

IN THE SUPREME COURT OF THE STATE OF NEVADA

ARTHUR SMITH,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 52205

**FILED**

NOV 05 2009

GRACE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction entered pursuant to a guilty plea of one count of second-degree murder with the use of a deadly weapon. Second Judicial District Court, Washoe County; Robert H. Perry, Judge. The district court sentenced appellant Arthur Smith to serve two consecutive prison terms of 10 to 25 years.

Smith contends that the district court erred in failing to appoint conflict-free counsel to represent him during the pendency of his motion to withdraw his guilty plea. Smith claims that his motion to withdraw the guilty plea was based on defense counsels' use of coercive tactics to obtain the guilty plea and avoid a trial. And Smith argues that the district court ignored the existence of an actual conflict of interest.

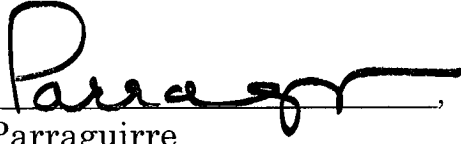
A hearing on a motion to withdraw a guilty plea is a critical stage of litigation, and a defendant therefore has a right to counsel at the hearing. Beals v. State, 106 Nev. 729, 731, 802 P.2d 2, 4 (1990). The right to counsel necessarily implies the right to effective assistance of counsel. Crump v. Warden, 113 Nev. 293, 303, 934 P.2d 247, 253 (1997). Counsel is


not effective when his performance is deficient and the deficiency results in prejudice to the defendant. Strickland v. Washington, 466 U.S. 668, 687 (1984). We presume a defendant has been prejudiced when counsel has an actual conflict that has an adverse effect on his performance, such as when he is in a position of divided loyalties. Clark v. State, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992).

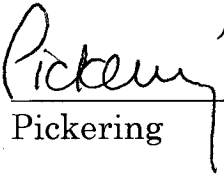
The basis of Smith's motion to withdraw his guilty plea was that the plea was obtained through defense counsels' use of coercive tactics. By requiring defense counsel to argue Smith's motion to withdraw his guilty plea, the district court placed defense counsel in the untenable position of having to argue their own ineffectiveness, which in turn placed them in direct conflict with Smith. See U.S. v. Del Muro, 87 F.3d 1078, 1080 (9th Cir. 1996). This direct conflict is presumptively prejudicial to Smith, who is entitled to conflict-free counsel. Accordingly, we conclude that the district court erred by not appointing conflict-free counsel to represent Smith during the pendency of his motion to withdraw his guilty plea, and we

ORDER the judgment of conviction REVERSED AND REMAND this matter to the district court with instructions to appoint conflict-free counsel to represent Smith in his motion to withdraw his guilty plea, conduct an evidentiary hearing on the claims raised in Smith's

motion, and allow Smith to withdraw his guilty plea if it is found to be invalid.<sup>1</sup>

 J.  
Parraguirre

 J.  
Douglas

 J.  
Pickering

cc: Hon. Robert H. Perry, District Judge  
Karla K. Butko  
Attorney General Catherine Cortez Masto/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk

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<sup>1</sup>Smith raises several other issues on appeal that, in light of this order, we decline to address: (1) the district court abused its discretion by denying his presentence motion to withdraw his guilty plea, (2) he was deprived of his right to a speedy trial, and (3) he was deprived of his right to due process by the district court's orders and procedural actions during the July 9, 2008, hearing on his pending motions. Further, Smith invites us to reconsider our holding in State v. Dist. Ct. (Pullin), 124 Nev. \_\_\_, 188 P.3d 1079 (2008). We decline to do so.