

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY EUGENE THOMAS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 58689

FILED

MAR 07 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *A. Malone*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of two counts of attempted sexual assault upon a child. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

Appellant Anthony Eugene Thomas contends that the district court abused its discretion by denying his presentence motion to withdraw his guilty plea. The district court concluded that the evidence presented during the evidentiary hearing on Thomas' motion was not sufficient to provide a substantial "fair and just" reason for allowing Thomas to withdraw his guilty plea. State v. District Court, 85 Nev. 381, 385, 455 P.2d 923, 926 (1969) (quoting Gearhart v. United States, 272 F.2d 499, 502 (D.C. Cir. 1959)). We agree and conclude that the district court did not abuse its discretion by denying the motion to withdraw the plea. See Crawford v. State, 117 Nev. 718, 722, 30 P.3d 1123, 1125 (2001).

First, Thomas contends that newly discovered evidence that may have bolstered his defense provided a substantial fair and just reason to withdraw his plea. See U.S. v. Garcia, 401 F.3d 1008, 1011-13 (9th Cir. 2005). We have not adopted the Ninth Circuit's view of the "fair and just" standard. See Crawford, 117 Nev. at 721-22, 30 P.3d at 1125-26; see also Woods v. State, 114 Nev. 468, 475, 958 P.2d 91, 95 (1998). However, even

if newly discovered evidence may be a substantial fair and just reason for allowing a defendant to withdraw his guilty plea, Thomas has not provided this court with a complete copy of the addendum to the victim's psychological evaluation and the record provided to this court does not support Thomas' contention that district court abused its discretion. See Jacobs v. State, 91 Nev. 155, 158, 532 P.2d 1034, 1036 (1975) ("It is the appellant's responsibility to provide the materials necessary for this court's review.").

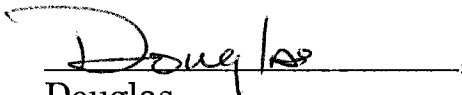
Second, Thomas contends that his guilty plea was entered without actual knowledge that he was waiving his right to appeal the denial of his pretrial motion to suppress the inculpatory statements he made to detectives. See Crawford, 117 Nev. at 722, 30 P.3d at 1126 (explaining that lack of knowledge may be a substantial fair and just reason for granting a motion to withdraw a guilty plea). Thomas testified during the evidentiary hearing that the district court assured him during the plea canvass that he could appeal "everything." However, this testimony was disputed by the State and contradicted by his guilty plea memorandum, and Thomas did not provide the district court or this court with a transcript from the plea canvass which supported his testimony. See Jacobs, 91 Nev. at 158, 532 P.2d at 1036. Therefore, we cannot conclude that the district court abused its discretion.


Third, Thomas contends that his guilty plea was the product of ineffective assistance of counsel. See Molina v. State, 120 Nev. 185, 191, 87 P.3d 533, 538 (2004). After reviewing Thomas' testimony during the evidentiary hearing along with his cursory cross-examination of trial

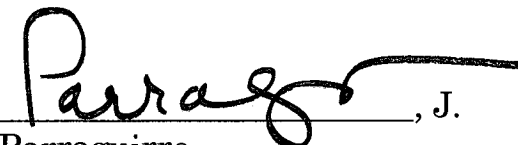
counsel,¹ we cannot conclude that the district court abused its discretion by not finding trial counsel ineffective and denying Thomas' presentence motion to withdraw his guilty plea. McConnell v. State, 125 Nev. 243, 252, 212 P.3d 307, 313 (2009) ("The defendant carries the affirmative burden of establishing prejudice." (internal quotations omitted)); Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004) (explaining that defendant must prove factual allegations underlying ineffective assistance of counsel claims by a preponderance of the evidence).

Having considered Thomas' contentions² and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.


_____, J.
Douglas


_____, J.
Gibbons


_____, J.
Parraguirre

cc: Hon. Steven P. Elliott, District Judge
Marc Picker, Esq., Ltd.
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

¹During the evidentiary hearing, Thomas admitted that he had no intention of calling trial counsel to testify and he made every effort to prevent counsel from testifying as a witness for the State.

²To the extent that Thomas contends that the affirmative misrepresentation exception is applicable to his plea, this claim is not supported by any specific factual allegations that, if true, would have entitled him to relief. See Rubio v. State, 124 Nev. 1032, 1044, 194 P.3d 1224, 1232 (2008).