

SC96474

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI

ex rel. Amy Fite, Prosecuting Attorney of Christian County, Missouri

Relator,

v.

THE HONORABLE LAURA JOHNSON,

Circuit Court Judge 38th Judicial Circuit, Division I

Respondent.

Petition in Prohibition or, in the Alternative, in Mandamus

RELATOR'S REPLY BRIEF

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REPLY STATEMENT OF FACTS

It appears the Respondent and the defendant concede the relevant facts. The defendant, Ledford, was sent to the Department of Corrections for a five-year sentence on November 6, 2015. He was advised of his 24.035 rights. The defendant did not file any timely post-conviction motion. *See Exhibit C, Docket Entry of July 7, 2015, and November 6, 2015; and Judgment dated November 6, 2015.* At the time of the defendant's Motion to set aside guilty plea, the defendant was in custody of the Department of Corrections serving his imposed sentence. He was not in custody in Christian County nor within Respondent's jurisdiction in the 38th Judicial Circuit.

There was no motion filed by the defendant under Rule 91 for habeas corpus relief either in the jurisdiction where the defendant was being held in custody or in Christian County. No motion was filed claiming plain error by trial court under Rule 29.12. The only motion filed was to withdraw guilty plea to correct manifest injustice under Rule 29.07(d). The defendant's argument was to retroactively set-aside the felony sentence and judgment. This resulted by the Respondent retroactively changing the filed felony charge to a misdemeanor and retroactively amending the judgment and sentence from felony to misdemeanor.

As of the filing of this Reply, there has been no ruling by this Court applying *State v Bazell*, 497 S.W. 3d 263 (Mo. banc 2016), applies retroactively to all judgments entered since 2002. There are well establish procedures to address any *Bazell* issues. The Respondent's actions were beyond the established procedures and clearly exceeded her

authority. Relator's request of writ relief is just and proper.

Respondent's Brief does not track the Relator's Brief. Respondent's brief is the first time the defendant has raised plain error and habeas corpus claims of relief. These are new issues which have not been addressed by the circuit court. Relator does not believe they are applicable for review or relief in this Court. The defendant has the ability to seek habeas corpus relief within the jurisdiction of his confinement.

POINTS RELIED UPON

POINT I

THE RELATOR IS ENTITLED TO AN ORDER PROHIBITING THE RESPONDENT FROM AMENDING THE CHARGE AND SENTENCE AND JUGDMENT OF NOVEMBER 6, 2015, BY ITS APRIL 12, 2017, ORDER AMENDING THE CHARGED OFFENSE AND FINDING THE DEFENDANT GUILTY OF A MISDEMEANOR OFFENSE AND SENTENCING THE DEFENDANT FROM A FELONY TO A MISDEMEANOR AND AN ORDER MANDATING THE CIRCUIT COURT DISMISS THE DEFENDANT'S POST-CONVICTION MOTION FOR LACK OF JURISDICTION, IN THAT THE CIRCUIT COURT DID NOT HAVE JURISDICTION TO HEAR THE DEFENDANT'S MOTION, BECAUSE THE DEFENDANT DID NOT TIMELY FILE A POST-CONVICTION MOTION WITHIN 180 DAYS FROM HIS DELIVERY TO THE DEPARTMENT OF CORRECTIONS FROM HIS NOVEMBER 6, 2015, SENTENCE.

Searcy v. State, 103 S.W.3d 201 (Mo. App. 2003)

State ex rel. Nixon v. Jaynes, 63 S.W.3d 210 (Mo. banc 2001)

State v. White, 838 S.W.2d 140 (Mo. App. 1992)

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POINT II

THE RELATOR IS ENTITLED TO AN ORDER PROHIBITING THE RESPONDENT FROM AMENDING THE CHARGE AND ENTERING A NEW SENTENCE AND JUDGMENT OF THE NOVEMBER 6, 2015, BY ITS APRIL 12, 2017, ORDER FROM A FELONY TO MISDEMEANOR AND MANDATING THE CIRCUIT COURT DENY DEFENDANT’S POST-CONVICTION MOTION TO WITHDRAW GUILTY PLEA TO CORRECT MANIFEST INJUSTICE UNDER RULE 29.07(d), IN THAT, THE CIRCUIT COURT EXCEEDED ITS JURISDICITON AND AUTHORITY ACTING OUTSIDE THE LAW IN GRANTING DEFENDANT’S MOTION UNDER RULE 29.07(d) BECAUSE SAID RULE DOES NOT AUTHORIZE AMENDING A CHARGE AND ENTERING A NEW SENTENCE AND JUDGMENT FROM FELONY TO MISDEMEANOR.

State v. Sexton, 75 S.W.3d 304 (Mo. App. 2002)

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State ex rel. Wagner v. Ruddy, 582 S.W.2d 692 (Mo. 1979)

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Section 532.030 RSMo

Rule 29.07(d)

Rule 24.035

Rule 29.12(b)

Rule 29.15

Rule 27.26

Rule 91

Rule 91.02(a)

Rule 91.04

Rule 91.09

LEGAL ARGUMENT

POINT I

THE RELATOR IS ENTITLED TO AN ORDER PROHIBITING THE RESPONDENT FROM AMENDING THE CHARGE AND SENTENCE AND JUGDMENT OF NOVEMBER 6, 2015 BY ITS APRIL 12, 2017 ORDER AMENDING THE CHARGED OFFENSE AND FINDING THE DEFENDANT GUILTY OF A MISDEMEANOR OFFENSE AND SENTENCING THE DEFENDANT FROM A FELONY TO A MISDEMEANOR ANDAN ORDER MANDATING THE CIRCUIT COURT DISMISS THE DEFENDANT'S POST-CONVITION MOTION FOR LACK OF JURISDICTION, IN THAT THE CIRCUIT COURT DID NOT HAVE JURISDICTION TO HEAR THE DEFENDANT'S MOTION, BECAUSE THE DEFENDANT DID NOT TIMELY FILE A POST-CONVICTION MOTION WITHIN 180 DAYS FROM HIS DELIVERY TO THE DEPARTMENT OF CORRECTIONS FROM HIS NOVEMBER 6, 2015, SENTENCE.

Because the Respondent concedes that the defendant is out of time for review of Rule 24.035 claims, a permanent writ should be issued. The defendant was delivered to the Department of Corrections on or about November 6, 2015. The defendant was advised of his rights under 24.035. The defendant filed a motion to set aside his guilty plea on or about February 1, 2017. It was more than 180 days from the defendant's delivery to the Department of Corrections. The defendant sought relief covered under Rule 24.035. The defendant claimed his sentence imposed was in excess of the maximum sentence authorized by law. The Defendant's failure to file a timely motion is a complete waiver of any right to proceed under Rule 24.035 or 29.15. *Searcy v. State*, 103 S.W.3d

201-204 (Mo. App. 2003); *Morris s. State*, 25 S.W.3d 649, 650-651 (Mo. App. 2000); *Unnerstall v. State*, 53 S.W.3d 589, 591-592 (Mo. App. 2001); *Crabtree v. State*, 91 S.W.3d 736, 737-738 (W.D. Mo. App. 2002). Because no timely motion has been filed within 180 days, the circuit court did not have jurisdiction to proceed or the ability to address the merits in the untimely motion filed under Rule 29.07(d). *Hines v. State*, 83 S.W.3d 108 (Mo. App. 2002). Therefore, Defendant's Motion should have been dismissed for lack of jurisdiction.

The defendant has available to him the process to seek relief under Rule 91.02(a) for not timely sought under Rule 24.035. *State ex rel Zinna v. Steele*, 301 S.W.3d 510, 517 (Mo. banc 2010); *Elam v. State*, 201 S.W.3d 216 (Mo. App. 2006); *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210 (Mo. banc 2001); *Brown v. State*, 66 S.W.3d 721, 723 (Mo. banc 2002). The jurisdiction for a habeas corpus is "in the county in which the person is held in custody at the time of the petition." Rule 91.02(a). *State v. White*, 838 S.W.2d 140, 142 (Mo. App. 1992); *State ex rel. Simmons v. White*. 866 S.W.2d 443, 445 (Mo banc. 1993); *State ex rel. Laughlin v. Bowersox*, 318 S.W. 695 (Mo banc. 2010). The Respondent did not have jurisdiction to act on the motion filed.

There is no dispute the law was followed at the time of defendant's plea and sentence in this case. The cases cited by Respondent of *State v. Ecford*, 239 S.W.3d 125 (Mo App. 2007) and *Woolford v. State*, 58 S.W.3d 87(Mo App. 2001) address the required elements for felony stealing convictions. *See also, Taylor v. State*, 25 S.W.3d 632, 633 (Mo. App. 2000); *State v. Passley*, 389 S.W.3d 180 (Mo. App. 2012); MAI-CR

324.02.1 (1-7-12); MACH-CR 24.02.1(7-1-13). Because the law at the time for the defendant's sentence had been followed, the Respondent was without jurisdiction and exceeded her authority in granting defendant's motion.

In this case, the Defendant was delivered to the Department of Corrections to serve his five- year sentence on or about November 6, 2015. He did not timely file any post-conviction pleadings. His filing on February 1, 2017, is untimely. Under the law, it must be dismissed for lack of jurisdiction. The Respondent exceeded her authority under the law in granting the defendant's post-conviction motion.

POINT II

THE RELATOR IS ENTITLED TO AN ORDER PROHIBITING THE RESPONDENT FROM AMENDING THE CHARGE AND ENTERING A NEW SENTENCE AND JUDGMENT OF THE NOVEMBER 6, 2015, BY ITS APRIL 12, 2017, ORDER FROM A FELONY TO MISDEMEANOR AND MANDATING THE CIRCUIT COURT DENY DEFENDANT'S POST-CONVICTION MOTION TO WITHDRAW GUILTY PLEA TO CORRECT MANIFEST INJUSTICE UNDER RULE 29.07(d), IN THAT, THE CIRCUIT COURT EXCEEDED ITS JURISDICITON AND AUTHORITY ACTING OUTSIDE THE LAW IN GRANTING DEFENDANT'S MOTION UNDER RULE 29.07(d) BECAUSE SAID RULE DOES NOT AUTHORIZE AMENDING A CHARGE AND ENTERING A NEW SENTENCE AND JUDGMENT FROM FELONY TO MISDEMEANOR.

The Respondent argues that clearly established laws and procedures do not need to be followed because the defendant may have a *Bazell* issue. As discussed in Relator's briefs, our system has established legal procedures for raising *Bazell* claims and relief. Habeas corpus is available in the proper jurisdiction were the person is being held in custody. Under the Respondent's argument, there would never be a final sentence and judgment. There would be no need for time requirements contest any criminal sentence and judgment. Any convicted defendant at any time could to file a motion claiming manifest injustice with the circuit court of the conviction having jurisdiction to grant the defendant's motion. This would return our State to the days of 27.26 motions being filed at any time with no limitation. *Wiglesworth v. Wyrick*, 531 S.W.2d 713 (Mo. banc 1976). There was reason Rule 27.26 was replaced with Rules 24.035 and 29.15. Under this scenario is no finality in criminal cases for the defendant, the victims, the judicial system,

or citizens.

The rule of law would not apply. Any defendant or any judge could at any time re-open a felony conviction and sentence. If the judge felt sorry that a child rapist is getting old and he has served enough of his life sentence, based upon the defendant's logic, the judge could find a manifest injustice to change the felony charge to a misdemeanor and amend the sentence and judgment to a misdemeanor. Or if the judge felt the defendant should serve a harsher punishment, based upon manifest injustice could change the defendant's misdemeanor conviction for DWI to a felony DWI. Under the law, this not allowed because the judgment is final. *State ex rel. Wagner v. Ruddy*, 582 S.W.2d 692 (Mo. 1979). *State ex rel. Simmons v. White*, 866 S.W.2d 443, 444 (Mo. 1993); *State ex rel. Johnston v. Berkemeyer*, 165 S.W.3d 222 (Mo. App. E.D. 2005).

The defendant only sought relief from the Respondent under Rule 29.07(d). As stated in Relator's prior brief, Rule 29.07(d), only allows the relief of withdrawing a plea of guilty. *State v. Sexton*, 75 S.W.3d 304, 306 (Mo. App. 2002). It does not grant authority to a judge to changing a felony charge to a misdemeanor nor allowing the amending of a felony sentence and judgment to a misdemeanor. If a court sets aside a defendant's guilty plea, the parties are returned to the status before the plea. *State v. White*, 838 S.W.2d 140,142 (Mo. App. 1992). The State can pursue the pending charge, refile any nolle charge, amend the charge, or elect not pursue the matter. *Id.* "When the plea of guilty is set aside the charge remains and the prosecuting attorney, not the court, is empowered to dismiss the charge pending" under Rule 29.07(d). *State re rel.*

Peach v. Tillman, 615 S.W.2d 514, 518 (Mo. App. 1981).

In this case, the defendant was out of time to seeking relief to withdraw his guilty plea. He had been in the Department of Corrections serving his sentence for over a year. For argument sakes, if the defendant had timely filed a motion under Rule 29.07(d) to set aside his plea before having his sentence executed, the only relief the court could grant is withdrawing of the defendant's plea. The State then has the option of pursue the pending charge, amending the charge, or not pursuing any charge. *White, supra; Peach, supra*.

The Relator contends that the defendant's sentence and judgment on November 6, 2015 followed the law. At the time, all defendants, victims, prosecutors, defense attorneys, judges, and the citizens relied on the well- established law of felony stealing. The defendant's sentence and judgment dated November 6, 2015, were final. If the Respondent's argument is followed then all felony stealing case since 2002 until end of August 2016 are contrary to the law. This would imply that every citizen, judge, probation officer, prosecutor, defense attorney, defendant, law enforcement officer ect....were wrong to rely upon the established rule of law, including case precedent for felony stealing. The required use of MAI-CR 324.02.1 and MACH-CR24.02.1 in all felony stealing cases was misplaced. No criminal sentence and judgment would be reliable or final even though all involved followed the well establish rule of law.

Because the defendant's sentence and judgment on November 6, 2015 was final, there is no jurisdiction for plain error review under Rule 29.12 (b) either. "The plain error rule is to be used sparingly and may not be used to justify review of every

point that has not been otherwise preserved for appellate review.” *State v. Jones*, 427 S.W.3d 191, 195 (Mo. banc 2014); concurring opinion, *State v. Collings*, 450 S.W.3d 741, 769 (Mo. banc 2014). If the sentence and judgment are final, the circuit court does not jurisdiction for plain error review. *State ex rel. Wagner v. Ruddy, supra; State ex rel. Simmons v. White, supra; State ex rel. Johnston v. Berkemeyer, surpa.* Plain error applies while the case is pending in the circuit court before or after trial. The right to appeal still exists. *Jones, surpa; Collings, supra.* It does not apply to cases with guilty pleas or to defendants who have exhausted post-conviction procedures or time restraints. *Vernor v. State*, 30 S.W.3d 196, 196-197 (Mo. App. 2000); *State v. Vickery*, 878 S.W.2d 460 (Mo. App. 1994). The defendant has not timely preserved any plain error review.

Rule 91 and Chapter 532 RSMo provides for a writ of habeas corpus. The jurisdiction for a habeas corpus is “in the county in which the person is held in custody at the time of filing the petition.” Rule 91.02(a); Section 532.030 RSMo.. *State v. White*, 838 S.W.2d at 142; *State ex rel. Simmons v. White*. 866 S.W.2d at 445; *State ex rel. Laughlin v. Bowersox*, 318 S.W. 695 (Mo banc. 2010). There are specific pleading and party requirements. Rule 91.04 and Rule 91.09. *Simmons v. White, supra.* The defendant has not plead nor met the requirements to seek habeas corpus relief. The defendant did not file the petition in the county of his confinement. The defendant did not name as a proper party the person nor place restraining the defendant. The defendant appears to be asking this Court to ignore the proper pleading requirements for writ of habeas corpus. It would appear that Rule 91.06 when reviewed with the entire Rule 91 and Section 532.030

RSMo, applies to the county where the defendant is confined.

Our criminal justice system has established rules of law. While the Respondent and defendant may claim this is a *Bazell* issue, Relator argues there is more at stake. As discussed previously, the defendant had a proper legal avenue to properly pursue any alleged *Bazell issue*. Without following well-established rules of law, the defendant has caused the Respondent to circumvent the established roles for the participants in the criminal justice system.

The Respondent Honorable, Laura Johnson exceeded her jurisdiction and authority on April 12, 2017, by granting the Rule 29.07(d) motion and entering a new charge and judgment from the November 6, 2015 charge and judgment. Granting the motion and changing the judgment is substantial error. At this point, the available procedure for the defendant to seek relief is a habeas corpus claim in the jurisdiction where he was housed. Relator's proper avenue to challenge the action of Respondent is via a petition for an extraordinary writ. *State ex rel. Kauble v. Hartenbach*, 216 S.W.3d 158, 159 (Mo. banc.2007).

Conclusion

The Circuit Court exceeded its jurisdiction and authority and acted outside the law and established rules by granting the Rule 29.07(d) motion and changing the felony charge filed on May 13, 2014, and November 6, 2015, judgment for sentence of 5 years in the Department of Corrections. The new order is a nullity and must be vacated. Relator asks this Court to set aside and vacate the new order judgment and to order Respondent to deny the Rule 29.07(d) motion. Relator prays that this Court issue a Writ of Prohibition, or in the alternative a Writ of Mandamus, to the Honorable Laura Johnson to prohibit her from changing the November 6, 2015, judgment and charge, to vacate the new order changing the charge, sentence, and judgment, to deny the defendant's Rule 29.07(d) motion, and for other and further relief as may be appropriate.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, the undersigned counsel hereby certifies that the above and foregoing was transmitted electronically to opposing counsel of record via the Missouri eFiling system on 4th day of September, 2017.

I further certify that the foregoing Reply Brief complies with the limitations contained in Rule 84.06(b) and that the Reply Brief contains 3,384 words as determined by Microsoft Word.

/s/John L. Young

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