

IN THE SUPREME COURT OF THE STATE OF NEVADA

HARVEY DEANDRE MCDANIEL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44155

FILED

MAY 05 2005

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *Richard*
DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of one count of robbery of a victim 65 years of age or older. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge. The district court sentenced appellant Harvey Deandre McDaniel to serve two consecutive prison terms of 60 to 156 months.

McDaniel first contends that the district court erred in denying his presentence motion to withdraw the guilty plea because his plea was coerced. Specifically, McDaniel claims he was forced into taking a plea by "procedural delays, numerous courtroom transfers, heroin addiction/use and physical pain, . . . existence of the jury standing in the hallway ready to come in to begin the trial, coupled with the barrage of recent publicity concerning the death of the victim."¹ We conclude that McDaniel's contention lacks merit.

¹McDaniel robbed a Las Vegas jewelry store, stealing \$250,000.00 worth of jewelry from a 67-year-old female victim. According to the prosecutor, McDaniel's blood was found on one of the store's wood display doors, and a subsequent DNA analysis confirmed that McDaniel was the perpetrator. Approximately one year later, the same victim was robbed

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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.² "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."³

The totality of the circumstances in this case indicates that McDaniel's guilty plea was knowing, voluntary and intelligent. McDaniel signed a written plea agreement and was thoroughly canvassed by the district court. Moreover, McDaniel's claim that his guilty plea was coerced is belied by the record. At the plea canvass or in the signed plea agreement, McDaniel acknowledged that he was pleading guilty because he believed it was in his best interest and also acknowledged that he was not acting under duress or coercion or under the influence of controlled substances. Finally, we note that McDaniel received a substantial benefit in exchange for his guilty plea in that the State dropped one count of burglary while in possession of a firearm. Accordingly, we conclude that the district court did not abuse its discretion by denying McDaniel's presentence motion to withdraw.

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again by a different individual and died from injuries sustained in that robbery.

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

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

McDaniel next contends that Judge Gates erred in assigning the case to overflow after Judge Gates recused himself because Eighth Judicial District Court rule 1.60(d) states: "Judges who disqualify themselves from hearing a case must direct the entry of an appropriate minute order for reassignment on a random basis." McDaniel claims that he was prejudiced by the assignment to overflow because "he could have more time to prepare for trial, since there would not have been this pressure to fill the courtrooms, nor pressure by a visiting judge who was only in town for a week to do something constructive." We decline to consider McDaniel's contention.

"[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."⁴

In this case, the reassignment of McDaniel's case into the overflow calendar occurred prior to the entry of the guilty plea. McDaniel does not allege, and the record does not indicate, that McDaniel preserved in writing the right to challenge the manner in which his case was reassigned.⁵ Moreover, we disagree with McDaniel that the issue raised was preserved for appeal because it is "jurisdictional" in nature. Accordingly, we conclude that McDaniel waived his right to challenge that ruling by entering a guilty plea.

⁴Webb v. State, 91 Nev. 469, 470, 538 P.2d 164, 165 (1975) (quoting Tollett v. Henderson, 411 U.S. 258, 267 (1973)).

⁵See NRS 174.035(3).

McDaniel last contends that he should be allowed to withdraw his guilty plea because: (1) visiting District Court Judge Michael Gibbons, who accepted the guilty plea, should have also imposed the sentence; and (2) assuming Judge Gibbons was unavailable, he should have at least been sentenced in Department 11, where he entered his guilty plea. Additionally, McDaniel argues that the sentencing court did not follow the proper procedure, set forth in EDCR 1.60(h),⁶ because his objection to the to the reassignment to Department 12 should have been heard by the Chief Judge. We conclude that McDaniel's contentions lacks merit.

Generally, a criminal defendant is entitled to be sentenced by the district judge who accepts his guilty plea.⁷ However, that general principle is subject to numerous exceptions, including where “[t]he judge . . . from other cause is unavailable to act.”⁸ Here, we conclude that McDaniel had no right to be sentenced by Judge Michael Gibbons, who accepted the guilty plea, because Judge Gibbons was a visiting district court judge who had returned to district court in Douglas County, and therefore, was “unavailable to act.” Moreover, because a replacement judge had not yet been named in Department 11, McDaniel could not, and

⁶EDCR 1.60(h) provides that a district court judge must transfer a case to the correct division if it appears a case has been improperly assigned. Any objection to the ruling on whether a case should be transferred must be heard by the chief judge.

⁷See DCR 18; Marshall v. District Court, 79 Nev. 280, 382 P.2d 214 (1963).

⁸DCR 18(2)(a).

had no right to be, sentenced in that department.⁹ Further, we disagree with McDaniel that the Eighth Judicial District Court Rules were violated in his case.

At the sentencing hearing before Judge Leavitt, defense counsel requested that the case be assigned back to Department 11. The prosecutor then explained that the case had been randomly reassigned by the Chief Judge because no district court judge had yet been appointed to fill the vacancy in Department 11. The district court ruled that the case had been properly reassigned in the ordinary course of business, refused to return the case to Department 11, and overruled the objection. We conclude that McDaniel has failed to show that the reassignment occurred in violation of EDCR 1.60.

Nonetheless, even assuming the reassignment of McDaniel's case violated the local procedural rules, McDaniel was not prejudiced by change in the district judge prior to sentencing.¹⁰ The record reveals that Judge Leavitt familiarized herself with the case prior to exercising her sentencing discretion; she reviewed the presentence investigation report, listened to testimony from the victims, and heard arguments from counsel. Because McDaniel was not prejudiced by the case reassignment, any violation of the local rules was harmless error.

⁹See DCR 18(2)(c); EDCR 1.60(b).

¹⁰See State v. Carson, 597 P.2d 862 (Utah 1979) (holding that defendant not prejudiced by the appointment of a replacement judge for sentencing where the record revealed the judge was familiar with the defendant's record and the facts of the case).

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

ORDER the judgment of conviction AFFIRMED.

Becker, C.J.
Becker

Rose, J.
Rose

Hardesty, J.
Hardesty

cc: Hon. Michelle Leavitt, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk