

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION	
)	(Not For Official Publication)	
Plaintiff and Appellee,)		
)	Case No. 20080743-CA	
v.)		
)	F I L E D	
David Calderon,)	(February 11, 2010)	
)		
Defendant and Appellant.)	<table border="1"><tr><td>2010 UT App 32</td></tr></table>	2010 UT App 32
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Second District, Ogden Department, 071902173
The Honorable Ernest W. Jones

Attorneys: Randall W. Richards, Ogden, for Appellant
Mark L. Shurtleff and Karen A. Klucznik, Salt Lake
City, for Appellee

Before Judges Davis, McHugh, and Thorne.

McHUGH, Associate Presiding Judge:

David Calderon appeals from the trial court's denial of his timely motion to withdraw his guilty pleas to charges of arson, theft, and receiving stolen property. Specifically, Calderon claims that at the time the trial court accepted his pleas, the State failed to provide a factual basis sufficient to meet the requirements of the due process clause or those of rule 11(e)(4)(B) of the Utah Rules of Criminal Procedure. We review a denial of a motion to withdraw a guilty plea for abuse of discretion. See State v. Blair, 868 P.2d 802, 805 (Utah 1993).

Appellate courts generally do not consider claims raised for the first time on appeal. See State v. Dean, 2004 UT 63, ¶ 13, 95 P.3d 276. The purpose of this rule is to allow the trial judge proper "notice of the asserted error and . . . opportunity for correction at that time in the course of the proceeding." Id. ¶ 13. To preserve an issue for appeal in a criminal matter, an objection must be made on the trial court record, see State v. Worwood, 2007 UT 47, ¶ 16, 164 P.3d 397, and "the issue must be sufficiently raised to a level of consciousness before the trial court and must be supported by evidence or relevant legal authority," Dean, 2004 UT 63, ¶ 13 (internal quotation marks omitted).

The preservation rule applies equally to constitutional questions. See State v. Holgate, 2000 UT 74, ¶ 11, 10 P.3d 346. It is, however, subject to two limited exceptions. Despite the failure to raise the issue in the trial court, an appellate court may address it if "a defendant can demonstrate that 'exceptional circumstances' exist or 'plain error' occurred." Id. Consequently, "unpreserved arguments [should be presented] to this court through the lens of one or [both] of these exceptions." State v. Rhinehart, 2007 UT 61, ¶ 21, 167 P.3d 1046; see also Utah R. App. P. 24(a)(5) (requiring an appellant, in his opening brief, to either demonstrate that the issue was preserved in the trial court or state an exception for considering the unpreserved issue).

Calderon's factual basis argument was not properly preserved in the trial court. In support of his motion to withdraw his guilty pleas in the trial court, Calderon claimed that his pleas were "not knowingly and voluntarily made" and that he "felt pressure from [his] attorney" to enter them. At oral argument on the motion, Calderon asserted that there were two grounds for withdrawal of his pleas. First, Calderon claimed that the plea affidavit omitted the element of the crime that requires the State to prove that the defendant intended to permanently deprive the owner of the property. Calderon has not raised this issue on appeal. Second, Calderon claims that the plea colloquy was insufficient because it was Calderon's attorney,¹ not Calderon, who responded to several of the court's questions. Neither of these arguments encompassed a claim that the State failed to set forth an adequate factual basis to support a conclusion that Calderon was at a "substantial risk of conviction." Willett v. Barnes, 842 P.2d 860, 862 (Utah 1992).

Further, Calderon has not asserted in his appellate brief that this court should review the unpreserved claim either under the plain error doctrine or under a claim of exceptional circumstances, and has also failed to demonstrate how either exception to the preservation rule applies to the facts of this case. See Rhinehart, 2007 UT 61, ¶ 21 (refusing to consider unpreserved constitutional claims where the defendant failed "to present an argument to support the application of either

¹Calderon hired different counsel to handle his motion to withdraw his pleas than the attorney who represented him at the plea hearing.

exception"). Accordingly, we do not address the merits of his constitutional claim on appeal.²

Carolyn B. McHugh,
Associate Presiding Judge

WE CONCUR:

James Z. Davis, Presiding Judge

William A. Thorne Jr., Judge

²We also do not consider Calderon's assertion, raised for the first time at oral argument, that his attorney rendered ineffective assistance at the plea hearing. See State v. Arviso, 1999 UT App 381, ¶ 4 n.2, 993 P.2d 894 (noting that "[i]t is generally inappropriate to raise issues at oral argument that have not been designated as issues on appeal in a docketing statement or in the briefs" because doing so "violates our requirement that parties appearing before us provide a proper argument supported by legal authority" and does not give the opposing party an opportunity to prepare to respond (citations omitted)).