

IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN R. BOOG,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 41540

**FILED**

DEC 02 2003

ORDER OF AFFIRMANCE

JANETTE M. GLOOM  
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 attempted possession of visual presentation depicting sexual conduct of a person under 16 years of age. The district court sentenced appellant Kevin R. Boog to serve a prison term of 12 to 30 months and then suspended execution of the sentence, placing Boog on probation for a period not to exceed 3 years.

Boog was originally charged with one count of using a minor in producing pornography and two counts of possession of visual presentation depicting sexual conduct of a person under 16 years of age. According to the presentence investigation report, Boog, while sitting naked in a hot tub, asked the victim, his fifteen-year-old stepdaughter, for a massage. After the victim rubbed his back, Boog suggested that the victim take off her clothes and get into the hot tub with him. The victim refused and went to the bathroom to take a shower. While the victim was in the shower, Boog entered the bathroom with a camera and began to photograph the victim. The victim attempted to conceal herself with her arms, but Boog pulled her arms away from her body. Subsequently, Boog's wife, the victim's mother, found the nude pictures of the victim on

Boog's computer. Boog was not reported to the police until approximately one year later when the police responded to a domestic violence call at the Boog household.

Boog's sole contention is that the district court abused its discretion in denying his presentence motion to withdraw his plea because Boog was not competent to enter a valid plea. Specifically, Boog argues that when he pleaded guilty he was unable to "think clearly" because he was not taking his prescription medications.<sup>1</sup> Boog points to the fact that he was "suffering from a combination of hormonal imbalance and clinical depression which rendered his ability to understand the enormity of [the consequences of the guilty plea] an impossibility." Therefore, Boog alleges that allowing the guilty plea to stand would be manifestly unfair and unjust. We conclude that Boog's contention lacks merit.

The district court has discretion to grant a defendant's presentence motion to withdraw a guilty plea for any substantial reason that is fair and just.<sup>2</sup> "To determine whether the defendant advanced a substantial, fair, and just reason to withdraw a plea, the district court

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<sup>1</sup>At the time he entered the plea agreement, Boog had not been taking his medications, Zoloft and a testosterone replacement, for approximately three weeks.

<sup>2</sup>NRS 176.165; Woods v. State, 114 Nev. 468, 475, 958 P.2d 91, 95 (1998).

must consider the totality of the circumstances to determine whether the defendant entered the plea voluntarily, knowingly, and intelligently."<sup>3</sup>

A guilty plea is invalid if the defendant is not competent to enter the plea.<sup>4</sup> A defendant is competent to enter a plea if he has: (1) "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding"; and (2) "a rational as well as factual understanding of the proceedings against him."<sup>5</sup> A district court's competency determination will be sustained on appeal where substantial evidence exists to support it.<sup>6</sup>

In support of his motion to withdraw his guilty plea, Boog presented written reports from two medical providers. First, urologist Dr. Steven B. Kurtz reported that, due to Boog's low testosterone level, depriving him of the medication for his hormonal imbalance would "likely result in a rapid decline of testosterone levels, as well as cognitive and mood disorders and physical fatigue." According to Dr. Kurtz, Boog's hormonal imbalance certainly may have played a role in his ability to make rational decisions during the plea negotiations. Second, clinical psychologist Dr. Mark Chambers reported that, although Boog's medical condition would not have necessarily prevented him from understanding

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

<sup>4</sup>Godinez v. Moran, 509 U.S. 389, 396 (1993).

<sup>5</sup>Id. (quoting Dusky v. United States, 362 U.S. 402, 402 (1960)).

<sup>6</sup>See Ogden v. State, 96 Nev. 697, 698, 615 P.2d 251, 252 (1980).

the terms of the plea agreement, it was "likely" that "Boog's compromised mental condition affected his judgment in an adverse fashion at the time he made the decision to sign the current plea agreement." After reviewing the medical reports and entertaining arguments from counsel, the district court denied Boog's presentence motion to withdraw the guilty plea, finding that Boog failed to show that he did not understand the proceedings at the plea canvass.

We conclude that there was substantial evidence in support of the district court's determination that Boog was competent to plead guilty. Notably, the medical evaluations provided by Boog did not conclude that his medical condition rendered him incapable of consulting with his lawyer or prevented him from understanding the proceedings. Moreover, the transcripts of Boog's plea canvass reveal that he had a rational and factual understanding of the proceedings below and was able to appropriately respond to the district court's questions.

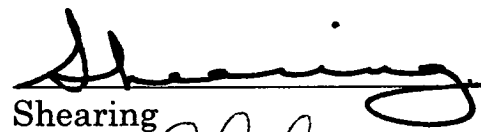
At the beginning of the plea canvass, defense counsel informed the district court that Boog had requested a change in the terms of the negotiations, which the State had agreed to. Further, the district court asked Boog if he had any questions, and Boog responded: "Your honor, were you in receipt of a letter from my therapist." Likewise, in response to the district court's inquiry about the nature of the offense committed, Boog stated: "I attempted to have a photograph of my stepdaughter to embarrass her to [sic] -- in the shower with no clothes." Finally, during the course of the plea canvass, Boog informed the district court that: (1) his guilty plea was entered freely and voluntarily; (2) he understood the matter of sentencing was up to the district court; and (3) he had read and


signed the plea agreement. The coherent nature of Boog's statements on the record belies his claim that he was incompetent to plead guilty because he was not taking his medication. Accordingly, the district court did not abuse its discretion in denying Boog's presentence motion to withdraw his guilty plea.

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

ORDER the judgment of conviction AFFIRMED.

 \_\_\_\_\_, J.  
Becker

 \_\_\_\_\_ J.  
Shearing

 \_\_\_\_\_, J.  
Gibbons

cc: Hon. Donald M. Mosley, District Judge  
Clark County Public Defender  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk