

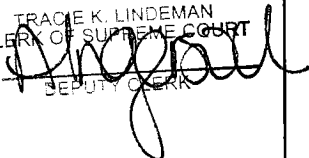
IN THE SUPREME COURT OF THE STATE OF NEVADA

DEMONDRAY D. MAYO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 63512

FILED

NOV 13 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal under NRAP 4(c) from a judgment of conviction, pursuant to a guilty plea, of second-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Jennifer P. Togliatti, Judge. Appellant raises four claims on appeal.

First, appellant argues that the district court abused its discretion by denying his presentence motion to withdraw his guilty plea because he was incompetent at the time he entered his guilty plea. 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 that is fair and just. *State v. Second Judicial Dist. Court*, 85 Nev. 381, 385, 455 P.2d 923, 926 (1969). "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, and we will not reverse the lower court's determination absent a clear showing of an abuse of discretion.'" *Riker 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)). Appellant contends that his guilty plea was unknowing and involuntary because he suffered from intellectual

deficiencies, including learning disabilities and an IQ of 67, and he was under the influence of antipsychotic and antidepressant medication at the time he entered his plea. After reviewing the pleadings and the “entire record,” the district court denied appellant’s motion on the grounds that there was no showing that his guilty plea was unknowing or involuntary as he “has been involved and directing several of the important decisions in his case of his own volition” and that appellant’s “regret or change of heart” is insufficient to withdraw the plea. As to appellant’s claim that his plea was unknowing and involuntary based on the influence of medication, he did not make that argument in his motion to withdraw his guilty plea below and therefore we need not consider it.¹ *See Davis v. State*, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991) (holding that this court need not consider arguments raised on appeal that were not presented to the district court in the first instance), *overruled on other grounds by Means v. State*, 120 Nev. 1001, 103 P.3d 25 (2004). Based on the record, we conclude that appellant has not demonstrated that the district court abused its discretion by denying his motion to withdraw his guilty plea.

Second, in a closely related claim, appellant contends that the district court abused its discretion by not conducting a competency hearing before accepting his guilty plea because the district court should

¹In his opening brief, appellant requests this court to take judicial notice of information concerning the medication he was taking at the time he entered his guilty plea. We reject appellant’s request because he is required to seek such relief by filing a separate motion, *see* NRAP 27(a)(1). Further, appellant concedes that the information was not presented to the district court, and this court generally “will not look outside the district court record in deciding a case.” *See Carson Ready Mix v. First Nat’l Bk.*, 97 Nev. 474, 476, 635 P.2d 276, 277 (1981).

have questioned his competency based on the numerous orders it signed to transport him for psychological evaluation, his alleged intellectual deficiencies described above, and the influence of medication. However, those matters were insufficient to cause the district court to question his competency and there is no indication in the record that the district court was aware that appellant was on medication at the time of his guilty plea. Further, the district court had the opportunity to observe appellant's demeanor during the plea canvass. *See Graves v. State*, 112 Nev. 118, 124, 912 P.2d 234, 238 (1996) ("Through face-to-face interaction in the courtroom, the trial judges are much more competent to judge a defendant's understanding than this court. The cold record is a poor substitute for demeanor observation."). We therefore conclude that appellant failed to show that the district court abused its discretion in this regard. *See NRS 178.405; Jones v. State*, 107 Nev. 632, 637, 817 P.2d 1179, 1182 (1991) ("[I]n the absence of reasonable doubt as to a defendant's competence, the district judge is not required to order a competency examination."); *Melchor-Gloria v. State*, 99 Nev. 174, 179-80, 660 P.2d 109, 113 (1983) (observing that competency requires the defendant to have sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and to have a rational and factual understanding of the proceedings against him).

Third, appellant argues that his counsel was ineffective for advising him to plead guilty despite his intellectual deficiencies and medicated state at the time he entered his guilty plea. In his motion, below, appellant argued that counsel was ineffective for advising him to plead guilty due to his intellectual deficiencies but not on the ground that he was under the influence of medication when he entered his guilty plea.

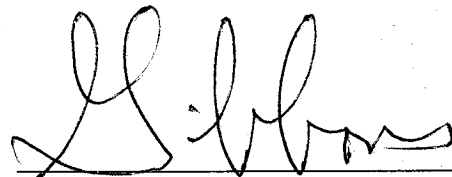
To prove ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*). To demonstrate prejudice sufficient to invalidate the decision to enter a guilty plea, a petitioner must demonstrate a reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985); *Kirksey v. State*, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 697. We give deference to the district court's factual findings if supported by substantial evidence and not clearly erroneous but review the court's application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005). Based on the record before us, we conclude that appellant failed to demonstrate that counsel had a sufficient basis to question appellant's competency and therefore has not shown that counsel was ineffective in this regard.

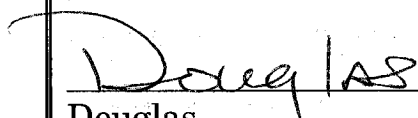
Fourth, appellant argues that he was denied his Fifth and Eighth Amendment rights to individualized sentencing where the district court imposed an equal and consecutive sentence for the deadly weapon enhancement. In this, he argues that the district court abused its discretion by denying his motion to correct an illegal sentence based on the imposition of the deadly weapon enhancement. A few months after sentencing, the Legislature amended NRS 193.165 to eliminate the equal


and consecutive sentence required to be imposed for a deadly weapon enhancement. See 2007 Nev. Stat., ch. 525, § 13, at 3188. This court has held, however, “that the penalty for the use of a deadly weapon should be the one in effect at the time the defendant used a weapon to commit the primary offense.” *State v. Second Judicial Dist. Court (Pullin)*, 124 Nev. 564, 572, 188 P.3d 1079, 1084 (2008). Because the imposition of an equal and consecutive term was required at the time appellant committed his crime, the district court did not abuse its discretion by imposing it, and appellant does not adequately explain how imposing the enhancement was unconstitutional.²

Having considered appellant’s arguments and concluded that no relief is warranted, we

ORDER the judgment of conviction AFFIRMED.


_____, J.
Gibbons


_____, J.
Douglas


_____, J.
Saitta

²We note that appellant appealed the denial of his motion to correct an illegal sentence based on the deadly weapon enhancement, and this court concluded that his sentence was facially legal because it “fell within the permissible range of punishment in effect at the time he committed his crime.” *Mayo v. State*, Docket No. 51040 (Order of Affirmance, January 30, 2009).

cc: Hon. Jennifer P. Togliatti, District Judge
Law Office of Lisa Rasmussen
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk