

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

AJAYE BOTLEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 72215

FILED

DEC 13 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER VACATING JUDGMENT AND REMANDING

Ajaye Botley appeals from a judgment of conviction, pursuant to a guilty plea, of one count each of burglary and invasion of the home. Eighth Judicial District Court, Clark County; Douglas Smith, Judge.

Botley contends the district court erred in denying his presentencing motion to withdraw his guilty plea in which he alleged his guilty plea was the result of the ineffective assistance of counsel. The district court, relying exclusively on its canvass of Botley, concluded Botley failed to demonstrate his guilty plea was not freely and voluntarily given.

A defendant may move to withdraw a guilty plea before sentencing, NRS 176.165, and “a district court may grant a defendant’s motion to withdraw his guilty plea before sentencing for any reason where permitting withdrawal would be fair and just,” *Stevenson v. State*, 131 Nev. ___, ___, 354 P.3d 1277, 1281 (2015). To this end, the Nevada Supreme Court has disavowed the standard previously announced in *Crawford v. State*, 117 Nev. 718, 30 P.3d 1123 (2001), which focused exclusively on whether the plea was knowingly, voluntarily, and intelligently made, and affirmed that “the district court must consider the totality of the circumstances to determine whether permitting withdrawal of a guilty plea before sentencing would be fair and just.” *Stevenson*, 131 Nev. at ___, 354

P.3d at 1281. As a defendant has the right to the effective assistance of counsel at all critical stages of criminal proceedings, including during the guilty-plea negotiation process, *Missouri v. Frye*, 566 U.S. 134, 140, 143 (2012), the performance of counsel is one of the circumstances the district court must consider.

Generally, to demonstrate ineffective assistance of counsel, a defendant must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that there was a reasonable probability of a different outcome absent counsel's errors. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 697. Further, to warrant an evidentiary hearing on the claim, a defendant must allege facts that, if true and not belied by the record, would entitle him to relief. See *Berry v. State*, 131 Nev. ___, ___, 363 P.3d 1148, 1154-55 (2015).

Counsel is deficient when he fails to communicate to and advise his client regarding a favorable guilty plea offer. *Frye*, 566 U.S. at 145. To demonstrate prejudice in such a situation, a defendant must show 1) a reasonable probability that, but for counsel's deficient performance, he would have accepted the earlier guilty plea offer; 2) a reasonable probability the guilty plea would have been entered without the prosecution withdrawing the offer or the trial court rejecting it, and 3) a reasonable probability the result of the guilty plea would have been more favorable by reason of a guilty plea to a lesser charge or a sentence of less prison time. *Id.* at 147.

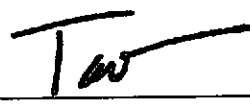
Botley's claims satisfy the *Frye* elements and tend to be supported by the record. First, he claimed counsel informed him of earlier, more favorable guilty plea offers but failed to discuss them with him before they expired. The prosecutor agreed it had made two guilty plea offers that had since expired: one for a stipulated sentence of 3 to 8 years, and another for a stipulated sentence of 28 to 72 months. And counsel indicated to the district court more than once in the week leading up to Botley's guilty plea that he had not had time to discuss the earlier plea offers with his client.

Second, Botley claimed that, but for counsel's deficient performance in not consulting with him regarding the guilty plea offers before they expired, he would have accepted an earlier, more favorable guilty plea offer. As the district court found, Botley indicated nine times during his colloquy that he wanted to plead guilty, which supports that he would have accepted earlier guilty plea offers had he understood them. Further, nothing in the record suggests the State would have withdrawn the offers before their expiration dates or the district court would have rejected either or failed to follow the stipulated sentence, either of which would have been less than what Botley received.

Botley has alleged facts that are not belied by the record and, if true, would constitute a fair and just reason to withdraw his guilty plea, thereby entitling him to relief. We conclude the district court abused its discretion in denying Botley's motion without first conducting an evidentiary hearing. *See Hubbard v. State*, 110 Nev. 671, 675, 877 P.2d 519, 521 (1994). Therefore, we vacate the judgment of conviction and remand to the district court to conduct an evidentiary hearing and reconsider Botley's motion. If the district court determines Botley's motion lacks merit under *Stevenson*, it may reinstate the judgment of conviction. Accordingly, we

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


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Douglas Smith, District Judge
Law Office of Gabriel L. Grasso, P.C.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk