No. SC89867

In the
Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

MICHAEL G. CRAIG,

Appellant.

Appeal from Clay County Circuit Court
Seventh Judicial Circuit
The Honorable Michael J. Maloney, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Appellant, Michael Craig, appeals from his conviction in Clay County Circuit Court of the class C felony of driving while intoxicated. He filed a direct appeal with the Western District Court of Appeals, which was dismissed without consideration on the merits. *State v. Craig*, No. WD68570, slip op. at 1 (Mo. App. W.D. Oct. 28, 2008). This Court granted Appellant's application for transfer on February 24, 2009. Therefore, jurisdiction lies in this Court. MO. CONST. art. V, § 10; Supreme Court Rule 83.04.

Despite the Court's jurisdiction to hear this appeal, Appellant's claims are not cognizable on direct appeal because they were waived by his guilty plea. *See* Point I, *infra*. Therefore, this Court should dismiss Appellant's direct appeal without considering the merits of his claims.

STATEMENT OF FACTS

Appellant was charged in Clay County Circuit Court with the class C felony of driving while intoxicated ("DWI") as an aggravated offender, §§ 577.010 and 577.023, RSMo 2000[1] (L.F. 7-8). The information alleged that on March 10, 2006, Appellant operated a motor vehicle while under the influence of alcohol (L.F. 7). It also alleged that on three prior occasions, Appellant had pleaded guilty to or was found guilty of intoxication-related traffic offenses (L.F. 7). Appellant moved to dismiss the information and strike the enhancement allegations, arguing that the State could not prove the enhancement allegations beyond a reasonable doubt (L.F. 9-61).

On February 16, 2007, the plea court conducted a guilty plea colloquy during which Appellant admitted that he operated his vehicle while under the influence of alcohol as charged (Tr. 18, 22-23). Appellant did not admit, however, that the State's records were sufficient to prove his aggravated offender status (Tr. 2-3). The court was unsure how to proceed:

> THE COURT: I've never had a case where someone pled guilty to part and had a trial as to the rest, but as I understand how we approach this, the defendant wants to protect his legal issues and does not want to trouble a judge or jury with a contested hearing on the issue of whether what happened on March 10, 2006, makes him guilty of operating a motor vehicle while under the influence of alcohol that [sic] time and place. Am I coming pretty close?

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[1] All statutory references herein are to RSMo 2000 unless otherwise noted.

[Defense Counsel] MR. BROWN: That's correct, Judge, I believe.

THE COURT: I think we ought to have a guilty plea proceeding with me in which I take care to be sure and not be asking the defendant to acknowledge the level of the offense he's pleading guilty to, and in that guilty plea proceeding make plain that if the plea of guilty to some degree of Driving While Intoxicated is received, then there'll be a court trial on the issue of what, at what level the plea should be accepted.

You know, as I think about it, that might blow you out of the water on an appeal, and that's the last thing I want to do.

(Tr. 2-3). The prosecutor suggested that it might be better to do a bench trial, where subsequent appeal rights would be much clearer (Tr. 5). The court observed that the necessary witness was not present (Tr. 6). Instead, the court decided to go forward with the plea, saying:

THE COURT: So I'd like for it to be open to discussion with no one hesitating to say, well, now, wait a minute, Judge, think what that would do. I would like to explore whether I could bring the defendant up to the bench and, through the examination of him, learn that he is willing to plead guilty to operating a motor vehicle while under the influence of alcohol, but he does not plead guilty to that offense at any level other than Class B Misdemeanor, and he knows that the State wants to introduce evidence that, if deemed to be admissible and evidence that meets all the requirements of 577.023 as well as the – do we have constitutional issues?

MR. BRUCE BROWN: I think the constitutional issues, I think are raised within the parameters of the way the rule's set up because when you do take a plea of

guilty, you advise them of the constitutional rights, and that's the basis, the main basis of what we have going on here. It wasn't done in the priors.

THE COURT: Why don't we start down the road and see if people stay comfortable, and if we can't get to the end of the road with everybody being comfortable that rights are being protected, there will be a three-way veto power. If I'm uncomfortable with it, I can do it; if the defendant's uncomfortable with it, he can do it; if the State is uncomfortable, the State can say, we'd rather have a full bench trial.

Anybody can say, we should have started with a full bench trial, and it's not too late to turn around and go back. No jeopardy will have attached in an attempted guilty plea proceeding. I quit in the middle of guilty plea proceedings with more frequency than – well, I'm not a stranger to having to stop in the middle of a guilty plea proceeding.

MR. BROWN: Judge, are you suggesting that we take the plea as a B Misdemeanor –

THE COURT: I'm suggesting we take the plea as a plea to operating a motor vehicle while under the influence alcohol [sic], known to be an offense.

MR. BROWN: Right.

THE COURT: But with everybody knowing that the defendant claims that he is guilty of nothing more than a Class B Misdemeanor.

MR. BROWN: Okay.

THE COURT: And the State making him well aware that they think he's guilty of a Class C. They're going to be introducing evidence to prove it and, depending on how I rule, he's going to be found guilty of no less than a Class B Misdemeanor –

MR. BROWN: Correct.

THE COURT: -- and if that's the result, he's not going to have any appellate rights if he gets a sentence within the range of punishment allowed by law for a Class B Misdemeanor.

MR. BROWN: Right.

THE COURT: But that if he is found guilty of a Class A Misdemeanor, a Class D Felony or a Class C Felony, he has appellate rights because of whatever the record is that we make on the evidence. You all will have given me the benefit of a motion and briefing.

(Tr. 7-9).

Following this discussion, the plea court addressed Appellant directly (Tr. 10). The court told Appellant:

THE COURT: Mr. Craig, I would like to handle the matter in a way that will allow you to acknowledge whatever you believe is the truth of matters with the comfort of knowing that if you are found guilty of anything except a Class B Misdemeanor, you will have appellate rights to test the rulings this Court makes. I also believe if you are found guilty of just a Class B Misdemeanor, and you receive a punishment within the range of punishment allowed by law for a Class B

Misdemeanor, that you will not have any appellate rights, that that will bring an end to the case.

Mr. Brown, are you comfortable with what I just said?

MR. BROWN: Yes.

(Tr. 12-13). The court advised Appellant of his constitutional right to a jury trial and of the associated trial rights (Tr. 13-15). The court outlined the possibility that Appellant could be found guilty as a prior, persistent, or aggravated offender, enhancing the classification of the offense, if the State was able to prove Appellant's prior offenses (Tr. 15-16). Appellant indicated that he did not have any questions about that (Tr. 16). The plea court told Appellant that:

THE COURT: We are handling this in a way to give you all of the trial that you are entitled to under the law for a Class A Misdemeanor, a Class D Felony or a Class C Felony. The only trial you are giving up is the trial that you're entitled to if you wanted to contest your guilt with respect to a Class B Misdemeanor. Are you willing to give up your right to trial to the Class B Misdemeanor only?

[Appellant]: Yes.

(Tr. 18). The court further advised Appellant about his trial rights (Tr. 18-21). The court then inquired about the facts of the charged conviction, assuring Appellant that it would not treat anything he said as an acknowledgement of guilt for "anything worse than a Class B Misdemeanor" (Tr. 22). Appellant admitted that, on March 10, 2006, he drove his vehicle while under the influence of alcohol, as charged (Tr. 22-23).

At the conclusion of the colloquy, the court permitted the parties to offer evidence and argument with respect to the enhancement allegations (Tr. 23-40). Appellant claims in this appeal that the evidence presented to support the plea court's finding that he was an aggravated offender was insufficient. In the light most favorable to the court's finding, the evidence was as follows:

First, the State offered State's Exhibit 1, a certified copy of the first alleged prior conviction (Tr. 23-24). The exhibit showed that on or about March 6, 2002, Appellant pleaded guilty to, or was found guilty of, driving while intoxicated on November 8, 2001, in the Municipal Division in Smithville, Missouri. The records showed that the judge was an attorney and Appellant was either represented by an attorney or waived his right to counsel. (Tr. 24). Appellant was sentenced to sixty days in jail, the execution of the sentence was suspended, and he was placed on probation for twenty-four months (L.F. 24). Appellant stated that he had no objection to the admission of State's Exhibit 1 (Tr. 24).[2]

The prosecutor then offered State's Exhibit 2, which showed that on or about September 15, 1999, Appellant pleaded guilty to, or was found guilty of, driving with excessive blood alcohol content for an offense which occurred on April 23, 1999, in the

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[2] Because appellant did not receive a suspended *imposition* of sentence in Smithville Municipal Court, this Court's decision in *Turner v. State* does not affect this case. *Turner*, 245 S.W.3d 826 (Mo. banc 2008) (finding that a prior municipal DWI conviction that resulted in a suspended imposition of sentence did not qualify as a predicate prior DWI conviction necessary for persistent-offender enhancement of a new DWI offense).

Circuit Court of Clay County, Liberty, Missouri. (Tr. 25). Appellant stated that he had no objection to the admission of State's Exhibit 2 (Tr. 25).

Finally, the prosecutor offered State's Exhibit 3, which showed that on or about January 30, 1992, Appellant pleaded guilty to, or was found guilty of, Driving While Intoxicated for events occurring October 20, 1991, in the Circuit Court of Clay County, Liberty, Missouri. (Tr. 25-26). Appellant stated that he had no objection to the admission of State's Exhibit 3 (Tr. 33).

Appellant also submitted certified copies of the entire court files for each of the three prior offenses (Def. Ex. 4 at L.F. 19-34 is the file relating to the acts in the City of Smithville in 2001; Def. Ex. 5 at L.F. 35-46 is the file relating to the 1999 acts; Def. Ex. 6 at L.F. 47-55 is the file relating to the 1991 acts). The exhibits were attached to Appellant's "Motion to Dismiss Felony Information and to Strike Enhancement Allegations" (Tr. 33; L.F. 9-18).

When the hearing concluded, the court granted the State additional time to respond to Appellant's motion to dismiss the information and strike the enhancement allegations (L.F. 3). The court noted that in any event, Appellant would "be found guilty of some level of driving while intoxicated." (L.F. 3).

The plea court found that the evidence presented by the State "proves beyond a reasonable doubt that defendant had three intoxication-related traffic offenses on his record before the one that is the subject of this trial" (L.F. 4). The plea court made the following findings:

> On or about March 6, 2002, defendant pleaded guilty to driving while intoxicated, for events occurring on November 8, 2001, in the Municipal Court

> of Smithville, Missouri. The judge was an attorney. The defendant was represented by an attorney. On or about September 15, 1999, defendant pleaded guilty to driving with excessive blood alcohol content, for events occurring on April 23, 1999, in the Circuit Court of Clay County, Missouri. On or about January 30, 1992, defendant either pleaded guilty to, or was found guilty of, driving while intoxicated, for events occurring on October 20, 1991, in the Circuit Court of Clay County, Missouri. State's Exhibit 3, which pertains to this offense, does not show whether defendant pleaded guilty or not guilty. It does show that he received a suspended imposition of sentence and was placed on probation for two years, a probation that was satisfactorily completed in 1994. The law does not allow probation unless and until a defendant has either been found guilty or pleaded guilty.
>
> It is legally concluded that the state is not required to prove strict compliance with the requirements of Rule 24.02 in state courts or Rule 37.58 in municipal courts to be able to use pleas or findings of guilty in prior intoxication-related offenses to increase the severity of driving while intoxicated charges.

(L.F. 4).

Accordingly, the plea court found that Appellant's DWI qualified for enhancement to a class C felony due to his aggravated offender status (L.F. 4). Appellant was sentenced to five years imprisonment (L.F. 5, 77-78).

ARGUMENT

I. (waiver)

This Court should dismiss Appellant's appeal without consideration on the merits because Appellant, by pleading guilty to the charged offense, waived his right to challenge the sufficiency of the evidence to support the enhancement allegations on direct appeal.

In his first point, Appellant claims that the Western District Court of Appeals erred in holding that Appellant had waived his right to direct appeal with respect to his sufficiency claims by pleading guilty. App. Br. at 18. Appellant's point is improperly framed—when this Court transfers a case following an opinion by the Court of Appeals, the Court of Appeals's opinion is effectively withdrawn and this Court determines the case as on original appeal. *See Johnston v. Sweany*, 68 S.W.3d 398, 405 (Mo. banc 2002); Rule 83.09. Even so, Appellant's direct appeal should be dismissed because his claims, relating exclusively to the sufficiency of the evidence presented to prove his aggravated-offender status, are not within the exceedingly narrow category of claims that are reviewable on direct appeal following a guilty plea. Any claim that Appellant may have with respect to his plea or sentence, including a potential challenge to the validity of his plea based on the plea court's mistaken assurances that Appellant's right to direct appeal would be preserved despite the guilty plea, should be raised in a motion to vacate pursuant to Rule 24.035.

Analysis

By pleading guilty, Appellant waived his right to challenge on direct appeal the plea court's factual findings relating to Appellant's aggravated-offender status. Missouri law has

long-provided that "[a] plea of guilty voluntarily and understandingly made is conclusive as to the guilt of the accused, admits all of the facts charged and waives all nonjurisdictional defects in the prior proceedings." *Robinson v. State*, 491 S.W.2d 314, 315 (Mo. 1973). Following a guilty plea, appellate review on direct appeal is limited to two categories of claims: 1) claims against the subject-matter jurisdiction of the lower court or 2) claims regarding the sufficiency of the charging document. *See Maulhardt v. State*, 789 S.W.2d 835, 837 (Mo. App. E.D. 1990); *State v. Sharp*, 39 S.W.3d 70, 71-72 (Mo. App. E.D. 2001). For any other claim that "the conviction or sentence imposed violates the constitution and laws of this state or the constitution of the United States," a motion for post-conviction relief pursuant to Rule 24.035 provides the exclusive remedy. Rule 24.035(a). A challenge to the evidentiary basis for a court's factual finding does not implicate either subject-matter jurisdiction or the sufficiency of the charging document. *See Sharp*, 39 S.W.3d at 72; *State v. Sparks*, 916 S.W.2d 234, 238 (Mo. App. E.D. 1995); *State v. Phillips*, 204 S.W.3d 729, 732 (Mo. App. S.D. 2006). Thus, such a claim is not cognizable on direct appeal and must be brought in a post-conviction motion. *See id*.

1. Appellant pleaded guilty to the crime charged—he did not and cannot separately plead "not guilty" to allegations of prior convictions that have no bearing on his guilt or innocence.

Appellant argues that he did not waive his right to challenge on direct appeal the plea court's findings with respect to his aggravated-offender status because, although he pleaded guilty to the DWI, he specifically pleaded "not guilty" to the enhancement. App. Br. at 23. He claims that § 577.023.9, RSMo Cum. Supp. 2005, allows a defendant to plead guilty to

the underlying offense of DWI and to defer the hearing on the felony offender status 'to a later time, but prior to sentencing.'" App. Br. at 23. Appellant insists, without citation to legal authority, that "inherent or implied in this type of procedure should be a right to a direct appeal of the findings of being a previous offender" whether or not the offender pleaded guilty to the underlying offense. App. Br. at 23. To reach his conclusion, Appellant twists § 577.023.9 beyond recognition. Neither this statute nor any other provision of Missouri law permits a defendant to plead guilty to the charged offense but somehow plead "not guilty" to enhancement allegations. Accordingly, Appellant's argument should be rejected.

The actual text of § 577.023.9 reads: "In a trial without a jury or upon a plea of guilty, the court may defer the proof in findings of such facts to a later time, but prior to sentencing." § 577.023.9, RSMo Cum. Supp. 2005. This statute does not provide the defendant with any additional rights. It is explicitly directed at the court, which may, at its convenience, defer certain fact-finding to a later time. Appellant's suggestion that this straightforward provision means the defendant may transform his guilty plea into a guilty/not guilty hybrid, preserving direct appeal rights over certain issues, unreasonably stretches the plain meaning of the text.

Furthermore, Missouri courts do not consider the prior convictions that permit enhanced sentencing status as elements of the crime charged. *See State v. Cobb*, 875 S.W.2d 533, 536-37 (Mo. banc 1994) (noting that procedure used to determine enhanced punishment does not go to the guilt or innocence of the accused); *see also State v. McGinness*, 215 S.W.3d 322, 324-25 (Mo. App. E.D. 2007) (holding that the classification of the charged offense was not an essential element). It follows, then, that a defendant cannot plead "not

guilty" to allegations of prior convictions that could be used to enhance his sentence, because those allegations do not pose the question of guilt. He may, of course, contest the evidence offered to prove the fact of the priors at a hearing, or he may waive that proof. *See* § 577.023.10-.11. But contesting the State's evidence during the enhancement hearing does not constitute a "not guilty" plea. Here, Appellant pleaded guilty to the charged crime of DWI (Tr. 22-23). By doing so, he waived any claim of error for purposes of direct appeal (aside from the two limited categories described below). *See e.g. Sharp*, 39 S.W.3d at 71-72.

2. Appellant's claims do not implicate the subject-matter jurisdiction of the plea court or the sufficiency of the charging document, and are therefore unreviewable on direct appeal.

In an apparent effort to shoehorn his points into the "subject-matter jurisdiction" category of claims that this Court may review on direct appeal, Appellant suggests that his challenge "involves 'the power to render the particular judgment in question.'" *See* App. Br. at 25-30. But even if, as Appellant argues, his claims could be considered "jurisdictional" in a broad sense (App. Br. at 25-30), he does not and cannot contend that the plea court lacked *subject-matter* jurisdiction to determine his case.[3] No allegations of error following a guilty plea may be reviewed on direct appeal apart from questions of *subject-matter* jurisdiction and sufficiency of the pleadings. *See Kansas City v. Stricklin*, 428 S.W.2d 721, 724-25 (Mo. banc 1968); *see also State v. LePage*, 536 S.W.2d 834, 835 (Mo. App. K.C.D. 1976); *Sharp*,

[3] "The circuit courts shall have original jurisdiction over all cases and matters, civil and criminal." MO. CONST. art. V, § 14.

39 S.W.3d at 72-73; *Phillips*, 204 S.W.3d at 730. Rule 24.035 provides "the exclusive procedure" by which Appellant may raise any other claim that "the court imposing the sentence was without jurisdiction to do so. . . ." Rule 24.035(a).

Appellant implies, however, that this Court is empowered to review challenges not only to the circuit court's subject-matter jurisdiction, but also to the circuit court's "jurisdiction to render the particular judgment in question." App. Br. at 25-30. This argument has no basis in the law. Appellant tries to support his position by citing cases that note that the word "jurisdiction" is susceptible to various meanings. *See* App. Br. at 25-28, citing *Jennings v. State*, 631 S.W.2d 361 (Mo. App. S.D. 1982); *Evans v. St. Louis Comprehensive Neighborhood Health Center*, 895 S.W.2d 124 (Mo. App. E.D. 1995); *Harris v. Director of Revenue*, 132 S.W.3d 897 (Mo. App. S.D. 2004); *LePage*, 536 S.W.2d 834; *State v. Wallace*, 825 S.W.2d 626 (Mo. App. E.D. 1992).

Appellant's reliance on these cases is misplaced because, aside from *LePage*, none involved the scope of appellate authority on direct appeal following a guilty plea. *LePage*, meanwhile, directly refutes Appellant's position. In *LePage*, the court noted that "[t]he question of jurisdiction of the *subject-matter*" may be raised after a guilty plea on direct appeal. 536 S.W.2d at 835 (emphasis added). Appellant has not cited a single case in which a Missouri court reviewed a "non-subject-matter" jurisdictional claim on direct appeal following a valid guilty plea. Thus, while "jurisdiction" may be defined in a variety of ways depending on context, the cases pertaining to guilty pleas are quite clear—only challenges to *subject-matter* jurisdiction, not jurisdictional claims in general, are cognizable on direct appeal. *See e.g. Sharp*, 39 S.W.3d at 72; *Phillips*, 204 S.W.3d at 730.

The Eastern District Court of Appeals's holding in *Sharp* is particularly illuminating because the facts of that case are quite similar to the facts here. In *Sharp*, the defendant pleaded guilty to two felony charges and was sentenced. 39 S.W.3d at 71-72. Due to a procedural error, the original sentence was vacated and the State filed an amended information for resentencing. *Id*. at 72. In its amended information, the State alleged that the defendant had two previous convictions for drug possession. *Id*. The prosecution offered exhibits as evidence of these convictions, but both exhibits listed a social security number different than the one listed for the defendant on the State's information. *Id*. Nonetheless, the resentencing court found that the defendant was a prior and persistent offender and sentenced him accordingly. *Id*.

The defendant filed a direct appeal, alleging that the resentencing court erred in finding that he was a prior and persistent offender because the State offered insufficient evidence. *Id*. The Eastern District held that the defendant's point was unreviewable on direct appeal. *Id*. The Court observed that the defendant's complaint was "about the evidentiary basis for the trial court's finding he was a prior and persistent offender." *Id*. Because the Court's review was "restricted to the subject-matter jurisdiction of the trial court and the sufficiency of the information or indictment," it could not consider the merits of the defendant's claim. *Id*.

Appellant's case is analogous. Here, Appellant pleaded guilty to DWI (Tr. 22-23; L.F. 3-4). Subsequently, the plea court heard evidence of Appellant's prior convictions and argument from both parties (Tr. 23-42; L.F. 4). The court found beyond a reasonable doubt that Appellant had three prior intoxication-related traffic offenses, qualifying him as an

aggravated offender pursuant to § 577.023.1, RSMo Cum. Supp. 2005 (L.F. 4). In both of Appellant's substantive points on appeal, he claims that the evidence upon which the court based its finding was insufficient to prove his priors beyond a reasonable doubt. *See* App. Br. at 31-53. Like the defendant's claim in *Sharp*, Appellant's claims challenge neither the plea court's subject-matter jurisdiction nor the sufficiency of the information. Therefore, Appellant's claims may not be reviewed on direct appeal.

Similarly, in *State v. Sparks*, the defendant pleaded guilty to the charged offense, but argued on appeal that the trial court erred in sentencing him as a persistent offender because it "did not specifically find him to be a persistent offender" as required by statute. *Sparks*, 916 S.W.2d at 238. The Eastern District held that because the defendant's claim did not fall into either of the two limited categories the Court was permitted to review following a guilty plea, his argument was "unreviewable." *Id*. Likewise, in *Phillips*, the Southern District dismissed two points raised on appeal following the defendant's guilty plea, holding that "[a] complaint about the evidentiary basis for the trial court's finding is not subject to review on direct appeal." *Phillips*, 204 S.W.3d at 732.

Appellant attempts to distinguish *Sparks* by pointing out that nothing in the court's opinion indicates that the defendant objected to the allegedly insufficient evidence (via motion or otherwise). *See* App. Br. at 29. This distinction is inconsequential. The reason Appellant's claims are unreviewable on direct appeal is not that Appellant failed to contest the State's evidence relating to his prior convictions, but because his guilty plea *affirmatively waived* all nonjurisdictional defects in the proceeding. *See e.g. Robinson*, 491 S.W.2d at 315; *see also State v. Klaus*, 91 S.W.3d 706 (Mo. App. E.D. 2002) (court could not review

on direct appeal following a guilty plea defendant's claim that his sentence was based on an erroneous presentence investigation report); *State v. Goodues*, No. ED91261, slip op. at 2 (Mo. App. E.D. Feb. 10, 2009)[4] (court could not review on direct appeal following a guilty plea defendant's claim that the plea court erroneously ignored mitigating factors in imposing sentence, despite the court's express acknowledgment that it mistakenly believed the defendant would not be required to serve eighty-five percent of his sentence).

Furthermore, Appellant's reliance on § 577.023 is misplaced. *See* App. Br at 22-23. The statute states that "[i]n a trial without a jury or upon a plea of guilty, the court may defer the proof in findings of such facts to a later time. . . ." *See* § 577.023.9, RSMo Cum. Supp. 2005. The provision does not even hint that it seeks to overturn the well-established general rule that, following a guilty plea, review on direct appeal is limited. Appellant has provided no basis to distinguish his case from *Sharp*, *Sparks*, or *Phillips*, each of which limit review on direct appeal to two narrow categories. Because Appellant's claims do not fall within the two categories this Court will review on direct appeal following a guilty plea, Appellant's appeal should be dismissed.

3. Appellant may still seek post-conviction relief pursuant to Rule 24.035.

Finally, this Court's recognition that Appellant's claims are unreviewable on direct appeal does not foreclose Appellant's opportunity to have his claims fully determined on the merits. Rule 24.035 provides an avenue for relief for those "convicted of a felony on a plea

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[4] Opinion and mandate issued 3/5/2009. It appears that no motion for rehearing or application for transfer was filed.

of guilty" to challenge the validity of their convictions or sentences. Here, Appellant was convicted of a felony (L.F. 4, 83-84). And his conviction was the result of his guilty plea (L.F. 3, 4; Tr. 22-23). Offenders routinely challenge the legality of their sentences following their guilty pleas by filing a Rule 24.035 motion. *See e.g. Turner v. State*, 245 S.W.3d 826 (Mo. banc 2008) (movant alleged in Rule 24.035 motion that one of the DWI offenses used to enhance the penalty for his current DWI offense should not have been considered). Like in *Turner*, the proper procedure by which a defendant who pleads guilty may challenge the validity of the prior offenses used to enhance the penalty is a Rule 24.035 motion for post-conviction relief, not by direct appeal.

Although Appellant does not raise this issue in his brief, this Court may be concerned that Appellant's plea was not voluntarily or understandingly made as a result of the plea court's repeated, mistaken assurances that Appellant would be able to directly appeal the plea court's decision with respect to his aggravated-offender status even though he pleaded guilty to the charged offense. While this is certainly a legitimate concern, it may be addressed in a Rule 24.035 motion to vacate, not in a direct appeal. Like claims regarding the legality of sentences received after a guilty plea, claims relating to the voluntariness of a guilty plea are routinely litigated via the post-conviction relief procedure established by Rule 24.035. *See e.g. Thurman v. State*, 263 S.W.3d 744 (Mo. App. E.D. 2008) (movant alleged in Rule 24.035 motion that his plea was involuntary because the plea court misinformed him of proper sentencing range); *Vanzandt v. State*, 212 S.W.3d 228 (Mo. App. S.D. 2007) (same); *Beal v. State*, 51 S.W.3d 109 (Mo. App. W.D. 2001) (movant alleged in Rule 24.035 motion that his plea was involuntary because his attorney misled him regarding the

applicability of the eighty-five percent rule). This Court should not permit Appellant to raise a claim on direct appeal that would otherwise be barred simply because his guilty plea was arguably involuntary; Rule 24.035 provides an adequate, available procedure to permit Appellant to fully litigate his claims.

II. (sufficiency)

The trial court did not err in finding Appellant to be an aggravated offender and in sentencing him as such, because the State proved beyond a reasonable doubt that Appellant had pleaded guilty to, or had been found guilty of, three or more intoxication-related traffic offenses. (Responds to Appellant's Points II and III).

As argued above, Appellant's claims that the State's evidence was insufficient to prove his aggravated offender status were waived for purposes of direct appeal by his guilty plea. *See* Point I, *supra*. For that reason, Appellant's appeal should be dismissed.

Notwithstanding the issue of waiver, both of Appellant's substantive claims are without merit. In Point II, Appellant claims that the trial court erred in finding him to be an aggravated offender because the State did not prove beyond a reasonable doubt that the prior pleas of guilt were taken in accordance with Rules 24.02 (state prosecutions) and Rule 37.58 (municipal prosecutions). App. Br. at 31-47. In Point III, Appellant claims that, although State's Exhibit 3 shows he received a suspended imposition of sentence and probation, there was no evidence that Appellant pleaded guilty or was found guilty by the fact finder because neither of those boxes on the disposition form was marked. App. Br. at 48-53. Both points should be denied.

Analysis

Appellant was charged as an aggravated offender under § 577.023.1(1)(a) because he had pleaded guilty to, or had been found guilty of, three or more intoxication-related traffic offenses (L.F. 7-8). An "intoxication-related traffic offense" is defined, in pertinent part, as driving while intoxicated, driving with excessive blood alcohol content, or driving under the

influence of alcohol or drugs in violation of state law or a county or municipal ordinance, where the defendant was represented by or waived the right to an attorney in writing. § 577.023.1(3). Any person who pleads guilty to or is found guilty of a violation of § 577.010 or § 577.012 who is alleged and proved to be an aggravated offender shall be guilty of a class C felony. § 577.023.4.

The statute provides that the court "shall find the defendant to be a[n] . . . aggravated offender" if (1) the charging document pleads all essential facts warranting a finding that the defendant is a prior or persistent offender; and (2) evidence is introduced that establishes sufficient facts pleaded to warrant a finding beyond a reasonable doubt that the defendant is an aggravated offender; and (3) the court makes findings of fact that warrant a finding beyond a reasonable doubt by the court that the defendant is an aggravated offender. § 577.023.7.

1. The State was not obligated to affirmatively prove that each of the requirements of Rule 24.02 and Rule 37.58 were satisfied with respect to each of Appellant's guilty pleas to the three prior intoxication-related traffic offenses.

Appellant asserts that the State failed to prove beyond a reasonable doubt that the three prior intoxication-related traffic offenses the State was using to enhance the current DWI charge were valid. App. Br. at 31, 45-47. He claims that the evidence introduced by the State failed to show that the judges who accepted his pleas followed each of the steps required by Rule 24.02 for the state offenses and Rule 37.58 for the municipal offense. App. Br. at 45-47. Additionally, in an affidavit generated by Appellant after he was charged with his fourth DWI, Appellant contended that, "to the best of [his] knowledge," the judges who

accepted his prior pleas did not address him regarding the range of punishment, the right to a jury trial, the right to confront witnesses, and the right not to incriminate himself, or ask him whether his plea was a result of threats or promises (L.F. 56-58).

In support of his argument, Appellant cites to *State v. Pfeifer*, 544 S.W.2d 317 (Mo. App. K.C.D. 1976). In *Pfeifer*, the state attempted to use a 1970 misdemeanor conviction of driving while intoxicated as a basis for enhancing punishment for a 1974 charge of driving while intoxicated. *Id*. at 318. The court record of the 1970 conviction showed that the defendant's attorney appeared and entered a plea of guilty on the defendant's behalf. *Id*. at 319. At that time, Rule 29.02 provided that no person would be allowed to enter a plea of guilty to a misdemeanor unless he was personally present or the court and prosecuting attorney consented to such a plea in the defendant's absence. *Id*. at 320. The *Pfeifer* court held that a defendant's attorney, in the absence of the defendant, could enter a plea of guilty to a misdemeanor only in response to a request by the defendant. *Id*. at 321. As the record of the 1970 conviction did not show that the accused requested that the plea be entered in his absence, the court held that such conviction could not be used for enhancement of the 1974 charge. *Id*.

Appellant argues that because in *Pfeifer* the violation of a Missouri Supreme Court Rule prevented the state from using a prior guilty plea to enhance the present sentence, the State in Appellant's case similarly could not use his prior three cases for enhancement because the court record failed to show substantial compliance with Rules 24.02 and 37.58. App. Br. at 37. But the *Pfeifer* Court did *not* address whether compliance with procedural

requirements other than defendant's appearance at the plea or waiver thereof must appear affirmatively in the record before a plea may be used in subsequent enhancement proceeding.

In *Dover v. State*, the Southern District Court of Appeals answered this open question, holding that evidence of a plea court's compliance with the "multifarious requirements of Rule 24.02" did not need to appear in the record to permit a subsequent court from using those pleas for enhancement purposes. 725 S.W.2d 915, 918 (Mo. App. S.D. 1987). The *Dover* court noted that the defendant's argument, if accepted by the appellate court, "would, for all practical purposes, bar the use of any plea of guilty to an intoxication-related traffic misdemeanor for the purpose of establishing, in a subsequent prosecution, that an accused is a persistent intoxication-related traffic offender." *Id*. at 918. This is because "[t]he only way a court record can conclusively demonstrate that a court complied with the multifarious requirements of Rule 24.02 in accepting a plea of guilty is by a transcript of the guilty plea proceeding." *Id*. Court reporters are only required to prepare and file a transcript when an accused enters a plea of guilty to a felony and the court imposes a sentence of imprisonment. Rule 24.03. The *Dover* court noted that, "[t]he position championed by movant would require the State to prove, by court record, that certain dialogue occurred between the accused and the court in a guilty plea proceeding in a misdemeanor case, as to which no verbatim record would exist." *Dover*, 725 S.W.2d at 918-919.

Appellant criticizes the Southern District's rationale in *Dover* as "simply unreasonable." App. Br. at 39. He suggests that the state could present prima facie proof of compliance with the applicable rules through a "plea petition" and "appropriate court docket entries," which the defendant would then be free to refute. App. Br. at 40. Therefore,

Appellant insists, a transcript of the guilty plea proceeding, which he does not dispute may not be available, would not be necessary because a "conclusive demonstration" of compliance is not required. App. Br. at 40.

Appellant's attempt to diminish *Dover* is flawed in several respects. First, while he suggests that a plea petition and "appropriate court docket entries" could substitute for the frequent absence of a colloquy transcript, there is no reason to believe that the "plea petition" or "appropriate court docket entries" will be available. Rule 24.03 requires that a detailed record of a plea be made only in felony cases, and even then, a transcript is prepared only if the plea results in imprisonment for a class A or B felony or a Rule 24.035 motion is filed. Rule 24.03(b). In all other cases, including pleas to class C or D felonies and all misdemeanors, no rule requires that a transcript be prepared or any "plea petition" or "appropriate docket entry" be entered in the record. If Appellant's suggestion is adopted, every guilty plea for an intoxication-related offense which lacks a supporting transcript, "plea petition," or "appropriate docket entry" detailing the plea court's colloquy will be ineligible for use as a prior conviction, even though no rule required that such a record be made.

Second, Appellant's repeated insistence that numerous Missouri cases "clearly require *substantial* compliance with the *mandates* of Rule 24.02" (App. Br. at 40, emphasis original) misunderstands the holding in *Dover* and the State's position in the case at bar. The State recognizes and does not dispute that pursuant to cases such as *Boykin v. Alabama*, 395 U.S. 238 (1969); *State v. Shafer*, 969 S.W.2d 719 (Mo. banc 1998); *State v. Thomas*, 96 S.W.3d 834 (Mo. App. W.D. 2002); and *State v. Taylor*, 929 S.W.2d 209, 216 (Mo. banc 1996), all

cited by Appellant, certain procedural safeguards must be adhered to during a guilty-plea hearing before a guilty plea is valid and can be accepted by the court.

The issue in the present case is not whether those safeguards were required to be followed when Appellant originally entered his plea, but whether the State, in a subsequent prosecution long after the prior judgments have been finalized and satisfied, must affirmatively prove, time and again, that the prior courts did not err in accepting the pleas. The *Dover* court correctly noted that no Missouri case requires the State to prove the procedural correctness of each prior guilty plea in multiple mini-trials each time it seeks to use a prior plea for enhanced sentencing. *Dover*, 725 S.W.2d at 918-19.

To the contrary, this Court's decision in *State v. Quinn*, 594 S.W.2d 599 (Mo. banc 1980), suggests that a prior guilty plea may not be collaterally attacked in a subsequent prosecution if the record is facially valid and the offender did not challenge the prior plea with a timely post-conviction motion. In *Quinn*, the defendant's sentence was enhanced pursuant to the Second Offender Act, which required the state to prove that the defendant was convicted of a prior offense punishable by imprisonment in the penitentiary, that he was sentenced for that offense, and that he was placed on probation, paroled, fined, or imprisoned. *Id*. at 601. To satisfy its burden, the state had the clerk read into the record an entry in the circuit court minutes, which demonstrated that the defendant had pleaded guilty to carrying a concealed weapon. *Id*. Defendant's counsel objected, arguing that the record did not show that the defendant had "waived his right to trial by jury and all the constitutional rights therewith or that the plea had a factual basis." *Id*. at 602. The objection was overruled and the evidence admitted. *Id*.

This Court found that the state had satisfied its burden to invoke the application of the Second Offender Act. *Id*. The Court observed that although only a partial record was presented by the state to prove the prior conviction, an entire transcript "showing all the circumstances and conditions surrounding that conviction" was not required. *Id*. Moreover, the Court held that the defendant was not entitled to object to the admission of his prior conviction for enhancement purposes because he had failed to take "timely advantage of the various remedies provided to set aside the judgment for invalidities not apparent on the face of the judgment." *Id*. Finally, the Court noted that the defendant never claimed that his plea to the earlier charge was involuntary or otherwise violated his constitutional rights. *Id*. at 603. Instead, the defendant merely complained that the record was insufficient to show that the plea had a factual basis, was voluntary, that he understood the consequences of his plea, and that he waived his right to trial. *Id*. Therefore, the Court concluded, the defendant must lose for substantive and procedural reasons. *Id*.

Although *Quinn* involved the application of the Second Offender Act rather than the sentencing enhancement provisions of § 577.023, this Court's reasoning in rejecting the defendant's challenge in *Quinn* applies with equal force in Appellant's case. Like the record presented of the *Quinn* defendant's prior guilty plea, the records presented in Appellant's case demonstrating that he had pleaded guilty to other intoxication-related traffic offenses did not show "all the circumstances and conditions surrounding" the previous convictions. *Quinn*, 594 S.W.2d at 602; (Tr. 23-27; L.F. 24, 36-38, 55). But a "complete showing" is unnecessary. *Quinn*, 564 S.W.2d at 602. The records presented by the State were facially valid and admitted without objection (Tr. 25-32). Those court records, which indicated that

Appellant had three prior convictions for intoxication-related traffic offenses, were sufficient for the plea court to find that Appellant qualified as an aggravated offender.

Furthermore, like in *Quinn*, there is no evidence that Appellant took timely advantage of the remedies available to set aside his prior guilty pleas for the failures he now alleges were present in each of the plea colloquies. Instead, it appears that Appellant accepted the validity of the pleas and paid the fines, completed treatment programs and probation, submitted to house arrest, and performed community service as required (L.F. 22-26, 39-42, 47-51). Now, faced with a possible felony charge for his fourth DWI, he claims that the previous guilty pleas were invalid because the plea courts did not conduct the proper colloquy (L.F. 56-58). Because there is no patent invalidity in the records presented by the State and because Appellant failed to timely avail himself of any remedy to expose the recently-alleged and heretofore unknown invalidities, he should not now be permitted to void his prior pleas for purposes of qualifying him as an aggravated offender. *Quinn*, 594 S.W.2d at 602-03.

Moreover, Appellant, like the defendant in *Quinn*, does not argue that his prior guilty pleas were actually involuntary. He claims that his affidavit "essentially reflect[ed] that his pleas were 'involuntary or otherwise violative of his constitutional rights.'" App. Br. at 45. But in fact, Appellant's affidavit simply states that each of the judges who accepted his prior guilty pleas failed to adequately inform him about various trial rights or inquire whether his plea was the product of threats or coercion (L.F. 56-58). At no point does Appellant allege that his plea *actually was* involuntary or that he was unaware of each of the rights the judges all failed to explain (LF. 56-58). Under *Quinn*, Appellant must lose his point "for procedural

and substantive reasons." 594 S.W.2d at 603. The court did not err in sentencing Appellant as an aggravated offender for the class C felony of DWI.

2. The State proved beyond a reasonable doubt that Appellant pleaded guilty to or was found guilty of driving while intoxicated on January 30, 1992.

To prove one of the three prior offenses, the prosecutor offered State's Exhibit 3, which alleged the following:

> that on or about January the 30th, 1992, the defendant pleaded guilty to or was found guilty of Driving While Intoxicated for events occurring October the 20th, 1991, in the Circuit Court of Clay County, Liberty, Missouri.

(Tr. 25-26). State's Exhibit 3 and Defendant's Exhibit 6 do not show whether appellant pleaded guilty or not guilty (L.F. 55). There is an "X" next to "court" but no "X" next to the line indicating that the court "finds guilty" (L.F. 55). The exhibit does show, however, that Appellant received a suspended imposition of sentence and was placed on probation for two years (L.F. 50-51, 55). The exhibit also shows that the court ordered that Appellant pay $35 in court costs (L.F. 55). The exhibit shows that Appellant was represented by attorney James Brown during the proceeding (L.F. 47, 55). The exhibit shows that Appellant successfully completed his probation on January 20, 1994 (L.F. 47-48). In finding that the State proved the conviction beyond a reasonable doubt, the court stated that "[t]he law does not allow probation unless and until a defendant has either been found guilty or pleaded guilty" (L.F. 4).

Appellant argues that because the box next to "find guilty" was left unchecked, there is a "rebuttable presumption that the court failed to request a guilty plea and failed to make a finding of guilt[]" so the trial court was not authorized to sentence him to a suspended imposition of sentence and two years of probation. App. Br. 52. Appellant does not cite any authority in support of the existence of this "rebuttable presumption," founded solely upon speculation not apparent on the face of the record.

Appellant was represented by counsel during the proceeding, a fact he does not deny. Appellant asks this Court to assume that defense counsel, James Brown, a member of the same firm representing Appellant in the present action, stood by and allowed the trial court to sentence his client without any finding of guilt or a guilty plea. As the prosecutor argued to the plea court, "[i]t is highly doubtful that any attorney would stand by and allow a court to impose a form of punishment on his client without a finding of guilty by that court" (L.F. 64). In response, Appellant argues that it was not defense counsel's responsibility to make sure the proper procedures were followed. App. Br. at 52. This argument misses the point. Defense counsel's apparent silence is notable not because he was necessarily legally or ethically responsible for speaking up (although permitting one's client to be sentenced in the absence of a guilty finding would seem to be remarkably poor lawyering), but rather because it tends to show that there was, in fact, a guilty finding that simply was not fully recorded on the worksheet.

Additionally, the format of the computer-generated form and the placement of the markings supports the inference that a guilty finding was made. On the sheet, six possible dispositions are listed which may be the result of "Court" action (L.F. 55). The fifth

disposition, "finds guilty and sets. . .," not only has a line that may be marked, but several subparts that may also be selected (L.F. 55). Here, one of the subparts, "Court Costs of $35.00" is marked with an "X." (L.F. 55). Because the selected disposition necessarily follows from "Court finds guilty and sets," it may reasonably be inferred that the court did find Appellant guilty. The court's failure to check the first box is irrelevant given the specific instruction that court costs were to be set at $35.00, a selection that may be made only if the defendant is found guilty (L.F. 55).

Thus, the record does not support a presumption that there was no finding of guilt or plea of guilty as Appellant argues. What likely happened was that there was an oral pronouncement by the court of Appellant's guilt and sentence, but the proper line did not get marked on the written embodiment of the oral finding of guilt and sentence (L.F. 55). The legal force attached to a judgment comes from the court's judicial act, not from a clerical entry in the record. *State v. Johnson*, 220 S.W.3d 377, 384 (Mo. App. E.D. 2007). Thus, the failure to accurately memorialize the trial court's judgment as announced in open court is a clerical error. *Id*. Had either party noticed this clerical error back in 1992, the court could have corrected it *nunc pro tunc*, which is a tool that can be used to make the record conform to what actually occurred and may be used when there is a clerical error in the circuit court's records. *State v. Carasco*, 877 S.W.2d 115, 117 (Mo. banc 1994). An uncorrected clerical error in the written record should not preclude the State from using this prior intoxication-related traffic offense to prove that Appellant is an aggravated offender.

By presenting evidence that Appellant had received a suspended imposition of sentence, was required to pay court costs of $35.00, was put on probation, and successfully

completed probation, the State proved beyond a reasonable doubt that on January 30, 1992, Appellant pleaded guilty to, or was found guilty of, driving while intoxicated for events occurring on October 20, 1991, in the Circuit Court of Clay County. The plea court did not err in relying on this conviction in its finding that Appellant was an aggravated offender.

CONCLUSION

Appellant's claims should be dismissed as unreviewable on direct appeal without consideration of the merits. On the merits, the plea court did not commit reversible error in this case. Appellant's conviction and sentence 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 8,917 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 6th day of April, 2009, to:

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APPENDIX