

No. SC88353

In the
Supreme Court of Missouri

KERRY BROOKS,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

**Appeal from Greene County Circuit Court
Thirty-First Judicial Circuit, Division Five
The Honorable Calvin Holden, Judge at Plea, Sentencing and Post-Conviction
Proceedings**

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from the denial of a motion under Rule 24.035, filed in the Circuit Court of Greene County. Appellant sought to overturn his guilty plea and conviction for assault of a law enforcement officer, § 565.081.1 RSMo¹, obtained in the Circuit Court of Greene County, and for which Appellant was sentenced to fifteen-years imprisonment, to be served concurrently with a federal sentence.

On March 27, 2006, the motion court issued an order sustaining in part and overruling in part Appellant's Rule 24.035 motion. The motion court granted partial relief to Appellant on his motion and vacated his sentence and set the matter for re-sentencing; otherwise, the motion court denied Appellant's request to vacate his guilty plea.

On January 31, 2007, the Missouri Court of Appeals, Southern District, issued its opinion dismissing the appeal on the ground that it lacked jurisdiction to hear the appeal because Appellant's sentence had been vacated. This Court later ordered this appeal transferred to it. Therefore, jurisdiction lies in this Court. Missouri Constitution Article V, § 10; Rule 83.04.

¹ All statutory references are to Revised Statutes of Missouri 2000, as amended, unless otherwise noted.

STATEMENT OF FACTS

Appellant was charged as a prior and persistent offender with assault of a law enforcement officer in the first degree and armed criminal action. (L.F. 9-11).² On April 19, 2004, Appellant entered a plea of guilty before Judge Calvin R. Holden. (L.F. 13-19).

The court announced the plea agreement that Appellant would enter an *Alford*³ plea to the count of assault of a law enforcement officer; that his sentence would be for a term not to exceed the sentence he received in federal court; that the sentence would run concurrent to all existing sentences; that the state would dismiss the armed criminal action count; that Appellant would waive a pre-sentence investigation, and that Appellant would be released into federal custody after his sentencing. (L.F. 12-13). Appellant's counsel stated that this was Appellant's intent. (L.F. 13). Appellant testified that he understood the charges and had no questions about them. (L.F. 13-14).

Appellant testified that he was pleading guilty only because he pleaded guilty in federal court and received a sentence of 15 to 20 years. (L.F. 14). Appellant testified that he had maintained his innocence but there was no benefit for him to maintain his innocence any longer. (L.F. 14).

² The abbreviation 'L.F.' refers to the legal file prepared for Appellant's current appeal involving his post-conviction motion. The abbreviation "PCR Tr." Refers to the transcript of the evidentiary hearing for his post-conviction motion.

³ *North Carolina v. Alford*, 400 U.S. 25 (1970).

Appellant had pleaded guilty in federal court to possessing a gun, (L.F. 14), but denied pulling a gun on an officer, claiming that the officer had “dramatized the whole situation.” (L.F. 15). After the Court expressed concern about accepting Appellant’s guilty plea, Appellant apologized to the court for any inconvenience and stated he would plead guilty. (L.F. 15). Appellant stated again that he understood the charges against him and that he understood the plea agreement, and had no questions about it. (L.F. 15). Appellant stated that he had sufficient time to discuss his case with his attorney and had told him all that he knew about the case, including facts and witnesses. (L.F. 15). Appellant was not completely satisfied with his attorney’s services. (L.F. 15).

Appellant testified that he understood that he could persist in a plea of not guilty and have a trial, where the state would have the burden of proving him guilty beyond a reasonable doubt and where all twelve jurors must agree that the state has met that burden before finding him guilty. (L.F. 15). Appellant testified that he understood that he had a right to an attorney at all stages of the proceedings, and the right to confront and cross-examine witnesses brought by the state. (L.F. 16). Appellant testified that he understood that he had the right to choose whether or not to testify at trial and that the state could not comment on any failure to testify, and that he had the presumption of innocence and the right to present evidence on his own behalf and to subpoena witnesses, as well as the right to appeal. (L.F. 16). Appellant testified that he understood he was waiving all the rights explained to him by entering the *Alford* plea of guilty, and that he still wished to waive his right to trial and enter an *Alford* plea. (L.F. 16). Appellant testified that no one told him to lie when he appeared in court. (L.F. 16).

The prosecutor explained the range of punishment for the class A felony of first-degree assault of a law enforcement officer, which was a mandatory minimum sentence of ten years up to a maximum of 30 years or life in the Department of Corrections. (L.F. 16).

The prosecutor announced the factual basis and the evidence the state would present at trial and what it would establish. (L.F. 16). The evidence would establish that on November 5, 2002, near the intersection of Calhoun and Sherman in Springfield, Officer Monica Crews attempted to stop a vehicle Appellant was driving for a traffic violation. (L.F. 16). When Officer Crews tried to stop the vehicle, Appellant attempted to elude her until Appellant collided with another vehicle. (L.F. 16). As Officer Crews approached the vehicle, two passengers fled on foot while Appellant attempted to flee by crawling outside the passenger side door. (L.F. 16).

Officer Crews attempted to place Appellant into custody after he crawled out of the vehicle by grabbing his left arm and attempting to put him in a restraint hold. (L.F. 16). Officer Crews saw that Appellant was holding a handgun in his right hand and that he had begun to swing his right arm towards the front of his body, with the gun in a ready-to-fire position. (L.F. 16). Officer Crews grabbed Appellant's right wrist with her left hand to prevent him from pointing the gun at her. (L.F. 16). As Officer Crews was attempting to remove her duty weapon, Appellant threw her to the ground and fell on her, and a struggle ensued. (L.F. 16-17). Officer Crews was finally able to draw her duty weapon and pointed it at Appellant and ordered him to drop his handgun. (L.F. 17). Appellant threw his gun on the ground and began to run away, with Officer Crews giving

chase and catching and detaining Appellant. (L.F. 17). Other evidence would show that police found Appellant's handgun, a loaded .38 caliber with one round in the firing position. (L.F. 17). Other witnesses would testify that they had observed the altercation. (L.F. 17).

The prosecutor then announced the basis for a finding that Appellant was a prior and persistent felony offender. (L.F. 17). The court announced that it would incorporate Officer Crew's testimony from an earlier hearing on a motion to suppress into the factual basis. (L.F. 17). Appellant's attorney stated that he believed that the state could make a submissible case if it went to trial, as well as a finding that Appellant was a prior and persistent offender. (L.F. 17). Appellant agreed that there was substantial evidence against him and a great likelihood that he would be convicted if he went to trial. (L.F. 17-18).

Appellant claimed that the federal prosecutor had threatened to try him on all the charges separately if he did not plead guilty. (L.F. 18). Appellant testified that he took a package deal because he thought he would get less time with a sentence running concurrent to his federal sentence. (L.F. 18). No one else threatened Appellant in any way to have him plead guilty. (L.F. 18). Appellant pleaded guilty to Count I, assault of a law enforcement officer in the first degree, and the court found a factual basis for the guilty plea, and found that Appellant's plea was made voluntarily with an understanding of his rights, and accepted the guilty plea and found Appellant guilty beyond a reasonable doubt. (L.F. 18).

On September 14, 2004, Appellant appeared for sentencing. (L.F. 20). Appellant's attorney announced that Appellant had been sentenced in federal court to 210 months (seventeen-and-a-half years) imprisonment, to run concurrently with the present case. (L.F. 20). The court sentenced Appellant to fifteen years imprisonment in the Missouri Department of Corrections to run concurrently with his federal sentence, and furloughed Appellant to the federal system to allow him to serve his time on the federal sentence. (L.F. 20, 22).

On October 20, 2004, Appellant filed a *pro se* motion for post-conviction relief pursuant to Supreme Court Rule 24.035. (L.F. 29-34). An amended motion was filed on May 26, 2005. (L.F. 38-49). An evidentiary hearing was held on February 22, 2006. (PCR Tr. 2-29).

On March 27, 2006, the motion court issued an order sustaining in part and overruling in part Appellant's Rule 24.035 motion. (L.F. 50-53). The only claim of Appellant's which was sustained by the motion court was his claim that he was not given the benefit of his plea agreement; in that regard, the motion court vacated Appellant's sentence and set the matter for re-sentencing. (L.F. 50, 53).

Appellant filed his notice of appeal on April 18, 2006. (L.F. 55-56). On January 2, 2007, after briefing was completed, the Court of Appeals, Southern District, *sua sponte* considered its jurisdiction in the case, noting that the motion court had vacated the sentence in Appellant's underlying criminal case and ordered Appellant to be re-sentenced, but observing that Appellant had not been re-sentenced at the time the notice

of appeal had been filed.⁴ After receiving written suggestions from both Appellant and Respondent, the Southern District dismissed the appeal on January 31, 2007, finding that there was no final judgment in the underlying criminal case that Appellant could contest in his post-conviction motion, and thus the court lacked jurisdiction. *Brooks v. State*, No. 27682, slip op. at 1, 4 (Mo. App. S.D. Jan. 31, 2007).

After the Southern District issued its opinion, Appellant sought transfer to this Court, which ordered this case transferred on May 29, 2007.

⁴ Appellant was re-sentenced on October 27, 2006 to fifteen years imprisonment, although it is not included in the legal file. *See* <http://www.greenecountymo.org/ccourt31/nxhist.exe>

ARGUMENT

I.

This Court has jurisdiction over this appeal in that the motion court’s “Order Regarding Amended Motion Under Rule 24.035” sustained one claim in Appellant’s Rule 24.035 motion and overruled all the other claims and was a final judgment for purposes of appeal under Rule 24.035(k).

A. Background

The motion court conducted a PCR evidentiary hearing on February 22, 2006. At the evidentiary hearing, the state conceded Appellant’s claim that the plea agreement had been breached, in that Appellant had been promised concurrent federal and state sentences and that the sentence would be served in federal custody, but Appellant was subsequently transported to the Missouri Department of Corrections to begin serving his sentence. (PCR Tr. 3, L.F. 50). Appellant and the state agreed that the appropriate disposition for this claim was for the court to vacate the sentence and re-sentence Appellant. (PCR Tr. 12, 25). Appellant was re-sentenced on October 27, 2006, to fifteen years imprisonment in the Department of Corrections, to run concurrently with any other existing sentences⁵.

⁵ Appellant’s re-sentencing is not part of the legal file. *See* Greene County Circuit Court website at <http://www.greenecountymo.org/ccourt31/nxhist.exe>

B. Appeal is from a final judgment under Rule 24.035(k)

The Court of Appeals should not have dismissed this case for lack of jurisdiction. When the motion court granted Appellant relief on his sentence on the ground that the plea agreement had been breached, but refused to grant him relief from the guilty pleas, there was a final, appealable judgment under both Supreme Court Rule 24.035(k) and § 547.360.11 RSMo, which state “An order sustaining or overruling a motion filed under the provisions of this [Rule 24.035] shall be deemed a final judgment for purposes of appeal by the movant or the state.” The present appeal is an appeal from such an order. *See* § 512.020 RSMo (“Any party to a suit aggrieved by any judgment of any trial court in any civil cause from which an appeal is not prohibited by the constitution, nor clearly limited in special statutory proceedings, may take his or her appeal to a court having appellate jurisdiction . . . ”)

Section 547.070 RSMo allows appeals in criminal cases from a “final judgment”. A final judgment occurs when a sentence is entered. *State ex rel. Wagner v. Ruddy*, 582 S.W.2d 692, 693 (Mo. banc 1979). “After the rendition of final judgment in a criminal case, every party shall be entitled to any appeal permitted by law.” Rule 30.01(a). Similarly, an order sustaining or overruling a motion filed under the provisions of Rule 24.035 or Rule 29.15 shall be deemed a final judgment for purposes of appeal under the rules of civil procedure. Rule 24.035(k) and 29.15(k); *State v. Stout*, 960 S.W.2d 535, 536 (Mo. App. E.D. 1998).

Motions for post-conviction relief are governed by the Missouri rules of civil procedure “insofar as applicable.” *See* Rule 24.035(a); *Wise v. State*, 219 S.W.3d 270,

272 (Mo. App. S.D. 2007). To determine whether a particular rule of civil procedure applies in the context of post-conviction review, the essential inquiry is whether the rule in question enhances, conflicts with, or is of neutral consequence to the purposes of the post-conviction rule. *Thomas v. State*, 808 S.W.2d 364, 366 (Mo. banc 1991). If the civil rule enhances the purposes of the post-conviction rule or bears a neutral consequence, it applies. *Id.* If the rule hinders the purposes of the post-conviction rule, it should not apply. *Id.*

For example, the requirement of Rule 74.01(a), that an order be denominated as a “judgment” or “decree,” is not applicable in the context of the disposition of a motion for post-conviction relief, because Rule 24.035(k) provides that an “order sustaining or overruling a motion filed under the provisions of this Rule 24.035 shall be deemed a final judgment for purposes of appeal by the movant or the state.” *Wise v. State*, 219 S.W.3d 270, 272 (Mo. App. S.D. 2007); *see also State v. Reber*, 976 S.W.2d 450, 451 (Mo. banc 1998) (application of the denomination requirement of Rule 74.01(a) runs counter to the purposes of Rules 29.15 and 24.035 and is, therefore, not applicable). A motion under Rule 24.035 is a separate action from the underlying criminal case, and does not retain the same docket number as the criminal case. *See State v. Larson*, 79 S.W.3d 891, 893 (Mo. banc 2002).

In the present case, Appellant is appealing the order of the motion court denying him post-conviction relief on his request to vacate his guilty pleas. Similarly, the State would have been entitled to appeal the granting of his claim that the plea agreement was breached at sentencing and the resulting order vacating his sentence, but has not chosen

to do so here. *See* Rule 24.035(k) and § 512.020 RSMo. For this reason, this Court cannot be said to lack subject-matter jurisdiction to hear the present appeal.

The fact that Appellant's original sentence was vacated by the motion court would apply only in a direct appeal from a guilty plea and sentence, and not in the present case, where no direct appeal was taken. Appellant's claims on appeal were adjudicated by the motion court and were in no way affected by the subsequent re-sentencing. Appellant is not appealing his guilty plea, conviction and sentence in the criminal case; rather he is appealing the denial by the motion court of a number of his claims raised in his Rule 24.035 motion, which is a civil action.

In the event the present appeal remains dismissed, Appellant presumably would bring a new Rule 24.035 claim that may or may not include any claims arising out of his re-sentencing. In any case, Appellant would claim he was entitled to re-litigate his claims that had been denied by the motion court but from which he was not allowed to appeal. Such a motion may be denied as a successive motion prohibited by Rule 24.035(l) and § 547.360.12 RSMo. Thus, Appellant may be denied his right to appeal the decision adverse to him in the motion court's order of March 27, 2006. Respondent agrees that the interests of judicial economy are not served by requiring Appellant to begin post-conviction proceedings again.

Although the circumstances in the present case appear to be almost identical to those in *Barringer v. State*, 12 S.W.3d 765 (Mo. App. S.D. 2000), one apparent distinction is that in *Barringer*, all of the movant's claims on appeal were related to his sentencing. *Barringer*, 12 S.W.3d at 766 n. 4. Here, Appellant's claims on appeal in the

present case involve the motion court's refusal to grant Appellant relief from his guilty pleas. These claims involve matters which were unaffected by the vacation of his sentence and his subsequent re-sentencing.

Respondent submits that the holding in *Barringer* is applicable only in cases where the claims on appeal relate directly to a sentence which is subsequently vacated by the motion court, and where an appellant has not been re-sentenced at the time the notice of appeal is filed. To the extent that *Barringer* is read as precluding all appeals from an order sustaining or overruling a Rule 24.035 motion where the sentence is vacated, it is incorrect and contrary to both Rule 24.035(k) and §547.360.11 RSMo, which state that an order sustaining or overruling a motion filed under the provisions of Rule 24.035 shall be deemed a final judgment for purposes of appeal.

Just this month, this Court decided the case of *Glass v. State*, No. SC87852, (Mo. banc July 6, 2007). *Glass* involved an appellant seeking post-conviction relief from his conviction and his sentence of death. The motion court subsequently denied Glass relief on the guilty verdicts but did grant relief from the sentence of death and ordered a new penalty phase. Glass then appealed the denial of guilt-phase relief, while the state appealed the grant of penalty-phase relief. No issue was raised on appeal that this Court lacked jurisdiction because the appellant's sentence had been set aside.

Because an appeal may be taken from the motion court's order in this case, this Court has jurisdiction to resolve Appellant's claims on the merits.

ARGUMENT

II.

The motion court did not clearly err in overruling Appellant’s Rule 24.035 motion after an evidentiary hearing because Appellant failed to meet his burden of showing that his guilty plea for assault of a law enforcement officer in the first degree lacked a factual basis because the record from the plea hearing established that Appellant held a handgun and began to swing his right arm towards the front of his body with the gun in a ready-to-fire position and loaded with one round in the firing position, and that Appellant threw the officer to the ground and fell on her and began to fight, and that together, the evidence provided a factual basis showing that Appellant attempted to kill or cause serious physical injury to the officer, with Appellant agreeing that there was substantial evidence against him and a great likelihood that he would be convicted if he went to trial.

Appellant’s Second Point Relied On claims that the motion court clearly erred in denying Appellant’s claim that his guilty plea was unknowing and involuntary because no factual basis was established for his *Alford* plea of guilty to the charge of first-degree assault of a law enforcement officer because there was no evidence of a specific intent to injure or kill the officer.⁶

⁶ Appellant’s Point Relied On differs from the claim included in his amended Rule 24.035 motion, which stated that a sufficient factual basis was not established for his guilty plea because the plea court used Appellant’s guilty plea in federal court to establish a factual basis

A. Evidentiary Hearing and Motion Court's Findings

The motion court conducted a PCR evidentiary hearing on February 22, 2006.

The only witness called was Appellant, who testified that he did not commit the crime of assault of a law enforcement officer, and that the only reason he pleaded guilty was that he had already pleaded guilty to felony possession of a firearm in federal court. (PCR Tr. 14).

During cross-examination, Appellant recalled that at the plea hearing, he agreed to enter an *Alford* plea and further agreed that there was substantial evidence against him and a great likelihood that he would be convicted if he went to trial. (PCR Tr. 15).

Appellant testified that he made these statements only because it was part of the procedure in getting the judge to accept his plea. (PCR Tr. 16). Appellant also claimed that he had not actually wanted the plea court to accept his guilty plea, and that he did not want to enter the plea but was coerced by his counsel who told him that the court would not accept his guilty plea unless Appellant said he was guilty. (PCR Tr. 18).

Appellant could not answer what would have happened if the plea court had not accepted his guilty plea, and could not explain why he pleaded guilty if he did not wish to. (PCR Tr. 18-19).

The motion court issued an "Order Regarding Amended Motion Under Rule 24.035" on March 27, 2006. (L.F. 50-53). The motion court overruled all of Appellant's

for his plea in the present case. (L.F. 39, 47-48). Appellant has abandoned any claim related to the plea court's use of Appellant's guilty plea in federal court.

claims except for the claim that the plea agreement had been breached. (L.F. 53). The motion court found that for an *Alford* plea, it was not necessary for Appellant to admit any of the facts; it was only necessary that it be an intelligent choice by Appellant among alternative courses of action. (L.F. 52). The motion court found that following the recitation of facts by the prosecutor, Appellant conceded that there was substantial evidence against him and a great likelihood he would be convicted if he went to trial. (L.F. 52). The court also found that Appellant's plea in federal court to possession of the weapon was not essential to establishing the factual basis. (L.F. 52).

B. Standard of Review

Appellate review of the denial of a Rule 24.035 motion is limited to determining whether the trial court's findings and conclusions are clearly erroneous. Supreme Court Rule 24.035(k); *State v. Taylor*, 929 S.W.2d 209, 224 (Mo. banc 1996). Findings of fact and conclusions of law are clearly erroneous only if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made. *Taylor*, 929 S.W.2d at 224. On review, the motion court's findings and conclusions are presumptively correct. *Wilson v. State*, 813 S.W.2d 833, 835 (Mo. banc 1991). When a movant seeks post-conviction relief following a guilty plea, appellate review is limited to a determination of whether the guilty plea was knowing and voluntary. *Rollins v. State*, 974 S.W.2d 593, 595 (Mo. App. W.D. 1998).

C. Sufficient factual basis for *Alford* plea was established

The motion court's denial of Appellant's Rule 24.035 motion after an evidentiary hearing was not clearly erroneous because Appellant failed to meet his burden of

showing that his guilty plea for assault of a law enforcement officer in the first degree lacked a factual basis.

Rule 24.02(e) states that the court shall not enter a judgment upon a plea of guilty unless it determines that there is a factual basis for the plea. Rule 24.02 ensures that a defendant understands the specific charges against him, the minimum and maximum possible penalties, and that he is waiving certain rights by pleading guilty. *Taylor v. State*, 929 S.W.2d 209, 216 (Mo. banc 2005).

A plea of guilty is an admission as to the facts alleged in the information. *Milligan v. State*, 772 S.W.2d 736, 739 (Mo. App., W.D. 1989). It is not necessary that every element of the crime be explained to the defendant so long as he understands the nature of the charges against him. *Franklin v. State*, 989 S.W.2d 678, 679 (Mo. App. E.D. 1999). It is not necessary for a defendant to admit to or recite facts constituting the offense in a guilty plea proceeding, so long as a factual basis for the plea exists. *State v. Morton*, 971 S.W.2d 335, 339 (Mo. App. E.D. 1998).

A factual basis is established if the defendant indicates an understanding of and an agreement with the facts underlying his crimes as recited by the judge or the prosecutor. *Morton*, 971 S.W.2d at 340. A prosecutor's statement that he is prepared to prove facts which would constitute the crime to which defendant is pleading guilty is sufficient. *Id.*

For a guilty plea to be valid, it is not necessary that the defendant admit to, or even believe the veracity of the charges against him. *Saffold v. State*, 982 S.W.2d 749, 753 (Mo. App. W.D. 1998). In this respect, all that is necessary is that the plea be knowing and voluntary. *Bradley v. State*, 494 S.W.2d 45, 48 (Mo. banc 1973). The factual basis

required by Rule 24.02(e) need not be established by the accused's testimony at the guilty plea hearing. *Pittman v. State*, 796 S.W.2d 413, 414 (Mo. App. S.D. 1990).

In *North Carolina v. Alford*, 400 U.S. 25 (1970), the United States Supreme Court approved the acceptance of a plea of guilty from a defendant who is unwilling or unable to admit participation in acts constituting the crime charged so long as the plea is knowingly and voluntarily entered and is supported by a strong factual basis. This Court has ruled that an *Alford* plea stands on equal footing with one in which an accused specifically admits the commission of the particular act charged. *Wilson v. State*, 813 S.W.2d 833, 843 (Mo. banc 1991). In *Wilson*, this Court specifically rejected the appellant's claim that his admissions of guilt during the plea hearing, after he had announced his guilty plea as being an *Alford* plea, demonstrated a lack of understanding and the voluntariness of the plea. *Id.*

An *Alford* plea enables a defendant to plead guilty to the charged crime and accept the criminal penalty even if he is unwilling or unable to admit he committed the acts constituting the crime. *Alford*, 400 U.S. at 37. Prior to accepting a plea of guilty or an *Alford* plea, the plea court is required to determine facts which a [defendant] admits by his plea and that those facts would result in [defendant] being guilty of the offense charged. *Brown v. State*, 45 S.W.3d 506, 508 (Mo. App. W.D. 2001). As with any guilty plea, an *Alford* plea is valid if it represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. *Sexton v. State*, 36 S.W.3d 782, 785 (Mo. App. S.D. 2001).

Even the failure to satisfy the formal requirements of Rule 24.02 does not entitle the movant to automatic vacation of his guilty plea. *Moore v. State*, 974 S.W.2d 658, 659 (Mo. App. E.D. 1998). Rather, to establish a claim based on a violation of Rule 24.02, the movant must show that he was prejudiced because his guilty plea was rendered unknowing or involuntary. *Dean v. State*, 901 S.W.2d 323, 328 (Mo. App. W.D. 1995). Relief under Rule 24.02(e) is available only for an error of law that is jurisdictional, constitutional, or constitutes a fundamental defect which inherently results in a complete miscarriage of justice. *Schuerenberg v. State*, 98 S.W.3d 922, 923-924 (Mo. App. S.D. 2003).

To prove that Appellant committed the crime of assault of a law enforcement officer in the first degree, the state was required to show that he attempted to kill or knowingly cause or attempt to cause serious physical injury to a law enforcement officer. § 565.081 RSMo.⁷ Although assault in the first degree requires a very specific intent on the part of the actor to kill or cause physical injury, the intent element is generally not susceptible to proof by direct evidence. *State v. Chambers*, 998 S.W.2d 85, 90 (Mo. App. W.D. 1999). Instead, intent may be inferred by circumstantial evidence and the surrounding facts. *Id.*; *State v. Smotherman*, 993 S.W.2d 525, 530 (Mo. App. S.D. 1999).

In his overly charitable version of the events that led to charges in the present case, Appellant argues that there was no evidence of a specific intent to injure or kill the

⁷ At the time Appellant committed the acts he was charged with, § 565.081 had not been amended by S.B. 5 in 2003 or H.B. 353 in 2005.

officer; instead, Appellant claims that he merely possessed a loaded gun. (L.F. 12). But Appellant's claim is not supported by the record, wherein the prosecutor announced the factual basis and the evidence the state would present at trial. (L.F. 16).

The evidence would establish that on November 5, 2002, near the intersection of Calhoun and Sherman in Springfield, Officer Monica Crews attempted to stop a vehicle Appellant was driving for a traffic violation. (L.F. 16). When Officer Crews attempted to stop the vehicle, Appellant attempted to elude her until Appellant collided with another vehicle. (L.F. 16). As Officer Crews approached the vehicle, two passengers fled on foot while Appellant attempted to flee by crawling outside the passenger side door. (L.F. 16). Officer Crews attempted to place Appellant into custody after he crawled out of the vehicle by grabbing his left arm and attempting to put him in a restraint hold. (L.F. 16). Officer Crews saw that Appellant was holding a handgun in his right hand and that he had begun to swing his right arm towards the front of his body, with the gun in a ready-to-fire position. (L.F. 16). Officer Crews grabbed Appellant's right wrist with her left hand to prevent him from pointing the gun at her. (L.F. 16). As Officer Crews was attempting to remove her duty weapon, Appellant threw her to the ground and fell on her and began to fight. (L.F. 16-17). Officer Crews was finally able to draw her duty weapon and point it at Appellant and ordered him to drop his handgun. (L.F. 17). Appellant threw his gun on the ground and began to run away, and Officer Crews gave chase and caught and detained Appellant. (L.F. 17). Other evidence showed that police found Appellant's handgun, a loaded .38 caliber with one round in the firing position. (L.F. 17).

The evidence announced by the state provided a sufficient factual basis for Appellant's attorney to state that he believed that the state could make a submissible case if it went to trial. (L.F. 17). Taken together, the above provided a factual basis showing that Appellant attempted to kill or attempted to cause serious physical injury to the officer, by demonstrating not only that Appellant was armed with a loaded .38, but also that the struggle continued with Appellant's gun loaded, drawn, and with Appellant attempting to point it at the officer. Appellant agreed that there was substantial evidence against him and a great likelihood that he would be convicted if he went to trial. (L.F. 17-18). His point fails.

ARGUMENT

III.

The motion court did not clearly err in overruling Appellant's Rule 24.035 motion after an evidentiary hearing because Appellant failed to meet his burden of showing that his plea was unknowing due to his allegedly pleading guilty to an uncharged offense. Appellant's plea was knowing and voluntary in that the information contained all the necessary elements for assault of a law enforcement officer in the first degree and clearly informed Appellant of the facts constituting the offense and the additional language in the information was mere surplusage and did not prejudice Appellant. Neither did Appellant suffer any prejudice from his sentence of fifteen years imprisonment, which was to run concurrently with his federal sentence, because it was within the range of punishment for either a class A or class B felony.

For his Third Point Relied On, Appellant claims that his guilty plea to the charge of assault of a law enforcement officer in the first degree was unknowing because the information actually charged Appellant with attempted assault of a law enforcement officer in the first degree, which resulted in Appellant pleading guilty to the uncharged crime of assault of a law enforcement officer in the first degree.

A. Evidentiary Hearing and Motion Court's Findings

The motion court conducted a PCR evidentiary hearing on February 22, 2006. The only witness called was Appellant, who testified that he did not commit the crime of assault of a law enforcement officer, and that the only reason he pleaded guilty was that

he had already pleaded guilty to felony possession of a firearm in federal court. (PCR Tr. 14).

During cross-examination, Appellant recalled that at the plea hearing, he agreed to enter an *Alford* plea and further agreed that there was substantial evidence against him and a great likelihood that he would be convicted if he went to trial. (PCR Tr. 15).

Appellant also claimed that he did not actually want the plea court to accept his guilty plea, and that he did not want to enter the plea but was coerced by his counsel who told him that the court would not accept his guilty plea unless Appellant said he was guilty. (PCR Tr. 18). Appellant could not answer what would have happened if the plea court had not accepted his guilty plea, and could not explain why he pleaded guilty if he did not wish to. (PCR Tr. 18-19).

The motion court issued an “Order Regarding Amended Motion Under Rule 24.035” on March 27, 2006. (L.F. 50-53). Regarding Appellant’s claim that he was convicted of the class A felony of first-degree assault of a law enforcement officer for which he was not charged, the court found that Appellant had been clearly advised at the time of the plea that he was pleading to the class A felony of first-degree assault of a law enforcement officer and was advised of the range of punishment for a class A offense. (L.F. 51). The motion court found that the factual basis recited by the prosecutor supported a finding of guilt of the class A felony of first-degree assault of a law enforcement officer. (L.F. 51).

The court found that the information contained “substantial step” language from § 564.011 RSMo, the attempt statute, which was unnecessary to the charge, and that there

was no reference to § 564.011 RSMo in the charge itself, although the offense required “an attempt to kill or cause serious physical injury” to the victim and that Appellant must have, with the purpose of committing the offense, taken a substantial step toward committing the offense. (L.F. 51). The court found that any defect in the form of the information was waived when Appellant entered his guilty plea. (L.F. 51). The court found that the record clearly established that Appellant understood the charge to which he was pleading, as well as the range of punishment, and that even if he had been properly charged only with the class B felony of attempted assault in the first degree, his sentence was within the range of punishment for that offense and Appellant had not established any prejudice. (L.F. 51).

B. Standard of Review

Appellate review of the denial of a Rule 24.035 motion is limited to determining whether the trial court’s findings and conclusions are clearly erroneous. Supreme Court Rule 24.035(k); *State v. Taylor*, 929 S.W.2d 209, 224 (Mo. banc 1996). Findings of fact and conclusions of law are clearly erroneous only if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made. *Taylor*, 929 S.W.2d at 224. On review, the motion court’s findings and conclusions are presumptively correct. *Wilson v. State*, 813 S.W.2d 833, 835 (Mo. banc 1991). When a movant seeks post-conviction relief following a guilty plea, appellate review is limited to a determination of whether the guilty plea was knowing and voluntary. *Rollins v. State*, 974 S.W.2d 593, 595 (Mo. App. W.D. 1998).

C. Appellant was charged with and pleaded guilty to first-degree assault of a law enforcement officer

Appellant’s claim that he was actually charged with attempted first-degree assault of a law enforcement officer fails because: (1) the information contained all the necessary elements for assault of a law enforcement officer in the first degree and clearly informed Appellant of the facts constituting the offense; (2) the language referring to a “substantial step” was mere surplusage; and (3) Appellant’s sentence of fifteen years was within the range of punishment for either a class A felony, or a class B felony.⁸ Thus, any defect or surplus language in the information charging Appellant did not prejudice Appellant or render his plea unknowing.

At the time Appellant committed the acts he was charged with, § 565.081.1 RSMo defined assault of a law enforcement officer in the first degree when a person attempts to kill or knowingly causes or attempts to cause serious physical injury to a law enforcement officer, and classified the crime as a class A felony. Pursuant to § 564.011.1 RSMo, a person is guilty of attempt to commit an offense when, with the purpose of committing the offense, he does any act which is a substantial step towards the commission of the offense. A “substantial step” is defined as conduct which is strongly corroborative of the firmness of the actor's purpose to complete the commission of the offense. Section 564.011.3 RSMo states that unless otherwise provided, an attempt to

⁸ Appellant was sentenced as a prior and persistent offender, so a class B felony would have been sentenced with the range of punishment for a class A Felony.

commit an offense is a (1) class B felony if the offense attempted is a class A felony.

Appellant was charged under Count I with the following:

The Prosecuting Attorney of the County of Greene, State of Missouri, charges that the defendant, in violation of Section 565.081.1, RSMo , committed the class A felony of assault of a law enforcement officer in the first degree . . . in that . . . Monica Crews was a law enforcement officer, defendant . . . knew Monica Crews was a law enforcement officer, and Defendant drew a firearm . . . and such conduct was a substantial step toward the commission of the crime of attempting to kill or cause serious physical injury to law enforcement officer Monica Crews and was done for the purpose of committing such assault.

(L.F. 9).

The purpose of an information is to inform an accused of the charges against him so that he may prepare an adequate defense and to prevent retrial on the same charges in case of acquittal. *State v. O'Connell*, 726 S.W.2d 742, 746 (Mo. banc 1987). The test for sufficiency of an information is (1) whether it contains all essential elements of the offense as set out in the statute creating the offense, and (2) whether it clearly apprises the accused of the facts constituting the offense. *Id.*; *State v. Nevels*, 804 S.W.2d 380, 382 (Mo. App. W.D. 1991).

Under Supreme Court Rule 23.11, an indictment or information shall not be invalid because of any defect that does not prejudice the substantial rights of the

defendant. A collateral attack on a conviction made on the basis of an alleged defective information will succeed only if the information “is so obviously defective that by no reasonable construction can it be said to charge the offense for which the prisoner was convicted.” *Shive v. State*, 780 S.W.2d 359, 363 (Mo. App. S.D. 1989).

Appellant faults the information for not charging him with having the purpose to kill or cause serious physical injury, which he claims is an element of the offense. (L.F. 18). As shown above, the information alleged Appellant’s act of drawing the firearm “was done for the purpose of committing such an assault.” Additionally, § 565.081 RSMo requires that Appellant “knowingly cause or attempt to cause serious physical injury” and does not require that Appellant have the “purpose” to kill or cause serious physical injury. Appellant attempts to interject “purpose” as an element because it is required for a finding of guilt for attempt under § 564.011.1 RSMo. It is not applicable here because Appellant was not charged with attempted assault of a law enforcement officer.

Contrary to Appellant’s assertions, all of the elements of the crime of assault of a law enforcement officer in the first degree were included in the charging instrument. Those elements are: (1) an attempt to kill (or) knowingly cause serious physical injury (or) an attempt to cause serious physical injury to (2) a law enforcement officer. Section 565.081 RSMo. “Serious physical injury” is defined in § 565.002(6) RSMo as physical injury that creates a substantial risk of death or that causes serious disfigurement or protracted loss or impairment of the function of any part of the body. Thus, it is possible to commit the crime of assault of a law enforcement officer in the first degree by either

knowingly causing serious physical injury or by attempting to kill or by attempting to cause serious physical injury.

It is true that Count I of the charging instrument in the present case included language alleging that Appellant's acts were "a substantial step toward the commission of the crime of attempting to kill or cause physical injury to [the law enforcement officer]." (L.F. 9). The motion court found that the information contained "substantial step" language from § 564.011, which was unnecessary to the charge, and that there was no reference to § 564.011 in the charge itself, although the offense required "an attempt to kill or cause serious physical injury" to the victim and that Appellant must have, with the purpose of committing the offense, taken a substantial step toward committing the offense. (L.F. 51). "Surplusage" is the inclusion of words or phrases which are unnecessary to charge the statutory elements of the offense. *State v. Hodges*, 829 S.W.2d 604, 607 (Mo. App. E.D. 1992). Absent demonstration of prejudice to the defendant, surplusage is disregarded in determining the adequacy of the information. *State v. Downs*, 593 S.W.2d 535, 540 (Mo. banc 1980).

The motion court correctly found that Appellant had been clearly advised at the time of the plea that he was pleading to the class A felony of first-degree assault of a law enforcement officer and was advised of the range of punishment for a class A offense. (L.F. 51). The court found that the factual basis recited by the prosecutor supported a finding of guilt of the class A felony of first-degree assault of a law enforcement officer, and that any defect in the form of the information was waived when Appellant entered his

guilty plea. (L.F. 51). By conceding that there was substantial evidence against him and a great likelihood that he would be convicted if he went to trial, (L.F. 17-18), Appellant essentially stated that the State had evidence that would demonstrate Appellant tried to point his gun at the officer. Intent may be inferred by circumstantial evidence and the surrounding facts. *State v. Chambers*, 998 S.W.2d 85, 90 (Mo. App. W.D. 1999); *State v. Smotherman*, 993 S.W.2d 525, 530 (Mo. App. S.D. 1999).

The court found that the record clearly established that Appellant understood the charge to which he was pleading, as well as the range of punishment, and that even if he had been properly charged only with the class B felony of attempted assault in the first degree, his sentence was within the range of punishment for that offense and Appellant had not established any prejudice. (L.F. 51).

In *State v. Moorehead*, 875 S.W.2d 915 (Mo. App. E.D. 1994), the Eastern District was faced with a claim similar to Appellant's. The defendant in *Moorehead* claimed that the indictment was fatally defective due to the improper designation of the charge as a "class A" felony, rather than a "class B" felony. *Moorehead*, 875 S.W.2d at 918-919. The Court determined that the movant was not prejudiced for two reasons: (1) the indictment correctly specified the statute defining the crime and set forth the facts and essential elements of the crime, and the incorrect reference to the offense as a class A felony was "mere surplusage"; and (2) even though the correct underlying charge should have stated the crime was a class B felony, the defendant/movant was correctly sentenced as a prior drug offender to an enhanced punishment for a class A felony. *Id.* at 919.

The record in the present case reflects that Appellant's *Alford* plea was knowing and voluntary. Appellant claimed that the only reason he pleaded guilty was that he had already pleaded guilty to felony possession of a firearm in federal court. (PCR Tr. 14). Regardless of whether this was true, a plea of guilty to escape a greater penalty than might be assessed in a jury trial is not involuntary. *Goodloe v. State*, 486 S.W.2d 430, 432 (Mo. 1972). Having chosen to accept the certainty of lesser punishment rather than face the possibility of greater punishment, Appellant cannot now obtain relief from his guilty plea by claiming it was involuntary. *Brady v. United States*, 397 U.S. 742, 750-751 (1970).

Appellant has failed to demonstrate any prejudice by the court's acceptance of his guilty plea. At the evidentiary hearing, Appellant could not answer what would have happened if the plea court had not accepted his guilty plea, and could not explain why he pleaded guilty if he did not wish to. (PCR Tr. 18-19). Appellant's sentence of fifteen years, which would run concurrently with his federal sentence, was within the range provided for either a class A or a class B felony, even without considering the fact that because Appellant had been found to be a prior and persistent offender, any sentence he would receive for a class B felony would be within the range of punishment for a class A felony. *See* § 558.011.1 and § 558.016 RSMo. The findings of the motion court were supported by the record and not clearly erroneous. With no showing of prejudice, Appellant's claim fails.

CONCLUSION

In view of the foregoing, respondent submits that the motion court's denial of Appellant's Rule 24.035 motion 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 8,253 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 _____ day of July, 2007, to:

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APPENDIX

Order Regarding Amended Motion Under Rule 24.035 A1