

THE SUPREME COURT OF MISSOURI

STATE EX REL. WILLIE JOHNSON,
Relator

vs.

THE HONORABLE CALEA STOVALL-REID,
Respondent

No. SC96152

Petition for Writ of Prohibition to the Supreme Court of Missouri
from the Circuit Court of St. Louis City, Missouri
Twenty-Second Judicial Circuit, Division 26
The Honorable Calea Stovall-Reid, Judge

RESPONDENT'S STATEMENT, BRIEF, AND ARGUMENT

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Statement of Jurisdiction

On September 11, 2013, in the Circuit Court of the City of St. Louis, Cause No. 1322-CR02418, Relator pled guilty to one count of Unlawful Use of a Weapon. Respondent suspended imposition of sentence and placed Relator on three years' probation. On November 21, 2016, Relator filed a motion to terminate probation, which was subsequently denied.

Relator then filed a petition for a writ with the Court of Appeals Eastern District, No. ED105050, which was denied on December 15, 2016. Relator filed a petition for writ of prohibition with this Court on January 10, 2017. Jurisdiction lies in the Supreme Court of Missouri. Mo. Const., Art. V, Sec. 5; Rule 97.01.

Statement of Facts

On May 18, 2013, the St. Louis Circuit Attorney's Office charged Relator, Willie Johnson, with one count of the Class D Felony of Unlawful Use of a Weapon in cause number 1322-CR02418-01. The charge alleged that on or about May 17, 2013, in the City of St. Louis, State of Missouri, Relator carried concealed a firearm upon or about his person, specifically a Russian 7.62 caliber pistol, which was readily capable of lethal use.

On September 11, 2013, Relator pled guilty to one count of the Class D Felony of Unlawful Use of a Weapon before Respondent. (Relator's Appendix 2-4). Respondent suspended the imposition of sentence and placed Relator on supervised probation for a period of three years. *Id.* The Court imposed eleven conditions of probation, which included special conditions of paying court costs and other fees, obtaining a high school equivalency diploma, and maintaining part time employment. During the course of Relator's probation, probation reports in this matter show Relator violated conditions of his probation during the following months: November 2013, June 2014, December 2014, March 2015, April 2015, June 2015, October 2015, December 2015, February 2016, April 2016, and June 2016. (Relator's Appendix 9-10).

On July 13, 2015, Respondent ordered Relator's probation to be extended for a period of two years. (Relator's Appendix 5). That order stated Relator's probation had an expiration date of September 10, 2018. *Id.*

On June 1, 2016, Relator's probation officer issued an initial field violation report, which indicated Relator violated conditions #1 laws and #6 drugs. (Relator's Appendix 6-8). The violation report alleged that on May 26, 2016, in the City of St. Louis, State of

Missouri, Relator was arrested for the following offenses: Two Counts of Distribution of a Controlled Substance, Possession of a Controlled Substance, and Possession of up to 35 Grams of Marijuana. *Id.*

On August 5, 2016, the Saint Louis City Circuit Attorney's Office issued new charges against Relator in cause number 1622-CR03419 for the following offenses: Two counts of Distribution of a Controlled Substance, Possession of a Controlled Substance, Possession of up to 35 Grams of Marijuana, and Interfering with an Arrest.

On August 29, 2016, Respondent suspended Relator's probation, issued a *capias* warrant for his arrest, and set the Relator's bond at \$25,000.00 cash only. (Relator's Appendix 11). Respondent scheduled the matter for a probation revocation hearing on October 7, 2016. *Id.*

On August 31, 2016, Relator's probation officer filed a case summary report recommending revocation of Relator's probation. (Respondent's Appendix 2-4). That report indicated that, while on probation, Relator continuously engaged in criminal activity and failed to comply with conditions of probation. (Respondent's Appendix 4). That report further indicated Relator was "no longer eligible for earned compliance credit as his probation is suspended." *Id.*

On October 6, 2016, Counsel for Relator made a motion for bond reduction before Respondent. (Relator's Appendix 12). Relator's motion was denied. *Id.* After the bond reduction motion, Counsel for Relator made off-the-record statements, in chambers, regarding potential resolution of Relator's pending felony charges, prior to Respondent holding a revocation hearing. Following that discussion, Relator's probation revocation

hearing, which was initially scheduled for the following day on October 7, 2016, was continued to December 2, 2016. (Relator's Appendix 13).

On November 21, 2016, Counsel for Relator filed a motion to terminate probation, alleging Respondent lacked statutory authority to revoke Relator's probation because Relator's discharge dates had expired. (Relator's Appendix 14-17).

On November 28, 2016, Relator's motion to terminate probation was heard and denied on the basis that Relator was "not eligible for earned compliance credits as his probation is currently suspended" and "...earned credits shall continue to be suspended for a period of time during which the court or board has suspended the term of probation..." (Respondent's Appendix 5).

On November 30, 2016, Relator filed a Petition for Writ of Prohibition, or in the alternative, a Writ of Mandamus, in the Missouri Court of Appeals, Eastern District, No. E.D. 105050. On December 12, 2016, the State of Missouri, on behalf of the Respondent, filed an Answer and Suggestions in Opposition to the Relator's Petition for Writ. The Missouri Court of Appeals, Eastern District denied Relator's Writ of Prohibition on December 15, 2016. (Relator's Appendix 29).

On December 21, 2016, Respondent scheduled a probation revocation hearing to be heard on January 12, 2017. Counsel for Relator and Counsel for State were notified of the scheduling. (Respondent's Appendix 6).

On January 6, 2017, Respondent contacted Counsel for Relator for a scheduling matter on a separate and unrelated case set that was *also* scheduled for January 12, 2017. Counsel for the State was present. During the conference call, Respondent reminded

Counsel for Relator that Relator's probation revocation hearing was still scheduled for January 12, 2017. Counsel for Relator then requested Respondent continue the probation revocation hearing to a later date so Relator's pending felony case could be resolved. Relator's request to continue the probation revocation hearing was not granted.

On January 10, 2017, Relator filed a Petition for Writ of Prohibition, or in the alternative, a Writ of Mandamus, in the Missouri Supreme Court.

Standard of Review

A writ of prohibition or mandamus is an appropriate remedy where a trial court exceeds its statutory authority by holding a probation violation hearing and revoking a defendant's probation past the expiration of the probationary term. *State ex rel. Whittenhall v. Conklin*, 294 S.W.3d 106, 109 (Mo. App. S.D., 2009). "Prohibition is a discretionary writ that lies to prevent abuse of judicial discretion, avoid irreparable harm to a party, or to prevent exercise of extra-jurisdictional power." *Hill v. Kendrick*, 192 S.W.3d 719, 720 (Mo.App. E.D. 2006). "Mandamus is the proper remedy to compel the discharge of ministerial functions, but not to control the exercise of discretionary powers." *State ex rel. Mertens v. Brown*, 198 S.W.3d 616, 618 (Mo. banc 2006). Abuse of discretion, in the context of a writ of mandamus application, occurs where the circuit court fails to follow applicable statutes. *State ex rel. City of Jennings v. Riley*, 236 S.W.3d 630, 631 (Mo. banc 2007). The petitioning party has the burden of showing that the trial court exceeded its authority **and** that burden includes a presumption in favor of the trial court's ruling. *Kendrick*, 192 S.W.3d at 720.

Point Relied on – I

The trial court did not err in denying Relator’s motion to terminate probation because Respondent retains jurisdiction over Realtor’s probation, in that Relator’s probation was suspended on August 29, 2016, which caused the Relator’s probationary period to stop running. Additionally, Respondent has made every reasonable effort to conduct a revocation hearing prior to the expiration of Relator’s probationary term, as it has not yet expired.

Robinson v. State, No. ED103627, Mo. App. E.D. slip op. (November 1, 2016)

Marc’s Resturant, Inc. v. CBS, Inc., 730 S.W.2d 582 (Mo. App. E.D., 1987)

Bd. Of Pub. Utils. Of City of Springfield v. Fenton, 669 S.W.2d 612, 614 (Mo. Appl. S.D. 1984)

§ 217.703 RSMo

§ 559.016 RSMo

§ 559.036 RSMo

§ 559.016.1(1) RSMo

§ 559.036.8 RSMo

Argument – I

Respondent retains jurisdiction to hold a probation revocation hearing and revoke Relator’s probation because Respondent has made every reasonable effort to conduct a revocation hearing prior to the expiration of Relator’s probationary term.

Under §§ 559.036 and 559.016 RSMo, courts have the authority to supervise, extend, suspend, and revoke the probation of a defendant. (Respondent’s Appendix 7-10).

Under § 559.016 RSMo, the court has the authority to extend a defendant's probation beyond the original expiration date. *Id.* The term of probation is considered to be the full term imposed by the court. *Id.* The maximum probation term for a felony is "not to exceed five years." § 559.016.1(1), § 559.016.3 RSMo. Additionally, pursuant to § 559.016.3 RSMo, a term of probation, including an extension, shall not exceed the maximum term of probation, unless extended one additional year by the court.

Under § 559.036 RSMo, courts have the authority to suspend and revoke a defendant's probation, if he or she violates a probationary condition. (Respondent's Appendix 8-10). If a defendant's probation is suspended, the probation is to remain suspended until a ruling is made on the motion to revoke or until the court orders probation to be reinstated. *Id.*; *See also Robinson v. State*, No. ED103627, Mo. App. E.D. slip op. at 3-4 (November 1, 2016)¹. Suspension has the effect of temporarily stopping the probation period from running. *Id.* In other words, "the probation period is 'tolled' during suspension." *Id.* Therefore, "when the court enters an order suspending the period of probation, the running of the probationary period is tolled for however many days the period is suspended." *Id.* at 4.

Under § 559.036.8 RSMo, the court's authority to revoke probation only extends until the term expires. (Respondent's Appendix 10). However, courts are permitted to revoke probation after the probationary term has expired when it "is reasonably necessary for the adjudication of matters arising before its expiration provided that some affirmative manifestation of an intent to conduct a revocation hearing occurs prior to the expiration

¹ The mandate has been issued in this case.

of the period **and** every reasonable effort is made to notify the probationer and to conduct the hearing prior to the expiration of the period.” *Id.*; *Robinson*, slip op. at 6.

Relator was initially given a three-year term of probation on September 11, 2013. Due to numerous probation violations, Relator’s probation was extended on July 13, 2015 to have a maximum discharge date of September 10, 2018. At the time that Relator’s probation was extended on July 13, 2015, less than two years had elapsed and Relator was statutorily ineligible for early discharge under § 217.703.7.

On August 5, 2016, the Saint Louis City Circuit Attorney’s Office issued new charges against Relator in cause number 1622-CR03419 for two counts of Distribution of a Controlled Substance, Possession of a Controlled Substance, and Possession of up to 35 Grams of Marijuana. On August 29, 2016, Respondent issued a Notice and Order of Hearing on Revocation of Probation. (Relator’s Appendix 11). The revocation hearing was “scheduled to a reasonable time after that order and within the probationary period.” *Robinson*, slip op. at 5. Due to the timing of the issuance of Relator’s new charges, Respondent could not have conducted a hearing prior to this date.

Respondent has made every reasonable effort to conduct a revocation hearing during the term of Relator’s probation.² *Robinson*, slip op. at 5. On October 6, 2016, Counsel for Relator made a motion for bond reduction before Respondent. After the motion, Counsel for Relator made off-the-record statements in chambers regarding

² Relator concedes that Respondent did manifest intent to conduct a revocation hearing during the probation term. (*See* Relator’s Brief, Point Relied on – I, Argument – I at 6).

potential resolution of Relator's pending felony charges prior to Respondent holding a revocation hearing. Following this off-the-record discussion, Respondent continued the cause based on the expectation that Relator's pending felony case would be resolved prior to the next revocation hearing. This provided the court with reasonable grounds for continuing the matter. Following this conversation, Respondent advised Counsel for Relator that she would continue the probation revocation hearing to December 2, 2016 so that Relator's pending felony case could be resolved. (Relator's Appendix 13). The December 2, 2016 revocation hearing date was within the Relator's probationary period, as Relator's probationary term was suspended and had not yet expired.

Two days prior to the revocation hearing on December 2, 2016, Counsel for Relator filed a Petition for Writ of Prohibition with the Missouri Eastern District Court of Appeals, No. E.D. 105050. Respondent was ordered not to take action. On December 15, 2016, the Missouri Eastern District Court of Appeals denied the Relator's Petition for Writ of Prohibition. On December 21, 2016, Respondent again scheduled a probation revocation hearing for January 12, 2017. (Respondent's Appendix 6).

On January 6, 2017, Respondent contacted Counsel for Relator on a separate and unrelated case and mentioned that Relator's probation revocation hearing was still scheduled for January 12, 2017. Counsel for Relator suggested the Respondent continue the probation revocation hearing so Relator's still pending felony case could be resolved. The probation revocation hearing was not continued. Two days before the probation revocation hearing, Counsel for Realtor filed a Petition for Writ of Prohibition with the Missouri Supreme Court. Respondent was ordered not to take action.

Respondent has continuously demonstrated an affirmative manifestation of intent to hold a revocation hearing before the expiration of Relator's probationary term. § 559.036.8 RSMo. At no point has the Respondent demonstrated any contrary intent. *Id.* Additionally, Respondent notified Counsel for Relator about every probation revocation scheduling, prior to the expiration of Relator's probationary period. Respondent has made every reasonable effort to conduct the hearing prior to the expiration of Relator's probation and, thus, retains statutory authority and jurisdiction to hold a revocation hearing and revoke Relator's probation. *Id.*

Argument – II

Relator did not object on October 6, 2016, when the Respondent continued his probation revocation hearing.

Following an off-the-record discussion with Respondent, Relator did not object to continuing revocation hearing on October 6, 2016. During the off-the-record, in chambers discussion, Counsel for Relator suggested that Relator's probation revocation hearing should be continued so that his pending felony cause could be resolved. The off-the-record statements implied continuing the revocation hearing would be in the best interest of the Relator. This provided Respondent with reasonable grounds for continuing the revocation hearing and, further, provides context as to why Relator had no objection to the continuance. (Relator's Appendix 13). Therefore, Relator cannot equitably claim that Respondent has not made every reasonable effort under §559.036.8 RSMo.

Argument – III

The reason for the continuance is within the scope of the record because it clarifies facts already within the record.

Relator cites Respondent’s “Answer to Relator’s Amended Petition for Writ of Prohibition, or in the alternative, Writ of Mandamus” as follows:

“Respondent denies this case was continued *sua sponte*. After the [October 6, 2016] bond reduction hearing, Counsel for Relator made off the record statements in chambers regarding potential resolution of Relator’s pending felony charges prior to Respondent holding a revocation hearing. Respondent advised counsel that she would continue the probation revocation hearing to December 2, 2016 so that Relator’s pending felony case could be resolved.”

Relator erroneously claims the off-the-record discussions are beyond the scope of the record, and therefore, cannot be considered by this Court. Relator cites *Marc’s Restaurant, Inc. v. CBS, Inc.*, which found documents or other exhibits never presented to or considered by the trial court, may not be introduced into the record on appeal. 730 S.W.2d 582 (Mo. App. E.D., 1987) (Citation omitted). Additionally, Relator cites *Bd. Of Pub. Utils. Of City of Springfield v. Fenton*, which found an appellate court will not look beyond the record on appeal for facts necessary to resolve the issues that the case presents, 669 S.W.2d 612, 614 (Mo. Appl. S.D. 9184).

First, the discussions at issue do not set forth additional documents or exhibits that have not already been presented to and considered by the trial court. The discussions at issue have been presented to the trial court, both on and off the record. Additionally, the

discussions were considered by the trial court when continuing the revocation hearing from October 7, 2016 to December 2, 2016. The off-the-record discussions are relevant to Relator's erroneous claim that Respondent has failed to take action in this cause.

Second, the discussions at issue provide additional details about facts that are already in the record. Taking these facts into consideration is necessary to resolve the issues that the case presents. Specifically, Respondent's filings in the Missouri Court of Appeals, Eastern District allege that the probation revocation hearing, which was scheduled for October 7, 2016, was subsequently continued to December 2, 2016. (Relator's Appendix 13). The off-the-record discussions clarify the incomplete record and provide context to the revocation hearing continuance. The discussions present facts necessary to resolve Relator's mistaken claim that Respondent failed to take action prior to the expiration to Relator's probationary term. Therefore, Respondent respectfully submits the off-the-record discussions may be considered by this Court.

Point Relied on - II

Respondent did not err in ruling that an order suspending Relator's probation had the effect of tolling probation, as suspension may toll the expiration of probation past the end of the probationary period if the conditions under § 559.036 are met, as they were in this case.

Robinson v. State, No. ED103627, Mo. App. E.D. slip op. (November 1, 2016)

§ 217.703 RSMo

§ 217.703.7 RSMo

§ 559.016 RSMo

§ 217.703.4 RSMo

Argument – I

Relator was not entitled to an earned discharge date of October 20, 2016. The order suspending Relator’s probation made Relator ineligible to be discharged while his probationary term was in suspension status.

Under § 217.703, a defendant may be eligible for earned compliance credits during the course of probation, which has the effect of reducing a term of probation where a defendant is in compliance with the probationary conditions. (Respondent’s Appendix 11-13). If a defendant is eligible to receive earned compliance credits, his full term of probation may be decreased. *Id.* When earned compliance credits and time served on supervision satisfy the total term of supervision, the board or the sentencing court “shall order the final discharge of an offender” so long as the offender has completed at least two years of probation. § 217.703.7 RSMo. However, if a defendant’s probation has been suspended, “... *earned credits shall continue to be suspended* for a period of time during which the court... has suspended the term of probation.” *Robinson*, slip op. at 3-4 (Emphasis added).

Relator’s Brief erroneously alleges Relator was entitled to a discharge date of October 20, 2016 because Relator earned compliance credits that accrued prior to Respondent’s order suspending probation. (Relator’s Brief, Point Relied on – II, Argument – I, at 11). Relator is incorrect.

On August 29, 2016, Respondent suspended Relator’s probation. Respondent’s suspension order stopped Relator’s probationary period from running and rendered any

subsequent discharge date moot, until a ruling has been made on the motion to revoke or the court orders probation reinstated. Further, any earned compliance credits accrued during the probationary term remain suspended for the period of time during which the probationary term is suspended. In this case, Relator's probationary period was tolled, his earned compliance credits were suspended and, as a result, his probationary term had not yet expired. Therefore, Relator was not eligible to be discharged from probation on October 20, 2016.

Argument – II

The August 29, 2016 suspension order tolled the Relator's probationary term from running.

On August 29, 2016, Respondent entered an order suspending Relator's probation, which 'tolled' the running of Relator's probationary period. *Robinson*, slip op. at 3-4. "When the court enters an order 'suspending the period of probation,' the running of the probationary term is tolled for however many days the period is suspended." *Id.* at 3 (emphasis added.) Respondent scheduled a probation revocation hearing to October 7, 2016 which was subsequently rescheduled to December 2, 2016. Although Relator had an earned discharge date of October 20, 2016, he was not eligible to be terminated until a ruling was made on the motion to revoke. *Robinson*, slip op. at 3-4. Relator's probation currently remains suspended and the probation revocation hearing has not yet been heard. Therefore, Respondent was properly acting within her judicial authority by scheduling the matter for a probation revocation hearing while the Relator's probation was suspended.

Relator concedes that a suspension of probation can toll the probation term, though not indefinitely and not beyond the five-year statutory maximum. He argues that earned compliance credits per § 217.703 RSMo reduce that statutory maximum under § 559.016 such that his probationary sentence could not be “tolled” past October 20, 2016. because doing so “would extend Relator’s probation beyond the ‘statutory maximum’” in violation of § 559.016.

However, Relator is mistaken in his reading of section 217.703. Under § 217.703, “earned compliance credits shall reduce the term of probation, parole, or conditional release by thirty days for each full calendar month of compliance with the terms of supervision.” (Respondent’s Appendix 11-13). The term “compliance” means the absence of an initial violation report in a given calendar month, or where there has been no motion to revoke or suspend the defendant’s probation. § 217.703.4.

Relator was initially given a three-year term of probation on September 11, 2013. Due to numerous probation violations, Relator’s probation was extended on July 13, 2015 to have a maximum discharge date of September 10, 2018. (Relator’s Appendix 5). This discharge date accurately reflects the Relator’s maximum term of probation, within the five-year statutory maximum. During Relator’s probationary period, he was not in compliance with numerous conditions. Specifically, Relator was not eligible for earned compliance credits during the months of November 2013, June 2014, December 2014, March 2015, April 2015, June 2015, October 2015, December 2015, February 2016, April 2016, and June 2016 where probation officers filed initial violation reports and notices of citations. (Relator’s Appendix 9-10); *See also* § 217.703 RSMo. Additionally,

Relator was not eligible for earned compliance credits for the month of August 2016 when his probation was suspended and the time for credit tolled. *Robinson*, slip op. at 3-5. Relator's maximum term of probation is the date of September 10, 2018, not October 20, 2016. Therefore, Relator's probation remains within the statutory maximum prescribed by §§ 559.016 and 217.703 RSMo.

Conclusion

WHEREFORE, as Relator's term of probation has not yet expired because his probation is currently suspended, Relator did not have a sufficient amount of earned compliance credits for an earned discharge date before Respondent suspended his probation, Relator cannot earn additional compliance credits while his probation is suspended, and Respondent has made every reasonable effort to conduct a revocation hearing prior to the expiration of Relator's probation, the Respondent respectfully requests the Court deny the Relator's Writ of Prohibition and Relator's Writ of Mandamus and find that Respondent retains the statutory authority to hold a probation revocation hearing and revoke Relator's probation under § 559.036.8 RSMo.

Respectfully Submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(g), I hereby certify that on this 3rd day of April, 2017, a true and accurate copy of the foregoing brief and attached appendix were served via the e-filing system to Counsel for Relator, Brian Cooke, and by e-mail at briancookelaw@gmail.com. The undersigned certifies that this brief includes the information required by Rule 55.03 and complies with Rules 84.06(b) and 84.06(c). This brief was prepared by Microsoft Word for Windows, uses Times New Roman 13 point font and does not exceed the greater of 15,550 words, 1,100 lines, or fifty pages. The word processing software identified that this brief contains 3,765 words. Finally, I hereby certify that this brief has been scanned for viruses and found to be virus free.

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