

IN THE UTAH COURT OF APPEALS

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State of Utah,	)	MEMORANDUM DECISION	
	)	(Not For Official Publication)	
Plaintiff and Appellee,	)		
	)	Case No. 20090934-CA	
v.	)		
	)	F I L E D	
Kelly Tyson Davis,	)	(March 11, 2010)	
	)		
Defendant and Appellant.	)	<table border="1"><tr><td>2010 UT App 61</td></tr></table>	2010 UT App 61
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Second District, Ogden Department, 091901063  
The Honorable Scott M. Hadley

Attorneys: Samuel P. Newton, Centerville, for Appellant  
Mark L. Shurtleff and Marian Decker, Salt Lake City,  
for Appellee

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Before Judges Davis, McHugh, and Bench.<sup>1</sup>

PER CURIAM:

Appellant Kelly Tyson Davis appeals his conviction and sentence following a guilty plea. Davis filed a docketing statement raising a single issue, to wit: "Whether the defendant knowingly and voluntarily entered a guilty plea and whether the trial court committed plain error in failing to comply with Rule 11 of the Rules of Criminal Procedure." This court sua sponte moved for summary dismissal for lack of jurisdiction because Davis did not file a timely motion to withdraw his guilty plea. See generally State v. Grimmatt, 2007 UT 11, ¶ 8, 152 P.3d 306 ("Section 77-13-6(2)(b) [of the Utah Code] imposes a jurisdictional bar on late-filed motions to withdraw guilty pleas."); State v. Briggs, 2006 UT App 448, ¶ 6, 147 P.3d 969.

Davis concedes that he did not file a timely motion to withdraw his guilty plea. However, he asks the court to consider his challenge to the voluntariness of the plea, despite the jurisdictional bar imposed by case law. "[T]o challenge a guilty plea, a defendant must move to withdraw the plea prior to the trial court's announcement of sentencing." State v. Tenorio, 2007 UT App 92, ¶ 6, 156 P.3d 854. If a defendant fails to do so, the appellate court lacks jurisdiction to consider an appeal

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<sup>1</sup>The Honorable Russell W. Bench, Senior Judge, sat by special assignment pursuant to Utah Code section 78A-3-102 (2008) and rule 11-201(6) of the Utah Rules of Judicial Administration.

challenging a guilty plea. See id. ¶ 7. Therefore, any challenge to a guilty plea not made prior to sentencing "shall be pursued under [the] Post-Conviction Remedies Act, and Rule 65C, Utah Rules of Civil Procedure." Utah Code Ann. § 77-13-6(2)(c) (2008). Challenging a guilty plea based upon a claim of plain error does not overcome the jurisdictional bar resulting from the failure to make a timely motion to withdraw a guilty plea. See id. ¶ 9; see also State v. Melo, 2001 UT App 392, ¶ 4, 40 P.3d 646 (holding that the appellate court lacked jurisdiction to consider plain error and ineffective assistance of counsel claims due to defendant's failure timely to move to withdraw his guilty pleas). Because we lack jurisdiction to consider the challenge to the guilty plea, even when based upon a claim of plain error, we must dismiss the appeal insofar as Davis seeks to challenge his conviction on grounds that his guilty plea was not knowing and voluntary.

In his response to our sua sponte motion, Davis now raises additional claims that his sentence was excessive and that the district court did not consider all relevant factors in sentencing. A challenge only to Davis's sentence following his conviction is not subject to the jurisdictional bar resulting from his failure to file a timely motion to withdraw the guilty plea. Accordingly, we do have jurisdiction to review the challenge to the sentence. Therefore, we dismiss the appeal for lack of jurisdiction only insofar as it seeks to challenge the conviction on grounds that the guilty plea was not knowing and voluntary. We allow the appeal to proceed insofar as it appeals the sentence.<sup>2</sup>

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James Z. Davis,  
Presiding Judge

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Carolyn B. McHugh,  
Associate Presiding Judge

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Russell W. Bench,  
Senior Judge

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<sup>2</sup>As the State correctly notes, Davis can challenge his guilty plea in post-conviction proceedings. However, because a direct appeal is available in which to raise his sentencing challenges, he could be procedurally barred from joining that claim in a post-conviction proceeding. See Utah Code Ann. § 78B-9-106(1)(a) (2008) (barring relief upon any ground that "may still be raised on direct appeal").