

No. SC 87864

IN THE SUPREME COURT OF MISSOURI

STATE EX REL. HAROLD KAUBLE,

Relator,

V.

THE HONORABLE JAMES R. HARTENBACH,

Respondent.

**ORIGINAL PROCEEDING IN MANDAMUS
FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI
TWENTY-FIRST JUDICIAL CIRCUIT, DIVISION 14
THE HONORABLE JAMES R. HARTENBACH, JUDGE**

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

ROBERT P. McCULLOCH
Prosecuting Attorney, St. Louis County

ROBERT F. LIVERGOOD
Assistant Prosecuting Attorney
Missouri Bar No. 35432

DAVID R. TRUMAN
Assistant Prosecuting Attorney
Missouri Bar No. 44360

St. Louis County Justice Center
100 South Central Avenue, Second Floor
Clayton, Missouri 63105
(314) 889-2600
Attorneys for Respondent

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JURISDICTIONAL STATEMENT

This action is an original proceeding in mandamus. This Court has jurisdiction to hear such petitions for original writs pursuant to Supreme Court Rule 84.23. Relator previously filed a petition for a writ of prohibition or, in the alternative, for writ of mandamus, in the Missouri Court of Appeals, Eastern District. That petition was denied by the Court of Appeals on May 31, 2006.

STATEMENT OF FACTS

On January 8, 1999, relator appeared before respondent and entered a plea of guilty to one count of sexual misconduct involving a child, a Class D felony. (Rel.App. A15.)¹ Specifically, the charge alleged that between July 4, 1998, and August 1, 1998, relator exposed his genitals to a child less than fourteen years of age in a manner that would cause a reasonable adult to believe the conduct was likely to cause affront or alarm to a child less than fourteen years of age, in violation of Section 566.083.1, RSMo. (Resp.App. A1.) Respondent suspended the imposition of sentence and placed relator on probation for five years. (Rel.App. A16.) Relator was discharged from supervision by the Board of Probation and Parole effective January 7, 2004. (Rel.App. A17.)

On or about November 4, 2005, relator filed with respondent a Motion to Dismiss and Set Aside Resulting Sentence due to Lack of Subject Matter Jurisdiction. (Rel.App. A18-21.) This motion noted that, on April 26, 2005, this Court had declared Section 566.083.1, RSMo, the statute under which relator had been charged and, based upon his guilty plea, convicted, was unconstitutional.² (Rel.App. A19.) Relator requested that respondent set aside its judgment and sentence, dismiss the charge against him, and order relator's name to be removed from the Missouri Sex Offender Registry. (Rel.App. A20.) Following an *in camera* hearing on December 16, 2005, respondent denied relator's

¹The record on this original proceeding in mandamus consists of Relator's Appendix ("Rel.App.") and Respondent's Appendix ("Resp.App.").

motion to dismiss on April 12, 2006. (Rel.App. A22-23.)

On or about May 12, 2006, relator filed a Petition for Writ of Prohibition or, in the alternative, Writ of Mandamus, with the Missouri Court of Appeals, Eastern District. (Rel.App. A24-34.) That petition was denied by the Court of Appeals on May 31, 2006. (Rel.App. A43.)

On or about July 25, 2006, relator filed a Petition for Writ of Prohibition or, in the alternative, Writ of Mandamus, with this Court. This Court issued a preliminary writ of mandamus on August 22, 2006, and respondent filed his answer on September 20, 2006.

² State v. Beine, 162 S.W.3d 483, 486 (Mo. banc 2005).

POINT RELIED ON

**RELATOR IS NOT ENTITLED TO AN ORDER COMPELLING
RESPONDENT TO GRANT RELATOR’S MOTION TO DISMISS AND SET
ASIDE SENTENCE BECAUSE RESPONDENT LACKED JURISDICTION TO
GRANT, OR EVEN CONSIDER, SAID MOTION IN THAT RELATOR’S
PROBATION HAD EXPIRED PRIOR TO THE FILING OF THE MOTION.**

State v. Ortega, 985 S.W.2d 373 (Mo.App. S.D. 1999);

State ex rel. Simmons v. White, 866 S.W.2d 443 (Mo. banc 1993);

Norfolk v. State, 200 S.W.3d 36 (Mo.App. W.D. 2006);

State v. Beine, 162 S.W.3d 483 (Mo. banc 2005);

State v. Summers, 50 S.W.3d 890 (Mo.App. S.D. 2001);

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State ex rel. Wagner v. Ruddy, 582 S.W.2d 692 (Mo. banc 1979);

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State ex rel. Cardinal Glennon Hospital v. Gaertner, 583 S.W.2d 107 (Mo. 1979);

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J.S. v. Beard, 28 S.W.3d 875 (Mo. banc 2000);

Haffner v. Saulters, 77 S.W.3d 45 (Mo.App. E.D. 2002);

Section 589.405, RSMo.;

Section 547.360, RSMo.;

Section 566.083.1, RSMo.;

Supreme Court Rule 24.04;

Supreme Court Rule 29.07;

Supreme Court Rule 30.20;

Supreme Court Rule 29.12.

ARGUMENT

RELATOR IS NOT ENTITLED TO AN ORDER COMPELLING RESPONDENT TO GRANT RELATOR’S MOTION TO DISMISS AND SET ASIDE SENTENCE BECAUSE RESPONDENT LACKED JURISDICTION TO GRANT, OR EVEN CONSIDER, SAID MOTION IN THAT RELATOR’S PROBATION HAD EXPIRED PRIOR TO THE FILING OF THE MOTION.

In this original proceeding in mandamus, relator seeks an order from this Court compelling respondent to grant his Motion to Dismiss and Set Aside Resulting Sentence due to Lack of Subject Matter Jurisdiction. (Relator’s Brief, hereinafter “Rel.Br.,” at 8.) However, respondent properly denied this motion because respondent no longer retained jurisdiction, owing to the completion of relator’s probation nearly two years prior to the filing of relator’s motion, and thus his request for a writ of mandamus should be denied.

Relator’s motion was filed pursuant to Supreme Court Rule 24.04(b)(2). Under that rule, respondent could only consider motions alleging a lack of jurisdiction or the failure of the information to charge an offense during the pendency of the proceeding. *See* Rule 24.04(d). Here, relator filed his motion after the proceedings were terminated. Therefore, respondent had no jurisdiction to consider relator’s motion pursuant to Rule 24.04(b)(2).³

³ Relator also claimed that his sentence was manifestly unjust, a claim that falls under Rule 29.07(d), though it should be noted that relator did not cite this rule in his motion.

In State v. Ortega, 985 S.W.2d 373 (Mo.App. S.D. 1999), appellant entered a guilty plea and received a suspended imposition of sentence. After appellant was discharged from probation, he sought to withdraw his guilty plea under Rule 29.07(d). The Southern District of the Missouri Court of Appeals held that “[w]hen the trial court discharged appellant from probation, it discharged him from its jurisdiction with respect to that case.” Id. at 375. “It, therefore, lacked authority to grant the relief sought by appellant’s subsequent motion to withdraw his guilty plea.” Id. *See also* State v. Summers, 50 S.W.3d 890, 896-97 (Mo.App. S.D. 2001) (holding that trial court improperly set aside misdemeanor plea and subsequent suspended imposition of sentence because court lost jurisdiction once defendant’s probation was completed).

Indeed, the principle that a court loses jurisdiction over a criminal case upon the termination of, discharge from, or expiration of, a defendant’s probation is quite well settled. As recently as April of 2006, the Western District of the Missouri Court of Appeals held that a trial court could not revoke a defendant’s probation, and execute a previously imposed sentence, after the court had already terminated the probation. Norfolk v. State, 200 S.W.3d 36 (Mo.App. W.D. 2006). “A discharge from probation,” the court noted, “terminates the trial court’s jurisdiction.” Id. If a discharge from probation terminates the court’s ability to revoke a defendant’s probation, surely it also terminates the court’s ability to set aside the guilty plea for which that probation was granted. Similarly, more than two decades ago, the Western District held that a trial court had lost jurisdiction to order a defendant’s record closed when, having received a

suspended execution of sentence, defendant was subsequently discharged from probation. State v. Bachman, 675 S.W.2d 41, 47-48 (Mo.App. W.D. 1984).

This Court's opinion in State ex rel. Simmons v. White, 866 S.W.2d 443 (Mo. banc 1993) is also instructive. In holding that a trial court lacked authority to set aside, on its own motion, a judgment and sentence of imprisonment, the Simmons court noted that "once judgment and sentencing occur in a criminal proceeding, the trial court has exhausted its jurisdiction." Id. at 445 (citing State ex rel. Wagner v. Ruddy, 582 S.W.2d 692, 695 (Mo. banc 1979)). Once that jurisdiction has been exhausted, the Simmons court held, the trial court "can take no further action in that case except when otherwise expressly provided by statute or rule." Simmons, supra at 445. Other than citing Rule 24.02, which by its express terms applies only "during the pendency of the proceeding," relator has pointed to no statute or rule which expressly grants respondent the jurisdiction to take any action in his case after the expiration of relator's probation.⁴ By comparison,

⁴ Relator's motion also cited Supreme Court Rule 30.20, which allows a court to consider "plain errors affecting substantial rights ... when the court finds that manifest injustice or miscarriage of justice has resulted therefrom." The language contained in this rule is identical to that contained in Supreme Court Rule 29.12 (b). Unfortunately for relator, as all three districts of the Missouri Court of Appeals have held, Rule 29.12(b) "does not provide an independent basis under which a person convicted of a crime can subsequently challenge his conviction or sentence." Harris v. State, 48 S.W.3d 71, 71-72 (Mo.App.

this Court in Simmons, *supra*, cited, as examples of rules and statutes that specifically confer continuing jurisdiction on trial courts after judgment and sentencing, Rules 24.035 and 29.15, addressing postconviction relief, and Section 217.775, RSMo, the forerunner to Section 559.115, allowing a trial court to retain jurisdiction over a criminal case for 120 days after committing the defendant to the Department of Corrections and, in the court's discretion, suspend the balance of that sentence and place the defendant on probation. State v. Simmons, *supra* at 445. *See also* Smoot v. State, 851 S.W.2d 572, 573 (Mo.App. E.D. 1993); Section 547.360, RSMo.

Respondent need hardly remind this Court of the specific terms and conditions set forth in Rules 24.035 and 29.15, and §217.775 and its successor, §559.115. Those rules and statutes, as this Court properly noted in Simmons, expressly grant jurisdiction to a trial court at a point where it would otherwise have been exhausted. Relator has identified no rule or statute that would, in this case, have conferred jurisdiction on respondent subsequent to the expiration of his probation.

The irony of relator's argument is that he claims respondent *exceeded* his jurisdiction in denying relator's motion (Rel.Br. 8-10). In fact, respondent's jurisdiction over relator's case expired upon the completion of relator's probation, and thus the very

W.D. 2001) (citing Vernor v. State, 30 S.W.3d 196, 197 (Mo.App. E.D. 2000) and State v. Massey, 990 S.W.2d 201, 204 (Mo.App. S.D. 1999)). Accordingly, Rule 30.20 did not confer any jurisdiction upon respondent to set aside relator's guilty plea.

action relator urged respondent to take (and asks this Court to order) would, in and of itself, be an action beyond the jurisdiction of respondent. Similarly, relator's citation of this Court's opinion in State ex rel. Leigh v. Dierker, 974 S.W.2d 505 (Mo. banc 1998) is most curious considering the facts of this case. In Leigh, the trial court entered an order transferring venue in the underlying tort action from the City of St. Louis to Miller County; two days later, the trial court vacated that order and overruled the motion to transfer venue. Id. at 505. In issuing a writ of mandamus directing the trial court to reinstate its order transferring venue, this Court observed that "once [the trial court] entered a valid order transferring venue to Miller County, he had no authority to proceed in the case other than to effect the transfer to Miller County." Id. at 506. Likewise, once relator in this case had successfully completed his probation, respondent had no authority to take any action whatsoever, because respondent's jurisdiction expired upon the expiration of relator's probation.

Relator is reduced, in essence, to arguing that respondent lacked jurisdiction to accept his original plea of guilty, notwithstanding the fact that he pleaded guilty in January 1999, and the statute he pleaded guilty of violating was not held unconstitutional until April 2005, more than six years later. Relator relies on State ex rel. Cardinal Glennon Hospital v. Gaertner, 583 S.W.2d 107, 118 (Mo. 1979) for the proposition that "an unconstitutional statute is not law and confers no rights from the date of its enactment, not merely from the date of the decision so branding it." (Rel.Br. 8.) Unfortunately for relator, the language he cites does not appear in this Court's majority

opinion in Cardinal Glennon Hospital, in which this Court held unconstitutional a then-existing statute requiring medical malpractice claims to be submitted to a Professional Liability Review Board Authority before filing such a claim in court. Cardinal Glennon Hospital, *supra* at 108-11. Rather, the quoted language, stating the traditional rule that a statute declared unconstitutional is void from the date of its enactment, appears in this Court's supplemental opinion in Cardinal Glennon Hospital. That opinion joined in the "modern view" that "rejects this rule to the extent that it causes injustice to persons who have acted in good faith and reasonable reliance upon a statute later held unconstitutional..." Cardinal Glennon Hospital, *supra* at 118 (supplemental opinion) (citations omitted). This Court should likewise reject this rule in the instant case, in which respondent acted in good faith and reasonable reliance in accepting defendant's plea of guilty to a statute that was, some six years later, found to be unconstitutional.

Relator, in arguing otherwise, cites State v. Ossana, 699 S.W.2d 72 (Mo.App. E.D. 1985), and suggests that Ossana allows respondent to maintain jurisdiction over relator's case. In Ossana, the trial court imposed a sentence that, at the time it was imposed, was contrary to the law. Id. at 73. Therefore, the trial court maintained jurisdiction in order to properly resentence the defendant, in accordance with the law. Id. In this case, by contrast, an information was filed on October 26, 1998. Based upon the contents of the information, respondent had jurisdiction over the criminal case against relator. Relator entered his plea of guilty and received a suspended imposition of sentence on January 8, 1999. At that time, it was not contrary to the law for respondent to accept relator's guilty

plea and suspend the imposition of sentence, because the statute in question had not yet been declared unconstitutional. The fact that more than six years after relator's guilty plea and, more importantly, more than a year after his probation expired, this statute was then declared unconstitutional does not confer jurisdiction where it would not otherwise exist. Respondent lacked jurisdiction over relator's case because relator filed his motion to withdraw his plea of guilty after his probation was terminated.

Relator also cites the recent decision by the Eastern District of the Missouri Court of Appeals in State v. Burgin, --- S.W.3d ---, 2006 Mo. App. LEXIS 676 (Mo.App. E.D. May 16, 2006), in which defendant's conviction and sentence under Section 566.083.1 was overturned in reliance upon State v. Beine, *supra*. Respondent notes, however, that in Burgin, the defendant's appeal had been pending at the time this Court decided Beine. State v. Burgin, *supra* at *4. In this case, by contrast no appeal of the judgment originally entered by respondent was ever taken by relator, and relator completed his probation (thus extinguishing respondent's jurisdiction) *prior* to this Court's decision in Beine.

Relator's final attempt to confer jurisdiction where it otherwise does not exist centers around the requirement that he register as a sex offender, even though he is no longer on probation. While it is understandable that this requirement receive relator's attention, inasmuch as he is no longer subject to the restrictions of probation, or the possibility that he would receive a conviction and sentence upon the revocation of that probation, the problem with this argument is that respondent is not responsible for the maintenance of the sex offender registry. For this reason, challenges to the various

requirements of the sex offender registry are properly made through petitions for declaratory and injunctive relief against sheriffs, prosecuting attorneys, and other law enforcement agencies, and not as a motion filed before an original sentencing judge in a criminal case. *See, e.g., In re R.W.*, 168 S.W.3d 65 (Mo. banc 2005); *Jane Doe I v. Phillips*, 194 S.W.3d 833 (Mo. banc 2006); *J.S. v. Beaird*, 28 S.W.3d 875 (Mo. banc 2000); *Haffner v. Saulters*, 77 S.W.3d 45 (Mo.App. E.D. 2002). Significantly, in *In re R.W.*, *supra*, the appellant completed his probation and only then ceased to register as a sex offender. *In re R.W.*, *supra* at 68. His challenge to the registration statutes, and the enforcement of the penalties for failing to register, was not brought before his original sentencing court but rather against the Jackson County Sheriff's Department and the Jackson County Prosecuting Attorney's Office. *Id.* Had the appellant in *In re R.W.* brought a similar challenge before his original sentencing court, that court would have lacked jurisdiction owing to the expiration of his probation.

An examination of the statutes governing the sex offender registry, §§ 589.400 to 589.425, reveals numerous obligations on the part of “chief law enforcement officers of the county” and the Missouri State Highway Patrol regarding the maintenance of the registry. The only obligation these statutes impose upon a judge, by contrast, is to inform defendants, upon the granting of probation, the imposition of a fine, or the release from a county jail, of their obligation to register as a sex offender, and to obtain the addresses of those defendants who are required to register and provide them to the chief law enforcement officer of the county in question. § 589.405, RSMo. Accordingly,

respondent's obligation regarding relator's registration as a sex offender expired when relator was placed on probation. (Ironically, therefore, while relator seeks to use the registration requirement as a means to extend respondent's jurisdiction beyond the expiration of his probation, respondent extinguished his responsibility with regard to the sex offender registry *before* losing jurisdiction over relator's case.) If relator seeks to relieve himself of the obligation to register as a sex offender, based upon the argument that the statute giving rise to that obligation has been found unconstitutional, he must bring an action against the parties responsible for maintaining that registry. He cannot obtain such relief from respondent, nor can he use his obligation to register as a means of conferring jurisdiction on respondent such as would allow respondent to set aside his original plea of guilty.

In sum, relator's Motion to Dismiss and Set Aside Resulting Sentence was properly denied. Respondent no longer retained jurisdiction over relator's case, because respondent's jurisdiction expired upon relator's successful completion of probation, and therefore had no authority to consider, let alone grant, the relief sought by relator in his motion. Relator's petition for a writ of mandamus, seeking to require respondent to grant that motion, should likewise be denied.

CONCLUSION

In view of the foregoing, respondent submits that this Court's preliminary writ of mandamus should be dissolved and relator's petition for writ of mandamus should be denied.

Respectfully submitted,

ROBERT P. McCULLOCH
St. Louis County Prosecuting Attorney

ROBERT F. LIVERGOOD
Missouri Bar No. 35432

DAVID R. TRUMAN
Missouri Bar No. 44360
Assistant Prosecuting Attorneys
St. Louis County Justice Center
100 South Central Avenue
Clayton, Missouri 63105
(314) 615-2600
Attorneys for Respondent

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 3,465 words, excluding the cover and this certification, as determined by Microsoft Word software; and
2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses, using McAfee Anti-virus software, and is virus-free; and
3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 7th day of November 2006, to:

Daniel A. Juengel
Todd A. Wakeland
Frank & Juengel, P.C.
7777 Bonhomme, Suite 1601
Clayton, Missouri 63105
Attorneys for Relator

DAVID R. TRUMAN
Assistant Prosecuting Attorney
Missouri Bar No. 44360
100 South Central Avenue
Clayton, Missouri 63105
(314) 615-2600
Attorney for Respondent