

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

NO. 02-KA-538

VERSUS

**COURT OF APPEAL,
FIFTH CIRCUIT**

FIFTH CIRCUIT

FRANK J. ROBERTS

REC NOV 26 2002

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM
THE TWENTY-FOURTH JUDICIAL DISTRICT COURT,
PARISH OF JEFFERSON, STATE OF LOUISIANA,
NO. 01-3516, DIVISION "P,"
HONORABLE MELVIN C. ZENO, JUDGE PRESIDING

November 26, 2002

**SUSAN M. CHEHARDY
JUDGE**

Panel composed of Judges James L. Cannella,
Susan M. Chehardy, and Walter J. Rothschild.

MARTIN E. REGAN, JR.

KRIS A. MOE

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New Orleans, Louisiana 70130

Counsel for Defendant-Appellant, Frank J. Roberts

PAUL D. CONNICK, JR.

District Attorney, 24th Judicial District

Parish of Jefferson, State of Louisiana

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Gretna, Louisiana 70063

Counsel for Plaintiff-Appellee, the State of Louisiana

APPEAL DISMISSED; CASE REMANDED.

SMC
JLC
WJR

Defendant, Frank Roberts, along with several co-defendants, was charged on July 3, 2001 in a bill of information with two counts of theft over \$1,000, in violation of La.R.S. 14:67, and one count of simple burglary of an inhabited dwelling, in violation of La.R.S. 14:62.2. The bill of information was subsequently amended to reduce the charge of simple burglary to possession of stolen property valued over \$500, in violation of La.R.S. 14:69(A).

Pursuant to a plea agreement, defendant pleaded guilty to all three charges on October 15, 2001. On the same date he was sentenced to ten years on each of the three charges, to run concurrently. The sentence was suspended and he was placed on five years of active probation.

Thereafter, defendant filed a motion to withdraw his guilty pleas, claiming his attorney had a conflict of interest in representing multiple co-defendants and that his plea was based on a threat by the State that his fiancée would not receive probation if he did not plead guilty. His motion was denied after a hearing. On the same day, defendant's probation was revoked for violating the conditions of his probation.

Defendant appeals the denial of his motion to withdraw his guilty pleas.

We cannot consider the appeal, however, because it is untimely. Defendant filed his motion to withdraw his guilty pleas on October 22, 2001, seven days after he entered the pleas. A hearing on the motion was held on March 13, 2002, after which the trial court denied defendant's motion. Defendant objected to the trial court's ruling, but did not make an oral motion to appeal. Defendant did not file a written motion for appeal until March 21, 2002, more than five days after the ruling from which he appeals.

La.C.Cr.P. art. 914 requires that a motion for appeal be made within five days from the ruling from which the appeal is taken. Defendant's motion for appeal was filed one day late.

In State v. Counterman, 475 So.2d 336, 338 (La. 1985), the Louisiana Supreme Court held that a defendant who fails to make a motion for appeal within the five-day time period provided in La.C.Cr.P. art. 914 loses the right to obtain an appeal by simply filing a motion for appeal. The court explained that after the time for appealing has elapsed, the conviction and sentence become final and are no longer subject to review under ordinary appellate process, unless the defendant obtains the reinstatement of his right to appeal. Id.

The proper procedural vehicle for a defendant seeking the exercise of his right to appeal after the time for appeal has expired is an application for post-conviction relief pursuant to La.C.Cr.P. arts. 924-930. State v. Brooks, 01-1316 (La. App. 5 Cir. 4/10/02), 817 So.2d 222, 223.

Further, the issues defendant raises in his appeal are issues more properly raised in an application for post-conviction relief. Defendant not only complains of the trial court's denial of his motion to withdraw his guilty pleas, which was

filed after defendant was sentenced, but also defendant asserts a new ground for the withdrawal of his guilty pleas for the first time in this appeal.¹

The jurisprudence is clear that a trial court retains authority to permit the withdrawal of a constitutionally infirm guilty plea even after sentencing, despite the language of La.C.Cr.P. art. 559.² State v. Lewis, 421 So.2d 224, 225-226 (La. 1982). However, a request to withdraw a guilty plea after sentencing is in the nature of post-conviction relief. State ex rel. Chauvin v. State, 99-2456 (La. App. 1 Cir. 1/28/00), 814 So.2d 1, 2, *citing* State v. Lewis, *supra* at 226.

In the present case, the trial court recognized that defendant's motion to withdraw his guilty pleas was a matter more properly raised in an application for post-conviction relief. The trial court even stated the matter was not properly before the court in its present state of a motion. Nonetheless, the trial court denied the motion, stating:

I do not find that there is evidence set forth before this Court which would support it setting aside or withdrawing the guilty plea in this matter. I hear the argument of Counsel and the Court was present and conducted the plea colloquy in this matter and finds that there were no procedural defects concerning the entering of the plea that satisfies the Court on the information presented to us today that I should let him withdraw that guilty plea.

Because the appeal is untimely and the issues raised by defendant should be addressed first on application for post-conviction relief, we dismiss this appeal and remand the case to allow defendant the opportunity to seek reinstatement of his

¹Defendant asserts two grounds for the withdrawal of his guilty pleas. He first argues that he was not advised of his right to separate representation as required by La.C.Cr.P. art. 517. He contends the failure to be advised of this right rendered his plea involuntary. Second, defendant asserts his plea was involuntary because he was coerced into pleading guilty because the State threatened that his fiancée, who was a co-defendant, would receive jail time if he did not plead guilty. This second basis is being raised for the first time on appeal.

²La.C.Cr.P. art. 559(A) provides: "The court may permit a plea of guilty to be withdrawn at any time before sentence."

appeal rights and address the newly-raised issues by application for post-conviction relief.

APPEAL DISMISSED; CASE REMANDED.



EDWARD A. DUFRESNE, JR.
CHIEF JUDGE

SOL GOTHARD
JAMES L. CANNELLA
THOMAS F. DALEY
MARION F. EDWARDS
SUSAN M. CHEHARDY
CLARENCE E. MCMANUS
WALTER J. ROTHSCHILD

JUDGES

Court of Appeal

FIFTH CIRCUIT
STATE OF LOUISIANA

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CERTIFICATE

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN MAILED OR DELIVERED THIS DAY NOVEMBER 26, 2002 TO ALL COUNSEL OF RECORD AND TO ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

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