

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JAMES BRANKO STOJIC,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 66734

FILED

AUG 25 2015

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

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction entered pursuant to a guilty plea of forgery, establishing or possessing a financial forgery laboratory, possession of a credit or debit card without the cardholder's consent, and theft. Eighth Judicial District Court, Clark County; Douglas Smith, Judge.

Appellant James Stojic claims the district court erred by denying his presentence motion to withdraw his guilty plea. A defendant may move to withdraw a guilty plea before sentencing, NRS 176.165, and the district court may, in its discretion, grant such a motion for any substantial reason that is "fair and just," *State v. Second Judicial Dist. Court (Bernardelli)*, 85 Nev. 381, 385, 455 P.2d 923, 926 (1969).¹ In

¹The Nevada Supreme Court has recently ruled that "the district court must consider the totality of the circumstances to determine whether permitting withdrawal of a guilty plea before sentencing would be fair and just," and it has disavowed the standard previously announced in *Crawford v. State*, 117 Nev. 718, 30 P.3d 1123 (2001), which focused exclusively on whether the plea was knowing, voluntarily, and intelligently made. *Stevenson v. State*, 131 Nev. ___, ___ P.3d ___ (Adv. Op. No. 61, August 13, 2015).

making its determination, the district court is required to conduct an evidentiary hearing if the defendant raises claims that are not belied by the record and would, if true, entitle him to relief. *Cf. Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

Here, defense counsel filed a presentence motion to withdraw the guilty plea, which alleged in relevant part,


At the time of his plea, his counsel led Mr. Stojic to believe that the plea would lead to one small habitual sentence. Based on this advice, Mr. Stojic agreed to plead guilty to the above mentioned offenses. However, upon entering this plea, Mr. Stojic and his counsel discovered that the court was prepared to sentence Mr. Stojic to numerous small habitual sentences. *It is from this ineffective assistance of counsel that Mr. Stojic asks this court to withdraw his guilty plea.*


(Emphasis added.) The district court conducted a brief hearing and summarily denied the motion, stating the “[t]ranscript is very clear that the Defendant knowingly and voluntarily pled guilty to the charge” and the “[a]ppointment of an attorney . . . wouldn’t have changed the record.”

The basis of Stojic’s motion to withdraw his guilty plea was that defense counsel’s ineffective assistance rendered his guilty plea invalid. By requiring defense counsel to argue Stojic’s motion to withdraw his guilty plea, the district court placed defense counsel in the untenable position of having to argue his own ineffectiveness, which in turn placed him in direct conflict with Stojic. *See U.S. v. Del Muro*, 87 F.3d 1078, 1080 (9th Cir. 1996) (requiring trial counsel to prove his own ineffectiveness creates an inherent conflict of interest that deprives the defendant of his Sixth Amendment right to effective assistance of counsel). Accordingly, we conclude the district court abused its discretion by not appointing

conflict-free counsel to represent Stojic 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 Stojic in his motion to withdraw his guilty plea, conduct an evidentiary hearing on the claims raised in Stojic's motion, and allow Stojic to withdraw his guilty plea if it is found to be invalid.²


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Douglas Smith, District Judge
Pitaro & Fumo, Chtd.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

²Because we reverse the judgment of conviction on this basis, we do not address Stojic's claim that defense counsel was ineffective for failing to communicate a plea offer to him.