NO. SC85018

SUPREME COURT OF MISSOURI

TOMMY DORSEY,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

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

RESPONDENT'S STATEMENT, BRIEF, AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from a conviction for driving while intoxicated, §577.010, RSMo 2000, and driving while license revoked, §302.321, RSMo 2000, obtained in the Circuit Court of

Greene County, and for which the appellant was sentenced to concurrent terms of five years of imprisonment, with the terms to be served concurrently with a sentence existing at the time. Appellant challenges the driving while revoked statute, §302.321, RSMo 2000, alleging that it is void for vagueness. Therefore, this Court has jurisdiction. Article V, §10, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Tommy Dorsey, was charged by information with driving while intoxicated and driving while license revoked (L.F. 5-7). With regard to the charge of driving while license revoked, the felony information listed previous convictions: burglary in the second degree,

assault in the second degree and arson in the first degree; receiving stolen property of over $150; and another count of burglary in the second degree (L.F. 6). On April 8, 2002, Appellant appeared in the Circuit Court of Greene County before the Honorable Calvin R. Holden to plead guilty to the charges (L.F. 8-9).

At Appellant's guilty plea hearing, the court announced that, pursuant to a plea agreement, Appellant would receive concurrent terms of five years of imprisonment (L.F. 9). Appellant admitted that he had received enough time to speak with plea counsel about the case and that he told counsel the facts of the case so that counsel could prepare a defense and give advice (L.F. 12-13). Appellant was completely satisfied with counsel's services (L.F. 13). Appellant also understood that by pleading guilty, he waived his rights regarding jury trial (L.F. 13-15). The State advised Appellant of the range of punishment and stated that Appellant was being pled "straight;" i.e., without pleading that Appellant was a prior and persistent offender (L.F. 15).

The State recited a factual basis; specifically, that on January 25, 2001, a corporal with the Springfield Police Department stopped a Lincoln on the corner of Frisco and Lynn Streets because the car was obstructing traffic (L.F. 16). Another officer arrived at the scene and heard Appellant, the driver and sole occupant of the Lincoln, tell the corporal that he did not have a driver's license (L.F. 16-17). Appellant's appearance and demeanor were consistent with intoxication, and he refused to perform field sobriety tests (L.F. 17-18). The officer checked Appellant's driving record and discovered "five active point revocations, a five-year alcohol denial as well as two municipal driving while intoxicated convictions" (L.F. 17). The

officer advised Appellant of the Implied Consent Law and asked Appellant to submit to a breath test, but Appellant refused (L.F. 18). Additionally, the State was prepared to prove that Appellant had pleaded guilty to driving while intoxicated on two previous occasions and that he also had at least four other criminal convictions (L.F. 18-19).

Appellant acknowledged that he signed his plea agreement and that it contained all of the promises that had been made to him regarding his guilty plea (L.F. 20). Appellant admitted that no one had threatened him, his family, or his friends to force a guilty plea (L.F. 20). Appellant admitted that he was pleading because he was guilty of the offenses detailed in the State's factual basis (L.F. 20).

The plea court found that a factual basis supported the pleas and that Appellant's pleas were voluntary (L.F. 21). It found Appellant guilty of driving while intoxicated and driving while license revoked and sentenced Appellant to concurrent terms of five years of imprisonment (L.F. 21-22, 27, 28). The terms were also to be served concurrently to all terms existing at the time of the plea (L.F. 22, 27, 28).

On April 29, 2002, Appellant filed his pro se motion for postconviction relief pursuant to Rule 24.035, and counsel filed an amended motion on September 16, 2002 (L.F. 29-30, 31-36, 38-49). The court had scheduled an evidentiary hearing, but cancelled it at the request of AppellantÆs counsel and subsequently granted the State's motion to dismiss without an evidentiary hearing (L.F. 30). On October 31, 2002, the motion court issued its "Order Granting State's Motion to Dismiss Without an Evidentiary Hearing" in which it entered findings of fact and conclusions of law (L.F. 50-54). This appeal follows.

ARGUMENT

I

This Court should decline to review Appellant's allegation that the motion court clearly erred in denying Appellant's claims that §302.321.2, RSMo 2000 is void for vagueness and that Appellant's conviction was unlawfully enhanced to a felony based upon prior convictions for burglary, assault, arson, and receiving stolen property because a plea of guilty waives all claims other than the voluntariness of the plea.

However, should this Court decide to review the claim, a review of §302.321.2 reflects that the statute is not vague in that it plainly allows for felony enhancement on "a fourth or subsequent conviction for any other offense."

In his first point, Appellant claims that the motion court clearly erred in denying his claim on the grounds that §302.321, RSMo 2000, is void for vagueness and that his conviction was unlawfully enhanced to a felony based upon prior convictions for burglary, assault, arson, and receiving stolen property (App. Br. 8, 11). He argues that the prosecutor and the motion court misinterpreted the provision of the statute which allows for felony enhancement on the "'fourth or subsequent conviction for any other offense'" (App. Br. 16).

A. Relevant Facts

Count II of Appellant's felony information, the charge of driving while license revoked, listed the previous convictions of burglary in the second degree, assault in the second degree and arson in the first degree; receiving stolen property of over $150; and another count of burglary in the second degree (L.F. 6). At the plea, the State announced that it could prove that Appellant was a persistent driving while intoxicated offender in that he had previously pled guilty to two municipal counts of driving while intoxicated (L.F. 18-19). With regard to the charge of driving while license revoked, the State announced that it was prepared to prove that Appellant had at least four other criminal convictions (L.F. 19). The plea court found Appellant guilty of driving while intoxicated and driving while license revoked and sentenced him to concurrent terms of five years of imprisonment (L.F. 21-22, 27, 28).

B. Postconviction Proceedings

In his amended motion, Appellant alleged that "trial counsel failed to move to dismiss the felony charge of driving while his license was revoked on the basis that the information did not properly charge a felony and alternatively, RSMo. 302.321 . . . is void for vagueness" (L.F. 39, 42-43). Appellant argued that "the intent and scope of the last sentence which also appears to be an attempt at an enhancement from a misdemeanor to a felony" was not clear (L.F. 44). After noting that the statute "appears to purport to establish two instances of enhancement," Appellant asserted that the use of the word "on" in the last sentence of the statute "suggests a relationship between the driving while revoked and that two options" (L.F. 44). Appellant stated that the language could be interpreted to mean that "a conviction for a second DWI offense is itself a felony conviction of driving while revoked" but asserted "that makes no sense and would not comport with due process requirements" (L.F. 44). Appellant stated that the language could also be interpreted to mean that "driving while revoked is a felony when the underlying revocation is for a second DWI offense OR a fourth other offense such as no insurance, loss of points, etc." (L.F. 44).

In its findings and conclusions, the motion court denied relief, stating:

> . . . Although the prosecutor at sentencing made reference to the fact that Defendant, in fact, had at least two prior DWI convictions, they were not made part of the pleading on the DWLR offense. The enhancement on that count was accomplished by means of four non-DWI convictions, including two convictions for burglary in the second degree, assault in the second degree and arson in the first degree, and a felony receiving stolen property charge. Since the language of the charge tracks the language of the statute

creating the felony and contains all of the elements of the crime, it would be sufficient to charge a felony, assuming that the statute were constitutionally sound.

The clear language of the statute provides for enhancement when the defendant has four or more mon-DWI convictions. In Movant's case, the state had pleaded five prior convictions. There is no interpretation cited by Movant's brief which would conceivably have [a]ffected Movant other than that which the statute plainly authorizes.

* * * * *

Although the statute was subsequently amended in 2002 (HB 1270), the legislature did not remove the language challenged by Movant, indicating that it had been the legislature's intent to punish such conduct. The existence or non-existence of a particular jury instruction on the issue is not a standard tool of statutory construction and is not appropriate for the purpose of determining legislative intent. . . .

(L.F. 51-52) (internal citations omitted).

Appellant's guilty plea waived his claim that §302.321.2, RSMo 2000 is void for vagueness. "'[A] plea of guilty voluntarily and understandably made waives all non-jurisdictional defects and defenses.'" Hagan v. State, 836 S.W.2d 459, 461 (Mo. banc 1992) (internal citations omitted). "'By pleading guilty, the defendant waives all errors except those that affect the voluntariness of his plea or understanding with which the plea was made.'" Smith v. State, 972 S.W.2d 551, 553 (Mo.App. S.D. 1998) (quoting White v. State, 957

S.W.2d 805, 807 (Mo.App. W.D. 1997)). Therefore, by pleading guilty, Appellant waived any claim as to whether §302.321.2, RSMo 2000 was void for vagueness, because such claim does not relate to the voluntariness of his guilty plea. Accordingly, this Court should decline to review Appellant's claim.

C. The Statute At Issue

However, should this Court decide to review Appellant's claim, a review of the statute at bar reveals that it is not vague. Section 302.321.2, RSMo 2000 states:

> Any person convicted of driving while revoked is guilty of a class A misdemeanor. **Any person with no prior alcohol-related enforcement contacts** as defined in section 302.525,[1] **convicted of a fourth or subsequent time of driving while revoked and any person with a prior alcohol-related enforcement contact** as defined in section 302.525, **convicted a third or subsequent time of driving while revoked is guilty of a class D felony.** No court shall suspend the imposition of sentence as to such a person nor sentence such person to pay a fine in lieu of a term of imprisonment, nor

[1]"Alcohol related enforcement contacts" are defined as "any suspension or revocation under sections 302.500 to 302.540," a suspension or revocation obtained in any state for refusing to submit to chemical testing under an implied consent law, and a conviction obtained in any state "for a violation which involves driving a vehicle while having an unlawful alcohol concentration." §302.525.3, RSMo 2000.

shall such person be eligible for parole or probation until he has served a minium of forty-eight consecutive hours of imprisonment, unless as a condition such parole or probation, such person performs at least ten days involving at least forty hours of community service under the supervision of the court in those jurisdictions which have a recognized program for community service. **Driving while revoked is a class D felony on the second or subsequent conviction pursuant to section 577.010, RSMo,[2] or a fourth or subsequent conviction for any other offense.[3]**

(emphasis added).

As the statutory language indicates, driving while revoked can be enhanced from a class A misdemeanor to a class D felony in four different instances:

1. When a person with no prior alcohol-related enforcement contacts has been convicted four or more times of driving while revoked;

2. When a person with a prior alcohol-related enforcement contact has been convicted three or more times of driving while revoked;

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[2]Driving while intoxicated.

[3]In 2002, the General Assembly amended §302.321, RSMo. *See* §302.321, 2002 RSMo. Cum. Supp. However, the last sentence of the statute, the sentence at issue in this case, was not amended. See §302.321.2, RSMo 2000; § 302.321.2, 2002 RSMo Cum. Supp.

3. On the second or subsequent conviction pursuant to section 577.010;

4. For a fourth or subsequent conviction for any other offense.

§302.321.2, RSMo 2000.

D. Legal Analysis

1. The Statute is not Vague

Statutes are presumed to be constitutional and will be found unconstitutional only if they clearly contravene a constitutional provision. State v. Stokely, 842 S.W.2d 77, 79 (Mo. banc 1992); State v. Wiles, 26 S.W.3d 436, 442 (Mo.App. S.D. 2000). If at all feasible, the statute must be interpreted in a manner consistent with the constitutions, and any doubt about the constitutionality of a statute will be resolved in favor of the statute's validity. State v. Stokely, *supra*; State v. Wiles, *supra*. When defining a criminal offense, the legislature is not held to "'impossible standards of specificity.'" State v. Hatton, 918 S.W.2d 790, 793 (Mo. banc 1996); State v. Duggar, 806 S.W.2d 407, 408 (Mo. banc 1991); State v. Wiles, *supra*. "It is not the fact that the legislative branch of government which enacted the statue could have chosen more precise or clearer language which determines the issue of vagueness." State v. Wiles, *supra* (internal citation omitted). Moreover, "'[i]t is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand.'" State v. Hatton, *supra* at 792.

Two types of vagueness may render a statute unconstitutional. State v. Stokely, *supra*

at 80. A statute can be vague if "whether on the face of the statute a potential offender lacks notice." Id.; see also State v. Mahan, 971 S.W.2d 307, 312 (Mo. banc 1998). The test for determining if a statute is void for vagueness is whether the terms or words used in the statute are of common usage and are understandable by people of ordinary intelligence. State v. Stokely, *supra*; State v. Bratina, 73 S.W.3d 625, 628 (Mo. banc 2002); State v. Allen, 905 S.W.2d 874, 877 (Mo. banc 1995). "Due process requires that a statute give 'a person of ordinary intelligence fair notice that his contemplated conduct is forbidden . . . ." State v. Allen, *supra* (internal citation omitted); *see also* State v. Stokely, supra at 80; State v. Wiles, *supra*. The other type of vagueness applies to the application of statute. State v. Stokely, *supra*. "There must be sufficient guidance provided by the statute so as to avoid arbitrary and discriminatory applications." Id.; State v. Allen, supra.

Section 302.321.2, RSMo 2000 is not void for vagueness. The provision which allows for enhancement on the "fourth or subsequent conviction for any other offense" can be understood by people of ordinary intelligence, and it makes people aware that driving while revoked becomes a felony if the perpetrator has been convicted of four or more offenses. §302.321.2., RSMo 2000. Moreover, enforcement of the statute is not arbitrary or discriminatory. Appellant argues that "[t]he only way to prevent arbitrary use of the provision is to find it void for vagueness and excise it from the statute" (App. Br. 21). However, there is nothing arbitrary in the statute. "Arbitrary" is defined as "[i]n an unreasonable manner, as fixed or done capriciously or at pleasure." BLACK'S LAW DICTIONARY 69 (6th ed. 1991). Section 302.321.2. clearly states that driving while revoked is a felony if the person has four

or more convictions for any other offense. Under the statute, it is not "arbitrary," i.e., unreasonable or capricious, to enhance driving while license revoked to a class D felony so long as the perpetrator has four or more convictions for any other offense.

Criminal defendants regularly raise the issue of statutory vagueness before this Court. In State v. Bratina, *supra* at 626, the defendant asserted that §194.425, RSMo 2000, the statute governing abandonment of a corpse, was void for vagueness. That statute made the abandonment, disposal, desertion, or leaving of a corpse "without properly reporting the location of the body to the proper law enforcement officials in that county" a class D felony. Id., see also §194.425, RSMo 2000. The State's criminal complaint alleged that on the morning of January 15, 2001, the defendant left his apartment while his daughter and his wife's dead body remained inside. Id. He returned several hours later. Id. The defendant moved to dismiss the charge of abandonment of a corpse, asserting that it was void for vagueness. Id. The trial court granted the motion and declared the statute unconstitutional; the State appealed the ruling. Id.

On appeal before this Court, the defendant argued that, under the statute, a person would commit a felony if he walked by a corpse on the street and did not report the corpse to the proper authorities. Id. at 627. However, this Court held that the statute was not void for vagueness and that it gave fair notice to the defendant of the criminal conduct. Id. at 629. This Court stated that the questions to be resolved were whether the defendant knew that his wife was dead and whether he intended to abandon the body. Id. at 628. A jury could resolve those

questions. Id.

This Court held that the standard for vagueness is less exacting for a malum in se offense than it is for a *malum prohibitum* offense. State v. Bratina, *supra* at 628. However, the language of §302.321.2 is so clear that it puts anyone on notice of the felony enhancement. Regardless of the fact that driving while revoked is a malum prohibitum offense, the statute clearly states that driving while revoked is a class D felony on "a fourth or subsequent conviction for any other offense." §302.321.2., RSMo 2000.

In State v. Mahan, *supra* at 312, the defendant claimed that §191.677, RSMo 1994, the statute governing infecting a person with HIV, was vague in that the phrase "grave and unjustifiable risk" did not give fair notice about prohibited conduct and did not provide law enforcement with standards to prevent arbitrary enforcement. The defendant also claimed that because scientists did not know the quantitative risk of passing HIV through sexual intercourse, a person of ordinary intelligence had no way to know whether his behavior rose to the level of "grave and unjustifiable risk." Id.

This Court noted that although there might be hypothetical situations which "would not clearly fall either in or out of the statutory prohibition on creating a ægrave and unjustifiable' risk," this Court stated that it did not have to determine a situation in which statutory language would be vague or confusing. Id. Rather, this Court reiterated the standard that the statutory language is to be applied "'to the facts at hand.'" Id. (internal citation omitted). *See also* State v. Hatton, *supra* at 792. This Court noted that the defendant had signed a verification acknowledging his HIV-positive status and that Missouri law prohibited acts which put others

at risk for contracting HIV; had engaged in ten to twenty acts of unprotected sex after a public health counselor informed him that having sex without a condom would put his partners at risk for HIV and was illegal; and had lied to his sex partner after the partner specifically asked the defendant if he was HIV-positive. Id. Under the facts of the case, this Court held that there was "no doubt" that the defendant exposed his partner to a "grave and unjustifiable risk" of HIV exposure. Id.

The statute at bar is much more clear than terms such as "abandonment of a corpse" or "grave and unjustifiable risk." Section 302.321.2 plainly states that driving while revoked is a class D felony on the "fourth or subsequent conviction for any other offense." Id. Accordingly, this Court should not deem the statute to be void for vagueness.

2. Plain Language Allows Enhancement

On Four Or More Convictions For Any Other Offense

Not only is §302.321.2 not vague, but the prosecutor and the plea court could not have plainly erred in charging and finding Appellant guilty of a felony offense because the plain language of the statute allows for enhancement on the fourth or subsequent conviction for any other offense. Appellant argues that the prosecutor and the court misinterpreted the statute's second enhancement provision, that "enhancement based on diverse convictions rather than revocations is not consistent with the purpose of the statute, which addresses revocations and driving while revoked," and that such an enhancement is anomalous with other recidivist provisions of the Revised Statutes of Missouri (i.e., driving while intoxicated, controlled substances, sexual offenses) (Ap. Br. 16). However,"[c]ourts do not have the authority to read

into a statute a legislative intent that is contrary to its plain and ordinary meaning." State v. Rowe, 63 S.W.3d 647, 650 (Mo. banc 2002). "'The Legislature is conclusively presumed to have intended what it plainly and unambiguously said. If the statute so written needs alteration, it is for the Legislature, and not the court, to make it.'" Roberson v. State, 989 S.W.2d 192, 194 (Mo.App. S.D. 1999) (internal citation omitted).

Under the plain language of the statute, Appellant's conviction for driving while revoked could be enhanced to a class D felony based upon his prior convictions. The statute reads "any other offense." §302.321.2, RSMo 2000. In 1983 and 1992, Appellant pleaded guilty to separate counts of burglary in the second degree, and in 1984, he pled guilty to receiving stolen property over $150 (L.F. 6). In 1986, a jury found Appellant guilty of assault in the second degree and arson in the first degree (L.F. 6). Appellant had more than four convictions for "other offenses." Accordingly, the State legitimately enhanced Appellant's driving while revoked to a felony, and the court legitimately found Appellant guilty of a felony offense. Appellant's argument that "conviction" really means "revocation" cannot defeat the plain language of the statute (App. Br. 17).

Appellant also argues that the language "any offense" is over inclusive and notes that the 2002 amendment to §302.321 specified what prior convictions for driving while revoked could be used to enhance the charge from a misdemeanor to a felony (App. Br. 20). Appellant argues that it is unreasonable to conclude that the legislature specified the types of driving while revoked convictions that could be used in felony enhancement but would leave unchanged the language that permits enhancement for four or more subsequent convictions (App. Br. 20).

However, as the motion court noted and as a review of the amendment reveals, the legislature did not amend the last sentence of §302.321.2 (L.F. 52); see also §302.321.2 RSMo 2000, §302.321.2, 2002 RSMo Cum. Supp. Although Appellant can speculate as to the legislature Æs intent, Appellant cannot overcome the plain language of the statute.

For these reasons, §302.321.2 should not be deemed void for vagueness, and the motion court did not err in denying Appellant relief on his claim.

II.

The motion court did not clearly err in denying, without an evidentiary hearing, Appellant's Rule 24.035 claim that counsel was ineffective for allegedly advising Appellant that he would receive jail time credit for an unrelated assault case because Appellant's claim is refuted by the record in that the record of the plea proceeding and of the written plea agreement reflects that no promise regarding jail time credit had been made to Appellant to induce his guilty plea.

In his second and final point, Appellant alleges that the motion court clearly erred in denying, without an evidentiary hearing, his Rule 24.035 claim that plea counsel was ineffective for telling him "that he would receive credit against his five-year sentences for driving while revoked and driving while intoxicated . . . for time spent incarcerated on an unrelated assault case while this case was pending" (App. Br. 22).

A. Plea Proceedings

At Appellant's plea proceeding, the court announced that it understood that, according to a plea agreement, Appellant would receive two concurrent terms of five years of imprisonment for driving while intoxicated and driving while revoked (L.F. 9). Those terms were to be served concurrently with one another and "to all existing sentences" (L.F. 9).

Appellant admitted that he read and understood the terms of his plea agreement, but he had questions about it (L.F. 11). The following ensued:

> [Appellant]: Okay. Now, this will run from the time that 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?

[Appellant]: Yeah, last year.

[The court]: Whenever they revoked the bond and put you back in custody, you will be given credit for that time.

[Appellant]: Okay.

(L.F. 11-12). Appellant had no further questions for the court (L.F. 12).

Subsequently, the court discussed Court's Exhibit 1, the plea agreement, with Appellant (L.F. 20).[4] Appellant admitted that he signed the agreement (L.F. 20). The following ensued:

[The court]: Does it contain all the promises that have been made to you to have you enter a plea of guilty here today? Is everything in here that youÆve been told will happen to you if you plead guilty?

[Appellant]: Yes, yes.

(L.F. 20) (emphasis added).

Appellant was sentenced to two concurrent terms of five years of imprisonment, with the sentences to run concurrently with all existing sentences (L.F. 22). After the court sentenced Appellant, it asked Appellant questions about plea counsel (L.F. 23-24). Appellant

[4]Respondent has filed Court's Exhibit 1 in conjunction with this brief.

admitted that he was satisfied with counsel's services and that, other than the plea agreement, counsel made no promises to induce Appellant to plead guilty (L.F. 24). The sentence Appellant received was the sentence that Appellant expected (L.F. 24).

B. Postconviction Proceedings

In his amended motion, Appellant alleged ineffective assistance of counsel; specifically, that his plea was involuntary "because trial counsel misinformed movant as to the consequences of entering a guilty plea in that he advised movant that he would be entitled to credit toward the new sentences for all time served awaiting trial, including time served in the Department of Corrections on his previously imposed assault sentence" (L.F. 39, 46). In his motion, Appellant claimed that he was convicted of assault in the second degree after a bench trial conducted from April 20-23, 2001 (L.F. 46). Appellant claimed that he posted bond on April 24 and that he was sentenced on that conviction on June 15, 2001 (L.F. 46). According to Appellant, "[o]n the last day of the trial," the State filed a complaint charging Appellant with the two crimes at bar (L.F. 46). Appellant allegedly posted bond as to the complaint on April 25, 2001 (L.F. 46; *see also* L.F. 1). Appellant claimed that on June 15, the day he was sentenced for assault, his bond on the assault case was increased, and he was returned to the county jail (L.F. 46). Appellant asserted that he was delivered to the Department of Corrections on the assault charge on August 9, 2001 but "[a]fter some apparent mishaps in not bringing movant back to Greene County for court," he was returned to Greene County in late March 2002 (L.F. 46).

Appellant claimed that, at the time of the plea offer, he asked about how much credit

he would receive "under concurrent sentences for the time he had already served on the assault charge" (L.F. 47). According to Appellant, plea counsel "advised movant that since all sentences were being run concurrent he would receive credit toward these convictions for all time served after the complaint was filed and the warrant issued on April 23, 2001" (L.F. 47). Appellant claimed that he relied on counsel's advice when he decided to accept the plea offer but that, after he arrived at the Department of Corrections, he "learned that he is not entitled to any credit on these convictions for time served in prison on the assault sentence" (L.F. 47). According to Appellant, but for plea counsel's "incorrect advice about the appropriate measure of jail credit," he would not have accepted the plea offer but would have insisted on a trial (L.F. 47).

Appellant also alleged that his plea was involuntary and unknowing in that the plea court misinformed him as to the amount of credit he would receive (L.F. 47). Although Appellant does not challenge the issue of the plea court's misadvice in the brief before this Court, the amended motion is instructive as to the issue of plea counsel's ineffectiveness. Appellant claimed that, at his plea, he asked the court about his sentences because he wanted to "verify" the advice that he had received from plea counsel (L.F. 47).

In its findings, the motion court combined the claims regarding the ineffective assistance of plea counsel and the plea court's misadvice about credit (L.F. 52). The motion court denied relief, stating:

> . . . The Court repeatedly stated to Movant that he would be credited with time he served "**on this case**[.]" Movant's brief concedes that when Movant was returned to custody on

June 15, 2001, it was a direct result of his conviction and subsequent increase in bond on the assault case. He was then transported to the Department of Corrections on the assault case and served time on that sentence before he accepted the plea offer on the new charges. The Court correctly stated the rule as to credit for time served and Movant was in a better position than the Court at that point to know the facts regarding the assault case, including the reason for the change in bond status. Movant's belief, therefore, that he would be credited with time from the day of his sentencing in June, 2001, was not reasonable based on the information given to him by the Court. If he had intended, as Movant's brief indicates, to "verify the above advice from counsel" by asking the Court, the Court's response should have disabused him of any misconceptions he may have had based on this attorney's alleged misadvice.

The Court inquired of Movant, following the discussion of credit for time, whether the plea agreement contained "all of the promises that have been made to you to have you enter a plea of guilty here today? Is everything in here that you've been told will happen to you if you plead guilty?" Movant responded, "Yes, yes." Aside from the provision that the sentences were to run concurrent, there is no discussion of credit for time served in the plea agreement. After the sentence was imposed, Movant was asked again whether any promises had been made by his counsel to induce his plea. Again, Movant said No. He assured the Court that the sentence was what he had expected to receive and he was satisfied with counsel's services.

The record, in short, does not support Movant's claim that his plea was involuntary and

> induced by false or inaccurate promises or assurances made either by the Court or by trial counsel[.] Any reliance Movant placed on 'misadvice' allegedly made by counsel, even if such advice was given, was unreasonable given the Court's response to Movant's questions prior to his entering a plea of guilty. Even if, however, the record had been less clear, Movant has not established prejudice . . . .Movant clearly entered into the plea agreement in order to minimize the amount of time that he would have to serve. In return for that agreement, he received a substantial reduction of his time even with the contested seven months. It cannot reasonably be argued that Movant was prejudiced by entering into the plea agreement with the State.

(L.F. 53-54) (emphasis in original) (internal citations omitted).

C. Legal Analysis

A motion court is not required to grant a movant an evidentiary hearing on a claim unless 1) the movant pleads facts, not conclusions, which if true would warrant relief, 2) the facts alleged are not refuted by the record, and 3) the matters complained of resulted in prejudice to the movant. State v. Blankenship, 830 S.W.2d 1, 16 (Mo. banc 1992). The standard of review of a motion court's decision to deny relief is limited to a determination of whether the court's findings and conclusions are clearly erroneous. Supreme Court Rule 24.035 (k), Antwine v. State, 791 S.W.2d 403, 406 (Mo. banc 1990), *cert. denied* 498 U.S. 1055 (1991). The motion court's rulings are presumed to be correct and will be found clearly erroneous only if, upon review of the entire record, the appellate court is left with "a definite and firm impression that a mistake has been made." Wilson v. State, 813 S.W.2d 833, 835

(Mo. banc 1991).

Movants claiming ineffective assistance of counsel must establish 1) that counsel's representation fell below an objective standard of reasonableness and 2) counsel's actions prejudiced the movant. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). This two-part test applies to ineffective assistance claims following a guilty plea. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 367, 88 L.Ed.2d 203 (1985). To satisfy the prejudice requirement following a guilty plea, a defendant must show that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. Id.

Following a plea of guilty, the ineffectiveness inquiry is limited to whether the alleged ineffective assistance of counsel impinged on a defendant's ability to enter a knowing and voluntary plea of guilty. State v. Roll, 942 S.W.2d 370, 375 (Mo. banc 1997), *cert. denied*, 118 S.Ct. 378 (1997). An appellant waives all errors except those which affect the voluntariness of the plea or the understanding with which it was given. Hagan v. State, 836 S.W.2d 459, 464 (Mo. banc 1992); Betts v. State, 876 S.W.2d 802, 803-804 (Mo.App. W.D. 1993). As a result, appellant must demonstrate that, "but for" the alleged errors of counsel, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. at 59; Hagan v. State, *supra*.

"Mistaken beliefs about sentencing may affect a defendant's ability to knowingly enter a guilty plea if: 1) the mistake is reasonable, and 2) the mistake is based upon a positive representation upon which movant is entitled to rely." Redeemer v. State, 979 S.W.2d 565, 572 (Mo.App. W.D. 1998); "Where a defendant claims to have pleaded guilty based on a

mistaken belief about his sentence, the test is whether a reasonable basis exists in the record for such belief." Miller v. State, 869 S.W.2d 278, 279 (Mo.App. E.D. 1994). "The mere prediction or advice of counsel will not lead to a finding of legal coercion rendering a guilty plea involuntary." Tyus v. State, 913 S.W.2d 72, 72 (Mo.App. E.D. 1995) (citing Spencer v. State, 805 S.W.2d 677, 679 (Mo.App. E.D. 1990)). The disappointed hope or expectation of a lesser sentence does not make a plea of guilty involuntary. Redeemer v. State, *supra*.

In the case at bar, the motion court did not clearly err in denying Appellant postconviction relief without a hearing because Appellant's claim is refuted by the record. The record of Appellant's guilty plea and the written plea agreement reflect that no promises regarding jail time credit were made to Appellant to induce his plea. The record reflects that the court told Appellant it could not answer his question regarding whether or not "[t]his will run" from the time Appellant was sentenced on the previous charge but that Appellant would receive credit for time spent in custody on the case before the court; i.e., the charges of driving while intoxicated and driving while revoked (L.F. 11-12). The court did not promise Appellant that he would receive jail time credit for the assault case (L.F. 12). Cognizant of the court's statements, Appellant chose to plead guilty (L.F. 20-21). Accordingly, any assertion that counsel was ineffective for misadvising Appellant about jail time credit is unreasonable in light of what the court told Appellant at sentencing.

Moreover, Court's Exhibit 1, the written plea agreement, does not contain any promises about jail time credit for the assault case (see Court's Exhibit 1). Court's Exhibit 1 reflects that Appellant received two five-year sentences and that the sentences are to be served

concurrently to "each other and existing sentences" (Court's Exhibit 1). At the plea proceeding, the court specifically referred to the written plea agreement and asked Appellant, "Is everything in here that you've been told will happen to you if you plead guilty," and Appellant replied, "Yes. Yes." (L.F. 20). Therefore, by his own admission, Appellant acknowledged that no one told him that he would receive jail time credit for the assault case if he pled guilty on the charges at bar. Any claim of ineffectiveness regarding counsel's misadvice is unreasonable in light of the written plea agreement.

Appellant analogizes his cases to Beal v. State, 51 S.W.3d 109 (Mo.App. W.D. 2001), a case remanded due to counsel's advice on the "eighty-five percent rule," and Hao v. State, 67 S.W.3d 661 (Mo.App. E.D. 2002), a case remanded due to counsel's advice on parole eligibility (App. Br. 25). However, those cases are factually distinguishable from the case at bar. In Beal v. State, *supra* at 110-111, the defendant alleged that plea counsel informed him that because the he would be sentenced for a class B felony of first degree assault, he would not be subject to the "eighty-five percent" provisions of §558.019, RSMo 1994. After the filing of the amended motion, plea counsel filed an affidavit acknowledging that he had told the defendant that he would not be subject to the eighty-five percent rule. Id. at 111. The record of the plea proceeding also reflected that the court told the defendant that he would serve approximately eighty-five percent of "æany felony that you are . . . convicted of or plead guilty to in the future.'" Id. at 112 (emphasis added).

In Hao v. State, *supra* at 663, the defendant alleged that counsel misinformed him that he would only have to serve fifteen percent of a fifteen-year sentence before becoming eligible

for parole. In reality, Department of Corrections guidelines indicated that the defendant would not become eligible for parole until he had served one-third of his sentence. Id. The defendant's allegation was not refuted by the record, in that there was no discussion of parole eligibility, and the court did not ask the defendant about any other promises. Id. at 664. The State conceded error. Id. at 663. The facts of Beal and Hao are distinguishable from the present case. Unlike the appellants in Beal and Hao, Appellant is not entitled to an evidentiary hearing.

For these reasons, the motion court did not clearly err, and Appellant's second and final point must be denied.

CONCLUSION

In view of the foregoing, Respondent submits that §302.321.2, RSMo 2000 is not vague, and the denial of postconviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06 (b) and contains 6, 986 words, excluding the cover, this certification and any appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses, using McAfee anti-virus software, and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this _____ day of June 2003, to:

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