No. SC95800

In the
Supreme Court of Missouri

State ex rel. CHRISTINE DELF
Relator,
v.
THE HONORABLE DARRELL E. MISSEY
Respondent.

On a Writ of Prohibition to the Supreme Court of Missouri
From the Twenty-third Judicial Circuit
The Honorable Darrell E. Missey, Judge

RESPONDENT'S BRIEF

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ATTORNEYS FOR RESPONDENT

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SUMMARY OF THE ARGUMENT

This case presents the question of whether Respondent abused his discretion in adding conditions of probation, specifically, 120 days jail and a restriction on working in the home health care industry.

Relator seeks a writ of prohibition to prevent Respondent from adding these conditions. Relator insists Respondent lacked the power to do so because said conditions were not stated in the plea bargain. Relator is willing to accept probation without those conditions, or withdraw her guilty plea and set the case for trial.

The State and Respondent followed the plea bargain, and Relator received precisely the sentence bargained for and stated in the plea agreement: a 7 year suspended execution of sentence. Probation and its terms are not part of a sentence. *State v. Williams*, 871 S.W.2d 450, 452 (Mo. banc 1994). Mo. Rev. Stat. § 559.021 (2004) gives courts wide discretion to impose and modify conditions of probation and absent an abuse of discretion, Relator is not entitled to relief. *State ex rel. Doe v. Moore*, 265 S.W.3d 278, 279 (Mo. banc 2008). Courts are specifically authorized to impose up to 120 days jail as a condition of probation under Mo. Rev. Stat. § 557.011 (2013) and Mo. Rev. Stat. § 559.026 (2004). If relator is dissatisfied with the conditions of her probation, the remedy is not a withdrawal of her guilty plea; the remedy is acceptance of her sentence. *State v. Fetterhoff*, 739 S.W.2d 573, 576 (Mo. App. E.D. 1987).

Any additional apparent claims of Respondent should be dismissed as premature because she has not been delivered to the Department of Corrections.

STATEMENT OF FACTS

On May 21, 2015, the State filed an Information charging Relator with one count of forgery, a class C felony, for events occurring on October 2, 2014. (Relator's Ex. A.) On March 17, 2016, Relator pleaded guilty to the charge. (Relator's Ex. F.) Relator's plea was pursuant to a plea bargain. (Relator's Ex F at 11:15 – 13:2.) The plea bargain was pursuant to Mo. Sup. Ct. R. 24.02(d)(1)(c). (Relator's Ex. B.) The terms of the plea bargain were as follows: "7 years MDC, SES, 5 years probation. Restitution of $5,000 plus administrative fee to be paid through P.A. Restitution Dept., and to be paid in full prior to the expiration of probation." (Relator's Ex. B.) A sentencing assessment report ("SAR") was ordered by The Honorable Robert G. Wilkins, the circuit judge at the time of plea and sentencing[1]. (Relator's Ex. F at 19:24-25; State's Ex. 3.) The SAR was subsequently prepared by the Board of Probation and Parole. (Relator's Ex. F at 19:24-25; State's Ex. 3.)

The SAR detailed Relator's criminal history and prior term of probation, namely, a prior conviction and term of probation involving nine counts of forgery, and theft of more than $25,000, in Cause No. 07SL-CR02893-01. (State's Ex 3 at 2.) The SAR also

[1] The Honorable Robert G. Wilkins, Circuit Judge, Division 1 of the Twenty-third Judicial Circuit retired on August 19, 2016. No successor has been appointed or elected at the present time. The case has been transferred to The Honorable Darrell E. Missey, Circuit Judge, Division 2 for any further proceedings.

detailed an arrest of Relator while on probation for fraudulent use of a credit device which alleged Relator had fraudulently used the debit card of an 84 year old man for whom Relator was providing home health care services. (State's Ex. 3 at 3.)

On June 15, 2016, the cause was called for sentencing. (Relator's Ex. G.) Initially, the court had considered rejecting the plea bargain in light of the SAR. (Relator's Ex. G at 4:4-9.) The court had concerns over Relator's criminal history and prior term of probation, namely, a prior conviction and term of probation involving nine counts of forgery in Cause No. 07SL-CR02893-01. (Relator's Ex. G at 11:3-10, State's Ex. 3 at 3.) At the sentencing hearing the court stated,

> "What really bothers me is that you have nine priors for doing the exactly the same thing. You wrote $25,000 checks - $25,000 checks in St. Louis County in 2009 on an identical case where you just stole old people's freaking money. While you were on probation, you managed to do it again to an 84-year-old man and you took his money while you were working as a home healthcare aid." (Relator's Ex. G at 10:15-24.)

The court ultimately concluded it would follow the recommendation of the State, which at the time of sentencing, the State was still recommending a 7 year suspended execution of sentence (Relator's Ex. G at 6:19-20), the court stated,

> "First I was going to reject the recommendation. I would have put her in the penitentiary for seven years, but the

> recommendation that was negotiated with the State, and I assume that there is difficulty because that's the predatory nature of your client's actions is that she's picking on old people (Relator's Ex. G at 16:13-19)…[t]hat's why I'm not rejecting the recommendation." (Relator's Ex. G at 17:7.)

The court followed the State's recommendation and sentenced Relator to 7 years, suspended execution of sentence. (Relator's Ex. G at 20:14 – 21:2.) The court added conditions to Relator's probation which included, but were not limited to: 120 days jail as a condition of probation, along with a restriction on working in the home health care industry. (Relator's Ex. G at 22:1-4.) After the conclusion of the sentencing hearing Relator was taken into custody and taken to the Jefferson County Jail. (Relator's Ex. G at 22:11-13.)

On June 20, 2016, Relator filed a Motion to Enforce Plea Agreement or, in the Alternative, Withdraw Guilty Plea and Set Case for Trial. (Relator's Ex. D.) On June 22, 2016, the circuit court denied the motion without an evidentiary hearing. (Relator's Ex. E.)

On June 23, 2016, Relator filed a Petition for Writ of Mandamus in the Court of Appeals, Eastern District, case number ED104510. (Pet. ¶ 17.) The Court of Appeals issued a preliminary writ of habeas corpus, and the defendant was released from the Jefferson County Jail on her own recognizance. (Relator's Ex. H.) On July 7, 2016, after the State filed an Answer, the Court of Appeals issued an Order quashing the preliminary

Writ of Habeas Corpus and ordered Relator to return to the Jefferson County Jail no later than July 11, 2016. (Relator's Ex. I.)

This action follows.

ARGUMENT

Standard of review

This Court has jurisdiction to issue original remedial writs. Mo. Const. art. V, sec. 4. "Prohibition is a discretionary writ that only issues to prevent an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent exercise of extrajurisdictional power." *State ex rel. Amorine v. Parker*, 490 S.W.3d 372, 374 (Mo. banc 2016) quoting *State ex rel. Schwarz Pharma, Inc. v. Dowd*, 432 S.W.3d 764, 768 (Mo. banc 2014). Whether a trial court has exceeded its authority is a question of law, which an appellate court reviews independently of the trial court. *In re Smythe*, 254 S.W.3d 895, 896–97 (Mo. App. S.D 2008). A court has discretion as to the imposition of conditions of probation and the modification of those conditions and absent an abuse of that discretion, a writ of prohibition is not available. *State ex rel. Doe v. Moore*, 265 S.W.3d 278, 279 (Mo. banc 2008). "In order to establish an abuse of discretion, defendant must show that reasonable persons could not differ as to the propriety of the action taken by the trial court. Unless the record clearly shows an abuse of discretion and a real probability of injury to the complaining party, the appellate court may not interfere with the discretion of the trial court." *State v. Welsh*, 853 S.W.22 466, 469 (Mo. App S.D. 1993).

I. The Preliminary Writ Should be Quashed Because Respondent Acted Within the Authority of Mo. Rev. Stat. § 559.021 (2004), § 559.026 (2004), and § 557.011 (2013) and There Was No Abuse of Discretion Because Jail and an Employment Restriction Were Necessary to Ensure Relator Would Not Again Violate the Law.

The preliminary writ of prohibition should be quashed because Respondent had authority to impose conditions of probation under Mo. Rev. Stat. § 559.021 (2004), § 559.026 (2004), and § 557.011 (2013). Adding 120 days jail and a restriction on working in the home health care industry as conditions of probation was not an abuse of discretion because it was necessary to ensure relator would not again violate the law as Relator had done before. Both the State and Respondent followed the plea bargain and Relator received precisely the sentence for which she bargained: a 7 year suspended sentence.

A. The State and Respondent Followed the Plea Bargain, and Under the Authority of Mo. Rev. Stat. § 559.021 (2004), § 559.026 (2004), and § 557.011 (2013), Respondent Imposed 120 Days Jail Along With a Restriction on Working in the Home Healthcare Industry as Conditions of Probation.

Respondent had authority to impose conditions of probation under Mo. Rev. Stat. § 559.021 (2004), § 559.026 (2004), and § 557.011 (2013). On March 17, 2016, pursuant to a plea bargain with the State of Missouri, Relator pleaded guilty to a one-count Information charging Relator with the class C felony of forgery. (Relator's Ex. C; Relator's Ex. F, 19:1-23.) The terms of the plea agreement were as follows: "7 years

MDC, SES, 5 years probation. Restitution in the amount of $5,000 plus administrative fee to be paid through P.A. Restitution Dept., and to be paid in full prior to the expiration of probation." (Relator's Ex. B.) Relator agrees the plea bargain was entered pursuant to Mo. Sup. Ct. R. 24.02(d)(1)(C) for a "specific sentence." (Pet. ¶4.) On June 15, 2016, both the State recommended (Relator's Ex. G at 6:19-20.) and Respondent sentenced Relator to, a "specific sentence:" 7 years, suspended execution of sentence. (Relator's Ex. C.) Special conditions of probation were added that Relator serve 120 days in the Jefferson County Jail along with a restriction on working in the home health care industry. (Relator's Ex. C.)

The crux of Relator's argument is that a defendant can withdraw her guilty plea if the court has rejected her plea bargain under Mo. Sup. Ct. R. 24.02(d)(4). In Relator's case, however, this condition precedent is absent. Respondent followed the plea bargain and imposed a sentence within the range authorized by statute and within the sentence bargained for between the State and Relator. (Relator's Ex. G at 4:10-16.) The sentence imposed by Respondent was precisely the sentence bargained for and stated in the plea agreement: 7 years in the Missouri Department of Corrections with execution of that sentence suspended. (Relator's Ex. B, Relator's Ex. C.) Relator is correct that nothing about the terms of the sentence were left open. Where Relator errs is in her assumption that conditions of probation are part of a sentence. Probation and its terms are not part of a sentence. *State v. Williams*, 871 S.W.2d 450, 452 (Mo. banc 1994). Thus, Relator's true complaint is that a special condition of probation was added.

In *State v. Williams*, the Defendant received consecutive 10 year and three year

sentences on first-degree robbery and armed criminal action, respectively. *Id.* The 10 year sentence was to be suspended and probation to begin after Defendant had served the three-year sentence. *Id.* Defendant appealed and this Court denied review on a jurisdictional basis because only a final judgement can be appealed. *Id.* This Court held that a final judgement only occurs when a sentence is entered, and that probation, and its terms and conditions, are not part of a sentence. *Id.*

Notably, not a single case cited by Relator involves a fact pattern where a plea was set aside because the court added conditions of probation.[2] This is not surprising. It is true that some probation conditions can, at times, be specifically incorporated into a plea

[2] The cases cited by Relator involve factual scenarios where the State agreed to stand silent but then violated its own agreement and recommended the maximum at sentencing and the defendant received the maximum sentence. *Santobello v. New York*, 404 U.S. 257 (1971). In *Schellert*, for example, the State recommended probation and then the court sentenced the Defendant to the maximum to serve without being allowed an opportunity to withdraw his guilty plea. *Schellert v. State*, 569 S.W.2d 735 (Mo. 1978). In *Reed*, the State promised 7 years pursuant to 217.378 RSMo., the court imposed that sentence, but the Department of Corrections failed to place the Defendant in the 217.378 program so the court attempted to correct this by "considering" probation under 559.115 but ultimately shipped the Defendant. *Reed v. State*, 114 S.W.3d 871 (Mo. App. 2003). The remainder of Relators citations are similar scenarios and none are analogous to the facts before this Court.

bargain. Certainly not all conditions can be incorporated, however. Such an expectation is an absurdity; the vast majority of necessary conditions are not known until after a plea has been entered because sentencing assessment reports are not prepared until *after* a plea of guilty is entered.

While the plea agreement in the instant cause of action did not require jail time as a condition of probation, it certainly did not forbid it. At the time the plea bargain was reduced to writing the State was aware that restitution existed and so restitution was included in the plea bargain; the remainder of probation conditions were left to the court. The State and the court both followed the plea bargain. Relator received the sentence for which she bargained, and the court imposed conditions of probation pursuant to Mo. Rev. Stat. § 559.021 (2004), § 559.026 (2004), and § 557.011 (2013).

B. Adding 120 Days Jail as a Condition of Probation Was Not an Abuse of Discretion Because It Was Necessary to Ensure Relator Would Not Again Violate the Law.

Mo. Rev. Stat. § 559.021 (2004) gives courts wide discretion to impose and modify conditions of probation and absent an abuse of discretion, Relator is not entitled to relief. *State ex rel. Doe v. Moore*, 265 S.W.3d 278, 279 (Mo. banc 2008). In order to establish an abuse of discretion, the complaining party must show that reasonable persons could not differ as to the propriety of the action taken by the trial court. *State v. Welsh*, 853 S.W.2d 466, 469 (Mo. App. S.D. 1993). Unless the record clearly shows an abuse of discretion and a real probability of injury to the complaining party, the appellate court may not interfere with the discretion of the trial court. *Id.*

The current version of Section 559.021 specifically states, "The conditions of probation shall be such as the court in its discretion deems reasonably necessary to ensure that the defendant will not again violate the law." Mo. Rev. Stat. § 559.021 (2004). In imposing conditions of probation, a court is permitted to consider matters outside the record. *State v. Burton*, 198 S.W. 2d 19, 22-23 (Mo. 1946). The comments to Section 559.021 of the 1973 Proposed Code warn against the danger of imposing standard conditions in every case and encourage courts to carefully consider the needs of each particular offender, acknowledging that those needs may even change during the term of probation and may require enlargement or modification. Mo. Ann. Stat. § 559.021 (West 2004). Furthermore, Mo. Rev. Stat. § 557.011 (2013) and § 559.026 (2004) specifically authorize courts to impose up to 120 days shock incarceration as a condition of probation.

In *State ex rel. Doe v. Moore*, 265 S.W.3d 278 (Mo. banc. 2008), this Court quashed a writ of prohibtion seeking to prevent the sentencing court from enforcing modified probation conditions regarding conviction for endangering the welfare of a child in the first degree. There, the defendant received a suspended imposition of sentence and was placed on a period of 5 years probation. *Id.* The Court later modified probation conditions to include that the defendant be supervised as a sex offender, that he be evaluated by a physician, and that he complete sex offender treatment. *Id.* The Defendant contested the conditions and in quashing the writ, this Court held, "[t]he court shall determine any conditions of probation deemed necessary to ensure the successful completion of probation." *Id.* at 279

Here, Respondent did not abuse his discretion. Respondent was not arbitrary in imposing 120 days jail as a condition of probation. Respondent was authorized to do so by Section 559.026. Additionally, Relator's Sentencing Assessment Report ("SAR") describes an egregious case wherein Relator was placed on probation for the same crime as the instant cause, giving Respondent good reason to "shock" Relator into compliance with the law. (State's Ex. 3.) The SAR also describes an account alleging Relator violated her previous probation by again committing the same offense while on probation. (State's Ex. 3.) Here, Respondent had good reason to take steps to ensure Relator would not again violate the law during her term of probation, as she did during, and after, her previous term of probation. Indeed, Respondent indicated on the record the accounts recited in the SAR were his reason for accepting the State's recommendation but imposing conditions of probation. (Relator's Ex. G at 10:15-24, 11:3-10, 16:13-19, 17:7; State's Ex. 3 at 3).

Relator received that for which she bargained. If relator is dissatisfied with the conditions of her probation, the remedy is not a withdrawal of her guilty plea; the remedy is acceptance of her sentence: "a probationer is free to reject terms of probation which limit his future rights and instead may accept the punishment imposed for his crime." *State v. Fetterhoff*, 739 S.W.2d 573, 576 (Mo. App. E.D. 1987); s*ee State v. Priesmeyer*, 719 S.W.2d 873, 876 (Mo. App. W.D. 1986) (Probation is a privilege, not a right, which may be granted or withheld in the discretion of the court.).

Here, the State and Respondent followed the plea bargain and Relator received the sentence for which she bargained. Respondent sentenced Relator within the confines of

the plea bargain and added conditions of probation under the authority of Sections 557.011, 559.021 and 559.026. There was no abuse of discretion in adding 120 days incarceration as a condition of probation because this condition was necessary to ensure Relator would not again violate the law during her term of probation. Relator's confinement was lawful. Relator is not entitled to relief. The preliminary writ of prohibition should be quashed.

II. Any Claim of Ineffective Assistance of Counsel is Premature Because Relator Has Not Been Delivered to the Department of Corrections

In an apparent additional point, Relator and her counsel seem to attack the voluntariness of her plea through a claim of counsel's own ineffectiveness vis-á-vis an affirmative misrepresentation by counsel.[3] This Court need not address this apparent claim because it was not raised by Relator in the circuit court or the Eastern District: the only question raised in the lower courts was whether the circuit court had the authority to impose jail time as a condition of probation.

In Missouri, there are three ways an individual may seek relief from a guilty plea: Mo. Sup. Ct. R. 24.035, Mo. Sup. Ct. R. 29.07, or Mo. Sup. Ct. R. 91.01. At this juncture, a claim pursuant to Rule 24.035 is premature because Relator has not yet been delivered to the Department of Corrections and delivery to the Department of Corrections is a mandatory prerequisite to any Rule 24.035 claim. *Ramsey v. State*, 98 S.W.3d 578, 579 (Mo. App. E.D. 2002); *Bandy v. State*, 847 S.W.2d 93, 94–95 (Mo. App. W.D.1992).

Rule 29.07 is also inapplicable because it cannot be used as a substitute for a claim cognizable under Rule 24.035, and ineffective assistance of counsel is cognizable under Rule 24.035. *State v. Ison*, 270 S.W.3d 444, 446 (Mo. App. W.D. 2008); *State v. Vogt*, 304 S.W.3d 209, 211 (Mo. App. W.D. 2009). In fact, Rule 24.035 specifically states it

[3] The State does not address the inherent conflict of interest that seems present in counsel's representation of Relator in a claim of ineffective assistance of counsel against, himself.

"provides the exclusive procedure by which such person may seek relief in the sentencing court for the claims enumerated." Mo. Sup. Ct. R. 24.035.

Finally, Rule 91.01 is also inapplicable for two reasons. First, both Rule 91.02 and Section 532.030 specifically require that an application for habeas relief be made first in the circuit court. Mo. Sup. Ct. R. 91.02; Mo. Rev. Stat. § 532.030 (1979). Here, no application for habeas relief was made in the circuit court at all; Relator is first raising the issue of ineffective assistance of counsel in this Court and first seeking habeas relief on the issue from this Court. Because the issue has never been raised before, no evidentiary hearing has been conducted and there is no record for this Court to review. It may be true that counsel was ineffective, or it may not be true: a hearing is necessary to make that determination. Second, even assuming an evidentiary hearing had been conducted where both counsel and Relator had been examined, under oath, on the record, on this issue, Rule 91.01 may only be used to raise a habeas claim of ineffective assistance of counsel in limited circumstances. *State ex rel. Zinna v. Steele*, 301 S.W.3d 510, 516-17 (Mo. banc. 2010). Specifically, Rule 91.01 is used when the time to file a claim of ineffective assistance of counsel pursuant to Rule 24.035 has expired, and the petitioner can demonstrate the additional element(s) of: "(1) a claim of actual innocence or (2) a jurisdictional defect or (3)(a) that the procedural defect was caused by something external to the defense—that is, a cause for which the defense is not responsible—and (b) prejudice resulted from the underlying error that worked to the petitioner's actual and substantial disadvantage." *Id., quoting, Brown v. State*, 66 S.W. 3d 721, 731 (Mo. banc. 2002). Because Relator has not alleged or demonstrated these additional elements (and

even had she, there is no record for this Court to review), an application pursuant to Rule 91.01 is, at this time, inappropriate.

Here, Relator is not time barred; her time has not even begun to run because she has not yet been delivered to the Department of Corrections. The proper remedy for a premature Rule 24.035 claim is dismissal without prejudice. *Hopkins v. State*, 802 S.W.2d 956, 958 (Mo. App. W.D. 1991); *Roth v. State*, 921 S.W.2d 680, 681 (Mo. App. W.D. 1996); *Johnston v. State*, 833 S.W.2d 451, 452 (Mo. App. S.D. 1992). Relator may file a claim pursuant to Rule 24.035 at a later, proper time. Rule 24.035 is "designed to provide a 'single, unitary, post-conviction remedy, to be used in place of other remedies,' including the writ of habeas corpus." *State ex rel. Zinna v. Steele*, 301 S.W.3d 510, 516 (Mo. banc. 2010), *citing*, *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 214 (Mo. banc 2001), *quoting*, *Wiglesworth v. Wyrick*, 531 S.W.2d 713, 715–16 (Mo. banc 1976) (emphasis omitted). Because relator is premature, her apparent claim of ineffective assistance of counsel should be dismissed.

CONCLUSION

The preliminary writ of prohibition should be quashed because there was no abuse of discretion. Respondent lawfully added conditions of probation under the authority of Mo. Rev. Stat. § 559.021 (2004), § 559.026 (2004), and § 557.011 (2013) and in doing so was not arbitrary because he added the conditions to ensure Relator would not again violate the law. Any additional claims of Respondent should be dismissed as premature because she has not been delivered to the Department of Corrections and can file her claim of ineffective assistance of counsel at a later, proper time, in the proper court,

where an evidentiary hearing may be held.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

Undersigned counsel herby certifies that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 4,374 words excluding the cover and certification, as determined by Microsoft Word 2016 software, and that a copy of this brief was sent through the electronic filing system on October 14, 2016 to:

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