

IN THE
MISSOURI SUPREME COURT

WILLIE E. COOPER,)
)
 Appellant,)
)
 vs.) Appeal No. SC91695
)
 STATE OF MISSOURI,)
)
 Respondent.)

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT FOR ST. LOUIS COUNTY, MISSOURI
THE HONORABLE GLORIA CLARK RENO, JUDGE AT POST-
CONVICTION PROCEEDINGS

APPELLANT'S SUBSTITUTE STATEMENT, BRIEF AND
ARGUMENT

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Jurisdictional Statement

Appellant Willie E. Cooper pled guilty to two counts of stealing over \$500 in St. Louis Circuit Court cause numbers 2106R-00649A-01 and 07SL-CR05248-01, the Honorable Melvyn W. Weisman presiding. On October 24, 2008, the court sentenced Appellant, as a prior and persistent offender, to fifteen (15) years in each count to run concurrently, however, the court suspended execution of sentence and placed Appellant on probation for a period of five (5) years. On April 17, 2009, the court, the Honorable Stephen K. Wilcox, revoked Appellant's probation and committed Appellant to the Department of Corrections.

On May 18, 2009, Appellant filed a pro se motion for post-conviction relief pursuant to Rule 24.035 with the sentencing court. Complete transcripts were filed September 1, 2009 and the motion court, the Honorable Gloria Clark Reno, granted post-conviction counsel thirty (30) additional days in which to file an amended motion. On December 4, 2009, post-conviction filed an amended post-conviction motion and asked the motion court to deem it timely because the lateness of the motion was not Appellant's fault. The motion court denied an evidentiary hearing but ruled on the merits of Appellant's claims on March 17, 2010.

Notice of appeal was filed on May 14, 2010. On February 15, 2011, the Missouri Court of Appeals, Eastern District, dismissed Appellant's appeal because of Appellant's waiver of appeal in Circuit Court with directions to the motion court to vacate its judgment and dismiss Appellants 24.035 motion.

This Court sustained Appellant's application for transfer on May 31, 2011. This Court has jurisdiction of this appeal.

* * *

The Record on Appeal will be cited to as follows: Legal File, "LF" (which contains the Plea and Sentencing Transcripts as well as the court's legal files in the criminal case and post-conviction case).

Statement of Facts

The state charged Appellant Willie E. Cooper with two counts of stealing over \$500 in two St. Louis Circuit Court cases, 2106R-00649A-01 and 07SL-CR05248-01 (LF 8, 39). Additionally, the state charged Appellant with being a prior and persistent offender (LF 11-12). Appellant entered guilty pleas in both cases on October 24, 2008, pursuant to a recommendation from the state for probation (LF 14). Appellant pled guilty before the Honorable Melvyn W. Weisman (LF 10).

Appellant agreed he did not have to plead guilty and that no one had threatened him or promised him anything to get him to plead guilty (LF 15). Appellant agreed he was satisfied with plea counsel's representation of him (LF 15). The court sentenced that day to fifteen (15) years in the Missouri Department of Corrections but suspended the execution of sentence and placed Appellant on probation for a period of five (5) years (LF 15, 17). Apparently, as part of plea agreement, Appellant agreed to waive his post-conviction remedies (LF 15-16).

On April 16, 2009, Appellant was the subject of a probation violation hearing conducted before the Honorable Stephen Wilcox (LF 21-28). After hearing evidence, the court, on April 17, 2009, revoked

Appellant's probation and executed the previously imposed fifteen-year sentence (LF 28, 33, 45).

Appellant filed a *pro se* motion under Supreme Court Rule 24.035 in the Circuit Court for St. Louis County as to both convictions on May 18, 2009 (LF 50-56). The sentencing court appointed the State Public Defender as post-conviction counsel (LF 57). Post-conviction counsel entered his appearance on August 19, 2009, and, at counsel's request, the motion court granted Appellant an additional thirty days in which to prepare an amended motion for post-conviction relief (LF 58-59). Complete transcripts of the plea, sentencing and probation revocation were filed September 1, 2009 (LF 10, 19).

