CASE NO. SC84229

IN THE
SUPREME COURT OF MISSOURI

IN RE THE MATTER OF:

AMY M. RODRIGUEZ,

PETITIONER

V.

PATRICIA CORNELL, SUPT.

RESPONDENT

ORIGINAL PROCEEDING IN HABEAS CORPUS

REPLY BRIEF OF PETITIONER AMY M. RODRIGUEZ

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JURISDICTIONAL STATEMENT

Petitioner adopts and incorporates by reference her Jurisdictional Statement contained in Petitioner's Brief. (Petitioner's Brief at pg. 4)

STATEMENT OF FACTS

Petitioner adopts and incorporates by reference her Statement of Facts contained in Petitioner's Brief. (Petitioner's Brief at pg. 5)

ARGUMENT

Petitioner Amy M. Rodriguez files this reply brief in response to the brief of Respondent. As required by Missouri Supreme Court Rule 84.04(g), this brief only discusses those issues raised in the Respondent's brief which, in the belief of Petitioner, require a response. As Respondent, in her brief, has compressed Petitioner's four points relied on and accompanying arguments into two arguments, Petitioner has only replied to those two arguments. The failure to reiterate any contention made in Petitioner's initial brief is not intended as a waiver of that contention, and Petitioner relies on each and every point and contention in her initial brief.

I. THE COURT MAY REVIEW PETITIONER'S CLAIMS CHALLENGING THE LAWFULNESS OF HER GUILTY PLEA BECAUSE HABEAS CORPUS IS THE PROPER REMEDY AND THE CLAIMS WERE NOT PROCEDURALLY DEFAULTED BY HER FAILURE TO TIMELY SEEK POST-CONVICTION RELIEF PURSUANT TO RULE 24.035.

As stated in her initial brief, Petitioner admits that her claims would normally proceed through a Rule 24.035 post-conviction motion. However, there are limited circumstances when habeas corpus relief is proper without having first sought 24.035 post-conviction relief.

See State ex rel. Simmons v. White, 866 S.W.2d 443 (Mo. banc 1993). Petitioner's claims fall under such circumstances.

Respondent initially asserts that Petitioner does not suggest that she received ineffective assistance of counsel subsequent to her sentencing hearing. (Respondent's Brief, pg. 8) That is false. The passage of Petitioner's brief which Respondent cites to (Petitioner's Brief pgs. 18-19) specifically sets forth that very argument. Furthermore, Petitioner is not referring to post-conviction counsel. Petitioner is referring to her guilty plea counsel. After sentencing, Petitioner's attorney continued to take affirmative steps regarding her release. He filed a "Motion to Request 120 Day Call Back" (Appendix pg. A61-A65) and sent Petitioner a letter indicating that he was continuing to act on her behalf and instructing her on what she could do to assist. (Appendix pg. A60). These documents show that Petitioner's attorney continued to mislead her to think that she could be released after 120 days. These actions by her guilty plea counsel constitute an ongoing pattern of ineffective assistance which stretched from before her guilty plea to long after her sentencing.

Respondent asserts that "Petitioner refers to no Supreme Court decision where the underlying claim of ineffective assistance of trial counsel is also the cause for the default of that underlying claim." (Respondent's Brief, pg. 9) Petitioner does not cite a case from this Court, as it does not appear that this Court has specifically addressed this issue. However, Petitioner has cited appellate court cases which are directly on point; Brown v. Gammon, 947 S.W.2d 437 (Mo.App. 1997); Matthews v. State, 863 S.W.2d 388 (Mo.App. 1993); both of which entered findings that habeas corpus relief was proper. Furthermore, this Court has indicated that the holding in Brown v. Gammon is meritorious. Brown v. State, 66 S.W.3d 721, 730 (Mo. banc 2002). If either of these two cases are distinguishable factually, it is only because the facts in the case at hand go beyond the facts of Brown and Matthews in showing that in injustice has occurred.

Respondent next asserts that Petitioner's claim is not proper because she "had the factual and legal tools by which to construct her challenge to the guilty plea." (Respondent's Brief, pg. 9) Petitioner certainly does not dispute that Section 559.115, R.S.Mo. was on the books that the time of her guilty plea. However, her attorney, the prosecuting attorney and the judge also had that statute at their disposal. None of them were apparently aware of its provisions. Is Respondent suggesting that Petitioner be held to a higher standard of legal knowledge than the three principals in the case whom have legal degrees and many years of experience in these matters? Is Respondent suggesting that Petitioner is not entitled to rely on the advice given to her by her attorney? The court system is already overburdened with defendants who maintain that they have as much, or more, knowledge of the law than the attorneys or the judges who are involved in their cases. To actually hold defendants to such a standard would throw our system of justice into chaos.

Respondent cites Leggins v. Lockhart, 822 F.2d 764 (8th Cir. 1987); to support his contention that Petitioner had the opportunity to challenge her guilty plea pursuant to Rule 24.035. That case is a discussion of when a federal court can address a habeas corpus claim which was not raised in state habeas proceedings, Id. at 765, which is certainly not the circumstances of the case at hand. However, the Eighth Circuit does state that such a claim can be raised if it is so "novel" there was no reasonable basis for the attorney to assert it in state court. Id. at 766; citing Reed v. Ross, 468 U.S. 1, 16 (1984). In determining what is "novel", a court should look at what "reasonably diligent counsel" would have been aware of. Leggins at 766.

If respondent maintains that this case is relevant, then we must look at whether or not Petitioner's claim is "novel", that is, whether a reasonably diligent attorney would have been aware that she could not

receive a 120 day callback. If Respondent maintains that Petitioner should have been diligent enough to discover the error in her sentencing, there can certainly be no doubt that her attorney should be just as, if not more, diligent.

Respondent, citing Brown v. State, 66 S.W.3d 721, 731 (Mo. banc 2002); indicates the issue "whether petitioner could reasonably have been aware of her claim. (Respondent's Brief, pg. 9). Petitioner believes that Respondent is referring to the passage in the Court's opinion on page 727 (Petitioner realizes that the Brown opinion is extremely recent and thus the page numbering may not yet be consistent in all printings), where the Court states that a defendant could not seek relief under Rule 29.07(d) for claims that he reasonably should have been aware of within the time constraints of Rule 24.035. Again, that is not the case here as Petitioner has not sought relief under Rule 29.07(d). In fact, the Court goes on to state that in cases where a defendant asserts that his claims could not be brought within the time limits of Rule 24.035, then "habeas corpus...provides the mechanism by which the person may attempt to obtain relief." Id. at 731 (Reference to Rule 29.07(d) omitted). That IS the fact situation of the case at hand. Petitioner is currently seeking the appropriate means of relief.

Respondent then cites several cases for the proposition that it is not what Petitioner knew, but instead what she should have known, which determines whether or not her failure to timely file her claims under Rule 24.035 resulted in default. However, two of these cases; McClesky v. Zant, 499 U.S. 467 (1991) and Zeitvogel v. Delo, 84 S.W.3d 276 (8th Cir. 1996); address issues of whether or not those defendants should have discovered certain factual evidence, not whether or not they should have aware of the law relevant to their cases.

Respondent also cites Duvall v. Purkett, 15 S.W.3d 745 (8th Cir.), cert. denied, 512 U.S. 1241

(1984). In that case, defendant was sentenced as a prior and persistent offender under Missouri law, which would require him to serve 60 % of his sentence before he would be eligible for parole. He contended his attorney never told him of the 60% requirement. Id. at 746. The court did rule that the defendant was told that he was being sentenced as a prior and persistent offender and that he could have discovered the 60% requirement had he read the statute.

The defendant in Duvall was sentenced and then given no advice as to the nature of the sentence. In the case at hand, Petitioner was affirmatively given erroneous advice by her attorney which was later confirmed by the erroneous actions of the court. The Eighth Circuit has already held a different standard applies in cases where the defendant was given erroneous advice by her attorney.

In Hill v. Lockhart, 877 F.2d 698 (1989), sustained, 894 F.2d 1009 (8th Cir. 1990); defendant's counsel expressly misinformed him of when he would be eligible for parole. Id. at 700. The Eighth Circuit determined that a lawyer owes his client a duty to accurately inform him of his release date and that the lawyer should do "minimal research" to determine when he would be released from parole. Id. at 703. The court held that no crystal ball was needed and that simply looking up the applicable statute posed no special research challenge. Id. By failing to do this simple task, the actions of the attorney fell below the objective standards of reasonableness required by the Sixth Amendment and habeas corpus relief was appropriate.

In the case at hand, Petitioner was expressly informed, orally and in writing, by her attorney and the judge, that she would be eligible for release (and in fact released) after 120 days. (Appendix pgs. A1-A2, A3-A4, A33-A34, A60, A61-65) Pursuant to Hill, once her attorney and the court affirmatively advised her of the potential for release after 120 days, they had a duty to advise her correctly. The

"minimal research" required to administer correct advice and render a correct sentence would have simply been to read Section 559.115, R.S.Mo. Such actions would surely not constitute any "special research challenge" and would have avoided the injustice to Petitioner.

II. THE COURT SHOULD GRANT HABEAS CORPUS RELIEF AS PETITIONER'S CLAIMS ARE MERITORIOUS AND HER PLEA WAS IMPROPER.

In order to be valid, a plea must represent a voluntary and intelligent choice among the alternatives available to the defendant. North Carolina v. Alford, 400 U.S. 25, 31 (1970). "Where...a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of that plea depends on whether counsel's advice was 'within the range of competence demanded of attorneys in criminal cases.'" Hill v. Lockhart, 474 U.S. 52, 56 (1985); citing, McMann v. Richardson, 397 U.S. 759 U.S. 759, 771 (1970). As discussed in detail in Petitioner's initial brief, Petitioner was not correctly aware of what alternatives were or were not available to her. As discussed above, the failure of her attorney to realize that she could not be sentenced pursuant to Section 559.115, R.S.Mo. is conduct which would not be considered within the range of competence required in such a case. As a result, Plaintiff's plea was not voluntary and thus should be set aside. See Brown v. Gammon, supra at 441; Hampton v. State, 877 S.W. 2d 250, 252 (Mo.App. 1994).

Respondent's argument supporting his contention is based on the fact that "there was no promise to petitioner that she would be placed on or given an opportunity for shock probation under 559.115, R.S.Mo. 2000 and his contention this the circumstances at hand are identical to those found in Brown v.

State. (Respondent's Brief, pg. 15) While it is true that, at the time of the plea, no promise was made to her that she would get a 120 day callback pursuant to Section 559.115, the evidence is uncontroverted that she was advised she could receive one. (Appendix pgs. A33-A34)

While the cases are analogous, this case is not identical to Brown v. Gammons. Unlike in Brown, the plea agreement which Petitioner entered into in this case contained no specific sentence. See Brown v. Gammons, supra at 722 (Pursuant to the plea agreement, Brown was to be sentenced to three years in prison). Petitioner agreed to do what is commonly referred to as "pleading up to the court." The agreement was that the judge could sentence her to no more than fifteen years in prison. (Respondent's Exhibit A, pgs. 20-21) As the prosecuting attorney questioned her, "...[I]t would be up to the judge to determine what sentence you get, all the way from probation, up to fifteen years in prison, do you understand?" (Respondent's Exhibit A, pgs. 20-21) As a result, there were no discussions of a specific resolution to the case between the attorneys and the judge until the sentencing hearing of June 18, 1999.

Certainly a 120 day callback falls within a sentence of probation and fifteen years in prison. Petitioner was lead to believe this specific outcome was possible. That belief was then ratified by the actions of the court in sentencing her pursuant to Section 559.115, R.S.Mo. and subsequently ordering her release. By then it was too late for Petitioner to seek relief under Rule 24.035.

Petitioner was affirmatively and expressly mislead by her attorney and the court was to what sentence she could and did receive. Pursuant to the holding of the Supreme Court in North Carolina v. Alford, supra, it is clear that she was not correctly advised as to the possible sentences she could receive and thus her guilty plea was not proper.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, Petitioner prays that this Honorable Court grant and issue a writ of habeas corpus and order that she be released and/or allowed to withdraw her previously entered plea of guilty.

Respectfully submitted,

Campbell, Turner & Simpkins, L.L.C.

_____

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CERTIFICATE OF COMPLIANCE AND SERVICE

Comes now the undersigned counsel, Scott W. Turner, to hereby certify as follows:

1. The Brief of Petitioner complies with the limitations contained in Missouri Supreme Court Rule 84.06. The brief was completed using Wordperfect 7 in Times New Roman size 13 point font. This brief contains 2,706 words, which is within the maximum allowed by rule.

2. Pursuant to Missouri Supreme Court Rule 84.06, a 3.5 inch disc has been included which contains a copy of the brief. This disc has been scanned for viruses and it is virus-free.

3. Two true and correct copies of the Brief of Petitioner and disc containing a copy of the brief were mailed, postage prepaid, this ____ day of May, 2002 to Mr. Stephen D. Hawke, Office of the Attorney General, P.O. Box 899, Jefferson City, MO 65102.

_____

Scott W. Turner