

IN THE SUPREME COURT OF THE STATE OF NEVADA

ARIEL BARRIOS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43712

FILED

JAN 07 2005

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. R. [Signature]*
CHIEF DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of two counts of attempted sexual assault. Eighth Judicial District Court, Clark County; Nancy M. Saitta, Judge. The district court sentenced appellant Ariel Barrios to serve two concurrent prison terms of 48 to 180 months.

Barrios contends that the district court abused its discretion in denying his presentence motion to withdraw his guilty plea. Specifically, Barrios contends that his guilty plea was not knowing and intelligent because he does not speak English and had no prior criminal history and, therefore, only had a limited understanding of the criminal proceedings below. Barrios also contends that he pleaded guilty based on "acceptance of advice from 'jailhouse sources' that caused him to abandon his apparently valid defenses and enter a plea of guilty." Finally, Barrios contends that the district court should have allowed him to withdraw his guilty plea because he presented newly discovered evidence of his innocence, namely, a notarized letter from the victim's mother stating that the victim told her that Barrios was innocent. We conclude that Barrios' contentions lack merit.

NRS 176.165 permits a defendant to file a motion to withdraw a guilty plea before sentencing. The district court may grant such a motion in its discretion for any substantial reason that is fair and just.¹ A defendant has no right, however, to withdraw his plea merely because he moved to do so prior to sentencing or because the State failed to establish actual prejudice.² Rather, in order to show that the district court abused its discretion in denying a motion to withdraw a guilty plea, a defendant must prove that the totality of the circumstances indicates that the plea was not entered knowingly, voluntarily and intelligently.³ "On appeal from a district court's denial of a motion to withdraw a guilty plea, this court 'will presume that the lower court correctly assessed the validity of the plea, and we will not reverse the lower court's determination absent a clear showing of an abuse of discretion.'"⁴

In this case, the totality of the circumstances indicates that Barrios entered a knowing, voluntary and intelligent guilty plea. Barrios signed a written plea agreement and was thoroughly canvassed by the district court. Although Barrios had a limited understanding of English, a Spanish-speaking interpreter translated both the guilty plea agreement and the plea canvass. Moreover, we conclude that the notarized letter

¹State v. District Court, 85 Nev. 381, 385, 455 P.2d 923, 926 (1969).

²Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994).


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

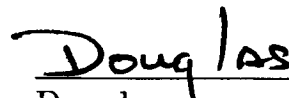
⁴Riker v. State, 111 Nev. 1316, 1322, 905 P.2d 706, 710 (1995) (quoting Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986)).

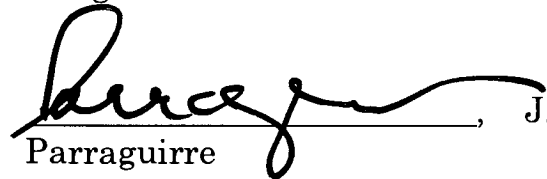
from the victim's mother was not newly discovered evidence,⁵ and that Barrios failed to make a credible claim of factual innocence.⁶ Accordingly, the district court did not abuse its discretion in denying the presentence motion to withdraw the guilty plea.

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

ORDER the judgment of conviction AFFIRMED.


_____, J.
Maupin


_____, J.
Douglas


_____, J.
Parraguirre

cc: Hon. Nancy M. Saitta, District Judge
Patti & Sgro
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

⁵See Sanborn v. State, 107 Nev. 399, 406, 812 P.2d 1279, 1284-85 (1991) (noting that evidence is newly discovered where "even with the exercise of reasonable diligence it could not have been discovered and produced for trial").

⁶See Mitchell v. State, 109 Nev. 137, 139-41, 848 P.2d 1060, 1060-62 (1993) (allowing defendant to withdraw her plea where she brought motion to withdraw prior to sentencing and provided both a credible claim of factual innocence and a claim that she misunderstood the plea canvass).