

No. SC96754

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In the  
**Supreme Court of Missouri**

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**RICHARD MILLER,**

**Respondent,**

**v.**

**STATE OF MISSOURI,**

**Appellant.**

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**Appeal from the Circuit Court of Pulaski County  
Twenty-Fifth Judicial Circuit  
The Honorable John D. Wiggins, Judge**

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**APPELLANT'S SUBSTITUTE BRIEF**

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## **JURISDICTIONAL STATEMENT**

This is an appeal from a Pulaski County Circuit Court order sustaining Respondent's postconviction motion to vacate, set aside, or correct the judgment or sentence. The State is permitted an appeal in a postconviction case where the motion court's order sustains a movant's postconviction motion. Rule 29.15; § 547.360.11, RSMo 2000.

The State appealed to the Missouri Court of Appeals Southern District. Mo. Const. art. V § 3; § 477.060, RSMo 2000. The Court of Appeals issued its opinion on September 19, 2017, reversing the motion court's decision. Respondent then timely filed an application for transfer to this Court pursuant to Rule 83.04, which was granted. Therefore, jurisdiction lies in the Missouri Supreme Court.

## STATEMENT OF FACTS

This is an appeal by the State of Missouri following a Pulaski County Circuit Court order sustaining Respondent's postconviction motion to vacate, set aside or correct the judgment or sentence following an evidentiary hearing.

In the underlying criminal case, the State charged Respondent (Defendant), Richard Miller, with two counts of the class C felony of involuntary manslaughter in the first degree. (L.F. 19.)<sup>1</sup> On September 14-15, 2007, a jury trial was held. (Tr. 86-271.) The evidence at trial showed the following:

On Christmas Day, 2004, Defendant was driving a black pickup truck southbound on Highway 63, a two-lane roadway, just outside of Rolla. (Tr. 124-26, 159, 211.) As Defendant approached the Beaver Creek bridge, he passed a couple also driving southbound. (Tr. 93, 124-27.) After passing the couple, Defendant stayed in the northbound lane of the highway. (Tr. 95, 129.) Moments later, while crossing the bridge, Defendant's truck struck another vehicle head-on. (Tr. 105, 134.) The occupants of the vehicle Defendant struck died as a result of the accident. (Tr. 86-90, 163.)

The jury found Defendant guilty as charged, and he was given a suspended imposition of sentence and five years' probation. (Tr. 272; L.F. 49-50, 62; S.Tr. 30.)

On June 26, 2012, the State filed a motion to revoke probation. (L.F. 64.) On October 18, 2012, the State filed an amended motion to revoke

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<sup>1</sup> The record consists of the legal file from the underlying case (L.F.), the trial transcript (Tr.), the sentencing transcript (S.Tr.), the probation-violation transcript (P.V.Tr.) and a supplemental transcript (Supp.Tr.), two legal files from the postconviction case: (PCR L.F.) and (Supp.PCR L.F.), and the evidentiary-hearing transcript (PCR Tr.).

probation. (L.F. 81-82.) On December 5, 2012, a probation-revocation hearing was held. (P.V. Tr. 3-27.)

At the probation-revocation hearing, Defendant asserted that the motion court did not have jurisdiction<sup>2</sup> to sentence him because the term of his probation had ended. (P.V. Tr. 3-5.) The trial court found that it did have jurisdiction, and Defendant admitted that he violated the terms of his probation. (P.V. Tr. 5-9.) The court then sentenced Defendant to five years in prison on each of the two counts, with the sentences running consecutively for a total of ten years. (L.F. 87, 91; Supp.Tr. 13.)

Defendant appealed his convictions and sentences, and they were affirmed by the Missouri Court of Appeals Southern District on October 21, 2014. *State v. Miller*, 448 S.W.3d 331 (Mo. App. S.D. 2014). The mandate issued on December 24, 2014. (Case No. SD32730.)

On March 19, 2015, Defendant filed a motion to vacate, set aside or correct the judgment or sentence alleging that the trial court did not have jurisdiction to revoke his probation because the revocation occurred after his probation ended. (PCR L.F. 5-8.) An evidentiary hearing was held on July 27, 2016, during which the parties stipulated to some facts and Defendant testified. (PCR Tr. 2-10.)

On September 9, 2016, the motion court issued its findings and judgment granting Defendant's motion. (PCR L.F. 13-14.) The motion court found that the trial court did not have jurisdiction to revoke Defendant's probation because the trial court did not make every reasonable effort to hold the revocation hearing during the probationary period. (PCR L.F. 14.)

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<sup>2</sup> Although referred to throughout these proceedings as jurisdiction, the issue in this case is more precisely whether the circuit court exceeded its statutory authority. *State ex rel. Strauser v. Martinez*, 416 S.W.3d 798, 800 n.1 (Mo. banc 2014).



## POINTS RELIED ON

**I. The motion court clearly erred in granting Defendant's postconviction motion to vacate, set aside, or correct the judgment or sentence because Defendant's postconviction claim was an allegation of trial-court error that is not cognizable in a postconviction motion in that Defendant could have raised the issue on direct appeal, and issues that can be raised on direct appeal cannot be raised in a postconviction motion.**

*State v. Tolliver*, 839 S.W.2d 296, 298 (Mo. banc 1992)

*McIntosh v. State*, 413 S.W.3d 320, 331 (Mo. banc 2013)

**II. The motion court clearly erred in granting Defendant's postconviction motion to vacate, set aside, or correct the judgment or sentence because the trial court made every reasonable effort to hold the revocation hearing during the probationary period in that the probation-revocation hearing was continued past the end of Defendant's probation on his counsel's request and again by agreement, and the hearing was held within five months after Defendant's probationary period ended.**

Section 559.036.1, RSMo

*Suber v. State*, 516 S.W.3d 386 (Mo. App. E.D. 2017)

*State v. Roark*, 877 S.W.2d 678 (Mo. App. S.D. 1994)

*State ex rel. Connett v. Dickerson*, 833 S.W.2d 471 (Mo. App. S.D. 1992)

*Petree v. State*, 190 S.W.3d 641 (Mo. App. W.D. 2006)

## ARGUMENT

**I. The motion court clearly erred in granting Defendant's postconviction motion to vacate, set aside, or correct the judgment or sentence because Defendant's postconviction claim was an allegation of trial-court error that is not cognizable in a postconviction motion in that Defendant could have raised the issue on direct appeal, and issues that can be raised on direct appeal cannot be raised in a postconviction motion.**

### **A. The record pertaining to this claim**

Defendant was put on five-years' probation on August 29, 2007. (L.F. 62.) The State filed its first motion to revoke probation on June 26, 2012. (L.F. 64; PCR Tr. 4.)

On December 5, 2012, the probation-revocation hearing was held. (P.R. Tr. 3-27.) At the beginning of the hearing, the trial court addressed whether the court retained authority to consider the motion for revocation based on the passage of time:

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.

\* \* \*

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 [sic] clear intent, reasonable efforts were made. It passed the five years by agreement of the Defendant; therefore, this Court has not lost jurisdiction.

(P.V. Tr. 3-4.)

The trial court then sentenced Defendant to five years in prison on each of the two counts, with the sentences running consecutively for a total of ten years. (L.F. 87, 91; Supp.Tr. 13.)

Defendant appealed his convictions and sentences, and they were affirmed by the Missouri Court of Appeals Southern District on October 21, 2014. *State v. Miller*, 448 S.W.3d 331 (Mo. App. S.D. 2014). The mandate issued on December 24, 2014. (Case No. SD32730.) Defendant did not include a claim that the trial court erred in revoking his probation or sentencing him based on the probation revocation. The Southern District stated in its opinion that “[a]t a probation violation hearing on December 5, 2012, the parties stipulated that the State had filed a timely motion to revoke probation, and there was a clear manifestation by the State of intent to revoke [Defendant’s] probation.” *Miller*, 448 S.W.3d at 332.

Defendant then filed a motion to vacate, set aside or correct the judgment or sentence alleging that the trial court did not have jurisdiction to revoke his probation because the revocation occurred after his probation ended. (PCR L.F. 5-8.) The motion court granted Defendant’s postconviction motion. (PCR L.F. 13-14.)

## **B. Standard of review**

“This Court reviews post-conviction cases to determine whether the findings and conclusions of the trial court are clearly erroneous.” *Knese v. State*, 85 S.W.3d 628, 631 (Mo. banc 2002) (citing Rule 29.15(k)). “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.* (quoting *Moss v. State*, 10 S.W.3d 508, 511 (Mo. banc 2000)). Defendant must prove his claims by a preponderance of the evidence.” *Id.* (citing Rule 29.15(i)).

### C. The motion court clearly erred

The motion court clearly erred in granting Defendant's motion for postconviction relief because his claim that the trial court erred in sentencing him because his probation was improperly revoked after his probationary period ended should have been raised on direct appeal.

"A postconviction motion does not substitute for a direct appeal." *State v. Tolliver*, 839 S.W.2d 296, 298 (Mo. banc 1992) (citing *Rodden v. State*, 795 S.W.2d 393, 395 (Mo. banc 1990)). "Rule 29.15 cannot be used to obtain postconviction review of matters which were or should have been raised on direct appeal." *Id.* "Issues that could have been raised on direct appeal—even if constitutional claims—may not be raised in postconviction motions, except where fundamental unfairness requires otherwise and only in rare and exceptional circumstances." *Id.* (citing *Davis v. State*, 804 S.W.2d 31, 34 (Mo. App. E.D. 1990)).

Here, Defendant's claim that the trial court was without authority to revoke his probation and sentence him could have been raised on direct appeal because the alleged error occurred in the trial court, and Defendant was aware of the alleged error at the time it occurred. Defendant raised the issue before the trial court at the probation-revocation hearing, and Defendant had the transcript from the probation-revocation hearing at the time of his direct appeal.

Missouri Courts have regularly held that similar known trial court errors should have been raised on direct appeal. *See McIntosh v. State*, 413 S.W.3d 320, 331 (Mo. banc 2013) (finding that the movant's prosecutorial misconduct claim was not cognizable in a 29.15 motion); *McLaughlin v. State*, 378 S.W.3d 328, 357 (Mo. banc 2012) ("Claims challenging the constitutionality of the death penalty are for direct appeal and are not

cognizable on a motion for post-conviction relief.”); *Tolliver*, 839 S.W.2d at 298 (“The double jeopardy claim was not cognizable in the Rule 29.15 proceedings. . . .”); *Wilson v. State*, 383 S.W.3d 51, 57 (Mo. App. E.D. 2012) (declining to review a claim that the prosecutor interfered with the defendant’s right to present a defense); *Glaviano v. State*, 298 S.W.3d 112, 115-16 (Mo. App. W.D. 2009) (finding that movant’s punitive sentencing claim was not cognizable under Rule 29.15); *Rupert v. State*, 250 S.W.3d 442, 446-47 (Mo. App. E.D. 2008) (refusing to review a claim that the information was “fatally defective in that it does not charge a criminal offense”); *Phillips v. State*, 214 S.W.3d 361, 364-65 (Mo. App. S.D. 2007) (“A claim of denial of the right to self-representation and due process is not cognizable in a post-conviction proceeding where it could have been raised on direct appeal.”).

In this case, the motion court clearly erred in granting Defendant’s motion for postconviction relief because his claim could have, and should have, been raised on direct appeal. Defendant did not raise a cognizable claim in his postconviction motion, and therefore, he cannot succeed in his request for postconviction relief.

**II. The motion court clearly erred in granting Defendant's postconviction motion to vacate, set aside, or correct the judgment or sentence because the trial court made every reasonable effort to hold the revocation hearing during the probationary period in that the probation-revocation hearing was continued past the end of Defendant's probation on his counsel's request and again by agreement, and the hearing was held within five months after Defendant's probationary period ended.**

**A. The record pertaining to this issue**

The State and Defendant stipulated to the following facts:

Defendant was put on five-years' probation on August 29, 2007. (L.F. 62.) The State filed its first motion to revoke probation on June 26, 2012, alleging that Defendant violated his probation on June 11, 2012, by "being in possession of an imitation controlled substance and drug paraphernalia[.]" (L.F. 64; PCR Tr. 4; Supp.PCR L.F. 7.) On that same day, the State sent notice of a probation-revocation hearing for August 8, 2012. (L.F. 68; Supp.PCR L.F. 7.)

On August 3, 2012, counsel for Defendant entered his appearance and filed a request for discovery. (L.F. 69, 71-72; PCR Tr. 4; Supp.PCR L.F. 3, 7.) At the August 8, 2012 hearing, Defendant's counsel announced that his office was conflicted out of the case. (Supp.PCR L.F. 3, 7.) The hearing was reset without agreement to August 23, 2012 (L.F. 13; Supp.PCR L.F. 3, 7.)

On August 9, 2012, the State filed a response to Defendant's request for discovery and included the same motion to revoke probation that was filed on June 26. (L.F. 13, 74-75; PCR Tr. 4.) On August 14, 2012, conflict counsel for Defendant entered his appearance, and on August 17, 2012, Defendant's former counsel sought to withdraw. (L.F. 13-14, 78, 80; PCR Tr. 4.)

On August 23, 2012, conflict counsel asked for a continuance without objection from the State. (Supp.PCR L.F. 3, 7.) The probation-violation hearing was then rescheduled to October 3, 2012 by agreement of the parties, which was past the end of Defendant's probation term. (L.F. 14; PCR Tr. 4; Supp.PCR L.F. 1.) The probation-revocation hearing was again continued by agreement to December 5, 2012. (L.F. 14; PCR Tr. 4; Supp.PCR L.F. 2.) On October 18, 2012, the State filed an amended motion to revoke probation. (L.F. 14, 81-82; PCR Tr. 4-5.)

On December 5, 2012, the probation-revocation hearing was held. (P.R. Tr. 3-27.) At the beginning of the hearing, the trial court addressed whether the court retained authority to consider the motion for revocation based on the passage of time:

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.

\* \* \*

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 [sic] clear intent, reasonable efforts were made. It passed the five years by agreement of the Defendant; therefore, this Court has not lost jurisdiction.

(P.V. Tr. 3-4.)

In his postconviction motion, Defendant alleged that the trial court was without jurisdiction to sentence him at the time his probation was revoked. (PCR L.F. 5-6.)

At the evidentiary hearing, the parties stipulated to the dates mentioned above regarding the filings and continuances. (PCR L.F. 4-6.) Defendant's postconviction counsel noted that "Judge, the only thing I would add is that [Defendant] – and we will address this – maintains that he did not agree to the – whatever [conflict counsel] may have done that he did not agree to any continuances of the hearing. And we'll just address that. I think that's one of those he said/he said type things." (PCR Tr. 5-6.)

Defendant testified and alleged that he did not agree to any continuances. (PCR L.F. 5, 7-8.) Specifically, Defendant testified that "[i]nitially, 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, [conflict counsel], he did do a verbal objection on both of those occasions and argued to the court that – that I was about to be – you know, my probation was about to expire." (PCR Tr. 7-8.)

Both parties submitted suggestions to the motion court. (Supp.LF 3:1-3, 4:1-8.) In its findings of fact and conclusions of law, the motion court found that the August 8, 2012 hearing setting was continued due to the entry of conflict counsel. (PCR L.F. 13.) The motion court also found that the August 23, 2012 hearing was "reset by signed memorandum of said date to October 3, 2012. This document is signed by counsel for the Movant and counsel for the Respondent and does not indicate which party, if either, requested said continuance nor does it indicate a reason for the continuance." (PCR L.F. 13.) The motion court concluded that the trial court did not have jurisdiction to revoke Defendant's probation because "there is no indication in the record for



the reason for the continuance of the revocation hearing from its August 23, 2007 [sic] date.”<sup>3</sup> (PCR L.F. 14.)

## **B. Standard of Review**

“This Court reviews post-conviction cases to determine whether the findings and conclusions of the trial court are clearly erroneous.” *Knese v. State*, 85 S.W.3d 628, 631 (Mo. banc 2002) (citing Rule 29.15(k)). “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.* (quoting *Moss v. State*, 10 S.W.3d 508, 511 (Mo. banc 2000)). Defendant must prove his claims by a preponderance of the evidence.” *Id.* (citing Rule 29.15(i)).

## **C. The law regarding the timing of probation revocations.**

“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 § 559.036.1, RSMo) (additional citation excluded). “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 o[f] probation.” *Petree*, 190 S.W.3d at 642 (citing *Stelljes v. State*, 72 S.W.3d 196, 200 (Mo. App. W.D. 2002)). “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).

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<sup>3</sup> There was no probation-revocation hearing set in 2007. The motion court’s reference to a hearing in 2007 was in error.

Missouri courts have addressed whether the trial court made every reasonable effort to hold a revocation hearing within the time of probation.

In *Timberlake v. State*, which the motion court cited in the instant case, two probation-violation reports were filed with the trial court before the end of the defendant's probation. 419 S.W.3d 224, 226-27 (Mo. App. S.D. 2014). Despite these filings, the trial court did not set a probation-revocation hearing until 23 days after the defendant's probationary period ended. *Id.* In reversing the motion court's decision denying the defendant's postconviction motion, the Southern District held that the trial court did not make every reasonable effort to hold the hearing before the expiration of the defendant's probation:

. . . [W]e are mindful of crowded dockets trial courts must manage, and difficulties which may arise when defendants have to be located and/or transported to court. Unfortunately, on the record before us, there is no evidence of a "reasonable effort" to conduct the hearing within the term of probation. This is not a case where a hearing was scheduled prior to expiration of probation and then continued. . . . The only evidence on this record before us is that the trial court set the matter for hearing one time, and that one setting was after [the defendant's] probation expired.

*Id.* at 230.

In *State ex rel. Strauser v. Martinez*, this Court considered whether the trial court made every reasonable effort to hold probation-revocation hearings before the probationary terms of two defendants ended. 416 S.W.3d at 799. The first defendant was placed on probation on June 4, 2007, and the State filed a motion to revoke probation on August 22, 2007. *Id.* at 800. The defendant appeared in court a total of 37 times between the time her probation-revocation hearing initially was scheduled and June 4, 2012, when her probation ended. *Id.* The defendant appeared in court eight more times between June 4, 2012 and February 4, 2013, when the trial court appointed a

public defender and scheduled the probation-violation hearing for March 4, 2013. *Id.* The defendant then filed a writ of prohibition. *Id.*

The other defendant in *Strauser* was placed on a five-year probation term on September 4, 2003. *Id.* On July 21, 2008, the trial court suspended the defendant's probation for failure to pay court costs. *Id.* On September 4, 2008, the last day of her probation, the trial court held a hearing, but, like with the other defendant, the trial court only addressed restitution. *Id.* Between September 4, 2008, and January 7, 2013, the trial court continued the case 22 times, and each time the docket entry listed the hearing as a case review or a hearing to monitor payments. *Id.* The defendant then filed a writ of prohibition. *Id.* at 801.

This Court found that, in each case, the trial court could have ruled on the revocation motion during any of the numerous occasions the defendants appeared in court, and because the court failed to make such ruling, it did not make every reasonable effort to hold the hearing during the probationary period. *Id.* at 802-03. *See also State ex rel. Whittenhall v. Conklin*, 294 S.W.3d 106, 107 (Mo. App. S.D. 2009) (holding that it was not reasonable to hold the revocation hearing three years after the end of the probationary period); *State ex rel. Breeding v. Seay*, 244 S.W.3d 791 (Mo. App. S.D. 2008) (holding that the trial court acted unreasonably in waiting nearly two years from the time the first motion to revoke probation was filed until the revocation hearing was held); *State ex rel. Parrott v. Martinez*, 496 S.W.3d 563 (Mo. App. E.D. 2016) (holding that the trial court did not make every reasonable effort to hold the revocation hearing before the end of the defendant's probation when the trial court held seven hearings before the end of the defendant's probation and the defendant appeared seven more times after her probation ended before the trial court ruled on the revocation motion); *State ex rel.*

*Zimmerman v. Dolan*, 514 S.W.3d 603 (Mo. banc 2017) (holding that trial court did not make every reasonable effort to conduct a hearing before the end of the defendant's probation when there was an almost-11-year delay between the end of the defendant's probation and the date of the hearing).

In cases more factually on point, Missouri Courts have found that trial courts did hold the revocation hearing as soon as reasonably possible. In *State v. Roark*, the State filed an application to revoke the defendant's probation on June 3, 1993, about two months before the end of the probation period. 877 S.W.2d 678, 680 (Mo. App. S.D. 1994). The State simultaneously filed a notice of hearing setting the probation-violation hearing for June 23, 1993. *Id.* On the day of the hearing, the State requested a continuance because there were no witnesses subpoenaed. *Id.* The trial court reset the hearing for August 9, 1993. *Id.* On June 30, 1993, the defendant filed a continuance. *Id.* On July 2, 1993, the trial court reset the hearing for August 16, 1993, which was after the end of the defendant's probationary period. *Id.* At the hearing, the defendant moved to dismiss the application to revoke probation because the hearing occurred outside the probation period. *Id.* The trial court denied the defendant's motion to dismiss and found that the August 16 date was the soonest the hearing could be held based on the calendars of the court, the State, and the defendant. *Id.* On appeal, the Southern District affirmed the trial court's ruling, finding that the defendant did not challenge the trial court's statement that the hearing was held on the soonest date it could be held, and therefore, the defendant failed to show that the trial court did not make every reasonable effort to hold the hearing before the expiration of the probation period. *Id.*

In *Petree v. State*, the Board of Probation and Parole recommended on March 29, 2002, that the defendant's probation be revoked, which was two

months before the end of the probation period. 190 S.W.3d at 642. On May 6, 2002, a hearing was held, at which the defendant asked for a continuance to obtain counsel. *Id.* The next hearing was set for July 1, 2002, and it was continued on the court's own motion to September 6, 2002. *Id.* The hearing was ultimately held on November 4, 2002. *Id.* The defendant then filed a postconviction motion alleging that the trial court did not have jurisdiction to revoke his probation because his probationary period had expired on May 28, 2002. *Id.* The motion court found that the delays in holding the revocation hearing were reasonable and that the defendant was not prejudiced. *Id.* On appeal, the Western District affirmed, holding that the defendant did not allege or demonstrate that the delays were unreasonable. *Id.* at 643. *See also State ex rel. Connett v. Dickerson*, 833 S.W.2d 471 (Mo. App. S.D. 1992) (stating that when a continuance is granted on the defendant's request, "he cannot complain that it was not conducted prior to the expiration of the five-year period.").

In *Suber v. State*, the defendant was put on a five-year term of probation on January 14, 2010. 516 S.W.3d 386, 387 (Mo. App. E.D. 2017). After violating his probation and waiving a revocation hearing, the defendant's probation period was suspended and extended to March 19, 2015. *Id.* On November 7, 2011, the defendant was confined on a probation officer's warrant, and a revocation hearing was scheduled for January 23, 2012. *Id.* Between January 23, 2012 and June 10, 2015, the revocation hearing was rescheduled at the request of the parties 12 times because both parties wanted new charges the defendant had acquired to be resolved before holding the hearing. *Id.* The majority of the continuances were "respectfully submitted" by the defendant's counsel, and the defendant did not object when the State asked for continuances. *Id.* The hearing eventually was held on

June 10, 2015, and the defendant's probation was revoked. *Id.* The defendant then filed a postconviction motion, and the motion court denied the defendant's motion for postconviction relief. *Id.* at 388. On appeal, the Eastern District affirmed and found that "[the defendant's] consenting to or filing motions for continuances supports a finding that the motion court took every reasonable measure to hold a revocation hearing." *Id.* at 391. *See also Robinson v. State*, 509 S.W.3d 811 (Mo. App. E.D. 2016) (stating that the trial court held the hearing within a reasonable amount of time because "all the delays during those few months were attributable to [the defendant's] actions of consenting to continuances or filing motions and writs.").

#### **D. The motion court clearly erred**

Here, it is clear from the motion court's findings and judgment that a mistake has been made.

First, the motion court's findings are not supported by the record, including the facts stipulated to by both parties. Throughout the findings, the motion court confused both years and when events occurred. Most notably, the motion court found that "the hearing set for August 8, 2012 was continued or reset to August 23, 2007 [sic] due to the entry of conflict counsel." (PCR L.F. 13.) But this cannot be true because the August 8, 2012 hearing was reset before conflict counsel entered his appearance on August 14. (L.F. 13.) Counsel for Defendant did announce that there was a conflict on August 8, but the case was reset for August 23, which was still within Defendant's probation period.

The motion court also found that the August 23, 2012 hearing was "reset by signed memorandum of said date to October 3, 2012. This document is signed by counsel for the Movant and counsel for the Respondent and does not indicate which party, if either, requested said continuance nor does it

indicate a reason for the continuance.” While it is correct that the signed memorandum does not specify who requested the continuance, both parties admitted in their suggestions that Defendant’s conflict counsel asked for the continuance of the August 23 hearing. This agreement and stipulation of fact should be considered a judicial admission that is binding on the parties. See *Bull v. Excel Corp.*, 985 S.W.2d 411, 415 (Mo. App. W.D. 1999) (citing *Pierson v. Allen*, 409 S.W.2d 127, 130 (Mo. 1966) (“stipulations of fact are generally binding in Missouri”)); *State v. Licata*, 501 S.W.3d 449, 454 n.5 (Mo. App. W.D. 2016) (“Counsel’s argument regarding [the defendant’s] purpose constituted a judicial admission.”).

Next, the motion court’s finding that the trial court did not have authority to revoke Defendant’s probation because “there is no indication in the record for the reason for the continuance of the revocation from its August 23, 2007 [sic] date” also is clearly erroneous. The motion court clearly erred because it found that the only relevant inquiry into whether the trial court made every reasonable effort to hold the hearing during the probationary term was who sought the continuance and why. Because this information was not memorialized in the continuance memorandum, the motion court found that the trial court did not make every reasonable effort to hold the hearing within the probationary term. But the motion court failed to consider the fact that Defendant’s conflict counsel asked for the continuance.<sup>4</sup>

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<sup>4</sup> Defendant argued to the motion court that he did not personally consent to his counsel asking for or agreeing to continuances. But counsel “has—and must have—full authority to manage the conduct of the trial.” *New York v. Hill*, 528 U.S. 110, 114-15 (2000) (quoting *Taylor v. Illinois*, 484 U.S. 400, 417-18 (1988)).



Here, the record shows that every reasonable effort to hold a probation-revocation hearing was made by the trial court. The trial court initially set the probation-revocation hearing for August 8, 2012, 21 days before Defendant's probation was set to expire. (L.F. 68.) That hearing was continued and rescheduled for August 23, 2012, after counsel for Defendant entered his appearance and announced that his office had a conflict. (L.F. 13; Supp.PCR L.F. 3:1.) The probation-revocation hearing then was rescheduled to October 3, 2012, after Defendant's conflict counsel sought a continuance. (L.F. 14; PCR Tr. 4; Supp.PCR L.F. 3:1, 4:1.) Even though this information was not included in the continuance memo, both parties stipulated to those facts. The parties again consented to a continuance from October 3 to December 5, when the hearing ultimately was held.

This case is more like *Dickerson*, *Roark*, *Petree*, and *Suber* in that the trial court initially set hearing dates during the time Defendant was still on probation, but because of continuances sought and consented to by Defendant's counsel, the hearing ultimately was held outside of the probationary period. The trial court is not required to make every conceivable effort to conduct the hearing prior to the expiration of the period of probation; rather, it must make only every reasonable effort. Therefore, the motion court clearly erred in granting Defendant's motion for postconviction relief.



## CONCLUSION

For the foregoing reasons, the motion court clearly erred and its order granting Defendant's motion to vacate, set aside, or correct the judgment or sentence should be reversed.

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE**

I hereby certify that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) in that it contains 5922 words excluding the cover, certificate required by Rule 84.06(c), and signature block.

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