

No. SC96095

**IN THE MISSOURI
SUPREME COURT**

STATE OF MISSOURI,

Respondent,

v.

BRYAN MARSDON PIERCE,

Appellant.

Appeal from the Circuit Court of Jackson County, Missouri
16th Judicial Circuit, Division 11
The Honorable W. Brent Powell, Judge

APPELLANT'S SUBSTITUTE REPLY BRIEF

NATALIE HULL HOGE # 64498
Assistant Appellate Defender
Office of the Public Defender
Western Appellate/PCR Division
920 Main Street, Suite 500
Kansas City, Missouri 64105

Tel: 816.889.7699
Fax: 816.889.2088
natalie.hull@mspd.mo.gov

Counsel for Appellant

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ARGUMENT

Appellant, Bryan Pierce, relies on the argument set forth on pages 10-37 of Appellant's Substitute Brief but also makes the following additional reply to the issues raised in Respondent's Substitute Brief.

Point I: The trial court plainly erred in sentencing Mr. Pierce, because the sentence was based on a materially false misunderstanding of the range of punishment, and that error was evidence, obvious, and clear.

Respondent argues the court's error was not evident, obvious, and clear because the trial court explained "in substantial detail" its reasoning for the sentence given. (Resp. Br. 12). Respondent points out, several times, that the court's rationale spanned 5.5 transcript pages and argues the court's sentence was based on the factors the court addressed and not affected by the court's materially false misunderstanding of the range of punishment. (Resp. Br. 12). The factors included rehabilitation (Tr. 274-75), retribution (Tr. 275-76), and likelihood of reoffending (Tr. 275, 277). These factors are not unique to Mr. Pierce's case, however. *See Haynes v. State*, 937 S.W.2d 199, 204 (Mo. banc 1996) (Listing "deterrence, rehabilitation, protection of the public, and punishment" as relevant sentencing factors.). Insofar as Courts are presumed to know the law, *See State v. McDonald*, 10 S.W.3d 561, 564 (Mo. App. S.D. 1999), even when not explicitly states, courts consider these factors.

As Respondent points out, the sentencing court said the factors are "what drive my sentence in this case." (Resp. Br. 12, Tr. 280) If those factors drove the sentence in this

case, the speed limit was set by the range of punishment. The range of punishment controls all sentences, because a sentence is required to fall within the specified range of punishment. *See* § 558.011. The legislature created a range of punish to reflect society's determination of a just punishment for crimes of different classes. *See* 558.011. A sentencing court's consideration of factors is only accurate if it is made within the correct parameters established by the statutory range of punishment.

In the foundational case for the argument of materially false foundation warranting resentencing in Missouri, this Court held a sentencing court's mistaken belief about facts affecting sentencing entitles a defendant to resentencing. *Wraggs v. State*, 549 S.W.2d 881, 884 (Mo. banc 1977).

In *Wraggs*, 549 S.W.2d at 881, the sentencing judge believed Mr. Wraggs had been properly convicted of 5 felonies prior to the court sentencing Mr. Wraggs to 13 years in prison for an assault charge. Two of Mr. Wraggs' convictions, however, were later converted into one conviction and that sentence was lowered from ten years to six years. *Id.* This Court's rationale for remanding the case was:

The change from two robbery convictions with two concurrent 10-year terms to one robbery conviction with a single 6-year term places appellant in a significantly different position than what he was at the time Judge Tillman sentenced him. *It is not for us to say that this change would not influence, although not compel, a sentencing judge to render a lesser sentence.* This is true even though, as Judge Tillman has stated, the 13-year sentence was within legal limits and his discretion; it was not based upon

prior convictions which were unconstitutional and was justified and supported by the severity of the crime of assault with intent to maim with malice. The fact remains that it was the sentencing judge who declared at the sentencing that the 10-year sentences appellant was then serving played a significant part in his decision to impose the 13-year sentence.

Id at 886 (emphasis added). The sentencing court in *Wraggs* made it clear the intent of the sentence was to add to the amount of time Mr. Wraggs would serve beyond the robbery case sentence. *Id* at 885. This Court noted the record failed to show how much additional time was contemplated by the sentencing court. *Id*.

The minimum sentence in Mr. Pierce's case is analogous to the 10-year sentence in *Wraggs*. Once the sentence changed from 10 down to 6, this Court held the sentencing court in *Wraggs* needed the opportunity to apply the change to the sentence at hand. Similarly, with the minimum sentence in Mr. Pierce's case being 5 years rather than 10 the sentencing court should have the opportunity to address resentencing taking the correct minimum sentence into account. As this Court held in *Wraggs*: "A sentence passed on the basis of a materially false foundation lacks due process of law and entitles the defendant to a reconsideration of the question of punishment in the light of the true facts, *regardless of the eventual outcome*." *Id* at 884 (emphasis added).

An appellate court's role differs from that of the trial court. For example, in *State v. Porter*, 439 S.W.3d 208, 212 (Mo. banc 2014), this Court abolished the corroboration rule and the destructive contradiction rule, both of which essentially allowed an appellate court to overturn a conviction when the complaining witness' testimony was so

contradictory that it could not be reasonably believed. This Court found both rules problematic because they were contrary to the standard of review for sufficiency claims, which “is premised on the notion that appellate courts are not a ‘super juror’ with the power to override factual determinations supported by sufficient evidence.” *Id* at 212. This Court drew a hard distinction between the role of the appellate and the role of the finder of fact at the trial level. *Id*. Appellate courts are not “to engage in credibility determinations that are properly left to judges and juries sitting as triers of fact.” *Id*.

Additionally, an appellate court cannot determine whether the sentencing court would have given Mr. Pierce the same sentence had he understood the minimum punishment available to him was 5 years in prison rather than 10: “[I]t is not for us to say that this change would not affect the trial court’s decision on sentencing. Consequently, it is appropriate that this case be remanded for resentencing. The trial court has the authority to reimpose the original sentence if it chooses to do so.” *State v. Rowan*, 201 S.W.3d 82, 84 (Mo. App. E.D. 2006).

Respondent argues the trial court’s comments do not need to be extensive to explain the valid reasons a sentence is being imposed despite a misunderstanding of the law, pointing to *State v. Seaton*, 815 S.W. 2d 90, 92 (Mo. App. E.D. 1991). This, however, is a misleading argument. In *Seaton*, the “valid reason” was the court’s expressed desire to sentence the defendant to a “very severe” punishment and to follow the State’s recommendation. *Id*. at 91-92. The misunderstanding of law hinged upon whether the court was required to impose a consecutive sentence to the charges. The *Seaton* court held the sentencing court was not following the State’s recommendation

because it believed consecutive time was required, but because that was the court's explicit intent. *Id.* at 92.

What distinguishes this case from *Seaton* is the fact that the court did not impose the maximum sentence possible, either by law or pursuant to the plea agreement's 20-year cap. (Tr. 249). Had the sentencing court indicated that Mr. Pierce was being sentenced to the maximum allowed, then it would indicate the court would not have considered 5 years, even if the court knew that to be the minimum, because the intent was to sentence to the maximum sentence allowed under the agreement.

Further, Respondent's reliance on *State v. Elam*, 493 S.W.3d 38, 43 (Mo. App. S.D. 2016), is misplaced. (Resp. Br. 18). In *Elam*, plain error was not found because three reasons were all present: (1) the trial court explained its rationale for the sentences; (2) the "sentences were based on valid considerations"; and (3) *nothing* in the record indicated the sentences were based on the trial court having a misapprehension of the applicable law. *Id.* at 44. The third reason is what distinguishes *Elam* from this case. The record indicated the sentence was based on the trial court having a misapprehension of the applicable law because the court expressed that misapprehension explicitly. (Tr. 249). While the trial court explained some of its rationale for the sentence, the court did not explain why 15 rather than 20 or how the factors the court used in determining the sentence added up to 15 years. The court's rationale did not explain the specific sentence issued. Every point the sentencing court made when explaining the sentence imposed on Mr. Pierce would apply no matter the mandated range of punishment – whether that range was 1 to 6 years or 30 to 60 years. Nothing in the court's statement explains why

those factors translated into 15 years rather than 14 or 16 or 20. Additionally, not all of the considerations in Mr. Pierce's case were valid: specifically, the minimum punishment the court understood to be allowed by law was not valid. (Tr. 249). As addressed in Appellant's Substitute brief, the State outlined the incorrect range of punishment in *Elam*, not the court. *Elam*, 493 S.W.3d at 43. This is essential to the analysis of this issue. When a party argues incorrect law, "trial judges are presumed to know the law and to apply it in making their decisions." *State v. McDonald*, 10 S.W.3d 561, 564 (Mo.App. S.D. 1999). When a court misstates the law, that presumption is rebutted. *See State v. Webber*, 504 S.W.3d 221, 234 (Mo. App. W.D. 2016).

What makes this case "evident, obvious, and clear" are the sentencing court's own words: "[I]t's my understanding that the defendant, his range of punishment was, pursuant to statute, extended to ten to 30 years, is that correct?? (Tr. 249). It was the court's erroneous understanding that Mr. Pierce faced a minimum sentence of 10 years. This, however, was incorrect. See § 558.016.

Respondent argues manifest injustice is not present because it does not appear Mr. Pierce was sentenced as a persistent felony offender. (Resp. Br. 24) Respondent repeatedly notes that Mr. Pierce's sentence falls within the unenhanced range of punishment and that there is no indication the sentencing court took Mr. Pierce's status as a persistent felon into consideration. (Resp. Br. 24, 25). This, however, is not the test. The trial court did not consider the full range of punishment because of its misunderstanding that Mr. Pierce's status as a persistent felon incorrectly made the possible minimum 10 years in prison, resulting in manifest injustice and plain error. *See*

State v. Williams, 465 S.W.3d 516 (Mo. App. W.D. 2015), *State v. Troya*, 407 S.W.3d 695, 700 (Mo. App. W.D. 2013). “A sentence passed on the basis of a materially false foundation lacks due process of law and entitles the defendant to a reconsideration of the question of punishment in the light of the true facts, regardless of the eventual outcome ... even if it is likely the court will return the same sentence.” *Williams*, 465 S.W.3d at 520.

Respondent lists several cases in which sentencing errors did not result in manifest injustice, however, these cases are all completely irrelevant to the issue. (Resp. Br. 23-24). Respondent ignores the fact that courts routinely remand cases in which sentencing was predicated on a materially false foundation of fact after a plain error review. See *Williams*, 465 S.W.3d at 520; *Troya*, 407 S.W.3d at 700, *Rowan*, 201 S.W.3d at 84; and *State v. Webber*, 504 S.W.3d at 234 (Manifest injustice was found because trial court plainly erred in erroneously instructing the jury as to the range of punishment; “The law is clear that an erroneous jury instruction on sentencing and a sentence passed on the basis of a materially false foundation constitute evident, obvious, and clear error and that such error results in manifest injustice if left uncorrected.” *Id* at 235).

Even if the court’s sentence was within the valid range of punishment, the fact that the court did not consider the correct, full range of punishment warrants resentencing. The court is not required to change Mr. Pierce’s sentence, but the court is required to consider the correct range of punishment.

CONCLUSION

Based on the argument presented above and in Appellant's Substitute Brief, Mr. Pierce respectfully requests this Court reverse the judgment of the trial court and remand the case with instructions for the court to vacate and set aside the judgment and discharge Mr. Pierce from this sentence, or remand Mr. Pierce's case for resentencing.

Respectfully submitted,

/s/ Natalie Hull Hoge
NATALIE HULL HOGE #64498
Assistant Appellate Defender
Office of the Public Defender – Area 69
Western Appellate Division
920 Main, Suite 500
Kansas City, MO 64105
Tel: 816/889-7699
Fax: 816/889-2001
Natalie.Hull@mspd.mo.gov

Counsel for Appellant

CERTIFICATE OF COMPLIANCE AND SERVICE

I, Natalie Hull Hoge, hereby certify as follows:

The attached brief complies with the limitations contained in Supreme Court Rule 84.4. The brief was completed using Microsoft Office Word, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, this brief contains **2,197** words, which does not exceed the 7,750 words allowed for an appellant's reply brief under Rule 84.06(b).

A true and correct copy of the attached brief was sent through the e-filing system on June 2, 2017, to: Nathan Aquino, Office of the Attorney General, at Nathan.Aquino@ago.mo.gov.

/s/ Natalie Hull Hoge
Natalie Hull Hoge