

IN THE
MISSOURI SUPREME COURT

TRAVIS M. STANLEY,)	
)	
Appellant,)	
)	
vs.)	Appeal No. SC93121
)	
STATE OF MISSOURI,)	
)	
Respondent.)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT FOR PERRY COUNTY, MISSOURI
THE HONORABLE BENJAMIN F. LEWIS, JUDGE AT PLEA, SENTENCING AND
POST-CONVICTION PROCEEDINGS

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

On February 5, 2010, Appellant, Travis Malone Stanley, pled guilty to Failure to Register as a Sex Offender, and a second charge of Failure to Register Change of Address as a Sex Offender in the Circuit Court for Perry County, the Honorable Benjamin F. Lewis presiding. On March 5, 2010, the court sentenced Appellant to four years in Count I and four years in Count II to run consecutively.

Appellant filed a *pro se* motion for post-conviction relief under Rule 24.035 on April 12, 2010. The motion court appointed post-conviction counsel on April 30, 2010. Counsel filed the first amended motion on September 30, 2010. On December 10, 2010, counsel moved to withdraw from Appellant's case because he had accepted appointment as a Circuit Attorney in Madison County, Missouri. That motion was granted on January 7, 2011. New counsel entered his appearance on April 13, 2011. The court granted a continuance and on July 21, 2011, newly appointed counsel filed a second amended motion with the permission of the motion court. On November 4, 2011, the motion court denied Appellant's request for post-conviction relief without an evidentiary hearing. Appellant filed his Notice of Appeal to the Missouri Court of Appeals on December 13, 2011. The Eastern District of the Missouri Court of Appeals remanded the case back to circuit court for a hearing as to why a second amended motion was filed and whether its apparent lateness was the fault of Appellant. However, this Court sustained Respondent's application for transfer on March 19, 2013. This Court has jurisdiction over this appeal, Article V, Section 10, Mo. Const.; Rule 83.04.

The Record on Appeal will be cited to as follows: Legal File, “LF” (which contains the Plea and Sentencing Transcripts).

STATEMENT OF FACTS

On February 5, 2010 Appellant, Travis Malone Stanley, pled guilty to two counts: Failure to Register as a Sex Offender and a second charge of Failure to Register Change of Address as a Sex Offender in pleas heard by the Honorable Benjamin F. Lewis (LF 48-60). Ms. Amy Metzinger represented Mr. Stanley in the plea and sentencing proceedings (LF 49). Mr. Thomas Hoeh represented the State (LF 49).

Prior to the plea proceedings, the prosecutor and Mr. Stanley, through counsel, negotiated a plea agreement by which the State would request a 3-year cap on each count to run concurrently, with Mr. Stanley's counsel free to argue for probation (LF 51). The parties memorialized their agreement in a Petition signed by Mr. Stanley (LF 43-44). In the petition, the State promised it would recommend a three-year cap (LF 44).

During the proceedings, the court asked Mr. Stanley about the plea agreement, saying at one point, "Has anybody promised you anything other than the plea agreement to get you to plead guilty?" (LF 51). When asked about the plea agreement, the State responded, "[t]he State has agreed to a cap of three years" to run concurrent with the option defense can argue for probation (LF 51). The court then asked for a stipulation that the maximum sentence was four years on each count (LF 52-53). The State agreed, "No harm would be done by doing so" because of the three year cap (LF 53).

The court addressed Mr. Stanley saying, "the maximum that [the Court] could possibly impose would be eight. Now I'm not saying I'm going to do that, but today I can't promise that I won't" (LF 53). After explaining a guilty plea waived his right to trial, the court asked if Mr. Stanley's counsel negotiated the pleas to his satisfaction (LF

54-56). Mr. Stanley answered the court's questions regarding his understanding of the proceedings and entered his guilty plea (LF 60).

On March 5, 2010, the State recommended three-year sentences in each count to run concurrently (LF 61). Ms. Metzinger requested probation (LF 62). The court asked Ms. Metzinger to confirm that, "when I accepted the plea, that was under our usual plea rules, correct?" (LF 62). After hearing briefly from Mr. Stanley, the court abruptly sentenced him to the maximum possible sentence, four years on each count to run consecutively, for a total of eight years in the Missouri Department of Corrections (LF 64). The court read Rule 24.035 to Mr. Stanley (LF 64). The court did not examine Mr. Stanley as to the effectiveness of counsel (LF 64).

Mr. Stanley filed a *pro se* motion for post-conviction relief under Rule 24.035 on April 12, 2010 (LF 6). In that *pro se* motion, he complained he was "promised a sentence of probation to 3 years by counsel" (LF 7, 12). His plea counsel was ineffective because she led him to believe he had a plea agreement but they had really tendered an "open plea" (LF 12). He did not realize he was making an open plea observing, "the plea bargain was never rejected in open court" (LF 12). The motion court appointed post-conviction counsel on April 30, 2010 (LF 5). Attorney Andrew Tarry entered his appearance on July 22, 2010 as post-conviction counsel (LF 3). On August 9, 2010, the court reporter filed the transcripts of Mr. Stanley's plea and sentencing (LF 48).

On September 30, 2010, Mr. Tarry filed his "FIRST AMENDED MOTION UNDER RULE 29.15" [sic] (LF 15-17). The motion stated Mr. Stanley's "attached hereto and incorporated by reference" (LF 15). The motion also noted that its amendment

of Mr. Stanley's *pro se* complaints was "not intended or meant in any way to subtract from those allegations previously made" (LF 15). Mr. Tarry advanced five specific complaints in his amended motion stating initially:

- "The Court violated Rule 24.02(d)(4) when it failed to inform the Parties that it rejected their plea agreement" (LF 16);
- "The Court violated Rule 24.02(d)(4)... when it failed to afford Movant the opportunity to withdraw his plea after the Court rejected the plea agreement" (LF 16)(citation omitted);

Mr. Tarry then added Mr. Stanley was generally denied effective assistance of counsel and Mr. Stanley thereby prejudiced (LF 16). Mr. Tarry elaborated:

- "Plea counsel failed to accurately state [to the court] the plea agreement" by failing to mention that the three-year sentence were to have been concurrent. "Said omission could have directly influenced the Judge's ultimate decision to run the sentences consecutive as opposed to concurrent" (LF 16)(citation omitted);
- "That plea counsel failed to render effective assistance of counsel by failing to thoroughly explain the concept that the Court was free to reject the plea. Movant's knowledge of what the Court could do in reference to the plea was incomplete and said omission on the part of plea counsel affected the voluntary nature of the plea" (LF 16);
- "That plea counsel failed to render effective assistance of counsel by failing to inquire of the Court or object to the imposition of the Court's

four (4) year consecutive sentences when the Court imposed said sentences. Counsel's failure to inquire of the Court to ensure that the plea agreement was relayed correctly to the Court or that the Court correctly understood the terms of the plea agreement was deficient and thus rendered the plea involuntary" (LF 17)(citations omitted).

After the filing of the amended motion, the court conducted a conference on November 5, 2010 (LF 3). The court continued the case for review until January 7, 2011 (LF 3). But on December 10, 2010, Mr. Tarry moved to withdraw because, on information and belief, he had been appointed prosecutor for Madison County, Missouri. The court granted Mr. Tarry's motion on January 7, 2011 (LF 3). On April 13, 2011, new post-conviction counsel entered his appearance (LF 13-14).

On July 21, 2011, new counsel filed Mr. Stanley's second amended motion under Rule 24.035 (LF 18). Mr. Stanley made two related complaints that his pleas were involuntary. First, he faulted the plea court for not explaining with absolute clarity the non-binding nature of his plea agreement and that he could not withdraw his guilty plea if the court rejected the plea agreement (LF 19-25). The court's failure to advise rendered Mr. Stanley's pleas involuntary and unintelligent and but for the court's omissions, Mr. Stanley wrote, he would not have pled guilty but would have insisted on a trial (LF 25). Second, Mr. Stanley said his lawyer was ineffective for not explaining that his "plea agreement" for a three-year cap, was, in actuality, an open plea subjecting him to eight years in prison (LF 20, 26-28). But for counsel's omission, he would not have pled guilty but insisted on a trial (LF 28).

The motion court denied Appellant's motion without a hearing in a Judgment issued November 4, 2011. After noting its advice to Appellant, "the maximum that I could possibly impose would be eight. Now I'm not saying I'm going to do that, but today I can't promise that I won't", the court concluded a hearing was not required because the allegations were refuted by the record (LF 33).

Mr. Stanley filed an appeal on December 13, 2011 (LF 36). On December 4, 2012, the appellate court reversed and remanded. Travis M. Stanley v. State of Missouri, ED97795 (Mo. App. E.D. 2012). The court remanded for a hearing on the timeliness of the second amended motion. Id. The Respondent filed an application for transfer to this Court challenging the remand. To avoid repetition, additional facts may be adduced in the argument portion of the brief.

POINTS RELIED ON

I.

The motion court clearly erred when it denied Appellant's motion for post-conviction relief without a hearing because Appellant was denied his right to due process as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Sections 10 and 18 (a) of the Missouri Constitution in that the court did not inform Appellant he could not withdraw his guilty plea if the court refused to accept the plea agreement and the court sentenced Appellant to the maximum possible sentence. Appellant reasonably believed the plea agreement to be a binding agreement and the motion court failed in its responsibility to ensure Appellant understood the agreement was a mere recommendation.

Brown v. Gammon, 947 S.W.2d 437 (Mo. App. W.D. 1997)

Dodson v. State, 364 S.W.3d 773 (Mo. App. W.D. 2012)

Schellert v. State, 569 S.W.2d 731 (Mo. banc 1978)

State v. Thomas, 96 S.W.3d 834 (Mo. App W.D. 2002)

Missouri Supreme Court Rules 24.02 and 24.035

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

U.S. Constitution, Fifth 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 failing to explain prior to him entering his guilty pleas that what he reasonably believed was a binding plea agreement was actually a mere recommendation that the court was not required to follow thus inducing Appellant to plead guilty. The motion court's denial of relief without a hearing leaves a definite and firm impression that a mistake was made because Appellant's general acknowledgement that the court could disregard the State's recommendation and sentence Appellant to any sentence within the range prescribed by law did not conclusively refute Appellant's claim and preclude a hearing.

Flowers v. State, 632 S.W.2d 307 (Mo. App. S.D. 1982)

Porter v. State, 678 S.W.2d 2 (Mo. App. E.D. 1984)

Roberts v. State, 276 S.W.3d 833 (Mo. banc 2009)

Missouri Supreme Court Rules 24.035 and 29.07

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

U.S. Constitution, Fifth and Fourteenth Amendments

ARGUMENT

I.

The motion court clearly erred when it denied Appellant’s motion for post-conviction relief without a hearing because Appellant was denied his right to due process as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Sections 10 and 18 (a) of the Missouri Constitution in that the court did not inform Appellant he could not withdraw his guilty plea if the court refused to accept the plea agreement and the court sentenced Appellant to the maximum possible sentence. Appellant reasonably believed the plea agreement to be a binding agreement and the motion court failed in its responsibility to ensure Appellant understood the agreement was a mere recommendation.

Standard of Review

“Review of a motion court’s ruling on a motion for post-conviction relief is limited to a determination of whether the court’s findings of fact and conclusions of law are clearly erroneous.” Barnes v. State, 160 S.W.3d 837, 838 (Mo. App. S.D. 2005). The clearly erroneous standard is satisfied after a review of the entire record leaves a definite and firm impression that a mistake has been made. Id.

The Motion Court’s Authority to Accept a Second Amended Motion

Though it recorded no objection to the filing of a second amended motion in circuit court, Respondent sought transfer to this Court on the grounds that the motion court’s acceptance of a second amended motion was *per se* error. Mr. Stanley addresses this challenge to the motion court’s authority below:

Mr. Stanley could not have been abandoned by Mr. Tarry, the State urges, because abandonment exists only where appointed counsel: 1) takes “no action” with respect to an amended motion or 2) files an amended motion late or 3) “overtly acts in a way that prevents the movant’s timely filing of a postconviction motion” (Respondent’s Application at 4 citing Gehrke v. State, 280 S.W.3d 54, 57 (Mo. banc 2009)). Though this Court did note such instances as examples of case in which it found abandonment, that list was not exhaustive. Respondent overlooks that abandonment occurs where post-conviction counsel files a motion so patently defective as to amount to a nullity. Dudley v. State, 254 S.W.3d 109, 111 (Mo. App. W.D. 2008); see State v. Bradley, 811 S.W.2d 379, 382-383 (Mo. banc 1991) (remanding for an abandonment hearing). The only remedy for such abandonment is the filing a second amended motion.

In Trehan v. State, 835 S.W.2d 427, 429-430 (Mo. App. S.D. 1992), the Southern District of the Court of Appeals held a presumption of abandonment arose where counsel filed an amended motion that “merely incorporated the allegations of [the movant’s] *pro se* motion.” Similarly, in Pope v. State, 87 S.W.3d 425, 428-429 (Mo. App. W.D. 2002), the Western District held a presumption of abandonment arose where counsel filed an amended motion that was a replica of the movant’s *pro se* motion, except that the amended motion changed the pronoun “I” to “Movant” or “he” or “his.” In each case, the remedy for abandonment was to permit filing of a second amended motion.

It is generally agreed that appointed post-conviction counsel must conform his or her conduct to the dictates of the post-conviction rules. “For abandonment to remain a valid concept, it must be limited only to the requirements set forth in the postconviction

rules.” Gehrke supra at 60 (Judge Fischer in concurrence) citing Kennedy v. State, 210 S.W.3d 417, 420 (Mo. App. S.D. 2006) (the purpose of the abandonment doctrine is to ensure that post-conviction counsel complies with the duties imposed by the post-conviction rules) and Luleff v. State, 807 S.W.2d 495, 498 (Mo. banc 1991) (counsel's obligations include reviewing the file and determining whether an amended motion is warranted, and if so, filing that motion in a timely fashion). Indeed, appointed counsel must follow the post-conviction rules.

One explicit duty of post-conviction counsel is to include all claims known to movant and allege facts in support of those claims. Rule 24.035(e). Just as appointed counsel is required to timely file an amended motion or statement in lieu of an amended motion, appointed post-conviction counsel must include, amend and support an evident and obvious post-conviction claim. Rule 24.035(e). Not to do so would be abandonment. Rule 24.035 makes clear the obligations of appointed counsel,

Counsel shall ascertain whether sufficient facts supporting the claims are asserted in the motion and whether the movant has included all claims known to the movant as a basis for attacking the judgment and sentence. If the motion does not assert sufficient facts or include all claims known to the movant, counsel shall file an amended motion that sufficiently alleges the additional facts and claims.

Rule 24.035(e). The Rule (which also provides for replacing appointed counsel (Rule 24.035(f)) makes no provision relieving successor counsel of his or her obligation to include all claims and allege sufficient facts depending on when he or she was appointed.

Thus, for appointed counsel to willfully ignore a meritorious issue would be abandonment just as surely as failing to file an amended motion. The review and legal expertise contributed by appointed counsel in including “all claims” and supporting those claims with facts is every bit as important to finality as the time limits in the Rules.

While multiple *pro se* motions are prohibited (Rule 24.035(1)) that is not necessarily the case with amended motions. For one thing, subsection (1) cannot refer to amended motions because all amended motions are successive to the *pro se* motions that preceded them. And, as noted above, sometimes replacement amended motions have to be filed. Pope, supra; Trehan, supra; see also Bain v. State, 59 S.W.3d 625 (Mo. App. E.D. 2001)(movant prevailed on first Rule 29.15 motion and was resentenced so to file timely notice of appeal; later he was permitted a new Rule 29.15 motion as to that resentencing and appeal).

The post-conviction rules are not meant to fetter the motion court from reviewing meritorious claims. Circuit courts may deviate from the letter of the post-conviction rules in the interest of justice. See e.g.; Carter v. State, 181 S.W.3d 78 (Mo. banc 2006)(remanding though movant filed *pro se* motion in wrong county and failed to sign *pro se* motion); Howard v. State, 289 S.W. 3d 651 (Mo. App. E.D. 2009)(remanding though *pro se* motion was received late because delay was occasioned by prison mailroom not movant); Nicholson v. State, 151 S.W.3d 369 (Mo. banc 2004)(movant delivered his Form 40 to the wrong circuit and receiving clerk did not forward form to correct court until after the ninety days had elapsed). Mr. Stanley urges the Court uphold the remand of the appellate court. “Unlike preconviction procedures, the purpose of

which is to protect the innocent and convict the guilty, the purpose of postconviction procedures is to ‘satisfy the public conscience that fairness dominates the administration of justice.’” Bain, 59 S.W.3d at 626 quoting Adams v. United States, 317 U.S. 269, 279 (1942).

Facts

In his first amended motion, Mr. Stanley claimed,

- “The Court violated Rule 24.02(d)(4) when it failed to inform the Parties that it rejected their plea agreement” (LF 16);
- “The Court violated Rule 24.02(d)(4)... when it failed to afford Movant the opportunity to withdraw his plea after the Court rejected the plea agreement”

(LF 16)(citation omitted). In his second amended motion, Mr. Stanley clarified,

Movant genuinely believed he had a plea agreement of a specific disposition – no more than three years - in return for his plea of guilty. Cf. Rule 24.02.1(C) or (D). However, what the Court and state contemplated was an agreement for a non-binding recommendation as contemplated by Rule 24.02.1(B). The distinction between the two was lost on Movant. (LF 21).

Argument

A plea agreement once reached cannot be departed from unless the defendant is given the opportunity to withdraw his plea. “Though the court is not bound by a plea bargain between the prosecutor and the defendant and/or his attorney, if the court does not intend to follow the prosecutor’s recommendation, the defendant should have the

privilege of withdrawing his guilty plea.” Schellert v. State, 569 S.W.2d 731, 739 (Mo. banc 1978). The Missouri Supreme Court codified this principal in Rule 24.02(d). Harrison v. State, 903 S.W.2d 206, 208 (Mo. App. W.D. 1995). If a guilty plea is pursuant to a non-binding recommendation (as Mr. Stanley’s agreement apparently was), Rule 24.02(d)2 states the court “shall advise the defendant that the plea cannot be withdrawn if the court does not adopt the recommendation or request.”

“If a defendant is misled or induced to enter a plea of guilty by fraud, mistake, misapprehension, coercion, duress, or fear, he should be permitted to withdraw the plea.” State v. Thomas, 96 S.W.3d 834, 838 (Mo. App W.D. 2002). “Unless it is *clear* that defendant understood the effect of the discussions with the prosecution as involving a mere non-binding recommendation, then it is plain error to deny defendant an opportunity to withdraw his plea when the court is going to reject the plea agreement.” Id. If defendant had a reasonable basis for his belief that the plea agreement was binding and the record supports that reasonable belief, then relief is warranted. Brown v. Gammon, 947 S.W.2d 437, 441 (Mo. App. W.D. 1997).

In Thomas, to explain the non-binding nature of Thomas’ plea agreement, the court stated, “in this circuit there is also no such thing as a binding plea agreement” and “the court is not bound by anything you all agree to.” Thomas, 96 S.W.3d at 837. The Western District of the Court of Appeals ruled these statements insufficient explanation that the court was free to sentence as it saw fit and defendant would not have an opportunity to withdraw his guilty plea later. Id. at 84. This failure to ensure defendant’s

understanding is grounds for the defendant to withdraw his guilty plea when the court rejected the plea agreement. Id.

Mr. Stanley's case is indistinguishable from Thomas in that Judge Lewis did not adequately explain that the court was not bound by the plea agreement and Mr. Stanley would not have the opportunity to withdraw his guilty plea if the court decided to reject the recommend sentence. The court only told Mr. Stanley that the maximum sentence was four years on each count and "that means the maximum I could possibly impose would be eight. Now, I'm not saying I'm going to do that, but today I can't promise that I won't." (LF 53). The court did not explain during the proceedings that Mr. Stanley would not have the opportunity to withdraw his guilty plea or that the plea agreement that was mentioned multiple times was not actually an agreement so much as it was a recommendation by the prosecutor to the court. The court failed in its responsibility to ensure Mr. Stanley understood the proceeding and it erred when it neglected to inform him that he could not withdraw his plea after the court rejected the recommendation.

The Missouri Court of Appeals ruled in Brown v. Gammon that if the defendant's mistake or misunderstanding of a non-binding plea agreement is reasonable then the motion court should grant the defendant an opportunity to withdraw his guilty plea. Brown, 947 S.W.2d at 441. In that case, the motion court repeatedly referred to its proposed disposition as an "opportunity" and the court did not question defendant during the proceedings about his understanding of this "opportunity." Id. In its opinion, the appellate court ruled the defendant reasonably believed his plea agreement was for probation following the 120-day incarceration. Id.

Applying the Brown ruling, it was reasonable for Mr. Stanley to believe his plea agreement was binding on the court. The motion court repeatedly referred to the recommendation of the prosecutor as a plea agreement (as did the “Petition to Enter Plea of Guilty” (LF 43-44)) and when questioning Mr. Stanley about people promising him anything in return for his guilty plea asked “Has anybody **promised** you anything **other than the plea agreement** to get you to plead guilty?” (LF 51)(emphasis added). The question distinguished the plea agreement from other types of promises and led Mr. Stanley to believe he had a binding plea agreement. The judge also asked the State about the plea agreement then immediately after the State’s explanation of the agreement asked Mr. Stanley if he understood the agreement (LF 51), further leading him to believe this agreement was binding and he would receive no longer than three years in prison for his guilty plea. Finally, the court asked the State to stipulate the maximum punishment was but four years on each count observing “you’re only asking for three, right, a cap of three?” (LF 53).

The motion court must permit Mr. Stanley to withdraw his pleas. See, e.g., Trammell v. State, 284 S.W.3d 625, 629 (Mo. App. W.D. 2009); Dennis v. State, 116 S.W.3d 552, 556 (Mo. App. W.D. 2003). “It is essential to due process and justice that a defendant understand the true nature of the agreement before his plea is accepted by the court.” Dodson v. State, 364 S.W.3d 773, 778 (Mo. App. W.D. 2012) (quotation omitted). The court must tell the defendant “clearly and specifically whether he will or will not be able to withdraw the plea of guilty if the court exceeds the recommendation.” Trammell, 284 S.W.3d at 628 (emphasis in original). The motion court failed to clarify to

Mr. Stanley the differences between a binding plea agreement and a mere recommendation. As a matter of law, the motion court erred in not giving telling him he could not withdraw his pleas if the court did not follow the agreement. Therefore, Mr. Stanley's motion to vacate, set aside, or correct sentence and request for an evidentiary hearing should be granted.

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 failing to explain prior to him entering his guilty pleas that what he reasonably believed was a binding plea agreement was actually a mere recommendation that the court was not required to follow thus inducing Appellant to plead guilty. The motion court's denial of relief without a hearing leaves a definite and firm impression that a mistake was made because Appellant's general acknowledgement that the court could disregard the State's recommendation and sentence Appellant to any sentence within the range prescribed by law did not conclusively refute Appellant's claim and preclude a hearing.

Standard of Review

"Review of a motion court's ruling on a motion for post-conviction relief is limited to a determination of whether the court's findings of fact and conclusions of law are clearly erroneous." Barnes, 160 S.W.3d at 838. The clearly erroneous standard is satisfied after a review of the entire record leaves a definite and firm impression that a mistake has been made. Id.

The Motion Court's Authority to Accept a Second Amended Motion

Mr. Stanley incorporates by reference his argument about the motion court's authority to accept his second amended motion made in point one of this brief.

Facts

In his first amended motion, Mr. Stanley pled,

That plea counsel failed to render effective assistance of counsel by failing to thoroughly explain the concept that the Court was free to reject the plea. Movant's knowledge of what the Court could do in reference to the plea was incomplete and said omission on the part of plea counsel affected the voluntary nature of the plea"

(LF 16). Later, in his second amended motion, Mr. Stanley elaborated,

Plea counsel was ineffective for failing to explain to Movant that, should the Court fail to follow the recommendation, the judge could give him more time than what the prosecutor promised. Counsel failed to explain the gravity of Movant's decision to plead guilty to merely a "recommendation." Instead, counsel likened the recommendation to a "promise" that Movant could take to the bank.

Counsel's advice to Movant seemed reasonable. Counsel told Movant the Court would do as the state recommended and the plea petition seemed to bear that out, given its promise of a three year cap. Plea counsel did request Movant be placed on probation, but failed to argue for, at least, concurrent sentences if the court was going to elect to sentence Movant to

prison time. Had Movant realized he was pleading to a perfectly non-binding agreement with no recourse – should the Court reject the agreement – he would not have pled guilty but would have insisted on a trial. (LF 27-28).

Argument

The Sixth Amendment to the Constitution of the United States established the right to counsel, a fundamental right of all criminal defendants through the due process clause of the Fourteenth Amendment. Gideon v. Wainwright, 372 U.S. 335 (1963). This right is designed to assure fairness, and thus to give legitimacy to the adversary process. To fulfill its role of assuring 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). When a criminal defendant seeks post-conviction relief on a claim of ineffective assistance of counsel, he must establish first, that his attorney’s performance was deficient and second, that 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).

The Strickland test is applicable to cases in which guilty pleas are entered. In order to satisfy the second Strickland requirement in connection with his guilty plea, the Movant must show that, 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).

In the instant case, counsel's error affected the voluntariness of Mr. Stanley's guilty plea. The effectiveness of counsel is relevant to the extent it affects the voluntariness of the guilty plea. Porter v. State, 678 S.W.2d 2, 3 (Mo. App. E.D. 1984); Walker v. State, 698 S.W.2d 871, 874 (Mo. App. W.D. 1985). "Upon a plea of guilty, Movant waives all errors except those which affect the voluntariness or understanding with which he pleads." Cross v. State, 970 S.W.2d 840, 842 (Mo. App. E.D. 1998).

The motion court, in its rather conclusory findings, used but one case to support its denial of an evidentiary hearing (LF 53); Flowers v. State, 632 S.W.2d 307, 311 (Mo. App. S.D. 1982). But Flowers is distinguishable and does not support the motion court's denial.

In Flowers, the circuit court "interrogated movant (and his brother) at great length and explained his rights to him, and the consequences of his proposed plea, before accepting his guilty plea." Id. Specifically, the plea court asked Flowers, "Has anyone made you any promises in connection with entering a plea of guilty," "You understand that the Court fixes the punishment if we accept your guilty plea," and "The Court may listen to recommendations of the Prosecuting Attorney and also your attorney, but the Court is not bound by those recommendations." Id. at 313.

The judge in Flowers was extremely diligent in asking the defendant if he understood his rights and if anyone had made him promises. Not so the plea court here, it continually reiterated that Mr. Stanley (unlike Mr. Flowers) had a "plea agreement." The court asked Mr. Stanley, "Has anybody **promised** you anything **other than the plea agreement** to get you to plead guilty?" (LF 51)(Emphasis added). The question

specifically referenced the plea agreement between Mr. Stanley and the State, distinguishing it from any other promise. This question is different from the questions asked in Flowers in that it led Mr. Stanley to believe that the promises made in the plea agreement were binding and fundamentally different than any other type of promise made by someone other than the prosecutor.

Moreover, the court never made clear it could impose any sentence it deemed fit. The court judge was not straightforward with its warnings but rather stated, “The maximum that I could possibly impose would be eight. Now, I’m not saying I’m going to do that, but today I can’t promise that I won’t.” (LF 53). The court added, “it could be as much as eight years. Do you understand that?” (LF 54).

The legal analysis in Roberts v. State, 276 S.W.3d 833 (Mo. banc 2009), applies to Mr. Stanley’s case and mandates a hearing. Mr. Roberts was denied an evidentiary hearing on his post-conviction relief motion but this Court determined the denial was a reversible error because Roberts alleged facts that, if true, would demonstrate his counsel was ineffective and the court should have allowed him to withdraw his guilty plea. Id. at 836. Mr. Roberts did not knowingly or voluntarily submit his guilty plea because he was reasonably confused that the State’s “Plea Agreement” was not binding on the court and that his counsel did not object when the State altered the agreement at the plea hearing. Id. Since the record did not conclusively show that Roberts was not entitled to relief, the motion court should have held an evidentiary hearing. Id. at 837. Rule 24.035 instructs the motion court should grant a hearing regarding post-conviction relief if the record does not conclusively show the defendant is not entitled to relief. Rule 24.035(h).

The trial court erred in Mr. Stanley's case by not granting an evidentiary hearing when the record did not conclusively show that Mr. Stanley was not entitled to relief. Similar to Mr. Roberts, Mr. Stanley misunderstood that the "Plea Agreement" he and the State agreed to was not binding on the court. An evidentiary hearing was required in this situation because the record did not conclusively refute the facts alleged by Appellant.

Mr. Stanley's pleadings satisfied the first prong of the Strickland test for ineffective assistance of counsel. His trial counsel did not explain prior to him entering his guilty plea that what he reasonably believed was a binding plea agreement was actually a mere recommendation that the court was not required to follow (LF 20, 26-29). Had counsel exercised the customary skill and diligence that a reasonably competent attorney would have in this situation, counsel would have clarified the subtleties to her client. Counsel did not do this and therefore, she did not exercise the diligence and competency required for her to be effective counsel.

Mr. Stanley satisfied the second prong of the Strickland test by alleging that counsel prejudiced him because, but for the actions of counsel, he would not have plead guilty but would have insisted on exercising his constitutional right to trial (LF 28). "Movant must show, but for the conduct of his trial attorney about which he complains, he would not have pleaded guilty but would have gone to trial." Stuart v. State, 263 S.W.3d 755, 757 (Mo. App. S.D. 2008). Mr. Stanley would not have pled guilty if he fully understood the court was free to disregard the recommendation of the prosecutor's plea agreement and sentence him to the maximum eight years in the Department of

Corrections. Had counsel explained the potential consequences of his guilty plea being was a maximum sentence then Mr. Stanley would have opted for a trial.

Finally, the court's decision to dispense with an examination pursuant to Rule 29.07 necessitates a hearing. Rule 29.07 (b) (4) states "the court at the conclusion of final sentencing shall... examine the defendant as to the assistance of counsel received by the defendant. The examination shall be on the record... At the conclusion of the examination the court shall determine whether probable cause exists to believe the defendant has received ineffective assistance of counsel." Rule 29.07 (b)(4). The purpose of the examination under Rule 29.07 is to establish the facts so the court can make the determination of ineffective assistance required by the rule. Liebeck v. State, 910 S.W.2d 373, 377 (Mo. App. S.D. 1995).

In Mr. Stanley's case, the motion court did not examine him as to the effectiveness of assistance. There is no record of questions about counsel's assistance at the conclusion of the final sentencing. "[S]pecific inquiries are required in sentencing hearings in order to conclusively refute specific claims of ineffective assistance of counsel that may later be asserted in post-conviction motions." Bauer v. State, 926 S.W.2d 188, 190 (Mo. App. S.D. 1996) (citing State v. Driver, 912 S.W.2d 52 (Mo. banc 1995)). Here, the judge read Rule 24.035 aloud and then promptly adjourned court (LF 64). This lack of inquiry combined with Mr. Stanley's reasonable misunderstanding of the terms of his plea agreement show he is entitled to an evidentiary hearing for post-conviction relief for ineffective assistance of counsel.

CONCLUSION

WHEREFORE, for the foregoing reasons, this Court should reverse the motion court's judgment denying Mr. Stanley's motion for post-conviction relief and remand with directions that the court permit Mr. Stanley to withdraw his pleas or with orders to conduct an evidentiary hearing.

Respectfully Submitted,

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Certificate of Service

An electronic copy of the forgoing Appellant's Substitute Brief and Appendix was delivered to this Court and to Karen Kramer of the Office of the Attorney General, State of Missouri, Jefferson City, Missouri, via the Missouri E-filing System on this 24th day of April, 2013.

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Certificate of Compliance

Pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03. This brief was prepared with Microsoft Word for Windows, uses Times New Roman 13 point font. The word-processing software identified that this brief contains 6969 words, 726 lines, and 32 pages including the cover page, signature block, and certificates of service and of compliance, and the cover page of the Appendix. In addition, I hereby certify that this document has been scanned for viruses with Symantec Endpoint Protection Anti-Virus software, with updated virus definitions, and has been found virus-free.

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