



Missouri Court of Appeals

Southern District

Division One

IN THE MATTER OF THE CARE)
AND TREATMENT OF)
JAMES BRADDY,)
a/k/a JAMES A. BRADDY,)
a/k/a JAMES ARNOLD BRADDY, JR.,)
Respondent-Appellant.)

No. SD34550
Filed: November 29, 2017

APPEAL FROM THE CIRCUIT COURT OF IRON COUNTY

Honorable Randall L. Head

AFFIRMED

James Braddy¹ ("Braddy") brings five points in appealing a judgment that committed him to the Department of Mental Health's custody following a jury finding that he is a sexually violent predator ("SVP"). *See* sections 632.480 through 632.513.² Finding that point 2 does not present a cognizable claim, and the remainder of Braddy's points are not preserved for our review, we affirm.

¹ A/k/a James A. Braddy, a/k/a James Arnold Braddy, Jr.

² Statutory references are to RSMo Supp. (2014). Rule references are to Missouri Court Rules (2017). Braddy's opening brief raised six points, but Braddy has since withdrawn point 1. For the sake of continuity, we refer to points 2 through 6 as each point is labeled in Braddy's opening brief.

Point 2 – Ineffective Assistance of Counsel

In point 2, Braddy argues that he was denied effective assistance of trial counsel. Specifically, Braddy claims trial counsel was ineffective for introducing certain evidence of the process implemented to screen for potential SVP's and failing to object to other evidence of that same screening process.

The parties initially dispute the proper procedural vehicle for bringing a claim of ineffective assistance of counsel in SVP proceedings (*e.g.*, via direct appeal, a habeas proceeding pursuant to Rule 91.01, or remand to the trial court for an evidentiary hearing). We need not resolve this dispute because Braddy's point collapses for a more fundamental reason: no matter the procedural vehicle employed, Missouri does not recognize a claim for ineffective assistance of counsel following an SVP proceeding.

Indeed, Braddy concedes that no Missouri court has yet recognized such a claim. He argues, however, that Missouri should recognize such a right based primarily on the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Due Process Clause of the Missouri Constitution. *See* U.S. Const. Amend. XIV; Mo. Const. art. I, § 10 (1945). In support, he cites to cases from a number of other jurisdictions, which he claims recognize such a right.

The Western District of this Court heard an identical argument in ***Grado v. State***, WD79756, 2017 WL 4622132, at *7-9 (Mo. App. W.D. Oct. 17, 2017). After summarizing the current state of the law in this area, ***Grado*** concluded that "[w]here the Missouri Supreme Court has had the opportunity to recognize such a claim but has declined to decide the issue or amend its own rules, we decline to take such a leap at this

time."³ *Id.* at *7. **Grado** also addressed Braddy's reliance on cases from other jurisdictions, finding that the application of those holdings in Missouri "should more properly be determined by the Missouri Supreme Court and the legislature." *Id.* at *8.

We agree with the reasoning employed by our sister district, and "will not recognize a new cause of action for ineffective assistance of counsel following a[n] SVP trial where such a claim has yet to be recognized in this state." *Id.* at *9. Point 2 is denied.

Points 3 through 6 – Issues Not Preserved for Appellate Review

This Court addresses points 3 through 6 together because they fail for the same reason: they are not preserved for appellate review due to the lack of a timely filed motion for new trial.

Rule 78.04 governs the time for filing a motion for new trial in civil cases, and provides that such a motion "shall be filed not later than thirty days after the entry of judgment." Rule 78.04.⁴ In jury-tried civil cases, "allegations of error must be included in a motion for a new trial in order to be preserved for appellate review." Rule 78.07(a). Rule 78.07 makes exceptions only for: "(1) [q]uestions of jurisdiction over the subject matter; (2) [q]uestions presented in motions for judgment under Rule 72.01(b); and (3) [q]uestions relating to motions for directed verdict that are granted at trial." Rule 78.07(a).

For purposes of this rule, to say that an allegation of error in a motion for new trial is not preserved for review is the same as to say that

³ The case referenced by the Western District as placing the issue before the Supreme Court of Missouri was *this* case. As the **Grado** Court correctly noted, this case was before the Supreme Court of Missouri, but it was retransferred to this Court in light of ***In re Care & Treatment of Kirk***, 520 S.W.3d 443 (Mo. banc 2017), and ***In re Care & Treatment of Nelson***, 521 S.W.3d 229 (Mo. banc 2017), neither of which decided whether a claim for ineffective assistance of counsel in SVP proceedings was cognizable.

⁴ "[I]t is clear that SVP Act proceedings are civil in nature." ***In re Care & Treatment of Tyson***, 249 S.W.3d 849, 853 (Mo. banc 2008).

same allegation of error was not properly before the circuit court. If an allegation of error is not timely presented in a motion for new trial, then that allegation is never properly before the circuit court and, therefore, not preserved for review.

Smith v. Brown & Williamson Tobacco Corp., 410 S.W.3d 623, 641 (Mo. banc 2013); *see also* **Miller v. Varsity Corp.**, 922 S.W.2d 821, 823 (Mo. App. E.D. 1996) (finding that a motion for new trial that is not timely filed preserves nothing for this Court's review); **Greeson v. Ace Pipe Cleaning, Inc.**, 830 S.W.2d 444, 446 (Mo. App. W.D. 1992) (same holding). Here, the motion for new trial was not timely filed, and therefore, preserves nothing for appellate review.

