

No. SC97272

**In the
Supreme Court of Missouri**

MICHAEL E. WILLIAMS,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

**Appeal from Warren County Circuit Court
Twelfth Judicial Circuit, Division One
The Honorable Wesley Clay Dalton, Judge**

RESPONDENT'S SUBSTITUTE BRIEF

**JOSHUA D. HAWLEY
Attorney General**

**ROBERT J. (JEFF) BARTHOLOMEW
Assistant Attorney General
Missouri Bar No. 44473**

**P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
Jeff.Bartholomew@ago.mo.gov**

**ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI**

TABLE OF CONTENTS

TABLE OF AUTHORITIES 3

STATEMENT OF FACTS 5

ARGUMENT 12

 A. Standard of Review..... 12

 B. Appellant failed to prove that he was prejudiced by the failure to
 determine his eligibility for long-term treatment. 13

CONCLUSION..... 21

CERTIFICATE OF COMPLIANCE..... 22

TABLE OF AUTHORITIES

Cases

<i>Brady v. United States</i> , 397 U.S. 742 (1970)	16
<i>Church v. State</i> , 928 S.W.2d 385 (Mo. App. S.D. 1996)	16
<i>Conley v. State</i> , 301 S.W.3d 84 (Mo. App. S.D. 2010)	17, 18
<i>Cook v. State</i> , 193 S.W.3d 378 (Mo. App. S.D. 2006)	17
<i>Franklin v. State</i> , 156 S.W.3d 507 (Mo. App. S.D. 2005).....	13
<i>Goodloe v. State</i> , 486 S.W.2d 430 (Mo. 1972)	16
<i>Hill v. Lockhart</i> , 474 U.S. 52 (1985)	13
<i>Jones v. State</i> , 516 S.W.3d 447 (Mo. App. E.D. 2017).....	17
<i>Krider v. State</i> , 44 S.W.3d 850 (Mo. App. W.D. 2001)	16, 17
<i>Noland v. State</i> , 413 S.W.3d 684 (Mo. App. S.D. 2013)	17
<i>Peiffer v. State</i> , 88 S.W.3d 439 (Mo. banc 2002).....	13
<i>Proctor v. State</i> , 809 S.W.2d 32 (Mo. App. W.D. 1991)	16, 17
<i>Savick v. State</i> , 461 S.W.3d 63 (Mo. App. S.D. 2015)	17
<i>Searcy v. State</i> , 103 S.W.3d 201 (Mo. App. W.D. 2003)	5
<i>Shoemaker v. State</i> , 462 S.W. 2d 772 (Mo. banc 1971)	17
<i>State ex rel. Busch v. Busch</i> , 776 S.W.2d 374 (Mo. 1989)	19
<i>State ex rel. Taylor v. Moore</i> , 136 S.W.3d 799 (Mo. banc 2004).....	14, 18, 19
<i>State v. Nunley</i> , 980 S.W.2d 290 (Mo. banc 1998).....	13
<i>State v. Roll</i> , 942 S.W.2d 370 (Mo. banc 1997).....	13

State v. Taylor, 929 S.W.2d 209 (Mo. banc 1996)..... 12, 16

Strickland v. Washington, 466 U.S. 668 (1984) 13

Swallow v. State, 398 S.W.3d 1 (Mo. 2013) 12

Thomas v. State, 808 S.W.2d 364 (Mo. banc 1991) 17

Wilhite v. State, 339 S.W.3d 57 (Mo. App. W.D. 2011) 16, 17

Wilson v. State, 813 S.W.2d 833 (Mo. banc 1991) 12

Statutes

Section 217.362, RSMo 5, 7, 12, 13, 14, 18

Section 556.061, RSMo 14

Rules

Supreme Court Rule 24.035 7, 11, 12, 21

STATEMENT OF FACTS

Appellant was charged in the Circuit Court of Warren County with driving while intoxicated, chronic offender. (L.F. 4). On July 5, 2016, Appellant appeared in court for the purpose of entering a guilty plea pursuant to a plea agreement. (L.F. 5-16).

Appellant's plea counsel announced that Appellant would be sent to the Department of Corrections pursuant to long-term treatment.¹ (L.F. 7). The court told Appellant that it would follow that plea agreement, and that if the court didn't follow it, the court would allow Appellant to withdraw his guilty plea. (L.F. 11). Appellant told the court that he understood the full range of punishment was five to fifteen years imprisonment. (L.F. 11).

Appellant told the court that he'd had enough time to discuss his case with his attorney and that he had no complaint about how his attorney had handled his case. (L.F. 7-8). Appellant told the court that he understood the

¹ Section 217.362, RSMo., is a treatment program in which probation is revoked and the individual is placed in the custody of the department of corrections for treatment and upon successful completion, the person may be returned to probation if the trial court so determines after a hearing. *See Searcy v. State*, 103 S.W.3d 201, 205-206 (Mo. App. W.D. 2003).

specific constitutional rights attendant with a trial and appeal that he was giving up by pleading guilty. (L.F. 8-9).

Appellant admitted that on November 29, 2013, he operated a motor vehicle in Warren County while under the influence of alcohol. (L.F. 10).

Appellant further admitted to four prior convictions for driving while intoxicated. (L.F. 10, 12-13).

The prosecutor stated that if this case went to trial, the evidence would show that a police officer observed a vehicle being driven which veered to the right off of the roadway, then corrected itself and continued traveling. (L.F. 12). The officer further observed the vehicle cross over the center line into the opposite lane of traffic three separate times. (L.F. 12). After a traffic stop, the officer could smell the odor of an intoxicating beverage in the vehicle and noted that the eyes of Appellant, the driver of the vehicle, were bloodshot, watery, and glassy. (L.F. 12). Appellant, whose speech was slurred, admitted to having consumed alcohol. (L.F. 12). During the officer's administration of the Horizontal Gaze Nystagmus (HGN) Test, Appellant showed six clues of intoxication. (L.F. 12). Appellant refused to perform any more road sobriety tests, whereupon two blood samples were taken. (L.F. 12). The results of the tests showed .119% blood alcohol content and .094% blood alcohol content. (L.F. 12-13). Appellant agreed with the prosecutor's statement of the facts. (L.F. 13). The court found a factual basis for Appellant's guilty plea and that

his plea was voluntary. (L.F. 13). The court accepted Appellant's guilty plea. (L.F. 13).

After Appellant waived the sentencing assessment report, the court announced that it would follow the plea agreement. (L.F. 13). The court sentenced Appellant to eight years' imprisonment but retained jurisdiction and sentenced Appellant to long-term drug treatment under § 217.362, RSMo.² (L.F. 13, 18-19). Appellant told the court that that was his understanding of the plea agreement. (L.F. 13-14). Appellant told the court that he was satisfied with the services of his attorney. (L.F. 15-16). Appellant was delivered to the Department of Corrections on July 8, 2016. (L.F. 26).

Appellant timely filed a *pro se* motion for post-conviction relief pursuant to Supreme Court Rule 24.035 on November 28, 2016. (L.F. 26-31). On December 1, 2016, the motion court appointed counsel. (L.F. 21). On December 13, 2016, a transcript of Appellant's guilty plea and sentencing was filed in the circuit court. (L.F. 3). On February 9, 2017, post-conviction counsel sought an extension of time to file the amended motion, which was granted by the motion court. (L.F. 22, 32).

² Statutory citations are to the Revised Statutes of Missouri (RSMo.) 2000, as updated by the 2013 Cumulative Supplement unless otherwise noted.

An amended motion was timely filed on March 2, 2017, which claimed, *inter alia*, that after Appellant was delivered to the custody of the Department of Corrections, he was found to be ineligible for the long-term treatment program due to an insufficient number of felony convictions. (L.F. 33-42). Appellant claimed that his guilty plea was not voluntary, knowing, or intelligent because he was denied effective assistance of counsel when his plea counsel told Appellant that he would be placed in an institutional long-term treatment program. (L.F. 34). Appellant further claimed that he was denied due process by the sentencing court's failure to determine whether he was eligible for long-term treatment. (L.F. 34-35).

An evidentiary hearing was held on May 4, 2017. (Tr. 3-15). Appellant testified that he was found to be ineligible for the long-term treatment program because he lacked three felony convictions. (Tr. 4). Appellant claimed that his plea counsel told him that if he pleaded guilty he would get long-term treatment. (Tr. 5). Appellant believed that his counsel had checked to determine his eligibility for the treatment program and that she had determined that Appellant was eligible. (Tr. 5). Appellant also believed that the court had checked and had determined that he was eligible for the treatment program. (Tr. 5). Appellant testified that he pleaded guilty because he believed he would be placed in the long-term treatment program and that he would not have pleaded guilty had he known he was ineligible. (Tr. 5-6).

Appellant admitted that when he pleaded guilty he understood that he could not be released on probation unless he successfully completed the treatment program. (Tr. 6).

Katie Thoman testified that she had represented Appellant in his criminal case. (Tr. 9). Thoman testified that she had told Appellant of the plea recommendation from the prosecutor, which was a sentence of eight years with long-term treatment. (Tr. 10). Thoman testified that she had told Appellant that if he pleaded guilty, he would go to the Department of Corrections and probably serve a portion of his sentence before he was placed in the treatment program, so that he would be released after two years, having completed the program. (Tr. 10-11). Thoman testified that in Appellant's current situation, he would still become eligible for parole after serving two years in the Department of Corrections. (Tr. 13). Thoman testified that she had assumed that Appellant would be placed in the long-term treatment program, but that she had not checked beforehand to determine whether he was eligible. (Tr. 11). Thoman testified that Appellant was not placed in the long-term treatment program because he did not have the requisite number of prior felony convictions (two) required before placement in the program. (Tr. 10, 13).

On May 26, 2017, the motion court issued findings of fact and conclusions of law. (L.F. 43-49). The motion court found that Appellant had

pleaded guilty pursuant to a plea agreement with the State, which the court had accepted and that Appellant had received a sentence of eight years with placement in a long-term treatment program. (L.F. 44-45).

Regarding Appellant's claim that he was denied effective assistance of counsel when his plea counsel told Appellant that he would be placed in an institutional long-term treatment program, when he was in fact ineligible for such a program, the motion court found that Appellant's testimony that he would not have pleaded guilty had he known he was ineligible for the long-term treatment program lacked credibility. (L.F. 47). The court noted that Appellant, who admitted his guilt and did not dispute the charge, faced a possible sentence of fifteen years' imprisonment but was sentenced to substantially less time than the maximum sentence. (L.F. 47). The motion court believed that Appellant accepted the plea offer of eight years to avoid a potentially longer sentence, while hoping to participate in the long-term treatment program. (L.F. 47).

Regarding Appellant's claim that he was denied due process due to the sentencing court's failure to ensure that he was eligible for long-term treatment, the motion court found that Appellant's guilty plea waived any complaints he might have had regarding the plea court's pre-sentencing procedures. (L.F. 48). The motion court found that Appellant failed to

demonstrate prejudice by the judgment and sentence of the court and overruled his Rule 24.035 motion. (L.F. 49).

ARGUMENT

The motion court did not clearly err in overruling, after an evidentiary hearing, Appellant's Rule 24.035 claim that his guilty plea was involuntary due to the failure of both plea counsel and the trial court to investigate his eligibility for long-term drug treatment under § 217.362. (Responds to Appellant's points I and II).

A. Standard of Review.

Appellate review of the denial of a Rule 24.035 motion is limited to determining whether the trial court's findings and conclusions are clearly erroneous. Supreme Court Rule 24.035 (k); *State v. Taylor*, 929 S.W.2d 209, 224 (Mo. banc 1996). Findings of fact and conclusions of law are clearly erroneous only if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made. *Taylor*, 929 S.W.2d at 224. On review, the motion court's findings and conclusions are presumptively correct. *Wilson v. State*, 813 S.W.2d 833, 835 (Mo. banc 1991). Even if the stated reason for a motion court's ruling is incorrect, the judgment should be affirmed if the judgment is sustainable on other grounds. *Swallow v. State*, 398 S.W.3d 1, 3 (Mo. 2013).

To establish ineffective assistance of counsel, Appellant must show both (1) that his attorney failed to conform his representation to the degree of skill, care, and diligence of a reasonably competent attorney under similar

circumstances and (2) that he was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Nunley*, 980 S.W.2d 290, 292 (Mo. banc 1998).

Even if a defendant did not receive competent advice, he must still prove prejudice. *Franklin v. State*, 156 S.W.3d 507, 512 (Mo. App. S.D. 2005). To prove prejudice, the movant must show that but for his counsel's errors, he would not have pleaded guilty but would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); see also *Nunley*, 980 S.W.2d at 292. In the context of a guilty plea, any claim of ineffective assistance of counsel is immaterial except to the extent that it impinges on the voluntariness and knowledge with which the plea is made. *State v. Roll*, 942 S.W.2d 370, 375 (Mo. banc 1997). Hence, when a movant alleges ineffective assistance of counsel after a guilty plea, he must show that counsel's inadequate representation rendered the plea involuntary or affected the understanding upon which it was made. *Peiffer v. State*, 88 S.W.3d 439, 445 (Mo. banc 2002).

B. Appellant failed to prove that he was prejudiced by the failure to determine his eligibility for long-term treatment.

In his first point, Appellant claims that he was denied due process due to the sentencing court's failure to ensure that Appellant was eligible for long-term treatment under § 217.362. (App. Br. 10-12). In his second point, Appellant claims that he was denied effective assistance of counsel when his

plea counsel told him that he would be placed in an institutional long-term treatment program without verifying whether Appellant was eligible. (App. Br. 13-18). Because resolution of these claims rests on the same finding – that Appellant failed to prove prejudice - respondent has addressed them together.

Section 217.362, RSMo., provides for the creation and implementation of “an intensive long-term program for the treatment of chronic nonviolent offenders with serious substance abuse addictions who have not pleaded guilty to or been convicted of a dangerous felony as defined in section 556.061.” § 217.362.1. Section 217.362.2 requires a judge to notify the department of corrections of any offender being considered for long-term treatment prior to sentencing. This is to allow the department of corrections to screen the offender to determine eligibility for long-term treatment, and only an eligible offender may be sentenced by the judge to long-term treatment. *See State ex rel. Taylor v. Moore*, 136 S.W.3d 799, 801 (Mo. banc 2004).

In the present case, Appellant properly understood the plea agreement with the State, which was for eight years’ imprisonment and long-term drug treatment under § 217.362, RSMo. (L.F. 13, 18-19). After admitting that he operated a motor vehicle while under the influence of alcohol, as well as admitting four prior convictions for driving while intoxicated, (L.F. 10, 12-13),

Appellant told the court that he understood that the full range of punishment was five to fifteen years imprisonment. (L.F. 11). After Appellant waived the sentencing assessment report, the court announced that it would follow the plea agreement, and it sentenced Appellant to eight years' imprisonment with long-term treatment under § 217.362. (L.F. 13).

At his evidentiary hearing, Appellant testified that he pleaded guilty because he believed he would be placed in the long-term treatment program and that he would not have pleaded guilty had he known he was ineligible. (Tr. 5-6). But in its findings of fact and conclusions of law, the motion court found that Appellant's testimony that he would not have pleaded guilty had he known he was ineligible for the long-term treatment program lacked credibility. (L.F. 47). The court noted that Appellant, who admitted his guilt and did not dispute the charge, faced a possible sentence of fifteen years imprisonment if he went to trial, but that Appellant was sentenced to substantially less time than the maximum sentence. (L.F. 47). The motion court found that Appellant accepted the plea offer of eight years to avoid a potentially longer sentence, while hoping to participate in the long-term treatment program. (L.F. 47).

The motion court concluded that Appellant failed to prove prejudice. The court found that Appellant accepted the plea offer of eight years to avoid a potentially longer sentence, while hoping to participate in the long-term

treatment program. (L.F. 47). A plea of guilty to escape a greater penalty than might be assessed in a jury trial is not involuntary. *Goodloe v. State*, 486 S.W.2d 430, 432 (Mo. 1972). Having chosen to accept the certainty of lesser punishment rather than face the possibility of greater punishment, Appellant cannot now obtain relief from his guilty plea by claiming it was involuntary. *Brady v. United States*, 397 U.S. 742, 750-751 (1970). See also *Church v. State*, 928 S.W.2d 385, 388 (Mo. App. S.D. 1996) (where movant failed to show prejudice when going to trial would have subjected him to the same problems with increased vulnerability to punishment).

