

ORIGINAL

**IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT**

FILED
JUL 22 2011

LAURA ROY
CLERK, MISSOURI COURT OF APPEALS
EASTERN DISTRICT

BRANDON L. SWALLOW,
Appellant,

vs.

STATE OF MISSOURI,
Respondent.

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)
)
) Appeal No. ED96672
)
)
)

92432

**APPEAL TO THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
FROM THE CITY OF ST. LOUIS CIRCUIT COURT
STATE OF MISSOURI**

FILED

**THE HONORABLE LARRY L. KENDRICK
JUDGE AT GUILTY-PLEA PROCEEDINGS
THE HONORABLE RICHARD C. BRESNAHAN
JUDGE AT POST-CONVICTION PROCEEDINGS**

MAY 7 2012

CLERK, SUPREME COURT

APPELLANT'S STATEMENT, BRIEF, AND ARGUMENT

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SCANNED

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JURISDICTIONAL STATEMENT

On January 13, 2006, Appellant Brandon L. Swallow pleaded guilty to first-degree assault, a class A felony violating Mo. Rev. Stat. § 565.050 (2000); and armed criminal action, an unclassified felony violating Mo. Rev. Stat. § 571.015 (2000), in St. Louis County Cause No. 2105R-02815-01 before the Honorable Larry L. Kendrick, Judge, 21st Judicial Circuit. On March 3, 2006, the court sentenced Mr. Swallow in Count I to twenty (20) years' imprisonment in the Missouri Department of Corrections' (DOC's) custody, with execution of sentence suspended; and in Count II to a concurrent three years' imprisonment to be served. Mr. Swallow was delivered to DOC to serve the armed-criminal-action sentence on March 10, 2006 (L.F. 101).

After Mr. Swallow completed the armed-criminal-action sentence, he was placed on supervised probation on the first-degree assault count (L.F. 15). On March 25, 2010, the court revoked Mr. Swallow's probation, executed the twenty-(20-) year sentence, and retained jurisdiction under Mo. Rev. Stat. § 559.115 (Cum. Supp. 2004) (L.F. 15). Mr. Swallow was delivered to DOC on March 31, 2010 (L.F. 101).

Mr. Swallow filed a Motion for Post-Conviction Relief under Missouri Supreme Court Rule 24.035 on September 10, 2010. On November 3, 2010, the motion court appointed the Office of the State Public Defender, Appellate/PCR Division, to represent Mr. Swallow and gave counsel an additional thirty (30) days in which to file an amended motion. Counsel filed an amended motion on January

31, 2011. The court dismissed Mr. Swallow's request for post-conviction relief as untimely on March 15, 2011.

Mr. Swallow filed a Notice of Appeal on April 25, 2011. Mr. Swallow was also granted leave to file his appeal as a poor person. Mr. Swallow appeals to this Court because he does not raise any issue reserved for the Missouri Supreme Court's exclusive jurisdiction. Mo. Const. Art. V, § 3 (2000); Mo. Rev. Stat. 477.050 (2000).¹

* * * * *

The legal file on appeal of post-conviction proceeding – including the legal file and guilty plea and sentencing transcript from St. Louis County Cause No. 2105R-02815-01 – will be cited as “L.F.”

¹All further statutory references are to Mo. Rev. Stat. 2000, unless otherwise indicated in the index.

STATEMENT OF FACTS

Appellant Brendan Swallow pleaded guilty to first-degree assault and armed criminal action on March 3, 2006 (L.F. 11, 16, 31). The court sentenced him in both counts, but suspended the execution of sentence on the first-degree assault count (L.F. 12-14, 43-44). Mr. Swallow was sentenced to three years' incarceration on the armed-criminal-action count (L.F. 12, 43). Mr. Swallow was delivered to the Missouri Department of Corrections to serve the armed-criminal-action sentence (L.F. 101).

After serving the three-year sentence, Mr. Swallow was released on probation on the first-degree assault count (L.F. 12-14). That probation was revoked on March 25, 2010 (L.F. 15, 54). The court ordered the sentence on the first-degree assault count executed (L.F. 15, 54). Mr. Swallow was delivered to the Missouri Department of Corrections on March 31, 2010 (L.F. 101).

Mr. Swallow filed for post-conviction relief on September 10, 2010 (L.F. 58). In an amended motion, Mr. Swallow alleged he had pleaded guilty involuntarily, unknowingly, and unintelligently because plea counsel failed to 1) advise him of, and pursue, the meritorious defense that the police unconstitutionally obtained incriminating statements from him; and 2) advocate for Mr. Swallow at sentencing by asking the court to order Mr. Swallow receive a psychological examination (L.F. 72-81).

Point I

Mr. Swallow was accused of stabbing Mr. Mitchell House (L.F. 8-9).

When Mr. Swallow was interrogated by police, he admitted stabbing Mr. House (L.F. 73). Before Mr. Swallow made any incriminating statements to police, he was never advised of his right to remain silent; that any statement he made could and may be used against him, that he had a right to have a parent, guardian, or custodian present during questioning; and that he had a right to consult with an attorney (L.F. 73). Mo. Rev. Stat. § 211.059 (Cum. Supp. 2004); Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966).

Mr. Swallow had a right to have his parents present during the police interrogation because he was a “child” under juvenile law (L.F. 73). He had that status because he was only seventeen (17) years old (L.F. 73). Mo. Rev. Stat. § 211.021.1(2) (2000). Neither Mr. Swallow’s mother nor father was with him when he was interrogated (L.F. 73).

Counsel knew Mr. Swallow’s parents had not been with him when he was interrogated partly because the state sent him police reports in discovery (L.F. 73). Despite knowing that, counsel did not advise Mr. Swallow he had the right to have his parents present when he was interrogated (L.F. 73). Nor did counsel file and litigate a Motion to Suppress Statements because the police did not tell Mr. Swallow he had a right to have his parents present during questioning (L.F. 73-74).

The motion court denied Mr. Swallow’s post-conviction relief motion as untimely and dismissed it (L.F. 98). The motion court concluded Mr. Swallow had untimely filed for post-conviction relief because he had not filed his *pro se*

motion within one-hundred-eighty (180) days of being delivered to DOC (L.F. 98). The court ruled Mr. Swallow had been “initially delivered” to DOC on March 10, 2006 (L.F. 98).

Point II

After Mr. Swallow was sentenced to a three-year term in Count I and delivered to the Missouri Department of Corrections, he was diagnosed with schizophrenia and prescribed certain medications, including Haldol and Prozac (L.F. 77). When Mr. Swallow was released from DOC, he could not continue taking those medications because he could not get insurance (L.F. 77).

Mr. Swallow was being supervised on probation in Count I after serving the sentence in Count II (L.F. 77). On March 25, 2010, this court revoked that probation and ordered Mr. Swallow into DOC’s Institution Treatment Centers (ITC) under Mo. Rev. Stat. § 559.115 for substance abuse treatment (L.F. 77-78). At the sentencing hearing following the probation violation hearing, counsel did not request the court to order Mr. Swallow be psychologically examined so he could receive the anti-psychotic medications he had received before in DOC (L.F. 78).

Because of counsel’s failure, when Mr. Swallow arrived at the Western Reception, Diagnostic & Correctional Ctr. to complete the treatment program, he did not receive the anti-psychotic medications he had received before (L.F. 78). He was only prescribed anti-depressant medications (L.F. 78).

Because he was not receiving anti-psychotic medications, Mr. Swallow suffered from symptoms of schizophrenia; specifically, paranoia and auditory hallucinations (L.F. 78). *See* American Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 287 (4th ed. 1994). Because of the paranoia and auditory hallucinations, Mr. Swallow was terminated from ITC (L.F. 78). The Department terminated Mr. Swallow because of his “negative” actions and behaviors (L.F. 78).

The motion court denied Mr. Swallow’s post-conviction relief motion as untimely and dismissed it (L.F. 98). The motion court concluded Mr. Swallow had untimely filed for post-conviction relief because he had not filed his *pro se* motion within one-hundred-eighty (180) days of being delivered to DOC (L.F. 98). The court ruled Mr. Swallow had been “initially delivered” to DOC on March 10, 2006 (L.F. 98).

Mr. Swallow appeals the motion court’s denying post-conviction relief. Further facts will be cited in the Argument section as necessary.

POINTS RELIED ON

I.

The motion court clearly erred in dismissing Appellant Brendan Swallow's Rule 24.035 motion for post-conviction relief as untimely because Mr. Swallow was denied his rights to due process of law² in that Mr. Swallow had timely filed for post-conviction relief on the first-degree assault count. He filed his *pro se* motion for post-conviction relief within one-hundred eighty (180) days after being delivered to the Department of Corrections on the first-degree assault count.

Mr. Swallow was prejudiced by the court's error because the court did not rule on whether Mr. Swallow's guilty pleas were involuntary, unknowing, and unintelligent because had been denied his rights to effective assistance of counsel and due process of law³ in that plea counsel failed to advise him of, and pursue, the meritorious defense that the police unconstitutionally obtained incriminating statements from Mr. Swallow. Had counsel filed and litigated a Motion to Suppress Statements, the court would have suppressed

² These rights are guaranteed by the United States Constitution's Fifth and Fourteenth Amendments and the Missouri Constitution's Article I, § 10.

³ These rights are guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution.

the statements because the police interrogated Mr. Swallow – when he was seventeen (17) years old – without advising him of his right to have his parents present.

Mr. Swallow asks this Court to reverse the motion court's dismissing Mr. Swallow's post-conviction motion and remand this cause for a hearing or, in the alternative, for findings of fact and conclusions of law.

Buckner v. State, 35 S.W.3d 417 (Mo. App. W.D. 2000);

Porter v. State, 678 S.W.2d 2 (Mo. App. E.D. 1984);

Wesbecher v. State, 863 S.W.2d 2 (Mo. App. E.D. 1993)

Whitby v. State, 930 S.W.2d 68 (Mo. App. E.D. 1996);

U.S. Const., Amend. V;

U.S. Const., Amend. XIV;

U.S. Const., Amend. XIV;

Mo. Const., Art. I, § 10;

Mo. Const., Art. I, § 18;

Mo. Rev. Stat. § 559.115 (Cum. Supp. 2004); and

Mo. Sup. Ct. Rule 24.035.

II.

The motion court clearly erred in dismissing Appellant Brendan Swallow's Rule 24.035 motion for post-conviction relief as untimely because Mr. Swallow was denied his rights to due process of law⁴ in that Mr. Swallow had timely filed for post-conviction relief on the first-degree assault count. He filed his *pro se* motion for post-conviction relief within one-hundred eighty (180) days after being delivered to the Department of Corrections on the first-degree assault count.

Mr. Swallow was prejudiced by the court's error because the court did not rule on whether Mr. Swallow's guilty pleas were involuntary, unknowing, and unintelligent because had been denied his rights to effective assistance of counsel and due process of law⁵ in that plea counsel failed to advocate for Mr. Swallow at sentencing. Counsel did not ask the court to order Mr. Swallow receive a psychological examination after being delivered to the Missouri Department of Corrections so he could receive anti-psychotic medications.

Had counsel advocated for an examination, Mr. Swallow would have received the medications in time to prevent his being terminated from ITC, because DOC would have tailored Mr. Swallow's treatment program to address his schizophrenia. Had Mr. Swallow received a psychological

⁴ See n.2.

⁵ See n.3.

examination, Mr. Swallow could have completed the program and been released onto probation.

Mr. Swallow asks this Court to reverse the motion court's dismissing Mr. Swallow's post-conviction motion and remand this cause for a hearing or, in the alternative, for findings of fact and conclusions of law.

Griffin v. State, 937 S.W.2d 400, 401 (Mo. App. E.D. 1997)

Wesbecher v. State, 863 S.W.2d 2 (Mo. App. E.D. 1993);

Hopkins v. State, 802 S.W.2d 956 (Mo. App. W.D. 1991);

Whitby v. State, 930 S.W.2d 68 (Mo. App. E.D. 1996);

U.S. Const., Amend. V;

U.S. Const., Amend. VI;

U.S. Const., Amend. XIV;

Mo. Const., Art. I, § 10,

Mo. Const., Art. I, § 18;

Mo. Rev. Stat. § 556.061 (Cum. Supp. 2004);

Mo. Rev. Stat. § 558.019 (Cum. Supp. 2004);

Mo. Rev. Stat. § 559.115 (Cum. Supp. 2004); and

Mo. Sup. Ct. Rule 24.035.

ARGUMENT

I.

The motion court clearly erred in dismissing Appellant Brendan Swallow's Rule 24.035 motion for post-conviction relief as untimely because Mr. Swallow was denied his rights to due process of law⁶ in that Mr. Swallow had timely filed for post-conviction relief on the first-degree assault count. He filed his *pro se* motion for post-conviction relief within one-hundred eighty (180) days after being delivered to the Department of Corrections on the first-degree assault count.

Mr. Swallow was prejudiced by the court's error because the court did not rule on whether Mr. Swallow's guilty pleas were involuntary, unknowing, and unintelligent because had been denied his rights to effective assistance of counsel and due process of law⁷ in that plea counsel failed to advise him of, and pursue, the meritorious defense that the police unconstitutionally obtained incriminating statements from Mr. Swallow. Had counsel filed and litigated a Motion to Suppress Statements, the court would have suppressed the statements because the police interrogated Mr. Swallow – when he was seventeen (17) years old – without advising him of his right to have his parents present.

⁶ See n.2.

⁷ See n.3.

Mr. Swallow asks this Court to reverse the motion court's dismissing Mr. Swallow's post-conviction motion and remand this cause for a hearing or, in the alternative, for findings of fact and conclusions of law.

Preservation Statement

Mr. Swallow argued in his amended motion he pleaded guilty involuntarily, unknowingly, and unintelligently because plea counsel failed to advise him of, and pursue, the meritorious defense that the police unconstitutionally obtained incriminating statements from him (L.F. 55-59). Because the claim was included in the amended motion, it has been preserved for appellate review. See Mouse v. State, 90 S.W.3d 145, 152 (Mo. App. S.D. 2002) (to be preserved for appellate review, the claim raised on post-conviction appeal must have been either raised in amended post-conviction motion or tried by the parties' implicit consent at the evidentiary hearing).

Review Standard

The motion court clearly erred in dismissing Mr. Swallow's request for an evidentiary hearing and post-conviction relief because Missouri Supreme Court Rule 24.035(h) requires an evidentiary hearing be held when the motion pleads facts, not conclusions, warranting relief, not refuted by the record, and the matters complained of resulted in prejudice to the movant. Burroughs v. State, 773 S.W.2d 167, 169 (Mo. App. E.D. 1986).

Appellate review is limited to determining whether the motion court's findings and conclusions are clearly erroneous. Id. Findings of fact and

conclusions of law are clearly erroneous if an appellate court, upon reviewing the record, is left with the definite and firm impression a mistake has been made. Id.; Richardson v. State, 719 S.W.2d 912, 915 (Mo. App. E.D. 1986).

Counsel failed to advise Mr. Swallow of, file, and litigate a

Motion to Suppress Statements

General Case Law

The United States Constitution's Sixth Amendment and the Missouri Constitution's Article I, §§ 10 and 18(a) guarantee the right to assistance of counsel. Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 782 (1963); Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55 (1932). The Fourteenth Amendment mandates the assistance be effective. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984).

To establish that a conviction must be set aside due to ineffective assistance of counsel, a movant must show counsel did not demonstrate the customary skill and diligence a reasonably competent attorney would display when rendering similar services under the existing circumstances, and movant was prejudiced thereby. Id.; Seales v. State, 580 S.W.2d 733, 736-737 (Mo. 1979). A person who pleads guilty is as entitled to effective assistance of counsel as one who has had a trial. Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366 (1985). But to establish prejudice, a movant must show, but for counsel's error, he would not have pleaded guilty but would have insisted on going to trial. Hill, 466 U.S. at 59, 106 S. Ct. 370.

Analysis

Counsel was ineffective for failing to advise Mr. Swallow of, and pursuing, the meritorious defense that police unconstitutionally obtained incriminating statements from Mr. Swallow (L.F. 74). Counsel failed to pursue this meritorious defense by not filing and litigating a Motion to Suppress Statements (L.F. 74). Counsel may be found ineffective for failing to advise his client concerning, and failing to file and litigate, a Motion to Suppress where there is a reasonable probability, but for counsel's errors, the proceeding's result would have been different. Buckner v. State, 35 S.W.3d 417, 421 (Mo. App. W.D. 2000). Because counsel did not advise Mr. Swallow the police violated his constitutional rights when interrogating him, and failed to file and litigate a Motion to Suppress Statements on that basis, counsel was ineffective (L.F. 74).

Counsel's ineffectiveness was relevant because it affected Mr. Swallow's voluntariness in pleading guilty. Porter v. State, 678 S.W.2d 2, 3 (Mo. App. E.D. 1984); Walker v. State, 698 S.W.2d 871, 874 (Mo. App. E.D. 1985). Ordinarily, a voluntary guilty plea waives a claim counsel was ineffective for failing to file and pursue a motion to suppress. Ramsay v. State, 182 S.W.3d 655, 657 (Mo. App. E.D. 2005). But that is not the case here because Mr. Swallow's guilty pleas were not "knowing and voluntary act[s] done with sufficient awareness of the relevant circumstances and likely consequences of the act[s]." Id. at 658(material in brackets added). Mr. Swallow did not knowingly and voluntarily plead guilty with

sufficient awareness of what he was doing because he did not know the police had unconstitutionally obtained his confession (L.F. 74-5).

The record did not refute that claim because Mr. Swallow was never asked specifically about motions to suppress (L.F. 74). Nor did Mr. Swallow allege he was aware he could move to suppress his statements. Id. Instead, he alleged counsel did not advise him a motion to suppress could have been filed and litigated because of the police's failure to advise him he had a right to have his parents present during interrogation (L.F. 75).

Mr. Swallow was prejudiced by counsel's ineffectiveness (L.F. 75). Had counsel advised him a motion to suppress his confession to police could be filed and litigated, the court would have sustained the motion (L.F. 75). Knowing the police could not use his statements against him, Mr. Swallow would not have pleaded guilty (L.F. 75). He would have instead proceeded to trial (L.F. 75). Thus, but for counsel's ineffectiveness, Mr. Swallow was prejudiced (L.F. 75).

The motion court clearly erred in dismissing

Mr. Swallow's post-conviction motion as untimely

The motion court denied Mr. Swallow's post-conviction relief motion as untimely and dismissed it (L.F. 98). The motion court concluded Mr. Swallow had untimely filed for post-conviction relief because he had not filed his *pro se* motion within one-hundred-eighty (180) days of being delivered to DOC (L.F. 98). The court ruled Mr. Swallow had been "initially delivered" to DOC on March 10, 2006 (L.F. 98).

In Missouri, a person convicted of a felony after pleading guilty who claims that the conviction or sentence violates the United States' or Missouri's constitutions and laws must file for post-conviction relief within **one hundred eighty (180) days** after being delivered to the Department of Corrections if no appeal is taken. Rule 24.035(a),(b).

Under Rule 24.035, a movant must file a *pro se* motion requesting relief *from particular criminal convictions* within the required time of his being delivered to DOC on those counts. Wesbecher v. State, 863 S.W.2d 2, 3 (Mo. App. E.D. 1993). Mr. Wesbecher had pleaded guilty to seven felony counts. Id. at 3. The court suspended imposition of sentence on all counts. Id. Two years later, the court revoked that probation, sentenced Mr. Wesbecher in all counts, but ordered the execution suspended and Mr. Wesbecher placed on probation. Id. Two years after that, the court suspended probation on five of the seven counts, but executed the sentence on two. Id. Mr. Wesbecher served time in DOC on those two counts. Id. After serving the time, he was placed on probation on the other five counts. Id.

Three years after Mr. Wesbecher was released from DOC, the court revoked his probation and ordered the sentences on the five counts be executed. Id. at 4. Mr. Wesbecher was returned to DOC and filed for post-conviction relief within ninety (90) days after being delivered to DOC – the limit at the time – to serve the sentences on the five counts. Id. This Court decided Mr. Wesbecher had timely filed for post-conviction relief because he had filed his *pro se* motion

within the required time of his being delivered to DOC on those counts for which he was requesting post-conviction relief. Id. at 4.

For the same reason, this Court dismissed a post-conviction case without prejudice because the movant had not been delivered to DOC *on the same conviction* as challenged in the motion. Roth v. State, 921 S.W.2d 680, 682 (Mo. App. W.D. 1996). Mr. Roth had pleaded guilty and was ordered to serve a sentence in the Missouri Department of Corrections consecutively to a sentence he was serving in federal custody. Id. at 681. While still in federal custody – before being delivered to DOC – Mr. Roth filed a *pro se* motion for post-conviction relief under Rule 24.035. Id. This Court dismissed Mr. Roth’s post-conviction case as being premature because he was not incarcerated on the criminal offense for which he was requesting post-conviction relief. Id. at 682.

Similarly, if Mr. Swallow had filed for post-conviction relief on the first-degree assault sentence when he was delivered to DOC on the armed-criminal-action sentence, the case would have been dismissed as premature because he had not been delivered to DOC *on the first-degree assault conviction*.

In Hopkins v. State, this Court again upheld a post-conviction case being dismissed as prematurely filed. 802 S.W.2d 956, 957 (Mo. App. W.D. 1991). Mr. Hopkins had pleaded guilty to passing a bad check, been sentenced to DOC, but had the execution of sentence suspended and been placed on probation. Id. At the time, he was serving an unrelated sentence in DOC. Id. Mr. Hopkins filed for

post-conviction relief from the suspended sentence while he was incarcerated on the unrelated sentence. Id.

This Court held the motion was prematurely filed because Mr. Hopkins had not yet been delivered to DOC on the passing-a-bad-check sentence. Id. at 958.

To reach its decision, this Court looked at Rule 24.035's wording:

The language and grammatical construction of the first sentence of Rule 24.035(a) implicitly require a Rule 24.035 movant to be delivered to the custody of the department of corrections on the same conviction challenged in the motion. When paraphrased, the first sentence of Rule 24.035(a) indicates that, in order to seek Rule 24.035 relief, a person must (1) be convicted of a felony on a guilty plea, (2) be delivered to the custody of the department of corrections, and (3) claim the judgment or the sentence imposed to be unconstitutional or illegal. In setting forth its requirements, that same sentence contains repeated references to “the judgment of conviction,” “the sentence,” and “the sentence imposed.” The use of the definite article “the”, as opposed to the indefinite article “a”, denotes the particular judgment or the particular sentence which resulted from a felony conviction on a guilty plea and delivery to custody.

The dual requirement of being “convicted of a felony ... and

delivered to the custody ...” is linked by the conjunctive “and.” The phrases beginning with “convicted” and “delivered” in addition to the clause beginning with “who” modify “a person.” When read together, each component of the first sentence of Rule 24.035 necessarily relates to the same underlying conviction.

Id. at 957-58 (emphasis added).

Following the above cases, this Court should decide Mr. Swallow timely filed for post-conviction relief on the first-degree assault count. The criminal court revoked Mr. Swallow’s probation on the first-degree assault count and ordered the previously-imposed sentence executed on March 25, 2010 (L.F. 51, 54). After the court executed the first-degree assault sentence, Mr. Swallow was delivered to DOC on March 31, 2010 (L.F. 101). Mr. Swallow filed for post-conviction relief one-hundred-sixty-three (163) days later on September 10, 2010 (L.F. 58). This was within Rule 24.035(b)’s one-hundred-eighty- (180-) day limit. Thus, the motion court clearly erred in dismissing Mr. Swallow’s post-conviction motion as untimely.

The motion court also clearly erred in relying on the cases cited in its Conclusions of Law to dismiss Mr. Swallow’s case. The cases cited by the court were not factually similar to Mr. Swallow’s. Some of the cases were dismissed because the movants had been delivered to the Department of Corrections for certain convictions, but requested post-conviction relief from those same

convictions outside Rule 24.035's time limits. Whitby v. State, 930 S.W.2d 68 (Mo. App. E.D. 1996); Kendrick v. State, 804 S.W.2d 386 (Mo. App. W.D. 1991).

Or, movants had been sentenced to DOC under § 559.115 for certain offenses, been released onto probation, had that probation revoked, been returned to DOC, and only then requested post-conviction relief from those offenses.

Crabtree v. State, 91 S.W.3d 736, 737 (Mo. App. W.D. 2002); Hall v. State, 992 S.W.2d 895, 897 (Mo. App. W.D. 1999).

Finally, the court cited a case where – because the movant had been sentenced before Rule 24.035 became effective – he had until a particular date to file under Rule 24.035, but did not. Kendrick v. State, 804 S.W.2d 386, 387 (Mo. App. W.D. 1991).

The court clearly erred in comparing these cases to Mr. Swallow's. In none of the cases had the movants been delivered to DOC for one offense, delivered later on another, then requested post-conviction relief from the latter sentence. Thus, the motion court clearly erred in citing the above cases in its Conclusions of Law to support its dismissing Mr. Swallow's post-conviction motion.

The motion court erred in dismissing Appellant Brandon Swallow's *pro se* motion and not ruling on his claim counsel failed to advise Mr. Swallow of, and pursue, the meritorious defense that the police unconstitutionally obtained incriminating statements from Mr. Swallow. Therefore, for the forgoing reasons, this Court must reverse the motion court's dismissing Mr. Swallow's post-

conviction motion and remand this cause for findings of fact and conclusions of law or, in the alternative, for an evidentiary hearing.

II.

The motion court clearly erred in dismissing Appellant Brendan Swallow's Rule 24.035 motion for post-conviction relief as untimely because Mr. Swallow was denied his rights to due process of law⁸ in that Mr. Swallow had timely filed for post-conviction relief on the first-degree assault count. He filed his *pro se* motion for post-conviction relief within one-hundred eighty (180) days after being delivered to the Department of Corrections on the first-degree assault count.

Mr. Swallow was prejudiced by the court's error because the court did not rule on whether Mr. Swallow's guilty pleas were involuntary, unknowing, and unintelligent because had been denied his rights to effective assistance of counsel and due process of law⁹ in that plea counsel failed to advocate for Mr. Swallow at sentencing. Counsel did not ask the court to order Mr. Swallow receive a psychological examination after being delivered to the Missouri Department of Corrections so he could receive anti-psychotic medications.

Had counsel advocated for an examination, Mr. Swallow would have received the medications in time to prevent his being terminated from ITC, because DOC would have tailored Mr. Swallow's treatment program to address his schizophrenia. Had Mr. Swallow received a psychological

⁸ See n.2.

⁹ See n.3.

examination, Mr. Swallow could have completed the program and been released onto probation.

Mr. Swallow asks this Court to reverse the motion court's dismissing Mr. Swallow's post-conviction motion and remand this cause for a hearing or, in the alternative, for findings of fact and conclusions of law.

Preservation Statement

Mr. Swallow argued in his amended motion he pleaded guilty involuntarily, unknowingly, and unintelligently because plea counsel failed to advocate for Mr. Swallow at sentencing by asking the court to order Mr. Swallow receive a psychological examination (L.F. 77-81). Because the claim was included in the amended motion, it has been preserved for appellate review. *See Mouse v. State*, 90 S.W.3d at 152.

Review Standard

The review standard set forth in Point I applies equally to this point and is adopted and incorporated herein.

Counsel failed to ask the court for Mr. Swallow to be psychologically examined

General Case Law

The general case law set forth in Point I applies equally to this point and is adopted and incorporated herein.

Analysis

Counsel was ineffective for failing to request the court order Mr. Swallow receive a psychological examination so he could receive the anti-psychotic

medications he needed in DOC (L.F. 78). A movant may claim in a Rule 24.035 proceeding counsel was ineffective for failing to advocate his client receive a more favorable sentencing disposition. Griffin v. State, 937 S.W.2d 400, 401 (Mo. App. E.D. 1997). Such a claim concerns counsel's performance during the sentencing, which occurs after probation revocation. Id.

Counsel needed to advocate on Mr. Swallow's behalf by ensuring he received the medications he needed to complete the treatment program (L.F. 78). Suffering from untreated schizophrenia, Mr. Swallow could not complete the program (L.F. 79). Had counsel advocated for an examination, Mr. Swallow would have received the medications in time to prevent his being terminated from ITC, because DOC would have tailored Mr. Swallow's treatment program to address his schizophrenia (L.F. 79). Had Mr. Swallow received a psychological examination, Mr. Swallow could have completed the program and been released onto probation (L.F. 79). Thus, counsel was ineffective (L.F. 79).

Mr. Swallow was prejudiced by counsel's ineffectiveness (L.F. 79). Counsel's failure to advocate caused Mr. Swallow to be terminated from ITC (L.F. 79). Because of that, he was not released on probation, but instead ordered to complete the twenty- (20-) year sentence (L.F. 79). Further, because first-degree assault is a dangerous felony, he must serve a mandatory minimum of eighty-five percent (85%) of the twenty- (20-) year sentence, or seventeen (17) years' incarceration. Mo. Rev. Stat. §§ 556.061(8); 558.019.3 (Cum. Supp. 2004). Thus, Mr. Swallow was prejudiced (L.F. 79).

The motion court clearly erred in dismissing

Mr. Swallow's post-conviction motion as untimely

The motion court denied Mr. Swallow's post-conviction relief motion as untimely and dismissed it (L.F. 98). The motion court concluded Mr. Swallow had untimely filed for post-conviction relief because he had not filed his *pro se* motion within one-hundred-eighty (180) days of being delivered to DOC (L.F. 98). The court ruled Mr. Swallow had been "initially delivered" to DOC on March 10, 2006 (L.F. 98).

In Missouri, a person convicted of a felony after pleading guilty who claims that the conviction or sentence violates the United States' or Missouri's constitutions and laws must file for post-conviction relief within **one hundred eighty (180) days** after being delivered to the Department of Corrections if no appeal is taken. Rule 24.035(a),(b).

Under Rule 24.035, a movant must file a *pro se* motion requesting relief *from particular criminal convictions* within the required time of his being delivered to DOC on those counts. Wesbecher v. State, 863 S.W.2d at 3. Mr. Wesbecher had pleaded guilty to seven felony counts. Id. at 3. The court suspended imposition of sentence on all counts. Id. Two years later, the court revoked that probation, sentenced Mr. Wesbecher in all counts, but ordered the execution suspended and Mr. Wesbecher placed on probation. Id. Two years after that, the court suspended probation on five of the seven counts, but executed the sentence on two. Id. Mr. Wesbecher served time in DOC on those two counts.

Id. After serving the time, he was placed on probation on the other five counts.

Id.

Three years after Mr. Wesbecher was released from DOC, the court revoked his probation and ordered the sentences on the five counts be executed.

Id. at 4. Mr. Wesbecher was returned to DOC and filed for post-conviction relief within ninety (90) days after being delivered to DOC – the limit at the time – to serve the sentences on the five counts. Id. This Court decided Mr. Wesbecher had timely filed for post-conviction relief because he had filed his *pro se* motion within the required time of his being delivered to DOC on those counts for which he was requesting post-conviction relief. Id. at 4.

For the same reason, this Court dismissed a post-conviction case without prejudice because the movant had not been delivered to DOC *on the same conviction* as challenged in the motion. Roth v. State, 921 S.W.2d at 682. Mr. Roth had pleaded guilty and was ordered to serve a sentence in the Missouri Department of Corrections consecutively to a sentence he was serving in federal custody. Id. at 681. While still in federal custody – before being delivered to DOC – Mr. Roth filed a *pro se* motion for post-conviction relief under Rule 24.035. Id. This Court dismissed Mr. Roth’s post-conviction case as being premature because he was not incarcerated on the criminal offense for which he was requesting post-conviction relief. Id. at 682.

Similarly, if Mr. Swallow had filed for post-conviction relief on the first-degree assault sentence when he was delivered to DOC on the armed-criminal-

action sentence, the case would have been dismissed as premature because he had not been delivered to DOC *on the first-degree assault conviction*.

In Hopkins v. State, this Court again upheld a post-conviction case being dismissed as prematurely filed. 802 S.W.2d at 957. Mr. Hopkins had pleaded guilty to passing a bad check, been sentenced to DOC, but had the execution of sentence suspended and been placed on probation. Id. At the time, he was serving an unrelated sentence in DOC. Id. Mr. Hopkins filed for post-conviction relief from the suspended sentence while he was incarcerated on the unrelated sentence. Id.

This Court held the motion was prematurely filed because Mr. Hopkins had not yet been delivered to DOC on the passing-a-bad-check sentence. Id. at 958.

To reach its decision, this Court looked at Rule 24.035's wording:

The language and grammatical construction of the first sentence of Rule 24.035(a) implicitly require a Rule 24.035 movant to be delivered to the custody of the department of corrections on the same conviction challenged in the motion. When paraphrased, the first sentence of Rule 24.035(a) indicates that, in order to seek Rule 24.035 relief, a person must (1) be convicted of a felony on a guilty plea, (2) be delivered to the custody of the department of corrections, and (3) claim the judgment or the sentence imposed to be unconstitutional or illegal. In setting forth its requirements,

that same sentence contains repeated references to “the judgment of conviction,” “the sentence,” and “the sentence imposed.” The use of the definite article “the”, as opposed to the indefinite article “a”, denotes the particular judgment or the particular sentence which resulted from a felony conviction on a guilty plea and delivery to custody.

The dual requirement of being “convicted of a felony ... and delivered to the custody ...” is linked by the conjunctive “and.” The phrases beginning with “convicted” and “delivered” in addition to the clause beginning with “who” modify “a person.” When read together, each component of the first sentence of Rule 24.035 necessarily relates to the same underlying conviction.

Id. at 957-58 (emphasis added).

Following the above cases, this Court should decide Mr. Swallow timely filed for post-conviction relief on the first-degree assault count. The criminal court revoked Mr. Swallow’s probation on the first-degree assault count and ordered the previously-imposed sentence executed on March 25, 2010 (L.F. 51, 54). After the court executed the first-degree assault sentence, Mr. Swallow was delivered to DOC on March 31, 2010 (L.F. 101). Mr. Swallow filed for post-conviction relief one-hundred-sixty-three (163) days later on September 10, 2010 (L.F. 58). This was within Rule 24.035(b)’s one-hundred-eighty- (180-) day limit.

Thus, the motion court clearly erred in dismissing Mr. Swallow's post-conviction motion as untimely.

The motion court also clearly erred in relying on the cases cited in its Conclusions of Law to dismiss Mr. Swallow's case. The cases cited by the court were not factually similar to Mr. Swallow's. Some of the cases were dismissed because the movants had been delivered to the Department of Corrections for certain convictions, but requested post-conviction relief from those same convictions outside Rule 24.035's time limits. Whitby v. State, supra; Kendrick v. State, supra.

Or, movants had been sentenced to DOC under § 559.115 for certain offenses, been released onto probation, had that probation revoked, been returned to DOC, and only then requested post-conviction relief from those offenses. Crabtree v. State, 91 S.W.3d at 737; Hall v. State, 992 S.W.2d at 897.

Finally, the court cited a case where – because the movant had been sentenced before Rule 24.035 became effective – he had until a particular date to file under Rule 24.035, but did not. Kendrick v. State, 804 S.W.2d at 387.

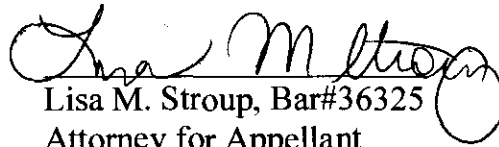
The court clearly erred in comparing these cases to Mr. Swallow's. In none of the cases had the movants been delivered to DOC for one offense, delivered later on another, then requested post-conviction relief from the latter sentence. Thus, the motion court clearly erred in citing the above cases in its Conclusions of Law to support its dismissing Mr. Swallow's post-conviction motion.

The motion court erred in dismissing Appellant Brandon Swallow's *pro se* motion and not ruling on his claim counsel failed to advocate for Mr. Swallow at sentencing by asking the court to order Mr. Swallow receive a psychological examination. Therefore, for the forgoing reasons, this Court must reverse the motion court's dismissing Mr. Swallow's post-conviction motion and remand this cause for findings of fact and conclusions of law or, in the alternative, for an evidentiary hearing.

CONCLUSION

WHEREFORE, for the reasons set forth in Points I and II, Appellant Brendan Swallow requests this Honorable Court reverse the motion court's dismissing his post-conviction motion and remand this cause for findings of fact and conclusions of law or, in the alternative, for an evidentiary hearing.

Respectfully submitted,



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Attorney for Appellant
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Ste. 1100
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Fax (314)340-7685
lisa.stroup@mspd.mo.gov

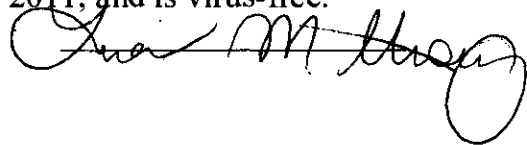
CERTIFICATE OF SERVICE

A copy of the foregoing Appellant's Statement, Brief, and Argument was mailed electronically to the Missouri Court of Appeals, Eastern District and to the Attorney General, State of Missouri, and by U.S. Mail, postage prepaid, to the Attorney General, P.O. Box 899, Jefferson City, MO 65102 on this 22nd day of July, 2011.

Counsel also certifies

1) The brief complies with the limitations contained in Rule 84.06(b) and Eastern District Special Rule 363 because it contains 6,224 words, excluding the cover, index, table of authorities, certificate, signature block, and appendix; and

2) This brief has been scanned for viruses using Symantec Endpoint Protection, most recently updated on July 21, 2011, and is virus-free.



**IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT**

BRANDON L. SWALLOW,)	
Appellant,)	
)	
vs.)	Appeal No. ED96672
)	
STATE OF MISSOURI,)	
Respondent.)	

**APPEAL TO THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
FROM THE CITY OF ST. LOUIS CIRCUIT COURT
STATE OF MISSOURI
THE HONORABLE LARRY L. KENDRICK
JUDGE AT GUILTY-PLEA PROCEEDINGS
THE HONORABLE RICHARD C. BRESNAHAN
JUDGE AT POST-CONVICTION PROCEEDINGS**

APPENDIX

JUDGMENT	A1-A5
ORDER & JUDGMENT	A6-11

In the
CIRCUIT COURT
Of St. Louis County, Missouri



For File Stamp Only

STATE OF MISSOURI

vs.

Brandon Swallow
Defendant(s)

3/3/06
Date

SSN 487-98-3051 OCN 06000917

05 CR-2815
Case Number

DOB 2/20/88

17
Division

FILED IN DIV. 17

MAR 03 2006

JOAN M. GILMER
CIRCUIT CLERK, ST. LOUIS COUNTY

Sentence and Judgment

PRE-SENTENCE: <input checked="" type="checkbox"/> Ordered <input type="checkbox"/> Waived <u>3/3/06</u> Sentence Date		State of Missouri appears by Asst. Pros. Attorney, <u>Andy Wasserman</u> Defendant appears in person and by attorney, <u>Craty Kessen</u>													
Count Number <u>1</u> Charge <u>Assault First Degree</u> Offense Date <u>7/6/05</u> <input type="checkbox"/> Misdemeanor <input checked="" type="checkbox"/> Felony Class: <u>(A)</u> B C D Unclassified On <u>1/13/06</u> in the above count, it is adjudged that the defendant has been: <input checked="" type="checkbox"/> Found guilty upon a plea of guilty <input type="checkbox"/> Found guilty by a Jury/Court <input type="checkbox"/> Dismissed/Nolle pros/Found not guilty	Count Number <u>2</u> Charge <u>Armed Criminal Action</u> Offense Date <u>7/6/05</u> <input type="checkbox"/> Misdemeanor <input checked="" type="checkbox"/> Felony Class: A B C D <u>(Unclassified)</u> On <u>1/13/06</u> in the above count, it is adjudged that the defendant has been: <input checked="" type="checkbox"/> Found guilty upon a plea of guilty <input type="checkbox"/> Found guilty by a Jury/Court <input type="checkbox"/> Dismissed/Nolle pros/Found not guilty	Count Number _____ Charge _____ Offense Date _____ <input type="checkbox"/> Misdemeanor <input type="checkbox"/> Felony Class: A B C D Unclassified On _____ in the above count, it is adjudged that the defendant has been: <input type="checkbox"/> Found guilty upon a plea of guilty <input type="checkbox"/> Found guilty by a Jury/Court <input type="checkbox"/> Dismissed/Nolle pros/Found not guilty													
THE COURT FINDS BEYOND A REASONABLE DOUBT THAT THE DEFENDANT IS A: <table border="0"><tr><td><input type="checkbox"/> Persistent Sexual Offender (558.018 RSMo)</td><td><input type="checkbox"/> Persistent Offender (558.016 RSMo)</td><td><input type="checkbox"/> Persistent Intoxication-Related Traffic Offender (577.023 RSMo)</td></tr><tr><td><input type="checkbox"/> Prior Drug Offender (195.285, .291, .292, .295, or .296 RSMo)</td><td><input type="checkbox"/> Dangerous Offender (558.016 RSMo)</td><td><input type="checkbox"/> Aggravated Offender (577.023 RSMo)</td></tr><tr><td><input type="checkbox"/> Persistent Drug Offender (195.285, .291, .295, or .296 RSMo)</td><td><input type="checkbox"/> Persistent Misdemeanor Offender (558.016 RSMo)</td><td><input type="checkbox"/> Chronic Offender (577.023 RSMo)</td></tr><tr><td><input type="checkbox"/> Prior Offender (558.016 RSMo)</td><td><input type="checkbox"/> Prior Intoxication-Related Traffic Offender (577.023 RSMo)</td><td></td></tr></table>				<input type="checkbox"/> Persistent Sexual Offender (558.018 RSMo)	<input type="checkbox"/> Persistent Offender (558.016 RSMo)	<input type="checkbox"/> Persistent Intoxication-Related Traffic Offender (577.023 RSMo)	<input type="checkbox"/> Prior Drug Offender (195.285, .291, .292, .295, or .296 RSMo)	<input type="checkbox"/> Dangerous Offender (558.016 RSMo)	<input type="checkbox"/> Aggravated Offender (577.023 RSMo)	<input type="checkbox"/> Persistent Drug Offender (195.285, .291, .295, or .296 RSMo)	<input type="checkbox"/> Persistent Misdemeanor Offender (558.016 RSMo)	<input type="checkbox"/> Chronic Offender (577.023 RSMo)	<input type="checkbox"/> Prior Offender (558.016 RSMo)	<input type="checkbox"/> Prior Intoxication-Related Traffic Offender (577.023 RSMo)	
<input type="checkbox"/> Persistent Sexual Offender (558.018 RSMo)	<input type="checkbox"/> Persistent Offender (558.016 RSMo)	<input type="checkbox"/> Persistent Intoxication-Related Traffic Offender (577.023 RSMo)													
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<input type="checkbox"/> Prior Offender (558.016 RSMo)	<input type="checkbox"/> Prior Intoxication-Related Traffic Offender (577.023 RSMo)														
Defendant advised and examined pursuant to Rule 29.07 and the Court has found <input type="checkbox"/> Probable Cause <input type="checkbox"/> No Probable Cause to believe that defendant has received ineffective assistance of counsel. <input checked="" type="checkbox"/> Allocation granted.															

- ☒ On Count 1 the Court
Sentences and commits the defendant to the custody of ☒ Department of Corrections ☐ Department of Justice Services of St. Louis County for a period of 20 (years) (~~months~~) (~~days~~). Sentenced to be served ☒ Concurrent ☐ Consecutive with Count 2
- ☐ **Suspends Execution of Sentence.** Defendant is placed on probation for a period of 5 (~~months~~) (years) under the supervision of ☒ State Board of Probation and Parole ☐ Department of Justice Services ☐ Court, subject to their conditions and regulations and to the following special conditions of probation: see supplemental sentence form attached huto
- ☐ **Suspends Imposition of Sentence.** Defendant is placed on probation for a period of _____ (months) (years) under the supervision of ☐ State Board of Probation and Parole ☐ Department of Justice Services ☐ Court, subject to their conditions and regulations and to the following special conditions of probation: _____
- ☐ Defendant is sentenced to pay a fine of \$ _____.

- ☒ On Count 2 the Court
Sentences and commits the defendant to the custody of ☒ Department of Corrections ☐ Department of Justice Services of St. Louis County for a period of 3 (years) (~~months~~) (~~days~~). Sentenced to be served ☒ Concurrent ☐ Consecutive with Count 1
- ☐ **Suspends Execution of Sentence.** Defendant is placed on probation for a period of _____ (months) (years) under the supervision of ☐ State Board of Probation and Parole ☐ Department of Justice Services ☐ Court, subject to their conditions and regulations and to the following special conditions of probation: _____
- ☐ **Suspends Imposition of Sentence.** Defendant is placed on probation for a period of _____ (months) (years) under the supervision of ☐ State Board of Probation and Parole ☐ Department of Justice Services ☐ Court, subject to their conditions and regulations and to the following special conditions of probation: _____
- ☐ Defendant is sentenced to pay a fine of \$ _____.

- ☐ On Count _____ the Court
Sentences and commits the defendant to the custody of ☐ Department of Corrections ☐ Department of Justice Services of St. Louis County for a period of _____ (years) (months) (days). Sentenced to be served ☐ Concurrent ☐ Consecutive with _____
- ☐ **Suspends Execution of Sentence.** Defendant is placed on probation for a period of _____ (months) (years) under the supervision of ☐ State Board of Probation and Parole ☐ Department of Justice Services ☐ Court, subject to their conditions and regulations and to the following special conditions of probation: _____
- ☐ **Suspends Imposition of Sentence.** Defendant is placed on probation for a period of _____ (months) (years) under the supervision of ☐ State Board of Probation and Parole ☐ Department of Justice Services ☐ Court, subject to their conditions and regulations and to the following special conditions of probation: _____
- ☐ Defendant is sentenced to pay a fine of \$ _____.

CASE NUMBER: 05CR-2815

12 DEFENDANT: Brandon Swallow

2 of 2

A2

the Court further Orders:

Department of Corrections ordered to credit jail time pursuant to 558.031 RSMo.

☒ Pursuant to 595.045 RSMo (Crime Victims Compensation Judgment), the State of Missouri shall have and take from the defendant the amount of \$ 68.00.

☒ ~~State~~ (Defendant) is ordered to pay court costs

☐ as a condition of probation,

☐ and is granted (____ days) (until ____) to pay said costs.

☐ Costs Waived.

☐ Restitution Ordered:

☐ The following special conditions of probation: _____

☒ Defendant is remanded to the Department of Justice Services of St. Louis County for transportation to the Department of Corrections to serve said sentence.

☐ Supplemental page(s) attached.

JUDGMENT FOR TREATMENT

The defendant is ordered to participate in and successfully complete:

☐ The Missouri Post Conviction Drug Treatment Program 217.75 RSMo. As a special condition of probation.

☐ Non-institutional Phase

☐ Institutional Phase

☐ Long Term Treatment Program for offenders with serious substance abuse addictions as screened and approved by the Missouri Board of Probation and Parole. 217.362 RSMo. Any release of the defendant on probation pursuant to 217.362 RSMo. shall be to the supervision of the State Board of Probation and Parole for the maximum term of probation allowed by law.

☐ Regimented Discipline Program - (Boot Camp) as screened and approved by the Missouri Board of Probation and Parole. (MO Dept of Corrections) 217.378 RSMo.

☐ 217.777 RSMo Community corrections program for intensive supervision

☐ The Defendant is recommended for placement in the Shock Incarceration Program pursuant to 559.115 RSMo. Any release of the defendant on probation pursuant to 559.115 RSMo. shall be to the supervision of the State Board of Probation and Parole for the maximum of probation allowed by law.

☐ As a special condition of the Shock Incarceration Program the defendant is recommended for placement in:

☐ An appropriate Institutional Treatment Center which has been screened and approved by the Missouri Department of Probation and Parole.

☐ Sexual offender assessment unit as provided in the Pre-Sentence Investigation report.

☐ There shall be no early release of defendant on probation or otherwise pursuant to 558.016 unless the court issues a prior written order.

☐ The probation department may, within its discretion, issue sock detention pursuant to 559.026 without further order of the court.

☐ St. Louis County Choices Program.

A. W. Wain AA# 3448
Attorney for State MBE

Craig Kessler 40206
Attorney for Defendant MBE

SO ORDERED:

Samy S. Kendrick 3/3/06
Judge 17

ROBIN COX
Court Reporter

3-3-06
Date

I CERTIFY THAT THE ABOVE IS A TRUE COPY OF THE ORIGINAL JUDGMENT AND SENTENCE OF THE COURT IN THE ABOVE CASE AS IT APPEARS ON RECORD IN MY OFFICE.



JOAN M. GILMER

Circuit Clerk

By [Signature]
Deputy Clerk

Date Issued 3/3/06

Received [Signature]

Department of Justice Services

Date 3/3/06

CASE NUMBER: 05CR-2815 13 DEFENDANT: Brandon Swallow

3 OF 3

A3

In the
CIRCUIT COURT
of St. Louis County, Missouri



FILED IN DIV. 17

For File Stamp Only
MAR 2 5 2006

STATE OF MISSOURI

March 3, 2006
Date

JOAN M. GILMER
CIRCUIT CLERK, ST. LOUIS COUNTY

vs.

05CR - 2851
Case No.

Brandon J. Swallow
Defendant

17
Division

SSN 487-98-3051

OCN D 6000 917

SUPPLEMENTAL SENTENCE FORM
(for use for additional special conditions of probation)

The court orders and enters the following special conditions of probation

- ① Upon Defendant's release from the Missouri Department of Corrections, Defendant shall complete the St. Louis County Department of Justice Services in-custody Choices Program for the maximum period of time the program allows.
- ② Defendant shall pay restitution, if any, for Victim Mitchell House's out-of-pocket medical expenses and restitution for Victim Mitchell House's lost summer job wages in an amount to be determined by Defendant's Probation Officer.
- ③ Defendant shall obtain his GED by 3/3/09.
- ④ Defendant shall participate in any drug, alcohol and/or mental evaluation and/or treatment that is recommended by Defendant's Probation Officer.
- ⑤ Defendant shall participate in an aggressive offender/anger management program as determined by Defendant's Probation Officer.

SO ORDERED:

14

Larry L. Kendrick 3/3/06
Judge

In the
CIRCUIT COURT
Of St. Louis County, Missouri



For File Stamp Only

Plaintiff(s)

vs.

Defendant(s)

OCN D6000917 OCA

Date

Case Number

Division

Offense Date

3/25/10

OSCR-002815

18

7/6/09

FILED

PROBATION REVOCATION HEARING AND JUDGMENT

Case called for probation revocation hearing. State appears by Assistant Prosecuting Attorney
Defendant appears in person and by counsel JOHN YARBROUGH.

JOHN M. GILMER
CIRCUIT CLERK, ST. LOUIS COUNTY

- ☒ Defendant hereby waives the hearing of this matter and admits violating condition(s) of probation numbers 6, 8 and 11 as alleged in the Probation Violation Report(s) dated _____, and filed with the Court. The Court accepts the defendant's waiver, and based upon the admission of defendant finds that defendant has violated said conditions of probation.
- ☐ Upon hearing, the Court finds from the evidence adduced that the defendant has violated condition(s) of probation number(s) _____ as alleged in the Probation Violation Report(s) dated _____, and filed with the Court.

After considering the alternatives, the Court hereby orders that:

- ☒ Defendant be continued on probation. Probation to terminate on _____ Date _____
- ☒ The following special condition(s) is/are added to the condition(s) of probation:
Defendant to enter institutional drug treatment program. 559.115
Defendant has been screened; and has a bed date of 4/25/10.
- ☐ The probation granted herein is revoked. (Defendant's sentence is as set forth in attached sentence order).
- ☒ The probation granted herein is revoked, and the previously imposed sentence of 20 YEARS shall be executed forthwith. Defendant is remanded to the Department of Justice Services (for transportation to the Department of Corrections) to serve said sentence.
- ☐ The Court exercises its discretion pursuant to §559.036.3 RSMo., and grants defendant credit against the sentence imposed for (year[s]) (month[s]) (day[s]) of the time spent on probation from _____ to _____.
- ☐ Defendant advised and examined pursuant to Rule 29.07. (No) probable cause exists to believe that defendant has received ineffective assistance of counsel.

ASSISTANT PROSECUTING ATTORNEY

PHONE

DEFENDANT

SO ORDERED

JUDGE

ATTORNEY FOR DEFENDANT

PROBATION OFFICER

PHONE

PHONE



I certify that the above is a true copy of the original order of the court in the above cause, as it appears on record in my office.

By:

Deputy Clerk

Date

Received

15

Department of Justice Services

Date

FILED

**IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS,
STATE OF MISSOURI**

JOAN M. GILMER
CIRCUIT CLERK, ST. LOUIS COUNTY

BRANDON L. SWALLOW,

Movant,

v.

STATE OF MISSOURI,

Respondent.

Cause No. 10SL-CC03729

Division No. 18

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

This matter comes before the Court on a Motion filed by Movant, pursuant to Rule 24.035 of the Missouri Rules of Criminal Procedure to Vacate, Set Aside or Correct the Judgment or Sentence in cause numbered, 05CR-002815. The Court takes judicial notice of its file in the aforementioned cause and now makes the following findings of fact and enters the following conclusions of law and judgment.

FINDINGS OF FACT

1. On January 13, 2006, Movant entered a "blind" plea of guilty (not pursuant to the State's recommendation) in cause number 05CR-002815 to the charges of Assault in the First Degree, a class A felony and Armed Criminal Action, an unclassified felony.

2. On March 3, 2006, the Court sentenced Movant on the Assault charge to serve twenty (20) years in the Department of Corrections, and on the Armed Criminal Action charge to serve three (3) years in the Department of Corrections. The Court

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suspended the execution of the sentence on the Assault charge only and placed Movant on probation for five (5) years with conditions.

3. On March 10, 2006, Movant was delivered to the Department of Corrections to serve his three (3) year sentence on the charge of Armed Criminal Action. He was released on July 6, 2008. (See Exhibit 1 attached hereto and incorporated herein).

4. On March 25, 2010, Movant's probation was revoked on the Assault charge and the Court executed the previously imposed sentence of twenty (20) years in the Department of Corrections. The sentence was made pursuant to §559.115 RSMo.

5. On March 31, 2010, Movant was delivered to the Department of Corrections to serve his sentence on the Assault charge. (See Exhibit 1).

6. This Court, upon receipt of a report from the Missouri Board of Probation and Parole declined to release Movant pursuant to §559.115 RSMo on June 10, 2010.

7. On September 10, 2010, Movant filed his Pro Se Motion to Vacate, Set Aside or Correct the Judgment or Sentence pursuant to Rule 24.035 of the Missouri Rules of Criminal Procedure.

8. On January 31, 2011, Movant by and through counsel filed his Amended Motion pursuant to Rule 24.035 to Vacate, Set Aside or Correct Judgment and Sentence and Request for Evidentiary Hearing.

CONCLUSIONS OF LAW

1. Rule 24.035(b) of the Missouri Rules of Criminal Procedure provides that where a defendant does not appeal the judgment or sentence, "the motion shall be filed

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within one hundred eighty (180) days of the date the person is delivered to the custody of the department of corrections."

2. "The law is well-settled that the limitations start to run upon a movant's initial delivery to the custody of the department of corrections, even if he or she is later granted probation." Crabtree v. State, 91 S.W.3d 736, 737 (Mo.App. 2002), citing Hall v. State, 39 S.W. 3d 101, 992 S.W. 2d 895, 897 (Mo.App. 1999).

3. Movant was initially delivered to the Department of Corrections on March 10, 2006. Movant filed his Rule 24.035 motion more than four (4) years and six (6) months later, on September 10, 2010.

4. Movant's failure to comply with the time constraints of Rule 24.035(b) constitutes a complete waiver of his right to seek relief under the rule. Whitby v. State, 930 S.W.2d 68 (Mo.App. 1996).

5. The time limitations imposed by Rule 24.035(b) has been consistently held valid and mandatory. Day v. State, 770 S.W.2d 692, 695 (Mo. banc 1989), cert denied, Walker v. Missouri, 110 S.Ct. 186 (1989). Further the limitation does not violate Movant's right to due process or equal protection. Kendrick v. State, 804 S.W.2d 386 (Mo.App. 1991).

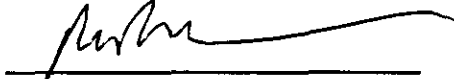
ORDER, JUDGMENT AND DECREE

WHEREFORE, IT IS ORDERED ADJUDGED AND DECREED, that Movant's Motion to Vacate, Set Aside or Correct the Judgment or Sentence pursuant to Rule 24.035 of the Missouri Rules of Criminal Procedure be and is hereby denied as untimely and the Court hereby dismisses said motion.

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SO ORDERED:


Honorable Richard Bresnahan, Judge
St. Louis County Circuit Court
Division 18

Entered this 15 day of March, 2011

cc: Lisa Stroup, Attorney for Movant
Andrew F. Wasserman, Attorney for Respondent

STATE OF MISSOURI)
) ss
COUNTY OF ST FRANCOIS)

AFFIDAVIT OF CUSTODIAN PURSUANT TO SECTION 490.692 RSMO

Before me, the undersigned authority, personally appeared Phyllis M. Byland, Records Officer, who stated as follows:

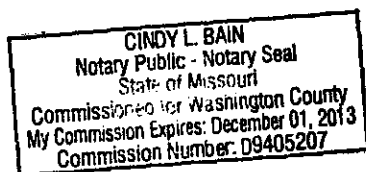
My name is Phyllis M. Byland. I am of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated:

I am a Custodian of Records for the Missouri Department of Corrections. Attached hereto are 1 pages of records from the Missouri Department of Corrections. These records are kept in the regular course of business, and it was in the regular course of business for an employee or representative with knowledge of the act, event, condition, opinion or diagnosis recorded to make the record or to transmit information thereof to be included in such record, and the record was made at or near the time of the act, event, condition, opinion, or diagnosis. The records attached hereto are exact duplicates of the original.

Phyllis M. Byland
Records Officer

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my official seal this 8th day of February, 2011.

Cindy L. Bain
Notary Public



Jeremiah W. (Jay) Nixon
Governor



**Eastern Reception Diagnostic and
Correctional Center**
2727 Highway K
Bonne Terre, Missouri 63628
Telephone: 573-358-5516
Fax: 573-358-0734

George A. Lombardi
Director

State of Missouri
DEPARTMENT OF CORRECTIONS
Ad Excelleum Conamur – "We Strive Towards Excellence"

February 8, 2011

Andrew F. Wasserman
Assistant Prosecuting Attorney
St. Louis County
100 South Central Ave
St. Louis County, MO 63105

RE: Brandon L. Swallow W/M DOB/02-20-88 MDC No. 1140694

Dear Mr. Wasserman:

Brandon Swallow was received by the Missouri Dept. of Corrections on 3-10-06, to serve a 3 year Armed Criminal Action conviction on Cause No. 05CR-2815. He also received an SES on the Assault 1st Degree conviction under the same cause number. He was released on July 6, 2008. On March 31, 2010, he returned to the Dept. of Corrections on a probation violation on the Assault First Degree conviction on Cause No. 05CR-2815. As of this date, he is still incarcerated at the Eastern Reception Diagnostic and Correctional Center.

Sincerely,

A handwritten signature in dark ink, appearing to read "Phyllis M. Byland", is written over the typed name.

Phyllis M. Byland
Records Officer

Cc: File