

IN THE SUPREME COURT OF THE STATE OF NEVADA

EARL R. NISWONGER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 60419

FILED

JAN 23 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Tracie K. Lindeman*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to an Alford¹ plea, of battery with the use of a deadly weapon resulting in substantial bodily harm. Eighth Judicial District Court, Clark County; Doug Smith, Judge. Appellant's arguments on appeal center on the district court's refusal to order a post-plea competency evaluation. He argues that a competency evaluation was necessary because his mental health condition had deteriorated since a pretrial competency evaluation. Appellant's claim encompasses two aspects.

First, appellant argues that the district court abused its discretion by denying his presentence motion to withdraw his guilty plea on the grounds that he was incompetent and was pressured by counsel to enter a guilty plea. He further argues that the district court used the wrong standard of review in denying his motion. A defendant may file a presentence motion to withdraw a guilty plea, NRS 176.165, which the

¹North Carolina v. Alford, 400 U.S. 25 (1970).

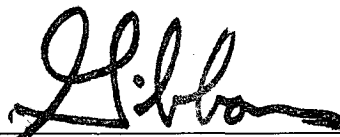
district court may grant “for any substantial, fair, and just reason,” Crawford v. State, 117 Nev. 718, 721, 30 P.3d 1123, 1125 (2001). In considering whether a defendant has “advanced a substantial, fair, and just reason to withdraw a [guilty] plea, the district court must consider the totality of the circumstances to determine whether the defendant entered the plea voluntarily, knowingly, and intelligently.” Id. at 722, 30 P.3d at 1125-26. Here, the district court initially granted appellant’s post-plea request for a competency evaluation but later learned that appellant had been determined competent before trial—appellant entered his guilty plea after trial commenced. It appears that the district court denied the motion to withdraw the guilty plea based on appellant’s pretrial competency determination and the adequacy of the plea canvass, not solely on the latter as appellant suggests. Considering the record as a whole, we conclude that appellant’s contentions supporting his motion were insufficient to justify allowing him to withdraw his guilty plea.² As to appellant’s claim that his guilty plea was involuntary because of undue pressure by counsel, we conclude that he failed to support that claim sufficiently to justify allowing him to withdraw his guilty plea. We cannot say based on this record that the district court abused its discretion or applied the wrong standard in denying the motion. Riker v. State, 111 Nev. 1316, 1322, 905 P.2d 706, 710 (1995).

²We remind the district court that a defendant’s competency can be a fluid condition and may require inquiry after the passage of time from a previous competency determination where new doubts arise as to his competency. See Oliveras v. State, 124 Nev. 1142, 1149, 195 P.3d 864, 869 (2008).

Second, appellant argues that a competency evaluation before sentencing was necessary because of his deteriorating physical health and nonsensical statements made to the Department of Probation and Parole and during the sentencing hearing, in addition to his continuing mental health problems. Constitutional mandate obligates a district court to order a competency hearing when there is reasonable doubt regarding a defendant's competency to stand trial. Olivares, 124 Nev. at 1148, 195 P.3d at 868; see NRS 178.400(1) ("A person may not be tried or adjudged to punishment for a public offense while incompetent."). "A district court abuses its discretion and denies a defendant his right to due process when there is reasonable doubt regarding a defendant's competency and the district court fails to order a competency evaluation." Id. Based on the record before us, we conclude that appellant failed to sufficiently support his claim of incompetence so as to trigger the district court's obligation to order a competency evaluation before sentencing him.

Having considered appellant's arguments and concluded that no relief is warranted, we

ORDER the judgment of conviction AFFIRMED.


_____, J.
Gibbons


_____, J.
Douglas


_____, J.
Saitta

cc: Hon. Doug Smith, District Judge
Law Offices of C. Conrad Claus
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk