

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARC ANTHONY EARLEY,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 74734-COA

**FILED**

APR 18 2019

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER OF REVERSAL AND REMAND*

Marc Anthony Earley appeals from a judgment of conviction entered pursuant to a guilty plea of burglary while in possession of a deadly weapon, robbery with the use of a deadly weapon, attempted robbery with the use of a deadly weapon, and robbery of a victim 60 years of age or older. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Earley filed two pro se motions requesting to withdraw his guilty plea. In those motions, Earley claimed he did not understand the plea agreement or the rights he waived due to complications from his prescription medication and mental health issues, his counsel was not prepared and did not properly explain the plea agreement or waiver of rights, his counsel did not permit him to ask questions during the plea canvass when an issue he did not understand arose, and he did not understand the consequences he faced by entering a guilty plea.

The district court appointed alternate counsel to represent Earley concerning his motions, but requested alternate counsel to review

Earley's motions and to advise the court if they had any legal merit. Over the course of several hearings, alternate counsel informed the district court of the results of Earley's mental health evaluations and advised the district court that Earley's motions did not have merit. While counsel provided the district court with information concerning Earley's claims related to his mental health, counsel did not specifically address Earley's claims concerning the actions and advice of his initial counsel. The district court acknowledged alternate counsel's conclusions, denied the motions, and proceeded to impose sentence.

Earley argues the district court erred by tasking his alternate counsel with evaluating whether his pro se motions to withdraw guilty plea had merit and then deferring to counsel's opinion that his motions lacked merit.<sup>1</sup> Earley also contends that alternate counsel did not actually represent his interests, but rather improperly worked as an arm of the district court.

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

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<sup>1</sup>The State argues the district court did not have to consider Earley's pro se motions because, pursuant to EDCR 7.40(a), Earley was not permitted to file pro se documents as he was represented by counsel. We note, however, the district court did not decline to consider Earley's pro se motions due to application of EDCR 7.40(a).


permitting withdrawal would be fair and just,” *Stevenson v. State*, 131 Nev. 598, 604, 354 P.3d 1277, 1281 (2015). In considering the motion, “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.” *Id.* at 603, 354 P.3d at 1281. “This court will not reverse a district court’s determination concerning the validity of a plea absent a clear abuse of discretion.” *Johnson v. State*, 123 Nev. 139, 144, 159 P.3d 1096, 1098 (2007).


Our review of the record reveals Earley is entitled to relief. The purpose of the appointment of counsel is to represent the defendant, not to provide a summary or a legal opinion to the district court. *See Anders v. California*, 386 U.S. 738, 744 (1967) (“The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae.”); *see also Ellis v. United States*, 356 U.S. 674, 675 (1958) (appointed counsel improperly “performed essentially the role of amici curiae” where “representation in the role of an advocate is required”); *DiMartino v. Dist. Ct.*, 119 Nev. 119, 121-22, 66 P.3d 945, 946-47 (2003) (an attorney may not act as an advocate and a witness in the same proceeding). In effect, alternate counsel’s appointment served to assist the district court rather than Earley, and this was improper. Therefore, we conclude the district court abused its discretion in denying the motions. Accordingly, we reverse the denial of Earley’s motions and remand for the district court to

reconsider those motions to evaluate whether, under the totality of the circumstances, it would be fair and just for Earley to withdraw his guilty plea.

Having concluded Earley is entitled to relief, we

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

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

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

  
\_\_\_\_\_, J.  
Bulla

cc: Hon. Michelle Leavitt, District Judge  
The Law Offices of William H. Brown, Ltd.  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk

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<sup>2</sup>In light of our conclusion that the district court abused its discretion when denying Earley's motion to withdraw guilty plea, we need not consider Earley's additional claims.

This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.