

IN THE SUPREME COURT OF THE STATE OF NEVADA


MICHAEL HOWARD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51761

FILED

AUG 10 2009

ORDER OF AFFIRMANCE

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of sexually motivated coercion. Eighth Judicial District Court, Clark County; Valorie Vega, Judge. The district court sentenced appellant Michael Howard to serve a prison term of 12 to 48 months.

Howard claims that the district court abused its discretion by denying his presentence motion to withdraw his guilty plea and by failing to grant him probation. For the reasons discussed below, we conclude these claims lack merit.

Motion to withdraw guilty plea

Howard claims that the district court abused its discretion by denying his presentence motion to withdraw his guilty plea. Howard asserts that at the time he entered his plea he did not understand or appreciate the impact sex offender registration would have on his relationship with his children.

“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).

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),

limited on other grounds by *Smith v. State*, 110 Nev. 1009, 1010 n.1, 879 P.2d 60, 61 n.1 (1994). 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.*

The record on appeal reveals that the district court correctly assessed the validity of Howard's plea. In the written plea agreement, Howard acknowledged that he had discussed the elements of the original criminal charges and possible defenses with his attorney and his attorney had carefully explained his rights, waiver of rights, elements of the offenses, and consequences of the plea. Howard also acknowledged that as a result of his conviction he would be required to register as a sex offender and accepting the plea was in his best interest. At the plea canvass, Howard demonstrated a rational and factual understanding of the proceedings and acknowledged that he thoroughly read and understood the written plea agreement before signing it. Because sex offender registration is a collateral consequence of Howard's guilty plea, Howard's lack of understanding regarding any impact sex offender registration may have on his relationship with his children did not render his plea invalid. *Nollette v. State*, 118 Nev. 341, 347, 46 P.3d 87, 91 (2002). Accordingly, we conclude that the district court did not abuse its discretion in denying Howard's presentence motion to withdraw his guilty plea.

Abuse of discretion at sentencing

Next, Howard claims that the district court erred by not granting him probation although his was a probational offense. Howard asserts that the district court should have granted him probation because

he was a first-time offender and registration as a sex offender would be unjust.

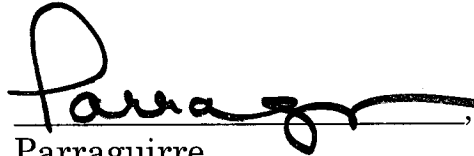
This court has consistently afforded the district court wide discretion in its sentencing decision. Houk v. State, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). The district court's discretion, however, is not limitless. Parrish v. State, 116 Nev. 982, 989, 12 P.3d 953, 957 (2000). Nevertheless, we will refrain from interfering with the sentence imposed "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976). Despite its severity, a sentence within the statutory limits is not cruel and unusual punishment where the statute itself is constitutional, and the sentence is not so unreasonably disproportionate to the crime as to shock the conscience. Allred v. State, 120 Nev. 410, 420, 92 P.3d 1246, 1253 (2004). Finally, it is within the district court's discretion to grant probation. NRS 176A.100(1)(c).

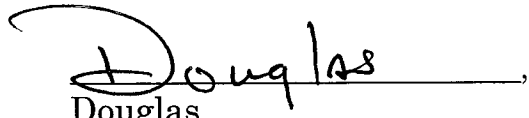
Howard does not allege that the district court relied on impalpable or highly suspect evidence or that the relevant sentencing statutes are unconstitutional. The sentence imposed was within the parameters provided by the relevant statute. See NRS 207.190(2)(a). At sentencing, the district court noted that Howard's violent actions appeared to be an aberration and this was a crime of opportunity. However, the district court further noted that the victim was going to be impacted by the crime for a significant period of time and therefore determined that prison time was appropriate. We conclude that Howard has failed to

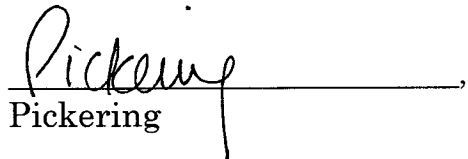
demonstrate that the district court abused its discretion by failing to sentence him to probation.

Having considered Howard's contentions and concluded they lack merit, we

ORDER the judgment of conviction AFFIRMED.

 J.
Parraguirre

 J.
Douglas

 J.
Pickering

cc: Hon. Valorie Vega, District Judge
Mueller Hinds & Associates
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk