaction with your undersigned in the weeks and days leading up to his decision of whether accept the government's plea deal or proceed to trial.[2] Finally, Appellant argued that on the days leading up to his change of plea hearing his

[1] Appellant filed his first motion to withdraw from his plea agreement on March 2, 2020 **(Appx. 2)**; and his second motion to withdraw his plea on December 10, 2020 **(Appx. 3).**

[2] On July 28, 2021, the District Court granted the motion of your undersigned to withdraw as attorney of record for then, defendant, Dryden **(Appx 4).** On August 6, 2021, this Court countermanded that District Court order reinstating your undersigned as counsel of record for purposes of this appeal. **(Appx. 5**).

cognitive abilities were diminished because he had not received his prescription medications from the penal facility.

Beginning on August 13, 2020, District Judge Mary Kay Holthus presided over a hearing on the Appellant's motion to withdraw his plea. Unable to complete that hearing in one day, Judge Holthus continued the hearing on the successive days of October 13, 2020, and October 29, 2020. During that multi-day hearing only two witnesses testified: the Appellant on his own behalf; and your undersigned on behalf of the government, who opposed Appellant's plea withdrawal motion.

The Appellant's testimony at that hearing provided the district judge with ample justification to grant Appellant's motion. Despite unrebutted testimony in support of the Appellant's motion adduced at that hearing, on January 28, 2021, Judge Holthus denied Appellant's motion to withdraw his plea. *See Hearing Transcript* (**Appx. 6**) p. 6. On July 8, 2021, Judge Holthus sentenced the Appellant to, amongst other things, sixty (60) to two hundred and forty (240) months incarceration to run concurrently with a sentence that the Appellant was then currently serving in case No. 09-C258241. (Based on that 2009 conviction for second-degree murder, the district court had previously sentenced the Appellant to life with the possibility of parole after ten years.) On behalf of the Appellant, your undersigned filed a timely notice of appeal in this case on July 14, 2021. **(Appx. 7).**

It was error for the district judge to deny the Appellant's motion to withdraw his claim because he provided the court with ample, and largely unrebutted, testimony that withdrawal of his plea was justified. Prior to his sentencing, the Appellant generated a series of written communications to the undersigned and this Court, chronicling the irretrievably broken nature of the professional relationship between himself and the undersigned.[3]

[3] After his change of plea but prior to his sentencing, the Appellant repeatedly documented his disaffection with your undersigned counsel in letters that he sent to this Court, your undersigned or both.

To wit:

1) On December 14, 2021, the Appellant delivered a letter to your undersigned insisting that he no longer wanted your undersigned to represent him on this appeal and specifically accusing your unsigned of fraud, coercion, and ineffective assistance. **(Appx 8)**;

2) On January 2, 2022, the Appellant sent another letter to your undersigned reiterating his resolute posture that he no longer desired your undersigned to represent him because, according to the Appellant, your undersigned ineffectively represented him during trial, and specifically plea, proceedings. **(Appx 9)**;

3) Also on January 2, 2022, the appellant posted a letter to this Court where he implies that he has been unable to contact your undersigned despite numerous attempts, presumably setting up an ineffective assistance of counsel claim. **(Appx 10)**; and,

4) On January 24, 2022, the Appellant delivered a letter to your undersigned accusing both your undersigned and Appellant's subsequent counsel, Marisa Borders, of lies and coercion that led him to accept a plea deal

STANDARD OF REVIEW

On appeal from a trial court's denial of an appellant's motion to withdraw his plea, this Court "gives deference to the district court's factual findings as long as they are supported by the record." *Sunseri v. State*, 137 Nev. Adv. Op. 58, 495 P.3d 127, 131 (2021).

SUMMARY OF THE ARGUMENT

The district court's denial of the Appellant's motion to withdraw his plea was contrary to Supreme Court precedent that requires a district judge to make a finding that the motion is, or is not, grounded in "fairness and justice." Moreover, the district court's final ruling denying the Appellant's motion is unsupported by references to the record, as required by *Sunseri v. State, infra.*

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under false and fraudulent pretenses **(Appx 11)**.

Because this Court has specifically and repeatedly ordered your undersigned to continue representing the Appellant despite clear, present and significant factual disagreements between the two that go to the heart of a productive lawyer-client relationship, your undersigned is compelled, in the interest of his professional responsibility obligations as well as his personal integrity, to state for the record that Appellant's allegations against your undersigned are manifestly false and/or wholly taken out of context.

In addition, it was error for the district court to deny the Appellant's motion to withdraw his plea in light of the fact that there is ample support in the record that granting that motion would be both fair and just. *Sunseri, infra.*

ARGUMENT

A. THE DISTRICT COURT ERRED IN DENYING THE APPELLANT'S MOTION TO WITHDRAW HIS CLAIM

1. CONTRARY TO THE MANDATE OF ESTABLISHED PRECEDENT, THE DISTRICT COURT FAILED TO ARTICULATE A FACTUAL BASIS FOR ITS DECISION TO DENY THE APPELLANT'S MOTION TO WITHDRAW HIS PLEA

The Court erred in refusing to grant the Appellant's motion to withdraw his plea. The Appellant's central reason for being permitted to withdraw his plea was/is his dissatisfaction with his representation by the undersigned, a point that he repeatedly made clear in motions filed with the District Court, **Appendices 2-3,** as well as numerous letters to this Court and the undersigned, as referenced in footnote number 2, *supra*.

In the recent case of *Sunseri v. State,* 137 Nev. Adv. Op. 58, 495 P.3d 127 (September 23, 2021) this Court articulated the applicable standard for a trial court to consider in determining the validity of a defendant's motion to withdraw his guilty plea:

> "[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. 598, 604, 354 P.3d 1277, 1281 (2015); NRS 176.165 (permitting withdrawal of a guilty plea before sentencing). Courts should not focus exclusively on whether the plea was knowingly, voluntarily, and intelligently pleaded, *Stevenson*, 131 Nev. at 603, 354 P.3d at 1281, nor should courts consider the guilt or innocence of the defendant, *Hargrove v. State*, 100 Nev. 498, 503, 686 P.2d 222, 226 (1984). **In determining whether withdrawal of a guilty plea would be fair and just, courts should "consider the totality of the circumstances."** *Stevenson*, 131 Nev. at 603, 354 P.3d at 1281. *Id.* at 131 (emphasis added). *See also Hubbenette-Bridges v. State*, 501 P.3d 468 (Nev. App. December 23, 2021).
>
> *Id.* at 131 (emphasis added).

Thus, the touchstone of relief under N.R.S. § 176.165 (the statute that authorizes a defendant to withdraw his plea) are the twin jurisprudential virtues of fairness and justice.

However, before we approach those two pillars, we highlight a fundamental deficiency in the plea process in this case. Specifically, *Sunseri* collaterally ruled that "[i]n reviewing a denial of a motion to withdraw a guilty plea, this court gives deference to the district court's factual findings as long as they are supported by the record." *Id*. (emphasis added); *see also Stevenson v. State,* 131 Nev. 598 (2015) (We must give deference to these findings so long as they are supported by the record, *see Little v. Warden, 117 Nev. 845, 854, 34 P.3d 540, 546 (2001)*(giving

deference to factual findings made by the district court in the course of a motion to withdraw a guilty plea) which they are." *Id.* at 604 (emphasis added).

In this case, however, the district judge made no specific credibility findings on the evidence that had been offered by either of the parties and, more specifically, by either of the principal witnesses (The Appellant on his own behalf and your undersigned on behalf of the government.) She offered no commentary on the quality, or the persuasiveness of the arguments made in the competing briefing materials, or the oral arguments made by the parties. Neither in a written opinion nor on the record did she weigh the arguments of either party and arrive at a reasoned decision for why one party's argument was factually and/or legally more dispositive than the other. In fact, her analysis was non-existent and her finding was cursory: "I did sit through the hearing and observed all the testimony and I do not find a basis to withdraw the plea. It's going to be denied as set forth in the State's brief and opposition." *Hearing Transcript,* **Appx. 6,** p. 6, lines 10-12. This short-hand ruling was insufficient to establish that her decision was supported by the record as required by *Sunseri, Stevenson and Little, supra.* Thus, because the district court's summary ruling failed to articulate a factual basis for her decision, her final order denying the Appellant's motion to withdraw his plea violates established precedent and cannot stand.

2. THERE IS AMPLE EVIDENCE IN THE RECORD TO SUPPORT THE APPELLANT'S MOTION TO WITHDRAW HIS PLEA

As noted above, *Sunseri* and its predecessor opinions, *Stevenson* and *Little*, *supra*, provide the framework for this appellate body to evaluate whether it was appropriate for the district court to deny the Appellant's motion to withdraw his claim. Those cases unanimously hold that a motion to withdraw a guilty plea must be granted if it would be "fair and just" to do so. *See e.g., Sunseri v. State*, *supra* at 131. The District Court neglected to follow that mandate and further failed to even acknowledge that she had considered the concepts of fairness and justice in reaching her decision. Regardless, the record is replete with circumstances and narratives to establish that it was "fair and just" to grant the Appellant's motion to withdraw his plea.

For example, there was apparently a misunderstanding between your undersigned and the Appellant regarding his eligibility for parole if he accepted the plea deal offered by the Government. The Appellant was left with the impression that if he accepted the proffered plea deal, the date of his eligibility for parole in this case would, more or less, coincide with the date of his release in the 2009 second-degree murder conviction. That confusion was fomented by the misunderstood communication between the Appellant and your undersigned, that the length of time of incarceration was four to ten years; while in truth the length of

incarceration required by the government under the written plea agreement, and imposed by the district court, was five to twenty years. Your undersigned testified under oath that he miscommunicated the four-to-ten-year deal to the appellant *See* August 13, 2020, *Hearing Transcript*, **Appx. 12,** p.14, lines 23-25; p. 15,lines 1-4) but was then later corrected in his testimony that the deal was, in fact, for five-to-twenty years. (*Id.* p. 17, lines 7-9). While such erroneous miscommunication was unintentional, it is more than plausible that the Appellant mistakenly believed that he was pleading guilty to a deal with lesser penal sanctions than was the case. This type of error significantly prejudiced the Appellant's belief of what he was facing in terms of penal sanctions. This unrebutted testimony provided a basis for the trial judge to conclude that holding the Appellant to an agreement where he was genuinely and unwittingly mistaken as to the length of his period of incarceration would be both unfair and unjust.

Collaterally, there was further confusion regarding the "back number" that the Appellant would have to serve in this case within the context of the rule that requires him to serve 40/60% of his sentence. **Appx. 3** (Appellant's December 10, 2020, Motion, p. 2) Appellant apparently was of the impression that his agreed to sentence made him eligible for parole in eight years; whereas, under the terms of that plea deal he would not be eligible for parole for twelve years. The significance of that misunderstanding is that the Appellant was operating under the mistaken

belief that his eligibility for this case would temporally coincide with the date of his parole in the 2009 case. **Appx. 13,** October13, 2020 Hearing Transcript, pp. 26-28

In addition, testimony was adduced from both the Appellant and the undersigned regarding the significance of two gifts that your undersigned bestowed on the Appellant during plea negotiations. Specifically, your undersigned discussed with the Appellant the prospect of him pleading guilty to an attempted sexual assault charge. During their discussions, Appellant told your undersigned that in accepting the plea deal he (Appellant) would have to serve more time and that a television would be a useful distraction for him during those additional years of incarceration. Your undersigned responded that because of his personal regard for the Appellant he would purchase a television for him as well as a pair of sneakers. **Appx 13.** *Hearing Transcript*, pp. 13-14. Your undersigned conveyed the television and the pair of shoes as nothing more than a gift to the Appellant since, as noted above, your undersigned had developed a personal bond with the Appellant, which your undersigned felt was based on mutual admiration. At no point did your undersigned state, suggest, or imply that the conveyance of these meager gifts was in exchange for the Appellant pleading guilty. The gifts were merely a symbol of the fondness that your undersigned held for the Appellant and nothing more. **Appx. 13** (October 13, 2020, Transcript, p.14, lines 4-12). In summary, the gifts that your undersigned bestowed on the Appellant was not a bargain for exchange.

On the other hand, the Appellant may have construed the gifts conveyed to him as compensation for his accepting the government's plea deal, although there was, objectively, nothing that your undersigned said or did that would convey that impression. Still reasonable minds could differ on the separate states of mind of the giver and the gift recipient. In any event, the trial court could have and should have considered the mix-up in communications as a basis, in the interest of "fairness and justice," to grant the Appellant's motion to withdraw his plea; thereby removing any doubt regarding the Appellant's motive in agreeing to plead guilty.

Regardless of the source of this misunderstanding the Appellant testified that he would not have accepted the deal if he had been aware that his eligibility for parole in this case would have been twelve rather than eight years. *Id.* at p. 27, lines 22-25; p. 28, lines 1-6.

The primary issue in this case is whether the district court improperly denied the Appellant's motion to withdraw his plea. But the foundational issue is whether the Court declined to accept the Appellant's unrebutted claim that withdrawing his plea was necessary because of his fundamental disagreements and disputes with his counsel, your undersigned.

The courts are unambiguous in their collective view that meaningful representation involves a coordination between counsel and client toward a common goal, typically, if not obviously, the best outcome for the client. But when

there has been a breakdown in communication wherein the counsel and his/her client are operating at cross purposes, the courts recognize an imperative to intervene. *See generally, Bland v. California Dept. of Corrections,* 20 F.3d 1469, (9th Cir. 1994) citing as one of the distinct elements that a court should consider in assessing the effectiveness of the lawyer-client relationship is "whether the conflict between the defendant and his attorney was so great that it resulted in a total lack of communication preventing an adequate defense." *Id.*at 1475. In addition, as noted by *Ramirez v. Yates,* 71 F. Supp. 3d 1100 (N.D. Cal. 2014) effective representation of a client is undermined if not defeated "where there is a complete breakdown in communication between the attorney and client, and the breakdown prevents effective assistance of counsel. (citation omitted). On the other hand, "disagreements over strategical or tactical decisions do not rise to level of a complete breakdown in communication." *Id* at 1114. *See also Stenson v. Lambert*, 504 F.3d 873, 886 (9th Cir. 2007)("An irreconcilable conflict in violation of the Sixth Amendment occurs only where there is a complete breakdown in communication between the attorney and client, and the breakdown prevents effective assistance of counsel. *Schell,* 218 F.3d at 1026. Disagreements over strategical or tactical decisions do not rise to level of a complete breakdown in communication." *Id.*); *Daniels v. Woodford,* 428 F.3d

1181, 1203 (9th Cir. 2005) ("Courts have repeatedly stressed the importance of adequate consultation between attorney and client. . .")

As the bipartite holdings in *Ramirez* and *Stenson* suggest, strategic differences are one thing; but the failure to communicate is a disagreement so fundamental as to make any movement toward a common goal untenable. To employ, perhaps, a pedestrian metaphor it is the difference between two partners in one romantic relationship saying there are issues that they can resolve through discussion, negotiation, and compromise while in a separate relationship, one partner says, 'go away, don't talk to me and I want nothing more to do with you.' In a situation such as this, that imbroglio is compounded where one person, here the Appellant, has accused the other, your undersigned, of the crimes of coercion and deception (i.e. fraud) as well as subornation of testimony. *Hearing Transcript*, **Appx. 12,** p.8, lines 11-12; p. 20, lines 1-2)[4].

