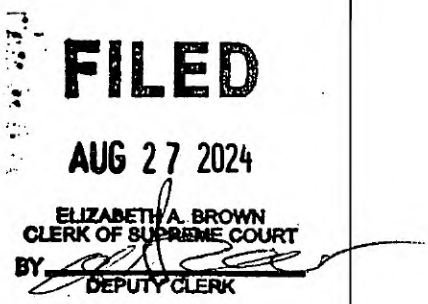
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JACORBIN CROSS-BURTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 86940-COA



ORDER OF AFFIRMANCE

Jacorbin Cross-Burton appeals from a judgment of conviction, entered pursuant to a guilty plea, of second-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Jacqueline M. Bluth, Judge.

Cross-Burton argues the district court abused its discretion by denying his presentence motion to withdraw his guilty plea. 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. 598, 604, 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.* at 603, 354 P.3d at 1281. We give deference to the district court's factual findings if they are supported by the record. *Id.* at 604, 354 P.3d at 1281. The district court's ruling on a presentence motion to withdraw a guilty plea "is discretionary

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and will not be reversed unless there has been a clear abuse of . . . discretion." *State v. Second Jud. Dist. Ct. (Bernardelli)*, 85 Nev. 381, 385, 455 P.2d 923, 926 (1969).

First, Cross-Burton argued that he had a fair and just reason to withdraw his plea because his plea was not freely, voluntarily, and knowingly entered. Cross-Burton contended that he did not understand the defenses or trial strategies available to him based on his intellectual disabilities and that his IQ score may have made it difficult for him to form the requisite intent to commit murder or to have "laid in wait" as alleged in the charging document. The only evidence Cross-Burton provided was evidence indicating his IQ was 65. He failed to demonstrate an IQ of 65 alone would provide a possible defense nor did he cite to any caselaw to support his claim. Therefore, we conclude that the district court did not abuse its discretion by finding that this claim did not present a fair and just reason to withdraw the plea.

Second, Cross-Burton argued that he had a fair and just reason to withdraw his plea due to the ineffective assistance of counsel. In particular, Cross-Burton contended that counsel was ineffective for failing to investigate his mental health issues and his intellectual difficulties and how these issues would have impacted any possible defense to the crime. He claimed that counsel knew Cross-Burton was seeing a psychologist prior to the crime and should have sought those records and that counsel also should have had him evaluated. Had counsel done these things, Cross-Burton claimed the negotiations with the State would have been different.

Ineffective assistance of counsel can constitute a fair and just reason for withdrawing a guilty plea. *See Sunseri v. State*, 137 Nev. 562, 566, 495 P.3d 127, 132 (2021). A defendant must meet two criteria to establish ineffective assistance of counsel sufficient to invalidate his or her guilty plea: (1) "a defendant must show counsel's performance was deficient in that it fell below an objective standard of reasonableness" and (2) "prejudice resulted in that, but for counsel's errors, there is a reasonable probability the defendant would not have pleaded guilty and would have insisted on going to trial." *Id.*

After an evidentiary hearing, the district court found that counsel would have explored Cross-Burton's intellectual difficulties if counsel thought Cross-Burton was unable to understand what was going on in his case. This finding is supported by the record. Counsel testified that he discussed the case with Cross-Burton numerous times and did not believe that Cross-Burton was unable to understand the conversations and information. Further, based on conversations with Cross-Burton, he did not believe that Cross-Burton was unable to form the intent to kill. As to Cross-Burton's mental health records, counsel testified that he sought Cross-Burton's psychological records but was unable to procure them. Finally, Cross-Burton did not allege or testify that he would not have pleaded guilty and would have insisted on going to trial had counsel done further investigation into these issues. Accordingly, Cross-Burton failed to demonstrate counsel was deficient or resulting prejudice, and we conclude that the district court did not abuse its discretion by finding that this claim did not present a fair and just reason to withdraw the plea.

Having concluded that Cross-Burton is not entitled to relief, we ORDER the judgment of conviction AFFIRMED.[1]

_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

cc: Hon. Jacqueline M. Bluth, District Judge
Ewing WN Enterprises LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[1]To the extent that Cross-Burton argues that he had a fair and just reason to withdraw his plea because he was a juvenile at the time he committed his crime, this claim was not raised in his motion below. Therefore, we decline to consider it on appeal. *See State v. Wade*, 105 Nev. 206, 209 n.3, 772 P.2d 1291, 1293 n.3 (1989) ("This court will not consider issues raised for the first time on appeal."). Cross-Burton also argues that the district court improperly added a factor to the fair and just standard established in *Stevenson*. This argument was raised for the first time in his reply brief, and we decline to consider it. *See LaChance v. State*, 130 Nev. 263, 277 n. 7, 321 P.3d 919, 929 n. 7 (2014).