

IN THE COURT OF APPEALS OF THE STATE OF NEVADA


KEVIN GRESHAM,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 87889-COA

FILED

JAN 14 2025

ELIZABETH A. BROWN
CLERK OF SUPREME COURT

BY 
DEPUTY CLERK

*ORDER OF AFFIRMANCE AND REMANDING TO CORRECT
JUDGMENT OF CONVICTION*

Kevin Gresham appeals from a judgment of conviction, entered pursuant to a guilty plea, of four counts of robbery, burglary of a business, conspiracy to commit robbery, and conspiracy to commit burglary. Eighth Judicial District Court, Clark County; Monica Trujillo, Judge.

First, Gresham argues the district court abused its discretion by denying his presentence motions to withdraw his guilty plea without conducting an evidentiary hearing on all the issues raised in his motions. A defendant may move to withdraw a guilty plea before sentencing, NRS 176.165, and a district court may grant the motion “for any reason where permitting withdrawal would be fair and just,” *Stevenson v. State*, 131 Nev. 598, 604, 354 P.3d 1277, 1281 (2015). “[T]he 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 and will not be reversed unless there has been a clear abuse of that discretion.” *State v. Second Jud. Dist. Ct. (Bernardelli)*, 85

Nev. 381, 385, 455 P.2d 923, 926 (1969). A defendant is entitled to an evidentiary hearing on his motion to withdraw a guilty plea if there are factual allegations not belied by the record that, if true, would entitle him to relief. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

In his February 24, 2023, motion, Gresham alleged he had fair and just reasons to withdraw his plea because it was not freely, knowingly, and voluntarily entered. Specifically, Gresham claimed his plea was not freely, knowingly, and voluntarily made because counsel failed to: (1) file an opposition to the State's motion for leave to amend the information by affidavit, thus resulting in additional charges; (2) review all the discovery with him; and (3) file a request for bail. The district court denied these claims without conducting an evidentiary hearing. Gresham's claims were bare as Gresham failed to allege specific facts demonstrating how these alleged errors impacted the knowing and voluntary nature of his plea.¹ Therefore, the court did not abuse its discretion by denying these claims without first conducting an evidentiary hearing.

Gresham also claimed his plea was not freely, knowingly, and voluntarily entered because he did not fully understand the terms of the guilty plea memorandum, including the concept and application of habitual sentencing. The court also denied this claim without an evidentiary hearing. The amended information and the written plea memorandum provided that, if Gresham was convicted of robbery in this case, the court had to adjudicate and sentence him under the mandatory habitual felon

¹We note that, during the evidentiary hearing conducted on other claims within Gresham's motion, counsel testified that he had reviewed discovery with Gresham. While Gresham testified that he had not seen any discovery other than his arrest report, he provided no testimony regarding how the alleged lack of discovery affected his guilty plea.

statute, NRS 207.012, based on Gresham's two prior robbery convictions.² During the plea canvass, Gresham stated that he had read these documents and that he understood he faced a possible sentence of "life without the possibility of parole, life with the possibility of parole, or 10 to 25" if the State established he had prior felonies that made him eligible for adjudication as a habitual felon pursuant to NRS 207.012. Based on these circumstances, we conclude Gresham understood habitual sentencing, that it could apply to all counts, and that it was mandatory depending on the charges. As Gresham understood the intricacies of habitual sentencing, he did not present a fair and just reason to withdraw his plea, and the district court did not abuse its discretion by denying this claim without first conducting an evidentiary hearing.

Finally, Gresham claimed his plea was not freely, knowingly, and voluntarily entered because it was entered under duress as he suffered from significant mental health issues and a mental health evaluation was not completed prior to the entry of his plea. The district court conducted an evidentiary hearing regarding this claim where Gresham and his entry-of-plea counsel testified and Gresham admitted mental health records from the California prison system. The district court concluded that Gresham's

²Prior to the entry of Gresham's plea, the State also separately filed its notice of intent to seek punishment as a habitual criminal pursuant to NRS 207.010. While the district court canvassed Gresham at entry of plea regarding habitual felon sentencing under NRS 207.012 and orally referenced that statute as the grounds for Gresham's sentence, the written judgment of conviction reflects that Gresham was sentenced pursuant to NRS 207.010 as a large habitual criminal on Count 1 (robbery). Gresham did not allege in his motions below that the district court's failure to canvass him regarding NRS 207.010 when he pleaded guilty presented a fair and just reason to withdraw his plea; to the extent he makes this argument on appeal, we decline to consider it in the first instance. *See State v. Wade*, 105 Nev. 206, 209 n.3, 772 P.2d 1291, 1293 n.3 (1989).

mental health issues did not impact his ability to knowingly or voluntarily enter his plea. In support of its conclusion, the court found that both the court and counsel interacted with Gresham on multiple occasions and the interactions did not raise concerns about Gresham's mental health. These findings are supported by the record. And while Gresham testified that he suffered from anxiety, had trouble sleeping, "self-destruct[ed]," and made spontaneous statements, and that his mental health issues generally affected his ability to comprehend and process things, he offered no testimony or evidence that his mental health issues specifically affected his ability to understand his plea or what aspects of his plea he was unable to understand because of his mental health issues.

Further, counsel testified he read Gresham's prison mental health records as indicating that Gresham's mental health episodes were a way for Gresham to manipulate the prison system. Counsel also testified that, despite his awareness of these records and of the fact Gresham suffered from anxiety and depression, counsel was able to interact with Gresham multiple times and never considered having a mental health evaluation done. The district court reviewed the prison mental health records and found they did not demonstrate that Gresham's mental health impacted the knowing or voluntary nature of his plea. Because Gresham fails to provide these records for our review on appeal, we presume they support the district court's decision. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d, 131, 135 (2007); *see also Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) ("The burden to make a proper appellate record rests on appellant."); *accord* NRAP 30(b)(3). In light of these circumstances, we conclude that Gresham failed to demonstrate a fair and just reason to withdraw his plea, and the district court did not abuse its discretion by denying this claim.

In his October 10, 2023, motion, Gresham again alleged he had a fair and just reason to withdraw his plea because it was not freely, voluntarily, and knowingly entered. Specifically, Gresham claimed his plea was not freely, knowingly, and voluntarily made because counsel failed to: (1) review and explain discovery to him; (2) properly explain the nature and consequences of his plea, including the consequences of the habitual offender statute; (3) disclose that counsel had previously represented the codefendant and thus had a conflict of interest; (4) request and have the district court conduct a *Young*³ hearing; and (5) properly address Gresham's mental health issues by obtaining a mental health evaluation or necessary treatment. Claims 1, 2, and 5 were duplicative of claims Gresham made in his first motion, and Gresham offered no further argument or analysis for these claims in his second motion. Therefore, for the reasons discussed above, Gresham failed to demonstrate a fair and just reason to withdraw his plea as to claims 1, 2, and 5. Further, claims 3 and 4 were bare as Gresham failed to allege specific facts demonstrating how these alleged errors impacted the knowing and voluntary nature of his plea. Therefore, Gresham did not demonstrate a fair and just reason to withdraw his plea based on these claims. Accordingly, we conclude the district court did not abuse its discretion by denying Gresham's motions to withdraw his plea without conducting an evidentiary hearing on all of Gresham's claims.⁴

Second, Gresham argues the district court erred by applying the wrong legal standard to his motions. Gresham contends the district court

³*Young v. State*, 120 Nev. 963, 102 P.3d 572 (2004).

⁴To the extent Gresham attempts to support the claims raised in his motions by adding facts or argument on appeal, we decline to consider these facts or argument for the first time on appeal. *See Wade*, 105 Nev. at 209 n.3, 772 P.2d at 1293 n.3.

erred because it concluded that Gresham's mental health issues did not impact his "ability to understand or voluntarily enter" his plea. Gresham claims the district court's finding demonstrates it considered only the validity of his plea as opposed to considering whether he demonstrated a fair and just reason to withdraw his plea based on his mental health issues. *See Stevenson*, 131 Nev. at 603, 354 P.3d at 1281 (providing 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" instead of exclusively focusing on the validity of the plea). In his motions, Gresham claimed that his mental health issues made his plea not freely, knowingly, and voluntarily entered and thus that he had a fair and just reason to withdraw his plea. Based on Gresham's claim in his motions, we conclude the district court did not err when it considered whether Gresham's plea was knowingly and voluntarily made based on his mental health issues in determining whether Gresham had demonstrated a fair and just reason to withdraw his plea.

Gresham also contends the district court erred because it considered whether Gresham had demonstrated an actual conflict of interest and not whether Gresham had demonstrated a fair and just reason to withdraw his plea. As with his mental health claim, Gresham argued counsel's alleged conflict of interest impacted the knowing and voluntary nature of Gresham's plea; however, he failed to allege specific facts explaining how counsel's alleged representation of Gresham's codefendant impacted the knowing and voluntary nature of his plea. Further, in determining whether Gresham had shown withdrawal of his plea was warranted based on a purported conflict of interest, the district court determined there was no conflict of interest and thus no basis to grant Gresham's motion. We conclude the district court did not apply the

incorrect legal standard in this regard. Accordingly, Gresham is not entitled to relief based on this claim.

Third, Gresham argues the district court erred by failing to make sufficient findings of fact or conclusions of law about the denial of his first motion and by failing to timely enter a written order denying Gresham's motions. Gresham also contends this court cannot consider the findings in the district court's written order because it was filed after Gresham filed a notice of appeal. Gresham fails to provide any authority for the proposition that a district court must enter a written order when denying a presentence motion to withdraw a guilty plea. Thus, we need not consider this argument. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court."). We agree with Gresham that we should not consider the district court's written order because it was filed after Gresham filed his notice of appeal, and we therefore do not consider that order in resolving this appeal. However, the district court's comments when orally denying Gresham's motions were sufficiently specific to allow us to address Gresham's claims on appeal. Therefore, Gresham fails to demonstrate he is entitled to relief based on these claims.

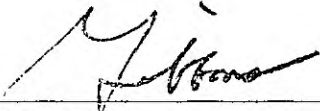
Finally, we note that the judgment of conviction contains a clerical error in that it reflects that the district court adjudicated Gresham a large habitual criminal pursuant to NRS 207.010. While the State noticed its intent to seek habitual criminal adjudication pursuant to NRS 207.010 as well as its intent to seek habitual felon adjudication pursuant to NRS 207.012, Gresham was only canvassed at the entry of his plea regarding the habitual felon statute, NRS 207.012. And at the sentencing hearing, the district court did not comment on whether Gresham qualified for large habitual criminal treatment pursuant to NRS 207.010; instead, it only

referenced the habitual felon statute in sentencing Gresham. Because the district court has the authority to correct a clerical error at any time, *see* NRS 176.565, we direct the district court, upon remand, to enter a corrected judgment of conviction accurately reflecting that Gresham was adjudicated a habitual felon pursuant to NRS 207.012.

For the foregoing reasons, we

ORDER the judgment of conviction AFFIRMED AND REMAND this matter to the district court to correct the judgment of conviction.⁵


_____, C.J.
Bulla


_____, J.
Gibbons


_____, J.
Westbrook

cc: Hon. Monica Trujillo, District Judge
Steven S. Owens
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

⁵In light of our disposition, we need not address Gresham's claim that the district court erred by adjudicating him a large habitual criminal pursuant to NRS 207.010.