IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN JOHN MENTABERRY,

Appellant,

vs. CASE NO.83878

THE STATE OF NEVADA,

Respondent.

Appeal From The Fourth Judicial District Court
Of The State of Nevada
In And For The County Of Elko

RESPONDENT'S ANSWERING BRIEF TO PETITION FOR REVIEW

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STATEMENT OF ISSUES

I. Whether the case law in Jackson v. State, 133 Nev. 880 (2017), Sullivan v. State, 120 Nev. 537 (2004) and Lozada v. State, 110 Nev. 349 (1994) and the law in NRS 34 should be circumvented because the parties erroneously fully briefed the appeal as if this were the first opportunity to file a direct appeal due to the fact that the parties and the District Court were unaware that the filing of an amended or corrected judgment of conviction did not 'reset' a party's direct appeal timeline requirements. Put another way, should this matter be remanded to the District Court to go through the writ process, which was originally started correctly, but dismissed without prejudice because the parties thought incorrectly that the filing of the amended or corrected judgment of conviction reset the timeline for the filing of a direct appeal even though the original deadline to file a direct appeal had lapsed.

STATEMENT OF THE CASE

Mentaberry was convicted by a jury and a judgment of conviction was entered on June 19, 2020. AA Vol. 1 p. 5. Mentaberry filed a Petition for Writ of Habeas Corpus in the District Court on June 11, 2021, and then an Amended Petition on July 7, 2021, claiming that his trial counsel was ineffective for not filing a direct appeal. AA Vol. 1 p. 11. This was the only ground for the writ. Id.

Upon review of the case the parties and the District Court came to the realization that Mentaberry had received an illegal sentence by being granted probation. Petition for Rehearing Exhibit A p. 3-7. The District Court held a resentencing hearing and again handed down the exact same sentence except that this time the District Court did not grant Mentaberry probation. Petition for Review Exhibit A p. 33-40. On November 2, 2021 a "Corrected Judgment of Conviction" was filed in the District Court. AA Vol. 1 p. 40.

Neither the District Court nor the parties were aware of the Jackson v. State, 133 Nev. 880 (2017) or Sullivan v. State, 120 Nev. 537 (2004) cases and no discussion of these cases is in the record during either hearing. During the resentencing hearing the District Court contemplated the pending petition for writ of habeas corpus and dismissed it without prejudice thinking that Mentaberry could now appeal. Petition for Review Exhibit A, p. 40-41;

62-63. This was followed up by an order filed November 4, 2021 in the writ case. AA Vol. 1 p. 44.[1]

Still ignorant of the issues that the above Jackson and Sullivan cases raise, Mentaberry filed a direct appeal raising claims that according to him would have been the subject of his direct appeal had trial counsel filed a direct appeal after the original judgment of conviction was entered. The State, equally ignorant of the Jackson and Sullivan cases filed an answer to the appeal.

The Court of Appeals issued the Order of Affirmance without addressing the issues briefed by the parties citing Jackson and Sullivan. Undeterred, Mentaberry, instead of going back to the District Court to refile the writ that was dismissed without prejudice and take up the issues anew there, filed a Motion for Reconsideration in the Court of Appeals which was denied and now is asking this Court to review the briefs and determine the appeal on the issues presented therein without having to go back and start the writ process anew.

[1] The State would note that both the Petition for Writ of Habeas Corpus and the Order dismissing the Petition were not filed in the Criminal case and are not part of the record pursuant to NRAP 10, but because they were attached to the Appellant's Appendix and filed the State is referencing them here.

STATEMENT OF THE FACTS

The State takes issue with several of the statements by Mentaberry in his Petition for Review. First, Mentaberry claims that "Trial counsel failed to perfect a direct appeal." Petition for Review p. 5 ln. 6. This phrase seems to infer that trial counsel tried but failed to file the direct appeal as if he were late in filing or some other problem in filing occurred. There is nothing in the record to support such an inference so all that can be said of trial counsel at this point is that he did not file a direct appeal. His reasons for doing so would have to be fleshed out and decided at an evidentiary hearing.

Second, Mentaberry states that the "...parties and court concluded that the sentence was indeed illegal, and that appellant's petition had substantive merit..." Petition for Review p. 5 ln. 18-19. The first part is true, the second is not. This statement endorsing merit seems to infer that the State and the District Court both believed Mentaberry's claims in his petition. This could not be further from the truth. There is nowhere in the record where the State or the District Court expressed such claims. There would have been an evidentiary hearing to flesh out the issue of why no direct appeal was filed, but that doesn't mean that the claim has merit, not until a court hears all the facts, from the defendant and from the trial attorney, can any such

determination be made and to claim that the State and the District Court believed his petition had merit is misleading to this Court at the very least.

Third, Mentaberry later in the brief states that "the parties concurred that his petition had merit and that he had indeed been deprived of his direct appeal of the judgment of conviction, and he should not now be again deprived of his direct appeal by the courts." Petition for Review p. 7 ln. 12-14. There is no citation to the record in support of this assertion of concurrence by the State. The State does not agree with this characterization of its position regarding this matter. The only agreement or concurrence that existed was the fact that no direct appeal was filed, and the original sentence was illegal.

Fourth, Mentaberry states that, "His petition was timely from the original judgment of conviction, the parties concurred that it had merit and should be granted." Petition for Review p. 8 ln. 11-12. This is simply not true. As noted above, the State and the District Court were both under the erroneous belief that upon the corrected judgment being filed, the clock would reset allowing the defendant to file his direct appeal making the petition moot. Petition for Review Exhibit A, p. 40-41; 62-63. There was no concession on the issue of why the original trial attorney did not file a direct appeal, the matter simply never matured that far in the District Court

because of the erroneous belief by the parties and the court that the issue was moot upon the entry of the corrected judgment of conviction.

The great concern the State has in raising these points is that Mentaberry's assertions above may be read in such a way as to lead one to believe that the District Court and the State concurred that his petition had merit and further that the issues on appeal have merit and this is simply not true. The State and the District Court opined that the appellate issues, in their view, based on the evidence presented at trial would be relatively limited and weak. Petition for Review Exhibit A, p. 49-55; 60-62. The District Court, commenting on the evidence and issues for appeal, went so far as to say the following:

> "So no legal arguments on the instructions, against the instructions. No legal arguments on instructions that the Court did not give…very little pretrial litigation in this case. And as I recall, very little in the way of objections on and rulings on evidentiary issues that actually came up during the trial….So my assessment of this case is that the evidence was strong on the – on the dealing when it came to the count with which the defendant was convicted. The defendant testified and, frankly, I don't think he very much helped himself in the testimony…the nature and the quality of the evidence adduced at trial, the circumstances of the offense, the age of the victim, the defendant obviously was in the throes of his alcohol problem at that time. He drank too much and he was lewd with a child is what the evidence disclosed to me."

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Petition for Review Exhibit A, p. 60 lns. 19-22; p. 60 lns. 23 p. 61 ln. 1; p. 62 lns. 1 – 6; p. 61 lns. 9-14.

STANDARD OF REVIEW

Petitions for review are governed by Rule 40B and are subject to judicial discretion with the following three factors to be considered:

1 Whether the question presented is one of first impression of general statewide significance.

2 Whether the decision of the Court of Appeals conflicts with a prior decision of the Court of Appeals, the Supreme Court, or the United States Supreme Court; or

3 Whether the case involves fundamental issues of statewide public importance.

SUMMARY OF ARGUMENT

I. The Court of Appeals was correct. The appeal should have been limited to only the reasons behind the filing of the corrected judgment of conviction.

II. Mentaberry is not without recourse. Based on these facts, NRS 34.276 will not bar his re-filing of the petition for writ of habeas corpus in the District Court.

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ARGUMENT

I. The Court of Appeals was correct. The appeal should have been limited to only the reasons behind the filing of the corrected judgment of conviction.

In this case the judgment of conviction containing the illegal sentence was corrected and the only change that was made upon finding the error was that Mentaberry was not granted probation. Given these facts, and after finally reading Jackson and Sullivan, it is clear that the Court of Appeals was right. The issue here is not one of first impression as both Jackson and Sullivan speak to it already. The decision of the Court of Appeals does not conflict but rather follows the prior decisions. Finally, due to the strange nature that brought this case to this point, it is not of statewide importance. This is more embarrassing for the attorneys and the District Court than it is of statewide importance. The State does not understand why Mentaberry has persisted in seeking reconsideration from the Court of Appeals and now this Court's review.

II. Mentaberry is not without recourse.

Based on these facts, NRS 34.726 will not bar his re-filing of the petition for writ of habeas corpus and that process can proceed anew where it will no doubt start with an evidentiary hearing where trial counsel and

Mentaberry will testify about why no direct appeal was filed. The procedure to deal with this case is already in place and should be followed, beginning with the District Court first entertaining the writ regarding why no direct appeal was initially filed. It may well be that the issues presented change via the writ process and this Court or the Court of Appeals should allow the District Court to play its role first. Perhaps the issues will be refined or removed via that process. The fact that the District Court dismissed the writ without prejudice is clear evidence that there will be room for the writ in the District Court below, the State surely couldn't argue against good cause for the delay based on these facts. NRS 34.726(1).

After the initial hearing regarding why no direct appeal was originally filed and depending on the outcome of that initial hearing, Mentaberry would then be able to follow one of two paths which would significantly change an appellate court's involvement. If the petition were dismissed, then Mentaberry could file an appeal of the District Court's dismissal of the petition, but solely on that issue. If Mentaberry were to prevail on the petition then pursuant to Lozada v. State, 110 Nev. 349 (1994), Mentaberry would then be able to amend the petition and include all the arguments which are in his brief now. Id. Then depending on how that turns out, likely the case will be in front of an appellate court again but with the benefit of

possibly evidentiary hearings and the like, but at the very least with the input of the District Court who may make factual findings that will assist during appellate review.

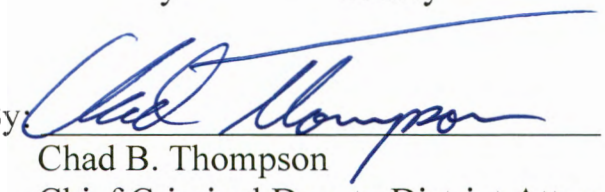
This is the proper procedure that should be pursued without affecting current precedent or making a special exception of Mentaberry. To circumvent this process would be to set aside precedent and reward the ignorance of counsel, which ought not to be encouraged. Rather, the State and Mentaberry should be ushered to the door, and with hats in hand they should bid their farewells to the appellate courts, begging their pardon, and head back to the District Court to go through this process properly via the petition for writ of habeas corpus.

CONCLUSION

The petition for review should be denied.

RESPECTFULLY SUBMITTED this 1 day of February 2023.

TYLER J. INGRAM
Elko County District Attorney

By: 
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CERTIFICATE OF COMPLIANCE

I hereby certify that this Respondent's Answering 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). This Respondent's Answering Brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007, in size 14-point Times New Roman font.

I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the Respondent's Answering Brief exempted by NRAP32(a)(7)(C), because it contains 2,116 words.

I hereby certify that I have read the Respondent's Answering 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), which requires every assertion in the brief regarding

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matters in the record to be supported by appropriate references to the record on appeal. 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.

DATED this 1 day of February, 2023.

TYLER J. INGRAM
Elko County District Attorney

By: _____
Chad B. Thompson
Chief Criminal Deputy District Attorney
State Bar Number: 10248

CERTIFICATE OF SERVICE

I certify that this document was filed electronically with the Nevada Supreme Court on the 18 day of February, 2023. Electronic Service of the Respondent's Answering Brief to Petition For Review shall be made in accordance with the Master Service List as follows:

Honorable Aaron D. Ford
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