

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN M. WEIBLE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40026

FILED

OCT 15 2003

ORDER OF AFFIRMANCE

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

This is an appeal from a judgment of conviction, pursuant to an Alford plea,¹ of one count of gross misdemeanor conspiracy to commit a crime. The district court sentenced appellant John M. Weible to serve a prison term of 1 year and then suspended execution of the sentence, placing Weible on probation for a period not to exceed 2 years.²

On July 10, 2001, Weible was charged with one count each of grand larceny auto and burglary for allegedly entering his ex-wife's garage and taking her vehicle. On November 8, 2001, Weible entered an Alford plea to one count of conspiracy to commit a crime. Pursuant to the plea agreement, Weible waived the "right to appeal the conviction . . . unless the appeal is based upon reasonable constitutional jurisdictional or other

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

²Pursuant to the plea agreement, the gross misdemeanor conviction would be reduced to misdemeanor trespass provided Weible successfully completed probation.

grounds challenging the legality of the proceedings and except as otherwise provided in subsection 3 of NRS 174.035."

On January 3, 2002, the day Weible's sentencing hearing was scheduled, defense counsel Gary Segal requested a 30-day continuance, stating that he had received new evidence from the Department of Motor Vehicles that Weible was the owner of the vehicle that he was charged with stealing and, therefore, wanted to file a "motion" based on legal impossibility. Counsel, however, did not specify whether he wanted to file a presentence motion to withdraw the plea or a motion for dismissal. The district court set a briefing schedule, ordering counsel to file the motion by January 31, 2003, and scheduling argument on the motion for March 5, 2003. Counsel did not file the motion as ordered, and neither Weible nor his counsel appeared for the scheduled argument or for a subsequent sentencing hearing on March 11, 2003. Subsequently, a bench warrant for Weible was issued.

On June 22, 2002, Weible, as well as his counsel, appeared for sentencing. Counsel stated:

Judge, you had set a briefing schedule in this matter in regards to a motion to dismiss. Unfortunately, I did not file the appropriate brief at that time. I have now filed that brief, it is currently set on [the] motion to dismiss [calendar] for July 23rd. Since it wasn't filed and the defendant did not appear at the hearing date, I believe in March, you issued a bench warrant. At this point we are requesting that [the] bench warrant be quashed and that we go ahead and hear the motion on July 23.

The State opposed the request, noting that Weible had missed numerous court appearances and arguing: "[t]he idea that the motion could be filed today, six months late and we should even consider it, after a guilty plea, he's just been jerking this Court around almost a year now post plea." The district court denied Weible's request, stating:

The motion is denied as far as any -- I gave you ample opportunity to file briefs. This has been going on in front of me at least with initial arraignment [since] April 24, 2001. Now here we are in June of 2002 on a simple case like this. I gave you ample opportunity, I bent over backwards to accommodate your client. You didn't do what you had to do, therefore, I'm not ruling on any motions.

Thereafter, the district court sentenced Weible according to the terms of the plea agreement. Weible filed the instant appeal

Weible contends that the district court abused its discretion in refusing to consider his motion to dismiss. In particular, Weible argues that the motion should have been "construed as including a motion to withdraw a guilty plea" because the motion would have first sought to withdraw his plea. Assuming his motion to dismiss was a presentence motion to withdraw the plea, Weible argues that the district court erred in denying the motion because it failed to: (1) exercise its discretion on the basis of "sound information"; (2) hold an evidentiary hearing on the validity of the plea; and (3) determine whether Weible had a "fair and just"

reason to withdraw his plea.³ Additionally, Weible argues that his motion was timely because it "was filed within the time line authorized by NRS 176.165" since it was filed prior to sentencing.⁴ We conclude that Weible's argument lacks merit.

We disagree with Weible that his motion to dismiss should have been construed as a motion to withdraw the Alford plea. Notably, the motion does not contain a request that Weible be allowed to withdraw his plea and proceed to trial on the original charges, and the transcripts of the proceedings below reveal that Weible failed to make such a request in the district court. Instead, Weible's motion sought dismissal of the criminal charges based on a claim of mistake of fact, namely, that he could not form the specific intent to steal the vehicle at issue because he believed that he owned it. We therefore conclude the motion to dismiss was not the functional equivalent of a presentence motion to withdraw the plea, and the district court did not err in failing to treat it as such.

Likewise, we conclude that the district court did not err in declining to consider the merits of the motion to dismiss. By entering an


³See NRS 176.165; State v District Court, 85 Nev. 381, 385, 455 P.2d 923, 926 (1969) (citing Gearhart v. United States, 272 F.2d 499 (D.C. Cir. 1959)).

⁴Weible also argues that he "should not be penalized for his attorney's failure to adhere to the court's briefing schedule." We note that Weible may seek to withdraw his plea in the district court in the first instance based on a claim of ineffective assistance of counsel. See Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986).

Alford plea, Weible waived the right to file a motion to dismiss alleging mistake of fact.⁵ Moreover, the motion to dismiss was untimely because it was filed approximately six months after the deadline set by the district court. Accordingly, the district court properly dismissed the motion without consideration of the merits of Weible's claims.

Having considered Weible's contentions and concluded that they lack merit, we

ORDER the judgment of the conviction AFFIRMED.


_____, J.
Becker


_____, J.
Shearing


_____, J.
Gibbons

cc: Hon. Joseph T. Bonaventure, District Judge
Clark County Public Defender
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

⁵See Tollett v. Henderson, 411 U.S. 258, 267 (1973); Webb v. State, 91 Nev. 469, 470, 538 P.2d 164, 165 (1975).