

IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS ANDREW NEWTON,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 49338

**FILED**

OCT 18 2007

ORDER OF AFFIRMANCE

JAMETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY A. Alvarado  
DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of three counts of burglary.<sup>1</sup> Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge. The district court sentenced appellant Thomas Andrew Newton to serve two concurrent prison terms of 24-120 months and a consecutive prison term of 12-60 months and ordered him to pay \$600.00 in restitution.

Newton contends that the district court erred by denying his presentence motion to withdraw his guilty plea. Specifically, Newton claims that his plea was not entered freely and voluntarily because he was never advised by either counsel or the district court that part of his sentence may be ordered to run consecutively, and therefore, he was “unaware of the fact that two of the three sentences HAD to run consecutive to one another” in order to satisfy the spirit of the negotiations

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<sup>1</sup>Appellant was initially charged with assault with a deadly weapon, first-degree arson, home invasion, burglary, malicious destruction of private property, aggravated stalking, grand larceny, possession of stolen property, third-degree arson, unlawful taking of a vehicle, and preventing or dissuading a person from testifying or producing evidence.

and his stipulated plea to a sentence of 3-15 years. We conclude that Newton is not entitled to relief.

“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 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

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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, 191, 87 P.3d 533, 537 (2004).

intermediate order in the proceedings.<sup>7</sup> “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.”<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 Newton has failed to substantiate his claim that his guilty plea was not entered freely and voluntarily. The district court did not advise Newton at the plea canvass about its discretion to impose concurrent and/or consecutive prison terms, as Newton claims, however, the district court did state its intent to impose a prison term of 3-15 years in order to satisfy the spirit of the plea negotiations. The formal plea agreement signed by Newton, as well, reflected the parties’ stipulation to a prison term of 3-15 years. Additionally, the plea agreement stated that the district court had the discretion to order the sentences to run concurrently or consecutively. At the plea canvass, Newton answered in the affirmative when asked whether he read and understood the plea agreement and whether he was entering his plea freely and voluntarily and without coercion.

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<sup>7</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>8</sup>Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986).

<sup>9</sup>See id.


At the hearing on Newton's motion to withdraw his plea, where he was represented by newly-appointed counsel, Newton claimed that he did not read the formal plea agreement. The district court, however, did not find Newton's testimony credible, and instead, found the testimony of Newton's previous counsel, Gary Guymon, more credible, specifically with regard to his testimony about the amount of time he spent discussing the case with Newton. In denying Newton's motion, the district court stated that it considered the totality of the circumstances. We note that Newton was, in fact, sentenced in accordance with the stipulated plea agreement, as he concedes in his appeal. Therefore, we conclude that the district court did not abuse its discretion in denying Newton's presentence motion to withdraw his guilty plea.

Having considered Newton's contention and concluded that it is without merit, we

ORDER the judgment of conviction AFFIRMED.

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

  
\_\_\_\_\_, J.  
Gibbons

  
\_\_\_\_\_, J.  
Saitta

cc: Hon. Douglas W. Herndon, District Judge  
Allen & Dustin, LLC  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk