No. SC96599

IN THE

Supreme Court of Missouri

CHARLES M. RYAN,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the St. Francois County Circuit Court
Twenty-fourth Judicial Circuit
The Honorable Timothy W. Inman, Judge

RESPONDENT'S SUBSTITUTE BRIEF

JOSHUA D. HAWLEY
Attorney General

SHAUN J MACKELPRANG
Assistant Attorney General
Missouri Bar No. 49627

P.O. Box 899
Jefferson City, MO 65102
Tel.: (573) 751-3321
Fax: (573) 751-5391
shaun.mackelprang@ago.mo.gov

Attorneys for Respondent

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STATEMENT OF FACTS

Mr. Ryan appeals the denial of his Rule 24.035 motion, in which he alleged that "plea counsel was ineffective for inducing [his] unknowing, unintelligent, and involuntary guilty plea by informing him of a change in the state's offer only minutes before he would enter a plea, by failing to meet with and discuss the facts of [his] case before [his] plea, and by informing [him] that if he did not accept the state's plea offer, he would likely receive a very harsh sentence" (L.F. 53). The motion court denied Mr. Ryan's post-conviction motion without an evidentiary hearing (L.F. 65-69).

* * *

In June, 2010, in case no. 10SF-00540-01 (Mr. Ryan's "first case"), the State charged Mr. Ryan with the class B felony of trafficking in the second degree (more than 30 grams of methamphetamine), § 195.223, RSMo Cum. Supp. 2011, the class B felony of possession of a controlled substance (marijuana) with intent to distribute within 2000 feet of a school, § 195.211, RSMo Cum. Supp. 2013, and the class C felony of possession of a controlled substance (pseudoephedrine), § 195.202, RSMo Cum. Supp. 2009 (L.F. 12-13).

On August 19, 2011, Mr. Ryan pleaded guilty to trafficking in the second degree, and the State dismissed the other two counts (L.F. 4-5). The court sentenced Mr. Ryan to fifteen years' imprisonment and ordered long-term drug treatment in the Department of Corrections pursuant to § 217.362

(L.F. 5). Mr. Ryan was then delivered to the Department of Corrections to begin drug treatment (*see* L.F. 5).

On August 10, 2012, in case no. 12SF-CR00116-01 (Mr. Ryan's "second case"), the State charged Mr. Ryan with the class A felony of manufacturing a controlled substance (methamphetamine) within 2000 feet of a school, § 195.211, RSMo Cum. Supp. 2013 (L.F. 29). This offense was alleged to have been committed on March 10, 2011—about five months before Mr. Ryan pleaded guilty in his first case (*see* L.F. 29).

On September 21, 2012, the State amended the charge in Mr. Ryan's second case, and reduced it to the class B felony of manufacturing a controlled substance (L.F. 31). That same day, Mr. Ryan pleaded guilty to the reduced charge (*see* 2nd Supp.Tr. 2, 4-5; L.F. 21-22). Six other defendants in separate cases also pleaded guilty at the same hearing (*see* 2nd Supp.Tr. 2-5).[1]

[1] Respondent's citations to "2nd Supp.Tr." refer to the second "Supplemental Transcript" that was filed in the Court of Appeals on July 8, 2016. This second transcript included a complete record of all of the responses given by the seven defendants who pleaded guilty at the hearing. The record on appeal also includes a redacted "Supplemental Transcript" containing only Mr. Ryan's responses, which was filed in the Court of Appeals on May 18, 2016. The redacted transcript was the transcript filed in the circuit court.

Mr. Ryan was represented by Mr. Daris Almond, who did not represent any of the other defendants (*see* 2nd Supp.Tr. 2-5, 8-9).

At the outset of the hearing, the court addressed the defendants as a group and stated that it was going to question them "in order to determine that [their] pleas of guilty are knowingly, intelligently, and voluntarily given, to be sure that [they] understand the rights that [they would] be giving up by waiving [their] right to a jury trial, to be sure that [they] fully understand all the consequences of entering these pleas of guilty" (2nd Supp.Tr. 5-6). The court outlined the procedure it would employ in questioning the defendants (2nd Supp.Tr. 6). The court advised the defendants, "If at any time there is something that you're confused about, you don't understand something, I want you to be sure and stop me, get your attorney's attention, do whatever is necessary, and we will be sure and take the time and stop and go over and explain anything that you have a problem with" (2nd Supp.Tr. 7). Mr. Ryan and his attorney stated that they had no objection to the procedures outlined by the court (2nd Supp.Tr. 7).

The court then questioned the defendants to ensure that their guilty pleas were knowing, intelligent, and voluntary (2nd Supp.Tr. 8-50). Mr. Ryan assured the court that he understood the charge, and he stated that Mr. Almond had been his attorney throughout the proceedings (2nd Supp.Tr. 8-9). Mr. Ryan stated that he had discussed his case with counsel approximately

ten times over the course of "[m]aybe four hours" (2nd Supp.Tr. 10). Mr. Ryan assured the court that counsel had investigated the case to his satisfaction, that counsel had interviewed all of the witnesses that Mr. Ryan was aware of, that counsel had done everything he had asked him to do, and that counsel had not refused to do anything that Mr. Ryan thought he should do (2nd Supp.Tr. 11-12).

The court then asked, "Mr. Ryan, did you make a confession or make any incriminating statements in your case to any law enforcement officers" (2nd Supp.Tr. 13). Mr. Ryan stated that he had made statements, and, upon further questioning, he told the court that he had been advised of the *Miranda* warnings and that his statements were freely and voluntarily given (2nd Supp.Tr. 13).

Mr. Ryan assured the court that he thought he had "had sufficient opportunity to discuss the case" with counsel before pleading guilty, and he assured the court that counsel had discussed available defenses with him and satisfactorily explained them (2nd Supp.Tr. 14). Mr. Ryan assured the court that he was fully satisfied with counsel's advice, and he stated that he had no complaints about counsel's handling of the case (2nd Supp.Tr. 14-15).

The court then asked, "Now, Mr. Ryan, how do you plead to the charge against you in the amended information, the class B felony of manufacturing a controlled substance, methamphetamine?" (2nd Supp.Tr. 15). Mr. Ryan

stated, "Guilty, Your Honor" (2nd Supp.Tr. 16). Mr. Ryan assured the court that he understood that he was giving up the right to have a jury determine his guilt at a speedy and public trial (2nd Supp.Tr. 18). He assured the court that he understood he was giving up his right to face the witnesses, listen to their testimony, and confront and cross-examine them (2nd Supp.Tr. 19). He assured the court that he understood that, at a trial, he would be presumed innocent and his guilt would have to be proved beyond a reasonable doubt to twelve jurors who would have to unanimously agree to his guilt (2nd Supp.Tr. 20). He assured the court that he understood that he had a right not to say anything that might incriminate him (2nd Supp.Tr. 20). He assured the court that he understood that he was giving up his right to trial and was making an incriminating statement by pleading guilty (2nd Supp.Tr. 20-21). He also assured the court that he understood that he was giving up his right to call witnesses to testify in his behalf (2nd Supp.Tr. 21).

The court then outlined the elements of the charge, stating, "Mr. Ryan, the essential elements of the charge filed against you are as follows: That you did on or about March 10, 2011, in the County of St. Francois, State of Missouri, knowingly manufactured [sic] methamphetamine, a controlled substance, by combining chemicals, knowing that it was a controlled substance" (2nd Supp.Tr 25-26). Mr. Ryan stated that he understood and admitted the elements of the offense (2nd Supp.Tr. 26). The court also advised

Mr. Ryan of the range of punishment, stating, "Mr. Ryan, you are charged with a class B felony. The range of punishment is five to fifteen years in the Department of Corrections. Do you understand the range of punishment?" (2nd Supp.Tr. 29). Mr. Ryan said that he understood (2nd Supp.Tr. 29). Mr. Ryan assured the court that no threats or pressure of any kind had been exerted against him to cause him to plead guilty (2nd Supp.Tr. 30).

The court then inquired about plea agreements. The prosecutor outlined the plea agreement in Mr. Ryan's case and said that the State was recommending a fifteen-year sentence, a suspended execution of sentence, and five-year term of supervised probation (2nd Supp.Tr. 34). The prosecutor stated that the fifteen-year sentence was to run consecutively to Mr. Ryan's sentence in his first case (case no. 10SF-CR00540) (2nd Supp.Tr. 34). The prosecutor stated that Mr. Ryan would be waiving his right to a sentencing assessment report, and defense counsel confirmed that (2nd Supp.Tr. 34).

The court then inquired about Mr. Ryan's sentence in his first case, and counsel informed the court that Mr. Ryan was serving a fifteen-year sentence in his first case (2nd Supp.Tr. 34). The court reiterated that the fifteen-year sentence in the second case would run consecutively to Mr. Ryan's sentence in his first case, plea counsel stated that they understood (2nd Supp.Tr. 34-35). Plea counsel further informed the court that the State had agreed to dismiss another case that had been pending against Mr. Ryan (2nd Supp.Tr.

35). The prosecutor confirmed that the other case had been dismissed (2nd Supp.Tr. 35). The court then questioned Mr. Ryan and asked, "Do you understand the plea bargain agreement, Mr. Ryan?", and Mr. Ryan said that he understood (2nd Supp.Tr. 35). The court asked if he had "[a]ny questions about it at all?", and Mr. Ryan stated that he had no questions (2nd Supp.Tr. 35). He also assured the court that no other promises or agreements had been made (2nd Supp.Tr. 37).

The court then asked plea counsel about other advice about collateral consequences that counsel might have given (2nd Supp.Tr. 38). Plea counsel informed the court that he had not advised Mr. Ryan about "how long he would serve in the Department of Corrections" if he were to violate probation (2nd Supp.Tr. 40). Counsel stated that he had talked to Mr. Ryan about his first case, in which Mr. Ryan had been sentenced to fifteen years and was "doing a 217" (long-term drug treatment) (2nd Supp.Tr. 40). Counsel stated that Mr. Ryan was "pretty much up right now" (*i.e.*, finished with the program) (*see* 2nd Supp.Tr. 40). Counsel stated, "In fact, the Department of Corrections has probably sent you the information on how well he's done" (2nd Supp.Tr. 40). Counsel said that he had not represented to Mr. Ryan how the court would "receive that" information, and he stated that there had also "been no representations made as to how long [Mr. Ryan] would serve" if he were to violate probation in his two cases (2nd Supp.Tr. 40). However, counsel

stated, "I [sic] would be a very, very long time"(2nd Supp.Tr. 40-41). The court asked Mr. Ryan if counsel had discussed that with him, and Mr. Ryan said, "Yes, sir" (2nd Supp.Tr. 40-41).

Mr. Ryan assured the court that he was pleading guilty because he had committed the charged offense (2nd Supp.Tr. 42). The court asked Mr. Ryan to describe what he had done, stating, "Mr. Ryan, tell me what you did on or about March 10, 2011, which led to this charge filed against you" (2nd Supp.Tr. 44). Mr. Ryan said that he had "[m]anufactured methamphetamine and possessed chemicals to manufacture methamphetamine" (2nd Supp.Tr. 44). He stated that he knew methamphetamine was a controlled substance (2nd Supp.Tr. 44).

Mr. Ryan stated that he had completed high school, and he assured the court that he was not under the influence of any drug or alcohol (2nd Supp.Tr. 47-48). He assured the court that he understood that he could withdraw his plea before the court accepted it, but he assured the court that it was still his desire to plea guilty (2nd Supp.Tr. 48).

Mr. Ryan assured the court that counsel had not told him to answer untruthfully, and he assured the court that no one had told him that there were any specials deals in his case that had not been mentioned on the record (2nd Supp.Tr. 49). Mr. Ryan assured the court that all of his answers had been truthful (2nd Supp.Tr. 50).

Mr. Ryan confirmed that he was giving up his right to a sentencing assessment report and that he would like the court to sentence him in accordance with the plea agreement (2nd Supp.Tr. 50). The court accepted Mr. Ryan's guilty plea and sentenced him to fifteen years' imprisonment (2nd Supp.Tr. 51, 54). Before imposing sentence, the court asked Mr. Ryan if he knew of any reason why the court should not pronounce sentence, and Mr. Ryan stated that he did not (2nd Supp.Tr. 54). The court ordered the sentence to run consecutively to the sentence in Mr. Ryan's first case, but it suspended execution of the sentence and placed Mr. Ryan on probation for a period of five years (2nd Supp.Br. 54).

At the conclusion of the hearing, the court stated that it did not recall seeing Mr. Ryan's drug-treatment report from the Department of Corrections (2nd Supp.Tr. 55). Counsel stated that he and the prosecutor believed that the court would release Mr. Ryan after reviewing the report, but he said, "we don't know that" (2nd Supp.Tr. 55). Counsel continued, "And that has been what has been discussed with [Mr. Ryan]. Obviously, that's your decision" (2nd Supp.Tr. 55). Mr. Ryan stated that he understood (2nd Supp.Tr. 55-56).

About two weeks later, on October 3, 2012, the court granted Mr. Ryan release from prison in his first case under § 217.362 (L.F. 5). The court suspended execution of Mr. Ryan's sentence in that case and placed him on parole for a period of five years (L.F. 5).

Almost two years later, on September 12, 2014, a probation violation report was filed in each of Mr. Ryan's two criminal cases and a capias warrant issued (L.F. 6, 23). A revocation hearing was set for November 5, 2014 (L.F. 6, 23). On April 20, 2015, after multiple continuances, the court revoked Mr. Ryan's probation in both cases and executed his previously imposed sentences (L.F. 11, 27-28).

On June 22, 2015, Mr. Ryan filed a *pro se* motion pursuant to Rule 24.035, in which he sought to challenge his convictions and sentences in both of his criminal cases (L.F. 41).[2] The motion court appointed the public defender (*see* L.F. 38, 47), and a transcript of the guilty plea and sentencing was filed in the circuit court on August 27, 2015 (L.F. 28). Thus, Mr. Ryan's amended motion was due by October 26, 2015. *See* Rule 24.035(g).

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[2] In his first case, Mr. Ryan was delivered to the Department of Corrections sometime between August 19, 2011, and October 3, 2012, for long-term drug treatment (*see* L.F. 4-5). Thus, by the time he filed his post-conviction motion on June 22, 2015, he could not challenge his conviction in that case, as a post-conviction motion would have been due long before then. *See Searcy v. State*, 103 S.W.3d 201, 204-206 (Mo.App. W.D. 2003) (*pro se* motion was not timely as determined by the defendant's delivery to the Department of Corrections for long-term drug treatment pursuant to §217.362).

On October 26, 2015, Mr. Ryan timely filed an amended motion, in which he challenged his conviction in his second case (L.F. 39, 51).[3] He alleged in his motion that "plea counsel was ineffective for inducing [Mr. Ryan's] unknowing, unintelligent, and involuntary guilty plea by informing him of a change in the state's offer only minutes before he would enter a plea, by failing to meet with and discuss the facts of [his] case before [his] plea, and by informing [him] that if he did not accept the state's plea offer, he would likely receive a very harsh sentence" (L.F. 53).

On November 6, 2015, the motion court denied Mr. Ryan's motion without an evidentiary hearing (L.F. 65-69). The motion court quoted from the record made at the guilty plea hearing and found that Mr. Ryan's claim was conclusively refuted by the record (L.F. 67-68).

[3] Mr. Ryan noted that if he was delivered to the Department of Corrections in his first case "on or about September 2011," then "his Form 40 related to that specific conviction and sentence would be late" (L.F. 52 n. 1).

ARGUMENT

I.

The motion court did not clearly err in denying Mr. Ryan's claim that plea counsel was ineffective for "inducing his unknowing, unintelligent, and involuntary guilty plea" by "pressuring and misleading him in the final minutes before his plea[.]"

Mr. Ryan asserts that the motion court clearly erred in denying his claim that "counsel was ineffective for inducing his unknowing, unintelligent, and involuntary guilty plea by unreasonably pressuring and misleading him in the final minutes before his plea by only then informing him of a change in the plea offer and indicating that he would receive a harsh sentence if he did not accept the offer in the next few minutes" (App.Sub.Br. 21). He asserts that "[t]he record of [his] responses to the plea court's inquiries at his plea does not conclusively refute the claim because [he] gave his responses as part of a 'group plea'—a procedure that may impact the voluntariness of the defendant's plea and may lead the defendant to 'parrot' the responses of other defendants speaking before him" (App.Sub.Br. 21).

A. The standard of review

"Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous." *Moss v. State*, 10 S.W.3d 510, 511 (Mo.

2000). "Findings and conclusions are clearly erroneous if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made." *Id.*

To be entitled to an evidentiary hearing, a movant must allege facts, not conclusions, that would warrant relief if true. *Barnett v. State*, 103 S.W.3d 765, 769 (Mo. 2003). The alleged facts must raise matters not refuted by the record and files in the case, and the matters complained of must have resulted in prejudice to the movant. *Id.*

B. Mr. Ryan's claim was conclusively refuted by the record and he failed to allege facts warranting relief

To prevail on a claim of ineffective assistance of counsel, the movant must "show that counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The movant must also "affirmatively prove prejudice." *Id.* at 693. Generally, after a guilty plea, "to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

In denying Mr. Ryan's claim, the motion court quoted from the record made at the guilty plea hearing and found that his claim was conclusively refuted by the record (L.F. 67-68). The motion court did not clearly err.

In his amended motion, Mr. Ryan alleged that his mother hired counsel to represent him and that counsel never talked to him about the case (L.F. 55). He alleged that his mother "relayed [counsel's] messages," and that his mother told him, "prior to the day he appeared in court, that [counsel] was indicating that he would obtain a *concurrent* sentence for movant—concurrent to the fifteen year sentence in" Mr. Ryan's first case (L.F. 55-56). He alleged that "because he understood the sentence . . . would be concurrent (*i.e.*, would not substantively add time to his already existing sentence), and because he had no information about his case (*i.e.*, the charging document, discovery etc.) he gave his case little thought and expected that counsel would discuss the case with him at some point prior to court" (L.F. 56).

Mr. Ryan alleged that "the first time he spoke to [counsel] regarding his new case was in court only minutes before he would stand before the court to enter a plea" (L.F. 56). He alleged that, "[a]t that time, counsel informed [him] that the state would not agree to a concurrent sentence, but instead would offer probation with a fifteen year *consecutive* back-up sentence" (L.F. 56-57). He alleged that "counsel informed him at that time that if he did not accept the state's offer, that [he] would likely receive a very harsh, or the maximum sentence" (L.F. 57). He alleged that he "was informed that he had only a matter of minutes to accept or reject the state's plea offer" (L.F. 57). He alleged that he "had not substantively discussed the charges or

the facts with counsel, nor had he had the opportunity to review any of the discovery from his case prior to his plea" (L.F. 57).

Mr. Ryan alleged that he "felt pressured to enter a guilty plea" (L.F. 57). He alleged that, "up until the day he appeared in court, he believed (as was the information which was relayed to him) that his plea agreement would be for concurrent time; and when counsel at the last minute informed him of a consecutive sentence, he was taken by surprise" (L.F. 57). He alleged that counsel's "last minute" communication "together with the fact that counsel had not substantively discussed the facts underlying his case, had given [him] only a matter of minutes to decide about entering a guilty plea, and had informed [him] of the harsh sentence that would follow a rejected plea agreement, led [him] to feel pressure to enter a guilty plea" (L.F. 57). He alleged finally that "had counsel not pressured him through the foregoing, he would not have entered a guilty plea, but would have taken his case to trial" (L.F. 57-58).

1. The record conclusively refuted Mr. Ryan's allegation that counsel never communicated with him about this case until a few minutes before he pleaded guilty

The record conclusively refuted Mr. Ryan's allegations that he had not spoken to counsel until a few minutes before the guilty plea hearing, and that he had not substantively discussed the charges or the facts with counsel at

any time. As the record shows, Mr. Ryan assured the court that he understood the charge, and he stated that he had discussed his case with counsel approximately ten times over the course of "[m]aybe four hours" (2nd Supp.Tr. 8-10). Mr. Ryan assured the court that counsel had investigated the case to his full satisfaction, that counsel had interviewed all witnesses that Mr. Ryan was aware of, that counsel had done everything he had asked him to do, and that counsel had not refused to do anything that Mr. Ryan thought he should do (2nd Supp.Tr. 11-12).

Mr. Ryan also assured the court that he thought he had "had sufficient opportunity to discuss the case" with counsel before pleading guilty, and he assured the court that counsel had discussed available defenses with him and satisfactorily explained them (2nd Supp.Tr. 14). Mr. Ryan assured the court that he was fully satisfied with counsel's advice, and he stated that he had no complaints about counsel's handling of the case (2nd Supp.Tr. 14).

The court's questioning also demonstrated that Mr. Ryan was fully aware of the elements of the charge and the facts of his case. Mr. Ryan stated that he was pleading guilty to the class B felony of manufacturing a controlled substance as charged in the amended information (2nd Supp.Tr. 15-16). Then, after the court had outlined the elements of the charge, Mr. Ryan stated that he understood the elements (2nd Supp.Tr. 25-26). Mr. Ryan also assured the court that he understood the range of punishment (2nd Supp.Tr.

29). Mr. Ryan stated that he was pleading guilty because he had committed the charged offense, and he described the conduct that led to his being charged with manufacture of methamphetamine (2nd Supp.Tr. 42, 44). In short, the record conclusively refuted Mr. Ryan's allegation that the first conversation he had with counsel was a few minutes before the guilty plea hearing, and it conclusively refuted his allegation that he and counsel had not discussed the substance of his case. *See Castor v. State*, 245 S.W.3d 909, 915 (Mo.App. E.D. 2008) (claim was refuted by the record where the defendant stated that she had met with counsel six times for a total of three hours and had had sufficient opportunity to discuss the case with counsel).

2. The record conclusively refuted Mr. Ryan's allegation that he was pressured into pleading guilty, and Mr. Ryan's allegations otherwise failed to allege facts warranting relief

The record also refuted Mr. Ryan's allegation that he was improperly pressured into pleading guilty. As outlined above, the alleged pressure to plead guilty was caused by three alleged circumstances: (1) counsel's failure to discuss the case with Mr. Ryan aside from a few minutes before the plea hearing, (2) the last-minute revelation that the State's offer was for a consecutive sentence after Mr. Ryan had been led to believe that counsel would obtain a concurrent sentence, and (3) counsel's warning that he would likely receive a harsh sentence if he rejected the State's plea offer (L.F. 55-

57). As discussed above, the record conclusively refuted Mr. Ryan's claim that counsel did not discuss the substance of his case with him until a few minutes before the plea hearing.

The allegation that Mr. Ryan was "pressured" into pleading guilty was also conclusively refuted by the record. As outlined above, Mr. Ryan assured the court that he had "had sufficient opportunity to discuss the case" with counsel before pleading guilty, that he was fully satisfied with counsel's advice, and that he had no complaints about counsel's handling of the case (2nd Supp.Tr. 14-15, 30). He also specifically assured the court that no threats or pressure of any kind had been exerted against him to cause him to plead guilty (2nd Supp.Tr. 30). Thus, his claim that he was pressured was conclusively refuted by the record. *See Ventimiglia v. State*, 468 S.W.3d 455, 464 (Mo.App. E.D. 2015) (similar responses refuted the defendant's claim that he was pressured into pleading guilty by counsel's alleged lack of preparation).

In addition, the record showed that Mr. Ryan was fully informed about the terms of the plea agreement. The prosecutor outlined the plea agreement and said that the State was recommending a fifteen-year sentence, a suspended execution of sentence, and a five-year term of probation (2nd Supp.Tr. 34). The prosecutor said that the fifteen-year sentence was to run consecutively to Mr. Ryan's sentence in his first case (2nd Supp.Tr. 34).

Plea counsel informed the court that Mr. Ryan was serving a fifteen-year sentence in his first case, and the court then made plain that the fifteen-year sentence in this case would run consecutively to Mr. Ryan's fifteen-year sentence in his first case (2nd Supp.Tr. 34). Counsel stated that they understood, and counsel further informed the court that the State had agreed to dismiss another case that had been pending against Mr. Ryan (2nd Supp.Tr. 34-35). The prosecutor confirmed that the other case had been dismissed (2nd Supp.Tr. 35). Mr. Ryan then assured the court that he understood the plea agreement, and he said that he did not have any questions about it (2nd Supp.Tr. 35).

Plea counsel also informed the court that Mr. Ryan was "doing a 217" (long-term drug treatment) at that time, and that he was "pretty much up right now" (*i.e.*, finished with the program) (*see* 2nd Supp.Tr. 40). Counsel stated, "In fact, the Department of Corrections has probably sent you the information on how well he's done" (2nd Supp.Tr. 40). Counsel stated that he had not represented to Mr. Ryan how the court would "receive that" information, and he stated that there had also "been no representations made as to how long [Mr. Ryan] would serve" if he violated probation in his two cases (2nd Supp.Tr. 40). The court asked Mr. Ryan if counsel had discussed that with him, and Mr. Ryan said, "Yes, sir" (2nd Supp.Tr. 40-41).

Later, at the conclusion of the hearing, the court stated that it did not

recall seeing Mr. Ryan's drug-treatment report from the Department of Corrections (2nd Supp.Tr. 55). Counsel stated that he and the prosecutor believed that the court would release Mr. Ryan after reviewing the report, but he said, "we don't know that" (2nd Supp.Tr. 55). Counsel continued, "And that has been what has been discussed with [Mr. Ryan]. Obviously, that's your decision" (2nd Supp.Tr. 55). Mr. Ryan again stated that he understood (2nd Supp.Tr. 55-56).

In short, the record showed that Mr. Ryan was fully aware of the terms of the plea agreement when he pleaded guilty and that he did not feel he had been threatened or pressured in any way. Thus, even assuming that he might have hoped at some point that counsel "would obtain" an agreement for concurrent sentences, he was plainly advised before he pleaded guilty that the plea agreement the State was offering was for consecutive sentences. Thus, he was not misled into pleading guilty by any false assurance that he would be sentenced to concurrent sentences.

Moreover, even assuming (as alleged) that he had only a short time to decide whether to plead guilty, Mr. Ryan failed to allege facts showing that the alleged pressure he felt was caused by counsel. There was no allegation that counsel learned about the State's plea offer at an earlier point in time and failed to communicate it to him until the day of the guilty plea. There was no allegation, for instance, that counsel received the offer days or weeks

earlier (*see* L.F. 55-57). In other words, there were no factual allegations showing that *counsel* (as opposed to the State and the plea negotiation process) was to blame for the short amount of time available to Mr. Ryan. Plea negotiations can continue until shortly before a guilty plea or trial, and counsel has an obligation to convey plea offers whenever they are made. *See Missouri v. Frye*, 566 U.S. 134, 145 (2012) (". . . as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.").

In addition, there is no constitutionally-mandated minimum amount of time that a defendant must be accorded to accept or reject a plea agreement. The State is not required to make plea offers, but in cases where it does make an offer, the State is free to set an expiration date or to unilaterally withdraw the offer at any time (at least until it is accepted by the court and embodied in a judgment). *See Mabry v. Johnson*, 467 U.S. 504, 506-507 (1984); *see also Griffith v. State*, 845 S.W.2d 684, 688 (Mo.App. S.D. 1993) ("Under *Mabry*, movant's inability to enforce the prosecutor's offer 'is without constitutional significance,' and there is no 'relevance' in the question whether the prosecutor was negligent or otherwise culpable in first making and then withdrawing his offer."); *Stokes v. State*, 688 S.W.2d 19, 22 (Mo.App. E.D. 1985) ("We know of no duty imposed upon a prosecutor to keep a plea bargain open for any length of time . . . ."). Accordingly, during plea negotiations, a

defendant must always operate under the assumption that a plea offer might disappear at any moment.

Here, there was no allegation that the State set a deadline for accepting the offer; rather, Mr. Ryan alleged merely that he "was informed that he had only a matter of minutes to accept or reject the state's plea offer" (L.F. 57). Of course, as a logical and practical matter, Mr. Ryan had to decide before the plea hearing started (at least as a preliminary matter) whether he wanted to accept or reject the offer (else there was no reason to involve him in the proceedings). Such a decision does not constitute coercion (even if it poses a *difficult* decision), and, unless the court *fails* to ask appropriate questions at the guilty plea hearing, the court's subsequent questioning will permit a defendant to consider the decision and inform the court if there has been improper coercion or pressure. As outlined above, Mr. Ryan assured the court that he had not been pressured in any way (2nd Supp.Tr. 30).

In addition to the timing of counsel's communication, Mr. Ryan alleged that counsel told him it was likely he would receive a harsh sentenced if he rejected the State's offer. There was no allegation, however, that counsel's advice along these lines was incorrect or unreasonable, and the record showed that Mr. Ryan would have been facing a class A felony (punishable by up to thirty years or life) if he had not accepted the State's offer of fifteen years on the reduced charge (*see* L.F. 55-57).

It is well settled that "[m]ere prediction or advice of counsel regarding the possible sentence does not lead to a finding of legal coercion such that would render a guilty plea involuntary." *Gales v. State*, 2017 WL 5580220, *2 (Mo.App. E.D. 2017) (citing *Moore v. State*, 207 S.W.3d 725, 731 (Mo.App. S.D. 2006)); *see Simons v. State*, 719 S.W.2d 479, 481 (Mo.App. S.D. 1986) ("For counsel to predict the possibility of a lengthy sentence following a jury trial does not amount to a coerced and involuntary plea."). Moreover, "[Plea] counsel has a duty to advise [her] client of the strength of the State's case." *Robertson v. State*, 502 S.W.3d 32, 36 (Mo.App. W.D. 2016). "Advice will not constitute coercion merely because it is unpleasant to hear." *Id*. In short, the fact that a defendant must make a difficult decision posed by the alternatives of a favorable plea offer and a potentially harsh outcome after trial does mean that the defendant was coerced. *See id*.

Mr. Ryan asserts that "although [he] responded 'no' to the plea court's inquiry whether threats or pressure had caused him to plead guilty, [his] negative response to such a routine inquiry is too general to conclusively refute [his] specific allegations that counsel informed him of a change in the plea offer at the eleventh hour and told him that he had to accept the offer in a matter of minutes or receive a harsh sentence" (App.Sub.Br. 27). He argues that the question about "threats" would not have caused him to reveal the pressure he was feeling because counsel's communications were not "threats"

in the traditional sense (*see* App.Sub.Br. 27-28).

However, while a single question about threats would not conclusively refute Mr. Ryan's claim, the motion court did not rely solely on that response (*see* L.F. 67-68). The motion court relied on the entire record; and, as outlined above, there were aspects of the record that conclusively refuted Mr. Ryan's allegations, including his statement that no pressure of any kind had been exerted against him to get him to plead guilty (2nd Supp.Tr. 30). The meaning of the word "pressure" is commonly understood, and it should have prompted Mr. Ryan to reveal the pressure he subsequently alleged that he felt.

3. Mr. Ryan waived the new claims he now asserts on appeal

Mr. Ryan concedes that the statements he attributed to counsel in his amended motion amounted to pressure, and he concedes "that he did not disclose those statements in response to the plea court's inquiry" about pressure (*see* App.Sub.Br. 29). However, he asks the Court "to consider the circumstances of his plea and the record as a whole" (App.Sub.Br. 29). He then asserts, " 'When a defendant experiences a last-minute burst of pressure to plead guilty, it is reasonable to assume that that pressure might affect his answers to the plea court's inquiries at the plea' " (App.Sub.Br. 30, quoting App.Br. 18). He asserts, "To expect perfect, full and complete, and unreserved responses by the defendant in such a psychological state is not reasonable" (App.Sub.Br. 29). He then asserts that he "was not sure of himself or what

the correct course of action should be, and he did not have enough time to think about it" (App.Sub.Br. 30). In other words, Mr. Ryan asserts that the alleged pressure caused him to give answers that were not truthful.

But absent allegations that a particular response was false or fabricated as a result of the alleged pressure, it was not clearly erroneous for the motion court to rely on Mr. Ryan's sworn testimony. To the contrary, it was reasonable to believe that he told the truth after he swore to do so. And, as outlined above, Mr. Ryan assured the court that he had "had sufficient opportunity to discuss the case" with counsel before pleading guilty, and that no pressure of any kind had been exerted against him to get him to plead guilty (2nd Supp.Tr. 30).

To the extent that Mr. Ryan is now alleging that his sworn testimony was not reliable due to the pressure he allegedly felt (but denied), this Court should reject Mr. Ryan's attempt to make new factual allegations on appeal. Mr. Ryan did not allege in his amended motion that his testimony at the hearing was false or that his ability to speak the truth was overcome by the pressure that induced him to plead guilty (*see* L.F. 53-59).

It is well settled that, under Rule 24.035, " 'any allegations or issues that are not raised in the [post-conviction] motion are waived on appeal.' " *See McLaughlin v. State*, 378 S.W.3d 328, 340 (Mo. 2012) (quoting *Johnson v. State*, 333 S.W.3d 459, 471 (Mo. 2011) (citation omitted)). " 'Pleading defects

cannot be remedied by the presentation of evidence and refinement of a claim on appeal.' " *Id*. "Furthermore, there is no plain error review in appeals from post-conviction judgments for claims that were not presented in the post-conviction motion." *Id*. (citing *Hoskins v. State*, 329 S.W.3d 695, 696-697 (Mo. 2010)). "Claims are waived if not presented in the motion, regardless of whether evidence on that claim was presented." *Dorsey v. State*, 448 S.W.3d 276, 285 (Mo. 2014).

Mr. Ryan also points out that the motion court "utilized a group plea procedure in questioning [him] about the voluntariness of [his] plea" (App.Sub.Br. 30). He observes that the Court of Appeals has "repeatedly criticized" group pleas and he cites to two opinions wherein the Court of Appeals stated that "the practice inescapably impacts and impinges upon the voluntariness of the defendant's plea" (App.Sub.Br. 31, citing *Bearden v. State*, 2017 WL 2644068 (Mo.App. E.D. June 20, 2017); *Miller v. State*, 2016 WL 2339049 (Mo.App. E.D. May 3, 2016)).[4] He acknowledges that this Court "declined to deem the practice automatically invalid or impermissible"

[4] The opinions in *Bearden* and *Miller* were rendered non-precedential after the cases were transferred to this Court. *See Bearden v. State*, No. SC96515 (case transferred by the Court of Appeals on June 20, 2017); *Miller v. State*, No. SC95805 (transfer ordered by this Court on April 4 2017).

(App.Sub.Br. 31, citing *Roberts v. State*, 276 S.W.3d 833 (Mo. 2009)),[5] but he asserts that "the use of the practice presents inherent risks that the defendants will be confused or simply parrot the answers of other defendants without fully understanding the court's inquires, the court's advisements, or the plea proceedings themselves" (App.Sub.Br. 31-32, citing *Wright v. State*, 411 S.W.3d 381, 388 (Mo.App. E.D. 2013)). He also asserts that such proceedings might confuse the plea court (App.Sub.Br. 32). He then asserts that "[t]he procedure raised the unanswered question whether Mr. Ryan's plea was knowing and voluntary 'or the result of his parroting the answers of the other defendants as the judge 'moved down the line' " (App.Sub.Br. 32). He then asserts that, because his plea was entered as part of a group plea, the Court "should find that [his] claim of ineffectiveness is not conclusively refuted by the record" (App.Sub.Br. 32-33).

But this claim regarding the alleged effect of the group plea on Mr. Ryan's ability to understand and speak the truth also was not included in his

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[5] This Court has stated that "the basic question is whether or not [the defendant's] pleas of guilty were in fact voluntarily made with understanding of the nature of the charge . . .; not whether the trial judge followed some particular procedure before accepting the pleas." *Flood v. State*, 476 S.W.2d 529, 533 (Mo. 1972).

amended motion (*see* L.F. 53-59). He did not allege that the "group plea" procedure itself undermined the voluntariness of his guilty plea, or that it rendered him incapable of answering the court's questions correctly or truthfully (*see* L.F. 53-59). He did not allege, for example, that the procedure confused him, misled him, coerced him or induced him to simply "parrot" the responses of other defendants (*see* L.F. 53-59). He did not allege that any of his responses were actually false or inaccurate (*see* L.F. 53-59). Accordingly, the claim Mr. Ryan now asserts on appeal was never presented to the motion court, and it was waived.

C. Conclusion

The record showed that Mr. Ryan and counsel spent considerable time discussing the case over the course of several meetings; that Mr. Ryan was well aware of all aspects of his case, including the terms of the plea agreement; that Mr. Ryan was satisfied with counsel's representation and felt that he had had sufficient opportunity to discuss his case with counsel; and that Mr. Ryan felt no pressure to plead guilty. Mr. Ryan's allegations were, thus, refuted by the record, and he otherwise failed to allege facts warranting relief. His new allegations on appeal were waived and cannot be considered in determining whether the motion court clearly erred in denying relief. This point should be denied.

CONCLUSION

The Court should affirm the denial of Mr. Ryan's Rule 24.035 motion.

Respectfully submitted,

JOSHUA D. HAWLEY
Attorney General

/s/ Shaun J Mackelprang

SHAUN J MACKELPRANG
Assistant Attorney General
Missouri Bar No. 49627

P.O. Box 899
Jefferson City, MO 65102
Tel.: (573) 751-3321
Fax: (573) 751-5391
shaun.mackelprang@ago.mo.gov

Attorneys for Respondent

CERTIFICATE OF COMPLIANCE AND SERVICE

I certify that the attached brief complies with Rule 84.06(b) and contains 7,226 words, excluding the cover, this certification, and the signature block, as counted by Microsoft Word.

JOSHUA D. HAWLEY
Attorney General

/s/ Shaun J Mackelprang

SHAUN J MACKELPRANG
Assistant Attorney General
Missouri Bar No. 49627

P.O. Box 899
Jefferson City, MO 65102
Tel.: (573) 751-3321
Fax: (573) 751-5391
shaun.mackelprang@ago.mo.gov

Attorneys for Respondent