

2004

Utah v. Rey De La Cruz Lopez : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellant,	:	
v.	:	Case No. 20040816-CA
REY DE LA CRUZ LOPEZ,	:	
Defendant/Appellee.	:	

BRIEF OF APPELLANT

APPEAL FROM TRIAL COURT'S SUA SPONTE ORDER WITHDRAWING
DEFENDANT'S GUILTY PLEAS TO TWO COUNTS OF FORGERY, A THIRD
DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-6-501 (1999), IN
THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, THE
HONORABLE LEE A. DEVER PRESIDING

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FILED
UTAH APPELLATE COURTS

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IN THE UTAH COURT OF APPEALS

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REY DE LA CRUZ LOPEZ,	:	
Defendant/Appellee.	:	

BRIEF OF APPELLANT

JURISDICTION AND NATURE OF PROCEEDINGS

The State appeals from the trial court's sua sponte order withdrawing defendant's guilty pleas to two counts of forgery, a third degree felony. This Court has jurisdiction under Utah Code Ann. § 78-2a-3(2)(e) (2002).

ISSUES ON APPEAL AND STANDARD OF REVIEW

- I. Once the trial court announced sentence, did the court lose jurisdiction to withdraw defendant's guilty pleas, where the plea withdrawal statute provides that any request to withdraw a plea "shall be made by motion before sentence is announced"?**

Whether the trial court has subject matter jurisdiction presents a question of law reviewed for correctness. *Beaver County v. Qwest, Inc.*, 2001 UT 81, ¶ 8, 31 P.3d 1147. Similarly, the interpretation of a statute presents a question of law reviewed for correctness. *State v. Bluff*, 2002 UT 66, ¶ 31, 52 P.3d 1210, *cert. denied*, 537 U.S. 1172 (2003).

Preservation: The State preserved this claim by arguing, during the hearing on the trial court's sua sponte motion, "that there's [no] mechanism at this stage for the defendant" to withdraw his plea (R. 103:5). Even if the State's argument did not preserve this claim, "[o]bjection to the jurisdiction of the court over the subject matter may be urged at any stage of the proceedings, and the right to make such an objection is never waived." *James v. Galetka*, 965 P.2d 567, 570 (Utah App. 1998) (citations and internal quotation marks omitted).

II. Did the trial court abuse its discretion in sua sponte withdrawing defendant's guilty pleas, where nothing in the record demonstrates that defendant's pleas were unknowing or involuntary?

A trial court's grant or denial of a motion to withdraw a guilty plea is reviewed for abuse of discretion. *See State v. Lehi*, 2003 UT App 212, ¶ 7, 73 P.3d 985. However, whether the trial court applied the appropriate rule of law in reaching that decision is reviewed for correctness. *Cf. State v. Calliham*, 2002 UT 86, ¶ 24, 55 P.3d 573.

Preservation: This issue was preserved by the State's objections during the hearing on the trial court's motion (R. 103:3, 7).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following statutory provision is attached at Addendum A:

Utah Code Ann. § 77-13-6 (2003).

STATEMENT OF THE CASE AND FACTS

In April 1999, defendant presented an invalid social security number and a counterfeit residency card in order to secure a U.S. Department of Housing and Urban Development (HUD) guaranteed loan on a home (R. 102:7).

On March 19, 2004, defendant was charged with one count of forgery, a third degree felony, and one count of communications fraud, a second degree felony, or in the alternative, one count of theft by deception, also a second degree felony (R. 1-6).

On August 19, 2004, defendant entered into a plea agreement with the State in which the State agreed to amend the communications fraud count to a count of forgery and defendant agreed to plead guilty to two counts of forgery (R. 43-50; R. 102:2). The trial court then conducted a plea colloquy with defendant through an interpreter. During the colloquy, defendant confirmed that he understood the rights he was waiving by entering his pleas, the charges and penalties involved in the pleas, and the factual basis for the pleas (R. 102:4-7). Defendant also confirmed that, although the Statement of Defendant in Support of Guilty Plea and Certificate of Counsel was in English, not Spanish, his attorney had “[gone] through [the document] carefully with [him]” (R. 102:7-8). The trial court accepted defendant’s pleas (R. 102:4-9).

Defendant asked to be sentenced immediately (R. 102:9). His counsel explained, “[We’d] ask the Court to sentence him today, and I think that the State joins with me in this, basically just to turn the case over or not give him any more time, release him to the immigration customs enforcement officials for deportation to Mexico” (R. 102:10).

Before announcing sentence, the trial court addressed defendant directly: “If you are sentenced today then you are giving up the right to file a request to withdraw this guilty plea. Did you discuss that with [counsel]?” (R. 102:11). Defendant responded, “Yes,” and then confirmed that he wanted to be sentenced immediately (R. 102:11). The court further inquired, “You understand, sir, that if you are released to INS, then you are prohibited from coming back to this country if they deport you without their permission?” (R. 102:11). Defendant again responded, “Yes” (R. 102:11).

The trial court then sentenced defendant to two concurrent terms of zero-to-five years at the Utah State Prison, stayed imposition of those terms, placed defendant on probation, and authorized his release to the INS (R. 102:12). After also ordering restitution, the court announced, “We’ll be in recess” (R. 102:13).

In a minute entry entered the same day, the trial court noted, “Based upon information brought to the Court, the court sets aside defendant’s plea in this matter. Plea is stayed pending a hearing in this matter” (R. 51-53).

On August 23, 2004, the trial court held a hearing on the matter (R. 103). When the prosecutor indicated, “Your Honor, I’m not entirely sure what the current status is. I just got a call Friday saying show up today,” the court responded:

The current status is is [sic] that on Friday the record will indicate that Mr. Rey de la Cruz Lopez entered a plea to two third degree felonies, forgery charges. It’s been brought to the Court’s attention—in fact, we discussed this at the time that the plea form itself was in English and not in Spanish. Mr. de la Cruz is not fluent in English. This form was translated for him, but based upon information the Court received, I have serious concerns that Mr.

Lopez understands the ramifications of what he is doing and what a plea to these charges means to him.

(R. 103:2). Specifically, the court was concerned that “the plea here will eliminate the fact that he will be able to spend any time with his family for the rest of his life” (R. 103:3). Thus, the court determined, “it might be appropriate for the Court to set aside his plea in this case and allow this matter to proceed” (R. 103:2-3).

The State objected to the court’s sua sponte motion, arguing that “it’s the State’s position that defendant did know what he was doing based upon [defense counsel’s] representation and the Court’s colloquy with the defendant,” and that “[e]verybody knew, including the defendant, that the plea meant he would be deported” (R. 103:3). The State also questioned whether such deportation meant that defendant would not be able to see his family where he could either attempt to seek legal re-entry into the country or his family could visit him in Mexico (R. 103:3).

Defense counsel confirmed that he had reviewed the plea agreement with defendant (R. 103:4). However, counsel differed from the State concerning whether defendant would ever be allowed to re-enter the country after his pleas (R. 103:4). Thus, although defendant “isn’t sure what he wants to do in terms of allowing the Court to withdraw his guilty plea,” counsel concluded that, “given the Court’s concerns, it may be wise to have that reviewed by the defendant. I want to make sure that he understands the consequences” (R. 103:4, 6).

The State again objected “to reopening” defendant’s pleas (R. 103:7). The trial court acknowledged the State’s objections but ruled:

I believe that based upon everything that has been brought to the Court’s attention that Mr. Lopez was not fully informed in understanding—and had full understanding of the consequences of his act here, and I’m going to set aside his plea.

(R. 103:7).

The State filed a notice of appeal on September 21, 2004 (R. 69-70). The trial court entered a final order setting aside defendant’s pleas on October 6, 2004 (R. 84-85). The State filed an amended notice of appeal on October 19, 2004 (R. 86-87).

SUMMARY OF THE ARGUMENT

Under the former statute governing withdrawal of guilty pleas, Utah’s appellate courts held that a court lacks jurisdiction to consider motions to withdraw filed outside of the statutory thirty-day period. In 2003, the Legislature redefined the statutory period to expire upon announcement of sentence. Applying the prior law to the current statute, the trial court lacked jurisdiction to consider its sua sponte motion to withdraw because it was made after sentence had already been announced.

Alternatively, the trial court abused its discretion in setting aside defendant’s pleas because the court based its decision on concern that defendant may not have recognized all the collateral effects of his pleas. Under established case law, a defendant’s lack of knowledge of the collateral consequences of a plea does not render that plea unknowing or involuntary. In any case, the record demonstrates that defendant was aware of those

collateral consequences when he entered his pleas. Finally, to the extent the court's decision rests upon non-record evidence, it is error.

ARGUMENT

I. WHERE THE PLEA WITHDRAWAL STATUTE PROVIDES THAT MOTIONS TO WITHDRAW MUST BE MADE BEFORE ANNOUNCEMENT OF SENTENCE, THE TRIAL COURT LACKED JURISDICTION TO WITHDRAW DEFENDANT'S PLEAS ONCE SENTENCE WAS ANNOUNCED

Under the statute governing withdrawal of pleas (the "plea withdrawal statute"), the trial court lacked jurisdiction to set aside defendant's pleas once it announced sentences on those pleas. Thus, this Court should vacate the trial court's order setting aside defendant's pleas.

Before May 5, 2003, the plea withdrawal statute provided that "[a] request to withdraw a plea of guilty or no contest . . . shall be made within 30 days after the entry of the plea." Utah Code Ann. § 77-13-6(2)(b) (1999). In 1992, this Court held that the 30-day time limit in the statute was jurisdictional. *See State v. Price*, 837 P.2d 578, 583 (Utah App. 1992), *overruled on other grounds by State v. Ostler*, 2001 UT 68, ¶ 11, 31 P.3d 528. The supreme court reached the same conclusion one year later. *See State v. Abeyta*, 852 P.2d 993, 995 (Utah 1993) (per curiam) (holding that once thirty-day statutory period expires, "the right [to move to withdraw a plea] is extinguished"). Thus, under the former statute, "[i]f a defendant [was] informed of the statute's thirty-day deadline for filing a motion to withdraw a guilty plea, section 77-13-6(2)(b) [was] jurisdictional." *Price*, 837 P.2d at 583; *see also State v. Reyes*, 2002 UT 13, ¶¶ 3-4, 40

P.3d 630; *Ostler*, 2001 UT 68, ¶¶ 10-11 & n.3; *State v. Smit*, 2004 UT App 222, ¶ 26, 95 P.3d 1203; *State v. Melo*, 2001 UT App 392, ¶ 4, 40 P.3d 646; *State v. Tarnawiecki*, 2000 UT App 186, ¶ 10, 5 P.3d 1222, *abrogated on other grounds by State v. Reyes*, 2002 UT 13, ¶¶ 3-4, 40 P.3d 630; *State v. Canfield*, 917 P.2d 561, 562 (Utah App. 1996).

Effective May 2003, the Legislature amended the plea withdrawal statute to provide that “[a] request to withdraw a plea of guilty or no contest . . . shall be made by motion before sentence is announced. Sentence may not be announced unless the motion is denied.” Utah Code Ann. § 77-13-6(2)(b) (2003).

Having passed this amendment against the backdrop of *Price*, *Abeyta*, *Reyes*, and *Ostler*, the Legislature’s clear intent was to redefine the jurisdictional period in which a trial court may consider a motion to withdraw. *See Horton v. Royal Order of the Sun*, 821 P.2d 1167, 1169 (Utah 1991) (noting “legislature is presumed aware of legal context in which it acts”) (citing *Hackford v. Utah Power & Light Co.*, 740 P.2d 1281, 1284-85 (Utah 1987)); *State v. Hatch*, 342 P.2d 1103, 1105 (Utah 1959) (“The Legislature is presumed to know the construction placed upon the language of the act . . .”).¹

¹The Senate floor debates concerning the amendment are consistent with that intent. As Senator Gladwell explained in presenting the bill on the floor:

The plain language of the statute currently states that [defendant’s] must withdraw the plea within 30 days after the entry of the plea. It takes about six weeks from the time a person enters a plea until they are sentenced, so the statute has always anticipated that a person would enter a plea knowingly and voluntarily and then the plea would take effect prior to sentencing so that he couldn’t withdraw it unless there was some showing of lack of voluntariness or that he didn’t enter it knowingly. And of course, that’s challenged from

Thus, if the defendant is given proper notice, the trial court's jurisdiction to withdraw a guilty plea now expires upon announcement of sentence. *See State v. Helbach*, 2004 UT App 388, ¶ 7 (Oct. 28, 2004) (per curiam) (unpublished) (holding "trial court had no jurisdiction" to consider motion to withdraw filed after sentence was announced where statute "limits a defendant's right to withdraw a guilty plea to the time before the announcement of sentence") (attached at Addendum B); *see also State v. Peterson*, 2004 UT App 456, ¶ 4 (Dec. 2, 2004) (per curiam) (unpublished) ("The effect of section 77-13-6 is to grant a limited opportunity to withdraw a plea. If a motion to withdraw is not filed within the specified time frame, '[t]hereafter, the right is extinguished.'") (quoting *Abeyta*, 852 P.2d at 995) (attached at Addendum B).

