

IN THE UTAH COURT OF APPEALS

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| State of Utah, |) | MEMORANDUM DECISION | |
| |) | (Not For Official Publication) | |
| Plaintiff and Appellee, |) | | |
| |) | Case No. 20040823-CA | |
| v. |) | | |
| |) | F I L E D | |
| Joseph Andrew Chavez, |) | (August 25, 2005) | |
| |) | | |
| Defendant and Appellant. |) | <table border="1"><tr><td>2005 UT App 363</td></tr></table> | 2005 UT App 363 |
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Second District, Ogden Department, 041901031
The Honorable Michael D. Lyon

Attorneys: Randall W. Richards, Ogden, for Appellant
Mark L. Shurtleff and Matthew D. Bates, Salt Lake
City, for Appellee

Before Judges Davis, Greenwood, and Thorne.

PER CURIAM:

This case is before the court on its own motion for summary disposition on the alternative grounds that the notice of appeal was untimely and that the question presented for appeal is so insubstantial so as not to merit further consideration. In response to the motion, Chavez presented an affidavit stating that during the entire thirty-day period following the entry of final judgment, he was incarcerated in the Weber County correctional facility and that he deposited the notice of appeal within the prison mail system within that time period. Accordingly, Rule 4(f) of the Utah Rules of Appellate Procedure, containing the prison mailbox rule, was invoked because the notice of appeal was placed in the prison mail delivery system during the appeal period. Therefore, the State conceded and this court agrees that Chavez's notice of appeal was timely filed. However, for other reasons, this court has no jurisdiction to review the validity of Chavez's appeal.

Section 77-13-6 of the Utah Code requires a defendant to file a motion to withdraw a guilty plea prior to the date the sentenced is announced. See Utah Code Ann. § 77-13-6 (Supp. 2005). Failure to make a timely motion to withdraw a guilty plea "extinguishes a defendant's right to challenge the validity of

the guilty plea on appeal." State v. Reyes, 2002 UT 13, ¶3, 40 P.3d 630; see also State v. Merrill, 2005 UT 34, ¶20, 114 P.3d 585 (concluding that time limitation contained within section 77-13-6(2)(6) is jurisdictional). The record is clear that Chavez never filed such a motion. Accordingly, we lack jurisdiction to review the substantive issues Chavez raises on appeal.

Because Chavez failed to timely move to withdraw his guilty plea in the district court, any challenge to the validity of Chavez's plea agreement must be brought in a post-conviction proceeding. See Utah Code Ann. § 77-13-6(2)(c) ("Any challenge to a guilty plea not made within the time period specified in Subsection (2)(c) shall be pursued under Title 78, Chapter 35a, Post-Conviction Remedies Act, and Rule 65C, Utah Rules of Civil Procedure."); see also Merrill, 2005 UT at ¶25 (concluding that person not satisfying jurisdictional time limit for withdrawing plea still has potential remedy under the statute).

The appeal is dismissed for lack of jurisdiction.

James Z. Davis, Judge

Pamela T. Greenwood, Judge

William A. Thorne, Jr., Judge