

NO. SC 89867

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

RESPONDENT,

vs.

MICHAEL G. CRAIG,

APPELLANT.

Appeal from the Circuit Court of Clay County, Missouri

Seventh Judicial Circuit

Honorable Michael J. Maloney, Judge

APPELLANT'S SUBSTITUTE REPLY BRIEF

BRUCE B. BROWN, MO. BAR NO. 30307

P.O. BOX 679

KEARNEY, MISSOURI 64060

1-816-628-6100

1-816-628-4980 (FAX)

ATTORNEY FOR APPELLANT

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STATEMENT

Because the Respondent has raised additional issues not addressed by the Appellant in his brief, the Appellant submits this substitute reply brief pursuant to Missouri Rules of Court 30.06(g) and 83.08(b). References to Respondent's brief will be abbreviated as "R.Br." and to Appellant's brief as "App.Br.".

POINTS RELIED ON

POINT ONE

The Court of Appeals erred as a matter of law and to the prejudice of Appellant when it ruled that it did not have jurisdiction to determine the issues because a direct appeal from a judgment entered on a guilty plea did not occur in that Appellant only pled guilty to the underlying DWI misdemeanor, pleading not guilty to the enhancement allegations and having a hearing as provided under §577.023; in that Appellant was only appealing the trial court's finding beyond a reasonable doubt that Defendant was an aggravated offender; in that it would be unreasonable to require a defendant to plead not guilty to the underlying offense in order to preserve a right to contest and directly appeal a finding of being a prior, persistent, aggravated, or chronic offender; and in that the State's failure to prove the facts warranting a finding of enhanced offender status beyond a reasonable doubt would be a jurisdictional defect.

MO.REV.STAT. §577.023.

MO.REV.STAT. §302.020.

Brown v. State Farm Mutual Automobile Ins. Co., 776 S.W.2d 384

(Mo.banc 1989).

POINT TWO

The trial court erred as a matter of law and to the prejudice of Defendant when it overruled Defendant's motion to dismiss the felony information and to strike enhancement allegations and when it overruled Defendant's motion for judgment of acquittal as to the findings of three prior intoxication related traffic offenses because the enhancement of the charge of Driving While Intoxicated from a Class B misdemeanor to a Class C felony was based upon invalid pleas of guilty and/or findings of guilty to all three intoxication related traffic offenses in that the evidence, based upon the whole record, did not establish beyond a reasonable doubt that any of the alleged pleas of guilty and/or findings of guilty were knowingly, voluntarily, and intelligently made as mandated by Rule 24.02 (state prosecutions) and Rule 37.59 (municipal prosecutions) and in that the evidence, based upon the whole record, established that the record was invalid on its face.

State v. Shafer, 969 S.W.2d 719(Mo.banc 1998).

State v. Quinn, 594 S.W.2d 599(Mo.banc 1980).

Moore v. State, 974 S.W.2d 658(Mo.App. E.D. 1998).

Missouri Constitution, Article One, §18(a).

Missouri Constitution, Article One, §22(a).

POINT THREE

The trial court erred as a matter of law and to the prejudice of Defendant when it overruled Defendant's motion to dismiss as to the alleged plea of guilty to or finding of guilty of driving while intoxicated in the 1991/1992 state court proceeding because the evidence did not establish beyond a reasonable doubt that Defendant pleaded guilty or was found guilty as required under MO.REV.STAT. §577.023 in that the disposition form in the court records clearly shows that both the line for the plea and the line for a finding of guilty were not checked and in that none of the other court records reflect a guilty plea or finding of guilty.

Weaver v. Schaaf, 520 S.W.2d 58(Mo. banc 1975).

Turner v. State, 245 S.W.3d 826(Mo.banc 2008).

State v. Pedockie, 391 S.W.2d 25(Mo. 1965).

State v. Johnson, 220 S.W.3d 377(Mo.App. E.D. 2007).

MO.REV.STAT. §577.023.

ARGUMENT

POINT ONE

The Court of Appeals erred as a matter of law and to the prejudice of Appellant when it ruled that it did not have jurisdiction to determine the issues because a direct appeal from a judgment entered on a guilty plea did not occur in that Appellant only pled guilty to the underlying DWI misdemeanor, pleading not guilty to the enhancement allegations and having a hearing as provided under §577.023; in that Appellant was only appealing the trial court’s finding beyond a reasonable doubt that Defendant was an aggravated offender; in that it would be unreasonable to require a defendant to plead not guilty to the underlying offense in order to preserve a right to contest and directly appeal a finding of being a prior, persistent, aggravated, or chronic offender; and in that the State’s failure to prove the facts warranting a finding of enhanced offender status beyond a reasonable doubt would be a jurisdictional defect.

In Point One, the State advances several arguments which can be summarized into two basic assertions: one, that the statutory scheme under §577.023 does not provide for a “guilty/not guilty hybrid”; and two, that Appellant’s “distinction” of various cases, particularly *Sparks*, “is inconsequential” as to the premise that those cases involve guilty pleas to the criminal charges, including the enhancement allegations, while in the case at bar, Appellant pled not guilty to or contested the enhancement allegations. R.Br 20 & 25.

With regard to its first assertion, Respondent points out that Appellant's arguments are made "without citation to legal authority". R.Br. 19. While Respondent's assertion is not entirely correct, Appellant did point out that the "issue herein also appears to be one of first impression." App.Br. 21.

In addition, while the trial court referred to the plea proceeding as a "hybrid proceeding", (L.F. 3), the statutory scheme actually involves a "bifurcated hearing procedure". App.Br. 23. Viewed in this manner, it is reasonable to conclude that a defendant should have the right to plead guilty to the underlying misdemeanor charge, to plead "not guilty" or contest the enhancement allegations, and to have a direct appeal of any finding in favor of enhancement. Respondent's position simply involves an absurd or unreasonable result.

As to Respondent's second argument, it is based upon the doctrine of waiver. To Appellant's knowledge, a waiver cannot occur when the person objects to or contests the matter in issue. See, e.g., *Brown v. State Farm Mutual Automobile Ins. Co.*, 776 S.W.2d 384, 388[5](Mo.banc 1989)(a waiver is either express or implied, but to be implied it must be based upon conduct which clearly and unequivocally shows a purpose to relinquish a right). Surely, if the "civil law" provides such protections, the "criminal law" would also provide such protections to a defendant who may be facing a conviction for a class B felony with a minimum two years' imprisonment before being eligible for parole.

Contrary to Respondent's assertion, Appellant's distinction is not "inconsequential". Appellant's distinction is material, being the key to allowing a direct appeal of a finding in favor of being a prior, persistent, aggravated, or chronic offender. Herein, Appellant filed a pretrial motion to dismiss (L.F. 2, 9-61), specifically contested the enhancement allegations in a separate hearing (L.F. 4, 67-70), and filed a post-hearing motion for judgment of acquittal as to the findings of prior intoxication related traffic offenses (L.F. 5, 71-76). Appellant did not waive this issue.

Finally, Respondent did not address the issue raised by Appellant's analysis involving the application of the issues in the case at bar to violations of §302.020. Apparently, Respondent does not contest Appellant's assertions that "if this Court rejects Appellant's claim, the State could and undoubtedly will prosecute such alleged violators if there are any prior convictions". App.Br. 44. Thus, Appellant respectfully submits that the Court's decision herein will not only affect "repeat DWI offenders", but will also affect any defendant accused of being some type of repeat offender based on the recidivist statutes currently enacted and those being enacted in the future. Like §577.023 and its predecessor statute, the legislature may in the future continue to amend §302.020, evolving from "state convictions" to pleas of guilty or findings of guilty and to municipal and county prosecutions. Accepting Appellant's arguments will prevent invalid pleas based upon noncompliance with the court rules from being used now and in the future. Establishing a standard for recording pleas will also ensure future compliance with the court rules.

POINT TWO

The trial court erred as a matter of law and to the prejudice of Defendant when it overruled Defendant's motion to dismiss the felony information and to strike enhancement allegations and when it overruled Defendant's motion for judgment of acquittal as to the findings of three prior intoxication related traffic offenses because the enhancement of the charge of Driving While Intoxicated from a Class B misdemeanor to a Class C felony was based upon invalid pleas of guilty and/or findings of guilty to all three intoxication related traffic offenses in that the evidence, based upon the whole record, did not establish beyond a reasonable doubt that any of the alleged pleas of guilty and/or findings of guilty were knowingly, voluntarily, and intelligently made as mandated by Rule 24.02 (state prosecutions) and Rule 37.59 (municipal prosecutions) and in that the evidence, based upon the whole record, established that the record was invalid on its face.

In Part 1 of its brief, Respondent initially states as follows:

Appellant asserts that the State failed to prove beyond a reasonable doubt that the three prior intoxication-related traffic offenses the State was using to enhance the current DWI charge were valid. * * * He claims that the evidence introduced by the State failed to show that the judges who

accepted his pleas followed each of the steps required by Rule 24.02 for the state offenses and Rule 37.58 for the municipal offense.

R.Br. 31.

Respondent misstates Appellant's assertions.

While the State's evidence does not show compliance with the rules, Appellant has not actually asserted that the State has this burden of production. Appellant has encouraged the Court "to impose a greater obligation upon prosecutors to review the records" before the filing of a felony. App.Br. 45, fn 3. This obligation would require the prosecutor to review all of the records in the court file to determine whether or not there is sufficient evidence of compliance. Herein, the State apparently did not review all of the records, introducing only chosen parts. Appellant introduced the *entire* court file, which indicates no compliance, and supplemented it with Appellant's affidavit, which showed no compliance. And, the State did not contest these matters.

Next, in its attempt to distinguish the *Pfeifer* case, Respondent asserts that "the *Pfeifer* Court did not address whether compliance with *procedural* requirements other than defendant's appearance at the plea or waiver thereof must appear affirmatively in the record before a plea may be used in subsequent enhancement proceeding". R.Br. 32. (Emphasis ours). Appellant submits that all of the rights reflected in former Rule 29.02 [now Rules 29.07 & 37.57] and in Rules 24.02 and 37.58 are not mere procedural rules, but instead substantive, constitutional rights. See, e.g., Missouri Constitution, Article

One, §18(a)(rights of accused in criminal proceedings) and §22(a)(right of trial by jury); United States Constitution, Amendments Five and Six. (A1 & A2).

With regard to the Dover case, Respondent submits that Appellant's arguments are "flawed in several respects." R.Br. 34. As to the first flaw, Respondent basically asserts that "[i]f Appellant's suggestion is adopted, every guilty plea for an intoxication-related offense which lacks a supporting transcript, 'plea petition,' or 'appropriate docket entry' detailing the plea court's colloquy will be ineligible for use as a prior conviction, even though no rule required that such a record be made". R.Br. 34. While technically "no rule" requires a record, beginning with the Burgett and Boykin cases in 1967 and 1969 respectively, the United States Supreme Court recognized that a showing of compliance with the waiver of constitutional rights could not be presumed from a "silent record". App.Br. 34. Historically, there was undoubtedly little if any concern with recording a waiver in misdemeanor cases because these cases were not considered to involve serious crimes. However, with the advent of using prior misdemeanors to enhance a misdemeanor to a felony, the significance of recording a waiver is substantial and should be apparent. And, the loss of some felony prosecutions because of the absence of a supporting transcript, plea petition, or appropriate docket entries, should not outweigh the rules involving waivers of constitutional rights. Perhaps the State made the same arguments in the Turner case, but as in the Turner case, the rules of law should prevail.

As to the second flaw, Respondent asserts that the "issue in the present case is not whether those safeguards were required to be followed when Appellant originally entered

his plea, but whether the State, in a subsequent prosecution long after the prior judgments have been finalized and satisfied, must affirmatively prove, time and again, that the prior courts did not err in accepting the pleas”. R.Br. 35. Actually, the issue herein does involve whether or not there was compliance with the rules. The courts have created these rules because a guilty plea involves a waiver of several constitutional rights, which requires that “the record taken as a whole must show that a person pleading guilty is aware, understands, and freely relinquishes before a guilty plea is effective”. App.Br. 36, citing *Shafer*. In addition, even though the State may or may not initially be required to “affirmatively prove” substantial compliance, §577.023, as currently written, requires the State to prove “time and again” the existence of prior pleas through court records. Requiring the State to prove the validity of the prior plea based upon a court record showing substantial compliance with the “guilty plea rules” is not an impossible or “too heavy” of a burden. A simple plea petition and appropriate judgment entries are sufficient to put the burden on the defendant to refute the record.

