

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ADRIAN POWELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 79037-COA

FILED

MAY 11 2020

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

ORDER OF REVERSAL AND REMAND

Adrian Powell appeals from a judgment of conviction, pursuant to a guilty plea, of two counts each of conspiracy to commit robbery, burglary while in possession of a deadly weapon, and first-degree kidnapping with the use of a deadly weapon, and seven counts of robbery with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

Powell claims the district court erred by denying his presentence motion to withdraw his guilty plea without first conducting an evidentiary hearing. 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 permitting withdrawal would be fair and just," *Stevenson v. State*, 131 Nev. 598, 604, 354 P.3d 1277, 1281 (2015). Courts should not focus exclusively on whether the plea was knowingly, voluntarily, and intelligently pleaded. *Id.* at 603, 354 P.3d at 1281. Nor should courts generally consider the guilt or innocence of the defendant. *See Hargrove v. State*, 100 Nev. 498, 503, 686 P.2d 222, 226 (1984).

Ineffective assistance of counsel could be a fair and just reason for withdrawing a guilty plea. *See Stevenson*, 131 Nev. at 604, 354 P.3d at

1281. A defendant is entitled to an evidentiary hearing on a claim of ineffective assistance of counsel only if he asserts specific factual allegations that are not belied by the record and, if true, would entitle him to relief. *Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225.

As Powell points out on appeal, he claimed counsel was ineffective for advising him to enter a guilty plea when part of the purported benefit was the State foregoing filing new charges but neither counsel nor Powell fully understood the nature of the new charges. Powell further claimed that, because he has since learned there was no evidence linking him to the new charges, he would not have pleaded guilty but would have insisted on going to trial. Powell's claims, if true and not belied by the record, entitled him to relief. *See Kirksey v. State*, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996) (setting forth the deficiency and prejudice prongs of the test for ineffective assistance of counsel). The record does not belie Powell's claims. We therefore conclude the district court erred by denying this claim without first conducting an evidentiary hearing.


Powell also points out that he claimed counsel advised him he would receive a sentence of approximately 6 to 15 years, and this untrue assurance led him into accepting the guilty plea. Powell's claim, if true and not belied by the record, entitled him to relief. *See id.* The record does not belie Powell's claim. We therefore conclude the district court erred by denying this claim without first conducting an evidentiary hearing.

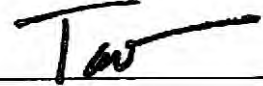
Finally, Powell claims the district court should have conducted an evidentiary hearing regarding whether or not he understood the nature of the pending trial. None of Powell's claims, either below or in this court, are particularly well pleaded, but it does not appear that Powell raised this

underlying claim below. We therefore conclude the district court did not err by not conducting an evidentiary hearing on this issue.

For the foregoing reasons, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court to conduct an evidentiary hearing on Powell's presentence motion to withdraw his guilty plea.¹


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Ronald J. Israel, District Judge
Monique A. McNeill
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

¹Although not raised in the appeal, we note the district court applied the wrong standard for presentence motions to withdraw a guilty plea. The district court reviewed Powell's motion for whether his guilty plea was knowingly and voluntarily entered instead of for whether there was a fair and just reason to grant withdrawal.