

IN THE SUPREME COURT OF THE STATE OF NEVADA

KA MUI NG,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51997

FILED

JUN 28 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
[Signature]
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of one count of drawing and passing a check without sufficient funds with intent to defraud. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge. The district court sentenced appellant Ka Mui Ng to serve a prison term of 12 to 30 months, suspended the execution of the sentence and placed Ng on probation for a period not to exceed five years. As conditions of probation, the district court ordered Ng to pay restitution totaling \$110,075 and to refrain from entering any gaming establishment for the purpose of gambling.

Ng contends the district court abused its discretion by denying her presentence motion to withdraw her guilty plea because her plea was not voluntarily, knowingly and intelligently entered. Specifically, Ng contends (1) at the time her plea was negotiated and entered, her "attorneys were not representing her best interests;" (2) the guilty plea agreement was not read to her in Chinese, her native language; and (3) the plea canvass "was insufficient in that it did not disclose all the conditions" of the plea agreement, "namely that she would be excluded from entry into the United States and/or denied naturalization." Ng also

claims she has “a credible claim of factual innocence” and the State would not be prejudiced by withdrawal of her guilty plea.

A defendant may file a motion to withdraw a guilty plea before sentencing. NRS 176.165. The district court may grant such a motion in its discretion for any substantial reason that is fair and just. State v. District Court, 85 Nev. 381, 385, 455 P.2d 923, 926 (1969). A defendant has no right, however, to withdraw a guilty plea solely because she moved to do so prior to sentencing and the State did not 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). 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).

An order denying a presentence motion to withdraw a guilty plea is reviewable on direct appeal from a 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). The burden to substantiate a claim that the guilty plea was not entered voluntarily, knowingly, and intelligently, remains with the appellant. 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). 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." Id.

Our review of the record reveals that the district court correctly assessed the validity of Ng's plea. Before denying Ng's motion to withdraw her plea, the district court considered the totality of the circumstances and reviewed the entire record, including a DVD of Ng's arraignment and plea canvass. During the plea canvass, Ng answered in the affirmative when asked whether she could read, write and understand Cantonese. Ng was provided a Cantonese interpreter, Ng's counsel spoke Cantonese, and the district court found that Ng participated in the proceedings, had a rational and factual understanding of the proceedings, and responded thoughtfully and intelligently to the district court's questions. Speaking through the interpreter at the plea canvass, Ng told the district court that (1) the guilty plea agreement had been read to her in her native language; (2) she understood the elements of the charge against her and the terms of the negotiated agreement with the State, which included dismissal of one count, release on her own recognizance and probation, payment of full restitution, and dismissal of the case if restitution was made; and (3) she had discussed with her attorney the constitutional rights she was waiving by pleading guilty. Although the district court did not advise Ng of the immigration consequences of her plea, "the possibility of [negative immigration consequences] is a collateral consequence which does not affect the voluntariness of a plea." Barajas v. State, 115 Nev. 440, 442, 991 P.2d 474, 475-76 (1999). Finally, because Ng "failed to allege that her attorney made affirmative misrepresentations

regarding immigration consequences, we find no abuse of discretion in the district court's decision to deny her relief on that ground." Rubio v. State, 124 Nev. ___, 194 P.3d 1224, 1226 (2008).

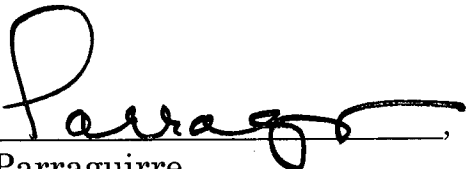
Ng also contends that the district court erred in denying her motion to withdraw her guilty plea because she made "a credible claim of factual innocence" and the State would not have been prejudiced by a presentence withdrawal of her plea. Ng claims she lacked the requisite intent to defraud because she relied on the assurances of her travel partner and a casino host that it "was no problem" that Ng did not have sufficient funds in her bank account to cover the \$100,000 check she wrote to the casino in return for cash and/or gambling chips. However, the requisite "intent to defraud [when passing a bad check] . . . is presumed to exist if . . . [p]ayment of the [check] is refused by the drawee [bank] when it is presented" and the writer of the check fails to pay the full amount due within five days of receiving notice of the bank's refusal. NRS 205.132(1)(b) (emphasis added); see also Nguyen v. State, 116 Nev. 1171, 1176, 14 P.3d 515, 518-19 (2000) (intent to defraud is demonstrated by bank returning check unpaid and check-writer failing to make good on bad check). Moreover, we note that at the hearing on her motion, Ng responded, "Yes, it's the truth," when the district court asked whether she had entered the casino, signed the check, and then failed to pay the money. The district court found that Ng failed to substantiate her claim that her guilty plea was not entered voluntarily, knowingly, and intelligently. We agree and conclude that the district court did not abuse its discretion in denying Ng's motion to withdraw her guilty plea.

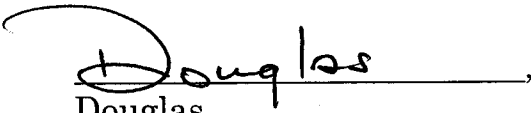
To the extent that Ng contends her counsel was ineffective, we note that this court has repeatedly stated that, generally, claims of

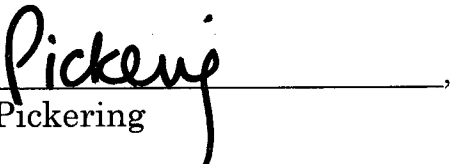
ineffective assistance of counsel will not be considered on direct appeal; such claims must be presented to the district court in the first instance. See Johnson v. State, 117 Nev. 153, 160-61, 17 P.3d 1008, 1013 (2001). Ng has failed to provide this court with any reason to depart from this policy in her case.

Having considered Ng's contentions and concluded that no relief is warranted, we

ORDER the judgment of conviction AFFIRMED.


_____, J.
Parraguirre


_____, J.
Douglas


_____, J.
Pickering

cc: Eighth Judicial District Court Dept. 8, District Judge
Lawrence J. Semenza
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk