

IN THE UTAH COURT OF APPEALS

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Joseph Andrew Chavez,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Petitioner and Appellant,)	
)	Case No. 20070133-CA
v.)	
)	F I L E D
State of Utah,)	(December 20, 2007)
)	
Respondent and Appellee.)	2007 UT App 400

Second District, Ogden Department, 050905860
The Honorable Michael D. Lyon

Attorneys: Joseph Andrew Chavez, Brigham City, Appellant Pro Se
Mark L. Shurtleff and Brett J. Delporto, Salt Lake
City, for Appellee

Before Judges Greenwood, Billings, and Davis.

PER CURIAM:

Joseph Andrew Chavez appeals from the district court's order dismissing his petition for post-conviction relief.¹ We affirm.

Chavez argues that the district court erred in determining that his plea was entered knowingly and voluntarily. Specifically, he claims that the plea was confusing as to whether the State agreed to recommend solely jail time or if it merely agreed to recommend jail time in lieu of prison time.² He also

¹For the sake of clarity, the post-conviction court shall be referred to as the district court, while the original trial court shall be referred to as the trial court.

²This is important because the trial court sentenced him to prison, then suspended that sentence and imposed jail time. During his confinement, Chavez walked away from a work detail. As a result, the trial court revoked Chavez's probation and ordered Chavez to fulfill the suspended sentence in prison. Chavez correctly asserts that if he had been sentenced to jail
(continued...)

claims that neither the trial court nor his counsel made it clear to him that the trial court was not bound to the sentencing recommendations in the plea agreement.

The district court conducted an evidentiary hearing in which it heard testimony from Chavez, his attorney who negotiated the plea deal, and the prosecutor. After hearing this testimony, the district court determined that Chavez's plea was voluntarily made with full knowledge of the consequences of the plea. The record supports the district court's determination. See Myers v. State, 2004 UT 31, ¶ 9, 94 P.3d 211 (stating that appellate courts review the record in the light most favorable to the findings and judgment). Chavez signed a statement in support of his guilty plea. Chavez informed the trial court that he had both read the statement and understood it. The statement unequivocally indicated that he was pleading guilty to a crime that was punishable by zero to five years in the Utah State Prison, and that the State would recommend that Chavez receive jail time in lieu of prison. The statement also unequivocally stated that the district court was not bound by the sentencing recommendations. At sentencing, after some initial confusion by the prosecuting attorney concerning whether the State had agreed to recommend concurrent sentences, the trial court sentenced Chavez in accordance with the agreement, except as to work release and good time. The court imposed the sentence with some reluctance stating that had it not been for the State's recommendation, the trial court would have sentenced Chavez to prison. With the exception of the testimony of Chavez, which the district court described as self-serving, there is simply no evidence that Chavez did not enter a knowing and voluntary plea. Accordingly, the district court appropriately dismissed Chavez's claims challenging the validity of his plea.

Chavez's remaining claims are procedurally barred under Utah Code section 78-35a-106(1)(c) because the issues could have been raised on direct appeal but were not.³ See Utah Code Ann. § 78-35a-106(1)(c) (2002). Specifically, Chavez argues that the trial court violated his constitutional rights by failing to grant him the right to allocution. However, Chavez did not raise this issue in his direct appeal. The only issues Chavez raised in his direct appeal related to the validity of his plea. See State v.

²(...continued)
time only, the district court would not have had the opportunity later to revoke the probation and send him to prison.

³The district court dismissed these claims on their merits. However, our review of the record reveals that they were not properly raised in the post-conviction petition.

Chavez, 2005 UT App 363U (mem.) (per curiam). As a result, this court dismissed the appeal based upon lack of jurisdiction. See id. Had Chavez raised the allocution issue in his direct appeal, or any other issue relating to sentencing, this court would have had jurisdiction over those issues. Chavez chose not to raise the allocution issue in his direct appeal. Accordingly, Chavez was not eligible for relief under the Post-Conviction Remedies Act for this claim. See Utah Code Ann. § 78-35a-106(1)(c); Loose v. State, 2006 UT App 149, ¶ 13, 135 P.3d 149 (stating that issues raised in post-conviction proceeding that could have been raised in a direct appeal but were not are not eligible for relief). Chavez's claim that his counsel was ineffective because he failed to request that Chavez be given the right to allocution fails for the same reason.

Even if these two claims were not barred, Chavez is still not entitled to relief. Specifically, Chavez claims that he was prejudiced by the trial court's failure to grant him the right to allocution. However, he does not argue that he would have requested a lighter sentence during allocution, but instead he asserts that he would have used his allocution to ask to withdraw his guilty plea. However, as explained above, the district court determined that Chavez's plea was made voluntarily and knowingly. Thus, Chavez cannot demonstrate prejudice as a result of the failure to allow allocution because a plea of guilty may only be withdrawn upon a showing that the plea was not knowingly and voluntarily made. See Utah Code Ann. § 77-13-6 (2)(a) (Supp. 2007). As a result, any verbal motion Chavez may have made to withdraw his plea during allocution would have been futile.

The district court's dismissal of Chavez's petition for post-conviction relief is affirmed.

Pamela T. Greenwood,
Associate Presiding Judge

Judith M. Billings, Judge

James Z. Davis, Judge