

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION	
)	(Not For Official Publication)	
Plaintiff and Appellee,)		
)	Case No. 20100150-CA	
v.)		
)	F I L E D	
Gene Vincent Wood,)	(April 15, 2010)	
)		
Defendant and Appellant.)	<table border="1"><tr><td>2010 UT App 93</td></tr></table>	2010 UT App 93
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Third District, Salt Lake Department, 011911361
The Honorable Ann Boyden

Attorneys: Gene Vincent Wood, Draper, Appellant Pro Se
Mark L. Shurtleff and Erin Riley, Salt Lake City, for
Appellee

Before Judges Orme, Thorne, and Roth.

PER CURIAM:

Gene Vincent Wood appeals the denial of a motion to withdraw a guilty plea as untimely. The case is before the court on a sua sponte motion for summary disposition.

In February 2002, Wood entered a guilty plea to manslaughter, a second degree felony. This resulted in entry of the Sentence, Judgment, and Commitment on July 31, 2002, which suspended a prison sentence and placed Wood on thirty-six months of probation. In September 2004, proceedings were commenced to revoke Wood's probation. In March 2005, Wood filed a motion to withdraw his February 2002 guilty plea. On July 1, 2005, the district court entered a judgment and sentence revoking Wood's probation and imposing the original prison sentence of one to fifteen years. We affirmed the decision revoking probation and imposing the original prison sentence. See State v. Wood, 2006 UT App 408U (mem.)(per curiam), cert. denied, 153 P.3d 185 (Utah 2007). In January 2008, Wood filed a Petition for Post-Conviction Remedies. In May 2009, the district court in the post-conviction remedies case ruled that the motion to withdraw the guilty plea was denied as time-barred. Wood filed a timely appeal, which was assigned our Case No. 20090303-CA and was later

dismissed for failure to prosecute.¹ On January 19, 2010, the district court in the underlying criminal case entered a decision on the motion to withdraw the guilty plea filed in 2005, ruling that it was untimely under any theory advanced by Wood. Wood filed this appeal from that ruling.

At the time that Wood entered his 2002 guilty plea, Utah Code section 77-13-6(2)(b) provided that "[a] request to withdraw a plea of guilty or no contest is made by motion and shall be made within 30 days after the entry of the plea." Utah Code Ann. § 77-13-6(2)(b) (1999). The Utah Supreme Court held that the statutory thirty-day limitation on the filing of a motion to withdraw a guilty plea ran from the date of entry of the final judgment and sentence. See State v. Ostler, 2001 UT 68, ¶¶ 10-11, 31 P.3d 528. A 2003 amendment to section 77-13-6(2), which became effective on May 5, 2003, rewrote subsection (2)(b) to provide, in relevant part, that "[a] request to withdraw a plea of guilty or no contest, except for a plea held in abeyance, shall be made by motion before sentence is announced." Utah Code Ann. § 77-13-6 (2008). Under the version of section 77-13-6 in effect at the time of Wood's 2002 guilty plea and sentencing, any motion to withdraw his guilty plea must have been filed within thirty days after the entry of the July 31, 2002 judgment and sentence. Wood's motion was not filed until March 2, 2005 and was therefore untimely.

Case law imposes a jurisdictional bar that precludes a trial court from considering an untimely motion to withdraw a guilty plea. See State v. Merrill, 2005 UT 34, ¶ 20, 114 P.3d 585. Therefore, the district court correctly denied Wood's motion as untimely. A defendant who fails to file a timely motion to withdraw a guilty plea may seek to challenge the guilty plea only through a petition for post-conviction remedies. See Utah Code Ann. § 77-13-6. Wood has also unsuccessfully challenged his guilty plea in a petition for post-conviction remedies. Accordingly, the district court in the underlying criminal case

¹The district court in the underlying criminal case directed that "[a]ny future filings arising from Wood's 2001 Homicide case must reflect the Post-Conviction Remedies case numbers." This direction was based upon "the Court of Appeals' filing instruction," referring to language in the letter sent to Wood when he filed an appeal in Case No. 20090303-CA, which was his appeal in the post-conviction remedies case. We clarify that the present appeal was opened based upon the receipt of a certified notice of appeal from the January 2010 ruling in the underlying criminal case. It would not have been viable to file a new notice of appeal under the number of the closed and remitted appeal in the post-conviction remedies case.

also correctly concluded that the ruling rejecting an untimely challenge to Wood's guilty plea in post-conviction proceedings barred relitigation of that claim under the res judicata doctrine.

In opposition to summary disposition, Wood contends that his motion to withdraw the guilty plea was timely. First, he claims that the July 2002 judgment and sentence imposing a one to fifteen year sentence, but suspending the prison term and placing Wood on probation, tolled or extended the time for filing a motion to withdraw his guilty plea. The assertion is without merit. Under the statute and case law in effect at both the time of the entry of Wood's guilty plea and his sentence, Wood must have filed a motion to withdraw his guilty plea within thirty days after entry of the judgment and sentence on July 31, 2002. Second, Wood contends that failure to rule on the untimely motion to withdraw his guilty plea prevented the district court from re-imposing the original prison sentence following his probation violation, although that revocation was affirmed on appeal. This contention is also without merit. Finally, Wood claims that his sentence was illegal due to claimed defects in his guilty plea. A challenge to an illegal sentence under Rule 22(e) of the Utah Rules of Criminal Procedure "presupposes a valid conviction," after which the court imposes a sentence that is illegal or imposed in an illegal manner. See State v. Brooks, 908 P.2d 856, 860 (Utah 1995). Accordingly, "rule 22(e) does not allow an appellate court to review the legality of a sentence when the substance of the appeal is not a challenge to the sentence itself, but to the underlying conviction." Id. Because the entirety of Wood's argument is a claim that the original 2002 guilty plea was invalid, we cannot consider those claims under the guise of a claim of illegal sentence.

Accordingly, we affirm.

Gregory K. Orme, Judge

William A. Thorne Jr., Judge

Stephen L. Roth, Judge