The relevant facts are as follows. The jury returned its verdict on June 9, 2016. Immediately after the trial court accepted the jury's verdict, defense counsel asked for "an additional ten days for filing the motion for new trial." The trial court purported to grant defense counsel's request for an extension, and judgment was entered later that same day. Defense counsel filed the motion for new trial 36 days later—outside the 30-day window required by Rule 78.04, but within the trial court's purported ten-day extension.

Under certain circumstances outlined by Rule 44.01, the trial court may enlarge the time in which an act required to be performed within a specified time by the rules of civil procedure must be completed. Rule 44.01(b). But the trial court "may not extend the time for taking any action under . . . Rule[] 78.04." Rule 44.01(b). For example, in **Wilson By and Through Wilson v. Stephens**, 757 S.W.2d 297, 298 (Mo. App. W.D. 1988), the trial court entered an order purporting to grant a ten-day extension for

the filing of a motion for new trial in addition to the time Rule 78.04 then allowed.⁵ The plaintiff filed his motion after the time allowed by Rule 78.04, but, like this case, within the extension granted by the trial court. **Stephens**, 757 S.W.2d at 298. On appeal, the Court held that because Rule 44.01(b) provides that the trial court cannot extend the time to file a motion for new trial under Rule 78.04, a motion for new trial filed beyond Rule 78.04's time limit—but within the trial court's purported extension—was untimely. **Stephens**, 757 S.W.2d at 298.

Similarly, here, Braddy's motion for new trial was untimely because it was filed beyond the time limit imposed by Rule 78.04, which the trial court had no authority to extend. Because Braddy's motion was not timely filed, the motion "is treated procedurally as though it had never been filed[.]" **State v. Langston**, 229 S.W.3d 289, 294 (Mo. App. S.D. 2007).⁶ "Under Rule 78.07, with a few exceptions, all allegations of error must be properly presented in a motion for new trial to be preserved for appellate review." **Smith**, 410 S.W.3d at 641. The allegations of error raised in points 3 through 6 do not fall within any exceptions to Rule 78.07, and therefore, are not preserved for appellate review. Braddy does not request review for plain error under Rule 84.13(c), and we decline our discretionary authority to do so. **Cornelious v. State**, 351 S.W.3d 36, 42 (Mo. App. W.D. 2011); **Gill Const., Inc. v. 18th & Vine**

⁵ At the time **Stephens** was decided, Rule 78.04 set forth a 15-day time limit within which a motion for new trial had to be filed following entry of judgment. Rule 78.04 has since been amended to allow for a 30-day time limit within which the motion must be filed following entry of judgment.

⁶ Even if Braddy had presented any meritorious claims in his motion for new trial, the trial court would not have had the opportunity to grant Braddy any relief. A trial court retains control over a judgment for 30 days after the judgment is entered. Rule 75.01. If no authorized after-trial motion is filed prior to the expiration of this 30-day period, the trial court loses control over the judgment and loses the authority to vacate or reconsider the proceeding. Rule 81.05; **Payne v. Markeson**, 414 S.W.3d 530, 536 (Mo. App. W.D. 2013); **McLean v. First Horizon Home Loan, Corp.**, 369 S.W.3d 794, 800 (Mo. App. W.D. 2012). By the time Braddy presented his motion for new trial to the trial court—36 days after judgment was entered—the trial court had lost the ability to grant any of the relief requested in the motion, even if it had been so inclined.

Auth., 157 S.W.3d 699, 724 (Mo. App. W.D. 2004). Points 3 through 6 are denied.⁷

The trial court's judgment committing Braddy to the Department of Mental Health's custody following a jury finding that he is an SVP is affirmed.

MARY W. SHEFFIELD, P.J. – OPINION AUTHOR

GARY W. LYNCH, J. – CONCURS

DON E. BURRELL, J. – CONCURS

⁷ Points 5 and 6 contend, respectively, that the trial court erred in denying Braddy's motion to dismiss because, under the 2006 amendments to the SVP Act, "there is no possibility of discharge from State custody once committed[.]" and "commitment under the Act is punitive[.]" We do not address these constitutional claims because they were not preserved for appellate review via inclusion in a timely filed motion for new trial. See ***Mayes v. St. Luke's Hosp. of Kansas City***, 430 S.W.3d 260, 269 (Mo. banc 2014). Moreover, even if the claims were preserved, they have been heard and decided adversely to Braddy's positions by our Supreme Court. See ***Kirk***, 520 S.W.3d at 449-52 (addressing point five's arguments at 449-50, and point six's at 449-52); ***Nelson***, 521 S.W.3d at 232 (addressing point six's arguments at 232). This Court is constitutionally bound to follow ***Kirk*** and ***Nelson*** as the latest controlling decisions of the Supreme Court of Missouri on these issues. Mo. Const. art. V, § 2 (1945); ***Inman v. Dominguez***, 371 S.W.3d 921, 925 (Mo. App. S.D. 2012).