

IN THE SUPREME COURT OF THE STATE OF NEVADA

ERNESTO SOTELO, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53881

FILED

MAY 26 2010

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

ORDER OF REVERSAL AND REMAND

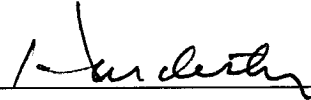
This is an appeal from a judgment of conviction, pursuant to an Alford plea, of sexually motivated coercion. North Carolina v. Alford, 400 U.S. 25 (1970). Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

Appellant Ernesto Sotelo, Jr., claims that the district court erred by summarily dismissing his presentence motion to withdraw his Alford plea without reviewing the record, appointing new counsel, conducting an evidentiary hearing, or making findings of fact.

A defendant may move to withdraw a plea before sentencing, NRS 176.165, and the district court may, in its discretion, grant such a motion "for any substantial, fair, and just reason." Crawford v. State, 117 Nev. 718, 721, 30 P.3d 1123, 1125 (2001). In 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 that would, if true, would entitle him to relief. Cf. Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Sotelo made an oral motion to withdraw his plea at the sentencing hearing. At the time, the district court did not have a transcript of the plea canvass, which had been conducted by a

magistrate, and therefore could not determine whether Sotelo's challenge to his plea was belied by the record. Ultimately, the district court refused to consider the motion and informed Sotelo that his "motion to withdraw [his] plea can be proffered in a post[-]conviction petition" because "[t]his is the time set for sentencing." We conclude that the district court abused its discretion by failing to make a further inquiry and consider the totality of the circumstances based on a review of the entire record to determine whether Sotelo could meet his burden for withdrawing his plea. Crawford, 117 Nev. at 722, 30 P.3d at 1125-26; see also Mitchell v. State, 109 Nev. 137, 141, 848 P.2d 1060, 1062 (1993). Accordingly, we,

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



_____, J.
Hardesty


_____, J.
Douglas

PICKERING, J., dissenting:

Although a defendant is permitted to file a motion to withdraw a plea before sentencing, he must advance a substantial reason warranting withdrawal of the plea to obtain relief. See Crawford v. State, 117 Nev. 718, 721, 30 P.3d 1123, 1125 (2001). Sotelo had the opportunity to file a written motion to withdraw the plea after his sentencing hearing was continued due to confusion about the psychosexual evaluation and his eligibility for probation. He failed to do so. Instead, when he again

appeared for sentencing, he orally moved to withdraw his plea after the district court indicated that it would not be inclined to grant him probation. Sotelo offered no reason that would warrant withdrawal of the plea. Under the circumstances, I respectfully disagree with the majority's decision that the district court abused its discretion and therefore dissent.

 _____, J.
Pickering

cc: Hon. Donald M. Mosley, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk