

No. SC96079

**In the
Missouri Supreme Court**

VIVIAN R. HALL,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from Barton County Circuit Court
Twenty-Eighth Judicial Circuit
The Honorable James R. Bickle, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Vivian R. Hall is appealing the denial of her Rule 24.035 motion which sought to vacate her guilty plea and sentence for the class C felony of driving while intoxicated, aggravated offender, sections 577.010, RSMo Cum. Supp. 2010 and 577.023, RSMo Cum. Supp. 2010. (L.F. 50-51).

The information that charged Appellant alleged that she operated a motor vehicle on or about April 17, 2011, while under the influence of alcohol. (L.F. 8). The information also alleged that Appellant had three prior convictions for driving while intoxicated: (1) on or about September 29, 2003, in the municipal court of Lamar, Missouri; (2) on or about November 15, 2002, in the Circuit Court of Jasper County, Missouri; and (3) on or about October 26, 1999, in the municipal court of Lamar, Missouri. (L.F. 8).

Appellant entered a guilty plea on August 6, 2012, before Judge James R. Bickle. (L.F. 3, 9). The court first noted that Appellant had signed a five page form containing 52 questions. (L.F. 11). Appellant stated that she had adequate time to discuss with counsel the questions on the form and that counsel discussed with her the questions that she did not understand. (L.F. 12). Appellant said that the answers given on the form were true. (L.F. 13).

Appellant told the court that she understood that she could continue with a plea of not guilty and have a jury trial. (L.F. 13). She also expressed her understanding that the prosecutor at trial would have to present enough

evidence to convince the jury beyond a reasonable doubt that she was guilty, and that her attorney could cross-examine the State's witnesses and present evidence on her behalf. (L.F. 13). Appellant told the court she understood that she was giving up her right to trial by pleading guilty and that the prosecutor would no longer have to prove beyond a reasonable doubt that she was guilty. (L.F. 13). Appellant acknowledged her understanding that the court would listen to the circumstances and decide on the punishment, and that she was entering an open plea with no agreement on what the prosecutor would recommend as far as sentencing. (L.F. 14). Appellant denied that any promises or threats had been made to induce her plea. (L.F. 15).

The prosecutor then outlined the factual basis for the plea:

MR. KADERLY: On or about April 17th, 2011, Trooper Brian O' Sullivan of the Missouri State Highway Patrol responded to Northeast 30th Lane, north of Northeast 10th Road, a location in Barton County, to check on a stranded motorist, who was partially blocking the road with a vehicle.

When he got there, he noticed the defendant, Miss Hall, was laying down in the front seat of the vehicle. He arrived about 1:15 in the afternoon. It was a maroon Nissan pickup. It was partially blocking the road.

He knocked on the right side window. She sat up and would not answer the door. He went to the other side. When he went to the driver's side, he noticed that there was a pool of vomit on the ground, just underneath the door. He also noticed that the defendant, Miss Hall, had vomited on her lap. He asked her if she was okay. She said that she wasn't where she was suppose[d] to be.

While speaking to her, he noticed that her eyes were watery and blood shot, her speech was slurred and at times she was hard to understand. He also noticed a strong smell of intoxicating beverage coming from within the vehicle and from her. He noticed several large empty beer cans within the vehicle, on the seat and on the floor board.

He asked her why she was there. She said she was out of gas, indicating that she had been there for just minutes.

He asked her how much she had to drink. She said, "Too much."

He asked her if she was drunk. She said, "Yes." She said, "It only takes one beer to fuck me up."

He asked her about the empty beer cans and she indicated that she was driving around drinking them.

He administered, he asked her to get out of the vehicle, administered the horizontal gaze and nystagmus test, which indicated all six signs of nystagmus, indicating that she was intoxicated. Based upon observations, and field sobriety tests, he placed her under arrest for DWI.

They went to the jail. He read the implied consent and he began the observation period. He tried to ask her questions, but nearly every time he did, she answered it with either, "Fuck you" or "Fuck off."

Now, he set up the Datamaster to get a sample of her breath. She did blow and the reading was .183 percent.

She has the prior convictions as more specifically described in the Felony Information, which I would incorporate into this statement of factual basis by reference.

THE COURT: Is that the evidence that you understood the State to have, [defense counsel]?

[DEFENSE COUNSEL]: I do understand that is the State's evidence. Miss Hall would contend that she was driving around, the car ran out of gas and then she began to drink the alcohol she had with her. And she maintained that the vehicle had no gas and that there were also no keys in the ignition.

We took depositions of some of the witnesses in the case and nobody could corroborate that the vehicle was out of gas and the trooper in the deposition indicated the keys were still in the ignition at the time that he made contact with Miss Hall.

We have discussed the different options in regard to her case, and believing that a jury could find her guilty of that, she is choosing to do the Alford plea.

THE COURT: Is that correct, Miss Hall?

DEFENDANT HALL: Yes.

(L.F. 16-19). Appellant entered her plea of guilty. (L.F. 19). The court accepted the plea, finding that it had been knowingly, willingly, voluntarily, and intelligently made. (L.F. 19). The court also found that a factual basis existed for the court to accept the plea. (L.F. 19).

Appellant was sentenced on November 5, 2012. (L.F. 21). The prosecutor acknowledged that he had received a copy of the Sentencing Assessment Report. (L.F. 23). He then noted that Appellant had a long history of DWI's, including a case that was then pending in Jasper County, and recommended a sentence of seven years imprisonment. (L.F. 23). After listening to defense counsel's recommendation, the court noted that Appellant's history showed that the present case was at least her fourth conviction of driving while intoxicated, and that it referred to another arrest

in Lawrence County. (L.F. 25). The court then asked, “Maybe that was when she was incarcerated in Jasper County for DWI, not Lawrence County?” (L.F. 25). A person identified as Ms. Rose¹ responded, “Yeah, last court appearance, she was in Jasper County.” (L.F. 25).

The court sentenced Appellant to seven years imprisonment in the Department of Corrections. (L.F. 25-26). The court also ordered that Appellant participate in the Long Term Drug Treatment Program. (L.F. 26).

Appellant filed a *pro se* Motion to Vacate, Set Aside or Correct the Judgment or Sentence under Supreme Court Rule 24.035 on June 19, 2013. (L.F. 5, 37-42). The motion alleged that Appellant was delivered to the Department of Corrections on March 5, 2013. (L.F. 37). Counsel entered an appearance on July 17, 2013, and the transcript of the guilty plea and sentencing hearings was filed on August 5, 2013. (L.F. 5). New counsel for Appellant entered an appearance on October 13, 2015, and filed an amended motion on November 3, 2015. (L.F. 5-6, 43-47). The amended motion also alleged that Appellant was delivered to the Department of Corrections on March 5, 2013. (L.F. 43).

¹ It appears from the record that Ms. Rose might have been Appellant’s probation officer, though that cannot definitely be determined. (L.F. 31).

The amended motion alleged that the conviction and sentence was imposed in violation of Appellant's due process rights because only two of the three convictions used to find that she was an aggravated offender were factually sound. (L.F. 44). The motion alleged that one of the prior DWI offenses listed in the information was a September 29, 2003, conviction in the municipal court of Lamar, Missouri. (L.F. 45). The motion alleged that Appellant was not convicted of that offense as listed in the information. (L.F. 45). The motion alleged that Appellant should only be subject to sentencing as a persistent DWI offender, which would subject her to a maximum penalty of four years imprisonment as compared to the seven-year sentence that she received. (L.F. 45-46).

A hearing was held on January 27, 2016. (L.F. 6). The court noted that post-conviction counsel had sent a letter to the court indicating that Appellant's initial post-conviction counsel was hired by the Public Defender System as private contract counsel and that she had abandoned Appellant. (Tr. 6-7). The court found that Appellant had been abandoned, and allowed the hearing to proceed on the merits of the amended motion. (Tr. 7). The parties presented arguments to the court, which took the matter under advisement. (L.F. 7-14). No evidence was presented at the hearing regarding the date that Appellant was delivered to the Department of Corrections, nor did the parties enter into any stipulations on that issue.

The motion court issued its Findings, Conclusions and Judgment on February 19, 2016. (L.F. 48). The court reiterated its oral finding that Appellant had been abandoned by her initial post-conviction counsel, and it allowed the untimely filing of the amended Rule 24.035 motion. (L.F. 48). The court then overruled the claim raised in the amended motion:

In the underlying case, the Court ordered a Sentencing Assessment Report, and noted at the sentencing hearing that: “This case is at least her fourth (4th) conviction of Driving While Intoxicated.” The record thus established the factual basis for conviction of a Class C Felony of Driving While Intoxicated. The error in the Information was as to what court entered one of the prior convictions. The Court takes judicial notice of its own files, specifically Case 02CR673892-01 in which the Circuit Court of Barton County, Missouri convicted Movant of a Class D Felony of Driving While Intoxicated – Persistent Offender on September 29, 2003, the very date the information in this underlying criminal case alleged an alcohol related conviction, although misstated to have been in the Municipal Court of Lamar, Missouri. The Court finds the underlying Information was incorrect by virtue of a scrivener’s error. That error did not prejudice Movant, as any claim that she did not have the

requisite number of prior alcohol related convictions was without merit.

(L.F. 48-49). The court also found that the claim was not subject to review because it should have been raised on direct appeal, but was not. (L.F. 49).

The motion court's findings were initially appealed to the Missouri Court of Appeals Southern District. Neither party raised the issue of whether the *pro se* Rule 24.035 motion had been timely filed. The Court of Appeals issued an opinion on November 10, 2016, that vacated the judgment and remanded the cause to the circuit court with directions to dismiss because Appellant had failed to prove that she had timely filed her *pro se* motion as required by Rule 24.035, and had thus waived the claim asserted on appeal. (*Hall v. State*, No. SD34385, slip op. at 1, 3). This Court granted Appellant's application to transfer the cause under Supreme Court Rule 83.04.

ARGUMENT

I.

Appellant did not meet her burden of proving that her *pro se* motion was timely filed.

Appellant claims that she sufficiently established that her *pro se* Rule 24.035 motion was timely filed. But while Appellant alleged sufficient facts in the motion to show timeliness, she was obligated to prove those facts by a preponderance of the evidence once the motion court granted her an evidentiary hearing. Appellant presented no evidence concerning when she was delivered to the Department of Corrections and thus failed to meet her burden of proving that the *pro se* motion was timely filed. Appellant has accordingly waived her claims for relief and the case should be remanded to the motion court with directions to dismiss the cause.

A. Standard of Review.

This Court has a duty to enforce the mandatory time limits and resulting complete waiver of the right to proceed in the post-conviction rules, even if the issue is not raised before the motion court. *Dorris v. State*, 360 S.W.3d 260, 268 (Mo. 2012). The State cannot waive noncompliance with the time limits in Rule 24.035. *Id.* If the motion was not timely filed, it must be dismissed, as neither the motion court nor this Court has any authority to address the merits of Appellant's post-conviction claims. *Id.* at 267-68.

B. Analysis.

A person convicted of a felony following a guilty plea may claim that the conviction violates the constitution or laws of Missouri by seeking post-conviction relief in the sentencing court. *Id.* at 265 (citing Supreme Court Rule 24.035(a)). “To request relief, the defendant ‘shall file a motion to vacate, set aside or correct the judgment or sentence’ within specified time limits.” *Id.* (quoting Supreme Court Rule 24.035(b)). If the defendant appeals the judgment, the motion shall be filed within ninety days after the mandate of the appellate court is issued affirming such judgment or sentence. *Id.*; Supreme Court Rule 2.035(b). If the defendant did not appeal, the motion shall be filed within 180 days of the date the person is delivered to the custody of the Department of Corrections. *Id.*; Supreme Court Rule 24.035(b). “The Rules state that the ‘[f]ailure to file a motion within the time provided by this Rule . . . shall constitute a *complete waiver* of any right to proceed under this Rule . . . and a *complete waiver* of any claim that could be raised in a motion filed pursuant to this Rule.” *Id.* (quoting Supreme Court Rule 24.035(b)) (emphasis added by Court).

A Rule 24.035 movant must allege facts showing a basis for relief to entitle the movant to an evidentiary hearing. *Id.* at 267. The movant must also allege facts showing that the motion was timely filed. *Id.* In this case, the *pro se* motion was filed on June 19, 2013, and alleged that Appellant was

delivered to the Department of Corrections on March 5, 2013. (L.F. 5, 37).

The amended motion also alleged that Appellant was delivered to the Department of Corrections on that date. (L.F. 43). Those allegations are assumed to be true for purposes of determining whether Appellant was entitled to an evidentiary hearing. *Williams v. State*, 497 S.W.3d 395, 399 (Mo. App. E.D. 2016). Under that standard, Appellant pled facts that, if assumed to be true, demonstrated that her motion was timely filed under Rule 24.035(b). *Carroll v. State*, 461 S.W.3d 43, 48 (Mo. App. E.D. 2015).

But once Appellant was granted an evidentiary hearing, she had the burden of proving her claims by a preponderance of the evidence. Supreme Court Rule 24.035(i). In addition to proving her substantive claims, Appellant was required to show that she filed her motion within the time limits provided in the Rules. *Dorris*, 360 S.W.3d at 267.

This Court has stated that a movant can meet her burden of proof of a timely filing by either: (1) timely filing the original *pro se* motion so that the time stamp on the file reflects that it is within the limits proscribed in the Rule; (2) alleging and proving by a preponderance of the evidence in her motion that she falls within a recognized exception to the time limits; or (3) alleging and proving by a preponderance of the evidence in her amended motion that the court misfiled the motion. *Id.* Options two and three are inapplicable to this case. The first option would facially seem to apply, since

the time stamp on the *pro se* motion shows that it was filed within 180 days of the alleged date of delivery to the Department of Corrections. But the question that the first exception does not address is the movant's obligation to prove the accuracy of the alleged date of delivery at an evidentiary hearing.

Allegations in a post-conviction motion are not self-proving. *Woods v. State*, 458 S.W.3d 352, 360 (Mo. App. W.D. 2014); *Shelton v. State*, 440 S.W.3d 464, 471 (Mo. App. E.D. 2014); *McCain v. State*, 317 S.W.3d 657, 660 (Mo. App. S.D. 2010). While that standard has typically been applied to factual allegations supporting a claim for relief pled in a post-conviction motion, there is no reason why it should not also apply to the factual allegations that would demonstrate whether the motion was timely filed. The burden would not have been a difficult one for Appellant to meet.

Appellant could have established her delivery date by introducing into evidence certified records from the Department of Corrections or by providing live testimony of someone with personal knowledge of that delivery date. Appellant's own testimony, if believed by the motion court, could have sufficiently established that date. The State could have stipulated to the date of delivery, thus relieving Appellant of the burden of presenting evidence on that issue. *Jenkins v. Wabash R. Co.*, 322 S.W.2d 788, 794 (Mo. 1959). None of those things occurred, and the record of the evidentiary hearing is silent as

to when Appellant was delivered to the Department of Corrections. “If the timely filing of an original post-conviction motion is not proven, the motion court will regard the untimely motion as a ‘complete waiver’ of any right to proceed under Rule 24.035.” *Vogt v. State*, 437 S.W.3d 218, 226-27 (Mo. 2014).

Appellant argues that the motion court must have accepted the *pro se* motion as timely because it considered the merits of her claim. That contention is squarely rejected by *Dorris*, where the motion court ruled on the merits of the motions filed by the three movants in the consolidated appeals. *Dorris*, 360 S.W.3d at 263-65. Appellant further claims that this Court should presume that the motion court resolved the factual issues of the timeliness of the amended motion in accordance with the result reached. That argument might bear weight if the motion court had heard contested evidence about the timeliness of the motion. But Appellant does not cite to cases holding that the presumption can be applied to a factual issue on which no evidence has been presented. Put another way, the presumption that Appellant cites cannot be used to relieve a party from meeting its burden of proof at trial by adducing evidence to support the relevant issue.

Appellant next argues that she is entitled to remand to the motion court for a determination of the timeliness of the motion. The cases she cites are inapposite and do not aid her. Appellant first relies on *McCoo v. State*, 844 S.W.2d 565 (Mo. App. S.D. 1992). The movant in that case used an older

version of Form 40 that required the movant to set forth the date upon which sentence was imposed and the term of the sentence. *Id.* at 567. The movant filled out that line by stating, “January 26, 1990 – five (5) years.” *Id.* The form did not contain an averment about when the movant was delivered to the Department of Corrections, but the motion court interpreted the sentencing date as the date of delivery, and dismissed the motion as untimely filed. *Id.* at 566, 567. The Southern District found that the record contained no support for the motion court’s finding that the defendant was delivered to the Department of Corrections on January 26, 1990. *Id.* at 567. The court thus invoked the plain error rule to remand the case for further proceedings to determine when delivery occurred. *Id.* at 568.

The distinction between *McCoo* and this case is plain. In *McCoo*, the motion court dismissed the post-conviction motion as untimely, even though the record contained no facts to support that finding. In this case, Appellant alleged facts that would facially establish the timeliness of her motion, but failed to present evidence to prove those facts when given the opportunity to do so at an evidentiary hearing. *McCoo* does not support the proposition that remand is proper to give a party a second chance to prove the facts supporting her claims. To the contrary, this Court has declined to permit the presentation of additional evidence upon remand when a party was given the opportunity to present that evidence in the original proceeding, but failed to

do so. *State v. Emery*, 95 S.W.3d 98, 101-02 (Mo. 2003) (declining to permit State to present evidence of prior and persistent offender status upon remand for resentencing when State failed to even attempt to introduce such evidence at original sentencing).

Appellant next relies on *Dorris*, which remanded the case of one of the three movants in the consolidated appeal for the presentation of evidence to establish timeliness. *Dorris* is clearly distinguishable. As mentioned before, *Dorris* was a consolidated appeal involving movants Jesse V. Dorris, Jose Luis Lopez-McCurdy, and Louis Hill, all of whom had their post-conviction motions dismissed on appeal due to untimeliness. *Dorris*, 360 S.W.3d at 263-65. The State did not challenge the timeliness of the motions in the cases of Dorris or Lopez-McCurdy. *Id.* at 263-64. The motion courts in both cases denied the motions on the merits following an evidentiary hearing, but the Court of Appeals vacated the judgments and remanded to the motion court with directions to dismiss due to untimeliness. *Id.* at 263-64. This Court ruled that the Court of Appeals had properly remanded the cases to the motion court for dismissal of the post-conviction motions. *Id.* at 270.

In Hill's case, the State had originally challenged the timeliness of the post-conviction motion. *Id.* at 264. Hill was prepared to call witnesses to establish the timeliness of the motion. *Id.* at 265 n.2. But the State dropped its objection to the timeliness of the motion before the evidentiary hearing,

and Hill thus did not call his witnesses. *Id.* at 265. This Court remanded the case to the motion court to allow Hill to present his evidence. *Id.* at 270.

This is not a case like Hill's where Appellant planned to present evidence demonstrating timeliness, but was induced not to do so because of an affirmative action by the State. Her situation is instead more like that of Dorris and Lopez-McCurry, where the State did not raise the issue of timeliness and the movant simply neglected to present evidence on that issue. The fact that the State did not affirmatively challenge the timeliness of the motion does not aid Appellant, as the State cannot waive noncompliance with the time limits in Rule 24.035. *Id.* at 268. The same result that followed in the cases of Dorris and Lopez-McCurry should thus follow here. The cause should be remanded to the motion court with directions to dismiss this Rule 24.035 action as untimely filed.

Out of an abundance of caution, Respondent will address the claim of error contained in the amended Rule 24.035 motion that Appellant raises in her brief.

II.

Appellant is not entitled to relief on her claim regarding an error in the information.

Appellant claims that the motion court clearly erred in denying her Rule 24.035 motion because her guilty plea was not supported by a factual basis. Appellant claims that the State failed to present sufficient facts to warrant a finding beyond a reasonable doubt that she was an aggravated offender, because she was not convicted of one of the charges cited in the information to establish aggravated offender status. But her claim is really one of insufficiency of the information, which is not cognizable in a Rule 24.035 motion.

A. Standard of Review.

Appellate review of the denial of a Rule 24.035 motion is limited to a determination of whether the motion court's findings of fact and conclusions of law are clearly erroneous. *Roberts v. State*, 276 S.W.3d 833, 835 (Mo. 2009); Supreme Court Rule 24.035(k). The motion court's findings are clearly erroneous only if, after reviewing the entire record, the appellate court is left with the definite and firm impression that a mistake has been made. *Roberts*, 276 S.W.3d at 835. Appellant has the burden to show by a preponderance of the evidence that the motion court clearly erred in its

ruling. *Id.* The motion court's findings should be upheld if they are sustainable on any grounds. *Swallow v. State*, 398 S.W.3d 1, 3 (Mo. 2013).

B. Analysis.

While Appellant fashions her claim as one of an insufficient factual basis for her guilty plea, the gravamen of her complaint is that the information contained incorrect information regarding the September 29, 2003, conviction that was used to plead her status as an aggravated DWI offender. Appellant does not deny that she had a DWI conviction on that date, but only that the conviction did not occur in the court listed on the information. Appellant is thus essentially attacking the sufficiency of the information as it relates to her status as an aggravated offender.

A person who pleads guilty to a criminal offense has a right to challenge the sufficiency of the information or indictment by direct appeal. *Souttee v. State*, 51 S.W.3d 474, 480 (Mo. App. S.D. 2001). A post-conviction motion does not substitute for a direct appeal. *Id.* Matters that were or should have been raised on direct appeal are not subject to review by motion for post-conviction relief. *Id.*

The movant in *Dodds v. State* filed a Rule 24.035 motion in which he claimed that he was improperly sentenced as a persistent offender because the State did not properly plead his persistent offender status in the information and failed to prove that he was a persistent offender. *Dodds v.*

State, 60 S.W.3d 1, 5 (Mo. App. E.D. 2001). The Court of Appeals found that claim to be non-cognizable because it was a challenge to the sufficiency of the information that could have been raised on direct appeal, but was not. *Id.* at 5-6. Appellant did not file a direct appeal challenging the sufficiency of the aggravated offender allegations in the information. She accordingly is not entitled to do so in a Rule 24.035 claim. *Id.* at 6; *Soutee*, 51 S.W.3d at 480.

The *Sharp* case that Appellant relies on to claim that this is not an issue for direct appeal is distinguishable. The claim raised in that case concerned whether the exhibits admitted into evidence at sentencing were sufficient to establish prior and persistent offender status where those exhibits contained information that was at variance with the facts set forth in the information. *State v. Sharp*, 39 S.W.3d 70, 72 (Mo. App. E.D. 2001). The Court of Appeals found that the case was not subject to review on direct appeal because the defendant had made no claim about the sufficiency of the information. *Id.* Appellant's claim, as set forth in the amended motion, is simply that the information listed a conviction that never occurred, at least not in the designated court. (L.F. 44-46). The amended motion raises no claim regarding any independent evidence presented to the motion court.

The *Matthews* case that Appellant discusses in her brief is also distinguishable. The indictment in that case charged the movant as a prior and persistent offender with stealing, third offense. *Matthews v. State*, 123

S.W.3d 307, 308 (Mo. App. E.D. 2003). The indictment listed two prior guilty pleas for misdemeanor stealing charges and four prior felony convictions. *Id.* at 308-09. The prosecutor did not discuss the prior felony convictions at the plea hearing, but the movant admitted to having unspecified prior felony convictions, and the court sentenced him as a persistent offender. *Id.* at 309. The movant filed a Rule 24.035 motion alleging that the court erred in sentencing him as a persistent offender because the State failed to prove beyond a reasonable doubt that he was convicted of two or more felonies at different times. *Id.* The Court of Appeals granted relief, finding that the movant had never admitted that he pled guilty to the felonies listed in the indictment. *Id.* at 310.

Unlike this case, the movant in *Matthews* did not challenge the accuracy of the prior convictions listed in the indictment. His claim was solely concerned with whether the State had proved those facts that were accurately listed in the indictment. Furthermore, the opinion gives no indication that the cognizability of the claim was raised or considered on appeal. *Matthews* thus does not establish that Appellant is raising a claim that could not have been raised on direct appeal.

Appellant has not demonstrated that she is entitled to relief even if she has stated a cognizable claim. A Rule 24.035 movant asserting an insufficient factual basis must demonstrate that the insufficiency deprived her of the

actual knowledge of the factual basis for the charge, thus rendering her plea unknowing and involuntary. *Chipman v. State*, 274 S.W.3d 468, 472 (Mo. App. S.D. 2008). Appellant does not deny that she has a prior conviction for DWI entered in the Circuit Court of Barton County on September 29, 2003, or that that conviction in combination with her other convictions qualifies her to be sentenced as an aggravated DWI offender. Appellant would be presumed to be aware of her prior convictions and the facts surrounding them, including the court in which they were entered. Appellant makes no claim to the contrary and thus has not demonstrated that she was deprived of the actual knowledge of the factual basis for the charge.

Furthermore, the prosecutor in this case, unlike his counterpart in *Matthews*, did make reference at the guilty plea hearing to the prior convictions pled in the information when he incorporated those prior convictions into the factual basis he presented to the court. (L.F. 18). Appellant did not dispute at the plea hearing the fact of the prior conviction she now complains of. (L.F. 18-19). Appellant should thus be deemed to have waived any complaints about the accuracy of the information when that inaccuracy would have been readily apparent to her at the time she entered her guilty plea. *Cf. State v. Arnette*, 686 S.W.2d 4, 8 (Mo. App. W.D. 1984) (finding that defendant waived claim concerning erroneous court designation on charging document when he proceeded to trial without objection); *see also*

Feldhaus v. State, 311 S.W.3d 802, 804 (Mo. 2010) (noting the general rule that a guilty plea waives all non-jurisdictional defects); *State v. Parkhurst*, 845 S.W.2d 31, 35 (Mo. 1992) (stating that sufficiency of an indictment or information is not jurisdictional); *but see Scharnhorst v. State*, 775 S.W.2d 241, 245 (Mo. App. W.D. 1989) (guilty plea did not waive claim of due process violation from plea court's failure to make a persistent offender determination).

Appellant's claim for relief would also appear to be barred under Missouri's statute of jeofails, which states in pertinent part, that:

1. No indictment or information shall be deemed invalid, nor shall the trial, judgment or other proceedings thereon be stayed, arrested or in any manner affected:

* * *

(18) For any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits.

§ 545.030.1(18), RSMo 2000. Because the record before the plea and motion court demonstrated that Appellant qualified as an aggravated DWI offender, and because Appellant has not pled that she was unaware of the facts so qualifying her at the time she entered her guilty plea, she has not shown prejudice to her substantial rights.

Should this Court decide to address the merits of Appellant's claim, it should find that the motion court did not clearly err in denying the claim raised in the amended Rule 24.035 motion, and it should deny Appellant's point.

CONCLUSION

In view of the foregoing, Respondent requests that the judgment of the motion court be vacated, and the cause remanded to the motion court for dismissal of the original Rule 24.035 motion as untimely filed. In the alternative, Respondent submits that the denial of Appellant's amended Rule 24.035 motion should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06, and contains 5,679 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2010 software; and

2. That a copy of this notification was sent through the eFiling system on this 17th day of March, 2017, to:

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