

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20070771-CA
v.)	
)	F I L E D
Rudy Damond McKnight,)	(December 26, 2008)
)	
Defendant and Appellant.)	2008 UT App 473

Third District, West Jordan Department, 171400707
The Honorable Robert Adkins

Attorneys: Herschel Bullen, Salt Lake City, for Appellant
Mark L. Shurtleff and Kris C. Leonard, Salt Lake
City, for Appellee

Before Judges Greenwood, Billings, and Orme.

PER CURIAM:

Rudy Damond McKnight appeals the trial court's denial of his motion to withdraw his guilty plea. We affirm.

McKnight asserts that he received ineffective assistance of counsel because trial counsel failed to produce a new witness at the motion hearing and instead proffered the witness's testimony. To establish ineffective assistance of counsel, McKnight must show both deficient performance and prejudice. See State v. Dunn, 850 P.2d 1201, 1225 (Utah 1993). Prejudice means that, absent the asserted error, there is a reasonable likelihood of a different outcome. See id. Under the circumstances here, McKnight has not shown that any prejudice resulted from counsel's failure to assure the witness's presence. The trial court denied McKnight's motion to withdraw his plea after considering the proffered facts even without direct witness testimony.

Trial counsel proffered to the court that "[w]e have a witness who can testify that the driver admitted to him of using controlled substances and being in possession of the controlled substances." Although the trial court noted that the actual witness would be useful, the court considered the proffer and determined that the new evidence would not support withdrawal of

the plea. The trial court emphasized that McKnight acknowledged that the colloquy pursuant to rule 11 of the Utah Rules of Criminal Procedure was sufficient and that McKnight admitted a factual basis for the plea. The court continued:

The defendant acknowledged the possession of the controlled substance. Whether that was joint possession or whether that was individual possession, but the defendant clearly acknowledged [possession] when the plea was taken. The Court is not persuaded by the claims that [a new witness] may have some information that the other person in the vehicle claimed that he also had possession of the substance.

The trial court clearly considered the proffered facts and determined that even in light of the new facts, the plea would stand. Because the trial court considered the evidentiary basis for the motion, McKnight has failed to show any prejudice from the absence of the witness.

Based on the lack of prejudice, McKnight's claim of plain error also fails. To establish plain error, an appellant must show that an error was made, that it should have been obvious to the trial court, and that the error was harmful. See State v. Dean, 2004 UT 63, ¶ 15, 95 P.3d 276. McKnight asserts that the trial court should have continued the hearing to permit the production of the witness. However, the error in failing to procure the witness, if any, was not harmful given that the trial court considered the proffered testimony and determined that the additional facts did not support withdrawal of McKnight's plea. Accordingly, McKnight has not established plain error.

Affirmed.

Pamela T. Greenwood,
Presiding Judge

Judith M. Billings, Judge

Gregory K. Orme, Judge