

IN THE
MISSOURI SUPREME COURT

STATE EX REL.)	
GARY SAMPSON,)	
)	
Relator,)	
)	
vs.)	No. SC97002
)	
HONORABLE WILLIAM HICKLE,)	
)	
Respondent.)	

PETITION OF WRIT OF MANDAMUS TO THE MISSOURI SUPREME
COURT
FROM THE CIRCUIT COURT OF
PHELPS COUNTY, MISSOURI
TWENTY-FIFTH JUDICIAL CIRCUIT
THE HONORABLE WILLIAM HICKLE, JUDGE

RELATOR'S BRIEF

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JURISDICTIONAL STATEMENT

In this writ case, Mr. Sampson Jr. seeks to compel Judge William Hickle to immediately release him from probation. On October 13, 2015 Relator was placed on an invalid third term of probation. On March 1, 2018, Relator filed a writ with the Court of Appeals Southern District. On March 2, 2018, the Missouri Court of Appeals Southern District issued an order denying the writ. The Missouri Constitution grants this Court Jurisdiction because this is an original writ involving an abuse of discretion by a lower court. Mo. Const. art. V. § 4. Missouri Constitution grants this Court control over all courts and tribunals and the authority to issue and determine original remedial writs. *Id.* On March 7, 2018, this Court issued a preliminary writ.

STATEMENT OF FACTS

On November 8, 2012, Relator pleaded guilty to possession of a controlled substance. Relator was granted a suspended imposition of sentence and was placed on probation for a term of five years supervised by the Board of Probation and Parole, creating a first term of probation. (Ex. A pg.3). On November 14, 2013, Judge William Hickle revoked Relator's probation. Relator was sentenced to six years in the department of corrections, and the execution of his sentence suspended. He was placed on a five year term of probation, creating a second term of probation. (Pet. Ex. A pg.4).

On July 9, 2015, Relator's second term of probation was revoked and Respondent executed his sentence. Relator was placed into a 120 day Institutional Treatment Program (ITC) in the Department of Corrections. (Pet. Ex. A pg. 6). On October 2, 2015, the Missouri Department of Corrections Board of Probation and Parole filed a Court Report Investigation that detailed Relator's good behavior in ITC and recommended a statutory discharge on his 120th day of incarceration. (Pet. Ex. A Pg. 7). On October 13, 2015, respondent granted probation, effective on November 10, 2015, creating an invalid third term of probation. (Pet. Ex. A pg. 7, Pet. Ex. B pg. 1, Pet. Ex. D pg.1).

Between the Months of November 10, 2015, and September 10, 2017, Relator accumulated Earned Compliance Credit (ECC) for the months of November 2015, December 2015, January 2016, February 2016, March 2016, April 2016, May 2016, June 2016, July 2016, August 2016, September 2016, October 2016, November 2016, January 2017, February 2017, March 2017, May 2017, July 2017, August 2017, and September 2017. Relator did not earn credit for December 2016, April 2017 and May 2017. (Pet. Ex.

A pg. 7). On June 20, 2016, Missouri Department of Corrections Board of Probation and Parole filed a Case Summary Report. The report indicated an earned date and an optimal date for Relator to be discharged from the invalid third term of probation. (Pet. Ex. C pg. 18).

When the ECC s are applied to the second term of probation, Relator's second term of probation expired on July 10, 2017. (Pet. Ex. A pg. 7). On December 13, 2017, five months after the date of the correct statutory discharge, the State filed a Motion to Revoke probation. (Pet. Ex. A pg. 7). On February 5, 2018, Relator filed a Motion to Discharge Relator from probation. (Pet. Ex. A pg. 8). On February 8, 2018, Relator's motion was heard, argued and taken under advisement. (Pet. Ex. A pg. 9). On February 14, 2018, Respondent issued an order denying Relator's Motion for Discharge stating that the third term was erroneous. The order further stated that the court has the power to revoke Relator's second term of probation, a second time, and further denying ECC under the second term. (Pet. Ex. D pg. 19). The case was set for a probation violation hearing on March 8, 2018. (Pet. Ex. A pg. 9).

On March 1, 2018, Relator filed a Petition for Writ of Mandamus, or in the alternative, a Writ of Prohibition with the Missouri Court of Appeals Southern District. On March 2, 2018, Missouri Court of Appeals Southern District issued an order denying Relator's writ. (Pet. Ex. E pg. 26). On March 2, 2018, Relator filed a petition for writ of mandamus, or in the alternative a writ of prohibition, with the Missouri Supreme Court. On March 7, 2018, this court issued a preliminary writ ordering Respondent to discharge Relator on Probation. On March 9, 2018, an amended preliminary writ was filed ordering the continuation of

probation which gave Respondent 30 days to show cause. On April 6, 2018, Respondent filed a motion for continuance. On April 9, 2018, Respondent was granted a continuance and given the new date of April 23, 2018 to answer. On April 23, 2018, Respondent filed an answer and activating the briefing schedule pursuant to Rule 84.24 (H).

POINTS RELIED ON

The trial court erred in denying Relator's Motion to Discharge Relator from probation and setting the matter for probation violation hearing because Respondent lost jurisdiction when he placed Relator on an invalid third term of probation. Furthermore, Respondent did not manifest an intent to revoke Relators second term of probation, for the second time, before he accumulated enough ECC credits to be statutorily discharged from the second term of probation.

State ex rel. Brown v. Combs, 994 S.W. 2d 69 (Mo. App. W.D. 1999)

State ex. rel. Weaver v. Martinez, 481 S.W. 3d 127 (Mo. App. E.D. 2016)

State ex. rel. Amorine v. Parker, 490 S.W. 3d 371 (Mo. Banc 2016)

State ex. rel. Valentine v. Orr, 366 S.W. 3d 534 (Mo. Banc 2012)

Missouri Constitution, Article V, Section 4;

Section 217.703,

Section 559.115,

Section 559.036

ARGUMENT I

The trial court erred in denying Relator’s Motion to Discharge Relator from probation and setting the matter for probation violation hearing because Respondent lost jurisdiction when he placed Relator on an invalid third term of probation.

A. Standard of Review

This Court has original jurisdiction to issue original remedial writs. Mo. Const. art. V. § 4. Mandamus is a discretionary writ that is appropriate “to compel a Court to do what it is obligated to do and to undo that which was by law prohibited from doing”. *State ex. rel. Schnuck Markets, Inc v. Koehr*, 859 S.W. 2d 696, 698 (Mo. Banc 1993). A litigant must allege and prove a clear and specific right to a claim. *Id.* If, as a matter of law, the Respondent’s actions are wrong then he has abused his discretion and mandamus is appropriate. *Id.*

B. Analysis

If a probation violation occurs, under 559.036 RSMo, the court is authorized to revoke a defendant’s probation and impose a new period of probation. Accordingly:

3. If the defendant violates a condition of probation at any time prior to the expiration or termination of the probation term, the court may continue him or her on the existing conditions, with or without modifying or enlarging the conditions or extending the term.

5. . . .The court may mitigate any sentence of imprisonment by reducing the prison or jail term by all or part of the time the defendant was on probation.

The court may, upon revocation of probation, place an offender on a second term of probation. . .(emphasis added)

(8) The power of the court to revoke probation shall extend for the duration of the term of probation designated by the court and for any further period which is reasonably necessary for the adjudication of matters arising before its expiration, provided that some affirmative manifestation of an intent to conduct a revocation hearing occurs prior to the expiration of the period and every reasonable effort is made to notify the probationer and to conduct the hearing prior to the expiration of the period.

“[T]he court may take advantage of Section 559.036’s permission to revoke and impose a new term of probation only once”. *State ex rel. Brown v. Combs*, 994 S.W. 2d 69, 71 (Mo. App. W.D. 1999). Upon a second revocation, the court has no authority under this or any other statute to impose a third term of probation. *Id.* “When a court has no authority to impose a third term of probation, it likewise has no authority to conduct a hearing to adjudicate whether Relator violated probation.” *State ex rel. Weaver v. Martinez*, 481 S.W. 3d 127, 128 (Mo. App. E.D. 2016).

In *Martinez*, Relator’s probation was revoked and she was placed into ITC (Institutional Treatment Center) under 559.115 RSMo. *Id.* When Relator was released from the program, she was placed on a second term of probation. *Id.* Relator’s probation was revoked again and her sentenced was executed placing her in ITC after discovering she did not qualify for long-term treatment under 559.115 RSMo. *Id.* Relator was placed on an invalid third term of probation. *Id.* When the Court attempted to revoke Relator’s third term of

probation, the Missouri Court of Appeals issued a writ of prohibition and directing the court to discharge Relator from probation. *Id.*

In *Combs*, Relator pleaded guilty to tampering with a motor vehicle in the second degree, and was put on probation. *Combs*, 994 S.W. 2d 69, 70 (Mo. App. W.D. 1999). Relator's probation was revoked twice and she was put on a third term of probation. *Id.* The Missouri Court of Appeals determined that the court had a reasonable period of time to complete its job and order execution of sentence. *Id.* Due to Respondent's void attempt to extend probation, Respondent did not take steps for more than a year and, therefore, lost authority to do so. *Id.*

In his answer, Respondent attempts to mislead the court by stating that he "ordered Relator to resume or 'continue to serve the term of probation' as contemplated by Sections 559.036.4(3) and 559.115.3". (Respondent's answer paragraph 5). Respondent's order on October 13, 2015 creates a new term of probation by ordering supervision for a term of five years, not to continue on the remaining three years. (Pet. Ex. B pg. 10). 559.036.4(3) RSMo states, "the court shall release the defendant to continue to serve the term of probation, *which shall not be modified, enlarged, or extended based on the same incident of violation*". (559.036.4(3) emphasis added). Furthermore, in his order, Respondent admitted that the October 13, 2015 order was an impermissible granting of a third term of probation. (Pet. Ex. D pg 19).

Much like *Martinez*, Respondent took advantage of Section 559.036's authority to revoke and impose a new term of probation on November 14, 2013. (Pet. Ex. A pg. 4). Relator had no authority to take advantage of 559.036 a second time, creating a third term

of probation. Respondent acknowledged this error in his order denying Relator's motion for discharge, stating, "both parties agree that the third order of probation beginning November 10, 2015 was erroneous". (Pet. Ex. D pg. 19). However, Respondent cites *Combs*, as the case which sets out his power to revoke under the second valid term of probation. (Pet. Ex. D pg. 20).

Combs states, "when, prior to expiration of probation, there is some affirmative manifestation of the court's intent to timely conduct a revocation hearing and there is no unreasonable delay in affording the probationer the hearing," the Court has complied with 559.036's power to revoke probation. *Combs*, 994 S.W. 2d 69 at 70 (1999). Here the Court did not manifest an intent to execute Relator's sentence until five months after the previously revoked second term of probation had expired. (Pet. Ex. A pg.7). Therefore, the court lost jurisdiction over Relator.

ARGUMENT II

Assuming the Court finds that Respondent has the power to revoke under the second term of probation for a second time, Respondent did not manifest an intent to revoke Relator's probation for the second time before Relator accumulated enough ECC credits to be statutorily discharged from the second term of probation.

A. Analysis

ECCs are awarded to offenders by the Board of probation and parole who meet the statutory requirements and who remain in compliance with the terms of their probation. *State ex. Rel. Amorine v. Parker*, 490 S.W. 3d 371, 374 (Mo. Banc 2016). 217.703 RSMo requires that board of probation and parole award credits stating the following:

(4) For the purposes of this section, the term compliance shall mean the absence of an initial violation report submitted by a probation or parole officer during a calendar month, or a motion to revoke or motion to suspend filed by a prosecuting or circuit attorney, against the offender.

(5) Credits shall not accrue during any calendar month in which a violation report has been submitted or a motion to revoke or motion to suspend has been filed, and shall be pending the outcome of a hearing, if a hearing is held. If no hearing is held or if the court or board finds that the violation did not occur, then the offender shall be deemed in compliance and shall begin earning credits on the first day of the next calendar month following the month in which the report was submitted or the motion was filed. All credits shall be rescinded if the court or board revokes the probation or parole or the court places the offender in a department program under subsection 4 of section 559.036. Earned credits shall continue to be suspended for a period of time during which the court or board the term of probation, parole, or release, and *shall begin to accrue on the first day of the next calendar month following the lifting of suspension.* (Emphasis added)

While the statute is unclear about how to apply ECCs to an unlawful third term of probation, it clearly states unless probation is suspended, the offender is to be awarded credits while in compliance.

In this case, after Relator was put on the invalid third term of probation, he was in compliance with probation for 20 months. (Pet. Ex. A pg.7). Respondent's order denying discharge states, "This Court revoked Defendant's last, valid term of probation (probation #2) on July 9, 2015, thereby rescinding all earned credits otherwise accumulated by the Defendant." (Pet. Ex. D pg. 20). 217.703.5 RSMo does allow for earned credits to be rescinded if the court revokes and places the defender in a department program under subsection 4 of section 559.036. While the statute does not contemplate what happens to ECC when a person is put on an invalid third term of probation, it does address suspension. While suspended, a probationer begins accruing credit as soon as the suspension is lifted. It does not allow for an indefinite recession of credits moving forward.

The division probation and parole awards ECC. Here, the Missouri Board of Probation and Parole awarded credit as demonstrated by the "Optimal Date" referenced in the Information Report filed on June 13, 2016. The 20 months of credit Relator needed to be released from a second term of probation were applied to Relator's invalid third term. Applying Relator's ECCs to the invalid third term, or rescinding credits all together, would allow the Court to circumvent the statutory right given to offenders who are in compliance. Therefore, when the ECCs are correctly awarded and applied to the second term of probation, Relator's probation expired at the end of July 2017. Thus, Relator asks this Court issue a writ of mandamus ordering Respondent to discharge him from probation.

CONCLUSION

Relator was placed on a third term of probation. During the invalid third term Missouri Board of Probation and Parole awarded ECCs for Relators compliance. The Court does not have the authority to revoke Relators probation because it had no authority to put probationer on a third term. Futhermore, if the Court determines Respondent has the power to revoke under the second term of probation for a second time, then Respondent had to manifest an intent to revoke within the original second term of probation. The original second term would expire on November 13, 2018, if Relator never earned compliance credits. However, Relator did earn compliance credits for roughly two years after the third term of probation was ordered. The Court never manifested its intent to revoke Relator's probation until the original term expired when the ECCs are applied correctly. Therefore, Relator asks this Court to issue a Writ of Mandamus ordering the Court to discharge him from probation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned counsel, hereby certify that on this 21 day of May, 2018, true and correct copies of the foregoing motion were served to all parties by fax transmission to Judge William E. Hickle, 200 North Main Street, Suite 201, Rolla, MO 65401, Phone # 573-458-6232; and Brad Neckermann, Assistant Prosecuting Attorney, 200 North Main Street, Suite G69, Rolla, MO 65401, Phone # 573-458-6170.

/s/ Katherine L. Schmidt

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