

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID OLSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39802

FILED

NOV 21 2002

ORDER OF AFFIRMANCE

CLERK OF SUPREME COURT
BY *J. Richard*
DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a nolo contendere plea,¹ of one count of burglary. The district court sentenced appellant David Olson to serve a prison term of 16 to 40 months.

Olson contends that the district court abused its discretion in denying his presentence motion to withdraw his nolo contendere plea. In particular, Olson contends that the district court erred in denying his motion because he was "factually innocent of the charges made against him and [because] his counsel had been ineffective and had misled him about the terms of the plea agreement." We conclude that Olson'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

¹Appellant 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).

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.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 Olson entered a knowing and voluntary plea is supported by substantial evidence. At the plea canvass, Olson acknowledged reading the plea agreement, which informed him of the elements of the charged offense, the direct consequences of the criminal conviction, and the constitutional rights he was waiving. Olson also represented to the court that he was entering into the plea agreement because he believed it was in his best interest; in exchange for Olson's nolo contendere plea, the State agreed not

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

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

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

⁵Riker 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.

to oppose Olson's request for probation and also agreed to drop the robbery count.

Additionally, in accepting Olson's plea, the district court sufficiently determined the factual basis for the entry of plea and resolved the conflict between Olson's entry of a nolo contendere plea and his claim of innocence.⁶ In particular, the prosecutor informed the district court that J.C. Penney loss prevention officer Anthony Perez would testify that he observed Olson take clothing from the J.C. Penney store without paying for it, using pliers to remove the security tags.⁷

Finally, we reject Olson's contention that, like the defendant in Mitchell v. State,⁸ 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.⁹ Therefore, Olson's assertion of actual innocence as to an element of the offense does not entitle him to withdraw his plea.¹⁰ Because the district court's finding that Olson entered a knowing and voluntary nolo contendere plea is supported by the record, we conclude that the district

⁶See 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.

⁷See Bryant, 102 Nev. at 271, 721 P.2d at 367 (defendant may adopt factual statement of guilt made by judge or prosecutor).

⁸109 Nev. 137, 848 P.2d 1060 (1993).

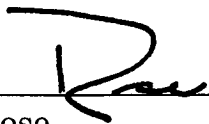
⁹Gomes, 112 Nev. at 1479, 930 P.2d at 705.

¹⁰See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 226 (1984).

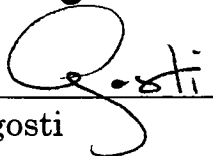
court did not abuse its discretion in denying his presentence motion to withdraw his plea.

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

ORDER the judgment of conviction AFFIRMED.


_____, J.
Rose


_____, J.
Young


_____, J.
Agosti

cc: Hon. Kathy A. Hardcastle, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk