

MISSOURI SUPREME COURT

Supreme Court No. SC90000

State of Missouri ex rel. Anthony Zinna,

Relator,

vs.

Troy Steele,

Respondent.

**RELATOR'S
Reply Brief**

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ARGUMENT I

RELATOR ZINNA IS ENTITLED TO A WRIT OF HABEAS CORPUS REQUIRING RESPONDENT STEELE TO RELEASE HIM FROM INCARCERATION BASED UPON THE SENTENCING COURT'S WRITTEN ORDER ERRONEOUSLY STATING THAT RELATOR'S FIVE YEAR SENTENCE RUN CONSECUTIVELY TO A PREVIOUS, NOW COMPLETED SENTENCE BECAUSE RULE 29.09 MANDATES THAT A SENTENCE SHALL RUN CONCURRENTLY WITH A PREVIOUS SENTENCE IF THE COURT FAILS TO STATE THAT IT RUN CONSECUTIVELY IN THAT THE SENTENCING COURT WHEN PRONOUNCING SENTENCE IN RELATOR'S PRESENCE FAILED TO STATE THAT HIS SENTENCE WAS TO BE SERVED CONSECUTIVELY WITH HIS PRIOR SENTENCES.

The lynchpin of Respondent's argument is that the plea discussion among the parties and the Sentencing Court when read in its entirety reveals a "bargained for" intent for consecutive sentences. Therefore, Respondent claims that the Sentencing Court's oral pronouncement of sentence and its written Sentence and Judgment do not conflict. Respondent bemoans that Relator will receive a sentencing windfall if he prevails.

Respondent's argument misses the mark. *Rule 29.09* controls the effect given to multiple sentences. The Sentencing Court did not state that Relator's multiple sentences should run consecutively; accordingly, they run concurrently by operation of law. *Id.* This is a bright line rule. It is strictly limited because the "possibility of abuses inherent

in broad judicial power to increase sentences outweighs the possibility of windfalls to a few prisoners.” Rupert v. State, 250 S.W.3d 442 (Mo. App. E.D. 2008); Cooper, 712 S.W.2d at 33 *quoting* Munoz-Dela Rosa, 495 F.2d at 255. Such is the case here.

The Sentencing Court stated: “It will be the sentence, order and judgment of this Court that this defendant be committed to the State Department of Corrections for a term of five years for the class C felony of possession of a controlled substance in a correctional facility.” (Guilty Plea Transcript found in Relator’s Opening Brief appendix at A 14-15). The Court subsequently stated: “As a result of that plea of guilty, the Court sentenced you to five years to serve in the State Department of Corrections; is that your recollection?” (Guilty Plea Transcript found in Relator’s Opening Brief appendix at A 15-16).

The Sentencing Court did not state that the sentences should run consecutively. Consequently, the sentences run concurrently. *Rule 29.09*.

ARGUMENT II

RELATOR ZINNA IS ENTITLED TO A WRIT OF HABEAS CORPUS REQUIRING RESPONDENT STEELE TO RELEASE HIM FROM INCARCERATION BASED UPON THE SENTENCING COURT'S WRITTEN ORDER ERRONEOUSLY STATING THAT RELATOR'S FIVE YEAR SENTENCE RUN CONSECUTIVELY TO A PREVIOUS, NOW COMPLETED SENTENCE BECAUSE HABEAS CORPUS IS THE PROPER METHOD TO CHALLENGE A SENTENCE WHERE RELIEF UNDER RULE 24.035 IS TIME-BARRED AND CAUSE AND PREJUDICE CAN BE SHOWN IN THAT RELATOR IS OUT-OF-TIME TO FILE A RULE 24.035 CHALLENGE, HIS SENTENCE WAS NOT CALCULATED UNTIL MORE THAN TWO YEARS AFTER THE DATE ON WHICH HIS CURRENT SENTENCE WAS PRONOUNCED, AND HE IS PREJUDICED NOTING THAT HE WOULD BE FREE FROM INCARCERATION PRESENTLY IF HIS SENTENCE HAD BEEN PROPERLY CALCULATED TO RUN CONCURRENTLY WITH HIS NOW COMPLETED, PRIOR SENTENCES.

Respondent claims that Relator was furnished with a copy of his face sheet and the written Sentence and Judgment. Yet, no documents exist in the record on Appeal to substantiate this claim. More importantly, Respondent has no evidence that Relator knew or was made aware of the inconsistent written Sentence and Judgment within *Rule 24.035's* time limitations.

The only evidence of what Relator knew within *Rule 24.035*'s time limitations is the information conveyed to him in person by the Sentencing Court when it pronounced sentence in his presence on March 14, 2003.¹ The Sentencing Court stated: "It will be the sentence, order and judgment of this Court that this defendant be committed to the State Department of Corrections for a term of five years for the class C felony of possession of a controlled substance in a correctional facility." (Guilty Plea Transcript found in Relator's Opening Brief appendix at A 14-15). In contrast, the written Sentence and Judgment stated: "It is the Sentence, Order and Judgment of the Court that the Defendant be confined for a term of 5 years for the offense of Possession of a Controlled Substance in a Correctional Facility, said sentence to run consecutive to sentence now being served and to be endured in such place of confinement as may be designated by the State Department of Corrections." (Written Sentence and Judgment in case no. 02CR615004, found in Relator's Opening Brief appendix at A-21) (emphasis added). Relator did not receive this Written Sentence and Judgment. The record on appeal is devoid of any evidence that Relator was actually provided or made aware of the inconsistent written Sentence and Judgment within *Rule 24.035*'s time limitations.

¹ Relator in his Opening Brief stated on page 17, line 5 and on page 18, line 20 that his sentencing date was May 14, 2003 and then May 13, 2003, respectively. The correct date was March 14, 2003.

Respondent counters by stating that its internal document, Relator's adult institutions face sheet, timely and correctly calculated the sentences to run concurrently. Respondent's argument once again misses the mark. The issue is Relator's knowledge within the PCR time limitations, not the internal record keeping practices of Respondent. Relator, in his Opening Brief, did inject the issue of the internal notations in his adult institutions face sheet. Yet, there are no facts in the record on appeal showing that Relator was made privy to these internal documents during *Rule 24.035*'s time limitations.²

On March 27, 2006, Relator's face sheet was amended to show: "ADJUSTED RELEASE DATES AND RECALCULATED CS SENTENCE ON 12/02CR615004. RENUMBERED SEQUENCES AND PUT IN CHRONOLOGICAL ORDER. NECC." (Relator's Face Sheet found in Relator's Opening Brief appendix at A-24). Relator does not claim that he learned of the erroneous sentencing effect on March 27, 2006. Rather, Relator merely directs the Court's attention to this document as additional evidence that Relator has satisfied his cause and prejudice exception to *Rule 24.035*.

In that connection, Respondent's discussion of actual innocence and jurisdiction are not germane to the thrust of Relator's claim for Habeas relief. Here, Relator's

² Undersigned counsel obtained these documents and referenced them in Relator's Opening Brief because they were attached to Respondent's Return to the Preliminary Writ of Habeas Corpus – not because they were provided by Relator.

requested Habeas relief is not barred by *Rule 24.035*'s time limitations because he was unable due to lack of knowledge to raise his claim of error regarding an improper sentencing calculation in a timely manner. As such, *Rule 24.035* does not bar Habeas relief. See *Brown v State*, 66 S.W.3d 721, 722 (Mo. banc 2002); *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 214 (Mo. banc 2001).

Finally, Respondent invites this Court to remand Relator to the Sentencing Court for a full-blown re-sentencing. However, a release from confinement, not a remand for re-sentencing, is the proper remedy for Relator. See, *State v. Bulloch*, 838 S.W.2d 510, 514 (Mo. App. W.D. 1992) (holding that under *Rule 29.09*, a judicial oversight in specifying whether an arson charge was to run consecutively or concurrently with a manslaughter conviction could not be remedied by a remand).

CONCLUSION

Respondent Troy Steele failed to properly calculate and carry out Relator's sentence in case no. 02CR615004 as required by *Rule 29.09*. Had Respondent properly calculated and carried out the sentence, Relator would have been released from incarceration on August 20, 2007. This Court should make its preliminary Writ of Habeas Corpus permanent or, in the alternative, issue a permanent writ of mandamus and command Respondent to immediately release Relator from incarceration.

RULE 84.06 CERTIFICATE

1. a. The undersigned certifies pursuant to Rule 55.03(3) that this brief is signed by at least one attorney of record in the attorney's individual name. The signer's address, Missouri Bar Number and telephone number are as follows:

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The undersigned certifies that this brief is not verified or accompanied by affidavit.

b. The undersigned certifies pursuant to Rule 55.03(b) to the best of his knowledge, information and belief, formed after an inquiry reasonable under the circumstances, that: (1) the matters set forth in this brief are not presented or maintained for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (2) the matters set forth in this brief are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) the allegations and other factual contents have evidentiary support of, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

c. The undersigned certifies pursuant to Rule 55.03(c) that this brief is not sanctionable.

2. The undersigned certifies that this brief complies with the limitations contained in Rule 84.06(b).

3. Relying on the word and line count of the word-processing system used to prepare this brief, the undersigned certifies that this brief contains 1,786 words and 307 lines of text.

4. Pursuant to Rule 86.06(g), the undersigned certifies that the disks containing this brief that are filed with the Court and served to the parties have been scanned for viruses and that they are virus-free.

Respectfully submitted,

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