

IN THE SUPREME COURT OF THE STATE OF NEVADA

VICTOR VITACCA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52337

FILED

JAN 22 2009

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, entered pursuant to a plea of no contest, of one count of battery causing substantial bodily harm. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge. The district court sentenced appellant Victor Vitacca to serve a prison sentence of 12 to 60 months.

Vitacca contends that the district court abused its discretion by denying his presentence motion to withdraw his guilty plea. Vitacca claims that the district court applied the wrong standard and that his credible claim of factual innocence, coupled with a lack of prejudice to the State, constituted a substantial, fair, and just reason for granting the motion.

“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).

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; Harte v. State, 116 Nev. 558, 562 n.2, 1 P.3d 969, 971 n.2 (2000). 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 the motion to withdraw is based on a claim that the guilty plea was not entered voluntarily, knowingly, and intelligently, the burden to substantiate the claim remains with the appellant. See Bryant, 102 Nev. at 272, 721 P.2d at 368.

Our review of the record on appeal reveals that the district court correctly assessed the validity of Vitacca’s plea. In his written plea agreement, Vitacca acknowledged that he had discussed the criminal charge, facts of the case, and possible defenses with his attorney and that his attorney had carefully explained his rights, waiver of rights, elements of the offense, and possible penalties and consequences of the plea. Vitacca further stated that he was satisfied with his attorney’s advice and representation and that he believed that the plea was in his best interest.

During its oral plea canvass, the district court ensured Vitacca understood the important constitutional rights that he was waiving, the nature of the offense charged, and the consequences of his plea. Vitacca informed the district court that he read, understood, and signed the written plea agreement and that he talked with his attorney about the written plea agreement and was satisfied with the services that his attorney had provided.

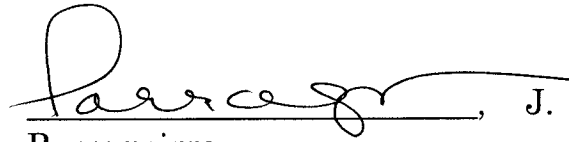
In his motion to withdraw, Vitacca argued that his guilty plea was the product of ineffective assistance of counsel. See Molina v. State, 120 Nev. 185, 190-92, 87 P.3d 533, 537-38 (2004) (discussing challenges to the validity of a guilty plea based on claims of ineffective assistance of counsel). Vitacca specifically claimed that “his previous attorney did not clearly advise him” that a defense of self-defense was “still possible,” and that his previous attorney “did not communicate well with [him].” However, Vitacca failed to demonstrate that he would be entitled to relief if these allegations were true. See id.

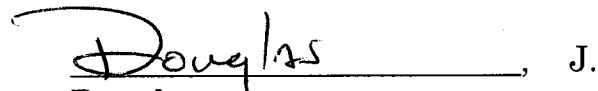
Vitacca also argued that despite the admissions he made on a telephone answering machine, his “claim that he acted in self-defense combined with additional evidence may well result in a jury acquitting [him].” This argument does not constitute a “credible claim of factual innocence.” See Mitchell, 109 Nev. at 141, 848 P.2d at 1062 (holding that the district court abused its discretion by denying appellant’s presentence motion to withdraw her guilty plea in light of her credible claim of factual innocence).

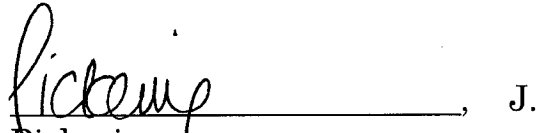
Based on our consideration of the totality of the circumstances, we conclude that Vitacca has failed to carry his burden to

show that the district court clearly abused its discretion by denying his presentence motion to withdraw his guilty plea. Accordingly, we

ORDER the judgment of conviction AFFIRMED.


Parraguirre, J.


Douglas, J.


Pickering, J.

cc: Hon. Patrick Flanagan, District Judge
Dennis E. Widdis
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk