

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSE MARTINEZ BANDERA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 53611

**FILED**

**NOV 13 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 guilty plea, of one count of false imprisonment. Second Judicial District Court, Washoe County; Janet J. Berry, Judge. The district court sentenced appellant Jose Martinez Bandera to serve a prison term of 12 to 48 months.

Bandera contends that the district court abused its discretion by denying his presentence motion to withdraw his guilty plea. Specifically, Bandera argues that the district court should have permitted him to withdraw his plea because he had indications that the victim, his wife, may recant some of her prior claims and be less willing to participate in his prosecution, and the State would not suffer prejudice as a result. We disagree.

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). 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

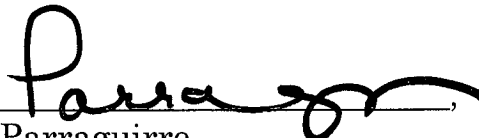
circumstances to determine whether the defendant entered the plea voluntarily, knowingly, and intelligently.” Crawford v. State, 117 Nev. 718, 722, 30 P.3d 1123, 1125-26 (2001). The district court “has a duty to review the entire record to determine whether the plea was valid ... [and] may not simply review the plea canvass in a vacuum.” Mitchell v. State, 109 Nev. 137, 141, 848 P.2d 1060, 1062 (1993). 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 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). If the 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. 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.


In this case, Bandera failed to advance any substantial, fair, and just reason for withdrawal of his plea. Bandera's wife was present in the courtroom when Bandera's motion was heard by the district court.

Bandera did not call his wife to the stand. The State represented that Bandera's wife was not recanting her prior claims and was prepared to give a victim impact statement should the district court deny Bandera's motion and proceed to sentencing. The district court found that Bandera entered his guilty plea voluntarily, knowingly, and intelligently, and that Bandera's subjective belief that the victim may recant or be uncooperative with the State did not justify withdrawal of his plea. We conclude that the district court did not abuse its discretion in denying Bandera's presentence motion to withdraw his guilty plea, and we

ORDER the judgment of conviction AFFIRMED.

  
\_\_\_\_\_, J.  
Parraguirre

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Pickering

cc: Hon. Janet J. Berry, District Judge  
Washoe County Public Defender  
Attorney General Catherine Cortez Masto/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk