

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
ANTHONY R. CIESINSKI, JR.,
Respondent.

No. 50701

FILED

SEP 18 2008

TRACE K. LINDEMAN
CLERK OF SUPREME COURT
BY: *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court granting a post-conviction motion to withdraw a guilty plea. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

On March 20, 2003, the State charged respondent Anthony Ciesinski, Jr., with one count each of using technology to lure children, attempted sexual assault of a minor under 16 years of age, attempted statutory sexual seduction, and attempted first-degree kidnapping. Ciesinski challenged all four counts in a pretrial petition for a writ of habeas corpus. During the district court's hearing on the petition, Ciesinski argued that the use of technology to lure children count should be dismissed because there was no child involved, only an FBI agent. The district court dismissed the attempted kidnapping count and denied the rest of the petition.

On September 29, 2003, the district court accepted Ciesinski's guilty plea to one count of using technology to lure children. Thereafter, the district court convicted Ciesinski of using technology to lure children, sentenced him to a prison term of 48 to 120 months, ordered his sentence suspended, and placed him on probation for a period not to exceed five years. The district court further dismissed the attempted sexual assault

of a minor count and the attempted statutory sexual seduction count. Ciesinski did not file a direct appeal.

On October 5, 2007, Ciesinski filed a motion to withdraw his guilty plea and dismiss the charge. In his motion, Ciesinski cited to State v. Colosimo¹ and Johnson v. State.² Ciesinski claimed that the arguments that he made in his habeas petition mirrored those that this court approved of in Colosimo, he suffered a criminal sentence and sex offender classification for violating a statute that this court determined could not be violated in the manner alleged by the State, and his plea was not entered knowingly and voluntarily. The State filed an opposition and the district court heard argument on the motion. The district court noted that Ciesinski was accused of committing this crime in 2002; Ciesinski was charged under NRS 201.560(1); and, pursuant to Colosimo, this was only a crime if the victim was actually 16 years of age or under. The district court found that Ciesinski pleaded guilty to something that was not a crime, concluded that “out of fairness” Ciesinski must be allowed to withdraw his guilty plea, and granted Ciesinski’s motion.

¹122 Nev. 950, 960-61, 142 P.3d 352, 359 (2006) (holding “that in order to commit the offense described [in NRS 201.560], a defendant’s intended victim must be ‘less than 16 years of age’ and that victim must have actual parents or guardians whose express consent was absent or avoided”).

²123 Nev. ___, ___, 159 P.3d 1096, 1098 (2007) (holding that “a conviction for attempting to lure a child pursuant to NRS 201.560 is proper when the State proves or the defendant admits that he attempted to contact a person whom he believed was a child” (emphasis added)).

On November 16, 2007, the State filed a motion to reconsider the order granting Ciesinski's motion to withdraw his guilty plea and dismissing the charge. In its motion, the State argued that Colosimo is not retroactive and that Johnson applies to this case because the charging document alleged an attempt crime. Ciesinski opposed the motion, arguing that the retroactivity of Colosimo was not at issue and that he was charged with a completed crime. The district court conducted a hearing on the motion, noted that it had read Johnson, and found that its original decision to allow Ciesinski to withdraw his guilty plea was correct. The district court denied the State's motion as it pertained to the withdrawal of the guilty plea. This appeal follows.

"To correct manifest injustice, the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."³ In determining whether manifest injustice has occurred, the court should consider whether the defendant acted voluntarily, understood the nature of the charges against him, and understood the consequences of his plea.⁴ "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."⁵

Here, the district court considered the amended charging document, heard argument regarding Ciesinski's pretrial habeas petition,

³NRS 176.165.


⁴Wilson v. State, 99 Nev. 362, 372-73, 664 P.2d 328, 334-35 (1983).

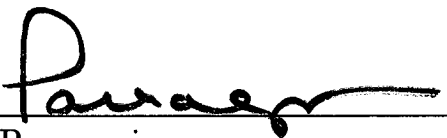
⁵Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986).

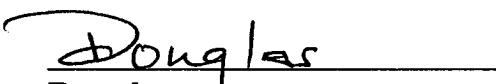
canvassed Ciesinski regarding his decision to plead guilty, conducted the sentencing hearing, entered the judgment of conviction, heard argument on Ciesinski's motion to withdraw the guilty plea, read the relevant statutes and case law, and heard argument on the State's subsequent motion to reconsider its order granting Ciesinski's motion to withdraw. Under these circumstances, the State has not shown that the district court clearly abused its discretion by finding that Ciesinski pleaded guilty to something that was not a crime at the time it was committed and that Ciesinski must be permitted to withdraw his plea.⁶

Having considered the State's contention and concluded that the State is not entitled to relief, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

⁶See generally, Lyons v. State, 105 Nev. 317, 323, 755 P.2d 219, 223 (1989) (holding that where this court determines that the conduct engaged in by a defendant is not a criminal act in Nevada, no evidence of actual guilt exists on any underlying criminal conduct to justify accepting a guilty plea for that conduct).

cc: Hon. Lee A. Gates, District Judge
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Gabriel L. Grasso
Eighth District Court Clerk