

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICKEY TOLTON A/K/A RICKEY
EUGENE TOLTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43175

RICKEY TOLTON A/K/A RICKEY
EUGENE TOLTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43177

FILED

AUG 27 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

These are appeals from judgments of conviction pursuant to guilty pleas.¹ Fifth Judicial District Court, Mineral County; Robert W. Lane, Judge. In Docket No. 43175, appellant Rickey Tolton was convicted of possession of a controlled substance for the purpose of sale. The district court sentenced Tolton to serve a prison term of 12 to 30 months. In Docket No. 43177, Tolton was convicted of level-two trafficking in a controlled substance. The district court sentenced Tolton to serve a prison term of 60 to 150 months to run consecutively to the sentence imposed in the possession case.

¹Pursuant to NRAP 3(b), we have elected to consolidate these appeals for disposition.

Tolton first contends that both his constitutional right to a speedy trial and his statutory right to a timely preliminary hearing were violated. We decline to consider the merits of Tolton's contention. This court has stated that the entry of a guilty plea waives any right to appeal from events occurring prior to the entry of the plea.² Moreover, the right to a speedy trial is not jurisdictional and may be waived by the conduct of the defendant.³ In this case, Tolton waived his right to challenge pretrial rulings by entering a guilty plea. In fact, at the plea canvass and in the signed plea agreement, Tolton was expressly advised that by entering a guilty plea he was waiving his speedy trial rights and, with certain limited exceptions, the right to appeal. Accordingly, we decline to consider this issue.

Tolton next contends that his convictions should be reversed because his constitutional right to conflict-free counsel was violated. In particular, Tolton alleges that counsel Robert Witek, who represented a co-defendant, filed a notice consenting to a continuance of Tolton's preliminary hearing without authority to do so. Tolton alleges that Witek had no authority to file the document on his behalf, and that a

²See Webb v. State, 91 Nev. 469, 538 P.2d 164 (1975); see also Tollett v. Henderson, 411 U.S. 258, 267 (1973).

³See Bates v. State, 84 Nev. 43, 47, 436 P.2d 27, 29 (1968) (recognizing that "when the appellant entered his plea of guilty . . . he waived whatever right he had to a speedy trial").

"continuance was not in the best interests of Tolton as he remained in custody without movement on his criminal charges." We conclude that Tolton's contention lacks merit.

To show a Sixth Amendment violation of the right to counsel an appellant must demonstrate that "a conflict of interest actually affected the adequacy of his representation."⁴ Assuming that Witek acted as Tolton's counsel, we conclude that Tolton has failed to show that he was adversely affected by the grant of a continuance. After the continuance was granted, Tolton, with the assistance of conflict-free counsel, entered valid guilty pleas. Tolton has not alleged, and the record does not indicate, that the guilty pleas were the product of representation by an attorney who had an actual conflict of interest that adversely affected his attorney's performance. Accordingly, Tolton has failed to show a Sixth Amendment violation.

Finally, Tolton contends that the district court erred in denying his presentence motion to withdraw. In particular, Tolton alleges that after "determining that Tolton's rights under NRS 171.196 and his constitutional right to a speedy trial had been violated, the district court had a right to fashion a remedy for these violations." We disagree with Tolton's contention.

⁴Cuyler v. Sullivan, 446 U.S. 335, 349 (1980).

The district court has discretion to grant a defendant's presentence motion to withdraw a guilty plea for any substantial reason that is fair and just.⁵ "To determine whether the defendant advanced a substantial, fair, and just reason to withdraw a plea, the district court must consider the totality of the circumstances to determine whether the defendant entered the plea voluntarily, knowingly, and intelligently."⁶ Here, the totality of the circumstances indicates that Tolton's guilty pleas were knowing, voluntary and intelligent. Tolton signed a written plea agreement and was thoroughly canvassed by the district court. Accordingly, the district court acted within its discretion in refusing to grant Tolton's motion to withdraw the guilty pleas.⁷

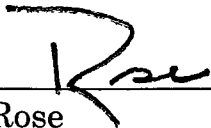
⁵NRS 176.165; Woods v. State, 114 Nev. 468, 475, 958 P.2d 91, 95 (1998).


⁶Crawford v. State, 117 Nev. 718, 721-22, 30 P.3d 1123, 1125-26 (2001).

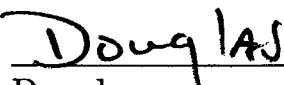
⁷See generally Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994) (noting that a defendant has no right to withdraw his plea merely because he moved to do so prior to sentencing or because the State failed to establish actual prejudice).

Having considered Tolton's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.⁸


_____, J.
Rose


_____, J.
Maupin


_____, J.
Douglas

⁸On July 1, 2004, in Docket No. 43177, Tolton filed a motion to strike portions of respondent's fast track responses and appendices. Specifically, Tolton argues that respondent's appendices filed in Docket Nos. 43175 and 43177, at pages 3-4 and 23-28, should be stricken because the appendices contain documents outside the district court record. Additionally, Tolton argues that the following portions of the fast track responses referencing the improper material should be stricken: Docket No. 43177, page 2, lines 26-28; page 3, lines 1-3; and page 5, lines 11-26. On July 7, 2004, the State filed a response to the motion, conceding error. Good cause appearing, we grant the motion and direct the clerk of this court to strike the documents in the respondent's appendices and the portions of the fast track response set forth above. We note that in resolving this appeal on the merits, this court has not considered any matters that were not properly part of the record made and considered below. We also note that, on June 10, 2004, Tolton filed proper person motions for leave to file supplemental fast track statements in Docket Nos. 43175 and 43177. Because Tolton is represented by counsel in this matter, we decline to grant Tolton permission to file documents in proper person in this court. See NRAP 46(b). Accordingly, the clerk of this court shall return to Tolton unfiled all proper person documents submitted to this court in these matters.

cc: Hon. Robert W. Lane, District Judge
Karla K. Butko
Attorney General Brian Sandoval/Carson City
Mineral County District Attorney
Mineral County Clerk