

IN THE UTAH COURT OF APPEALS

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State of Utah,	)	MEMORANDUM DECISION
	)	(Not For Official Publication)
Plaintiff and Appellee,	)	
	)	Case No. 20100105-CA
v.	)	
	)	F I L E D
James Breeze,	)	(July 9, 2010)
	)	
Defendant and Appellant.	)	<span style="border: 1px solid black; padding: 2px;">2010 UT App 184</span>

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Third District, Tooele Department, 071300446  
The Honorable Stephen L. Henriod

Attorneys: Robert Breeze, Salt Lake City, for Appellant  
Mark L. Shurtleff and Marion Decker, Salt Lake City,  
for Appellee

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Before Judges Davis, McHugh, and Roth.

PER CURIAM:

This case is before the court on James Breeze's motion to dismiss his appeal. This motion does not comply with the procedure for a voluntary dismissal of an appeal in a criminal case, which requires such a motion to be accompanied by an affidavit from an appellant. See Utah R. App. P. 37(b) (requiring motions to dismiss an appeal to include an "affidavit demonstrating that appellant's decision to dismiss the appeal is voluntary and made with knowledge of the right to an appeal and an understanding of the consequences of voluntary dismissal"). Nevertheless, because we agree that this court lacks jurisdiction to consider the issues Breeze seeks to raise on appeal, we dismiss the appeal.

On March 18, 2008, Breeze entered a guilty plea to theft, a class A misdemeanor. The printed form for entry of the guilty plea included a hand-written statement, reading,

Sentence Recommendations. 1 yr prob[ation];  
\$300 fine; no violations of law; upon  
successful completion of probation  
def[endant] shall have the right to withdraw

his guilty plea and the case will be dismissed.

On the same day that Breeze entered his guilty plea, the district court sentenced him to pay a \$300 fine, plus surcharge, and to serve a one-year jail term, which was suspended. The district court placed Breeze on court-supervised probation for twelve months on the conditions that he violate no laws, pay the fine in full, and complete fifty community service hours with a nonprofit organization, submitting written proof of completion to the court. On August 4, 2008, the district court revoked and reinstated probation, entering an amended judgment and sentence requiring 150 community service hours, requiring proof of completion of at least twelve hours per month.

On January 4, 2010, Breeze filed a pro se motion to dismiss the case. The motion stated, "The original plea agreement states after completion of probation and community service that I would be able to get the Class A dismissed." The district court denied the motion to dismiss, finding that the probation was not completed successfully. Breeze filed a timely appeal, but he now moves to dismiss that appeal.

Breeze concedes that the plea agreement was not a valid plea in abeyance agreement under Utah Code section 77-2a-1. See Utah Code Ann. § 77-2a-1 (2008). He also concedes that he did not file a timely motion to withdraw his guilty plea at any time prior to sentencing. The State does not oppose the motion, agreeing that where no timely motion to withdraw a guilty plea is filed in the trial court, the appellate court has no jurisdiction to consider a challenge to the validity of the plea, see State v. Grimmer, 2007 UT 11, ¶ 25, 152 P.3d 306; see also State v. Ott, 2010 UT 1, ¶ 18, 647 Utah Adv. Rep. 19 ("[F]ailure to withdraw a guilty plea within the time frame dictated by section 77-13-6 deprives the trial court and the appellate courts of jurisdiction to review the validity of the plea."). Utah Code section 77-13-6(2)(b) states,

A request to withdraw a plea of guilty or no contest, except for a plea held in abeyance, shall be made by motion before sentence is announced. Sentence may not be announced unless the motion is denied. For a plea held in abeyance, a motion to withdraw the plea shall be made within 30 days of pleading guilty or no contest.

Utah Code Ann. § 77-13-6(2)(b) (2008). "Section 77-13-6(2)(b) imposes a jurisdictional bar on late-filed motions to withdraw guilty pleas, and failure to comply with its requirements

extinguishes a defendant's right to challenge the validity of the guilty plea on appeal." Grimmett, 2007 UT 11, ¶ 8. Because Breeze now seeks to challenge the validity of his guilty plea, we agree that his claims are subject to the jurisdictional bar of section 77-13-6(2)(b). In addition, even if the guilty plea had been a proper plea in abeyance, the time to file a motion to withdraw would have expired in April 2008--thirty days after the entry of the guilty plea. Accordingly, we dismiss the appeal for lack of jurisdiction.<sup>1</sup>

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James Z. Davis,  
Presiding Judge

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Carolyn B. McHugh,  
Associate Presiding Judge

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Stephen L. Roth, Judge

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<sup>1</sup>We do not address the merits of the assertion that Breeze can challenge his guilty plea in a motion for a misplea filed in the district court. See generally State v. Ott, 2010 UT 1, ¶ 20, 647 Utah Adv. Rep. 19 (holding that a motion for misplea could not be used to circumvent the jurisdictional requirements of Utah Code section 77-13-6(2)). However, where a defendant does not make a timely motion to withdraw a guilty plea, he or she may challenge the guilty plea in a petition for post-conviction relief. See Utah Code Ann. § 77-13-6(3) (2008).