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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellee,

4 v.

NO. 34,088

5 **ROBERT COLEMAN,**

6 Defendant-Appellant.

7 **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

8 **Judith K. Nakamura, District Judge**

9 Hector H. Balderas, Attorney General

10 Santa Fe, NM

11 for Appellee

12 Jorge A. Alvarado, Chief Public Defender

13 Allison H. Jaramillo, Assistant Appellate Defender

14 Santa Fe, NM

15 for Appellant

16 **MEMORANDUM OPINION**

17 **WECHSLER, Judge.**

1 {1} Defendant appeals from the district court's order denying his motion to
2 withdraw his guilty plea and the district court's refusal to order a competency
3 evaluation. This Court issued a calendar notice proposing to affirm. Defendant has
4 filed a memorandum opposing this Court's proposed disposition, and has moved to
5 amend his docketing statement. Having given due consideration to Defendant's
6 arguments in opposition, we affirm. Moreover, Defendant's motion to amend his
7 docketing statement is denied.

8 {2} As a prefatory matter, we note that a party responding to a proposed disposition
9 of this Court must point out specific errors in fact or law. *See Hennessy v. Duryea*,
10 1998-NMCA-036, ¶ 24, 124 N.M. 754, 955 P.2d 683 ("Our courts have repeatedly
11 held that, in summary calendar cases, the burden is on the party opposing the proposed
12 disposition to clearly point out errors in fact or law."). In response to this Court's
13 calendar notice, counsel has provided seven pages describing the facts and
14 proceedings. We note that a number of the facts provided are attributed to a telephone
15 conversation with Defendant, and counsel has not indicated whether these facts were
16 actually before the district court. Unlike trial counsel, we note that a defendant is not
17 an officer of the Court and is not bound by a duty of candor towards the tribunal.
18 Moreover, counsel does not point out whether any of the facts asserted are contrary
19 to those relied on by this Court in our notice of proposed disposition.

1 **Withdrawal of Plea**

2 {3} Defendant continues to maintain that the district court abused its discretion in
3 denying his motion to withdraw his guilty plea. In this Court’s calendar notice, we
4 pointed out that a hearing was held on Defendant’s motion where Defendant testified,
5 and a transcript of the plea proceeding and Defendant’s medical records were
6 introduced. [CN 3] We suggested that the district court appeared to have concluded
7 that Defendant’s testimony was not credible, and that this Court defers to the district
8 court on matters of credibility. [CN 4]

9 {4} In response, Defendant asserts that his counsel was ineffective by misinforming
10 him that he would be able to withdraw his no contest plea. [MIO 12] We note,
11 however, as we did in our notice of proposed disposition, that the testimony
12 introduced on this matter appears to be Defendant’s self-serving statement that
13 counsel instructed him that he would be able to plead guilty, get released, and later
14 withdraw his plea. Given that it is for the trial court to weigh evidence and assess
15 credibility, we cannot conclude that the district court abused its discretion in denying
16 Defendant relief on this basis. *See Patterson v. LeMaster*, 2001-NMSC-013, ¶ 29, 130
17 N.M. 179, 21 P.3d 1032 (“Because courts are reluctant to rely solely on the
18 self-serving statements of defendants, which are often made after they have been
19 convicted and sentenced, a defendant is generally required to adduce additional

1 evidence to prove that there is a reasonable probability that he or she would have gone
2 to trial.”).

3 {5} Similarly, Defendant asserts that he was suffering from mental health issues at
4 the time he entered his plea. However, the evidence supporting Defendant’s claim was
5 largely his own testimony, which the district court rejected. Because we defer to the
6 district court’s weighing of evidence and assessment of credibility, we cannot
7 conclude that the district court abused its discretion on this basis. *See State v. Salas*,
8 1999-NMCA-099, ¶ 13, 127 N.M. 686, 986 P.2d 482 (recognizing that the appellate
9 court defers to the factfinder when weighing the credibility of witnesses and resolving
10 conflicts in witness testimony).

11 {6} Defendant also asserts that his plea was not knowing and voluntary, because
12 counsel failed to investigate and inform Defendant of possible defenses, including that
13 the victim was unavailable. [MIO 13] However, Defendant does not assert that this
14 information was before the district court at the time of the hearing on Defendant’s
15 motion to withdraw his guilty plea. Rather, according to Defendant’s memorandum
16 in opposition, the information that the witness was unavailable is only attributed to a
17 telephone conversation between Defendant and counsel during the pendency of this
18 appeal. [MIO 4-5] Where information that is not of record may give rise to a claim of
19 ineffective assistance of counsel, such arguments are best raised in habeas corpus

1 proceedings. *See State v. Roybal*, 2002-NMSC-027, ¶ 19, 132 N.M. 657, 54 P.3d 61
2 (“If facts necessary to a full determination are not part of the record, an ineffective
3 assistance claim is more properly brought through a habeas corpus petition[.]”).

4 **Competency Evaluation**

5 {7} Defendant maintains that the district court erred in not granting his motion for
6 a forensic evaluation. In this Court’s calendar notice, we pointed out that “[n]o
7 competency hearing is required when there is minimal or no evidence of
8 incompetency.” *State v. Flores*, 2005-NMCA-135, ¶ 20 ,138 N.M. 636, 124 P.3d
9 1175. We noted that, in order to satisfy this burden, there needed to be “something
10 more than counsel’s unsubstantiated assertion and opinion regarding a defendant’s
11 competency . . . to pass the reasonable doubt and good cause test.” *Id.* ¶ 27. Given that
12 Defendant had not described any evidence before the district court other than
13 counsel’s assertions, we proposed to conclude that Defendant had not demonstrated
14 an abuse of discretion by the district court. [CN 5]

15 {8} In response, Defendant asserts that he did not simply rely on counsel’s
16 assertions, but that testimony and medical records were also introduced. [MIO 21]
17 However, as previously noted, the district court rejected Defendant’s testimony as not
18 credible. And, to the extent Defendant relies on the introduction of other medical
19 records to assert that the district court abused its discretion in not granting a

1 competency evaluation, Defendant has not adequately described the documentation
2 presented to the district court to demonstrate an abuse of discretion. [MIO 21] *See*
3 *Hennessy*, 1998-NMCA-036, ¶ 24 (noting that the party opposing summary
4 disposition most point out specific error in facts or law); *State v. Aragon*, 1999-
5 NMCA-060, ¶ 10, 127 N.M. 393, 981 P.2d 1211 (stating that there is a presumption
6 of correctness in the rulings or decisions of the trial court, and the party claiming error
7 bears the burden of showing such error). Moreover, to the extent counsel asserts that
8 the medical records show that Defendant was “not on the correct medication and it did
9 nothing to help with the voices he was hearing” [MIO 8], the fact that counsel has
10 attributed this information to a telephone call with Defendant that occurred during the
11 pendency of this appeal, coupled with a failure to actually describe the medical
12 documentation purported to support this assertion, is insufficient to demonstrate that
13 this information was before the district court. To the extent that this assertion is based,
14 in part, on Defendant’s testimony or his own reporting of his symptoms, we again note
15 that the district court specifically determined that Defendant was not credible. [MIO
16 8 (noting that the district court found that Defendant had a “history of manipulative
17 behavior which raises questions regarding his credibility”); MIO 15 (stating that
18 Defendant “acknowledges that he admitted at the hearing to fabricating the severity
19 of that claim [referring to his being placed on suicide watch] in order to obtain a

1 phone call with his pregnant girlfriend”)] For these reasons, we conclude that
2 Defendant failed to demonstrate that the district court abused its discretion.

3 **Motion to Amend the Docketing Statement**

4 ¶9 Defendant has also moved this Court to amend his docketing statement
5 pursuant to Rule 12-208(E) NMRA to add four new issues: (1) “the grand jury was
6 not presented with relevant defense information”; (2) “there was in [sic] inadequate
7 factual basis presented for the plea agreement”; (3) “ineffective assistance of counsel
8 provided by Ms. Mitsunaga”; and (4) “the district court erred in forcing [Defendant]
9 to choose between immediately proceeding to sentencing or going for a 60-day
10 evaluation when he was without counsel.” [MIO 1] The essential requirements to
11 show good cause for our allowance of an amendment to an appellant’s docketing
12 statement are: (1) that the motion be timely, (2) that the new issue sought to be raised
13 was either (a) properly preserved below or (b) allowed to be raised for the first time
14 on appeal, and (3) the issues raised are viable. *See State v. Moore*, 1989-NMCA-073,
15 ¶ 42, 109 N.M. 119, 782 P.2d 91, *overruled on other grounds by State v. Salgado*,
16 1991-NMCA-044, 112 N.M. 537, 817 P.2d 730. For the reasons that follow, we deny
17 Defendant’s motion to amend the docketing statement on the ground that the issues
18 raised are not viable appellate issues.

1 {10} First, Defendant challenges his grand jury indictment because he did not get to
2 present exculpatory evidence to the grand jury. [MIO 22] Specifically, Defendant
3 asserts that he would have presented evidence that the victim sexually assaulted him
4 and that he did not rob the victim. [Id.] However, we conclude that Defendant has not
5 demonstrated a viable issue because Defendant waived this issue when he entered
6 what we have determined to be a valid plea. *See State v. Hodge*, 1994-NMSC-087, ¶
7 14, 118 N.M. 410, 882 P.2d 1 (noting “a plea of guilty or nolo contendere, when
8 voluntarily made after advice of counsel and with full understanding of the
9 consequences, waives objections to prior defects in the proceedings”).

10 {11} Second, Defendant contends that there was an insufficient factual basis
11 provided for his plea rendering his no contest plea invalid. However, we conclude that
12 this issue is also without merit. *See State v. Vincent*, 2005-NMCA-064, ¶ 43, 137 N.M.
13 462, 112 P.3d 1119 (holding that “[a] court is not required to inquire into whether
14 there is a factual basis for a no contest plea”); Rule 5-304(G) NMRA
15 (“Notwithstanding the acceptance of a plea of guilty, the court should not enter a
16 judgment upon such plea without making such inquiry as shall satisfy it that there is
17 a factual basis for the plea.”); Rule 5-303 NMRA, committee commentary (“[U]nlike
18 the case in which the defendant pleads guilty, a court need not inquire into whether
19 or not there is a factual basis for the no contest plea”).

1 {12} Third, Defendant asserts that Ms. Mitsunaga provided him with ineffective
2 assistance of counsel. Specifically, Defendant asserts that Ms. Mitsunaga failed to call
3 his prior attorney to testify and failed to investigate the extent of Defendant's mental
4 health issues. [MIO 25] However, Defendant notes that this information was not
5 presented to the district court. [Id.] Where evidence supporting an ineffective
6 assistance of counsel claim is not contained in the record, "an ineffective assistance
7 claim is more properly brought through a habeas corpus petition[.]" *Roybal*,
8 2002-NMSC-027, ¶ 19.

9 {13} Fourth, Defendant contends that his due process rights were violated because
10 he was not provided counsel during a critical stage of the proceedings against him.
11 Specifically, Defendant asserts that "a criminal defendant has a constitutional right to
12 counsel at all critical stages of a criminal prosecution, including sentencing." [MIO
13 27] We note, however, that Defendant had counsel at his sentencing hearing.
14 According to the memorandum in opposition, Defendant's sentencing hearing was
15 scheduled for March 13, 2014, and Ms. Mitsunaga entered her appearance on January
16 15, 2014. [MIO 5] Further, we note that Defendant's prior counsel, Mr. Rhinehart,
17 appeared at the January 2, 2014 hearing, prior to moving to withdraw. [MIO 5] At this
18 same hearing, the district court asked Defendant if he would like to proceed to
19 sentencing or do a sixty-day evaluation. Defendant fails to articulate how these facts

1 constitute a violation of his right to due process. *See State v. Guerra*, 2012-NMSC-
2 027, ¶ 30, 284 P.3d 1076 (recognizing that in the absence of demonstrating harm done
3 by alleged errors, there is no due process violation); *State v. Duran*, 1988-NMSC-082,
4 ¶ 12, 107 N.M. 603, 762 P.2d 890 (“[T]o establish a due process violation, and thus
5 reversible error, the defendant must demonstrate prejudice.”), *superseded by rule as*
6 *stated in State v. Gutierrez*, 1998-NMCA-172, 126 N.M. 366, 969 P.2d 970).

7 {14} Given that Defendant has failed to demonstrate any viable appellate issue, his
8 motion to amend the docketing statement is denied. With respect to the issues raised
9 in Defendant’s original docketing statement and argued in his memorandum in
10 opposition, we affirm for the reasons stated above and in this Court’s notice of
11 proposed disposition.

12 {15} **IT IS SO ORDERED.**

13
14

JAMES J. WECHSLER, Judge

15 **WE CONCUR:**

1

2 **MICHAEL D. BUSTAMANTE, Judge**

3

4 **LINDA M. VANZI, Judge**