

IN THE
MISSOURI SUPREME COURT

SCOTT D. BARMORE,)	
)	
Appellant,)	No. SC85103
)	
vs.)	
)	Transferred from
STATE OF MISSOURI,)	ED80470
)	
Respondent.)	

APPEAL TO THE MISSOURI COURT OF APPEALS,
EASTERN DISTRICT
FROM THE CIRCUIT COURT FOR ST. CHARLES COUNTY,
ELEVENTH JUDICIAL CIRCUIT,
THE HONORABLE GRACE NICHOLS JUDGE AT PLEA AND
THE HONORABLE NANCY SCHNEIDER,
JUDGE AT SENTENCING AND POST-CONVICTION PROCEEDINGS

APPELLANT'S SUBSTITUTE REPLY BRIEF

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JURISDICTIONAL STATEMENT and STATEMENT OF FACTS

The appellant Scott Barmore adopts the jurisdictional statement and statement of facts set forth in his substitute brief filed on April 29, 2003 and incorporates them herein by reference.

POINT RELIED ON

The motion court clearly erred in denying Mr. Barmore’s Rule 24.035 post-conviction motion without an evidentiary hearing because a review of the record leaves a definite and firm impression that Mr. Barmore was entitled to a hearing since he pleaded facts, not refuted by the record, which if proved warranted relief, in that Mr. Barmore alleged that his attorney did not act as a reasonably competent attorney, in derogation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article One, Sections 10 and 18(a) of the Missouri Constitution’s because his attorney failed to inform him that if he accepted a suspended imposition of sentence, the sentencing caps he agreed to as part of his plea bargain would no longer be valid and he could be sentenced under the full range of punishment. At a minimum, the motion court should have allowed Mr. Barmore the opportunity to withdraw his plea when it became clear he could be sentenced to terms of imprisonment greater than those he agreed to. The motion court’s denial of an evidentiary hearing prejudiced Mr. Barmore by foreclosing him the opportunity to prove his claim. Had Mr. Barmore known that he could be sentenced under the full range of punishment if he accepted a suspended imposition of sentence, he would not have pleaded guilty but would have proceeded to trial.

Brown v. State, 67 S.W.3d 708 (Mo. App. E.D. 2002);

Missouri Constitution, Article I, Sections 10, 18(a);

U.S. Constitution, Amendments 5, 6, 14;

Missouri Supreme Court Rule 24.02(d) (4);

Missouri Supreme Court Rule 24.035;

Missouri Supreme Court Rule 83.08(b).

ARGUMENT

The motion court clearly erred in denying Mr. Barmore’s Rule 24.035 post-conviction motion without an evidentiary hearing because a review of the record leaves a definite and firm impression that Mr. Barmore was entitled to a hearing since he pleaded facts, not refuted by the record, which if proved warranted relief, in that Mr. Barmore alleged that his attorney did not act as a reasonably competent attorney, in derogation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article One, Sections 10 and 18(a) of the Missouri Constitution’s because his attorney failed to inform him that if he accepted a suspended imposition of sentence, the sentencing caps he agreed to as part of his plea bargain would no longer be valid and he could be sentenced under the full range of punishment. At a minimum, the motion court should have allowed Mr. Barmore the opportunity to withdraw his plea when it became clear he could be sentenced to terms of imprisonment greater than those he agreed to. The motion court’s denial of an evidentiary hearing prejudiced Mr. Barmore by foreclosing him the opportunity to prove his claim. Had Mr. Barmore known that he could be sentenced under the full range of punishment if he accepted a suspended imposition of sentence, he would not have pleaded guilty but would have proceeded to trial.

As a preliminary matter, contrary to Rule 83.08(b), the state has altered the basis of the claim it raised in its appellate brief. On appeal the state conceded; now it opposes Mr. Barmore’s request for an evidentiary hearing.

Also contrary to the state's new position (Respondent's Substitute Brief 15), Mr. Barmore's guilty plea was unknowing and unintelligent because it was based, in part, on a mistaken belief. The record reflects an unassailable basis for that mistaken belief: Mr. Barmore's petition to enter a guilty plea sets out the sentencing caps Mr. Barmore agreed to as a predicate to his pleading guilty (Appellant's Substitute Brief. 15, 16).

Mr. Barmore's plea counsel's failure to tell him that his plea bargain would not remain in effect if he accepted a suspended imposition of sentence was not a collateral consequence of his guilty plea. Nothing is more central to a guilty plea than the sentence. Mr. Barmore's plea came as a direct result of his bargain with the State. While Missouri precedent does not oblige plea counsel to inform clients about collateral consequences of their pleas, plea counsel are required to inform clients about a plea's direct consequences. Brown v. State, 67 S.W.3d 708 (Mo. App. E.D. 2002).

A direct consequence of a guilty plea is one which "definitely, immediately and largely automatically follow[s] from the entry of a guilty plea." (Respondent's Substitute Brief 14, Opinion, 4). The State's sentencing recommendations no longer applied when the plea court accepted Mr. Barmore's guilty plea. Mr. Barmore's plea agreement thus expired automatically and immediately following his guilty plea, as a direct consequence of it, and not, as the State newly reasoned, because of his probation violation. (Respondent's Substitute Brief 14,15).

Further, plea counsel's deficient advice about what could happen if he accepted a suspended imposition of sentence related to the sentence Mr. Barmore could face if his

probation were revoked. That sentence stemmed from and was a direct consequence of his guilty plea.

Because this direct consequence had the concomitant effect of subjecting Mr. Barmore to the whole range of punishment rather than the sentencing agreement reflected in his plea bargain, it affected Mr. Barmore's decision to plead guilty, was not refuted by the record and warranted relief, as he has argued in his brief and as the State conceded on appeal.

Respondent also wrongly contends that Rule 24.02(d)(4) does not apply because Mr. Barmore received the benefit of his bargain (Respondent's Substitute Brief, 16). Mr. Barmore was sentenced to prison terms greater than the sentencing caps expressed in the plea agreement. Respondent misconstrues the terms of Mr. Barmore's bargain. The irrefutable fact remains that after the probation revocation court revoked Mr. Barmore's probation, the judge sentenced him pursuant to his guilty pleas to prison terms in excess of those in the plea agreement.

Mr. Barmore did not receive the benefit of his plea bargain. The benefit of Mr. Barmore's bargain was the possibility of probation and the State's specific sentencing recommendations, not only probation. Once Mr. Barmore received sentences greater than the ones the State recommended, Rule 24.02(b)(4) required he be given the chance to withdraw his plea. That did not occur here.

The motion court clearly erred for the reasons stated above. The motion court's ruling denying Mr. Barmore relief violated 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. This Court must reverse and remand this cause for an evidentiary hearing.

CONCLUSION

WHEREFORE, for the forgoing reasons, appellant Scott Barmore prays that this honorable Court reverse the motion court's denial of his Rule 24.035 Motion and remand this cause for an evidentiary hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Missouri Supreme Court Rule 84.06(g) and Special Rule 361, I hereby certify that on this 28th day of May 2003, a true and correct copy of the foregoing brief and a floppy disk containing the foregoing brief were mailed postage prepaid to the office of the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

Raymund J. Capelovitch

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 and that it complies with the page limitations of Special Rule 360. This brief was prepared with Microsoft Word for Windows, uses Times New Roman 13 point font, and does not exceed 15,500 words, 1,100 lines, or fifty pages. The word-processing software identified that this brief contains 1,599 words, including the cover page, signature block, and certificates of service and of compliance. In addition, I hereby certify that the enclosed diskette has been scanned for viruses with McAfee Anti-Virus software and found virus-free.

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