

IN THE SUPREME COURT OF THE STATE OF NEVADA

CLINTON GARY GREENE,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 50903

**FILED**

MAY 28 2009

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

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of attempted murder.<sup>1</sup> Seventh Judicial District Court, White Pine County; Dan L. Papez, Judge. The district court sentenced appellant Clinton Gary Greene to serve a prison term of 76 to 192 months, imposed consecutively to all prior terms.

Greene contends that the denial of his presentence “motion to withdraw his guilty plea violated his Sixth Amendment right to conflict-free counsel.” Specifically, he contends that, in drafting the motion and arguing its merits at the hearing, his attorney had to argue that his own representation was deficient. Further, statements made by counsel in response to inquiry from the district court conflicted with Greene’s sworn testimony.

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<sup>1</sup>We note the judgment of conviction appears to contain a clerical error in that it indicates that Greene was convicted of attempted murder with the use of a deadly weapon.

To show a Sixth Amendment violation of his right to counsel, Greene must demonstrate both an actual conflict and an adverse effect on his attorney's performance. Cuyler v. Sullivan, 446 U.S. 335, 348 (1980). "In general, a conflict exists when an attorney is placed in a situation conducive to divided loyalties." Clark v. State, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992) (quoting Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir. 1991)). "[W]e presume prejudice only if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance." Burger v. Kemp, 483 U.S. 776, 783 (1987) (internal quotation marks and citation omitted); see also Lockhart v. Terhune, 250 F.3d 1223, 1226 (9th Cir. 2001) (noting that harmless error does not apply where an actual conflict of interest is alleged).

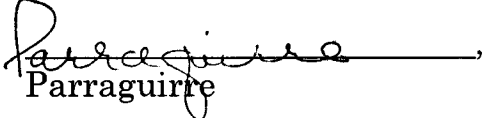
After entering his guilty plea, Greene sent a letter to the district court in which he stated that he wanted to withdraw his guilty plea because his counsel failed to sufficiently inform him of the consequences of his plea. Accordingly, the district court ordered Greene's counsel to meet with Greene and file a motion to withdraw Greene's guilty plea on his behalf if he so requested. Greene later filed, through counsel, a motion to withdraw his guilty plea in which he claimed that his counsel did not have his "best interests in mind" and failed to discuss "the facts, strategy and other facets of the criminal procedure sufficiently enough for Mr. Greene to be fully informed of the possibilities that might exist if he were to go to trial." At the hearing on the motion to withdraw, Greene's counsel questioned Greene about Greene's assertion that his counsel was deficient. Greene's counsel further pressed Greene on contested matters such as how long they met before Greene agreed to


plead guilty and what they discussed at that meeting. Near the end of the hearing, during the district court's examination of Greene, the court solicited statements from Greene's counsel about contested matters regarding his service to Greene. Some of counsel's statements contradicted Greene's testimony. Greene's counsel also made statements during his argument on the motion that contradicted Greene's testimony. The district court denied Greene's motion to withdraw his guilty plea.

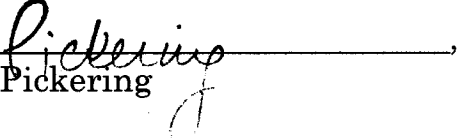
We conclude that the manner in which the proceedings were conducted concerning Greene's motion to withdraw his guilty plea violated Greene's Sixth Amendment right to counsel. Based on Greene's letter to the court and the subsequent motion to withdraw that was filed by counsel, it was evident that Greene's counsel was placed in the untenable position of arguing his own ineffectiveness. Such a position creates an inherent conflict of interest. See U.S. v. Del Muro, 87 F.3d 1078, 1080 (9th Cir. 1996) (holding that a district court erred in making counsel litigate a motion for a new trial based on that counsel's ineffectiveness). Further, the nature of the claims raised in the motion indicated that counsel might be a necessary witness in the proceeding. See DiMartino v. Dist. Ct., 119 Nev. 119, 121-22, 66 P.3d 945, 946-47 (2003) (recognizing that an attorney cannot act as advocate and witness in the same proceeding); contra RPC 3.7 (permitting a lawyer to act as an advocate at a trial where that lawyer is likely to be a necessary witness if "the testimony relates to an uncontested issue" or where the lawyer's "testimony relates to the nature and value of legal services rendered in the case"). Therefore, the district court should have appointed alternate counsel to assist Greene at the hearing on the motion to withdraw his plea. Because Greene demonstrated an actual conflict that adversely

affected his counsel's performance, prejudice is presumed. Accordingly, we

ORDER the judgment of conviction REVERSED AND REMAND this matter to the district court for further proceedings on the presentence motion to withdraw the guilty plea consistent with this order.<sup>2</sup>

 J.  
Parraguirre

 J.  
Douglas

 J.  
Pickering

cc: Hon. Dan L. Papez, District Judge  
State Public Defender/Carson City  
State Public Defender/Winnemucca  
Attorney General Catherine Cortez Masto/Carson City  
Attorney General Catherine Cortez Masto/Ely  
White Pine County District Attorney  
White Pine County Clerk

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<sup>2</sup>Because we are reversing based on the order denying the motion to withdraw the guilty plea, we need not address Greene's remaining claims. Further, we express no opinion on the merits of the claims raised in the motion to withdraw.