

MEMORANDUM

Date: October 13, 2016

To: Criminal Rules Committee

From: Judge Shelley Gilman, Matt Holman and Karen Taylor

Subject: Recommendation re: Crim. P. 32(d) and *People v. Sosa*, ___ P.3d ___ (Colo. App. Case No. 14CA1865, June 30, 2016)

In *People v. Sosa*, a panel of the court of appeals held that when a criminal defendant pleads guilty and receives a deferred judgment, the court of appeals does not 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 sentence imposed. Mr. Sosa alleged that the lawyer who represented him on the deferred had provided ineffective assistance of counsel. He raised that issue in a Crim.P. 32(d) motion to withdraw the plea. The court of appeals concluded that, although the acceptance of a guilty plea that results in a deferred judgment is a “conviction,” it is not a “final judgment.” Because the court of appeals can only review final judgments, the court reasoned, it lacked jurisdiction to hear the appeal of the denial of Mr. Sosa’s Crim.P. 32(d) motion.

Recognizing the harshness of its decision, the appellate court suggested the Criminal Rules Committee consider creating a way to allow an appeal in this situation:

[w]hile 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.

Sosa at ¶21.

The subcommittee was asked to review this recommendation. The subcommittee respectfully recommends that the committee wait and see what happens in the *Sosa* case as well as two other cases pending in the supreme court, rather than consider a rules change at this time. The subcommittee reached that recommendation for three reasons:

1. **The decision in *Sosa* is not yet final.** The petition for rehearing in *Sosa* is currently pending. Mr. Sosa’s deferred judgment has been revoked and supplemental information on the revocation is being sent to the court of appeals. Thus, the underlying procedural posture of the case has changed

and the decision may ultimately be changed to reflect those circumstances. Also, the time for filing a petition for writ of certiorari in the supreme court is not yet running in the case. So it is possible that even if the court of appeals does not modify its opinion based on the changed procedural posture of the case, the supreme court will decide to review the case and it could reach a different conclusion.

2. **The supreme court is currently considering related issues in two other cases.** In *Sosa*, the court acknowledged two other cases, *People v Espino-Paez*, 2014 COA 126 (*cert. granted* Sept. 8, 2015), and *People v. Corrales-Castro*, 2015 COA 34M (*cert. granted* Sept. 8, 2015), in which panels of the court of appeals reached different conclusions about whether or not a defendant could move to withdraw a guilty plea to a deferred judgment pursuant to Crim.P. 32(d) if the defendant had successfully completed the deferred judgment, the plea had been withdrawn, and the charge dismissed. The *Espino-Paez* panel said no in a split decision, concluding that the district court lacked jurisdiction to review the matter under Crim.P. 32(d) since the relief it provides – withdraw of the guilty plea – had already been granted. The *Corrales-Castro* panel said yes unanimously, holding that “Crim.P. 32(d) allows defendant to challenge his guilty plea under the specific circumstances of this case because his plea remains a ‘conviction’ with serious immigration consequences[.]”. *Corrales-Castro* at ¶22. The *Sosa* panel said its analysis was “unaffected” by these cases. *Sosa* at ¶17.

The subcommittee believed, however, that the supreme court decisions in these cases may very well contain broad language that affects the *Sosa* decision given the jurisdictional questions these cases raise. The supreme court will hear oral argument in these cases in November 2016.

3. **More research would be necessary before the subcommittee could even say the committee can make the type of change suggested by the court in *Sosa*.** The subcommittee members agreed it is clear this committee cannot give the court of appeals jurisdiction via a rule of criminal procedure. See e.g., *Bill Dreiling Motor Co. v. Court of Appeals*, 171 Colo. 448, 468 P.2d 37 (1970) (“[O]ur jurisdiction, as initially spelled out in our Constitutions, may be expanded by statute. But such is no authority for us to expand our jurisdiction by rule of court.”); *South Washington Associates v. Flanagan*, 859 P.2d 217 (1992) (“Under Colo. Const. art. VI, §1 and §2, the authority to determine the jurisdiction of this court is vested exclusively in the General Assembly.”). We would have to do significantly more research to more definitively determine whether we can adopt a rule of criminal procedure to say that the denial of a Crim.P. 32(d) motion under the circumstances of these cases is a final judgment for purposes of appeal. Given that the supreme court make speak to this specific issue in the *Espino-Paez* and *Corrales-Castro* cases, if not *Sosa* itself, the subcommittee thought it wise to

first see how the supreme court decides these cases before considering further what changes to the rules might be possible.