IN THE
MISSOURI SUPREME COURT

TOMMY DORSEY,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 85018
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF GREENE COUNTY, MISSOURI
THIRTY-FIRST JUDICIAL CIRCUIT, DIVISION V
THE HONORABLE CALVIN HOLDEN, JUDGE

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Tommy Dorsey appeals the denial of his postconviction motion to vacate his pleas of guilty to driving while intoxicated, Section 577.010, RSMo 2000,[1] and driving while revoked, Section 302.321. Because Mr. Dorsey challenged the validity of Section 302.321, the statute under which he was prosecuted for driving while revoked, jurisdiction lies in this Court under Article V, Section 3, Mo. Const. (as amended 1982).

[1] All further references will be to RSMo 2000 unless otherwise noted.

STATEMENT OF FACTS

In April of 2002**,** Tommy Dorsey appeared with counsel before the Honorable Calvin Holden in Greene County Circuit Court to plead guilty to charges of driving while revoked, Section 302.321, and driving while intoxicated, Section 577.010 (L.F 8, 28). The State charged Mr. Dorsey with driving while revoked as a class D felony, enhancing it from misdemeanor status with four prior convictions for burglary, arson, assault, and receiving stolen property (L.F. 6).

Judge Holden first read the charges to Mr. Dorsey and recited the plea agreement as the State's recommendation of a five-year sentence on each charge, with the terms running concurrently with one another and any other existing sentence (L.F. 9, 11). Mr. Dorsey asked the court if the sentences in this case would run from the time that the court sentenced him on another offense (L.F. 11-12). Judge Holden replied that the statute would give him credit for time spent incarcerated on this case (L.F. 12). Mr. Dorsey told the court that the written memorandum filed with the court accurately stated the full agreement (L.F. 20, 27).

The court ascertained that Mr. Dorsey was in good physical and mental health and had adequate opportunity to consult with counsel before deciding to plead guilty (L.F. 10-13). The court reviewed rights attendant to a criminal trial that Mr. Dorsey was waiving by pleading guilty (L.F. 13-15). The prosecutor recited evidentiary facts underlying the charges (L.F. 16-18). The court found a

factual basis for the plea after Mr. Dorsey acknowledged that he was pleading guilty because his conduct was as described (L.F. 20).

The court accepted Mr. Dorsey's pleas as knowing and voluntary, and sentenced him in accordance with the plea agreement to two concurrent terms of five years in the custody of the Department of Corrections, those sentences to be served concurrently with an existing sentence (L.F. 21-22, 28).

Mr. Dorsey timely filed a *pro se* motion for postconviction relief in which he alleged that his plea was unknowing because he was misled by counsel and the court to believe that under the plea agreement the sentences for driving while intoxicated and driving while revoked would be credited for time served while he was incarcerated on an unrelated assault conviction while this case was pending (L.F. 31-36).

Appointed counsel filed an amended motion which restated Mr. Dorsey's *pro se* claim (L.F. 39-40, 46-48) and also alleged ineffective assistance of counsel based on plea counsel's failure to file a motion to dismiss the charge of driving while revoked on the grounds that the information improperly charged the offense of driving while revoked as a class D felony or, alternatively, the enhancement provision within Section 302.321 used by the State is void for vagueness (L.F. 39, 43-45).

Judge Holden denied the motion by an order with findings of fact and conclusions of law granting the State's motion to dismiss without an evidentiary hearing (L.F. 50-54). The court found that Mr. Dorsey's claim of being

misinformed about the effect of the plea agreement on the issue of jail time credit was refuted by the record (L.F. 53). The court found that the enhancement provision in Section 302.321 had been applied as directed by the statute, that there was no need for construction of the provision since the language was not ambiguous, and that Mr. Dorsey was not prejudiced at any rate because the plea bargain obviated the risk of a significantly longer sentence had he gone to trial (L.F. 51-52). Notice of appeal was timely filed (L.F. 56).

POINTS RELIED ON

I.

The motion court erred in denying Tommy Dorsey's motion for postconviction relief because his conviction and sentence for class D felony driving while revoked violated his right to due process as guaranteed by the Fourteenth Amendment of the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the charge was unlawfully enhanced from a class A misdemeanor by use of convictions for burglary, arson, assault, and receiving stolen property, when the pertinent enhancement provision requires proof of four or more prior revocations, suspensions or cancellations of a driver's license.

Alternatively, the motion court erred in denying Tommy Dorsey's motion for postconviction relief because his conviction and sentence for class D felony driving while revoked violated his right to due process as guaranteed by the Fourteenth Amendment of the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that Section 302.321 is void for vagueness, since the plain language of the final sentence of the statute permits the State to charge driving while revoked as a class D felony by use of any offense, resulting in arbitrary application because it permits the use of predicate offenses not related to the subject of the statute and non-counseled convictions.

Collins v. Director of Revenue, 691 S.W.2d 246 (Mo. banc 1985);

A.B. v. Frank, 657 S.W.2d 625 (Mo. banc 1983);

Ryan v. Kirkpatrick, 669 S.W.2d 215(Mo. banc 1984);

State v. Burns, 978 S.W.2d 759 (Mo. banc 1998);

United States Constitution, Amend. XIV;

Missouri Constitution, Article I, Section 10;

Sections 1.140, 195.275, 195.285, 302.010, 302.321, 302.525, 558.016, 558.017 and 577.023, RSMo 2000;

Section 302.321, RSMo Cum. Supp. 2002;

Section 566.025, RSMo 1994; and

Rule 24.035.

II.

The trial court clearly erred in denying Tommy Dorsey's Rule 24.035 motion without a hearing, in violation of his right to effective assistance of counsel and due process of law as guarantee by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, because he stated a claim, not conclusively refuted by the record, which if proven would entitle him to relief. Mr. Dorsey alleged that he received ineffective assistance of counsel in that plea counsel told him that he would receive credit against his five-year sentences for driving while revoked and driving while intoxicated in the case at bar for time spent incarcerated on an unrelated assault case while this case was pending. Mr. Dorsey alleged that had he known he would not be credited for the time in question, he would not have pled guilty but would have proceeded to trial.

Hao v. State, 67 S.W.3d 661 (Mo. App., E.D. 2002);

Beal v. State, 51 S.W.3d 109 (Mo. App., W.D. 2001);

Hill v. Lockhart, 472 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985);

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984);

United States Constitution, Amends. VI and XIV;

Missouri Constitution, Article I, Section 18(a); and

Rule 24.035.

ARGUMENT

I.

The motion court erred in denying Tommy Dorsey's motion for postconviction relief because his conviction and sentence for class D felony driving while revoked violated his right to due process as guaranteed by the Fourteenth Amendment of the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the charge was unlawfully enhanced from a class A misdemeanor by use of convictions for burglary, arson, assault, and receiving stolen property, when the pertinent enhancement provision requires proof of four or more prior revocations, suspensions or cancellations of a driver's license.

Alternatively, the motion court erred in denying Tommy Dorsey's motion for postconviction relief because his conviction and sentence for class D felony driving while revoked violated his right to due process as guaranteed by the Fourteenth Amendment of the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that Section 302.321 is void for vagueness, since the plain language of the final sentence of the statute permits the State to charge driving while revoked as a class D felony by use of any offense, resulting in arbitrary application because it permits the use of predicate offenses not related to the subject of the statute and non-counseled convictions.

I. The claim and the standard of review.

In January of 2001 Tommy Dorsey was arrested in Springfield for driving after his license had been revoked (L.F. 16, 21). Mr. Dorsey pled guilty to driving while revoked as a class D felony after the prosecutor used four prior convictions for burglary, arson, assault, and receiving stolen property to enhance the charge from a class A misdemeanor (L.F. 6, 28). Mr. Dorsey later filed a postconviction relief motion, alleging in pertinent part that plea counsel was ineffective in failing to move to dismiss the charge of driving while revoked a) "on the basis that the information did not properly charge a felony" or alternatively b) because "the statute creating the felony of driving while revoked is void for vagueness." (L.F. 42-43)

The subsequent discussion in the amended motion clarifies the claim (L.F. 42-46), which can be restated as a) the information did not properly charge a felony because the prosecutor misconstrued the statute to permit enhancement with predicate offenses other than revocations, or b) because the language of the provision in question ("fourth or subsequent conviction for any other offense") does not sufficiently inform those who enforce the statute that the predicate convictions must be revocations, it is void for vagueness.

The motion court did not treat Mr. Dorsey's claim as one of ineffective assistance, rather, it addressed the substantive statutory claim contained therein.

First, the court found the enhancement provision properly applied: "Since the language of the charge tracks the language of the statute creating the felony and contains all the elements of the crime, it would be sufficient to charge a felony, assuming that the statute were constitutionally sound." (L.F. 51) (citation omitted.) The court then observed that there was no need to interpret the statute because the language is clear and unambiguous (L.F. 51-52).

At issue is the meaning of the second part of the last sentence of Section 302.321.2. "Driving while revoked is a class D felony on the second or subsequent conviction pursuant to section 577.010, RSMo, *or a fourth or subsequent conviction for any other offense*." (emphasis added.) The prosecutor read the second part of that sentence to permit enhancement by means of Mr. Dorsey's prior convictions for burglary, arson, assault, and receiving stolen property. Appellant contends that the phrase is correctly interpreted to allow charging driving while revoked as a class D felony when the defendant's license has been revoked four or more times previously—the term "conviction" refers to prior revocations.[2] Thus clarified, the sentence would read "Driving while

[2] The definitions section at the beginning of Chapter 302 is not helpful. "Conviction" is defined there as any final conviction or forfeiture of bail or other collateral due to failure to appear, followed by other information relevant to an appeal of points assessed against a license or the beginning date of a revocation or suspension. Section 302.010.

revoked is a class D felony on the second or subsequent revocation pursuant to section 577.010, RSMo, or a fourth or subsequent revocation for any other offense."

Ordinarily, appellate review of the motion court's decision is limited to determining whether the court's findings and conclusions are clearly erroneous. Rule 24.035(k); **Peiffer v**. **State**, 88 S.W.3d 439, 445 (Mo. banc 2002). However, statutory interpretation presents a question of law that this Court reviews *de novo*. **Ochoa v. Ochoa**, 71 S.W.3d 593, 595 (Mo. banc 2002).

II. Section 302.321. Driving while canceled, revoked or suspended.

Section 302.321 addresses the offense of driving when one's license is canceled, revoked or suspended. Driving while revoked is a class A misdemeanor except under circumstances set out by two sentences in subsection 2, which specify when it can be charged as a class D felony.

The first of the two sentences references a "prior alcohol-related enforcement contact," defined in Section 302.525 as any suspension or revocation for refusal to submit to chemical testing under implied consent or 2) any conviction for driving while having an unlawful blood alcohol concentration. Not all revocations result from alcohol-related enforcement contacts. A person can also have his license revoked or suspended for 1) a conviction of driving while intoxicated, 2) failing to maintain financial responsibility under Chapter 303, or 3) accumulating points assessed against his license for other vehicular misconduct

(e.g., careless and imprudent driving, permitting an unlicensed driver to operate the vehicle, etc.) The first sentence addressing enhancement reads:

> Any person with no prior alcohol-related enforcement contacts [] convicted a fourth or subsequent time of driving while revoked and any person with a prior alcohol-related enforcement contact [] convicted a third or subsequent time of driving while revoked is guilty of a class D felony.

Section 302.321.2.

This first classification by its language applies to recidivist offenders, people who have previously been convicted of driving while revoked. Thus, a person convicted of driving while revoked is guilty of a D felony 1) when he is before the court on the charge of driving while revoked for the fourth or subsequent time or 2) when he has previously been convicted of driving with an unlawful blood alcohol concentration, or refused to submit to chemical testing to determine his blood alcohol level, and he is before the court on a charge of driving while revoked the third or subsequent time.[3]

The subsection next addresses sentencing, forbidding the court to suspend imposition of a sentence and requiring certain conditions for the grant of probation. The last sentence, the provision at issue here, returns to the topic of enhancement, "Driving while revoked is a class D felony on the second or

[3] The 2002 amendment to the statute added restrictions about which convictions for driving while revoked can be used as predicate offenses. See page 20, *infra*.

subsequent conviction pursuant to section 577.010, RSMo, or a fourth or subsequent conviction for any other offense."

III. The prosecutor and the motion court simply misinterpreted the second enhancement provision.

Interpreting the provision literally, as the prosecutor did here, to permit using diverse other convictions to enhance the offense to a class D felony, reads into the statute an intent to sanction repeat offenders in general, without regard to the nature of the predicate offenses, a concern that is out of place in a specialized recidivist statute. Interpreting "fourth or subsequent conviction of any offense" to permit enhancement based on diverse convictions rather than revocations is not consistent with the purpose of the statute, which addresses revocations and driving while revoked. To permit the State to enhance a charge of driving while revoked by means of other offenses, not related to the purpose of the statute, is anomalous in view of the way other recidivist offender provisions are written and applied. *See e.g.*, Section 577.023, intoxication-relate offenses; Section 195.275 and 195.285, convictions related to controlled substances; and Section 558.017, enumerated sexual offenses.

The phrase "fourth or subsequent conviction for any other offense" seems clear enough when separated from the rest of the sentence. But phrases within a statute should not be construed in isolation; they should be read in conjunction with the purpose of the whole statute and the purpose of the law. **Collins v. Director of Revenue**, 691 S.W.2d 246 (Mo. banc 1985). In **Collins**, the appellant

contended that the statute governing suspension for driving under the influence of alcohol should be read literally to require the Director to prove at the suspension hearing that the arresting officer had probable cause to believe appellant was driving under the influence when the officer stopped him. 691 S.W.2d at 251. The Court found that another statute within the legislative act indicated that the legislature did not intend that the State be required to do so, and noted that reading the statute literally would permit the Director to suspend a driver's license merely on the basis of an officer's probable cause. *Id.* The Court rejected Collins' argument because interpreting the provision literally would "wreak havoc" with the rest of the act. "It appears to us that the statute was designed to expeditiously remove the most dangerous drunk drivers from Missouri roadways. In order to effectuate this intent, the strict letter of the law must yield." **Collins**, 691 S.W.2d at 252.

"Driving while revoked is a class D felony on the second or subsequent conviction pursuant to section 577.010, RSMo, or a fourth or subsequent conviction for any other offense." Examining the sentence as a whole supports appellant's argument that the word "conviction" refers to prior revocations.

In contrast with the first provision, which addresses recidivist offenders ("Any person"), the subject of the second provision is the offense itself "Driving while revoked is . . ." The first part of the sentence permits charging driving while revoked as a felony "on the second or subsequent conviction pursuant to section 577.010". Since a person is not convicted of driving while revoked "pursuant to

Section 577.010," the only plausible interpretation is that "Driving while revoked is a class D felony where the underlying revocation is the second or subsequent such revocation due to driving while intoxicated."

Recognizing that "conviction" refers to a prior revocation explains the second part of the sentence, "or a fourth or subsequent conviction for any other offense" as directing that driving while revoked can be charged as a class D felony when the license has been revoked four or more times previously for any offense other than driving while intoxicated. Because the second enhancement provision focuses on the offense, in contrast with the prior provision addressing the recidivist defendant, it can be applied to someone who has never before been charged with driving while revoked. It might be the first time the defendant was caught driving on a revoked license, but if he has been revoked twice before for driving while intoxicated—or four times before for any other reason--this first driving while revoked can be charged as a D felony.

Twenty years ago in **A.B. v. Frank**, the Court was presented with a constitutional challenge to Section 577.023, the intoxication-related offenses recidivist statute. 657 S.W.2d 625 (Mo. banc 1983). The Court found it unnecessary to decide A.B.'s various constitutional challenges because an amendment to the statute, which did away with the distinction between counseled and non-counseled convictions, would be in effect before A.B. was tried. **A.B**., 657 S.W.2d at 627. However, the Court gratuitously considered an apparent conflict within the final subdivision of the new version of the statute, and

construed it in a manner that obviated constitutional challenges similar to A.B.'s in the future. **A.B**., 657 S.W.2d at 628-629.

This Court is obligated to adopt any reasonable interpretation of a statute that will allow its validity and resolve any doubts in favor of affirming its constitutionality. **State v. Burns**, 978 S.W.2d 759 760 (Mo. banc 1998). The Court should do as it did in **A.B**., and construe the final sentence of Section 302.321.2 in order to give trial courts guidance on its proper application. The provision should be read as permitting enhancement of a charge of driving while revoked to a class D felony when the underlying revocation is the second or subsequent revocation for driving while intoxicated, or the fourth or subsequent such revocation for any reason. Accordingly, the Court should reverse the motion court's denial of Mr. Dorsey's postconviction motion and remand with instructions that he be resentenced for driving while revoked as a class A misdemeanor.

IV. Alternatively, the provision plainly permits enhancement based on any prior offense, and thus is void for vagueness since the purpose of the statute is to define and prescribe punishment for the offense of driving while revoked.

Due Process requires that a statute provide adequate guidance to those who must apply it to avoid arbitrary or discriminatory application." **State v. Young**, 695 S.W.2d 882, 884 (Mo. banc 1985); **Grayned v. City of Rockford**, 408 U.S. 104, 108, 92 S.Ct. 2294, 2299, 33 L.Ed.2d 222(1972).

The statute's language of "any offense" is overinclusive. In addition to permitting enhancement by use of offenses not related to the subject matter and purpose of the statute, "any offense" could also be read to include class C misdemeanors, municipal offenses and other non-counseled convictions. As noted above, none of the other specialized recidivist provisions allow the use of "any offense." Even Section 558.016, the general recidivist offender statute, identifies predicate offenses as felonies or class A or B misdemeanors.

Moreover, the 2002 amendment to Section 302.321 restricted the use of prior convictions for driving while revoked for enhancement to those where the judge was an attorney, the defendant was represented by an attorney or waived his right to one, the defendant served at least ten days in jail on the offense, and other limitations. Section 302.321, RSMo Cum. Supp. 2002. It is not reasonable to think that the legislature intended to restrict the convictions that can be used to enhance punishment for a repeat offender under the statute's first enhancement provision, but leave unchanged a provision permitting the State to convict a first-time driving-while-revoked offender of a felony because he has four or more "other offenses" that lack the procedural protections afforded to repeat offenders.

As illustrated by what happened in Mr. Dorsey's case, the plain language of the phrase "or a fourth or subsequent conviction for any offense" invites the use of unrelated offenses and non-counseled convictions. But even though the Court might doubt that the legislature intended the provision be used that way, legislative intent can be ascertained only from the words of the statute, which

states clearly "Driving while revoked is a class D felony on . . . a fourth or subsequent conviction for any other offense." *See*, **State v. Rowe**, 63 S.W.2d 647, 648-649 (Mo. banc 2002) (Court could not construe Section 302.321 to include revocation from another state when the statute plainly defines the crime of driving while revoked as operating a motor vehicle on a highway when his license has been canceled, suspended or revoked *under the laws of this state*.)

In **State v. Burns**, *supra*, the Court declined to read into Section 566.025, RSMo 1994, a requirement that the trial court weigh the probative value of propensity evidence made admissible by the statute against the potential for unfair prejudice. The Court found the statue unconstitutional after concluding that there was no construction from the text as written that would save it from misapplication by a trial court. **Burns**, 978 S.W.2d at 760.

So it is here, where the language at issue is not ambiguous. The only way to prevent arbitrary use of the provision is to find it void for vagueness and excise it from the statute. Under Section 1.140, the Court may void only part of a statute where the remaining provisions are complete and capable of being executed in accord with legislative intent. **Ryan v. Kirkpatrick**, 669 S.W.2d 215, 219 (Mo. banc 1984). Upon striking the enhancement provision from the statute, the Court should reverse the motion court's denial of Mr. Dorsey's postconviction motion and remand with instructions that he be resentenced for driving while revoked as a class A misdemeanor.

II.

The trial court clearly erred in denying Tommy Dorsey's Rule 24.035 motion without a hearing, in violation of his right to effective assistance of counsel and due process of law as guarantee by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, because he stated a claim, not conclusively refuted by the record, which if proven would entitle him to relief. Mr. Dorsey alleged that he received ineffective assistance of counsel in that plea counsel told him that he would receive credit against his five-year sentences for driving while revoked and driving while intoxicated in the case at bar for time spent incarcerated on an unrelated assault case while this case was pending. Mr. Dorsey alleged that had he known he would not be credited for the time in question, he would not have pled guilty but would have proceeded to trial.

Mr. Dorsey alleged in his *pro se* motion that his plea was unknowing because he was misled by counsel and the court to believe that the plea agreement included credit for time served while he was incarcerated on an unrelated assault conviction while this case was pending (L.F. 31-36). However, the Department of Corrections declined to credit the time served from the date of his prior conviction through the date he received the two five-year sentences in this case (L.F. 32).

Mr. Dorsey repeated and explained the allegation in his amended motion, in which he alleged both that plea counsel misadvised him (L.F. 46), and that the trial court misinformed him at the time of the plea that he would be credited for time served between the time he was sentenced on an unrelated assault charge, June 15, 2001, and the date of the plea in this case, April 8, 2002 (L.F. 47).

The docket sheet in the underlying criminal case shows that charges in the case at bar were filed on April 23, 2001, and Mr. Dorsey bonded out two days later (L.F.1). The amended motion informs that Mr. Dorsey was sentenced to a nine-year term of imprisonment on an unrelated assault charge on June 15, 2001, and was incarcerated on that date (L.F. 46).

At the plea and sentencing hearing on April 8, 2002, the court recited the plea agreement as the State's recommendation of a five-year sentence on each charge, with the terms running concurrently with one another and any other existing sentence (L.F. 9, 11). Mr. Dorsey asked the court if the sentences in this case would run from the time that the court sentenced him on the other offense

DEFENDANT DORSEY: Okay. Now, this will run from the time you sentenced me on my nine, right? This will run from the time I was sentenced on my current sentence?

THE COURT: I can't answer that question. I haven't looked it up. I don't know. If you were in custody on this case at that time, it will run. That's all I can tell you. And the statute gives you credit for all the time on this case that you were in custody on this case by statute. They revoked your bond, didn't they?

DEFENDANT DORSEY: Yeah, last year.

THE COURT: Whenever they revoked your bond and put you back in custody, you will be given credit for that time.

(L.F. 11-12).

It is clear from this exchange that getting credit for time served from the date of sentencing on his earlier conviction, in June of 2001, was very important to Mr. Dorsey.

Review of the motion court's decision is limited to determining if it is clearly erroneous. Rule 24.035(k). The court's findings and conclusions are clearly erroneous when the reviewing court is left with the definite and firm impression that the motion court was mistaken. **Peiffer v**. **State**, 88 S.W.3d 439, 445 (Mo. banc 2002). To be entitled to a hearing, the motion must allege facts, not refuted by the record, that entitle him to relief and resulted in prejudice. *Id*.

To succeed on a claim of ineffective assistance of counsel, a movant must show that his attorney failed to exercise the customary skill and diligence of a reasonably competent attorney under similar circumstances, and as a result he was prejudiced. **Strickland v. Washington**, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). After a guilty plea, the prejudice requirement focuses on whether there is a reasonable probability that, but for his attorney's errors, the movant would not have pled guilty but would have proceeded to trial. **Hill v. Lockhart**, 472 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985). After a plea of guilty, ineffectiveness of counsel is relevant only to the extent that it

affected the voluntariness of the plea. **Hao v. State**, 67 S.W.3d 661 (Mo. App., E.D. 2002).

Erroneous advice about parole eligibility can affect the voluntariness of a plea. The Western District of the Court of Appeals acknowledged the importance of counsel's advice on the matter, remanding Jermont Beal's Rule 24.035 case for an evidentiary hearing on the allegation that counsel incorrectly advised Beal that the eighty-five percent of term mandatory incarceration statute would not apply to his sentence for first-degree assault. **Beal v. State**, 51 S.W.3d 109 (Mo. App., W.D. 2001).

In **Hao**, the Eastern District remanded for an evidentiary hearing based on Stuart Hao's claim that plea counsel was ineffective for advising him that he would be required to serve only 15% of his fifteen-year sentence before being eligible for parole. **Hao**, 67 S.W.3d at 663. The court distinguished between cases where counsel simply fails to inform his client about parole eligibility, a collateral consequence of a conviction, and those where counsel incorrectly advises his client as to eligibility. *Id*.

Mr. Dorsey's claim is analogous, since the amount of time credited to a sentence directly affects the parole date. Although it is not clear from the pleadings why Mr. Dorsey valued the ten-month period so highly in light of a concurrent nine-year sentence, Mr. Dorsey's query of the court at the time of the plea, and the fact that he asserted the claim in his *pro se* motion dated less than

three weeks later, evidence the importance of the time credit to his decision to plead guilty (L.F. 36).

This Court should remand the cause to the motion court for a hearing to give Mr. Dorsey an opportunity to prove that he misunderstood the plea agreement based on counsel's advice that his concurrent five-year sentences would be credited for all the time that he was incarcerated while the charges were pending, and to present evidence showing why the period of time was so significant that he would have insisted on going to trial if he had been aware that he would not receive credit for that period of time.

CONCLUSION

Because the second enhancement provision in Section 302.321 was misinterpreted by the State and the motion court, Mr. Dorsey respectfully requests this Court to construe the word "conviction" in the final sentence of Section 302.321.2 as meaning "revocation," consistent with the purpose of the statute. Alternatively, the Court should recognize that the provision clearly permits "any offense" to be used as a predicate conviction to enhance the misdemeanor of driving while revoked to a class D felony, an application that is arbitrary in light of the purpose of the statute, and excise it as void for vagueness. Accordingly, Mr. Dorsey respectfully requests that the Court reverse the motion court's denial of his postconviction motion and remand with instructions that he be sentenced for driving while revoked as a class A misdemeanor.

Alternatively or in addition to the relief requested above, Mr. Dorsey respectfully requests this Court to reverse the motion court's denial of his motion for postconviction relief without an evidentiary hearing and remand for a hearing on the claim that his plea was unknowing as set out in Point II.

Respectfully submitted,

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IN THE
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APPEAL TO THE MISSOURI SUPREME COURT
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THE HONORABLE CALVIN HOLDEN, JUDGE

APPENDIX TO APPELLANT'S BRIEF

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Certificate of Compliance and Service

I, Irene Karns, hereby certify as follows:

- ✓ The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office2000, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix if any, the brief contains 5,493 words, which does not exceed the number of words allowed for an appellant's brief.
- ✓ The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in April of 2003. According to that program, the disks provided to this Court and to the Attorney General are virus-free.
- ✓ Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were shipped by United Parcel Service this 7th day of April, 2003, to John M. Morris, Assistant Attorney General, 1530 Rax Court, Jefferson City, Missouri 65109.

_____

Irene Karns