

IN THE SUPREME COURT OF MISSOURI

GARY G. ROBERTS,)
)
 Appellant,)
)
 v.) No. SC89245
)
 STATE OF MISSOURI,)
)
 Respondent.)

APPEAL FROM THE CIRCUIT COURT OF ST. FRANCOIS COUNTY
THE HONORABLE KENNETH WAYNE PRATTE, JUDGE
AT PLEA, SENTENCING, AND POST-CONVICTION PROCEEDINGS

APPELLANT'S SUBSTITUTE REPLY BRIEF

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JURISDICTIONAL STATEMENT

The jurisdictional statement in Appellant's initial brief is adopted and incorporated.

REPLY STATEMENT OF FACTS

Appellant disputes Respondent's characterization of the prosecutor's recommendation at sentencing. Respondent says, "At sentencing, the prosecutor clarified with the court that institutional drug treatment was not recommended in the sentencing assessment report (Tr. 45-47). At the end of that discussion, the prosecutor **reiterated that the State would not oppose institutional treatment (Tr. 47).**" Resp. Br. 7 (emphasis added).

It is not clear what on page 47 the State is referring to in support of its characterization of the prosecutor's position. On page 47 of the transcript, the parties talked about whether institutional treatment was recommended in the S.A.R. and argued about the nature of the plea agreement. Tr. 45-47. Then, the prosecutor says:

Mr. King: "Well, all I'll say for the record, Judge, the plea agreement is that we would not oppose [treatment] if it is recommended.

The Court: And it's not. Anything you wish to say on behalf of the defendant?

Tr. 47. The prosecutor is not saying that he is unopposed to institutional treatment. He is clearly saying that *the plea agreement* in the case was that he would not oppose institutional treatment only if it was recommended in the S.A.R., and that it was not recommended. Tr. 47.

POINTS RELIED ON

The points relied on in Appellant's initial brief are adopted and incorporated.

REPLY ARGUMENT I

Respondent’s argument to the Court regarding the prosecutor’s recommendation at sentencing omits the context of the prosecutor’s statement regarding treatment. Further, the nature of the group guilty plea in this case contributed to the breach of the plea agreement, and contributed to counsel failing to object when the plea agreement was misstated.

Respondent states that the prosecutor told the court regarding institutional treatment, expressly, “we would not oppose it if it is recommended.’ (Tr. 47).” Resp. Br. 14, 20. Based on this characterization, Respondent argues Appellant suffered no prejudice from any breach. *Id.*

The State’s use of quotation marks obscures what the prosecutor said. The State omits the first part of the sentence at issue. What the prosecutor said was:

Mr. King: “Well, all I’ll say for the record, Judge, the plea agreement is that we would not oppose [treatment] if it is recommended.

The Court: And it’s not. Anything you wish to say on behalf of the defendant?

Tr. 47. Thus, it is clear that the State is not simply saying, “we would not oppose” treatment. Resp. Br. 14. The State was saying, as part of the dispute about the plea agreement, that for the record, “**the plea agreement is that** we would not

oppose” treatment only if it was recommended by the S.A.R. Tr. 47 (emphasis added).

It is very hard to see how the Respondent reads this exchange as the prosecutor going on record as unopposed to treatment. It can only be read as the State characterizes it by omitting the first part of sentence, omitting the Court’s response, ignoring that treatment was in fact not recommended in the S.A.R, as well as disregarding the prosecutor’s unambiguous request for 14 years of prison time. Tr. 45.

Group Guilty Pleas

The parties appear to agree that groups are not the preferred way to take guilty pleas from criminal defendants. Resp. Br. 15, 18; *Guynes v. State*, 191 S.W.3d 80, 83 n.2 (Mo. App. E.D. 2006); *Elverum v. State*, 232 S.W.3d 710, 716 (Mo. App. E.D. 2007); *Castor v. State* 245 S.W.3d 909, 915 n.8 (Mo. App. E.D. 2008); *United States v. Hobson*, 686 F.2d 628, 630 (8th Cir. 1982) (collective questioning of multiple defendants does not violate federal Rule 11, “although it is not the preferred method” of taking guilty pleas). The question for this Court is whether the practice detrimentally affected the guilty plea this case, and if group guilty pleas should be allowed in the future. Appellant raised the issue in the motion court by challenging the guilty plea and citing case law criticizing the practice. L.F. 32. The motion court addressed the issue in its findings of fact and conclusions of law, finding that the record refuted Appellant’s claims, the plea

was not affected by the group setting, and that the court could continue to take pleas in this manner. L.F. 50.

This Court is a law-declaring court. *See State v. Freeman*, – S.W.3d –, 2008 WL 4711005, *7 (Mo., October 28, 2008) (Wolff, concurring). Correcting errors is incidental to that primary purpose. *Id.* Thus, it is appropriate for this Court to decide both the merits of Appellant’s claims, as well as the larger issue of whether group guilty pleas in felony cases should be allowed, or under what circumstances. The two issues are related.

Appellant believes it is implicit in Rule 24.02(c)’s requirement that guilty pleas be taken “personally” that such pleas will be taken individually, because it appears that no other practice other than individual guilty pleas for felonies was known at common law. *See App. Br. 24-30.* A dramatic change to the look of a felony guilty plea should be supported by a Rule, by precedent, or by a compelling reason. Group guilty pleas add disorder to a proceeding that should be orderly. They degrade what should be a dignified process for criminal defendants and victims of crime. If it is not a preferred method, as nearly all concede, then it should not be done routinely.

If felony guilty pleas are taken in groups, it should be for a good reason that outweighs the fact it is disfavored and undesirable. Here, there is evidence it is done routinely, and for no compelling reason. *Guynes*, 191 S.W.3d at 83 n.2; *Elverum*, 232 S.W.3d at 716; *Castor*, 245 S.W.3d at 915 n.8; Tr. 3 (“The reason you’re all up here together, in a group is to save some time.”). If collective guilty

pleas are allowed in felony cases, they should be the exception, rather than the rule.

The Plea Agreement

As it relates to this case, Appellant argues that the nature of a group guilty plea contributed to the confusion regarding the plea agreement in his case. Each of the numerous defendants pleading at the same time had slightly different, and somewhat complicated, plea agreements. Tr. 26, 27, 28, 29, 30. Appellant's lawyer was representing six of those individuals, including Appellant. Tr. 1-2, 5. It is more difficult for plea agreements to be conveyed and honored in such a setting. It is more difficult for the State to accurately convey numerous plea agreements, which all tend to differ slightly, when eight or nine cases are being handled at the same time.

It is also more difficult for defense attorneys to note and speak up if plea agreements are not being stated properly. Here, Appellant's lawyer did not speak up when the prosecutor stated an agreement that was different than the one he had told Appellant. Tr. 26. Consistent with the summary nature of the group plea, the prosecutor stated the agreement in a shorthand fashion that would be nearly impossible for any layman to understand: "Both sides free to argue following a S.A.R. The remaining counts to be dismissed. The State agreed not to oppose I.T.C. if it's recommended." Tr. 26.

Appellant has pleaded facts that show both a breach of what Appellant believed his plea agreement was, and resulting prejudice. Instead of not

opposing the defense attorney's pleas for institutional treatment, the State argued for a straight 14-year term of incarceration and kept repeating that the State had agreed to go along with treatment "only if recommended," which it was not. Tr. 46-47.

Appellant pleaded facts in this motion to justify a hearing on the issue of Appellant's understanding of the plea agreement and how it induced his guilty plea. The State's argument regarding the need for Appellant to demonstrate that his sentence would have been different (Resp. Br. 20) is contrary to law. Appellant was required to plead his understanding of the plea agreement, and that the agreement induced his decision to plead guilty. Appellant does not have to plead or prove that his sentence would have differed if the agreement had been honored. *Shepard v. State*, 549 S.W.2d 551, 554 (Mo. App. K.C.D. 1977).

Appellant, based on his arguments in his initial brief and in this brief, respectfully requests that this conviction be vacated, or the matter remanded for further proceedings.

REPLY ARGUMENT II

Appellant pleaded facts sufficient for a hearing, because Appellant's lawyer had a duty at the guilty plea to ensure the plea agreement was presented to the court in the same way he had conveyed it to Appellant.

Respondent's argument opposing a hearing on this issue is based on the assertion that the prosecutor's version of the agreement was the "correct" one, and that Appellant's understanding of the plea agreement was the incorrect one. Resp. Br. 25. Appellant was denied an evidentiary hearing on this claim, thus was unable to prove the State wrong with evidence. But, as required, Appellant pleaded in some detail the evidence he would present at a hearing. L.F. 15-16. That evidence was in the form of a written note to plea counsel's file characterizing the plea agreement, as well as a letter to Appellant from counsel, stating the plea agreement. *Id.*

The claim is supported by the record at sentencing, where plea counsel, now representing only one client instead of six, stated, "Judge, I had treatment as part of my agreement with Mr. Bryant." Tr. 45. Appellant's argument is that his lawyer simply failed to speak up at the plea hearing, when the agreement was first misstated by the prosecutor. This is supported by the record. The best evidence of what the true agreement was should not be based upon what Appellant did not say during a very confusing hearing, or general statements of satisfaction with his

lawyer. Tr. 52. The record of the guilty plea and sentencing do not show “conclusively” that Appellant is entitled to no relief. Rule 24.035(h).

Appellant, based on his arguments in his initial brief and in this brief, respectfully requests that the matter be remanded for further proceedings.

CONCLUSION

Mr. Roberts, based on his arguments in his initial brief and in this brief, respectfully requests that this Court reverse the judgment of the St. Francois County Rule 24.035 motion court and remand the cause for an evidentiary hearing on Points I and II, or vacate the conviction.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rules 84.06(g) and 83.08(c), I hereby certify that on this 20th day of November, 2008, two true and correct copies of the foregoing reply brief and a floppy disk containing the foregoing were hand-delivered to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102. In addition, pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this reply brief includes the information required by Rule 55.03 and that it complies with the word count limitations of Rule 84.06(b). This brief was prepared with Microsoft Word for Windows, using Lucida Bright Serif 13-point font. The word-processing software identified that this brief contains **2,195** words. The enclosed diskette has been scanned for viruses with a currently updated version of McAfee VirusScan Enterprise 7.1.0 software and found virus-free.

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