

IN THE SUPREME COURT OF THE STATE OF NEVADA

JUAN ALFONSO NUNO-VELASCO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49574

FILED

MAY 16 2008

TRACEE K. LINDEMAN
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 second-degree murder with the use of a deadly weapon. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

On May 1, 2007, the district court sentenced appellant Juan Alfonso Nuno-Velasco to serve a prison term of life with parole eligibility after 10 years, plus an equal and consecutive term for the deadly weapon enhancement for his role in the murder of Antoinette "Tony" Howard.¹

Nuno-Velasco's sole contention on appeal is that the district court erred in denying his presentence motion to withdraw his guilty plea. He asserts that he was coerced into the plea to help his cousin/co-defendant and he has presented a credible claim of innocence. Along with

¹Nuno-Velasco was charged with four counts: murder, robbery with the use of a firearm, kidnapping in the first degree with the use of a deadly weapon, and murder in the second degree with the use of a deadly weapon. As a result of negotiations, Nuno-Velasco entered a plea of murder in the second degree with the use of a deadly weapon and the other charges were dismissed.

the motion to withdraw his plea, Nuno-Velasco filed an affidavit in which he claimed (1) Howard was killed by Alvaro “Sleepy” Romero, (2) Romero admitted to David Cerritos and Roseanna Saldana that he killed Howard, (3) Roseanna Saldana possessed material information that would exonerate Nuno-Velasco, (4) Nuno-Velasco was being set up as a “fall guy” for a drug cartel run by “El Jefe” Rogelio Silva, (5) the order to kill Howard was given by El Jefe’s son Samuel “Smokey” Silva to Alvaro Romero, and (6) the Silvas tried to kill Nuno-Velasco because Nuno-Velasco knew that Romero had killed Howard.

“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.’”² In considering “whether the defendant advanced a substantial, fair, and just reason to withdraw a plea, the district court must consider the totality of the circumstances to determine whether the defendant entered the plea voluntarily, knowingly, and intelligently.”³ 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.”⁴

On appeal from the district court’s determination, we will presume that the lower court correctly assessed the validity of the plea,

²Woods 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.

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

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

and we will not reverse the lower court's determination absent a clear showing of an abuse of discretion.⁵ 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.⁶

There is no evidence in the record that the district court abused its discretion in denying Nuno-Velasco's presentence motion to withdraw his guilty plea. In considering Nuno-Velasco's motion the district court properly considered the totality of the circumstances, including (1) Nuno-Velasco's written motion and affidavit, (2) the transcript of his plea canvass, (3) the transcript of the preliminary hearing, (4) the representations of defense counsel, (5) all papers and pleadings on file, and (6) the defendant's own testimony. After review of the entire record, the district court concluded that Nuno-Velasco had not presented a credible claim of innocence or established that his plea was involuntarily entered and that there was no fair or just reason to permit withdrawal of the guilty plea.

The record indicates that Nuno-Velasco knowingly and voluntarily pleaded to second-degree murder. During the plea canvass, Nuno-Velasco denied that anyone had threatened him to get him to enter the plea of guilty. He admitted that he was entering a guilty plea to second-degree murder because he was in fact guilty of that crime. Nuno-Velasco stated that he understood the consequences of his plea. Likewise, in the the guilty plea memorandum signed by Nuno-Velasco on May 15,

⁵Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986).

⁶Id.

2006, he again acknowledged that his plea was not the result of any threats or coercion. Because Nuno-Velasco was canvassed thoroughly and signed a guilty plea memorandum, the record does not support his claims of coercion.⁷

Nor did Nuno-Velasco articulate a credible claim of innocence.⁸ Nuno-Velasco confessed to Detective James Stegmaier of the Reno Police Department that he had murdered Howard. Nuno-Velasco also confessed to a Fresno County Sheriff's Office detective that he killed Howard. Further, his co-defendant and cousin Uriel Barajas-Velasco gave a separate confession to police that mirrored the details of Nuno-Velasco's admissions. Specifically, Nuno-Velasco stated that he shot Howard in the shoulder at the Rancho Sierra Motel in Reno, Nevada. He stated that he and Barajas-Velasco put Howard in the trunk of her car and drove to Merced, California to speak with a person known as "El Jefe." Nuno-Velasco stated that at El Jefe's direction he and Barajas drove Howard to a spot on Highway 165, took her out of the trunk, and executed her on the side of the road.

At the preliminary hearing, William Edwards testified that he found Howard's body on the side of Highway 165 near Los Banos, California. Merced County Deputy Sheriff Gerald Dover testified that

⁷Molina v. State, 120 Nev. 185, 191, 87 P.3d 533, 537-38 (2004); Crawford v. State, 117 Nev. 718, 722, 30 P.3d 1123, 1126 (2001) ("A thorough plea canvas coupled with a detailed, consistent, written plea agreement supports a finding that the defendant entered the plea voluntarily, knowingly, and intelligently.")

⁸See Mitchell, 109 Nev. at 141, 848 P.2d at 1062.

Howard's body was found wrapped in a floral print bedspread, that in Howard's pocket was a one-way bus ticket from Sacramento to Reno, and that the autopsy revealed a bullet fragment inside her skull and a pattern of chipping that indicated a shot to the back of Howard's head at close range. He further testified that he received an anonymous phone call stating that those responsible for the murder were at a residence in Fresno, California. At the specified residence the police found Nuno-Velasco and Barajas-Velasco, along with Howard's car with blood in the trunk.

Faviola Mariscal testified that on March 31, 2002, she saw Nuno-Velasco at the Rancho Sierra Motel. She testified that she left with a group of people to go to the Sands Hotel and Casino across the street and that Nuno-Velasco and Howard remained at the motel. Maria Mariscal testified that after gambling at the Sands she returned with the others to the motel and saw Nuno-Velasco inside Howard's car, but did not see Howard. She also testified that when they returned Nuno-Velasco was acting nervous and that he and Barajas-Velasco were looking in the trunk of Howard's car. She further testified that when she returned to the motel a few days later she peeked in the room and saw "a bunch of blood."

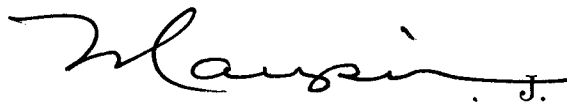
Officer Wesley Myers of the Reno Police Department testified that the bedspread found wrapped around Howard's body appeared to be the same as the bedspreads from the Rancho Sierra Motel. He further testified that blood and bullet evidence were in found in the bathroom of the motel room where Nuno-Velasco and Barajas-Velasco had been staying. He testified that he found pooled blood in the trunk of Howard's car. The evidence presented at the preliminary hearing was consistent with Nuno-Velasco's confession to police.

The exculpatory evidence listed in Nuno-Velasco's affidavit was never produced. Nuno-Velasco's girlfriend at the time of Howard's murder, Roseanna Saldana, was contacted by defense counsel and admitted that she was not a percipient witness to the shooting. She further denied that a third party had admitted responsibility for the murder. David Cerritos, who claimed that Alvaro Romero had told him in prison that Barajas-Velasco was "in here for something I did," was interviewed by defense counsel and was found not to be a credible witness. A polygraph exam was conducted and Cerritos "didn't do very well." Furthermore, the only evidence of a conspiracy by the Silva family to set up Nuno-Velasco for Howard's murder is Nuno-Velasco's own self-serving affidavit. The district court was presented with no credible evidence supporting Nuno-Velasco's claims of innocence.

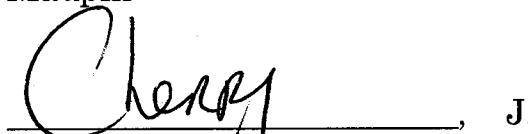
Based on the foregoing, we conclude that the district court did not abuse its discretion by denying Nuno-Velasco's presentence motion to withdraw his guilty plea.

Having considered Nuno-Velasco's arguments and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.



Maupin



Cherry



Saitta

cc: Hon. Jerome Polaha, District Judge
Thomas L. Qualls
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk