IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SC90125
	)	
MICHAEL MOORE,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF MONTGOMERY COUNTY, MISSOURI
12TH JUDICIAL CIRCUIT, DIVISION I
THE HONORABLE KELLY BRONIEC, JUDGE

APPELLANT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Appellant, Michael Moore, is appealing his conviction, after a jury trial in Montgomery County, of the class D felony of Failure to Return to Confinement, § 575.220, RSMo 2000.[1] Mr. Moore was sentenced, as a prior and persistent offender, to four years imprisonment, concurrent with the sentence he was then serving. The Eastern District Court of Appeals reversed Mr. Moore's conviction, *State v. Moore*, ED91056 (March 17, 2009). This Court sustained the State's Application for Transfer pursuant to Rules 30.27 and 83.04 and therefore jurisdiction lies with this Court.

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

STATEMENT OF FACTS

The case against Mr. Moore originated in Warren County, but was moved to Montgomery County on a change of venue (L.F. 2).[2] He was charged by amended information with the class D felony of failure to return to confinement, § 575.220, and was found to be a prior and persistent offender (L.F. 10; Tr. 4).

On December 7, 2006, the Honorable Keith Sutherland, Circuit Court Judge of the 12th Judicial Circuit, revoked Mr. Moore's probation in an earlier case (Tr. 79). He ordered Mr. Moore to begin serving his sentences of four and seven years imprisonment (Tr. 82).

Judge Sutherland stated that the circuit courts could only send so many prisoners to the Department of Corrections (D.O.C.) at one time (Tr. 79). He believed that Mr. Moore's bed date was in February, 2007 (Tr. 79). Since he could not go to the penitentiary, Mr. Moore requested time to spend Christmas with his children (Tr. 79). Judge Sutherland granted Mr. Moore a furlough (Tr. 79).

According to the judge, a furlough meant that Mr. Moore would be taken into custody, the Sheriff of Warren County would book him, process him, and release him with orders that he return and surrender to the Sheriff to be taken to D.O.C. to begin his sentence (Tr. 80). Mr. Moore had requested a stay, which

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[2] The record on appeal consists of a legal file (L.F.), a pretrial hearing transcript (H.Tr.), the trial transcript (Tr.), and the sentencing transcript (S.Tr.).

meant that he would have just left the courtroom and returned when ordered to do so (Tr. 83). Judge Sutherland testified that he chose to give Mr. Moore a furlough because it meant that he was "in custody" and therefore could be prosecuted if he did not return (Tr. 83). Mr. Moore was ordered to return no later than noon on December 27, 2007 (Tr. 84). Judge Sutherland warned Mr. Moore that if he did not return by then, the prosecuting attorney could file a felony charge of failing to appear (Tr. 84).

Judge Sutherland was permitted to give, over objection, his opinion that Mr. Moore was serving a sentence to the D.O.C. on December 27, 2007 (Tr. 85). He believed this because Mr. Moore would be entitled to all jail time credit once he was booked into the jail (Tr. 85). As far as Judge Sutherland was concerned, Mr. Moore was in custody and the Sheriff was simply holding him on behalf of D.O.C. (Tr. 86).

Judge Sutherland conceded that once someone was in the physical custody of D.O.C., he would not have the authority to grant a furlough (Tr. 86). He also agreed that in a deposition on behalf of David Sanning, he testified that a sentence begins once the prisoner is in the Fulton Reception and Diagnostic Center (FRDC) (Tr. 88). He added however, that Sanning would have been, or was, credited for all the time he was in jail (Tr. 88).

Judge Sutherland was shown Defendant's Exhibit B, a copy of § 558.031.1 which states: "A sentence of imprisonment shall commence when a person convicted of a crime in this state is received into the custody of the department of

corrections or other place of confinement where the offender is sentenced" (Tr. 90).

On redirect, Judge Sutherland was permitted, over objection, to read aloud State's Exhibit 3, a copy of §575.220, the statute criminalizing the failure to return to confinement (Tr. 92-93). He also read the penalty provision which makes the failure to return to confinement a Class C misdemeanor unless the sentence served is to D.O.C., in which case a violation is a Class D felony (Tr. 93-94). The State was permitted to publish the statute to the jury over Mr. Moore's objection (Tr. 94). Judge Sutherland stated that Mr. Moore was sentenced to D.O.C. for a class D felony of DWI (Tr. 95).

Kim Symes was working in the Warren County Detention Facility on December 7, 2006 (Tr. 96, 97). He took Mr. Moore back to the jail after court and booked, processed, and released him (Tr. 97). Symes told Mr. Moore to be sure and return by noon on December 27, 2006 (Tr. 98). Mr. Moore did not return until January 2, 2007, and he had not called or notified anyone in Warren County that he would be returning late (Tr. 100).

Symes was the jail employee responsible for calculating jail time credit (Tr. 101). He knew what paperwork an inmate needed to be accepted by D.O.C. (Tr. 101). In order to be sent to D.O.C., an inmate needed a Judgment and Sentence, the Commitment Report from the Prosecuting Attorney, and a form showing jail credit (Tr. 102). According to Symes, an inmate begins serving his sentence when

he is delivered to D.O.C. (Tr. 105). Symes agreed that people could be sentenced to serve a term of imprisonment in the jail (Tr. 102).

Mr. Moore called Stewart Epps, the Warden at FRDC (Tr. 111). FRDC receives all prisoners from the western half of the state and assigns them to the appropriate facility (Tr. 111).

Epps has been employed by D.O.C. for twenty-one years, and has been warden at FRDC for five years (Tr. 112, 113). He is responsible for all operations at the facility (Tr. 114). Epps testified that D.O.C. does not have county jails hold prisoners for it (Tr. 114). D.O.C. becomes aware that someone has been sentenced to D.O.C. when they are delivered to FRDC (Tr. 115). Epps stated that if someone escaped on the way to D.O.C., he would not have escaped from D.O.C., he would have escaped from whoever had custody of him at the time (Tr. 115-116).

An inmate begins serving a sentence when D.O.C. receives him and accepts custody of him, i.e., when he is in the physical custody of D.O.C. (Tr. 116). If the paperwork accompanying the inmate is wrong, D.O.C. will not accept custody (Tr. 116). According to Epps, "[o]nce we accept custody, then they are in our custody and serving their sentence" (Tr. 116).

Jail time credit is determined by the county, not D.O.C. (Tr. 119). They bring a jail time endorsement with them when they arrive (Tr. 119). If they are given jail time credit, it back dates their start date (Tr. 120). Mr. Moore received jail time credit starting sometime in March, 2006 and he was received in D.O.C. on January 4, 2007 (Tr. 120).

Epps agreed with the proposition that an inmate could be sentenced to D.O.C., be out on furlough, and not actually be serving that sentence (Tr. 120). The inmate has to be in the physical custody of D.O.C., regardless of jail time, before he is serving a sentence (Tr. 121).

Mr. Moore's Motion for Judgment of Acquittal at the Close of All of the Evidence was denied (Tr. 124). Mr. Moore objected to Instruction #5, the verdict director (Tr. 127). The State had modified the first paragraph of MAI-CR3d 329.76 to read, ". . .the defendant was under a sentence ***to*** the Missouri Department of Corrections . . ." instead of ". . . the defendant was under a sentence ***in*** the Missouri Department of Corrections. . ." (L.F. 47). Mr. Moore's tendered instruction A, an unmodified version of MAI-CR3d 329.76 was refused (L.F. 52). The jury was also given instruction 7, a verdict director on the Class C misdemeanor of failure to return to confinement (L.F. 49).

During the State's closing argument, the prosecuting attorney informed the jury:

> They are also submitting to you a lesser included offense and its really just an easy way out. I don't really know. I'm just going to go with the lesser included offense. You can't do that. You have to hold him accountable for what he's done. He was sentenced to the Department - -

(Tr. 145).

At this point, defense counsel objected to the prosecutor telling the jurors that it was the defendant who had submitted the lesser-included offense instruction (Tr.

145). Defense counsel argued that this was a blatant argument that Mr. Moore was conceding guilt to the lesser offense (Tr. 145-146). Mr. Moore asked for a mistrial which was denied (Tr. 147). The court offered to instruct the jury to disregard the prosecutor's statement about who submits instructions, but defense counsel believed that an instruction would exacerbate the prejudice and declined the court's offer (Tr. 147-148).

The jury returned its verdict finding Mr. Moore guilty of the Class D felony (L.F. 56; Tr. 154). Mr. Moore's motion for new trial was overruled, (L.F. 57-60; S.Tr. 2), and the trial court sentenced him to a term of four years imprisonment, concurrent to the term he was currently serving (L.F. 65; Tr. 16).

The trial court granted Mr. Moore's motion to appeal *in forma pauperis* (L.F. 61), and Notice of Appeal was timely filed (L.F. 62).

POINTS RELIED ON

I

The trial court erred in overruling Mr. Moore's motion for judgment of acquittal at the close of all of the evidence in violation of his rights to due process and a fair trial, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 10 and 18(a) of the Missouri Constitution because the evidence was insufficient to establish the Class D felony of failure to return to confinement in that Mr. Moore was furloughed from the Warren County jail, and he was told to return to the custody of the Warren County Sheriff by noon on December 27, 2007. Therefore, Mr. Moore was not serving a sentence on December 27, 2006 and cannot be guilty of the class D felony of failure to return to confinement on that date.

Johnson v. Haynes, 504 S.W.2d 308 (Mo.App., K.C.D. 1973);

State v. Taylor, 126 S.W.3d 2 (Mo.App. E.D.2003);

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

State v. Trevino, 428 S.W.2d 552 (Mo. 1968);

U.S. Constitution, Amendments VI and XIV;

Mo. Constitution, Article I, §§10 and 18(a);

§558.031 and 575.220; and

MAI-CR3d 329.76.

II.

The trial court abused its discretion and plainly erred in permitting Judge Sutherland to testify to his opinion that Mr. Moore was serving a sentence to D.O.C. on December 27, 2006, because his testimony violated Mr. Moore's right to due process and a fair trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§10 and 18(a) of the Missouri Constitution, in that no foundation was laid that Judge Sutherland was an expert, his opinion was irrelevant, it invaded the province of the jury, and he stated a legal conclusion. Mr. Moore was prejudiced by Judge Sutherland's testimony because the jury was bound to give great weight to the opinion of a judge and if the jury believed Judge Sutherland, it had to convict Mr. Moore.

State v. Taylor, 663 S.W.2d 235 (Mo. banc 1984);

State v. Faulkner, 103 S.W.3d 346 (Mo.App., S.D. 2003);

Stucker v. Chitwood, 841 S.W.2d 816 (Mo.App., S.D. 1992);

State v. Foster, 244 S.W.3d 800 (Mo.App., S.D. 2008);

United States Constitution, Amendments VI and XIV;

Mo. Constitution, Article I, §§10 and 18(a);

Rule 30.20;

MAI-CR3d 329.76; and

McCormick, Evidence § 185.

ARGUMENT

I

The trial court erred in overruling Mr. Moore's motion for judgment of acquittal at the close of all of the evidence in violation of his rights to due process and a fair trial, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 10 and 18(a) of the Missouri Constitution because the evidence was insufficient to establish the Class D felony of failure to return to confinement in that Mr. Moore was furloughed from the Warren County jail, and he was told to return to the custody of the Warren County Sheriff by noon on December 27, 2007. Therefore, Mr. Moore was not serving a sentence on December 27, 2006 and cannot be guilty of the class D felony of failure to return to confinement on that date.

Mr. Moore was found guilty and sentenced for a violation of §575.220.3(1), the Class D felony of failure to return to confinement. But the evidence is clear that Mr. Moore was not serving a sentence on December 27, 2006 and therefore he did not commit failure to return to confinement.

Preservation:

Mr. Moore filed a Motion for Judgment of Acquittal At the Close of All of the Evidence which was denied (L.F. 41, 42; Tr. 124). He also included this claim of error in his Motion for New Trial (L.F. 58). This claim is properly preserved for review. Rule 29.11(d).

Standard of Review:

This Court reviews the denial of a motion for judgment of acquittal to determine whether the state adduced sufficient evidence to make a submissible case. *State v. Barnes*, 245 S.W.3d 885, 888 -889 (Mo.App. E.D., 2008).

To make this determination, the Court views all of the evidence, and all reasonable inferences that may be drawn therefrom, in the light most favorable to the verdict, and disregards all contrary evidence and inferences." *Id.* The Court ascertains whether there was sufficient evidence from which reasonable persons could have found the defendant guilty beyond a reasonable doubt." *Id.*

In construing a statute, appellate courts are guided by the principle that criminal statutes must be "construed strictly against the [s]tate and liberally in favor of the defendant." *Goings v. Missouri Department of Corrections*, 6 S.W.3d 906, 908 (Mo. banc 1999) (citations omitted).

Relevant facts:

On December 7, 2006, the Honorable Keith Sutherland, Circuit Judge for the 12th Judicial Circuit revoked Mr. Moore's probation and ordered him to begin serving his sentences of four years and seven years imprisonment (Tr. 79). Because there was no bed space for Mr. Moore in D.O.C., he could not be delivered to FRDC until sometime in February (Tr. 79). He was to be held in the Warren County jail until the Sheriff could deliver him to D.O.C. (Tr. 80). But before returning to the jail, Judge Sutherland granted Mr. Moore's request that he be permitted to spend Christmas with his children, and furloughed him with

instructions that he return to the Warren County jail no later than noon on December 27, 2006 (Tr.79, 84).

Mr. Moore did not return to confinement until January 2, 2007 and he failed to notify the Sheriff that he would be returning late, and the record discloses no reason offered by Mr. Moore for his failure to return by the time ordered (Tr. 84, 100).

On April 2, 2007, the Warren County prosecutor filed a charge of the Class D felony of failure to return to confinement against Mr. Moore (L.F. 10). A Montgomery County jury found him guilty, and the trial court sentenced him to four years imprisonment, to run concurrently with the sentences he was then serving (L.F. 56, S.Tr. 16).

Argument:

The State has the burden of proving each and every element of its case beyond a reasonable doubt. *State v. Taylor*, 126 S.W.3d 2, 4 (Mo.App. E.D.2003). In Mr. Moore's case, the State did not make a submissible case.

> A person commits the crime of failure to return to confinement if, . . .while serving any . . . type of sentence for any crime wherein he is temporarily permitted to go at large without guard, he purposely fails to return to confinement when he is required to do so.

§ 575.220.1. Thus the state had to prove: 1) that Mr. Moore was serving a sentence for D.W.I.; 2) that he was temporarily permitted to go at large without a

guard; and 3) that he purposely failed to return to confinement when he was required to do so. *State v. Dailey*, 53 S.W.3d 580, 585 (Mo.App., W.D. 2001).

Failure to return to confinement is a class C misdemeanor unless: the sentence being served is to the Missouri department of corrections and human resources in which case failure to return to confinement is a class D felony. §575.220.3(1).

Respondent argues that §575.220.1 does not require that a defendant be in the physical custody of D.O.C., only that he be under sentence to D.O.C.. Respondent cites no authority for this proposition and it is contrary to the plain language of the statute which requires that the defendant fail to return to confinement "while *serving* any … type of sentence for any crime." (emphasis added). A defendant cannot be serving a sentence to or in D.O.C. unless he is in its custody.

The state's case failed because from December 27, 2006 to January 2, 2007, Mr. Moore was not serving a sentence to or in D.O.C. or anywhere else. Judge Sutherland offered his opinion that after Mr. Moore's probation was revoked, and he ordered Mr. Moore's sentence executed, he was serving a sentence to D.O.C. (Tr. 85). In Judge Sutherland's opinion, Mr. Moore was in custody and the Sheriff of Warren County was simply holding him for D.O.C. (Tr. 86). Judge Sutherland's opinion does not accurately reflect the law.

> A sentence of imprisonment shall commence when a person convicted of a crime in this state is received into the custody of the

department of corrections or other place of confinement where the offender is sentenced.

§558.031.1 Since Mr. Moore was not sentenced to any "other place of confinement," that portion of the statute is irrelevant.

§558.031.2 and .3 also support Mr. Moore's argument that he was not serving his sentence at the time he failed to return to confinement. §558.031.2 and .3 provide that:

> 2. The officer required by law to deliver a person convicted of a crime in this state to the department of corrections shall endorse upon the papers required by §217.305, both the dates the offender was in custody and the *period of time to be credited toward the service of the sentence* of imprisonment, except as endorsed by such officer.
>
> 3. If a person convicted of a crime escapes from custody, such escape shall interrupt the sentence. The interruption shall continue until such person is returned to the correctional center where the sentence was being served, or in the case of a person committed to the custody of the department of corrections, to any correctional center operated by the department of corrections. *An escape shall also interrupt the jail time credit to be applied to a sentence which had not commenced when the escape occurred.*

(emphasis added).

In *Johnson v. Haynes*, 504 S.W.2d 308 (Mo.App., K.C.D. 1973), the petitioner filed a writ of habeas corpus alleging that he had served his entire sentence and was being illegally held by D.O.C. *Id*. at 309. The evidence showed that on October 23, 1969, a jury found the petitioner guilty of assault with intent to do great bodily harm. *Id*. The trial court sentenced him to five years imprisonment and entered its judgment on December 12, 1969. *Id*.
For reasons unexplained in the record, the petitioner was not received into D.O.C. until January 18, 1971. *Id*. at 310.[3]

The petitioner argued that his sentence commenced on December 12, 1969, the day he was sentenced and judgment was entered. *Id*. The appellate court disagreed, noting that the circuit court had no power to "commence" the sentence and the recital thereof was surplusage. *Id.* "The courts of this State have repeatedly held that the commencement of a sentence is by operation of law. A circuit court has no power to fix a date for the commencement of a sentence." *Id*., (citations omitted). A sentence commences when the petitioner is actually received by D.O.C. *Id*., citing *State v. Trevino*, 428 S.W.2d 552 (Mo. 1968).

Judge Sutherland's attempt to put Mr. Moore at risk of committing the class D felony of failure to return to confinement by granting a "furlough" rather than a "stay" had no legal effect. As the Eastern District Court of Appeals noted, there is

[3] Later in the opinion, the Court notes that petitioner's attorney conceded during oral argument that he had been released on bond. *Id*. at 311.

no statute authorizing a circuit judge to grant a "furlough" after sentencing but before transport to D.O.C..[4] *State v. Moore*, WL 679482 (March 17, 2009) pg.1n.1. The booking of Mr. Moore into the Warren County jail did not commence the service of his sentence. Mr. Moore began serving his sentence on January 4, 2007, when he was actually delivered to, and accepted by, D.O.C. (Tr. 120). Judge Sutherland's opinion that because Mr. Moore would be entitled to jail time credit, he was serving his sentence, is also not supported by the law.

§558.031, requires that any offender sentenced to D.O.C. be given credit for all time in prison, jail or custody after the offense occurred and ***before the commencement of the sentence***, when the time in custody was related to that offense.

Thus, Judge Sutherland's opinion that Mr. Moore was serving his sentence and the Sheriff of Warren County was simply holding him for D.O.C. is incorrect (Tr. 86). As Warden Epps testified, D.O.C. does not have county jails hold prisoners for them (Tr. 114). And there is a difference between being sentenced and serving that sentence (Tr. 120). Mr. Moore was not serving his sentence to or

[4] §217.425 provides that the director of D.O.C. may grant a furlough for a period not to exceed thirty days to allow a trustworthy offender to visit a sick relative, to attend a relative's funeral, to obtain medical services not otherwise available, to contact prospective employers, and to participate in approved rehabilitation programs.

in D.O.C. by virtue of having his probation revoked and his sentences executed (Tr. 120). It was not until he was in the physical custody of D.O.C., regardless of jail time credit, that he began serving his sentence. This situation is analogous to the one Mr. Epps mentioned during his testimony. If a prisoner escaped while being transported to D.O.C. The prisoner would not have escaped from D.O.C., he would have escaped from whoever had custody of him in at the time (Tr. 115-116).

In order to prove the Mr. Moore was guilty of the class D felony of failure to return to confinement, the state had to prove that he was "serving a sentence to the Missouri Department of Corrections" (L.F. 47). The State modified MAI-CR3d 329.76, changing "serving a sentence ***in*** the Missouri Department of Corrections," to "serving a sentence ***to*** the Missouri Department of Corrections". That modification makes no difference to the issue presented. Whether Mr. Moore had been sentenced ***to*** D.O.C. or ***in*** D.O.C., §575.220 requires that he be ***serving*** that sentence, and when he returned to the Warren County jail five days late, he had not yet begun to serve his sentence to or in D.O.C.

Respondent relies on *State v. Mobley*, 267 S.W.3d 776 (Mo.App., S.D. 2008) and *State v. Dailey*, 53 S.W.3d 580 (Mo.App., W.D. 2001) in support of its position.

While it is true that the facts in *Mobley* are nearly identical to those in Mr. Moore's case, *Mobley* is distinguishable. In *Mobley*, the appellant argued that

because he had never been confined in the Lawrence County jail, he could not be guilty of failing to return to confinement in the Lawrence County jail. *Id*. at 778.

The Southern District Court of Appeals affirmed Mobley's Class D felony conviction, holding that:

> Defendant's sentences to imprisonment in the department of corrections were imposed on June 14, 2005, and he was remanded to the custody of the sheriff of Lawrence County for the purpose of serving those sentences.

Id.

The *Mobley* Court overlooked its earlier finding that "[d]efendant was remanded to the sheriff of Lawrence County for transfer to the department of corrections. *Id*. at 777. The Court never mentioned §558.031. It also ignored §546.610 which provides that after an offender has been sentenced to D.O.C., the sheriff's duty, "without delay", is to cause such offender to be transported to a place designated by the director of the department of corrections and delivered to the chief administrative officer thereof." §546.610 expresses the legislature's intent that offenders begin serving their sentences once they are in the custody of D.O.C., and the county sheriff's obligation is to get them there, "without delay."

State v. Dailey, 53 S.W.3d 580 (Mo.App., W.D. 2001) is easily distinguished because Mr. Dailey was serving a sentence in D.O.C. at the time he failed to return to confinement. He had been serving a sentence in the Algoa Correctional Center when authorities freed him temporarily without guard with

instructions that he report to the Kansas City Community Release Center. *Id*. at 585. He failed to report as directed, and was arrested eight months later in Anchorage, Alaska. *Id*. at 583. He was serving a sentence and in the custody of D.O.C. when he left Algoa, and he failed to return to the custody of D.O.C. when he did not report to the Kansas City Community Release Center. There is nothing in *Dailey* that supports Respondent's argument in Mr. Moore's case.

On December 7, 2006, and January 2, 2007, Mr. Moore was in the custody of the Warren County Sheriff. He was permitted to go at large without guard from the Warren County jail, and he failed to return to confinement at the Warren County jail. On December 27, 2006, he had not begun serving a sentence in D.O.C.. Therefore, this Court should reverse his conviction and discharge him from the conviction of failure to return to confinement.

II.

The trial court abused its discretion and plainly erred in permitting Judge Sutherland to testify to his opinion that Mr. Moore was serving a sentence to D.O.C. on December 27, 2006, because his testimony violated Mr. Moore's right to due process and a fair trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§10 and 18(a) of the Missouri Constitution, in that no foundation was laid that Judge Sutherland was an expert, his opinion was irrelevant, it invaded the province of the jury, and he stated a legal conclusion. Mr. Moore was prejudiced by Judge Sutherland's testimony because the jury was bound to give great weight to the opinion of a judge and if the jury believed Judge Sutherland, it had to convict Mr. Moore.

The trial court abused its discretion and plainly erred when it allowed the State to elicit from Judge Sutherland his opinion that Mr. Moore was serving a sentence to D.O.C. on December 27, 2006. The jury was bound to give great weight to the testimony of a circuit court judge, and Judge Sutherland's opinion basically told the jury that it must find Mr. Moore guilty of the Class D felony of failure to return to confinement.

Preservation:

When the prosecuting attorney asked Judge Sutherland for his opinion of whether Mr. Moore was "serving a sentence to the Department of Corrections on

December 27, 2006," defense counsel objected on the basis that he had not been qualified as an expert (Tr. 85). Mr. Moore included this issue in his motion for new trial on the same basis, that a proper foundation had not been laid to certify the witness as an expert (L.F. 58). But defense counsel did not object on the other grounds included in Mr. Moore's Point Relied On, that Judge Sutherland's opinion was irrelevant, that it invaded the province of the jury, and that it was a legal conclusion. Therefore, on those grounds, Mr. Moore must ask this Court to review for plain error. Rule 30.20.

Standard of Review:

Trial courts retain broad discretion over issues of relevancy and admissibility of evidence, and an appellate court will not interfere with those decisions unless there is a clear showing of an abuse of discretion. *State v. Hutchison*, 957 S.W.2d 757, 763 (Mo. banc 1997). An abuse of discretion occurs when the trial court's ruling "is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *State v. Fassero*, 256 S.W.3d 109, 115 (Mo. banc 2008).

Courts review for prejudice, not mere error, and a conviction will be reversed only if the error was so prejudicial that it deprived Mr. Moore of a fair trial. *State v. McMillin*, 783 S.W.2d 82, 98 (Mo. banc 1990). Improperly admitted evidence should not be declared harmless unless it can be said to be harmless without question and the record demonstrates the evidence did not influence the

jury or the jury disregarded it. *State v. Russell*, 872 S.W.2d 866, 869 (Mo.App., S.D. 1994) (citations omitted).

Under plain error review, Mr. Moore bears the burden of proving to this Court that the action of the trial court was not only erroneous, but that it so substantially impacted his right to a fair trial that manifest injustice will result if this Court leaves the error uncorrected. *State v. Hornbuckle*, 769 S.W.2d 89, 93 (Mo. banc 1989); *State v. Hadley*, 815 S.W.2d 422, 423 (Mo. banc 1991). Relief under the plain error rule requires that Mr. Moore go beyond the mere showing of demonstrable prejudice to show manifest prejudice affecting his substantial rights. *Hornbuckle*, 769 S.W.2d at 93.

Relevant Facts:

The State called the Honorable Keith Sutherland, Circuit Judge of the 12th Judicial Circuit in its case in chief (Tr. 78). Judge Sutherland testified that he had served on the bench for eight years (Tr. 78). He was the judge who revoked Mr. Moore's probation and granted him the furlough which ended up in the State filing this failure to return to confinement charge when Mr. Moore was late in returning to the Warren County jail.

After testifying to the facts that led to the charge, the following exchange took place:

Prosecutor: Okay. And in your opinion was Mr. Moore serving a sentence the Department of Corrections on December 27, 2006?

Defense Counsel: Judge, I would object at this point to the Judge

making (sic) an opinion as he has not been qualified as an expert in this case.

Prosecutor: Your Honor, he's a Judge.

Witness: That doesn't necessarily make me an expert in anything.

Court: Overruled.

Witness: The - - as far as I'm concerned, he was because he was entitled to credit all the jail time he spent towards his sentence and once he was booked in at the jail and then furloughed he was entitled to credit for that time.

(Tr. 85).

Argument:

The only issue in Mr. Moore's case was whether he was serving a sentence in or to the Department of Corrections (D.O.C.). Judge Sutherland was permitted to offer his opinion that Mr. Moore was serving a sentence to D.O.C. on December 27, 2006. In effect, Judge Sutherland told the jury they would have to find Mr. Moore guilty. That was improper and prejudicial.

The rule in Missouri is that expert opinion testimony "should never be admitted unless it is clear that the jurors themselves are not capable, for want of experience or knowledge of the subject, to draw correct conclusions from the facts proved." *State v. Taylor*, 663 S.W.2d 235, 239 (Mo. banc 1984) (citations omitted).

The issue in *Taylor* was whether testimony that the victim of an alleged rape suffered from rape trauma syndrome was admissible as evidence that the intercourse was not consensual. *Id*. at 237. In concluding that such evidence was inadmissible, this Court noted that expert testimony is not admissible as it relates to credibility of witnesses. *Id*. at 239, citing, *Beishir v. State*, 522 S.W.2d 761, 765 (Mo. banc 1975). Next, the probative value of the evidence must not be outweighed by its tendency to create undue prejudice in the minds of the jury. *Id*. at 240, citing McCormick, Evidence § 185, at 439. This Court noted that the Defendant's objections went to the very heart of the issue. *Id*. Those objections were: 1) the introduction of this evidence would not be probative of the fact of rape and it would be unduly prejudicial; and 2) the testimony presupposed the existence of a rape. *Id*.

This Court found that the expert's testimony in *Taylor* vouched too much for the victim's credibility and "supplie[d] verisimilitude for her on the critical issue of whether defendant did rape her." *Id.* The State used the expert's testimony to buttress the victim's credibility and lend scientific cachet to this critical issue. *Id*. at 241. In reversing, this Court noted that the jury was competent to determine the victim's credibility, and the State could have met its burden of proof without proving that the victim suffered from rape trauma syndrome. *Id*.

In Mr. Moore's case, Judge Sutherland's opinion went to the very heart of the defense, that Mr. Moore was not serving a sentence to D.O.C. on December

27, 2006. That was the first element of the offense the jury had to find in its deliberations. The relevant portion of the verdict director read:

> First, that on December 27, 2006, in the County of Warren, State of Missouri, the Defendant *was serving a sentence to the Missouri Department of Corrections* for driving while intoxicated where he was temporarily permitted to go at large without a guard, . . .

(L.F. 47) MAI-CR3d Modified 329.76. (emphasis added).

"An expert may testify as to his opinion on an ultimate issue in a criminal case, but the evidence must aid the jury and it must not invade the province of the jury." *State v. Faulkner*, 103 S.W.3d 346, 360-361 (Mo.App., S.D. 2003), quoting *State v. Clements*, 849 S.W.2d 640, 644 (Mo.App., S.D. 1993).

Judge Sutherland's opinion testimony invaded the province of the jury on the ultimate issue of whether Mr. Moore was serving a sentence to D.O.C. on December 27, 2006. While an expert is now permitted to offer his opinion on the ultimate issue in criminal cases, he cannot offer an opinion "which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day." *Stucker v. Chitwood*, 841 S.W.2d 816, 819 (Mo.App., S.D. 1992). That is exactly what Judge Sutherland did.

Mr. Moore was prejudiced by the improper admission of this testimony. In other cases, appellate courts have recognized that experts' testimony carries great weight with jurors, especially when the expert has practiced in the area at issue for a long time. See, e.g. *State v. Foster*, 244 S.W.3d 800, 803 (Mo.App., S.D. 2008).

A sitting circuit court judge would carry even more weight with a jury, especially if he was the judge who had been involved in the case. The jury could not help but believe that Judge Sutherland was an expert in the law and that his opinion was based on that legal knowledge and the facts of Mr. Moore's case. To allow him to offer his opinion as to the ultimate issue in the case, an issue the jurors could have decided for themselves without the benefit of the Judge's opinion, was a clear abuse of discretion. This Court's refusal to remedy this error would result in a manifest injustice since Mr. Moore had no way to counter the opinion of an experienced trial judge.

This Court should find that the trial court abused its discretion and of left uncorrected, this error will result in a manifest injustice affecting Mr. Moore's substantial rights.

CONCLUSION

Because the State's evidence was insufficient to support his conviction, Appellant Michael Moore respectfully requests that this Court reverse his conviction for the class D felony of failure to return to confinement and order Mr. Moore's discharge from that conviction. In the alternative, if this Court believes that the State made a submissible case, Mr. Moore respectfully requests that this Court find that the trial court abused its discretion and plainly erred by allowing Judge Sutherland to offer his opinion that Mr. Moore was serving a sentence in D.O.C. on December 27, 2006, reverse his conviction, and remand for a new trial.

Respectfully submitted,

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Certificate of Compliance and Service

I, Nancy A. McKerrow, 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 2007, 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 6,332 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disks filed with this brief and served on opposing counsel contain a complete copy of this brief, and have been scanned for viruses using McAfee VirusScan Enterprise 7.1.0, updated in June, 2009. According to that program, these disks 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 5th day of June, 2009 to Assistant Attorney General Dora Fichter, Criminal Division, Missouri Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

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Nancy A. McKerrow

APPENDIX

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