

IN THE SUPREME COURT OF THE STATE OF NEVADA

AVERY ALLAN CHURCH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41424

FILED

APR 13 2004

ORDER OF AFFIRMANCE

JANE T. L. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of felony stop required on the signal of a police officer. The district court sentenced appellant Avery Allan Church to serve a prison term of 28 to 72 months to run concurrently with an unrelated case.

On November 5, 1999, Church was charged with two counts of battery with the use of a deadly weapon and one count of stop required on the signal of a police officer for hitting two occupied police cars with his vehicle while in the course of a high-speed police chase.

After the appointment of new counsel and several continuances were granted, on October 9, 2001, Church entered a guilty plea. The terms of the plea agreement were as follows: in exchange for Church's guilty plea to one felony count of stop required on the signal of a police officer and two gross misdemeanor conspiracy counts, the State agreed to stay rendition of sentence for one year and, provided Church did not incur additional criminal charges for the one-year period, the felony count would be dropped and Church would be sentenced on the gross misdemeanor counts only to credit for time served. If, however, during the one-year period, Church incurred additional criminal charges, he would be

adjudicated on the felony count and the State would make no recommendation at sentencing.

On July 31, 2002, Church was arrested on additional criminal charges in an unrelated case. On November 26, 2002, Church filed a proper person motion seeking dismissal of his attorney and a motion to withdraw his guilty plea, alleging that his trial counsel was ineffective and that she coerced him into entering a guilty plea. The State opposed the petition. On February 11, 2003, Church, with the assistance of newly-appointed counsel, filed a second motion to withdraw the guilty plea. In that motion, counsel argued that a manifest injustice would occur if Church was not allowed to withdraw his guilty plea because he was factually innocent of the charges. The State opposed the petition. After hearing arguments from counsel, the district court denied Church's motion to withdraw his guilty plea. Thereafter, the district court adjudicated Church on the felony count of stop required on the signal of a police officer count and sentenced him to serve a prison term of 28 to 72 months. Church filed the instant appeal.

Church contends that a manifest injustice will occur if he is not allowed to withdraw his guilty plea because his trial counsel was ineffective and his guilty plea was not knowing. In particular, Church contends that he should be allowed to withdraw his guilty plea because his trial counsel failed to inform him that accident reconstruction specialist William Heffner had agreed to testify that Church did not intentionally hit

the police cars to avoid arrest. Relying on Mitchell v. State,¹ Church alleges that, had trial counsel informed him of Heffner's testimony, Church would have not pleaded guilty because Heffner's account provided both a reasonable defense to the battery charges and a credible claim of factual innocence. We conclude that Church's contention lacks merit.

NRS 176.165 permits a defendant to file a motion to withdraw a guilty plea before sentencing. The district court may grant such a motion in its discretion for any substantial reason and if it is fair and just.² A defendant has no right, however, to withdraw his plea merely because he moved to do so prior to sentencing or because the State failed to establish actual prejudice.³ Rather, in order to show that the district court abused its discretion in denying a motion to withdraw a guilty plea, a defendant has the burden of showing that the plea was not entered knowingly, voluntarily and intelligently.⁴ "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 validity of the plea,

¹109 Nev. 137, 848 P.2d 1060 (1993).

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

³Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994).

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

and we will not reverse the lower court's determination absent a clear showing of an abuse of discretion."⁵

In this case, we conclude that district court's finding that Church entered a knowing, voluntary and intelligent plea is supported by substantial evidence. Additionally, we conclude that Church has failed to show that he would not have pleaded guilty if he had known about Heffner's testimony about his intent to commit battery.⁶ In the signed written plea agreement, Church was advised of the constitutional rights he was waiving by entering the guilty plea, the elements of the charged offenses, and the direct consequences of the guilty plea. Likewise, at the plea canvass, Church advised the district court that he had discussed the elements of the charged crimes, as well as possible defenses with his attorney. In exchange for his guilty plea, Church received a substantial benefit in that he avoided additional criminal charges and the possibility of a significantly longer prison term. Finally, we conclude that Church has failed to make a credible claim of factual innocence and note that, at the plea canvass, Church admitted that he "didn't pull over for the police"

⁵Riker v. State, 111 Nev. 1316, 1322, 905 P.2d 706, 710 (1995) (quoting Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986)).

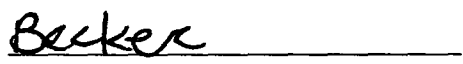
⁶See Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996). We note that, at the time Church pleaded guilty, even the State recognized that his intent to commit a battery upon the police officers was in question. In fact, at the plea canvass, the prosecutor noted that the State was negotiating the case, in part, because it "couldn't tell if [Church] intentionally hit the police cars or if he was just hitting them to try to get away."

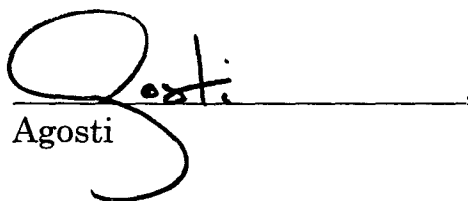
and was guilty of the offense of felony stop required on the signal of a police officer.⁷ Accordingly, the district court did not abuse its discretion in denying Church's presentence motion to withdraw his guilty plea.

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

ORDER the judgment of conviction AFFIRMED.

 C.J.
Shearing

 J.
Becker

 J.
Agosti

cc: Hon. Michael L. Douglas, District Judge
Sciscento & Montgomery
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

⁷Cf. Mitchell, 109 Nev. at 139-41, 848 P.2d at 1062 (allowing defendant to withdraw her plea where she brought motion to withdraw prior to sentencing and provided both a credible claim of factual innocence and a claim that she misunderstood the plea canvass).