

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ANTHONY CLARKE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 80130-COA

FILED

APR 28 2021

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

ORDER OF AFFIRMANCE

Anthony Clarke appeals from a judgment of conviction, pursuant to a guilty plea, of burglary. Second Judicial District Court, Washoe County; David A. Hardy, Judge.

The State charged Clarke by information with burglary, specifically alleging that he entered a restaurant with the intent to commit larceny therein. Pursuant to negotiations, Clarke agreed to plead guilty in exchange for the State's stipulation to a recommended sentence of 12 to 36 months. After a thorough canvassing, Clarke pleaded guilty pursuant to the agreement.¹

Months later, but prior to sentencing, the Washoe County Public Defender filed a motion on Clarke's behalf to allow him to represent himself, as well as a motion requesting a hearing pursuant to *Young v.*

¹On appeal, Clarke erroneously contends that an amendment to NRS 205.060, which became effective on July 1, 2020, has some bearing on the case at hand. Clarke committed the burglary on or around March 2, 2019, and was sentenced on November 25, 2019. There is no indication that the Nevada Legislature intended for the amendment to NRS 205.060 to be retroactive. *See State v. Second Judicial Dist. Court*, 124 Nev. 564, 569, 188 P.3d 1079, 1082 (2008) (noting the general rule that the proper penalty for an offense is that in effect at the time the offense was committed unless the Legislature expresses clear intent to apply a different statute retroactively).

State, 120 Nev. 963, 102 P.3d 572 (2004). The district court granted the evidentiary hearing pursuant to *Young* and conducted the hearing on the same day that was initially scheduled for Clarke's sentencing. The district court conducted a *Faretta*² canvas, which resulted in the court granting Clarke's request to represent himself, and appointed him counsel from the public defender's office acting in a standby capacity.

A week after the hearing, Clarke moved to withdraw his guilty plea. The State opposed Clarke's motion, and the district court entered an order denying the same. Approximately 30 days later, Clarke appeared for his sentencing hearing. Part way through this hearing, Clarke changed his mind regarding self-representation and requested that the court permit standby counsel to represent him during sentencing. The district court denied his request. In its denial, the district court specifically found Clarke's request to be "intentional gamesmanship." Ultimately, the district court sentenced Clarke to a term of 28 to 96 months in prison. This appeal followed.

On appeal, Clarke first argues that the district court erred by denying his motion to withdraw his guilty plea. We review the district court's denial of a motion to withdraw a guilty plea for a clear abuse of discretion. *Mitchell v. State*, 109 Nev. 137, 141, 848 P.2d 1060, 1062 (1993). NRS 176.165 permits a defendant to move to withdraw a plea of guilty before a sentence is imposed. 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. *Stevenson v. State*, 131 Nev. 598, 603, 354 P.3d 1277, 1281 (2015).

²*Faretta v. California*, 422 U.S. 806 (1975).

Clarke argues that he only pleaded guilty due to his former defense counsel's representation that he had been identified in an in-person lineup. The district court found that the existence of lineup evidence was not central to Clarke's plea, as Clarke mentioned the lineup for the first time at a hearing on his motions requesting a hearing pursuant to *Young* and for self-representation. Further, the district court noted the logical fallacies in Clarke's assertion, as he was apprehended by the restaurant owner at the scene of the crime, his theft was caught on surveillance camera, and he admitted in his motion that he stole from the restaurant. Thus, it is unclear how or why evidence of a lineup, if one had occurred, would have had any bearing on Clarke's plea. Importantly, there is no evidence in the record to support that an in-person lineup in fact occurred, which is presumably an event that Clarke would have recalled prior to pleading guilty. Thus, any alleged procedural defects pertaining to a non-existent lineup need not be entertained by this court. Because the record supports the district court's decision that, based on the totality of the circumstances, there was no fair and just reason to grant Clarke's motion to withdraw his guilty plea, we conclude that the district court did not abuse its discretion.

Second, Clarke contends that the district court erred by denying Clarke's request to reinstate counsel at the time of sentencing. We review the district court's decision to deny the appointment of counsel for an abuse of discretion. *Renteria-Novoa v. State*, 133 Nev. 75, 76, 391 P.3d 760, 761 (2017). A request to reinstate counsel after acting pro se depends on whether the defendant made a voluntary, intelligent, and timely decision to change the nature of his representation. *Arajakis v. State*, 108 Nev. 976, 982, 843 P.2d 800, 804 (1992). "[A] district court may deny a request to

withdraw from self-representation when said request is made with an intent to delay or obstruct proceedings.” *Meisler v. State*, 130 Nev. 279, 284, 321 P.3d 930, 934 (2014). Upon a showing of dilatory intent by a defendant, it is within the district court’s discretion to deny a request to reinstate counsel and require the defendant to proceed with either designated counsel or pro se. *Arajakis*, 108 Nev. at 981, 843 P.2d at 803; see also *United States v. Flewitt*, 874 F.2d 669, 674 (9th Cir. 1989) (“Of course, a request for self-representation need not be granted if it is intended merely as a tactic for delay.”).

Here, the record confirms that prior to his initial sentencing hearing Clarke invoked his right to self-representation. After conducting a proper *Faretta* canvass, the district court granted Clarke’s request, appointed standby counsel, and continued his sentencing hearing for 30 days. At this hearing, Clarke changed course again, requesting the assistance of standby counsel part way through the adjudication. The district court denied the request, concluding that Clarke’s behavior was part of a pattern of dilatory activity that amounted to “intentional gamesmanship.”³ Although standby counsel was present at the sentencing hearing, there is no indication in the record that counsel was prepared to argue on Clarke’s behalf. Moreover, the district court was in the best position to determine whether Clarke’s request was a dilatory act aimed at

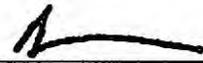
³Even if the district court failed to find Clarke’s request to be intentional gamesmanship, the court would have been within its discretion to deny the request as untimely as Clarke attempted to invoke counsel in the middle of the sentencing hearing without showing good cause. See *Arajakis*, 108 Nev. at 981, 843 P.2d at 803 (holding that the district court acted within its discretion in denying a defendant’s request to withdraw from self-representation where he waited five weeks after trial, and on the day of sentencing, to retract his waiver of counsel).

causing further delay. *See Meisler*, 130 Nev. at 284, 321 P.3d at 934 (affirming the district court's denial of a defendant's request to withdraw from self-representation where standby counsel was unprepared for trial and the record revealed an intent to delay). Based on this record, we conclude that the district court did not abuse its discretion in denying Clarke's last-minute request for counsel during sentencing.⁴ Accordingly, we

ORDER the judgment of conviction AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. David A. Hardy, District Judge
Tracie Lindeman
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

⁴Clarke argues on appeal that the district court abused its discretion by considering an altercation surrounding the return of the stolen money. Clarke fails to show how this consideration resulted in error. *See Silks v. State*, 92 Nev. 94, 545 P.2d 1159, 1161 (1976). Additionally, the sentence imposed was within the statutory range and the record reflects that the district court considered several factors. Thus, Clarke's argument is meritless. *See Deveroux v. State*, 96 Nev. 388, 610 P.2d 722 (1980) (holding that the degree to which the district court considers defendant's prior record is within its wide discretionary authority).