

No. SC90695

In the
Missouri Supreme Court

LINN O. HOSKINS, III,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the Circuit Court of Livingston County
Forty-Third Judicial Circuit
The Honorable Stephen K. Griffin, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from the denial of a motion to vacate judgment and sentence under Supreme Court Rule 24.035 in the Circuit Court of Livingston County. Appellant did not seek to vacate any conviction, but sought to vacate his sentences for burglary in the second degree, § 569.170, RSMo 2000, and felony stealing, § 570.030, RSMo Cum. Supp. 2008, for which appellant was sentenced to consecutive terms of seven years in the custody of the Department of Corrections, to be served consecutively to sentences for other convictions.¹ The Missouri Court of Appeals, Western District, affirmed the denial of appellant's post-conviction motion. *Linn O. Hoskins, III v. State of Missouri*, WD70413 (Mo. App., W.D. Dec. 22, 2009). On April 20, 2010, this Court sustained appellant's application for transfer pursuant to Supreme Court Rule 83.04, and therefore has jurisdiction over this case. Article V, § 10, Missouri Constitution (as amended 1982).

¹Those other convictions were for one count of burglary in the first degree, § 569.160, RSMo 2000, and another count of felony stealing, § 570.030, RSMo Cum. Supp. 2008. While appellant claims in his jurisdictional statement that he sought to have all of these convictions vacated (App.Br. 4), appellant did not seek to have any of his convictions vacated at all, and his claims in his *pro se* motion, amended motion, and appeal all challenge only the consecutive sentences referenced above.

STATEMENT OF FACTS

Appellant, Linn O. Hoskins, III, was originally charged in the Circuit Court of Livingston County in two separate cases; one case charged him with one count of burglary in the first degree, and the other case charged him with one count of burglary in the second degree, one count of felony stealing, and one count of property damage in the first degree (L.F. 8, 50-51). Later, appellant was also charged in yet another case with second-degree burglary and felony stealing (L.F. 86-87). Appellant pled guilty to several of these charges before the Honorable Stephen K. Griffin (L.F. 16-31, 59-72, 97-125).

Appellant first pled guilty in the first-degree burglary case, appearing for that plea on May 9, 2007 (L.F. 16-31). In a plea petition and at the plea hearing, appellant admitted that, on January 26, 2007, he unlawfully entered 402 Market Street in Wheeling, Missouri, the home of his former roommate, Jessica Davis, with the intent to assault her, and that he actually pushed her once he got in the house and confronted her (L.F. 10, 22-25). The prosecutor stated that the evidence would show that appellant kicked in the door of the residence, came in, grabbed the victim, and threw her to the ground (L.F. 25). Appellant denied grabbing the victim and throwing her down, stating that he only pushed her, but admitted that the remaining facts were accurate (L.F. 26-27). The court accepted the plea, and, on June 15, 2007, sentenced appellant, pursuant to a plea agreement, to a suspended fifteen-year sentence and placed appellant on five years of probation (L.F. 17-18, 30, 36). During that sentencing hearing, the court was told that appellant had another felony case, which had been committed prior to this crime, pending in another division (L.F. 35).

On that other case, appellant appeared for a guilty plea to second-degree burglary and felony stealing on July 18, 2007 (L.F. 59-72). In his plea petition and testimony at the plea hearing, appellant admitted that, on December 30, 2006, he and a friend unlawfully entered an unlocked apartment at 501 South Second Street in Wheeling with the intent to steal and stole a television, a stereo, and a “bunch” of compact discs, with the total value of everything being over \$500 (L.F. 53, 66-67). The prosecutor added that there was evidence that appellant may have actually entered the apartment more than one time between October 15, 2006, and March 17, 2007, but that it was known that appellant entered at least once (L.F. 68). Appellant agreed that this was his understanding of the evidence (L.F. 68). The parties stated that the plea agreement was that appellant would be sentenced to seven-year sentences for those two crimes and that the State would dismiss the property damage count (L.F. 60-61). The prosecutor clarified that the State’s position was that those sentences would run concurrently if appellant paid restitution, but consecutively if he did not (L.F. 61). The court accepted the pleas and sentenced appellant to suspended seven-year sentences on each count and placed appellant on five years of probation (L.F. 70-71, 73-76). The court did not state, either in the oral or written judgment, whether those sentences would be concurrent or consecutive if appellant eventually had his probation revoked (L.F. 70-71, 73-76).

Appellant appeared before the court again on April 1, 2008, to plead guilty to the new charge of felony stealing of a motor vehicle (L.F. 97-125). At the beginning of the hearing, appellant’s counsel stated that the plea agreement was that the State would dismiss the burglary charge and would recommend a seven-year sentence to run concurrently to the

previously-imposed fifteen-year sentence in the first-degree burglary case, which would be executed as appellant's new plea also would result in the revocation of his probation (L.F. 98-99). The prosecutor agreed that this was the agreement, but that there was no agreement as to how the previously-imposed seven-year sentences would run for appellant's probation violation in the second-degree burglary and stealing case (L.F. 99). Appellant stated that this was the agreement, and he admitted that he violated his probation (L.F. 99).

In his plea petition and testimony, appellant admitted that he was out partying and driving around with two friends when they parked at the bottom of a hill leading up to the property of the victim, Larry Jones (L.F. 107-108). He testified that one of his friends walked up the hill and came back a few minutes later riding a Yamaha four-wheeler (L.F. 107). Appellant's friend told him that it belonged to his cousin, but appellant said, "I highly doubt that," and the friend admitted that he took it from the victim's barn (L.F. 108). Appellant, knowing it was stolen, took turns riding it until they parked it in a pasture and left it (L.F. 108-109). The prosecutor clarified that the four-wheeler was driven to the farm of the friend's grandfather in Carroll County and that there was substantial damage done to the victim's property (L.F. 110-111). The trial court accepted the plea, revoked appellant's probations, and sentenced appellant to seven years on the new crime to run concurrently with the fifteen-year sentence (L.F. 39-41, 93-95, 114-115).

The court then took up the issue of the other two seven-year sentences from appellant's other probation case (L.F. 115). After counsel argued for the sentences to be run concurrently to the rest of his sentences, the prosecutor advised the court that appellant had

been involved in an attempted escape from the jail (L.F. 116-119). Appellant and his cell mate had made a fake handgun out of papier-mâché and painted it with ink from pens (L.F. 119). Appellant and his accomplice identified the oldest guard as the weakest potential victim, and planned to make up a story to get him to let them out of their cell, subdue him, then use the fake gun to make the dispatchers up front let them out by threatening the life of the guard they would be holding hostage (L.F. 119-120). They actually attempted their plan, but the guard managed to shut the cell door after only appellant was outside, and, without the aid of his accomplice, appellant did not attack the victim (L.F. 120). Based on appellant's significant criminal history for his age and this plot, the prosecutor asked the court to run the seven-year sentences consecutively with each other and consecutively to the fifteen-year sentences (L.F. 120-121). The court then 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 stated that, if the court imposed the consecutive sentences, he would not file attempted escape charges (L.F. 122). The court then asked appellant, "Do you understand that? Does that sound like a fair resolution then?" and appellant stated, "Yes" (L.F. 122). Based on appellant's agreement, the court executed the two seven-year sentences to run consecutively to each other and consecutively to the fifteen-year sentence (L.F. 93-95, 122-123).

On April 21, 2008, appellant timely filed a *pro se* motion to vacate, set aside, or correct the judgment or sentence pursuant to Rule 24.035 (L.F. 130-136). Appointed counsel filed an amended motion, raising a single claim that the plea court erred by engaging in plea

negotiations with the parties during the final sentencing hearing (L.F. 137-142). Appellant did not raise any claim in his amended motion that the plea court had erred in executing his sentences consecutively to each other because the court had not stated those sentences were to be served consecutively when the sentences were imposed (L.F. 137-142). On November 12, 2008, the motion court entered findings of fact and conclusions of law denying appellant's motion without an evidentiary hearing (L.F. 143-145). This appeal followed.

ARGUMENT

Appellant is not entitled to relief on his claim (raised for the first time on appeal from the denial of post-conviction relief) that the plea court “plainly erred” in executing, following a probation violation, two previously-imposed seven-year sentences² consecutively to each other and to appellant’s fifteen-year sentence from another probation violation because appellant waived this claim in that he failed to raise this claim in the amended motion, the claim is not “jurisdictional,” and appellant waived any error in the sentences by affirmatively agreeing to the sentences. Moreover, even if appellant had not waived review of this claim, he would not have been entitled to all of his requested relief, as the court acted within its discretion in running appellant’s seven-year sentences consecutively to his fifteen-year sentence. Finally, to the extent that appellant’s sentences were erroneous, he can lawfully seek relief from those sentences in a state habeas proceeding.

Appellant claims that the motion court plainly erred in failing to grant relief on his claim, not raised in his amended motion, that the plea court acted outside of its authority in running his sentences following a probation violation on three different charges from two

²Respondent’s use of the term “seven-year sentences” refers to those sentences for which he was placed on probation in 2007, not the subsequent seven-year sentence he received in 2008 which resulted in the revocation of his terms of probation. As that seven-year sentence was explicitly run concurrently to the fifteen-year sentence, respondent’s use of the term “fifteen-year sentence” would include the 2008 sentence.

different cases consecutively to each other (App.Br. 9-20). He argues that the plea court only had the authority to run the sentences concurrently because the court had not announced that the sentences would run consecutively when he originally imposed the sentences (App.Br. 9-20). But because appellant's claim is not "jurisdictional," but a claim of mere error, appellant's failure to raise the claim in his amended motion and his affirmative agreement to the consecutive sentences prohibits relief for this claim raised for the first time on post-conviction appeal. Moreover, even if appellant had raised the claim, he would not have been entitled to all of his requested relief, as the court had the discretion to run appellant's seven-year sentences consecutively to his fifteen-year sentence. Finally, to the extent that appellant's sentences were erroneous, he can lawfully seek relief from those sentences in a state habeas proceeding.

A. Standard of Review

Generally, review of the denial of a motion for post-conviction relief is for clear error. *Dorsey v. State*, 115 S.W.3d 842, 844-45 (Mo. banc 2003); Supreme Court Rule 24.035(k). Here, however, appellant requests plain error review under Supreme Court Rule 84.13(c), as his claim was not raised in his amended motion. Under that rule, 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." Supreme Court Rule 84.13(c). There are two steps to such a review: first, this Court determines whether the lower court actually committed evident, obvious, and clear error that affected substantial rights; and second, this Court must determine whether the

evident, obvious, and clear error found resulted in manifest injustice or a miscarriage of justice. *Riddell v. Bell*, 262 S.W.3d 301, 304 (Mo.App., W.D. 2008).

B. Appellant Waived Review of this Claim

1. Appellant Failed to Raise this Claim in His Amended Motion

While appellant argues that his failure to raise this claim should simply be viewed as a lack of preservation for his claim, this failure actually precludes any review of this claim. In general, “[c]laims which were not 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). The effect of Rule 29.15(d), which addresses the contents of a post-conviction motion and requires an acknowledgment that the movant understands that any known claims are waived if not raised, is to bar all claims not included in a timely-filed pleading. *Burris v. State*, 164 S.W.3d 533, 535 (Mo.App., S.D. 2005). All of the districts of Missouri appellate courts recognize that claims that were not presented to the motion court cannot be raised on appeal, and the failure to include a post-conviction claim in an amended motion constitutes a waiver of that claim. *Spencer v. State*, 202 S.W.3d 723, 726 (Mo.App., S.D. 2006); *Francis v. State*, 183 S.W.3d 288, 298 (Mo.App., W.D. 2005); *Jameson v. State*, 125 S.W.3d 885, 890 n. 4 (Mo.App., E.D. 2004). Thus, because appellant failed to raise this claim, which was known to appellant prior to the filing of his amended motion and could have been raised in that motion, appellant waived this claim.

The language in the above opinions logically flows from the plain language of Rule 24.035. The rule places the burden on the movant to raise the claims to be reviewed by the

motion court and explicitly states that any claims are waived if not pled. Supreme Court Rule 24.035(a), (d). This waiver applies to the amended motion, as appointed counsel has the duty to raise any known claim not raised by the *pro se* motion. Supreme Court Rule 24.035(e). The movant's selection of claims limits the review the motion court can conduct, as the rule only permits findings of fact and conclusions of law to be issued on "all issues *presented*" and does not authorize the motion court to conduct an independent review of the record to discern potential errors of the plea court that were not raised in the pleadings. Supreme Court Rule 24.035(j) (emphasis added). Further, appellant's selection of claims also limits the review of the appellate courts. Under the rule, "[a]ppellate review of the trial court's action *on the motion filed under this Rule 24.035 shall be limited* to a determination of whether the findings and conclusions of the trial court are clearly erroneous." Supreme Court Rule 24.035(k)(emphasis added). Thus, under the plain language of the rule, if the movant does not raise a claim in his amended motion, the motion court has no authority to entertain it, and the appellate court has no authority to review it. Therefore, appellant's failure to raise his claim in his amended motion constituted a waiver of his claim, and this Court should not review that claim even for "plain error."

The conclusion that appellant cannot receive review of a claim not presented to the motion court is also consistent with the civil nature of a post-conviction proceeding. A Rule 24.035 post-conviction proceeding is a civil action, raising a collateral attack on the judgment in a criminal conviction. *In re Competency of Parkus*, 219 S.W.3d 250, 254 (Mo. banc 2007). A post-conviction proceeding is neither a substitute for a direct appeal nor a

second direct appeal. *Zink v. State*, 278 S.W.3d 170, 191 (Mo. banc 2009). Essentially, appellant is asking this Court to disregard these precedents and find that the post-conviction proceeding is a substitute for a direct appeal instead of the civil action that it is, as he seeks to: 1) have this Court review the action of the plea court, which is not the court being appealed from; and 2) have the motion court found to be in error for failing to consider claims not raised before it. This Court should not grant appellant's request. In a civil proceeding, claims must be raised by a petition which sets forth "a short and plain statement of the facts showing that the pleader is entitled to relief" and "a demand for judgment for the relief to which the plead claims to be entitled." Supreme Court Rule 55.05. The purpose of the pleading is to limit and define the issues to be tried and to put the opposing party on notice thereof. *Allen Quarries, Inc. v. Auge*, 244 S.W.3d 781, 783 (Mo.App., S.D. 2008); *City of St. Joseph v. St. Joseph Riverboat Partners*, 141 S.W.3d 513, 516 (Mo.App., W.D. 2004). "It is axiomatic that a trial court cannot grant judgment on a cause of action not pleaded." *Auge*, 244 S.W.3d at 783; *see also Brock v. Blackwood*, 143 S.W.3d 47, 60 (Mo.App., W.D. 2004).³ Because the post-conviction proceeding is civil in nature, the issues to be litigated in it are necessarily limited by the pleadings. It would have been improper for

³There is an exception in civil cases for an amendment by "implied consent" where the issue that was not included in the pleadings was actually tried. Supreme Court Rule 55.33(b). As there was no evidentiary hearing in this case, there was no "trial" at which this issue could have been litigated by implied consent. Thus, this exception is irrelevant to this case.

the motion court to consider issues not raised by the proceedings, as a “judgment is void to the extent it is based upon issues not raised by the pleadings.” *Auge*, 244 S.W.3d at 783; *see also State ex rel. Mohart v. Romano*, 924 S.W.3d 537, 540 (Mo.App., W.D. 1996). Therefore, because appellant’s post-conviction proceeding was not a substitute for a direct appeal, but instead was a civil action limited by the claims raised in his amended motion, the motion court did not have the authority to consider appellant’s claim raised for the first time here. Thus, the motion court did not “plainly err” in failing to consider this issue.

Appellant argues that this Court can engage in “plain error” review of this claim, citing *McCoo v. State*, 844 S.W.2d 565 (Mo.App., S.D. 1992), in which the motion court erroneously denied the movant’s claim as untimely. *Id.* at 567-68 (App.Br. 16-17). The Court of Appeals ruled that, even though the movant’s appellate brief did not include that claim on appeal, the Court could consider it under the plain error rule. *Id.* at 568. Such an application of the plain error rule is proper in such a case because it was the motion court which actually committed the error in the conduct of post-conviction proceedings. By necessity, an error that the motion court commits in its findings and conclusions is an error committed after the filing of the amended motion, and thus could not have been included in the amended motion. Such an error could not be deemed waived by failure to include it in the amended motion, as it was not “known to the movant” at the time of the filing of the amended motion. Supreme Court Rule 24.035(d),(e). Thus, *McCoo*’s application of the civil plain error rule was appropriate.

Appellant’s claim, however, is not one where the motion court erred in its conduct of the post-conviction proceeding, but where the original plea court allegedly erred in the criminal proceedings. Thus, under the plain language of the rule and general nature of a post-conviction action, the motion court had no authority to review a claim not presented to it for review. As this claim was never presented to the motion court, the motion court was never placed in the position of erring or not erring in its consideration of the claim. Thus, this is not the same type of error as that alleged in *McCoo*, and *McCoo* cannot support appellant’s request for “plain error” review.

2. Appellant’s Claim is Not “Jurisdictional”

Appellant cites two other cases in support of his claim that “plain error” review is available for claims not raised in the post-conviction motion (App.Br. 17-18). Those two cases, *Searcy v. State*, 981 S.W.2d 596 (Mo.App., W.D. 1998), and *Ivy v. State*, 81 S.W.3d 199 (Mo.App., W.D. 2002), are more similar to appellant’s case in that they permitted review on post-conviction appeal of alleged errors committed by the plea court. *Searcy*, 981 S.W.2d at 598; *Ivy*, 81 S.W.3d at 206. They do not, however, provide appellant relief. First, those cases do not account for the limitations on review of claims set forth in the post-conviction rules or the civil nature of post-conviction proceedings discussed above. Thus, respondent believes those cases are in conflict with the plain language of this Court’s rules,⁴ and should no longer be followed.

⁴As the legislature had also codified the substance of Rule 24.035, these cases also violate the plain language of that statute. § 547.360, RSMo 2000.

Second, in both of those cases, the Court of Appeals considered the claims raised by the movants for the first time on appeal because they were perceived to be “jurisdictional defects” due to double jeopardy violations. *Searcy*, 981 S.W.2d at 598-600 (appellant convicted in a county when another county had charged the defendant with the same crime first, giving the other county sole jurisdiction of the cause); *Ivy*, 81 S.W.3d at 205-08 (convictions for felony murder based on unlawful use of a weapon and for armed criminal action constituted double jeopardy). This Court has recently clarified what is meant by the term “jurisdiction.” In *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249 (Mo. banc 2009), the Court recognized that the concept of jurisdiction had been distorted, and held that there are only two kinds of jurisdiction in Missouri: personal jurisdiction and subject matter jurisdiction. *Id.* at 252. Personal jurisdiction refers simply to the power of the court to require a person to respond to a legal proceeding that may affect his rights or interests. *Id.* at 253. Thus, a court only lacks personal jurisdiction when a constitutional principle of due process bars it from affecting the interests of a particular person. *Id.* Subject matter jurisdiction refers to the court’s authority to render a judgment in a particular category of case, and, in Missouri, is governed solely by the state constitution, which gives circuit courts original jurisdiction “over *all* cases and matters, civil and criminal.” *Id.* (emphasis in original). While cases have claimed that other errors were “jurisdictional,” this Court described these as claims of “jurisdictional competence,” which do not question either personal or subject matter jurisdiction, but instead question “the court’s authority to render a

particular judgment in a particular case.” *Id.* at 254. In rejecting the concept that claims of “jurisdictional competence” are actually jurisdictional claims, this Court stated:

Elevating statutory restrictions to matters of “jurisdictional competence” erodes the constitutional boundary established by article V of the Missouri Constitution, as well as the separation of powers doctrine, and robs the concept of subject matter jurisdiction of the clarity that the constitution provides. If “jurisdictional competence” is recognized as a distinct concept under which a statute can restrict subject matter jurisdiction, the term creates a temptation for litigants to label every statutory restriction on claims for relief as a matter of jurisdictional competence. Accordingly, having fully considered the potential ill effects of recognizing a separate jurisdictional basis called jurisdictional competence, the courts of this state should confine their discussions of circuit court jurisdiction to constitutionally recognized doctrines of personal and subject matter jurisdiction; there is no third category of jurisdiction called “jurisdictional competence.”

Id. at 254.

Under a proper understanding of jurisdiction, appellant’s claim was not jurisdictional. The only two valid questions of jurisdiction show that the plea court had jurisdiction in this

case. The trial court had personal jurisdiction over appellant, as he committed crimes in Livingston County, and had subject matter jurisdiction, as appellant’s case was a criminal case. The issue appellant raises – whether the trial court violated § 558.026 and Rule 29.09 in running his sentences consecutively at the time the sentences were executed – does not call into question either subject matter or personal jurisdiction, but only questions the power of the plea court to render the particular judgment that was rendered in this case. Therefore, appellant’s claim, fitting within the concept of “jurisdictional competence,” is not actually a jurisdictional claim, but is merely a claim of error by the plea court. *See State ex rel. Zinna v. Steele*, 301 S.W.3d 510, 517 (Mo. banc 2010)(a claim that sentences were in excess of that authorized by law is not “jurisdictional” as defined by *Webb*). Thus, those cases that appellant relies on that allow this Court to consider claims in a post-conviction appeal not included in the pleadings below do not apply.⁵ Because appellant’s claim neither attacks an action of the motion court in the conduct of the post-conviction proceedings nor validly challenges the jurisdiction of the plea court, “plain error” review is not available for appellant’s claim.

⁵Even if *Searcy* and *Ivy* were still viable, this Court has noted that double jeopardy claims are an “anomaly” to the general rule that claims of trial court error are not “jurisdictional” and thus would still not aid appellant. *Feldhaus v. State*, 311 S.W.3d 802, 805 (Mo. banc 2010).

3. Appellant Affirmatively Agreed to the Consecutive Sentences

In addition to waiving his claim by failing to include it in his amended motion, appellant also waived any claim of error in the consecutive sentences by affirmatively agreeing to the sentences. After the prosecutor stated that he would not file charges in the attempted escape case if the seven-year probation violation sentences were run consecutively, the court asked appellant if that sounded like a “fair resolution,” and appellant said, “Yes” (L.F. 122). Thus, appellant, given an opportunity to object to the consecutive sentences, affirmatively waived such an objection and agreed to the consecutive sentences. Where a party states that it has no objection to an action by the court and affirmatively acts in a manner precluding a finding that the failure to object was inadvertent or negligent, a party waives any claim of error, and not even plain error review is available for such a claim on appeal. *State v. Mead*, 105 S.W.3d 552, 556 (Mo.App., W.D. 2003).⁶

Here, by not objecting and by affirmatively agreeing to the consecutive sentences, appellant secured a benefit for himself: charges would not be filed for his escape attempt. By affirmatively agreeing to the court’s action to achieve a benefit, then turning around and claiming error in that same action, appellant is engaging in sandbagging. Some of the effects of such sandbagging are present in this case: by renegeing on his agreement which enticed the prosecutor not to file attempted escape charges, appellant gets the benefit of the lapse of time. This could result in worsened memories of potential State’s witnesses and the loss or

⁶Appellant did not allege, either in his amended motion or on appeal, that appellant’s counsel was ineffective for failing to object to the sentences (L.F. 137-142; App.Br. 8-18).

spoliation of evidence of the attempted escape. Thus, the State (which would only be permitted to file such charges if appellant was granted relief for his claim, as only then would appellant have breached his plea agreement) would be at a disadvantage solely due to relying on appellant's affirmative waiver of any objection. Further, while not necessarily an issue in this case, allowing a defendant to seek relief for a sentence he specifically agreed to in exchange for the waiver of filing of charges could result in the lapse of the statute of limitations for certain crimes.⁷ Therefore, this Court should not encourage sandbagging by allowing a defendant to affirmatively agree to an action of the trial court in exchange for a benefit, and then fault the court for that agreed-to error in a post-conviction proceeding.

Appellant attempts to avoid the conclusion of waiver based on his express agreement to the sentence by first implying that the agreement may have been "involuntary and unknowing," noting that a "challenge to the involuntary and unknowing nature of the plea is the nature of a 24.035 action" (App.Br. 20). But, again, by failing to raise this claim in his amended motion, appellant failed to plead that his agreement to the sentence was unknowing and involuntary. Appellant bore the burden of pleading and then proving by a preponderance of the evidence that his agreement was unknowing and involuntary. Supreme Court Rule 24.035(d),(i). By failing to raise this issue, he failed to meet this burden.

⁷Due to the speed with which appellant filed his post-conviction motion and the motion court disposed of that motion, the three-year statute of limitations appears not to have lapsed, and therefore the prosecutor could file charges for, at the very least, attempted escape, for which appellant could be charged as a persistent felony offender.

Appellant also argues that he could not have agreed to a sentence “not statutorily authorized (App.Br. 20).” Appellant overlooks case law establishing that a defendant can waive review of any claim of error as part of a plea agreement. In *Jackson v. State*, 241 S.W.3d 831 (Mo.App., E.D. 2007), the Court of Appeals dismissed an appeal from the denial of a post-conviction motion because the movant had, as part of his plea agreement, waived his right to pursue post-conviction relief. *Id.* at 833-34. As that Court noted, a movant has the right to waive his right to post-conviction review in order to receive a benefit as part of a plea agreement. *Id.* at 833. By necessity, if a defendant can waive his ability to challenge any error in his plea or sentencing, he can waive the right to challenge specific errors by agreeing to them. Thus, appellant’s affirmative waiver of any objection to the consecutive sentences should prohibit review of that sentence for plea court error.

C. The Seven-Year Sentences Could Run Consecutively to the Fifteen-Year Sentences

Even if appellant had not waived his claim by agreeing to the sentences, his claim of error is not entirely correct. Appellant argues that the seven-year sentences must be run concurrently with each other and with the fifteen-year sentence for a total sentence of fifteen years (App.Br. 20-21). Appellant’s argument is incorrect. Appellant would not be entitled to a sentence totaling only fifteen years, as the trial court acted within its discretion by running the two seven-year sentences consecutively to his fifteen-year sentence. In his analysis, appellant cites three different provisions which govern the analysis in this case:

§ 558.026.1, § 558.026.2, and Rule 29.09.⁸ Section 558.026.1 requires multiple sentences to run concurrently unless the court specifies that they are to run consecutively, and Rule 29.09 requires the court to state whether the sentences are concurrent or consecutive at the time of “pronouncing the sentences.” § 558.026.1, RSMo 2000; Supreme Court Rule 29.09.

These two provisions, however, did not require the plea court to state whether or not those seven-year sentences were to run consecutively to the fifteen-year sentence. The Court of Appeals correctly analyzed the application of these statutes in *State v. Dailey*, 53 S.W.3d 580 (Mo.App., W.D. 2001). In that case, the defendant was on parole from a previous sentence at the time the defendant was sentenced on a new offense. The Court of Appeals stated that § 558.026.1 and Rule 29.09 “apply only when a court can impose multiple prison sentences.” *Id.* at 583-84. Thus, the Court concluded that, because Dailey was on parole and not serving a sentence at the time the circuit court entered its judgment following a later conviction, neither § 558.026.1 nor Rule 29.09 required the court to determine whether the latter sentence was concurrent or consecutive to the sentence for which he was on parole. *Id.* at 584. That same logic applies here. Because appellant was not actually serving the fifteen-year sentence at the time the seven-year sentences were pronounced, but was on probation,

⁸Appellant also cites to § 559.036, which permits the trial court to revoke probation and execute any previously imposed sentence. § 559.036, RSMo Cum. Supp. 2005. Respondent does not believe this section adds anything of importance to the analysis, as the section does not deal with the imposition or execution of concurrent or consecutive sentences.

there was no sentence actually being served to which the seven-year sentences could be run consecutively. Therefore § 558.026.1 and Rule 29.09 do not apply.

Appellant, citing *Dailey*, apparently argues that § 558.026.2 requires the seven-year sentences to be concurrent to the fifteen-year sentence (App.Br. 11-13).⁹ But the plain language of that section shows that it did not apply to appellant's sentences. Section 558.026.2 states:

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.

§ 558.026.2, RSMo 2000 (emphasis added).

Here, the burglary and stealing for which appellant received his seven-year sentences were committed on December 30, 2006, and he was sentenced and placed on probation for those offenses on July 18, 2007 (L.F. 30, 36). Appellant committed the first-degree burglary

⁹Oddly, even though appellant quotes § 558.026.2 and cites to *Dailey*'s use of that section in arguing that the court erred (App.Br. 11-13), appellant later argues that this section "not only does not control appellant's situation, it does not even apply" (App.Br. 15). For the sake of clarification, respondent has included this analysis to show that it does not apply.

on January 26, 2007, and was sentenced and placed on probation for that offense on June 15, 2007 (L.F. 53, 66-67, 70-71, 73-76). Thus, the second-degree burglary/stealing offense—the second case on which appellant was sentenced—was not committed after the granting of probation in the first-degree burglary case; it was actually committed before the first-degree burglary was committed and well before he was given probation in the first-degree burglary case (L.F. 10, 22-25, 35, 53, 66-67). Where language in a criminal statute is unambiguous, it is given its plain and ordinary meaning. *State v. Cloyd*, 238 S.W.3d 183, 186 (Mo.App., W.D. 2007). Because, by its very language, § 558.026.2 only applies when the subsequent crime is committed after the defendant is already on probation, and appellant was not yet on probation when he committed either the first-degree burglary or the second-degree burglary, this section did not require the plea court to specify that the seven-year sentences would run consecutively to the fifteen-year sentence in this case.

Because none of the statutory provisions applied to the situation present in this case—where the defendant was given probation in two different cases which occurred before the defendant was placed on probation for either case—the plea court could only make that decision when it was required to be made: when the defendant was actually going to be serving his sentences. The Court of Appeals has concluded that it is within the trial court’s discretion to decide to run a previously imposed sentence following a probation revocation in one case consecutively to sentences pronounced following probation revocation in other cases at the time the sentences are executed. *See Coker v. State*, 995 S.W.2d 7, 10 (Mo.App., E.D. 1999)(where the defendant had one two-year SES and two SIS probations revoked, the

court had discretion to execute the two-year SES consecutively to the new sentences in the SIS cases). The same discretion should apply here. Such a conclusion in favor of trial court discretion furthers the purposes of probation by allowing the decision as to whether the sentences should run concurrently or consecutively to be based on appellant's conduct while on probation. Therefore, the court did not violate any statute in running appellant's seven-year sentences consecutively to his fifteen-year sentence, and should be deemed to have acted within its discretion in doing so.

D. Appellant Apparently Has an Available Lawful Remedy for Any Error

While the plea court's execution of the fifteen-year sentence consecutively to the two seven-year sentences did not run afoul of the relevant statutes, it appears that executing the two seven-year sentences consecutively to each other did violate those statutes. Because the court did not pronounce that the two seven-year sentences were to be served consecutively to each other at the time they were imposed (i.e. "pronounced")—at the original sentencing proceeding—by operation of § 558.026.1 and Rule 29.09, the court's lack of declaration meant that the sentences had to be imposed concurrently (L.F. 70-71, 73-76). The court did not have the authority to change the original "pronouncement" at the time it executed the sentences. *See State ex rel. Poucher v. Vincent*, 258 S.W.3d 62, 65 (Mo. banc 2008)(it was error for the sentencing court to change consecutive sentences when imposed to concurrent sentences when executed, as the court only had the authority to execute the previously imposed sentence, not impose a new sentence). The fact that the plea court erred in sentencing, however, does not require this Court to disregard the plain language of Rule

24.035 and § 547.360 or the civil nature of a Rule 24.035 proceeding to grant appellant relief in this appeal, as appellant appears to have an adequate remedy in state habeas that would not violate the law governing post-conviction proceedings.

In *State ex rel. Zinna v. Steele*, this Court held that, where a defendant receives a sentence in excess of that allowed by law, relief in habeas corpus is available. *Zinna*, 301 S.W.3d at 516-17. This is true even if the habeas petitioner failed to raise the sentencing claim in a timely Rule 24.035 motion. *Id.* Thus, appellant appears to have a viable claim under state habeas to receive relief from the erroneous sentence. Further, appellant suffers no undue prejudice in having to wait for relief in a habeas proceeding. Appellant himself concedes that he is lawfully serving a fifteen-year sentence; that sentence would still be in effect even if appellant received habeas relief on this claim. Thus, requiring appellant to properly pursue habeas relief would not improperly extend his imprisonment.

On the other hand, granting appellant's relief in this appeal would do great harm to the post-conviction scheme set out under Rule 24.035. A decision in appellant's favor would transform post-conviction motions into second or substitute direct appeals. Motion courts, in violation of the law governing post-conviction proceedings, would be forced to review the full record of every criminal case to seek out errors not presented to it by the post-conviction movant. Appellate courts would also violate the plain language of the law to review additional claims not presented to the motion court that were not discovered by the motion court. Appellant's proposal of "plain error" review of claims not raised would create judicial uncertainty as to the trust that they could place in this Court's rules, as appellant's argument

essentially states that he is not bound to follow those rules. Thus, the balancing of interests of the minor inconvenience to appellant to have to properly file a state habeas proceeding versus the harmful effects to the criminal justice system should this Court allow new claims to be raised on appeal from post-convictions proceedings weighs heavily in favor of denying appellant's claim in this appeal.

Appellant, apparently recognizing that state habeas may provide a more appropriate avenue for the relief he seeks, asks this Court to “treat this action as a petition for writ of habeas corpus” (App.Br. 20). This Court should not accept appellant's invitation. This Court rejected a similar invitation in *Brown v. State*, 66 S.W.3d 721 (Mo. banc 2002), in an appeal from the denial of a Rule 29.07(d) motion, as follows:

While in rare circumstances this Court has exercised its discretion to treat an improperly filed appeal from denial of a writ of habeas corpus or an improperly labeled writ as if it were a petition for a writ of habeas corpus filed in the appellate court, none of those circumstances are present here. *See, e.g., Jones v. State*, 471 S.W.2d 166, 168-69 (Mo. banc 1971) (where trial court treated movant's motion under Rule 27.26 as a petition for habeas and denied relief, but petitioner erroneously filed an appeal rather than a new petition in this Court, Court would treat appeal as if it were a new petition for writ); *State ex rel. Haley v. Groose*, 873 S.W.2d 221, 223 (Mo. banc 1994) (“Where

appropriate, courts may treat a petition for habeas corpus as a petition for mandamus.”) Here, as noted, the trial court did not treat the Rule 29.07(d) motion as a petition for a writ of habeas corpus. Moreover, even had it done so, Mr. Brown would not have been entitled to relief because a petition for habeas corpus must be filed in the court having jurisdiction over defendant, and here the Rule 29.07(d) motion was filed in the sentencing court. *See* Rule 91.02(a); *Reynolds [v. State]*, 939 S.W.2d [451,] 454 [(Mo.App., W.D. 1996)].

Brown, 66 S.W.3d at 732 n. 8. As in *Brown*, the lower court did not treat this claim as a petition for habeas corpus; in this case, the claim was never before the lower court. *Id.* As in *Brown*, appellant did not file his underlying post-conviction case in the circuit court of the county where he was incarcerated, but in the county of the sentencing court. *Id.* To allow appellant to turn his improper appeal into a petition for a writ of habeas corpus would violate the rules governing habeas proceedings in the same manner as his current claim violates the rules governing post-conviction relief. Therefore, as in *Brown*, this Court should not treat appellant’s appeal as a petition for a writ of habeas corpus, but should deny his claim and require appellant to file his state habeas proceeding in the proper venue.

For the foregoing reasons, appellant’s sole point on appeal must fail.

CONCLUSION

In view of the foregoing, respondent submits that the denial of appellant's Rule 24.035 motion should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 7632 words, excluding the cover, this certification and the 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, postage prepaid, this 5th day of August, 2010, to:

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APPENDIX

Order and Judgment..... A-1

§ 558.026, RSMo 2000..... A-4

Supreme Court Rule 24.035 A-5

Supreme Court Rule 29.09 A-8