

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

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2009-413

OCTOBER TERM, 2010

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 3, Franklin Circuit
	}	
Mark Mumley	}	DOCKET NO. 1125-9-08 Frcr

Trial Judge: A. Gregory Rainville

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

Defendant appeals pro se from a district court order denying his motion to withdraw a no-contest plea to a charge of receiving stolen property. We affirm.

In September 2008, defendant was charged with one count of receiving stolen property. He was on furlough release at the time and was returned to prison. In September 2009, defendant, with the assistance of appointed counsel, entered a negotiated plea of no contest to the charge and received a sentence of one to five years, all suspended except for one year to serve, to run consecutively to a sentence defendant was already serving. About a month later, while incarcerated, defendant filed a pro se motion to withdraw his plea, asserting what appear to be claims of ineffective assistance of counsel and malicious prosecution, and a violation of his right to a speedy trial, among other assertions. The trial court denied the motion in a brief entry order, finding “no basis cited that justifies granting [the] request.” This appeal followed.

The rule governing withdrawal of pleas provides, in pertinent part, that “[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.” V.R.Cr.P. 32(d). As we have explained with respect to this provision, “we read the rule according to its terms: under V.R.Cr.P. 32(d), a defendant who is in custody under sentence may not file a motion to withdraw his or her guilty plea.” State v. Brooks, 170 Vt. 597, 599 (2000) (mem.). As we have further explained, a trial court, in these circumstances, “ha[s] no jurisdiction to hear the motion.” Id.

As the record here discloses that defendant was “in custody under sentence” when he brought his motion to withdraw, the trial court lacked jurisdiction to consider it. Accordingly, although it appears that the court considered and rejected the merits of the claims, however

briefly, we conclude that the proper disposition was to dismiss the motion for lack of jurisdiction, and the judgment is affirmed on that basis.

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice

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Brian L. Burgess, Associate Justice