

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 82896

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Elizabeth A. Brown
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JARELL WASHINGTON

Appellant,

v.

THE STATE OF NEVADA

Respondent.

Appeal from a Judgment of Conviction
Eighth Judicial District Court, Clark County
The Honorable Tierra Jones, District Court Judge
District Court Case No. C-19-341380-1

APPELLANT'S OPENING BRIEF

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1 **I. NRAP 26.1 DISCLOSURE**

2 The undersigned counsel of record certifies that the following are persons
3 and entities as described in NRAP 26.1(a), and must be disclosed. These
4 representations are made in order that the judges of this Court may evaluate
5 possible disqualifications or recusal.
6
7

8 **NONE**

9 Attorney of Record for Appellant:

10 /s/ Thomas A. Ericsson
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1 On June 25, 2019, the Grand Jury indicted Mr. Washington on the charges
2 of Murder with Use of a Deadly Weapon and Robbery with Use of a Deadly
3 Weapon. Appellant's Appendix (hereinafter "AA"), Volume I, 137.

4
5 On February 10, 2020, the Court heard the Deputy District Attorney
6 Kenneth N. Portz, Esq.'s Request for Entry of Plea. AA II 179. At this hearing
7 Judge Herndon denied Defendant's Motion to Dismiss Counsel. District Attorney
8 Portz stated that the State would be filing an Amended Indictment charging the
9 Defendant with one count of second-degree murder with use of a deadly weapon
10 and that is what the Defendant pled guilty to. AA II 185.

11
12 Before Mr. Washington's sentencing, on March 12, 2020, the Honorable
13 Judge Herndon addressed Defendant's Motion to Dismiss Counsel, Frank P.
14 Kocka, Esq. AA II 190. The Court then inquired if Defendant was moving to
15 withdraw his plea and Mr. Washington answered affirmatively. AA II 191. Judge
16 Herndon granted the Motion to Dismiss Counsel. AA II 192. On March 26, 2020,
17 James A. Oronoz, Esq., was appointed as defense counsel for Mr. Washington.

18
19 On February 19, 2021, the Honorable Tierra Jones presided over an
20 Evidentiary Hearing on Mr. Washington's motion to withdraw plea. AA II 248. On
21 March 17, 2021, the Court heard arguments relating to Defendant's Motion to
22 Withdraw Plea. AA II 320. On March 19, 2021, Judge Jones issued a Minute Order
23 Denying Defendant's Motion to Withdraw Plea. AA II 322. An Order Denying
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1 Defendant's Motion to Withdraw Guilty Plea was filed on March 23, 2021. AA II
2 324.

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4 On April 16, 2021, Mr. Washington was sentenced on the charge of second-
5 degree murder with use of a deadly weapon to 120 to 300 months in the Nevada
6 Department of Corrections on the murder charge with a consecutive sentence of 72
7 to 180 months in the Nevada Department of Corrections for the weapons
8 enhancement, with 680 days of credit for time served. AA II 330. The Judgment of
9 Conviction was filed May 6, 2021. AA II 353.
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12 **VII. STATEMENT OF THE ISSUES**

- 13 1. Whether the District Court Erred by Denying Appellant's Motion to
14 Withdraw His Guilty Plea.
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16 **VIII. STATEMENT OF THE FACTS**

17 On June 25, 2019, a Grand Jury indicted Mr. Washington on the charges of
18 Murder with Use of a Deadly Weapon and Robbery with Use of a Deadly Weapon.
19 AA I 137. On July 24, 2019, an arraignment hearing was conducted, and Mr.
20 Washington entered a Plea of Not Guilty. AA I 145.
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23 A calendar call was heard on February 6, 2020, and during that hearing, Mr.
24 Washington voiced his concerns to Judge Jones with proceeding to trial stating, "I
25 just haven't had the chance to look over the full discovery, and I just feel like I just
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1 need more time to look over everything. I don't feel like - - I feel like I want to just
2 push it back." AA I 168.

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4 On February 10, 2020, the Court heard the Deputy District Attorney
5 Kenneth N. Portz, Esq.'s Request for Entry of Plea. AA II 179. At the time of this
6 hearing, Trial was scheduled to start at 1:30 p.m., this same day. AA II 182. Mr.
7 Washington was presented with a Plea Agreement just prior to this hearing. AA II
8 180. At this hearing, Mr. Kocka indicated to the Court that his client wanted to
9 renew his motion that was brought at calendar call to have Mr. Kocka dismissed as
10 counsel. AA II 180. Mr. Kocka also represented to the Court that his client "did not
11 feel comfortable with being, one, prepared for this trial, and two, having me
12 prepare him for trial. He indicates that he's not received a full copy of his
13 discovery." AA II 181. At this hearing Judge Herndon denied Defendant's Motion
14 to Dismiss Counsel. AA II 184. Upon the Judge's ruling regarding going to trial
15 with Mr. Kocka or accepting the Guilty Plea Agreement that he had just received
16 from the District Attorney, Mr. Washington agreed to accept the Plea Agreement.
17 AA II 185. Upon canvassing the Defendant, the trial was vacated. AA II 189.

18
19 On March 12, 2020, the Honorable Judge Herndon hear Defendant's Motion
20 to Dismiss Counsel, Frank P. Kocka, Esq. AA II 190. At this hearing, Mr.
21 Washington testified "I just feel like I was misled and I was coerced. I didn't even
22 know what was going on with my case. I was promised my discovery I never got it
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1 by Tierra Jones. And then it was just like up to trial he only came to see me three
2 times. I'm fighting for my life and I feel like it's not right for me to go to trial or to
3 sign the deal that I can't even study my case. This is my life up on the line. I didn't
4 even want to sign the deal. I felt like because he said I was going to lose in trial.
5 So, I'm not going to see daylight." AA II 191. The Court then inquired if
6 Defendant was moving to withdraw his plea and Mr. Washington answered
7 affirmatively. AA II 191. Judge Herndon granted the Motion to Dismiss Counsel.
8 AA II 192.

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11
12 On March 26, 2020, James A. Oronoz, Esq., was appointed as defense
13 counsel for Mr. Washington. AA II 195. On September 11, 2020, the Court heard
14 arguments relating to Defendant's Motion to Withdraw Plea and an evidentiary
15 hearing was set for September 2, 2020. AA II 200. On August 13, 2020, Defendant
16 Filed his Motion to Withdraw Guilty Plea. AA II 203. On September 2, 2020,
17 Defendant Jarell Washington's Reply to the State's Opposition to Defendant's
18 Motion to Withdraw Guilty Plea was filed. AA II 230. On December 11, 2020,
19 Defendant filed his Motion for Release on December 16, 2020. AA II 237. A
20 hearing was held on December 16, 2020. The Motion was denied. AA II 247.

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24 On February 19, 2021, The Honorable Tierra Jones presided over the
25 Evidentiary Hearing. AA II 248. Witnesses were Frank Kocka, Esq. and Jarell
26 Washington. AA II 249. After hearing testimony, Judge Jones decided to review
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1 the transcript of the Calendar Call and continue the hearing and argument until a
2 later date. AA II 299. On March 17, 2021, the Court heard additional arguments
3 relating to Defendant's Motion to Withdraw Plea and decided she was going to
4 issue a written decision on the matter. AA II 320. On March 19, 2021, Judge Jones
5 issued a Minute Order Denying Defendant's Motion to Withdraw Plea. AA II 322.
6 Order Denying Defendant's Motion to Withdraw Guilty Plea was filed on March
7 23, 2021. AA II 324.

8
9
10 On April 16, 2021, Mr. Washington was sentenced on the charge of second-
11 degree murder with use of a deadly weapon to 120 to 300 months in the Nevada
12 Department of Corrections on the murder charge with a consecutive sentence of 72
13 to 180 months in the Nevada Department of Corrections for the weapons
14 enhancement, with 680 days of credit for time served. The Judgment of Conviction
15 was filed May 6, 2021. AA II 330.

16 17 18 **IX. SUMMARY OF THE ARGUMENT**

19 This is a simple appeal under NRS 176.165 requesting that Mr. Washington
20 be allowed to withdraw his guilty plea and proceed to trial. The trial court erred when
21 it denied Mr. Washington's timely filed request to withdraw his guilty plea.
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1 **X. ARGUMENT**

2 **The Trial Court Erred in Denying Appellant Washington’s Motion to**
3 **Withdraw Guilty Plea**

4 A. Standard of Review

5
6 This appeal involves a question of law related to the district court’s
7 application of NRS 176.165 in Mr. Washington’s underlying motion to withdraw
8 guilty plea. “Questions of statutory construction, including the meaning and scope
9 of a statute, are questions of law, which this court reviews de novo.” *City of Reno*
10 *v. Reno Gazette–Journal*, 119 Nev. 55, 58, 63 P.3d 1147, 1148 (2003).
11

12 B. Legal Discussion

13 **February 19, 2021 Evidentiary Hearing Testimony**

14 TRIAL COUNSEL testified in pertinent part as follows:

15
16 Trial counsel presented the written plea agreement to Mr. Washington for
17 the first time on the morning trial was to begin. AA II 254. When he was presented
18 the written plea, Mr. Washington said he did not want to enter the plea and he
19 renewed his request to continue the trial. *Id.* Mr. Washington had requested a full
20 copy of the discovery in his case. AA II 255-56.
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23 Trial counsel provided some, but not all of the discovery to Mr. Washington.

24 *Id.* Trial counsel testified there were two reasons he did not provide all the
25 discovery to Mr. Washington: 1. He did not want to give Mr. Washington details of
26 statements related to the “snitch” against him as other inmates might obtain the
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1 information and use it against Mr. Washington. 2. Mr. Washington required glasses
2 to read, but he did not have glasses in the jail. Consequently, trial counsel did not
3 give Mr. Washington “the specific part of discovery which entailed the actual
4 details regarding the statements that were given by the snitch in this case,” as “it
5 was [trial counsel’s] fear that him having someone read the discovery to him would
6 not only accelerate the possibility of someone find the discovery, but learning
7 about the discovery and be – the possibility of one of the inmates becoming
8 opportunistic and corroborating the State’s case against Mr. Washington.” AA II
9 256-57.

13 Mr. Washington also testified at the evidentiary hearing. AA II 273-97. He
14 acknowledged that he had entered a guilty plea on the morning of trial, but he did
15 so because he felt that neither he nor his attorney were ready for the trial and he
16 was scared. He tried to continue the trial again, but the court refused his request.
17 He testified that he received very little written discovery and only had a few visits
18 with his attorney before the trial was scheduled to start.

21 Nevada Revised Statute § 176.165 provides:

23 Except as otherwise provided in this section, a motion to withdraw a
24 plea of guilty, guilty but mentally ill or nolo contendere may be made
25 only before sentence is imposed or imposition of sentence is
26 suspended. To correct manifest injustice, the court after sentence may
27 set aside the judgment of conviction and permit the defendant to
28 withdraw the plea.

1 This Court revisited its prior decisions interpreting NRS § 176.165 in
2 *Stevenson v. State*, 131 Nev. 598, 354 P.3d 1277 (2015). In *Stevenson*, this Court
3 found that prior limitations to allow Defendants to withdraw pleas were too
4 restrictive. The Court held that “the district court must consider the totality of the
5 circumstances to determine whether permitting withdrawal of a guilty plea before
6 sentencing would be fair and just.” *Id.* at 603.
7

8
9 In the *Stevenson* decision, this Court then went on to cite two cases that have
10 direct relevance to Mr. Washington’s case: 1) *United States v. Alexander*, 948 F.2d
11 1002, 1004 (6th Cir. 1991) (explaining that one of the goals of the fair and just
12 analysis “is to allow a hastily entered plea made with unsure heart and confused
13 mind to be undone, not to allow a defendant to make a tactical decision to enter a
14 plea, wait several weeks, and then obtain a withdrawal if he believes that he made
15 a bad choice in pleading guilty); 2) *United States v. Barker*, 514 F.2d 208, 222
16 (D.C. Cir. 1975) (“A swift change of heart is itself strong indication that the plea
17 was entered in haste and confusion[.]”). *Stevenson*, 131 Nev. at 605.
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22 Here, Mr. Washington was presented for the first time a written guilty plea
23 on the morning his trial was scheduled to begin and then was denied his oral
24 motion to continue the trial. Under the pressure of the trial’s imminent start and his
25 belief that neither he nor his attorney were ready for trial, Mr. Washington entered
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1 the plea “with an unsure heart and confused mind.” *See*, Declaration of Jarell
2 Washington, dated August 7, 2020, AA II 227-28.
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4 On that very same day upon his return to his cell, Mr. Washington began
5 writing his motion to withdraw counsel to be able to withdraw his plea. Mr.
6 Washington’s situation mirrors the examples given by the *Stevenson* decision as
7 circumstances where it would be “fair and just” to allow a defendant to withdraw a
8 plea.
9

10 Under the “totality of the circumstances” of Mr. Washington’s entry of plea
11 in the lower court, Mr. Washington respectfully requests that this Honorable Court
12 allow him to withdraw his guilty plea, vacate his conviction, and remand this
13 matter for trial.
14
15

16 **XI. CONCLUSION**

17 Appellant respectfully requests that this Court vacate his conviction and
18 remand this matter for trial.
19

20 Respectfully submitted this 12th day of November 2021.

21
22 By: /s/ Thomas A. Ericsson
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1 **XII. CERTIFICATE OF COMPLIANCE**

2 I hereby certify that I have read this appellate brief, and to the best of my
3 knowledge, information, and belief, it is not frivolous or interposed for any
4 improper purpose. I certify that this brief complies with all applicable Nevada Rules
5 of Appellate Procedure, in particular NRAP 28(e)(1), which requires every
6 assertion in the brief regarding matters in the record to be supported by a reference
7 to the page of the transcript or appendix where the matter relied on is to be found.
8 I further certify that this brief complies with the formatting requirements of NRAP
9 32(a)(4)-(6) and the type style requirements of NRAP 32(a)(6) because this brief
10 has been prepared in a proportionately spaced typeface using Microsoft Word, a
11 word-processing program, in 14 point Times New Roman.
12
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16 I further certify that this brief complies with the type volume limitations of
17 NRAP 32(a)(7) because it is proportionately spaced, has a typeface of 14 points or
18 more and contains 2,869 words. I understand that I may be subject to sanctions in
19 the event that the accompanying brief is not in conformity with the requirements of
20 the Nevada Rules of Appellate Procedure.
21
22

23 Dated this 12th day of November 2021.

24 By: /s/ Thomas A. Ericsson
25 JAMESA A. ORONOZ, ESQ.
26 THOMAS A. ERICSSON, ESQ.
27 *Attorneys for Appellant*
28

1 **XIII. CERTIFICATE OF SERVICE**

2 I hereby certify and affirm that this document was filed electronically with
3 the Nevada Supreme Court on November 12, 2021. Electronic Service of the
4 foregoing document shall be made in accordance with the Master Service List as
5 follows:
6
7

8 AARON FORD
9 Nevada Attorney General

10 STEVEN B. WOLFSON
11 Clark County District Attorney

12 By /s/ Jan Ellison
13 Oronoz & Ericsson, LLC
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