

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL VINCENT COLEMAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44381

FILED

JUL 06 2005

ORDER OF AFFIRMANCE

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

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of one count of being an ex-felon in possession of a firearm. Third Judicial District Court, Lyon County; David A. Huff, Judge. The district court sentenced appellant Michael Vincent Coleman to serve a prison term of 12-48 months to run consecutively to the sentence imposed in an unrelated case.

Coleman's sole contention on appeal is that the district court erred in denying his presentence motion to withdraw his guilty plea. After Coleman expressed a desire to change his plea, the district court appointed new counsel to assist him with his motion. First, Coleman argues that he and his initial counsel "had a failure to communicate," and that counsel "made promises to . . . induce him to plead guilty." This argument is raised by Coleman for the first time on appeal and was not presented in his motion filed below; therefore, the argument was not considered by the district court. In his motion to withdraw his guilty plea filed in the district court, Coleman's sole contention was that he was factually innocent, claiming that "he never possessed a firearm as is alleged in the information." This court has consistently held that an appellant "cannot change [his] theory underlying an assignment of error

on appeal.”¹ As a result, Coleman’s argument is not properly raised and we decline to address it.²

Second, Coleman contends that the district court did not consider the totality of the circumstances, including reviewing the entire record, before denying his motion to withdraw. Coleman claims that “had the Court considered more than the arraignment and pleadings,” it would have granted his motion. 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.’”³ 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.⁴ 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

¹Ford v. Warden, 111 Nev. 872, 884, 901 P.2d 123, 130 (1995); see also Garrettson v. State, 114 Nev. 1064, 1068 n.2, 967 P.2d 428, 430 n.2 (1998).

²See Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991) (holding that this court need not consider arguments raised on appeal that were not presented to the district court), overruled on other grounds by Means v. State, 120 Nev. ___, 103 P.3d 25 (2004); O’Guinn v. State, 118 Nev. 849, 851, 59 P.3d 488, 489 (2002).

³Woods 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.

⁴See Crawford v. State, 117 Nev. 718, 721-22, 30 P.3d 1123, 1125-26 (2001).

canvass in a vacuum.”⁵ 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.⁶ Nevertheless, a more lenient standard applies to motions filed prior to sentencing than to motions filed after sentencing.⁷

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.⁸ “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.”⁹

We conclude that Coleman has failed to show that the district court abused its discretion in denying his motion to withdraw his guilty plea. The district court stated in its order that a hearing on the motion was not necessary, and that it was denying Coleman’s motion after “[h]aving considered the pleadings and affidavits on file herein and transcripts of Defendant’s arraignment.” Moreover, our review of the record reveals that Coleman’s claim of innocence was less than credible

⁵Mitchell v. State, 109 Nev. 137, 141, 848 P.2d 1060, 1062 (1993).

⁶See Hubbard v. State, 110 Nev. 671, 675-76, 877 P.2d 519, 521 (1994).

⁷See Molina v. State, 120 Nev. 185, 87 P.3d 533 (2004).

⁸NRS 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)).

⁹Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986).


and belied by the record, and therefore, he was not entitled to an evidentiary hearing.¹⁰ At his arraignment, Coleman made the following admission:


Your Honor, back in March, I was under the influence of methamphetamines. And, uhm, I ran into somebody who had possession of the firearm. I traded him half a gram of methamphetamine for the pistol. And I sold it to a dealer for \$170 worth of methamphetamine.

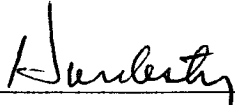
Thereafter, the district court found that a factual basis for the guilty plea existed. Coleman also provided a handwritten statement, attached to the presentence investigation report, wherein he admitted to trading drugs for the firearm, and then selling the firearm for methamphetamine. Finally, Coleman concedes that the plea canvass "was done correctly."

Therefore, having considered Coleman's contentions and concluded that they are either not properly raised or without merit, we

ORDER the judgment of conviction AFFIRMED.


_____, J.
Rose


_____, J.
Gibbons


_____, J.
Hardesty

¹⁰See Lee v. State, 115 Nev. 207, 210, 985 P.2d 164, 167 (1999); Hargrove, 100 Nev. at 502-03, 686 P.2d at 225.

cc: Hon. David A. Huff, District Judge
Les W. Bradshaw
Attorney General Brian Sandoval/Carson City
Lyon County District Attorney
Lyon County Clerk