

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSHUA COLA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48578

FILED

MAY 11 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of robbery with the use of a deadly weapon (counts I-III) and conspiracy to commit robbery (count IV). Eighth Judicial District Court, Clark County; Valorie Vega, Judge. The district court sentenced appellant Joshua Cola to serve two consecutive prison terms of 24-60 months for count I, two consecutive prison terms of 24-60 months for count II to run consecutively to the sentence imposed for count I, two consecutive prison terms of 24-60 months for count III to run concurrently with the sentence imposed for count II, and a prison term of 24-60 months for count IV to run concurrently with the sentence imposed for count III.

Cola's sole contention is that the district court erred by denying his presentence motion to withdraw his guilty plea. Specifically, Cola claims that former counsel John Parris did not provide him with discovery or adequately consult with him. Additionally, Cola argues that he should be able to withdraw his plea because he did not have ample time to discuss the negotiations with his family. 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.’”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

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

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).

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

In the instant case, the district court conducted an extensive evidentiary hearing on Cola’s motion, filed by newly appointed counsel, and heard from Cola and his two former counsel. The district court found that the discovery materials not provided to Cola were inculpatory and “would have served to increase the likelihood of conviction and would have increased the Defendant’s need and desire to enter into a plea bargain such as the package that was entered into.” Former counsel Frank Cremen testified at the evidentiary hearing that he reviewed the plea agreement with Cola, and advised Cola to accept the plea bargain based on the “compelling evidence” of his guilt. Cremen informed the district court that Cola decided that pleading guilty “was the best thing for him,” especially in light of the fact that the State agreed to dismiss several additional counts, including multiple counts of first-degree kidnapping. The district court found that Cola failed to substantiate his claim that 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)).

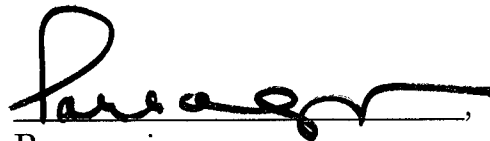
⁷Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986).

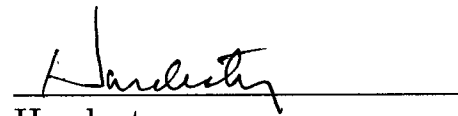
⁸See id. at 272, 721 P.2d at 368.


guilty plea was not entered knowingly and intelligently. We agree and conclude that the district court did not abuse its discretion in denying Cola's presentence motion to withdraw his guilty plea.

Therefore, having considered Cola's contention and concluded that it is without merit, we

ORDER the judgment of conviction AFFIRMED.

 J.
Parraguirre

 J.
Hardesty

 J.
Saitta

cc: Hon. Valorie Vega, District Judge
Oswaldo E. Fumo, Chtd.
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk