IN THE SUPREME COURT OF THE STATE OF NEVADA

RONNY LEE FAIN A/K/A KIM MICHAEL FULLER A/K/A RONNY L. TAYLOR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50971

FILED

MAR 04 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of second-degree murder. Eighth Judicial District Court, Clark County; Carl J. Christensen, Judge. The district court sentenced appellant Ronny Lee Fain to serve a term of life in prison with the possibility of parole after 5 years.

This case has a somewhat unusual procedural history. The district court entered the judgment of conviction on June 3, 1980. The day before, Fain filed a proper person notice of appeal in the district court. The notice of appeal, however, was not transmitted to this court until January 2008, after this court discovered the situation in connection with a post-conviction appeal. Fain v. State, Docket No. 49808 (Order Denying Rehearing, Directing Transmission of Notice of Appeal, and Directing the District Court to Secure Appellate Counsel, January 18, 2008). As a

result, we must now consider Fain's arguments on appeal from a 29-year-old judgment of conviction.[1]

Fain challenges the validity of his guilty plea on three grounds: the trial court failed to adequately canvass him regarding (1) his understanding of the malice element of the murder charge, (2) the coercive impact of the State's promise to dismiss an accessory charge against his girlfriend (whom he apparently later married), and (3) his mental state and competency to plead guilty. We conclude that these claims lack merit.

Since our decision in Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 367-68 (1986), we have consistently refused to consider challenges to the validity of a guilty plea in the first instance on direct appeal from a judgment of conviction except in limited circumstances when the error clearly appears from the record or the challenge to the plea involves a pure question of law. E.g., O'Guinn v. State, 118 Nev. 849, 851-52, 59 P.3d 488, 489-90 (2002). Before Bryant, this court had, on occasion, entertained a challenge to a guilty plea on direct appeal when the issue had not been raised first in the district court, but it appears that the court did so only when the error was clear from the record. See, e.g., Love v. State, 99 Nev. 147, 148, 659 P.2d 876, 877 (1983). Because Fain's appeal was initiated in 1980, we must keep these variations in our cases in mind. What has remained constant is the defendant's burden of proving that his plea was invalid, Gardner v. State, 91 Nev. 443, 448, 537 P.2d 469, 472 (1975), and this court's focus on the totality of the circumstances when considering a challenge to the validity of a guilty plea, Bryant, 102 Nev. at

[1]During those 29 years, Fain has challenged his judgment of conviction in numerous post-conviction proceedings.

272, 721 P.2d at 367-68 (citing Taylor v. Warden, 96 Nev. 272, 607 P.2d 587 (1980), overruled on other grounds by David v. Warden, 99 Nev. 799, 671 P.2d 234 (1983)).

As to Fain's knowledge of the malice element, this court has indicated that the record must demonstrate that the defendant understood the elements of the offense or made factual statements that constitute an admission to the offense. Id. at 270, 721 P.2d at 366. Although the district court asked a question during Fain's factual admission that erroneously suggested that malice aforethought was not an element of second-degree murder, it is clear that the district court was drawing a distinction between first-degree murder and second-degree murder. But more importantly, Fain's factual statements constituted an admission to the offense of second-degree murder—he was enraged at the victim's bragging about raping and killing a teenage girl and stabbed the victim in the face and slashed his neck. Additionally, Fain indicated that he and counsel had discussed the elements of the charged offense and that he had received the amended information, which included the malice aforethought element. Given the totality of the circumstances, we conclude that Fain understood the nature of the charge.

As to the coercion claim, this court has recognized that "[a] threat to prosecute a member of a defendant's family does not constitute coercion per se," rather "[t]he defendant must prove that the threat in fact coerced him into making the plea." Gardner, 91 Nev. at 447, 537 P.2d at 471. Here, the State had charged Fain's girlfriend as an accessory after the fact. As part of Fain's plea agreement, the State agreed to dismiss that charge, but it also agreed to dismiss other charges against Fain and accept a plea to a reduced charge of second-degree murder with no deadly

weapon enhancement. The district court inquired into these benefits of the plea during the plea canvass, including the agreement to dismiss the charge against Fain's girlfriend. Although the inquiry was brief, Fain acknowledged these benefits and represented that his plea was a free and voluntary act that was not coerced. Given this record, Fain has not demonstrated that the plea was the result of coercion rather than a voluntary choice.

As to the competency claim, the United States Supreme Court has held that the competency standard for pleading guilty is the same as that for standing trial: "whether the defendant has 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and has 'a rational as well as factual understanding of the proceedings against him.'" Godinez v. Moran, 509 U.S. 389, 396-97 (1993) (quoting Dusky v. United States, 362 U.S. 402, 402 (1960)); accord Riker v. State, 111 Nev. 1316, 1325, 905 P.2d 706, 711 (1995). A trial court must make a competency determination "only when [it] has reason to doubt the defendant's competence." Godinez, 509 U.S. at 401 n.13; accord NRS 178.405(1); Melchor-Gloria v. State, 99 Nev. 174, 180, 660 P.2d 109, 113 (1983). Here, Fain points to a proper person motion that he filed and then withdrew before sentencing as demonstrating a reason to doubt his competence. In that motion, Fain sought to enter a plea of not guilty by reason of insanity and included information suggesting prior mental health issues. The motion is not sufficient to raise a doubt as to competency for two reasons. First, when asked about the motion, Fain explained that the basis for the motion was that he was insane at the time of the offense, and he explicitly stated that he was not saying that he was presently insane. Second, the record of Fain's interactions with the

district court show a man who was able to consult with his lawyer and understand the proceedings. The record before us simply shows no reason for the trial court to have doubted Fain's competence.

Fain also argues that the delay in processing this appeal violates due process and requires reversal of the judgment of conviction.[2] He relies in part on an analysis of the four factors used by the Ninth Circuit based on the speedy-trial factors from Barker v. Wingo, 407 U.S. 514 (1972). See, e.g., U.S. v. Tucker, 8 F.3d 673, 676 (9th Cir. 1993). This court, however, has rejected the Barker factors in addressing delay on appeal, Lopez v. State, 105 Nev. 68, 86-87, 769 P.2d 1276, 1288-89 (1989), and we are not bound by the Ninth Circuit's contrary decisions, see Blanton v. North Las Vegas Mun. Ct., 103 Nev. 623, 633, 748 P.2d 494, 500 (1987), aff'd, 489 U.S. 538 (1989). In Lopez, we held that delay on appeal violates due process when the appellant demonstrates prejudice: that the appellant "is unable to present an adequate appeal because of the delay, or that he will be unable to adequately defend in the event the conviction is reversed." 105 Nev. at 86, 769 P.2d at 1289. Here, Fain has not demonstrated that the delay prejudiced his ability to fully develop and present his appellate issues or a complete and accurate record for our review. Cf. George v. State, 122 Nev. 1, 4, 127 P.3d 1055, 1057 (2006) (reversing judgment of conviction because appellant was prejudiced by delay in processing appeal where transcripts of jury trial and evidence

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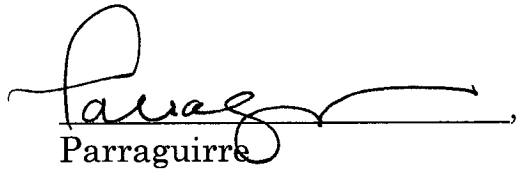
[2]Although we denied the State's motion to dismiss this appeal on the ground that Fain was responsible for the delay, we are not unmindful that Fain had some obligation to assert his rights in a timely fashion despite the comments made by the trial judge regarding his right to appeal following a guilty plea.

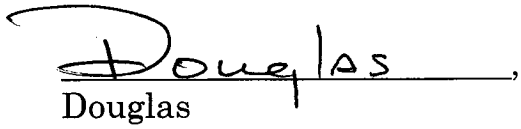
admitted at trial were no longer available so that appellant was "unable to effectively prosecute" the appeal). And similar to the decision in Lopez, our conclusion that Fain has not demonstrated that his plea was invalid makes "concerns regarding prejudice upon retrial . . . of no relevance." 105 Nev. at 87-88, 769 P.2d at 1289. For these reasons we conclude that Fain has not demonstrated that he is entitled to relief based solely on the delay in processing this appeal.

Having considered Fain's arguments and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.



_____, J.
Parraguirre



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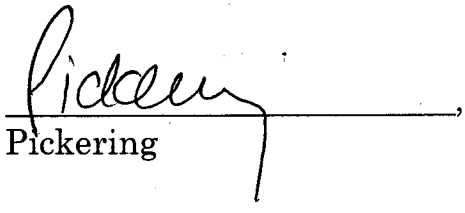
Douglas



_____, J.
Pickering

cc: Chief Judge, Eighth Judicial District
Special Public Defender David M. Schieck
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk