IN THE SUPREME COURT OF MISSOURI

SC 95132

COLIN M. HENNEN,
RELATOR

v.

HON. DENNIS ROLF,
RESPONDENT

Petition for Writ of Prohibition or Mandamus to the Supreme Court of Missouri
From The Circuit Court of Lafayette County, Missouri
15th Judicial Circuit, Division 1
Honorable Dennis Rolf
Case No. 11LF-CR00982-01

RELATOR'S REPLY BRIEF

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I. The State did not expend "every reasonable effort" to hold the revocation hearing before Hennen's term of probation expired, therefore Respondent is without statutory authority to revoke Hennen's probation.

The State acknowledges that the "real issue" is whether the State made every reasonable effort under Section 559.036.8 to conduct the probation revocation hearing before April 1, 2015. Resp.'s Br., p. 14. The Statute, in relevant part, provides:

> The power of the court to revoke probation shall extend for the duration of the term of probation designated by the court and for any further period which is reasonably necessary for the adjudication of matters arising before its expiration, provided that … every reasonable effort is made… to conduct the hearing prior to the expiration of the period.

Mo. Rev. Stat. §559.036.8. This requires the State (both Respondent and the prosecutor) to make "every reasonable effort" to conduct the hearing before the probation period ends. *See Id*.; *State ex rel. Strauser v. Martinez*, 416 S.W.3d 798 (Mo. banc 2014).

The State has never once disputed the fact that it did nothing between February 20 and April 6, 2015. *See generally* Resp.'s Br. The State's Statement of Facts asserts that it filed the Application to Revoke Hennen's Probation on February 20, 2105. *Id*. at 6. The Statement of Facts also asserts that the State issued a warrant on that same date. *Id*. The State then admits that it did literally nothing until April 6, 2015, despite knowing that Hennen's probation expired on April 1, 2015. *Id*. It cannot be argued that doing nothing for approximately a month and a half is making "every reasonable effort."

II. The fact that Hennen informed Respondent that Respondent did not have statutory authority to revoke Hennen's probation did not grant Respondent statutory authority to revoke Hennen's probation.

After the State essentially admitted defeat on the "every reasonable effort" prong, by acknowledging that it did not do anything, the State again attempts to point the finger at Hennen as somehow responsible for the delay. The State appears to abandon its argument that Hennen was required to "retake himself," which Hennen refuted on pages 27-28 of his Opening Brief. However, the State now asserts that Hennen "actively tried to prevent Respondent from holding a probation revocation hearing" by filing a Motion to Discharge. Resp.'s Br., p. 15. Respondent lost statutory authority to revoke Hennen's probation after April 1, 2015. Mo. Rev. Stat. §559.036.8. Hennen's Motion to Discharge, filed on April 17, 2015, cannot somehow be the reason that Hennen's probation revocation hearing was not held before April 1, 2015.

The State continues to falsely assert that Hennen asked Respondent for an extension of time to file this Writ. Resp.'s Br., p. 15. Hennen's Opening Brief previously addressed this issue, noting that Respondent *sua sponte* continued the hearing, likely because Respondent believed he did not have the authority to revoke Hennen's probation:

> What I think I'm going to do is, I'm going to deny the motion, but I'm going to continue the hearing to allow you an opportunity to get a writ.

Exh. A, p. 1; Exh. F, pp. 48-49 (Appx., pp. A13-A14); Rel.'s Op. Br., p. 19. Further, as discussed in Hennen's Opening Brief, even if Hennen had requested the extensions, Hennen is not vested with any authority to extend Respondent's statutory authority under

Section 559.036, as specifically addressed in St*ate ex rel. Strauser v. Martinez*, 416 S.W.3d 798, 804 (Mo. banc 2014). This argument is particularly disingenuous: It asserts that actions taken by Hennen in July 2015 somehow prevented the State from holding the probation revocation hearing before April 1, 2015.

Despite the fact that Hennen's Opening Brief points out that this Court, in *Strauser*, specifically addressed this issue the State asks the question:

> Should Respondent have conducted the hearing with the affirmation from counsel that they were seeking a writ to prevent the hearing?

Resp.'s Br., p. 16. This Court stated in *Strauser*:

> [T]he record does not indicate that either Strauser or Edmonds requested the continuances [prior to the probation term expiring], nor was it their duty to ensure the trial court ruled on the pending revocation motions… Rather, the language clearly states that the "power of the court" to hold a revocation hearing only extends beyond a probation term if the two conditions listed in the statute are met.

416 S.W.3d at 803. The State is attempting to shift the burden back to Hennen to ensure that the trial court hold a revocation hearing before the probation term expires, despite the clear language in Section 559.036 and *Strauser*.

In *Strauser*, this Court acknowledged that the delays were only permitted because the trial court was "attempting to ensure the maximum restitution payments while avoiding imprisonment for the Defendants." 416 S.W.3d at 804. However, such niceties by the trial court for the defendants did not extend the trial court's statutory authority.

Here, Respondent *sua sponte* continuing the hearing to allow for a writ cannot extend Respondent's statutory authority. Further, this argument ignores the fact that each of these extensions occurred ***after*** the probation term had already expired. Even if Hennen did seek these extensions, it would be irrelevant, as he did not seek any extensions ***before*** his term of probation expired. Events that occurred after April 1, 2015 cannot shift the blame for the State's inaction prior to April 1, 2015.

III. The State's discovery violations only highlight the injustice of the State's delay tactics in this case.

Seemingly unaware of the State's inability to comply with Rule 25, the State asserts that Hennen's request for Rule 25.04 Discovery "admits" that the discovery sought was not covered by Rule 25.03. Resp.'s Br., p. 19. However, this measure was taken simply as a precautionary measure to try and assure production of relevant documents. Obviously, it failed. The State then attempts to assert that it would be absurd for the State to fail to produce relevant documents:

> There is no reason the State would withhold these documents from Relator when they obviously show the State made every reasonable effort to return Relator back to Missouri to hold a hearing before Respondent.

Resp.'s Br., p. 19. The State is apparently unaware that it ***did*** withhold these documents from Hennen. In fact, the State asserted that none of these documents even existed (by asserting that it was unaware of documents which the State was required to be aware of, under *Merriweather v. State*, 294 S.W.3d 52, 55-56 (Mo. banc 2009)). Hennen agrees that it is absurd for the State to withhold relevant discovery from Hennen.

As a final attempt to shift the blame for the lack of production to Hennen, the State resurrects the much-maligned "open file" discovery policy. Resp.'s Br., p. 19. As early as 1975 Missouri has held that simply maintaining an "open prosecutor's file" does not comply with Due Process. *State v. Buckner*, 526 S.W.2d 387, 392 (Mo. App. W.D. 1975); *State v. Moore*, 645 S.W.2d 117, 119 (Mo. App. W.D. 1982).

The discovery violations are not particularly relevant to the ultimate issue here: Did the State expend "every reasonable effort" to hold the revocation hearing before Hennen's probation expired? Hennen continues to believe that there is ***something more*** which should have been produced to support his case (given the fact that Missouri happened to file the no-bond warrant at the last possible moment before Hennen was to be released in Pennsylvania). However, it is ultimately irrelevant, because the State has admitted that it did nothing from February 20 to April 6, 2015. "Nothing" is not "every reasonable effort," so a discovery dispute regarding what the State may have known is not necessary to resolve this case.

CONCLUSION

The State did not make every reasonable effort to conduct a hearing before the expiration of Hennen's probation, as required by Section 559.036.8 and *State ex rel. Strauser v. Martinez*, 416 S.W.3d 798 (Mo. banc 2014). As such, Respondent is without authority to revoke Hennen's probation. Thus, a writ of prohibition, or in the alternative, a writ of mandamus, prohibiting Respondent from doing anything other than vacating Respondent's Order scheduling a probation violation hearing on July 20, 2015, is the appropriate remedy.

The State's apathy towards retaking Hennen caused him to sit in a Pennsylvania jail and a Penitentiary (some of which was spent in solitary confinement), for nearly 60 days more than necessary (from February 18 through April 8, 2015). The State downplays the fact that Hennen would still be waiting in the Pennsylvania Penitentiary for Missouri to retake him, if Pennsylvania had not taken the extra step to send the teletype. Allowing the State to meet its burden to expend "every reasonable effort" by doing nothing permits exactly that result. For these reasons, this Court's writ should be made permanent.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned hereby certifies that the foregoing document, has a word count of 1,463 using Microsoft Word's tools calculated in accordance with the Missouri Supreme Court Rules and is otherwise in compliance with this Court's Rules and was filed via this Court's Electronic Filing System on October 6, 2015, and thereby served upon all counsel of record:

/s/ Clayton E Gillette

The undersigned hereby additionally certifies that a true and correct copy of the foregoing document was sent via electronic mail, pursuant to agreement under the Rules, to the party below on October 6, 2015:

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