

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

THOMAS JUSTIN SJOBERG,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 70447

FILED

APR 19 2017

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

ORDER OF AFFIRMANCE

Appellant Thomas Justin Sjoberg appeals from a judgment of conviction, pursuant to a jury verdict, of lewdness with a child under the age of 14. Third Judicial District Court, Lyon County; John Schlegelmilch, Judge.

Sjoberg argues the district court erred in denying his presentence motion to withdraw his guilty plea.¹ A defendant may move to withdraw a guilty plea before sentencing, NRS 176.165, and “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

¹We note the State asserts this court lacks jurisdiction to consider this appeal because it believes the notice of appeal was not timely filed from the district court’s order denying the motion to withdraw guilty plea. However, this assertion lacks merit because the denial of the motion to withdraw guilty plea was an intermediate decision which is properly challenged in a direct appeal following entry of the judgment of conviction. See NRS 177.015(3); NRS 177.045.

just,” *Stevenson v. State*, 131 Nev. ___, ___, 354 P.3d 1277, 1281 (2015). In considering the motion, “the district court must consider the totality of the circumstances to determine whether permitting withdrawal of a guilty plea before sentencing would be fair and just.” *Id.*

In his motion, Sjoberg asserted he should be entitled to withdraw his plea because his counsel was ineffective for failing to move to suppress statements he made to a sheriff’s deputy.² Sjoberg argued his statements should have been suppressed because he did not voluntarily, knowingly, and intelligently waive his rights because he has hearing difficulties and was not provided with a hearing device or interpreter to permit him to understand the deputy’s questions and the advisement of his *Miranda*³ rights.

The district court conducted an evidentiary hearing and reviewed a recording of the interview where Sjoberg uttered the

²The State argues Sjoberg’s claim of ineffective assistance of counsel was not appropriately raised in a presentence motion to withdraw guilty plea, but rather may only be pursued in a postconviction petition for a writ of habeas corpus. However, the Nevada Supreme Court explained a criminal defendant may move to withdraw a “guilty plea before sentencing for *any* reason where permitting withdrawal would be fair and just.” *Stevenson*, 131 Nev. at ___, 354 P.3d at 1281 (emphasis added). Because a defendant may move for withdrawal of his guilty plea upon any reason which may be fair and just, the State does not demonstrate Sjoberg’s claim of ineffective assistance of counsel was improperly raised in his presentence motion to withdraw his guilty plea.

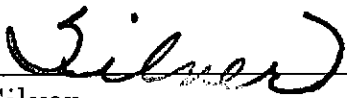
³*Miranda v. Arizona*, 384 U.S. 436 (1966).

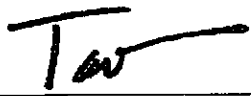
challenged statements. The district court concluded a review of the interview recording revealed Sjoberg could hear and understand the deputy. The district court noted Sjoberg repeated the deputy's questions multiple times during the interview and responded to the questions in an appropriate and coherent manner. In addition, the district court concluded, based upon the testimony presented at the evidentiary hearing, Sjoberg could read lips and he had a clear view of the deputy's face during the interview.


The district court further concluded Sjoberg was properly advised of his *Miranda* rights, informed the deputy he understood those rights, and chose to continue to talk with the deputy. The district court found the totality of the circumstances demonstrated Sjoberg knowingly, intelligently, and voluntarily waived his rights, and his counsel was not ineffective for failing to move to suppress his statements under these circumstances. *See Gonzales v. State*, 131 Nev. ___, ___, 354 P.3d 654, 658 (Nev. App. 2015); *see also Kirksey v. State*, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996) (explaining a defendant seeking to demonstrate ineffective assistance of counsel following a guilty plea, must demonstrate his 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, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial). The district court concluded Sjoberg failed to demonstrate a fair and just reason to withdraw his plea and denied the motion.

The record before this court supports the district court's conclusion and we conclude Sjoberg has not demonstrated the district court abused its discretion by denying his motion to withdraw his guilty plea.⁴ *See Hubbard v. State*, 110 Nev. 671, 675, 877 P.2d 519, 521 (1994). Therefore, Sjoberg fails to demonstrate he is entitled to relief and we

ORDER the judgment of conviction AFFIRMED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

⁴We note the record before this court does not contain a transcript of Sjoberg's interview with the deputy and Sjoberg did not have the interview recording transmitted to this court, *see* NRAP 30(d). We remind Sjoberg it is his burden to provide this court with an appropriate record with which to review his claims. *See* NRAP 30(b)(3); *McConnell v. State*, 125 Nev. 243, 256 n.13, 212 P.3d 307, 316 n.13 (2009).

cc: Hon. John Schlegelmilch, District Judge
Law Office of Kenneth V. Ward/Dayton
Attorney General/Carson City
Lyon County District Attorney
Third District Court Clerk