

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARION THERESA AUSIELLO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48244

FILED

OCT 17 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
J. Alvarado
DEPUTY CLERK

ORDER VACATING SENTENCE AND REMANDING

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of trafficking in a controlled substance. Fifth Judicial District Court, Nye County; John P. Davis, Judge. The district court sentenced appellant Marion Theresa Ausiello to serve a term of ten to twenty-five years in prison.

On the day scheduled for sentencing, defense counsel orally moved the district court for a continuance of the proceeding and requested permission to file a motion to withdraw Ausiello's guilty plea. Defense counsel indicated that he had a written motion to withdraw prepared and that it had been provided to counsel for the State. Defense counsel also advised the court that Ausiello was prepared to proceed with sentencing should the district court deny his requests.

The State erroneously argued in response that because jeopardy had attached due to the empanelment of the jury, the State would be prejudiced if the district court granted Ausiello's motion to

withdraw her guilty plea.¹ Accepting the State's erroneous argument, the district court stated, "So I'm going to summarily deny the motion without even reading it."

On appeal, Ausiello contends that the district court abused its discretion in refusing to consider her motion to withdraw her guilty plea. In that motion, she attempted to argue that her plea was involuntary and that the State had breached the plea agreement by preventing her from providing substantial assistance after assuring her that she would be given the opportunity to do so.² A district court may grant a presentence motion to withdraw a guilty plea for any substantial reason so long as it is fair and just.³ However, the district court must examine the totality of the circumstances to determine whether a defendant entered her plea voluntarily, knowingly, and intelligently.⁴

We conclude that the district court's refusal to even read or consider Ausiello's contentions regarding her plea, based on the State's erroneous assertion that jeopardy had attached, was a complete failure to exercise any discretion, requiring a new sentencing proceeding. The motion to withdraw the guilty plea that was tendered to the district court for filing was the only motion that had been reduced to writing.

¹The State concedes in its Fast Track response that this was an erroneous statement.

²See NRS 453.3405.

³Molina v. State, 120 Nev. 185, 191, 87 P.3d 533, 537 (2004).

⁴Id.

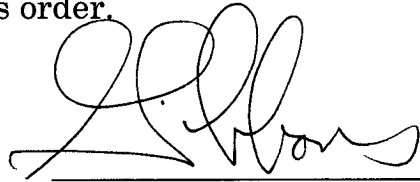
Thus, we must assume that the motion to withdraw was the motion that the district court refused to read and summarily denied. In any event, based on the State's legally erroneous argument, the district court refused to consider Ausiello's claims.

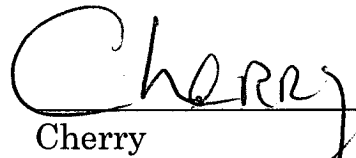
Additionally, the record does not indicate that the district court evaluated during sentencing whether the cooperation Ausiello had provided constituted substantial assistance.⁵ In her motion, Ausiello asserted that she had participated in two controlled purchases of drugs and that she cooperated with law enforcement until she suffered a miscarriage seven months into her pregnancy. She also contended that law enforcement officers did not assist her in securing transportation despite their assurances that they would do so.

We conclude that the district court erroneously refused to consider Ausiello's claims relating to the issue of substantial assistance. Therefore, we vacate the sentence in this case and remand the matter to the district court to consider Ausiello's claims and to evaluate the substantial assistance issues. Resolution of those claims may well require an evidentiary hearing to determine whether Ausiello provided substantial assistance to law enforcement officers or was unreasonably prevented from doing so. Accordingly, we

⁵See Parrish v. State, 116 Nev. 983, 12 P.3d 953 (2000)(holding that under NRS 453.3405(2), it is the district court, not law enforcement personnel, that must exercise discretion to determine whether a defendant rendered substantial assistance).

VACATE the sentence imposed in the judgment of conviction AND REMAND this matter to the district court for proceedings consistent with this order.


_____, J.
Gibbons


_____, J.
Cherry


_____, J.
Saitta

cc: Hon. John P. Davis, District Judge
Jose C. Pallares
Attorney General Catherine Cortez Masto/Carson City
Nye County District Attorney/Pahrump
Nye County District Attorney/Tonopah
Nye County Clerk