

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

STATE OF MISSOURI,

v.

KEVIN E. HICKS,

Respondent,

Appellant.

DOCKET NUMBER WD71650

Date: January 17, 2012

Appeal from:
Jackson County Circuit Court
The Honorable Sandra C. Midkiff, Judge

Appellate Judges:
BEFORE COURT EN BANC: LISA WHITE HARDWICK, CHIEF JUDGE PRESIDING, JAMES M. SMART,
JOSEPH M. ELLIS, VICTOR C. HOWARD, THOMAS H. NEWTON, JAMES E. WELSH, ALOK AHUJA,
MARK D. PFEIFFER, KAREN KING MITCHELL, CINDY MARTIN AND GARY WITT, JUDGES

Attorneys:
Ellen H. Flottman, Columbia, MO, for appellant.
James Farnsworth, Jefferson City, MO, for respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY

COURT OF APPEALS -- WESTERN DISTRICT

STATE OF MISSOURI

v.

KEVIN E. HICKS,

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Appellant.

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Jackson County

On August 5, 1992, appellant Kevin Hicks and five other men, armed with firearms, accosted a male and female adult couple on the street outside the male's home. Hicks and his compatriots ordered the couple into the house. The men kept the male victim downstairs at gunpoint, and forcibly stole keys and a videocassette recorder from him. The assailants took the female victim to an upstairs room, where multiple members of the group took turns sexually assaulting her.

The crimes went unsolved for many years. In 2008, DNA testing revealed a match between Hicks' cousin Elbert Hicks and DNA collected from the female victim shortly after the incident.

In the meantime, Hicks had been convicted for unrelated offenses, and was scheduled for release on his existing convictions in 2018.

Hicks had been identified as a potential suspect in the August 5, 1992 offense in 1992, and again in 2008. On Friday, March 14, 2008, detectives visited Hicks in prison. Hicks executed a written waiver of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), and agreed to talk. He admitted some involvement in the 1992 incident, but did not provide details. Hicks also indicated that he had knowledge of other unresolved crimes, including a rape, and a murder in Kansas. Hicks told the detectives he wanted to help them, but that he also wanted to get the best deal possible for himself.

The detectives contacted prosecutors, and obtained a verbal agreement that "the term of imprisonment" Hicks received "for his involvement and participation in these [new] crimes" would "be served concurrently with [his] current prison sentences." Hicks stated that he wanted an agreement in writing.

The detectives returned to the prison on Monday, March 17, 2008, with a letter from a prosecutor memorializing the agreement offered the prior Friday. Hicks initially expressed

dissatisfaction, stating that he wanted a commitment that he could retain his existing “out date” from prison, or at a minimum an agreement to a specific release date. The detectives told Hicks that “they’re not going to specify a date or anything like that because they don’t know exactly what you’re gonna tell us.” Hicks then agreed to speak, and provided a series of detailed statements implicating himself and his associates in the August 5, 1992 offenses.

Hicks was later charged with two counts of first-degree robbery, and seven sexual offenses, arising out of the August 5, 1992 incident. Subsequent to his indictment, it became apparent that, if convicted on all counts, Hicks’ sentences for the sexual offenses would have to run consecutively to his sentences for the robbery counts under § 558.026.1, RSMo. Hicks filed a motion to suppress his pre-trial statements, claiming such mandatory consecutive sentencing would violate his March 2008 agreement with the State.

The trial court denied Hicks’ motion to suppress after an evidentiary hearing. Following a jury trial, Hicks was convicted on all nine counts submitted. He was sentenced to fifteen years for each of his two first-degree robbery convictions, with those sentences to run concurrently to each other. The court sentenced Hicks to thirty-year sentences for each of the seven sexual offenses. Those sentences were ordered to run concurrently to one another, but consecutively to the robbery sentences (as required by § 558.026.1). The court ordered that Hicks’ new term of imprisonment run concurrently to the other sentences he was then serving.

Hicks appeals.

AFFIRMED IN PART AND REVERSED IN PART.

Majority Opinion holds:

Hicks first argues that his inculpatory statements were involuntary, based on the State’s failure to fulfill the March 2008 agreement by charging him so that certain of his new sentences had to run consecutively to others. According to Hicks, the agreement requires that all of his new sentences run concurrently to one another, as well as concurrently to his existing sentences.

The voluntariness of Hicks’ inculpatory statements must be determined by examining the totality of the surrounding circumstances. Putting the written agreement (momentarily) to one side, consideration of the other surrounding circumstances supports the trial court’s determination that Hicks’ pretrial statements were voluntary. Hicks read and explicitly waived his *Miranda* rights on multiple occasions; he appears to have been of sound mind, articulate, and fully capable of comprehending the proceedings; there is no indication he was under the influence of any drugs; the interviews were conducted during normal daytime hours and reasonable breaks were taken; the record contains no signs of duress or coercion; and Hicks had prior experience with the criminal justice system, and demonstrated his sophistication by negotiating for a written agreement before he would provide incriminating information.

The written agreement does not support Hicks’ claims. Although he now contends that the agreement promised that all new sentences he received would be concurrent to one another, and *also* concurrent to his existing sentences, the reference to his new “term of imprisonment” being “served concurrently with” his “current prison sentences” related only to the relationship between Hicks’ new and old sentences, not to the relationship *among* any new sentences. The

reference to a new “term of imprisonment” for “these crimes” does not aid Hicks, either. The phrase “term of imprisonment” can refer either to a single prison sentence, or to the aggregate of multiple prison sentences. Here, it is evident from the context that “term of imprisonment” was intended to refer to the aggregate punishment for multiple crimes. And there is nothing in the phrase “term of imprisonment” to indicate that the individual sentences making up that “term of imprisonment” must be concurrent to one another, rather than consecutive.

The discussions leading up to the March 2008 agreement also undercut Hicks’ current reading. Hicks has failed to provide this Court with the recordings and transcripts of the March 2008 interviews, and we must therefore presume they would be unhelpful to his present claims. The record that *has* been provided reflects that Hicks was prepared to implicate himself, and others, in at least two incidents in addition to the August 5, 1992 home invasion, and that he knew he could be held criminally responsible for both the sexual and non-sexual offenses committed on August 5, 1992, despite his claims that he did not sexually assault the female victim himself. These circumstances cut against Hicks’ claim that “term of imprisonment” was intended to refer to a single prison sentence, or that the prosecution agreed that *all* sentences Hicks received, for *all* crimes in which he might implicate himself, would be served concurrently to one another. Finally, the detectives and prosecutors made clear that they were unwilling to make *any* commitment as to the punishment Hicks would face for the offenses in which he was prepared to implicate himself, until they heard what he had to say.

Because the totality of the surrounding circumstances indicate that Hicks voluntarily made his inculpatory statements, and that the consecutive sentencing for sexual and non-sexual offenses required by § 558.026.1, RSMo did not violate the March 2008 agreement, the trial court did not err in denying Hicks’ motion to suppress.

In his second Point, Hicks argues that he was subjected to multiple punishments for the same offense, in violation of the Double Jeopardy Clause, when he was convicted of two counts of robbery for stealing two pieces of property from the male victim, in the course of a single continuous act of force. The State concedes Hicks’ second Point, and we therefore vacate Hicks’ second robbery conviction. In all other respects the judgment is affirmed.

Majority opinion by Judge Ahuja, in which Chief Judge Hardwick and Judges Howard, Welsh, Pfeiffer, Mitchell, Martin and Witt join.

Judge Smart dissents in separate opinion:

The dissent asserts that the agreement would reasonably have been understood to require that all new sentences would run concurrently with the previous sentences. The trial court's duty was to enforce the agreement as it was entered into and is reasonably understood.

The trial court should have ruled that the prosecution, if it wished to use the confession against Hicks, must dismiss either the robbery counts or the sex counts, and otherwise the confession must be suppressed (because the use of the confession in circumstances resulting in consecutive sentences would violate the agreement).

The trial court erred in failing to hold the State to its agreement. This court should remand to the trial court with instructions to allow the prosecution to do what it should have done earlier—dismiss the robbery counts or the sex counts—so that all the sentences arising from this prosecution run concurrently with the former sentences.

Judges Ellis and Newton join in the dissenting opinion.

Majority opinion by: Alok Ahuja, Judge

January 17, 2012

Dissenting opinion by: James M. Smart, Jr., Judge

THIS SUMMARY IS UNOFFICIAL AND SHOULD NOT BE QUOTED OR CITED.