

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID E. DUDO,

No. 34983

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

FILED

JUL 12 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant's post-conviction motion to withdraw his nolo contendere plea. Appellant was convicted, pursuant to a nolo contendere plea,¹ of one count of first degree kidnapping. The district court sentenced appellant to serve a prison term of life with the possibility of parole after five years.

On July 20, 1999, appellant filed a proper person motion to vacate an illegal sentence in district court. Because the motion challenged the validity of the nolo contendere plea, the district court treated it as a post-conviction motion to withdraw the plea and denied the motion. This timely appeal followed.

Appellant first contends that the district court erred in denying his motion because a manifest injustice occurred since he was not competent to enter his nolo contendere plea.² Specifically, appellant contends that the

¹Appellant pleaded guilty pursuant to North Carolina v. Alford, 400 U.S. 25 (1970). Under Nevada law, "whenever a defendant maintains his or her innocence but pleads guilty pursuant to Alford, the plea constitutes one of nolo contendere." State v. Gomes, 112 Nev. 1473, 1479, 930 P.2d 701, 705 (1996).

²NRS 176.165 allows the district court to grant a post-conviction motion to withdraw a guilty plea to correct
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district court erred in making a determination that he was competent to enter a plea based on a report from only one psychiatrist, when two psychiatric reports are required by NRS 178.415. We conclude that this contention lacks merit.

Although appellant properly notes that NRS 178.415(1) requires the district court to appoint two psychiatrists or psychologists to conduct an examination of a defendant, NRS 178.415 is inapplicable in matters, like the present one, where the district court has found that no reasonable doubt exists as to the defendant's competency.³

Further, upon review of the record, we conclude that the district court did not err in finding that a competency hearing was not warranted, as there was no doubt about appellant's competence to enter a valid plea. A defendant is competent if he has sufficient "'ability to consult with his lawyer with a reasonable degree of rational understanding' and a 'rational as well as factual understanding of the proceedings against him.'"⁴ At the hearing on appellant's motion to correct illegal sentence, the district court explained that it did not have a question as to appellant's competency, in part, because he had written six pages of "coherent, clear, and logical" arguments concerning his case, which were attached to the presentence investigation report. Moreover, the transcripts of appellant's entry of plea and sentencing hearing reflect that appellant had the ability to

. . . continued

"manifest injustice." See Hart v. State, 116 Nev. 558, 561, 1 P.3d 969, 971 (2000) (construing NRS 176.165).

³See NRS 178.405; Bishop v. Warden, 94 Nev. 410, 411, 581 P.2d 4, 5 (1978) (holding that district court not required to follow NRS 178.415 when there is no doubt as to the defendant's competency).

⁴Riker v. State, 111 Nev. 1316, 1325, 905 P.2d 706, 711 (1995) (quoting Dusky v. United States, 362 U.S. 402, 402 (1960)).

consult with his lawyer and had a rational and factual understanding of the proceedings. In fact, at sentencing, appellant addressed the court, apologizing for his conduct and reflecting on the cause of his problems: "I know I need counseling for the problems that have been in my life, I will be able to use this time [in prison] to my advantage, seek counseling and help for other problems I have such as alcohol and drug usage, as well as take my medications regularly."

The coherent nature of appellant's statements on the record belies his claim that the district court should have further investigated his competency. Moreover, at a status hearing, appellant's counsel explained that ordering a preliminary psychological examination was merely done as a precautionary measure: "[the D.A's office and I] did this out of an abundance of caution just to make sure that when this plea does occur that everything goes down correctly and appropriately so it doesn't come back to hurt us later."⁵

Accordingly, because there is no evidence in the record that would have given rise to the need to hold a competency hearing, we conclude that the district court properly denied appellant's motion to withdraw his guilty plea.

Appellant next contends that his counsel was ineffective in failing to object to the fact that two different psychiatrists did not evaluate appellant as required by NRS 178.415(1). We decline to consider appellant's contention because it was not raised in the motion filed below.⁶ Moreover, we note that appellant has raised this contention in a post-conviction petition for a writ of habeas

⁵See Bishop, 94 Nev. at 411, 581 P.2d at 5.

⁶See Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (199).

corpus that is still pending in the district court and is not the subject of this appeal. For these reasons, we decline to address this contention.

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

ORDER the judgment of the district court AFFIRMED.

Young, J.
Young

Leavitt, J.
Leavitt

Becker, J.
Becker

cc: Hon. Kathy A. Hardcastle, District Judge
Attorney General
Clark County District Attorney
Gary E. Gowen
Clark County Clerk