

No. SC96754

In the
Supreme Court of Missouri

RICHARD MILLER,

Respondent,

v.

STATE OF MISSOURI,

Appellant.

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

APPELLANT'S SUBSTITUTE REPLY BRIEF

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ARGUMENT

I. (Claim should have been raised on direct appeal.)

As an initial matter, “[i]n all appeals, this Court is required to examine its jurisdiction *sua sponte*.” *Gash v. Lafayette County*, 245 S.W.3d 229, 232 (Mo. banc 2008) (quoting *In re Marriage of Werths*, 33 S.W.3d 541, 542 (Mo. banc 2000)). When a postconviction motion raises claims that should have been raised on direct appeal, the defendant “is procedurally barred from raising such claims in a post-conviction motion.” *Rodden v. State*, 795 S.W.2d 393, 395 (Mo. banc 1990). And “[i]f the motion [motion] court lacked authority to grant the relief [movant] sought, this court acquired no jurisdiction to review the matter appealed on its merits.” *Norville v. State*, 83 S.W.3d 112, 114 (Mo. App. S.D. 2002) (quoting *State v. Ortega*, 985 S.W.2d 373, 374 (Mo. App. S.D. 1999) (alteration in *Norville*)). Because Defendant should have raised his sentencing claim on direct appeal, the motion court had no authority to rule on the postconviction motion. Therefore, this Court does not have jurisdiction to decide the merits of this case and, whether or not this issue was timely raised, the Court should remand for dismissal.

Defendant argues that trial court authority to revoke probation after expiry cannot be raised on direct appeal, and he relies primarily on *State v. Burnett*, 72 S.W.3d 212 (Mo. App. W.D. 2002), and *State v. Person*, 288 S.W.3d 802 (Mo. App. E.D. 2009). (Defendant’s Subst. Br. at 15-19.) But these cases are inapposite because they are in the guilty plea context, and generally a direct appeal is waived by the entry of a guilty plea.

“In Missouri, the general rule is that a guilty plea waives all nonjurisdictional defects, including statutory and constitutional guarantees.” *Garris v. State*, 389 S.W.3d 648, 651 (Mo. banc 2012) (citing *Feldhaus v. State*, 311 S.W.3d 802, 805 (Mo. banc 2010) (citation omitted)). This is

because “[a] guilty plea not only admits guilt but also consents to judgment of conviction without a jury trial.” *Id.* (quoting *Cooper v. State*, 356 S.W.3d 148, 153 (Mo. banc 2011)). “Therefore, ‘[i]n a direct appeal of a judgment and sentence entered as a result of a guilty plea, [appellate court] review is restricted to [claims involving] the subject-matter jurisdiction of the trial court and the sufficiency of the information or indictment.’” *State v. Hopkins*, 432 S.W.3d 208, 211 (Mo. App. W.D. 2014) (quoting *State v. Onate*, 398 S.W.3d 102, 105 (Mo. App. W.D. 2013); *State v. Klaus*, 91 S.W.3d 706, 706 (Mo. App. E.D. 2002)).

Because a defendant usually cannot take a direct appeal following a guilty plea, the defendant’s only avenue to challenge a probation revocation is through an extraordinary writ. *Burnett*, 72 S.W.3d at 215. Similarly, for a defendant who has entered a guilty plea, the only way to challenge the jurisdiction of the court to enter a sentence is through a postconviction motion under Rule 24.035. *Id.* at 214 n.2.

But Defendant, in this case, did not plead guilty. Therefore, he was entitled to take, and did take, a direct appeal. *See State v. Miller*, 448 S.W.3d 331 (Mo. App. S.D. 2014). Missouri courts regularly decide sentencing issues on direct appeal. *See State v. Severe*, 307 S.W.3d 640, 642 (Mo. banc 2010) (finding, on direct appeal, that it was plain error for the trial court to sentence the defendant as a persistent DWI offender); *State v. Tisius*, 92 S.W.3d 751, 766 (Mo. banc 2002) (finding, on direct appeal, that the trial court had jurisdiction to sentence the defendant to death). Therefore, Defendant should have raised this issue on direct appeal. Because Defendant failed to raise this issue on direct appeal, the issue cannot be raised in a motion for postconviction relief. *See State v. Tolliver*, 839 S.W.2d 296, 298 (Mo. banc 1992).

Defendant next argues that, even if his revocation and sentencing claim is not cognizable in a postconviction action, he also alleged that the trial court was without jurisdiction to rule on the State's amended motion to revoke probation because it was filed outside of the probationary period, and that his trial counsel was ineffective at his probation revocation hearing. (Defendant's Subst. Br. at 20-21.) Defendant argues that, because he raised these claims in his postconviction motion, this Court could find that the motion court's decision was correct even for the wrong reason. *Id.* at 20. But Defendant also could have raised the issue about the trial court proceeding on the State's amended motion to revoke probation in a direct appeal or in an application for an extraordinary writ. And a claim of ineffective assistance of counsel during the probation revocation hearing also is not cognizable in a postconviction action. *See Swallow v. State*, 398 S.W.3d 1, 7 (Mo. banc 2013).

Therefore, because none of Defendant's claims were cognizable in a postconviction action, the motion court had no authority to rule on Defendant's postconviction claims. Because the motion court had no authority to entertain Defendant's postconviction motion, this Court should order the motion court to dismiss Defendant's postconviction motion.

II. (The motion court clearly erred.)

If this Court reaches the merits of Defendant's postconviction motion, the Court should find that the motion court clearly erred in finding that the trial court did not make every reasonable effort to hold the probation-revocation hearing during Defendant's probation term.

Defendant's arguments rely on his testimony at the evidentiary hearing that "my representation, James Wilson, 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. 8.) But this self-serving testimony was contrary to the stipulations of fact made at the revocation hearing, the stipulations of fact made at the postconviction evidentiary hearing, and the suggestions of both counsel for Defendant and counsel for the State following the evidentiary hearing. "[W]here facts are largely stipulated, it is error for a trial court to find a fact contrary to the parties' stipulation." *Orthotic & Prosthetic Lab, Inc. v. Pott*, 851 S.W.2d 633, 639 (Mo. App. E.D. 1993) (citing *Degerinis v. Degerinis*, 724 S.W.2d 717, 720 (Mo. App. E.D. 1987)).

Throughout the postconviction action, counsel for Defendant maintained that Defendant's conflict counsel at the probation revocation hearing did consent to the continuances, and postconviction counsel admitted in her suggestions in support of postconviction relief that conflict counsel sought the continuance of the revocation hearing on August 28, which caused the hearing to be held beyond the probationary period. Postconviction counsel was required to admit these facts because "[counsel], on behalf of movant, is obligated to make a fair and accurate statement of the essential and decisive facts of the case[;]" and "[t]he attorney's obligation to the client does not

include omitting relevant and decisive facts from the court.” *Thurman v. State*, 859 S.W.2d 250, 253 (Mo. App. W.D. 1993).

The motion court should have relied on the stipulations of fact set forth by the parties. Because Defendant both sought and consented to continuances that pushed his probation-revocation hearing past the end of his probationary period, the motion court erred in finding that the trial court failed to make every reasonable effort to conduct the probation-revocation hearing within the probationary period.

Defendant also argues that neither postconviction counsel nor counsel for the State was present for the requests for continuances, so his own testimony was “highly persuasive.” (Defendant’s Subst. Br. at 38-39.) Defendant cites *State v. Ward*, 745 S.W.2d 666, 672 (Mo. banc 1988), to support his argument that Defendant’s testimony was “a compelling first-hand account of the revocation proceedings as countervailing evidence refuting appellant’s contention drawn from the alleged ‘stipulation’ that trial counsel sought a continuance of the August 23, 2012 hearing.” (Defendant’s Subst. Br. at 38.) But *Ward* dealt with testimony about the inferences drawn from evidence that was admitted by stipulation, not a stipulation of fact. Moreover, trial counsel would have been the best witness to deliver a “compelling first-hand account of the revocation proceedings[,]” but postconviction counsel instead opted to enter into a stipulation of the facts. It is clear from the record that postconviction counsel did not believe Defendant’s testimony in that she initially told the court that Defendant “maintains that he did not agree to the – whatever Mr. Wilson 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.) Plea counsel also informed the motion court, and Defendant agreed, that what happened at the hearing was in the transcript. (PCR Tr. 9.)

Further, even if this Court does not find that the motion court was bound by the stipulations and admissions of the parties, the motion court did not find that Defendant did not consent to the continuances. (PCR L.F. 13 (“The August 23, 2007 [sic] 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 the reason for the continuance.”)) In fact, the motion court did not even consider Defendant’s testimony in making its ruling. (PCR L.F. 13 (“Now, in chambers, the Court reviews the stipulations of the parties, examines the court files and entries therein and reviews the suggestions of counsel and makes the following findings, conclusions, and judgment[.]”)) Instead, the motion court found only 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.” (PCR L.F. 16.) But the fact that Defendant consented to the continuances should be sufficient to show that the trial court made every reasonable effort to hold the hearing within the probationary period. *See Suber v. State*, 516 S.W.3d 386, 387 (Mo. App. E.D. 2017); *Robinson v. State*, 509 S.W.3d 811 (Mo. App. E.D. 2016).

Finally, as stated in Appellant’s Substitute Brief, 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. It was reasonable for the trial court to continue the August 28, 2012, hearing past the end of the probation period either because

Defendant requested it to be continued or because he consented to it being continued. Therefore, the motion court clearly erred in granting Defendant's motion for postconviction relief.

CONCLUSION

For the foregoing reasons, Defendant's postconviction claims should be dismissed; or, in the alternative, 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 2101 words excluding the cover, certificate required by Rule 84.06(c), and signature block.

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