

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY LUCIANO A/K/A ANTHONY
JOSEPH LUCIANO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53229

FILED

DEC 18 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, pursuant to a guilty plea, of two counts of theft. Eighth Judicial District Court, Clark County; Michael Villani, Judge. The district court sentenced appellant Anthony Luciano to serve two concurrent terms of three to ten years in the Nevada State Prison.

On appeal, Luciano claims that the district court erred by (1) refusing to allow him to withdraw his plea because it was not made knowingly, intelligently, and voluntarily; (2) precluding relevant evidence during the evidentiary hearing on his motion to withdraw; and (3) permitting the prosecutor to argue at sentencing in violation of the guilty plea agreement. We conclude that the district court did not err and affirm the judgment of conviction.

Validity of the guilty plea

Luciano claims that the district court erred in denying his motion to withdraw his guilty plea because he did not plead knowingly, voluntarily, and intelligently. Luciano's claim is without merit.

"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.” Molina v. State, 120 Nev. 185, 191, 87 P.3d 533, 537 (2004) (quoting Woods v. State, 114 Nev. 468, 475, 958 P.2d 91, 95 (1998)) (internal alterations and quotations omitted). However, “[a] guilty plea is presumptively valid, and [a defendant has] the burden of establishing that the plea was not entered knowingly and intelligently.” McConnell v. State, 125 Nev. ___, ___, 212 P.3d 307, 312 (2009). “In determining the validity of a guilty plea, the district court must look to the totality of the circumstances.” Id. “This court will not reverse a district court’s determination concerning the validity of a plea absent a clear abuse of discretion.” Id.

Luciano first claims that his plea was not entered voluntarily and knowingly because language in the guilty plea agreement regarding the consequences of his failure to pay restitution was ambiguous. Luciano claims that he reasonably believed that the plea agreement provided that his failure to pay \$150,000 at the time of sentencing would result in withdrawal of the plea and that he would proceed to trial.

Although Luciano testified to this belief at an evidentiary hearing on his motion to withdraw the plea, Luciano’s plea counsel testified that he told Luciano several times that the failure to pay the \$150,000 would result in a prison sentence. The district court found that Luciano’s testimony was not credible, and this court typically refrains from second-guessing a district court’s credibility determination. State v. Ruscetta, 123 Nev. 299, 305 n.25, 163 P.3d 451, 455 n.25 (2007). Furthermore, nothing in the plea agreement suggests that the failure to fulfill the plea bargain allowed Luciano to withdraw his plea. Nor does the record demonstrate that the plea bargain contemplated Luciano’s right to change his mind about pleading guilty after he had already done so. We agree with the district court that Luciano’s assertions otherwise are neither credible nor reasonable. Accordingly, we conclude that the district

court did not abuse its discretion in denying Luciano's motion to withdraw his guilty plea on this basis.

Luciano further argues that his plea was involuntary because the district court's plea canvass was inadequate. Specifically, he asserts that the district court failed to (1) establish that he understood a hand-written interlineation in the guilty plea agreement and (2) explain that his sentences could run consecutively. Luciano fails to demonstrate that relief is warranted.

At the guilty plea hearing, the prosecutor and counsel initialed a hand-written interlineation stating that "[i]f the defendant does not pay \$150,000 by the time of sentencing, he agrees to be sentenced to a nonsuspended term of imprisonment." While Luciano signed the agreement with the handwritten term, he did not specifically initial the addition. Accordingly, following an evidentiary hearing on the issue, the district court struck the handwritten interlineation. Therefore, even if the court's canvass was inadequate with regard to that term of the agreement, Luciano cannot demonstrate any prejudice.

As for the canvass on his possible sentence, the district court informed Luciano that "the sentencing range for—for both counts is a maximum term of ten years and a minimum year of one year in the Nevada Department of Corrections." Luciano contends that this advisement was inadequate because it failed to ensure that Luciano knew his sentences could run consecutively. However, at the plea canvass, Luciano stated that he had read the guilty plea agreement and understood everything contained in it. The guilty plea clearly indicated that the

sentences could run concurrently or consecutively. We conclude that Luciano fails to show that his plea was involuntary on this basis.¹

Evidentiary hearing

Luciano claims that during the evidentiary hearing on the motion to withdraw his guilty plea, the district court erred by (1) preventing him from calling the prosecutor as a witness and refusing to admit the prosecutor's "dump sheet" as evidence, and (2) denying his request to submit an affidavit in lieu of testifying. Luciano's claims are without merit.

This court reviews a district court's evidentiary rulings for an abuse of discretion. Hernandez v. State, 124 Nev. ___, ___, 188 P.3d 1126, 1131 (2008).

With respect to the prosecutor's testimony and the admission of the dump sheet, the district court declined to allow the prosecutor to testify because it was not relevant to Luciano's understanding of the plea negotiations. The district court allowed counsel to make an offer of proof that the interlineated language added to the plea agreement was not contained on the prosecutor's "dump sheet." The district court announced that it would "not hold[] the Defendant to that language." Defense counsel then asked to make the dump sheet part of the record. The court declined, concluding that it was inadmissible work product.

We conclude that the district court did not abuse its discretion on the grounds Luciano asserts. Even if the evidence was relevant, it was unnecessary because the district court accepted Luciano's offer of proof.

¹Moreover, the judgment of conviction reflects that Luciano's sentences are concurrent.

See NRS 48.035(2). Moreover, the district court struck the interlineated language and therefore Luciano cannot demonstrate any prejudice.²

As for Luciano's request to submit an affidavit in lieu of testifying, Luciano cites no authority specifically authorizing a defendant who challenges his guilty plea to testify at an evidentiary hearing by affidavit. Rather, Luciano relies on this court's opinion in Molina v. State, 120 Nev. 185, 87 P.3d 533 (2004), which involves a situation where defense counsel was the only witness at an evidentiary hearing challenging a guilty plea. He further argues that requiring him to testify at the evidentiary hearing violated his Fifth Amendment rights. Luciano's claims are without merit.

Nothing in this court's holding in Molina requires a district court to accept an affidavit in lieu of testimony at an evidentiary hearing. Furthermore, the district court did not compel Luciano to testify. Rather, the district court precluded him from testifying by affidavit without being subject to cross-examination, which did not violate Luciano's Fifth Amendment rights. See Doyle v. Ohio, 426 U.S. 610, 629 n.8 (1976). In any case, Luciano specifically waived his Fifth Amendment right against self-incrimination when he pleaded guilty. Therefore, we conclude that the district court did not abuse its discretion.

²Luciano argues for the first time in his reply brief that even though the interlineated language was struck, the prosecutor's testimony was still relevant to impeach defense counsel's testimony. In addition to the fact that this court need not address arguments raised for the first time in a reply brief, see Diomampo v. State, 124 Nev. ___, ___ n.25, 185 P.3d 1031, 1039 n.25 (2008), Luciano's claim is speculative. An appellant has the burden to demonstrate error below, Fairman v. State, 87 Nev. 627, 629, 491 P.2d 1283, 1284 (1971), and without showing what testimony would have been offered, he fails to carry his burden.

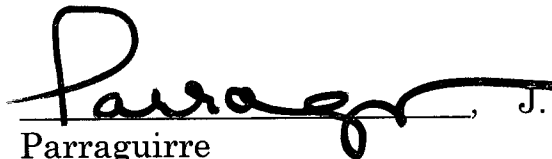
Sentencing

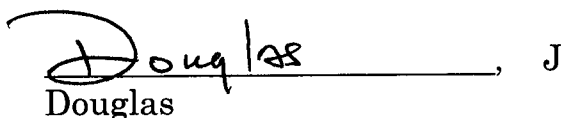
Luciano claims that the district court erred by permitting the State to argue at sentencing in violation of the guilty plea agreement. His claim is patently without merit.

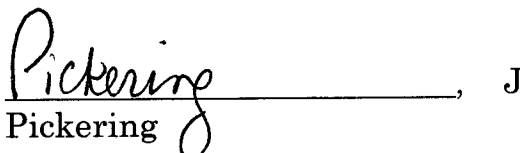
Luciano's claim is based on the fact that the guilty plea agreement did not include an express reservation of the right to argue at sentencing. This is true, and the State would have violated the guilty plea agreement and its promise not to oppose probation had Luciano fulfilled his responsibilities under the agreement. However, Luciano's failure to pay \$150,000 at the time of sentencing effectively repudiated that portion of the agreement. See Villalpando v. State, 107 Nev. 465, 467, 814 P.2d 78, 79 (1991). Therefore, we conclude that the district court did not err by permitting the State to argue at sentencing.

Having considered Luciano's claims and concluded that no relief is warranted, we

ORDER the judgment of conviction AFFIRMED.

 J.
Parraguirre

 J.
Douglas

 J.
Pickering

cc: Hon. Michael Villani, District Judge
Law Offices of Al Lasso, LLC
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk