IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
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APRIL PARKS,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Supreme Court Case No. 82876

APPELLANT'S REPLY BRIEF

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Appeal from Judgment of Conviction
Eighth Judicial District Court, Clark County

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. ARGUMENT

Ms. Parks provides the following brief argument in response to each of the issues raised in this appeal.

A. Parks has always contended her lawyer was ineffective in directing her to a "right to argue" plea deal, which she would never have taken had she known counsel would not prepare for or perform at sentencing in a reasonable manner.

The structure of Ground One is straightforward. Parks was given a choice between two plea offers and chose, with her counsel's advice, the far riskier of the two options. While the first option could have capped her prison time at eight years minimum, the "right to argue" offer she accepted contained no such limitation. Predictably, the State argued for and received a much larger sentence.

The State contends, repeatedly, that Parks has raised a new claim on appeal "based upon alleged deficient advice and failure to perform adequately at sentencing." AB, p. 16. But those were always components of the claim, including at the trial court level.

The entire claim below was premised on the fact counsel advised Parks to reject a more favorable plea deal, resulting in a much longer period of incarceration. 1 AA 141. The core of the claim was the risks and benefits of the offer, to include what would happen if the State retained the right to argue at sentencing. 1 AA 143. Effective counsel would have warned Parks that allowing the State to retain the right to argue was too risky. 1 AA 144. This was all the more so given counsel's lack of investigation before sentencing, and, errors counsel declined to address at sentencing. 1 AA 144-145.

There's no way to divorce counsel's performance at sentencing from counsel's performance during plea negotiations. Parks took the deal she did because counsel led her to believe the outcome would be better. Not only was it not better, it had no chance of being better given the other deficiencies in counsel's preparation and performance.

Turning to the State's response to the merits of the claim, the State focuses on Parks' on-the-record rejection of the fixed plea offer. AB, p. 19. But that misses the point. Parks never contended that she misspoke in

rejecting the offer. She rejected it because her attorney convinced her to. The fact the fixed offer was rejected on the record adds nothing to the analysis, because the question before this Court is "why" she rejected it.

The "why" is answered in the allegations below. Counsel provided Parks with advice that the right to argue offer would result in a more favorable sentence than the proposed eight year minimum. 1 AA 144. Counsel failed to advise Parks of the "high likelihood the actual sentence imposed would also exceed that amount." 1 AA 144.

The prejudice from these events is apparent, in that the fixed plea would have resulted in a minimum sentence half the amount actually imposed. This isn't a question of hindsight or Parks making the "wrong choice" as the State calls it. AB, p. 25. Instead, the focus here is on counsel's performance in recommending that the State retain the right to argue in this proceeding. Effective counsel would have advised the client of the extreme risk of a higher sentence, not convince the client that a lower sentence was possible when the actual chance of that happening was miniscule.

B. Parks' sentence is inseparable from the amount of money at issue, which the State conceded is far less than what was presented at sentencing. Where Parks' sentence was based on the so-called high dollar value of the case, and counsel failed to discover errors in those amounts, resentencing is required.

Ground Two and the response to it contain several moving parts. But what looms largest is the fact that the State conceded below, and concedes again on appeal, that the restitution stated in the judgment of conviction is erroneous.

Now, the State offers that the correct amount of restitution is $412,943.02. AB, p. 33. But even the amended judgment of conviction fixes the amount at $554,397.71 and the amount presented at sentencing was even higher. 2 AA 261. An error to the tune of +$140,000 is not minor and is proof, standing alone, of Parks' other point which is that her conduct was not nearly as bad as what the State argued at sentencing.

Below and in the opening brief, Parks pointed out at least nine specific examples of erroneous or misleading information provided at sentencing. OB, pp. 13-19. Most of that information was based on public

records and the State never meaningfully disputed any of it. Likewise, there is no dispute trial counsel was not notified that this information would be presented, or that trial counsel did not specifically object to any of it or attempt to rebut the information in any way.

To be sure, the trial court judge dismissed the significance of this information by claiming if the court had known the correct information it would not have affected the sentence. 6 AA 1022. This Court isn't required to accept that rationale. Cameron v. State, 968 P.2d 1169, 114 Nev. 1281 (1998); see also Earl v. State, 111 Nev. 1304, 1311, 904 P.2d 1029 (1995). This Court has remanded sentencing errors for resentencing, before a new judge unfamiliar with the record, to ensure preservation of the Defendant's right to an individualized and accurate sentencing. Brake v. State, 113 Nev. 579, 939 P.2d 1029 (1997).

At sentencing the trial court was presented with restitution that was off by in excess of 20%, and presented with "evidence" of Parks' conduct that was belied in many cases by publicly available information. Yet when these errors were finally presented in postconviction proceedings, the Court

found none of this information could have affected the sentence. Parks contends the far fairer result is to order a new sentencing proceeding in front of a judge unfamiliar with the record because the sheer magnitude of sentencing errors renders the sentence unreliable.

Briefly, there were even more errors at sentencing which would justify a new sentencing proceeding, such as the State's comments about Parks' so-called lack of remorse. As explained in the opening brief, Parks took a plea deal, which was a deal crafted and offered by the State. It cannot legally be used against her in the manner that it was at the time of sentencing. Brown v. State, 113 Nev. 275, 291, 934 P.2d 235 (1997).

Further, trial counsel never presented the court with a comparison of sentences from similar cases. Cases don't need to be identical to provide some historical reference of reasonableness. Evidence was available that in Nevada, far larger thefts generally result in far smaller periods of incarceration. There was a reasonable probability of a smaller period of incarceration had that information been provided by trial counsel at sentencing.

As it did below, the State repeatedly tries to divorce the amount of money at issue from the sentence. But it can't, because those two factors simply go hand in hand. The State acknowledges as much, as it must, in its answering brief. See AB, p. 38 (sentencing factors included "assets taken from her victims"), p. 35 (Parks stole "an incredibly large" amount of money), p. 31 (taking "around a half million dollars…constituted a serious crime").

In the end, the issue is laid bare. The alleged amount of theft was the basis for a harsh sentence. Yet the amount of theft is substantially less than what was represented. If the amount of theft is less, so too should be the sentence. This Court should find counsel performed ineffectively at sentencing and order that Parks receive a new sentencing hearing before a judge unfamiliar with the record of proceedings.

C. The record unequivocally shows Parks asked her lawyer to challenge her sentence within thirty days of conviction. Under Toston, she is entitled to a belated direct appeal.

The State's response to the claim that Parks was denied her direct appeal spends much time on the facts presented during the evidentiary

hearing. Parks discussed those in her opening brief as well. But this Court may be interested to zoom in on one specific fact that can't be disputed – during the time when an appeal could have been filed, Parks asked her attorney in writing to challenge her sentence.

This Court has already held that a defendant can be entitled to a belated direct appeal where she conveyed a "desire to challenge [her] sentence within the period for filing an appeal." Toston v. State, 127 Nev. 971, 979-980, 267 P.3d 795 (2011). That happened here, because Parks plainly wrote her attorney a letter right after sentencing and asked him to file for a "sentence modification." 2 AA 264.

While her request doesn't use the word appeal, that cuts the issue too finely. A reasonable attorney would have understood she wanted to challenge her conviction, and the way to do that within thirty days of conviction is typically through an appeal. That such an understanding was reasonable is itself already established given this Court's ruling in Toston.

Worse, the evidentiary hearing established that trial counsel didn't appeal because he didn't think there were appealable issues and didn't

think he was asked to file an appeal. This Court's ruling in Toston resolves the first part of that rationale, and the second is belied by the fact there were many appealable issues as discussed in the briefs before the Court here.

The State here is itself guilty of raising a new issue on appeal, in that it never argued below that Parks somehow waived her right to a direct appeal. In fact, below, the State conceded the claim was proper and that an evidentiary hearing was necessary to resolve it. 4 AA 705. Now though, it appears the State has taken the position Parks waived her direct appeal. AB, p. 50.

Parks offers two responses to that. First, this Court has already determined that the question of whether an appeal is waived is separate from the question of whether a notice of appeal was required to be filed. Burns v. State, 137 Nev. Adv. Op. 50, 495 P.3d 1091 (2021). That alone justifies this Court granting relief, ordering a belated appeal, and taking up the waiver question at that time.

But even if the question was reached here, Parks never waived her entire direct appeal. See AB, p. 50. The supposed waiver appears to be based on language in the guilty plea agreement. 1 AA 180. There's several problems with the State's reliance on that provision.

First, the language at issue is required to be in a particular form, and the guilty plea agreement in this case is not. See NRS 174.063 (plea agreements must be in "substantially" the following form). The mandatory form of a guilty plea agreement requires that the defendant retain the right to appeal "based upon reasonable constitutional, jurisdictional, or other grounds that challenge the legality of the proceedings…" The language at issue here was substantially modified from the required form and is therefore void.

Second, there is a strong argument that someone in Ms. Parks' position could not be required to waive errors which had not yet occurred as of the time a plea was entered. Gonzales v. State, 137 Nev. Adv. Op. 40, 492 P.3d 556 (2021). The errors discussed here, and which largely would have been raised on appeal, all arose during the sentencing. This Court's

decision in Gonzales seems to preserve a right to effective assistance of counsel at sentencing. Assuming that to be so, there is no reason to deprive a criminal defendant of the full panoply of protections against an unconstitutional result at sentencing.

Under Nevada law including NRS 174.063 and Gonzales, Parks could not waive errors that hadn't happened yet, such as by purportedly waiving her right to a fair sentencing at the time of arraignment. Parks did not waive her right to a direct appeal and instead has presented a clear cut case for relief in the form of a belated appeal.

II. CONCLUSION

Parks believes that any issues raised in the opening brief but not addressed here are adequately presented for the Court's review. For all these reasons and those in the opening brief, Parks requests this Honorable Court grant relief on her claims and order that the convictions and sentences be reversed.

DATED this 23rd day of November, 2021.

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RULE 28.2 ATTORNEY CERTIFICATE

1. 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, including NRAP 28(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 upon is 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.

2. I further 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(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font of the Ebrima style.

3. I further certify this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is proportionally spaced, has a typeface of 14 points or more, and contains 2,090 words.

DATED this 23rd day of November 2021.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on November 23, 2021. Electronic service of the foregoing document shall be made in accordance with the master service list as follows:

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