IN THE SUPREME COURT OF THE STATE OF NEVADA

LIONEL WEEMS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51222

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of one count of attempted battery causing substantial bodily harm. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge. The district court sentenced appellant Lionel Weems to serve a term of 12 months in the Clark County Detention Center, suspended the sentence, and placed Weems on probation for a period not to exceed 3 years.

Weems asserts that the district court abused its discretion by denying his presentence motion to withdraw the guilty plea. Specifically, Weems argues that his counsel was ineffective and his plea was not voluntarily or intelligently entered because his counsel did not give him sufficient time to review the plea agreement and consider whether to accept the negotiation. Weems further argues that his counsel was ineffective and the State unreasonably interfered in the plea negotiation because Weems' counsel and the prosecutor discussed the negotiations while in Weems' presence and the discussions allegedly included predictions by the prosecutor about the potential sentencing outcome. We disagree.

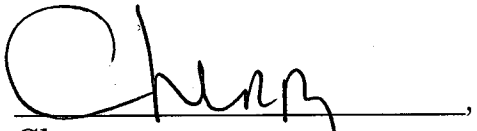
"A district court may, in its discretion, grant a defendant's [presentence] motion to withdraw a guilty plea for any 'substantial reason' if it is 'fair and just.'" Woods v. State, 114 Nev. 468, 475, 958 P.2d 91, 95 (1998) (quoting State v. District Court, 85 Nev. 381, 385, 455 P.2d 923, 926 (1969)); 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, 721-22, 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). 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). Although a defendant may attack the validity of a guilty plea by showing that he received ineffective assistance of counsel, the defendant maintains the burden of demonstrating that the plea was not entered knowingly, intelligently and voluntarily. See Id. at 190, 87 P.3d at 537. To establish the necessary prejudice to support such a claim, 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.'" Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996) (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)).

An order denying a presentence motion to withdraw a guilty plea is reviewable on direct appeal from the judgment of conviction as an intermediate order in the proceedings. 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)). "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." Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986). 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. See id.

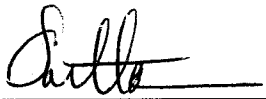
We conclude that the district court did not abuse its discretion in denying Weems' presentence motion to withdraw his guilty plea. In the written plea agreement Weems acknowledged that he had been informed of the potential sentence he was facing, he had not been promised or guaranteed any particular sentence, and the issue of sentencing was to be determined by the court. In the plea agreement and at the plea canvass, Weems also acknowledged that he had read and understood the terms of the plea and indicated that he was entering the guilty plea voluntarily. At the argument on the motion to withdraw the guilty plea, the prosecutor informed the district court that although she discussed the negotiations with Weems' counsel while Weems was present, the discussion was entered into at Weems' counsel's request, Weems did not take part in the discussion, and the negotiation was the same one that had been offered to Weems on several prior occasions. The district court found that Weems' plea was freely and voluntarily entered and orally denied Weems' motion.

Based on the above, we conclude that Weems has failed to substantiate his claim that his guilty plea was not entered knowingly and intelligently. Therefore, we affirm the denial of the motion to withdraw the guilty plea, and we

ORDER the judgment of conviction AFFIRMED.



_____, J.
Cherry



_____, J.
Saitta

_____, J.
Gibbons

cc: Hon. Elizabeth Goff Gonzalez, District Judge
Kirk T. Kennedy
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk