

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER ADAM TRUSCA,
Appellant,

vs.

THE STATE OF NEVADA,
Respondent.

No. 83853

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CHRISTOPHER ADAM TRUSCA,
Appellant,

vs.

THE STATE OF NEVADA,
Respondent.

No. 84183

APPELLANT'S REPLY BRIEF

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

As an initial matter, Mr. Trusca requests the Court expedite resolution of this appeal to the extent possible. His motion for bail pending appeal was denied, and Mr. Trusca is not parole eligible until May 2023. If this appeal is swiftly resolved, it will either expedite the relief requested (a new sentencing hearing), or, allow sufficient time for a potential postconviction challenge.

To that end, the State's answering brief seems to lay blame for an alleged failure to preserve issues on trial counsel. But focusing on the preservation question, the State's cited authorities say a party is required to object to error "at the time it is alleged to have occurred." AB, p. 5.

In McCullough v. State, 99 Nev. 72, 74, 657 P.2d 1157 (1983), this Court held that error can be waived if not objected to "at trial." Naturally, the case at hand resulted from a plea of guilty and not a trial. Likewise, in State v. Taylor, 114 Nev. 1071, 1077, 968 P.2d 315 (1998), this Court more broadly found that appellate issues are preserved if "raised below." In yet

another matter, this Court found that a post-trial motion was sufficient to preserve an issue for appellate review. Castaneda v. State, 132 Nev. 434, 436-437, 373 P.3d 108 (2016).

It certainly would have been nice if trial counsel understood what was required by the Constitution, Nevada's statutes, and the operative administrative order, which was that sentencing in this matter had to be held in-person. That apparently didn't happen, but the issue was nonetheless raised to the district court which could have granted relief. It did not do so, and Trusca therefore appeals to this Court for relief.

No matter what standard of review applies, the error here was substantial as evidenced by the Answering Brief's avoidance of the constitutional and statutory issues involved. The State does not challenge the fact sentencings are critical stage proceedings. The State appears to agree the United States Constitution requires the defendant's presence at

critical stage proceedings. Kirksey v. State, 112 Nev. 980, 1000, 923 P.2d 1102 (1996), citing United States v. Gagnon, 470 U.S. 522 (1985). The State makes no mention that Nevada has a statute that requires the defendant's in-person presence at the time of sentencing. NRS 178.388.

The State's position seems to be that Mr. Trusca and his counsel made some sort of deliberate choice to appear remotely and separately for the sentencing. Nothing in the record supports this. The fact Mr. Trusca was never canvassed by the court about his so-called "decision" to appear remotely is fatal to the State's argument that Trusca waived his right to an in-person sentencing. Brady v. United States, 397 U.S. 742, 748 (1970) ("Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences").

Instead, the record is clear Mr. Trusca had a constitutional and statutory right to an in-person sentencing which he never knowingly or voluntarily waived. The focus here is on court error. While trial counsel should have been familiar with these concepts, that also applies to the

judge at sentencing. It was error, plain or otherwise, for the court to proceed with remote sentencing without ensuring Mr. Trusca waived his right to an in-person proceeding.

The State makes much of the operative administrative order. Here's two responses. First, the order says what it says: in-person sentencing was required where "the negotiation contemplates a prison or jail sentence..." App. at 73. This provision plainly applied in this case, where the plea agreement allowed the State to argue for a prison sentence.

Second, although supportive of Trusca's arguments, the administrative order ultimately reads the way it does because it was required to do so by the constitutional and statutory authority which required an in-person sentencing. Although the order supports Trusca's arguments, constitutional and statutory arguments undoubtedly carry even more weight.

Blame for failing to object to a remote sentencing simply cannot fall on Mr. Trusca. It could fall on his counsel, but that's not the issue presented here. The problem instead is the district court proceeded with a remote sentencing which violated constitutional and statutory rights,

without determining if Mr. Trusca waived those rights. This prejudiced Mr. Trusca for all of the reasons stated in the opening brief, and this Court should therefore remand the matter for a new sentencing proceeding.

Regarding the other issue before this Court, Mr. Trusca contends his sentence was at least partially based on materially untrue information regarding the relationship between the charged offense and his severe drug addiction. The State's strategy in response seems to be to disparage Mr. Trusca to the maximum extent possible. But the plea agreement here was entered into with the State, and that of course could not have happened without the State's consent.

At the sentencing and on appeal, the State rejected the concept that drug addiction can "cause" someone to view child pornography. AB, p. 16. But clinical research suggests there is a relationship in that one addiction can in fact cause a secondary, seemingly unrelated addiction to arise and get worse over time. OB, p. 8. This isn't just a function of generalized

research. The same exact theme was core to Mr. Trusca's psychosexual report which the trial court had at the time of sentencing.

As a result, the sentencing was based on materially untrue information. Also, Trusca had not yet started to serve the sentence when this issue was raised, so the district court had the authority to modify it below. Campbell v. Eighth Judicial Dist. Ct., 114 Nev. 410, 413, 957 P.2d 1141 (1998). District courts can resentence a defendant when the State provides incorrect information at sentencing. State v. Eighth Judicial Dist. Ct., 100 Nev. 90, 100-101, 677 P.2d 1044 (1984).

The district court erred by failing to grant Trusca's motion to modify sentence. This matter should be remanded for a new sentencing hearing.

II. CONCLUSION

For these reasons, Trusca asks this Court to reverse the lower court's judgment of conviction and sentence and order a new sentencing proceeding.

DATED this 6th day of May, 2022.

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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 1,057 words.

DATED this 6th day of May 2022.

RESCH LAW, PLLC d/b/a Conviction
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By: 

JAMIE J. RESCH

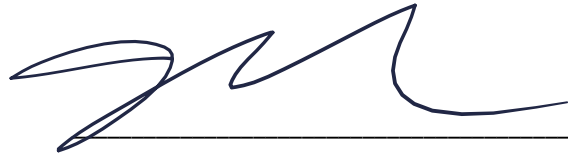
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on May 6, 2022, electronic service of the foregoing document shall be made in accordance with the master service list as follows:

STEVEN WOLFSON
Clark County District Attorney
Counsel for Respondent

AARON FORD
Nevada Attorney General

A handwritten signature in dark ink, consisting of a series of loops and a long horizontal stroke, positioned above a solid horizontal line.

An Employee of RESCH LAW,
PLLC, d/b/a Conviction Solutions