

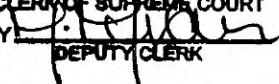
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

WALTER RICHARD HETHERINGTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 86543-COA

FILED

AUG 08 2024

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Walter Richard Hetherington appeals from a judgment of conviction, entered pursuant to an *Alford*¹ plea, of attempted lewdness with a child under the age of 14. Eighth Judicial District Court, Clark County; Monica Trujillo, Judge.

Hetherington argues the district court abused its discretion by denying two presentence motions to withdraw his plea. A defendant may move to withdraw a guilty plea before sentencing, NRS 176.165, and the district court may grant the motion “for any reason where 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. We give deference to the district court’s factual findings if they are supported by the record. *Id.* at 604, 354 P.3d at 1281. The district court’s ruling on a presentence motion to withdraw a guilty plea “is discretionary and will not be reversed unless there has been

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

a clear abuse of . . . discretion.” *State v. Second Jud. Dist. Ct. (Bernardelli)*, 85 Nev. 381, 385, 455 P.2d 923, 926 (1969).

In his October 6, 2022, motion, Hetherington claimed he had a fair and just reason to withdraw his plea because his mental health issues and daily cannabis use made him more susceptible to pressure than other defendants and rendered him incapable of entering a knowing and voluntary plea. Specifically, Hetherington contended that he suffered from depression and anxiety and that these mental health issues, combined with his cannabis use, impaired his ability to process information or engage in a proper analysis of risk and benefit. The district court held an evidentiary hearing on this motion, in which counsel and Hetherington testified.

The district court determined that Hetherington’s alleged mental health issues and daily cannabis use, when considered under the totality of the circumstances, did not present a sufficient reason to permit withdrawal of Hetherington’s plea. In particular, the district court found that the court thoroughly canvassed Hetherington and that Hetherington informed the court (1) he was not under the influence of drugs, medications, or alcohol; (2) he voluntarily and freely participated in the settlement conference; and (3) he was entering his plea knowingly and voluntarily.² The district court also found that Hetherington did not inform either the judge facilitating the settlement conference or the judge accepting his change of plea that he was being forced to participate, that he was forced to accept the negotiations, or that he lacked an understanding of the agreement. The district court further found that counsel did not ask

²We note a different district court judge facilitated the settlement conference, took Hetherington’s change of plea, and adjudicated each of Hetherington’s motions to withdraw plea.

Hetherington about his cannabis use or the status of his mental health because counsel never felt that either were an issue during his representation. The district court noted Hetherington's testimony that he was not under the influence of cannabis when he entered his plea. And the district court found that there was no evidence of dishonesty by the State or counsel, there was no evidence of coercion, and, although Hetherington's "perception of his personal stressors may now, in retrospect, seem to be well above a person's average stressors, at the time of his plea there was absolutely no indication that those stressors negatively impacted his ability to understand the consequences of his plea."

The district court's findings are supported by the record. In light of the foregoing, Hetherington failed to demonstrate that his mental health issues and daily cannabis use rendered him incapable of entering a knowing and voluntary plea. Therefore, we conclude the district court did not abuse its discretion in determining that Hetherington failed to demonstrate a fair and just reason for withdrawing his plea in his October 6, 2022, motion.

In his April 1, 2022, motion, Hetherington claimed he had a fair and just reason to withdraw his plea because he was unaware that he would be designated a Tier III offender and, thus, that he would be required to leave his home due to its proximity to two parks with jungle gyms. Hetherington contended that he entered his plea based on the notion that the agreement would permit him to "return home to his children," that the plea agreement was silent as to his sex offender tier designation, and that counsel did not inform him that he would be a Tier III sex offender. He also claimed that counsel sent him a document the night before he entered his plea that contained select statutes regarding the tier designations for sex

offenders. Based on these statutes, Hetherington believed he would be a Tier I offender. The document, however, did not include certain statutes necessary to determine his correct tier designation; Hetherington was unaware of the omission or of its significance to his tier designation. Hetherington contended that he entered his plea believing he would be treated as a Tier I offender and that he would not have accepted the plea offer had he been advised that he would be designated a Tier III offender.


The district court did not hold an evidentiary hearing on this motion. Rather, the district court denied the motion after finding counsel was not required to advise Hetherington of his sex offender tier designation because that designation was a collateral consequence of his plea, and thus, any failure to so advise did not render the plea constitutionally infirm. Although the district court initially recognized the applicable standard for a presentence motion to withdraw plea under *Stevenson*, its analysis focused solely on whether counsel's failure to advise Hetherington of his sex offender tier designation rendered the plea constitutionally infirm. However, Hetherington did not contend that his plea was constitutionally infirm in his April 1, 2022, motion, and the Nevada Supreme Court has held that the district court may not "focus[] the 'fair and just' analysis *solely* upon whether the plea was valid." *Stevenson*, 131 Nev. at 602-03, 354 P.3d at 1280-81. Thus, even if the district court correctly determined that Hetherington's plea was not constitutionally infirm, *see Nollette v. State*, 118 Nev. 341, 347, 46 P.3d 87, 91 (2002), because the district court did not apply the correct standard in resolving the motion,³ we conclude the

³To the extent the district court relied on this court's prior order in *Mack v. State*, No. 83165-COA, 2022 WL 1090726 (Nev. Ct. App. Apr. 11, 2022) (Order of Affirmance), for the proposition that counsel's failure to


judgment of conviction must be reversed for consideration of Hetherington's motion under the standard set forth in *Stevenson*. Because Hetherington's claims are not belied by the record, the district court should conduct an evidentiary hearing on Hetherington's April 1, 2022, motion, *see Little v. Warden*, 117 Nev. 845, 854, 34 P.3d 540, 546 (2001), and ascertain whether the circumstances surrounding Hetherington's sex offender tier designation constitute a fair and just reason for withdrawing the plea, *see Stevenson*, 131 Nev. at 603, 354 P.3d at 1281. If after the evidentiary hearing the district court determines Hetherington failed to demonstrate a fair and just reason for withdrawing his plea, the district court must reinstate the judgment of conviction.

Accordingly, we

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


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

inform a defendant that they will be designated a Tier III offender does not constitute grounds for withdrawing a plea, we note that *Mack* did not concern a presentence motion to withdraw a plea but rather a claim of ineffective assistance of counsel raised in a postconviction petition for a writ of habeas corpus.

cc: Hon. Monica Trujillo, District Judge
The Gersten Law Firm PLLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk