

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JAMES EARL EGGLESTON,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 71646

**FILED**

SEP 13 2017

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

James Earl Eggleston appeals from a judgment of conviction entered pursuant to a guilty plea of sexual assault of a minor under sixteen years of age. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Eggleston claims the district court erred by denying his presentence motion to withdraw his guilty plea because he presented the following fair and just reasons for its withdrawal. There would be no prejudice to the State because the motion was filed prior to sentencing. He had a credible claim of factual innocence because consent is a defense to sexual assault and statutory sexual seduction is a lesser-included offense to sexual assault. And his defense counsel's performance was deficient because counsel did not communicate with him in the county jail, counsel did not discuss his version of the allegations or the possible defenses, and counsel did not provide him with discovery.


A defendant may move to withdraw a guilty plea before sentencing. NRS 176.165. "[A] district court may grant a defendant's motion to withdraw his guilty plea before sentencing for any reason where permitting withdrawal would be fair and just." *Stevenson v. State*, 131 Nev. 354 P.3d 1277, 1281 (2015). To determine whether permitting withdrawal


would be fair and just, the district court must consider the totality of the circumstances. *Id.* We review the district court's decision to grant or deny a presentence motion to withdraw a guilty plea for abuse of discretion. *State v. Second Judicial Dist. Court (Bernardelli)*, 85 Nev. 381, 385, 455 P.2d 923, 926 (1969).

The district court conducted an evidentiary hearing and heard the following testimony. Defense counsel visited Eggleston one time and defense counsel's investigator visited Eggleston three times while Eggleston was in jail. Eggleston received and signed a receipt for the discovery. Because Eggleston repeatedly stated he did not sexually assault the victim, there was no reason for defense counsel to discuss or pursue consent and statutory sexual seduction as possible defenses. Eggleston's entire defense was the sexual assaults never occurred. However, when defense counsel looked at the DNA report and saw the victim's DNA was found on Eggleston's underwear and Eggleston's DNA was found on the victim's vaginal swab, defense counsel asked the State to re-extend its plea offer and advised Eggleston it was in his best interest to take the offer.

We conclude the record does not demonstrate Eggleston had a fair and just reason for withdrawing his guilty plea and therefore the district court did not abuse its discretion by denying Eggleston's motion to withdraw his guilty plea. Accordingly, we

ORDER the judgment of conviction AFFIRMED.

  
\_\_\_\_\_, C.J.  
Silver

  
\_\_\_\_\_, J.  
Tao

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

cc: Hon. Michelle Leavitt, District Judge  
James J. Ruggeroli  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk