

ORIGINAL

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01/24/2023
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Bowen Greenwood
Bowen Greenwood COURT
CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 21-0425

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 21-0425

FILED

NOV 22 2022

Bowen Greenwood
Clerk of Supreme Court
State of Montana

JAY DONALD WITKOWSKI,

Petitioner and Appellant,

v.

ORDER

STATE OF MONTANA,

Respondent and Appellee.

Before this Court are Jay Donald Witkowski’s Motion to Withdraw Guilty Plea and to Dismiss the Charges and the response, filed by the State of Montana.

Witkowski moves this Court to withdraw his guilty plea because he has and is “being denied access to evidence the State used against [him].” He puts forth that he has been denied a copy of the surveillance video from Valley County Jail, the day of the attempted escape in August 2017. He states that he has never seen the video and denial of this “evidence” violates his due process.

The State responds that Witkowski’s motion is not properly before this Court. The State points out that, pursuant to § 46-16-105(2), MCA, Witkowski must seek a withdrawal of his guilty plea in the District Court and within one year from when the conviction becomes final. The State adds that his conviction became final on April 23, 2019. The State also summarizes the facts found in the affidavit concerning Witkowski’s charges of escape and aggravated kidnapping of a jail employee. The State concludes that Witkowski’s motion should be denied without consideration.

We agree with the State. Witkowski’s relief is not with this Court and not by this motion. Therefore,

IT IS ORDERED that Witkowski’s Motion to Withdraw the Guilty Plea and to Dismiss the Charges is DENIED.

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IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0425

JAY DONALD WITKOWSKI,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

**STATE'S RESPONSE TO MOTION TO WITHDRAW
GUILTY PLEA AND DISMISS CHARGES**

The Appellee, State of Montana, submits this response to Appellant's motion to withdraw guilty plea and dismiss charges.

BACKGROUND

The Appellant, Jay Donald Witkowski, pled guilty in Valley County Cause No. DC 17-35 to aggravated kidnapping. The court issued a judgment on February 22, 2018. He subsequently filed a petition for postconviction relief, which the court denied.

Witkowski appealed the denial of his petition for postconviction relief in this case, DA 21-0425. While his appeal was pending, he requested that this Court allow him access to a video of his attempted escape from the Valley County Detention Center. *Witkowski v. State*, DA 21-0425, Motion to Compel the 17th Judicial Court to allow me access and send copy of surveillance/jail video of attempted Escape, filed October 3, 2022. This Court denied the motion, noting that it did not have the video and this is an appellate court that reviews the records submitted from the district court. *Witkowski v. State*, DA 21-0425, Order, (Mont. Sup. Ct. Nov. 1, 2022).

Witkowski's appeal is still pending. The State has not yet filed its response brief, but will do so within the next week.

ARGUMENT

Witkowski's motion is improper and should not be considered on the merits.

*Miscarriage
of Justice
Since
When do
we not
consider
the merits*

The process for withdrawing a guilty plea is set out in Mont. Code Ann. § 46-16-105(2), which provides that

At any time before judgment or, except when a claim of innocence is supported by evidence of a fundamental miscarriage of justice, within 1 year after judgment becomes final, the court may, for good cause shown, permit the plea of guilty or nolo contendere to be withdrawn and a plea of not guilty substituted.

The motion to withdraw a guilty plea must be filed in the district court where the plea was entered. As this Court noted in its Order denying Witkowski's motion for the video, this is an appellate court that reviews the decisions of the district court. Therefore, the motion filed in this Court is improper and should be denied.

Further, the motion is untimely. Montana Code Annotated § 46-16-105(2) requires that a motion to withdraw a guilty plea be filed within one year after the judgment becomes final unless a claim of innocence is supported by evidence of a fundamental miscarriage of justice. Witkowski's conviction became final 60 days after his judgment was issued because he did not file a timely appeal. Mont. Code Ann. § 46-16-105(2). As such, it became final on April 23, 2018, and his time for filing a motion to withdraw his guilty plea expired a year later on April 23, 2019.

His motion was filed in this Court on November 7, 2022, more than three years after his time to file such a motion expired.

Witkowski has not provided any evidence indicating that the actual innocence exception applies to him. There is no indication that the surveillance video he requests would demonstrate that he did not commit aggravated kidnapping. Although counsel for the State does not know whether a video ever existed or still exists or what the purported video contained, Witkowski's allegations do not contradict the allegations in the affidavit in support of the Information, and those facts were sufficient to support a conviction for aggravated kidnapping. According to the affidavit, Witkowski's codefendant pinned the guard's arms to her side while he requested her keys. (Doc. 1 at 2.) After they obtained her keys, they unlocked the cell pod door, exited, and closed and locked it behind them, leaving the guard inside. *Auto locking doors* (Id.) Regardless of whether the door was self-locking or they took an action to lock it, Witkowski does not dispute that the guard did not have the ability to open the door on her own. It appears that she was *she had same ability as she did every day she worked* able to use an intercom to contact dispatch, which was able to open the door, but that does not negate Witkowski's conduct, which met the elements of aggravated kidnapping. Because Witkowski has not established that the actual innocence

exception applies, his motion to withdraw his guilty plea is time-barred and should be denied without consideration on the merits.

Respectfully submitted this 14th day of November, 2022.

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