

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONALD RAY SMITH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40058

FILED

DEC 10 2002

ORDER OF AFFIRMANCE

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

This is an appeal from a district court order denying appellant Donald Ray Smith's motion to withdraw his guilty plea. On February 20, 2001, Smith was convicted, pursuant to a guilty plea, of one count of burglary. The district court sentenced Smith to serve a prison term of 24 to 60 months. Smith did not file a direct appeal.

On April 11, 2001, Smith filed a proper person post-conviction motion to vacate an illegal sentence and withdraw his guilty plea. The district court appointed counsel, and Smith filed a supplemental motion. The State opposed the motion. After hearing arguments from counsel, the district court denied the motion. Smith appealed. This court affirmed the part of the district court order denying Smith's motion to correct an illegal sentence, but vacated the part of the order denying Smith's motion to withdraw his guilty plea and remanded for an evidentiary hearing on the issue of whether Smith was aware, at the time he pleaded guilty, that

mandatory consecutive sentences would be imposed.¹ Pursuant to this court's order, on May 29, 2002, the district court conducted an evidentiary hearing and, thereafter, denied Smith's motion to withdraw his guilty plea. Smith filed the instant appeal.

Smith contends that the district court erred in denying his motion to withdraw his guilty plea because the record is "totally devoid of any suggestion that defense counsel, the prosecutor or the sentencing judge ever advised [Smith] that his sentence . . . must be served consecutively to any sentence of parole." We conclude that Smith's contention lacks merit.

On a motion to withdraw a guilty plea, the defendant has the burden of showing that the guilty plea was not entered knowingly and intelligently.² To determine if a plea is valid, the court must consider the entire record and the totality of the facts and circumstances of a case.³ "On appeal from a district court's denial of a motion to withdraw a guilty plea, this court 'will presume that the lower court correctly assessed the

¹Smith v. State, Docket No. 38374 (Order Affirming in Part, Vacating in Part and Remanding, March 5, 2002). Because Smith was on parole at the time he committed the burglary, the district court was required to impose the sentence consecutively to the sentence imposed in the parole revocation case. See NRS 176.035(2).

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

³See id. at 271, 721 P.2d at 367; see also Mitchell v. State, 109 Nev. 137, 140-41, 848 P.2d 1060, 1061-62 (1993).

validity of the plea, and we will not reverse the lower court's determination absent a clear showing of an abuse of discretion."⁴


In the instant case, we conclude that the district court did not abuse its discretion in denying Smith's motion to withdraw his guilty plea. Although Smith testified that he would not have pleaded guilty if he had known that a consecutive sentence would be imposed, the district court did not find Smith's testimony credible. The district court noted that Smith was familiar with the criminal justice system in Nevada, had been on parole before, and had received a favorable plea negotiation considering he had six prior felony convictions and had been previously adjudicated a habitual criminal. Finally, in concluding that Smith was aware that consecutive sentences would be imposed, the district court relied upon the testimony of Violet Radosta, Smith's trial counsel. Radosta testified that, although she did not have an independent recollection of advising Smith about consecutive sentencing, she "would assume that [she] told him" because her case file contained several notations that Smith was on parole. Radosta also testified that, at the time Smith pleaded guilty, she knew that a defendant who commits a crime while on parole in the Nevada system would receive a mandatory consecutive sentence. Accordingly, we conclude the district court did not abuse its discretion in denying Smith's motion to withdraw his guilty plea because the district

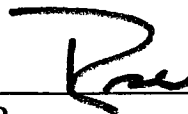
⁴Riker v. State, 111 Nev. 1316, 1322, 905 P.2d 706, 710 (1995) (quoting Bryant, 102 Nev. at 272, 721 P.2d at 368).

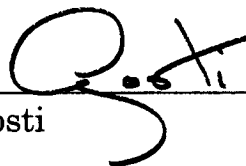
court's finding that Radosta informed Smith that he would receive a consecutive sentence is supported by substantial evidence.⁵

Having considered Smith's contention and concluded that it lacks merit, we

ORDER the judgment of the district court AFFIRMED.

 _____, C.J.
Young

 _____, J.
Rose

 _____, J.
Agosti

cc: Hon. Nancy M. Saitta, District Judge
Gary E. Gowen
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk

⁵In light of the district court's finding that Smith was aware he would receive a mandatory consecutive sentence, we reject Smith's contention that Radosta was ineffective for failing to advise him of consecutive sentencing. See Strickland v. Washington, 466 U.S. 668 (1984).