

IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS O. BRUNSEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50830

FILED

SEP 10 2009

TRAGIE K. LINDEMAN
CLERK OF SUPREME COURT
BY A. Alvarado
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of one count of child abuse and neglect and one count of first-degree kidnapping. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge. The district court sentenced appellant Thomas O. Brunsen to serve a maximum term in prison of 15 years with a minimum parole eligibility of 5 years for child abuse and to a consecutive term of life in prison with the possibility of parole after 5 years for kidnapping.

Brunsen's primary issues on appeal are that the district court erred in failing to conduct an evidentiary hearing on Brunsen's presentence motion to withdraw his guilty plea and in failing to appoint conflict-free counsel for that hearing. We agree.

This court will not reverse a district court's ruling on a motion to withdraw a guilty plea absent a clear abuse of discretion. Hubbard v. State, 110 Nev. 671, 675, 877 P.2d 519, 521 (1994). A defendant who makes specific factual allegations that, if true and if not belied by the record, would entitle him to relief is entitled to an evidentiary hearing on a motion to withdraw his guilty plea. Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Here, the public defender filed

Brunsen's proper person motion to withdraw his guilty plea on his behalf. The district court calendared a hearing on Brunsen's motion for the same time as his sentencing hearing, but at the hearing, the district court specifically stated that Brunsen was not entitled to an evidentiary hearing and denied the motion after counsel submitted the matter on the record.

Brunsen's motion was based in part on his public defender's allegedly ineffective assistance. More particularly, Brunsen claims that he agreed at that time to enter a plea of guilty because his public defender advised him that he would be able to withdraw it at will if he so chose. A defendant must seek leave of the court to withdraw a guilty plea. See NRS 176.165; see also Rubio v. State, 124 Nev. ___, ___, 194 P.3d 1224, 1228 (2008). Brunsen's allegation is neither supported nor belied by the record. Accordingly, if Brunsen's allegations were true, he would be entitled to relief. See, e.g., Jeziarski v. State, 107 Nev. 395, 396, 812 P.2d 355, 355-56 (1991) (holding that a defendant who entered guilty plea on mistaken belief that court could not consider dismissed charges in sentencing is entitled to withdraw his guilty plea). Brunsen was therefore entitled to an evidentiary hearing on his motion to withdraw his guilty plea, and the district court abused its discretion in denying the motion without such a hearing.

To the extent that Brunsen's sentencing hearing was a hearing on the motion to withdraw his guilty plea, the district court erred in failing to appoint conflict-free counsel for the hearing. 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

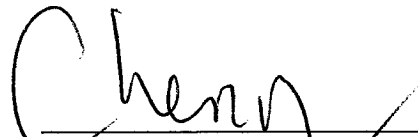
Nev. 293, 303, 934 P.2d 247, 253 (1997). Counsel is not effective when his performance is deficient and the deficiency results in prejudice to the defendant, Strickland v. Washington, 466 U.S. 668, 687 (1984). We presume a defendant has been so prejudiced when counsel has an actual conflict that has 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). Brunsen's counsel was in a position of divided loyalties.

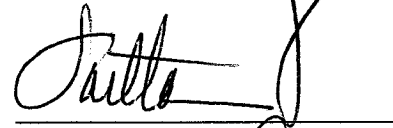
The basis of Brunsen's motion to withdraw his guilty plea was that his public defender had misinformed him of the consequences of his plea, to wit, that he could thereafter withdraw the plea without the district court's consent. Were the district court to require the public defender to argue Brunsen's motion to withdraw his guilty plea, it would place the public defender in the untenable position of having to argue his own ineffectiveness, which in turn would put him in direct conflict with Brunsen. See U.S. v. Del Muro, 87 F.3d 1078, 1080 (9th Cir., 1996). This direct conflict is presumptively prejudicial to Brunsen, who was therefore entitled to conflict-free counsel. Conflict-free counsel must be appointed for Brunsen's evidentiary hearing on his motion to withdraw his guilty plea.¹


¹Brunsen raises two other issues on appeal that we need not decide today. First, Brunsen argues that the district court erred in denying his motion to withdraw his guilty plea. As this order of remand directs the district court to conduct an evidentiary hearing on that question, this issue is not ripe for review. Second, Brunsen argues that the district court erred in denying the public defender's motion to withdraw as counsel due to a conflict of interest, a motion that included Brunsen's proper person motion to remove the public defender's office as counsel and to appoint
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Having held that the district court abused its discretion in denying Brunsen an evidentiary hearing on his motion to withdraw his guilty plea and having determined that Brunsen is entitled to conflict-free counsel at the hearing, we therefore,

ORDER the judgment of conviction REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Eighth Judicial District Court Dept. 7, District Judge
James J. Ruggeroli
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

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new counsel. We note that the district court did not specifically deny the motion, but rather initially speculated that it would be moot and then later removed it from the calendar. To the extent it was a denial of the motion, our direction to the district court on remand to appoint conflict-free counsel renders the issue moot.