Finally, in that same hearing on October 13, 2020, the Appellant testified that in the days leading up to his change of plea hearing, he was deprived of his prescription medications; and that such deprivation caused him to experience both

[4] That is why, with all due respect, this Court's reliance on *Thomas v. Wainwright*, 767 F.2d 738 (11th Cir. 1985) in its' Order Regarding Motions, docketed February 3, 2022, is mis-suited to this case. While *Thomas* accused his counsel of ineffective assistance of counsel, he did not accuse his counsel of the committing a crime (here fraud, coercion and subornation of perjury) as the Appellant has done in this case.

physical and mental anguish. The Appellant specifically testified that "I was in severe pain and mental anguish, [had] racing thoughts [and] I couldn't sleep. My arms and legs hurt so bad it felt like my bones were crushing." **Appx. 13,** *Id.* at p. 19, lines 18-20. The Appellant further testified that his judgment during the change of plea was affected because of the fact "that I was in so much pain, I felt like I was being tortured by this pain and agony to where in a way it was like when I took the plea deal, I was also in the frame of mind that the torture would end." *Id.* at p. 20, lines 12-15.

Additionally, on the same page of that transcript, when asked whether he was able to comprehend either the written plea agreement or the change of plea proceedings, the Appellant responded "I – never really read over any of it. It was just a once over glancing at it. We didn't go over everything word for word." *Id.*, lines 19-20. Finally, on p. 21, lines 8-9, Appellant testified that "I really wasn't in the right frame of mind to take the plea deal, no."

The Appellant's testimony regarding his cognitive deficiency to understand the written plea agreement and the change of plea proceeding was hardly challenged on cross-examination; nor did the government offer testimony and/or documents to rebut the Appellant's sworn testimony regarding his physical and mental deficiencies affecting his judgment on the day that he changed his plea. Because the Appellant's testimony regarding his cognitive deficiencies were unrebutted, that

testimony, too, provided a basis for the District Court to conclude that the judicially-recognized principles of fairness and justice required that the Appellant's motion to withdraw his plea be granted.

With regard to the miscommunications between Appellant and the undersigned, the former has made it clear: 1) in correspondence to the undersigned as well as this Court and the district court; 2) in pleadings filed with the District Court; and 3) in his testimony at the hearing on his motion to withdraw his plea, that he does not like or trust your undersigned. Most importantly, the Appellant seeks to impugn your undersigned's character, professionalism through pernicious character assassination. Collaterally, the Appellant has criminally accused your undersigned of committing deception (fraud), coercion and subornation of perjury in his representation of the Appellant. The district court should have recognized these elements of irreconcilable discontent and concluded that in the interest of fairness and justice, it would be proper to allow the Appellant to withdraw his plea.

CONCLUSION

The district court abused its discretion when it refused withdraw Appellant's plea due to not making an adequate findings of facts and conclusion of law. The appellant provided fair and just reasons for the granting of the withdrawal of his plea. Therefore, this honorable court should grant appellant requested relief.

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(1)(6) because:
2. This brief complies with NRAP 32(a)(5) in that this brief has been prepared in a proportionally spaced typefaced using Microsoft Word is in 14 Point Font, Timeblans New Roman.
3. I further certify that this brief complies with the page or type volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), is proportionately spaced, has a typeface of 14 points, and contains less than 30 pages.
4. 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 18(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 4th day of March, 2022.

Respectfully Submitted By:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Opening Brief and Appendix was electronically served and/or send U.S. Mail in a sealed envelope, first class postage prepaid, to the following parties on the 4th day of March, 2022.

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