IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TERRY LEE FULTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 66659

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction entered pursuant to a guilty plea of driving and/or being in actual physical control of a motor vehicle while under the influence of intoxicating liquor. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

Appellant Terry Fulton claims that the district court erred by denying his presentence motion to withdraw his guilty plea. Fulton argues that his plea is invalid because the district court's plea canvass was insufficient and the written plea agreement does not cure the deficiency. He specifically asserts that he never entered a plea of guilty because the district court asked him if he was pleading *not guilty* pursuant to *Alford*,[1] his counsel stated that he was pleading *not guilty* pursuant to *Alford*, and he never personally entered his plea.

A defendant may move to withdraw his 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). "To determine whether the defendant advanced a substantial, fair, and just reason to withdraw a

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

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 721-22, 30 P.3d at 1125-26. "On appeal from a district court's denial of a motion to withdraw a guilty plea, [we] will presume that the lower court correctly assessed the validity of the plea, and we will not reverse the lower court's determination absent a clear showing of an abuse of discretion." *Riker v. State*, 111 Nev. 1316, 1322, 905 P.2d 706, 710 (1995) (internal quotation marks omitted).

We conclude that the district court abused its discretion by denying Fulton's presentence motion to withdraw his plea. Fulton is correct that the district court misspoke by saying "not guilty pursuant to *Alford*" during the plea canvass and that counsel carried on that mistake by repeating it. Even though the district court attempted to clarify to Fulton what pleading pursuant to *Alford* meant, Fulton never actually entered a plea of guilty.

Further, we conclude that there were other significant errors made by the district court when it canvassed Fulton. We recognize that the district court has some flexibility in the manner in which it conducts a plea canvass. *See Bryant v. State*, 102 Nev. 268, 271, 721 P.2d 364, 367 (1986) (talismanic phrases are not required). Nevertheless, the district court failed to properly advise Fulton of the consequences of his plea such as the fact that probation is not allowed, that there was a mandatory fine, that he would lose his driving privileges, and that he was required to install an alcohol testing device on his vehicle. *See* NRS 174.035(2); NRS 484C.220; NRS 484C.400(1)(c); NRS 484C.420(1); NRS 484C.460(1)(b)(2).

The district court also failed to explain that once he was convicted of this felony, any future convictions for driving under the influence would always be a felony and that Fulton would be facing a mandatory prison sentence of 2 to 15 years on a subsequent conviction and

a mandatory fine of $2,000 to $5,000. *See* NRS 484C.410(1). *But see Nollette v. State*, 118 Nev. 341, 348, 46 P.3d 87, 92 (2002) (court does not have to advise defendant of all collateral consequences).

Finally, and most importantly, the district court did not canvass Fulton regarding the constitutional rights that he was waiving, nor was he questioned whether he read and understood the plea agreement. *See Brown v. Warden*, 88 Nev. 166, 494 P.2d 959 (1972). Based on the totality of the circumstances, we conclude that Fulton's plea was not entered voluntarily, knowingly, and intelligently. Accordingly, we

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

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Silver

cc: Hon. Kathleen E. Delaney, District Judge
Bill A. Berrett
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk