

**IN THE SUPREME COURT
STATE OF MISSOURI**

CHARLES MERTENS)	
)	
Relator,)	
)	
vs.)	Case No. SC87564
)	
THE HONORABLE)	
THOMAS J. BROWN, III)	
)	
Respondent.)	

RELATOR’S BRIEF

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JURISDICTIONAL STATEMENT

The Missouri Supreme Court is authorized by Article 5, Section 4, of the Missouri Constitution to issue remedial writs, and one such writ is a writ of prohibition. This action is one involving the question of whether Respondent, a judge in the Circuit Court of Cole County, Missouri, has acted in excess of his jurisdiction by scheduling a hearing to be conducted pursuant to the provisions of Section 559.115, RSMo., (Cum.Supp. 2005).

STATEMENT OF FACTS

Relator is currently incarcerated in the Missouri Department of Corrections (hereinafter “MDOC”), Algoa Correctional Center (hereinafter “Algoa”) in the City of Jefferson, County of Cole, Missouri. Relator was previously incarcerated in MDOC at the Eastern Reception, Diagnostic and Correctional Center (ERDCC) in the City of Bonne Terre, County of St. Francois, Missouri. Relator is in the MDOC because on May 2, 2005, in the Circuit Court of Cole County Missouri, he was sentenced to a term of five years in the MDOC for the offense of involuntary manslaughter; and to a term of four years for the offense of leaving the scene of a motor vehicle accident; said sentences were ordered to run concurrent with one another and were ordered pursuant to Section 559.115, RSMo., with a recommendation that Relator be placed in an institutional treatment program. (See certified copy of the Judgment and Sentence, Exhibit A, and the Order for Section 559.115, RSMo, review, Exhibit B). Execution of that sentence was Stayed until June 6, 2005, at which time Defendant reported to begin serving his sentence. (See Exhibit C, copy of the docket sheet from Cole County Circuit Court Case No. 04CR325320-01, entitled State of Missouri, Plaintiff, v. Charles Mertens, Defendant.)

Relator successfully completed the institutional treatment program and received a favorable recommendation for probationary release, as evidenced by the court report investigation dated September 1, 2005 (see Exhibit D.) On September 9, 2005, Respondent denied Relator’s release to probation by writing the word “DENIED” on the

face of the court report investigation, placing that in the court file, and making a corresponding docket entry. (See Exhibits C and D). Respondent did not make a finding that the release recommendation was an abuse of discretion nor was a hearing conducted on the issue.

Relator subsequently filed a petition for Writ of Habeas Corpus in the Circuit Court of St. Francois County, alleging that he was being illegally detained because Respondent had denied his release without affording him a hearing. On December 22, 2005, the Honorable James H. Kelly of that court conducted a hearing on said petition, and subsequently entered a “Judgment Granting Writ of Habeas Corpus” (See Exhibit E) finding that Relator is illegally detained, but Judge Kelly did not grant Relator’s discharge. Rather, Judge Kelly remanded the cause to the Circuit Court of Cole County, and directed that Court to hold a hearing pursuant to Section 559.115, RSMo., to determine whether Relator should be released to probation. (See Exhibit E). Respondent scheduled such hearing for January 11, 2006 at 1:30 p.m. (See Exhibit C). On January 5, 2006, Relator made an oral motion before Respondent to cancel the scheduled hearing for lack of jurisdiction, and said motion was overruled (See Exhibit C, page 5).

On January 9, 2006, Relator petitioned the Missouri Court of Appeals, Western District, for a Writ of Prohibition seeking to prohibit Respondent from holding the hearing for lack of jurisdiction. That same day, the Missouri Court of Appeals, Western District, entered a Stop Order preventing Respondent (Judge Brown) from conducting the hearing on January 11, 2006, and further ordered Respondent to take no further action

regarding Relator until further order of the Missouri Court of Appeals, Western District. (Exhibit F).

On March 3, 2006, the Missouri Court of Appeals, Western District, entered an order denying Relator's petition for a Writ of Prohibition. (See Exhibit G).

On January 9, 2006, Relator also filed a petition for Writ of Mandamus in the Eastern District Court of Missouri, Court of Appeals, which denied the petition stating that Relator's proper remedy was to be found in the Western District Court of Missouri, Court of Appeals. (See Exhibit H).

On March 9, 2006, Respondent scheduled this matter on March 20, 2006, for setting a date for a 120 day release hearing. (Exhibit C, page 5).

On March 15, 2006, Relator filed for a Writ of Prohibition in this court, asking this court to prohibit Respondent from conducting said hearing. On March 20, 2006, this court entered its Preliminary Writ of Prohibition.

POINT RELIED ON

RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM CONDUCTING A HEARING PURSUANT TO SECTION 559.115, RSMo., BECAUSE RESPONDENT NO LONGER HAS JURISDICTION TO CONDUCT SUCH A HEARING, IN THAT SECTION 559.115, RSMo., REQUIRES SUCH HEARING TO BE CONDUCTED WITHIN NINETY TO ONE HUNDRED TWENTY DAYS OF RELATOR'S SENTENCE, AND SUCH TIME HAS PASSED.

Duly v. Heflin, 873 S.W2d 932, 934 (Mo.App.W.D.1994)

State ex rel. Beggs v. Dormire, 91 S.W.3d 605 (Mo. banc 2002)

Section 559.115 RSMo. (Cum.Supp.2005)

ARGUMENT

A writ of prohibition is “not issued as a matter of right, but instead, whether a writ is issued is a question left to the sound discretion of the court in which a petition has been filed.” *State ex rel. J.E. Dunn Construction Co. v. Fairness in Const. Bd.*, 960 S.W.2d 507, 511 (Mo.App.W.D. 1997). This court has noted that a Writ of Prohibition is a proper remedy:

(1) to prevent the usurpation of judicial power when the trial court lacks jurisdiction;

(2) to remedy a excess of jurisdiction or an abuse of discretion where the lower court lacks the power to act as intended; or

(3) where a party may suffer irreparable harm if relief is not made available in response to the trial court’s order.

State ex rel. Proctor v. Bryson, 100 S.W.3d775, 776 (Mo., 2003) (quoting *Rockwood R-VI School District v. Romines*, 63 S.W.3d 682, 684 (Mo.App.E.D., 2001)).

Additionally, this court has noted that Relator has the procedural burden to “establish that respondent has usurped or acted in excess of his jurisdiction.” *State ex rel. Eggers v. Enright*, 609 S.W.2d 381, 382 (Mo.1980).

Relator was sentenced to a term of five years in the MDOC for the offense of involuntary manslaughter; and to a term of four years for the offense of leaving the scene of a motor vehicle accident; said sentences were ordered to run concurrent with one

another and were ordered pursuant to §559.115, RSMo., with a recommendation that defendant be placed in an institutional treatment program. Relator successfully completed the institutional treatment program and received a favorable recommendation for probationary release, as evidenced by the Court Report Investigation dated September 1, 2005, but was not released on probation. The sentencing court did not find that the release would be an abuse of discretion nor did the court conduct a hearing on this issue.

This is a situation in which Respondent proposes to exercise power beyond his jurisdiction by now scheduling a hearing to be conducted under the provisions of section 559.115, RSMo. Respondent's jurisdiction to conduct such hearing terminated 120 days after Relator was delivered to the Missouri Department of Corrections.

Section 559.115, RSMo., provides that if an offender is placed in and successfully completes an institutional treatment program, that offender **shall** be released on probation **unless** the sentencing court determines that such release recommendation constitutes an abuse of discretion. (Emphasis added). Further, Section 559.115.2, RSMo., provides that a Circuit Court only upon its own motion and not that of the state or the offender shall have the **power** to grant probation to an offender anytime up to one hundred twenty days after such offender has been delivered to the department of corrections **but not thereafter** (emphasis added). The Circuit Court of Cole County lost jurisdiction over Relator with regards to 559.115 on October 4, 2005.

Section 559.115.3, RSMo., provides that if an offender successfully completes a treatment program recommended by the sentencing court, the offender **shall** be released

on probation unless the court determines that such release constitutes an abuse of discretion. The court here made no such finding.

The same section further provides that the court may order the execution of the offender's sentence **only after** conducting a hearing on the matter within ninety to one hundred twenty days of the offender's sentence. The court conducted no such hearing. Section 559.115 expressly requires that the hearing be conducted within ninety to one hundred twenty days because, as provided in subsection (2), the court cannot place an offender on probation after one hundred twenty days has expired. It would be pointless to hold a hearing after one hundred twenty days if the court could not grant probation at the conclusion of the hearing.

After Relator's probationary release was denied by the sentencing court, Relator petitioned the Circuit Court of St. Francois County, Missouri, for a Writ of Habeas Corpus. The Honorable James H. Kelly subsequently conducted a hearing on the petition on December 22, 2005. Judge Kelly entered a "Judgment Granting Writ of Habeas Corpus" finding that Relator is illegally detained, but did not grant Relator's release as required by Rule 91.18. Rather, the cause was remanded to the Circuit Court of Cole County, directing the court to hold a hearing pursuant to Section 559.115, a hearing the

sentencing court no longer has jurisdiction to conduct.¹ It is this hearing which Relator seeks to prohibit.

As a general rule Section 559.100, RSMo., grants circuit courts jurisdiction to both place people on parole or probation and to revoke probation or parole that has been previously granted. However, Section 559.100.1 RSMo., makes an important exception to this jurisdiction when it comes to probationary issues decided under Section 559.115. Under Section 559.115 the circuit court's jurisdiction over probation issues is limited to a thirty day window which exists only between the 90th and 120th day of a prisoner's incarceration— a window that has already been closed in the case at hand. There are no exceptions which allow it to open again.

The Missouri Court of Appeals for the Western District has recognized this important exception limiting the Circuit Court's jurisdiction over probation issues that arise under Section 559.115 in *Duly v. Heflin*, 873 S.W.2d 932, 934 (Mo.App.W.D.1994). The *Duly* court stated:

¹ Citing Rule 91.18, "Order for Discharge," which provides "[i]f no legal cause is shown for the restraint, the court **shall forthwith** order the person discharged" (Emphasis added), Relator subsequently filed a petition for Writ of Mandamus in the Eastern District Court of Appeals. That court denied the petition stating that the proper remedy was to be found with the Western District Court of Appeals who had jurisdiction over the sentencing court.

“[t]he only exception to the authority of the state board of probation and parole is found under section 559.115 which grants the circuit court authority to grant probation to a defendant any time up to 120 days after he has been delivered to the custody of the department of corrections.”

Duly further stated that “[i]n accordance with the statutory scheme, the circuit court loses jurisdiction over parole of a defendant, sentenced to the department of corrections, after 120 days.” *Id.*, at 935. The plain reading of *Duly* shows that the circuit court lost jurisdiction over the present case as of October 4, 2005.

Since the sentencing court only had the power to order the execution of Relator’s sentence after affording him a hearing, and the jurisdiction of the sentencing court to hold this hearing only existed until October 4, 2005, Judge Kelly’s order directing the sentencing court to conduct a hearing pursuant to Section 559.115 is an order directing the sentencing court to hold a hearing on a matter over which they no longer have jurisdiction.

The case of State ex rel. *Beggs v. Dormire*, 91 S.W.3d 605 (Mo. banc 2002) is instructive, if not controlling. Beggs was sentenced to the MDOC under a program created by Section 217.362, RSMo., 2000, for offenders with substance abuse addiction. Said statute, like 559.115, RSMo., allows a trial judge to place an offender on probation upon successful completion of a treatment program in the MDOC. The language of these

two sections and the mechanisms by which the offender can be placed on probation are nearly identical.²

Beggs successfully completed his treatment program and received a favorable release recommendation. A Polk County judge nonetheless denied his release and he thereafter petitioned this court for a writ of habeas corpus. Treating his petition as a petition for mandamus, this court issued a writ of mandamus to the Circuit Court of Polk County to place Beggs on probation. *Id.* at 607. This court found that no evidence supported the sentencing court's determination that Beggs was unfit for probation, thus placement on probation would not be an abuse of discretion, and the Board's recommendation for probation must be followed.

Similarly, no evidence supports Respondent's denial of probation in this case, because no evidence was adduced. It was not Relator's burden in the trial court to adduce evidence that he was fit for probation; it was the burden of Respondent and the State to adduce evidence that he was unfit for probation. That burden was not met, and Relator should be released to probation. Even if a Section 559.115 hearing was held in this case, there is nothing in the court report investigation which would support a denial

² Section 217.362, RSMo. (Cum.Supp. 2003), has been amended to remove the requirement that the trial court conduct a hearing to determine whether release to probation is appropriate. The version in effect when this court decided *Beggs* required such a hearing.

of probation. If a hearing were held and probation were denied, Relator would be continued in unlawful confinement while that decision was challenged.

Insomuch as Relator is illegally incarcerated in the MDOC and insomuch as the Circuit Court of Cole County no longer has jurisdiction to hold a 559.115 hearing or to grant or deny probation, there is no other adequate remedy at law other than for this court to issue a Writ of Prohibition preventing the Honorable Judge Thomas J. Brown III from conducting such hearing as there is no jurisdiction under RSMo 559.115. Judge Kelly's order in the Habeas Corpus matter should then control and Relator would be released to probation per that order. Additionally, since Relator has been transferred from St. Francois County to Cole County since these proceedings began, and there is therefore an issue as to whether Judge Kelly's order still has force and effect, Relator respectfully requests this court to enter the appropriate orders to effect his release to probation.

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CERTIFICATION UNDER RULE 84.06(c)

Comes Now, Douglas W. Hennon, Attorney for Relator, and pursuant to Supreme Court Rule 84.06 hereby certifies that:

1. Relator's Brief as submitted in the above styled cause includes the information required by Rule 55.03;
2. Relator's Brief compiles with the limitations contained in Supreme Court Rule 84.06(b);
3. As reported by the undersigned's copy of Microsoft Word 11, the word count of Relator's Brief is 2,846 words; and
4. The diskettes submitted to the court and to respondent have been scanned for viruses using Symantec Anti-Virus Version 7 updated as of March 20, 2006, and they are virus free.

Douglas W. Hennon

CERTIFICATE OF SERVICE

Now on this *18th* day of *May*, 2006, the undersigned hereby certifies that two complete paper copies and one diskette containing Relator's Brief were hand-delivered to:

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