

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20080668-CA
v.)	
)	F I L E D
David E. Epling,)	(April 22, 2010)
)	
Defendant and Appellant.)	2010 UT App 100

Fourth District, Provo Department, 061403432
The Honorable Samuel D. McVey

Attorneys: Elizabeth Hunt, Salt Lake City, for Appellant
Mark L. Shurtleff and Erin Riley, Salt Lake City,
for Appellee

Before Judges Davis, Thorne, and Roth.

PER CURIAM:

David E. Epling appeals his conviction and sentence following no contest pleas. Epling filed a rule 23B motion for remand. We requested that the parties file supplemental memoranda addressing whether this court has jurisdiction to consider Epling's challenges to his plea.

Utah Code section 77-13-6 requires that a defendant file a motion to withdraw his guilty or no contest plea before the sentence is announced. See Utah Code Ann. § 77-13-6(2)(b)(2008). "[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. "Sentence may not be announced unless the motion is denied." Utah Code Ann. § 77-13-6(2)(b). If a defendant fails to timely file a motion to withdraw his plea, this court lacks jurisdiction to consider his ineffective assistance of counsel claims as they pertain to the plea. See State v. Briggs, 2006 UT App 448, ¶ 6, 147 P.3d 969. The Utah Supreme Court has held that claims of ineffective assistance of counsel raised in the context of guilty or no contest pleas remain subject to the requirements of Utah Code section 77-13-6. See State v. Rhinehart, 2007 UT 61, ¶ 14, 167 P.3d 1046.

The record indicates that Epling withdrew his motion to withdraw his pleas before the district court ruled on the motion. Epling asserts that he withdrew his motion to withdraw his pleas based on the ineffective assistance of counsel. While the gravamen of Epling's claim is that his pleas were not knowing or voluntary and that the withdrawal of his motion prevented the court from addressing the issue and granting relief, he remains bound by the requirements of Utah Code section 77-13-6. See id. Epling responds that he filed a timely motion to withdraw his pleas. However, although Epling initially made a motion to withdraw his pleas, once Epling withdrew the motion, it ceased to have any legal effect. Consequently, Epling did not satisfy the requirements of Utah Code section 77-13-6(2). See Utah Code Ann. § 77-13-6(2).

This court lacks jurisdiction to consider challenges to Epling's pleas, even as they relate to the ineffective assistance of counsel. See Rhinehart, 2007 UT 61, ¶ 14. Thus, we are required to dismiss those portions of his appeal.¹ Epling's challenge to his sentence is not subject to the jurisdictional bar resulting from his noncompliance with section 77-13-6. Accordingly, Epling's appeal may proceed on issues pertaining to his sentence.

James Z. Davis,
Presiding Judge

William A. Thorne Jr., Judge

Stephen L. Roth, Judge

¹In so doing, Epling's motion for a rule 23B remand is necessarily denied.