

IN THE
MISSOURI SUPREME COURT

DAVID LATHAM)
)
 Appellant,)
)
 vs.) No. SC 96315
)
 STATE OF MISSOURI,)
)
 Respondent.)

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF
JASPER COUNTY, MISSOURI
TWENTY-NINTH JUDICIAL CIRCUIT
THE HONORABLE GAYLE CRANE, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from the denial of appellant's motion for postconviction relief pursuant to Rule 24.035 with an evidentiary hearing by the Honorable Gayle Crane, judge of the Circuit Court of Jasper County, Missouri. Judge Crayne entered a final judgment December 29, 2015 denying Mr. Latham's amended motion. (LF 72-77).

Jurisdiction of this appeal originally was in the Missouri Court of Appeals, Southern District. Article V, section 3, Mo. Const.; section 477.060. This Court thereafter granted Mr. Latham's application for transfer, so this Court has jurisdiction. Article V, sections 3 and 10, Mo. Const. and Rule 83.04.

STATEMENT OF FACTS

David Latham was charged with the class A felony of trafficking in the second degree. (LF 22). The information alleged that on June 6, 2010, Mr. Latham “possessed 6 grams or more of a mixture of substance containing a cocaine base, a controlled substance, knowing of its presence and nature.” (LF 22). Mr. Latham pleaded guilty to this offense at a hearing held on January 9, 2012. (LF 27-29). At the sentencing hearing, the court stated that it was not comfortable sentencing Mr. Latham to merely ten years in prison. (LF 33). The Court instead, offered to place Mr. Latham on probation with a fifteen year backup sentence. (LF 33). Mr. Latham agreed to this framework. (LF 33).

On August 12, 2013, Mr. Latham’s probation was revoked, and his sentence was executed. (LF 34-37). On November 20, 2013, Mr. Latham timely filed a petition to vacate, set aside, or correct his judgment or sentence pursuant to Rule 24.035. (LF 39-46). The motion court appointed the public defender’s office to represent Mr. Latham on December 11, 2013, but a transcript of Mr. Latham’s guilty plea was not filed until March 25, 2014. (LF 12, 47).

On June 18, 2014, counsel for Mr. Latham filed a statement of intent not to file an amended motion. (LF 50-52). Because no motion for extension was ever filed or granted, this statement of intent was filed after the sixty day deadline to file an amended motion. On June 23, 2014, Mr. Latham filed a *pro se* amended motion. (LF 54-60). Mr. Latham alleged in the amended motion that his counsel was ineffective “in that counsel erroneously allowed defendant/Movant to be

prosecuted for the criminal offense of Trafficking in Drugs/or Attempt to Traffick (sic) in Drugs in violation of Section 195.223 RSMO. when no element of trafficking existed that involved a Controlled Buy conducted by Police officials nor was movant present in the ‘shared’ domicile when law enforcement searched the premeises (sic).” (LF 55).

An evidentiary hearing on Mr. Latham’s amended motion was held on September 1, 2015. (TR 1). At the hearing, counsel for Mr. Latham asked the court to take judicial notice of the 2010 version of Section 195.223 in place at the time of Mr. Latham’s charged crime. That statute states in part that “[a] person commits the crime of trafficking drugs in the second degree if . . . he possesses or has under his control . . . more than one hundred fifty grams of a mixture or substance containing a detectable amount of coca leaves, . . . cocaine salts and their optical and geometric isomers[.]” Section 195.223.2, RSMo Cum. Supp. 2010. Under this section, it takes at least one hundred and fifty grams of cocaine salt to be a class B felony, while it takes at least four hundred and fifty grams of cocaine salt to be a class A felony. The statute also states that “[a] person commits the crime of trafficking drugs in the second degree if . . . he possesses or has under his control . . . more than two grams of a mixture or substance described in subsection 2 of this section which contains cocaine base.” Section 195.223.3, RSMo Cum. Supp. 2010.

At the evidentiary hearing, plea counsel agreed that the lab report showed that Mr. Latham possessed 6.09 grams of cocaine salt and not cocaine base. (TR

7). Plea counsel agreed that Mr. Latham was charged with possessing cocaine base. (TR 15). She agreed that under the statute, Mr. Latham needed to possess at least 150 grams of cocaine salt to be guilty of trafficking. (TR 16). She testified that although Mr. Latham was improperly charged, the decision to plead guilty belonged to Mr. Latham. (TR 17-18). While plea counsel had numerous discussions with Mr. Latham, she did not specifically recall discussing the fact that he had been improperly charged with trafficking cocaine base. (TR 18-19).

Plea counsel discussed with Mr. Latham that if the case was remanded, an additional gun charge could have been added. (TR 33). Also, Mr. Latham could have been charged as a prior and persistent offender. (TR 35).

Mr. Latham testified at the evidentiary hearing that his attorney never told him that he had been charged improperly. (TR 38). His plea counsel instead only informed him about the weight necessary for trafficking. (TR 38). He testified that had he known he did not possess enough cocaine salt to constitute trafficking, he would not have pleaded guilty to that charge. (TR 39). Instead, he would have taken his case to trial. (TR 39). He admitted that he had two prior felony convictions. (TR 46).

On December 29, 2015, the motion court entered findings of fact and conclusions of law. (LF 72). The court acknowledged Mr. Latham's testimony that he would not have taken the plea deal had his attorney told him about the problems with the charged offense. (LF 76). The court stated, though, that Mr. Latham's argument was flawed in that the court did not accept the original plea

bargain of ten years in prison. (LF 76). The court stated that Mr. Latham failed to show “that anything would have changed if [plea counsel] would have . . . objected to the factual basis[.]” (LF 76).

The court acknowledged that Mr. Latham “could argue that the most the Court could have given Movant would be 7 years.” (LF 76). However, the court went on to state that Mr. Latham presented “no evidence that the State wouldn’t have filed under prior and persistent offender or a charge for the weapon.” (LF 76). The Court concluded that Mr. Latham “provided no evidence that would show Movant was prejudiced or would have received a more favorable or different outcome even taking his allegations as true.” (LF 76). The Court further concluded that Mr. Latham “wanted the probation and agreed to the 15 year backup.” (LF 76). This appeal follows.

POINT RELIED ON

The motion court clearly erred in denying Mr. Latham’s claim in his *pro se* amended motion that his plea counsel was ineffective for allowing him to plead guilty to the criminal offense of trafficking because Mr. Latham received ineffective assistance of counsel in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that at most, Mr. Latham possessed six grams of cocaine salt, which was not enough to be guilty of either the class A felony or class B felony of trafficking, and a reasonable attorney would have discussed this with him; furthermore, Mr. Latham was prejudiced by his attorney’s ineffectiveness.

Johnson v. State, 210 S.W.3d 427 (Mo. App. S.D. 2006);

Mason v. State, 488 S.W.3d 135 (Mo. App. S.D. 2016);

Messner v. American Union Ins. Co., 119 S.W.3d 642 (Mo. App. S.D. 2003);

Stanley v. State, 420 S.W.3d 532 (Mo. banc 2014);

United States Constitution, Sixth and Fourteenth Amendments;

Missouri Constitution, Article I, Sections 10 and 18(a);

Section 195.223, RSMo Cum. Supp. 2010; and

Rule 24.035.

ARGUMENT

The motion court clearly erred in denying Mr. Latham’s claim in his *pro se* amended motion that his plea counsel was ineffective for allowing him to plead guilty to the criminal offense of trafficking because Mr. Latham received ineffective assistance of counsel in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that at most, Mr. Latham possessed six grams of cocaine salt, which was not enough to be guilty of either the class A felony or class B felony of trafficking, and a reasonable attorney would have discussed this with him; furthermore, Mr. Latham was prejudiced by his attorney’s ineffectiveness.

A. Standard of Review

Review on appeal of a Rule 24.035 motion is limited to a determination of whether the findings, conclusions, and judgment of the motion are clearly erroneous. *State v. Leisure*, 838 S.W.2d 49, 54 (Mo. App. E.D. 1992). They are clearly erroneous only if a review of the entire record leaves the reviewing court with a definite and firm impression that a mistake has been made. *Id.*

B. A statement in lieu of an amended motion filed after the deadline for filing an amended motion should create a presumption that abandonment has occurred

Under Rule 24.035(g), appointed counsel has sixty days to file an amended motion from the time that both he or she is appointed and the transcript of the early proceedings has been filed. In the present case, this deadline passed without an amended motion being filed. Under this Court's decision in *Moore v. State*, had counsel attempted to file an amended motion after this date, a presumption of abandonment would have applied. 458 S.W.3d 822, 825-26 (Mo. banc 2015). If counsel has been found to have abandoned the movant, the motion court must adjudicate the amended motion instead of the initial *pro se* motion. *Id.* at 826.

Rule 24.035(e) states:

When an indigent movant files a *pro se* motion, the court shall cause counsel to be appointed for the movant. Counsel shall ascertain whether sufficient facts supporting the claims are asserted in the motion and whether the movant has included all claims known to the movant as a basis for attacking the judgment and sentence. If the motion does not assert sufficient facts or include all claims known to the movant, counsel shall file an amended motion that sufficiently alleges the additional facts and claims. If counsel determines that no amended motion shall be filed, counsel shall file a statement setting out facts demonstrating what actions were taken to ensure that (1) all facts supporting the claims are asserted in the *pro se* motion and (2) all claims known to the movant are alleged in the *pro se* motion. The statement shall be presented to the

movant prior to filing. The movant may file a reply to the statement not later than ten days after the statement is filed.

Under current law from the Missouri Court of Appeals, no presumption of abandonment occurs when appointed counsel files a statement in lieu of an amended motion after the deadline for filing an amended motion. *See Mason v. State*, 488 S.W.3d 135 (Mo. App. S.D. 2016); *Pennell v. State*, 467 S.W.3d 367 (Mo. App. E.D. 2015); and *Scott v. State*, 472 S.W.3d 593 (Mo. App. W.D. 2015). In *Pennell v. State*, the Eastern District Court of Appeals stated the following in reaching its holding:

Here, Rule 29.15(e) provides two avenues for action by post-conviction counsel: filing an amended motion or filing a statement in lieu of an amended motion. Rule 29.15(g) provides a time limit for only one of those options: the amended motion. Thus, it appears from the language of the rule that the Supreme Court intended for the deadline to apply to only the amended motion and not to the statement in lieu of an amended motion.

467 S.W.3d at 373.

However, this Court stated in *Stanley v. State* that “[t]he movant is responsible for timely filing the initial motion, and appointed counsel must timely file either an amended motion or a statement that the pro se motion is sufficient.” 420 S.W.3d 532, 540 (Mo. banc 2014). This language aligns with this Court’s previous discussion of the issue in *Moore v. State*, where this Court stressed the

timeliness of a statement in lieu as a critical factor in an abandonment determination. 934 S.W.2d 289, 292 (Mo. banc 1996).

It simply serves no purpose to allow appointed counsel to wait until after the initial sixty day deadline has passed to file a statement in lieu of an amended motion. Surely if counsel is diligently working on the movant's case, this statement should be filed before the deadline has passed. While it is true that no specific deadline for filing a statement in lieu is provided in Rule 24.035, no rule states that counsel has unlimited time to file such a statement. The decisions of *Pennell*, *Mason*, and *Scott* create the absurd scenario where on the sixty-first day, if no amended motion or statement in lieu has been filed, the movant has either been abandoned or *not* abandoned based on the later decision of counsel as to whether or not an amended motion is necessary. To avoid this scenario, this Court should hold that abandonment occurs when counsel fails to file either an extension, an amended motion, or a statement in lieu by the initial deadline.

C. In the alternative, Mr. Latham's *pro se* amended motion should be treated as timely

If this Court chooses to follow the holdings of *Pennell*, *Mason*, and *Scott*, this does not end the matter in the present case. This is because under Rule 24.035(e), when appointed counsel files a statement in lieu of an amended motion, the statement "shall be presented to the movant prior to filing," and "[t]he movant

may file a reply to the statement not later than ten days after the statement is filed.”

Here, the movant was unsatisfied with this statement, so he chose to file his own *pro se* amended motion. (LF 54-60). The Southern District Court of Appeals held in *Johnson v. State* that movants may file *pro se* amended motions as long as they are timely. 210 S.W.3d 427, 432 (Mo. App. S.D. 2006).

The question here is whether or not Mr. Latham’s *pro se* amended motion should be treated as being timely filed. It *should* be treated as timely because Rule 24.035(e) allows the movant to reply within ten days of a statement in lieu being filed. Here, Mr. Latham filed the *pro se* amended motion within five days of the statement in lieu being filed. Surely nearly all movants have the expectation that their counsel will file an amended motion. If counsel acts outside of that expectation, the movant should have a remedy.

In its slip opinion, the Southern District determined that because Mr. Latham’s *pro se* amended motion was filed outside of the time limits contained in Rule 24.035(g), it must be treated as untimely. (Slip Opinion, *5). The problem with this analysis is that it nullifies the language of Rule 24.035(e). If a statement in lieu is filed after the deadline for an amended motion, then what good could a reply within ten days possibly do for the movant? Surely a movant is already permitted to communicate with appointed counsel under the general rules of professional responsibility. Allowing for a reply therefore must mean something more than just basic communication.

Rules 24.035(e) and (g) should be read together in order to create a purpose for the ten day time period for a response. If counsel files a statement in lieu, a movant must be allowed to either convince counsel to file an amended motion or to file his or her own amended motion. An amended motion filed with ten days of a statement in lieu should therefore be treated as timely, even if it is filed outside of the time limits contained in Rule 24.035(g).

In the alternative, Rule 24.035(e) should serve as a *de facto* time limit for filing a statement in lieu. In other words, if a statement in lieu is filed less than ten days before an amended motion is due, it should constitute abandonment.

In the present case, Mr. Latham filed a *pro se* amended motion five days after appointed counsel filed a statement in lieu. (LF 50-52, 54-60). This Court should either find that a presumption of abandonment occurred when the statement in lieu was filed after the deadline for filing an amended motion or it should treat Mr. Latham's *pro se* amended motion as timely.

D. Analysis

Mr. Latham has the right to effective assistance of counsel, a violation of which is shown by establishing that (1) trial counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances; and (2) appellant was prejudiced thereby. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). For an appellant to succeed on a claim that his guilty plea resulted from ineffective assistance of counsel, he must

demonstrate that counsel's performance was both deficient and prejudicial. *Hill v. Lockhart*, 474 U.S. 52, 57-58 (1985).

The validity of a plea of guilty depends on whether it was made voluntarily and intelligently. *Johnson v. State*, 318 S.W.3d 313, 317 (Mo. App. E.D. 2010), citing *Reynolds v. State*, 994 S.W.2d 944, 946 (Mo. banc 1999). “A plea of guilty is not made voluntarily if the defendant is misled, or is induced to plead guilty by fraud or mistake.” *Id.* (internal modification omitted), citing *Roberts v. State*, 276 S.W.3d 833, 836 (Mo. banc 2009). “Mistaken beliefs about sentencing affect a defendant’s ability to knowingly enter a guilty plea if the mistake is reasonable and the mistake is based upon a positive representation upon which the movant is entitled to rely.” *Roberts*, 276 S.W.3d at 842, citing *Dorsey v. State*, 115 S.W.3d 842, 845 (Mo. banc 2003).

Here, reasonable trial counsel would have noticed that the lab report indicated Mr. Latham possessed 6.09 grams of cocaine salt and not cocaine base. (TR 7).¹ Plea counsel agreed that under Section 195.223, RSMo Cum. Supp. 2010, Mr. Latham needed to possess at least 150 grams of cocaine salt to be guilty of trafficking. (TR 16). Reasonable plea counsel would have discussed the discrepancy between the lab report and the charging document with Mr. Latham.

¹ See *State v. Smith*, 825 S.W.2d 388 (Mo. App. S.D. 1992)(reversing a defendant’s conviction for trafficking because the information referred only to six grams of cocaine and not cocaine base).

While plea counsel had numerous discussions with Mr. Latham, she did not specifically recall discussing the fact that he had been improperly charged with trafficking cocaine base. (TR 18-19).

Supreme Court Rule 24.02(e) provides that “[t]he court shall not enter a judgment upon a plea of guilty unless it determines that there is a factual basis for the plea.” Furthermore, if the facts presented to the court during the guilty plea hearing do not establish the commission of the offense, the court should reject the guilty plea. *Carmons v. State*, 26 S.W.3d 382, 384 (Mo. App. W.D. 2000). “A factual basis for a guilty plea is necessary to ensure that the guilty plea was intelligently and voluntarily entered, thereby satisfying due process requirements.” *State v. Henry*, 88 S.W.3d 451, 457 (Mo. App. W.D. 2002). While Rule 24.02(e) is not directly implicated by this case, it is nonetheless concerning that based on the lab report, Mr. Latham was allowed to plead guilty to an offense that he did not commit.²

² It appears that the lab report was not entered into evidence below, and therefore cannot be made a part of the record on appeal. However, plea counsel confirmed that it stated Mr. Latham possessed cocaine salt. Furthermore, the motion court implicitly accepted the accuracy of the lab report by assuming that Mr. Latham would have only been subject to a seven year sentence for the cocaine salt that he possessed. (LF 76).

In its findings of fact and conclusions of law, the motion court acknowledged Mr. Latham's testimony that he would not have taken the plea deal had his attorney told him about the problems with the charged offense. (LF 76). The court stated, though, that Mr. Latham's argument was flawed in that the court did not accept the original plea bargain of ten years in prison. (LF 76). The court stated that Mr. Latham failed to show "that anything would have changed if [plea counsel] would have . . . objected to the factual basis[.]" (LF 76).

The court acknowledged that Mr. Latham "could argue that the most the Court could have given Movant would be 7 years." (LF 76). However, the court went on to state that Mr. Latham presented "no evidence that the State wouldn't have filed under prior and persistent offender or a charge for the weapon." (LF 76). The Court concluded that Mr. Latham "provided no evidence that would show Movant was prejudiced or would have received a more favorable or different outcome even taking his allegations as true." (LF 76). The Court further concluded that Mr. Latham "wanted the probation and agreed to the 15 year backup." (LF 76).

The Court clearly erred in its analysis because it was based on pure speculation about what could have happened had Mr. Latham been correctly advised about his charge. *See Messner v. American Union Ins. Co.*, 119 S.W.3d 642, 649-50 (Mo. App. S.D. 2003)("It is axiomatic that judgments based on speculation and conjecture cannot stand."), quoting *Stone v. Farmington Aviation Corp.*, 232 S.W.2d 495, 499 (Mo. 1950). It is true that the plea court would not

accept a plea bargain of ten years in prison, but that was for the class A felony of trafficking. The plea court very well may have accepted a ten year plea bargain for possession of a controlled substance, even if Mr. Latham was charged as a prior and persistent offender. Furthermore, Mr. Latham would have been much more likely to take his chances with a jury on a charge (possession) that does not carry a minimum sentence of ten years in prison (trafficking).

In the present case, Mr. Latham received ineffective assistance of counsel in that his counsel should have noticed and explained that the lab report contradicted the charging document, and that Mr. Latham could not be convicted of trafficking. Furthermore, Mr. Latham was prejudiced in that he would not have pleaded guilty to trafficking had he known about this defense. Therefore, the motion court clearly erred in denying Mr. Latham's *pro se* amended motion.

CONCLUSION

Because the statement in lieu of an amended motion was not filed until after the deadline for filing an amended motion had passed, this Court should remand the case for an abandonment hearing. In the alternative, because Mr. Latham's *pro se* amended motion was filed within ten days of appointed counsel's statement in lieu, it should be treated as timely, and the motion court's findings of fact and conclusions of law should be reversed.

Respectfully submitted,

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Certificate of Compliance

I, Samuel E. Buffaloe, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2010, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 4,038 words, which does not exceed the 31,000 words allowed for an appellant's brief.

/s/ Samuel Buffaloe

Samuel Buffaloe