IN THE SUPREME COURT OF THE STATE OF NEVADA

DARREN ROY MACK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51143

FILED

JUN 22 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a guilty plea, to first-degree murder, and, pursuant to an Alford plea, to attempted murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

On appeal, appellant Darren Mack raises two issues. He first contends that the district court abused its discretion when it denied his presentence motion to withdraw his guilty pleas after holding a hearing on the matter. In this regard, Mack argues that his pleas were not knowingly, voluntarily, and intelligently entered with a full understanding of the nature and consequences of the pleas because neither the court nor his counsel informed him of all of the elements of the lesser-included offenses or the lesser penalties for those offenses. Second, Mack contends that the district court improperly involved itself in his plea negotiations, thereby violating the bright-line rule established in Cripps v. State, 122 Nev. 764, 137 P.3d 1187 (2006). We conclude that both of these contentions lack merit.

Motion to withdraw the guilty plea

"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.'" 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. In deciding whether a defendant has "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." See Crawford v. State, 117 Nev. 718, 722, 30 P.3d 1123, 1125-26 (2001). A district court "has a duty to review the entire record to determine whether the plea was valid. A district court may not simply review the plea canvass in a vacuum." Mitchell v. State, 109 Nev. 137, 141, 848 P.2d 1060, 1062 (1993). 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. See Hubbard v. State, 110 Nev. 671, 675-76, 877 P.2d 519, 521 (1994). Further, "this court has never required the 'articulation of talismanic phrases' at plea hearings, and we have instead been flexible in terms of permitting a district judge wide latitude in fulfilling the above requirements." Bryant v. State, 102 Nev. 268, 271, 721 P.2d 364, 367 (1986) (internal citation omitted), superseded by statute on other grounds in Hart v. State, 116 Nev. 558, 562, 1 P.3d 969, 971 (2000). Nevertheless, a more lenient standard applies to motions filed prior to sentencing than to motions filed after sentencing. See Molina v. State, 120 Nev. 185, 191, 87 P.3d 533, 537 (2004).

During the evidentiary hearing on his presentence motion to withdraw his guilty pleas, Mack sought to withdraw the pleas on the basis that his counsel and the court failed to advise him of the elements of all the lesser-included offenses to first-degree murder or attempted murder, the likelihood of his conviction on the lesser-included offenses (rather than the greater charged offenses), or the lesser penalties for the lesser-included offenses. In the context of his assertion that his pleas were not

knowing and voluntary, Mack claims that his counsel was ineffective as to his guilty pleas. Thus, we must review caselaw related to the assistance of counsel, i.e., as it relates to the validity of his plea.

A petitioner must satisfy a two-part test, originally set forth in Strickland v. Washington, 466 U.S. 668 (1984), to establish that counsel's assistance was ineffective. Molina v. State, 120 Nev. 185, 190, 87 P.3d 533, 537 (2004). "Under Strickland, the defendant must demonstrate that his counsel's performance was deficient, i.e., it fell below an objective standard of reasonableness, and that the deficient performance prejudiced the defense." Id. "To establish prejudice in the context of a challenge to a guilty plea based upon an assertion of ineffective assistance of counsel, a defendant must "'demonstrate a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'"" Molina, 120 Nev. at 190-91, 87 P.3d at 537 (quoting Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996) (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985))). While "[w]e need not consider both prongs of the test if the defendant makes an insufficient showing on either one," Molina, 120 Nev. at 190, 87 P.3d at 537, we note that Mack failed to meet his burden on either prong of his ineffective assistance claim because his attorneys' performances did not fall below an objective standard of reasonableness and he failed to demonstrate a reasonable probability that but for counsel's failure to advise him on the lesser-included offenses he would not have pleaded guilty and insisted on going to trial.

Further, Mack failed to meet his burden of demonstrating that his guilty plea agreement or plea canvass were invalid. In Nevada, as outlined in Heffley v. Warden, "the court's 'canvassing' should accomplish at least two tasks: (1) assure that the defendant does not improvidently or

involuntarily waive his constitutional right to jury trial, right to confront witnesses, and privilege against self-incrimination; and, (2) facilitate and deter appellate and collateral proceedings on the plea." 89 Nev. 573, 574, 516 P.2d 1403, 1404 (1973) (citing Boykin v. Alabama, 395 U.S. 238, 243-44 (1969)).

In comparison, Mack argued for relief pursuant to Rule 11 of the Federal Rules of Criminal Procedure, which sets forth specific procedures designed to assist the judge in making the determination of whether a defendant's guilty plea is truly voluntary and knowing. McCarthy v. United States, 394 U.S. 459, 465 (1969).[1] In particular, Rule 11(b)(2) requires a federal district judge to "address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement)."[2]

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[1]Rule 11 "requires a judge to address a defendant about to enter a plea of guilty, to ensure that he understands the law of his crime in relation to the facts of his case, as well as his rights as a criminal defendant." United States v. Vonn, 535 U.S. 55, 62 (2002).

[2]In determining whether the entry of a plea of guilty by a criminal defendant was valid in federal court, the following questions must be answered:

> 1. Was the defendant advised of the constitutional rights that are waived by a plea of guilty?
> 2. Was the defendant advised of the direct consequences of the plea?
> 3. Was the defendant adequately advised of the nature of the charges to which he or she pleaded guilty?
> 4. Did the court make a sufficient inquiry as to a factual basis for the plea of guilty?

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While Nevada does not have the same detailed procedure followed by federal courts, as provided in Rule 11, it does incorporate the general scheme of the rule in determining whether a guilty plea was entered knowingly, voluntarily, and intelligently. Based on this scheme, we conclude that the district court did not abuse its discretion when it denied Mack's presentence motion to withdraw his guilty plea. In this case, the district court judge asked Mack if he had "occasion to read the plea agreement before [he] signed it?" and "[d]id [his] attorneys answer any questions [he] had before [he] signed it?" Mack answered yes to both of these questions. In addition, Mack was asked if he had been advised of his constitutional rights that were waived by pleading guilty, the direct consequences of the plea, and the nature of the charges to which he pleaded guilty, and he answered in the affirmative to each of these questions.

Further, during Mack's plea canvass, the judge asked him questions to determine whether his plea was entered knowingly, intelligently, and voluntarily. Throughout this exchange, Mack asked the judge questions and affirmatively stated that he understood the consequences of his plea. Mack testified that he asked his attorneys about

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. . . *continued*

> 5. Was the guilty plea voluntarily entered?
> 6. If the court failed to adequately advise the defendant of the consequences of the plea, was the error harmless?

42 Am. Jur. Trials, at 534-35 (1991).

manslaughter since he was charged with open murder, thereby acknowledging he was aware of other possible offenses.

In addition, the court made a sufficient inquiry as to a factual basis for the plea, as evidenced by the plea canvass, and found that the plea was voluntarily entered. Therefore, although Nevada law does not require courts to strictly adhere to detailed requirements such as those set forth in Rule 11, Nevada law parallels the purpose of Rule 11 in requiring that a canvass of a defendant's guilty plea sufficiently explore whether the plea is voluntary, knowing, and intelligent. Based upon the totality of the circumstances, a sufficiently thorough canvass was conducted in this case. We conclude that Mack's assertion of his pleas being invalid and not being knowingly, voluntarily, and intelligently entered are belied by the record.

Moreover, to the extent Mack claims his attorneys acted improperly because they did not provide him with information regarding lesser-included offenses because they planned to argue self-defense, we disagree. There is no caselaw in Nevada that supports Mack's assertion that a defendant must be advised of lesser-included offenses in order for a plea of guilty to be entered knowingly, voluntarily, and intelligently. Mack cites to several cases in his opening brief that support an appellate court overturning a defendant's plea of guilty based on findings that the defendant did not knowingly, voluntarily, and intelligently enter into the plea.[3] However, the cases do not provide adequate support for the principle that reversal of a conviction pursuant to a guilty plea is

[3]Including Copas v. Commissioner of Correction, 662 A.2d 718 (Conn. 1995); Thompson v. State, 818 So. 2d 632 (Fla. Dist. App. 2002); Duprey v. State, 870 So. 2d 256 (Fla. Dist. App. 2004); People v. Thew, 506 N.W.2d 547 (Mich. 1993); Harlow v. Murray, 443 F. Supp. 1327 (W.D. Va. 1978); and State v. Felton, 329 N.W.2d 161 (Wis. 1983).

warranted simply on grounds that a defendant was not informed of lesser-included offenses.

Further, to the extent Mack argues that this case is analogous to Rinehart v. Brewer, 561 F.2d 126 (8th Cir. 1977), we disagree. In Rinehart, the Eighth Circuit Court of Appeals held that a fifteen-year-old defendant's guilty plea to a murder charge, when viewed in the totality of the circumstances, was not entered voluntarily and understandingly because he was not informed of the elements of the crime of manslaughter and there was a probability that he would have been found guilty of manslaughter based on the facts of the case. Id. at 130-32.

To begin with, we note that in Rinehart, the judge failed to even inquire whether the defendant understood the charge or consequences of his guilty plea. Id. at 131. In contrast, here, Mack testified that he asked his attorneys about manslaughter since he was charged with open murder, thereby acknowledging he was aware of other possible offenses. Mack claims his attorneys did not provide information regarding lesser-included offenses because they planned to argue self-defense. However, one of Mack's trial attorneys testified at the hearing on Mack's motion to withdraw the guilty pleas that Mack had expressed an interest in pleading to "[s]omething less than first degree" and that second-degree murder was discussed. Mack also argued that he was entitled to information on the lesser-included offenses of second-degree murder, voluntary manslaughter, and involuntary manslaughter as to the first count, and assault with a deadly weapon, battery with use of a deadly weapon, and assault or battery with intent to kill as to the second count. Mack does not assert that based on the facts of his case he had a real possibility of being convicted of any of these lesser-included offenses. Instead, Mack simply asserts that he was entitled to information on these

lesser-included offenses, not that there was a probability that he would have been found guilty of any of them rather than the counts to which he pleaded guilty. This is an important distinction from the Rinehart decision that militates against its application in this case. Thus, we conclude the district court did not abuse its discretion in denying Mack's presentence motion to withdraw his guilty pleas.[4]

Alleged Cripps violation

Next, Mack argues that the district court's involvement in the plea negotiations violated the bright-line rule established in Cripps v. State because the district court inserted itself into his plea negotiations. 122 Nev. 764, 137 P.3d 1187 (2006). In Cripps, this court adopted a "bright-line rule" that "prohibit[s] any judicial participation in the formulation or discussions of a potential plea agreement with" the "limited exception" that "the judge may indicate on the record whether the judge is inclined to follow a particular sentencing recommendation of the parties." 122 Nev. at 770-71, 137 P.3d at 1191. This court reviews a judge's violation of the Cripps bright-line rule for harmless error. 122 Nev. at 771, 137 P.3d at 1192. We find no error as to the alleged Cripps violation.

The district court's involvement in plea negotiations was extremely limited in this case. The court allowed Mack to see his family prior to agreeing to the plea deal and allowed Mack an opportunity to speak during sentencing pursuant to the conditional plea. The only discretion that the district court had at sentencing was whether to impose consecutive or concurrent terms. The judge's involvement in facilitating

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[4]We are not persuaded that the judge should canvass counsel, as well as the defendant, when accepting a guilty plea, as Mack suggested in oral argument. Therefore, we do not extend the canvass rule to counsel.

plea negotiations is devoid of any promises that may reasonably be viewed as having been a material factor in affecting Mack's decision to plead guilty. Therefore, we conclude there was no Cripps violation. Accordingly, we

ORDER the judgment of the district court AFFIRMED.[5]

_____, C.J.
Parraguirre

_____, J.
Douglas

_____, J.
Cherry

_____, J.
Saitta

_____, J.
Gibbons

_____, J.
Pickering

cc: Hon. Douglas W. Herndon, District Judge
Kasowitz, Benson, Torres & Friedman, LLP
Laub & Laub
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[5]The Honorable James W. Hardesty, Justice, voluntarily recused himself from participation in the decision of this matter.