

1
2 IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
Clerk of Supreme Court

5
6 DANIEL CHARLES COOKE,
7

8 Appellant,

9 vs.

CASE NO.83578

10 THE STATE OF NEVADA,
11

12 Respondent.
13

14 Appeal From The Fourth Judicial District Court
15 Of The State of Nevada
16 In And For The County Of Elko

17 **RESPONDENT'S ANSWERING BRIEF**
18

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STATEMENT OF THE FACTS

The Defendant was originally charged in the Fourth Judicial District Court in case CR-FP-16-7293 with the following crimes: Count 1: Sexual Assault on a Child Under the age of 14 years, a Category A felony, Count 2: Lewdness with a Child under 14 Years of Age, a Category A felony, and Count 3: Abuse or Neglect of a Child, a Category B felony. JA p. 99.

At his first court appearance in the District Court held October 31, 2016, he was to enter into an agreement that would resolve the above criminal liability by allowing him to plead pursuant to an Amended Criminal Information to one count of Attempted Sexual Assault on a child under the age of 16 years. JA p. 106-119, 114-115. During this arraignment the maximum potential penalties and the non-probateable nature of the charge were explained to the defendant by both the prosecutor and the judge. Id. at 113-114, 116. The hearing ended with Cooke needing more time to talk with his attorney about the deal stating, “I’m not satisfied with the results of the charges, but I don’t really feel I have any other choice, so yes.” Id. at 114, 116.

At the next court appearance on December 5, 2016, Cooke's attorney informed the court that Cooke did not want to take the deal and therefore since the criminal information as filed did not have the original charges upon

1 which he would have to go to trial, the hearing was continued so the State
2 could file an amended information with the original charges and not the plea
3 deal charges mentioned above. JA p. 120-126, 123.

4 Cooke's next hearing in District Court was held on January 30, 2017,
5 where he pled not guilty to the original 3 charges in a Second Amended
6 Criminal Information filed December 13, 2016. JA p. 94-105. Cooke
7 declared at this hearing that he understood the potential penalties for said
8 crimes. Id. at 95, 100.

9 Then on February 10, 2017, an Amended Memorandum of Plea
10 Agreement was filed. JA p. 75-87. Within this plea agreement the
11 maximum potential penalty of 8-20 years is cited and the fact that it is a non-
12 probateable offense is also noted. JA p. 77.

13 Then on February 16, 2017, a Change of Plea Hearing was held, using
14 a Third Amended Criminal Information charging Cooke again with
15 Attempted Sexual Assault of a Child who is less than 16 Years of Age. JA
16 p. 52-53. Again, Cooke was apprised of the maximum potential penalty of
17 20 years and that probation was not an option. Id. at 54. The plea
18 agreement terms were placed on the record and a further explanation of his
19 agreement was had between he and the Court especially regarding his ability
20 to argue for the minimum sentence. JA p. 59-62. All of which the

1 Defendant stated that he understood and agreed to. Id. Later during the
2 plea, the Defendant indicated during his allocution about what he had done
3 wrong and explained that he was pretty drunk. JA p. 66. The Court then
4 asks Cooke's attorney about voluntary intoxication as a defense to an
5 attempted crime, but the Court then realizes that the allocution is for the
6 higher original crime which is a general intent crime and the Court accepts
7 the factual basis. JA p. 66-67. The plea is accepted and the matter is set for
8 sentencing. JA p. 68.

9 The Sentencing hearing was held on April 27, 2017, at which the
10 Defendant was sentenced to a term of imprisonment of 8-20 years. JA p. 39,
11 RA p. 1. During the Sentencing hearing there is a lengthy discussion about
12 the potential penalties and Cooke agrees to proceed with the sentencing. RA
13 p. 4-16.

14 The Elko County District Attorney's office was never ordered to
15 respond to the Petition for Writ of Habeas Corpus as required by NRS
16 34.745(1)(a) or to take any other "action" under 34.745(1)(b). The State's
17 filing was merely in response to the motion for bail pending the outcome of
18 the writ. JA p. 42.

1 such an instruction. NRS 193.220; Nevius v. State, 101 Nev. 238, 249
2 (1985).

3 The plea was knowingly and voluntarily entered into because Cooke
4 was apprised of the maximum potential penalties. In NRS 174.063 the stock
5 plea agreement language that must be substantially in that form states:

6 "I understand that as a consequence of my plea of guilty or
7 guilty but mentally ill I may be imprisoned for a period of not
8 more than (maximum term of imprisonment) and that I (may or
9 will) be fined up to (maximum amount of fine). I understand that
10 the law requires me to pay an administrative assessment fee."
11 NRS 174.063.

12 NRS 174.063 does have a section which references a minimum
13 sentence, but this is in a parenthetical as if it is optional and is included in
14 the section regarding probation eligibility. What it does require is the
15 following language: "I understand that I am not eligible for probation for the
16 offense to which I am pleading guilty or guilty but mentally ill." NRS
17 174.063. In this case Cooke was told that the maximum possible penalty is
18 20 years and further that it could be 8-20 years, and the 8 years could be the
19 first time he would be parole eligible. JA p. 54, 77, 113-114, 116. Then at
20 sentencing this is gone over again. RA p. 4-16. This is sufficient.

19 "A defendant's comprehension of the consequences of a plea, the
20 voluntariness of a plea and the general validity of a plea are to be
determined by reviewing the entire record and looking to the

1 totality of the facts and circumstances surrounding the plea. A
2 court must be able to conclude from the oral canvass, any
3 written plea memorandum and the circumstances surrounding the
4 execution of the memorandum (i.e., did the defendant read it,
5 have any questions about it, etc.) that the defendant's plea was
6 freely, voluntarily and knowingly made. No specific formula for
7 making this determination is required. Each case must be decided
8 upon the facts and circumstances of that case. See Taylor v.
9 Warden, 96 Nev. 272, 607 P.2d 587 (1980)."

10 State v. Freese, 116 Nev. 1097, 1106, 13 P.3d 442, 448 (2000).

11 Both of Cooke's claims regarding whether the plea was knowingly
12 and voluntarily entered into are belied by the record, and he therefore was
13 not entitled to an evidentiary hearing.

14 B. With regards to the appeal deprivation claim, Cooke's attorney only
15 had a duty to file a direct appeal under two circumstances: 1) when
16 requested to do so; and 2) when the defendant expresses dissatisfaction with
17 his conviction. Toston v. State, 127 Nev. 971, 978 (2011). A review of the
18 sentencing hearing transcript makes it clear that there is no such expression
19 of dissatisfaction via "outbursts" as there was in the Toston case, nor did
20 Cooke file a motion to withdraw his plea even when offered. Toston at 980;
21 RA p. 14-16, 30-33. The only evidence proffered in by Cooke in support of
22 his writ was a letter submitted by the Defendant attached to the writ. JA p.
23 20. This letter is self-serving and dated improperly, "5-4-2016" a year
24 before the sentencing hearing date. Id. It is questionable at best. "The

1 burden is on the client to indicate to his attorney that he wishes to pursue an
2 appeal.” Davis v. State, 115 Nev. 17, 20 (1999). Here, Cooke’s only
3 indication is a letter predating sentencing, not filed, bearing no hallmarks of
4 trustworthiness, and belied by the record in his conduct and actions at
5 sentencing.

6 While an appeal deprivation claim is easy to claim, Cooke is only
7 “...entitled to an evidentiary hearing if he raises claims supported by
8 sufficient factual allegations that, if true, would entitle him to relief and that
9 are not belied by the record.” Hargrove v. State, 100 Nev. 498, 502-503
10 (1984). Here, he claims to have requested an appeal...in a letter predating
11 the sentencing date by a year. While it is true that some people mess up
12 dates, especially in January after the new year, but this would have been
13 May, still using the prior year number? This is not a filed document, but
14 rather a handwritten letter to his attorney and he happens to have a copy of
15 it? There is nothing factual about these allegations and Cooke was not
16 entitled to an evidentiary hearing.

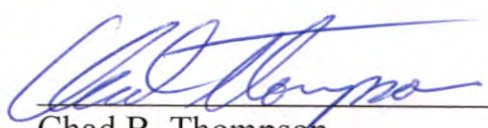
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CONCLUSION

Cooke knowingly and voluntarily entered his plea and accepted his sentence handed down on April 27, 2017. The Petition for Writ of Habeas Corpus was properly denied without an evidentiary hearing and the order of the District Court should be affirmed.

RESPECTFULLY SUBMITTED this 13 day of April, 2022.

TYLER J. INGRAM
Elko County District Attorney

By: 
Chad B. Thompson
Deputy District Attorney
State Bar Number: 10248

1 CERTIFICATE OF COMPLIANCE

2 I hereby certify that this Respondent's Answering Brief complies with
3 the formatting requirements of NRAP 32(a)(4), the typeface requirements of
4 NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6). This
5 Respondent's Answering Brief has been prepared in a proportionally spaced
6 typeface using Microsoft Office Word 2007, in size 14 point Times New
7 Roman font.

8 I further certify that this brief complies with the page or type-volume
9 limitations of NRAP 32(a)(7) because, excluding the parts of the
10 Respondent's Answering Brief exempted by NRAP32(a)(7)(C), because it
11 contains 1,723 words.

12 I hereby certify that I have read the Respondent's Answering Brief,
13 and to the best of my knowledge, information, and belief, it is not frivolous
14 or interposed for any improper purpose. I further certify that this brief
15 complies with all applicable Nevada Rules of Appellate Procedure, in
16 particular NRAP 28(e), which requires every assertion in the brief regarding
17 matters in the record to be supported by appropriate references to the record
18 on appeal.

19 ///

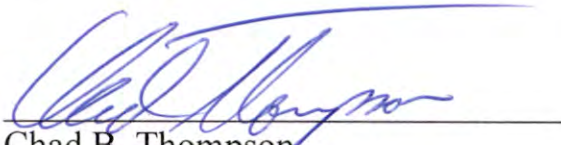
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1 I understand that I may be subject to sanctions in the event that the
2 accompanying brief is not in conformity with the requirements of the
3 Nevada Rules of Appellate Procedure.

4 DATED this 13 day of April, 2022.

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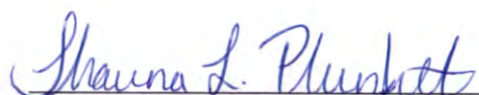
CERTIFICATE OF SERVICE

I certify that this document was filed electronically with the Nevada
Supreme Court on the 13 day of April, 2022. Electronic Service of the
Respondent's Answering Brief shall be made in accordance with the Master
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