

No. SC89245

In the
Supreme Court of Missouri

GARY ROBERTS,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

**Appeal from St. Francois County Circuit Court
Twenty-Fourth Judicial Circuit
The Honorable Kenneth W. Pratte, Judge**

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from the St. Francois County Circuit Court judgment overruling Appellant's post-conviction motion to vacate judgment and sentence under Supreme Court Rule 24.035. The convictions sought to be vacated were for two counts of possession of a controlled substance, § 195.202, RSMo 2000, for which Appellant was given two consecutive seven-year sentences. After the Court of Appeals, Eastern District, affirmed the motion court's judgment in an unpublished memorandum opinion, this Court ordered this appeal transferred to it. Therefore, jurisdiction lies in this Court. Mo. Const. art. V, § 10; Supreme Court Rule 83.04.

STATEMENT OF FACTS

On February 2, 2006, Appellant, Gary Roberts, was charged with one count of possession of a controlled substance, methamphetamine, § 195.202, RSMo 2000, and one count of possession of a controlled substance, diazepam, § 195.202, RSMo 2000 (L.F. 56). On August 25, 2006, the court accepted Appellant's guilty pleas to these charges (L.F. 20). In exchange for Appellant's guilty pleas to these two counts, the prosecutor dropped four other drug-related charges (L.F. 56-57). The plea agreement provided that Appellant would be sentenced to seven years on each count, sentences to run consecutively, and that the State would not oppose institutional treatment "if it's recommended." (Tr. 26). Appellant stated that he understood the plea agreement and that he had no questions about it (Tr. 26).

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). Plea counsel then argued that Appellant should receive drug treatment, and Appellant was sentenced in accordance with the plea agreement to two consecutive terms of seven years each (Tr. 50). Under oath, Appellant stated that he understood he was sentenced to two consecutive seven-year terms in the department of corrections, and that he was satisfied with the services of his attorney (Tr. 51-52)

On November 2, 2006, Appellant filed a pro se Rule 24.035 motion to vacate his convictions and sentences (L.F. 1). He alleged that the State had breached the plea agreement by arguing against institutional drug treatment and that his plea counsel was

ineffective for failing to object to the prosecutor's erroneous statement regarding the plea agreement during the plea hearing (L.F. 14-15, 22). After denying Appellant's request for an evidentiary hearing, the motion court issued its findings of fact and conclusions of law on May 29, 2007, overruling Appellant's motion (L.F. 48-51). The motion court found that the plea agreement had been properly stated at the plea hearing because Appellant had agreed under oath that the statement of the plea agreement was correct (L.F. 50). The court also found that counsel was not ineffective for failing to object because the plea agreement had been properly stated (L.F. 51). The motion court denied relief, and this appeal followed. (L.F. 51).

ARGUMENT

Point I

The motion court's judgment overruling Appellant's Rule 24.035 motion without an evidentiary hearing was not clearly erroneous because the record refutes Appellant's claim that the State breached the plea agreement in that the agreement provided that the prosecutor would not oppose institutional drug treatment if such treatment were recommended, but institutional drug treatment was not recommended in the sentencing assessment report.

Appellant argues that he reasonably believed he had a plea agreement whereby the State would stand silent on the issue of institutional treatment (App. Sub. Br. 23). He says this belief was reasonable in part because of the confusion caused by the fact that his guilty plea was entered during a proceeding in which the plea court accepted nine unrelated guilty pleas in the same proceeding (App. Sub. Br. 33). He spends considerable time addressing the relative merits of this practice in the abstract (App. Sub. Br. 25-30). This argument obscures the issues as they were raised in the motion court. The issue raised in Appellant's motion and on appeal is not whether the guilty plea was invalid because of the manner in which it was received. Despite his prolonged criticism of the manner by which his plea was taken, Appellant raises no claim directly challenging the procedure employed by the plea court.

The only issues in this case are whether the plea agreement included a provision that the State would stand silent on the issue of treatment and whether the State breached the plea agreement. Appellant's argument on each of those issues is flawed. First, the plea

agreement did in fact contain conditional language and thus did not bind the prosecutor to any specific action regarding institutional treatment if institutional treatment was not recommended in the sentencing assessment report. Second, Appellant's argument rests on a misunderstanding of what happened at the sentencing hearing. The State did not argue against institutional treatment, but merely attempted to clarify whether the sentencing assessment report had recommended institutional treatment.

A. Pertinent Facts

Appellant faced six separate drug charges in this case (L.F. 56-57). The prosecutor dropped four of those charges in exchange for Appellant's guilty pleas on the other two (Tr. 26). The agreement further provided that the State would recommend two consecutive seven-year sentences on those convictions but would "not oppose I.T.C. if it's recommended." (Tr. 26). When this was outlined at the guilty-plea hearing, Appellant's counsel stated "That's correct," and Appellant said he understood the agreement (Tr. 26).

At sentencing, the prosecutor pointed out that he did not find a recommendation for institutional treatment in the sentencing assessment report (Tr. 45). After some discussion, the prosecutor reminded the court that the State was not opposing treatment: "all I'll say for the record, Judge, the plea agreement is that we would not oppose it if it is recommended." (Tr. 47). Defense counsel argued that Appellant should receive institutional drug treatment because Appellant had not had the opportunity to do so before and because Appellant's prior convictions were several years old (Tr. 48). The prosecutor made no argument about the merits of sentencing Appellant to institutional treatment (Tr. 47-49).

B. Standard of Review

Review of a denial of a Rule 24.035 motion is limited to a determination of whether the motion court's findings of fact and conclusions of law are clearly erroneous. *Goodwin v. State*, 191 S.W.3d 20, 25 (Mo. banc 2006). The decision of the motion court is clearly erroneous if a review of the entire record leaves the appellate court with the definite and firm impression that a mistake has been made. *State v. Taylor*, 929 S.W.2d 209, 224 (Mo. banc 1996). Appellate courts presume that the findings and conclusions of the motion court are correct. *Wilson v. State*, 813 S.W.2d 833, 835 (Mo. banc 1991). Furthermore, a post-conviction movant is entitled to a hearing only if he alleges facts that would entitle him to relief, those facts are not refuted by the record, and he demonstrates prejudice. *Goodwin*, 191 S.W.3d at 25.

C. The plea agreement was not breached because the prosecutor did not argue against institutional treatment.

Appellant's claim is refuted by the record because the State could not have breached the plea agreement in the way Appellant alleges. The plea agreement only imposed an obligation on the prosecutor not to oppose institutional drug treatment if that treatment was recommended. Yet, the sentencing assessment report did not recommend such treatment (Tr. 45). When a promise made by the prosecutor is "the inducement or consideration for entering the plea, the promise must be fulfilled." *Sharp v. State*, 908 S.W.2d 752, 755 (Mo. App. E.D. 1995). But, not every minor difference between what the defendant expects to happen at sentencing and what actually occurs at sentencing is a breach of the plea agreement. *Id. Stufflebean v. State*, 986 S.W.2d 189 (Mo. App. W.D. 1999); *Hall v. State*, 806 S.W.2d 429, 431 (Mo. App. E.D. 1991).

The facts in *Stufflebean v. State*, 986 S.W.2d 189 (Mo. App. W.D. 1999), illustrate this principle. In *Stufflebean*, the State agreed that it would recommend probation in exchange for the defendant's guilty plea. 986 S.W.2d at 191. When the defendant called a psychologist at sentencing to testify that prison would not promote his treatment, the prosecutor rigorously cross-examined him on that issue. *Id.* Nevertheless, during closing remarks, the prosecutor reiterated that the State was recommending probation. *Id.* at 192. The court held that this was not a breach of the plea agreement in that the prosecutor had a duty to make sure the court had all the relevant facts before it "so long as the specific terms of the plea agreement were not violated." *Id.*

Here, just as in *Stufflebean*, the prosecutor was merely making sure the court had all the relevant facts before it. Appellant's plea agreement required that the State not oppose treatment *if* it was recommended in the sentencing assessment report (Tr. 26). But, the manner in which the sentencing assessment report had been written made it difficult to determine whether treatment had been recommended. The report did not recommend institutional treatment, yet it listed a bed date (Tr. 46). The prosecutor attempted to clarify this discrepancy for the court by indicating that he did not believe this discrepancy indicated that probation and parole had recommended treatment. Thus, the condition in the plea agreement had not come to pass and so the State had no obligation not to oppose treatment. *Stufflebean*, 986 S.W.2d at 191; *Hall*, 806 S.W.2d at 431.

Appellant argues that his plea agreement did not include the conditional language used by the prosecutor at the plea hearing based on a letter he received from plea counsel and a memo written to plea counsel's file (App. Br. 17). There are two problems with this

argument. First, Appellant's counsel indicated on the record that the prosecutor's statement of the plea agreement was correct, and Appellant stated on the record that he understood the plea agreement (Tr. 26). Appellant also stated that did not have any questions about it (Tr. 26). Thus, the record demonstrates that the plea agreement in fact contained the conditional language.

Second, even if the plea agreement did not contain the conditional language, the prosecutor still did not breach the agreement. After the discussion regarding whether the sentencing assessment report recommended treatment, the prosecutor expressly told the court that the State would not oppose treatment (Tr. 47). In fact, this is the last statement the prosecutor made during the entire hearing, except to indicate to the judge that he had nothing else for the record (Tr. 47-52).

The conversation recorded on pages 45 through 47 of the transcript on appeal is not, as Appellant contends, an argument against treatment. The prosecutor stated after that discussion that "we would not oppose it if it is recommended." (Tr. 47). After the discussion about whether the sentencing assessment report recommended treatment, Appellant's attorney listed for the sentencing court several reasons why treatment would be appropriate even though treatment was not recommended in the sentencing assessment report (Tr. 47-49). The prosecutor did not interrupt this argument, nor did he make any statement afterwards (Tr. 49). The prosecutor never said that the State opposed institutional treatment. Thus, the State did not breach the plea agreement, because it did not oppose treatment.

Appellant's reliance on *Evans v. State*, 28 S.W.3d 434 (Mo. App. S.D. 2000), is misplaced (App. Sub. Br. 36). The prosecutor's actions in *Evans* were substantially different

from those in the present case. In *Evans*, the defendant believed the State had agreed not to recommend a sentence, and at sentencing the prosecutor recommended two life sentences. 28 S.W.3d at 436. Here, Appellant believed the State would not oppose treatment, and the prosecutor explicitly told the court that the State would not oppose treatment if it was recommended (Tr. 47). Moreover, the State made no rebuttal when Appellant's counsel made a lengthy argument in favor of institutional treatment (Tr. 47-49). Thus, a comparison to *Evans* is inapposite.

D. The manner in which the guilty plea was taken did not cause undue confusion or violate the requirements of Rule 24.02.

Appellant's arguments regarding the evils of group guilty pleas is nothing but a red herring in this case. First, the claim was not raised directly in the motion court. Claims not brought to the attention of the motion court will not be considered by the appellate courts. *Goodwin v. State*, 191 S.W.3d 20, 41 (Mo. banc 2006). In his amended motion, Appellant claimed that his plea agreement had been breached when the prosecutor did not stand silent at sentencing and that counsel was ineffective for failing to object to the prosecutor's alleged misstatement of the plea agreement during the plea hearing (L.F. 14-15, 22). He mentioned the fact that his plea was taken in a group setting only in a footnote (L.F. 15). Thus, his argument regarding the validity of the group guilty plea is not preserved. *Goodwin*, 191 S.W.3d at 41.

In any event, the procedure used in this case did not violate the requirement that the court address the defendant personally, and it did not cause undue confusion. Supreme Court Rule 24.02(c). Appellant's argument implies that "personally" should be interpreted to mean

that guilty-plea hearings must be conducted separately and individually (App. Sub. Br. 27). The plain meaning of the word and Missouri case law suggest otherwise. The trend in Missouri, and other states, has been to interpret Rule 24.02 and its analogs as being satisfied where there is substantial compliance with the rule. *See, e.g., Taylor v. State*, 929 S.W.2d 209, 216-217 (Mo. banc 1996); *Belcher v. State*, 801 S.W.2d 372, 374-375 (Mo. App. E.D. 1990). *See also State v. Verdin*, 845 So.2d 372 (La. App. 2003); *State v. Parisien*, 469 N.W.2d 563 (N.D. 1991).

A guilty plea must be the product of a knowing and voluntary choice. *Taylor*, 929 S.W.2d at 216-217. To aid the court in determining that this requirement has been met, Rule 24.02 requires that the court personally address the defendant and advise him of certain rights and consequences of his guilty plea. *Id.* at 216. But if the court is assured that the defendant's plea is voluntary, no particular ritual or procedure is required. *Dean v. State*, 901 S.W.2d 323, 327 (Mo. App. W.D. 1995).

For example in *Taylor v. State*, 929 S.W.2d 209, 216 (Mo. banc 1996), this Court addressed the issue of whether the requirements of Rule 24.02 had been satisfied when the defendant had been questioned not by the court, but by his attorney and the prosecutor. The court noted that one of the purposes of Rule 24.02 was to ensure "that the defendant understands the specific charges and the maximum penalty confronting him and that the defendant recognizes that by pleading guilty, he waives a number of rights." *Id.* Since the procedure used accomplished that purpose, it did not violate the Rule. *Id.* at 216-217.

Other states have addressed this issue more directly and they generally find that the procedure does not violate the defendant's rights. *See, e.g., State v. Verdin*, 845 So.2d 372

(La. App. 2003); *Howell v. State*, 185 S.W.3d 319 (Tenn. 2006); *State v. Parisien*, 469 N.W.2d 563 (N.D. 1991); *State v. Predmore*, 370 N.W.2d 99 (Neb. 1985). For example, in *Parisien*, the defendant argued that “the ‘group’ explanation of rights does not constitute personally addressing the defendant as required” by the North Dakota analog to Rule 24.02. 496 N.W.2d at 566. The court disagreed, and held that “[t]he requirement of ‘addressing the defendant personally’ is satisfied when the court provides one recitation of those rights which are common to all of the defendants, and then subsequently requires each defendant to respond individually.” *Id.* See also *United States v. Hobson*, 686 F.2d 628, 629-630 (8th Cir. 1982). Thus, while the practice of accepting guilty pleas in a group setting may not be preferred, where, as here, it is clear that the defendant was required to respond individually and gave responses showing that his plea was knowing and voluntary, such a practice does not violate either the Rule or due process.

Here, the procedure used accomplished the purposes of the Rule, and it is clear from the record that Appellant’s pleas were knowing and voluntary. When the questions were the same for all the defendants, such as whether they understood the rights they were giving up by pleading guilty, the judge in this case asked one question, and then required the defendants to each respond individually (Tr. 15-18). Where the questions were specific to each defendant, such as whether they understood and admitted the elements of the crimes with which they were charged, the judge addressed the defendant by name and asked if he or she understood before moving on to the next defendant (Tr. 18-23). When the court encountered a problem with one defendant over the implication of statements she had made, that defendant was removed from the proceeding and handled individually later (Tr. 9-10).

This demonstrates that the court was solicitous of the defendants' rights, and that Appellant knew he had the opportunity to speak if he did not understand what was happening.

In this environment, Appellant admitted that the State's recitation of the plea agreement was correct. When the court inquired as to the plea agreement between Appellant and the State, the court did not ask a general question to the entire group but addressed Appellant by name and made sure that he understood the agreement and that he had no questions about it (Tr. 26). These facts clearly refute Appellant's claim that his misunderstanding was reasonable because of the group guilty plea, and so Appellant is not entitled to relief on his post-conviction motion.

This conclusion is buttressed by the fact that the word personally does not carry the meaning Appellant urges. The Western District has addressed the definition of personally as that term is used in Rule 24.02. *Dean*, 901 S.W.2d at 327. The court relied on the dictionary definition of personal, meaning "done in person without the intervention of another," to inform its analysis. *Id.* This definition does not imply that the proceeding must be conducted with only one defendant. If that were the case, the Rule would have required the defendant to be addressed "individually," meaning, "by or for one person," The American Heritage Dictionary of the English Language 920 (Houghton Mifflin 3rd ed. 1996), or mandated that only one defendant plead in a particular hearing. It does not. Nothing in the Rule mandates that guilty pleas be accepted only from one defendant at a time. Supreme Court Rule 24.02.

Finally, even if this Court were to determine that the dictates of Rule 24.02 were violated by the use of a group guilty plea, Appellant would not be entitled to relief in this

case because Appellant cannot demonstrate prejudice. A defendant is not entitled to a “flawless procedure” but only that the court assure itself that the defendant’s guilty plea is knowingly and voluntarily made. *Dean*, 901 S.W.2d at 328. For this reason, a showing of prejudice is required before relief may be granted on a post-conviction motion. *Id.* Here, the prosecutor did not argue against institutional treatment, and so Appellant received the benefit of his bargain (Tr. 47-49). After they had discussed whether the sentencing assessment report recommended treatment, the prosecutor informed the judge that the State would not oppose treatment if it were recommended (Tr. 47). The prosecutor also made no rebuttal to Appellant’s lengthy argument in favor of treatment (Tr. 47-49). Thus, Appellant got the benefit of the agreement he thought he had and so was not prejudiced.

E. Conclusion

Appellant’s claim that the State breached the plea agreement is refuted by the record because the plea agreement provided that in exchange for Appellant’s plea, the State would drop four drug-related charges, recommend consecutive seven-year sentences on the two charges to which Appellant pleaded guilty, and would not oppose treatment *if* treatment were recommended in the sentencing assessment report. The record also clearly shows that Appellant understood that agreement. As treatment was not recommended in the sentencing assessment report, the State could not breach its agreement by merely pointing out that lack of recommendation to the court. In any event, even absent the conditional language, the State ultimately did not oppose treatment as the prosecutor simply clarified whether the sentencing assessment report recommended treatment. Appellant’s arguments about the

nature of the group guilty plea do not change this analysis. Thus, Appellant's first point on appeal should be denied.

Point II

The motion court did not clearly err in deciding that Appellant did not receive ineffective assistance of counsel because that claim is refuted by the record in that there was no misstatement of the plea agreement and counsel cannot be ineffective for failing to make a non-meritorious objection.

Appellant argues that he received ineffective assistance of counsel when his counsel failed to object to the prosecutor's misstatement of the plea agreement (App. Sub. Br. 39). This claim is refuted by the record because, 1) as outlined above, there was no misstatement of the plea agreement for plea counsel to object to, and 2) Appellant indicated at sentencing that he was satisfied with counsel's performance.

A. Pertinent Facts

At the plea hearing, the prosecutor recited the agreement he had reached with Appellant: "On Counts I and II, the State will recommend seven years on each count to run consecutive, for a total of fourteen years. Both sides free to argue following an 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's attorney then stated "That's correct, Judge," and Appellant indicated he understood the agreement (Tr. 26).

Appellant was sentenced to a total of fourteen years, as contemplated by the plea agreement (Tr. 50). The judge then questioned Appellant regarding his satisfaction with his counsel (Tr. 52):

Q: Your attorney has been Mr. Blake Dudley; is that correct?

A: Yes, sir.

Q: Did you have sufficient opportunity to discuss this case with him before you entered your pleas of guilty?

A: Yes, sir.

Q: Other than the terms of any plea bargain agreement, did your attorney communicate any threats or promises to you to induce you to enter your pleas of guilty?

A: No.

Q: Are you satisfied with the services rendered to you by Mr. Dudley as your attorney?

A: Yes.

This exchange occurred after the discussion regarding whether the sentencing assessment report recommended institutional treatment, and so Appellant had all the information about the State's compliance with the plea agreement when he assured the court that he was satisfied with counsel's services.

B. Standard of Review

Review of a denial of a Rule 24.035 motion is limited to a determination of whether the motion court's findings of fact and conclusions of law are clearly erroneous. *Goodwin v. State*, 191 S.W.3d 20, 25 (Mo. banc 2006). The decision of the motion court is clearly erroneous if a review of the entire record leaves the appellate court with the definite and firm impression that a mistake has been made. *State v. Taylor*, 929 S.W.2d 209, 224 (Mo. banc 1996). Appellate courts presume that the findings and conclusions of the motion court are correct. *Wilson v. State*, 813 S.W.2d 833, 835 (Mo. banc 1991). Furthermore, a post-conviction movant is entitled to a hearing only if he alleges facts that would entitle him to relief, those facts are not refuted by the record, and he demonstrates prejudice. *Goodwin*, 191 S.W.3d at 25.

C. Counsel was not ineffective because any objection to the prosecutor's statement of the plea agreement would have been meritless.

Appellant did not receive ineffective assistance of counsel when his plea counsel failed to object to the alleged misstatement of the plea agreement, as the record refutes Appellant's claim that the plea agreement was misstated or that Appellant believed the plea agreement was something other than the agreement recited at the plea hearing. To obtain relief on a claim of ineffective assistance of counsel, Appellant must show that counsel's "representation fell below an objective standard of reasonableness and that these errors affected the outcome of the plea process." *Sharp v. State*, 908 S.W.2d 752, 757 (Mo. App. E.D. 1995) (citing *Hill v. Lockhart*, 474 U.S. 52 (1985)). The second prong of this test is met where "there is a reasonable probability that, but for counsel's errors, [Appellant] would

not have pled guilty and would have insisted on going to trial.” *Id.* Counsel will not be found ineffective for failing to make a nonmeritorious objection. *Vanzandt v. State*, 212 S.W.3d 228, 233 (Mo. App. S.D. 2007) (citing *State v. Clay*, 975 S.W.2d 121, 135 (Mo. banc 1998)).

