ENTRY ORDER

2003 VT 21

SUPREME COURT DOCKET NO. 2002-218

JANUARY TERM, 2003

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 3, Washington Circuit
Dana B. Martin	}	
	}	DOCKET NO. 1553-11-00 Wncr
		Trial Judge: M. Patricia Zimmerman

In the above-entitled cause, the Clerk will enter:

¶ 1. Defendant Dana B. Martin appeals from a district court order denying his motion to withdraw a guilty plea. Defendant contends that the trial court erred in concluding that he was "in custody under sentence," and therefore ineligible to withdraw his plea under V.R.Cr.P. 32(d), because the court at the change of plea hearing (1) failed to sign the judgment of conviction and (2) failed to order and review a presentence investigation report (PSI). We affirm.

¶ 2. On June 1, 2001, pursuant to a negotiated plea agreement, defendant entered a guilty plea to the murder of Deandra Florucci. At the change of plea hearing, the trial court reviewed with defendant each of his constitutional rights. Defendant assured the court that he understood and voluntarily waived those rights, that he was not under the influence of drugs, that he was acting voluntarily, that he understood his attorney's advice, and that he wished to plead guilty. Defendant then executed a four-page petition to enter a plea of guilty setting forth in detail the rights he waived. The trial court dispensed with a presentence investigation report and noted this in the change of plea document.

¶ 3. Based on the plea agreement, the court sentenced defendant to serve thirty-five years to life in prison, and informed defendant at the conclusion of the hearing that he was "in execution" of his sentence. The court issued a mittimus ordering defendant committed to the custody of the Department of Corrections to begin serving his sentence. In addition, the clerk entered judgment on the docket record, but the trial judge did not sign the judgment at that time.

¶ 4. On July 6, 2001, defendant filed a motion to withdraw his guilty plea. Defendant claimed that when he changed his plea, he was under the influence of an unknown drug given

to him by a fellow inmate, that he was pressured by his attorney to plead guilty, and that he did not understand the judge's questions. Following a hearing in April 2002, the court found that defendant was "in custody under sentence," and concluded that it lacked jurisdiction under V.R.Cr.P. 32(d) to hear defendant's motion.[1] See State v. Wargo, 168 Vt. 231, 233, 719 A.2d 407, 409 (1998) ("[W]here post-conviction relief was available to the defendant under 13 V.S.A. § 7131, the district court was without jurisdiction to consider a Rule 32(d) motion."). This appeal followed.

¶ 5. On appeal, defendant renews two arguments that he raised below relating to his "in custody under sentence" status pursuant to V.R.Cr.P. 32(d). First, he maintains that the court's failure to sign the judgment of conviction until April 2002 resulted in his not being "in custody under sentence" at the time he filed the motion to withdraw, and thus, the trial court still had jurisdiction. Defendant's status is a question of law, and therefore entitled to plenary and non-deferential review. Searles v. Agency of Transp., 171 Vt. 562, 562, 762 A.2d 812, 813 (2000) (mem.).

¶ 6. The plain language of V.R.Cr.P. 32(d) prohibits a defendant from filing a motion to withdraw a guilty plea when he or she is "in custody under sentence." Wargo, 168 Vt. at 233, 719 A.2d at 409. A defendant in custody under sentence may seek post-conviction relief under 13 V.S.A. § 7131, which in part provides, "[a] prisoner who is in custody under sentence of a court and claims the right to be released . . . may at any time move the superior court of the county where the sentence was imposed to vacate, set aside or correct the sentence."

¶ 7. The record here indicates that defendant was validly "in custody under sentence" when he moved to withdraw his plea. The court entered an express adjudication of guilt, sentenced defendant to thirty-five years to life, and stated "[y]ou're in execution of your sentence."[2] See State v. Yates, 169 Vt. 20, 22, 726 A.2d 483, 485 (1999) ("As we recently held in Wargo, a defendant is 'in custody under sentence' only when the custody is pursuant to a sentence imposed by the court."); Wargo, 168 Vt. at 235, 719 A.2d at 410 ("The relevant question is not whether defendant is incarcerated or placed on probation, but whether the trial court has imposed sentence."). Defendant cites no authority, and we have found none, to support his claim that the absence of a signed judgment of conviction somehow undermines the

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[1] V.R.Cr.P. 32(d) states in part: "[a] motion to withdraw a plea of guilty or of nolo contendere may be made only by a defendant who is not in custody under sentence."

[2] Contrary to the State's contention, the facts of this case do not necessitate the consideration of Administrative Order 26, which provides that any judgment in a criminal case "generated by an oral order of the judge made on the record and entered electronically may be signed in the name of the judge by a clerk or designee, or the judge's signature may be affixed by facsimile or other electronic means."

validity of his sentence. The change of plea hearing and contemporaneous docket entry of the adjudication of guilt leaves no doubt as to the validity of the conviction and sentence. Accordingly, we discern no basis to conclude that defendant was not "in custody under sentence" when he moved to withdraw his plea.

¶ 8. Defendant next argues that he was not "in custody under sentence" because the court failed to order a PSI. Under V.R.Cr.P. 32(a)(1)(A), prior to sentencing the court must "determine that the defendant and his counsel have had the opportunity to read and discuss the presentence investigation report." The court, however, has discretion to dispense with the report "if the defendant has two or more felony convictions." V.R.Cr.P. 32(c)(1)(B). Recently, we held that while "it may have been the better practice for the court to have ordered a PSI," the court did not err in failing to do so where the defendant did "not challenge the court's finding that he had 'two or more felony convictions,' " failed "to demonstrate – or even allege – how the lack of a PSI prejudiced him," and made no showing "that he was sentenced on the basis of unreliable or insufficient information." State v. LeClaire, No. 01-411, slip op. at 10 (Vt. Jan. 24, 2003). Here, the court was not required to order a PSI for defendant, who had two prior felony convictions. Defendant has not demonstrated that the court's failure to order a PSI somehow invalidated his sentence.

¶ 9. Defendant also contends that the court was required to issue a statement of the reasons for not ordering a PSI. While this is a requirement under Federal Rule of Criminal Procedure 32(c)(1)(A)(ii), it is not a requirement under V.R.Cr.P 32(c). Therefore, we conclude the court properly denied defendant's motion to withdraw his plea.

Affirmed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Frederic W. Allen, Chief Justice (Ret.)
Specially Assigned