IN THE SUPREME COURT OF THE STATE OF NEVADA

TERRY G. WAYNE A/K/A SADIQ QUINCY MILES A/K/A SANDIO QUINCY MILES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 36993

FILED

FEB 27 2003

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a nolo contendere plea,[1] of two counts of first-degree kidnapping and two counts of sexual assault. The district court sentenced appellant Terry G. Wayne to serve two prison terms of 5 to 15 years for the kidnapping counts and two prison terms of life with parole eligibility in 10 years for the sexual assault counts. The district court ordered one of the sexual assault counts to run consecutively to the kidnapping counts and ordered the remaining counts to run concurrently.

Wayne first contends that the district court abused its discretion in denying his presentence motion to withdraw his nolo contendere plea. In particular, Wayne contends that his plea was not knowingly entered because the district court failed to: (1) advise Wayne of the elements of the offenses, the sentencing range for each charge, and the

[1]Appellant 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).

constitutional rights he was waiving by pleading nolo contendere; and (2) ensure that Wayne was competent to enter a plea.[2] We conclude that Wayne's contentions lack merit.

NRS 176.165 permits a defendant to file a motion to withdraw a guilty plea prior to sentencing. The district court may grant such a motion in its discretion for any substantial reason that is fair and just.[3] A defendant has no right, however, to withdraw his plea merely because he moves to do so prior to sentencing or the State failed to establish actual prejudice.[4] Rather, in order to withdraw a nolo contendere plea, the defendant has the burden of showing that his plea was not entered knowingly and intelligently.[5] In reviewing a ruling on a presentence motion to withdraw a nolo contendere plea, "this court 'will presume that the lower court correctly assessed the validity of the plea, and we will not

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[2]To the extent that Wayne contends that his plea is infirm solely because the district court's plea canvass was inadequate, we reject that contention. We note that the validity of a nolo contendere plea is determined by considering the totality of the circumstances, including the written plea agreement and the facts and circumstances surrounding the signing of the plea agreement. See State v. Freese, 116 Nev. 337, 342, 13 P.3d 442, 448, opinion superseded on reconsideration, 116 Nev. 1097, 13 P.3d 442 (2000).

[3]State v. District Court, 85 Nev. 381, 385, 455 P.2d 923, 926 (1969).

[4]See Hubbard v. State, 110 Nev. 671, 675-76, 877 P.2d 519, 521 (1994).

[5]Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986).

reverse the lower court's determination absent a clear showing of an abuse of discretion.'"[6]

In the instant case, the district court's finding that Wayne entered a knowing and voluntary plea is supported by substantial evidence. At the plea canvass, Wayne acknowledged executing and reading the plea agreement, which advised him of the direct consequences of his criminal conviction, including the sentencing range of the charged offenses, the elements of the crimes, and his waiver of constitutional rights. Additionally, at the plea canvass, Wayne acknowledged that he had discussed the charges in the amended information with his trial counsel and that he understood the sentencing range. Finally, Wayne advised the district court that no one had threatened or coerced him into pleading guilty.[7]

Moreover, in accepting Wayne's plea, the district court sufficiently determined the factual basis for the entry of plea and resolved the conflict between Wayne's entry of a nolo contendere plea and his claim of innocence.[8] At Wayne's plea canvass, the State recited the factual basis for the nolo contendere plea to sexual assault and first-degree kidnapping: namely, that the victim would testify that Wayne accosted her at a bus

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[6]Riker v. State, 111 Nev. 1316, 1322, 905 P.2d 706, 710 (1995) (quoting Bryant, 102 Nev. at 272, 721 P.2d at 368); Hubbard, 110 Nev. at 675, 877 P.2d at 521.

[7]In light of Wayne's statements that he had not been threatened or coerced into pleading nolo contendere, we conclude that Wayne's argument that he entered his plea under duress is belied by the record. See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

[8]See Tiger v. State, 98 Nev. 555, 558, 654 P.2d 1031, 1033 (1982); see also Gomes, 112 Nev. at 1481, 930 P.2d at 706-07.

stop, showed the victim what appeared to be a gun under his sweater, threatened to kill her if she did not get into the car, and drove her to an apartment complex parking area where he repeatedly raped her.[9] Further, the record of the plea canvass, as well as the guilty plea agreement, reveals that Wayne entered the plea agreement because he believed it was in his best interest. In particular, in exchange for Wayne's nolo contendere plea, the State agreed to drop three similar counts of sexual assault, one count of attempted sexual assault, one count of battery with intent to commit sexual assault, and one count of possession of a controlled substance. Wayne also acknowledged that the State could convict him of those charges if he proceeded to trial and stated, at the plea canvass, that he was afraid if he went to trial he would lose "and get a lot more [prison] time." Because the district court's finding that Wayne entered a knowing and voluntary nolo contendere plea is supported by the record, the district court did not abuse its discretion in denying his presentence motion to withdraw his plea.

Wayne next contends that the district court erred in denying his motion for alternate counsel. In particular, Wayne contends that the district court abused its discretion in summarily denying his motion without an evidentiary hearing. In the motion, Wayne contended that he was entitled to alternate counsel because his trial counsel Linda Bell was ineffective in failing to: (1) communicate with him, (2) investigate to

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[9]See Bryant, 102 Nev. at 271, 721 P.2d at 367 (defendant may adopt factual statement of guilt made by judge or prosecutor). We note that the State recited the factual basis for the nolo contendere plea involving only one of the victims because Wayne admitted to the remaining counts involving the other victim.

uncover mitigating evidence to present at sentencing, and (3) discuss with Wayne whether he was forced into entering the plea agreement. We conclude that the district court did not abuse its discretion in denying Wayne's motion for substitute counsel.

This court has stated that "[t]he decision whether friction between counsel and client justifies appointment of new counsel is entrusted to the sound discretion of the trial court, and should not be disturbed on appeal in the absence of a clear showing of abuse."[10] Moreover, "'[a] defendant is not entitled to reject his court-appointed counsel and request substitution of other counsel at public expense absent a showing of adequate cause for such a change.'"[11]

In the instant case, we conclude the district court did not abuse its discretion in refusing to substitute alternate counsel. Wayne failed to demonstrate adequate cause for substitution of counsel because his claims that his trial counsel was ineffective lacked merit. Prior to sentencing, the district court inquired into Wayne's claims of ineffective assistance of trial counsel.[12] With regard to trial counsel's alleged failure to communicate, Wayne admitted that he had discussed his case with Ms.

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[10]Thomas v. State, 94 Nev. 605, 607-08, 584 P.2d 674, 676 (1978) (citation omitted).

[11]Id. at 607, 584 P.2d at 676 (quoting Junior v. State, 91 Nev. 439, 441, 537 P.2d 1204, 1206 (1975)).

[12]We reject Wayne's argument that the district court erred in denying his motion for substitution of counsel without conducting an evidentiary hearing. The transcript of the sentencing hearing held on October 17, 2000, reveals that the district court adequately inquired into the basis for Wayne's claim of ineffective assistance of counsel, which were the grounds asserted in his motion for substitute counsel.

Bell, as well as with Joseph Abood, the head of the Clark County Public Defender's Sexual Crimes Defense Unit. With regard to counsel's alleged deficient investigation, Wayne admitted that he did not provide his attorney with the names of witnesses to contact and did not make any requests that she gather forensic evidence. Moreover, Ms. Bell represented to the court that she had investigated and interviewed two eyewitnesses at one of the crime scenes, whose names were included on her trial witness list. Finally, as discussed above, Wayne's claim that he was forced into pleading guilty was belied by the record of the plea canvass and the plea agreement wherein Wayne stated that no one had coerced or threatened him into pleading guilty. Because Wayne failed to show adequate cause for substitute counsel, the district court did not abuse its discretion in denying Wayne's motion.

Finally, Wayne contends that his sentences constitute cruel and unusual punishment. Additionally, Wayne contends that the sentences imposed were disproportionate to the charges to which he pled guilty and that, in light of his nominal criminal history, marketable job skills, and addiction to drugs and alcohol, the district court abused its discretion in imposing consecutive sentences. We conclude that Wayne's contentions lack merit.

The Eighth Amendment does not require strict proportionality between crime and sentence, but forbids only an extreme sentence that is grossly disproportionate to the crime.[13] Regardless of its severity, a sentence that is within the statutory limits is not "'cruel and unusual

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[13]Harmelin v. Michigan, 501 U.S. 957, 1000-01 (1991) (plurality opinion).

punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience.'"[14] This court has consistently afforded the district court wide discretion in its sentencing decision.[15] This court will refrain from interfering with the sentence imposed "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence."[16]

In the instant case, Wayne does not allege that the district court relied on impalpable or highly suspect evidence or the relevant statutes are unconstitutional. Further, we note that the sentences imposed are within the parameters provided by the relevant statutes and are not so disproportionate to the crime as to shock the conscience.[17] Finally, it is within the district court's discretion to impose consecutive sentences.[18] Accordingly, we conclude that the sentences imposed do not constitute cruel and unusual punishment, and the district court did not abuse its discretion at sentencing.

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[14]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 Glegola v. State, 110 Nev. 344, 348, 871 P.2d 950, 953 (1994).

[15]See Houk v. State, 103 Nev. 659, 747 P.2d 1376 (1987).

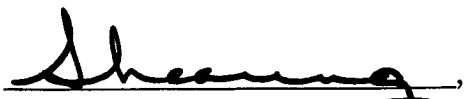
[16]Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

[17]See NRS 200.366(2)(b); NRS 200.320(2).

[18]See NRS 176.035(1); Warden v. Peters, 83 Nev. 298, 429 P.2d 549 (1967).

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

ORDER the judgment of conviction AFFIRMED.

 , J.
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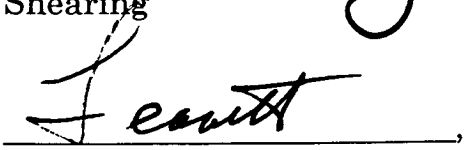 , J.
Leavitt

 , J.
Becker

cc: Hon. Sally L. Loehrer, District Judge
Robert L. Langford & Associates
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk