

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DONALD GUY KINSMAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 71643

FILED

NOV 15 2017

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

ORDER OF AFFIRMANCE

Donald Guy Kinsman appeals from a judgment of conviction, entered pursuant to a guilty plea, of four counts of reckless driving causing substantial bodily injury. Eighth Judicial District Court, Clark County; Carolyn Ellsworth, Judge.

Kinsman claims the district court erred by denying his 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. ___, ___, 354 P.3d 1277, 1281 (2015). To this end, the Nevada Supreme Court has 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. We give deference to the findings of the district court so long as they are supported by the record. *Id.*

In his motion, Kinsman claimed his plea should be withdrawn because counsel told him the charges he was pleading to were probatable and therefore he believed he would receive probation. When Kinsman received his presentence investigation report, he realized he would not receive probation.

The district court held an evidentiary hearing on Kinsman's motion to withdraw. The district court found, under the totality of the circumstances, there was no fair or just reason to allow Kinsman to withdraw his plea.¹ The district court found counsel did not tell Kinsman he was likely to receive probation,² Kinsman was informed in the plea agreement and during the plea colloquy that he was facing one to six years in prison for each offense, his sentencing was up to the district court judge, and no one had promised him a particular sentence. Further, the district court found Kinsman only decided to file his motion to withdraw after he received his presentence investigation report, which indicated his reason for withdrawal was more of a buyer's remorse than a misunderstanding regarding his potential punishment. Finally, the district court found counsel's testimony to be credible and Kinsman's testimony incredible.

We conclude the district court's findings are supported by the record, and the district court did not abuse its discretion by denying this claim. *See id.* at ___, 354 P.3d at 1282 ("Permitting [the defendant] to withdraw his plea under the circumstances would allow the solemn entry


¹Contrary to Kinsman's claim on appeal, the district court applied the correct standard as stated in *Stevenson*.


²We note this finding distinguishes this case from *United States v. Davis*, 428 F.3d 802, 805 (2005), where the federal court found counsel had "grossly mischaracterized' defendant's possible sentence."

of a guilty plea to become a mere gesture, a temporary and meaningless formality reversible at the defendant's whim." (internal quotation marks omitted)).

Kinsman also claimed his plea was invalid because counsel was ineffective for telling him it was likely he would receive probation, which coerced him into pleading guilty. The district court concluded Kinsman's plea was valid because he failed to demonstrate counsel was deficient. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). The district court found Kinsman had several conversations about the pros and cons of taking a plea. Counsel testified he informed Kinsman the charges were probatable but did not inform him of the likelihood he would receive probation. He also testified he explained to Kinsman he could receive prison time. Further, as stated above, Kinsman was informed in the plea agreement and during the plea colloquy that he was facing one to six years in prison for each offense, his sentencing was up to the district judge, and no one had promised him a particular sentence. We conclude the record supports the findings of the district court, and the district court did not abuse its discretion by denying this claim. Accordingly, we

ORDER the judgment of conviction AFFIRMED.


Silver, C.J.


Tao, J.


Gibbons, J.

cc: Hon. Carolyn Ellsworth, District Judge
Penney Law Firm
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk