

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH P. TAMBERELLA A/K/A  
JOSEPH P. TAMBRELLA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 47873

**FILED**

NOV 16 2007

JANEITE M. BLOOM  
CLERK OF SUPREME COURT  
BY: *J. Bloom*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, entered pursuant to a guilty plea, of one count of indecent exposure, a gross misdemeanor in violation of NRS 201.220. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge. The district court sentenced appellant Joseph P. Tamberella to serve 90 days in the county jail, awarded him credit for 68 days time served, and ordered him to register as a sex offender within 48 hours of his release from custody.

Tamberella contends that the district court abused its discretion by denying his presentence motion to withdraw his guilty plea. Tamberella specifically claims that he did not enter the plea knowingly and voluntarily because (1) he did not understand the implications of the sex offender registration requirement, (2) the plea memorandum did not indicate that the registration requirement was permanent and continuous, and (3) his mental health status was questionable at the time he entered his plea. Tamberella also claims that the guilty plea does not constitute a valid contract because (1) there was no "meeting of the minds" regarding the sex offender requirement, (2) the written plea agreement contains a



vague term regarding sex offender registration and an erroneous term regarding lifetime supervision,<sup>1</sup> (3) he lacked the capacity to form a valid contract because he is mentally ill and signed the agreement while under duress, and (4) the final written agreement does not reflect the original intent of the parties because the parties did not intend for him to be forced to register as a sex offender.

"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.'"<sup>2</sup> In considering 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>

An order denying a presentence motion to withdraw a guilty plea is reviewable on direct appeal from the judgment of conviction as an

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<sup>1</sup>See NRS 176.0931.

<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>Crawford v. State, 117 Nev. 718, 722, 30 P.3d 1123, 1125-26 (2001).

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

intermediate order in the proceedings.<sup>5</sup> In reviewing 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.<sup>6</sup> Moreover, if the motion to withdraw is based on a claim that the guilty plea was not entered voluntarily, knowingly, and intelligently, the appellant has the burden to substantiate the claim.<sup>7</sup>

The record before this court does not support Tamberella's contentions that his guilty plea agreement was not entered knowingly and intelligently and does not constitute a valid contract.

In the written guilty plea agreement, Tamberella acknowledged that he agreed to plead guilty, understood the rights and privileges he waived by pleading guilty, and that he was signing the agreement voluntarily after consulting with counsel. Tamberella specifically acknowledged that he understood that he must register as a sex offender within 48 hours of his release from custody and that counsel had explained and answered all his questions regarding the guilty plea and its consequences. Moreover, defense counsel Violet Radosta certified that, to the best of her knowledge and belief, Tamberella "is competent and understands the charges and consequences of pleading guilty as provided in this agreement."

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<sup>5</sup>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)).

<sup>6</sup>Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986).

<sup>7</sup>See id.

During the district court's oral plea canvass, Tamberella acknowledged that he read and signed the written plea agreement, that he understood everything contained in the written plea agreement, and that all of his questions regarding the written plea agreement had been answered to his satisfaction. Tamberella also acknowledged that he understood that he was required to register as a sex offender within 48 hours of being released from custody and that he would be required to register as a sex offender for the rest of his life. Tamberella further acknowledged that he entered his plea freely and voluntarily and that no one had threatened or coerced him into entering the plea.


During the district court's hearing on Tamberella's motion to withdraw his guilty plea, defense counsel David Westerbrook argued that Tamberella was not mentally competent when the plea was entered; he (Westerbrook) was ineffective for failing to advise Tamberella of the sex offender registration consequence; and, because the written plea agreement's lifetime supervision term constituted an illegal term, Tamberella was entitled to withdraw from the agreement under contract law. However, the district court observed that Westerbrook was not present on the day that Tamberella entered his plea. Instead, Radosta represented Tamberella. The district court noted that Radosta did a thorough job and advised Tamberella of the sex offender registration requirement. And the district court stated that it would not impose the special sentence of lifetime supervision.

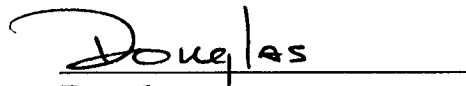
The totality of the circumstances indicate that Tamberella entered his guilty plea voluntarily, knowingly, and intelligently and there is no indication that Tamberella was deprived of the benefit of his bargain or was laboring under some misconception regarding the terms of the

agreement. Accordingly, we conclude that Tamberella has failed to demonstrate that the district court abused its discretion by denying his presentence motion to withdraw his guilty plea, and we

ORDER the judgment of conviction AFFIRMED.

  
\_\_\_\_\_, J.  
Hardesty

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

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

cc: Hon. David Wall, District Judge  
Hon. Michelle Leavitt, District Judge  
Clark County Public Defender Philip J. Kohn  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk