No. SC 87028

IN THE
MISSOURI SUPREME COURT

TERRY J. WOODS,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal to the Missouri Supreme Court
From the Circuit Court of St. Louis County, Missouri
Twenty-First Judicial Circuit, Division 11
The Honorable Emmett O'Brien, Judge

RESPONDENT'S SUBSTITUTE STATEMENT, BRIEF, AND ARGUMENT

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JURISDICTIONAL STATEMENT

On March 13, 2003, Appellant Terry Woods pled guilty to Stealing, Third Offense, RSMo. §570.030 and §570.040, in Cause # 02CR-277l before the Honorable Emmett M. O*Brien, 21st Judicial Circuit, St. Louis County. On the same date, the court sentenced Woods to the Missouri Department of Corrections (DOC) for four (4) years. Woods was delivered to the DOC on March 21, 2003.

Woods filed a motion for post-conviction relief under Missouri Supreme Court Rule 24.035 on June 18, 2003. Following a request to enlarge the time for filing, Counsel timely-filed an amended motion on October 29, 2003. On July 28, 2004, in his Amended Findings of Fact, Conclusions of Law, Order and Judgment, the Honorable Emmett M. O*Brien denied Woods* request for post-conviction relief without a hearing.

On September 3, 2004, Woods filed a timely Notice of Appeal to the Missouri Court of Appeals for the Eastern District. On May 17, 2005, the Missouri Court of Appeals for the Eastern District upheld the Circuit Courts denial of post-conviction relief. Woods' motions to the Court of Appeals for rehearing and/or transfer to the Missouri Supreme Court was filed on May 31, 2005 and denied on July 28, 2005. Pursuant to Supreme Court Rule 83.04, Woods filed his application for transfer with the Missouri Supreme Court on August 15, 2005 and the application was granted on September 1, 2005. Therefore jurisdiction properly lies in this Court pursuant to Article 5 §X of the Missouri Constitution, as amended 1982.

STATEMENT OF FACTS

On July 23, 1993, Woods pled guilty in the St. Louis County Circuit Court to stealing in Cause # 92CR-7028 for an act committed October 13, 1992. (Supp. L.F. 3-4). He was sentenced in that case to serve a term of five years in prison. *Id*. Also on July 23, 1993, Woods pled guilty to stealing in St. Louis County Circuit Court in Cause #93CR-0143 for an act committed on November 25, 1992. (Supp. L.F.1-2). He was sentenced in that case to serve a term of one year concurrent with his five year sentence. *Id*. On March 13, 2003, in Cause # 02CR-2771 before Emmett M. O*Brien, 21st Judicial Circuit, St. Louis County, Woods pled guilty to the charge of Stealing, Third Offense, RSMo. §570.040 (Supp. 2000) (L.F. 6)). As a result of the two prior guilty pleas, Woods was charged and sentenced under §570.040. (L.F. 4 and L.F. 10-26). For this crime, the Court sentenced Woods to the Missouri Department of Corrections for four (4) years. (L.F. 7-9).

Pursuant to Rule 24.035, on June 18, 2003, Woods timely filed a motion for post-conviction relief (L.F. 30-36). On July 31, 2003, the Court appointed the Office of the State Public Defender, Appellate/PCR Division, to represent Woods (L.F. 37). On October 29, 2003, counsel timely filed an amended motion for post-conviction relief (L.F. 40-53).

On July 28, 2004, in the Amended Findings of Fact, Conclusions of Law, Order and Judgment, the court denied relief for Woods* post-conviction motion without a hearing (L.F. 60-65). The court concluded that Woods was properly charged under the statute, that counsel was not ineffective, and that Woods* plea was made voluntarily and intelligently (L.F. 63-64). On September 3, 2004, Woods timely filed his Notice of Appeal (L.F. 88-96). On May 17, 2005, in its per curiam order, the Missouri Court of Appeals for the

Eastern District upheld the circuit court's denial of post-conviction relief. (Court Order Dated May 17, 2005, Case # ED85078). Woods' motions to the Court of Appeals for rehearing and/or transfer to the Missouri Supreme Court were filed on May 31, 2005 and denied on July 28, 2005. (Appellant's Mtn. for Rehearing/Transfer). Pursuant to Supreme Court Rule 83.04, Woods filed his application for transfer with the Missouri Supreme Court on August 15, 2005 and the application was granted on September 1, 2005. (Appellant's Application For Transfer).

