IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAVID COLVIN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 69915

FILED

FEB 22 2017

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

ORDER OF AFFIRMANCE

Appellant David Colvin appeals from a judgment of conviction entered pursuant to a guilty plea of sexual assault of a minor under 16 years of age. Eighth Judicial District Court, Clark County; Richard Scotti, Judge.

Colvin claims the district court erred by denying his motion to withdraw his guilty plea. Colvin argues he presented uncontroverted evidence that there was no evidence of a valid guilty plea and this evidence was disregarded. And Colvin further argues his motion was denied by a district judge who had made up his mind to deny the motion before it was even filed.

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 just," *Stevenson v. State*, 131 Nev. ___, ___, 354 P.3d 1277, 1281 (2015). To this end, the Nevada Supreme Court recently disavowed the standard previously announced in *Crawford v. State*, 117 Nev. 718, 30 P.3d 1123 (2001), which focused exclusively on whether the plea was knowingly, voluntarily, and

intelligently made, and affirmed that "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." *Stevenson*, 131 Nev. at ___, 354 P.3d at 1281.

The district court considered the following circumstances before rendering its decision:

> [T]he language of the GPA; Mr. Colvin's active participation in pre-plea negotiations; Mr. Colvin's pre-plea representation by counsel; Mr. Colvin's post-plea failure to appear at sentencing and fleeing from justice for more than 12 years; the significant pre-plea time Mr. Colvin had to conduct discovery for his case (from Oct. 25, 2000 when the right to preliminary hearing was waived until December 5, 2002, when Mr. Colvin entered his plea); the excuses provided by Mr. Colvin for originally entering his plea; the failure of Mr. Colvin to contest the validity of his plea for over 12 years; the fact that the passage of time will have caused the memories of the witnesses to fade; the fact that Mr. Colvin has not come forth with any affidavits from the victims to suggest his defenses to the charges have become stronger over time; the extreme prejudice to the state caused by Mr. Colvin's delay, in having to try this case if the plea was withdrawn, the nature and circumstances of the charges, and the presumptive validity of the plea.

The district court noted that Colvin did not request an evidentiary hearing on his motion to withdraw his guilty plea, and he did not indicate what, if any, evidence would be developed or presented during further proceedings. And the district court concluded there was not a fair and just reason to permit Colvin to withdraw his guilty plea.

Colvin did not provide a transcript of the October 29, 2015, hearing on his motion to withdraw his guilty plea, nor did he provide the

pleadings, affidavit, and written order denying his motion to disqualify District Judge Scotti. *See Thomas v. State*, 120 Nev. 37, 43 n.4, 83 P.3d 818, 822 n.4 (2004) ("Appellant has the ultimate responsibility to provide this court with 'portions of the record essential to determination of issues raised in appellant's appeal.'" (quoting NRAP 30(b)(3))); *Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) ("The burden to make a proper appellate record rests on appellant."). The written guilty plea agreement belies Colvin's claim that there is no evidence of a valid guilty plea,[1] and he has not shown the district court was predisposed to deny his motion. Accordingly, we conclude Colvin has not demonstrated the district court abused its discretion by denying his motion to withdraw his guilty plea. *See State v. Second Judicial Dist. Court (Bernardelli)*, 85 Nev. 381, 385, 455 P.2d 923, 926 (1969) (The district court's ruling on a presentence motion to withdraw a guilty plea "is discretionary and will not be reversed unless there has been a clear abuse of that discretion.").

Colvin also claims the district court erred by sentencing him to life in prison with the possibility of parole after 20 years. Colvin argues the district court imposed the maximum sentence permitted by law and it far exceeded the sentence stated in the guilty plea agreement.

We review a district court's sentencing decision for abuse of discretion. *Chavez v. State*, 125 Nev. 328, 348, 213 P.3d 476, 490 (2009). Generally, a district court does not abuse its discretion if it imposes a sentence within the statutory limits and does not rely on impalpable or

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[1]The record indicates a transcript of the December 5, 2002, plea canvass is unavailable because the court reporter has passed away and his records are gone. Colvin did not pursue the remedy in NRAP 9(d).

highly suspect evidence. *Etcheverry v. State*, 107 Nev. 782, 786, 821 P.2d 350, 352 (1991).

Colvin did not provide a sentencing transcript for our review. *See Thomas*, 120 Nev. at 43 n.4, 83 P.3d at 822 n.4; *Greene*, 96 Nev. at 558, 612 P.2d at 688. However, the record he did provide included the written guilty plea agreement, which states, "[i]f the defendant fails to appear in court on the first sentencing date, the State retains the full right to argue for the maximum sentence of life in prison with parole eligibility after twenty (20) years has been served." And the record demonstrates Colvin failed to appear for sentencing and the district court sentenced him to life in prison with the possibility of parole after 20 years.

Colvin's sentence falls within the parameters of the statute in effect at the time of his crime, *see* 1999 Nev. Stat., ch. 105, § 23, at 431-32 (former NRS 200.366), and he does not claim the district court relied upon impalpable or highly suspect evidence. Accordingly, we conclude Colvin has not demonstrated the district court abused its discretion at sentencing.

Having concluded Colvin is not entitled to relief, we ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Silver

_____, J.
Tao

_____, J.
Gibbons

cc: Hon. Richard Scotti, District Judge
Alan J. Buttell & Associates
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk