

IN THE SUPREME COURT OF MISSOURI

PATRICK LARSON)
)
 Appellant,)
 v.)
) **NO. SC84246**
 STATE OF MISSOURI,)
)
 Respondent)

**APPEAL FROM THE 21ST JUDICIAL CIRCUIT
ST. LOUIS COUNTY, MISSOURI
THE HONORABLE JOHN ROSS, JUDGE
DIVISION NO. 15**

APPELLANT'S SUBSTITUTE REPLY BRIEF

ALAN S. COHEN, P.C.

Alan S. Cohen, # 39896

(314) 721-2345

(314) 721-7965 facsimile

Attorney for Appellant

PATRICK LARSON V. STATE OF MISSOURI

APPEAL NO. SC84246

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JURISDICTIONAL STATEMENT

Appellant reaffirms and incorporates by reference the Jurisdictional Statement, contained in Appellant's Substitute Statement, Brief and Argument filed in this Court on February 19, 2002.

STATEMENT OF FACTS

Appellant reaffirms and incorporates by reference the Statement of Facts contained in Appellant's Substitute Statement, Brief and Argument filed in this Court on February 19, 2002.

POINT RELIED ON

II.

The Plea Court clearly erred in denying Appellant's Rule 29.07 Motion in violation of the rights guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(A) of the Missouri Constitution, in that the Plea Court incorrectly found that Appellant had waived his right to relief when he pleaded guilty because the plain language of Rule 29.07 states a motion to withdraw the plea may be made when the imposition of sentence is suspended. The denial of a 29.07 motion is an appealable order. ¹

Brunig v. Humburg, 957 S.W.2d 345 (Mo. App. E.D. 1997)

State v. Parkhurst, 845 S.W.2d 31 (Mo. 1992)

¹ Although Appellant disagrees with and challenges every point and argument raised in Respondent's Substitute Brief, appellant chooses to reply only to Respondent's second point (which purports to respond to Appellant's first and second points).

ARGUMENT

II.

The Plea Court clearly erred in denying Appellant’s Rule 29.07 Motion in violation of the rights guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(A) of the Missouri Constitution, in that the Plea Court incorrectly found that Appellant had waived his right to relief when he pleaded guilty because the plain language of Rule 29.07 states a motion to withdraw the plea may be made when the imposition of sentence is suspended. The denial of a 29.07 motion is an appealable order.

Appellant argues that the trial court was without subject matter jurisdiction to entertain or adjudicate or to impose a sentence on him because it had no jurisdiction to do so. The State, in its substitute brief, insists that appellant has waived his right to raise a subject matter jurisdiction claim.

The State is wrong. The absence of subject matter jurisdiction is a defect that cannot be waived, and any action taken by a court without subject matter jurisdiction is null and void. **Brunig v. Humburg**, 957 S.W.2d 345, 348 (Mo. App. E.D. 1997).

The State makes much of the fact that appellant did not raise this issue in the juvenile court, nor at the guilty plea before the Circuit Court. Contrary to the State's assertions, this does not mean appellant has waived subject matter jurisdiction claims. The absence of subject matter jurisdiction is not barred by the passage of time or opportunity and may be asserted at any time. **State v. Parkhurst**, 845 S.W.2d 31, 35 (Mo. 1992). It is perplexing that the State fails to concede same.

CONCLUSION

For the reasons stated in this and Appellant's opening Brief, the judgment of the Motion Court's denial of appellant's Rule 29.07 motion should be reversed, and the cause remanded with instructions to vacate the sentence and judgment, or in the alternative, remanded with instructions to consider merits of the 29.07 motion.

Respectfully Submitted,

ALAN S. COHEN, P.C.

By: _____

Alan S. Cohen, # 39896
Attorney for Appellant
35 N. Central Ave. # 208

(314) 721-7965 facsimile

CERTIFICATE OF COMPLIANCE AND SERVICE

I, Alan S. Cohen, hereby certify the following: The attached reply brief complies with the limitations contained in Rule 84.06 and Special Rule 1(b). The Word processing software used to prepare this brief was Word 97. The font used is Times New Roman 14 point. There are 804 words in the brief.

The floppy disk filed with this reply brief contains a complete copy of this reply brief. It has been scanned for viruses and is virus free.

Two true and correct copies of the attached reply brief and a floppy disk containing a copy of this reply brief were mailed, postage prepaid this 22nd day of March, 2002 to Dora A. Fichter, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

Alan S. Cohen