ARGUMENT

I. This Court should affirm the denial of Terry Woods' request for post-conviction relief because he was properly charged under §570.040 in that he had committed two prior acts of stealing to which he pled guilty and admitted to under oath in open Court. (Responding to point relied on I and II of Appellant's brief.)

Terry Woods was caught stealing three separate times. (L.F. 4-28 and Supp. L.F. 1-4). Woods' first act of stealing was committed in October of 1992 for which he was charged with a Class C felony and sentenced to five years imprisonment. (Supp. L.F. 1-4). Woods' second act of stealing was committed one month later in November of 1992 for which he was charged with a Class A misdemeanor and sentenced to one year in prison[1]. (Supp. L.F. 1-4). The first two crimes were charged in separate cases with separate cause numbers. (Supp. L.F. 4-10). Woods pled guilty in these two separate cases on the same day. *Id*. Woods was then caught and charged with stealing a third time for an act committed on January 14, 2002. (L.F. 4-9). The guilty pleas in the first two cases were applied to the third charge to meet the requirements of stealing-third offense under §570.040[2]. *Id*.

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[1]Woods also pled guilty to the Class B misdemeanor of making a false declaration. (Supp.L.F. 2).

[2]§570.040 has been amended four times since 1977. Woods committed his third stealing-related offense on January 14, 2002. (L.F. 4 -9). The 2002 amendments did not

Woods subsequently pled guilty to stealing third offense and was sentenced accordingly. (L.F. 2-28). Was Woods properly charged and pled?

When one reviews the history of §570.040, as well the charging documents associated with this statute and the general statutory definition of recidivism, one sees that the answer to the question posed above is, yes. Moreover, Woods admitted facts under oath in open court that establish that he was a prior offender. (L.F. 14-17). Furthermore, Woods' failure to raise this argument until the collateral post conviction relief proceeding amounts to a waiver. (*See* RSMo. §558.021 (2000)(L.F. 31-36). As a result, there is no definite and firm impression that a mistake has been made and the motion court's ruling denying Woods' post-conviction relief was not 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). Since Woods was properly charged, and has admitted so, defense counsel cannot be ineffective for failing to inform him of something that had no effect on his situation. *State v. Taylor*, 929 S.W.2d 209, 224-25 (Mo. banc 1996), *cert. denied*, 519 U.S. 1152 (1997). ("If [a movant] fails to show prejudice, the court need not evaluate

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go into effect until August of 2002. (H.B. 1888 (2002) and MACH-CR 24.02.1 (6/27/03 note 3)). Therefore, RSMo. §570.040 (2000) was in effect at the time Woods committed his third offense and is the statute at issue in this case. (L.F.6). Consequently, the ten year requirement of RSMo. §570.040 (2002) does not apply.

performance"). Therefore, this Court should affirm the motion court's denial of Woods' request for post-conviction relief.

A. Standard of Review

The standard of review of the motion court's ruling is limited to a determination of whether the findings and conclusions of the court 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 court's rulings are presumed correct, and will be found clearly erroneous only if, upon a 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); Supreme Court Rule 24.035(k).

"To prevail on a claim of ineffective assistance of counsel, the movant must show that: (1) his attorney's performance was deficient in that he failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances; and (2) the deficient performance prejudiced the defense." *Redeemer v. State*, 979 S.W.2d 565, 569 (Mo. App. W.D. 1998); *see also Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "In order to satisfy the prejudice prong of the *Strickland* test, a movant must demonstrate that, but for the errors of counsel, he would not have pleaded guilty but instead insisted upon proceeding to trial." *Dean v. State*, 950 S.W.2d 873, 878 (Mo. App. W.D. 1997). "If [a movant] fails to show prejudice, the court need not evaluate performance." *State v. Taylor*, 929 S.W.2d 209, 224-25 (Mo. banc 1996), *cert. denied*, 519 U.S. 1152 (1997). The two-part

Strickland test applies to a claim of ineffective assistance of counsel during a plea of guilty. *Hill v. Lockhart*, 474 U.S. 52, 57, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985). Appellate review of ineffectiveness relating to a guilty plea "is limited to determining whether the plea was knowing and voluntary." *Gehrke v. State*, 41 S.W.3d 615, 618 (Mo. App. W.D. 2001).

The motion court is not required to grant a movant an evidentiary hearing 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. *Coates v. State*, 939 S.W.2d 912, 914 (Mo. banc 1997); Supreme Court Rule 24.035(k).

B. The "two separate occasions" language of §570.040 refers to two separate acts of stealing.

Reviewing the history of §570.040 it becomes clear that the "two separate occasions " language of §570.040 refers to two separate acts of stealing and not two separate occasions of being in Court. The original form of §570.040, its various amendments, the charging documents associated with each amendment, and the general statutory definition of recidivist all point to this conclusion.

In 1977 the effective version of §570.040 stated that every person "who has been previously convicted of stealing two times, and who is subsequently convicted of stealing" is guilty of a Class C felony. (RSMo. §570.040 (Supp. 1976)). In 1993, this Court handed down its decision in *Yale v. City of Independence*, 846 S.W.2d 193 (Mo. banc 1993). *Yale*

held that a suspended imposition of sentence was not a conviction and therefore the collateral consequences of a conviction, i.e. enhancement under criminal statues, does not attach. *Yale v. City of Independence*, 846 S.W.2d at 195-196.

In an effort to insure that the collateral consequence of potential enhancement for recidivist stealing offenders attached to suspended sentences, following *Yale*, in 1995 the Legislature amended §570.040. (RSMo. §570.040 (Cumm. Supp.1995)). The 1995 amended statute reads "every person who has previously pled guilty or been found guilty on two separate occasions of stealing, and who subsequently pleads guilty or is found guilty of stealing" is guilty of a Class C felony. *Id*. By placing the words "pled or been found guilty" in two places, the 1995 amendment actually broadened the range for when an enhancement is proper. *Id*. Under this amendment, either a plea or a conviction to a stealing related offense qualifies one for an enhanced charged. *Id*. This covered all of the possibilities of what could happen in Court thus making what happens in Court irrelevant to the issue of enhancement and emphasizing the specific criminal actions of each defendant.

Later amendments to §570.040 continued this trend. (RSMo. §570.040 (Supp. 2002)). Effective August 28, 2002, the legislature added language requiring that the underlying offenses be committed within ten years of the third offense and that ten days or more must be served on a previous offense. (RSMo. §570.040 (Supp. 2002)). This amendment clearly discusses multiple "offenses " and leaves no doubt that multiple offenses and not multiple appearances in Court is what is necessary. *Id*.

Moreover, the charging documents in place for §570.040 at the time Woods pled to his third charge require a prosecutor seeking an indictment to list two prior pleas or convictions. (MACH-CR 24.02.1 9/1/99). Without two prior acts of stealing, one could not have two prior pleas or convictions and one could not fill out the charging form. *Id*. The current charging documents for §570.040 also requires two prior criminal acts. (MACH-CR 24.02.1 6/27/03). In addition, the past and present definitions of prior and persistent offenders discuss prior felonious acts committed at different time. (RSMo. §558.016 (Supp. 2000 and 2002)). For the past 30 years, the entire framework of how Missouri law deals with recidivism is based upon prior criminal acts of which the defendant is found guilty.

Woods argues, however, that he was improperly charged because he believes that the "two separate occasions " language in §570.040 refers not to acts of stealing but instead refers to two prior court dates (App. Supp. Brief Pg. 21). He further argues that the 1995 amendments were designed to require that a person go through the court system on two prior occasions before he could be enhanced under §570.040. (App. Substitute Brief Pg. 21). As a result, Woods submits that the motion court erred in denying his motion for post-conviction relief because even though he committed two separate crimes, he only went through the system on one prior occasion. (App. Substitute Brief Pg. 15-24).

Woods' interpretation, not only defies common sense, it completely circumvents the purpose of this statute. *State v. Condict*, 65 S.W.3d 6, 12 (Mo.App. 2001)(a reviewing court should not "dispense with common sense or ignore an evident legislative purpose ").

If Woods' interpretation were adopted, a person could commit numerous acts of stealing on numerous different days and as long as defendant e pled in all cases on the same day, the prior offenses would not be considered and the crime would not be eligible for an enhanced charge under §570.040. Thus, the penalty specifically designed to address recidivism could be avoided.

C. Woods has waived his right to assert that he did not qualify for a stealing third charge because he has admitted under oath that he was prior offender and because he raises this issue for the first time in a collateral proceeding.

At every stage during the underlying case, Woods had the opportunity to assert that he was not a prior offender, that he did not commit two prior acts of stealing and that he did not qualify for a stealing third charge. His failure to do so constitutes a waiver under §558.021. (RSMo.§558.021 (2000)). We know Woods was aware of the circumstances surrounding his charge from as early as his preliminary hearing. (L.F. 29-33). But even when given the opportunity in open Court and in front of the judge, Woods failed to even mention this issue. (L.F. 14-17). Instead, under oath and on the record, Woods admitted that he had committed and pled guilty to two prior acts of stealing and that he was in fact guilty of stealing third offense. (L.F. 14-17). The relevant transcript reads as follows:

> THE COURT: As you stand here this morning do you believe in your mind is perfectly clear so that you fully understand the nature of these proceedings and all of the questions asked of you thus far?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that in this case you are charged with the offense of stealing third offense, a Class C felony? Do you understand that is the charge presently pending against you?

THE DEFENDANT: Yes, sir.

THE COURT: Have you thoroughly discussed the charge pending against you with your attorney?

THE DEFENDANT: Yes, sir.

THE COURT: Has your attorney fully explained to you the nature of the charge pending against you? And by that I mean, has your attorney explained to you the elements which makeup the crime with which you were charged and any possible defenses that you might have to this charge?

THE DEFENDANT: Yes, sir.

THE COURT: In a moment I will be asking the Assistant Prosecuting Attorney to recite for me and for you the facts that the state would show in evidence if your case were to proceed to trial. I want you to pay close attention to what he says because at the conclusion of his remarks I will be asking you some additional questions. So please pay close attention, if you would.

Mr. Tyson, what facts would the state show in evidence if this case were to proceed to trial.

MR. TYSON: Your Honor, the state would show that Terry Woods on or about Monday, January 14th, 2002, at approximately 3:30 p.m. at 10835 Saint Charles Rock Road, St. Louis County, Missouri, he appropriated three sweat sets, three pairs of jeans, which property was in the possession of Wal-Mart. Defendant appropriated the property without the consent of Wal-Mart and with the purpose to deprive the victim thereof.

Also, on or about July 23rd, 1993, in the Circuit Court of the County of St. Louis, State of Missouri, the defendant pleaded guilty to the offense of stealing in Cause Number 93CR-143. And on or about July 23rd, 1993 in the Circuit Court of the County of St. Louis, State of Missouri, the defendant pled guilty to the offense of stealing in Cause Number 92CR-7028.

THE COURT: Did you hear the facts as were just recited by the Assistant Prosecuting Attorney?

THE DEFENDANT: Yes, sir.

THE COURT: Did you understand what he said?

THE DEFENDANT: Yes, sir.

THE COURT: Are the facts as were just recited by the Assistant Prosecuting Attorney, are those facts substantially correct?

THE DEFENDANT: Yes, sir.

At any moment during this proceeding, Woods could have informed the judge on the record that he did not meet the requirements of a stealing third charge. But instead he

admitted to his prior crimes and guilty pleas and pled guilty to the charge of stealing third. (L.F. 14-17). Now, for the first time and in a collateral proceeding, Woods argues that he was not properly charged. (L.F. 30-36). His failure to raise this issue until now amounts to a waiver under RSMo.§558.021, and similar reasoning should apply.

What Woods is really upset about is that he was enhanced to a felony for stealing $69.00 worth of clothing. (L.F. 32). But this Court should not be swayed by Woods' pleas for leniency based upon the amount stolen in his third crime. (App. Substitute Brief Pg. 15). Woods is an habitual offender who has stolen on three occasion. (Supp. L.F. 1-5 and L.F. 6). On one occasion he stole enough for the Judge to sentenced him to serve as much as five years in prison. (Supp. L.F. 4). No mistake has been made in this case. *Wilson v. State*, 813 S.W.2d at 835; Supreme Court Rule 24.035(k). Woods is exactly the type of person this statute was designed to address and he was properly charged.

The "two separate occasion" language of §570.040 refers to acts of stealing. Woods clearly committed two separate acts of stealing prior to his third case and admitted so under oath and in open Court. (Supp. L.F. 1-5). As a result, he meets the requirements for an enhancement and was properly charged. (RSMo. §570.040 (2000)). Since Woods was properly charged, there can be no "prejudice" to his case and he fails to meet any of the standards for ineffective assistance of counsel. *State v. Taylor*, 929 S.W.2d at 224-225 and *Strickland v. Washington*, 466 U.S. 668 (1984). Consequently no mistake has been made and the motion Court was not "clearly erroneous." *Wilson v. State*, 813 S.W.2d 833, 835 (Mo. banc 1991); Supreme Court Rule 24.035(k).

CONCLUSION

The denial of Woods' motion for post-conviction relief was proper and should be affirmed.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 3874 words, excluding cover, this certification, signature block and appendix, as determined by WordPerfect 9 software;

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

3. That two true and correct copies of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 24th day of October, 2005, to:

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