

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALBERTO PEREZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52567

FILED

FEB 03 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of one count of attempted lewdness with a child under the age of 14, and from an order denying a post-sentence motion to withdraw a guilty plea. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

Perez contends that the district court abused its discretion at sentencing because it relied on an incorrect assertion in the presentence investigation report (PSI). Because Perez did not object to the error during sentencing, we review this contention for plain error. See Mendoza-Lobos v. State, 125 Nev. ___, ___, 218 P.3d 501, 507 (2009); see also Puckett v. United States, 556 U.S. ___, ___, 129 S. Ct. 1423, 1428-29 (2009). Although the PSI erroneously states that probation is not available for Perez's offense, see NRS 176A.100(1)(a) (listing offenses that are not probationable), because the record does not support a conclusion that the district court relied solely on this error when imposing sentence, we conclude that the error did not affect Perez's substantial rights and no relief is warranted. See Valdez v. State, 124 Nev. ___, ___, 196 P.3d 465, 477 (2008).

Perez next contends that the sentence imposed constitutes cruel and unusual punishment and violates his right to equal protection

because this was his first offense and repeat offenders convicted of the same crime have received shorter sentences. We disagree. This court reviews the district court's sentencing determination for an abuse of discretion. Houk v. State, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). The sentence imposed is within the statutory limits. See NRS 201.230(2); NRS 193.330(1)(a)(1). Perez does not allege that the relevant statutes are unconstitutional, and we conclude that the sentence imposed is not grossly disproportionate to the offense for purposes of the constitutional prohibitions against cruel and unusual punishment. See Har melin v. Michigan, 501 U.S. 957, 1000-01 (1991) (plurality opinion); Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996). In particular, Perez admitted molesting a younger family member. Further, the district court is not required to sentence all offenders convicted of the same crime to the same punishment. Nobles v. Warden, 106 Nev. 67, 68, 787 P.2d 390, 391 (1990).

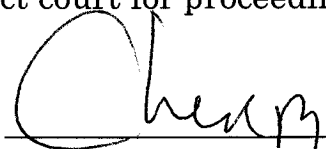
Lastly, Perez contends that the district court erred by denying his post-sentence proper person motion to withdraw his guilty plea.¹ The district court held a hearing on the motion at which Perez was permitted to argue the motion himself with his counsel acting as a sort of standby counsel. Because Perez's motion to withdraw was based on a claim that his counsel was ineffective, we conclude that the district court erred by failing to appoint separate counsel to represent Perez during the hearing. See Beals v. State, 106 Nev. 729, 731, 802 P.2d 2, 4 (1990) (a defendant has the right to counsel at a hearing on a motion to withdraw a guilty plea); Clark v. State, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992)


¹Although Perez contends that the motion was filed prior to sentencing and should be reviewed as a presentence motion, the record reveals that he withdrew the motion at the sentencing hearing and later renewed the motion after imposition of sentence.


(prejudice to a defendant is presumed when counsel is in a position of divided loyalties). To the extent that the district court permitted Perez to represent himself during the hearing, the district court erred by failing to adequately canvass Perez "to determine if he knowingly and intelligently waived his right to be assisted by counsel." Beals, 106 Nev. at 731-32, 802 P.2d at 4; Faretta v. California, 422 U.S. 806, 835 (1975). Accordingly, we conclude that Perez is entitled to a new hearing on his motion to withdraw his guilty plea, during which he is represented by conflict-free counsel or properly canvassed regarding self-representation.²

Having considered Perez's contentions and concluded that he is entitled to a new hearing on his motion to withdraw his guilty plea, we

ORDER the judgment of conviction AFFIRMED, the order denying the motion to withdraw guilty plea REVERSED, AND REMAND this matter to the district court for proceedings consistent with this order.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Elizabeth Goff Gonzalez, District Judge
Sterling Law, LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

²Because we conclude that Perez is entitled to a new hearing on his motion to withdraw we do not address his contentions regarding errors at the hearing.