IN THE
MISSOURI SUPREME COURT

TERRY J. WOODS,	)	
Appellant,	)	
vs.	)	No. SC 87028
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

APPELLANT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

On March 13, 2003, Appellant Terry Woods pled guilty to the class C felony offense of stealing, third offense, in violation of Section 570.040,[1] in Cause No. 02CR-2771 before the Honorable Emmett M. O'Brien, 21st Judicial Circuit, St. Louis County, Missouri. On the same date, the plea court sentenced appellant to the Missouri Department of Corrections for four years.

Appellant subsequently filed a motion for post-conviction relief under Missouri Supreme Court Rule 24.035, and the motion court, again the Honorable Emmett M. O'Brien, denied relief without a hearing.

After the Missouri Court of Appeals, Eastern District, issued its order and memorandum affirming the judgment in ED 85078, this Court granted appellant's Application for Transfer pursuant to Rule 83.03. This Court has jurisdiction of this appeal, Article V, Section 10, Mo. Const.; Rule 83.04.

* * * * *

The Record on Appeal will be cited as follows: legal file and plea and sentencing transcript – "L.F."; supplemental legal file – "Supp. L.F."

[1] Unless otherwise noted, all statutory references are to RSMo 2000.

STATEMENT OF FACTS

The state charged appellant with stealing, third offense under Section 570.040, for stealing three sweat suits and three pairs of jeans from Wal-Mart (L.F. 4-5). The statute in effect at the time of the crime and of the plea and sentencing proceedings in the present case provided:

> 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 and shall be punished accordingly.

570.040.1 (emphasis added).

To supply the two prior convictions required, the state pled two stealing convictions of appellant, St. Louis County cases 93CR-0143 and 92CR-7028 (L.F. 4). These two prior convictions were obtained by guilty pleas, both entered on July 23, 1993, in the same court, with the same prosecuting and defense attorneys, and with the same judge (L.F. 4; Supp. L.F. 1-4; A10-A13). In the charging document for the present case, the state cited the two previous guilty pleas as an element of Section 570.040, and it specified that both pleas were entered on July 23, 1993 in the Circuit Court of the County of St. Louis (L.F. 4). Additionally, in the guilty plea proceeding for the present case, the prosecutor recited the two previous guilty pleas as an element of Section 570.040 and specified that both pleas were entered on July 23, 1993 (Tr. 6). Appellant pled guilty to the present charge, and on the same date, the plea court

sentenced appellant to the Missouri Department of Corrections for four years (LF 6, 7-9; A7-A9).

Pursuant to Rule 24.035, appellant timely filed a pro se motion for post-conviction relief on June 18, 2003 (LF 30-36). After appointment of counsel, counsel filed an amended motion which alleged, in paragraphs 8(a) and 9(a), that the prosecutor improperly charged and the plea court improperly enhanced appellant's misdemeanor stealing to the class C felony of stealing, third offense, and therefore, the court's sentence of four years exceeded the one year maximum sentence authorized by law for class A misdemeanor stealing (L.F. 42). Specifically, appellant pled that the two previous guilty pleas from July 23, 1993, which occurred in the same court, in front of the same judge, with the same prosecuting and defense attorneys, did not satisfy the statutory language continued in Section 570.040 that the pleas of guilty or findings of guilt occur on two separate occasions (L.F. 43).

In paragraphs 8(b) and 9(b), appellant pled that his plea counsel was ineffective for not fully investigating the charging statute and for not considering the plain language of the statute, and for failing to advise appellant that he was improperly charged under the statute. Appellant pled that because he was misinformed, he did not enter a knowing, voluntary and intelligent plea (LF 42-43).

On July 28, 2004, in the Amended Findings of Fact, Conclusions of Law, Order and Judgment, the motion court denied relief without a hearing (LF 60-65, A1-A6). In its judgment, the motion court concluded that the language of the statute referencing

pleas of guilt on two separate occasions relates only to the acts of stealing, not the guilty plea. By that finding, the motion court also concluded that counsel was not ineffective in failing to advise appellant that he could not be properly charged under § 570.040.

Appellant first appealed to the Eastern District Court of Appeals, which ratified the motion court's judgment by summary affirmance on May 17, 2005. Appellant then petitioned this Court for transfer, which was granted on August 30, 2005.

POINTS RELIED ON

I.

The motion court clearly erred when it denied appellant's motion for post-conviction relief without a hearing because appellant alleged facts, not refuted by the record, showing that the trial court improperly enhanced appellant's class A misdemeanor stealing to the class C felony of stealing, third offense, and that the four year sentence imposed therefore exceeded the maximum one year sentence allowed by law, thus denying appellant his constitutional rights to due process of law and to be free from cruel and unusual punishment in violation of the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 21 of the Missouri Constitution, in that the state improperly pled and proved two prior stealing convictions obtained by guilty pleas entered at the same time, in the same court, with the same prosecuting and defense attorneys and the same judge, and this did not comply with the plead guilty or found guilty on two separate occasions requirement of Section 570.040.

State v. Cox, 98 S.W.3d 548 (Mo. banc 2003);

State v. Stewart, 832 S.W.2d 911 (Mo. banc 1992);

State v. Meggs, 950 S.W.2d 608 (Mo. App., S.D. 1997);

State v. Livingston, 797 A.2d 153 (N.J. 2002);

§ 570.040;

Mo. Const., Art I, §§ 10 and 21;

U.S. Const., Amend. V, VIII, and XIV; and

Mo. Sup. Ct. Rule 24.035.

II.

The motion court clearly erred when it denied appellant's motion for post-conviction relief without a hearing because appellant alleged facts, not refuted by the record, showing plea counsel was ineffective for not fully investigating the charging statute, Section 570.040, for not considering the meaning of the plain language of the statute, and for consequently failing to advise appellant that he was improperly charged under the statute, thus denying appellant his constitutional rights to due process, effective assistance of counsel, and equal protection, in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that counsel did not alert appellant that the state improperly pled and proved two prior stealing convictions that were obtained by guilty pleas at the same time, in the same court, with the same prosecuting and defense attorneys and the same judge, because this did not comply with the plead guilty or found guilty on two separate occasions requirement of Section 570.040. Because appellant was misinformed, he did not enter a knowing, voluntary and intelligent guilty plea, and but for counsel's failure, appellant would not have pled guilty to class C felony stealing third offense.

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984);

State v. Hunter, 840 S.W.2d 850 (Mo. banc 1992);

Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985);

Seales v. State, 580 S.W.2d 733 (Mo. banc 1979);

Mo. Const., Art. I, §§ 10 and 18(a);

U.S. Const., Amend. V, VI, and XIV;

Missouri Supreme Court Rule 24.035; and

§ 570.040.

ARGUMENT

I.

The motion court clearly erred when it denied appellant's motion for post-conviction relief without a hearing because appellant alleged facts, not refuted by the record, showing that the trial court improperly enhanced appellant's class A misdemeanor stealing to the class C felony of stealing, third offense, and that the four year sentence imposed therefore exceeded the maximum one year sentence allowed by law, thus denying appellant his constitutional rights to due process of law and to be free from cruel and unusual punishment in violation of the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 21 of the Missouri Constitution, in that the state improperly pled and proved two prior stealing convictions obtained by guilty pleas entered at the same time, in the same court, with the same prosecuting and defense attorneys and the same judge, and this did not comply with the plead guilty or found guilty on two separate occasions requirement of Section 570.040.

Standard of Review

Appellate review of decisions under Rule 24.035 is limited to whether the findings, conclusion, and judgment of the motion court are clearly erroneous. State v. Phillips, 940 S.W.2d 512, 521 (Mo. banc 1997); Rule 24.035(k). The motion court's findings, conclusion, and judgment are clearly erroneous if a review of the entire record leaves this Court with the firm and definite impression that a mistake has been made.

Dudley v. State, 903 S.W.2d 263, 265 (Mo. App., E.D. 1993). In reviewing the motion court's dismissal, this Court is required to assume every pleaded fact as true and to give the pleader the benefit of every favorable inference which may be reasonably drawn therefrom. Frederick v. State, 754 S.W.2d 934 (Mo. App., E.D. 1988) (citations omitted). The motion court can deny an evidentiary hearing only "[i]f the court shall determine the motion and the files and records of the case conclusively show that the movant is entitled to no relief." Rule 24.035(h).

Appellant's sentence was improperly enhanced

The state charged Appellant with Stealing, Third Offense under Section 570.040, for stealing three (3) sweat suits and three (3) pairs of jeans from Wal-Mart[2] (L.F. 4-5). The statute in effect at the time of the crime in the present case provided:

> 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 and shall be punished accordingly.

[2] Not only was it not much clothing, it also was from a discount retailer, Wal-Mart, so clearly the property itself was under the requisite amount, seven hundred fifty dollars at the time of the crime, § 570.040, to make the crime, standing alone, a felony. No mention as to value is discussed in the information or during the guilty plea, although postconviction counsel alleged the value of the clothing was sixty nine dollars and forty two cents (L.F. 43).

570.040.1 (emphasis added).

To supply the two prior convictions required, the state pleaded two stealing convictions of appellant, St. Louis County cases 93CR-0143 and 92CR-7028 (L.F. 4). However, these two prior convictions were obtained by guilty pleas, both entered on July 23, 1993, in the same court, with the same prosecuting and defense attorneys, and with the same judge (L.F. 4; Supp. L.F. 1-4; A10-A13). They did not occur on two separate occasions. In the charging document for the present case, the state cited the two previous guilty pleas as an element of Section 570.040, and it specified that both pleas were entered on July 23, 1993 in the Circuit Court of the County of St. Louis (L.F. 4). Additionally, in the guilty plea proceedings for the present case, the prosecutor recited the two previous guilty pleas as an element of Section 570.040 and specified that both pleas were entered on July 23, 1993 (Tr. 6). Appellant pled guilty to the present charge, and on the same date, the plea court sentenced Appellant to the Missouri Department of Corrections for four years (LF 6, 7-9; A7-A9).

In paragraphs 8(a) and 9(a) of his amended motion, appellant pleaded that the plea court improperly enhanced appellant's class A misdemeanor stealing to the class C felony of stealing, third offense, and therefore, the court's sentence of four years exceeded the maximum sentence of one year authorized by law for class A misdemeanor stealing (L.F. 42). Specifically, appellant pleaded that the two previous guilty pleas from July 23, 1993, which occurred in the same court, in front of the same judge, with the same prosecuting and defense attorneys, did not satisfy the pled guilty on two separate occasions requirement of Section 570.040 (L.F. 43).

The motion court's findings are clearly erroneous

Despite the plain language of Section 570.040, the motion court concluded that the "two separate occasions" provision of Section 570.040 relates to the prior acts of stealing rather than to the prior guilty pleas (L.F. 62). The court reasoned that to interpret the provision as relating to the timing of the prior guilty pleas would render the requirement "meaningless and with no legitimate purpose" (L.F. 62). The court further speculated that "[o]bviously, the legislature meant for the 'two separate occasions' requirement to relate to the acts of stealing which interpretation would give meaning and purpose to the legislative intent," and pointed out that "[t]he legislature is not presumed to have intended a meaningless act" (L.F. 63, 64, citing Beavers v. Recreation Assn. Lake Shore Est., 130 S.W.3d 702, 711 (Mo. App., S.D. 2004) (further citations omitted)). In so ruling, the motion court misinterpreted the clear legislative intent embodied in Section 570.040.

Effective January 1, 1979, the criminal code in Missouri was subject to a comprehensive overhaul as embodied in Senate Bill 60. Section 570.040, RSMo (1978), read as follows:

> 1. 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 and shall be punished accordingly.

Id. (emphasis added).

Clearly, under the above language, all that was required to elevate the third stealing conviction to a felony, irrespective of when the prior offenses were committed or adjudicated, was that the defendant be "previously convicted of stealing two times..."

Thereafter, Section 570.040.1 was amended by House Bill 424 in 1995 (RSMo Cum. Supp. 1995), to read as follows:

> 1. 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 and shall be punished accordingly.

Id. (emphasis added).

This language is still in effect now, and was at the time of appellant's January 14, 2002 stealing of clothes from Wal-Mart. This statutory language on who is eligible for enhanced punishment clearly displays a material change from the prior language, which only required a person to have been convicted of stealing twice, without regard to the occasions that they may have committed the offenses, been found guilty or pleaded guilty. [3] Clearly, if someone pled guilty on one occasion to two separate

[3] The pre-amendment language prompted the Eastern District Court of Appeals to conclude that two stealing offenses which "occurred at the same time, at the same address, in the same room, charged at the same time, sentenced at the same time, prosecuted by the same circuit court" satisfied the requirements under the statute. State v. Santonelli, 914 S.W.2d 13, 15 (Mo. App., E.D. 1995). In its decision, the Court

stealing charges, they are not eligible under the plain language of the current statute for the highly penal result of elevating the punishment for stealing from a misdemeanor to a felony.

There are three rules of statutory construction which confirm that the motion court came to a material misinterpretation of law in concluding appellant was subject to prosecution and sentencing for felony stealing:

> (1) Canon 1: **The legislature is not presumed to have intended a useless act when it changes language of a statute**. To the contrary, as this Court has made very clear, "[w]hen the legislature amends a statute, that amendment is presumed to change the existing law." State v. Cox, 98 S.W.3d 548, 549 (Mo. banc 2003). Under this canon of construction, the change to require the pleas or findings of guilt to occur on two separate occasions means exactly that, the pleas or findings of guilt, not the offenses, must have occurred on different occasions.
>
> (2) Canon 2: **The plain language of a statute should be utilized to ascertain legislative intent.** See, e.g., State v. Stewart, 832 S.W.2d 911, 913 (Mo. banc 1992) (persistent DWI offender status required three convictions prior to current prosecution, not two: "This may not have been the intent of the legislature, but the clear words of the statute govern interpretation."). Additionally, intent may not be inferred when the

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specifically cited the language of the statute as it existed before the amendment.

language of the statute is clear, and "[c]ourts may not 'read into a statute a legislative intent contrary to the intent made evident by the plain language.'" Home Builders Association of Greater St. Louis, Inc. v. City of Wildwood, 107 S.W.3d 235, 239 (Mo. 2003) (internal citations omitted). Therefore, when a statute's language is clear, courts "must give effect to its plain meaning and refrain from applying rules of construction unless there is some ambiguity." Id. The plain meaning of "previously pled guilty or been found guilty on two separate occasions" is clear, and if someone enters a plea of guilty to two charges at one time, as appellant did on July 23, 1993, or is tried and found guilty of two stealing charges on one occasion at one trial, they do not fall within the plain and ordinary meaning of 570.040.1.

(3) Canon 3: **Recidivist statutes, which are highly penal in nature, must be strictly construed against the state and liberally in favor of the defendant.** See, e.g., State v. Smith, 591 S.W.2d 263, 266 (Mo. App., W.D. 1979). Although the language in Section 570.040 is not ambiguous, any ambiguity in penal and criminal statutes is construed strictly against the state. State v. Liffick, 815 S.W.2d 132, 134 (Mo. App., E.D. 1991); State v. Eberenz, 805 S.W.2d 359, 360 (Mo. App., E.D. 1991). "Any doubt as to the meaning of a criminal statute must be resolved in favor of the defendant." State v. Wahby, 775 S.W.2d 147, 151 (Mo. banc 1989). Here, the General Assembly was quite clear in its language, and

the pleas or findings of guilt must occur on separate occasions, not on the same occasion, for the clear language of the statute to apply. Accordingly, pleading guilty to two different cases at the *same* time, in the *same* court, in front of the *same* judge, with the *same* prosecuting and defense attorneys cannot constitute pleading guilty on two separate occasions.

The motion court ignored all these canons in its ruling to, in effect, legislate a purpose the General Assembly did not intend, when it remarkably concluded that implementing the plain language of the statute would render the "two separate occasions" requirement "meaningless and with no legitimate purpose" (L.F. 62).

In fact, the plain language of the statute does *not* lead to a meaningless or illogical result. The General Assembly, in making this change, was not just concerned with punishing a person's third stealing offense, as the motion court seems to think, for if they had been, the legislature would not have adjusted the language from "every person who has been previously convicted of stealing two times" as reflected in the 1979 version of the statute, to the current version of "pled guilty or been found guilty on two separate occasions," as reflected in the 1995 amendment and current version of the statute. Rather, the change meant that every person who has been through the formality of the system and has been twice convicted on separate occasions - either in separate trials or before judges in formal guilty plea proceedings on separate days/occasions - will suffer much greater consequences when they commit a subsequent stealing offense. This increase in consequence is because the offender has already been through the legal system on more than one occasion and presumably better understands

and appreciates the gravity of the crime and the criminal justice system. There is nothing meaningless or illogical about such a legislative purpose, and that is what the General Assembly intended by their clear, unambiguous language.

In fact, as the United States Supreme Court noted, the judicial component is an important component of recidivist statutes:

> Throughout the States, legislatures enacting three strikes laws made a deliberate policy choice that individuals who have repeatedly engaged in serious or violent criminal behavior, *and whose conduct has not been deterred by more conventional approaches to punishment*, must be isolated from society in order to protect the public safety.

Ewing v. California, 538 U.S. 11, 24 (2003) (emphasis added). The New Jersey Supreme Court also noted succinctly that it is the cycle of crime-conviction-crime-conviction that represents "squandered opportunities for reform" noting "[r]ecidivism after a failed attempt to rehabilitate is the best measure of incorrigibility." State v. Livingston, 797 A.2d 153, 165 (N.J. 2002) (J. Long, concurring in part and dissenting in part).

Although petty theft is not a violent crime, the principle is the same. With the change to Section 570.040, the Missouri General Assembly intended to punish the unrepentant thief whose conduct has not been deterred by conventional punishment; the offender who had already come before courts and been punished on two separate occasions.

The language of the statute makes absolutely no reference in the amendment to the timing of the offenses, only to the timing of the guilty pleas or findings of guilt. Furthermore, that the General Assembly knows the difference between felonies committed at different times as opposed to pleas of guilty entered at different times and on different occasions, is without question. If the legislature *had* intended the new requirement to focus on the timing of the offenses, they easily could have adopted their own language from the statutory definition of a persistent offender, which is "one who has pleaded guilty to or has been found guilty of two or more felonies *committed* at different times." § 558.016 (emphasis added). They simply could have amended Section 570.040 to include language of stealing offenses *committed* on two separate occasions or at different times. Instead, the language specifies that a defendant must have previously *pled guilty* (or been found guilty) on two separate occasions.

There is no ambiguity in the amendment, and it must be presumed that the General Assembly intended what the statute clearly says. State v. Meggs 950 S.W.2d 608, 610 (Mo. App., S.D. 1997). Consequently, since the legislative intent is apparent from the words used, "there is no room for construction." Id. The Court cannot, and should not, substitute its judgment for the General Assembly's as evinced by the statutory language of Section 570.040.1.

Consequently, the state's use of the guilty pleas entered on July 23, 1993 in St. Louis County cases 93CR-0143 and 92CR-7028 to enhance Appellant's charge from a class A misdemeanor to a class C felony was improper, and the plea court imposed a sentence in excess of the maximum allowed by law. Thus, the motion court erred in

denying appellant's motion for post-conviction relief, and this violated appellant's constitutional rights to due process of law and to be free from cruel and unusual punishment as guaranteed by the Fifth, Eighth, and Fourteenth Amendments to the United States constitution and Article I, Sections 10 and 21 of the Missouri Constitution. Further, since this is an issue of law and not fact, remand for a hearing is unnecessary. Rather, appellant requests that this Court remand for appellant to be retried for misdemeanor stealing which occurred on January 14, 2002, unless the state has any clear and cogent evidence appellant in fact previously pleaded guilty or was found guilty on two or more separate occasions of stealing.

II.

The motion court clearly erred when it denied appellant's motion for post-conviction relief without a hearing because appellant alleged facts, not refuted by the record, showing plea counsel was ineffective for not fully investigating the charging statute, Section 570.040, for not considering the meaning of the plain language of the statute, and for consequently failing to advise appellant that he was improperly charged under the statute, thus denying appellant his constitutional rights to due process, effective assistance of counsel, and equal protection, in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that counsel did not alert appellant that the state improperly pled and proved two prior stealing convictions that were obtained by guilty pleas at the same time, in the same court, with the same prosecuting and defense attorneys and the same judge, because this did not comply with the plead guilty or found guilty on two separate occasions requirement of Section 570.040. Because appellant was misinformed, he did not enter a knowing, voluntary and intelligent guilty plea, and but for counsel's failure, appellant would not have pled guilty to class C felony stealing third offense.

Standard of Review

Appellate review of decisions under Rule 24.035 is limited to whether the findings, conclusion, and judgment of the motion court are clearly erroneous. State v.

Phillips, 940 S.W.2d 512, 521 (Mo. banc 1997); Rule 24.035(k). The motion court's findings, conclusion, and judgment are clearly erroneous if a review of the entire record leaves this Court with the firm and definite impression that a mistake has been made. Dudley v. State, 903 S.W.2d 263, 265 (Mo. App., E.D. 1993). In reviewing the motion court's dismissal, this Court is required to assume every pleaded fact as true and to give the pleader the benefit of every favorable inference which may be reasonably drawn therefrom. Frederick v. State, 754 S.W.2d 934 (Mo. App., E.D. 1988) (citations omitted). The motion court can deny an evidentiary hearing only "[i]f the court shall determine the motion and the files and records of the case conclusively show that the movant is entitled to no relief." Rule 24.035(h).

Appellant was denied effective assistance of counsel

Appellant's plea counsel was ineffective for not fully investigating the charging statute, Section 570.040, for not considering fully the plain language of the statute, and for consequently failing to advise appellant that he was improperly charged under the statute.

The Sixth Amendment to the Constitution of the United States established the right to counsel, a fundamental right of all criminal defendants through the due process clause of the Fourteenth Amendment. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792 (1963). This right is designed to assure fairness, legitimizing the adversary process. To fulfill its role of assuring a fair trial, the right to counsel must be the right to "effective" assistance of counsel. Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574 (1986); McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441 (1970).

When a criminal defendant seeks post-conviction relief on a claim of ineffective assistance of counsel, he must establish first, that his attorney's performance was deficient and second, that he was prejudiced thereby. Strickland v. Washington, 466 U.S. 668, 687-689, 104 S.Ct. 2052, 2064-65 (1984); Seales v. State, 580 S.W.2d 733, 735-736 (Mo. banc 1979). The Strickland test is applicable to cases in which guilty pleas were entered. In order to satisfy the second Strickland requirement in connection with his guilty plea, the movant must show that, but for counsel's error, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985); Kline v. State, 704 S.W.2d 721 (Mo. App., S.D. 1986).

The effectiveness of counsel is relevant to the extent it affects the voluntariness of the guilty plea. Porter v. State, 678 S.W.2d 2, 3 (Mo. App., E.D. 1984); Walker v. State, 698 S.W.2d 871, 874 (Mo. App., W.D. 1985). "Upon a plea of guilty, movant waives all errors except those which affect the voluntariness or understanding with which he pleads." Cross v. State, 970 S.W.2d 840, 842 (Mo. App., E.D. 1998). "A plea of guilty must not only be a voluntary expression of the defendant's choice, it must be a knowing and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences of the act." State v. Hunter, 840 S.W.2d 850, 861 (Mo. banc 1992). In the instant case, counsel's error affected the knowing and voluntariness of appellant's guilty plea. His plea was not knowingly and intelligently entered because he did not realize that the state's evidence against him was insufficient as a matter of law to allow him to be charged and prosecuted on a class C felony repeat stealing offender.

Although the evidence indicated that appellant had twice previously pled guilty to stealing related offenses, the two guilty pleas were entered on the same date, July 23, 1993, in the same court, in front of the same judge, and with the same prosecuting and defense attorneys. The two previous guilty pleas did not comply with the plain language of the previously pled guilty on two separate occasions requirement of Section 570.040. As a result, the state's evidence as to the charge of stealing, third offense, a class C felony, was insufficient as a matter of law. The only evidence the state could provide was for stealing, a class A misdemeanor, since the value of the property appropriated on January 14, 2002, was under seven hundred and fifty dollars.

Plea counsel was ineffective for not fully investigating the charging statute, Section 570.040, for not considering fully the plain language of the statute, and for failing to advise appellant that he was improperly charged under the statute. Had appellant been informed that he could not be sentenced to twenty years as a prior and persistent offender for stealing, third offense, but instead could only be sentenced to one (1) year for misdemeanor stealing, he would not have pled guilty to the four years recommended by the state. Thus, counsel's conduct caused appellant to enter a plea in a manner that was not knowing and intelligent, and violated his rights to due process, effective assistance of counsel, and equal protection as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States and Article I Sections 10 and 18(a) of the Missouri Constitution. (L.F. 42-43, 47-50).

The motion court's findings are clearly erroneous

The motion court concluded that "[t]rial counsel was not ineffective for not fully investigating the charging statute…since Movant was properly charged under the statute and Movant's plea of guilty in Cause No. 02CR-2771 was made voluntarily and intelligently" (L.F. 63).

However, for the reasons cited in Argument I above, appellant *was not* properly charged under Section 570.040, because the two prior stealing convictions the state pled and proved were not obtained on separate occasions.

Had counsel not failed to fully consider the meaning of the statutory language of 570.040, as appellant could not have been charged with class C felony stealing, and had counsel not informed appellant further that he could receive punishment as a persistent offender under 558.016 of up to twenty years, appellant would not have pleaded guilty to felony stealing and the four year sentence.

In making this argument, appellant is mindful of two things: first, the standard of effective counsel is judged by an objective standard of prevailing professional norms at the time the services are rendered. Strickland v. Washington, 466 U.S. at 690. At first blush, considering the motion court's and court of appeals' conclusion that the language of the statute allows for class C felony stealing only if there are two prior stealing offenses committed on separate occasions, not that the pleas or findings of guilt occurred on separate occasions, the first step of the Strickland inquiry may not be met. Second, if this Court agrees with appellant that the motion court was clearly erroneous on the issues of law regarding the interpretation of Section 570.040, the ineffectiveness

claim is essentially rendered moot since relief should be forthcoming under Rule 24.035 to correct an improper sentence.

CONCLUSION

For the foregoing reasons, this Court should reverse the motion court's judgment in Cause Number 03CC-2846, vacate the four year sentence imposed in Cause Number 02CR-2771, and remand for further proceedings in circuit court on the stealing offense that occurred on July 14, 2002.

Respectfully submitted,

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Certificate of Compliance and Service

I, Lew Kollias, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 5,789 words, which does not exceed the 31,000 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 September, 2005. 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 mailed, postage prepaid this 19th day of September, 2005, Steven Brown, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

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Lew Kollias