

IN THE
SUPREME COURT OF MISSOURI

VIVIAN HALL,)	
)	
Appellant,)	
)	
vs.)	No. SC96079
)	
STATE OF MISSOURI,)	
)	
Respondent.)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF BARTON COUNTY, MISSOURI
28TH JUDICIAL CIRCUIT
THE HONORABLE JAMES R. BICKEL, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Appellant, Vivian Hall, appeals from the denial of her motion for post-conviction relief after an evidentiary hearing and pursuant to Rule 24.035. Ms. Hall sought to vacate her conviction of driving while intoxicated (DWI), aggravated offender, section 577.023.1, following a guilty plea for the underlying felony of DWI, section 577.010, resulting in a term of seven years in the Department of Corrections. L.F. 48.¹

Ms. Hall filed her *pro se* motion for post-conviction relief on June 15, 2013. L.F. 37-42. It was uncontested by the State that she was delivered to the Department of Corrections on March 5, 2016. L.F. 37, 43-44. The Honorable James R. Bickel entered findings of fact and conclusions of law and denied Ms. Hall's motion on the merits. L.F. 48-49.

Ms. Hall filed a notice of appeal on March 3, 2016. L.F. 50-51. The Court of Appeals issued an opinion on November 10, 2016, vacating and remanding with directions for the motion court to dismiss Ms. Hall's *pro se* Rule 24.035 motion as untimely. Slip Opinion *1-3. Ms. Hall filed a motion for rehearing or transfer on November 21, 2016, which was denied on November 28, 2016. An application for transfer was filed on December 6, 2016, and was granted on January 31, 2017.

¹ The record on appeal consists of the legal file (L.F.), and the evidentiary hearing (H.Tr.).

Jurisdiction of this appeal originally was in the Missouri Court of Appeals for the Southern District. Mo. Const. Art. V, § 3; § 477.060. This Court thereafter granted Ms. Hall's application for transfer, thus, this Court has jurisdiction. Mo. Const., Art. V, §§ 3 and 10; Rule 83.04.

STATEMENT OF FACTS

Ms. Hall was charged with DWI, section 577.010, and sentence was imposed following a guilty plea for a class C felony DWI, aggravated offender, section 577.023.1. L.F. 8, 35. On August 6, 2012, she appeared before the Honorable James R. Bickel, Judge of Barton County Circuit Court, and entered an Alford plea. L.F. 35.² The State then offered the evidentiary basis for DWI and incorporated by reference the Felony Information that was the basis for the aggravated offender status. L.F. 16-18. The Felony Information listed three prior convictions for operating a motor vehicle while under the influence of alcohol:

- 1) on or about September 29, 2003, the defendant was convicted of driving while intoxicated in the municipal court of Lamar, Missouri;
- 2) on or about November 15, 2002, the defendant was convicted of driving while intoxicated in the Circuit Court of Jasper County, Missouri;
- 3) on or about October 26, 1999, the defendant was convicted of driving while intoxicated in the municipal court of Lamar, Missouri.

L.F. 8. Ms. Hall's attorney recognized that these facts would be sufficient for a jury to find Ms. Hall guilty of DWI. L.F. 18-19. The court accepted the plea, ordered a Sentencing Assessment Report and set a hearing for sentencing. L.F. 19.

On November 6, 2012, at the sentencing hearing, the court, presumably reading from the Sentencing Assessment Report, mentioned that this was Ms.

² *North Carolina v. Alford*, 400 U.S. 25 (U.S. 1970).

Hall's fourth conviction of DWI and imposed a sentence of seven years in the Department of Corrections. L.F. 25-26.

Ms. Hall filed her *pro se* motion for post-conviction relief on June 15, 2013. L.F. 37-42. Counsel entered an appearance on October 13, 2015, and filed an amended motion on November 3, 2015. L.F. 43-48. The amended motion alleged that Ms. Hall was denied her right to due process of the law when the court accepted her plea of guilty for DWI, aggravated offender, when only two of the three prior convictions for DWI were factually accurate. L.F. 44. An evidentiary hearing was held on January 27, 2016, where there was no factual dispute. H.Tr. 5. The State agreed to the admission and veracity of Ms. Hall's exhibit showing there was no conviction in the municipal court of Lamar for DWI in 2003. H.Tr. 4. The sole issue was regarding the error in the Felony Information, which the State argued was a typo and should have been brought on direct appeal. H.Tr. 11-12; L.F. 44. On February 19, 2016, the Honorable James R. Bickel entered findings of fact and conclusions of law and denied the amended motion. L.F. 48-49.

The court found that the record established the factual basis for a finding of aggravated offender because the Sentencing Assessment Report listed three prior convictions, the error in the underlying Information was incorrect by virtue of a scrivener's error—the conviction was actually in Barton County Circuit Court not the municipal court of Lamar, Missouri—and the court would take judicial notice of the correct file in the Circuit Court of Barton County. L.F. 48-49. The court

further held that it did not need to reach the foregoing conclusion to deny relief because this issue should have been raised on direct appeal. L.F. 49.

Ms. Hall filed a notice of appeal on March 3, 2016. L.F. 50-51. The appeals court issued an opinion on November 10, 2016, vacating and remanding with directions for the motion court to dismiss Ms. Hall's *pro se* Rule 24.035 motion as untimely. Slip Opinion *1-3. Ms. Hall alleged, and it was uncontested by the State, that she was delivered to the Department of Corrections on March 5, 2013. L.F. 37, L.F. 43-44. The appeals court found that Ms. Hall did not prove in the record that she was delivered to the Department of Corrections on March 5, 2013. Slip Opinion *2-3. Instead, the appeals court determined that she was likely delivered to the Department of Corrections on or about the day of sentencing, November 5, 2012. Slip Opinion *2-3. However, the appeals court did acknowledge that it did not "decide the precise date Hall's motion was due because we do not have a sufficient record to make that determination." Slip Opinion *2 n5.

Ms. Hall filed a motion for rehearing or transfer on November 21, 2016, which was denied on November 28, 2016. An application for transfer was filed on December 6, 2016, and was granted on January 31, 2017.

POINT RELIED ON

I.

The motion court clearly erred in denying Ms. Hall's motion for post-conviction relief because there was an insufficient factual basis for the plea court to accept Ms. Hall's plea as DWI, aggravated offender, in violation of appellant's due process rights under the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the State failed to present sufficient facts to warrant a finding beyond a reasonable doubt that Ms. Hall is an aggravated offender, since she was not convicted in municipal court of Lamar, Missouri, as the information inaccurately states.

State v. Sharp, 39 S.W.3d 70 (Mo. App. E.D. 2001);

Matthews v. State, 123 S.W.3d 307 (Mo. App. E.D. 2003);

Jones v. State, 117 S.W.3d 209 (Mo. App. S.D. 2003);

Dorris v. State, 360 S.W.3d 260 (Mo. banc 2012);

U.S. Const., Amend. XIV;

Mo. Const., Art. I, Sec. 10;

Sections 577.010, 577.023.1 and 577.023.7; and

Rules 24.02 and 24.035.

ARGUMENT

I.

The motion court clearly erred in denying Ms. Hall's motion for post-conviction relief because there was an insufficient factual basis for the plea court to accept Ms. Hall's plea as DWI, aggravated offender, in violation of appellant's due process rights under the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the State failed to present sufficient facts to warrant a finding beyond a reasonable doubt that Ms. Hall is an aggravated offender, since she was not convicted in municipal court of Lamar, Missouri, as the information inaccurately states.

Standard of Review

Review on appeal of a Rule 24.035 motion is limited to a determination of whether the findings of fact and conclusions of law are clearly erroneous. Rule 24.035(k); *Worthington v. State*, 166 S.W.3d 566, 572 (Mo. banc 2005). Such determinations are clearly erroneous when, in the light of the entire record, the court arrives at a definite and firm impression that a mistake has been made. *Worthington*, 166 S.W.3d at 572.

Facts

Ms. Hall was charged with DWI, section 577.010, and sentence was imposed following a guilty plea for a class C felony DWI, aggravated offender, section 577.023.1. L.F. 8, 35. To be an “aggravated offender,” one must have pleaded guilty to or been found guilty of three or more intoxication-related traffic offenses. Section 577.023.1(1)(a). The Felony Information listed three prior convictions for operating a motor vehicle while under the influence of alcohol:

- 1) on or about September 29, 2003, the defendant was convicted of driving while intoxicated in the municipal court of Lamar, Missouri;
- 2) on or about November 15, 2002, the defendant was convicted of driving while intoxicated in the Circuit Court of Jasper County, Missouri;
- 3) on or about October 26, 1999, the defendant was convicted of driving while intoxicated in the municipal court of Lamar, Missouri.

L.F. 8.

At the guilty plea hearing, the prosecutor recited the facts which he would present at trial for the underlying DWI. L.F. 16-18. To establish the basis as an aggravated offender, he stated “[s]he has prior convictions as more specifically described in the Felony Information, which I would incorporate into this statement of factual basis by reference.” L.F. 18.

The amended Rule 24.035 motion alleged that Ms. Hall’s conviction and sentence violated her right to due process when the court accepted her plea of guilty for DWI, aggravated offender, when only two of the three prior convictions

for DWI were factually accurate. L.F. 44. The motion court held that this issue should have been raised on direct appeal, and furthermore, the error in the information was a scrivener's error; the conviction was actually in Barton County Circuit Court not the municipal court of Lamar, Missouri. L.F. 48-49.

Ms. Hall filed a notice of appeal on March 3, 2016. L.F. 50-51. The appeals court in its opinion of November 10, 2016, vacated and remanded this case with directions for the motion court to dismiss Ms. Hall's *pro se* Rule 24.035 motion as untimely. Slip Opinion *3. Ms. Hall alleged, and it was uncontested by the State, that she was delivered to the Department of Corrections on March 5, 2013. L.F. 37, 43-44. The appeals court found that Ms. Hall did not prove in the record that she was delivered to the Department of Corrections on March 5, 2013. Slip Opinion *2-3. Instead, the appeals court determined that she was likely delivered to the Department of Corrections on or about the day of sentencing, November 5, 2012. Slip Opinion *2-3. However, the appeals court did acknowledge that it did not "decide the precise date Hall's motion was due because we do not have a sufficient record to make that determination." Slip Opinion *2 n5. As the letter from the Department of Corrections shows, which is included at pages 18-20 in the appendix, Ms. Hall was delivered to the Department of Corrections on March 5, 2013, in case number 11B4-CR00057-01.³ This evidence was not in the record

³ The Department of Corrections website shows Ms. Hall's intake photos were taken on March 5, 2013. web.mo.gov/doc/offSearchWeb/offenderInfoAction.do.

for the motion court or for the appeals court to consider because it was not a contested issue at the motion court.

Ms. Hall filed a motion for rehearing or transfer on November 21, 2016, which was denied on November 28, 2016. An application for transfer was filed on December 6, 2016 and was granted on January 31, 2017.

Not a Direct Appeal Issue

As an initial matter, the motion court's finding that this issue could have been raised on direct appeal was clear error. Rule 24.035 provides the exclusive procedure for someone who is challenging a conviction of a felony on a plea of guilty on the grounds of the legality of their sentence. *State v. Sharp*, 39 S.W.3d 70, 72 (Mo. App. E.D. 2001); *Schleeper v. State*, 982 S.W.2d 252, 254 (Mo. banc 1998). On direct appeal of a guilty plea, a defendant may only challenge the subject matter jurisdiction of the trial court and the sufficiency of the information or indictment. *Sharp*, 39 S.W.3d at 72.

In *Sharp*, Defendant was charged as a prior and persistent offender for which Defendant pleaded guilty. *Id.* at 71. At sentencing, the State offered two exhibits to demonstrate two prior convictions and the court determined Defendant was a prior and persistent offender. *Id.* at 72. On direct appeal, Defendant challenged the sufficiency of the evidence on the finding that he was a prior and persistent offender because of the discrepancy in social security numbers listed in the two exhibits compared to the State's indictment. *Id.* The court held that it

lacked jurisdiction because Defendant was challenging “the evidentiary basis for the trial court’s finding he was a prior and persistent offender” not the sufficiency of the evidence. *Id.*

Similarly, in this case, Ms. Hall’s appropriate remedy was to file a Rule 24.035 motion. Ms. Hall challenges the evidentiary basis for the finding of an aggravated offender; not the sufficiency of the information. *Cf. Souttee v. State*, 51 S.W.3d 474, 480 (Mo. App. SD 2001) (Movant challenged whether the information failed to allege an offense of stealing because property taken from an estate is not property of “another”). Because Ms. Hall is challenging the finding of the trial court, the motion court clearly erred in denying Ms. Hall’s claim.

Timeliness

Ms. Hall’s *pro se* motion for post-conviction relief was due 180 days after she was delivered to the Department of Corrections. Rule 24.035(b). The motion court has a duty to determine whether the motion is timely and to enforce the mandatory time limits that Rule 24.035 creates before reaching the merits of the claim. *Dorris v. State*, 360 S.W.3d 260, 268 (Mo. banc 2012). The motion court must have considered the *pro se* motion as timely because the court considered the merits of Ms. Hall’s claim, and the court considered whether to accept the untimely amended motion or proceed on the original *pro se* motion. H.Tr. 5-7; L.F. 48-49.

The appeals court, *sua sponte*, found Ms. Hall's motion to be untimely and order the case to be remanded and dismissed. Slip Opinion *1. The appeals court declined to defer to the implicit finding by the motion court that the *pro se* motion was timely filed. However, the appeals court should have presumed that the factual issue was resolved in accordance with the result reached. *See Bland v. IMCO Recycling, Inc.*, 67 S.W.3d 673, 678 (Mo. App. S.D. 2002) ("This court will defer to the trial court's findings and will presume that the factual issues were resolved by the trial court in accordance with the result reached."); *See also Smith-Scharff Paper Co. v. Blum*, 813 S.W.2d 27, 28 (Mo. App. E.D. 1991) ("This court will defer to the trial court's findings and will presume that the factual issues were resolved by the trial court in accordance with the result reached."). The appeals court instead assumed the position of a fact finder and speculated that Ms. Hall was delivered to the Department of Corrections sometime near sentencing.

Such a conclusion conflicted with the necessary finding that the motion court was required to consider when determining whether the amended motion was timely filed. Admittedly, the factual findings issued by the motion court are silent as to whether the *pro se* motion was timely filed, but such a decision in Ms. Hall's favor was necessary to reach the merits of her claim and to consider whether to accept the amended motion. This Court should defer to the implicit finding that Ms. Hall's *pro se* motion was timely and consider the merits of Ms. Hall's claim.

In the alternative, if this Court accepts the appeals court's conclusion that there is no evidence in the record as to whether the *pro se* motion was timely, this Court should remand the case back to the motion court for a finding on whether Ms. Hall's *pro se* motion was timely as this Court did in *Dorris*. 360 S.W.3d at 271.

In *Dorris*, the motion court did not hear evidence on whether the movant's *pro se* motion was timely filed, although the movant was prepared to present said evidence, because the State did not object to the motion's timeliness. *Id.* at 265-66. However, on appeal, the State did object to the timeliness of the motion, and because there was no evidence in the record, the appeals court found that the movant failed to prove the *pro se* motion was timely filed. *Id.* This Court disagreed on what the appropriate remedy should be for situations where a movant is prepared to introduce evidence showing when the *pro se* motion was filed but chooses not to introduce said evidence because the State does not contest the timeliness of the motion. *Id.* at 271. This Court reasoned that the appropriate remedy is to remand the case to determine whether the motion was timely filed, not to dismiss it as the appeals court did here. *Id.* This Court's logic should apply to both when the movant was delivered to the Department of Corrections and when the *pro se* motion was filed which determines if the motion is timely.

Additionally, the appeals court contradicted its own opinion in *McCoo v. State*, 844 S.W.2d 565, 569 (Mo. App. S.D. 1992), where it corrected the motion court for the same mistake that it made below. In *McCoo*, the motion court

assumed that Movant was delivered to the custody of the Department of Corrections at the date of sentencing or soon after, and therefore, his *pro se* motion was untimely. *Id.* at 569. The appeals court found that the record was not clear when delivery occurred and that it was not appropriate to speculate on when delivery occurred. *Id.* Therefore, the appropriate remedy was to reverse the motion court's order, which denied relief, and to remand the case for further proceeding to establish the date when Movant was delivered to the Department of Corrections. *Id.* at 568-69.

The appeals court erred when it remanded this case with directions to dismiss Ms. Hall's claim as untimely. At the evidentiary hearing, the State did not contest whether the *pro se* motion was timely, and more specifically, that Ms. Hall was delivered to the Department of Correction on March 5, 2013. If the State would have contested this claim, Ms. Hall would have submitted evidence which would have corroborated that she was delivered to the Department of Corrections on March 5, 2013. Just like in *Dorris*, the State did not contest the timeliness of the *pro se* motion, and therefore, the movant did not put on needless evidence to support that assertion. In both cases, when the record is silent as to whether the motion was timely, the appropriate remedy is to remand the case back to the motion court to consider the issue of timeliness.

Insufficient Factual Basis

Rule 24.02(e) provides, “[t]he court shall not enter a judgment upon a plea of guilty unless it determines that there is a factual basis for the plea.” *Jones v. State*, 117 S.W.3d 209, 213 (Mo. App. S.D. 2003). Ms. Hall pleaded guilty to DWI, aggravated offender, which required a showing of someone who has pleaded guilty to or has been found guilty of three or more intoxication-related offenses. Section 577.023.1(1)(a). Under section 577.023.7, the court shall find the defendant to be a prior aggravated offender if:

- (1) The indictment or information, original or amended, or the information in lieu of an indictment, pleads all essential facts warranting a finding that the defendant is a prior offender or persistent offender; and
- (2) Evidence is introduced that establishes sufficient facts pleaded to warrant a finding beyond a reasonable doubt the defendant is a prior offender, persistent offender, aggravated offender, or chronic offender; and
- (3) The court makes findings of fact that warrant a finding beyond a reasonable doubt by the court that the defendant is a prior offender, persistent offender, aggravated offender, or chronic offender.

The proof provided to the court must conform to what is set forth in the information. *Matthews v. State*, 123 S.W.3d 307, 310 (Mo. App. E.D. 2003). The information listed a conviction on September 23, 2003, in the municipal court of Lamar, which does not exist in that court. L.F. 8, 48-49. Therefore, the evidence, introduced to warrant a finding of three prior convictions for DWI, did not have

sufficient facts set forth in the information to warrant a finding of an aggravated offender.

In *Matthews*, the court overturned the trial court's denial of his Rule 24.035 motion, finding that the court improperly sentenced him as a persistent offender because there was insufficient evidence to prove beyond a reasonable doubt that Defendant committed the adequate number of priors to qualify as such. 123 S.W.3d at 310-11. The indictment alleged Defendant committed a class C felony of stealing, third offense. *Id.* at 309. The indictment further alleged he was a prior and persistent offender, requiring a showing of two prior felonies convictions, and the indictment listed four prior felony convictions. *Id.* At sentencing, the prosecutor asserted the state would prove Defendant stole property and had two prior misdemeanor convictions for stealing. *Id.* However, there was no proof of Defendant's prior felony convictions as set forth in the indictment. *Id.* He pleaded guilty but subsequently challenged the ruling arguing his sentence exceeded the maximum authorized by law as the state failed to present facts adequate to prove his felony prior convictions. *Id.* at 309-10. The court agreed, reasoning the prosecutor failed to offer proof of the prior convictions. *Id.* at 310. Therefore, there was insufficient evidence to find Defendant as a prior and persistent offender. *Id.*

In *Jones*, the court reversed the denial of Jones' Rule 24.035 motion, holding that his plea lacked the factual basis in the record of the plea hearing. 117 S.W.3d at 213. Defendant was charged with second degree assault causing

physical injury to another by means of a dangerous instrument. *Id.* at 211. He argued there was no description of the injuries or weapon in the record to support the second-degree assault charge. *Id.* at 212. The court recognized that Rule 24.02(e) requires a court not to enter judgment on a plea of guilty unless a determination is made that there is a factual basis for the plea in the record made at the guilty plea hearing. *Id.* at 213. Therefore, the motion court erred by considering matters outside the record, a complaint in the underlying criminal case and a presentence investigation, in determining whether to accept the plea of guilty. *Id.* at 213.

As in *Matthews*, Ms. Hall's guilty plea hearing record failed to establish a factual basis for a finding of an adequate number of priors for the enhancement, as one of the convictions was factually flawed. 123 S.W.3d at 310. The motion court should only look to the record at the guilty plea hearing in determining whether the plea should have been accepted and not look to matters outside that hearing. *Jones*, 117 S.W.3d at 213. The motion court recognized that the prior conviction listed in the Felony Information on September 29, 2003, in the municipal court of Lamar, Missouri for DWI did not occur in that court. L.F. 48-49. In other words, the factual basis for which the court relied on was flawed. However, the motion court noted that the factual basis was established beyond a reasonable doubt because the sentencing judge, reading from the Sentencing Assessment Report, noted the case is her fourth conviction of DWI. L.F. 25, 48. This finding was clearly erroneous because the motion court may not rely on a statement made by

the judge at sentencing, as that was based off of the Sentencing Assessment Report, which was not in the record at the guilty plea hearing. *See Jones*, 117 S.W.3d at 213. Therefore, the guilty plea hearing record does not have the factual basis necessary for a finding beyond a reasonable doubt of three prior convictions required by section 577.023.1(1)(a). Ms. Hall was prejudiced because the trial court sentenced her as an aggravated offender, subjecting her to a class C felony instead of the class D felony, which the record supports. *See Matthews*, 123 S.W.3d at 310.

Ms. Hall respectfully requests that this Court reverse the motion court's denial of post-conviction relief and remand for further proceedings in the criminal case.

CONCLUSION

For the reasons presented, Ms. Hall respectfully requests this Court to reverse the motion court's denial of post-conviction relief, and remand for entry of judgment on the class D felony of DWI, or remand to the motion court for a finding on whether Ms. Hall's *pro se* motion was timely filed.

Respectfully submitted,

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Certificate of Compliance

I, Christian E. Lehmborg, 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 in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance, and appendix, the brief contains 4,364 words, which does not exceed the 31,000 words allowed for an appellant's substitute brief.

/s/ Christian E. Lehmborg

Christian E. Lehmborg