**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 REPLY BRIEF

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### A. The District Judge's Failure to Articulate Findings to Support Her Decision to Deny the Appellant's Motion to Withdraw His Plea Remains Unresolved and Provides Ample Justification for Reversal

In his opening brief, the Appellant highlighted a critical and dispositive legal defect in the trial court proceedings below which, despite the State's failed efforts to improperly circumvent (by filing a post-trial motion with this Court—directed at the District Court--after trial court proceedings had closed) and now tries to studiously ignore, remains the *status quo* of this case. Specifically, the Appellant pointed out, in his lead argument, that when the District Judge denied his motion to withdraw his guilty plea, she failed to articulate a factual basis for that decision in violation *Sunseri v. State,* 495 P.3d 127 (2021). In that case, this body unambiguously stated that "this Court "gives deference to the district court's factual findings [on a motion to withdraw a guilty plea] as long as they are supported by the record." *Id.*at 131 (emphasis added). *Accord: Stevenson v. State,* 131 Nev. 958 (2015)("We must give deference to [the findings of a district court in ruling on a motion to withdraw a plea] so long as they are supported by the record." *Id.* at 604 (emphasis added); and, *Little v. Warden,* 117 Nev. 845 (2001)(The district court's factual finding, adjudging the credibility of the witnesses and the evidence, is entitled to deference on appeal and will not be overturned by this court if supported by substantial evidence." *Id.* at 854.)(emphasis added)

To briefly reiterate for this Court's edification, the following is a summary of the District Court procedural posture:

On November 5, 2019, the Appellant pled guilty to a charge of attempted sexual assault. Continuously unsettled by his belief and a strong sense before, during and after his change of plea hearing of specific, strategic disagreements, as well as numerous conflicting personality characteristics, between himself and his counsel (to wit: your undersigned) on December 30, 2019, the Appellant filed a *pro se* motion to withdraw his plea. Not only did the Appellant use the forum of that motion to disparage your undersigned's general capacity and competency to represent him, he (Appellant) also specifically accused your undersigned of fraud by stating that your undersigned had paid him (in the form of a television and a pair of sneakers) as compensation for accepting the State's plea offer. Additionally, the Appellant accused your undersigned of suborning perjury by cajoling him to lie to the District Court to facilitate the consummation of the plea agreement. On March 2, 2020 (0004-0008) and December 10, 2020 (009-00014) the Appellant (through his then attorney, Marisa Border) filed two additional motions to withdraw his plea; each motion similarly grounded in allegations of your undersigned's incompetence and felonious behavior.

Based on the Appellant's apparent dissatisfaction with your undersigned's representation, on July 28, 2021, the District Court granted your undersigned's

motion to withdraw from the case. However, on August 6, 2021, this Court countermanded that District Court order reassigning your undersigned as appellate counsel on this appeal.

On August 13, 2020, the Honorable District Court Judge Mary Kay Holthus presided over a multi-day hearing regarding the Appellant's motion to withdraw his plea. Over the course of those three days: August 13, 2020, October 13, 2020, and October 29, 2020, only two people testified: the Appellant on his own behalf and your undersigned on behalf of the State.[1]

On January 28, 2021, the final hearing day on the Appellant's motion to withdraw his plea, the Judge Holthus, issued a brief, verbal essentially two-sentence ruling from the bench denying the Appellant's motion. *BD00020*-00028 (with emphasis on *BD00025* as containing her truncated ruling). Judge Holthus did not reduce her findings of fact and conclusions of law to a written order. Nor did she offer verbal findings of fact or conclusions of law from the bench that would have been consistent with the requirements articulated in, and required by, *Sunseri, Stevenson* and *Little*; *i.e.,* that her adverse ruling against the Appellant be supported by references to the record. Collaterally, she did not abide by the additional mandate

[1]This was an odd, if not unethical circumstance: a lawyer testifying against his client during the pendency of that lawyer's active representation of the client; on a matter in which both the lawyer and the client had compelling and conflicting self-interests.

of *Little*, which requires her to make findings that are "substantial" in nature. Instead, she insufficiently made a cursory, one-sentence generalized assessment, conspicuously devoid of specific findings. That ruling was devoid of specific references to the record; failed to weigh the overall worthiness and credibility of the two competing witnesses (the Appellant and your undersigned); and neglected to provide an analysis that credited or discredited the overall merit of each party's presentation. To wit, her specific dispositive ruling was as follows: "I did sit through the [multi-day] hearing and observed all of the testimony and I do not find a basis to withdraw the plea." Summarily reducing the extensive evidence adduced during a three-day hearing (extended over the expanse of several months) to 23 words, wherein no specific findings of fact or conclusions of law were made, either verbally or in writing, disregards the mandate of *Sunseri* and its progeny.

And the State knows, full well, the defect inherent in the process that the District Judge engaged. How can we be sure? Because it (the State) improperly tried to supplement the trial record AFTER the District Court proceedings were closed by filing a motion with this Court to order the District Court to supplement its docket by issuing a written order that complies with the unified holdings of *Sunseri*, *Stevenson* and *Little.* Not only was the State's motion to this Court blatantly transgressive in that it disrespected the boundaries between closed District Court litigation and the extant, exclusive jurisdiction of this Court; but it was also a tacit

admission by the State that it knew that the District Judge's abbreviated final ruling from the bench was improper under the mandate of *Sunseri*. And the State only attempted this act of evidentiary legerdemain AFTER the Appellant raised it as an issue in his opening brief. (That State intervention might be viewed with more charity if it had raised this judicial deficiency during or at the end of the Appellant's hearing to withdraw his plea. But timed as it was, it is, indubitably, a transparent effort to staunch the bleeding of the District Court's final ruling misstep.) This type of "request for a mulligan" by attempting to alter the scorecard after the players have returned to the clubhouse is not only unfair in the abstract but is conspicuously and concretely unfair to Mr. Dryden who has pursued his appellate rights within clearly marked boundaries of law and procedure.[2]

The State attempts to add ballast to its leaky defense by arguing that the District Judge did issue findings consistent with *Sunseri, et. al.,* when she followed the one sentence referenced above, with an equally depthless statement that, "It's going to be denied as set forth in the State's brief." The State implies that this is

[2]In a minute order dated March 29, 2022, this Court denied the State's improvidently filed motion. In that same order, this Court ruled that it is the Appellant's duty to provide an adequate record on appeal. But as we now know from the State's admission in their brief, it would have been impossible for the Appellant to proffer a district court memorandum opinion, or even an unadorned minute order, because neither one exist. Which, coming full circle, is why the state was improperly urging this Court to compel the district judge to produce a more specific, *Sunseri*-compliant order during these appellate proceedings.

good enough to comply with the explicit mandate of *Sunseri*. But *Sunseri* compels the district court to issue its own findings not those of a partisan party as embodied, in this case, by the State. Nor should this Court ignore the unambiguous mandate of *Little, supra,* which requires the District Court to articulate "substantial" evidence to support its findings on a motion to withdraw plea. *Little's* ruling is consistent with logic because under the appellate standard of review, this Court must consider the District Court's factual findings to properly evaluate the validity of the appeal. *Sunseri v. State, supra* at 141. This appellate body can hardly fulfill its review obligations if the findings of the District Court barely exist and are, self-evidently, void for vagueness.

Moreover, the State, argues with no supporting decisional authority or analysis, that a trial court's ruling on a withdrawal motion is not obliged to make "credibility" findings. (Resp., Brf., p. 9). The State misapprehends *Sunseri* which obligates the trial judge to make "factual findings" within the context of a final order on a motion for plea withdrawal. *Sunseri,* makes no isolated reference to "credibility" findings; but requires, instead, an articulation of specific "factual findings." Although, of course, credibility assessments can be a component of overall factual findings.

As such, the State misstates the holding in *Sunseri*, which is unambiguous: a motion to withdraw a plea is not ripe for appeal unless the factual findings of the

trial court are supported by the record. In that regard, the district court's ruling in this case is doubly-flawed. First there were no factual findings: "I did sit through the hearing and observed all the testimony and I do not find a basis to withdraw the plea" is not a factual finding but an abbreviated judgment. Second, the District Judge made no reference to the record aside from her sweeping generalization that she had heard the testimony and that within her thought process, the Appellant's motion should be denied. But on appeal, this Court cannot evaluate the District Judge's thought process.

In that same regard, the State misguidedly states that "credibility determinations" were specifically made by the Court in a separate document. *Respondent's Answering Brief*, p. 9. That argument is also flawed. Once again, *Sunseri* does not require just "credibility determinations" but more broadly "factual findings" made by the District Judge based on the record. Second, the State makes reference to the fact that these "credibility determinations" were made in a "separate document" *id.*, without specifying that document. The Appellant is unaware of this amorphous reference to a "separate document."

The State also vacuously argues that the District Court's denial of the Appellant's motion is "an implicit finding that Dryden's testimony was not credible." *Id.* at p. 10. That is a circular, illogical argument. In essence, the State claims that the District Court's final ruling denying the Appellant's motion to

withdraw his claim is proof that she complied with the mandate of *Sunseri.* No, it does not. Once again, at the risk of redundancy, *Sunseri* requires a thorough and explicit articulation of facts on the record by the District Court justifying its decision whether to grant or deny the Appellant's motion. That did not happen here. Collaterally, the State disingenuously states that the District Court found that "Dryden's reasons did not create any "fair and just" reason to withdraw his guilty plea. *Id.* The District Court made no such explicit finding.

Finally, the State raises the inappropriate counter-argument that because the Appellant made the same arguments in an unsuccessful motion to withdraw his plea in a previous prosecution, designated as 09C25841, he must be lying in this case where he has raised similar issues. The State has offered no authority for the proposition that because a litigant has offered an argument in one case, *per force* makes his offer of the same, or a similar argument, in a subsequent case less credible.[3] But, most importantly, even if the District Judge determined that arguments the Appellant made in one case (09C25841) make his arguments in this case curiously suspect, she had an obligation, under the holding in *Sunseri*, to make

[3] This is, of course, akin to the well-known Rule 404(b), a component of the Federal Rules of Evidence, wherein, outside of express limitations, a factfinder is expressly precluded from using a criminal defendant's past behavior as relevant evidence that he acted in conformity therewith under present circumstances. As the case is for evidentiary prohibitions should apply with equal force to criminal pre-trial proceedings; absent relevant case law, statutory and/or ruled-based mandates to the contrary, which the State has failed to provide.

that credibility analysis and finding between the two cases on the record which, once again, she manifestly failed to do.

### B. The Appellant Has Demonstrated That Under the Totality of the Circumstances Depicted in the Record, Granting His Motion to Withdraw His Plea Would Be "Fair and Just"

This Court has ruled that it is proper to allow a defendant to withdraw his plea if doing so would be "fair and just." *Stevenson v. State,* 131 Nev. 598, 603. (2015). *Stevenson* also stands for the proposition, that in making his case, a defendant should not be restricted to the issue of whether his plea was "knowing, voluntary and intelligent." *Id.* And as the State, here, has conceded, a representative symbol of what constitutes a "fair and just" circumstance is when the defendant demonstrates that his guilty plea was "hastily entered [and] made with unsure heart and confused mind." (Respondent's Brief, p. 7), *quoting in part, United States v. Alexander,* 948 F. 2nd 1002, 1004 (6th Cir.1991). Simultaneously, the language of that opinion delegitimizes withdrawal requests wherein a defendant has strategically waited several months before filing a request to withdraw. (In *Alexander,* the defendant waited a full five months between the time he pled guilty, and just a few days, before his sentencing to withdraw his plea *Id. 1003.* By contrast, the Appellant made his motion to withdraw his plea within weeks after he pled guilty.)

In this case, the District Court made several procedural and substantive errors. First, as already noted above, the District Judge failed to specify the factual predicate(s) based on the record, for why she denied the Appellant's motion. Indeed, in making her two-sentence ruling, the District Judge never even utters the phrases "fair and just" or "totality of the circumstances"; which would seem, at a minimum, to be a perfunctory acknowledgement of the primacy of *Stevenson* and *Alexander*. Two of the criteria established by *Alexander* to ascertain whether his motion to withdraw is well-grounded is whether his plea was the product an "unsure heart" and a "confused mind." In this case, the Appellant proved both.[4]

But the district court's substantive flaws are even more prejudicial to the Appellant. Mr. Dryden established beyond peradventure that he met the standard embodied in *Alexander* and, therefore, should have been allowed to withdraw his plea.

For example, the Appellant was confused by the terms of the plea agreement. As Appellant notes in his opening brief, it is irrefutable, that in the crucial days

[4] The State continues to diminish and mischaracterize the holding of *Sunseri* when it states on page 10 of its brief that the district judge made remedially "implicit" findings on the evidence when she ruled against him. This argument is vapid and is diametrically opposed by *Sunseri's* holding. *Sunseri* unambiguously holds that the factual findings of the trial judge form the indispensable basis for that court's final ruling for or against the movant. Not, as the State suggests, by "implication," but by specific references to the record.

immediately before his change of plea hearing, your undersigned acknowledged initially and unintentionally telling the Appellant that the plea deal was for four to ten years, when, in fact, the terms of the deal were for five to twenty years. *See App. Appx. BD0056* (lines 23-4 on following page *BD00057*)*; BD00059* (lines7-11). Similarly, the Appellant was confused by the minimum length of time he would be required to serve under the so-called "60/40" rule. Under that rule, the Appellant was under the impression that he would only have to serve a minimum term of eight years, when, in fact, the minimum period of incarceration was twelve years. *Id.* A factual dispute was highlighted in the testimony on the Appellant's motion to withdraw his plea wherein your undersigned stated that it was his practice to inform defendants contemplating a plea the impact of the 60/40 rule. *BD00079* (lines 10-13). On the other hand, the Appellant adamantly defied that narrative, testifying under oath that your undersigned had represented to him (Appellant) that he would be eligible for parole in eight rather than twelve years. *BD00090* (lines 21-25; continuing on *BD00091* lines 1-4). Moreover, the Appellant emphatically testified that he would never have accepted a plea deal that required a twelve-year versus an eight-year minimum period of incarceration. *BD00091* (lines 22-25; continuing on *BD00092*, lines 1-2).

In that same vein, Appellant's opening brief, chronicles a circumstance where a legitimate misunderstanding between your undersigned and the Appellant may

have led to the Appellant's frame of mind that was inconsistent with the facts. Specifically, your undersigned conveyed two gifts, *de minimis* in value (specifically, a television set and a pair of sneakers) as tokens of good will between the Appellant and your undersigned. However, the Appellant testified that the television and sneakers were offered by your undersigned as a bargain for exchange; in other words, that your undersigned offered the items as an inducement to plead guilty. *BD00086* (lines 7-5; continuing on *BD00087*, lines 1-14).[5]

The problem with the testimonial disparities between the Appellant and the undersigned as it relates to each of the issues highlighted above; to wit: 1) whether the undersigned accurately informed the Appellant of his total penal exposure; 2) whether the undersigned accurately informed the Appellant when he would be eligible for parole; and 3) whether the undersigned's bestowal of gifts on the Appellant was motivated by altruism or by an attempt to facilitate a plea) are that each of those factual disputes call upon a fact-finder (in this case, the District Judge) to make specific credibility assessments and findings about the relative merits of the conflicting testimonies as is specifically required by *Little, supra.* "The district

[5] Once again, your undersigned is compelled, in the interests of professional propriety and integrity, to categorically deny that his intent in bestowing items on the Appellant was anything more than as unencumbered gifts. Specifically, your undersigned did not articulate or imply, in word or deed, that giving those items to the Appellant was intended to have any bearing, whatsoever, on his decision whether to plead guilty.

court's factual finding adjudging the credibility of the witnesses and the evidence, is entitled to deference on appeal and will not be overturned by this court if supported by substantial evidence." *Id.* at 854(emphasis added). But in this case, not only did the District Judge fail to make specific credibility assessments between the two witnesses (your undersigned and the Appellant) she also failed to make specific findings about any of the evidence offered over the course of the three-day, months-long hearing on the Appellant's motion to withdraw his plea. As such, the District Court's final order failed to comply with the express mandate of *Sunseri* and its progeny; and, as such, provides ample justification for reversal.

In summary, because the District Court's final order on the Appellant's motion to withdraw his plea disregarded the tripartite mandates of *Sunseri, Alexander and Little,* thereby depriving this Court of the ability to adequately review the District Court decision. In addition, because the Appellant presented the District Court with ample evidence to show that granting his motion would be "fair and just" based on, amongst other things, the confusion between himself and counsel regarding: 1) the length of his sentence; 2) the ripeness of his eligibility for parole; and 3) the intent underlying the bestowal of the above-referenced gifts, the Appellant reiterates the request made in his opening appellate brief that his appeal be granted.

//

## CONCLUSION

For all of the foregoing reasons, the Appellant pleas that his appeal be granted.

DATED this 3rd day of June, 2022.

Respectfully Submitted By:

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## 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, Times 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 3rd day of June, 2022.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Appellant's Reply Brief was filed electronically with the Nevada Supreme Court on the 3rd day of June, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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