

IN THE SUPREME COURT OF THE STATE OF NEVADA

JULIO CESAR NAVAS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 42158

**FILED**

JULIO CESAR NAVAS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 42159 JAN 20 2005

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

ORDER VACATING JUDGMENTS AND REMANDING

These are consolidated appeals from judgments of conviction, pursuant to nolo contendere pleas, of one count of lewdness with a child under the age of 14 years and two counts of open or gross lewdness (district court case no. CR02-2190), and one count of intimidating or bribing a witness (district court case no. CR03-0647). Second Judicial District Court, Washoe County; Jerome Polaha, Judge. The convictions stem from conduct directed toward appellant Julio Cesar Navas' three adopted daughters. The district court sentenced Navas to serve a prison term of life with the possibility of parole after 10 years for the count of lewdness with a child, two concurrent jail terms of 12 months for the two counts of open or gross lewdness, and a concurrent prison term of 12-32

months for the count of intimidating or bribing a witness. The district court ordered Navas to pay \$2,585.00 in restitution.

Navas contends that his nolo contendere pleas were not freely, voluntarily or intelligently entered. After the entry of his nolo pleas and prior to the sentencing hearing, Navas communicated to retained counsel his desire to withdraw his pleas, but counsel refused to file such a motion.<sup>1</sup> As a result of counsel's refusal, Navas sent a letter to the district court, informing the court of his desire to withdraw the pleas and of his dissatisfaction with his counsel. In his letter, Navas claimed, among other things, that he was innocent of the charges. At the beginning of Navas' sentencing hearing, defense counsel informed the district court that he would not be filing a motion to withdraw the nolo pleas:

I don't have any ethical grounds that I can represent to this court that there is a deficient plea in this matter. And, therefore, I did not file a written motion. However, he is still adamant that he still wants to withdraw his plea. And we are at complete odds on this. I don't think it's a healthy thing to do from – from a tactical or strategic standpoint, at any rate. . . .

And I am not going to stand here and represent to this court that there is a viable grounds to withdraw the plea.

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<sup>1</sup>We note that Navas has obtained new counsel to represent him in this appeal.

On the other hand, I am prepared to proceed to sentencing today.

The district court stated that it had reviewed Navas' letter and the transcript of the plea canvass and agreed with Navas' counsel that there were no viable grounds for allowing Navas to withdraw his nolo pleas. Accordingly, the district court proceeded with sentencing.

"Like the decision to enter a plea of guilty, the decision to seek withdrawal of the plea and proceed to trial is personal to the accused."<sup>2</sup> Such a decision, therefore, ultimately rests with the defendant alone and not defense counsel.<sup>3</sup> "The decision of how to plead in a criminal case is a fundamental one reserved ultimately to the defendant alone."<sup>4</sup>

NRS 176.165 permits a defendant to file a motion to withdraw a guilty plea before sentencing. A more lenient standard applies to motions filed prior to sentencing than to motions filed after sentencing.<sup>5</sup> The district court may grant a presentence motion in its discretion for any substantial reason and if it is fair and just.<sup>6</sup>

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<sup>2</sup>Parker v. State, 100 Nev. 264, 265, 679 P.2d 1271, 1272 (1984).

<sup>3</sup>See id.; see also Henderson v. Morgan, 426 U.S. 637, 650 (1976) (concurring opinion of White, Stewart, Blackmun and Powell, JJ.).

<sup>4</sup>Parker, 100 Nev. at 265, 679 P.2d at 1272.

<sup>5</sup>See Molina v. State, 120 Nev. \_\_\_, \_\_\_ P.3d \_\_\_ (Adv. Op. No. 21, April 14, 2001).

<sup>6</sup>Id.

As noted above, it is clear from the record that although Navas informed retained counsel, prior to sentencing and without equivocation, that he wished to withdraw his nolo pleas, counsel refused to file a motion to withdraw the pleas. Consequently, Navas was deprived of the opportunity to advance, with the assistance of counsel, any reasons that the district court might have found substantial, fair, and just cause to withdraw the pleas.

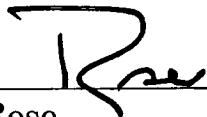
Under these circumstances, we conclude that counsel should have filed Navas' requested motion. Therefore, we vacate the judgments of conviction and remand these matters to the district court for the limited purpose of allowing Navas the opportunity, with the assistance of counsel, to file a motion to withdraw his pleas of nolo contendere. The district court shall conduct any proceedings it deems necessary to determine whether Navas has advanced a substantial, fair, and just reason to withdraw his pleas.<sup>7</sup>


Accordingly, we

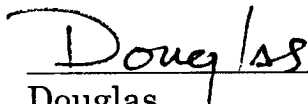
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<sup>7</sup>We reject Navas' contention that the district court abused its discretion at sentencing by not granting probation and by imposing a sentence disproportionate to the crime. In the event that Navas declines to file a motion to withdraw his pleas in the proceedings on remand, the district court will not be precluded from re-imposing the same sentence.

ORDER the judgments of conviction VACATED AND REMAND this matter to the district court for proceedings consistent with this order.<sup>8</sup>

  
\_\_\_\_\_, J.  
Rose

  
\_\_\_\_\_, J.  
Maupin

  
\_\_\_\_\_, J.  
Douglas

cc: Hon. Jerome Polaha, District Judge  
Kenneth A. Stover  
Attorney General Brian Sandoval/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk

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<sup>8</sup>Because Navas is represented by counsel in this matter, we decline to grant him permission to file documents in proper person in this court. See NRAP 46(b).