Additionally, the representations made by an accused in response to questions at the plea hearing and sentencing are not empty ritual. *State v. Driver*, 912 S.W.2d 52, 55 (Mo. banc 1995). These representations “are relevant to a determination of whether counsel acted contrary to the defendant’s direction.” *Id.*

In the present case, as stated above in Point I, the record refutes Appellant’s claim that the plea agreement was misstated at the plea hearing. After the prosecutor described the plea agreement, including the provision about not opposing institutional drug treatment if such treatment were recommended, plea counsel stated that the prosecutor had correctly described the plea agreement, and Appellant personally stated that he understood that agreement (Tr. 26). If the agreement had been otherwise, Appellant should have said then that he did not understand why the agreement had been changed. But in light of Appellant’s personal assurance, it is apparent that the agreement was correctly outlined (Tr. 26). This conclusion is further buttressed by Appellant’s testimony at sentencing where Appellant expressed satisfaction with his attorney’s performance, and said that he had not been promised anything other than the plea agreement (Tr. 52). Again, if Appellant had thought that the plea agreement was anything other than what he had received he should have said so then. Thus, there was no basis for an objection and so counsel was not constitutionally ineffective at the plea hearing. *Vanzandt*, 212 S.W.3d at 233.

Appellant's argument that counsel's failure to object to the prosecutor's statement of the plea agreement at the guilty-plea hearing was in some way caused by the fact that he was representing several of the defendants at that hearing is speculation. The court and the attorneys were careful to make sure that it was clear who was being addressed and that each defendant in fact understood his or her rights and the consequences of his or her actions. The court addressed the defendants by name when speaking about details which were specific to their cases (Tr. 18, 26). When it was clear there was a problem with one of the defendants, the court and the attorneys took appropriate action to ensure that the defendant in question received individual attention (Tr. 9-10). Given the manner in which the hearing was conducted, it is not reasonable to assume that counsel's failure to object was the result of confusion. Rather, counsel did not object because the plea agreement was properly stated, as he indicated when he said "That's correct" (Tr. 26).

D. Appellant was not prejudiced because the State did not argue against institutional treatment.

Appellant has also failed to demonstrate that the outcome would have been different if counsel had raised an objection to the prosecutor's statement at the plea hearing. If plea counsel had objected at the plea hearing and clarified that the agreement was an unconditional promise not to oppose treatment, the only substantial change would have been the omission of any discussion at sentencing about whether the sentencing assessment report recommended treatment. The State would not have opposed treatment, but that would not have altered sentencing in any meaningful way, because, as stated above in Point I, the prosecutor did not oppose treatment at the sentencing hearing (Tr. 47-49). Towards the end

of the sentencing hearing, the prosecutor specifically stated “all I’ll say for the record, Judge, the plea agreement is that we would not oppose it [treatment] if it is recommended.” (Tr. 47). He also made no rebuttal to Appellant’s arguments that Appellant should receive institutional treatment (Tr. 47-49). Since the State did what Appellant thought it had agreed to do, *i.e.*, the prosecutor did not oppose treatment, Appellant cannot demonstrate the prejudice necessary to succeed on his claim of ineffective assistance of counsel.

E. Conclusion

The motion court did not clearly err in denying Appellant’s claim that counsel was ineffective for failing to object to the prosecutor’s alleged misstatement of the plea agreement during the plea hearing. That claim is refuted by the record because both counsel and Appellant affirmed that the plea agreement was properly stated. Moreover, Appellant cannot show prejudice because the State did not oppose treatment at sentencing. Appellant’s second point should be denied.

CONCLUSION

The motion court's judgment overruling Appellant's Rule 24.035 post-conviction motion was not clearly erroneous. Its judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 5,238 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2003 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this 29th day of October, 2008, to:

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APPENDIX

Findings of Fact and Conclusions of Law..... A1