IN THE SUPREME COURT OF THE STATE OF NEVADA

SEAN RODNEY ORTH,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 85229

RESPONDENT'S ANSWERING BRIEF

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

C. BENJAMIN SCROGGINS, ESQ.
Nevada Bar #007902
The Law Firm of
C. Benjamin Scroggins, CHTD.
629 South Casino Center Boulevard
Las Vegas, Nevada 89101
(702) 3285550

Counsel for Appellant

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

AARON D. FORD
Nevada Attorney General
Nevada Bar #007704
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

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ROUTING STATEMENT

This appeal is presumptively assigned to the Nevada Court of Appeals as it involves a challenge to a Judgment of Conviction based on a plea of guilty. NRAP 17(b)(1).

STATEMENT OF THE ISSUES

1. Whether both of Appellant's issues on appeal are waived.
2. Whether the district court did not err in denying Appellant's Motion to Withdraw Plea of Guilty and Motion to Dismiss Charges as Violative of Brown v. Ohio, 432 U.S. 161 (1977).
3. Whether Appellant's conviction for a violation of NRS 484B.550 violates due process because Appellant was previously convicted of a lesser included charge under NRS 199.280 for allegedly the exact same conduct.
4. Whether the justice court and district court abused their discretion when a continuance of the preliminary hearing was granted over Appellant's objection and when the State allegedly failed to demonstrate good cause.

STATEMENT OF THE CASE

On November 4, 2020, Appellant Sean Rodney Orth (hereinafter "Appellant") was charged by way of Criminal Complaint with one count of Ownership or Possession of Firearm By Prohibited Person (Category B Felony - NRS 202.360 - NOC 51460). I Appellant's Appendix (hereinafter "AA") 12.

On November 5, 2020, at Appellant's initial arraignment in justice court, Appellant requested to represent himself with the public defender appointed as standby counsel. I AA 16. A Faretta canvas was conducted and Appellant's request was granted. I AA 16.

On November 17, 2020, the State filed an Amended Criminal Complaint adding one count of Stop Required on Signal of Police Officer (Category B Felony - NRS 484B.550.3b - NOC 53833). I AA 23.

The preliminary hearing was scheduled for November 17, 2020. I AA 25. On November 17, 2020, the State also filed a Motion to Continue the preliminary hearing because both Detectives D. Ozawa and K. Lapeer were unavailable. I AA 43. The justice court granted the State's Motion to Continue the preliminary hearing. I AA 25.

On December 9, 2020, on the date set for the continued preliminary hearing, the State filed a Second Amended Criminal Complaint. I AA 228. The justice court denied Appellant's Motion to Dismiss based on the State's Motion to Continue the

preliminary hearing. I AA 98. The preliminary hearing also proceeded on that date, and Detectives Alex Nelson, Kevin Lapeer, and Karl Lippisch testified. I AA 83. At the conclusion of the preliminary hearing, the justice court found that the State presented sufficient evidence to establish probable cause as to both the charges of Ownership or Possession of Firearm By Prohibited Person (Category B Felony - NRS 202.360 - NOC 51460) and Stop Required on Signal of Police Officer (Category B Felony - NRS 484B.550.3b - NOC 53833). I AA 145.

On February 3, 2021, Appellant filed a pretrial Amended Petition for Writ of Habeas Corpus. II AA 362. On February 19, 2021, the State filed the its Return to Writ of Habeas Corpus. II AA 420. On March 29, 2021, Appellant filed a Response to the State's Return. III AA 455. On April 20, 2021, Appellant filed a Supplemental Petition for Writ of Habeas Corpus. III AA 476. On May 10 and 11, 2021, the State filed Returns. III AA 586, 599. On June 1, 2021, Appellant's Petition was denied. III AA 609.

On September 13, 2021, Appellant filed a Motion to Dismiss Charges or in the Alternative Motion for Order of the Court. IV AA 637. On September 21, 2021, Appellant filed a Motion to Dismiss Charges for Violation to the Double Jeopardy Clauses of the Constitution of Nevada and the United States (V AA 849), a Motion to Suppress Evidence Obtained in Violation of U.S. Const. Amends IV and XIV and Nev. Const. Art. 1 & 18 and Request for Evidentiary Hearing (VI AA 915), and a

Petition for Writ of Habeas Corpus (V AA 871). On October 1, 2021, the State filed Oppositions to all three (3) Motions (VII AA 1136; VII AA 1142; VII AA 1154) and a Response to the Petition for Writ of Habeas Corpus. VII AA 1148. On October 12, 2021, the district court denied all three (3) Motions and the Petition. VII AA 1165.

At calendar call on October 19, 2021, Appellant indicated he wanted to plead guilty. VII AA 1202. On November 4, 2021, an Amended Information and Guilty Plea Agreement (hereinafter "GPA") was filed and Appellant pled guilty to Stop Required on Signal of Police Officer (Category B Felony - NRS 484B.550.3b - NOC 53833). VII AA 1225. The terms of the GPA were as follows:

> Both parties stipulate to twelve (12) to thirty (30) months to run consecutive to CR05-1459 with zero (0) days credit for time served. The negotiations are contingent upon the Court following the stipulated sentence. The State will not oppose the Defendant's request to withdraw plea if the Court is not inclined to follow the stipulated sentence. All remaining counts contained in the Criminal Complaint which were bound over to District Court shall be dismissed when Defendant is adjudged guilty and sentenced.

VII AA 1217.

After sentencing had been re-scheduled numerous times, on February 14, 2022, Appellant indicated he filed a Writ of Mandamus with the Nevada Supreme Court and wanted to withdraw his plea. VIII AA 1770. On March 9, 2022, Appellant filed a Motion to Withdraw Plea of Guilty and Motion to Dismiss Charges as Violative of Brown v. Ohio, 432 U.S. 161 (1977). VIII AA 1778. The State's

Opposition to Appellant's Motion to Withdraw Plea of Guilty and Motion to Dismiss Charges was filed on March 16, 2022. [1]Appellant filed a Reply on April 2, 2022. VIII AA 1856. On April 21, 2022, the district court denied Appellant's Motion to Withdraw Plea of Guilty and Motion to Dismiss Charges. [2]

On June 1, 2022, Appellant filed another Motion to Dismiss Charges. IX AA 1900. The State's Response was filed on June 23, 2022. [3]Appellant filed a Reply on July 29, 2022. IX AA 1928.

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[1] Appellant has the "responsibility to provide the materials necessary for this court's review." Jacobs v. State, 91 Nev. 155, 158, 532 P.2d 1034, 1036 (1975). Under NRAP 30(d), the required appendix should include "[c]opies of relevant and necessary exhibits." See also Thomas v. State, 120 Nev. 37, 43 & n. 4, 83 P.3d 818, 822 & n. 4 (2004) ("Appellant has the ultimate responsibility to provide this court with 'portions of the record essential to determination of issues raised in appellant's appeal.' " (quoting NRAP 30(b)(3)); Fields v. State, 125 Nev. 785, 220 P.3d 709 (2009) (appellant's burden to provide complete record on appeal). "When an appellant fails to include necessary documentation in the record, we necessarily presume that the missing portion supports the district court's decision." Cuzze v. Univ. & Cmty. Coll. Sys. of Nevada, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007).

[2] The State was unable to locate either the State's Opposition filed on March 16, 2022 or the district's court's April 21, 2022 Minute Order denying Appellant's Motion to Withdraw Plea of Guilty and Motion to Dismiss Charges, and neither is listed in the Index of Appellant's thirteen (13) volume Appendix. With all of the numerous sub-parts filed, Appellant's Appendix actually totals thirty (30) volumes, which were not timely filed with Appellant's Opening Brief filed on August 15, 2023. Appellant was still filing additional volumes as late as August 31, 2023.

[3] The State was unable to locate the State's Response to Appellant's Motion to Dismiss Charges filed on June 23, 2022, and is it not listed in the Index of Appellant's thirteen (13) volume Appendix.

On August 1, 2022, the district court denied Appellant's Motion to Dismiss Charges and sentenced Appellant in accordance with the exact terms of the GPA to a minimum of twelve (12) months and a maximum of thirty (30) months in the Nevada Department of Corrections (hereinafter "NDOC"), concurrent with Appellant's Parole Case No. CR051459 with zero (0) days credit for time served. [4]

The Judgment of Conviction was filed on August 8, 2022. IX AA 2058.

On August 22, 2022, Appellant filed a Notice of Appeal in district court. [5]

STATEMENT OF FACTS

On October 28, 2020 at approximately 7:11 a.m., Henderson Police Officer Alex Nelson ("Officer Nelson") responded to 981 Whitney Ranch Drive, in reference to a call about a subject in possession of a firearm and a potential robbery that had occurred the night before. I AA 120-121. When Officer Nelson arrived, other officers inside the complex advised that they had eyes on a vehicle which was failing to yield to them. I AA 123. Officer Nelson could hear sirens activated in the background. I AA 123.

[4] The State was unable to locate the transcript of Appellant's actual sentencing by the district court on August 1, 2022, and is it not listed in the Index of Appellant's thirteen (13) volume Appendix.

[5] The State was unable to locate Appellant's Notice of Appeal filed on August 22, 2022, and it is not listed in the Index of Appellant's thirteen (13) volume Appendix.

Officer Nelson positioned his patrol vehicle in front of the exit and entrance gate of the complex, to block the path of the vehicle. I AA 124. Eventually, Officer Nelson noticed a Chevy Malibu heading in his direction. I AA 124. He observed the vehicle make a left turn and accelerate at a high rate of speed toward his location. I AA 124. Following directly behind the vehicle were two (2) clearly identifiable police vehicles with their red and blue lights and sirens activated. I AA 124-125. When the vehicle started accelerating toward his direction, Officer Nelson had to run away from his patrol vehicle to the side of the gate so he would not be injured. I AA 125-126. The vehicle accelerated after the turn and was picking up speed in such a way that made Officer Nelson concerned enough to get out of the way. I AA 141. Officer Nelson was concerned that the vehicle might cause injury to property or someone in the area. I AA 141.

Then Officer Nelson observed Appellant exit the driver's seat. I AA 126. The vehicle continued to move forward until it hit the gate, as it appeared the vehicle had not been placed in park. I AA 126. Officer Nelson positively identified Appellant as the driver of the vehicle. I AA 127. The officers who were pursuing Appellant exited their vehicles and issued commands for Appellant to stop. I AA 127. Officer Nelson recognized the officers as Officer Hehn, Officer Brink, and Officer Duffy. I AA 128. Officer Nelson observed Appellant place a brown duffle bag on top of a wall that separated the apartment complex and the street and then observed

Appellant jump over that wall with the bag. I AA 128-129. A foot pursuit was initiated, and Officer Nelson ran toward Appellant. I AA 129. Appellant continued to run as Officers Mangan, Scoble and Hennebuel were issuing him commands to stop while Appellant continued to flee on foot. I AA 129. Once Officer Nelson got close enough to Appellant, he attempted to deploy his taser, which was ineffective. I AA 129. Officer Nelson lost his footing and fell onto the ground. I AA 131. As he got up, he noticed that another officer had Appellant on the ground and he assisted the other officer in taking Appellant into custody. I AA 131.

Henderson Police Department Detective Karl Lippisch ("Detective Lippisch") arrived on scene and contacted Appellant, who was sitting in the back of a patrol car. I AA 166. Initially, Appellant stated he did not want Detective Lippisch to read him his Miranda rights so that any statements he made would be inadmissible. I AA 166. After being told by Detective Lippisch that he would not speak to Appellant without reading him his Miranda rights, Appellant agreed to have his Miranda rights read to him. I AA 166. However, Appellant refused to have the interview recorded. I AA 167. Appellant stated that he initially believed the patrol cars were in the apartment complex for a different purpose. I AA 167-168. However, Appellant then realized they were attempting to stop him, but he refused to stop. I AA 168. Appellant admitted that he attempted to evade the officers and made the conscious decision to flee to attempt to get away. I AA 168. Appellant stated that he believed he was being

set up for something in the bag, but claimed he did not know the contents of the bag. I AA 168.

Ultimately, Detective Lippisch obtained a search warrant for the bag. I AA 171. He took the bag from the scene to the police station and secured it. I AA 172. Henderson Police Department Detective Kevin Lapeer ("Detective Lapeer") executed the search warrant on the bag. I AA 145. Inside the bag, he located a .20 gauge Winchester shotgun. I AA 147.

SUMMARY OF THE ARGUMENT

First, both of Appellant's issues on appeal are waived. Once Appellant pled guilty, he cannot raise legal or constitutional claims that occurred prior to the entry of his guilty plea.

Second, the district court did not err in denying Appellant's Motion to Withdraw Plea of Guilty and Motion to Dismiss Charges. Based on the clear terms of Appellant's GPA and Appellant's affirmations during thorough plea canvass, it is apparent from the record that Appellant's Waiver of Rights and guilty plea were intelligently, knowingly and voluntarily entered. The district court appropriately considered and weighed the totality of the circumstances and did not err in denying Appellant's Motion to Withdraw Plea of Guilty and Motion to Dismiss Charges.

Third, Appellant's conviction in this case for Felony Stop Required on Signal of Police Officer did not violate the double jeopardy clause because Appellant was

previously convicted of Misdemeanor Resisting a Public Officer. The charge of Stop Required on Signal of Police Officer arose out of different conduct than the actions forming the basis of the Resisting a Public Officer charge. The justice court properly found that the offenses of Stop Required on Signal of Police Officer and Resisting a Public Officer as charged by the State had different factual allegations to sustain the charges and that they were two (2) separate and distinct crimes. Appellant's conduct of attempting to flee from Officers Duffy, Brink and Hehn while driving his vehicle was separate and distinct from disobeying commands to stop by Officer Mangan and fleeing on foot from Officer Mangan.

Fourth, the justice court did not abuse its discretion in granting the State's Motion to Continue the preliminary hearing, and the district court did not abuse its discretion in denying Appellant's Motion to Dismiss on that basis. The State properly demonstrated good cause for the continuance. Either Detective Ozawa or Lapeer were necessary to the State's case for the preliminary hearing. Detectives Ozawa and Lapeer searched the bag in question that contained the firearm which formed the basis of the Possession of a Firearm by Prohibited Person charge. The record establishes that Detective Ozawa was out of town on vacation on the date of the preliminary hearing. This was a valid basis and constituted good cause for a continuance of the preliminary hearing.

ARGUMENT

I. BOTH OF APPELLANT'S ISSUES ON APPEAL ARE WAIVED

First, by pleading guilty, Appellant waived the right to challenge any legal or constitutional issues related to his charges and the continuance of his preliminary hearing. A defendant cannot enter a guilty plea then later raise independent claims alleging a deprivation of his rights before entry of the plea. State v. Eighth Judicial District Court, 121 Nev. 225, 112 P.3d 1070, n.24 (2005) (quoting Tollet v. Henderson, 411 U.S. 258, 267 (1973). Generally, the entry of a guilty plea waives any right to appeal from events occurring prior to the entry of the plea. See Webb v. State, 91 Nev. 469, 538 P.2d 164 (1975). '"[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. . . . [A defendant] may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.'" Id. (quoting Tollett, 411 U.S. at 267).

In the instant appeal, Appellant is raising two (2) issues that he has raised repeatedly since his preliminary hearing in justice court and which have consistently been denied by several lower courts. Once Appellant pled guilty, he cannot raise legal or constitutional claims that occurred prior to the entry of his guilty plea. Any alleged issues with his charges and preliminary hearing occurred well before the

filing of his GPA and his entry of plea in this case. Therefore, both issues on appeal should be summarily denied by this Court.

II. APPELLANT'S MOTION TO WITHDRAW PLEA OF GUILTY AND MOTION TO DISMISS CHARGES WERE PROPERLY DENIED

If Appellant is attempting to appeal the denial of his March 9, 2022 Motion to Withdraw Plea of Guilty and Motion to Dismiss Charges denied on April 21, 2022, or his June 1, 2022 Motion to Dismiss Charges denied on August 1, 2022, the State's response now follows.

A. Standard of Review

In reviewing a district court's ruling on a pre-sentence motion to withdraw a plea, "'this Court will presume that the lower court correctly assessed the validity of the plea and will not reverse absent a clear showing of an abuse of discretion.'" Riker v. State, 111 Nev. 1316, 1322, 905 P.2d 706, 710 (1995) (quoting Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986)); Mitchell v. State, 109 Nev. 137, 138, 848 P.2d 1060, 1060 (1993). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). To show that the district court abused its discretion, the defendant has the burden of proving that the district court failed to consider the totality of the circumstances when determining whether the defendant knowingly and intelligently entered the plea. Stevenson v.

State, 131 Nev. 598, 603, 354 P.3d 1277, 1281 (2015); Crawford v. State, 117 Nev. 718, 721-22, 30 P.3d 1123, 1125-26 (2001). This Court must give deference to the factual findings made by the district court in the course of a motion to withdraw a guilty plea as long as they are supported by the record. Little v. Warden, 117 Nev. 845, 854, 34 Pd. 3d 540, 546 (2001).

When a defendant moves to withdraw a plea before sentencing, the district court must examine the totality of the circumstances to determine whether the plea was valid, and consider whether the defendant has any fair and just reason to withdraw their plea. NRS 176.165; State v. Second Judicial Dist. Court (Bernardelli), 85 Nev. 381, 385, 455 P.2d 923, 926 (1969); Bryant, 102 Nev. at 271, 721 P.2d at 367; Stevenson, 131 Nev. at 599-600, 354 P.3d at 1278. A plea of guilty is presumptively valid, particularly where it is entered into on the advice of counsel. Jezierski v. State, 107 Nev. 395, 397, 812 P.2d 355, 356 (1991). The defendant has the burden of proving that the plea was not entered knowingly or voluntarily. Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); Wynn v. State, 96 Nev. 673, 615 P.2d 946 (1980); Housewright v. Powell, 101 Nev. 147, 710 P.2d 73 (1985).

In determining whether a guilty plea is knowingly and voluntarily entered, the court will review the totality of the circumstances surrounding the defendant's plea. Bryant, 102 Nev. at 271, 721 P.2d at 367. “A district court may not simply review the plea canvass in a vacuum.” Mitchel, 109 Nev. at141, 848 P.2d at 1062. While a

more lenient standard applies pre-sentence motions to withdraw a guilty plea, Molina v. State, 120 Nev. 185, 191, 87 P.3d 533, 537 (2004); a defendant has no right to withdraw his plea merely because the State failed to establish actual prejudice. See Hubbard v. State, 110 Nev. 671, 675-76, 877 P.2d 519, 521 (1994).

The proper standard set forth in Bryant requires the trial court to personally address a defendant at the time he enters his plea in order to determine whether he understands the nature of the charges to which he is pleading. Id. at 271; State v. Freese, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000). The guidelines for voluntariness of guilty pleas "do not require the articulation of talismanic phrases." Heffley v. Warden, 89 Nev. 573, 575, 516 P.2d 1403, 1404 (1973). It requires only "that the record affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily." Brady v. United States, 397 U.S. 742, 747-748, 90 S.Ct. 1463, 1470 (1970); United States v. Sherman, 474 F.2d 303 (9th Cir. 1973).

Specifically, the record must affirmatively show the following: 1) the defendant knowingly waived his privilege against self-incrimination, the right to trial by jury, and the right to confront his accusers; 2) the plea was voluntary, was not coerced, and was not the result of a promise of leniency; 3) the defendant understood the consequences of his plea and the range of punishment; and 4) the defendant understood the nature of the charge, i.e., the elements of the crime. Higby

v. Sheriff, 86 Nev. 774, 781, 476 P.2d 950, 963 (1970). Importantly, "the record must affirmatively disclose that a defendant is entering his plea understandingly and voluntarily." Brady v. United States, 397 U.S. 742, 747-748, 90 S.Ct. 1463, 1470 (1970). Consequently, in applying the "totality of circumstances" test, the most significant factors for review include the plea canvass and the written guilty plea agreement. See Hudson v. Warden, 117 Nev. 387, 399, 22 P.3d 1154, 1162 (2001).

When the Nevada Supreme Court decided Stevenson v. State, it explained that district courts must consider the totality of the circumstances to determine whether permitting withdrawal of a guilty plea before sentencing would be fair and just. Stevenson v. State, 131 Nev. 598, 354 P.3d 1277 (2015). In doing so, the Court explained that Crawford v. State's, 117 Nev. 718, 30 P.3d 1123 (2001), holding is more narrow than contemplated by NRS 176.165 and disavowed an analysis focused solely upon whether the plea was knowing, voluntary, and intelligent in determining the validity of the plea. However, the Court in Stevenson also held that the appellant had failed to present a fair and just reason favoring withdrawal of his plea, and therefore affirmed his judgment of conviction. Stevenson, 131 Nev at 603, 354 P.3d at 1281.

In Stevenson, the Nevada Supreme Court found that none of the reasons presented warranted the withdrawal of Stevenson's guilty plea, including allegations that the members of his defense team lied about the existence of the video in order

to induce him to plead guilty. Id. The Court found similarly unconvincing Stevenson's contention that he was coerced into pleading guilty based on the compounded pressures of the district court's evidentiary ruling, standby counsel's pressure to negotiate a plea, and time constraints. Id. As the Court noted, undue coercion occurs when a defendant is induced by promises or threats which deprive the plea of the nature of a voluntary act. Id. (quoting Doe v. Woodford, 508 F. 3d 563, 570 (9th Cir. 2007)). Time constraints and pressure exist in every criminal case, are hallmarks of pretrial discussions, and do not individually or in the aggregate make a plea involuntary. Id. at 605, 354 P.3d at 1281 (quoting Miles v. Dorsey, 61 F.3d 1459, 1470 (10th Cir. 1995)). Instead, the key inquiry for determining the validity of a plea is "'whether the plea itself was a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" Id. at 604-05, 354 P.3d at 1281 (quoting Doe, 508 F. 3d at 570).

The Nevada Supreme Court also rejected Stevenson's implied contention that withdrawal was warranted because he made an impulsive decision to plead guilty without knowing definitively whether the video could be viewed. Id. at 604-05, 354 P.3d at 1281. The Court made clear that one of the goals of the fair and just analysis is to allow a hastily entered plea made with unsure heart and confused mind to be undone, not to allow a defendant to make a tactical decision to enter a plea, wait several weeks, and then obtain a withdrawal if he believes that he made a bad choice

in pleading guilty. Id. at 604-05, 354 P.3d at 1281-82 (quoting United States v. Alexander, 948 F.2d 1002, 1004 (6th Cir. 1991)). After considering the totality of the circumstances, the Court found no difficulty in concluding that Stevenson failed to present a sufficient reason to permit withdrawal of his plea. Id. at 605, 354 P.3d at 1282. Permitting him to withdraw his plea under the circumstances would allow the solemn entry of a guilty plea to become a mere gesture, a temporary and meaningless formality reversible at the defendant's whim, which the Court cannot allow. Id. (quoting United States v. Barker, 514 F. 2d 208, 222 (D.C. Cir. 1975)).

B. Appellant Intelligently, Knowingly and Voluntarily Pled Guilty

Appellant knowingly, intelligently and voluntarily signed his GPA filed on November 4, 2021, and in doing so, he affirmed that he understood the nature and consequences of pleading guilty. First, Appellant acknowledged that he was waiving his constitutional rights related to his right to proceed to a jury trial:

WAIVER OF RIGHTS

> By entering my plea of guilty, I understand that *I am waiving and forever giving up the following rights* and privileges:
>
> 1. The constitutional privilege against self-incrimination, including the right to refuse to testify at trial, in which event the prosecution would not be allowed to comment to the jury about my refusal to testify.
>
> 2. The constitutional right to a speedy and public trial by an impartial jury, free of excessive pretrial publicity prejudicial to the defense, at which trial I would be entitled to the assistance of an attorney, either appointed or retained. At trial the State would

bear the burden of proving beyond a reasonable doubt each element of the offense(s) charged.

3. The constitutional right to confront and cross-examine any witnesses who would testify against me.

4. The constitutional right to subpoena witnesses to testify on my behalf.

5. The constitutional right to testify in my own defense.

6. 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.

VII AA 1220 (emphasis added).

The section of the GPA entitled "Voluntariness of Plea" further delineates the following statements that Appellant affirmed as true and accurate:

VOLUNTARINESS OF PLEA

I have discussed the elements of all of the original charge(s) against me with my attorney and I understand the nature of the charge(s) against me.

I understand that the State would have to prove each element of the charge(s) against me at trial.

I have discussed with my attorney any possible defenses, defense strategies and circumstances which might be in my favor.

All of the foregoing elements, consequences, rights, and waiver of rights have been thoroughly explained to me by my attorney.

I believe that pleading guilty and accepting this plea bargain is in my best interest, and that a trial would be contrary to my best interest.

I am signing this agreement voluntarily, after consultation with my attorney, and I am not acting under duress or coercion or by virtue of any promises of leniency, except for those set forth in this agreement.

I am not now under the influence of any intoxicating liquor, a controlled substance or other drug which would in any manner impair my ability to comprehend or understand this agreement or the proceedings surrounding my entry of this plea.

My attorney has answered all my questions regarding this guilty plea agreement and its consequences to my satisfaction and I am satisfied with the services provided by my attorney.

VII AA 1221 (emphasis added).

Appellant's standby counsel also executed a "Certificate of Counsel" as an officer of the court affirming the following:

CERTIFICATE OF COUNSEL

I, the undersigned, as the attorney for the Defendant named herein and as an officer of the court hereby certify that:

1. I have fully explained to the Defendant the allegations contained in the charge(s) to which guilty pleas are being entered.

2. I have advised the Defendant of the penalties for each charge and the restitution that the Defendant may be ordered to pay.

3. I have inquired of Defendant facts concerning Defendant's immigration status and explained to Defendant that if Defendant is not a United States citizen any criminal conviction will most

likely result in serious negative immigration consequences including but not limited to:

a. The removal from the United States through deportation;

b. An inability to reenter the United States;

c. The inability to gain United States citizenship or legal residency;

d. An inability to renew and/or retain any legal residency status; and/or

e. An indeterminate term of confinement, by with United States Federal Government based on the conviction and immigration status.

Moreover, I have explained that regardless of what Defendant may have been told by any attorney, no one can promise Defendant that this conviction will not result in negative immigration consequences and/or impact Defendant's ability to become a United States citizen and/or legal resident.

4. All pleas of guilty offered by the Defendant pursuant to this agreement are consistent with the facts known to me and are made with my advice to the Defendant.

5. To the best of my knowledge and belief, the Defendant:

a. Is competent and understands the charges and the consequences of pleading guilty as provided in this agreement,

b. Executed this agreement and will enter all guilty pleas pursuant hereto voluntarily, and

c. Was not under the influence of intoxicating liquor, a controlled substance or other drug at the time I consulted with the Defendant as certified in paragraphs 1 and 2 above.

VII AA 1222.

Additionally, the district court thoroughly canvassed Appellant when he entered his guilty plea:

THE COURT: Number or page 13, please. State of Nevada versus Sean Rodney Orth, C352701.

THE DEFENDANT: Good morning, Your Honor.

THE COURT: Good morning, sir. All right.

MS. GASTON: Good morning, Your Honor, Kara Gaston. I'm standby counsel for Mr. Orth. My secretary did file the Guilty Plea Agreement.

THE COURT: Yes.

MS. GASTON: The negotiation is that Mr. Orth will be pleading guilty to Count 2, the failure to stop, felony count. The parties would stipulate to a 12 to 30 sentence.

THE COURT: All right. Is that a correct statement of the negotiations, Ms. Mendoza?

MS. MENDOZA: Yes, with the additional caveat that he understands that it has to run consecutive to his parole case, which is named in the Guilty Plea Agreement. And he understands he will have zero days credit for time served.

THE COURT: All right. Sir, may I have your full name for the record.

THE DEFENDANT: Sean Rodney Orth.

THE COURT: How old are you?

THE DEFENDANT: 49.

THE COURT: How far did you go in school?

THE DEFENDANT: One year of college.

THE COURT: Do you read, write, and understand the English language?

THE DEFENDANT: I do.

THE COURT: Are you under the influence of any drug, alcoholic beverage, or medication today?

THE DEFENDANT: No.

THE COURT: Do you understand the proceedings that are happening here today?

THE DEFENDANT: Yes.

THE COURT: Have you received a copy of the Guilty Plea Agreement and Amended Information charging you with one count of stop required on the signal of a police officer, a category B felony.

THE DEFENDANT: Yes.

THE COURT: Do you understand that charge?

THE DEFENDANT: Yes.

THE COURT: Have you had the opportunity to discuss this case with your attorney?

THE DEFENDANT: I am the attorney in the case now, I'm representing pro se, so I have –

THE COURT: Oh, yeah, I apologize. I forgot that you are representing yourself. But have you had the opportunity to discuss with standby counsel any questions that you may have had?

THE DEFENDANT: We really haven't discussed the defenses or anything like that ma'am. She's just taking the -- she actually was ordered to basically not assist me a couple weeks ago. But other than that, I understand the defenses, etcetera, that are involved.

THE COURT: All right. Do you waive the formal reading of this charge into the record right now?

THE DEFENDANT: I do, ma'am.

THE COURT: As to the charge set forth in the Guilty Plea Agreement and Amended Information, one Count of stop required on the signal of

a police officer, a category B felony, how do you plead guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: Are you making this plea freely and voluntarily?

THE DEFENDANT: I do.

THE COURT: Has anyone forced or threatened you or forced or threatened anyone close to you to get you to enter this plea?

THE DEFENDANT: They have not.

THE COURT: Has anyone made you any promises other than what's contained in this document to get you to enter into this plea?

THE DEFENDANT: Only what's contained in the document.

THE COURT: Okay. Now I am looking at the document and it looks like on page 5 of the Guilty Plea Agreement dated November 4th of 2021, above the signature line Sean Rodney Orth, Defendant, is a signature on your behalf by your standby attorney because of Covid-19. Did you give permission to your standby attorney to sign this paper on your behalf?

THE DEFENDANT: You said on which page now? I'm sorry, page 5?

THE COURT: Page 5, yeah. In order to sign the Guilty Plea Agreement she had to sign it on your behalf because of Covid-19.

THE DEFENDANT: Oh, yes. Yes, ma'am.

THE COURT: All right.

THE DEFENDANT: I did concede.

THE COURT: Did you make that decision freely and voluntarily?

THE DEFENDANT: I did.

THE COURT: Do you understand that her signing that document on your behalf because of Covid-19 at your direction and request, it has the same legal effects and consequences as if you had signed the document yourself?

THE DEFENDANT: I do.

THE COURT: Therefore you can't come back later and try to get out of these negotiations claiming that's not your signature.

THE DEFENDANT: Agreed.

THE COURT: All right. Now before you asked your standby counsel to sign the document on your behalf, did you have the opportunity to go through these documents fully and completely?

THE DEFENDANT: To the extent of the plea agreement, yes, ma'am.

THE COURT: Yeah, that's what I'm talking about, --

THE DEFENDANT: Yes, ma'am.

THE COURT: -- the Guilty Plea Agreement. Okay. Do you understand everything contained in these documents including the constitutional and appellate rights you'll be giving up by entering into these negotiations?

THE DEFENDANT: I do, Your Honor.

THE COURT: Are you a United States citizen?

THE DEFENDANT: I am, Your Honor.

THE COURT: All right. Now it looks like the parties stipulated to a period of 12 to 30 months in the Nevada Department of Corrections. And if the Court is not inclined to follow this stipulating sentence the State is not going to oppose you withdrawing your plea. Is that your understanding?

THE DEFENDANT: Yes, ma'am.

THE COURT: All right. Are you pleading guilty because in truth and in fact or about the third day of November 2020, within the County of Clark, State of Nevada, you did then and there while driving a motor vehicle in the area of 981 Whitney Ranch, Clark County, Nevada, willfully, unlawfully, and feloniously fail or refuse to bring to a said vehicle of a stop, or otherwise flee or attempt to elude a peace officer in a readily identifiable vehicle of any police department or regulatory agency, specifically HPD Officers P. Duffy and/or B. Brink and/or J. Hehn, after being given a signal to bring the vehicle to a stop. And you did operate said motor vehicle in a manner which endangered or was likely to endanger any person other than yourself or the property of any person other than yourself.

THE DEFENDANT: I did, Your Honor.

THE COURT: All right. Do you have any questions, sir, that you'd like to ask before I go ahead and accept your plea?

THE DEFENDANT: Yes, ma'am. Is it possible, because it's conditional plea agreement that I be sentenced today? Is that possible?

THE COURT: Um.

THE DEFENDANT: I've been in the [Indiscernible] Department of Corrections and within their care and custody for the last 15 years without any other conditions. So I'm hoping that today maybe we can resolve this entirely and I could be sentenced, because I'm going to the revocation board on the 9th to deal with this and accept my punishment there. And I'd appreciate it if the Court is advised if we could just resolve this now.

THE COURT: Sorry, sir. No, we can't do that today. I don't have a PSI or anything in which to look at these negotiations or the deal, so I won't be able to do that. The Court finds that the Defendant's plea of guilty is freely and voluntarily made and that he understands the nature of the offense and he consequences of his plea and therefore accepts his plea of guilty. This matter will be referred to the Department of Parole and Probation for a PSI with an in-custody date please.

VII AA 1225-1232 (emphasis added).

Based on the clear terms of Appellant's GPA and Appellant's affirmations during his thorough plea canvass, it is apparent from the record that Appellant's Waiver of Rights and guilty plea were intelligently, knowingly and voluntarily entered. In his GPA, Appellant attested that he was freely and voluntarily pleading guilty and that he was not acting under duress or coercion or as a result of any promises of leniency, except those specifically contained within the GPA. VII AA 1221. During his plea canvass, Appellant advised the district court that he understood the charge of Stop Required on Signal of Police Officer including all of the elements of that offense, and that he was guilty of that charge. VII AA 1227, 1230-1231. As Appellant's claims are belied by the specific terms of his GPA as well as the transcript of his entry of plea, the record affirmatively demonstrates that Appellant intelligently, knowingly and voluntarily entered his guilty plea.

The State would also note that this was a conditional plea and Appellant was sentenced by the district court in accordance with the exact terms of the GPA to the same sentence agreed to by the State and Appellant. Consequently, Appellant failed to show a "fair and just" reason to allow for the withdrawal of his plea as referenced in Stevenson v. State, 131 Nev. 598, 354 P.3d 1277 (2015). Accordingly, the district court appropriately considered and weighed the totality of the circumstances and did not err in denying Appellant's Motion to Withdraw Plea of Guilty and Motion to Dismiss Charges.

III. APPELLANT'S CONVICTION DOES NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE

Appellant claims that the charge of Stop Required on Signal of Police Officer was precluded by Appellant's prior conviction for Resisting Public Officer because the latter charge is a lesser included offense of the former and both charges were predicated on the identical facts. Appellant's Opening Brief (hereinafter "AOB") 7.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, applicable to Nevada citizens via the Fourteenth Amendment to the United States Constitution, provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." This protection is additionally guaranteed by the Nevada Constitution. Nev. Const. art. 1, § 8.

Under the strict application of Blockburger, an offense is lesser included only where the defendant, in committing the greater offense, has also committed the lesser offense. See Barton v. State, 117 Nev. 686, 692, 30 P.3d 1103, 1107 (2001), overruled on other grounds by Rosas v. State, 122 Nev. 1258, 1269, 147 P.3d 1101, 1109 (2006); McIntosh v. State, 113 Nev. 224, 226, 932 P.2d 1072, 1073 (1997) ("The general test for determining the existence of a lesser included offense is whether the offense in question cannot be committed without committing the lesser offense.")

Nevada's redundancy case law captures both "unit of prosecution' and alternative-offense challenges within its sweep." Jackson v. State, 128 Nev. 598,

612, 291 P.3d 1274, 1283 (2012). Additionally, Nevada has renounced its line of redundancy cases that advocate for a "same-based" conduct test for determining the legality of cumulative punishment. Id. at 611, 291 P.3d at 1282 (expressly disapproving the "same conduct" test in favor of analyzing legislative authorization and employing the Blockburger test).

An analysis under the Double Jeopardy Clause requires a Court to perform two-part test. Athey v. State, 106 Nev. 520, 523, 797 P.2d 956, 958 (1990) (*citing* Talancon v. State, 102 Nev. 294, 721 P.2d 764 (1986). The first step is to determine whether "there are two offenses or only one" Id. This step focuses on *whether "each provision requires proof of a fact which the other does not*." Talancon, 102 Nev. at 298, 721 P.2d at 766 (quoting Blockburger, 284 U.S. at 304, 52 S.Ct at 182. If the offense is found to be the same offense, then "double jeopardy will not be violated by separate sentences for those two offenses following a single trial, if it appears that the legislature intended separate punishments. Talancon, 102 Nev. at 301, 721 P.2d at 769.

Additionally, the Double Jeopardy Clause does not disallow the charging of lesser included offenses. The purpose of the Fifth Amendment guarantee against Double Jeopardy is to prevent against three scenarios: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. North Carolina v.

Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076 (1969) (footnotes omitted), overruled on other grounds by Alabama v. Smith, 490 U.S. 794, 802, 109 S.Ct. 2201, 2206 (1989); See also State v. Lomas, 114 Nev 313, 315, 955 P.2d 678, 679 (1998).

Appellant cites to Brown v. Ohio, 432 U.S. 161 (1977) in support of his claim. Pursuant to Brown v. Ohio, a defendant may not be convicted and sentenced to multiple charges where one constitutes a lesser offense of the other. Brown was arrested on December 8, 1973 driving a vehicle that had been stolen on November 29, 1973. Id. Brown was initially charged in one jurisdiction with Joyriding for driving the stolen vehicle on December 8, 1973. Id. Thereafter, Brown was charged in another jurisdiction with Joyriding and Auto Theft on November 29, 1973. Id. The second proceeding involved the same vehicle and theft as the first proceeding. Id. Brown was alleged to have stolen the vehicle on November 29, 1973 and was in possession of it until he was arrested on December 8, 1973. Id. The United States Supreme Court found Ohio's crime of Joyriding was a lesser included offense of Auto Theft. Id. The United States Supreme Court found that, because the crime was a continuing crime, lasting from November 29, 1973 through December 8, 1973, Brown could not be tried for the same charges in both cases. Id.

In this case, Appellant was charged with Stop Required on Signal of Police Officer under NRS 4844B.550 as follows:

> did while driving a motor vehicle in the area of 981 Whitney Ranch, Clark County, Nevada, unlawfully, and feloniously fail or refuse to

> bring said vehicle to a stop, or otherwise flee or attempt to elude a peace officer in a readily identifiable vehicle of any police department or regulatory agency, specifically HPD Officers P. Duffy and/or B. Brink and/or J. Hehn, after being given a signal to bring the vehicle to a stop, and did operate said motor vehicle in a manner which endangered, or was likely to endanger any person other than himself/herself or the property of any person other than himself.

I AA 23.

Appellant was separately charged in Henderson municipal court with Resisting a Public Officer under NRS 199.280 as follows:

> did willfully and unlawfully resist, delay, or obstruct, Officer A. Mangan and/or Officer K. Lippisch, a public officer, in discharging or attempting to discharge any legal duty of his or her office, to-wit did disobey commands to stop and/or did flee the scene, all of which occurred in the area of 981 Whitney Ranch Drive.

III AA 579.

Here, the charge of Stop Required on Signal of Police Officer arose out of different conduct than the actions forming the basis of the Resisting a Public Officer charge. The Stop Required on Signal of Police Officer charge arose when Appellant failed to stop his vehicle after Officers Hehn, Brink and Duffy pursued him in their vehicles and attempted to stop Appellant's vehicle using their lights and sirens. I AA 128. Thereafter, Appellant exited the vehicle and fled on foot, jumped over a wall, and encountered another group of officers, including Officer Mangan[6], who gave

[6] Detective Lippisch was also named in the Municipal Court Criminal Complaint. However, Detective Lippisch did not arrive until after Appellant was in custody. I AA 166.

verbal commands for Appellant to stop, which he ignored. I AA 126-131. The Resisting a Public Officer charge arose from the foot pursuit with Officer Mangan. Officer Mangan was not even present for the initial vehicle pursuit. I AA 130-131. Thus, even assuming the Resisting a Public Officer charge could be considered a lesser offense of Stop Required on Signal of Police Officer, Appellant's case is unlike Brown as the Stop Required on Signal of Police Officer charged conduct was not continuing at the time the Resisting a Public Officer offense was committed.

The justice court properly found that Stop Required on Signal of Police Officer and Resisting a Public Officer have different factual allegations to sustain the charges. The justice court found that they were two (2) separate and distinct crimes. I AA 218. One was the evading while Appellant was in the vehicle and then the separate one was the resisting when Appellant was running and jumping over the wall. I AA 218. In Henderson municipal court, Appellant was charged with willfully and unlawfully resisting, delaying, or obstructing Officer A. Mangan and/or Officer K. Lippisch by disobeying commands to stop and/or did flee the scene, all of which occurred in the area of 981 Whitney Ranch Drive. III AA 579.

In this case, Appellant was charged with willfully and unlawfully failing or refusing to bring his vehicle to a stop or otherwise flee to attempt to elude a peace officer in a readily identifiable vehicle, specifically HPD Officer P. Duffy, and/or B. Brink, and/or J. Hehn, after being given a sign to bring the vehicle to a stop, and he

did operate the vehicle in such manner which endangered or was likely to endanger a person other than himself or property of another. I AA 23. At the preliminary hearing, Officer Nelson testified that Officer Mangan did not arrive at the scene until after Appellant was out of his vehicle. I AA 129-131. Detective Lippisch testified when he arrived, Appellant was already in the back of the patrol car. I AA 166. Accordingly, Appellant's conduct of attempting to flee from Officers Duffy, Brink and Hehn while driving his vehicle was separate and distinct from disobeying commands to stop by Officer Mangan and fleeing on foot from Officer Mangan.

Additionally, Resisting a Public Officer is not a lesser included offense of Stop Required on Signal of Police Officer. Nevada has adopted the double jeopardy test set forth in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), where the U.S. Supreme Court held that if "the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." Owens, 100 Nev. at 288, 680 P.2d at 594 (quoting Blockburger, 284 U.S. at 304, 52 S.Ct. at 182). Moreover, as the Blockburger court went on to hold, if the individual acts are the target of the law, then separate indictments and prosecutions are permissible, even if the acts together constitute a common course of action. Blockburger, 284 U.S. at 304, 52 S. Ct. at 182.

Pursuant to NRS 199.280: "a person who, in any case or under any circumstances not otherwise specially provided for, willfully *resists, delays or obstructs* a public officer in discharging or attempting to discharge any legal duty of his or her office" is guilty of Resisting a Public Officer (Misdemeanor). NRS 199.280.

Pursuant to NRS 484B.550: "the driver of a motor vehicle on a highway or premises to which the public has access who willfully *fails or refuses to bring the vehicle to a stop, or who otherwise flees or attempts to elude a peace officer in a readily identifiable vehicle of any police department or regulatory agency, when given a signal to bring the vehicle to a stop* is guilty of a misdemeanor and operates the motor vehicle in a manner which endangers or is likely to endanger any other person or the property of any other person" is guilty of Stop Required Upon Signal of a Police Officer (Felony). NRS 484B.550.

The elements of the Misdemeanor Resisting a Public Officer offense ("resists, delays or obstructs") are general in their description, while the elements of Felony Stop Required on Signal of Police Officer are specific and well delineated. The required elements are that the subject "fails or refuses to bring the vehicle to a stop or who otherwise flees or attempts to elude a peace officer in a readily identifiable vehicle when given a signal to bring the vehicle to a stop." Contrary to Appellant's contention, both charges are not predicated on the identical facts and Resisting a

Public Officer is not a lesser included offense of Stop Required on Signal of Police Officer. Each charge "requires proof of a fact which the other does not." Talancon, 102 Nev. at 298, 721 P.2d at 766 (quoting Blockburger, 284 U.S. at 304, 52 S.Ct at 182. The State was careful in how it charged both offenses. Appellant's vehicle pursuit was charged as the Stop Required on Signal of Police Officer offense and Appellant's foot pursuit was charged as the Resisting a Public Officer offense. Appellant cannot rely on a prosecutor's sentencing argument in justice court; it is the charging documents that control. Contrary to Appellant's allegations, both charges were not predicated on the identical facts. Different officers were involved in the vehicle and foot pursuits, and Appellant committed two (2) different crimes when he engaged first in the vehicle pursuit and then in the foot pursuit.

Appellant also relies on three (3) other cases in support of his arguments. First, Appellant cites to Waller v. Florida, 397 U.S. 387, 395, 90 S. Ct. 1184, 1189, (1970). However, Waller's holding was limited: "We decide only that the Florida courts were in error to the extent of holding that— 'even if a person has been tried in a municipal court for the *identical offense* with which he is charged in a state court, this would not be a bar to the prosecution of such person in the proper state court.'" Id. The Waller Court further stated: "In these circumstances we do not reach other contentions raised by petitioner." Waller, 397 U.S. at 395, 90 S. Ct. at 1189.

As previously argued, the charges in question in this case are not the "identical offense."

Moreover, the facts of Waller are clearly distinguishable from the facts of this case. In Waller, Waller was one of a number of persons who removed a canvas mural affixed to a wall inside the City Hall of St. Petersburg, Florida. Waller, 397 U.S. at 388, 90 S. Ct. at 1185. After the mural was removed, Waller and others carried it through the streets of St. Petersburg until they were confronted by police officers. Id. After a scuffle, the officers recovered the mural, but in a damaged condition. Id. Waller was first charged with the violation of two ordinances: destruction of city property and disorderly breach of the peace. Id. He was found guilty in the municipal court on both counts. Id. An Information was then filed by the State of Florida charging Waller with grand larceny. Id. The State of Florida conceded that the Information was based on the same acts as were involved in the violation of the two city ordinances. Id.

Unlike Waller, where the identical facts formed the basis for both charges, as conceded by the State of Florida, this case involved two (2) distinct sets of conduct by Appellant. Appellant's conduct fleeing in his vehicle from one set of police officers while he was driving formed the basis for the Stop Required on Signal of Police Officer charge, while his conduct fleeing on foot from another set of officers formed the basis for the Resisting a Public Officer charge.

Second, Appellant cites to Menna v. New York, 423 U.S. 61, 62, 96 S.Ct. 241, 242 (1975). In Menna, after being granted immunity, Menna refused to answer questions before a Grand Jury investigating a murder conspiracy. Menna, 423 U.S. at 61, 96 S.Ct. at 241. Menna subsequently refused to obey a court order to return to testify before the same Grand Jury in connection with the same investigation. Id. Menna was adjudicated of contempt of court for his failure to testify before the Grand Jury. Id. Menna was later indicted for his refusal to answer questions before the Grand Jury. Id.

The United States Supreme Court has ruled that double jeopardy protection applies in non-summary criminal contempt prosecutions. United States v. Dixon, 509 U.S. 688, 696, 113 S. Ct 2849, 2864 (1993). The Court in Dixon reasoned that criminal contempt, at least the sort enforced through non-summary proceedings, was a "crime in the ordinary sense" which deserved the same Constitutional protections as other prosecutions. Id. Dixon concerned two defendants who were released pursuant to court orders that prohibited the commission of criminal offenses, committed criminal offenses following that release, and were then prosecuted for those crimes after being found guilty of criminal contempt for violating their respective court orders. Id. at 691-93, 52 S. Ct 180. In conducting a same-elements analysis under Blockburger, the Court reasoned that "[T]he crime' of violating a condition of release cannot be abstracted from the 'element' of the violated

condition. The Dixon court order incorporated the entire governing criminal code . . ." Id. at 698, 113 S. Ct at 2857. Thus, the contempt offense of violating a court order not to commit crimes contained the same elements as any offense in the criminal code and a subsequent criminal prosecution following a finding of contempt ran afoul of double jeopardy protections. Id.

However, the situation in Menna is entirely different than the facts of this case. Menna's charges both resulted from a contempt of court charge for failure to testify at the same grand jury proceedings, not a series of criminal offenses. While the identical facts formed the basis of both charges in Menna, Appellant committed two (2) distinct crimes in this case as the Stop Required on Signal of Police Officer charge was based on the initial vehicle pursuit and the Resisting a Public Officer was based on the subsequent foot pursuit.

Third, Appellant relies on Kelley v. State, 132 Nev. 348, 371 P.3d 1052 (2016). When a deputy sheriff noticed Kelley driving an all-terrain vehicle without brake lights or turn signals, he started following Kelley, who then drove on the left side of the road facing oncoming traffic. Kelley, 132 Nev. at 349, 371 P.3d at 1053. The deputy activated his overhead lights and police siren, but Kelley did not stop and a vehicle chase ensued. Id. After they drove through several streets with Kelley exceeding the speed limit, the deputy finally stopped Kelley and arrested him. Id. Kelley first pled no contest to misdemeanor reckless driving and later pled guilty to

felony eluding a police officer. Id. The Nevada Supreme Court concluded that reckless driving is a lesser included offense of felony eluding a police officer as charged in this case and that Kelley may not be punished for both crimes. Id.

In Kelley, both misdemeanor reckless driving and felony eluding a police officer charges consisted of the exact same conduct involving Kelley's method of driving while fleeing from the same police officers. However, this case involved the separate and distinct conduct of Appellant refusing to stop his vehicle despite the activated lights and sirens of several officers in pursuing vehicles, followed by the subsequent foot pursuit while Appellant was running away from different officers.

Accordingly, in addition to this claim being waived based on Appellant's entering a guilty plea, there was no double jeopardy violation in this case. As Appellant's claims are without merit, they were properly denied by the district court.

IV. THE DISTRICT COURT PROPERLY GRANTED THE STATE'S MOTION TO CONTINUE THE PRELIMINARY HEARING

Appellant claims that the district and justice courts abused their discretion by denying Appellant's Motions to Dismiss based on the State's request for a continuance of the preliminary hearing. AOB at 14.

The granting of a continuance of a preliminary hearing is within the discretion of the justice court and must be reviewed for an abuse of discretion. State v. Nelson, 118 Nev. 399, 405, 46 P.3d 1232, 1235-36 (2002). On November 17, 2020, the State filed a Motion pursuant to Hill v. Sheriff of Clark County, 85 Nev. 234, 452 P.2d

918 (1969). I AA 43-45. Pursuant to Hill, the State is entitled to move for a continuance when the State has exercised due diligence in securing the presence of a necessary witness and the witness is unavailable. Id. Furthermore, the Nevada Supreme Court has held that '[G]ood cause' is not amenable to a bright-line rule. The justices' court must review the totality of the circumstances to determine whether 'good cause' has been shown." State v. Nelson, 118 Nev. 399, 404, 46 P.3d 1232, 1235 (2002).

Appellant claims that the State's Motion to Continue should have been denied as the State failed to show good cause based on one of the detectives starting vacation. AOB at 16.

The State made the following representations to the justice court on November 17, 2020 after filing its Motion to Continue the preliminary hearing:

> THE COURT: Looks to me from your motion that you're alleging that both Detective Ozawa and Detective Lapeer could probably testify to the allegation that they located the firearm in relation to the defendant; is that correct?
>
> MS. MENDOZA: I need one or the other.
>
> THE COURT: One or the other. So either one of those two can testify. And so it looks to me like what you've written here is that you first learned from Lapeer on the 12th and so you probably didn't file a motion at that time because you assumed Detective Ozawa could also do it, you didn't need Lapeer if Ozawa showed up. But now then on the 16th you found out that Detective Ozawa was out of town. You also wrote in here that he will be out town and I think Mr. Orth was concerned about whether he was out of town today.

MS. MENDOZA: Well, when I talked to Mr. Ozawa -- sorry, I'm looking at our conversation.

THE COURT: Yes. Did you email Mr. Ozawa or did you speak to him?

MS. MENDOZA: I emailed him the sub and then when we were talking about whether or not he was available today, I was texting him.

THE COURT: Okay.

MS. MENDOZA: That was our conversation yesterday. And he said I'm actually on vacation and I'm leaving tomorrow morning. So he was talking about this morning.

THE COURT: Leaving this morning?

MS. MENDOZA: Correct. And then as to sounds like your next question I asked when are you coming back. Judge will ask if you're available, and he said he'll be back on November 24th. So that's less than 15 days from today.

THE COURT: He informed you that he was leaving this morning?

MS. MENDOZA: Correct.

THE COURT: So did I surmise correctly from your motion as to how things went down?

MS. MENDOZA: Yes. In terms of first I found out about Lapeer and then I was waiting because I knew that I could use one or the other, and then yesterday I checked in with Ozawa, yes.

I AA 33-35.

The State had good cause to file the Motion to Continue on the day of the preliminary hearing as it did not learn of Detective Ozawa's unavailability until the afternoon of the day before the preliminary hearing. While Appellant asserted to the

justice court that the State should have filed the Motion on November 12, 2020 when it learned Detective Lapeer was unavailable, such would have been premature. A continuance was not necessary based on Detective Lapeer's unavailability alone as Detective Ozawa could have provided the same testimony; specifically, testimony as to the search of the bag containing the firearm in question. Moreover, even if the State filed the Motion on November 12, 2020, the justice court was not in session again until November 17, 2020, the day of the preliminary hearing; thus, the Motion would not have been heard until the same day it was in fact heard.

Either Detective Ozawa or Lapeer were necessary to the State's case for the preliminary hearing. Detectives Ozawa and Lapeer searched the bag in question that contained the firearm which formed the basis of the Possession of a Firearm by Prohibited Person charge. The record establishes that Detective Ozawa was out of town on vacation on the date of the preliminary hearing. This was a valid basis and constituted good cause for a continuance. Accordingly, the State had good cause to request a continuance and the justice court properly granted the State's Motion to Continue the preliminary hearing.

CONCLUSION

Based on the foregoing, the State respectfully requests that Appellant's Judgment of Conviction be AFFIRMED.

/ / /

Dated this 11th day of September, 2023.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Taleen Pandukht*
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #005734
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF COMPLIANCE

1. **I hereby 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 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 10,319 words.
3. **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 and volume number, if any, of the transcript or appendix where the matter relied on is to be 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.

Dated this 11th day of September, 2023.

Respectfully submitted

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Taleen Pandukht*
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #005734
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on September 11, 2023. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

C. BENJAMIN SCROGGINS, ESQ.
Cpunsel for Appellant

TALEEN PANDUKHT
Chief Deputy District Attorney

/s/ E. Davis
Employee, Clark County
District Attorney's Office

TP//ed