

**SUPREME COURT OF ARKANSAS**

No. CR 10-153

YVONNE DOCKERY

APPELLANT

v.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered March 8, 2012

PRO SE APPEAL FROM THE MILLER  
COUNTY CIRCUIT COURT, CR 2009-  
439, HON. KIRK JOHNSON, JUDGEREVERSED AND REMANDED.**PER CURIAM**

On October 23, 2009, appellant Yvonne Dockery pled no contest to one count of theft, pursuant to a negotiated plea. As per the plea agreement, she was sentenced to two years' probation, removed as mayor of Garland City, fined \$500 plus \$520 in court costs and fees, and ordered to pay a total of \$8600 in restitution. The judgment-and-commitment order was entered of record on October 30, 2009. On October 26, however, appellant filed in the circuit court a motion to withdraw her no-contest plea, which she styled as "Motion to Withdraw Forced Plea Bargain and Motion to Set Aside Court Order for Probation Pursuant to Rule 60(b) Rules of Civil Procedure with Brief Incorporated." This motion was denied by the circuit court by written order entered October 30, 2009.

Now before us is appellant's timely filed appeal of the circuit court's order. Because we find that the circuit court clearly erred in determining whether it had jurisdiction to entertain appellant's motion, we reverse its decision and remand.

The withdrawal of a no-contest plea is governed by Arkansas Rule of Criminal Procedure 26.1 (2009). *See Redding v. State*, 293 Ark. 411, 738 S.W.2d 410 (1987). Under Rule 26.1, a

defendant may withdraw a no-contest plea as a matter of right prior to the court's acceptance of the plea. Ark. R. Crim. P. 26.1(a). Once the plea has been accepted by the court, a defendant no longer has a right to withdraw the plea, but, "before entry of judgment, the court in its discretion may allow the defendant to withdraw his or her plea to correct a manifest injustice if it is fair and just to do so." *Id.* Finally, Rule 26.1 states that a no-contest plea "may not be withdrawn under this rule after entry of judgment." *Id.*

In its order denying appellant's motion to withdraw her no-contest plea, the circuit court incorrectly found that "sentencing had taken place prior to the filing of the motion and the court lost jurisdiction to set aside the plea." In fact, while appellant's sentence was pronounced in open court when she entered her no-contest plea on October 23, 2009, the commitment order was not filed with the circuit clerk until October 30, 2009, four days after appellant had filed her motion. Pursuant to Arkansas Supreme Court Administrative Order 2(b)(2) (2011), an oral order announced from the bench does not become effective until reduced to writing and filed. *Carr v. Nance*, 2010 Ark. 25. A sentence is placed into execution when the court issues a commitment order, unless the trial court grants appellate bond or specifically delays execution upon other valid grounds. *Redding*, 293 Ark. 411, 738 S.W.2d 410. A judgment of conviction and a sentence are not entered within the meaning of Rule 26.1 merely upon pronouncement in open court. *See Johnson v. State*, 330 Ark. 381, 953 S.W.2d 883 (1997).

Withdrawal of a no-contest plea under Rule 26.1 after that plea has been accepted, but before the sentence has been entered, is a matter of the court's discretion. *See* Ark. R. Crim. P. 26.1(a). Such motions are to be granted only where the withdrawal is necessary to correct a

manifest injustice, and the defendant must establish the manifest injustice by proving to the satisfaction of the court that

- (i) he or she was denied the effective assistance of counsel;
- (ii) the plea was not entered or ratified by the defendant or a person authorized to do so in his or her behalf;
- (iii) the plea was involuntary, or was entered without knowledge of the nature of the charge or that the sentence imposed could be imposed;
- (iv) he or she did not receive the charge or sentence concessions contemplated by a plea agreement and the prosecuting attorney failed to seek or not to oppose the concessions as promised in the plea agreement;
- (v) he or she did not receive the charge or sentence concessions contemplated by a plea agreement in which the trial court had indicated its concurrence and the defendant did not affirm the plea after receiving advice that the court had withdrawn its indicated concurrence and after an opportunity to either affirm or withdraw the plea.

Ark. R. Crim. P. 26.1(b). The provisions of this rule are mandatory, in that it provides that the withdrawal of the plea *shall* be deemed to be necessary when any of the enumerated factors are present. *Zoller v. State*, 282 Ark. 380, 669 S.W.2d 434 (1984).

Inasmuch as the circuit court was incorrect in its determination that it lacked jurisdiction to rule on appellant's motion, we reverse and remand to the circuit court so that it may rule on the merits of the motion. We note that, to prevail on a motion to withdraw a guilty plea between the time when the plea has been accepted and when the sentence is entered, the burden is on the defendant to establish one of the five bases under Rule 26.1(b). *See Duncan v. State*, 304 Ark. 311, 802 S.W.2d 917 (1991). Whether appellant established one of these bases is a question of fact to be answered by the circuit court on remand.

Reversed and remanded.