

No. 85609

**IN THE
MISSOURI SUPREME COURT**

STATE OF MISSOURI,

Respondent,

v.

ANTHONY FINERSON,

Appellant.

**Appeal from the Circuit Court of St. Louis City, Missouri
The Honorable Michael B. Calvin, Judge**

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from the denial of a Request for a Nunc Pro Tunc Order, in the Circuit Court of St. Louis City, Missouri, the Honorable Michael B. Calvin presiding. The convictions were for two counts of stealing, and one count of forgery, for which the sentences were one year for forgery consecutive to two concurrent terms of five years for the stealing counts in the custody of the Missouri Department of Corrections. Appellant alleges that this Court has jurisdiction because he is challenging the constitutionality of a statute. However, as explained in Point II of this brief, appellant's challenge is not real or substantial as it is not a cognizable claim. Thus, this Court does not have jurisdiction. State v. Wiles, 26 S.W.3d 436 (Mo.App. S.D. 2000). Article V, §3, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

On November 5, 1987, appellant, Anthony Finerson, pled guilty to two counts of stealing in cause number 871-00490, in the Circuit Court of the City of St. Louis, Missouri, and on December 28, 1987, he was sentenced to two concurrent terms of five years in the custody of the Missouri Department of Corrections (L.F. 24-25). Appellant's sentences were to run consecutive to a previous one year sentence for forgery in cause number 871-02277 (L.F. 7-8, 24-25).¹

At some point (the record does not reflect when appellant was placed on probation), appellant received a suspended execution of sentence and was placed on probation in both causes, 871-00490 and 871-02277 (L.F. 7-8, 13-14). On July 25, 1989, appellant's probation was revoked in both causes and his sentences were executed (L.F. 13-14).

Appellant's sentences for the forgery and two counts of stealing have been completed, although he is still incarcerated on other charges (L.F. 17-18).

¹Appellant has failed to include any trial transcripts, or court documents, save the judgment and sentence in cause number 871-00490, two of the trial court's orders and the docket sheets from 871-00490, from the underlying convictions in his legal file. Thus, respondent has attempted to glean the facts from the limited documents provided in the legal file.

In 1996, appellant filed a motion for correction in the trial court alleging that the trial court orally pronounced a sentence of two years on the date of his probation revocation hearing but the written judgment and sentence reflected a sentence of five years (L.F. 1-2, 7). In 1997, appellant filed a motion for correction alleging that at the probation revocation hearing, the trial court orally pronounced that appellant should receive jail time credit for his time on probation but the written sentence and judgment did not reflect it (L.F. 1-2, 7). The trial court denied both of these motions (L.F. 1-2, 7).

On June 30, 2003, appellant filed another nunc pro tunc motion² alleging this time that the trial court orally pronounced a sentence of one year during his probation revocation hearing for his counts of stealing and that the written judgment incorrectly reflected five year sentences (L.F. 1-2, 7, 10-12, 19).

The trial court denied appellant's motion, finding that:

Defendant's contention that the Court orally pronounced a sentence of one year in July 1989 in Cause No. 871-00490B is without merit for the simple reason that in July 1989 the Court merely ordered that defendant's probation be revoked and that the five year sentences imposed in 1997 be executed. The Court did not pronounce and impose the sentences in 1989.

²Appellant's motion is dated August 6, 2002 (L.F. 10-11). However, the docket sheets reflect that a nunc pro tunc was not filed with the clerk until June of 2003 (L.F. 2).

(L.F. 8). This appeal follows.

ARGUMENT

I.

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR A NUNC PRO TUNC TO CORRECT HIS SENTENCES FOR STEALING BECAUSE THERE WAS NO CLERICAL ERROR IN THAT THE RECORD DOES NOT REFLECT THAT THE ORAL PRONOUNCEMENT OF SENTENCE DIFFERED FROM THE WRITTEN JUDGMENT AND SENTENCE³

Appellant's challenge on appeal is that the trial court erred in denying his motion for a nunc pro tunc to correct the judgment and sentence in cause number 871-00490B (App. Br. 6). Appellant alleges that the judge orally declared during his probation revocation hearing, two years after he was sentenced to five years for his convictions of stealing, that appellant's sentence would be one year (App. Br. 6). Appellant claims that the written judgment and sentence reflects five year sentences which should be changed by a nunc pro tunc (App. Br. 6).

On November 5, 1987, appellant, Anthony Finerson, pled guilty to two counts of stealing in cause number 871-00490, in the Circuit Court of the City of St. Louis,

³This Court need not reach the merits of this claim because, as discussed in Point II, this Court does not have jurisdiction of this appeal in that appellant's constitutional claim is not cognizable, real or substantial.

Missouri, and on December 28, 1987, he was sentenced to two concurrent terms of five years in the custody of the Missouri Department of Corrections (L.F. 24-25). Appellant's sentences were to run consecutive to a previous one year sentence for forgery in cause number 871-02277 (L.F. 7-8, 24-25).

At some point (the portions of the record provided by appellant do not reflect when appellant was placed on probation), appellant received a suspended execution of sentence and was placed on probation in both causes, 871-00490 and 871-02277 (L.F. 7-8, 13-14). On July 25, 1989, appellant's probation was revoked in both causes and his sentences were executed (L.F. 13-14).

Appellant's sentences for the forgery and two counts of stealing have been completed, although he is still incarcerated on other charges (L.F. 17-18).

Appellant has not included his plea of guilty transcript and sentencing transcript from cause number 871-00490 where he was sentenced to two concurrent five year terms in the custody of the Missouri Department of Corrections.

"The responsibility of preparing and filing a complete record on appeal lies with appellant." State v. Davis, 830 S.W.2d 473 (Mo.App. E.D. 1992). The record on appeal must contain all of the records and proceedings necessary to a determination of the questions presented for decision, and where any such items are absent there is nothing for the appellate court to decide. State v. Holland, 653 S.W.2d 670, 678 (Mo banc. 1983).

Because appellant's point on appeal addresses whether the trial court's oral pronouncement of sentence differs from the written judgment and sentence, the transcript of the plea hearing and sentencing hearing are necessary to determine what the oral pronouncement of sentence was and whether that oral pronouncement differed from the written judgment and sentence. Appellant's failure to provide the complete transcript precludes the court from reviewing the record in its entirety. State v. Adams, 927 S.W.2d 483 (Mo.App. W.D. 1996). The Adams court found that an appeal with an incomplete record is not subject to review and therefore dismissed the appeal in that case. Id.

Because appellant has failed to file a complete transcript of the plea hearing and sentencing hearing, appellant's appeal should be dismissed.

Because it is impossible to review appellant's claim without the sentencing transcript, this Court may presume that the omitted portions of the record would have been unfavorable to appellant's position of appeal. State v. King, 873 S.W.2d 905, 907 (Mo.App. S.D. 1994); State v. Dade, 629 S.W.2d 418, 420 (Mo.App. E.D. 1981).

In any event, based on the record that appellant has provided, the trial court did not err in denying appellant's motion for an order nunc pro tunc because the oral pronouncement of sentence was reflected correctly on the written judgment and sentence.

Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time after such notice, if any, as the court orders. Supreme Court Rule 29.12(c). In order for Rule 29.12(c) to apply, the error about which defendant complains must have been a clerical mistake. State v. Carrasco, 877 S.W.2d 115, 117 (Mo.banc 1994). A judgment may be corrected nunc pro tunc only if it is a clerical error rather than a judicial error and, generally, only if the intention of the judge to do otherwise clearly appears in the record. Id. The trial court may not enter a new judgment or sentence but may only “amend or supply and record in accordance with the fact.” Id. A nunc pro tunc order is used to make the record conform to what actually occurred when, as here, there is a basis in the record supporting such an amendment. McDonald v. State, 77 S.W.3d 722, 728 (Mo.App. S.D. 2002).

In the trial court’s denial of appellant’s motion for an order nunc pro tunc, the trial court noted that appellant had filed another motion for an order nunc pro tunc back in 1996, where he claimed that the trial court orally pronounced a sentence of two years and that the written sentence and judgment reflected five year sentence (L.F. 7-8). The trial court noted that it had read the sentencing transcript at that time, had found appellant’s claim to be without merit and denied appellant’s request in 1997 (L.F. 7-8). Appellant’s argument now that the oral pronouncement was one year, compared to five on the written

sentence and judgment is also without merit (L.F. 7-8). The trial court had inspected the sentencing transcript, had found that there was no discrepancy between the oral pronouncement of sentence and the written judgment and sentence and thus no nunc pro tunc was in order. The written sentence and judgment was correct (L.F. 8). Because there is no discrepancy, the trial court did not err in denying appellant's motion.

Appellant claims that the trial court orally pronounced a new sentence and judgment during his probation revocation hearing two years after his sentencing and that this oral pronouncement (of which there is allegedly no transcript), differs from the written judgment and sentence prepared by the trial court (App. Br. 6-13). However, assuming, for the sake of argument, that appellant is correct that the trial court actually entered a new sentence and judgment at his probation revocation hearing different from that of the original judgment and sentence, but that the written judgment and sentence does not reflect that change, this claim is not a claim of clerical error which would be properly brought in a nunc pro tunc, but would be an alleged judicial error. Any claims of judicial error from a guilty plea and sentencing would have had to have been brought in a Rule 27.26 or Rule 24.035 motion, which appellant is over 15 years past the filing deadline. See Supreme Court 24.035. Moreover, the trial court expressly stated that it was not his intent to pronounce a new judgment or sentence at the probation revocation hearing, that the written judgment and sentence was not a clerical error, and that his

intent was that appellant be sentenced to five years for each count of stealing as reflected in the 1987 written judgment and sentence. Carrasco, supra at 117 (A judgment may be corrected nunc pro tunc only if it is a clerical error rather than a judicial error and, generally, only if the intention of the judge to do otherwise clearly appears in the record). Because the trial court's intent was to sentence appellant to five years and any alleged change in appellant's sentence would be a claim of judicial error, the trial court did not err in denying appellant's motion for an order nunc pro tunc.

Based on the foregoing, appellant's claim must fail.

II.

THIS COURT SHOULD DECLINE TO REVIEW APPELLANT'S CLAIM THAT SECTIONS 559.036 AND 557.011, RSMO 1986 ARE UNCONSTITUTIONAL BECAUSE THIS COURT LACKS JURISDICTION TO CONSIDER THIS CLAIM IN THAT APPELLANT'S APPEAL IS FROM A DENIAL OF A MOTION FOR A NUNC PRO TUNC AND ORDERS NUNC PRO TUNC ARE STRICTLY FOR CORRECTING CLERICAL ERRORS.

IN ANY EVENT, APPELLANT'S CLAIM THAT SECTIONS 559.036 AND 557.011, RSMO 1986 ARE UNCONSTITUTIONAL BECAUSE THEY DO NOT REQUIRE THE TRIAL COURT TO TRANSCRIBE PROBATION REVOCATION HEARINGS AND THUS THESE STATUTES ARE ALLEGEDLY VAGUE AND ARBITRARY, MUST FAIL BECAUSE APPELLANT'S CLAIM IS WAIVED IN THAT HE DID NOT RAISE THIS CONSTITUTIONAL CLAIM AT THE EARLIEST OPPORTUNITY AND APPELLANT'S CLAIM IS WITHOUT MERIT IN THAT HE HAS FAILED TO PLEAD FACTS DEMONSTRATING THAT THE STATUTE IS UNCONSTITUTIONAL AS APPLIED TO HIM.

Appellant claims that the trial court erred in denying his motion for a nunc pro tunc because Sections 559.036 and 557.011, RSMo 1986 are unconstitutional (App. Br. 12-13). Appellant claims that because these statutes do not provide for the trial court to

record probation revocation hearings, the statutes are vague, arbitrary, and discriminatory (App. Br. 13). Appellant alleges that if no recording is prepared, reviewing courts would not be able to determine if any arbitrary and discriminatory applications of §559.036, RSMo 1986 were committed (App. Br. 13).

Lack of Jurisdiction

This Court lacks jurisdiction to consider appellant's claim because an appeal from a denial of a motion for a nunc pro tunc is not a proper vehicle to raise a constitutional claim. A judgment may be corrected nunc pro tunc only if it is a clerical error. State v. Carrasco, 877 S.W.2d 115, 117 (Mo.banc 1994). A nunc pro tunc order is used to make the record conform to what actually occurred when, as here, there is a basis in the record supporting such an amendment. McDonald v. State, 77 S.W.3d 722, 728 (Mo.App. S.D. 2002). As nunc pro tuncs are only appropriate for clerical errors, appellant's constitutional challenge is not proper and this Court lacks jurisdiction to consider this claim.

Constitutional Claim is Waived

Even assuming that an appeal from the denial of a motion for a nunc pro tunc is a proper vehicle to raise a constitutional claim, appellant's claim is waived because he did not raise his claim at the earliest opportunity. "Constitutional violations are waived if not raised at the earliest possible opportunity." State v. William, 100 S.W.3d 828, 831

(Mo.App. W.D. 2003). Appellant's constitutional claim revolves around the fact that §559.036, RSMo 2000, does not specifically require trial courts to record probation revocation hearings (App. Br. 12). Any challenge to the constitutionality of this statute, §559.036, RSMo 2000, should have been made during the probation revocation hearing in 1989. Appellant failed to challenge the constitutionality of this statute until 15 years later. Consequently, appellant has waived any alleged constitutional violation by failing to raise the issue at the earliest opportunity. State v. Koenig, 115 S.W.3d 408, 415 (Mo.App. S.D. 2003).

No Constitutional Violation

Finally, even assuming that appellant's constitutional claim was properly before this Court, appellant's claim must fail. In order to attack the constitutionality of a statute, the party must show that the statute is unconstitutional as applied to them. State v. McMilian, 649 S.W.2d 467 (Mo.App. W.D. 1983). A party may not attack the constitutionality of a statute upon the basis that the statute may be unconstitutional as applied to others in a different hypothetical fact situation. Id.

In the case at bar, appellant claims that the statute is vague, arbitrary, and discriminatory because the statute does not specifically require the trial court to record and transcribe probation revocation proceedings. Appellant has not pled facts demonstrating that he requested that the proceeding be recorded and transcribed at the

revocation hearing and that the request was denied, he has not pled facts demonstrating that the proceedings were not recorded, and he has not pled facts that the probation revocation proceeding transcript was not available to be prepared. At best, appellant has only shown that there was no prepared transcript in the circuit court file (L.F. 26). Because appellant has not pled facts demonstrating that the challenged statute actually applies to him, appellant cannot attack the constitutionality of the statute and his claim must fail.

Based on the foregoing, appellant's claim must fail.

CONCLUSION

Based on the foregoing, respondent submits that the denial of appellant's motion for a nunc pro tunc 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)/Local Rule 360 of this Court and contains _____ words, excluding the cover, this certification and the 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 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 March, 2004.

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RESPONDENT'S APPENDIX

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