

IN THE
MISSOURI SUPREME COURT

STATE EX REL. ZANE)	
VALENTINE,)	
)	Cause No. SC92434
Relator,)	
)	
vs.)	
)	
THE HONORABLE MARK)	
ORR, CIRCUIT JUDGE, 38 TH)	
JUDICIAL CIRCUIT,)	
)	
Respondent.)	
)	
)	

ORIGINAL PETITION FOR WRIT OF MANDAMUS IN THE MISSOURI SUPREME
COURT FROM THE CIRCUIT COURT OF TANEY COUNTY, MISSOURI
THE HONORABLE MARK ORR, CIRCUIT JUDGE

RELATOR’S REPLY BRIEF IN SUPPORT OF HIS PERMANENT WRIT OF
MANDAMUS

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JURISDICTIONAL STATEMENT

Relator adopts the Jurisdictional Statement set forth in his original brief.

STATEMENT OF FACTS

Relator adopts his Statement of Facts set forth in his original brief.

POINT RELIED ON

Relator is entitled to a writ of mandamus ordering that Respondent, the Honorable Mark Orr, vacate his order of January 19, 2012 denying relator probation, and place him on probation, because at the time Respondent entered that order, Respondent had lost authority over Relator's case in that: (1) Respondent had placed Relator in the Sex Offender Assessment Unit (SOAU); (2) the SOAU is a one hundred twenty day program under § 559.115.3 RSMo and Respondent had sentenced Relator under § 559.115.3; (3) the Department of Corrections (DOC) had recommended Relator be placed on probation; (4) section 559.115.3 requires that when a defendant successfully completes a one hundred twenty day program, the trial court cannot deny him probation unless it conducts a hearing within ninety to one hundred twenty days of a defendant's sentence; and, (5) more than one hundred twenty days had passed since Relator's sentence when Respondent denied him probation.

***Etenburn v. State*, 341 S.W.3d 737 (Mo. App. S.D. 2011)**

***State ex rel. Mertens v. Brown*, 198 S.W.3d 616 (Mo. banc 2006)**

***Wolfe v. Department of Corrections*, 199 S.W.3d 219 (Mo. App. W.D. 2006)**

Section 559.115 RSMo. (Supp. 2010)

ARGUMENT

Relator is entitled to a writ of mandamus ordering that Respondent, the Honorable Mark Orr, vacate his order of January 19, 2012 denying relator probation, and place him on probation, because at the time Respondent entered that order, Respondent had lost authority over Relator's case in that: (1) Respondent had placed Relator in the Sex Offender Assessment Unit (SOAU); (2) the SOAU is a one hundred twenty day program under § 559.115.3 RSMo and Respondent had sentenced Relator under § 559.115.3; (3) the Department of Corrections (DOC) had recommended Relator be placed on probation; (4) section 559.115.3 requires that when a defendant successfully completes a one hundred twenty day program, the trial court cannot deny him probation unless it conducts a hearing within ninety to one hundred twenty days of a defendant's sentence; and, (5) more than one hundred twenty days had passed since Relator's sentence when Respondent denied him probation.

Respondent argues that the Sex Offender Assessment Unit (SOAU) is not a program under § 559.115.3 RSMo. He bases his argument on the fact that "Relator was simply *being assessed* for a program rather than having been placed in a one hundred twenty day program." (Respondent's Brief, p. 5) Respondent does not explain how this means the SOAU does not qualify as a program under § 559.115.3, even though the definition of program from Dictionary.com he used in his brief applies to the SOAU as

much as it does to any DOC treatment or shock incarceration programs.¹ (Respondent’s Brief, p. 4; Respondent’s Exhibit A, p. A1) Indeed, Respondent acknowledges that there is nothing that “explicitly” indicates whether or not the SOAU is a program under § 559.115.3. (Respondent’s Brief, p. 5)

**RESPONDENT PROVIDES NO LEGAL AUTHORITY TO SUPPORT HIS
CLAIM THAT THE SOAU IS NOT A ONE HUNDRED TWENTY DAY
PROGRAM UNDER SECTION 559.115.3**

Respondent argues that there are “clues” that are provided by DOC. (Respondent’s Brief, p. 5) Respondent cites to a power point from a presentation given in St. Louis on July 13, 2011, and to DOC’s Supervision Strategies and Treatment Alternatives. (Respondent’s Exhibit B, p. A19; Respondent’s Exhibit C, pp. 21-22). Neither of these exhibits refute Relator’s argument that the SOAU is a one hundred twenty-day program under § 559.115.3. They simply explain what the SOAU is and what its purpose is. Relator respectfully submits that these two exhibits do not provide this Court with any guidance or legal authority as to whether or not the SOAU is a program under § 559.115.3. Further, Respondent ignores the fact that in a different DOC publication the SOAU is specifically referred to as a one hundred twenty day residential program. (Relator’s Brief, Exhibit G, p. A33) Respondent also ignores that the Sentencing Advisory Commission User Guide refers to the SOAU as a program and

¹ The plan of action being to assess offenders who have committed sex crimes to accomplish the specific end of determining whether the offender can be treated in the community without endangering the community.

discusses it in conjunction with other one hundred twenty day programs under § 559.115. (Relator's Brief, Exhibit K, pp. A98-A99) Finally, Respondent ignores the fact that the procedures of §559.115.3, such as the Court recommending placement, DOC determining eligibility, and DOC issuing a report on whether an offender has successfully completed the program, are used when placing someone in the SOAU.

Respondent also cites to the "Court Report Investigation" written by the Board of Probation and Parole as evidence that the SOAU is not a one hundred twenty day program under §559.115.3. (Respondent's Brief, p. 6; Relator's Brief, Exhibit D, pp. A18-A25) Respondent argues that this report shows the one hundred twentieth day is calculated from the day that Relator arrived at DOC. (Respondent's Brief, p. 6; Relator's Brief, Exhibit D, p. A25) Respondent then attempts to contrast this with an example of how in a case of an offender sentenced to an Institutional Treatment Center, which is definitely a one hundred twenty day program under §559.115.3, DOC calculates the start of the one hundred twenty days on the sentencing date. (Respondent's Brief, p. 7; Respondent's Exhibit D, p. A24). His exhibit, however, shows just the opposite. Respondent's exhibit shows the offender arrived at DOC on August 19, 2004 and that date is used as the starting date to calculate the one hundred twenty day period. (Respondent's Exhibit D, p. A24) Thus even though the statute had been amended in 2003², DOC was following a procedure that contradicted the law. The case used in Respondent's brief was decided before this Court handed down its decision in *State ex*

² See Relator's Brief, Exhibit Q, p. A130.

rel. Mertens v. Brown, 198 S.W.3d 616 (Mo. banc 2006), and counsel for Relator believes DOC now uses the sentencing date for treatment and shock incarceration programs. Respondent's Exhibit, however, makes an important point. Namely, that the procedures DOC uses have no legal authority. They merely reflect its own interpretation of the law. Further, the fact that DOC uses a certain procedure does not mean that it is correctly following or interpreting the law. Respondent fails to recognize that this Court's, not DOC's, interpretation of a statute is what is controlling. This was clearly shown in *Wolfe v. Department of Corrections*, 199 S.W.3d 219, 222 (Mo. App. W.D. 2006). In *Wolfe*, the Missouri Court of Appeals, Western District, ruled that DOC's interpretation of the parole statute was not valid. *Id.*

Finally, Respondent asserts that the record shows he sentenced Relator under §559.115.2. (Respondent's Brief, pp. 8-9). Respondent cites to the record of the plea to show that he informed Relator that he had complete authority to decide if Relator received probation and that Relator understood this. (Respondent's Brief, p. 8) Respondent attempts to support his argument by showing that his use of the word "grant" implies that Relator was sentenced under §559.115.2 as that shows that there has to be a specific act by Respondent for Relator to receive probation. (Respondent's Brief, p. 9) Respondent contrasts this with the Court Investigation Report from his Exhibit D, which indicates the offender will be released on probation automatically if the court did nothing. (Respondent's Brief, p. 9; Respondent's Exhibit D, p. 24) This argument has no merit. The fact that Respondent believes he sentenced Relator under §559.115.2 has no bearing

on whether or not the SOAU is a one hundred twenty day program under §559.115.3 and as just discussed, *supra*, neither do the policies and practices of DOC.

CONCLUSION

Respondent cites to DOC publications and reports to support his theory that the SOAU is not a program under § 559.115.3. However, not only does he not explain how these support his argument, but also ignores that SOAU is referred to as a program in other DOC publications and reports. Respondent argues that Relator was just being assessed for a program, but does not explain why an assessment program cannot be a one hundred twenty day program under § 559.115.3. More importantly, however, Respondent does not address the “clues” that come directly from the *statute and case law*. Respondent does not address the fact that the SOAU is a program of one hundred twenty days in DOC and that § 559.115.3 applies to DOC one hundred twenty day programs. He does not address the fact that an offender’s placement in the SOAU follows the guidelines outlined in § 559.115.3. He provides no case law to show that the SOAU is not a one hundred twenty day program under § 559.115.3. Finally, he does not address the fact that § 559.115.2 has been interpreted to be *general shock incarceration*,³ which SOAU clearly is not. Respondent has not presented any concise or clear argument to support his argument that this Court should not make its preliminary writ absolute.

³ *Enteburn v. State*, 341 S.W.3d 737, 745-746 (Mo. App. S.D. 2011)

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned counsel, hereby certify, that on this 7th day of May, 2012, true and correct copies of the foregoing brief were personally delivered to the Hon. Mark Orr, Circuit Judge, 38th Judicial Circuit, 110 W. Elm, Room 205, Ozark, Missouri, 65721; Phone 417-581-2727; Fax 417-581-0091; E-Mail: Mark.Orr@courts.mo.gov; and, Mr. Jeff Merrell at the Taney County Prosecutor's Office, Taney County Judicial Center, 266 Main Street, Forsyth, Missouri 65653; Phone 417-546-7260; Fax 417-546-2376; E-Mail: JeffM@co.taney.mo.us.

/s/ James Egan

James Egan

CERTIFICATE OF COMPLIANCE

I, James Egan, hereby certify as follows:

The attached brief complies with the limitations contained in this Court's Rule 84.06. The brief was completed using Microsoft Word, Office 2010, in Times New Roman size 13 point font. Excluding the cover page, signature block, this certification and the certificate of service, this brief contains 1,554 words, which does not exceed the 31,000 words allowed for a Relator's brief.

/s/ James Egan

James C. Egan