In this case, defendant entered his guilty pleas on August 19, 2004, and asked to be sentenced immediately (R. 102:4-10). The trial court asked, "If you are sentenced today then you are giving up the right to file a request to withdraw this guilty plea. Did you discuss that with [counsel]?" (R. 102:11). Defendant responded, "Yes" (R. 102:11). The trial court then announced defendant's sentences, after which the court stated, "We'll be in recess" (R. 102:13).

time to time. The supreme court in 2001 decided that the plain reading of the statute didn't make sense so they decided that what the statute really meant is that they had 30 days after entry of the sentence to withdraw the plea. The purpose of this bill, one of the purposes, is to clarify that a plea must be withdrawn before sentencing is announced, to kind of reinstate that earlier language.

Tape 2 of Utah Senate Floor Debates, 56th Legislative, General Session (March 4, 2003) (statement of Sen. Gladwell discussing H.B. 238).

At that point, under section 77-13-6, as amended, the trial court lost jurisdiction to consider any motion to withdraw defendant's pleas. *See Helbach*, 2004 UT App 388, ¶ 7; *see also Reyes*, 2002 UT 13, ¶¶ 3-4; *Ostler*, 2001 UT 68, ¶¶ 10-11 & n.3; *Abeyta*, 852 P.2d at 995; *Smit*, 2004 UT App 222, ¶ 26; *Melo*, 2001 UT App 392, ¶ 4; *Tarnawiecki*, 2000 UT App 186, ¶ 10; *Canfield*, 917 P.2d at 562; *Price*, 837 P.2d at 583.

Consequently, the trial court lacked jurisdiction to grant its subsequent sua sponte motion to set aside defendant's pleas. This Court should therefore vacate the trial court's order and instruct the court to enter a final judgment consistent with defendant's pleas and the sentences announced thereon.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN SUA SPONTE WITHDRAWING DEFENDANT'S GUILTY PLEAS WHERE NOTHING IN THE RECORD DEMONSTRATES THAT DEFENDANT'S PLEAS WERE UNKNOWNING OR INVOLUNTARY

The trial court erred in granting its sua sponte motion to withdraw defendant's guilty pleas because nothing in the record established, as required by statute, that defendant's pleas were unknowing or involuntary.

Section 77-13-6(2)(a) of the Utah Code provides that "[a] plea of guilty . . . may be withdrawn only upon . . . a showing that it was not knowingly and voluntarily made." Utah Code Ann. § 77-13-6(2)(a) (2003).

A trial court's grant or denial of a motion to withdraw a guilty plea is reviewed for abuse of discretion. *See State v. Lehi*, 2003 UT App 212, ¶ 7, 73 P.3d 985. However, whether the trial court applied the appropriate rule of law is reviewed for correctness.

State v. Calliham, 2002 UT 86, ¶ 24, 55 P.3d 573. Moreover, an abuse of discretion occurs if the court’s ruling is “based purely on ‘unsupported generalizations and speculation.’” *In re Cruchelow*, 926 P.2d 833, 835 & n.4 (Utah 1996).

A. A defendant’s ignorance of the collateral consequences of his pleas does not render those pleas unknowing or involuntary.

Under authoritative Utah precedent, lack of knowledge about collateral consequences of a guilty plea, including those related to deportation, does not render that guilty plea unknowing or involuntary. Therefore, the trial court erred in setting aside defendant’s pleas based on concerns that defendant may not have understood the deportation-related consequences of his pleas.

In *State v. McFadden*, 884 P.2d 1303, 1304 (Utah App. 1994), *cert. denied*, 892 P.2d 13 (Utah 1995), the defendant claimed that the trial court erred in denying his motion to withdraw his plea. Specifically, McFadden “argue[d] that his guilty plea was not entered voluntarily or knowingly since he did not know of the possibility that he might be deported” *Id.*

In rejecting McFadden’s claim, this Court first noted that “[a]ctual knowledge of the collateral consequences of a guilty plea is not a prerequisite to the entry of a knowing and intelligent plea” *Id.* (quoting *United States v. Campbell*, 778 F.2d 764, 768 (11th Cir. 1965)).

This Court then noted that “[f]ederal courts have uniformly held that deportation is a collateral consequence of conviction and that the possibility of being deported does not affect the voluntariness of a guilty plea.” *Id.*

This Court was “persuaded by these federal authorities” and thus held, “as a matter of constitutional law, that the voluntariness of a plea is unaffected by collateral consequences such as possible deportation.” *Id.* at 1305 & n.2; *see also State v. Rojas-Martinez*, 2003 UT App 203, ¶ 7, 73 P.3d 967 (“[A]n attorney’s failure to inform a client of the deportation consequences of a guilty plea, *without more*, does not fall below an objective standard of reasonableness” where “deportation is a ‘collateral consequence’ of conviction”) (citation and internal quotation marks omitted), *cert. granted*, 80 P.3d 152 (Utah 2003); *El-Nobani v. United States*, 287 F.3d 417, 421 (6th Cir.), *cert. denied*, 537 U.S. 1024 (2002); *United States v. Amador-Leal*, 276 F.3d 511, 517 (9th Cir.), *cert. denied*, 535 U.S. 1070 (2002); *United States v. Gonzalez*, 202 F.3d 20, 27-28 (1st Cir. 2000); *United States v. Osiemi*, 980 F.2d 344, 349 (5th Cir. 1993); *United States v. Montoya*, 891 F.2d 1273, 1292-93 (7th Cir. 1989); *United States v. Romero-Vilca*, 850 F.2d 177, 179 (3d Cir.1988); *United States v. Campbell*, 778 F.2d 764, 767 (11th Cir. 1985); *United States v. Russell*, 686 F.2d 35, 39 (D.C. 1982); *Michel v. United States*, 507 F.2d 461, 464-66 (2d Cir. 1974); *Cuthrell v. Dir., Patuxent Inst.*, 475 F.2d 1364, 1366 (4th Cir. 1973); *State v. Nguyen*, 916 P.2d 689, 698 (Hawaii 1996); *Commonwealth v. Hason*, 545 N.E.2d 52, 54 (Mass. App. 1989); *People v. Ford*, 657 N.E.2d 265, 268 (N.Y. 1995); *State v. Jimenez*, 987 S.W.2d 886, 888-89 (Tex. Crim. App. 1999). *Cf. Broomes v.*

Ashcroft, 358 F.3d 1251, 1257 n. 4 (10th Cir.2004); *Kandiel v. United States*, 964 F.2d 794, 796 (8th Cir.1992).

The plea withdrawal statute and *McFadden* control the State's claim here. Under the plea withdrawal statute, a plea may only be withdrawn upon a showing that it was not knowing or voluntary. *See* Utah Code Ann. § 77-13-6(2)(a). Under *McFadden*, a defendant's lack of knowledge about the collateral consequences of his plea, including deportation-related consequences, does not render a plea unknowing or involuntary. *See* *McFadden*, 884 P.2d at 1304. Thus, lack of knowledge about the deportation-related consequences of a plea does not support withdrawal of that plea. *See* Utah Code Ann. § 77-13-6(2)(a); *McFadden*, 884 P.2d at 1304. Consequently, the trial court erred in setting aside defendant's pleas based on its concern that defendant did not understand those deportation-related consequences here.

B. Even if ignorance of collateral consequences did establish an unknowing and involuntary plea, the record shows that defendant was aware of those consequences in this case.

Even if ignorance of the deportation consequences of a plea could render a plea unknowing or involuntary, the trial court erred in withdrawing defendant's pleas because the record indicates that defendant was aware of those consequences here.

As previously stated, the plea withdrawal statute provides that "[a] plea of guilty . . . may be withdrawn only upon . . . a showing that it was not knowingly and voluntarily made." Utah Code Ann. § 77-13-6(2)(a); *see also* *State v. Humphrey*, 2003 UT App 333, ¶ 10, 79 P.3d 960 (holding, under prior statute requiring showing of good cause before

plea could be withdrawn, that “[a] defendant can show good cause *by putting forth evidence* that the plea was in fact involuntary”) (emphasis added).

In this case, the trial court set aside defendant’s pleas based on “serious concerns that Mr. Lopez [mis]understands the ramifications of what he is doing and what a plea to those charges means to him” (R. 103:2). Specifically, the court was concerned that, because the plea agreement was written in English, not Spanish, defendant may not have understood that “the plea here will eliminate the fact that he will be able to spend any time with his family for the rest of his life” (R. 103:2-3).

However, nothing in the record supports the trial court’s concern that defendant did not understand the plea agreement. Rather, as the State argued during the trial court’s hearing, the record establishes just the opposite. (*See* R. 102:7-8 (defendant confirming at plea hearing—at which defendant had the assistance of an interpreter—that, although the Statement of Defendant in Support of Guilty Plea and Certificate of Counsel was in English, not Spanish, his attorney had “[gone] through [the document] carefully with [him]”); R. 102:8 (defendant confirming at plea hearing that he had “[no] questions about what [he was] told by the interpreter about what that document says”); R. 102:8 (State noting that defense counsel “did take a fairly significant amount of time making sure his client did seem to understand the form”); R. 103:4 (defense counsel confirming “I did review the plea form with [defendant]”); R. 103:6 (second defense counsel stating “[w]e haven’t got into the aspect as to whether or not he completely understood the guilty plea form”)).

Moreover, neither the trial court nor defense counsel presented any evidence establishing or even suggesting that defendant would not be able to see his family again (R. 103:passim). Even assuming, as defense counsel did, that defendant's pleas would make it impossible for him to re-enter this country legally, the State noted without contradiction that, even if defendant were deported, nothing in defendant's pleas would stop his family from traveling to see him (*See* R. 103:3).

Finally, even assuming that defendant's pleas would make it impossible for him to re-enter this country legally, neither the trial court nor defense counsel presented any evidence establishing that defendant was unaware of that consequence when he entered his pleas (R. 103:passim). The only evidence on that issue was the record of the plea hearing, which established that defendant was in fact aware of that possible consequence (*See* R. 102:11 (court confirming that defendant understood "that if you are released to INS, then you are prohibited from coming back to this country if they deport you without their permission")). Thus, as the prosecutor argued in opposition to the trial court's sua sponte withdrawal motion, "[e]verybody knew, including the defendant, that the plea meant that he would be deported" (R. 103:3).

In sum, the trial court's withdrawal of defendant's pleas was not based on record evidence. Rather, it was based on unidentified information "brought to the Court's attention," which was itself contradicted by the record (*See* R. 51-53 (court referring in minute entry after announcement of sentence to "information brought to the Court")); R. 103:2 (court stating that "[i]t's been brought to the Court's attention" without indicating by

whom or how)) *Cf.* Utah Code Ann. § 77-13-6(2)(a) (“A plea of guilty . . . may be withdrawn only upon . . . *a showing* that it was not knowingly and voluntarily made.”) (emphasis added).

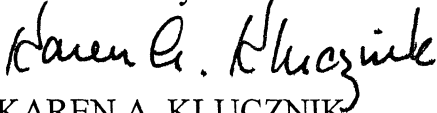
As such, the trial court’s order constituted an abuse of discretion. *See In re Cruchelow*, 926 P.2d at 835 & n.4 (holding trial court abused its discretion where ruling was “based purely on ‘unsupported generalizations and speculation’”). Thus, this Court should vacate the trial court’s order and instruct the court to enter a final judgment on defendant’s pleas and the sentences announced thereon.

CONCLUSION

Based on the foregoing, the State asks this Court to vacate the trial court’s order setting aside defendant’s guilty pleas and to order the trial court to enter a final judgment consistent with those pleas and the sentences announced by the court immediately after their entry.

RESPECTFULLY SUBMITTED 20 January 2005.

MARK L. SHURTLEFF
Utah Attorney General


KAREN A. KLUCZNIK
Assistant Attorney General

CERTIFICATE OF MAILING

I certify that on 20 January 2005, I caused to be delivered and/or mailed, by U.S. Mail, postage prepaid, two accurate copies of this ***BRIEF OF APPELLANT*** to DEBRA M. NELSON, Salt Lake Legal Defender Association, 424 East 500 South, Suite 300, Salt Lake City, Utah 84111, Attorney for Appellee.

Steven A. Huczyk

Addenda

Addendum A

77-13-6. Withdrawal of plea.

- (1) A plea of not guilty may be withdrawn at any time prior to conviction.
- (2) (a) A plea of guilty or no contest may be withdrawn only upon leave of the court and a showing that it was not knowingly and voluntarily made.
(b) 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. Sentence may not be announced unless the motion is denied. For a plea held in abeyance, a motion to withdraw the plea shall be made within 30 days of pleading guilty or no contest.
(c) Any challenge to a guilty plea not made within the time period specified in Subsection (2)(c) shall be pursued under Title 78, Chapter 35a, Post-Conviction Remedies Act, and Rule 65C, Utah Rules of Civil Procedure.

Addendum B

UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.

Court of Appeals of Utah.

STATE of Utah, Plaintiff and Appellee,
v.
Aaron L. HELBACH, Defendant and Appellant.

No. 20040671-CA.

Oct. 28, 2004.

Second District, Ogden Department; The
Honorable Roger S. Dutson.

Aaron L. Helbach, Gunnison, Appellant Pro Se.

Mark L. Shurtleff and Laura B. Dupaix, Salt Lake
City, for Appellee.

Before Judges BENCH, DAVIS, and ORME.

MEMORANDUM DECISION (Not For Official
Publication)

PER CURIAM:

*1 Aaron Helbach appeals the trial court's denial of his motion to be resentenced. This is before the court on the State's motion for summary disposition based on lack of jurisdiction.

Helbach pleaded guilty to a charge of aggravated robbery in August 2003. Helbach completed a statement in support of his guilty plea, giving the factual basis for his plea and waiving specific rights, including his right to appeal. The document also specified that he could withdraw his plea only on good cause shown, and that he must file a motion to withdraw his plea before the announcement of sentence. Helbach was sentenced in September 2003.

In March 2004, Helbach filed a motion for resentencing in the trial court in his criminal case. Helbach asserted that he was incompetent at the time of his plea, and thus the plea was invalid. The trial court denied the motion on its merits, finding there was no indication that Helbach was not fully capable of entering a knowing and voluntary plea, and that the mental evaluation from the State did not indicate any disorder that would impact his competency. The trial court also noted the motion was filed several months after sentencing, but did "not address [the] timeliness of the Motion."

Helbach asserts that his motion was filed "under the philosophy" of *State v. Rees*, 2003 UT App 4, 63 P.3d 120, *cert. granted*, 73 P.3d 946 (Utah 2003), which permitted a defendant to file a motion for resentencing in the sentencing court under particular circumstances. Helbach has apparently seized on *Rees* to avoid going through the procedures for post-conviction relief as set forth in the Utah Post-Conviction Remedies Act (Act), Utah Code sections 78-35a-101 to -304 (2002), and Utah Rule of Civil Procedure 65C. However, after *Rees*, this court has held that requests to be resentenced to permit a renewal of an opportunity to appeal fall squarely within rule 65C and the Act. *See State v. Manning*, 2004 UT App 87, ¶ 21, 89 P.3d 196, *cert. granted*, 2004 Utah LEXIS 172 (Utah Aug. 11, 2004).

Additionally, Helbach has not shown that he comes within the scope of *Rees*. In *Rees*, this court held that extraordinary relief may be available in the sentencing court if a defendant has been denied the effective assistance of counsel on appeal. *See Rees*, 2003 UT App 4 at ¶ 6. Such relief, however, is available only in "limited circumstances, to modify or vacate a judgment where extra-record facts show that the defendant has been deprived of his constitutional right to a fair trial or meaningful appeal." *Id.* at ¶ 13. Helbach waived his right to a trial and appeal by pleading guilty and does not come within the narrow scope of *Rees*.

Instead, Helbach's motion is governed by Utah

Code section 77-13-6, providing for the methods of challenging a guilty plea. Section 77-13-6 provides that a guilty plea "may be withdrawn only upon leave of the court and a showing that it was not knowingly and voluntarily made." Utah Code Ann. § 77-13-6(2)(a) (2003). A request to withdraw a plea "shall be made by motion before sentence is announced." *Id.* § 77-13-6(2)(b). If a defendant does not timely request to withdraw his plea, any challenge to the plea must be made pursuant to rule 65C and the Act. *See id.* § 77-13-6(2)(c).

*2 Helbach's motion requested resentencing, but attacked the validity of his plea, arguing he was incompetent. The trial court addressed the merits, finding that Helbach was not incompetent at his plea. The trial court also noted, but did not rule on, the late filing of the motion. In substance, Helbach's motion was a motion to withdraw his plea, and the trial court considered it as such. However, under section 77-13-6, the trial court had no jurisdiction to consider the motion because it was made months after sentence was announced. Section 77-13-6 limits a defendant's right to withdraw a guilty plea to the time before the announcement of sentence. *See id.* § 77-13-6(2)(b). "Thereafter, the right is extinguished." *State v. Abeyta*, 852 P.2d 993, 995 (Utah 1993) (holding that failure to file a timely motion for withdrawal extinguishes the right). The timely filing of a notice to withdraw a plea is jurisdictional. *See State v. Reyes*, 2002 UT 13, ¶¶ 3-4, 40 P.3d 630.

The trial court lacked jurisdiction over Helbach's motion, and thus this court likewise lacks jurisdiction over this appeal. *See State v. Montoya*, 825 P.2d 676, 678-79 (Utah Ct.App.1991). Accordingly, this appeal is dismissed.

2004 WL 2404373 (Utah App.), 2004 UT App 388

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UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.

Court of Appeals of Utah.

STATE of Utah, Plaintiff and Appellee,

v.

Joseph C. PETERSON, Defendant and Appellant.

No. 20040797-CA.

Dec. 2, 2004.

Third District, Salt Lake Department; The
Honorable Deno Himonas.

Joseph C. Peterson, Eloy, Arizona, Appellant Pro
Se.

Before Judges BILLINGS, BENCH, and ORME.

MEMORANDUM DECISION (Not For Official
Publication)

PER CURIAM:

*1 Joseph Peterson appeals the trial court's order summarily dismissing his petition for coram nobis. This is before the court on its own motion for summary disposition.

Peterson pleaded guilty to a third degree felony charge in 1998. His sentence was suspended and he was put on probation. His probation terminated in June 2003. In July 2004, Peterson filed his petition for coram nobis alleging that he received ineffective assistance of counsel and that his plea and conviction should be vacated.

The petition was filed in the sentencing court under the same criminal case number rather than as a new case under rule 65C of the Utah Rules of Civil Procedure. The trial court could have considered the petition substantively as a motion to withdraw

Peterson's plea, or as a post-conviction petition pursuant to rule 65C. The specific basis for the trial court's dismissal is unclear. It appears from the record, however, that Peterson's petition was procedurally barred whether construed as a post-conviction petition or as a motion to withdraw a plea.

Pursuant to the version of Utah Code section 77-13-6 in effect at the time of Peterson's plea, a motion to withdraw a plea must be made within thirty days after the entry of the plea. *See* Utah Code Ann. § 77-13-6(2)(b) (1994). The effect of section 77-13-6 is to grant a limited opportunity to withdraw a plea. If a motion to withdraw is not filed within the specified time frame, "[t]hereafter, the right is extinguished." *State v. Abeyta*, 852 P.2d 993, 995 (Utah 1993). If the trial court considered Peterson's petition as a motion to withdraw his plea, the trial court correctly dismissed the petition as untimely.

Alternatively, if the trial court considered the petition as a post-conviction petition pursuant to the Post-Conviction Remedies Act (Act), *see* Utah Code sections 78-35a-101 to -110 (2002), and rule 65C, then Peterson's petition was also time barred. Under the Act, a defendant must file a petition within one year after the cause of action has accrued. *See* Utah Code Ann. § 78-35a-107(1). A cause of action may accrue on "the date on which petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based." *Id.* § 78-35a-107(1)(e). Peterson filed his petition more than one year after his case was closed and his sentence terminated, and almost six years after his plea. He asserts that his claim is based on facts that were unknown to him. However, he does not provide dates or factual support for this assertion. Thus, Peterson has not alleged sufficient facts to show that he has timely filed his petition.

Because Peterson's petition was untimely either as a post-conviction petition or as a motion to withdraw his plea, the trial court correctly dismissed

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the petition.

Accordingly, the dismissal of Peterson's petition is affirmed.

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