IN THE SUPREME COURT OF THE STATE OF NEVADA

DANIEL LEE CARTER, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 44123
DANIEL LEE CARTER, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 44124
DANIEL LEE CARTER, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 44125
DANIEL LEE CARTER, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 44126

FILED

JUN 01 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

These are consolidated appeals from judgments of conviction, pursuant to guilty pleas, of one count each of possession of a stolen motor vehicle (district court case no. CR03-1942) (count I), being an ex-felon in possession of a firearm (district court case no. CR04-0702) (count II), burglary (district court case no. CR04-0703) (count III), and battery by a prisoner (district court case no. CR04-0705) (count IV).[1] Second Judicial District Court, Washoe County; Steven R. Kosach, Judge. The district

[1]In district court case no. CR04-0702, Carter entered a nolo contendere plea.

05-10675

court sentenced appellant Daniel Lee Carter to serve two concurrent prison terms of 48-120 months and 28-72 months for counts I and II, and two consecutive prison terms of 48-120 months and 28-72 months for counts III and IV. Carter was ordered to pay $100.00 in restitution.

First, Carter contends that the district court erred in denying his oral motion at the sentencing hearing to withdraw his pleas. Carter argues that his "pleas were predicated upon a series of plea agreements," including the State agreeing to recommend probation in all four cases. Prior to the sentencing hearing, however, Carter was arrested for level-three trafficking in a controlled substance, and the State, instead, asked the district court to impose prison terms. Carter claims that the plea agreement was breached and he should be allowed to withdraw his pleas, arguing that he did not commit the offense and that "the arrest was only an allegation." We disagree.

"A district court may, in its discretion, grant a defendant's [presentence] motion to withdraw a guilty plea for any 'substantial reason' if it is 'fair and just.'"[2] In deciding whether a defendant has advanced a substantial, fair, and just reason to withdraw a guilty plea, "the district court must consider the totality of the circumstances to determine whether the defendant entered the plea voluntarily, knowingly, and intelligently."[3] A defendant has no right, however, to withdraw his plea merely because he moves to do so prior to sentencing or because the State failed to

---

[2]Woods v. State, 114 Nev. 468, 475, 958 P.2d 91, 95 (1998) (quoting State v. District Court, 85 Nev. 381, 385, 455 P.2d 923, 926 (1969)); see also NRS 176.165.

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

establish actual prejudice.[4] A more lenient standard applies to motions filed prior to sentencing than to motions filed after sentencing.[5]

An order denying a presentence motion to withdraw a guilty plea is reviewable on direct appeal from the judgment of conviction as an intermediate order in the proceedings.[6] "On appeal from the district court's determination, we 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."[7]

We conclude that the district court did not abuse its discretion in denying Carter's presentence motion to withdraw his guilty and nolo contendere pleas. Carter never claims that his pleas were not entered voluntarily, knowingly, and intelligently. Further, our review of the record on appeal reveals that Carter was thoroughly canvassed prior to the entry of his pleas. We also conclude that the State did not breach the plea agreement. The State initially agreed to recommend terms of probation. Pursuant to the written plea agreement, however, the State also expressly reserved the right "to argue for an appropriate sentence" if Carter was "arrested in any jurisdiction for a violation of law." As noted above, Carter was arrested for level-three trafficking in a controlled

---

[4]See Hubbard v. State, 110 Nev. 671, 675-76, 877 P.2d 519, 521 (1994).

[5]See Molina v. State, 120 Nev. 185, 87 P.3d 533 (2004).

[6]NRS 177.045; Hart v. State, 116 Nev. 558, 562 n.2, 1 P.3d 969, 971 n.2 (2000) (citing Hargrove v. State, 100 Nev. 498, 502 n.3, 686 P.2d 222, 225, n.3 (1984)).

[7]Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986).

substance after the entry of his pleas and prior to the sentencing hearing. Accordingly, the State was released from its agreement and free to argue at the sentencing hearing for the imposition of prison terms. We also note that Carter did not object to the "free to argue" clause in the written plea agreement prior to the entry of his pleas. Therefore, Carter's contention is without merit.[8]

Finally, Carter contends that the sentences in the judgments of conviction differ from those articulated by the district court at the sentencing hearing. Carter claims that "[t]hese issues can only be resolved by remanding this matter to the District Court for re-sentencing or for clarification of sentence." We disagree. Although there is a slight discrepancy between the oral pronouncement of the sentences and the sentences listed in the judgments of conviction, this court has previously held that the district court's oral pronouncement of a sentence remains subject to modification by the imposing judge until such time as a judgment is signed and entered by the clerk.[9] It is the written judgment that is controlling; the oral pronouncement is not the final and effective

---

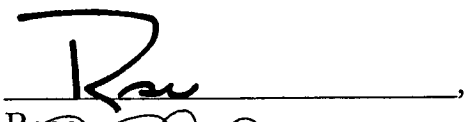
[8]See Citti v. State, 107 Nev. 89, 92, 807 P.2d 724, 726 (1991); see also Sparks v. State, 121 Nev. ___, ___ P.3d ___ (Adv. Op. No. 12, April 28, 2005) (holding that clause in written plea agreement releasing the State from plea negotiations if defendant fails to appear for a hearing or commits a criminal offense is valid under state law).

[9]See Bradley v. State, 109 Nev. 1090, 1094-95, 864 P.2d 1272, 1274-75 (1993) (holding that district court could modify original sentence, which had been orally pronounced without reference to consecutive or concurrent terms, to impose consecutive terms); see also Tener v. Babcock, 97 Nev. 369, 632 P.2d 1140 (1981) (a judge retains authority to reconsider a decision until such time as a written judgment is entered).

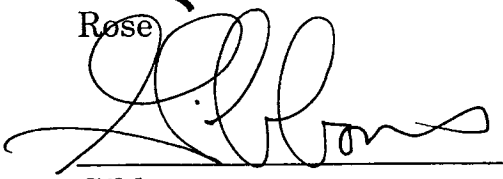
decision.[10] Because Carter's sentences did not become final until the district court entered its written judgment of conviction, we conclude that Carter's contention is without merit.

Having considered Carter's contentions and concluded that they are without merit, we

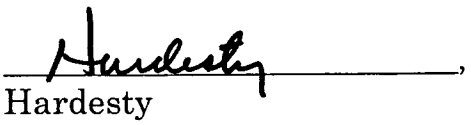
ORDER the judgments of conviction AFFIRMED.



_____, J.
Rose



_____, J.
Gibbons



_____, J.
Hardesty

cc: Hon. Steven R. Kosach, District Judge
Dennis A. Cameron
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

---

[10]See Bradley, 109 Nev. at 1094, 864 P.2d at 1275.