IN THE COURT OF APPEALS OF THE STATE OF NEVADA

PETER DOUGLAS ORTMANN, A/K/A TAHITI PETEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 69916

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction entered pursuant to a guilty plea of sale of unregistered securities. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

Motion to withdraw guilty plea

Appellant Peter Ortmann claims the district court abused its discretion by denying his presentence motion to withdraw his guilty plea because he had advanced fair and just reasons for the withdrawal: he was unaware of the immigration consequences of his guilty plea, previous defense counsel was ineffective for advising him that a motion to withdraw his plea would be futile, and he is actually innocent because his sale of unregistered securities fell within a recognized exemption.

A defendant may move to withdraw a guilty plea before sentencing, NRS 176.165, and "a district court may grant a defendant's motion to withdraw his guilty plea before sentencing for any reason where permitting withdrawal would be fair and just," *Stevenson v. State*, 131 Nev. ___, ___, 354 P.3d 1277, 1281 (2015). To this end, the Nevada Supreme Court recently disavowed the standard previously announced in *Crawford v. State*, 117 Nev. 718, 30 P.3d 1123 (2001), which focused

exclusively on whether the plea was knowingly, voluntarily, and intelligently made, and affirmed that "the district court must consider the totality of the circumstances to determine whether permitting withdrawal of a guilty plea before sentencing would be fair and just." *Stevenson*, 131 Nev. at ___, 354 P.3d at 1281.

Here, the district court found Ortmann entered his guilty plea in November 2007. As far back as September 2008, there was an acknowledgement in the district court that Ortmann's guilty plea could have potential immigration consequences. Ortmann absconded and was in bench-warrant status from January 2009 until his arrest in June 2015. Ortmann failed to make restitution payments as required by his negotiations with the State and the terms of his guilty plea agreement. And Ortmann waited until January 2016 to file his motion to withdraw the guilty plea. The district court concluded Ortmann's late request to withdraw his guilty plea was disingenuous, he had waited too long, and he failed to provide a fair and just reason for the withdrawal. The district court's factual findings are supported by the record on appeal.

We note Ortmann's motion to withdraw his guilty plea is premised primarily on changes in the law that occurred long after he entered his guilty plea. Nonetheless, even assuming defense counsel failed to advise Ortmann of the immigration consequences of his guilty plea, Ortmann has not demonstrated he was prejudiced by this lack of advice. *See Padilla v. Kentucky*, 559 U.S. 356, 372 (2010) (To demonstrate prejudice, "a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances."). And given the *Crawford* standard for deciding motions to withdraw guilty pleas was in effect at the time Ortmann entered his guilty plea, Ortmann

has not demonstrated defense counsel erred by advising him it would be "nearly impossible to withdraw [the] plea at that point." *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (establishing the two-part test for reviewing ineffective-assistance-of-counsel claims).

We also note the district court did not err by failing to address Ortmann's actual innocence claim because such claims are generally not at issue in motions to withdraw guilty pleas. *See Hargrove v. State*, 100 Nev. 498, 503, 686 P.2d 222, 226 (1984). Even if this claim were at issue, Ortmann failed to make a showing of actual innocence; he merely showed that a statutory exemption may provide a defense to the crime of sale of unregistered securities. *See* NRS 90.690(2); *Fullerton v. State*, 116 Nev. 906, 909, 8 P.3d 848, 850 (2000) ("[T]he State is not required to prove the lack of an exemption until the defendant injects some competent evidence showing his entitlement to the exemption.").

Finally, we note the issue of prejudice to the State must be considered when deciding whether it would be fair and just to allow a defendant to withdraw his or her guilty plea. *See generally Jezierski v. State*, 107 Nev. 395, 396, 812 P.2d 355, 356 (1991) (holding a defendant should have been allowed to withdraw his plea because it was made under a misconception and because the State had not yet been prejudiced). Here, the State would have been prejudiced if Ortmann were allowed to withdraw his guilty plea because eight years have passed since Ortmann entered his guilty plea and, in the interim, the victim passed away. Without the victim's testimony the State would be unable to prosecute this case.

For the foregoing reasons, we conclude the district court did not abuse its discretion by denying Ortmann's presentence motion to

withdraw his guilty plea. *See State v. Second Judicial Dist. Court (Bernardelli)*, 85 Nev. 381, 385, 455 P.2d 923, 926 (1969) (The district court's ruling on a presentence motion to withdraw a guilty plea "is discretionary and will not be reversed unless there has been a clear abuse of that discretion.").

Cruel and unusual punishment

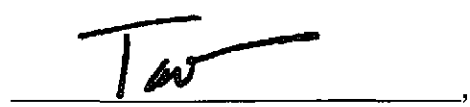
Ortmann also claims his prison term of 36 to 96 months constitutes cruel and unusual punishment because it is greater than the sentence requested by the State, it does not give him a chance to prove himself on probation, a lesser sentence would serve the penal interest, and the relevant penal statute is preempted by federal securities law and therefore unconstitutional under the Supremacy Clause.

Regardless of its severity, a sentence that is within the statutory limits is not "'cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience.'" *Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting *Culverson v. State*, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979)); *see also Harmelin v. Michigan*, 501 U.S. 957, 1000-01 (1991) (plurality opinion) (explaining the Eighth Amendment does not require strict proportionality between crime and sentence; it forbids only an extreme sentence that is grossly disproportionate to the crime). "Statutes are presumed to be valid, and the challenger bears the burden of showing that a statute is unconstitutional. In order to meet that burden, the challenger must make a clear showing of invalidity." *Silvar v. Eighth Judicial Dist. Court*, 122 Nev. 289, 292, 129 P.3d 682, 684 (2006).

Here, the sentence imposed falls within the parameters of NRS 90.650(1), and Ortmann has not made a clear showing that NRS 90.650(1) is unconstitutional. We conclude the sentence imposed is not so grossly disproportionate to the crime as to constitute cruel and unusual punishment and Ortmann has failed to overcome the presumption the statute is valid. *See generally Nanopierce Techs., Inc. v. Depository Trust & Clearing Corp.*, 123 Nev. 362, 370, 168 P.3d 73, 79 (2007) (discussing the preemption doctrine).

Having concluded Ortmann is not entitled to relief, we ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
Silver

cc: Hon. Stefany Miley, District Judge
Las Vegas Defense Group, LLC
Attorney General/Carson City
Attorney General/Las Vegas
Eighth District Court Clerk