

IN THE
MISSOURI SUPREME COURT

STATE EX REL. RONNIE)	
LUSK,)	
)	Cause No. SC93541
Relator,)	
)	
vs.)	
)	
THE HONORABLE MARK)	
ORR, CIRCUIT JUDGE, 38 TH)	
JUDICIAL CIRCUIT,)	
)	
Respondent.)	
)	
)	

ORIGINAL PETITION FOR WRIT OF PROHIBITION IN THE MISSOURI SUPREME
COURT FROM THE CIRCUIT COURT OF TANEY COUNTY,
MISSOURI
THE HONORABLE MARK ORR, CIRCUIT JUDGE

RELATOR’S REPLY BRIEF IN SUPPORT OF HIS PERMANENT WRIT OF
PROHIBITION

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JURISDICTIONAL STATEMENT

Relator adopts the Jurisdictional Statement set forth in his original brief.

STATEMENT OF FACTS

Relator adopts the Statement of Facts set forth in his original brief.

POINT RELIED ON

Relator is entitled to a writ of prohibition prohibiting Respondent, the Honorable Mark Orr, from revoking Relator’s probation, because Respondent does not have the authority to revoke his probation, in that Relator’s probation has expired since: (1) It was imposed on February 14, 2008; (2) Respondent has not extended it pursuant to section 559.016 RSMo; and, (3) Respondent has not suspended it pursuant to section 559.036 RSMo; and neither Respondent nor the State made every reasonable effort to conduct a probation violation hearing and revoke Relator’s probation before it expired as required by section 559.036 RSMo.

State ex rel. Carlton v. Haynes, 552 S.W.2d 710, 714 (Mo. banc 1977)

Williams v. State, 927 S.W2d 903 (Mo. App. S.D. 1996)

Section 559.036 RSMo. (Supp. 2012)

POINT RELIED ON

Relator is entitled to a writ of prohibition prohibiting Respondent, the Honorable Mark Orr, from revoking Relator’s probation, because Respondent does not have the authority to revoke his probation, in that Relator’s probation has expired since: (1) It was imposed on February 14, 2008; (2) Respondent has not extended it pursuant to section 559.016 RSMo; and, (3) Respondent has not suspended it pursuant to section 559.036 RSMo; and neither Respondent nor the State made every reasonable effort to conduct a probation violation hearing and revoke Relator’s probation before it expired as required by section 559.036 RSMo.

Respondent concedes that Relator’s probation has not been extended because he suspended Relator’s probation. (Respondent’s Brief, p. 5) Therefore, the only issue for this Court is whether or not Respondent made every reasonable effort to conduct Relator’s probation violation hearing before it expired in February, 2013.

RESPONDENT MISSTATES RELATOR’S ARGUMENT AND MISAPPLIES

MISSOURI LAW IN HIS BRIEF

Relator respectfully submits that in his brief, Respondent misstates Relator’s argument and misapplies Missouri law. In the first section of his brief, Respondent claims that Relator has argued that he did not make all reasonable efforts to conduct a hearing before Relator’s probation expired because “[t]aney County Representatives did not pick him up from DOC.” (Respondent’s Brief, p. 6) Respondent ignores the fact that not picking him up from DOC when he was released was only *one* of the arguments. Respondent fails to mention that Relator also pointed out that Respondent knew he was in

DOC since January, 2012 and could have brought him down to Taney County for a hearing before he was released. (Relator’s Brief, p. 14) Relator also pointed out that he could have initiated the hearing via polycom. (Relator’s Brief, p. 14) Finally, Relator pointed out that the State could have had him picked up at his probation officer’s report, just as it said it would do. (Relator’s Brief, p. 15)

Respondent states that the two months between expiration of Relator’s probation and the service of a warrant upon him was not an unreasonable delay. (Respondent’s Brief, p. 9) Relator respectfully submits that Respondent is misapplying the law. Relator respectfully submits that the “clock” does not start to run *after* a probationer’s probation has expired. Rather, it starts after the state has manifested an intention to revoke the probation. This manifestation was shown by the State on March 24, 2011. (Relator’s Exhibit B, p. A11) Between that date and December 3, 2012, the state had numerous opportunities to conduct a probation violation hearing. It had the opportunity in January, 2012, when Relator wrote a letter to Respondent from the Missouri Department of Corrections (DOC) asking to have his probation continued. (Relator’s Exhibit D, pp. A19-A20) The State could have attempted to have a hearing via a polycom or it could have had Relator brought down to Taney County to have the hearing. It had the opportunity to have the hearing before expiration of the probation period when it received notice from DOC on November 26, 2012 that Relator was going to be released on November 30, 2012. (Relator’s Exhibit A, p. A2) It had the opportunity to have it on December 3, 2012 when Relator went to his probation officer’s office, which the State indicated it would do. (Relator’s Exhibit A, p. A2) Respondent and the State had all

these opportunities to ensure that a probation violation hearing took place before Relator's probation expired. They chose not to take advantage of these opportunities. This is why the delay was unreasonable.

Respondent's reliance on *Williams v. State*, 927 S.W.2d 903, 904 (Mo. App. S.D. 1996) is misplaced. In *Williams*, the defendant argued that the Court should have contacted his parents. *Id.* at 906-907. This argument placed a burden on the Court to find out where defendant was. In Relator's case, both Respondent and the State *knew* where Relator was.

Respondent's final argument fares no better. He argues that Relator could have initiated the process to have a hearing via polycom since only he can waive his right to personally appear. (Respondent's Brief, p. 10) Respondent ignores that it is his burden to conduct the hearing. Respondent could have initiated the polycom and asked relator if he was willing to waive personal appearance. Further, if Relator had said no, Respondent could have then entered an order to bring him down from Taney County. Moreover, the fact remains that the State and Respondent had numerous other opportunities to conduct the hearing before Relator's probation expired.

Respondent also argues that Relator's absconding shortly after being released from DOC somehow makes the delay in holding his hearing not unreasonable. (Respondent's Brief, pp. 9-10) Respondent ignores the fact that section 559.036 requires that *every* reasonable effort be made to conduct the probation violation hearing before the probation expires. Moreover, Respondent ignores the fact that under the statute, it is *his* responsibility to make those reasonable efforts. Respondent did not do this and the fact

that Relator absconded shortly after being released from DOC does not change this. This Court has specifically held that “no unreasonable delay should occur in affording the probationer a hearing.” *State ex rel. Carlton v. Haynes*, 552 S.W.2d 710, 714 (Mo. banc 1977). Respondent had four opportunities to make sure Relator had his hearing before his probation expired and did not use any of them.

CONCLUSION

While a manifestation of intent to revoke was shown, the facts of Relator’s case clearly show that not every reasonable effort to conduct a hearing before his probation expired was taken. Respondent’s arguments in his brief do not refute these facts. As such, Respondent is without authority to revoke Relator’s probation. Relator respectfully requests this Court make its preliminary writ of prohibition permanent.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned counsel, hereby certify, that on this 10th day of September, 2013, true and correct copies of the foregoing brief were emailed to the Hon. Mark Orr, Circuit Judge, 38th Judicial Circuit, 110 W. Elm, Room 205, Ozark, Missouri, 65721; Phone 417-581-2727; Fax 417-581-0091; E-Mail: Mark.Orr@courts.mo.gov; and, Mr. Jeff Merrell at the Taney County Prosecutor’s Office, Taney County Judicial Center, 266 Main Street, Forsyth, Missouri 65653; Phone 417-546-7260; Fax 417-546-2376; E-Mail: Tonyb@co.taney.mo.us.

/s/ James Egan

James Egan

CERTIFICATE OF COMPLIANCE

I, James Egan, hereby certify as follows:

The attached brief complies with the limitations contained in this Court’s Rule 84.06. The brief was completed using Microsoft Word, Office 2010, in Times New Roman size 13 point font. Excluding the cover page, signature block, this certification and the certificate of service, this brief contains 1177 words, which does not exceed the 31,000 words allowed for a Relator’s brief.

/s/ James Egan

James C. Egan