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JURISDICTIONAL STATEMENT

This appeal is from the denial of appellant's motion to vacate, set aside or correct judgment and sentence pursuant to Rule 24.035, filed in the Circuit Court of Greene County. Appellant sought to overturn his conviction for assault of a law enforcement officer, § 565.081.1 RSMo 2000;¹ for which he was sentenced to fifteen years imprisonment.

Jurisdiction of this appeal originally was in the Missouri Court of Appeals, Southern District. Article V, §3, Mo. Const. (as amended 1982); §477.060. That Court granted the appellant's application for transfer after an opinion, so this Court now has jurisdiction. Article V, §§3 and 10, Mo. Const. (as amended 1982) and Rule 83.02, V.A.M.R.

¹ All statutory references are to RSMo 2000 unless otherwise noted.

STATEMENT OF FACTS

Criminal Proceedings

Appellant, Kerry Brooks, was charged with assault of a law enforcement officer, § 565.081; and one count of armed criminal action, § 571.015 (L.F. 9-11). Pursuant to the parties' agreement, the state dismissed the armed criminal action charge (L.F. 13). Appellant appeared to plead guilty to assault (L.F. 13). He maintained his innocence, but pled guilty because he was being prosecuted in federal court for possessing a weapon in the same incident, and the state had agreed to recommend a sentence to run concurrently with his federal sentence (L.F. 13-14). There was no downside to pleading guilty (L.F. 14).

Appellant told the court that he did have a gun but he did not pull it on the officer as charged in the information (L.F. 9, 15). He believed that the officer "dramatized the situation" (L.F. 15). Upon hearing this, the trial court suggested that appellant visit with his counsel (L.F. 15). After appellant was brought back in, he stated that he had no questions about the plea agreement (L.F. 15).

The court asked the state to outline the factual basis for the plea (L.F. 16). The state explained that on November 5, 2002, Officer Monica Crews

tried to stop appellant's car for a traffic violation, but appellant drove away (L.F. 16). Officer Crews followed appellant until he crashed into another car (L.F. 16).

Two passengers fled from appellant's car, and appellant also tried to run away (L.F. 16). Officer Crews tried to grab appellant's right hand and saw that he was grasping a handgun in a ready-to-fire position (L.F. 16). Appellant began to swing his right arm toward the front of his body, which would have put his arm between them (L.F. 16). Officer Crews grabbed his hand to prevent him from pointing the gun at her while trying with her other hand to get her gun (L.F. 16). Appellant threw her to the ground and fell on top of her (L.F. 17).

After a brief altercation, Officer Crews was able to get her gun (L.F. 17). She pointed it at appellant and ordered him to drop his weapon (L.F. 17). Appellant threw it down and began to run off (L.F. 17). Officer Crews chased and caught him (L.F. 17). She then retrieved appellant's handgun and found it loaded and in firing position (L.F. 17).

Appellant told the court that nobody involved with the state proceedings had coerced him to plead guilty, but the federal prosecutor had threatened to charge him with other offenses if he did not plead guilty in state court (L.F. 18). He therefore agreed to plead guilty to the assault

(L.F. 18). Appellant was sentenced to 15 years imprisonment to run concurrently with his federal sentence of 17½ years (L.F. 20).

Postconviction Action

Appellant filed a motion to vacate, set aside or correct judgment or sentence (L.F. 159-162). He alleged that his plea agreement was violated when the state failed to transfer him to federal custody so that the sentences could be served concurrently (L.F. 40-43). Appellant also alleged that his conviction and sentence were unconstitutionally obtained because there was no basis in fact for a conviction of assault of a law enforcement officer, since there was no attempt to kill or harm Officer Crews; and also alleged that the information did not charge a Class A felony (L.F. 43-46).

The motion court held an evidentiary hearing, and the state confessed his allegation that the plea agreement had been violated (Tr. 3). As to the other claims, appellant testified that he did not want to plead guilty because he did not commit the assault (Tr. 14). The only reason he pled guilty was because he faced more time in federal court than the state offered (Tr. 14). Appellant told his counsel that a jury would not convict him (Tr. 16). He did not want to plead guilty but was coerced by counsel (Tr. 18).

The motion court added on the record that it had heard a motion to suppress evidence in the case, and

“I thought there was substantial evidence. It wasn’t like he just got out of the car and ran and she asked him to drop the gun twice and he refused and on the third time he dropped it. That wasn’t the fact situation...She struggled with him after seeing the gun, repeatedly told him to drop it, they went to the ground. She had to pull her service revolver.”

(Tr. 23).

The motion court found that appellant's actions “in trying to point a loaded weapon in the ready-fire position and with a bullet in the chamber at an officer who is struggling to keep the weapon pointed away from her body go beyond negligence and are sufficient to indicate a specific intent on Movant’s part to cause death or serious physical injury” to Officer Crews (L.F. 52). It therefore denied relief (L.F. 53).

Appellant appealed to the Missouri Court of Appeals, Southern District (L.F. 55-56). The court dismissed the appeal, ruling that the motion court’s ruling was not a final judgment because the court had vacated the sentence and ordered resentencing. *Brooks v. State*, No. 27682, (Mo. App., S.D. January 31, 2007). This Court transferred the cause.

POINTS RELIED ON

I.

The Court of Appeals misapplied the law in dismissing the appeal for lack of jurisdiction, because the motion court's judgment was a final judgment, in that the it disposed of all issues in the civil action before it, and the fact that the sentence in the criminal matter had been vacated did not affect the finality of the separate civil action.

Hillhouse v. Creedon, 169 S.W.3d 599 (Mo. App., S.D. 2005);

Kniest v. State, 133 S.W.3d 70 (Mo. App., E.D. 2003);

Tisius v. State, 183 S.W.3d 207 (Mo. banc 2006);

§ 547.360.11;

Rule 24.035(k); and

Rule 24. 035(l).

II.

The motion court clearly erred in denying appellant's Rule 24.035 motion, in violation of Rule 24.02(e) and his right to due process of law, as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, because no factual basis was established for his plea of guilty to assault of a law enforcement officer and his plea was not knowing and voluntary, in that the facts recited at the guilty plea hearing established simply that appellant was armed and struggled with Officer Crews; and this alone is insufficient to establish an attempt to kill her or cause her serious physical injury, and the record at the plea hearing establishes that appellant did not believe that he intended any harm to her.

State v. Whalen, 49 S.W.3d 181 (Mo. banc 2002);

Fisher v. State, 192 S.W.3d 551 (Mo. App., S.D. 2006);

Johnson v. State, 172 S.W.3d 831 (Mo. App. S.D. 2005);

Boykin v. Alabama, 395 U.S. 238; 89 S.Ct. 1709; 23 L.Ed.2d 274 (1969);

§ 565.081; and

Rule 24.02(e).

III.

The motion court clearly erred in denying appellant's Rule 24.035 motion, in violation of his right to due process of law, as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, because he pled guilty to an uncharged offense, in that the information alleged appellant's having a gun was a substantial step toward commission of first degree assault on the officer, so that appellant was essentially charged with attempted assault, a Class B felony, not Class A assault; and his plea was therefore unknowingly entered because he believed that he was charged with a Class A felony.

Griffin v. State, 185 S.W.3d 763 (Mo. App. E.D. 2006);

§ 564.011; and

§ 565.081.1.

ARGUMENT

I.

The Court of Appeals misapplied the law in dismissing the appeal for lack of jurisdiction, because the motion court's judgment was a final judgment, in that the it disposed of all issues in the civil action before it, and the fact that the sentence in the criminal matter had been vacated did not affect the finality of the separate civil action.

Neither party questioned the finality of the motion court's judgment before the Court of Appeals, but the court raised it *sua sponte*. This was also the issue upon which this Court granted transfer. Accordingly, this issue should be addressed by the Court. Both appellant and the state have submitted to the Court that there was a final judgment and the Court of Appeals did have jurisdiction.

The motion court vacated appellant's sentence.² It denied appellant's motion to set aside his conviction, however. Appellant filed a timely

² The state confessed the motion as to the sentence, because it had agreed that appellant could serve concurrent time while in federal custody (Tr. 3). According to appellant's motion, the federal authorities refused to accept a

appeal before he could be resentenced (L.F. 7, 55). The Court of Appeals opined that until appellant was resentenced, there was no final judgment to appeal. After appellant was resentenced, appellant could attack his judgment in a Rule 29.15 motion. *Slip opinion* at 3.

Both sides agree that this holding addresses the civil action, which was a final judgment, as if it were the criminal case. Appellant was not appealing his guilty plea or the conviction and sentence. He was appealing the motion court's denial of the claims raised in his Rule 24.035 action.

Rule 24.035(k) provides that “[a]n order sustaining or overruling a motion filed under the provisions of this rule shall be deemed a final judgment for purposes of appeal by the movant or the state.” *See also*, § 547.360.11. Furthermore, a civil judgment is final “when it disposes of all issues for all parties in the case and leaves nothing for future determination.” *Hillhouse v. Creedon*, 169 S.W.3d 599, 602 (Mo. App., S.D. transfer (L.F. 41). As a result, appellant could not receive the benefit of concurrent time until his sentence could be vacated and the federal authorities would then be required to take custody. After transfer to federal custody, the motion court was able to resentence him. This is not an entirely unheard-of occurrence in Missouri courts.

2005). This motion is governed by the Rules of Civil Procedure. Rule 24.035(a); *Williams v. State*, 954 S.W.2d 710, 711 (Mo. App., S.D. 1997).

The motion court's order did both sustain and overrule the motion. It also disposed of all issues and left nothing for further determination. It was, therefore, a final judgment.

The parties have further agreed that the decision of the Court of Appeals will result in confusion. When a motion court denies relief as to the conviction but vacates a sentence and orders that the movant be resentenced, the movant must wait until resentencing and file a new postconviction motion.

Under this scenario, the state could, with some justification, argue that the challenge to the conviction must be dismissed as a successive motion. Rule 24.035(l). The motion court would be legally justified in dismissing on this ground, and would be likely upheld on appeal. *See, Kniest v. State*, 133 S.W.3d 70, 71 (Mo. App., E.D. 2003). The postconviction movant would be deprived of an opportunity to seek appellate review on the merits. The parties agree that the effect of the Southern District's decision is to deny the right to appeal an adverse decision of the motion court.

The Court of Appeals based its ruling on its previous ruling in *Barringer v. State*, 12 S.W.3d 765, 767 (Mo.App. S.D.,2000). In *Barringer*, the court dismissed the appeal, holding that “[i]n this case, Movant did not wait for resentencing to occur before filing this appeal. Until he was resentenced, there was no final judgment that Movant could contest in a post-conviction action.”

The difficulty with *Barringer* is that at that point the court was not hearing a postconviction action. It was deciding an appeal from a postconviction action, not a postconviction motion. *Barringer* was wrongly decided and should be overruled.

Criminal defendants charged with capital murder have had the right to obtain appellate review in this Court when their convictions are upheld but the sentences are vacated. *See, State v. Shafer*, 969 S.W.2d 719, 723 (Mo. banc 1998); *Tisius v. State*, 183 S.W.3d 207, 211 (Mo. banc 2006). Non-capital defendants have the same right, and post-conviction attorneys require guidance in determining the appropriate course of action when a conviction is upheld and the sentence is vacated. This Court should rule that an appeal may be taken from the motion court’s judgment.

II.

The motion court clearly erred in denying appellant's Rule 24.035 motion, in violation of Rule 24.02(e) and his right to due process of law, as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, because no factual basis was established for his plea of guilty to assault of a law enforcement officer and his plea was not knowing and voluntary, in that the facts recited at the guilty plea hearing established simply that appellant was armed and struggled with Officer Crews; and this alone is insufficient to establish an attempt to kill her or cause her serious physical injury, and the record at the plea hearing establishes that appellant did not believe that he intended any harm to her.

There must be a factual basis for a guilty plea. First degree assault of a law enforcement officer involves an attempt to kill or cause serious physical injury. The facts established that appellant was armed, and he struggled with Officer Crews, but he did not ever attempt to shoot her. There was therefore no basis for the guilty plea.

Standard of Review

Appellate review of a motion court's decision in a Rule 24.035 proceeding is limited to a determination of whether the findings and conclusions of the motion court are clearly erroneous. Rule 24.035(k). *Eichelberger v. State*, 134 S.W.3d 790, 792 (Mo. App. W.D. 2004). A motion court's actions are deemed clearly erroneous if a full review of the record leaves the appellate court with a definite and firm impression that a mistake has been made. *Carroll v. State*, 131 S.W.3d 907, 908 (Mo. App. S.D. 2004).

Discussion

In his amended motion, appellant alleged that an insufficient factual basis was established for assault of a law enforcement officer. (L.F. 45-48). Appellant pointed out that there was no evidence of his specific intent to injure or kill the officer (L.F. 45). There was no act that would transform appellant's mere possession of a loaded gun into a first degree assault (L.F. 45). The motion court clearly erred in denying relief.

Pursuant to Missouri Supreme Court Rule 24.02(e), a court may not enter judgment on a plea of guilty unless it first ascertains that there is a factual basis for that plea. *Johnson v. State*, 172 S.W.3d 831, 834 (Mo. App. S.D. 2005). Due process requires that the court must establish a factual

basis. *Santobello v. New York*, 404 U.S. 257, 261, 92 S.Ct. 495 (1971). The purpose of Rule 24.02(e) is to aid in the constitutionally required determination that a defendant's plea is knowing and voluntary. *Fisher v. State*, 192 S.W.3d 551, 554 (Mo. App., S.D. 2006). See also, *Boykin v. Alabama*, 395 U.S. 238, 243; 89 S.Ct. 1709; 23 L.Ed.2d 274 (1969).

A factual basis exists when the record unequivocally establishes the factual requisites necessary to satisfy each element of an offense, though it need not be through the defendant's testimony. *State v. Shafer*, 969 S.W.2d 719, 734 (Mo. banc 1998). It is also established if the defendant understands the facts as outlined by the judge or prosecutor. *Green v. State*, 829 S.W.2d 629, 630 (Mo. App. W.D. 1992).

A person commits the crime of assault of a law enforcement officer in the first degree if he "attempts to kill or knowingly causes or attempts to cause serious physical injury to a law enforcement officer or emergency personnel..." § 565.081.1. The state alleged that appellant "drew a firearm...and such conduct was a substantial step toward the commission of the crime of attempting to kill or cause serious physical injury to law enforcement officer Monica Crews and was done for the purpose of committing such assault" (L.F. 9).

Neither the prosecutor nor appellant ever established that appellant ever intended to kill Officer Crews or to cause her serious physical injury. Appellant never tried to shoot her. If he only intended to flourish his weapon threateningly at her, he was guilty of attempted third degree assault. § 565.070.1(3).

The state's account was that appellant ran away from Officer Crews and also struggled with her (L.F. 16). Nowhere was it ever suggested that appellant so much as pointed the gun her way. All that was proven was that he had a firearm that was operable and loaded, and he moved it between himself and the officer (L.F. 16).

At the evidentiary hearing, the motion court added to the record that appellant struggled with Officer Crews after the officer saw the gun, and she repeatedly ordered him to drop it (Tr. 23). They went to the ground, and Officer Crews was able to draw her service revolver (Tr. 23).

Appellant did not drop his weapon as ordered, and he struggled with Officer Crews. This is not equivalent with intent to kill or cause serious physical injury to her.

Conviction of an attempt to kill or cause serious physical injury "requires proof of a very specific intent on the part of the actor to accomplish that objective... 'a firm purpose'" *State v. Whalen*, 49 S.W.3d

181, 186 (Mo. banc 2002). A person “will be guilty of purposely causing or attempting to cause serious physical injury to another if the person consciously engages in conduct that causes such injury or it is his or her conscious object to cause such injury.” *Id.* at 187. It is not enough that appellant struggled with the officer while possessing the loaded firearm. Reckless behavior does not support the conviction.

The record is entirely lacking in evidence on this point. Appellant's actions will support a conviction for assault if they evince an intent to kill or injure, but the Court “may not supply missing evidence, or give the [State] the benefit of unreasonable, speculative or forced inferences.” *Whalen*, 49 S.W.3d at 184.

Appellant consistently disavowed any intent to injure the officer (L.F. 15). He maintained throughout the proceedings that he had a gun, but he did not pull it on Officer Crews (L.F. 15). This insistence on his innocence necessitated a court recess (L.F. 15). Appellant asserted throughout that he was only entering the plea because the state's offer for concurrent time made it unattractive to maintain his innocence. (L.F. 14). Although this was a proper inducement for a plea, it does not dispense with the need for a factual basis.

Because there was an insufficient factual basis for the court to accept appellant's plea of guilty to assault of a law enforcement officer in the first degree, his plea was involuntary and unknowing, in violation of his right to due process, as guaranteed by the Fourteenth Amendment to the United States Constitution, and by Article I, Section 10 of the Missouri Constitution. Appellant therefore respectfully requests that this Court reverse the judgment of the motion court and remand the underlying criminal case for a trial.

III.

The motion court clearly erred in denying appellant's Rule 24.035 motion, in violation of his right to due process of law, as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, because he pled guilty to an uncharged offense, in that the information alleged appellant's possession of a gun was a substantial step toward commission of first degree assault, so that the information charged attempted assault, a Class B felony, not Class A assault; and his plea was therefore unknowingly entered.

The state charged appellant as follows:

The Prosecuting Attorney of the County of Greene...charges that the defendant, in violation of Section 565.081.1, RSMo , committed the class A felony of assault of a law enforcement officer in the first degree...in that...Monica Crews was a law enforcement officer, defendant...knew Monica Crews was a law enforcement officer, and Defendant drew a firearm...and such conduct was a substantial step toward the commission of the crime of attempting to kill or cause serious physical injury to law enforcement officer

Monica Crews and was done for the purpose of committing such assault.

(L.F. 9).

This charge in fact charged an attempt to violate § 565.081.1. Appellant drew a firearm, which was alleged as a substantial step toward committing an assault. The information alleged a purpose to commit an assault, but never charged with having the purpose to kill or cause serious physical injury, an essential element of the offense. § 565.081.1; *State v. Whalen*, 49 S.W.3d 181, 186 (Mo. banc 2001).

In fact, the form approved by the Missouri Supreme Court, MACH-CR 19.32 (1991) reads as follows:

The... (Prosecuting Attorney)...charge(s) that the defendant, in violation of Section 565.081.1, RSMo, committed the class A felony of assault of a law enforcement officer in the first degree...in that...[name of victim] was a law enforcement officer, defendant knew [name of victim] was a law enforcement officer, and (attempted kill or to cause)(and)(knowingly caused) serious physical injury to him, by...

Appellant alleged that he was convicted of a crime with which he was not charged because the information failed to charge assault and instead charged attempted assault (L.F. 43). The motion court recognized

that the information “contains ‘substantial step’ language from Section 564.011 RSMo which was unnecessary to the charge although the offense required an ‘attempt to kill or cause serious physical injury’ to the victim” (L.F. 51). It concluded, however, that this defect was waived by the plea and appellant's sentence was within the range of punishment for a class B felony (L.F. 51).

Because the information contained the extra “substantial step” language, appellant was actually charged only with attempt to assault the officer, not the assault itself. The act of drawing a firearm was no more than a substantial step taken in the direction of committing an assault. It was not a means of committing first degree assault, because in and of itself it was not an attempt on the officer’s life. The information does not merely contain surplusage; it was deficient. It did not contain all the essential elements as set forth by § 565.081.1. *Griffin v. State*, 185 S.W.3d 763, 767 (Mo. App. E.D. 2006).

Facts that constitute elements of an offense, or increase punishment, must be outlined in the charge as a matter of due process. *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 2350; 147 L.Ed.2d 145 (2000). The test for sufficiency of an information is whether it contains all essential elements of an offense and clearly apprises the defendant of the facts

constituting the offense. *State v. McGinnis*, 215 S.W.3d 322, 324 (Mo. App., E.D. 2007). The information did not contain all essential elements because it did not allege that appellant committed one single act that was an attempt to kill or cause serious physical injury. The act of drawing a firearm was no more than a “substantial step.”

The motion court found, nevertheless, that appellant understood the charge to which he was pleading (L.F. 51). This finding is clearly erroneous. Appellant denied intending to kill or injure Officer Crews—he acknowledged possessing a firearm but steadfastly maintained that he did not intend any harm to the officer and she “dramatized the situation” (L.F. 15). He did not know that the proof of attempt to commit an assault only established a class B offense of attempted assault, not a class A felony of assault of a law enforcement officer. *See Griffin, supra*.

Even if appellant only received a 15 year sentence, he was convicted of a crime with which he was not properly charged. He was charged with attempted assault and convicted of assault. Because appellant was convicted of an offense with which he was never charged, his conviction must be set aside or, in the alternative, corrected to reflect the charge, the Class B felony of attempted first degree assault of a law enforcement officer, and resentencing, in view of the lesser charge.

CONCLUSION

For the reasons set forth above appellant requests that this Court reverse the judgment of the motion court denying relief, vacate appellant's conviction, and remand for trial; or, in the alternative, remand for resentencing on the Class B felony of attempted assault of a law enforcement officer.

Respectfully submitted,

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Certificate of Compliance and Service

I, Rosalynn Koch, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b) and Special Rule 360. The brief was completed using Microsoft Word, Office 2002, in Book Antiqua size 13 point font, which is no smaller than Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 4,372 words, which does not exceed the 15,500 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief.

It has been scanned for viruses using a McAfee VirusScan program, which was updated in June, 2007. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this 29th day of June, 2007, the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

Rosalynn Koch

APPENDIX

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