No. 83346

IN THE NEVADA SUPREME COURT

Eric Abasta
Appellant,
vs.
State of Nevada
Respondent.

Direct Appeal From a Judgment of Conviction (Plea of Guilty)
Eighth Judicial District Court
The Honorable Michael Villani, District Court Judge;
Honorable David Barker, District Court Judge;
Honorable Christina Silva, District Court Judge
District Court Case No. C-20-349045-1

APPELLANT'S REPLY BRIEF

JoNell Thomas
Special Public Defender
Nevada State Bar No. 4771
* Melinda E. Simpkins
Chief Deputy Special Public Defender
Nevada State Bar No. 7911
330 South Third Street, #800
Las Vegas, NV 89155
(702) 455-6265
(702) 455-6273 (fax)
Melinda.Simpkins@ClarkCountyNv.gov
*Counsel for Eric Abasta

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I. STATEMENT OF FACTS

Mr. Abasta incorporates the Statement of Facts contained in the Appellant's Opening Brief previously filed with this Court. Additional facts relevant to this Reply Brief include Mr. Abasta's waiver of appeal contained in his guilty plea agreement which states that Mr. Abasta waived:

> The right to appeal the conviction with the assistance of an attorney, either appointed or retained, unless specifically reserved in writing and agreed upon as provided in NRS 174.035(3). I understand this means I am unconditionally waiving my right to a direct appeal of this conviction, including any challenge based upon reasonable constitutional, jurisdictional or other grounds that challenge the legality of the proceedings as stated in NRS 177.015(4). However, I remain free to challenge my conviction through other post-conviction remedies including a habeas corpus petition pursuant to NRS Chapter 34.

3 AA 530.

II. SUMMARY OF THE ARGUMENT

Eric Abasta did not waive his right to this appeal. This appeal only deals with the district court's order that Mr. Abasta pay a fee to reimburse the State for providing an attorney. Mr. Abasta only waived his right to appeal his conviction. If this appeal is granted in its entirety, the conviction still stands.

Mr. Abasta is indigent which is a finding the State has no standing to challenge. He was appointed counsel because he was unable to afford to pay an attorney to represent him and the matter at issue is a determination based on Mr. Abasta's ability to pay, not that of his family. The requirement that the district court assess his ability prior to assessing attorney's fees is statutory and the district court is presumed to know the law and apply it accordingly. Mr. Abasta was aware of the potential for a fine, however, there was no indication in the plea agreement that he would be charged for the services of his attorney. Accordingly, the above entitled matter must be reversed and remanded for re-sentencing.

III. ARGUMENT

A. Mr. Abasta did not waive his right to appeal.

1. This appeal is beyond the scope of the waiver.

When analyzing the terms of a written plea agreement, contract law principles apply. *Burns v. State*, 137 Nev. Adv. Op. 50, *, 495 P.3d 1091, 1097 (2021). The agreement must be interpreted from its plain language and enforced as written. *Id.* Any ambiguities must be construed against the State. *Id.* The State is "'held to the most meticulous standards of

both promise and performance.' . . . The violation of the terms or 'the spirit' of the plea bargain requires reversal.'" *Citti v. State*, 107 Nev. 89, 91, 807 P.2d 724, 726 (1991), *quoting Van Buskirk v. State*, 102 Nev. 241, 243, 720 P.2d 1215, 1216 (1986). Further, a plea agreement is construed according to what the defendant reasonably understood when he or she entered the plea. *Sullivan v. State*, 115 Nev. 383, 387, 990 P.2d 1258, 1260 (1999).

> "While the term [appeal waivers] is useful shorthand for clauses like those in Garza's plea agreements, it can misleadingly suggest a monolithic end to all appellate rights. In fact, however, no appeal waiver serves as an absolute bar to all appellate claims."

Garza v. Idaho, 139 S. Ct. 738, 744, 586 U.S. ___, ___ (2019).

The plain and unambiguous terms of the appellate waiver in the plea agreement indicate that Mr. Abasta only waived his right to appeal his conviction. 3 AA 530. It says nothing about his sentence or the imposition of fees. *See United States v. Andis*, 333 F.3d 886, 888 (8th Cir. 2003) (upholding a waiver of both conviction and sentence appellate issues as the appellate waiver specifically included both).

The issues Mr. Abasta raised in his direct appeal deal only with fees assessed during sentencing. Even if all of Mr. Abasta's issues are held to

be meritorious by this Court, Mr. Abasta would only be remanded for re-sentencing. The conviction would still stand as Mr. Abasta did not appeal his conviction. Since the plain language of the appeal waiver indicates that Mr. Abasta only waived his right to appeal his conviction and says nothing about the sentence or the assessment of fees, the waiver does not apply to this appeal. Accordingly, this appeal is outside the scope of the appellate waiver pursuant to the plain language contained in the Plea Agreement. *See Garza,* 139 S. Ct. at 744, 586 U.S. at ___ (acknowledging that courts widely agree an appeal waiver is only valid and enforceable if it precludes challenges that fall within its scope).

2. The waiver was not knowing.

In *Burns v. State*, 137 Nev. Adv. Op. 50, *, 495 P.3d 1091, 1097 (2021), this Court expressed concern with regard to the prospective waiver of appellate rights "because when a defendant agrees to such a waiver, he or she cannot know what errors may occur in subsequent proceedings." *Id.* at *, 495 P.3d at 1099. Noting that the "weight of authority" generally accepts these prospective waivers, this Court created an exception and elected to refuse to honor a knowing and intelligently made waiver if doing so would result in a "miscarriage of justice" as that approach

balances the interests between valid agreements and providing a remedy for any injustices that may arise after the waiver is signed. *Id.*

Mr. Abasta's waiver of his appellate rights could not have been knowingly made just for that reason: because he could not know what errors would occur at his subsequent sentencing.

> "[K]nowingly" means that "the person waiving the particular right must 'know' of the existence of the right and *any other information legally relevant to the making of an informed decision either to exercise or relinquish that right."*

People v. Janis, 429 P.3d 1198, 1204 (Colo. 2018) (*quoting People v Mozee*, 723 P.2d 117, 121 n.4 (Colo. 1986) (emphasis added)).

To make an informed decision to waive his appellate rights, Mr. Abasta would have to know exactly what appellate issues he was giving up as this is legally relevant to the relinquishment. This situation is unlike giving up appellate rights to pre-trial issues as those issues are known to all parties prior to the waiver. What may happen at a sentencing hearing is a complete unknown, thus, there can be no knowing waiver of the right to appeal as a defendant cannot make an informed decision because he does not have all legally relevant information. To

allow otherwise is to give the State *carte blanche* to act in any manner without fear of consequence at sentencing.

3. The appeal waiver did not comply with NRS 174.063 and resulted in a miscarriage of justice.

The contents of a written guilty plea agreement are set forth in NRS 174.063, which indicates that when a guilty plea is in written form, it must "substantially" comply with that form set forth. The federal equivalent to NRS 174.063 is Federal Rule of Criminal Procedure 11, which also sets forth the contents of both the written plea agreement as well as the plea canvass that must be used in federal court. Failure to comply with Rule 11 is a reason for direct appeal. *See Burns*, 137 Nev. Adv. Op. at *, 495 P.3d at 1099, n.5 (*citing United States v. Bibler*, 495 F.3d 621, 624 (9th Cir. 2007) ("enforcing prospective appeal waivers unless '1) a defendant's guilty plea failed to comply with Fed. R. Crim. P. 11; 2) the sentencing judge informs a defendant that she retains the right to appeal; 3) the sentence does not comport with the terms of the plea agreement; or 4) the sentence violates the law'")).

While this Court has upheld plea agreements that "substantially" comply with NRS 174.063, this Court has stated that "[t]echnical

preciseness is not necessary, however, and under the plain language of NRS 174.063, a written plea agreement must only "substantially" comply with the statutory form." *Sparks v. State*, 121 Nev. 107, 110, 110 P.3d 486, 488 (2005). In *Sparks*, this Court upheld a modified plea agreement which set forth a "failure to appear" clause indicating that, if a defendant failed to appear at sentencing or committed a new infraction, the State would have full right to argue at sentencing even though they agreed to make no recommendation. *Id.* at 109, 110 P.3d at 487.

Here, the State's change to the waiver language contained in NRS 174.063 is a substantial change and violates both the plain language as well as the legislative intent of the statute. The language that the Legislature mandated when setting forth the waiver of rights specifically reserved a limited right to appeal to a defendant:

> By entering my plea of guilty or guilty but mentally ill, I understand that I have waived the following rights and privileges:
>
> . . .
>
> 6. The right to appeal the conviction, with the assistance of an attorney, either appointed or retained, ***unless the appeal is based upon reasonable constitutional, jurisdictional or other grounds that challenge the***

> ***legality of the proceedings*** and except as otherwise provided in subsection 3 of NRS 174.035.

NRS 174.063 (emphasis added).

Likewise, NRS 177.015(3) and (4) set forth a defendant's right to appeal:

> 3. The defendant only may appeal from a final judgment or verdict in a criminal case.
>
> 4. Except as otherwise provided in subsection 3 of NRS 174.035, the defendant in a criminal case shall not appeal a final judgment or verdict resulting from a plea of guilty, guilty but mentally ill or nolo contendere that the defendant entered into voluntarily and with a full understanding of the nature of the charge and the consequences of the plea, ***unless the appeal is based upon reasonable constitutional, jurisdictional or other grounds that challenge the legality of the proceedings.*** The appellate court of competent jurisdiction may establish procedures to require the defendant to make a preliminary showing of the propriety of the appeal.

(Emphasis added).

Compare the mandated language and the Legislature's clear intent to reserve a limited right to appeal to a defendant to the language that the State has inserted in the plea agreement herein:

> The right to appeal the conviction with the assistance of an attorney, either appointed or retained, unless specifically reserved in writing and agreed upon as provided in NRS 174.035(3). ***I understand this means I am***

> ***unconditionally waiving my right to a direct appeal of this conviction, including any challenge based upon reasonable constitutional, jurisdictional or other grounds that challenge the legality of the proceedings as stated in NRS 177.015(4).*** However, I remain free to challenge my conviction through other post-conviction remedies including a habeas corpus petition pursuant to NRS Chapter 34.

3 AA 530 (emphasis added).

This is not "substantial" compliance with the form required nor the intent of the Legislature. "When interpreting a statute, legislative intent is the controlling factor." *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011). Only when the statute lends itself to two or more reasonable interpretations can this Court look beyond the statute to determine legislative intent. *Id.* The rule of lenity requires any ambiguity in the criminal statutes to be construed in a defendant's favor. *Washington v. State*, 117 Nev. 735, 739, 30 P.3d 1134, 1136 (2001). Further, "[s]tatutes within a scheme and provisions within a statute must be interpreted harmoniously with one another in accordance with the general purpose of those statutes and should not be read to produce unreasonable or absurd results." *Id.*

Here, both NRS 174.063 and NRS 177.015(4) have provisions that deal directly with appeals from a guilty plea. The language in NRS 174.063 mirrors that set forth in NRS 177.015(4) and makes clear the Legislature's intent to reserve a limited right to appeal to a defendant who enters into a plea agreement with the State. Thus, the State's change to the language required by NRS 174.063 is substantial, violates the Legislature's clear intent as stated in the plain language of NRS 177.015(4) and, accordingly, this waiver cannot stand.

To the extent that "substantial" compliance with NRS 174.063 is an ambiguous term, the Legislative history indicates that NRS 174.063 was passed in order to cut down on the number of "frivolous appeals" which arose due to the practice of taking a defendant's plea without a written plea agreement while, at the same time, preserving a defendant's ability to contest constitutional and other issues. *See* Hearing on S.B. 549 before the Senate Committee on Judiciary, 68th Leg. (Nev., June 9, 1995) (summarizing statements of Noel Waters, District Attorney, Carson City and Ben Graham, Clark County Chief Deputy District Attorney).

The Legislature specifically discussed "repealing" the right to a direct appeal after a guilty plea, except where there were reasonable

constitutional, jurisdictional or other grounds or that the agreement was not entered into voluntarily or with a full understanding of the nature of the charge. *See* Hearing on S.B. 549 before the Senate Judiciary Comm., 68th Leg. (Nev., June 10, 1995) (summarizing statement of Clark County Chief Deputy District Attorney Ben Graham). The same testimony was made before the Assembly Committee on the Judiciary. *See* Hearing on S.B. 549 before the Assembly Judiciary Comm., 68th Leg (Nev., June 20, 1995) (summarizing statement of Clark County Chief Deputy District Attorney Ben Graham). Accordingly, the Legislative intent in passing NRS 174.063 was that a defendant retains the limited right to a direct appeal despite a plea of guilty and the State's waiver language used here nullifies the Legislative purpose. Further, this results in a miscarriage of justice – holding Mr. Abasta to the waiver of his right to appeal when his right to counsel was infringed upon due to his indigent status. *See* NRS 178.3975. Accordingly, any waiver of the right to appeal cannot stand.

B. The district court erred in sentencing Mr. Abasta by ordering him to pay an indigent defense civil assessment fee without considering his ability to pay

Mr. Abasta's state and federal constitutional rights to due process and assistance of counsel were violated because the District Court

assessed a fee to pay for the appointment of the public defender to represent him without establishing ability to pay. U.S. Const. amends. V, VI, XIV; Nevada Const. Art. I, Sec. 8; Art. IV, Sec. 21.

1. Mr. Abasta is indigent, counsel was appointed and the State has no standing to challenge that finding.

Due to this case involving multiple co-defendants, the Office of the Special Public Defender was appointed to represent Mr. Abasta, who was without means to hire his own attorney. *See* NRS 171.188, NRS 260.030, NRS 260.050**,** NRS 7.115, 3 AA 581. This appointment was between Mr. Abasta, the Office of the Special Public Defender and the district court, the purpose of which was the protection of Mr. Abasta's right to counsel under both the United States and Nevada constitutions.

In order to contest the issue of the finding of indigence and the appointment of counsel, the State must have standing, which has been defined as "a party's right to make a legal claim or seek judicial enforcement of a duty or right." *State ex rel. W. Va. Univ. Hosps - East, Inc. v. Hammer*, 866 S.E.2d 187, 195 (W. Va. 2021), *quoting Tabata v. charleston Area Med. Ctr., Inc.,* 759 S.E.2d 459, 463 (2014); *accord Carachure v. Scott*, 70 Cal. App. 5th, 16, 26-27 (Cal. Ct. App. 2021).

Because the issue involves Mr. Abasta's constitutional rights and the district court's determination of his indigent status, the State has no "duty or right" at issue and, accordingly, no standing to argue that Mr. Abasta or his family has sufficient funds to pay the ordered attorney's fees. Further, assuming for the sake of argument that the State had the necessary standing, the State made no attempt in the district court to challenge the finding that Mr. Abasta was indigent and, accordingly, they cannot now argue for the first time on appeal that Mr. Abasta has the ability to pay. *Emmons v. State*, 107 Nev. 53, 61, 807 P.2d 718, 723 (1991) (failure to raise an issue below bars consideration on appeal).

2. Whether a defendant can be ordered to pay for the services of the public defender must be based upon his ability to pay

Once a defendant's indigence has been established and he has requested the appointment of an attorney, such appointment must, pursuant to statute, be "without charge." *See* NRS 7.115, 171.188, 260.030, 260.050. At no time during this case did this initial determination change. *See* NRS 7.165. Further, while the district court has the discretion to assess fees against a defendant to pay for the services of his court appointed attorney, it is statutorily mandated that: "[t]he

court shall not order a defendant to make such payment unless the defendant is or will be able to do so" and that the district court, in making this determination, take into account a defendant's financial resources and the nature of the burden the payment will impose. *See* NRS 178.3975. This assessment is limited to the defendant's ability to pay – not the affluence of his family, friends or relatives.

While it is correct that Mr. Abasta did not object at the time of sentencing to the assessment of these fees, the requirement that the district court consider a defendant's financial resources *before* assessing the fees is statutorily mandated and "judges are presumed to know the law and to apply it in making their decisions." *Jones v. State*, 107 Nev. 632, 636, 817 P.2d 1179, 1181 (1991). Further, the determination of attorney's fees was made during the pronouncement of sentence – at a time when both parties had already been heard. Additionally, while Mr. Abasta was on notice of a potential fine, he was not notified of the potential for assessment of attorney's fees.

The fact that Mr. Abasta entered a plea to a charge that potentially carried a substantial fine does not indicate an ability to pay or an acquiescence to being assessed attorney's fees . As this Court indicated in

Taylor v State: "[O]nly those who actually become capable of repaying the State will ever be obliged to do so. Those who remain indigent or for whom repayment would work 'manifest hardship' are forever exempt from any obligation to pay." 111 Nev. 1253, 1259, 903 P.2d 805, 809 (1995) *overruled on other grounds by Gama v. State*, 112 Nev. 833, 836, 920 P.2d 1010, 1012-13 (1996) *(*quoting *Fuller v. Oregon*, 417 U.S. 40, 52-53 (1974)). In fact, during sentencing, the State acknowledged Mr. Abasta's inability to pay with regard to restitution, stating: "[w]hat my thoughts are is that Mr. Abasta is going to be spending the better part of his life, if not his whole life, in prison. And that it is very unlikely to be paid by him." 3 AA 572.

Mr. Abasta's prior employment history was sporadic and he spent well over a year in the Clark County Detention Center awaiting trial. PSI pg. 8. This delay was not Mr. Abasta's making. 2 AA 367-82, 396-98, 425-28; 3 AA 443-56, 470-87. During his lengthy pretrial incarceration, he had no opportunity to earn money and he did not have any ability to pay. Given these facts, the district court abused its discretion in assessing attorney's fees to Mr. Abasta as part of his sentence. As a result, Mr. Abasta's sentence must be reversed and remanded for re-sentencing.

IV. CONCLUSION

Mr. Eric Abasta is indigent and, having been appointed counsel as a result of his indigent status, the district court was obligated to assess his ability to pay before sentencing him to pay two hundred fifty dollars ($250.00) for attorney's fees. Mr. Abasta only waived his right to appeal his conviction, not other erroneous findings the district court made. The State has no standing to challenge Mr. Abasta's status as indigent, which never changed throughout the life of this case. Accordingly, the district court erred in assessing attorney's fees. Mr. Abasta's sentence must be reversed and remanded for re-sentencing.

DATED this 2nd day of May, 2022.

Respectfully submitted,

/s/ MELINDA E. SIMPKINS
By:_____
MELINDA E. SIMPKINS
State Bar No. 7911

CERTIFICATE OF COMPLIANCE

1. I hereby certify this brief does comply with the formatting requirements of NRAP 32(a)(4).

2. I hereby certify that this brief does comply with 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 Word Perfect Office 11 in 14 point font of the Century Schoolbook style.

3. I hereby certify that this brief does comply with the word limitation requirement of NRAP 32(a)(7)(A)(ii). The relevant portions of the brief are 3,327 words.

4. Finally, 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, in particular, 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 of the transcript or appendix where the matter relied on is to be found. I understand that I

may be subject to sanction in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 2nd day of May, 2022.

/s/ MELINDA E. SIMPKINS

_____

Melinda E. Simpkins
Nevada Bar No. 7911
Clark County
Special Public Defender's Office
330 S. Third Street Ste. 800
Las Vegas NV 89155

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 2nd day of May, 2022, a copy of the foregoing Reply Brief was served as follows:

BY ELECTRONIC FILING TO

District Attorney's Office
200 Lewis Ave., 3rd Floor
Las Vegas, NV 89155

Nevada Attorney General
100 N. Carson St.
Carson City NV 89701

/s/ MELINDA SIMPKINS

_____

MELINDA SIMPKINS