

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARIAN THERESA AUSIELLO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51503

FILED

APR 15 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an amended judgment of conviction, entered pursuant to a guilty plea, of one count of trafficking in a controlled substance. Fifth Judicial District Court, Nye County; John P. Davis, Judge.

In June 2006, the State filed an amended information in the district court that accused appellant Marian Theresa Ausiello of trafficking in a controlled substance and possession of a controlled substance. The matter proceeded to trial and a jury was impaneled. In the middle of the trial, Ausiello sought negotiations with the State, accepted the State's offer, and entered a guilty plea to one count of trafficking in a controlled substance. The district court conducted a plea canvass, accepted Ausiello's guilty plea, and set the matter for sentencing. At sentencing, Ausiello moved to withdraw her guilty plea, the district court summarily denied the motion, and the district court sentenced Ausiello. Thereafter, Ausiello appealed from the judgment of conviction.

On appeal, we determined that the district court abused its discretion by refusing to consider Ausiello's motion to withdraw her guilty plea and her claims relating to the issue of substantial assistance.

Ausiello v. State, Docket No. 48244 (Order Vacating Sentence and Remanding, October 17, 2007). On remand, the district court conducted an evidentiary hearing, denied Ausiello's motion to withdraw her guilty plea, found that she had not provided substantial assistance, sentenced her to a prison term of 10 to 25 years, and entered an amended judgment of conviction. This appeal followed.

First, Ausiello contends that the district court abused its discretion by denying her motion to withdraw her guilty plea. Ausiello specifically claims that the written plea agreement provided a distorted version of her right to appeal and that the district court's recitation of this right was inadequate. Ausiello also claims that the written plea agreement was not in substantial compliance with NRS 174.063 because it did not properly articulate her right to appeal; it did not reference the charging document; and it did not address administrative assessment fees, restitution, extradition fees, the mandatory nature of the sentence, and the possibility of consecutive or concurrent sentences if more than one sentence was imposed.

"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 considering 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." Crawford v. State, 117 Nev. 718, 722, 30 P.3d 1123, 1125-26 (2001). 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.” Mitchell v. State, 109 Nev. 137, 141, 848 P.2d 1060, 1062 (1993).

“NRS 174.063 sets forth a statutory written form for plea agreements. Technical preciseness is not necessary, however, and under the plain language of NRS 174.063, a written plea agreement must only ‘substantially’ comply with the statutory form.” Sparks v. State, 121 Nev. 107, 110, 110 P.3d 486, 488 (2005). We have observed that NRS 174.063 “was specifically crafted so that the parties retain some discretion as to the form of the written agreement, to facilitate the various fact patterns that arise in criminal law.” Id. at 111, 110 P.3d at 488 (internal quotation marks and citation omitted). We have “recognized that a defendant is entitled to enter into a plea agreement affecting fundamental rights.” Id. at 112, 110 P.3d at 489. And we have held that we “will enforce unique terms of the parties’ plea agreement even in cases where there has not been substantial compliance with NRS 174.063, provided that the totality of the circumstances indicates that the guilty plea was knowing, voluntary and intelligent.” Id.

In reviewing 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), limited on other grounds by Smith v. State, 110 Nev. 1009, 879 P.2d 60 (1994). If appellant’s motion to withdraw is based on a claim that the guilty plea was not entered voluntarily, knowingly, and intelligently, the appellant has the burden to substantiate the claim. See id.

Our review of the record on appeal reveals that the district court correctly assessed the validity of Ausiello's plea. In her written plea agreement, Ausiello acknowledged that: (1) she was entering the guilty plea to limit her criminal penalty exposure; (2) "the offense is non-probationable unless [she] performed substantial assistance as recommended by law enforcement and accepted by the court;" (3) she was waiving the right to appeal the search of her vehicle, sentencing errors should they appear, and ineffective assistance of counsel; and (4) her plea was made knowingly, willingly, and voluntarily.

The district court canvassed Ausiello to ensure that she understood the important constitutional rights that she was waiving, the nature of the offense charged, and the consequences of her plea. The district court specifically addressed Ausiello's right to appeal, the fact that her offense was non-probationable, and the impact substantial assistance may have on its sentencing discretion.

During its evidentiary hearing on Ausiello's motion to withdraw the guilty plea, the district court considered Ausiello's testimony that she did not receive prenatal care while in the county jail, and her argument that her plea was involuntary because it was compelled by her desire to get out of jail, get prenatal care for her baby, and do something to lower her sentence. The district court found that Ausiello entered her guilty plea knowingly, voluntarily, and willingly and denied her motion.

We conclude from the totality of the circumstances that Ausiello has failed to show that the district court clearly abused its discretion and, therefore, she is not entitled to relief on this claim.

Second, Ausiello contends that the district court abused its discretion by determining that she had not provided substantial assistance

to law enforcement authorities. Citing to Parrish v. State, 116 Nev. 982, 12 P.3d 953 (2000), Ausiello specifically claims “that the district judge’s ruling lacks the same kind of specificity mandated in Parrish. The ruling may well have been based on Detective Powell’s assertion, disapproved by this Court, that Ausiello did not provide substantial assistance because she only participated in one apparent mid-level trafficking transaction.”

NRS 453.3405(2) provides that a district judge may reduce or suspend the sentence of any person convicted of trafficking in a controlled substance “if he finds that the convicted person rendered substantial assistance in the identification, arrest or conviction of any of his accomplices, accessories, coconspirators or principals or of any other person involved in trafficking in a controlled substance.”

In construing this statute, we have observed that “[law enforcement authorities are] not free to represent to the court that substantial assistance has not been rendered simply because their internal requirements have not been met,” “a judicial determination of whether or not substantial assistance has been rendered must be made by application of the statutory requirements to the defendant’s efforts,” and “this court may imply factual findings if the record clearly supports the lower court’s ruling.” Parrish, 116 Nev. at 991-92, 12 P.3d at 958-59.

We have also recognized that the district court has great discretion in deciding whether to reduce a defendant’s sentence for providing substantial assistance, and we held “that when evidence is presented to the district court concerning whether or not a defendant has rendered substantial assistance pursuant to NRS 453.3405(2), the district court is required to expressly state its finding concerning whether or not

substantial assistance has been provided.” Id. at 989, 992, 12 P.3d at 957, 959.

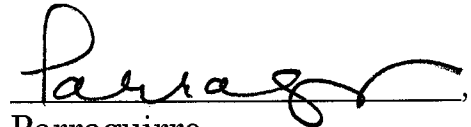
Here, the district court conducted an evidentiary hearing and heard testimony that Ausiello was released from custody to perform substantial assistance on June 23, 2006; on August 7, 2006, she had a miscarriage; and on August 24, 2006, she was taken back into custody. When Ausiello initially met with Nye County detectives, she told them that she was able to get a large quantity of methamphetamine and she was able to purchase methamphetamine from the Hells Angels Motorcycle Club. However, she did not get large quantities of methamphetamine or provide any information that would get law enforcement authorities inside the Hells Angels.

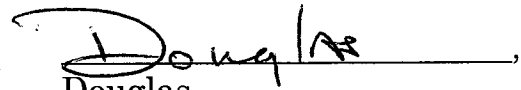
Over the course of time, the Nye County detectives developed doubts about Ausiello’s willingness to help. Ausiello wanted her telephone calls to the Sheriff’s Office to suffice and she would make excuses for not coming to the Sheriff’s Office to perform controlled buys. Although Ausiello did provide a trafficking transaction in the amount of one half of an ounce, Detective John Powell did not believe that it constituted a mid-level transaction.

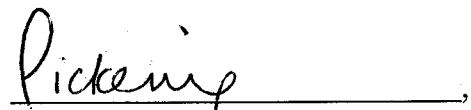
Ausiello argued that the State did not give “her ample opportunity to cooperate substantially.” In response, the State observed that the law enforcement authorities had determined that Ausiello was “simply unwilling to follow through with what she agreed to do” and noted that the “second page of the guilty plea agreement says that substantial assistance would be at the discretion of law enforcement.” At the conclusion of the evidentiary hearing, the district court expressly found that Ausiello did not render substantial assistance.

Under these circumstances, we conclude that Ausiello has not demonstrated that the district court abused its discretion. And, having considered Ausiello's contentions and concluded that they are without merit, we

ORDER the amended judgment of conviction AFFIRMED.

 J.
Parraguirre

 J.
Douglas

 J.
Pickering

cc: Hon. John P. Davis, District Judge
Gibson & Kuehn
Attorney General Catherine Cortez Masto/Carson City
Nye County District Attorney/Pahrump
Nye County District Attorney/Tonopah
Nye County Clerk