In his amended motion, filed December 4, 2009, Appellant pled his pleas were involuntary because of ineffective assistance on the part of his appointed lawyer, Ms. Jill Schaefer (LF 61-67). Appellant stated counsel warned Appellant that if he insisted on trying his case counsel would move to withdraw (LF 61-67). Additionally, counsel told Appellant that if he was to try his cases and lose, he would receive the maximum possible punishment to be served consecutively (LF 61-67). Finally, Appellant complained his lawyer wrongly told him he would be compelled to try both his cases jointly and would certainly lose as a result (LF 61-67). Undersigned counsel asked the motion court, the

Honorable Gloria Clark Reno, accept the amended motion though it was late by four days because the lateness was appointed counsel's fault and not the Appellant's (LF 67-68).

The motion court accepted Appellant's motion but rejected his complaint about the effectiveness of counsel. The court ruled in Findings issued March 17, 2010, that the record refuted Appellant's claims (LF 72-73). The court observed,

The transcript reveals that Movant stated under oath he was pleading guilty to the charges voluntarily of his own free will; that no one forced him to enter pleas of guilty to the charges; and that he was satisfied with Ms. Schaefer's representation.

(LF 73).

Appellant filed notice of appeal on May 14, 2010 (LF 76-79). The Missouri Court of Appeals, Eastern District, dismissed Appellant's appeal (ED94757) because of Appellant's waiver of post-conviction remedies with directions to the motion court to vacate its judgment and dismiss Appellant's 24.035 motion. The Missouri Court of Appeals, Eastern District, transferred Appellant's appeal to this Court on June 6, 2011 pursuant to Rule 83.02. To avoid repetition, additional facts will be cited in the argument portion of the brief.

Points Relied On

I. The motion court correctly refused to dismiss Appellant's post-conviction case and ruled on the merits of Appellant's claims – albeit incorrectly – in accordance with Appellant's rights to due process, effective assistance of counsel and equal protection as guaranteed by the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution in that Appellant's supposed waiver of post-conviction was uncounseled and consequently involuntarily and unintelligently entered. The dismissal by the Court of Appeals overlooks the unethical provision of such waivers in the absence of conflict-free counsel and Missouri precedent that the motion court is vested with determining the validity of such waivers.

Burgess v. State, No.SC91571 (Mo. July 19, 2011)

Chesney v. U.S., 367 F.3d 1055 (8th Cir. 2004)

Jackson v. State, 241 S.W.3d 831 (Mo. App. E.D. 2007)

Missouri Supreme Court Rules 4-1.7, 4-3.8, 8.4, 24.035, 29.15, and 83.02

Mo. Constitution, Art I, §§10 and 18(a)

Formal Opinion 126 of the Advisory Committee

U.S. Constitution, Fifth, Sixth and Fourteenth Amendments

II. The motion court clearly erred when it denied Appellant's motion for post-conviction relief without a hearing because Appellant alleged facts not conclusively refuted by the record which, if proven, would entitle him to relief in that Appellant was denied his rights to due process and effective assistance of counsel, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution because plea counsel was ineffective for coercing Appellant to plead guilty by threatening to withdraw, threatening the maximum punishment following trial, and threatening Appellant would have to undergo a joint trial. But for plea counsel's coercive tactics, Appellant would not have pled guilty but would have insisted on trials in each case. The motion court's denial of relief leaves a definite and firm impression that a mistake was made because Appellant's general expression of satisfaction with counsel's representation did not specifically refute Appellant's complaints that he was misled.

Nimrod v. State, 14 S.W.3d 103 (Mo. App. W.D. 2000)

State v. Lindley, 545 S.W.2d 669 (Mo. App. St.L.D. 1976)

State v. Vaughn, 940 S.W.2d 26 (Mo. App. S.D. 1997)

Missouri Supreme Court Rule 24.035

Mo. Constitution, Art I, §§10 and 18(a)

U.S. Constitution, Fifth, Sixth and Fourteenth Amendments

Argument

I. The motion court correctly refused to dismiss Appellant's post-conviction case and ruled on the merits of Appellant's claims – albeit incorrectly – in accordance with Appellant's rights to due process, effective assistance of counsel and equal protection as guaranteed by the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution in that Appellant's supposed waiver of post-conviction was uncounseled and consequently involuntarily and unintelligently entered. The dismissal by the Court of Appeals overlooks the unethical provision of such waivers in the absence of conflict-free counsel and Missouri precedent that the motion court is vested with determining the validity of such waivers.

Standard of Review and Preservation

In addition to responding and objecting to the State's motion to dismiss the appeal, Appellant raised in his brief below an argument that Appellant's waiver should not be enforced by the Court of Appeals. Because of the centrality of this procedural issue to Eastern District's order transferring and for the sake of clarity, Appellant makes his argument in a separate point.

Appellate review of post-conviction motions is limited to a determination of whether the findings and conclusions of the trial court are clearly erroneous. Burroughs v. State, 773 S.W.2d 167, 169 (Mo. App. E.D. 1989). Findings of facts and conclusions of law are clearly erroneous if the appellate court, upon reviewing the record, is left with the definite and firm impression that a mistake has been made. Id.; Richardson v. State, 719 S.W.2d 912, 915 (Mo. App. E.D. 1986); Rule 29.15(k).

Facts

Appellant was sentenced, following guilty pleas entered in St. Louis County Cause No. 2106R-00649A-01 for Count I – stealing over \$500, a C felony. The court sentenced Appellant in 07SL-CR05248-01 for Count I – stealing over \$500, a class C felony. When he pled, Appellant agreed he did not have to plead guilty and that no one had threatened him or promised him anything to get him to plead guilty (LF 15). Appellant agreed he was satisfied with plea counsel’s representation of him (LF 15). The court sentenced Appellant that day to fifteen (15) years in the Missouri Department of Corrections but suspended the execution of sentence and placed Appellant on probation for a period of five (5) years (LF 15, 17). Apparently, as part of plea agreement, Appellant agreed to waive his post-conviction remedies (LF

15-16). The plea court described the Rule 24.035 procedure, “just to make sure you know what you’re giving up.” (LF 15).

The Eastern District Court of Appeals held this waiver precluded Appellant from raising any claims on appeal relating to his post-conviction motion. Cooper v. State, No. ED94757 (Feb. 15, 2011). The Court so ruled despite: 1) the waiver being procured by plea counsel and the prosecutor; 2) the waiver being effectively uncounseled without independent counsel available to inform Appellant of the consequences of said waiver; and 3) the motion court, the court in the best position to evaluate the voluntariness of the waiver, chose not to enforce it. Slip Opinion at 5.

Analysis

The validity of the waiver of post-conviction rights is so important that Missouri case law requires post-conviction counsel to be appointed to evaluate the voluntariness of any such waiver. Simpson v. State, 90 S.W.3d 542 (Mo. App. E.D. 2002) (holding that the motion court may not dismiss a *pro se* filing from a movant who waived post-conviction relief without first appointing counsel). Here the motion court appointed counsel and was aware of the supposed waiver because Appellant noted the waiver in his pleadings (LF 63) And the state did not raise the issue of Appellant’s waiver in circuit court. The circuit

court ruled on the merits and ignored the waiver. But the Eastern District of the Missouri Court of Appeals made the ruling the circuit court would not make and enforced the waiver. The Eastern District's ruling calls into question the continued viability of the Simpson decision. Why require the circuit court to appoint counsel before passing on the legitimacy of a waiver, if appellate courts will simply remand for dismissal regardless what the circuit court does?¹

The circuit court did the appropriate thing in Appellant's case, it appointed counsel, chose not to enforce the waiver of post-conviction rights, and ruled on the merits of Appellant's case. Implicit in this decision is that the circuit court was unconvinced of the validity of the waiver, and felt compelled to rule on the merits of Appellant's case.

The central problem with post-conviction waivers is that plea counsel cannot advise a client to waive post-conviction rights in the

¹ Additionally, such rulings represent a drain on Public Defender resources because it appears counsel must be appointed but is quite powerless to help his or her client regardless of how the circuit court rules. Cf. Swofford v. State, 323 S.W.3d 60 (Mo. App. E.D. 2010) (dismissing movant's post-conviction appeal because the Form 40 was untimely even though neither the court nor state raised the issue).

same way counsel may offer objective, cogent advice about entering a guilty plea or waiving direct appeal. Counsel cannot offer objective advice about the quality of his or her own representation. Counsel's incompetence may mask her ability to recognize her incompetence. See Errol Morris, *The Anosognosic's Dilemma: Something's Wrong but You'll Never Know What It Is* (Pt. 1), N.Y. Times online content (June 20, 2010) < <http://opinionator.blogs.nytimes.com/2010/06/20/the-anosognosics-dilemma-1/>> (discussing the Dunning-Kruger Effect). Counsel's advice as to the quality of counsel's own representation may be flawed in ways counsel does not recognize.

Federal Courts recognize the problem inherent in waiving post-conviction claims of ineffective assistance on the advice of counsel: such advice by counsel (to waive) not only divests the criminal defendant of important rights, it also insulates the attorney from later challenge. In Chesney v. U.S., 367 F.3d 1055, 1058-1059 (8th Cir. 2004), the Eighth Circuit recognized this complication:

Chesney's specific claim that his waiver was the result of ineffective assistance of counsel is more complicated. A panel of this court has held that "[a] defendant's plea agreement waiver of the right to seek section 2255 post-conviction relief does not waive

defendant's right to argue, pursuant to that section, that the decision to enter into the plea was not knowing and voluntary because it was the result of ineffective assistance of counsel.” DeRoo v. United States, 223 F.3d 919, 924 (8th Cir.2000); *see also* United States v. Andis, 333 F.3d 886, 890 (8th Cir.2003) (en banc). According to DeRoo, “ [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.’ ” DeRoo, 223 F.3d at 924 (quoting Jones v. United States, 167 F.3d 1142, 1145 (7th Cir.1999)).

Chesney, 367 F.3d at 1058.

If plea counsel advised Appellant to waive post-conviction remedies (as the record suggests at LF 15) it was unethical of her to do so because she would be counseling Appellant to waive his sole means for testing plea counsel’s representation. The accused in a criminal case has a right to representation uncluttered by counsel’s efforts to vindicate his own conduct. Nunn v. State, 778 S.W.2d 707, 711 (Mo. App. E.D. 1989) (holding that where counsel’s conduct was made an issue at trial, counsel should have moved for mistrial or to withdraw).

Here, plea counsel, not independent counsel, advised Appellant to waive his post-conviction remedies even though it was the quality of plea counsel's representation that would likely be the subject of a post-conviction motion. Plea counsel could not objectively advise Appellant as to the effectiveness of her own representation.

It seems the chief "evil" waivers of post-conviction relief are designed to address are claims of ineffective assistance of counsel. If, for example, Appellant had presented a complaint that he was sentenced to more time than permitted under Missouri statute, it is unlikely the circuit court would refuse to correct the problem because Appellant waived post-conviction relief. Appellant contends complaints about the adequacy are typically waived by defendants pleading guilty when plea courts address defendants as to the job their lawyers did. In fact, the plea court even asked those questions of Appellant, despite his supposed waiver of a collateral challenge.

Furthermore, the record is not clear that Appellant understood he was waiving the very means he had to address his counsel's advice and representation. The plea court never pointed out that Rule 24.035 motions embodied claims of ineffective assistance of counsel.

Appellant's waiver was not a knowing and intelligent waiver. Plea Counsel did not and could not ethically advise Appellant to waive

any post-conviction rights or even counsel him on the subject because those rights were Appellant's sole avenue for addressing the effectiveness of plea counsel's representation. Formal Opinion 126 of the Advisory Committee of the Supreme Court of Missouri discourages advice by counsel that a client waive post-conviction relief. Formal Opinion 126 is unequivocal that defense counsel may not ethically counsel a client to waive post-conviction remedies:

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.

Formal Opinion 126.

This Court, in Burgess v. State, (No. SC91571), (Mo. banc July 19, 2011)), dealt with a similar issue as Mr. Burgess waived his right to post-conviction relief. However, the majority remanded the case without ruling on the waiver issue because the trial court failed to present findings of fact and conclusions of law. Slip Opinion at 7. The concurrence, though, stated that the findings of fact should include “findings as to whether defense counsel or the prosecutor went beyond the limits set forth in Formal Opinion 126...” Slip Opinion at 1 (Wolff, J., concurring). More specifically, the concurrence wanted to know “ (1) Whether defense counsel advised his client... to waive the client’s right to seek post-conviction relief based on ineffective assistance of counsel; and (2) Whether the prosecuting attorney required that [the appellant] waive all rights under 24.035 when entering in the plea agreement.” Id. The concurrence then cited to Formal Opinion 126 stating, “formal opinions are binding on attorneys” and concluded by indicating that the waiver issue may go to the merits of the appellant’s post-conviction motion. Id. at 3.

Appellant does concede that the majority in Burgess indicated that the waiver issue may be moot because Formal Opinion 126 wasn't published at the time the appellant entered his waiver. But Appellant argues that the specific date of enactment is immaterial because Formal Opinion 126 did not revolutionize the ethical obligations the legal system places on attorneys. Ethical standards frown on conflicts of interest and the publishing of Formal Opinion 126 did not change an attorney's responsibility to provide his client with the highest quality legal representation – it only restated accepted principles of professional responsibility.

Nevertheless, the Burgess concurrence indicates how strongly some members of this Court feel about the waiver of post-conviction rights and how important the ethical obligations in Formal Opinion 126 are to the legal profession. But here, the Respondent and the Missouri Court of Appeals promote doing what the circuit court refused to do – enforcing the waiver. Citing its decision in Jackson v. State, 241 S.W.3d 831, 833 (Mo. App. E.D. 2007), the Court of Appeals wrote, “A movant can waive his right to seek post-conviction relief in return for a reduced sentence if the record clearly demonstrates that the movant was properly informed of his rights and that the waiver was made knowingly, voluntarily, and intelligently.” Id. What that Court glosses

over is that Appellant could not have been properly informed nor was his waiver voluntary and intelligent.

Although the Jackson opinion countenances waivers where a defendant is “properly informed of his rights and that the waiver was made knowingly, voluntarily, and intelligently,” the Advisory Committee points out defense counsel cannot ethically dispense such advice. In the absence of advice from conflict-free counsel this Court must answer whether an uncounseled waiver (or one counseled by an attorney with a conflict) can truly be voluntary and intelligent.

Moreover, it was unethical for the prosecutor here to make such a waiver a condition of the guilty plea and sentence recommendation; to have done so was “inconsistent with the prosecutor’s duties as a minister of justice[.]” Formal Opinion 126 citing Rules of Professional Conduct 4-3.8 and 8.4(d).

In this case, the Eastern District of the Missouri Court of Appeals’ decision enforcing Appellant’s effectively uncounseled waiver of his post-conviction rights thus violated Appellant’s rights to due process and effective assistance of counsel as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution. Therefore, the Court of Appeals, Eastern District, overlooked material

matters of law and fact when it held that Appellant was barred from raising any claims for post-conviction relief because he waived those rights as part of his plea agreement.

II. The motion court clearly erred when it denied Appellant's motion for post-conviction relief without a hearing because Appellant alleged facts not conclusively refuted by the record which, if proven, would entitle him to relief in that Appellant was denied his rights to due process and effective assistance of counsel, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution because plea counsel was ineffective for coercing Appellant to plead guilty by threatening to withdraw, threatening the maximum punishment following trial, and threatening Appellant would have to undergo a joint trial. But for plea counsel's coercive tactics, Appellant would not have pled guilty but would have insisted on trials in each case. The motion court's denial of relief leaves a definite and firm impression that a mistake was made because Appellant's general expression of satisfaction with counsel's representation did not specifically refute Appellant's complaints that he was misled.

Standard of Review

Appellate review of decisions under Rule 24.035 is limited to whether the findings, conclusion, and judgment of the motion court are clearly erroneous. Vernor v. State, 894 S.W.2d 209, 210 (Mo. App. E.D.

1995); Rule 24.035(k). The motion court's findings, conclusion, and judgment are clearly erroneous if a review of the entire record leaves this Court with the firm and definite impression that a mistake has been made. Dudley v. State, 903 S.W.2d 263, 265 (Mo. App. E.D. 1993).

Analysis

Appellant complains plea counsel violated his right to effective assistance of counsel because counsel threatened Appellant with various dire consequences if he refused to plead guilty as charged. Appellant wrote his lawyer issued three threats on the day of Appellant's pleas to insure Appellant pled guilty,

On October 24, 2008, Movant met with counsel and reiterated that he did not wish to plead guilty. Counsel dismissed Movant's wishes and told him he had to plead guilty because he would lose his cases if he tried them. During their conversation, Ms. Schaefer told Movant if he did not agree to plead guilty and tell the Court he wanted to plead guilty, Ms. Schaefer would move to withdraw. Movant would have to defend himself counsel told Movant. Moreover, even if she did represent him at a trial beginning the following Monday, he would almost certainly lose and then be sentenced to maximum sentences to be served

consecutively (thirty years) for having tried his cases.

Finally, counsel said, his cases were going to be jointly-tried making it almost certain he would be convicted.

Movant did not want to proceed *pro se*, he did not have money to hire a new lawyer, and he certainly did not want to get convicted and serve thirty years for trying his case. Movant agreed to plead guilty to avoid what appeared to be a sure conviction if he was tried for both incidents simultaneously. However, at counsel's urging, Movant told the Court, the Honorable Melvyn W. Wiesman, that he was satisfied with counsel's efforts and that he had not been threatened or forced to plead guilty (Tr. 10-12, 22-23 of plea and sentencing). But Movant will testify at an evidentiary hearing he only hid his dissatisfaction because he was afraid of being compelled to go to trial the following Monday.

(LF 62-63)

Appellant had a right to the effective assistance of counsel. "The Sixth Amendment to the United States Constitution establishes the right to counsel, a fundamental right to all criminal defendants, which extends to state defendants through the Due Process Clause of the

Fourteenth Amendment.” Gideon v. Wainwright, 372 U.S. 355 (1963). This right is designed to assure fairness, and thus to give legitimacy to the adversarial process. To fulfill its role of ensuring a fair trial, the right to counsel must be the right to “effective” assistance of counsel. Kimmelman v. Morrison, 477 U.S. 365 (1986); McMann v. Richardson, 397 U.S. 759 (1970).

Counsel is obligated to be effective even when a defendant chooses to plead guilty. Ordinarily, “[t]o prevail on a claim that he received ineffective assistance of counsel in a plea proceeding, the movant must show that there is a reasonable probability that but for counsel’s errors, he would not have pled guilty and would have insisted on a trial.” Nimrod v. State, 14 S.W.3d 103 (Mo. App. W.D. 2000). Once a defendant has pled guilty, “the ineffective assistance of counsel is relevant only to the extent it affected the voluntariness and understanding with which the plea was made.” Rick v. State, 934 S.W.2d 601 (Mo. App. E.D. 1996). Appellant complained his pleas were not made voluntarily because of: 1) counsel’s threat to withdraw; 2) counsel’s threat Appellant would be punished for trying his case; and 3) counsel’s untrue assertion Appellant would have to try both incidents in a joint trial (LF 61-66).

If Appellant's pleas were the product of "...fraud, mistake, misapprehension, fear, coercion or promises, [he] should be permitted to withdraw his guilty plea." Tillock v. State, 711 S.W.2d 203, 205 (Mo. App. S.D. 1986) (*citing* Latham v. State, 439 S.W.2d 737, 739 (Mo. banc 1969)). The motion court's conclusion that Appellant's claims were refuted was error. In order to deny relief without a hearing the court must find that the record conclusively shows Appellant is not entitled to relief. Rule 24.035(h). The record here does not refute Appellant's claim. The motion court noted Appellant said he had not been forced to plead guilty and that he was satisfied with plea counsel's representation (LF 73).

As to each of his post-conviction claims, Appellant would have no reason to understand he had been coerced at the time he pled.

Appellant had no reason to think his lawyer would not withdraw or that she would have to get the trial court's permission to do so. See State v. Lindley, 545 S.W.2d 669, 670 (Mo. App. St.L.D. 1976).

Likewise, Appellant would not have understood that he could not be punished for exercising his right to trial. Exercising the constitutional right to trial by jury to determine guilt or innocence must have no bearing on the sentence imposed. State v. Vaughn, 940 S.W.2d 26, 29 (Mo. App. S.D. 1997); United States v. Marzette, 485 F.2d 207 (8th Cir.

1973). A court may not use the sentencing process to punish a defendant for exercising his right to receive a full and fair trial.

Vaughn, supra, United States v. Sales, 725 F.2d 458, 460 (8th Cir.

1984). Finally, counsel's dire warning to Appellant about having to try his cases jointly was factually incorrect. Though both cases had the same trial date (October 27, 2008), nothing in the record suggests the two were joined for trial and the state had not moved to do so by October 24, 2008 (LF 3, 36).

“To preclude an evidentiary hearing, inquiry into defendant's satisfaction with performance of trial counsel conducted at sentencing proceedings must be specific enough to elicit responses from which motion court may determine that record refutes conclusively allegation of ineffectiveness asserted in motion for post-conviction relief based upon ineffective assistance of trial counsel.” Schafer v. State, 256 S.W.3d 140, 148 (Mo. App. W.D. 2008) quoting Evans v. State, 921 S.W.2d 162, 165 (Mo. App. W.D, 1996). In Appellant's case, the questions posed by the court were too broad to conclusively refute Appellant's claim that plea counsel coerced Appellant's plea by a mixture of misleading legal and factual advice. State v. Driver, 912 S.W.2d 52 (Mo. banc 1995).

When a criminal defendant seeks post-conviction relief on a claim of ineffective assistance of counsel, he must establish by the preponderance of the evidence first, his attorney's performance was deficient and second, he was prejudiced thereby. Strickland v. Washington, 466 U.S. 668, 687-689 (1984); Seales v. State, 580 S.W.2d 733, 735-736 (Mo. banc 1979); Rule 24.035(i). The Strickland test is applicable to guilty pleas, and ordinarily in order to satisfy the second Strickland requirement, the appellant must show, but for counsel's error, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985); Kline v. State, 704 S.W.2d 721 (Mo. App. S.D. 1986). This is what Appellant pled below and it was error by the court to conclude Appellant had not stated grounds for relief and that his claim was refuted by the record. Appellant was deprived of his rights to due process of law and effective assistance of counsel, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution.

Conclusion

WHEREFORE, for the foregoing reasons, this Court should reverse the motion court's judgment denying Appellant post-conviction relief, and remand with directions that the court grant an evidentiary hearing.

Respectfully Submitted,

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Certificate of Compliance and Service

I, Scott Thompson, hereby certify the following: The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, in Century size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 5,430 words and 635 lines which does not exceed the 31,000 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 Symantec Endpoint Protection, with updated virus definitions. 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 27th day of July, 2011, to Mr. John W. Grantham, Office of the Attorney General, State of Missouri, Jefferson City, Missouri 65102.

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