

IN THE SUPREME COURT OF THE STATE OF NEVADA

ISIDRO LEMUS-LEON A/K/A ISIDRO
LEMUS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38735

FILED

DEC 02 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER VACATING JUDGMENT AND REMANDING

This is an appeal from a judgment of conviction, pursuant to an Alford plea,¹ of one count of sexual assault and one count of lewdness with a minor under the age of 14 years. Eighth Judicial District Court, Clark County; John S. McGroarty, Judge.

The district court sentenced appellant to serve a term in the Nevada State Prison of life with the possibility of parole after 100 months for the sexual assault charge and a concurrent term of life with the possibility of parole after 120 months for the lewdness with a minor under the age of 14 years charge. The district court further imposed a special sentence of lifetime supervision upon completion of any term of probation, parole, or imprisonment.

Appellant claims that the district court erred in failing to ensure that appellant's guilty plea was voluntarily and knowingly entered, and failing to consider appellant's proper person motion to withdraw his guilty plea. The record reveals that shortly after signing the written guilty plea memorandum, appellant's appointed counsel, Elizabeth

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

Quillin, upon appellant's request, filed a motion to withdraw as counsel of record. Thereafter, appellant attempted to file a proper person motion to withdraw his guilty plea prior to sentencing.² The district court appointed new counsel to review the plea canvass and record to assist appellant in filing a motion to withdraw his guilty plea. Thereafter at a hearing on September 12, 2001, the attorney that replaced Quillin as appellant's appointed counsel, Jennifer Bolton, indicated that she had reviewed appellant's case and determined that appellant fully understood the charges against him and potential penalties at the time he entered his plea. Bolton also indicated that despite numerous personal reasons underlying appellant's desire to withdraw his guilty plea, she had declined to file a motion to withdraw his plea because she believed appellant's stated reasons for the motion were not legal grounds. The record does not reflect that the district court ever finally resolved appellant's motion to withdraw his plea before sentencing. At sentencing on September 26, 2001, Bolton reiterated that she had thoroughly reviewed appellant's case and believed there were no legal grounds to withdraw his guilty plea.³

²We note that appellant's motion was received by the district court on June 29, 2001, but was never actually filed by the clerk of the court.

³Bolton indicated her investigation of appellant's case consisted of reviewing Quillin's lengthy notes from her meetings with the appellant, reviewing the transcript of the plea canvass, and conversing with appellant and the Public Defender's and District Attorney's offices. Bolton stated that the plea canvass was "perfect" and added that there was nothing in the case indicating that appellant did not understand "100 percent of what was to take place during this deal."

The decision to enter a plea of guilty is personal to the accused, not his or her attorney.⁴ Like the decision to enter a plea of guilty, the decision to seek withdrawal of the plea and proceed to trial is personal to the accused.⁵ This court has stated that the decision of how to plead in a criminal case is a fundamental one reserved ultimately to the defendant alone.⁶

NRS 176.165 permits a defendant to file a motion to withdraw a guilty plea before sentencing. The district court may grant such a motion in its discretion for any substantial reason and if it is fair and just.⁷ On a motion to withdraw a guilty plea, the defendant has the burden of showing that the guilty plea was not entered knowingly and intelligently.⁸ A guilty plea is not knowing and intelligent where the totality of the circumstances revealed by the record demonstrates that the defendant was not aware of the direct consequences of the guilty plea.⁹

It is clear from the record that although appellant communicated his desire to withdraw his Alford plea before sentencing to his appointed counsel, his counsel did not attempt to withdraw the plea. Consequently, appellant was not given the opportunity to advance any

⁴See Parker v. State, 100 Nev. 264, 679 P.2d 1271 (1984) citing Henderson v. Morgan, 426 U.S. 637, 647 (1976).

⁵Parker, 100 Nev. at 265, 679 P.2d at 1272.

⁶See id.

⁷State v. District Court, 85 Nev. 381, 385, 455 P.2d 923, 926 (1969).

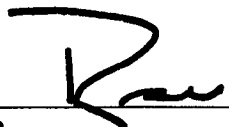
⁸Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986).

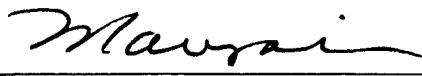
⁹Little v. Warden, 117 Nev. 845, 851-52, 34 P.3d 540, 543-44 (2001).

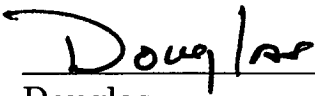
argument for why his plea should be allowed to be withdrawn, including any “personal reasons” that the district court might have found fair and just cause to withdraw the Alford plea.

Accordingly, we vacate the judgment of conviction and remand this matter to the district court for the limited purposes of appointing appellant new counsel to file a motion to withdraw appellant's guilty plea. The district court shall conduct any evidentiary proceedings it deems necessary to determine whether a substantial reason that is fair and just exists for appellant to be allowed to withdraw his guilty plea.¹⁰ Accordingly, we

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


_____, J.
Rose


_____, J.
Maupin


_____, J.
Douglas

¹⁰See Molina v. State, 120 Nev. ___, ___ P.3d (Adv. Op. No. 21, April 14, 2004).

cc: Hon. John S. McGroarty, District Judge
William J. Taylor
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk