14CA1865 Peo v Sosa 12-08-2016 modified

COLORADO COURT OF APPEALS

Court of Appeals No. 14CA1865
Arapahoe County District Court No. 11CR2138
Honorable Christopher C. Cross, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Alejandro Armando Sosa,

Defendant-Appellant.

ORDER AFFIRMED

Division IV
Opinion by JUDGE TERRY
Hawthorne and Fox, JJ., concur

Opinion Modified and
Petition for Rehearing DENIED

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced December 8, 2016

Cynthia H. Coffman, Attorney General, Michael D. McMaster, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

The Noble Law Firm, LLC, Antony Noble, Lakewood, Colorado, for Defendant-Appellant

OPINION is modified as follows:

Page 3, ¶ 7 currently reads:

With that knowledge, we now withdraw our previous opinion in *People v. Sosa*, 2016 COA 93, and issue this opinion based upon the new information.

Opinion now reads:

With that knowledge, we now withdraw our previous opinion in *People v. Sosa*, 2016 COA 92, and issue this opinion based upon the new information.

¶ 1 Defendant, Alejandro Armando Sosa, appeals the order denying his motion to withdraw his guilty plea to attempted contributing to the delinquency of a minor under Crim. P. 35(c) and his guilty plea to patronizing a prostituted child under Crim. P. 32(d). We affirm.

I. Background

¶ 2 In late 2012, law enforcement officers discovered defendant, who was thirty-six years old at the time, leaving a hotel room with a fifteen-year-old girl (the victim). The victim informed the police that defendant had had sex with her and had provided her with marijuana. The police searched the hotel room and recovered a used condom, which contained both defendant's and the victim's DNA. Defendant was charged with three counts: (1) contributing to the delinquency of a minor; (2) sexual assault; and (3) possession of marijuana.

¶ 3 As part of a plea agreement, defendant pleaded guilty to an amended count of attempted contributing to the delinquency of a minor (Count 1) and was sentenced to three years of probation on that count. He also agreed to allow an added count of patronizing a prostituted child (Count 4) and, in exchange for his guilty plea

to that charge, was given a deferred judgment and sentence, and was ordered to complete sex offender intensive supervised probation.

¶ 4 The probation department later filed a complaint seeking to revoke the deferred judgment, alleging that defendant had been unsuccessfully discharged from his sex offender treatment program and had failed to comply with the terms of his probation. While that complaint was pending, defendant filed a motion to withdraw his guilty plea to Count 1 — apparently relying on Crim. P. 35(c) — and to withdraw his guilty plea to Count 4 — apparently relying on Crim. P. 32(d). He asserted that his pleas were not voluntary and knowing because he was denied effective assistance of counsel when his plea counsel, Charles Torres, failed to adequately advise him of the collateral consequences of entering those pleas. He also asserted that Torres failed to inform him of his likely inability to comply with the terms and conditions of probation and a deferred judgment.

¶ 5 The district court held an evidentiary hearing and denied the motion. After defendant filed this appeal, the district court granted a stay of the hearing on the probation department's

revocation motion, pending the outcome of this appeal. But while his appeal was pending, and unbeknownst to this court, the district court reversed its previous stay and held a revocation hearing on defendant's deferred judgment. The court revoked defendant's deferred judgment and sentenced defendant to probation for a term of twenty years to life.

¶ 6 Without knowledge that defendant's deferred judgment had been revoked, this court issued a published opinion affirming the denial of defendant's Crim. P. 35(c) motion and dismissing his Crim. P. 32(d) motion for lack of jurisdiction. After publication of that decision, the parties alerted the division that the district court had in fact held the revocation hearing and sentenced defendant.

¶ 7 With that knowledge, we now withdraw our previous opinion in *People v. Sosa*, 2016 COA 92, and issue this opinion based upon the new information.

II. Denial of Crim. P. 35(c) Motion and Count 1

¶ 8 Defendant purports to appeal the denial of his Crim. P. 35(c) motion as to Count 1. But defendant has raised no argument on appeal with respect to Count 1 or his Crim. P. 35(c) motion.

Therefore, we will not consider his appellate claim for reversal of the district court's order as it pertains to that portion of his motion. *See People v. Diefenderfer*, 784 P.2d 741, 752 (Colo. 1989) (a defendant must inform an appellate court as to the specific errors relied upon and as to the grounds, supporting facts, and authorities therefor); *Denver U.S. Nat'l Bank v. People ex rel. Dunbar*, 29 Colo. App. 93, 98, 480 P.2d 849, 851 (1970) ("[T]he rule is universally recognized that an appellate court will consider only those questions properly raised by the appealing parties." (quoting *Eggert v. Pac. States Sav. & Loan Co.*, 136 P.2d 822, 829 (Cal. Dist. Ct. App. 1943))).

III. Denial of Motion to Withdraw Guilty Plea to Count 4

¶ 9 The court considered defendant's motion to withdraw his guilty plea to Count 4 under Crim. P. 32(d). He contends that he was denied his constitutional right to effective assistance of counsel by Torres's failure to adequately advise him of the consequences of stipulating to a deferred judgment for a sex offense. We conclude that the court did not err in denying this portion of his motion.

A. Standard of Review

¶ 10 We review the denial of a motion to withdraw a guilty plea under Crim. P. 32(d) for an abuse of discretion. *People v. Boling*, 261 P.3d 503, 504 (Colo. App. 2011). A district court abuses its discretion when its ruling is (1) based on an erroneous understanding or application of the law or (2) manifestly arbitrary, unreasonable, or unfair. *People v. Esparza-Treto*, 282 P.3d 471, 480 (Colo. App. 2011).

B. Applicable Law

¶ 11 A defendant does not have an absolute right to withdraw a guilty plea and bears the burden of establishing a fair and just reason to withdraw. *People v. Chippewa*, 751 P.2d 607, 609 (Colo. 1988). Whether a defendant has demonstrated a fair and just reason to withdraw a guilty plea is a determination committed to the sound discretion of the district court, whose ruling will not be overturned on appeal absent an abuse of that discretion. *People v. Gutierrez*, 622 P.2d 547, 559 (Colo. 1981); *People v. Lopez*, 12 P.3d 869, 871 (Colo. App. 2000).

¶ 12 A defendant must also show that justice will be subverted if the request is denied. *Kazadi v. People*, 2012 CO 73, ¶ 14. A

claim of ineffective assistance of counsel that is conclusory or contradicted by the record does not constitute a fair and just reason for withdrawing a guilty plea. *Lopez*, 12 P.3d at 871-72.

¶ 13 To establish a claim of ineffective assistance of counsel, a defendant must meet the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *Carmichael v. People*, 206 P.3d 800, 805 (Colo. 2009). The defendant must show, first, that counsel's performance was constitutionally deficient, and. second, that the deficient performance resulted in prejudice to the defendant. *Id.* at 805-06 (citing *Strickland*, 466 U.S. at 687). To obtain relief the defendant must prove each prong of the *Strickland* test. *People v. Osorio*, 170 P.3d 796, 800 (Colo. App. 2007).

¶ 14 In assessing the first prong of the *Strickland* test, "a court must be 'highly deferential' in reviewing counsel's performance and 'must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *People v. Garcia*, 815 P.2d 937, 941 (Colo. 1991) (quoting *Strickland*, 466 U.S. at 688-89).

¶ 15 In the context of a guilty plea, to satisfy the prejudice prong the defendant must show that "but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *People v. Stovall*, 2012 COA 7, ¶ 19 (quoting *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985)).

¶ 16 The district court determines the weight and credibility to be given to the testimony of witnesses in a postconviction hearing. *People v. Washington*, 2014 COA 41, ¶ 17 ("When the evidence in the record supports the court's findings, we will not disturb those findings on review.").

C. Analysis

¶ 17 The district court held a lengthy evidentiary hearing on defendant's postconviction motion and its order denying the motion contained detailed findings of fact and conclusions of law. The court found that Torres's representation was "beyond adequate" and that "any deficiencies in [his] performance were minimal."

¶ 18 But defendant asserts that Torres's performance was constitutionally deficient because Torres: (1) led him to believe he would be in a less stringent sex offender treatment program; (2)

led him to believe that he would be assigned to the same treatment provider who had evaluated him as being "low risk"; (3) informed him that he could complete the sex offender treatment and terminate his deferred judgment in two years; (4) failed to advise him of the lifetime consequences of stipulating to a deferred judgment to a sex offense; and (5) failed to advise him of the strict conditions of sex offender intensive supervision. We consider and reject each contention in turn.

1. Less Stringent Treatment Program

¶ 19 Defendant contends that Torres was ineffective for leading him to believe that he would not be placed in Sex Offender Intensive Supervision Probation (SOISP) because he had been evaluated as a low risk to reoffend.

¶ 20 The postconviction court found, and the record supports, that defendant knew that he would be placed in SOISP and also that the treatment program could be very challenging to complete. Torres testified that he informed defendant that some of the restrictions were very strict and many offenders had a very difficult time completing SOISP.

¶ 21 This claim is both conclusory and refuted by the record. Defendant did not establish a fair and just reason to allow him to withdraw his guilty plea on this basis. *See Lopez*, 12 P.3d at 871-72.

2. Treatment Provider

¶ 22 Defendant next contends that Torres was ineffective for leading him to believe that he would be assigned the same treatment provider who had evaluated him as being a low risk to reoffend.

¶ 23 At the postconviction hearing, Torres testified that he never told defendant that the same treatment provider would be assigned. He only told defendant that he would request assignment of that provider, and that he hoped the request would be honored. There is support in the record for the court's finding that Torres informed defendant he could be placed with a different provider. We defer to the court's finding and conclude that defendant has not shown that his counsel's performance was deficient in this respect. *See Garcia*, 815 P.2d at 941; *see also Lopez*, 12 P.3d at 871-72.

3. Completion of Treatment and Deferred Judgment in Two Years

¶ 24 Defendant's third claim is that Torres's performance was deficient for falsely leading him to believe that he could complete sexual assault intensive treatment and terminate the deferred judgment in two years. Defendant's assertion is not supported by the record. He testified only that Torres told him that "if he did everything right" he could complete the process in two years. But defendant testified that he knew that "it's hard." This testimony cannot establish a claim of deficient representation.

¶ 25 Defendant's reliance on the Lifetime Supervision of Sex Offenders Annual Report to support this claim is misplaced. That report only references the average length of time for completion of sexual assault treatment. There is no evidence in the record that it is impossible to complete treatment within two years.

¶ 26 Torres testified at the postconviction hearing that he had numerous conversations with defendant regarding the length of sex offender treatment. He testified that he told defendant that people were not getting through the program quickly, and that he discussed his worries about defendant's ability to complete the treatment at all. He further testified that he told defendant that

the district attorney was also skeptical of defendant's ability to complete the intensive treatment in less than three years.

¶ 27 Because this claim was unsupported by the record, the district court did not err in rejecting it. *See Lopez*, 12 P.3d at 871-72.

4. Lifetime Consequences of Sexual Offense

¶ 28 Defendant next asserts that Torres's performance was deficient because Torres failed to advise him of the lifetime consequences of a deferred judgment for a sexual offense.

¶ 29 Defendant points to his own testimony at the evidentiary hearing where he stated that he did not know that there were lifetime consequences for pleading guilty to the charges. But the district court found defendant's testimony to be "self-serving," to have "minimiz[ed] his knowledge" about the consequences of pleading guilty, and to be inconsistent with the written documentation of the plea agreement. Torres testified that he made defendant aware of the consequences of pleading guilty. The court found Torres to be a "credible witness," and further found that his "testimony was consistent with [that of] an attorney who had been practicing in this area for 20-some or

30-some years." These findings indicate that the court found Torres to be the more credible witness on this issue.

¶ 30 The record shows a number of different instances in which defendant acknowledged the possible penalties for each of his guilty pleas, which included lifetime consequences. He signed the "Rule 11 Advisement and the Sex Offender Addendum," which both listed the lifetime consequences of the charges against defendant and indicated his voluntary and knowing acceptance of the plea deal. He initialed each of the paragraphs that explained the possible penalties for the charge of patronizing a prostituted child.

¶ 31 Thus, this claim is refuted by the record and defendant did not establish any fair or just reason to overturn the district court's ruling. *See id.*

5. Strict Conditions of SOISP

¶ 32 Defendant's final assertion is that Torres was ineffective for failing to advise him of the strict conditions of SOISP and his likely inability to comply with the terms and conditions of the deferred judgment and probation.

¶ 33 The postconviction court found that Torres informed defendant of the very strict regulations he would face while going through sex offender treatment. Torres testified that although he did not list every possible restriction defendant would be placed under, he did inform defendant that it would be very difficult and that certain restrictions might seem "ridiculous." He also informed defendant of some "obvious" restrictions such as "not being able to be around children" and that he was "only going to be able to live in certain places."

¶ 34 Counsel is not obligated to inform a defendant of all collateral consequences of a guilty plea unless counsel knows that "particular collateral consequences are a concern to a defendant." *People v. Garcia*, 799 P.2d 413, 415 (Colo. App. 1990), *aff'd and remanded*, 815 P.2d 937. But citing *Garcia*, defendant asserts that Torres was deficient for not informing him of consequences that Torres should have known would cause particular concern to him — such as not being able to live with his girlfriend because she had a minor child, and not being able to have a cell phone. *See id.*

¶ 35 In ruling on this issue, the court stated:

> The court does not think that there would have been a reasonable probability of any other outcome, certainly even if . . . Torres had told [defendant] that he was not going to be able to use a cell phone, or pointed out to him precisely that he was not going to be able to be with anybody under the age of 18 even though that was on several documents that [defendant] signed. But even if all of those areas that [defendant] said that . . . Torres was deficient, had he known those things, *the Court is convinced that that would not have changed anything*.

(Emphasis added.) The court's reasoning is supported by the record. Because the record gives no indication that defendant would have done anything differently even had Torres advised him differently, we reject defendant's claim as to this issue.

¶ 36 Additionally, the record supports a finding that Torres did inform defendant that he would not be able to be around children or live in certain places. Thus, the court could reasonably find that Torres's performance was not deficient and that defendant was aware when he entered his plea that he would be subject to some of the extremely strict conditions of which he now complains. *See Washington*, ¶ 17.

¶ 37 We conclude that the court did not err in dismissing this claim. *See Lopez*, 12 P.3d at 871-72.

6. Summary

¶ 38 The record supports the conclusion that defendant failed to establish a fair and just reason to withdraw his guilty plea under Crim. P. 32(d), and, therefore, the district court did not abuse its discretion in denying defendant's motion.

IV. Conclusion

¶ 39 The order is affirmed.

JUDGE HAWTHORNE and JUDGE FOX concur.

14CA1865 Peo v Sosa 12-08-2016

COLORADO COURT OF APPEALS

Court of Appeals No. 14CA1865
Arapahoe County District Court No. 11CR2138
Honorable Christopher C. Cross, Judge

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Plaintiff-Appellee,

v.

Alejandro Armando Sosa,

Defendant-Appellant.

ORDER AFFIRMED

Division IV
Opinion by JUDGE TERRY
Hawthorne and Fox, JJ., concur

Prior Opinion Announced June 16, 2016, WITHDRAWN
Defendant-Appellant's Petition for Rehearing GRANTED

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced December 8, 2016

Cynthia H. Coffman, Attorney General, Michael D. McMaster, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

The Noble Law Firm, LLC, Antony Noble, Lakewood, Colorado, for Defendant-Appellant

¶ 1 Defendant, Alejandro Armando Sosa, appeals the order denying his motion to withdraw his guilty plea to attempted contributing to the delinquency of a minor under Crim. P. 35(c) and his guilty plea to patronizing a prostituted child under Crim. P. 32(d). We affirm.

I. Background

¶ 2 In late 2012, law enforcement officers discovered defendant, who was thirty-six years old at the time, leaving a hotel room with a fifteen-year-old girl (the victim). The victim informed the police that defendant had had sex with her and had provided her with marijuana. The police searched the hotel room and recovered a used condom, which contained both defendant's and the victim's DNA. Defendant was charged with three counts: (1) contributing to the delinquency of a minor; (2) sexual assault; and (3) possession of marijuana.

¶ 3 As part of a plea agreement, defendant pleaded guilty to an amended count of attempted contributing to the delinquency of a minor (Count 1) and was sentenced to three years of probation on that count. He also agreed to allow an added count of patronizing a prostituted child (Count 4) and, in exchange for his guilty plea

to that charge, was given a deferred judgment and sentence, and was ordered to complete sex offender intensive supervised probation.

¶ 4 The probation department later filed a complaint seeking to revoke the deferred judgment, alleging that defendant had been unsuccessfully discharged from his sex offender treatment program and had failed to comply with the terms of his probation. While that complaint was pending, defendant filed a motion to withdraw his guilty plea to Count 1 — apparently relying on Crim. P. 35(c) — and to withdraw his guilty plea to Count 4 — apparently relying on Crim. P. 32(d). He asserted that his pleas were not voluntary and knowing because he was denied effective assistance of counsel when his plea counsel, Charles Torres, failed to adequately advise him of the collateral consequences of entering those pleas. He also asserted that Torres failed to inform him of his likely inability to comply with the terms and conditions of probation and a deferred judgment.

¶ 5 The district court held an evidentiary hearing and denied the motion. After defendant filed this appeal, the district court granted a stay of the hearing on the probation department's

revocation motion, pending the outcome of this appeal. But while his appeal was pending, and unbeknownst to this court, the district court reversed its previous stay and held a revocation hearing on defendant's deferred judgment. The court revoked defendant's deferred judgment and sentenced defendant to probation for a term of twenty years to life.

¶ 6 Without knowledge that defendant's deferred judgment had been revoked, this court issued a published opinion affirming the denial of defendant's Crim. P. 35(c) motion and dismissing his Crim. P. 32(d) motion for lack of jurisdiction. After publication of that decision, the parties alerted the division that the district court had in fact held the revocation hearing and sentenced defendant.

¶ 7 With that knowledge, we now withdraw our previous opinion in *People v. Sosa*, 2016 COA 93, and issue this opinion based upon the new information.

II. Denial of Crim. P. 35(c) Motion and Count 1

¶ 8 Defendant purports to appeal the denial of his Crim. P. 35(c) motion as to Count 1. But defendant has raised no argument on appeal with respect to Count 1 or his Crim. P. 35(c) motion.

Therefore, we will not consider his appellate claim for reversal of the district court's order as it pertains to that portion of his motion. *See People v. Diefenderfer*, 784 P.2d 741, 752 (Colo. 1989) (a defendant must inform an appellate court as to the specific errors relied upon and as to the grounds, supporting facts, and authorities therefor); *Denver U.S. Nat'l Bank v. People ex rel. Dunbar*, 29 Colo. App. 93, 98, 480 P.2d 849, 851 (1970) ("[T]he rule is universally recognized that an appellate court will consider only those questions properly raised by the appealing parties." (quoting *Eggert v. Pac. States Sav. & Loan Co.*, 136 P.2d 822, 829 (Cal. Dist. Ct. App. 1943))).

III. Denial of Motion to Withdraw Guilty Plea to Count 4

¶ 9 The court considered defendant's motion to withdraw his guilty plea to Count 4 under Crim. P. 32(d). He contends that he was denied his constitutional right to effective assistance of counsel by Torres's failure to adequately advise him of the consequences of stipulating to a deferred judgment for a sex offense. We conclude that the court did not err in denying this portion of his motion.

A. Standard of Review

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claim of ineffective assistance of counsel that is conclusory or contradicted by the record does not constitute a fair and just reason for withdrawing a guilty plea. *Lopez*, 12 P.3d at 871-72.

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C. Analysis

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¶ 18 But defendant asserts that Torres's performance was constitutionally deficient because Torres: (1) led him to believe he would be in a less stringent sex offender treatment program; (2)

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1. Less Stringent Treatment Program

¶ 19 Defendant contends that Torres was ineffective for leading him to believe that he would not be placed in Sex Offender Intensive Supervision Probation (SOISP) because he had been evaluated as a low risk to reoffend.

¶ 20 The postconviction court found, and the record supports, that defendant knew that he would be placed in SOISP and also that the treatment program could be very challenging to complete. Torres testified that he informed defendant that some of the restrictions were very strict and many offenders had a very difficult time completing SOISP.

¶ 21 This claim is both conclusory and refuted by the record. Defendant did not establish a fair and just reason to allow him to withdraw his guilty plea on this basis. *See Lopez*, 12 P.3d at 871-72.

2. Treatment Provider

¶ 22 Defendant next contends that Torres was ineffective for leading him to believe that he would be assigned the same treatment provider who had evaluated him as being a low risk to reoffend.

¶ 23 At the postconviction hearing, Torres testified that he never told defendant that the same treatment provider would be assigned. He only told defendant that he would request assignment of that provider, and that he hoped the request would be honored. There is support in the record for the court's finding that Torres informed defendant he could be placed with a different provider. We defer to the court's finding and conclude that defendant has not shown that his counsel's performance was deficient in this respect. *See Garcia*, 815 P.2d at 941; *see also Lopez*, 12 P.3d at 871-72.

3. Completion of Treatment and Deferred Judgment in Two Years

¶ 24 Defendant's third claim is that Torres's performance was deficient for falsely leading him to believe that he could complete sexual assault intensive treatment and terminate the deferred judgment in two years. Defendant's assertion is not supported by the record. He testified only that Torres told him that "if he did everything right" he could complete the process in two years. But defendant testified that he knew that "it's hard." This testimony cannot establish a claim of deficient representation.

¶ 25 Defendant's reliance on the Lifetime Supervision of Sex Offenders Annual Report to support this claim is misplaced. That report only references the average length of time for completion of sexual assault treatment. There is no evidence in the record that it is impossible to complete treatment within two years.

¶ 26 Torres testified at the postconviction hearing that he had numerous conversations with defendant regarding the length of sex offender treatment. He testified that he told defendant that people were not getting through the program quickly, and that he discussed his worries about defendant's ability to complete the treatment at all. He further testified that he told defendant that

the district attorney was also skeptical of defendant's ability to complete the intensive treatment in less than three years.

¶ 27 Because this claim was unsupported by the record, the district court did not err in rejecting it. *See Lopez*, 12 P.3d at 871-72.

4. Lifetime Consequences of Sexual Offense

¶ 28 Defendant next asserts that Torres's performance was deficient because Torres failed to advise him of the lifetime consequences of a deferred judgment for a sexual offense.

¶ 29 Defendant points to his own testimony at the evidentiary hearing where he stated that he did not know that there were lifetime consequences for pleading guilty to the charges. But the district court found defendant's testimony to be "self-serving," to have "minimiz[ed] his knowledge" about the consequences of pleading guilty, and to be inconsistent with the written documentation of the plea agreement. Torres testified that he made defendant aware of the consequences of pleading guilty. The court found Torres to be a "credible witness," and further found that his "testimony was consistent with [that of] an attorney who had been practicing in this area for 20-some or

30-some years." These findings indicate that the court found Torres to be the more credible witness on this issue.

¶ 30 The record shows a number of different instances in which defendant acknowledged the possible penalties for each of his guilty pleas, which included lifetime consequences. He signed the "Rule 11 Advisement and the Sex Offender Addendum," which both listed the lifetime consequences of the charges against defendant and indicated his voluntary and knowing acceptance of the plea deal. He initialed each of the paragraphs that explained the possible penalties for the charge of patronizing a prostituted child.

¶ 31 Thus, this claim is refuted by the record and defendant did not establish any fair or just reason to overturn the district court's ruling. *See id.*

5. Strict Conditions of SOISP

¶ 32 Defendant's final assertion is that Torres was ineffective for failing to advise him of the strict conditions of SOISP and his likely inability to comply with the terms and conditions of the deferred judgment and probation.

¶ 33 The postconviction court found that Torres informed defendant of the very strict regulations he would face while going through sex offender treatment. Torres testified that although he did not list every possible restriction defendant would be placed under, he did inform defendant that it would be very difficult and that certain restrictions might seem "ridiculous." He also informed defendant of some "obvious" restrictions such as "not being able to be around children" and that he was "only going to be able to live in certain places."

¶ 34 Counsel is not obligated to inform a defendant of all collateral consequences of a guilty plea unless counsel knows that "particular collateral consequences are a concern to a defendant." *People v. Garcia*, 799 P.2d 413, 415 (Colo. App. 1990), *aff'd and remanded*, 815 P.2d 937. But citing *Garcia*, defendant asserts that Torres was deficient for not informing him of consequences that Torres should have known would cause particular concern to him — such as not being able to live with his girlfriend because she had a minor child, and not being able to have a cell phone. *See id.*

¶ 35 In ruling on this issue, the court stated:

> The court does not think that there would have been a reasonable probability of any other outcome, certainly even if . . . Torres had told [defendant] that he was not going to be able to use a cell phone, or pointed out to him precisely that he was not going to be able to be with anybody under the age of 18 even though that was on several documents that [defendant] signed. But even if all of those areas that [defendant] said that . . . Torres was deficient, had he known those things, *the Court is convinced that that would not have changed anything*.

(Emphasis added.) The court's reasoning is supported by the record. Because the record gives no indication that defendant would have done anything differently even had Torres advised him differently, we reject defendant's claim as to this issue.

¶ 36 Additionally, the record supports a finding that Torres did inform defendant that he would not be able to be around children or live in certain places. Thus, the court could reasonably find that Torres's performance was not deficient and that defendant was aware when he entered his plea that he would be subject to some of the extremely strict conditions of which he now complains. *See Washington*, ¶ 17.

¶ 37 We conclude that the court did not err in dismissing this claim. *See Lopez*, 12 P.3d at 871-72.

6. Summary

¶ 38 The record supports the conclusion that defendant failed to establish a fair and just reason to withdraw his guilty plea under Crim. P. 32(d), and, therefore, the district court did not abuse its discretion in denying defendant's motion.

IV. Conclusion

¶ 39 The order is affirmed.

JUDGE HAWTHORNE and JUDGE FOX concur.

COLORADO COURT OF APPEALS **2016COA92**

Court of Appeals No. 14CA1865
Arapahoe County District Court No. 11CR2138
Honorable Christopher C. Cross, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Alejandro Armando Sosa,

Defendant-Appellant.

APPEAL DISMISSED IN PART
AND ORDER AFFIRMED

Division IV
Opinion by JUDGE TERRY
Hawthorne and Fox, JJ., concur

Announced June 16, 2016

Cynthia H. Coffman, Attorney General, Michael D. McMaster, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

The Noble Law Firm, LLC, Antony Noble, Lakewood, Colorado, for Defendant-Appellant

¶ 1 When a defendant pleads guilty and receives a deferred judgment as part of the plea, does the court of appeals have jurisdiction to hear an appeal challenging the denial of a Crim. P. 32(d) motion for withdrawal of the plea *before* the judgment is entered and the defendant is sentenced? Despite the unfortunate consequences that a defendant will incur even before sentence is imposed, we conclude that the answer to this question is "no."

¶ 2 Defendant, Alejandro Armando Sosa, entered into a plea agreement to a deferred judgment. He later filed a motion seeking to withdraw his guilty plea to attempted contributing to the delinquency of a minor under Crim. P. 35(c), and to withdraw his guilty plea to patronizing a prostituted child under Crim. P. 32(d). After he filed an appeal of the order denying that motion, the People filed a motion to dismiss the appeal for lack of jurisdiction, and defendant responded. Because we conclude that this court lacks jurisdiction to consider the appeal of his Crim. P. 32(d) motion, we dismiss that portion of the appeal without prejudice and do not reach the merits. And for reasons discussed below, we affirm the denial of his Crim. P. 35(c) motion.

I. Background

¶ 3 In late 2012, law enforcement officers discovered defendant, who was thirty-six years old at the time, leaving a hotel room with a fifteen-year-old girl (the victim). The victim informed the police that defendant had had sex with her and had provided her with marijuana. The police searched the hotel room and recovered a used condom, which contained both defendant's and the victim's DNA. Defendant was charged with three counts: (1) contributing to the delinquency of a minor; (2) sexual assault; and (3) possession of marijuana.

¶ 4 As part of a plea agreement, defendant pleaded guilty to an amended count of attempted contributing to the delinquency of a minor (Count 1) and was sentenced to three years of probation on that count. He also agreed to allow an added count of patronizing a prostituted child (Count 4), and in exchange for his guilty plea to that charge, he was given a deferred judgment and sentence, and was ordered to complete sex offender intensive supervised probation.

¶ 5 The probation department later filed a complaint seeking to revoke the deferred judgment, alleging that defendant had been

unsuccessfully discharged from his sex offender treatment program and had failed to comply with the terms of his probation. While that complaint was pending, defendant filed a motion to withdraw his guilty plea to Count 1 — apparently relying on Crim. P. 35(c) — and to withdraw his guilty plea to Count 4 — apparently relying on Crim. P. 32(d). He asserted that his pleas were not voluntary and knowing because he was denied effective assistance of counsel when his plea counsel failed to adequately advise him of the collateral consequences of entering those pleas. He also asserted that plea counsel failed to inform him of his likely inability to comply with the terms and conditions of probation and a deferred judgment.

¶ 6 The district court held an evidentiary hearing and denied the motion. After defendant filed this appeal, the district court granted a continuance of the hearing on the probation department's revocation motion, pending the outcome of this appeal.

II. Motion to Dismiss

¶ 7 The People assert that we must dismiss this appeal. They contend that no final, appealable judgment exists because

defendant's deferred judgment has not yet been revoked and he has not been sentenced. With respect to the appeal of the district court's denial of defendant's Crim. P. 32(d) motion, we agree. As noted below, we do not dismiss the appeal of the denial of defendant's motion under Crim. P. 35(c).

A. Legal Standards

¶ 8 "Every court has authority to hear and decide the question of its own jurisdiction." *In re Water Rights of Elk Dance Colo., LLC*, 139 P.3d 660, 670 (Colo. 2006). Under section 13-4-102, C.R.S. 2015, the court of appeals has initial appellate jurisdiction over all final judgments entered by district courts of the state. *See also* C.A.R. 1(a)(1). A final judgment is "one that ends the particular action in which it is entered, leaving nothing further for the court pronouncing it to do in order to completely determine the rights of the parties involved in the proceedings." *People v. Guatney*, 214 P.3d 1049, 1051 (Colo. 2009).

¶ 9 In a criminal case, there is no final judgment until "the defendant is acquitted, the charges are dismissed, or the defendant is convicted and sentence is imposed." *People v.*

Gabriesheski, 262 P.3d 653, 657 (Colo. 2011) (quoting *Guatney*, 214 P.3d at 1051).

B. Application

¶ 10 Defendant asserts that because his counsel's performance was constitutionally deficient during the plea agreement process, he should be permitted to withdraw his guilty plea under Crim. P. 32(d). As we understand his pleadings and the record, this argument pertains to Count 4, to which he pleaded guilty in exchange for a deferred judgment and sentence.

¶ 11 A deferred judgment is authorized by statute. § 18-1.3-102(1), C.R.S. 2015; *People v. Carbajal*, 198 P.3d 102, 105 (Colo. 2008). Once a defendant pleads guilty to a felony, the statute allows the district court to continue the defendant's case without entering a judgment of conviction. § 18-1.3-102(1). Sentencing may be deferred for up to four years from the date of the plea, and probation-like supervision conditions may be imposed. § 18-1.3-102(2); *Carbajal*, 198 P.3d at 105.

¶ 12 Under section 16-7-206(3), C.R.S. 2015, the court's acceptance of a guilty plea is a "conviction" for the offense the defendant pleaded guilty to, even if the defendant is given a

deferred judgment for that offense. But the supreme court held in *Carbajal*, 198 P.3d at 105, that "[a] deferred judgment is not a final judgment, and thus may not be subject to either Crim. P. 35 review or direct appellate review until revoked." *See also Kazadi v. People*, 2012 CO 73, ¶ 18 (determining that "*Carbajal* is precedent for [its] ruling").

¶ 13 Because the revocation hearing is still pending, defendant will not be sentenced on Count 4 unless the district court determines that his deferred judgment should be revoked. If the court does make this determination, the court must enter a judgment of conviction, and sentence defendant, before the judgment becomes final. *People v. Wiedemer*, 899 P.2d 283, 284 (Colo. App. 1994); *see also* Crim. P. 32(b)(3)(I) (A "judgment of conviction shall consist of a recital of the plea, the verdict or findings, *the sentence*, the finding of the amount of presentence confinement, and costs," among other things.) (emphasis added).

¶ 14 In the absence of a judgment of conviction and a sentence, there is no final judgment, and for that reason this court lacks jurisdiction to hear the appeal. *Carbajal*, 198 P.3d at 105; *Wiedemer*, 899 P.2d at 284 ("A guilty plea alone . . . cannot

constitute a judgment . . . ; according to [what is now Crim. P. 32(b)(3)(I)], there can be no judgment unless a sentence accompanies the recital of the plea.").

¶ 15 Because defendant cannot obtain the relief he seeks based on a non-final judgment, we dismiss his appeal of his Crim. P. 32(d) motion for lack of jurisdiction. In dismissing this portion of the appeal, we do so without prejudice and note that defendant may refile his appeal if the district court revokes his deferred judgment.

C. *Kazadi*

¶ 16 We recognize that the result we reach is somewhat anomalous, given that the supreme court held in *Kazadi*, ¶ 1, that a defendant who has pleaded guilty in return for a deferred judgment and sentence can seek to withdraw his guilty plea under Crim. P. 32(d). However, the supreme court in *Kazadi* did not address the appealability of such an order to us. And because that court earlier held that a deferred judgment is not a final judgment, *see Carbajal*, 198 P.3d at 105, we must conclude that the denial of a Crim. P. 32(d) motion to withdraw such a non-final judgment is not subject to appeal.

¶ 17 Our analysis is unaffected by either *People v. Espino-Paez*, 2014 COA 126, ¶¶ 10-16 (*cert. granted* Sept. 8, 2015), or *People v. Corrales-Castro*, 2015 COA 34M, ¶¶ 31-36 (*cert. granted* Sept. 8, 2015), because in each of those cases, the defendant did not file his Crim. P. 32(d) motion to withdraw his guilty plea until after he had successfully completed his deferred judgment.

D. Fairness and Chief Justice Bender's Dissent in *Kazadi*

¶ 18 Despite our conclusion that we lack jurisdiction, we recognize the harshness of our decision, which was well expressed in Chief Justice Bender's dissent in *Kazadi*. He said that it seems "incongruous that a defendant who has received the privilege and benefit of a more lenient deferred judgment would have a more limited right of postconviction review to this constitutional claim than a defendant who has received a more traditional sentence to prison, jail, or probation." *Kazadi*, ¶ 25 (Bender, C.J., dissenting).

¶ 19 As his dissent notes, a defendant who pleads guilty to an offense in return for a deferred judgment is still considered to be convicted of that offense for many purposes and will suffer the collateral consequences of that conviction. *See id.* at ¶ 26 n.4

(stating that collateral consequences of a plea of guilty in Colorado can, depending on the offense, include the loss of a driver's license, the loss of the right to possess firearms, the inability to adopt a child, the inability to change one's name, the inability to obtain — or the revocation of — certain professional licenses, and the inability to obtain a United States passport). We share the dissent's concern about these consequences to defendant.

¶ 20 Defendant asserts that he faces one such collateral consequence because the terms of his probation essentially prohibit him from living with his partner. His inability to obtain appellate review of the denial of his Crim. P. 32(b) motion will prolong that and other adverse consequences.

¶ 21 While we recognize the harshness of this result, this court is powerless to create jurisdiction where none exists by statute or court rule. *See Espino-Paez*, ¶ 16. We commend this case to the attention of the General Assembly and the Colorado Supreme Court Advisory Committee on the Rules of Criminal Procedure to consider creation of a mechanism to allow appeal in cases such as this.

III. Appeal of Denial of Crim. P. 35(c) Motion

¶ 22 Defendant also purports to appeal the denial of his Crim. P. 35(c) motion. Because he could not yet seek postconviction relief under that rule for his guilty plea to Count 4, *see Kazadi*, ¶ 1, we construe his motion as applying only to his conviction for Count 1 (attempted contributing to the delinquency of a minor). And because he has already been sentenced for Count 1, his Crim. P. 35(c) motion was ripe for decision by the district court.

¶ 23 But defendant has raised no argument on appeal with respect to his Crim. P. 35(c) motion. Therefore, we will not consider his appellate claim for reversal of the district court's order as it pertains to that motion. *See People v. Diefenderfer*, 784 P.2d 741, 752 (Colo.1989) (a defendant must inform an appellate court as to the specific errors relied upon and as to the grounds, supporting facts and authorities therefor); *Denver U.S. Nat'l Bank v. People ex rel. Dunbar*, 29 Colo. App. 93, 98, 480 P.2d 849, 851 (1970) ("[T]he rule is universally recognized that an appellate court will consider only those questions properly raised by the appealing parties." (quoting *Eggert v. Pac. States Sav. & Loan Co.*, 136 P.2d 822, 829 (Cal. Dist. Ct. App. 1943))).

IV. Conclusion

¶ 24 The appeal of defendant's Crim. P. 32(d) motion is dismissed without prejudice. The portion of the district court's order denying defendant's Crim. P. 35(c) motion is affirmed.

JUDGE HAWTHORNE and JUDGE FOX concur.