

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TONEY ANTHONY WHITE,
Appellant,

v.

THE STATE OF NEVADA,
Respondent.

Electronically Filed
Apr 19 2022 02:17 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

CASE NO: 82889 - COA

RESPONDENT'S ANSWER TO ORDER TO SHOW CAUSE

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Chief Deputy, ALEXANDER G. CHEN, and now responds to Respondent's Answer to Order to Show Cause.

This answer is based on the following memorandum of points and authorities and all papers and pleadings on file herein.

Dated this 19th day of April, 2022.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar # 001565

BY */s/ Alexander Chen*

ALEXANDER G. CHEN
Chief Deputy District Attorney
Nevada Bar #010539
Office of the Clark County District Attorney

MEMORANDUM
POINTS AND AUTHORITIES

ARGUMENT

This response is based upon an Order to Show Cause filed by this Court on April 4, 2022. In examining the record, the State was unable to locate an appeal filed by Appellant Toney White. He has filed several Notice of Appeals, but there does not appear to be a substantive brief filed. Thus, this response is made in an attempt to respond to the inquiries of this Court.

First, this Court asked the State to respond on whether Appellant was denied his right to represent himself. This Court specifically refers Appellant's request at a hearing held on April 18, 2017. It should be noted that this Court has previously entertained this issue on direct appeal in Case No. 78483-COA. In its Order of Affirmance, this Court stated:

A district court may properly deny a request for self-representation if the request is equivocal. *Lyons v. State*, 106 Nev. 438, 443, 796 P.2d 210, 213 (1990), *clarified on other grounds by Vanisi v. State*, 117 Nev. 330, 341, 22 P.3d 1164, 1171-72 (2001). The record reveals that White filed a motion requesting to withdraw his guilty plea and for either the appointment of substitute counsel or permission to represent himself. The district court held a hearing concerning White's motion, discussed the motion with White, and clarified White's desire to move for the withdrawal of his guilty plea. Following the discussion, the district court decided to appoint substitute counsel. White acknowledged he understood the district court's decision to appoint substitute counsel and agreed that the district court had addressed his concerns. A review of White's motion and the transcript of the pertinent hearing demonstrates he did not make an unequivocal request to represent himself and the

district court appropriately addressed White's motion and concerns without conducting a *Faretta* canvass. Therefore, White fails to demonstrate he is entitled to relief.

The law of a first appeal is law of the case on all subsequent appeals in which the facts are substantially the same.” Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). “The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings.” Id. at 316, 535 P.2d at 799. Under the law of the case doctrine, issues previously decided on direct appeal may not be reargued. Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001) (*citing* McNelson v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)).

While a defendant has a right to self-representation, the request may be denied where the request is equivocal. Gallego v. State, 117 Nev. 348, 357 (2001) (overruled on other grounds).

This Court has already determined that Appellant’s claim that he wished to represent himself lacks merit and was equivocal. However, in response to this Order to Show Cause, this Court may again look at the actual transcript from the April 18, 2017 hearing in question. There was never a request by Appellant to represent himself.

Prior to the April 18, 2017 hearing, Appellant had filed a pro per motion that requested a one hundred eighty (180) day extension for trial, a request to recuse counsel, and an application to proceed pro se.

The hearing begins by the district court calling the case and explaining that it had reviewed his motions again. Vol 7, 1261. The district court explained to him that his attorney could not file a frivolous motion like the one he was requesting. Id. The district court then took the time to ask him about specific discovery that he was requesting that he felt his attorney had not provided to him.

Upon addressing the issues that Appellant had with his appointed counsel, Appellant was satisfied by the court's inquiry:

THE COURT: Okay. So, there's some photos you think you don't have and a copy of your statement to the police. And I've told your attorney, even if he's provided it, to provide that to you again. Is there anything else?

THE DEFENDANT: No, that's it.
Vol. 7, 1264.

Appellant then went on to ask the district court about some more discovery and what his trial strategy was going to be, including the strengths and weaknesses of his case. Vol. 7, 1268. The district court then asks his attorney if he has been talking to his client:

MR. GRUBER: I'm talking to my client over the phone. I haven't visited him in a while. Since the bar complaint, everything is done in writing and over the phone with someone in my office with me and he's met with my investigator.

THE COURT: Okay. Is there any other discovery? Anything else you want to talk about?

THE DEFENDANT: No, that's it.

Vol. 7, 1268-1269.

Based upon the inquiry, the district court denied his written motion. It is worth noting that his written motion was not an unequivocal request to represent himself. He cited the standards of competence for attorneys and explained his right to competent representation, but he also threw in a request to represent himself. Upon a thorough inquiry by the district court on the representation of his counsel, the court denied his request. Not once did Appellant seem like he was dissatisfied after the district court had addressed his concerns. Not once did Appellant make a request to represent himself.

Secondly, this Court wished briefing on whether his counsel was ineffective for not objecting to the imposition of restitution. Appellant's main argument was that his decision to plead guilty mid-trial lacked a specific canvas on restitution.

Although a defendant does not necessarily need to be informed during the district court's plea canvass of the consequences of his or her plea, "it must affirmatively appear, somewhere in the record," that he or she was so informed. Skinner v. State, 113 Nev. 49, 50, (1997).

Appellant is correct that the district court did not directly canvas him on restitution on the day that he entered his plea. However, Appellant was aware that

this could be a direct consequence of his plea. Appellant had previously entered into a guilty plea. The guilty plea contained the terms of pleading guilty, including that restitution could be ordered. When Appellant wanted to withdraw his guilty plea, the State did not even object so that he could have his day in trial. Then after a couple of days of trial, Appellant decided to enter a guilty plea to his charges. The district court, recognizing that he had previously tried to withdraw his prior guilty plea, conducted a thorough canvas of him.

This Court, in its Order to Show Cause, cites Cruzado v. State, 110 Nev. 745 (1994) for the proposition that restitution is a direct consequence of a guilty plea which the defendant must be informed. While generally, true, this case is more similar to Lee v. State, 115 Nev. 207 (1999), which overruled Cruzado in some respects. Lee indicates where the totality of circumstances shows that defendant was aware of a restitution possibility, the restitution may still be ordered even where there's no specific oral canvas. Due to the lengthy history of this case, including Appellant's prior plea of guilt, the record shows that he was aware restitution was a possibility.

CONCLUSION

Based on the history of this case, Appellant does not have a basis for this Court to grant any appeal. As such, he should not be granted relief and the case should not be remanded for further proceedings.

Dated this 19th day of April, 2022.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar # 001565

BY */s/ Alexander Chen*

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Court of Appeals on April 19, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

ALEXANDER CHEN
Chief Deputy District Attorney

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

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BY /s/ E. Davis
Employee, District Attorney's Office

AC//ed