

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSHUA EMMANUEL FRANKLIN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45375

FILED

MAR 07 2006

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of one count of robbery. Second Judicial District Court, Washoe County; Jerome Polaha, Judge. The district court sentenced appellant Joshua Emmanuel Franklin to serve a prison term of 40-180 months.

Franklin's sole contention on appeal is that the district court erred in denying his presentence motion to withdraw his guilty plea. Franklin does not challenge the sufficiency of the district court's plea canvass, nevertheless, he argues that he was coerced by previous counsel into pleading guilty, and therefore, did not enter his plea voluntarily. Specifically, Franklin alleges that counsel informed him that there was a videotape of him "beating this guy up," and if he pleaded guilty, "he and his girlfriend[-accomplice] would be released on their Own Recognizance." Franklin claims that, "most importantly," his confidence in receiving a fair trial was shaken after counsel allegedly made the following statement:

Look at it this way. You are a black man. You have a white girlfriend. The victim is white. And you are going to be before twelve white jurors.



And finally, Franklin contends that he was only guilty of theft, not robbery. We disagree with Franklin's contention.

"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.'"¹ 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.² 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."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 establish actual prejudice.⁴ Nevertheless, a more lenient standard applies to motions filed prior to sentencing than to motions filed after sentencing.⁵

¹Woods 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.

²See Crawford v. State, 117 Nev. 718, 721-22, 30 P.3d 1123, 1125-26 (2001).

³Mitchell v. State, 109 Nev. 137, 141, 848 P.2d 1060, 1062 (1993).

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

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

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 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.⁸

We conclude that the district court did not abuse its discretion in denying Franklin’s presentence motion to withdraw his guilty plea. The district court conducted an evidentiary hearing on Franklin’s motion, filed by newly appointed counsel, and heard from Franklin and his former counsel. The district court found, after reviewing the entire record, that Franklin failed to present a credible claim of innocence. Further, former counsel, Jeremy Bosler, testified that he informed Franklin that “he may not come across as a sympathetic defendant” in front of a jury because of his prior felony convictions, “including violence.” Also, Bosler was aware that Franklin’s girlfriend-accomplice informed police officers that the robbery involved a “trick roll,” and therefore, the jury might perceive his

⁶NRS 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)).

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

⁸See Bryant, 102 Nev. at 272, 721 P.2d at 368.

connection with the accomplice as a pimp-prostitute relationship. According to Bosler, the victim "said he had come to town to find a young eighteen year old prostitute."

Bosler also testified that he informed Franklin that a surveillance tape existed, but that he had not yet reviewed it. Franklin entered his guilty plea knowing that counsel had not viewed the videotape. Bosler stated that he believed the videotape had little evidentiary value "because we had other people putting him at the scene, [Franklin's] statement that he was at the scene." Bosler denied telling Franklin that the videotape showed him beating up the victim.

Finally, Franklin informed the district court at the evidentiary hearing why he decided to plead guilty:

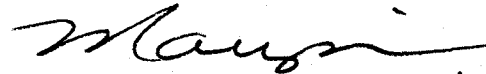
Being in my situation, being an addict at the time and then to be handed – hand to freedom, you know, through OR and then told that he would get me in a program and probation. I believe – ninety-nine percent of this room right here, if you was an addict at the time and then – having been told that – do you know what I am saying – that you face a possibility of being incarcerated and not going home and then from nowhere being handed your freedom, I think everyone would take that.

After the district court's thorough canvass and the entry of Franklin's guilty plea, he was, in fact, given an OR release.

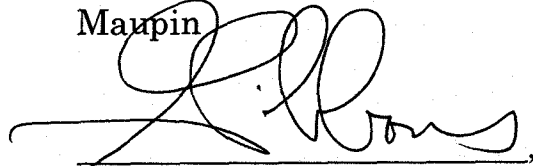
At the conclusion of the evidentiary hearing, the district court found that, based on the totality of the circumstances, Franklin failed to demonstrate that his plea was not entered knowingly, freely, and intelligently. We agree and conclude that Franklin could not substantiate

his claim that his guilty plea was coerced by counsel or that he did not enter his plea voluntarily. Accordingly, we

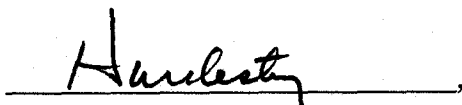
ORDER the judgment of conviction AFFIRMED.⁹



Maupin J.



Gibbons J.



Hardesty J.

cc: Hon. Jerome Polaha, District Judge
Jack A. Alian
Jenny Hubach
Joshua Emmanuel Franklin
Attorney General George Chanos/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

⁹Because Franklin is represented by counsel in this matter, we decline to grant him permission to file documents in proper person in this court. See NRAP 46(b). Accordingly, the clerk of this court shall return to Franklin, unfiled, all proper person documents he has submitted to this court in this matter.