IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN WELLINGTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40569

FILED

JUN 12 2003

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of one count each of attempted murder, robbery, and conspiracy to commit robbery. The district court sentenced appellant Kevin Wellington to serve three concurrent prison terms of 96-240 months, 72-180 months, and 28-72 months. Wellington was also ordered to pay $31,129.33 in restitution jointly and severally with his codefendant and $2,291.80 in extradition fees.

Wellington contends that the district court erred in denying his presentence motion to withdraw his guilty plea because his plea was not knowingly and intelligently entered. Wellington argues that he was unable "to make a sound and reasoned decision regarding his entry of plea." He asserts that: (1) despite his request, he did not receive his codefendant's statement to police prior to the entry of his plea; (2) that upon subsequent review, he discovered that the statement was missing pages; (3) his own statement to police in Florida, where he was arrested, was also missing pages; (4) he did not commit the offenses for which he was convicted; (5) counsel was ineffective by advising him to plead guilty

without fully explaining the offer made by the State,[1] therefore his guilty plea was "the product of duress and coercion"; and (6) pursuant to Jezierski v. State,[2] the State was not yet prejudiced because he "promptly attempted to withdraw the plea before sentencing." We disagree with Wellington's contentions.

"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.'"[3] In considering whether a defendant has advanced a 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.[4] The district court "has a duty to review the entire record to determine

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[1]Although Wellington did raise the issue of counsel's alleged ineffectiveness below, at no point in the filed pleadings or during the evidentiary hearing on the motion did he raise specific claims pertaining in any way to the plea negotiations, the State's offer, or counsel's performance in this area. Therefore, Wellington's argument regarding the ineffective assistance of counsel was not properly preserved for review on appeal. See McKenna v. State, 114 Nev. 1044, 1054, 968 P.2d 739, 746 (1998) (holding that "[w]here a defendant fails to present an argument below and the district court has not considered its merit, we will not consider it on appeal").

[2]107 Nev. 395, 396, 812 P.2d 355, 355-56 (1991).

[3]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.

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

whether the plea was valid. . . . [and] may not simply review the plea canvass in a vacuum."[5]

An order denying a presentence motion to withdraw a guilty plea is reviewable on direct appeal from the judgment of conviction as an intermediate order in the proceedings.[6] 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.[7] If the motion to withdraw is based on a claim that the guilty plea was not entered knowingly and intelligently, the burden to substantiate the claim remains with the appellant.[8]

We conclude that Wellington has failed to demonstrate either that the district court abused its discretion in denying his presentence motion to withdraw his guilty plea, or that his plea was not entered knowingly and intelligently. Our review of the record reveals that the statement made by Wellington's codefendant clearly and explicitly implicates him in the crimes for which he was convicted, and contains no exculpatory information whatsoever. Also, Wellington's own statement to authorities in Florida was inculpatory, and his claim the statement was missing pages does not explain how it could have rendered his guilty plea invalid. During the hearing on the motion, the district court stated:

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[5]Mitchell v. State, 109 Nev. 137, 141, 848 P.2d 1060, 1062 (1993).

[6]NRS 177.045; Hart v. State, 116 Nev. 558, 562 n.2, 1 P.3d 969, 971 n.2 (2000) (citing Hargrove v. State, 100 Nev. 498, 502 n.3, 686 P.2d 222, 225, n.3 (1984)).

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

[8]See id.

> I don't know of any law or case law that says that before a defendant enters a guilty plea he has to be made available all the police reports, preliminary hearing transcripts, witness statements, any evidentiary hearing [transcripts]. I don't know any rule regarding that. This is making new law. Are we going to say now before a guy enters his plea had you had an opportunity to read all your police reports, all the preliminary hearing transcripts, the Grand Jury indictments, the witnesses statements?

The district court also concluded that Wellington's counsel was not ineffective, finding that: (1) had counsel been in possession of the codefendant's statement, the district court was "not convinced" that counsel would have recommended that Wellington go to trial rather than plead, based on the absence of exculpatory information; (2) Wellington was sufficiently advised about the possible sentence; and (3) the negotiated plea agreement with the State resulted in a significantly beneficial deal with considerably less exposure.[9] We agree and conclude that the district court did not err in rejecting Wellington's allegations of ineffective assistance of counsel. Nor does the record demonstrate that the plea was made under any misconceptions sufficient to warrant withdrawal of the plea.[10]

Additionally, Wellington has not articulated a credible claim of innocence.[11] Not only did the codefendant's and Wellington's own

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[9]See generally Hill v. Lockhart, 474 U.S. 52 (1985).

[10]Cf. Jezierski, 107 Nev. at 396, 812 P.2d at 356 (no public policy supports binding a defendant to a plea where the plea was made under misconceptions, and where the State has not been prejudiced").

[11]Cf. Mitchell, 109 Nev. at 141, 848 P.2d at 1062.

statement implicate him in the crime, but he admitted in open court: "Me and my co-defendant tied up an individual and tried to kill him and took his property," namely, the victim's watch, wallet, and vehicle.[12] Therefore, based on all of the above, we conclude that the district court did not abuse its discretion in denying Wellington's presentence motion to withdraw his guilty plea.

Having considered Wellington's arguments and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Shearing

_____, J.
Leavitt

_____, J.
Becker

cc: Hon. Joseph T. Bonaventure, District Judge
Amesbury & Schutt
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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[12]See Lee v. State, 115 Nev. 207, 211, 985 P.2d 164, 167 (1999) (guilty plea valid when appellant, inter alia, admitted in open court to committing acts underlying the offense).