STATE V. JOSHUA O.

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
JOSHUA O.,
Child-Appellant.

No. 34,574

COURT OF APPEALS OF NEW MEXICO

December 21, 2015

APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY, Angie K. Schneider, District Judge

COUNSEL

Hector H. Balderas, Attorney General, Santa Fe, NM, for Appellee

Jorge A. Alvarado, Chief Public Defender, Matthew O'Gorman, Assistant Appellate Defender, Santa Fe, NM, for Appellant

JUDGES

MICHAEL E. VIGIL, Chief Judge. WE CONCUR: TIMOTHY L. GARCIA, Judge, J. MILES HANISEE, Judge

AUTHOR: MICHAEL E. VIGIL

MEMORANDUM OPINION

VIGIL, Chief Judge.

{1} Child appeals his adjudication as a delinquent child and the resulting judgment and disposition remanding him to the custody of the Children, Youth and Families Department for a period of time not to exceed two years. We issued a notice of

proposed disposition in which we proposed to affirm, and Child has responded with a motion to amend the docketing statement as well as a memorandum in opposition. As Child explains, the motion to amend the docketing statement is merely an elaboration of the ineffective-assistance-of-counsel issue raised in the docketing statement and addressed in our notice, and we therefore grant the motion. Having carefully reviewed the contents of Child's submissions, we remain convinced that affirmance is the correct result in this case. Therefore, for the reasons stated below and in our notice, we affirm the district court's judgment and disposition.

{2} In our notice we proceeded to address the merits of the ineffective-assistance claim raised in the docketing statement, without pausing to consider whether that claim could even be raised on direct appeal. The explanation of the procedural posture of this case contained in the motion to amend, as well as our review of the record proper, indicates that a crucial procedural prerequisite has not been met, rendering us unable to address the ineffective-assistance claim. Specifically, Child did not move to withdraw his plea below, and has therefore not laid either the factual or the procedural predicate for his claim of ineffective assistance. Where a defendant does not move to withdraw a plea agreement in district court, we cannot review the claim for the first time on appeal. *See State v. Dominguez*, 2007-NMSC-060, ¶ 14, 142 N.M. 811, 171 P.3d 750 (holding that the defendant failed to preserve his objection to his guilty plea because he failed to move to withdraw his plea in district court); *State v. Andazola*, 2003-NMCA-146, ¶ 25, 134 N.M. 710, 82 P.3d 77 (holding that if the defendant fails to file a motion in the trial court to withdraw his plea, he cannot attack it for the first time on appeal).

{3} This case illustrates the reason for the above rule. While Child raises valid concerns about the extremely small amount of time spent by trial counsel on the case before Child agreed to enter his no-contest plea, the record is devoid of any information indicating why Child agreed to the plea so quickly. As we suggested in the notice of proposed disposition, and as Child concedes, the facts of this case appear to be simple and Child and his trial counsel may have realized Child had no defense to raise; Child may have accordingly decided to take his chances at the sentencing rather than prolonging the proceedings unnecessarily. In the motion to amend Child mentions two defenses that might have been successful had trial counsel investigated them—a normative-entrapment defense and an identity defense. However, since Child failed to move to withdraw his plea there is no factual basis in the record for either possible defense, and there is therefore no way to assess whether investigation of either defense would simply have been a waste of time and effort. Furthermore, and critically, at this point there is absolutely no information in the record as to Child's motivation for agreeing to his plea. Without that information, Child cannot satisfy the second prong of the ineffective-assistance-of-counsel test that applies in plea-agreement cases such as this one; he cannot show that, in the absence of his attorney's allegedly deficient performance, he would have rejected the plea and proceeded to an adjudicatory hearing. *See State v. Tran*, 2009-NMCA-010, ¶ 22, 145 N.M. 487, 200 P.3d 537. For example, it is possible that Child was determined to enter into the plea no matter what his attorney told him, which would mean trial counsel's allegedly deficient performance had no impact on the decision to enter into the plea.

{4} In a case like this an evidentiary hearing is necessary, at which Child can establish what occurred during his pre-plea conversation with trial counsel and how that conversation impacted his decision to enter into the plea. Since no motion to withdraw the plea was filed below, such an evidentiary hearing was not held and we have no trial court decision to review in this appeal. Therefore, we must decline to consider Child's attempt to challenge his plea for the first time on appeal. *See Dominguez*, 2007-NMSC-060, ¶ 14; *Andazola*, 2003-NMCA-146, ¶ 25. In addition, for the reasons stated in the notice of proposed disposition we continue to believe that habeas corpus proceedings are the appropriate avenue for pursuing Child's claim of ineffective assistance of counsel, given the lack of an adequate record supporting that claim at present. *See State v. Arrendondo*, 2012-NMSC-013, ¶¶ 38-41, 278 P.3d 517. We therefore affirm the district court's judgment and disposition for the reasons stated in this opinion and in our notice of proposed disposition.

{5} IT IS SO ORDERED.

MICHAEL E. VIGIL, Chief Judge

WE CONCUR:

TIMOTHY L. GARCIA, Judge

J. MILES HANISEE, Judge