IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER WHITTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40065

FILED

DEC 13 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of one count each of burglary and conspiracy to commit battery. The district court sentenced appellant Christopher Whitton to serve a prison term of 30-96 months for the burglary and a concurrent jail term of 12 months for the conspiracy; he was given credit for 238 days time served.

First, Whitton contends the district court erred by denying his presentence motion to withdraw his guilty plea. Whitton argues that the district court did not review the entire record before finding that his guilty plea was knowing and voluntary, and denying his motion. Whitton claims that the district court's consideration of his motion, the State's opposition, and the arguments of counsel, "is not enough." We disagree.

"A district court may, in its discretion, grant a defendant's [presentence] motion to withdraw a guilty plea for any 'substantial reason' if it is 'fair and just.'"[1] To determine whether a defendant advanced a

[1]Woods v. State, 114 Nev. 468, 475, 958 P.2d 91, 95 (1998) (quoting State v. District Court, 85 Nev. 381, 385, 455 P.2d 923, 926 (1969)); see also NRS 176.165.

02-21327

substantial, fair, and just reason to withdraw a guilty plea, the district court must consider the totality of the circumstances to determine whether the defendant entered the plea voluntarily, knowingly, and intelligently.[2] On appeal from the district court's determination, we 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.[3] The burden is on the defendant to demonstrate that his guilty plea was not entered knowingly and intelligently.[4]

We conclude that the district court did not abuse its discretion in denying Whitton's presentence motion to withdraw his guilty plea. Whitton raised two arguments in support of his motion and again on appeal. First, Whitton contends he was not informed that the district court could consider at sentencing the initial charges brought against him, and not just those to which he pleaded guilty. Initially, we note that this argument is belied by the record.[5] During the plea canvass, Whitton informed the court that he read, understood, and signed the written plea memorandum. In the plea memorandum, Whitton was informed that "any counts which are to be dismissed and any other cases charged or uncharged which are either to be dismissed or not pursued by the State, may be considered by the court at the time of my sentencing." Further, during the plea canvass, when asked by the court, Whitton accurately

---

[2]See Crawford v. State, 117 Nev. 718, 721-22, 30 P.3d 1123, 1125-26 (2001).

[3]See Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986).

[4]See id.

[5]See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

recited the sentence range for both of the offenses to which he was pleading, thereby indicating that he understood that the imposed sentences would not be enhanced beyond the statutory range based on the original charges. Second, Whitton contends that because the victim recanted his accusatory statements to the police that he should be allowed to withdraw his plea. Initially, we note that Whitton has failed to provide any support for this unsubstantiated factual allegation.[6]

At the evidentiary hearing on the motion, Whitton failed to present his former counsel to testify to whether he was fully informed about the consequences of his plea. Further, Whitton also failed to present any witnesses to testify to the victim's alleged recantation. In effect, Whitton argues that the district court erred because it should have, sua sponte, inquired into these issues. And by not inquiring into these matters, Whitton claims, the district court did not review the entire record. As stated above, it was Whitton's responsibility to create a record and demonstrate that his guilty plea was not entered knowingly and intelligently.[7] Therefore, we conclude that Whitton did not meet this burden, and the district court did not abuse its discretion in denying his motion.

Finally, Whitton contends the district court abused its discretion at sentencing. Whitton argues that granting him probation and ordering him to attend a treatment program to address his drug problems would be "the best protection society could get." Citing to the dissent in

---

[6]See id.

[7]See Bryant, 102 Nev. At 272, 721 P.2d at 368.

Tanksley v. State[8] for support, Whitton asks this court to review the sentence imposed by the district court to determine whether justice was done. We decline to do so and disagree with Whitton's contention.

This court has consistently afforded the district court wide discretion in its sentencing decision,[9] and will refrain from interfering with the sentence imposed "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence."[10] Moreover, a sentence within the statutory limits is not cruel and unusual punishment where the statute itself is constitutional, and the sentence is not so unreasonably disproportionate as to shock the conscience.[11]

In the instant case, Whitton cannot demonstrate that the district court relied only on impalpable or highly suspect evidence or that the relevant statutes are unconstitutional. The sentence imposed was within the parameters provided by the relevant statutes.[12] We further note that the plea negotiations were entirely favorable to Whitton - based on his offense, he could have received a much longer prison term and a substantial monetary fine. Moreover, the granting of probation is

---

[8]113 Nev. 844, 852, 944 P.2d 240, 245 (1997) (Rose, J., dissenting).

[9]See Houk v. State, 103 Nev. 659, 747 P.2d 1376 (1987).

[10]Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

[11]Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979)).

[12]See NRS 205.060(2); NRS 199.480(3); NRS 193.140.

discretionary.[13] Accordingly, we conclude that the sentence imposed is not too harsh, is not disproportionate to the crime, does not constitute cruel and unusual punishment, and that the district court did not abuse its discretion at sentencing.

Having considered Whitton's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.[14]

_____, J.
Shearing

_____, J.
Leavitt

_____, J.
Becker

---

[13]See NRS 176A.100(1)(c).

[14]Although this court has elected to file the fast track statement submitted, we note that it does not comply with the arrangement and form requirements of the Nevada Rules of Appellate Procedure. See NRAP 3C(e); NRAP 32(a); Appendix of Forms, Form 6. Specifically, each section of the fast track statement must be numbered in the left margin, and may not run as one contiguous paragraph. Counsel is cautioned that failure to comply with the requirements for fast track statements in the future may result in the brief being returned, unfiled, to be correctly prepared. See NRAP 32(c). Failure to comply may also result in the imposition of sanctions by this court. NRAP 3C(n).

cc: Hon. Connie J. Steinheimer, District Judge
Washoe County Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk