

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20050746-CA
v.)	
)	F I L E D
Randall K. Johns,)	(December 14, 2006)
)	
Defendant and Appellant.)	2006 UT App 499

Second District, Ogden Department, 041903027
The Honorable Michael D. Lyon

Attorneys: Randall W. Richards, Ogden, for Appellant
Mark L. Shurtleff and Kenneth A. Bronston, Salt Lake
City, for Appellee

Before Judges Greenwood, Davis, and Orme.

ORME, Judge:

We have determined that "[t]he facts and legal arguments are adequately presented in the briefs and record[,] and the decisional process would not be significantly aided by oral argument." Utah R. App. P. 29(a)(3). Moreover, the issues presented are readily resolved under applicable law.

Defendant argues he was denied effective assistance of counsel because his trial counsel did not move to disallow Defendant's plea based on Defendant's incompetence. But "if a motion to withdraw a plea is not timely filed, this court does not have jurisdiction to review the plea, even on the basis of ineffective assistance of counsel." State v. Briggs, 2006 UT App 448, ¶6. Because no motion to withdraw the plea was filed in the instant case, we do not have jurisdiction over this appeal. "Therefore, Defendant's only remaining option is to raise this claim under the Post-Conviction Remedies Act and rule 65C of the Utah Rules of Civil Procedure." Id. Accord Utah Code Ann. § 77-13-6(2)(c) (Supp. 2006).

Defendant additionally argues that it was plain error for the trial court to fail to rule, sua sponte, that Defendant was

incompetent at the time he entered his plea. This argument is misplaced because the issue here is one of jurisdiction and not of preservation. See State v. Reyes, 2002 UT 13, ¶4, 40 P.3d 630. "This court may choose to review an issue not properly preserved for plain error. It cannot, however, use plain error to reach an issue over which it has no jurisdiction." Id. (citation omitted).

Accordingly, we dismiss Defendant's appeal. Given our lack of jurisdiction over this appeal, any correction of the sentencing error alleged by the State will need to be effected through other means.

Gregory K. Orme, Judge

WE CONCUR:

Pamela T. Greenwood,
Associate Presiding Judge

James Z. Davis, Judge