

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ENRIQUE ANTONIO FRANCO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 88810-COA

FILED

FEB 10 2025

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Enrique Antonio Franco appeals from a judgment of conviction, entered pursuant to a guilty plea, of grand larceny of a motor vehicle and willful injury to or destruction of property having a value of \$5,000 or more. Fourth Judicial District Court, Elko County; Alvin R. Kacin, Judge.

Franco argues that the district court erred in denying his presentence motion to withdraw a guilty plea. 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. 598, 604, 354 P.3d 1277, 1281 (2015). In considering the motion, “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.” *Id.* at 603, 354 P.3d at 1281. We review the district court’s decision on a motion to withdraw a guilty plea for an abuse of discretion. *Molina v. State*, 120 Nev. 185, 191, 87 P.3d 533, 538 (2004).

Here, as part of the plea negotiations, the State agreed to recommend probation at sentencing so long as Franco, among other

conditions, agreed to pay at least \$8,000 of the restitution amount by the sentencing hearing in May 2024, and to waive his right to withdraw the guilty plea. Franco stipulated to consecutive terms of incarceration if he did not make that payment. Although Franco was unemployed when he pleaded guilty in October 2023, he anticipated starting a new job in December. Franco received disbursements from his tribe, but he did not make any restitution payments from those disbursements. He did, however, purchase a golf cart in November. Then, Franco was attacked and seriously injured in early December. His injuries and resulting medical care left him unable to work.

Franco contends that, despite the waiver of his right to withdraw his guilty plea, the district court should have placed more weight on the effect of the injuries and found that his injuries made it impossible to pay the initial restitution payment by sentencing. *See Nebaco, Inc. v. Riverview Realty Co.*, 87 Nev. 55, 57, 482 P.2d 305, 307 (1971) (holding that “[g]enerally, the defense of impossibility is available to a promissor where his performance is made impossible or highly impractical by the occurrence of unforeseen contingencies”); *see also State v. Crockett*, 110 Nev. 838, 842, 877 P.2d 1077, 1079 (1994) (applying contract principles to guilty plea agreements). The district court upheld the waiver provision and denied the motion to withdraw the guilty plea.

We conclude the district court properly relied upon the waiver provision to deny the motion to withdraw the guilty plea. A defendant may waive constitutional rights, like appellate review, as part of a guilty plea agreement. *Burns v. State*, 137 Nev. 494, 499-500, 495 P.3d 1091, 1099-1100 (2021). Further, other jurisdictions have recognized that the right to withdraw a guilty plea is waivable as part of a plea agreement, so long as

the waiver itself is knowing and voluntary. *See United States v. Reyes*, 313 F.3d 1152, 1158 (9th Cir. 2002); *Blackwell v. State*, 786 S.E.2d 669, 672 (Ga. 2016); *State v. Caldwell*, 828 A.2d 765, 767 (Me. 2003); *Griffin v. Commonwealth*, 780 S.E.2d 909, 911-12 (Va. Ct. App. 2016); *see also Burns*, 137 Nev. at 499-500, 495 P.3d at 999-1100 (discussing the enforcement of knowing and voluntary waivers of the right to appeal).

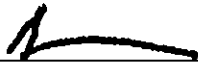
We conclude that Franco's waiver of the right to withdraw his guilty plea was permissible as this type of waiver is a logical extension of existing Nevada precedent permitting a criminal defendant to waive appellate rights as part of a guilty plea agreement. And in this case, because Franco does not assert, nor does the record indicate, that his waiver was not knowing and voluntary,¹ we conclude that the district court did not err in relying on the waiver to deny Franco's motion to withdraw his guilty plea.

Further, Franco has not demonstrated a miscarriage of justice such that his waiver should not be honored. *See Burns*, 137 Nev. at 499-500, 495 P.3d at 999-1100. As noted above, the plea agreement indicates the parties contemplated that circumstances might change after Franco's plea, including that he might fail to meet the conditions of the plea agreement, and provided for those changed circumstances. Although the

¹Franco did not include the transcript of the proceedings containing the plea canvass. *See McConnell v. State*, 125 Nev. 243, 256 n.13, 212 P.3d *see also* NRAP 30(b)(1) (requiring the appendix to contain all transcripts that are necessary for this court's review). Accordingly, we presume the transcript supports the conclusion that the waiver of the right to withdraw was knowing and voluntary. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) (presuming omitted documentation necessary for the disposition of the appeal supports the district court's decision).

reason why Franco did not make the first restitution payment may not have been foreseeable, that he might not make payments was foreseeable. Thus, the occurrence of an anticipated result in the agreement does not constitute a miscarriage of justice. Accordingly, we

ORDER the judgment of conviction AFFIRMED.


_____, C.J.
Bulla


_____, J.
Gibbons


_____, J.
Westbrook

cc: Hon. Alvin R. Kacin, District Judge
Kirsty E. Pickering Attorney at Law
Attorney General/Carson City
Elko County District Attorney
Elko County Clerk