

Summary of SC91571, *Clarence Burgess v. State of Missouri*

Appeal from the St. Louis County circuit court, Judge Tom W. DePriest
Argued and submitted May 11, 2011; opinion issued July 19, 2011

Attorneys: Burgess was represented by Timothy J. Forneris of the public defender's office in St. Louis, (314) 340-7662, and the state was represented by Jayne T. Woods of the attorney general's office in Jefferson City, (573) 751-3321.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A man who waived his rights to seek post-conviction relief in exchange for a plea agreement allowing him to be placed on probation violated the terms of probation, causing it to be revoked and him to be sent to prison. He challenges the circuit court's denial of his application for a change of judge and for post-conviction relief. In a 7-0 decision written by Judge Zel M. Fischer, the Supreme Court of Missouri reverses the circuit court's judgment and remands (sends back) the case. The circuit court did not abuse its discretion in denying the change of judge because the man failed to establish any extrajudicial source of disqualifying bias or prejudice. The circuit court did err, however, in failing to make the findings of fact and conclusions of law required by the applicable rule regardless of whether a hearing is held on the post-conviction relief motion.

In a concurring opinion, Judge Michael A. Wolff suggests that, on remand, the circuit court should make findings of facts and conclusions of law as to whether the defense counsel or the prosecutor violated ethical standards in their handling of the plea agreement.

Facts: Clarence Burgess was charged with discharging a firearm at a building. He was a juvenile at the time of the offense but later was certified to stand trial as an adult. Burgess subsequently entered a plea under *North Carolina v. Alford*, 400 U.S. 25 (1970) (in which a defendant does not admit guilt but does admit the state has sufficient evidence to convict him). In exchange for his plea and his waiver of his right to file any future motions for post-conviction relief, the state recommended that he be sentenced to 15 years in prison, that execution of the sentence be suspended and that he be put on probation for five years. At the plea hearing, the court questioned Burgess extensively to determine whether his plea was knowing, voluntary and intelligent. In response, Burgess said he was entering his *Alford* plea voluntarily and of his own free will. Burgess also said he had read, understood and signed the document waiving his right to seek post-conviction relief, and his counsel confirmed that the waiver of his post-conviction rights was part of the plea agreement. The court placed Burgess on probation in accordance with the plea agreement. He subsequently violated the terms of his probation. As a result, his probation was revoked, and the court executed his 15-year prison sentence. Burgess then sought post-conviction relief. He alleged that his defense counsel pressured him into accepting the guilty plea, that she had a conflict of interest in advising him to waive his post-conviction rights and, therefore, that his waiver was unknowing, unintelligent and involuntary. Burgess also sought a change of judge, alleging the judge who certified him as an adult and who accepted the waiver of his post-conviction rights could not be fair and impartial. The court denied the application for a

change of judge and sustained the state's motion to dismiss Burgess' post-conviction relief motion without making any findings of fact or conclusions of law. Burgess appeals.

REVERSED AND REMANDED.

Court en banc holds: (1) The circuit court did not abuse its discretion in denying the application for a change of judge. In a post-conviction proceeding, due process allows a movant to disqualify a judge on the grounds that the judge is biased and prejudiced against the movant. The disqualifying bias or prejudice must emanate from an extrajudicial source. *Haynes v. State*, 937 S.W.2d 199, 202 (Mo. banc 1996). Burgess, however, failed to allege the existence of any extrajudicial source of prejudice giving rise to the appearance of impropriety.

(2) The circuit court did fail, however, to make the findings of fact and conclusions of law required by Rule 24.035(h). Pursuant to Rule 24.035(j), this requirement stands regardless of whether a hearing is held on the post-conviction relief motion. Until the circuit court enters findings of fact and conclusions of law that the waiver was entered properly, the effectiveness of the waiver is unknown.

Concurring opinion by Judge Wolff: The author suggests, on remand, that the circuit court address whether defense counsel advised Burgess to waive his right to seek post-conviction relief based on ineffective assistance of counsel and whether the prosecutor required that Burgess waive all his post-conviction rights when entering into the plea agreement. He notes that the Advisory Committee has issued a formal opinion addressing the ethical obligations of attorneys engaged in a plea agreement in which a defendant is asked to waive his rights to post-conviction relief. He suggests this may affect the merits of Burgess' post-conviction motion.