

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL DOANE,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 38049

**FILED**

JUL 10 2002

ORDER OF AFFIRMANCE

BY *J. B. Smith*  
JANETTE B. SMITH  
CLERK OF SUPREME COURT  
DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a nolo contendere plea,<sup>1</sup> of sexual assault on a child under the age of 14 years (count I) and lewdness with a child under the age of 14 years (count II). The district court sentenced appellant Michael Doane to serve a life prison term with parole eligibility in 20 years for count I and a concurrent prison term of life with parole eligibility in 10 years for count II.

Doane contends that the district court abused its discretion in denying his presentence motion to withdraw his nolo contendere plea to count I. In particular, Doane contends that the district court erred in denying his motion because he was actually innocent of sexual assault in that he only rubbed his penis on the eight-year-old victim's buttocks and legs, but never actually penetrated her vagina. We conclude that Doane's contentions lack merit.

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<sup>1</sup>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).

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.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> 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 reverse the lower court's determination absent a clear showing of an abuse of discretion.”<sup>5</sup>

In the instant case, the district court's finding that Doane entered a knowing and voluntary plea is supported by substantial evidence. At the plea canvass, the district court advised Doane of the constitutional rights he was waiving in entering a nolo contendere plea, and the direct consequences resulting from that plea.<sup>6</sup> Further, Doane

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<sup>2</sup>State v. District Court, 85 Nev. 381, 385, 455 P.2d 923, 926 (1969).

<sup>3</sup>See Hubbard v. State, 110 Nev. 671, 675-76, 877 P.2d 519, 521 (1994).

<sup>4</sup>Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986).

<sup>5</sup>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.

<sup>6</sup>Doane also claims, for the first time on appeal, that the district court erred in denying his presentence motion to withdraw his plea because, at the plea canvass, the district court failed to advise him that he

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executed and acknowledged reading the plea agreement, which also advised him of the direct consequences of his criminal conviction, the elements of the charged offenses, and his waiver of constitutional rights.

Moreover, in accepting Doane's plea, the district court sufficiently determined the factual basis for the entry of plea and resolved the conflict between Doane's entry of a nolo contendere plea and his claim of innocence.<sup>7</sup> Particularly, at Doane's plea canvass, the State recited the factual basis for the nolo contendere plea to sexual assault: namely, that the eight-year-old victim would testify that Doane penetrated her vagina, and that there was physical evidence of trauma to the victim's hymen.<sup>8</sup> Further, the record of the plea canvass, as well as the guilty plea agreement, reveal that Doane entered the plea agreement because he believed it was in his best interest. In particular, in exchange for Doane's nolo contendere plea, the State agreed to drop three similar counts of

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was ineligible for probation. Because this claim was not raised in Doane's presentence motion or at the hearing on that motion, the claim need not be considered by this court. See Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991). Further, we note that Doane was advised that he was ineligible for probation in the signed plea memorandum, which provided: "I understand that I am not eligible for probation for the offenses to which I am pleading guilty." See Little v. Warden, 117 Nev. \_\_\_, \_\_\_, 34 P.3d 540, 545 (2001) (holding that defendant's claim that his plea was not knowing because he was unaware that he was ineligible for probation is belied by the record where signed plea memorandum states offense was nonprobational).

<sup>7</sup>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.

<sup>8</sup>See Bryant, 102 Nev. at 271, 721 P.2d at 367 (defendant may adopt factual statement of guilt made by judge or prosecutor).

sexual assault and three similar counts of lewdness. Doane also acknowledged that the State could convict him of those charges if he proceeded to trial.

Finally, we reject Doane's contention that, like the defendant in Mitchell v. State,<sup>9</sup> he should be allowed to withdraw his plea based on his claim of actual innocence. We note that a nolo contendere plea is by its nature accompanied by a denial of the facts constituting the offense.<sup>10</sup> Therefore, Doane's assertion of actual innocence as to an element of the offense at the time of the plea does not entitle him to withdraw his plea.<sup>11</sup> Additionally, we note that, in this case, the State alleged there was physical evidence of penetration, and Doane did not allege any misunderstanding with respect to the plea negotiations.<sup>12</sup>

Because the district court's finding that Doane 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.<sup>13</sup>

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<sup>9</sup>109 Nev. 137, 848 P.2d 1060 (1993).

<sup>10</sup>Gomes, 112 Nev. at 1479, 930 P.2d at 705.

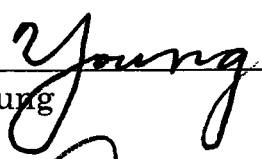
<sup>11</sup>See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 226 (1984).

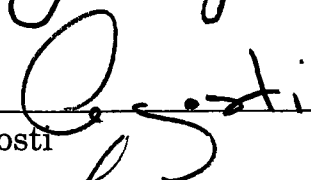
<sup>12</sup>Cf. Mitchell, 109 Nev. at 141, 848 P.2d at 1062 (withdrawal of plea is warranted where defendant shows credible claim of factual innocence, misunderstanding of plea negotiations, lack of prejudice to State, and offense is minor in nature).

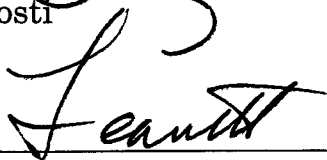
<sup>13</sup>In so concluding, we reject Doane's contention that the district court erred in considering only the plea canvass rather than the totality of the circumstances. Doane has failed to demonstrate that the district court limited its consideration to the record of the plea canvass.

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

ORDER the judgment of conviction AFFIRMED.

  
\_\_\_\_\_, J.  
Young

  
\_\_\_\_\_, J.  
Agosti

  
\_\_\_\_\_, J.  
Leavitt

cc: Hon. David A. Huff, District Judge  
Law Office of Kenneth V. Ward  
Attorney General/Carson City  
Lyon County District Attorney  
Lyon County Clerk