



In the Missouri Court of Appeals Eastern District

DIVISION THREE

TODD BEARDEN,	)	No. ED104464
	)	
Movant/Appellant,	)	
	)	Appeal from the Circuit Court
vs.	)	of St. Francois County
	)	
STATE OF MISSOURI,	)	Honorable Sandy Martinez ¹
	)	
Respondent.	)	FILED: June 20, 2017

OPINION

Todd Bearden appeals from the judgment of the circuit court denying, without an evidentiary hearing, his motion for post-conviction relief after a guilty plea, pursuant to Rule 24.035. This court would hold that plea counsel was ineffective for failing to object to the group plea procedure; thus we would reverse and remand for an evidentiary hearing as to the voluntariness of Movant's plea. However, given the general interest and importance of the question, we transfer the cause to the Supreme Court of Missouri pursuant to Rule 83.02

Background

In 2013, Movant appeared before the plea court as one of six unrelated defendants in ten separate cases disposed in a "group plea" procedure. All defendants were represented simultaneously by the same public defender. The court began by explaining that the purpose of

¹ Judge Martinez ruled on Bearden's post-conviction motion. The underlying plea hearing was conducted by Judge Kenneth Pratte.

the group procedure was to save time; to that end, the court would pose questions to the group and “move straight down the line” for their responses and, when necessary, would speak to each defendant individually regarding his or her particular case. Movant was fourth in line. The court asked counsel and each defendant if anyone objected to the procedure, and they all replied no.

Starting with group questions, the court first conducted an inquiry whether the defendants were satisfied with their attorney’s services. Twelve questions on this topic were followed by consecutive responses of yes or no, unanimously. For example:

- Q: Has your attorney done all the things that you have requested him to do for you in your case?
- A1: Yes, sir.
- A2: Yes, Your Honor.
- A3: Yes.
- A4: Yes, Your Honor.
- A5: Yes, Your Honor.
- A6: Yes, Your Honor.

The court’s subsequent inquiry, comprised of thirteen questions as to the defendants’ understanding of their right to a jury trial and the consequences of the waiver of that right, proceeded in the same fashion.

- Q: Do you understand that you have a right to have a jury determine your guilt or innocence of the charges against you at a speedy and public trial?
- A1: Yes, sir.
- A2: Yes, Your Honor.
- A3: Yes.
- A4: Yes, Your Honor.
- A5: Yes, Your Honor.
- A6: Yes, Your Honor.

Several of these queries were in the form of compound questions that would draw a sustained objection if posed by counsel. For example:

- Q: Do you understand that, at a trial of the charges against you, you would be presumed innocent until proven guilty, and that your guilt must be proved by evidence which convinces the jury of your guilt beyond a reasonable doubt, and that all twelve jurors would have to agree as to your guilt?

A1: Yes, sir.
A2: Yes, Your Honor.
A3: Yes.
A4: Yes, Your Honor.
A5: Yes, Your Honor.
A6: Yes, Sir.

Next, the court addressed each defendant individually for allocution. When Movant's turn came, he pleaded guilty to two counts of possession of a chemical with intent to create a controlled substance. In the final group inquiry, the court posed questions about the defendants' competence and willingness to enter their respective pleas, to which all defendants responded identically in succession. For example:

Q: Is it still your desire to plead guilty?
A1: Yes, sir.
A2: Yes, Your Honor.
A3: Yes.
A4: Yes, Your Honor.
A5: Yes, Your Honor.
A6: Yes, Sir.

The "round" after that consisted of individual sentencing. In Movant's case, the court suspended execution of sentence and placed Movant on probation for five years.

In 2015, Movant was charged with violating the terms of his probation. After a hearing, the court ordered Movant's probation revoked and his sentence executed, and Movant was delivered to the Department of Corrections. Movant then sought post-conviction relief claiming, among other grounds, that his counsel was ineffective for failing to object to the group plea procedure. The motion court denied relief without an evidentiary hearing, reasoning that, because the Supreme Court of Missouri has not declared group pleas impermissible, counsel was not ineffective for acquiescing to the procedure.

Standard of Review

This court reviews the denial of a motion for post-conviction relief to determine whether

the motion court's findings of fact and conclusions of law were clearly erroneous. Rule 24.05(k). Findings and conclusions are clearly erroneous if, after a review of the entire record, this court is left with the definite and firm impression that a mistake has been made. *State v. Roll*, 942 S.W.2d 370, 375 (Mo. 1997).

To prevail on a claim of ineffective assistance of counsel, a movant must show that counsel did not demonstrate the customary skill and diligence that a reasonably competent attorney would display when rendering similar services under the existing circumstances, and that movant was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668 (1984). Where a movant's conviction results from a guilty plea, claims of ineffectiveness of counsel are immaterial except to the extent that they infringe upon the voluntariness and knowledge with which the guilty plea was made. *McVay v. State*, 12 S.W.3d 370, 373 (Mo. App. S.D. 2000).

To receive an evidentiary hearing, a movant's motion for post-conviction relief must allege facts, not conclusions, warranting relief; the facts alleged must not be refuted by the record; and the allegations complained of must have prejudiced the movant. *Martin v. State*, 343 S.W.3d 744, 746 (Mo. App. E.D. 2011).

Discussion

This court has condemned the circuit court's practice of group pleas on numerous occasions. *See generally Briley v. State*, 464 S.W.3d 537 (Mo.App.E.D. 2015); *Snow v. State*, 461 S.W.3d 25, 30 n. 3 (Mo.App.E.D. 2015) ("This Court again cautioned that trial courts should heed the admonition of our Supreme Court that group guilty pleas are not preferred practice and should be used sparingly in a case involving the same court that took this group plea. This recurring admonition continues to be ignored ..."); *Wright v. State*, 411 S.W.3d 381, 388 (Mo.App.E.D. 2013) ("Defense lawyers agreeing to such a procedure may well be presumptively ineffective.")

(Richter, J., concurring); *Castor v. State*, 245 S.W.3d 909, 915 n. 8 (Mo.App.E.D. 2008) (“We reiterate that this procedure is not preferred and should be discontinued.”); *Elverum v. State*, 232 S.W.3d 710, 712 n. 4 (Mo.App.E.D. 2007); *Adams v. State*, 210 S.W.3d 387 (Mo.App.E.D. 2006); *Guynes v. State*, 191 S.W.3d 80, 83 n. 2 (Mo.App.E.D. 2006); *Guynes*, 191 S.W.3d at 83 n. 2 (“This procedure is far from ideal and should be discontinued.”).

The Supreme Court of Missouri has denounced the practice of group pleas but has not declared them *per se* invalid. *Roberts v. State*, 276 S.W.3d 833, 837 n. 5 (Mo. 2009); *DePriest v. State*, 510 S.W.3d 331, 342 (Mo. 2017) (“The possibility that the group plea procedure contributed to the trial court's failure to inquire [about counsel’s conflict of interest] should be added to the long and growing list of reasons why this practice should be consigned to judicial history.”). Though the practice remains passable, this court remains firmly convinced that the practice offends due process and severely undermines confidence in the voluntariness of a defendant's plea. In other words, even if the practice is not *per se* invalid under all circumstances, we find it sufficiently suspect to necessitate an individualized examination of voluntariness in a post-conviction evidentiary hearing.

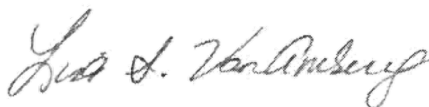
To successfully attack the voluntary and intelligent character of a plea, a movant must show that the advice counsel “was not within the reasonable prevailing norms, standards, diligence and skills that a reasonably competent attorney would provide under similar circumstances.” *Risalvato v. State*, 856 S.W.2d 370, 373–74 (Mo.App.W.D. 1993). Given this court’s frequent and emphatic repudiation of the group plea process, we conclude that a plea counsel’s failure to object to the procedure is sufficient, in and of itself, to warrant an evidentiary hearing, as the practice inescapably impacts the voluntariness of a defendant’s plea. In this light, the record fails to conclusively show that Movant is not entitled to relief. Rule 24.035(h). Thus, an evidentiary

hearing is required. Whether counsel's failure to object prejudiced Movant is left for the motion court's determination based on the evidence presented in said hearing.

Finally, this court is compelled to note that, contrary to the circuit court's justification that group pleas save time, this practice is the antithesis of judicial economy. It is the mirror opposite of efficient, only spawning further litigation in the form of appeals, remands, and additional proceedings, all which consume immeasurable public resources and personnel time, not only of the judiciary but also of the already budget-stretched offices of the Public Defender and the Attorney General. In attempting to minimize its personal expenditure of judicial hours, the circuit court has placed a colossal burden onto Missouri taxpayers.

Conclusion

This court would conclude that plea counsel was ineffective for failing to object to the group plea procedure, so Movant is entitled to an evidentiary hearing on the voluntariness of his plea. However, given the general interest and importance of the question, we transfer the cause to the Supreme Court of Missouri pursuant to Rule 83.02.



Lisa S. Van Amburg, Judge

Angela T. Quigless, P.J., and
Robert G. Dowd, Jr., J., concur.