

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALEXANDER OCASIO,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 44282

**FILED**

JUL 05 2005

ORDER OF AFFIRMANCE

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

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of one count of battery with the use of a deadly weapon resulting in substantial bodily harm. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge. The district court sentenced appellant Alexander Ocasio to serve a prison term of 30-90 months.<sup>1</sup>

First, Ocasio contends that the district court abused its discretion at the sentencing hearing by denying his oral motion to withdraw his guilty plea. Ocasio claims that prior to the entry of his guilty plea, "his attorney had not presented him with discovery nor had the attorney explained that there had been conflicting witnesses statements [sic] within the discovery." As a result, Ocasio argues that he did not knowingly enter his plea. We disagree.

"A district court may, in its discretion, grant a defendant's [presentence] motion to withdraw a guilty plea for any 'substantial reason'

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<sup>1</sup>Ocasio was initially charged by way of a criminal complaint with two counts of assault with a deadly weapon, and one count each of attempted murder with the use of a deadly weapon and battery with the use of a deadly weapon resulting in substantial bodily harm.

if it is 'fair and just.'"<sup>2</sup> 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.<sup>3</sup> The district court "has a duty to review the entire record to determine whether the plea was valid. . . . [and] may not simply review the plea canvass in a vacuum."<sup>4</sup> 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 establish actual prejudice.<sup>5</sup> Nevertheless, a more lenient standard applies to motions filed prior to sentencing than to motions filed after sentencing.<sup>6</sup>

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.<sup>7</sup> "On appeal from the district court's determination, we will presume that the lower court correctly

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<sup>2</sup>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.

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

<sup>4</sup>Mitchell v. State, 109 Nev. 137, 141, 848 P.2d 1060, 1062 (1993).

<sup>5</sup>See Hubbard v. State, 110 Nev. 671, 675-76, 877 P.2d 519, 521 (1994).

<sup>6</sup>See Molina v. State, 120 Nev. 185, 87 P.3d 533 (2004).

<sup>7</sup>See 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)).

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."<sup>8</sup> If the motion to withdraw is based on a claim that the guilty plea was not entered knowingly and intelligently, the burden to substantiate the claim remains with the appellant.<sup>9</sup>

We conclude that the district court did not abuse its discretion in denying Ocasio's presentence motion to withdraw his guilty plea. The district court considered the totality of the circumstances and properly determined that Ocasio did not substantiate his claim that his guilty plea was not knowingly entered. At the sentencing hearing, the district court questioned Ocasio after he made his oral request, and Ocasio again admitted to pulling the trigger and shooting the victim in the face. Ocasio's argument and request to withdraw his plea were based on allegedly newly obtained information leading him to believe that he had a viable trial defense to the dismissed attempted murder charge, specifically, self-defense. Upon further questioning by the district court, Ocasio's defense counsel stated:

We discussed the nature of the statements from both witnesses and his own version prior to the preliminary hearing, after the preliminary – after the waiver, prior to him pleading guilty and at length on the phone between then and today. I think that the defense he has goes towards the attempt murder case but it doesn't go toward the other charges, particularly the one he pled guilty to.

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<sup>8</sup>Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986).

<sup>9</sup>See id.

In denying Ocasio's oral motion, the district court made the following statement:

I just don't see it. I can't just look to the four corners of a guilty plea agreement or waiver, I have to look at the totality of the circumstances here. You're an intelligent man, you had advice of counsel, you decided a long time ago to take this deal. This is not something like you were at calendar call and you had to make a decision [in] five minutes, either take a deal or go to trial. I've had some cases like that.

You've had all this time to consider this since you unconditionally waived your preliminary hearing back in August; now we are in October. This is not new. You're just having second thoughts, cold feet. There's no reason for me to allow you to withdraw.

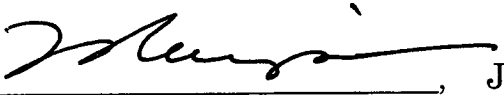
Accordingly, based on all of the above, we conclude that Ocasio has failed to meet his burden and demonstrate that his guilty plea was not entered knowingly. We further conclude that Ocasio's argument pertaining to counsel's allegedly deficient performance in this regard was therefore unsubstantiated and not supported by the record.

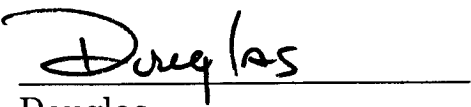
Second, Ocasio contends that he received ineffective assistance of counsel and asks this court to remand his case back to the district court for an evidentiary hearing. Ocasio claims that he "has established that there existed facts outside the record, [that] if true, would entitle him to a new trial." Ocasio does not specify in what manner his counsel was allegedly ineffective. To the extent that Ocasio is raising allegations of ineffective assistance of counsel beyond those addressed above relating to his oral motion to withdraw his guilty plea, we decline to address those arguments. This court has repeatedly stated that, generally, claims of ineffective assistance of counsel will not be considered on direct appeal;

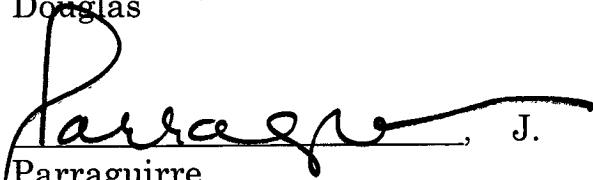
such claims must be presented to the district court in the first instance in a post-conviction proceeding where factual uncertainties can be resolved in an evidentiary hearing.<sup>10</sup> We conclude that Ocasio has failed to provide this court with any reason to depart from this policy in his case.<sup>11</sup>

Having considered Ocasio's contentions and concluded that they are either without merit or not cognizable on direct appeal, we

ORDER the judgment of conviction AFFIRMED.

  
\_\_\_\_\_, J.  
Maupin

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Parraguirre

cc: Hon. Joseph T. Bonaventure, District Judge  
Christopher R. Oram  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk

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<sup>10</sup>See Johnson v. State, 117 Nev. 153, 160-61, 17 P.3d 1008, 1013 (2001).

<sup>11</sup>See id. at 160-61, 17 P.3d at 1013-14.