

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT THOMAS BURNHAM,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 57715

**FILED**

OCT 05 2011

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

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction entered pursuant to a guilty plea of possession of a firearm by an ex-felon. Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

Appellant Robert Thomas Burnham contends that the district court abused its discretion by denying his presentence motion to withdraw his guilty plea. 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, entitle him to relief. Cf. Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

Here, defense counsel filed a presentence motion to withdraw the guilty plea which included her declaration that (1) Burnham requested that a motion to withdraw the guilty plea be filed on his behalf, (2) Burnham intended to argue that defense counsel did not provide adequate


advice and representation at the time of the plea, and (3) Burnham would need the assistance of independent counsel to review the facts and determine whether grounds for a motion exist. The district court conducted a brief hearing and summarily denied the motion, stating that “the defendant cannot bring a motion to withdraw guilty plea when he is represented by counsel.”


Because Burnham alleged that his counsel’s ineffective assistance rendered his guilty plea invalid, the district court erred by failing to consider Burnham’s proper person motion to withdraw his guilty plea or, alternatively, to appoint alternate counsel to file a motion to withdraw the guilty plea. See U.S. v. Del Muro, 87 F.3d 1078, 1080 (9th Cir. 1996) (requiring trial counsel to prove his own ineffectiveness creates an inherent conflict of interest that deprives the defendant of his Sixth Amendment right to effective assistance of counsel).<sup>1</sup> Accordingly, we


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<sup>1</sup>Burnham also claims that the district court erred by adjudicating Burnham a habitual criminal because there was an unreasonable delay in his sentencing and the evidence of his prior felony convictions was inadequate. We conclude that this claim is without merit. See NRS 176.015(1); Prince v. State, 118 Nev. 634, 641, 55 P.3d 947, 951 (2002); Dressler v. State, 107 Nev. 686, 697, 819 P.2d 1288, 1295 (1991). To the extent that Burnham claims that the district court erred by failing to conduct an evidentiary hearing on his other proper person motions, he failed to demonstrate that an evidentiary hearing was warranted. See Hargrove, 100 Nev. at 502-03, 686 P.2d at 225.

ORDER the judgment of conviction REVERSED AND  
REMAND this matter to the district court for proceedings consistent with  
this order.<sup>2</sup>

  
\_\_\_\_\_, J.  
Pickering

  
\_\_\_\_\_, Sr.J.  
Rose

  
\_\_\_\_\_, Sr.J.  
Shearing

cc: Hon. Valorie Vega, District Judge  
Clark County Public Defender  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk

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<sup>2</sup>The Honorables Robert Rose and Miriam Shearing, Senior Justices,  
participated in the decision of this matter under general orders of  
assignment.