With regard to the *Quinn* case, Respondent initially asserts that this Court’s decision “suggests that a prior guilty plea may not be collaterally attacked in a subsequent prosecution if the record is facially valid and the offender did not challenge the prior plea with a timely post-conviction motion”. R.Br. 35. Appellant would respectfully submit that when referring to the facial validity of the records, the *Quinn* Court was referring to the “whole record”. In the *Quinn* case, the whole record was not introduced, but what record was introduced actually indicated the existence of a

“verbatim record”. 594 S.W. 2d at 601; App.Br. 41 & 42. The Quinn Court also did not suggest that the defendant must have attempted to set aside the guilty plea. Instead, the Quinn Court recognized that in the “enhancement hearing”, the defendant “cannot shift what would have been his burden of proof in the usual postconviction proceeding by using another approach to obtain the same result”. Id. at 602 & 603. In the Quinn case, the defendant was attempting to shift the burden of production of the “whole record” to the State, which was not a burden for the State in the “usual postconviction proceeding”.

In the case at bar, Appellant introduced the “whole record” which established a patent invalidity – namely, no evidence of compliance with the court rules. The whole record is silent. Appellant also filed an affidavit to affirmatively support this patent invalidity. Contrary to Respondent’s assertions, Appellant’s affidavit was not a “mere complaint”, instead establishing that the plea courts failed to comply with the court rules. In addition, while Appellant did not “argue that his prior guilty pleas were *actually* involuntary”, R.Br. 38(emphasis ours), when a court fails to obtain a waiver of the constitutional rights, the guilty plea is deemed to be ineffective. It is only when there appears to be a waiver that the defendant would have the burden to prove that the plea was involuntary. See, e.g., Moore v. State, 974 S.W.2d 658(Mo.App. E.D. 1998)(plea petition outlining rights reflected in Rule 24.02(b) and court’s inquiry of defendant that he reviewed plea petition with his attorney and understood rights outlined in petition was sufficient to show substantial compliance, and the burden would then shift to the defendant to show prejudice – for example, “that the procedure followed in his guilty

plea hearing resulted in an involuntary or unintelligent plea or that he did not in fact understand his rights as enumerated in Rule 24.02(b)”).

Under *Quinn*, the Appellant has met his burdens of production. The State not only failed to rebut Appellant’s evidence, but also did not contest his evidence. Based upon the whole record, the pleas are invalid.

POINT THREE

The trial court erred as a matter of law and to the prejudice of Defendant when it overruled Defendant’s motion to dismiss as to the alleged plea of guilty to or finding of guilty of driving while intoxicated in the 1991/1992 state court proceeding because the evidence did not establish beyond a reasonable doubt that Defendant pleaded guilty or was found guilty as required under MO.REV.STAT. §577.023 in that the disposition form in the court records clearly shows that both the line for the plea and the line for a finding of guilty were not checked and in that none of the other court records reflect a guilty plea or finding of guilty.

Initially, Appellant would point out to Respondent that at the hearing before Judge Brown, defense counsel was Roy W. Brown, not James Brown. R.Br. 39 & 40. (L.F. 51 & 58). Regardless, he was a member of the same firm.

Respondent also alleges that “Appellant does not cite any authority in support of the existence of this ‘rebuttable presumption’, founded solely upon speculation not apparent on the face of the record”. R.Br. 40. Appellant would initially point out that he has acknowledged an inability to locate any cases directly on point. App.Br. 51. However, Respondent has apparently also been unable to locate any cases directly on point. In addition, contrary to Respondent’s assertion, Appellant’s arguments are not “founded solely upon speculation not apparent on the face of the record”.

As reflected in its summation, Respondent states as follows:

Thus, the record does not support a presumption that there was no finding of guilt or plea of guilty as Appellant argues. What likely happened was that there was an oral pronouncement by the court of Appellant's guilt and sentence, but the proper line did not get marked on the written embodiment of the oral finding of guilt and sentence (L.F. 55). The legal force attached to a judgment comes from the court's judicial act, not from a clerical entry in the record. *State v. Johnson*, 220 S.W.3d 377, 384 (Mo.App. E.D. 2007). Thus, the failure to accurately memorialize the trial court's judgment as announced in open court is a clerical error. Id.

R.Br. 41.

Respondent's conclusions are erroneous for at least three reasons.

One, "what likely happened" sounds like a preponderance of the evidence standard, which does not meet the standard of beyond a reasonable doubt. See, §577.023.7. Actually, Respondent's assertion is sheer speculation.

Two, in *Johnson* there was an ambiguous pronouncement, not an absence of a pronouncement. In addition, looking to the court record therein, the State apparently satisfied its burden of proof that the defendant was a persistent offender beyond a reasonable doubt. 220 S.W.3d at 384 & 385. Again, Respondent's assertions rest on sheer speculation.

Three, even if there was a “clerical error” which could have been corrected in 1992, R.Br. 41 & 42, there were no motions filed, and the court record was simply not amended. In addition, as reflected in *State v. Pedockie*, 391 S.W.2d 25(Mo.1965):

The power to make a nunc pro tunc order should be exercised cautiously and as justice requires. Its office is to speak what has been done, not to create; it cannot supply a jurisdictional defect by requiring something to be done which has not been done.

Id. at 257.

Respondent is clearly attempting to create facts to supply a jurisdictional defect by requiring something to be done which has not been established beyond a reasonable doubt as being done.

In addition, although the ultimate holding in the *Turner* case would not apply herein, the *Turner* Court’s use of the rule of lenity to resolve doubts in favor of a criminal defendant should have some effect herein. Whether Judge Brown did or did not request a plea and then verbally made a finding of guilt is at least subject to debate. All doubts should be resolved in Appellant’s favor with the result that the State failed to prove beyond a reasonable doubt that Appellant “pleaded guilty to or was found guilty of driving while intoxicated”. (L.F. 7).

Finally, Respondent raises an issue about the propriety of a defense attorney’s failure to notify the plea court about an error in not requesting a plea or in not making a finding of guilty. R.Br. 40. Even assuming awareness, defense counsel might actually be

subject to censure if he did not stand silent. *Cf., Weaver v. Schaaf*, 520 S.W.2d 58, 64 & 65(Mo.banc 1975). As with such rules as 24.02 and 37.58, it is the judge's responsibility to follow certain procedures. The prosecutor may also bear some responsibility, and if so, would surely have a duty "to speak up" before any defense counsel would be obligated to do so. Regardless, if the defendant/client received an acceptable punishment, then there should be "nothing illegal about a defendant or his lawyer preferring to be punished for a misdemeanor [in such a manner as] to foreclose a subsequent felony prosecution." *Weaver*, 520 S.W.2d at 64.

As clearly reflected in the "computer generated form" (App.Br. A13), there is a line for marking whether or not the "defendant pleads _____ not guilty, _____ guilty". It is not marked. There is also another line for a finding of guilty. It is not marked. The marked parts only involve punishment. Absent evidence to the contrary, the State failed to prove beyond a reasonable doubt that Appellant pled guilty or was found guilty, which is clearly an element of which it has the burden of production and burden of proof.

CONCLUSION

For the reasons set forth herein, Appellant respectfully requests the Court to hold that it has jurisdiction to hear the merits of the case at bar and then to reverse the judgment of the trial court and to remand this case to the trial court with directions to enter a judgment finding Appellant guilty of driving while intoxicated at the Class B misdemeanor level (Point Two) or to enter a judgment finding Appellant guilty of driving

while intoxicated at the class D felony level (Point Three), and for such other relief as this Court deems just.

Respectfully submitted,

BROWN & BROWN ATTORNEYS, L.L.C.

By: _____
BRUCE B. BROWN, BAR NO. 30307
P.O. BOX 679
KEARNEY, MISSOURI 64060
1-816-628-6100
1-816-628-4980 (FAX)

ATTORNEY FOR APPELLANT

CERTIFICATE OF MAILING

I hereby certify that one copy of the Appellant's Substitute Reply Brief and one copy of the disk thereof were mailed this ____ day of April, 2009, to:

Mr. James B. Farnsworth, Assistant Attorney General
P.O. Box 899
Jefferson City, Missouri 65102

I further certify that the reply brief complies with Rule 84.06(b) by not exceeding 7,750 words and that it contains 4,140 words, that the disk has been scanned for viruses, and that the disk is virus-free to the best of my knowledge.

BRUCE B. BROWN

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APPENDIX

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1. Missouri Constitution

Article One, §18(a). Rights of accused in criminal prosecutions

That in criminal prosecutions the accused shall have the right to appear and defend, in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy public trial by an impartial jury of the county.

Article One, §22(a). Right of trial by jury – qualifications of jurors

– two-thirds verdicts

That the right of trial by jury as heretofore enjoyed shall remain inviolate; * * *.

2. *United States Constitution*

Amendment Five

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; * * *.

Amendment Six

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

A2