

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LEVI MATHEW-JAMES ALGER,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 75660-COA

**FILED**

FEB 13 2019

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

*ORDER VACATING JUDGMENT AND REMANDING*

Levi Mathew-James Alger appeals from a judgment of conviction, entered pursuant to a no contest plea, of open or gross lewdness. Sixth Judicial District Court, Humboldt County; Michael Montero, Judge.

Alger claims the district court erred at sentencing because it sentenced him without the benefit of a psychosexual evaluation. Alger claims he was required to be certified as a low risk to reoffend in order to be considered for probation. He claims it was the Division of Parole and Probation's (Division) responsibility to set up and pay for that evaluation pursuant to NRS 176.139(1).

NRS 176A.110(1), (3)(g) requires a psychosexual evaluation or risk assessment before a person convicted of open or gross lewdness can be considered for probation. However, the Division was not required to arrange for that evaluation because Alger was convicted of a gross misdemeanor. See NRS 176.133(3)(g); NRS 176.139. Therefore, it was Alger's responsibility to arrange for and provide the court with a psychosexual evaluation.

At the sentencing hearing, Alger claimed he was indigent and was unable to pay the fee to obtain a psychosexual evaluation. Specifically,


he claimed his assets had been frozen pursuant to an order issued by the instant district court judge in a family court matter. He requested the Division to pay for the evaluation. While Alger claimed he was indigent at the sentencing hearing, he did not provide the court with documentation to support his claim of indigency. Further, he limited his argument for payment to the above argument regarding NRS 176.139 and did not request that the State pay for the evaluation based on the State's "duty to provide reasonable and necessary defense services at public expense to indigent criminal defendants who have nonetheless retained private counsel." See *Widdis v. Second Judicial Dist. Court*, 114 Nev. 1224, 1228, 963 P.2d 1165, 1167 (1998). Because Alger did not make a specific request for the State to pay for the evaluation at public expense, we review this claim for plain error.


"[T]he State has a duty to provide reasonable and necessary defense services at public expense to indigent criminal defendants who have nonetheless retained private counsel." *Widdis*, 114 Nev. at 1228, 963 P.2d at 1167 (1998). In order to receive necessary defense services at public expense, a defendant must demonstrate "indigency and need for the services." *Id.* at 1229, 968 P.2d at 1168.

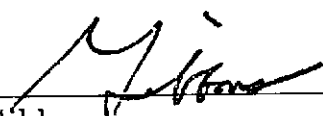
Alger made a colorable showing at the sentencing hearing that he was indigent. And Alger demonstrated the psychosexual evaluation was needed because the evaluation was necessary to be considered for probation. See NRS 176A.110(1)(b). The psychosexual evaluation was necessary for his defense case at sentencing. Therefore, we conclude it was error for the district court to sentence Alger without first determining whether Alger was actually indigent, see *Brown v. Eighth Judicial Dist. Court*, 133 Nev. \_\_\_, \_\_\_, 415 P.3d 7, 11 (2017), and whether the State should pay for the

psychosexual evaluation. We further conclude this error was plain on the record and it affected Alger's substantial rights. *See Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008). Thus, we vacate the judgment of conviction and remand for the district court to hold a hearing to determine whether Alger can demonstrate he is indigent and unable to pay for a psychosexual evaluation. If Alger can so demonstrate, the district court shall order the State to pay for the psychosexual evaluation and then consider that report when re-sentencing Alger. If Alger cannot demonstrate he is indigent, the district court shall re-enter the judgment of conviction. Accordingly, we

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

  
\_\_\_\_\_, A.C.J.  
Douglas

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Michael Montero, District Judge  
Kyle B. Swanson  
Attorney General/Carson City  
Humboldt County District Attorney  
Humboldt County Clerk