IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT FRANKLIN RAY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38733

SEP 13 2002

CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a nolo contendere plea,[1] of sexual assault on a minor under the age of 16 years (count I) and attempted lewdness with a child under the age of 14 years (count II). The district court sentenced appellant Robert Franklin Ray to serve a prison term of 96 to 240 months for count I and a onsecutive prison term of 24 to 120 months for count II.

Ray contends that the district court abused its discretion in denying his presentence motion to withdraw his nolo contendere plea. In particular, Ray contends that his nolo contendere plea was not knowing and voluntary because he did not understand that his sentences would run consecutively. Additionally, Ray contends that his plea was involuntary because he pleaded nolo contendere based on a misrepresentation from defense counsel that Ray's mother wanted him to plead guilty. We conclude that Ray's contentions lack merit.

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[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).

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.[2] 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.[3] 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.[4] 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.'"[5]

In the instant case, the district court's finding that Ray entered a knowing and voluntary plea is supported by substantial evidence. First, Ray was advised that the sentences would run consecutively. In fact, at the plea canvass, Ray informed the court that he understood the "negotiations," which were summarized by Ray's counsel Bridgette Hoffman. Hoffman explained that the State had stipulated to two specific sentences to "run consecutive. So that, in essence, the end

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

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

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

[5]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.

result will be a sentence of 10 to 30 years." Further, Ray executed and acknowledged reading the plea agreement stating that Ray "would stipulate to consecutive time between counts." Finally, in accepting Ray's nolo contendere plea, the district court informed Ray that "the matter of sentencing [was] strictly up to the Court and no one else."

Additionally, the record reveals that Ray pleaded nolo contendere voluntarily, and not based on defense counsel's representation that Ray's mother wanted him to do so. In fact, at the plea canvass, Ray informed the court that no one had promised him anything or threatened him to plead guilty. Further, the plea agreement provided that Ray was entering a plea because he believed it was in his best interest and not as a result of "duress or coercion." Finally, Ray received a substantial benefit in exchange for his nolo contendere plea; particularly, the State dropped three additional counts of lewdness with a child under 14 years and one count of open or gross lewdness, and also stipulated to a sentence for a term of years.[6] Accordingly, we conclude that the district court did not err in rejecting Ray's presentence motion to withdraw because the record reveals that his nolo contendere plea was both knowing and voluntary.[7]

Ray next contends that the district court abused its discretion in denying his motion for alternate counsel because Hoffman was ineffective. In particular, Ray contends that Hoffman failed to: (1) advise him of the direct consequences of the plea; (2) inform him that his

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[6]Ray faced a possible life sentence with parole eligibility for count I.

[7]Because Ray's claim that his plea was not knowing and voluntary was belied by the record, the district court did not err in rejecting Ray's presentence motion to withdraw without conducting an evidentiary hearing. See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

sentences would run consecutively; (3) misinformed Ray that his mother wanted him to plead guilty; and (4) failed to request an evidentiary hearing on Ray's presentence motion to withdraw. We conclude that the district court did not abuse its discretion in denying Ray's motion for substitute counsel.

Where a defendant asserts legitimate grounds for withdrawal of the plea based on ineffective assistance of trial counsel, the district court is required to appoint new counsel to assist the defendant in pursuing his motion since, in such circumstances, trial counsel cannot properly continue representation.[8] However, the district court has discretion in considering a request for substitution of counsel and, absent a showing of adequate cause such as an actual conflict, a defendant's request may be denied.[9]

In the instant case, we conclude the district court did not abuse its discretion in refusing to substitute alternate counsel. Ray's complaints about Hoffman and the validity of his plea are belied by the record. Specifically, at the plea canvass, Ray acknowledged that he had discussed the charges and the terms of the negotiations with Hoffman. Further, in the plea agreement, Ray was advised about the direct consequences of his plea and the fact that his sentences would run consecutively. Finally, in executing the plea agreement, Ray acknowledged that Hoffman had answered all his questions regarding the

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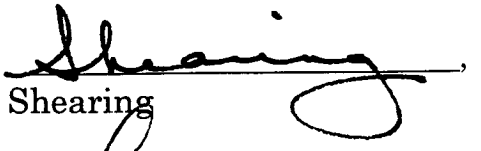
[8]See SCR 157, SCR 160, SCR 178.

[9]See Baker v. State, 97 Nev. 634, 637 P.2d 1217 (1981), overruled on other grounds by Lyons v. State, 106 Nev. 438, 796 P.2d 210 (1990); Thomas v. State, 94 Nev. 605, 584 P.2d 674 (1978).

plea agreement and its consequences and he was satisfied with the services provided by his attorney. Because Ray's claims of ineffective assistance of counsel were belied by the record, the district court did not err in denying the motion to substitute counsel without conducting an evidentiary hearing.

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

ORDER the judgment of the district court AFFIRMED.



_____, J.
Shearing

_____, J.
Leavitt

_____, J.
Becker

cc: Hon. Joseph T. Bonaventure, District Judge
J. Chip Siegel, Chtd.
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk