



RICHARD MILLER,¹)
)
 Respondent,)
)
 vs.) No. SD34678
) Filed: September 19, 2017
 STATE OF MISSOURI,)
)
 Appellant.)

Honorable John D. Wiggins, Senior Judge

The State of Missouri (“the State”) appeals the motion court’s judgment granting Richard Miller’s (“Miller”) *pro se* Rule 29.15² motion for post-conviction relief, which asserted that the trial court³ erred in revoking Miller’s probation because the revocation took place after his probation term had expired. Finding merit to the State’s argument, we reverse and remand the motion court’s judgment for further proceedings consistent with this opinion.

³ The same judge presided over both the jury trial and sentencing hearing, a second judge presided over the probation revocation hearing and sentencing, and a third judge presided over the post-conviction motion hearing. For ease of reference, we use “trial court” to refer to the jury trial court, sentencing court, and probation revocation court; and “motion court” to refer to the court rendering judgment on Miller’s post-conviction motion.

Facts and Procedural Background

In the underlying criminal case, the State charged Miller with two counts of the class C felony of involuntary manslaughter in the first degree. A two-day jury trial commenced on September 14, 2007. The evidence at trial demonstrated the following.

On December 25, 2004, Miller was driving a pickup truck southbound on Highway 63, a two-lane roadway, just outside of Rolla. As Miller approached the Beaver Creek bridge, he passed a couple also driving southbound. After passing the couple, Miller stayed in the northbound lane of the highway. Moments later, while crossing the bridge, Miller's truck struck another vehicle head-on. The occupants of the vehicle struck by Miller died as a result of the accident.

The jury found Miller guilty as charged, and on August 29, 2007, the trial court suspended imposition of sentence and placed Miller on five years' probation.

On June 26, 2012, the State filed a motion to revoke probation asserting Miller had violated his probation on June 11, 2012, by "being in possession of an imitation controlled substance and drug paraphernalia[.]" On that same day, the State sent a notice that the probation revocation hearing was being set for August 8, 2012. Miller's probation was due to expire on August 28, 2012.

Because the chronology and timing of procedural events is relevant to the resolution of this appeal, we relate those pertinent events as shown from the docket sheet:

June 26, 2012	Motion for Probation Revocation filed by the State. Notice of Hearing for August 8, 2012, on probation revocation, filed by the State.
August 3, 2012	Entry of Appearance filed by Miller's counsel. Motion for Discovery filed by Miller's counsel.
August 8, 2012	"Per order of the court, cause passed to August 23, 2012 at 9:00am [sic]." Defendant ordered to appear."

August 9, 2012	Motion for Probation Revocation filed by the State. ⁴ Response to Request for Disclosure filed by the State. Notice of hearing filed by the State.
August 14, 2012	Probation Violation Hearing scheduled for August 23, 2012. Entry of Appearance filed by Miller's new attorney.
August 17, 2012	Motion to Withdraw filed by Miller's former attorney.
August 23, 2012	"Case reset for probation violation hearing on October 3, 2013 at 9:00am. [sic] Defendant is ordered to appear." "Hearing Continued From: 23-Aug-2012; 9:00 AM."
October 3, 2012	"Hearing Continued From: 03-Oct-2012; 9:00 AM."
October 16, 2012	Probation Violation Hearing Scheduled for December 5, 2012.
October 18, 2012	Amended Motion for Probation Revocation filed by the State. ⁵

On December 5, 2012, a probation revocation hearing was held. Prior to the hearing, the trial court addressed the issue of whether the trial court retained jurisdiction based on the timing of the revocation hearing. The following colloquy then took place:

THE COURT: There was a question about whether or not there was a necessity for a suspension. We looked up some case law, and it states that there must be a clear manifestation of an intention to revoke. The motion to revoke did that. And, secondly, that there was an attempt to get the matter set, reasonable efforts made to get it resolved prior to the expiration of five years.

I went back through the file. This matter has been set at least once, if not twice. Was continued by agreement without objection past the date – and specifically to today.

So, first of all, do the attorneys agree that that's what's transpired up to this point?

[THE STATE]: The State so stipulates, your Honor.

THE COURT: [Miller's attorney]?

⁴ As best we can discern from the record, the August 9, 2012 motion to revoke probation is identical to the June 26, 2012 motion to revoke probation. At the evidentiary hearing, the parties stipulated that the August 9, 2012 motion to revoke was intended as an attachment to the Response to Request for Disclosure filed by the State.

⁵ The October 18, 2012 amended motion to revoke probation added two additional probation violations: domestic assault in the third degree in 2008 in Boone County, and driving with a revoked license in 2009 in Phelps County.

[MILLER’S ATTORNEY]: Yes, your Honor.

THE COURT: The oral motion to dismiss filed in these proceedings earlier this morning then is denied. I’m of the opinion that the State’s manifest and clear intent, reasonable efforts were made. It passed the five years by agreement of [Miller]; therefore, this Court has not lost jurisdiction.

Miller’s attorney then announced that Miller was going to “admit to those . . . allegations stated in the motion to revoke[,]” that there was “actually three separate misdemeanors ranging back to 2008 through 2012, and those cases have been finalized in municipal or associate court.” Miller admitted to the trial court that he violated the terms of his probation by virtue of the 2008, 2009, and 2012 charges of which he was either found guilty or voluntarily plead guilty to, and that currently, there were no pending charges against him.

The trial court sentenced Miller to five years in prison on each count, with the sentences to run consecutively, for a total of ten years. Miller appealed his convictions and sentences, and they were affirmed by this Court on October 21, 2014. **State v. Miller**, 448 S.W.3d 331 (Mo.App. S.D. 2014). Mandate was issued on December 24, 2014.

On March 19, 2015, Miller filed a *pro se* motion to vacate, set aside or correct the judgment or sentence⁶ alleging that the trial court did not have jurisdiction to revoke his probation because the revocation occurred after his probation ended.

⁶ Miller filed his Rule 29.15 motion for post-conviction relief on March 19, 2015, 84 days after this Court’s mandate issued. Although Miller filed an affidavit to proceed as a poor person, Miller indicated in his post-conviction motion that “Carrie Gerischer represents me for the purposes of preparation of this motion.” Thereafter, on April 6, 2015, Carrie Gerischer entered an appearance in her capacity as a private attorney: “Carrie Gerischer, Attorney at Law, LLC.” On April 8, 2015, two days after Miller’s retained counsel filed her entry of appearance, the motion court entered an order stating: “state public defender ordered to represent the plaintiff in the above referenced case.” The record reveals no entry of appearance by the public defender’s office; rather, all subsequent filings and motions were made and argued by Miller’s retained counsel, Carrie Gerischer. Because the record demonstrates Miller was represented by retained counsel and not a public defender, the abandonment doctrine of **Moore v. State**, 458 S.W.3d 822 (Mo. banc 2015), does not apply. **Gittemeier v. State**, No. 95953, slip op. at *10 (Mo. banc Sept. 12, 2017). Therefore, retained counsel was not required to, and did not, file an amended post-conviction motion or statement in lieu thereof. Rule 29.15(e).

An evidentiary hearing was held on July 27, 2016. The parties announced there was an issue of jurisdiction and proposed to present evidence by way of a “timeline by stipulation[.]” Using the docket sheet from the probation revocation case, the State recited into the record the stipulated timeline. Specifically, the State recounted that the continuances of the August 23, 2012 and October 3, 2012 probation revocation hearings were “by agreement of the parties[.]” At the conclusion of the State’s recitation of the stipulated timeline, Miller’s attorney stated that Miller “maintains that he did not agree to the – whatever his [attorney] may have done that he did not agree to any continuances of the hearing. . . . I think that’s one of those he said/he said type things.” The State offered no additional evidence.

Miller testified that his attorney “did do a verbal objection” to the “first two continuances,” and “argued to the court that . . . my probation was about to expire.” “[T]he main issue, was that he did make objection and . . . it was just a verbal argument.”⁷

On September 9, 2016, the motion court issued its findings and judgment granting Miller’s motion. The motion court specifically found that the hearing set for “August 8, 2012 was continued or reset to August 23, 20[12⁸] due to the entry of conflict counsel for [Miller].” The motion court also found that the “August 23, 20[12] hearing was reset by signed memorandum of said date to October 3, 2012[.]” and that the memorandum was “signed by counsel for [Miller] and counsel for the [State] and does not indicate which party, if either, requested said continuance nor does it indicate the reason for the continuance.”

⁷ It is unclear from the record before us when any verbal argument made by Miller’s attorney to the continuances of the August 23, 2012 and October 3, 2012 probation violation hearings took place. Miller suggested in his post-conviction testimony that it occurred at the probation violation hearing on December 5, 2012. A review of that transcript reveals no such verbal argument, and Miller fails to provide this Court with any citation to the record where the specific verbal argument can be found other than by citation to Miller’s own post-conviction testimony.

⁸ The motion court references the year 2007 several times in its findings when referring to events that occurred after the June 26, 2012 filing of the probation revocation. We believe, and the parties agreed at oral argument, that these are typographical errors and that the motion court intended to reference the year 2012.

The motion court concluded that the trial court did not have jurisdiction to revoke Miller's probation because the trial court did not make "every reasonable effort to hold the revocation hearing during the probationary period[,]" and that "there is no indication in the record for the reason for the continuance of the revocation hearing from its August 23, 20[12] date." This appeal followed.

In the State's sole point on appeal, the State argues that the motion court clearly erred in granting Miller's post-conviction motion in that the trial court made every reasonable effort to hold the revocation hearing within the probationary period.

Standard of Review

Appellate review under Rule 29.15 "is limited to a determination of whether the findings and conclusions of the motion court are clearly erroneous." *Lawrence v. State*, 160 S.W.3d 825, 829 (Mo.App. S.D. 2005) (citing Rule 29.15(k)). "The findings and conclusions of the motion court are clearly erroneous only if, after a thorough review of the record, [this Court is] left with the definite and firm impression that a mistake has been made." *Id.*

Analysis

The State argues that the motion court clearly erred in granting Miller's post-conviction motion to vacate, set aside, or correct the judgment or sentence in that the record shows the trial court "made every reasonable effort to hold the revocation hearing during the probationary period." Specifically, the State argues that the probation revocation hearing was continued twice with Miller's consent, and the hearing was held within five months after his probationary period ended.

"A term of probation commences the date it is imposed." *Petree v. State*, 190 S.W.3d 641, 642 (Mo.App. W.D. 2006) (citing section 559.036.1).⁹

⁹ All references to statutes are to RSMo as amended through 2016, unless otherwise indicated.

A trial court retains jurisdiction to revoke probation after expiration of the term if (1) there is an affirmative manifestation of an intent to revoke probation prior to the expiration of the probationary period; and (2) if every reasonable effort is made to notify the probationer of the intent to revoke probation and to conduct a hearing prior to the expiration or probation.

Petrie, 190 S.W.3d at 642. “Unless the court meets both of these conditions, it cannot hold a revocation hearing after probation expires.” **State ex rel. Strauser v. Martinez**, 416 S.W.3d 798, 801 (Mo. banc 2014). A defendant’s consent to continuances, however, must be considered in determining whether the motion court made every reasonable effort to conduct the revocation hearing during the probationary term. **Suber v. State**, 516 S.W.3d 386, 391 (Mo.App. E.D. 2017); **Robinson v. State**, 509 S.W.3d 811, 815 (Mo.App. E.D. 2016).

At the December 5, 2012 probation revocation hearing, at the outset of proceedings, the following colloquy occurred:

THE COURT: We looked up some case law, and it states that there must be a clear manifestation of an intention to revoke. The motion to revoke did that. And, secondly, that there was an attempt to get the matter set, reasonable efforts made to get it resolved prior to the expiration of five years.

I went back through the file. This matter has been set at least once, if not twice. Was continued by agreement without objection past the date – and specifically to today.

So, first of all, do the attorneys agree that that’s what’s transpired up to this point?

[THE STATE]: The State so stipulates, your Honor.

THE COURT: [Miller’s counsel]?

[MILLER’S ATTORNEY]: Yes, your Honor.

In other words, by stipulation of counsel, Miller made the following judicial admissions at the outset of the probation revocation hearing: (1) there was a motion to revoke, which was conceded to sufficiently manifest a clear intention to revoke his probation; (2) the probation revocation hearing was delayed past the terminus of Miller’s probation period; (3) that such delay

was occasioned by agreement of and without objection by Miller; and (4) that reasonable efforts to resolve the case before the expiration of Miller's probation had occurred.

"An admission made by an attorney in open court during trial which is against the interests of his client[]" constitutes a judicial admission for purposes of the attorney's client. *State v. Licata*, 501 S.W.3d 449, 444 n.5 (Mo.App. W.D. 2016) (internal quotations and citations omitted). A judicial admission "serves as a substitute for evidence and dispenses with proof of the actual fact." *State v. Howell*, 454 S.W.3d 386, 388 (Mo.App. E.D. 2015) (internal quotation and citation omitted). "A judicial admission . . . concedes for the purpose of the litigation that a certain proposition is true and is conclusive on the party making it." *State v. Wheeler*, 439 S.W.3d 241, 245 (Mo.App. W.D. 2014) (internal quotation and citation omitted). Judicial admissions "are not a means of evidence, but a waiver of all controversy and therefore a limitation of the issues." *Cohen v. Normand Property Associates, L.P.*, 498 S.W.3d 473, 481 (Mo.App. W.D. 2016) (internal quotation and citation omitted).

As of the time of Miller's judicial admission, the issue of whether the probation revocation hearing was continued with Miller's consent and without his objection was permanently waived, and no longer a matter of controversy subject to Miller's evidentiary proof or disputation.

At Miller's post-conviction relief hearing on July 27, 2016, the motion court took judicial notice of the underlying criminal file, including the transcript of the probation revocation hearing. At the evidentiary hearing, Miller testified that his attorney objected to the continuances to his revocation hearings:

[MILLER]: Initially, when the continuances, the first two continuances that were -- were done prior to the expiration of my probation by -- by process of law, the -- my representation[] . . . did do a verbal objection on both those occasions and argued to the court that -- that I was about to be -- you know, my probation was about to expire.

On both occasions, the prosecutor's office -- or the prosecutor himself had argued that they had maintained jurisdiction to do a revocation after expiration by

satisfying one of the two conditions of 559.036.8 and without regard to the -- to the third -- third portion of the second condition of -- which case law, you know, will show that -- that it needs to be conducted prior to -- prior to the expiration if -- you know, if they appear -- or if the defendant appears.

So that—that was the main issue, was that he did make objection and there was—it was just a verbal argument. [T]here wasn't any research done at—at that point.

In the motion court's findings and conclusions of law, the motion court made specific findings that:

4. The Public Defender entered his appearance for [Miller] on Aug. 3, 2012, but the hearing set for August 8, 2012 was continued or reset to August 23, 20[12] due to the entry of conflict counsel for [Miller].

5. The August 23, 20[12] hearing was reset by signed memorandum of said date to October 3, 2012. This document is signed by counsel for [Miller] and counsel for the [State] and does not indicate which party, if either, requested said continuance nor does it indicate the reason for the continuance.

On this basis, the motion court found that there was no indication that the trial court made every reasonable effort to hold the revocation hearing during the probationary period, because the record did not show “the reason for the continuance of the revocation hearing from its August 23, 20[12] date.”

The motion court's judgment was in error. At the outset of the December 5, 2012 probation revocation hearing—of which the motion court took notice—Miller's counsel stipulated that the hearings were continued with Miller's consent and without objection. This was, therefore, “waiver of all controversy” as to that issue, and not subject to, or reliant on, evidentiary proof or dispute. *Cohen*, 498 S.W.3d at 481; *Wheeler*, 439 S.W.3d at 245. In other words, this was not a live issue on which the court was free to make credibility determinations based on the evidence—by stipulation and judicial admission, this matter was permanently resolved at the outset of the December 5, 2012 probation revocation hearing.

The motion court's finding that the trial court failed to make every reasonable effort to hold the revocation hearing during the probationary period was clear error, and was also prejudicial because this was the motion court's sole rationale for granting Miller's motion to vacate, set aside, or correct the judgment or sentence.

The judgment of the motion court is reversed and remanded for further proceedings consistent with this opinion.

WILLIAM W. FRANCIS, JR., J. - OPINION AUTHOR

NANCY STEFFEN RAHMEYER, C.J., P.J. - Concur

JEFFREY W. BATES, J. - Concur