

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-392

APRIL TERM, 2008

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 2, Chittenden District
	}	
Larkin Forney	}	DOCKET NO. 7069-11-02 CnCr

Trial Judge: Cortland T. Corsones

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

Defendant appeals the district court's denial of his motion to withdraw from a plea agreement. The district court concluded that defendant's motion was untimely because his sentence included a term of imprisonment and the motion was filed more than thirty days after entry of judgment. We vacate the court's order because we conclude that the court lacked jurisdiction to entertain defendant's motion.

In November 2002, defendant was charged with violations of conditions of release. On March 30, 2005, defendant entered a plea of guilty pursuant to a global plea agreement with the State.* The district court accepted the plea. On July 13, 2005, the court entered judgment against defendant and sentenced defendant to one to two months all suspended except one month. Defendant was placed on probation with various conditions. In May 2007, defendant admitted to a violation of his probation and was sentenced to forty-two days and again placed on probation. On July 31, 2007, defendant filed a motion to withdraw from his plea agreement. Therefore, the record reveals that at the time defendant filed his motion to withdraw he was on probation. On August 9, 2007, the district court denied defendant's motion, concluding that it was untimely filed.

On appeal, defendant makes several arguments as to why his plea is invalid and should be withdrawn. At oral argument, defendant raised additional arguments attacking the validity of his

* Although defendant cited only docket number 7069-11-02 CnCr on his notice of appeal, his trial court filings indicate that he wished to withdraw his plea on all of the dockets involved in this global plea agreement, including trial court docket numbers 7379-11-02, 6773-10-02, 2812-5-03, 2837-5-03, 6954-11-02, and 7170-11-02 CnCr. Our conclusion that the district lacked jurisdiction to entertain defendant's motion to withdraw applies equally to all of the dockets involved in the plea agreement because defendant was on probation on all of the underlying charges at the time he filed his motion to withdraw.

plea agreement. We do not reach the substance of defendant's claims because we conclude that the court lacked jurisdiction to entertain defendant's motion.

Vermont Rule of Criminal Procedure 32(d) provides:

A motion to withdraw a plea of guilty . . . may be made only by a defendant who is not in custody under sentence. The motion must be made prior to or within 30 days after the date of entry of judgment, except that a defendant whose sentence does not include a term of imprisonment may make the motion at any time.

Rule 32(d) is intended to complement the post-conviction relief (PCR) statute that provides an avenue for individuals who are "in custody under sentence" to challenge their sentence. 13 V.S.A. § 7131; see State v. Wargo, 168 Vt. 231, 233 (1998) (explaining that "Rule 32(d) was not intended to provide a procedure for obtaining post-conviction relief separate and apart from the post-conviction relief statute"). "[A] defendant need not be incarcerated to be deemed in custody for purposes of V.R.Cr.P. 32(d); rather, the test is whether the defendant has had a significant restraint imposed on his or her personal liberty." State v. Brooks, 170 Vt. 597, 598 (2000) (mem.). In Wargo, we concluded that "[m]andatory supervision by judicial officers coupled with the possibility of imminent incarceration without a formal trial and criminal conviction are sufficient restrictions of a defendant's liberty to constitute custody." 168 Vt. at 234.

In this case, we similarly conclude that defendant was in custody under sentence when he moved to withdraw his plea, because he was under "[m]andatory supervision by judicial officers" and "faced with the possibility of imminent incarceration without a formal trial." Id. Thus, the district court lacked jurisdiction to entertain defendant's motion to withdraw his plea. See Brooks, 170 Vt. at 599 (concluding that "because defendant was in custody under sentence when he brought his motion to withdraw, the court had no jurisdiction to hear the motion" and explaining that his proper avenue for relief was through the PCR statute).

Order vacated and cause remanded for entry of an order dismissing the motion for lack of jurisdiction.

BY THE COURT:

Paul L. Reiber, Chief Justice

Denise R. Johnson, Associate Justice

Brian L. Burgess, Associate Justice