

NOT FINAL UNTIL TIME EXPIRES FOR REHEARING AND, IF FILED, DETERMINED

**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR PASCO COUNTY
APPELLATE DIVISION**

**RICHARD WALTON, JR.,
Appellant,**

**UCN: 512016CF3763A000WS
Appeal No.: CRC16003763CFAWS
L.T. No: 12-5638XBOT-WS**

v.

**STATE OF FLORIDA,
Appellee.**

_____/
On appeal from Pasco County Court,
Honorable Debra Roberts,

Elaine L. Cooper, Esq.,
for Appellant,

Office of the State Attorney,
for Appellee.

ORDER AND OPINION

Appellant did not preserve his right to appeal his original plea because a proper motion to withdraw his plea was never timely filed after his sentence. Appellant is unable to overcome this procedural hurdle. The order of the trial court is affirmed.

STATEMENT OF THE CASE AND FACTS

Appellant seeks to challenge his sentence for violation of probation, alleging that his original plea was defective in that he did not validly waive his right to counsel. Appellant claims that the trial court is precluded from issuing a penalty that was not available for the underlying offense, and as such, appeals his sentence.

The uncontested facts presented by Appellant are as follows. On September 25, 2012, Appellant was arrested and charged with a violation of Section 316.193, Florida Statutes. On November 29, 2012, Appellant appeared at first appearance with a group of other defendants. The trial judge provided a general advisement to all defendants in the courtroom. Appellant waived his right to an attorney, and thus did not have the benefit of counsel before arraignment, during arraignment, or at the time he reviewed his plea form.

Appellant pled no contest, and based on the plea colloquy, Appellant was sentenced to twelve months' probation.

On February 20, 2016, Appellant was served with an affidavit of violation of probation. Appellant filed a motion seeking to have the trial court certify that no jail time would be imposed upon the revocation because Appellant's original plea was defective, and that Appellant did not validly waive his right to counsel. After a partial hearing, the motion was denied. Appellant entered a plea admitting to the violation and preserving his right to challenge his sentence. This timely appeal followed. Appellee does not dispute the facts, but argues instead that Appellant's claim is procedurally barred.

STANDARD OF REVIEW

Pursuant to Florida Rule of Appellate Procedure 9.140(b)(2)(A)(ii), a defendant who enters a guilty or nolo contendere plea and who has not specifically reserved his or her right to appeal a pre-plea ruling of the trial court may challenge on appeal solely (1) the trial court's lack of subject matter jurisdiction; (2) the violation of the plea agreement, if preserved by a motion to withdraw the plea; (3) an involuntary plea, if preserved by a motion to withdraw the plea; and (4) a sentencing error, if preserved. *Biggs v. State*, 24 So. 3d 797, 798 (Fla. 2d DCA 2010); *Robinson v. State*, 373 So.2d 898 (Fla.1979). Put another way, a motion to withdraw a guilty plea is a prerequisite to a direct appeal challenging the voluntariness of that plea. *Counts v. State*, 376 So.2d 59, 60 (Fla. 2d DCA 1979); Fla. R. App. P. 9.140(b)(2)(A) (a defendant "may not appeal from a guilty or nolo contendere plea" unless the defendant "expressly reserve[s] the right to appeal a prior dispositive order of the lower tribunal").

The legality of a sentence presents a question of law and is reviewed *de novo*. *Washington v. State*, 199 So. 3d 1110, 1111 (Fla. 1st DCA 2016) (citing *Clowers v. State*, 31 So.3d 962, 966 (Fla. 1st DCA 2010)).

LAW AND ANALYSIS

Florida Rule of Appellate Procedure 9.140(b)(2)(A) reads in relevant part:

A defendant *may not appeal* from a guilty or nolo contendere plea *except as follows*:

- (i) A defendant who pleads guilty or nolo contendere may expressly reserve the right to appeal a prior dispositive order of the lower tribunal, identifying with particularity the point of law being reserved.

- (ii) A defendant who pleads guilty or nolo contendere may otherwise directly appeal only
- a. the lower tribunal's lack of subject matter jurisdiction;
 - b. a violation of the plea agreement, if preserved by a motion to withdraw plea;
 - c. an involuntary plea, *if preserved by a motion to withdraw plea*;
 - d. a sentencing error, if preserved; or as otherwise provided by law.

Fla. R. App. P. 9.140 (emphasis added). Furthermore, The Florida Supreme Court has held that:

[A]n appeal from a guilty plea should never be a substitute for a motion to withdraw a plea. If the record raises issues concerning the voluntary or intelligent character of the plea, that issue should first be presented to the trial court in accordance with the law and standards pertaining to a motion to withdraw a plea.

Robinson, 373 So. 2d at 902. Lastly, before raising the issue of a voluntary and intelligent plea on appeal, “the defendant must first file with the trial court a motion to withdraw the plea.” *Burns v. State*, 884 So. 2d 1010, 1013 (Fla. 4th DCA 2004).

Appellant did not preserve his right to appeal his original plea because a proper motion to withdraw his plea was never timely filed after his sentence. Because the Florida Rules of Criminal Procedure require the filing of a motion to withdraw a plea within thirty days of rendition of the sentence, Appellant was limited to filing a motion to vacate, set aside, or correct sentence after the sentencing on his violation of probation. Appellant does not address the issue of the procedural bar, and thus, the ruling of the trial court must be affirmed.

CONCLUSION

It is ORDERED AND ADJUDGED that the order of the trial court is hereby AFFIRMED.

DONE AND ORDERED in Chambers at New Port Richey, Pasco County, Florida on this ____ day of _____, 2017.

Original Order entered on October 3, 2017, by Circuit Judges Susan Barthle, Shawn Crane, and Linda Babb.

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