

IN THE  
MISSOURI SUPREME COURT

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LINN HOSKINS, )  
 )  
 Appellant, )  
 )  
 vs. ) No. SC 90695  
 )  
 STATE OF MISSOURI, )  
 )  
 Respondent. )

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APPEAL TO THE MISSOURI SUPREME COURT  
FROM THE CIRCUIT COURT OF LIVINGSTON COUNTY, MISSOURI  
FORTY-THIRD JUDICIAL CIRCUIT, DIVISION TWO  
THE HONORABLE STEPHEN K. GRIFFIN, JUDGE

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APPELLANT'S SUBSTITUTE BRIEF

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## **JURISDICTIONAL STATEMENT**

This is an appeal from the denial of appellant's motion for postconviction relief, without an evidentiary hearing, by the Honorable Stephen K. Griffin, Judge of Division 2 of the Circuit Court of Livingston County. Appellant sought to vacate his convictions of burglary in the first degree, Section 569.160,<sup>1</sup> burglary in the second degree, Section 569.170, and two counts of stealing, Section 570.030, for which appellant received sentences of fifteen years, seven years, and seven years, all to run consecutively, and another sentence of seven years, to run concurrently. The Western District Court of Appeals affirmed the motion court's ruling, and this Court granted transfer after opinion. This Court has jurisdiction pursuant to Rule 83.04 and Article V, Section 9, Mo. Const. (as amended 1976).

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<sup>1</sup> Statutory citations are to RSMo 2000.

## **STATEMENT OF FACTS**

Appellant was charged with burglary in the first degree, and pleaded guilty on May 9, 2007 (L.F. 8-16). The court found that the plea was voluntary and that there was a sufficient factual basis (L.F. 18-29). The court sentenced appellant to fifteen years imprisonment, suspended execution of the sentence, and placed appellant on five years probation (L.F. 32-37).

Appellant was charged with burglary in the second degree and stealing, and pleaded guilty on July 18, 2007 (L.F. 50-59). The court found that the plea was voluntary and that there was a sufficient factual basis (L.F. 62-70). The prosecutor said that if appellant did not make agreed-upon restitution, then the two seven-year sentences should run consecutively (L.F. 60-61). The court sentenced appellant to seven years for each count, suspended execution of the sentence, and placed appellant on five years probation (L.F. 70-75). The court did not specify in imposing sentence that the sentences would run consecutively, nor did it mention this in the judgment and sentence (L.F. 70-75).

Appellant was charged in a third case with burglary in the second degree and stealing (L.F. 86-87). The state dismissed the burglary charge, and appellant pleaded guilty on April 1, 2008, to stealing (L.F. 88-95, 97-100). At the same time, the court revoked appellant's probation in the earlier two cases (L.F. 114).

The court found that the plea was voluntary and that there was a sufficient factual basis (L.F. 103-113). The court imposed a sentence of seven years (L.F.

93-95). The court executed the earlier fifteen-year sentence and ordered it to run concurrently with the seven (L.F. 114).

Discussion then turned to the two seven year sentences from the second guilty plea. The prosecutor indicated that he had told defense counsel in a letter that “I wasn’t going to ... jump up and down and request that the two sevens be ran [sic] consecutive.” (L.F. 118). But the prosecutor said he would not be able to abide by that, because of a recent escape attempt from the jail by appellant, which involved a fake gun made from papier-mâché (L.F. 119-120). The prosecutor requested that the two seven-year sentences be run consecutively to each other and to the fifteen-year sentence, for a total of twenty-nine years (L.F. 121).

The court asked, “is the state in a position to enter an agreement not to file any charges based on the two consecutive sentences then on that?” (L.F. 122). The prosecutor responded, “if the Court imposed the sentences consecutive, I will not file charges against Mr. Hoskins for the attempted escape, Your Honor.” (L.F. 122). The court then addressed appellant: “Do you understand that? Does that sound like a fair resolution then?” (L.F. 122). Appellant replied, “yes.” (L.F. 122). The court then executed the two seven-year sentences from the second guilty plea, and ordered them to run consecutively to each other and consecutively to the fifteen-year sentence, for a total of twenty-nine years (L.F. 122-123).

Appellant filed his *pro se* motion for postconviction relief on April 21, 2008 (L.F. 130). Counsel was appointed, and filed an amended motion on July 31, 2008 (L.F. 137-142). The motion alleged only that appellant’s right to due process

of law was violated when the sentencing court engaged in plea negotiations in violation of Missouri Supreme Court Rule 24.02 (L.F. 138-141).

The Honorable Stephen K. Griffin entered findings of fact and conclusions of law on November 12, 2008 (L.F. 143-145). The court found that “The plea agreement regarding Defendant’s cases was presented to the Court, the Court did not negotiate the terms, or have any involvement in the negotiation, of the plea agreement.” (L.F. 145).

Appellant appealed to the Missouri Court of Appeals, Western District (L.F. 147). On December 22, 2009, the Court of Appeals affirmed. *Hoskins v. State*, 2009 WL 4907558 (Mo. App., W.D., 2009). This Court granted appellant’s transfer application.

## POINT RELIED ON

The motion court plainly erred in denying appellant's motion for postconviction relief, because the sentencing court did not have the statutory authority to run appellant's sentences from the first two guilty pleas consecutively, in violation of Sections 558.026 and 559.036, Rule 29.09, and appellant's right to due process of law, guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that if the court were going to run the sentences consecutively, it had to do so at the time of imposition of sentence, at the oral pronouncement, and could not do so at the time of execution of the sentences, even though the execution was originally suspended. This error has caused a miscarriage of justice because appellant is serving twenty-nine years although he could only be lawfully sentenced to fifteen years.

*State ex rel. Poucher v. Vincent*, 258 S.W.3d 62 (Mo. banc 2008);

*State ex rel. Zahnd v. Shafer*, 276 S.W.3d 368 (Mo. App., W.D. 2009);

*State ex rel. Zinna v. Steele*, 301 S.W.3d 510 (Mo. banc 2010);

*State v. Dailey*, 53 S.W.3d 580 (Mo. App., W.D. 2001);

U.S. Const., Amend. XIV;

Mo. Const., Art. I, Sec. 10;

Sections 557.011, 558.026 and 559.036; and

Rules 24.035, 27.26, 29.09, 29.15, 30.20 and 84.13.

## ARGUMENT

The motion court plainly erred in denying appellant's motion for postconviction relief, because the sentencing court did not have the statutory authority to run appellant's sentences from the first two guilty pleas consecutively, in violation of Sections 558.026 and 559.036, Rule 29.09, and appellant's right to due process of law, guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that if the court were going to run the sentences consecutively, it had to do so at the time of imposition of sentence, at the oral pronouncement, and could not do so at the time of execution of the sentences, even though the execution was originally suspended. This error has caused a miscarriage of justice because appellant is serving twenty-nine years although he could only be lawfully sentenced to fifteen years.

### *Standard of review*

This argument was not included in appellant's amended 29.15 motion. Normally, claims that have not been presented to the motion court cannot be raised for the first time on appeal. *Amrine v. State*, 785 S.W.2d 531, 535 (Mo. banc 1990). Appellant requests plain error review under Rules 30.20 and 84.13(c) given the unfairness of the sentence, which the sentencing court did not have authority to impose. As whether plain error review continues to be available from

a postconviction relief action is one of the issues which this Court took transfer to decide, this will be discussed further below.

*The sentences*

Guilty Plea (1): Appellant pleaded guilty to burglary in the first degree (L.F. 8-16). The court sentenced appellant to fifteen years imprisonment, suspended execution of the sentence, and placed appellant on five years probation (L.F. 32-37).

Guilty Plea (2): Appellant pleaded guilty to burglary in the second degree and stealing (L.F. 50-59). The prosecutor said in reciting the plea bargain that if appellant did not make agreed upon restitution, then the two seven-year sentences would run consecutively (L.F. 60-61). The court sentenced appellant to seven years for each count, suspended execution of the sentence, and placed appellant on five years probation (L.F. 70-75). The court did not specify in imposing sentence that the sentences would run consecutively, nor did it mention this in the judgment and sentence (L.F. 70-75). The court did not mention the fifteen years imposed in Guilty Plea (1).

Guilty Plea (3) Appellant was charged in a third case with burglary in the second degree and stealing (L.F. 86-87). The state dismissed the burglary, and appellant pleaded guilty only to stealing (L.F. 88-95, 97-100). At the same time, the court revoked appellant's probation in Guilty Plea (1) and Guilty Plea (2) (L.F. 114).

The court imposed a sentence of seven years for Guilty Plea (3) (L.F. 93-95). The court executed the fifteen-year sentence from Guilty Plea (1) and ordered it run concurrently with the seven-year sentence from Guilty Plea (3) (L.F. 114). The prosecutor requested, because of an escape attempt, that the two seven-year sentences from Guilty Plea (2) be run consecutively to each other and consecutively to the fifteen-year sentence, for a total of twenty-nine years (L.F. 121).

The State agreed not to file charges on the attempted escape if the seven-year sentences were run consecutively, and appellant said he understood (L.F. 122). The court then executed the two seven-year sentences from Guilty Plea (2), ordered them to run consecutively to each other and consecutively to the fifteen-year sentence from Guilty Plea (1), for a total of twenty-nine years (L.F. 122-123).

***The law that applies***

Section 558.026 provides in pertinent part:

1. Multiple sentences of imprisonment shall run concurrently unless the court specifies that they shall run consecutively ... .
2. If a person who is on probation, parole or conditional release is sentenced to a term of imprisonment for an offense committed after the granting of probation or parole or after the start of his conditional release term, the court shall direct the manner in which the sentence or sentences

imposed by the court shall run with respect to any resulting probation, parole or conditional release revocation term or terms. ...

Section 559.036, RSMo Cum. Supp. 2005, provides in pertinent part:

3. If the defendant violates a condition of probation at any time prior to the expiration or termination of the probation term, the court may ... revoke probation and order that any sentence previously imposed be executed. If imposition of sentence was suspended, the court may revoke probation and impose any sentence available under section 557.011 ...

Rule 29.09 provides:

The court, when pronouncing sentence, shall state whether the sentence shall run consecutively to or concurrently with sentences on one or more offenses for which defendant has been previously sentenced. If the court fails to do so at the time of pronouncing the sentences, the respective sentences shall run concurrently.

(emphasis added).

### ***Analysis***

Two principles can be gleaned from the Rule and statutes cited above and from the relevant cases which discuss them:

- *A judge must specify that a sentence is to run consecutively when it is imposed in open court for it to do so.*

- *A judge cannot change the sentence when it is executed.*

*Specify consecutive time*

In *State v. Dailey*, 53 S.W.3d 580 (Mo. App., W.D. 2001), the court failed to announce at its oral pronouncement of sentence whether the sentence was to run consecutively or concurrently with any parole revocation terms. In its written judgment, it ordered that the sentences run consecutively. 53 S.W.3d at 583.

The *Dailey* Court cited Section 558.026.2, and noted that nothing in that section says that the circuit court's failure to announce whether the sentence runs concurrently or consecutively with future possible parole revocations terms means that the sentence is automatically concurrent to any prospective prison term. *Id.* at 584. "Indeed by mandating that the circuit court 'shall direct,' Section 558.026.2 requires the circuit court to determine whether its sentence will run concurrently or consecutively in relation 'to any resulting probation, parole or conditional release revocation term or terms.'" *Id.* The Court found that the circuit court did not direct how Dailey's sentence was to run in relation to any resulting parole revocation term when it orally pronounced Dailey's sentence, therefore it could not do so in the written judgment and sentence. *Id.*

This error can be corrected in a Rule 24.035 motion. In *Rupert v. State*, 250 S.W.3d 442 (Mo. App., E.D. 2008), the defendant pleaded guilty to four counts of statutory rape. Although the judge did not specify at the sentencing hearing, he put in the written judgment and sentence that the sentences were to run consecutively. 250 S.W.3d at 445. The defendant filed a motion to vacate under Rule 24.035, and the motion court denied it. *Id.*

The Eastern District Court of Appeals reversed. The Court held that because the record was silent at oral pronouncement of sentence as to whether the defendant's multiple sentences were to be served concurrently or consecutively, the sentences must run concurrently by operation of Section 558.026.1. *Id.* at 449.

*Change the sentence after imposed*

*State ex rel. Poucher v. Vincent*, 258 S.W.3d 62 (Mo. banc 2008), involved a petition for writ of mandamus. Poucher had pleaded guilty and been sentenced to consecutive terms on two of the counts, placed on probation, and the execution of his sentence was suspended. 258 S.W.3d at 64. When he violated his probation and appeared to be revoked, the court ordered the sentences executed, but ordered them run concurrently instead of consecutively. *Id.*

While Poucher ultimately prevailed for reasons not relevant to this analysis, this Court noted that the trial court could not at the time it executed the sentence order them to run concurrently. *Id.* at 65. "This was error, because respondent had authority only to execute the sentence it previously had imposed, not to impose a new sentence." *Id.* The Court distinguished the situation from the suspended imposition of sentence, where at a probation revocation hearing, the trial court would have authority to impose any sentence authorized by law. *Id.*, n.2.

The Western District relied on *Poucher* in *State ex rel. Zahnd v. Shafer*, 276 S.W.3d 368 (Mo. App., W.D. 2009). In that case, the State petitioned for a

writ of mandamus when the trial court imposed a six-year sentence when revoking Milissa Gabauer's probation, despite the fact that it had sentenced her to twelve years, suspending execution of sentence, when it originally imposed sentence. *Id.* The Court of Appeals agreed with the State, and made its preliminary writ absolute. *Id.* The Court noted that this Court's decision in *Poucher* makes clear that a trial court generally has no authority to alter the prison sentences previously imposed in a judgment of conviction, even though execution of the sentences was suspended. *Id.* Also, in *State ex rel. Scroggins v. Kellogg*, 2010 WL 771240 (Mo. App., W.D., filed March 9, 2010), the Court held that Rule 29.15 merely permits the court to impose a lesser punishment than that recommended by the jury. Once the court enters judgment, its judgment is final and cannot later be changed. The court did not have authority to act. *See also, Hastings v. State*, 2010 WL 1752178 (Mo. App., W.D., filed May 4, 2010).

In its brief in the Court of Appeals, the State disagreed with the proposition that appellant's two seven year sentences could not run consecutively to the fifteen year sentence, and cited Section 558.026.2. But Section 558.026.2 not only does not control appellant's situation, it does not even apply. As the State acknowledged, 558.026.2 applies to a sentence to a term of imprisonment for an offense committed *after* the granting of probation or parole.

The State asserted that the second case, for which the two seven year sentences were imposed, occurred after the first case, the burglary for which the fifteen year sentence was imposed. But as discussed above, the "second" case was

charged as having occurred between October 2006 and March 2007 (L.F. 50). The “first” case was charged as having occurred in January 2007 (L.F. 8). The case the State cited to support its position, *Coker v. State*, 995 S.W.2d 7 (Mo. App., E.D. 1999), does not apply. *Neither* of appellant’s first two cases were committed *after* the start of the probationary period of the *other*.

When the trial court in appellant’s case sentenced him to two terms of seven years imprisonment in Guilty Plea (2), it did not specify that they were to run consecutively – either to each other, or to the fifteen years it had previously imposed in Guilty Plea (1). Therefore, by operation of law, they had to run concurrently. And when the court then executed the sentences at the time of Guilty Plea (3), it did not have the power to change the terms of those sentences. The trial court could have run the seven year sentence imposed in Guilty Plea (3) consecutively, but it did not. That was the one sentence it ran concurrently.

***Plain error review is appropriate***

Rule 84.13(c) provides:

Plain errors affecting substantial rights may be considered on appeal, in the discretion of the court, though not raised or preserved, when the court finds that manifest injustice or miscarriage of justice has resulted therefrom.

Rule 84.13(c) has been invoked for plain error review in appeals in post-conviction proceedings. *McCoo v. State*, 844 S.W.2d 565, 568 (Mo. App., S.D. 1992). Former Rule 27.26(a) provided that the procedure before the trial court and

on appeal is governed by the Rules of Civil Procedure insofar as applicable.

Similarly, Rules 24.035(a) and 29.15(a) provide that the procedure before the trial court is governed by the Rules of Civil Procedure insofar as applicable. *McCoo, supra*. The Rules of Criminal Procedure also have a plain error rule. Rule 30.20 reads, in pertinent part:

... Whether briefed or not, plain errors affecting substantial rights may be considered in the discretion of the court when the court finds that manifest injustice or miscarriage of justice has resulted therefrom.

Thus, the Court can review here for plain error regardless of whether the applicable rule is 30.20 (criminal) or 84.13(c) (civil). *McCoo*, 844 S.W.2d at 568.

Applying these rules, appellate courts have found plain error review is available in appeals of postconviction cases under limited circumstances. *Searcy v. State*, 981 S.W.2d 596 (Mo. App., W.D. 1998) (plain error review granted where plea court lacked jurisdiction over the defendant as he had a charge for the same offense pending in another county); *McCoo v. State*, 844 S.W.2d 565, 568 (Mo. App., S.D. 1992) (court finds a manifest injustice and a miscarriage of justice where the circuit court denied relief in a post-conviction proceeding on the ground that the motion was untimely, when the record contained no support for that finding); *Ivy v. State*, 81 S.W.3d 199, 205 (Mo. App., W.D. 2002) (the motion court plainly erred in denying Ivy's motion for post-conviction relief because the sentencing court violated Ivy's rights to be free from double jeopardy when it

accepted his guilty pleas and sentenced him for both felony murder based on the predicate felony of unlawful use of weapon and for armed criminal action).

This is a case where the error is clear from the face of the record: a matter which went to the very authority of the sentencing court, and one which resulted in manifest injustice and a miscarriage of justice. Appellant requests plain error review.

In the Court of Appeals, the State argued that appellant was not entitled to plain error review because this is not a jurisdictional error, citing *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249 (Mo. banc 2009). But the question in plain error review is whether manifest injustice has resulted from a trial court's error. The plain error cases cited by appellant, *Searcy*, 981 S.W.2d 596, and *Ivy*, 81 S.W.3d 199, are jurisdictional in the same way that appellant's case is jurisdictional. They are double jeopardy cases, reversed on postconviction appeal. Double jeopardy goes to the very authority of a trial court to sentence. Here, appellant has challenged the very authority of the court to sentence him to consecutive terms of imprisonment rather than concurrent; the very authority of the court to imprison him for twenty-nine years rather than fifteen. As Judge Wolff noted in *J.C.W.*, "the authority of a court to render judgment in a particular case is, in actuality, the definition of subject matter jurisdiction." 275 S.W.3d at 254.

Furthermore, at the oral argument before the Court of Appeals, the State agreed that at least one of the seven-year sentences had to be run concurrently.

Appellant could have at most received a twenty-two year sentence instead of the twenty-nine years he is serving. But, the State argued, the Court of Appeals could not grant plain error review in a postconviction appeal. The Court of Appeals agreed, citing *Wyciskalla*, and held that this Court effectively overruled *Ivy* and *Searcy* in that case. *Hoskins*, slip op. at 3.

But this Court does not have to find appellant's claim to be a jurisdictional one in order to grant relief; it simply has to find a manifest injustice or miscarriage of justice. That is the standard for plain error review. If appellant could at most have received twenty-two years imprisonment, not twenty-nine (and appellant maintains his argument that he could at most have received fifteen), how then is this not a manifest injustice?

This Court's opinion in *State ex rel. Zinna v. Steele*, 301 S.W.3d 510 (Mo. banc 2010), involved a petition for writ of habeas corpus on the similar grounds that a sentence for possession of a controlled substance in a correctional facility was concurrent to an existing sentence where oral pronouncement of the sentences was silent on whether it was consecutive. This Court cited *Wyciskalla* for the proposition that such a claim of sentencing beyond the trial court's authority was not jurisdictional. *Steele*, 301 S.W.3d at 517. Yet the Court found that the imposition of a consecutive sentence in this circumstance, where not authorized by law, was not permitted "whatever label is applied." *Id.* This Court granted habeas relief.

Habeas relief lies only in limited circumstances, where it is not barred by failing to raise an issue in a timely postconviction case. *Id.* at 516. This issue is squarely before this Court in postconviction, albeit as plain error. It can be addressed in this case. There must be some remedy from an unlawful sentence.<sup>2</sup>

In its opinion, the Court of Appeals also held that appellant's failure to present the claim in his amended motion was intentional. *Hoskins*, slip op. at 5. The Court's opinion cited appellant's agreement to his sentence as a reason to deny his claim that the sentence was unlawful. Slip op. at 5. Yet guilty pleas are agreed to, sometimes involuntarily and unknowingly. A challenge to the involuntary and unknowing nature of the plea is the nature of a 24.035 postconviction action. A holding that appellant "did not present this claim in his motion because he believed that he was receiving a benefit" is unsupported by the record and a tautology besides.

Could appellant have agreed to an unlawful sentence? What if he had agreed to a fifty-year sentence for a class C felony? Surely no one would argue that this could not be challenged. His "agreement," whether knowing or otherwise, cannot control the remedy of a sentence not statutorily authorized.

Appellant is serving twenty-nine years imprisonment – a sentence imposed upon him by a court without authority to do so. The court could at most impose

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<sup>2</sup> If this Court feels it necessary to do so, appellant requests that this Court treat this action as a petition for writ of habeas corpus.

fifteen years, once it determined to run the seven year sentence from Guilty Plea (3) concurrently. If ever a postconviction appeal merited plain error review, it is this one. This error is plain and it results in a manifest injustice and miscarriage of justice. Appellant therefore respectfully requests that this Court reverse the motion court's denial of postconviction relief, vacate appellant's judgment and sentences, and remand for resentencing to fifteen years imprisonment.

## CONCLUSION

For the reasons presented, appellant respectfully requests that this Court reverse the motion court's denial of postconviction relief, vacate appellant's judgment and sentences, and remand for resentencing to fifteen years imprisonment.

Respectfully submitted,

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**Certificate of Compliance and Service**

I, Ellen H. Flottman, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 4,343 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a Symantec VirusScan program, which was updated in June, 2010. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this 4<sup>th</sup> day of June, 2010, to Richard A. Starnes, Assistant Attorney General, Criminal Appeals Division, P.O. Box 899, Jefferson City, Missouri, 65102.

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Ellen H. Flottman

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