

IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

CLARENCE BURGESS,)
)
 Appellant,)
)
v.) No. ED94641
)
STATE OF MISSOURI,)
)
 Respondent.)

APPEAL TO THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI
TWENTY-FIRST JUDICIAL CIRCUIT, DIVISION 8
THE HONORABLE TOM W. DEPRIEST
JUDGE AT PLEA
AND POST-CONVICTION PROCEEDINGS

APPELLANT’S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

The State charged Appellant Clarence Burgess with one count of discharging a firearm at a building in violation of Section 571.030.¹ On April 24, 2008, Appellant appeared with counsel and tendered an Alford² guilty plea to the charged offense. The Honorable Tom W. DePriest sentenced Appellant to fifteen years of imprisonment in the Missouri Department of Corrections, suspended the execution of the sentence, and placed Appellant on probation for five years. On December 18, 2008, Appellant's probation was revoked and his fifteen-year sentence was executed.

On May 13, 2009, Appellant timely filed a pro se motion for post-conviction relief pursuant to Missouri Supreme Court Rule 24.035. On June 1, 2009, the motion court appointed the Office of the Public Defender and granted the request for thirty additional days on June 24, 2009. On August 31, 2009, Appellant filed a motion for change of judge and timely filed an amended motion to vacate, set aside, or correct judgment and sentence and request for evidentiary hearing.

On October 6, 2009, the motion court denied Appellant's motion to change judge. The motion court dismissed Appellant's amended motion without an evidentiary hearing on February 19, 2010. Appellant timely filed notice of appeal on March 29, 2010. This appeal presents no questions reserved for the exclusive

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

² North Carolina v. Alford, 400 U.S. 25 (1970).

jurisdiction of the Missouri Supreme Court and jurisdiction properly lies in this Court. Mo. Const., Art. V, Section 3; Section 477.050.

STATEMENT OF FACTS

In the Circuit Court of St. Louis County, Cause No. 07SL-CR3215, the State of Missouri charged that Appellant committed one count of discharging a firearm at a building (L.F. 9). On April 24, 2008, Appellant appeared with counsel and tendered an Alford guilty plea to the charged offense. (L.F. 14-27).

At Appellant's plea, he waived his post-conviction rights (L.F. 26-27). At first, the plea court asked if Appellant understood that a condition of his plea agreement was that he waive his right to proceed under Rule 24.035 (L.F. 26). Appellant responded, "No, no, sir. I don't understand." (L.F. 26). Plea counsel requested to go "Off the record" (L.F. 26). Then, the plea court asked Appellant if he read and understood the waiver document and Appellant replied, "Yes, sir." (L.F. 26-27; Supp. L.F. 1). The plea court also asked plea counsel if the waiver was a part of the plea bargain and plea counsel replied, "It was, Your Honor" (L.F. 27).

The Honorable Tom W. DePriest sentenced Appellant to fifteen years of imprisonment in the Missouri Department of Corrections, suspended the execution of the sentence, and placed Appellant on probation for five years (L.F. 25-26). On December 18, 2008, the court revoked Appellant's probation and executed the fifteen-year sentence (L.F. 35-37).

On May 13, 2009, Appellant timely filed a pro se motion for post-conviction relief pursuant to Missouri Supreme Court Rule 24.035 (L.F. 44-49). On June 1, 2009, the motion court appointed the Office of the Public Defender and

granted the request for thirty additional days on June 24, 2009 (L.F. 50-53). On August 31, 2009, Appellant filed a motion for change of judge and timely filed an amended motion to vacate, set aside, or correct judgment and sentence and request for evidentiary hearing (L.F. 54-79).

Appellant raised two claims in his amended motion (L.F. 59-76). First, Appellant pled that plea counsel was ineffective in that plea counsel pressured Appellant to accept the guilty plea (L.F. 59-60, 62-67). Second, Appellant pled plea counsel had an actual conflict of interest because plea counsel advised Appellant to waive his right to challenge his convictions and sentences under the Missouri Supreme Court's post-conviction rules (L.F. 60-61, 67-76).

On October 6, 2009, the motion court denied Appellant's motion to change judge (L.F. 81). The motion court dismissed Appellant's amended motion without an evidentiary hearing on February 19, 2010 (L.F. 83-84; A1-A2). Appellant timely filed notice of appeal on March 29, 2010 (L.F. 86-89). To avoid repetition, additional facts may be adduced in the argument portion of this brief.

POINTS RELIED ON

I.

The motion court clearly erred in dismissing Appellant’s motion for post-conviction relief without a hearing because Appellant alleged facts showing that he was denied his rights to conflict-free counsel, due process of law, access to courts, and effective assistance of counsel and to meaningful appeal and post-conviction review and remedies in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 14 and 18(a) of the Missouri Constitution and Rule 24.035, in that Appellant’s waiver of his post-conviction rights was invalid because trial counsel advised him while having a conflict of interest because her interest in avoiding a finding of ineffective assistance of counsel, in protecting her reputation, and in avoiding civil liability for legal malpractice was directly against Appellant’s interest in challenging his convictions and avoiding a lengthy term of imprisonment. This conflict of interest prejudiced Appellant by resulting in his unintelligent, unknowing, involuntary, and invalid waiver of post-conviction remedies.

State v. Griddine, 75 S.W.3d 741 (Mo. App. W.D. 2002);

State v. Taylor, 1 S.W.3d 610 (Mo. App. W.D. 1999);

Strickland v. Washington, 466 U.S. 668 (1984);

U.S. Const. Amends. V, VI and XIV; and,

Mo. Const. Art. I, Sections 10, 14, and 18(a).

II.

The motion court clearly erred in dismissing Appellant’s motion and abused its discretion in denying Appellant’s request for a change of judge because Judge DePriest certified Appellant as an adult in this case and accepted his waiver of his post-conviction rights depriving Appellant of his constitutional rights to due process of law, to present a defense, to access to the courts, and to a fair trial in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 14, and 18(a) of the Missouri Constitution. Appellant was prejudiced because based on the previous juvenile certification and subsequent waiver of post-conviction rights, Judge DePriest had prejudged the issue of ineffective assistance of trial counsel and could not be impartial in this case. Appellant was also prejudiced because Judge DePriest did not decide the merits of his post-conviction case and dismissed his case. Had the motion court excused himself from Appellant’s case, the post-conviction case would not have been dismissed and an evidentiary hearing would have been granted.

In re Murchison, 349 U.S. 133 (1955);

State ex. rel. Ferguson v. Corrigan, 959 S.W.2d 113 (Mo. banc 1997);

Rule 2.03;

U.S. Const., Amends. V, VI, XIV; and,

Mo. Const., Art. I, Sections 10, 14, and 18(a).

III.

The motion court clearly erred in dismissing Appellant's motion because Appellant pleaded facts showing he was denied his right to persist in his plea of not guilty, his right to effective assistance of counsel, his right against self-incrimination, his right to a jury trial and his right to due process of law in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10, 18(a), 19, and 22(a) of the Missouri Constitution, in that plea counsel was ineffective in pressuring Appellant to plead guilty by telling him that his case should not go to trial and that he had no other option, but to plead guilty. Appellant was seventeen years old at the time of his plea and plea counsel did not meet with Appellant sufficiently for him to make a decision to plead or go to trial. Plea counsel did not want to try his case.

Had plea counsel not coerced Appellant, he would not have pled guilty, and would have insisted on a trial. Plea counsel was ineffective and plea counsel's ineffectiveness rendered his guilty plea unknowing, unintelligent, and involuntary. Plea counsel was ineffective and plea counsel's ineffectiveness rendered Appellant's guilty plea unknowing, unintelligent and involuntary.

Spradling v. State, 865 S.W.2d 806 (Mo. App. S.D. 1993);

Strickland v. Washington, 466 U.S. 668 (1984);

U.S. Const. Amends. V, VI and XIV; and,

Mo. Const. Art. I, Sections 10, 14, 18(a), 19, and 22(a).

ARGUMENTS

I.

The motion court clearly erred in dismissing Appellant’s motion for post-conviction relief without a hearing because Appellant alleged facts showing that he was denied his rights to conflict-free counsel, due process of law, access to courts, and effective assistance of counsel and to meaningful appeal and post-conviction review and remedies in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 14 and 18(a) of the Missouri Constitution and Rule 24.035, in that Appellant’s waiver of his post-conviction rights was invalid because trial counsel advised him while having a conflict of interest because her interest in avoiding a finding of ineffective assistance of counsel, in protecting her reputation, and in avoiding civil liability for legal malpractice was directly against Appellant’s interest in challenging his convictions and avoiding a lengthy term of imprisonment. This conflict of interest prejudiced Appellant by resulting in his unintelligent, unknowing, involuntary, and invalid waiver of post-conviction remedies.

Preservation of Error and Standard of Review

Appellant pled that plea counsel had an actual conflict of interest because plea counsel advised Appellant to waive his right to challenge his conviction and sentence under the Missouri Supreme Court’s post-conviction rules (L.F. 60-61, 67-76). Because the claim was included in the amended motion, it is preserved for

appellate review. See Comstock v. State, 68 S.W.3d 561, 565 (Mo. App. W.D. 2001) (declining plain error review of claim not raised in original or amended post-conviction motions).

Appellate review of the motion court's denial of a motion for post-conviction relief is limited to a determination of whether the motion court's findings and conclusions are clearly erroneous. Daugherty v. State, 159 S.W.3d 405, 407 (Mo. App. E.D. 2005); Rule 24.035(k). The motion court's findings and conclusions are clearly erroneous if a review of the entire record leaves this Court with the firm impression that a mistake has been made. Yates v. State, 158 S.W.3d 798, 801 (Mo. App. E.D. 2005).

Counsel is ineffective if: 1) there is an conflict of interest such that the interests of counsel and the defendant diverge as to a material factual issue, legal issue, or course of action, and; 2) the conflict of interest had an adverse effect on counsel's performance. Cuyler v. Sullivan, 446 U.S. 335, 356 n. 3 (1980).

Invalid Waiver of Post-Conviction Rights

On April 24, 2008, Appellant appeared with counsel and tendered an Alford guilty plea to the charged offense. (L.F. 14-27). As a part of Appellant's plea, he waived his post-conviction rights (L.F. 26-27). At first, the plea court asked if Appellant understood that a condition of his plea agreement was that he waive his right to proceed under Rule 24.035 (L.F. 26). Appellant responded, "No, no, sir. I don't understand." (L.F. 26). Plea counsel requested to go "Off the record" (L.F. 26). Then, the plea court asked Appellant if he read and understood

the waiver document and Appellant replied, “Yes, sir.” (L.F. 26-27). The plea court also asked plea counsel if the waiver was a part of the plea bargain and plea counsel replied, “It was, Your Honor” (L.F. 27).

The right to appeal is a valuable right, but a defendant in a criminal case may voluntarily waive this right. State v. Cain, 287 S.W.3d 699, 703 (Mo. App. S.D. 2009). A defendant waives his right to appeal where the intention to voluntarily waive appears in the record. State v. Sanning, 271 S.W.3d 56, 58 (Mo. App. E.D. 2008). When a defendant agrees to waive his right to file a motion for new trial and appeal in exchange for a reduced sentence and then receives the “benefit of the bargain,” an appellate court will not hesitate in holding the defendant to his part of the bargain. Id.

Appellant’s case is different because he waived his post-conviction rights in a Rule 24.035 rather than direct appeal rights. When a trial attorney represents a defendant on direct appeal and in a post-conviction motion in which the claim is ineffective assistance of trial counsel, this creates an inherent conflict of interest for the attorney. State v. Taylor, 1 S.W.3d 610, 612 (Mo. App. W.D. 1999) (defense counsel’s advice not to file for post-conviction relief demonstrated actual conflict of interest from which prejudice would be presumed). “It puts the attorney in the untenable position of litigating his or her own incompetence.” Id.; State v. Griddine, 75 S.W.3d 741, 743-744 (Mo. App. W.D. 2002) (trial counsel, who represented defendant on direct appeal and who also advised defendant not to

file post-conviction motion alleging a conflict of interest, presumably caused prejudice to defendant).

In Missouri, Rule 24.035 post-conviction review is the only way for a prisoner to challenge his conviction after a guilty plea. Rule 24.035. In Missouri, a Rule 24.035 post-conviction action is equivalent to “first-tier review” of claims of attorney ineffectiveness. As the United States Supreme Court explained, a “first-tier” appeal entails an adjudication on the “merits.” Halbert v. Michigan, 545 U.S. 605, 611 (2005). “First-tier review differs from subsequent appellate stages ‘at which the claims have once been presented by [appellate counsel] and passed upon by an appellate court.’” Id. (quoting Douglas v. California, 372 U.S. 353, 356 (1963)).

Until a post-conviction proceeding, Appellant’s constitutional claims of ineffective assistance of plea counsel had never before been passed upon by *any* court, let alone an appellate court. Rule 24.035 is the exclusive way Appellant could claim ineffective assistance of counsel. Appellant’s claims, by definition, fall within the realm of “first-tier review.”

Additionally, the enforceability of a waiver of direct-appeal rights and a waiver of collateral-attack rights in the plea agreement are not absolute. See DeRoo v. United States, 223 F.3d 919, 923 (8th Cir. 2000). For example, defendants cannot waive their right to appeal an illegal sentence or a sentence imposed in violation of the terms of an agreement. See United States v. Michelsen, 141 F.3d 867, 872 (8th Cir. 1998).

A decision to enter into a plea agreement cannot be knowing and voluntary when the plea agreement itself is the result of advice outside “the range of competence demanded of attorneys in criminal cases.” Hill v. Lockhart, 474 U.S. 52, 56 (1985) (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)); Tollett v. Henderson, 411 U.S. 258, 266-67 (1973). Therefore, for example, “[j]ustice dictates that a claim of ineffective assistance of counsel in connection with the negotiation of a cooperation agreement cannot be barred by the agreement itself—the very product of the alleged ineffectiveness.” Jones v. United States, 167 F.3d 1142, 1145 (7th Cir. 1999) (defendant convicted and entered into cooperation agreement before sentencing).

A defendant’s plea agreement waiver of the right to seek post-conviction relief does not waive defendant’s right to argue, that the decision to enter into the plea was not knowing and voluntary because it was the result of ineffective assistance of counsel. See DeRoo, 223 F.3d at 924. Other courts agree that a waiver of federal section 2255 rights does not automatically preclude a defendant from raising ineffective assistance of counsel claims in a post-conviction motion. See United States v. Henderson, 72 F.3d 463, 465 (5th Cir. 1995) (“dismissal of an appeal based on a waiver in the plea agreement is inappropriate where the defendant’s motion to withdraw the plea incorporates a claim that the plea agreement generally and the defendant’s waiver of appeal specifically, were tainted by ineffective assistance of counsel”); United States v. Abarca, 985 F.2d 1012, 1014 (9th Cir. 1993) (stating waiver does not “categorically” foreclose

defendant's right to bring motion under section 2255 for ineffective assistance of counsel); see also United States v. Craig, 985 F.2d 175, 178 (4th Cir. 1993) (per curiam) (holding waiver did not preclude Rule 32(d) motion challenging validity of waiver due to ineffective assistance of counsel).

Further, the Advisory Committee of the Missouri Supreme Court recognized this problem in Formal Opinion 126 dated May 19, 2009. The Formal Opinion stated:

It is not permissible for defense counsel to advise the defendant regarding waiver of claims of ineffective assistance of counsel by defense counsel. Providing such advice would violate Rule 4-1.7(a)(2) because there is a significant risk that the representation of the client would be materially limited by the personal interest of defense counsel. Defense counsel is not a party to the post-conviction relief proceeding but defense counsel certainly has a personal interest related to the potential for a claim that defense counsel provided ineffective assistance to the defendant. It is not reasonable to believe that defense counsel will be able to provide competent and diligent representation to the defendant regarding the effectiveness of defense

counsel's representation of the defendant. Therefore,
under Rule 4-1.7(b)(1), this conflict is not waivable.

Mo. Advisory Comm. Op., Formal Op. 126 (2009).

Appellant's waiver should be found invalid based on Formal Opinion 126.
See Rule 24.035 and Mo. Advisory Comm. Op., Formal Op. 126 (2009).

Appellant anticipates the State will cite Jackson v. State, 241 S.W.3d 831, 833 (Mo. App. E.D. 2007); State v. Valdez, 851 S.W.2d 20, 22 (Mo. App. W.D. 1993); State v. Sanning, 271 S.W.3d 56, 58 (Mo. App. E.D. 2008); State v. Green, 189 S.W.3d 655, 657 (Mo. App. S.D. 2006) for the proposition that a movant can waive his right to seek post-conviction relief in return for a reduced sentence. However, all of these cases were written before the Advisory Committee of the Missouri Supreme Court's Formal Opinion 126 on May 19, 2009. This Court must re-examine these cases based on the Formal Opinion 126.

Analysis

Conflicts of interest between counsel and the criminal defendant may so adversely affect the adequacy of counsel's representation as to constitute ineffective assistance of counsel. Wood v. Georgia, 450 U.S. 261, 272-273 (1981). An accused is entitled to representation by counsel with undivided loyalty. Gordon v. State, 684 S.W.2d 888, 890 (Mo. App. W.D. 1985).

Factors taken into consideration in determining whether there is a conflict of interest include the following: whether trial counsel encouraged the defendant

to waive his post-conviction remedies and whether trial counsel was prepared to go to trial. See Roll v. Bowersox, 16 F.Supp.2d 1066, 1078 (W.D. Mo 1998).

In a criminal case, the authority to make certain decisions rests with the defendant. Brown v. State, 882 S.W.2d 154, 156 (Mo. App. E.D. 1994). These include whether to plead guilty, waive a jury, take an appeal, or take the stand to testify. Id.; Wainwright v. Sykes, 433 U.S. 72, 93, n. 1 (1977).

When a trial attorney represents a defendant on direct appeal and in a post-conviction motion in which the claim is ineffective assistance of trial counsel, this creates an inherent conflict of interest for the attorney. Taylor, 1 S.W.3d at 612 (defense counsel's advice not to file for post-conviction relief demonstrated actual conflict of interest from which prejudice would be presumed). "It puts the attorney in the untenable position of litigating his or her own incompetence." Id.; Griddine, 75 S.W.3d at 743-744 (trial counsel, who represented defendant on direct appeal and who also advised defendant not to file post-conviction motion alleging a conflict of interest, presumably caused prejudice to defendant).

In order to obtain an evidentiary hearing for his claims for post-conviction relief: (1) Appellant must plead facts, not conclusions, warranting relief; (2) the facts alleged must raise matters not conclusively refuted by the files and records in the case; and, (3) the matters complained of must have resulted in prejudice to Appellant. See State v. Driver, 912 S.W.2d 52, 55 (Mo. banc 1995).

To justify the denial of an evidentiary hearing, an accused's responses to a judge's questions in open court regarding performance of the accused's lawyer

must be specific enough to support a finding by the motion court in the post-conviction proceeding that the record conclusively refutes the allegation of ineffective assistance. Van v. State, 918 S.W.2d 921, 923 (Mo. App. S.D. 1996).

At Appellant's plea, he waived his post-conviction rights (L.F. 26-27). At first, the plea court asked if Appellant understood that a condition of his plea agreement was that he waive his right to proceed under Rule 24.035 (L.F. 26). Appellant responded, "No, no, sir. I don't understand." (L.F. 26). Plea counsel requested to go off the record (L.F. 26). Then, the plea court asked Appellant if he read and understood the waiver document and Appellant replied, "Yes, sir." (L.F. 26-27). The plea court also asked plea counsel if the waiver was a part of the plea bargain and plea counsel replied, "It was, Your Honor" (L.F. 27).

First, when asked about the waiver, Appellant stated he did not understand and counsel's response was to go off the record (L.F. 26). Second, the plea court did not ask about a possible conflict between waiver of post-conviction rights and counsel's interest (L.F. 26). Consequently, Appellant's claim is not refuted by the record and entitles him to post-conviction relief.

Appellant pled if an evidentiary hearing is granted, he would testify that plea counsel pressured him to waive his post-conviction rights (L.F. 72). Appellant pled he would also testify that plea counsel did not fully explain what he had waived at his plea (L.F. 72). Appellant pled he would testify that he did not understand that he had waived his post-conviction remedies (L.F. 72). Further, Appellant pled he would testify that a fifteen year sentence is not a "benefit of a

bargain” because fifteen years is the maximum time for an unenhanced class B felony (L.F. 72). Appellant pled that plea counsel would testify to her recollection of Appellant’s waiver of his post-conviction rights (L.F. 72).

Additionally, plea counsel’s advice to Appellant on the waiver of his post-conviction rights created an inherent conflict of interest and placed plea counsel in the untenable position of advising Appellant about the waiver of claims challenging the effectiveness of plea counsel’s representation (L.F. 72). This conflict of interest affected plea counsel’s representation because her interest in avoiding a finding of ineffective assistance of counsel, in protecting her reputation, and in avoiding civil liability for legal malpractice was contrary to Appellant’s interest in challenging his conviction and avoiding a lengthy term of imprisonment (L.F. 73).

When trial counsel advised Appellant about waiving his post-conviction remedies, plea counsel stepped into the shoes of post-conviction counsel and sought to advise Appellant about the merit of potential post-conviction claims, including challenges to plea counsel’s representation of Appellant (L.F. 73). Plea counsel cannot represent Appellant at his plea and advise him on the waiver of his post-conviction remedies because of the inherent conflict of interest. *Mo. Advisory Comm. Op., Formal Op. 126 (2009)*; (L.F. 73, 79).

Plea counsel was ineffective and plea counsel’s ineffectiveness rendered Appellant’s waiver of his post-conviction rights unknowing, unintelligent and involuntary (L.F. 73). Appellant pled he would testify that he would not have

waived these rights if plea counsel would have fully explained all the consequences of the waiver and disclosed the conflict of interest between them (L.F. 73-74). Had plea counsel not had an inherent conflict with Appellant, he would have not have waived his post-conviction remedies (L.F. 74).

As a result of trial counsel's pressure and inherent conflict of interest, Appellant was not to pursue his post-conviction rights on the merits (L.F. 74).

Reasonably competent trial counsel under the same or similar circumstances would have not have advised Appellant to waive his post-conviction rights because of the conflict of interest (L.F. 74). Reasonable competent trial counsel would have ensured that Appellant understood that he had a right to post-conviction relief in his case and that he could assert his right in the face of contrary advice from plea counsel (L.F. 74). Because plea counsel failed to act as reasonably competent plea counsel would have acted under the same or similar circumstances, plea counsel was ineffective (L.F. 74).

Appellant was prejudiced because plea counsel pressured Appellant to waive his rights and did not disclose the inherent conflict with Appellant about his waiving his post-conviction rights (L.F. 74). See Griddine, 75 S.W.3d at 744. Prejudice is presumed. Id.

But for plea counsel's coercion and inherent conflict, Appellant would not have waived his post-convictions rights at his plea (L.F. 74-75). Appellant's refusal to waive his rights would have allowed him to pursue his post-conviction

motion on its merits, and possibly appealing any denial of this motion to this Court (L.F. 74-75).

Therefore, plea counsel's ineffectiveness deprived Appellant of his rights to conflict-free counsel, due process, access to courts, meaningful post-conviction review and remedies and effective assistance of plea counsel in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Article I, Sections 10, 14 and 18(a) of the Missouri Constitution, and Rule 24.035, because plea counsel had an inherent conflict of interest. This Court should reverse the motion court's judgment and set aside his plea because the invalid waiver of post-conviction rights invalidated the plea. In the alternative, this Court should reverse the motion court's judgment and remand for findings on the substance of Appellant's post-conviction motion or grant Appellant an evidentiary hearing on the issue of the conflict of interest.

II.

The motion court clearly erred in dismissing Appellant's motion and abused its discretion in denying Appellant's request for a change of judge because Judge DePriest certified Appellant as an adult in this case and accepted his waiver of his post-conviction rights depriving Appellant of his constitutional rights to due process of law, to present a defense, to access to the courts, and to a fair trial in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 14, and 18(a) of the Missouri Constitution. Appellant was prejudiced because based on the previous juvenile certification and subsequent waiver of post-conviction rights, Judge DePriest had prejudged the issue of ineffective assistance of trial counsel and could not be impartial in this case. Appellant was also prejudiced because Judge DePriest did not decide the merits of his post-conviction case and dismissed his case. Had the motion court excused himself from Appellant's case, the post-conviction case would not have been dismissed and an evidentiary hearing would have been granted.

Preservation of Error and Standard of Review

On August 31, 2009, Appellant filed a motion for change of judge (L.F. 54-57). On October 6, 2009, the motion court denied Appellant's motion to change judge (L.F. 81). Because the issue was raised and ruled on by the motion court, it is preserved for appellate review (P.C.R. L.F. 54-57, 81). See Comstock, 68 S.W.3d at 565.

In reviewing the trial court's denial of a motion for change of judge, the appellate court presumes that a trial judge will not preside over a proceeding in which the judge cannot be impartial. Williams v. Reed, 6 S.W.3d 916, 920 (Mo. App. W.D. 1999). Therefore, this court will affirm the trial court's denial of a motion for change of judge unless the denial constitutes an abuse of discretion. Id.

Invalid Waiver of Post-Conviction Rights

Appellant re-asserts, as argued in Point I, that the waiver was invalid. (App. Br. 15-20).

Analysis

In denying Appellant's motion to change judge, the motion court did not give reasons for its denial (P.C.R. L.F. 81). In Appellant's motion to change judge, Appellant stated that he believed that he could not have a fair and impartial Rule 29.15 post-conviction proceeding before the Honorable Tom W. DePriest because Judge DePriest certified him as an adult in this case and accepted his waiver of his post-conviction rights (P.C.R. L.F. 54). Based on the previous juvenile certification and subsequent waiver of post-conviction rights, Appellant believed Judge DePriest had prejudged the issue of ineffective assistance of trial counsel and could not be impartial in this case (L.F. 55).

Due process requires that biased, prejudiced or impartial arbiters be removed. In re Murchison, 349 U.S. 133, 136 (1955). "There is no question that the law on judicial bias is clearly established: a criminal defendant is constitutionally required to be tried before an impartial judge, and the likelihood

or appearance of bias, even in the absence of actual bias, may prevent a defendant from receiving a fair trial.” Kinder v. Bowersox, 272 F.3d 532, 540 (8th Cir. 2001); Taylor v. Hayes, 418 U.S. 488, 501 (1974).

Consequently, the existence or nonexistence of actual bias against the defendant is not the benchmark for determining whether a judge should be disqualified or recused. State v. Smulls, 935 S.W.2d 9, 24 (Mo. banc 1996). A judge should be disqualified if a reasonable person would find an appearance of impropriety and doubt the impartiality of the court. State v. Whitfield, 939 S.W.2d 361, 367 (Mo. banc 1997).

As an arbiter and a highly visible symbol of government, the motion judge must avoid the very appearance of impropriety, regardless of whether the motion judge perceives an actual conflict of interest or whether the motion judge is actually biased against the defendant. See Rule 2.03 Canon 2A.

In order to comply with the Code of Judicial Conduct, the motion judge must disqualify herself if her failure to do so would undermine public confidence in the integrity and impartiality of the judiciary. See Rule 2.03 Canon 2A. The general disqualification provision of the Code of Judicial Conduct, Rule 2.03, Canon 3 E, provides in pertinent part:

- (1) A judge should recuse in a proceeding in which
 - the judge’s impartiality might reasonably be questioned,
 - including but not limited to instances where:
 - (a) the judge has a personal bias or prejudice concerning

a party or a party's lawyer, or personal knowledge
of disputed evidentiary facts concerning the proceeding;

In a post-conviction proceeding, the judge may, upon considering the merits, decide that the interests of justice require him to recuse himself from a post-conviction proceeding. State ex. rel. Ferguson v. Corrigan, 959 S.W.2d 113, 116 (Mo. banc 1997). The test for disqualifying bias is whether a reasonable person would have a factual basis to find an "appearance" of impropriety and question the impartiality of the court. Smulls, 935 S.W.2d at 24.

There were other judges available in the Circuit, who have not previously been involved in this case, and under Missouri Supreme Court Rule 51.07, the Presiding Judge of the Twenty-First Judicial Circuit can designate another judge in the Circuit when the original judge is disqualified. Rule 51.07.

The motion court abused its discretion in denying Appellant's request for a change of judge because Judge DePriest certified Appellant as an adult in this case and accepted his waiver of his post-conviction rights depriving Appellant of his constitutional rights to due process of law, to present a defense, to access to the courts, and to a fair trial in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 14, and 18(a) of the Missouri Constitution.

Appellant was prejudiced because based on the previous juvenile certification and subsequent waiver of post-conviction rights, Judge DePriest had prejudged the issue of ineffective assistance of trial counsel and could not be

impartial in this case. Appellant was also prejudiced because Judge DePriest did not decide the merits of his post-conviction case and dismissed his case. Had the motion court excused itself off of Appellant's case, the post-conviction case would not have been dismissed and an evidentiary hearing would have been granted. This Court must reverse the motion court's ruling and remand this case for an evidentiary hearing with a different judge from the Twenty-First Circuit.

III.

The motion court clearly erred in dismissing Appellant's motion because Appellant pleaded facts showing he was denied his right to persist in his plea of not guilty, his right to effective assistance of counsel, his right against self-incrimination, his right to a jury trial and his right to due process of law in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10, 18(a), 19, and 22(a) of the Missouri Constitution, in that plea counsel was ineffective in pressuring Appellant to plead guilty by telling him that his case should not go to trial and that he had no other option, but to plead guilty. Appellant was seventeen years old at the time of his plea and plea counsel did not meet with Appellant sufficiently for him to make a decision to plead or go to trial. Plea counsel did not want to try his case.

Had plea counsel not coerced Appellant, he would not have pled guilty, and would have insisted on a trial. Plea counsel was ineffective and plea counsel's ineffectiveness rendered his guilty plea unknowing, unintelligent, and involuntary. Plea counsel was ineffective and plea counsel's ineffectiveness rendered Appellant's guilty plea unknowing, unintelligent and involuntary.

Preservation of Error and Standard of Review

Appellant pled that plea counsel was ineffective in that plea counsel pressured Appellant to accept the guilty plea (L.F. 59-60, 62-67). Because the

claim was included in the amended, it is preserved for appellate review. See Comstock, 68 S.W.3d at 565.

Appellate review of the motion court's denial of a motion for post-conviction relief is limited to a determination of whether the motion court's findings and conclusions are clearly erroneous. Daugherty, 159 S.W.3d at 407; Rule 24.035(k). The motion court's findings and conclusions are clearly erroneous if a review of the entire record leaves this Court with the firm impression that a mistake has been made. Yates, 158 S.W.3d at 801.

“In order to prevail on a claim of ineffective assistance of trial counsel, a defendant in a criminal case must show (1) that trial counsel failed to exercise the customary skill and diligence of a reasonably competent attorney, and (2) that she was prejudiced in that a different outcome would have resulted but for trial counsel's errors.” Norville v. State, 83 S.W.3d 112, 114 (Mo. App. S.D. 2002); see also Strickland, 466 U.S. at 687 and Sanders v. State, 738 S.W.2d 856, 857 (Mo. banc 1987).

Invalid Waiver of Post-Conviction Rights

Appellant re-asserts, as argued in Point I, that the waiver was invalid. (App. Br. 15-20).

Analysis

To justify the denial of an evidentiary hearing, an accused's responses to a judge's questions in open court regarding performance of the accused's lawyer must be specific enough to support a finding by the motion court in the post-

conviction proceeding that the record conclusively refutes the allegation of ineffective assistance. Van v. State, 918 S.W.2d 921, 923 (Mo. App. S.D. 1996). The requirements Appellant must satisfy in order to obtain an evidentiary hearing when he seeks post-conviction relief on the ground of ineffective assistance of counsel are: (1) he must plead facts, not conclusions, warranting relief; (2) the facts alleged must raise matters not conclusively refuted by the files and records in the case; (3) the matters complained of must have resulted in prejudice to Appellant. See Smith v. State, 207 S.W.3d 228, 230 (Mo. App. S.D. 2006).

At his plea, when the plea court asked Appellant if he had any complaints or criticisms of plea counsel, Appellant responded, “No, sir.” (L.F. 21). At his plea and sentencing hearing, when the plea court asked Appellant if he had been threatened or promised anything to induce his plea, Appellant responded, “No, sir.” (Tr. 21, 37). However, responses to routine inquiries about making threats, coercion, or promises made to induce the defendant’s plea are too general to encompass all possible statements by counsel to his client. See Shackleford v. State, 51 S.W.3d 125, 128 (Mo. App. W.D. 2001); Bauer v. State, 926 S.W.2d 188, 191 (Mo. App. S.D. 1996). Consequently, Appellant’s claims are not refuted by the record and entitle him to post-conviction relief.

To prevail on a claim of ineffective assistance of counsel, Appellant must show that his plea attorney failed to exercise the customary skill and diligence a reasonably competent attorney would have exercised under similar circumstances, and that he was thereby prejudiced. Strickland v. Washington, 466 U.S. 668, 687

(1984). After entering a plea of guilty, ineffective assistance of counsel is relevant only to the extent that it affected the voluntariness of the plea. Boyd v. State, 205 S.W.3d 334, 339 (Mo. App. S.D. 2006).

Appellant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty but would have insisted on going to trial. Moore v. State, 207 S.W.3d 725, 729 (Mo. App. S.D. 2006).

A plea of guilty is constitutionally valid only to the extent it is voluntary and intelligent. Brady v. United States, 397 U.S. 742, 747 (1970). "A plea of guilty must not only be a voluntary expression of the defendant's choice, it must be a knowing and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences of the act." Id. The plea is involuntary if the defendant has been misled or induced to plead guilty by fraud, mistake, misapprehension, fear, coercion or promises, and the defendant's plea must be withdrawn. Bequette v. State, 161 S.W.3d 905, 907 (Mo. App. E.D. 2005).

In his amended motion, Appellant pled that he would testify that he was seventeen at the time of his plea and did not understand a lot of what was going on (L.F. 63). Appellant pled that he would testify that he did not understand the difference between suspended imposition of sentence and suspended execution of sentence (L.F. 63). Appellant pled that he would testify that he believed that when the court executed the 15 year sentence that meant "it went away" (L.F. 63).

Appellant pled that he would testify that plea counsel did not meet with him enough (L.F. 63). Appellant pled that he would testify that he repeatedly asked

plea counsel to meet with him (L.F. 63). Appellant pled that he would testify that he wanted his plea counsel to meet with him to learn more about his case and prepare for trial (L.F. 63).

Appellant pled that he would testify that he always wanted to take his case to trial (L.F. 64). Appellant pled that his plea counsel told him that he had no other option than to plead guilty (L.F. 64). Appellant pled that he would testify that plea counsel told him that as long as the witnesses came to court and pointed him out, he will be found guilty and receive 15 years (L.F. 64).

Additionally, Appellant pled that he would testify that plea counsel never wanted to take his case to trial and as the trial date drew near, plea counsel began to pressure Appellant to plead guilty (L.F. 64). Appellant pled that he would testify he felt helpless, and lost confidence in plea counsel (L.F. 64). Appellant pled that he lost confidence in his plea counsel and felt pressured to plead guilty because of plea counsel's apparent reluctance to take his case to trial (L.F. 64).

Further, Appellant pled that plea counsel would testify about her recollection of her representation of him before his plea (L.F. 64). Appellant pled that plea counsel was expected to testify that she recommended that Appellant plead guilty (L.F. 64).

Because of the coercion, plea counsel was ineffective and plea counsel's ineffectiveness rendered Appellant's guilty plea unknowing, unintelligent, and involuntary (L.F. 64). Appellant pled that he would have proceeded to trial had

plea counsel not coerced him into pleading guilty (L.F. 64). Had plea counsel not pressured Appellant to plead guilty, he would have insisted on a trial (L.F. 64).

As a result of plea counsel's pressure to plead guilty, instead of proceeding to trial, Appellant pled guilty to one count of discharging a firearm at a building resulting in a fifteen year sentence of imprisonment (L.F. 65).

Reasonably competent plea counsel under the same or similar circumstances would have advised Appellant that it was his choice whether or not to proceed to trial, would have met with Appellant, and would have investigated the existence of defenses to the charged crime (L.F. 65). Reasonably competent plea counsel would have ensured that Appellant understood that he had a right to proceed to trial and that he could assert his right in the face of contrary advice from plea counsel (L.F. 65). Because plea counsel failed to act as reasonably competent plea counsel would have acted under the same or similar circumstances, plea counsel was ineffective (L.F. 65).

Appellant was prejudiced by plea counsel's ineffectiveness because he wanted to persist in his plea of not guilty and wanted to proceed to trial on the alleged charge (L.F. 65).

Appellant's claim that his guilty plea was coerced is not waived by his entry of a plea of guilty. Morrison v. State, 65 S.W.3d 561, 564 (Mo. App. W.D. 2002). Based on the pleadings, his plea was therefore involuntary. Cf. Spradling v. State, 865 S.W.2d 806, 807-809 (Mo. App. S.D. 1993) (finding the claim that plea coerced when court advised defendant that a jury was waiting if he wanted to

go to trial even though court knew attorney at plea was unprepared for trial and was filling in for main attorney refuted by the record as transcripts of evidentiary hearing and plea demonstrated it was never contemplated that fill-in attorney would represent defendant at trial).

In summary, Appellant pled sufficient facts that entitled him to an evidentiary hearing. This Court has reversed a motion court's denial of an evidentiary hearing on sufficiently pled ineffective assistance of counsel claims. See e.g., Lomax v. State, 163 S.W.3d 561, 564 (Mo. App. E.D. 2005); Price v. State, 171 S.W.3d 154, 157-158 (Mo. App. E.D. 2005). This Court should reverse the judgment of the motion court and remand this cause for an evidentiary hearing.

CONCLUSION

WHEREFORE, based on his argument in Points I-III of his brief, Appellant requests that this Court reverse the motion court's judgment and set aside his plea because the invalid waiver of post-conviction rights invalidated the plea. In the alternative, this Court should reverse the motion court's judgment and remand for findings of facts and conclusions of law on the merits or grant Appellant an evidentiary hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(g) and Special Rule 361, I hereby certify that on this day, September 23rd, 2010, a true and correct copy of the foregoing brief and a floppy disk containing the foregoing brief were mailed postage prepaid to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102. In addition, pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the page limitations of Special Rule 360. This brief was prepared with Microsoft Word for Windows, uses Times New Roman 13 point font, and does not exceed 15,500 words, 1,100 lines, or fifty pages. The word-processing software identified that this brief contains 6,966 words, excluding the cover page, signature block, and certificates of service and of compliance. Finally, I hereby certify that the enclosed diskette has been scanned for viruses with Symantec Endpoint Protection software and found virus-free.

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APPENDIX

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