IN THE SUPREME COURT OF MISSOURI

Case No. SC96796

ALOK KUMAR ROHRA,
Appellant/Defendant,

v.

STATE OF MISSOURI,
Respondent/Plaintiff.

On Appeal to the Supreme Court of Missouri
Following Transfer After Opinion by the Missouri Court of Appeals
Eastern District of Missouri
From the 22nd Judicial Circuit Court, St. Louis City, Missouri, Division 12
Honorable Michael Francis Stelzer, Presiding

SUBSTITUTE REPLY BRIEF OF APPELLANT/DEFENDANT ALOK KUMAR ROHRA

ROSENBLUM, SCHWARTZ, & FRY, PC

JOEL J SCHWARTZ, #39066
120 S. Central Avenue, Suite 130
Clayton, Missouri 63105
(314) 862-4332
Facsimile 862-8050
Joel@rsflawfirm.com

Attorneys for Appellant/Defendant
Alok Kumar Rohra

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I. Appellant's Substitute Brief did not violate Missouri Supreme Court Rule 83.08(b) because he did not alter the basis of his claim of error raised in the Court of Appeals brief.

That Appellant's substitute brief edited the wording of his Point Relied On from the way it was presented in his original appellate brief does not violate Rule 83.08(b):

> (**b**) **Substitute Briefs.** A party may file a substitute brief in this Court. The substitute brief shall conform with Rule 84.04, **shall include all claims the party desires this Court to review, shall not alter the basis of any claim that was raised in the court of appeals brief,** and shall not incorporate by reference any material from the court of appeals brief. Any material included in the court of appeals brief that is not included in the substitute brief is abandoned.

Mo. Sup. Ct. R. 83.08(b) (emphasis added). The Court encourages litigants to file substitute briefs. *Williams v. Hubbard*, 455 S.W.3d 426, 432 (Mo. banc 2015), *reh'g denied* (Mar. 31, 2015), *as modified* (Mar. 31, 2015). Were it the case that a party could not add to, clarify, or elaborate on his arguments, "there would be no point in encouraging or allowing substitute briefs at all." *Cox v. Kansas City Chiefs Football Club, Inc.*, 473 S.W.3d 107, 114 n.4 (Mo. banc 2015), *reh'g overruled* (Nov. 24, 2015) (approving of appellant's substitute brief over the appellee's objection, stating, "This is substantially the same basis for his claim before this Court and, to the extent that his brief below does not specifically apply the legal relevance standard to the excluded evidence, Rule 83.08(b) does not prohibit a party filing a substitute brief with this Court from improving the brief with more detailed legal analysis than that articulated below.").

Rule 83.08 does not require that a litigant exactly reproduce the wording of the Point Relied On but instead, prohibits the litigant from "alter[ing] *the basis of*" his claim that was raised below. Mo. Sup. Ct. R. 83.08(b) (emphasis added). Here, the basis of Appellant's claim has not changed. This is evident from a simple comparison of Appellant's substitute brief with the appellate court's opinion below. (*See State v. Rohra*, No. ED105084, 2-3 (Mo. App. E.D., Nov. 21, 2017).) The appellate court recognized that Appellant challenged the charge against him based on his prior "conviction" by filing a motion to dismiss and later orally amending that motion, which the trial court ruled on in February 2016, and that "Rohra persisted in his challenge by filing a motion to quash the indictment in June 2016, which the court heard and summarily denied that August." *Rohra*, ED105084, at 2-3 (noting that the trial court record is "not clear"). It is the sufficiency of the charging document against him, ruled upon in these decisions by the trial court, which have always been the basis of Appellant's appeal.

> Rohra's point does not impede disposition on the merits. Both the State and this court fully understand the substantive issue presented on appeal. Rohra frames his argument around the trial court's denial of his motion to dismiss because that written order contains the trial court's legal analysis for this court to review. But Rohra's brief also cites to his subsequent motion to quash the indictment and the trial court's summary denial of that motion. Clearly Rohra's point challenges that ruling as well.

Id. at 4. Respondent's argument that Appellant waived the point of error as to the denial of his motion to quash the indictment is not well taken.

Appellant's substitute brief sought to clarify the issue presented, including by more accurately stating what has always been the issue on appeal—the trial court's denial of Appellant's challenges to the sufficiency of the charging documents. "Rule 83.08(b)

does not prohibit a party filing a substitute brief with this Court from improving the brief with more detailed legal analysis than that articulated below." *Cox*, 473 S.W.3d at 114 n.4; *see also Williams*, 455 S.W.3d at 432. Appellant did not "alter the basis of" his claim of error, and his substitute brief did not violate Rule 83.08(b). *See* Mo. Sup. Ct. R. 83.08(b).

II. Appellant's claim that the trial court erroneously denied Appellant's motions challenging the sufficiency of the charging documents is a proper basis for this appeal.

Respondent makes several arguments seeking the waiver of Appellant's claim of error. First, Respondent attempts to take advantage of an unclear trial court record by arguing that Appellant withdrew his motion to dismiss in the trial court, and therefore waived his claim of error as to the denial of the motion. That the trial court actually issued a written order considering and denying Appellant's motion on the merits belies Respondent's claim, and supports the conclusion that his orally amended motion to dismiss was before the trial court. And even if Appellant had entirely withdrawn the motion in the trial court, which the record does not support, Missouri law permits a challenge to the sufficiency of an indictment to be raised for the first time on appeal. *State v. Sparks*, 916 S.W.2d 234, 237 (Mo. App. 1995), citing *State v. Parkhurst*, 845 S.W.2d 31 (Mo. banc 1992).

Second, Respondent argues that Appellant's claim is waived because he pleaded guilty to the charge that he had initially challenged both in his amended motion to dismiss and his motion to quash the indictment. This argument is not well taken and

contradicts well-established authority that "a person who pleads guilty to a criminal offense has a right to challenge the sufficiency of the information or indictment by direct appeal." *Dodds v. State*, 60 S.W.3d 1, 6 (Mo. App. 2001).

An admission of every element of an offense is inherent in all guilty pleas. However, "a direct appeal [of a guilty plea] is available to challenge either jurisdiction or the sufficiency of the indictment or information." *Johnson v. State*, 941 S.W.2d 827, 829 n.1 (Mo. App. 1997). If admissions of the elements of a crime made at a plea hearing could foreclose reviewing the sufficiency of the underlying indictment or information, no such review would be possible. Yet, Respondent argues that when Appellant pleaded guilty, he "admitted" that he was "convicted" of Oklahoma felonies. (*See* Resp. Br. 19, 27-28.) This assertion has no merit. As an initial matter, Appellant's "admission" was tempered by his counsel's statement that Appellant was pleading "guilty with an explanation," made after counsel's observation that the issue whether the Oklahoma infractions were felony convictions had already been (adversely) decided by the court. (*See* Tr. 12:12-24.) Furthermore, Appellant's "admission" that he had been convicted of felonies has no practical effect because the issue whether he had been "convicted" is a matter of law, not a matter of fact, and therefore is subject to *de novo* review notwithstanding any "admission" to the contrary. *See, e.g., State v. Self*, 155 S.W.3d 756, 759 (Mo. banc 2005), *holding modified on other grounds by State v. Claycomb*, 470 S.W.3d 358 (Mo. banc 2015) (apart from factual matters, such as missing 40 days of school, "legal issues, such as what constitutes a failure to attend school regularly . . . are not matters for stipulation" in a criminal case and are subject to *de novo* review). For all

of these reasons, any contention that Defendant "admitted" he was "convicted" has no bearing on the propriety of this appeal.

Finally, Respondent argues in its substitute brief that "[Appellant]'s argument on appeal, while purporting to challenge the sufficiency of the indictment, is merely an allegation that he had a factual defense to one of the allegations (i.e., that he had not been "convicted" of the Oklahoma crimes)," and that "[f]actual defenses do not constitute pleading insufficiencies or defects in an indictment." (*See* Resp. Br. 24.)[1] Respondent's arguments must fail. "When the basis of a defendant's motion to dismiss is a question of law, the trial court may, for the purpose of deciding the legal issue, consider material outside of the information or indictment." *State v. Metzinger*, 456 S.W.3d 84, 93 (Mo. App. 2015) (citing *State v. Fernow*, 328 S.W.3d 429, 431 (Mo. App. 2010)); *see also Fernow*, 328 S.W.3d at 433 (concluding that an information was insufficient to charge defendant with escape from custody "because he was in custody for failing to appear at a probation revocation hearing," which was only evident from consideration of evidence outside the charging document). In this case, the question whether a "conviction" under § 571.070.1, RSMo., is defined by application of Missouri or Oklahoma principles and precedents is purely one of law, and reference to undisputed records of Defendant's criminal history was and is appropriate. Moreover, any objection regarding the

[1] Respondent cites *State v. Parker*, 792 S.W.2d 43, 44 (Mo. App. 1990), in support, but *Parker* does not stand for this proposition and does not address "factual defenses" or challenges to an indictment at all. *See id.* ("Appellant's sole contention on appeal is that the trial court did not have jurisdiction because he was charged under the wrong statute.").

consideration of material outside an indictment should not be entertained where, as here, "counsel for the State and Defendant both discussed and analyzed the [material] at the hearing on Defendant's motion to dismiss and at oral argument on appeal." *See Metzinger*, 456 S.W.3d at 93.

For all of the reasons stated above and in Appellant's Substitute Brief, Appellant properly challenges the sufficiency of the charging documents in this case and preserved that challenge in the trial court to any extent necessary through his amended motion to dismiss as well as his motion to quash the indictment, which were both erroneously denied by the trial court. Appellant's point of error is properly before this Court, is not waived by his guilty plea, and raises a question of law that should be decided *de novo*. *Metzinger*, 456 S.W.3d at 89 (citing *State v. Rousseau,* 34 S.W.3d 254, 259 (Mo. App. 2000)).

III. The trial court erred in denying Appellant's amended motion to dismiss which challenged the sufficiency of the charging document, and in denying Appellant's subsequent motion to quash the indictment on the same grounds, by finding that Appellant was "convicted" of a crime that would be a felony in Missouri.

The question raised in this case is whether the essential element of a predicate "conviction" under § 571.070.1, RSMo. was sufficiently alleged in the indictment to which Appellant ultimately pleaded guilty. Respondent recognizes this and offers a lengthy and meandering analysis of the statutory language which often misses the point or distracts from the real issue. Without belaboring the point, the statute states:

> A person commits the crime of unlawful possession of a firearm if such person knowingly has any firearm in his or her possession and: (1) Such person has been convicted of a felony under the laws of this state, or of a crime under the laws of any state or of the United States which, if committed within this state, would be a felony.

§ 571.070.1(1), RSMo. Appellant contends that whether a defendant charged with a violation of § 571.070 has a prior "conviction" must be determined according to whether that prior conviction would constitute a felony conviction under Missouri law. Respondent contends that a "conviction" under the law of another state, even if the same would not constitute a conviction under Missouri law, is sufficient to satisfy the required element of a predicate "conviction" for purposes of § 571.070, RSMo. If both interpretations are reasonable from the language of the statute, then the statute is ambiguous, and the rule of lenity must be applied such that only a "conviction" which would be considered a felony conviction under Missouri law will suffice to charge and convict a defendant with violation of § 571.070.1, RSMo. *See State v. Rodgers*, 396 S.W.3d 398, 403 (Mo. App. 2013) (quoting *Fainter v. State*, 174 S.W.3d 718, 721 (Mo. App. 2005)).

However, Respondent's interpretation of the statute is not reasonable. Despite Respondent's exhortations that "[w]hen interpreting a statute, this Court must give meaning to **every word or phrase** of the legislative enactment," (Resp. Sub. Br. 28 (quoting *State v. Moore*, 303 S.W.3d 515, 520 (Mo. banc 2010)) (emphasis added)), Respondent repeatedly supports its proffered interpretation of the statute by quoting only a portion thereof. (*See, e.g.*, Resp. Sub. Br. 29 (quoting § 571.070.1(1), RSMo.) ("The plain language of the statute, and the rules of ordinary grammar demonstrate that

Defendant need only have been 'convicted of a crime . . . under the laws of any state' and need not have been 'convicted' under the laws of Missouri.").) Respondent's failure to analyze the statute in its entirety, including essential phrases that necessarily modify the word "convicted," demonstrates the fallacy in its interpretation of the statutory language.

Moreover, Respondent's arguments rely on easily distinguished law. For example, Respondent claims that federal courts determine whether a defendant charged with violation of the federal felon-in-possession law has a prior "conviction" on the basis of the state's law where the conviction was entered. (*See* Resp. Sub. Br. 36 (citing *United States v. Soloman*, 826 F. Supp. 1221, 1222 (8th Cir. 1993); *United States v. Greenberg*, 104 Fed. Appx. 34 (9th Cir. 2004).) However, this determination is made because federal law *explicitly provides* that "What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held." 18 U.S.C. § 921(a)(20). In this case, Missouri law does not explicitly define "conviction," nor whether the law of Missouri or of the foreign state should determine whether a prior "conviction" exists under § 571.070.1, RSMo. Moreover, the federal law is consistent with principles of federalism applicable between the federal government and the States.

Likewise, Respondent's reliance on *People v. Allaire*, 843 P.2d 38 (Colo. App. 1992) and *Brant v. State*, 992 P.2d 590 (Alaska App. 1999) is misplaced, as those cases did not involve an alleged predicate felony conviction *in another state*. In each case both the predicate felony and the charged violation of the felon-in-possession statute occurred in the same state, and the state courts applied their own laws—including statutes and

caselaw defining a "conviction"—to determine whether a "conviction" occurred. *See Brant*, 992 P.2d at 591-92; *Allaire*, 843 P.2d at 40-41. In fact, *Allaire* turned on whether a Colorado guilty plea under its own deferred sentencing scheme constituted a prior conviction – a question that Missouri has already answered in the negative. *Yale v. City of Independence*, 846 S.W.2d 193, 195 (Mo. banc 1993); *see Allaire*, 843 P.2d at 40-41.

Here, where the only question is the interpretation of Missouri's felon-in-possession statute, the overriding interest is Missouri's right, accorded to each State, to legislate according to its own interests, values, and constitution. *See* App. Sub. Br. 16-17 (citing, *e.g.*, *State v. Evans*, 51 Kan. App. 2d 168, 172 (Kan. App. 2015); *State v. Menard*, 888 A.2d 57, 61 (R.I. 2005)). There is every reason to apply Missouri law to determine whether the adjudication of a foreign state would constitute a "conviction" in Missouri. Notably, Missouri chooses to apply its own law to the question of whether a prior offense constituted a felony under § 571.070.1, RSMo. There is no logical reason to conclude the legislature intended a different result when the question is whether there was a prior "conviction."

Overall, Respondent provides no authority for the statutory interpretation that it seeks to impose on § 571.070.1, RSMo., and Respondent's proposed interpretation is in fact contrary to Missouri law and its principles of statutory interpretation. For all of the reasons discussed above and in Appellant's Substitute Brief, Appellant's conviction for violation of section 571.070 must be vacated.

CONCLUSION

For the reasons stated above, Appellant's conviction and sentence for violation of § 571.070.1(1), RSMo. should be vacated and Appellant's case should be remanded to the trial court for entry of dismissal of that charge.

Respectfully submitted,

ROSENBLUM, SCHWARTZ & FRY, P.C.

By: */S/Joel J Schwartz*
JOEL J SCHWARTZ, #39066
Attorney for Appellant
120 S. Central Avenue, Suite 130
Clayton, Missouri 63105
(314) 862-4332
Facsimile 862-8050
Joel@rsflawfirm.com

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that on this 23rd day of February, 2018, a true and accurate copy of this substitute brief and all exhibits and appendices thereto were sent by U.S. Mail, and by means of the court's electronic filing system, to: Shaun J. Mackelprang, Assistant Attorney General, P.O. Box 899, Jefferson City, MO 65102.

/s/ Joel J Schwartz

RULE 84.06(c) CERTIFICATION

Undersigned counsel hereby certifies that this substitute reply brief complies with all requirements of Rule 84.06(c), including that:

(1) The information required by Rule 55.03 is contained herein;
(2) The brief complies with the limitations of Rule 84.06(b); and
(3) The brief contains a total of 3061 words.

By: */S/Joel J Schwartz*