IN THE UTAH COURT OF APPEALS

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State of Utah, Plaintiff and Appellee, v. Shelly Huynh, Defendant and Appellant.	)	MEMORANDUM DECISION (Not For Official Publication) Case No. 20051094-CA F I L E D (June 29, 2006) 2006 UT App 273

Fourth District, Provo Department, 001401103
The Honorable Lynn W. Davis

Attorneys: Aaron P. Dodd, Provo, for Appellant
Mark L. Shurtleff and Kris C. Leonard, Salt Lake City, for Appellee

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Before Judges Greenwood, Davis, and Thorne.

PER CURIAM:

Appellant Shelly Huynh appeals the Ruling on Defendant's Motion to Withdraw Plea, Motion to Change Plea and Motion to Dismiss.

Huynh was originally charged with a single count of aggravated arson, a first degree felony. On January 26, 2001, she pleaded guilty to one count of attempted arson, a third degree felony. On April 27, 2001, the district court sentenced her to an indeterminate term of no more than five years in prison, stayed that term, and placed her on probation. Both the caption and body of the sentencing order refer to the offense as "Attempted Aggravated Arson," a third degree felony. On June 27, 2001, the court entered a revised sentence incorporating a restitution amount and ordering the sentence to remain as previously imposed. On July 14, 2003, Huynh filed a notice of appeal, seeking to challenge her conviction. This court dismissed the appeal for lack of jurisdiction due to the untimely notice of appeal. See State v. Huynh, 2003 UT App 338 (per curiam). In 2004, the district court revoked Huynh's probation and reinstated her prison sentence. The judgment indicates that the offense was "Attempted Aggravated Arson (amended)," a third degree felony.

In July 2005, Huynh sought to withdraw her guilty plea on several grounds, including a claim that she actually entered a not guilty plea. She also claimed that she pleaded guilty to attempted arson, but the district court entered a guilty plea to attempted aggravated arson, which she claims rendered her guilty plea and resulting conviction invalid. The district court denied the motion for lack of jurisdiction because Huynh did not file a timely motion to withdraw her 2001 guilty plea. Because Huynh sought withdrawal of her guilty plea, instead of correction of the error in describing her offense, the court did not correct that error.[1]

Huynh now asserts that she entered a guilty plea to attempted arson, but she was illegally sentenced to attempted aggravated arson. On that basis, she contends that she is entitled to withdraw her plea and have her conviction vacated. There is no time limit for bringing a motion to correct an illegal sentence under rule 22(e) of the Utah Rules of Criminal Procedure. See Utah R. Crim. P. 22(e) ("The court may correct an illegal sentence, or a sentence imposed in an illegal manner, at any time."). However, Huynh is mistaken in her assertion that rule 22(e) provides a means to challenge her guilty plea and conviction. "A request to correct an illegal sentence presupposes a valid conviction." State v. Brooks, 908 P.2d 856, 860 (Utah 1995). "Therefore, issues concerning the validity of a conviction are not cognizable under rule 22(e)." Id. Because Huynh failed to file a timely motion to withdraw her guilty plea, the district court correctly concluded that it did not have jurisdiction to consider her motion. See State v. Reyes, 2002 UT 13,¶31, 40 P.3d 630 (holding that failure to file a timely motion to withdraw a guilty plea extinguishes the right to challenge the validity of the plea on appeal).

Huynh's reliance on State v. Arviso, 1999 UT App 381, 993 P.2d 894, is misplaced. In Arviso, the district court suspended a defendant's prison sentence on the condition that he remain out of the United States, which was an illegal sentence. Noting that an illegal sentence may be corrected at any time, we stated that a court retains jurisdiction over a defendant until a valid sentence is imposed. See id. at ¶8. However, we concluded that because the plea agreement in that case was based upon both

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[1]On stipulation of the parties, the district court later entered an order intended to correct the error. The district court's order describes the error as a "caption error." In fact, the error also appears in the body of the original sentence. Because Huynh did not appeal from the order or seek the remedy of correction of any error in sentencing orders, we do not consider any issues regarding that order in this appeal.

parties' mistaken assumption that the court could impose a particular sentence, the plea bargain could not be enforced. Id. at ¶10. The sentence in Huynh's case was a valid sentence for the third degree felony of attempted arson, and there is no demonstration that the plea bargain contemplated a particular sentence that later proved to be illegal.

We affirm the order of the district court.

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Pamela T. Greenwood,
Associate Presiding Judge

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James Z. Davis, Judge

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William A. Thorne Jr., Judge