

No. 97171

**IN THE
MISSOURI SUPREME COURT**

**STATE OF MISSOURI EX REL.
KEVIN HILLMAN,
PROSECUTING ATTORNEY OF PULASKI COUNTY,
Relator,
v.
THE HONORABLE JOHN BEGER
CIRCUIT JUDGE OF THE 25TH
JUDICIAL CIRCUIT,
Respondent,**

**In Opposition to a Petition for a Writ of Prohibition and/or
Mandamus to the Supreme Court of Missouri
From the Circuit Court of Pulaski County, Missouri
25th Judicial Circuit, Kevin Hillman
Prosecuting Attorney**

RESPONDENT'S STATEMENT, BRIEF, AND ARGUMENT

Respectfully submitted,

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STATEMENT OF FACTS

Respondent agrees with Relators Statement of Facts already filed with the court, but would like to clarify and add the following:

In a Case Summary Report dated November 21, 2014, and filed with the court on December 02, 2014, the Missouri Division of Probation and Parole identified an “optimal discharge date of 03-01-2017.” (Appendix p. A3).

The third Motion to Revoke was filed by Relator on February 20, 2018, after Defendant’s probation had expired on November 20, 2017. (Appendix p. A5).

On February 20, 2018, Respondent determined the Defendant’s Due Process rights required the assistance of legal counsel. Respondent appointed the Area 25 Office of the Missouri State Public Defender to represent Defendant and an Entry of Appearance was filed that same date. (Appendix p. A6).

POINTS RELIED ON-I

I. RESPONDENT DID NOT ABUSE HIS DISCRETION AND WAS STATUTORILY REQUIRED TO RELEASE DEFENDANT FROM PROBATION PURSUANT TO §559.036 RSMo AND §217.703 RSMo BECAUSE RESPONDENT DID NOT HAVE STATUTORY AUTHORITY OR JURISDICTION OVER THE DEFENDANT AND §559.105 RSMo WAS NOT APPLICABLE.

- *State ex rel. Strauser v. Martinez*, 416 S.W.3d 798 (Mo. banc 2014).
- *State ex rel Parrott v. Martinez*, 496 S.W.3d 563 (Mo. Ct. App. 2016).
- *State ex rel. Bowman v. Inman*, 516 S.W.3d 367 (Mo. 2017).
- *State ex rel. Amorine v. Parker*, 490 S.W.3d 372 (Mo. 2016).
- §559.036 RSMo.
- §559.105 RSMo.
- § 217.703 RSMo.
- Rule 29.18(d).
- Mo. Const. Art. V, § 15.1.

POINTS RELIED ON-II

II. §217.703 RSMo DOES NOT VIOLATE ARTICLE I, §32 OF THE MISSOURI CONSTITUTION BECAUSE CRIME VICTIMS ARE NOT DEPRIVED OF THEIR RIGHT TO RESTITUTION BASED ON THE REQUIREMENTS OF THE STATUTE.

- State ex rel. Strauser v. Martinez*, 416 S.W.3d 798, 805 (Mo. banc 2014).
- Mo. Const. Art. I, §32.
- §217.703 RSMo.
- §559.105 RSMo.
- §559.036.8 RSMo.

ARGUMENT – I

I. RESPONDENT DID NOT ABUSE HIS DISCRETION AND WAS STATUTORILY REQUIRED TO RELEASE DEFENDANT FROM PROBATION PURSUANT TO §559.036 RSMo AND §217.703 RSMo BECAUSE RESPONDENT DID NOT HAVE STATUTORY AUTHORITY OR JURISDICTION OVER THE DEFENDANT AND §559.105 RSMo WAS NOT APPLICABLE.

INTRODUCTION

This is a case in which the prosecutor (“Relator”) failed to demonstrate an affirmative manifestation of intent to revoke defendant’s probation by failing to file the most recent Motion to Revoke with the court *during* the term of probation and failing to file of notice of a hearing *during* the term of probation. Although a Motion to Revoke Probation was filed, it was filed with the court on January 3, 2018 and February 20, 2018, *after* the term of probation had already expired. Relator argues §559.105 RSMo prevents Respondent from discharging defendant from probation due to restitution still being owed and outstanding. Respondent asserts that since the defendant’s probation has expired, Respondent does not have statutory authority because the probation was discharged by operation of law.

A. In order to prevent the discharge of probation pursuant to §559.105 RSMo, the court must follow the procedures of §559.036 and some affirmative manifestation of an intent to conduct a revocation hearing or extend probation must occur prior to the expiration of the period.

Relator asserts §559.105 RSMo (2013) prohibits early discharge from probation

until restitution is complete. The Missouri Supreme Court held, "The plain language of §559.105.1 limits the authority of a trial court to require restitution as a condition of probation by restricting restitution only to 'the victim's losses due to such offense.'" *State ex rel. Bowman v. Inman*, 516 S.W.3d 367, 369 (Mo. 2017). §559.105 RSMo was intended to narrow the authority of the trial court to require restitution as a condition of probation by restricting the source of the restitution order to the victim's losses. It does not, however, give the court the authority to revoke probation when restitution is not paid. It only authorizes the court to "order the maximum term of probation allowed for such offense". §559.105(2) RSMo.

In this case, the maximum term of probation was ordered when defendant pled guilty and was placed on a five year term of probation. Pursuant to §559.105 RSMo, Respondent could not extend probation past that maximum term because the probation term had already expired by operation of law.. Further, although Relator cites to a concurring opinion of Chief Justice Fischer in *State ex rel. Strauser v. Martinez*, Relator does not provide the full context for the concurring opinion. Besides being dicta and not part of the Court's opinion, the comment goes on the say, "However, as most sentencing courts already give the maximum five-year probation term when ordering a probationer to pay a significant amount of restitution, the 2013 amendment to §559.105.3 likely will result in the more significant change in sentencing practice." *State ex rel. Strauser v. Martinez*, 416 S.W.3d 798, 805 (Mo. 2014)

In this concurring opinion, the Chief Justice recognized the dilemma this change to the statute would create. Since §559.105 RSMo only allows for the extension of probation to the maximum term allowed for the offense, there would be little the

sentencing court could do pursuant to §559.105 RSMo once the term of probation expired. Further, the Chief Justice recognized that this “likely will result in the more significant change in sentencing practices” because the only way to avoid this dilemma would be to not sentence a defendant to the maximum term of probation at sentencing or not place a defendant on probation at all, but instead impose a prison sentence and pursue the restitution monies as a condition of parole.

Further, Respondent found that all “statutes on the same subject be read together” as the court held in *State ex rel. Bowman v. Inman*, 516 S.W.3d 367, 369 (Mo. 2017), not just the two statutes Relator asserts. In reading all statutes on probation together, the Missouri Supreme Court held,

Sections 559.021 and 559.100, RSMo Supp. 2014, provide trial courts with broad discretion to determine the conditions of probation, including conditions that the defendant pay restitution to the crime victims. Section 559.100 provides that the trial court “shall determine any conditions of probation or parole for the defendant that it deems necessary.” To the same effect, section 559.021 authorizes a trial court to impose any conditions it determines are “reasonably necessary to ensure that the defendant will not again violate the law,” including conditions “the court believes will serve to compensate the victim ... *Id.* at 369.

Additionally, §559.036(8) RSMo provides:

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 that every reasonable effort is made to notify the probationer and to conduct the hearing prior to the expiration of the period.

Additionally, Rule 29.18(d) states, “A court may revoke probation or parole upon compliance with section 559.036 RSMo, but not otherwise.” Therefore, when all statutes and rules are read together and harmonized, Respondent found the court and Relator must rely on §559.036 RSMo as the statutory authority to revoke Defendant’s probation for failure to pay restitution. §559.036(8) RSMo requires the revocation proceedings must take place *during the term of probation*. (*emphasis added*).

In this case, Relator did not demonstrate an affirmative manifestation of intent to conduct a revocation hearing prior to the expiration of Defendant’s probation and every reasonable effort was not made to conduct the hearing as required by §559.036 RSMo. Respondent is bound by Rule 29.18(d) and §559.036 RSMo and did not have the statutory authority to extend or revoke Defendant’s probation because any action taken after November 20, 2017, was not initiated during the probationary period. “When the probation term ends, so does the court's authority to revoke probation.” *State ex rel. Amorine v. Parker*, 490 S.W.3d 372, 375 (Mo. 2016) (quoting *State ex rel. Strauser v. Martinez*, 416 S.W.3d 798 (Mo. 2014)).¹

¹Missouri Courts have consistently upheld that when the probation term ends, so does the court's authority to revoke probation. See also, *State ex rel. Zimmerman v. Dolan*,

As in *Amorine*, Respondent was without statutory authority to extend or revoke the defendant's probation for failure to pay restitution in full despite §559.105 RSMo because no action was taken during the term of probation.

Relator also asserts the defendant was released from probation "early" while still owing restitution. §217.703(3) RSMo requires a statutory reduction in the amount of time left on probation due to Earned Compliance Credit (ECC). "Earned compliance credits *shall* reduce the term of probation, parole, or conditional release by thirty days for each full calendar month of compliance with the terms of supervision." (*emphasis added*). Based on the plain, unambiguous language of the statute, the term of probation had been reduced requiring defendant to be released from probation. This was not an "early" release from probation because the probation term had been statutorily reduced and expired by operation of law on November 20, 2017.

Relator asserts defendant is not entitled to Earned Compliance Credit because her restitution was not paid in full. This exact issue was addressed by the court in *State ex rel. Parrot v. Martinez*, 496 S.W.3d 563 (Mo. Ct. App. 2016). In *Parrott*, the court held a trial/sentencing court could not deny a defendant Earned Compliance Credit

514 S.W.3d 603 (Mo. 2017); *State ex rel. Dotson v. Holden*, 416 S.W.3d 821, 824 (Mo. Ct. App. 2013); *State ex rel. Stimel v. White*, 373 S.W.3d 481, 484 (Mo.App.2012); *Starry v. State*, 318 S.W.3d 780, 782 (Mo. App. W.D. 2010).

because restitution had not been paid;

"Of particular concern here is Respondent's assertion that a probationer cannot earn compliance credits if she owes outstanding restitution or court costs, regardless of the payment conditions ordered. Respondent's position effectively bars indigent probationers from obtaining statutory credits available to more affluent probationers. Respondent's order, as applied to this case, sought to deny Relator earned compliance credits under the statute even though she was ahead in her ordered monthly payments simply because she was too poor to pay the costs outright. This position is inconsistent with the plain language of the statute and is impermissible under the law." *Id.* at 572.

Relator's assertion that defendant is not entitled to Earned Compliance Credit is against the plain language of Missouri Statute and contradicts the *Parrot* decision.

B. The local court rule was in direct contradiction to Missouri Supreme Court Rule 29.18 and the statutory language and requirements of §217.703 RSMo, which established a legal basis to find the local court rule not applicable.

Relator asserts that Respondent violated the 25th Judicial Circuit Local Court Rule 67.9.5 and abused his discretion by arbitrarily declaring he will not be bound by the local court rule with no legal basis. Respondent concluded the local court rule was in direct contradiction to Missouri Supreme Court Rule 29.18 and the statutory language and requirements of §217.703 RSMo, which established a legal basis to find the local court rule not applicable. "The circuit judges of the circuit may make rules for the circuit '*not inconsistent with the rules of the Supreme Court.*'" Mo. Const. Art. V, §

15.1 (*emphasis added in original*). *State ex rel. Helms v. Moore*, 694 S.W.2d 502, 504 (Mo. Ct. App. 1985).

The language of §217.703.4 RSMo is clear and unambiguous, and does not permit the court or the Board of Probation and Parole to deny Earned Compliance Credits simply because restitution and court costs are owed.

"Compliance" is defined as the absence of any initial violation reports or motions to revoke and suspend probation. "Monthly 'compliance' under the earned compliance credit statute is not defined as the strict fulfillment of each and every term of probation in a given month but is defined as the absence of an initial violation report or a motion to revoke or suspend."

State ex rel. Parrot v. Martinez, 496 S.W.3d at 569 (Mo. Ct. App. 2016).

Therefore, failure to pay restitution does not result in non-compliance and Earned Compliance Credit must be applied. Additionally, Relator's reliance on a local court rule that directly conflicts with a Missouri Supreme Court Rule and statutory requirements does not negate defendant's statutory right to Earned Compliance Credit.

Relator asserts the court violated the terms of the plea agreement, specifically the term that Defendant will not receive Earned Compliance Credit until restitution is paid in full. Relator further asserts defendant waived her rights to Earned Compliance Credit as part of the plea agreement. This is a circular argument in that Realtor argues defendant is not entitled to Earned Compliance Credit while still owing restitution. If that is the case, then there would be no need to make a specific term of the plea agreement that prevents the application of Earned Compliance Credits. Furthermore, a

defendant cannot waive the application of Earned Compliance Credits.

A statutory provision that imposes a mandatory administrative and non-discretionary duty on the Department of Corrections cannot be waived. *Buehrle v. Missouri Department of Corrections*, 344 S.W.3d 269, 271 (Mo. Ct. App. 2011). In *Buehrle*, a defendant petitioned the court to waive his right to jail time credit under §558.031.1 RSMo on a state sentence and apply it to a federal sentence. *Id.* at 270. §558.031.1 RSMo states in part that an inmate *shall receive* credit for any time spent in prison before his sentence. *Id.* at 271. (*emphasis in original*). To determine whether the statute is mandatory or directory in operation, the courts look to the context of the statute for legislative intent. *Buehrle*, 244 S.W.3d at 271.

In *Buehrle*, the court found that §558.031.1 RSMo imposed a mandate that a defendant receive credit for all time served pending trial and sentencing. *Id.* The award of jail time credit is not a matter for the trial court, but is a matter for the Missouri Department of Corrections. *Id.* The *Buehrle* court next looked at the purpose of §558.031.1 RSMo which is to insure that indigent defendants do not serve a longer sentence than those defendants who can afford bail. *Id.* at 271. Finding that the statute prescribes a mandatory, non-discretionary and administrative duty on the Missouri Department of Corrections to award credit for jail time spent in pre-trial and sentencing confinement, and that the purpose of the statute benefits defendants, the Court held that §558.031.1 RSMo imposes a mandatory duty on the Department of Corrections that neither a defendant, nor the Missouri Department of Corrections can waive. *Id.*

In the same manner that §558.031.1 RSMo imposes a mandatory duty on the Department of Corrections to award jail time credit, §217.703.1 (2014) RSMo imposes

a mandatory duty on the Missouri Department of Corrections, Division of Probation and Parole, to award Earned Compliance Credit to eligible probationers when they are compliant. The plain language of §217.703.1 RSMo mandates "The division of probation and parole *shall award* earned compliance credits to any offender who is eligible. (*emphasis added*). Like §558.031.1 RSMo, the purpose of §217.703 RSMo is to provide a mandatory benefit to defendants who are compliant with the terms of their probation because it operates to reduce the time a defendant spends on supervised probation and therefore directly impacts a defendant's liberty interest. "Statutes that affect the liberty interests of a criminal defendant should be construed strictly against the State and in favor of the defendant." *Goings v. MDOC*, 6 S.W.3d 906, 908 (Mo. banc 1999).

The mandate to award Earned Compliance Credit established by §217.703 RSMo is directed specifically to the Missouri Department of Corrections, Division of Probation and Parole and grants no discretion to the trial court to deny the award of Earned Compliance Credit to otherwise eligible defendants. As in *Buehrle*, where neither the defendant nor Missouri Department of Corrections could waive the mandatory provision of §558.031.1 RSMo crediting jail time, neither can Defendant nor the Missouri Department of Corrections Division of Probation and Parole waive the mandatory provision of §217.703.1 RSMo that directs the Missouri Department of Corrections to award Earned Compliance Credit. *Buehrle*, 244 S.W.3d at 271 (Mo. Ct. App. 2011). To do so would defeat the legislative intent and the purpose of §217.703 RSMo, and any such agreement between defendant and the State to do so is unenforceable.

The agreement to waive Earned Compliance Credit in this matter is

unenforceable because Respondent has no authority to enter an order waiving the Division of Probation and Parole's duty to award Earned Compliance Credit, defendant has no ability to waive Earned Compliance Credit, even as part of a plea agreement.

C. Respondent's reliance on *State ex rel. Parrott v. Martinez*, is not misplaced because the facts of the case are analogous to the case at bar.

Respondent's reliance on *State ex rel. Parrott v. Martinez*, is not misplaced. As discussed, *supra*, the *Parrott* court specifically addressed restitution and court cost and found that failure to pay restitution is not contemplated in the definition of compliance, and Earned Compliance Credits must be applied. Similarly, in *Parrott*, restitution was not paid in full and the defendant had made payments towards restitution. *Parrot* at 572. Here, the defendant made payments towards restitution but did not pay restitution in full. Additionally, the *Parrott* court found the defendant's probation term had expired and the court did not have statutory authority to take any action against the defendant. *Id.* at 570. Here, the defendant's probation expired by operation of law. The facts in this case are analogous to the facts in *Parrott*, defendant is statutorily entitled to Earned Compliance Credit, and defendant's term of probation expired on November 20, 2017.

ARGUMENT-II

I. §217.703 RSMo DOES NOT VIOLATE ARTICLE I, §32 OF THE MISSOURI CONSTITUTION BECAUSE CRIME VICTIMS ARE NOT DEPRIVED OF THEIR RIGHT TO RESTITUTION BASED ON THE REQUIREMENTS OF THE STATUTE.

INTRODUCTION

Respondent acknowledges and gives deference to a crime victim's right to restitution as guaranteed by the Missouri Constitution. However, Respondent also acknowledges and gives deference to the Revised Statutes of Missouri and the legislative intent of those statutes. If Relator had manifested his intent to conduct a revocation hearing during the probation term and made every reasonable effort to notify defendant and hold the hearing prior to the expiration of probation, then the victim's right to restitution pursuant to Article I, §32 of the Missouri Constitution would have been preserved.

A. §217.703 RSMo Does Not Violate Article I, §32 of the Missouri Constitution Because Crime Victims Are Not Deprived Of Their Right To Restitution Based On The Requirements Of The Statute.

It is incumbent upon the Relator to seek action against Defendant's probation *during* the term of probation (*emphasis added*). §559.036 RSMo. The defendant had been before the court numerous times prior to November 20, 2017, and no action was taken by Relator to extend defendant's probation pursuant to §559.105 and no action was taken by Relator to revoke defendant's probation or schedule a hearing for such revocation proceeding as statutorily required by §559.036.8 RSMo before the term of

probation expired. §559.036.8 RSMo sets out two conditions under which a court may revoke probation after a probation term has ended. First, the State must have manifested its intent to conduct a revocation hearing during the probation term. Second, it must make every reasonable effort to notify the probationer and hold the hearing before the term ends. *State ex rel. Strauser v. Martinez*, 416 S.W.3d 798, 801 (Mo. 2014). Relator did not comply with either prong of the two prong test established in *Strauser*. If Relator had manifested his intent to conduct a revocation hearing during the probation term and made every reasonable effort to notify defendant and hold the hearing prior to the expiration of probation, then the victim's right to restitution pursuant to Article I, §32 of the Missouri Constitution would have been preserved.

However, Relator took no action as the record clearly indicates. The defendant's probation expired by operation of law on November 20, 2017 and the state did not take any action to revoke the probation until January 3, 2018 and February 20, 2018. Respondent found this was not in accordance with the statutory requirements of §559.036 RSMo or the requirements set out by the Court in *Strauser*. Additionally, when all of the statutes on the same subject are read together and harmonized, §217.703 RSMo does not violate the Missouri Constitution. In fact, the statutes clearly identify a method to preserve the victims' rights to restitution when a defendant is on probation.

CONCLUSION

A permanent Writ of Prohibition and/or Mandamus should not issue in the case because Respondent did not abuse his discretion. Respondent ordered Defendant released from probation because he was statutorily required to do so. Defendant was not released "early" from probation because the probation term had been reduced by

statute and therefore expired on November 20, 2017. Due to the expiration of probation, Respondent did not have statutory authority to revoke Defendant's probation or extend Defendant's probation pursuant to §559.105 RSMo, and Respondent's reliance on the decision in *Parrot v. Martinez* is not misplaced.

Additionally, defendant cannot waive her statutory right to Earned Compliance Credits, and the local court rule was in direct contradiction to Missouri Supreme Court Rule 29.18 and the statutory language and requirements of §217.703 RSMo. Finally, it is incumbent upon Relator to comply with the requirements of §559.036 RSMo in seeking revocation or extension of probation due to failure to pay restitution during the term of probation. This will preserve the crime victims' rights to restitution pursuant to the Missouri Constitution and Missouri statutes.

Therefore, Respondent respectfully request that a permanent Writ of Prohibition be denied and Respondent's order of May 10, 2018, discharging the defendant from probation effective May 23, 2018, in cause No. 14PU-CR00973-01, entitled State of Missouri, Plaintiff, vs. Nettie Pallai, Defendant, be executed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06, I hereby certify that on this 16th day of July 2018, a true and correct copy of the foregoing brief and the attached appendix were served via the e-filing system and by e-mail to Mr. Kevin Hillman, Relator, at Kevin.Hillman@prosecutors.mo.gov and the Honorable John Beger at John.Beger@courts.mo.gov. In addition, pursuant to Missouri Supreme Court Rule 84.06, I hereby certify that this brief includes the information required by Rule 55.03. This brief was prepared with Microsoft Word for Windows, uses Times New Roman 13 point font and does not exceed 31,000 words. The word processing software identified this brief contains 4,149 words. Finally, I hereby certify that the electronic copies of this brief have been scanned for viruses and found virus-free.

Respectfully submitted,

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