The motion court found that Appellant's testimony that he would not have pleaded guilty had he known he was ineligible for the long-term treatment program lacked credibility. (L.F. 47). "The motion court is not required to believe the testimony of [the defendant] or any other witness at an evidentiary hearing even if uncontradicted." *Wilhite v. State*, 339 S.W.3d 573, 576 (Mo. App. W.D. 2011) (quoting *Proctor v. State*, 809 S.W.2d 32, 36 (Mo. App. W.D. 1991)). The motion court is free to believe or disbelieve any evidence, whether contradicted or undisputed, including the movant's own testimony. *Krider v. State*, 44 S.W.3d 850, 858 (Mo. App. W.D. 2001).

It is well established that an appellate court defers to the motion court's determination of credibility. In *State v. Taylor*, 929 S.W.2d 209, 224 (Mo. banc 1996), this Court stated, "We respect the motion court's superior

ability to determine matters of witness credibility.” It has long been the law that the weight of the evidence and credibility of the witnesses are matters for the motion court and the function of the appellate court is to determine whether the judgment of the trial court was clearly erroneous. *See Thomas v. State*, 808 S.W.2d 364, 366 (Mo. banc 1991); *Shoemaker v. State*, 462 S.W. 2d 772, 775 (Mo. banc 1971). Appellate courts are to defer to the motion court’s credibility findings. *See Jones v. State*, 516 S.W.3d 447, 450 (Mo. App. E.D. 2017); *Wilhite v. State*, 339 S.W.3d 573, 576 (Mo. App. W.D. 2011); *Cook v. State*, 193 S.W.3d 378, 382 (Mo. App. S.D. 2006); *Krider v. State*, 44 S.W.3d 850, 858 (Mo. App. W.D. 2001); *Proctor v. State*, 809 S.W.2d 32, 36 (Mo. App. W.D. 1991). *See also Savick v. State*, 461 S.W.3d 63, 67 (Mo. App. S.D. 2015) (the motion court disbelieved the defendant’s “explanation for why he rejected the offer”), and *Noland v. State*, 413 S.W.3d 684, 686 (Mo. App. S.D. 2013) (deferring to motion court’s credibility determination that movant would not have pleaded guilty because according to counsel and the trial transcript, he did not want to plead guilty and wanted to go to trial).

Appellant’s case is similar to *Conley v. State*, 301 S.W.3d 84 (Mo. App. S.D. 2010). In *Conley*, the court of appeals found that the movant failed to convince the motion court that he would have refused to plead guilty if the trial court had informed him that he might become ineligible for the treatment program. *Conley*, 301 S.W.3d at 90. Despite the movant’s claim

that he would have insisted on going to trial if the sentencing court had given him the information, the motion court did not find this claim credible, as the movant was facing the possibility of two consecutive fifteen-year sentences if convicted after trial of the charges against him. *Id.*

Here, similarly, Appellant testified that he would have insisted on going to trial instead of pleading guilty had he known he could not be placed in the long term treatment program. But as in *Conley*, the motion court did not find Appellant's testimony credible, given the fact Appellant faced up to fifteen years' imprisonment if he went to trial, as opposed to the eight-year sentence he received from the plea agreement. This Court should defer to the motion court's credibility determination.

In arguing that the sentencing court erred in failing to investigate his eligibility for long-term treatment prior to sentencing, Appellant argues his case is analogous to *State ex rel. Taylor v. Moore*, 136 S.W.3d 799 (Mo. banc 2004) (App. Br. 11-12). In *Taylor*, the defendant pleaded guilty to three counts of first-degree trafficking and one count of second-degree trafficking. *Taylor*, 136 S.W.3d at 801. The plea agreement provided that the defendant would be placed in a drug treatment program pursuant to § 217.362. *Id.* Counsel for defendant consistently advised him that through the drug treatment program, he would serve only nine to eighteen months of his prison sentences. *Id.* After sentencing, the department of corrections determined

that the defendant was ineligible for the treatment program, a fact that neither the trial court nor plea counsel were aware at the time of plea and sentencing. *Id.*

A master appointed by this Court made the above findings and recommended that the defendant's judgments be vacated. *Id.* The master further found that if the defendant had known he was ineligible for long term treatment, he would have rejected the plea agreement and gone to trial. *Taylor*, 136 S.W.3d at 802. This Court determined the defendant was entitled to habeas relief because the trial court erred in sentencing him without first verifying his eligibility for the treatment program. *Taylor*, 136 S.W.3d at 800.

Taylor supports respondent's position that Appellant failed to prove that he suffered prejudice. In *Taylor*, this Court adopted the findings and recommendations of the master it had appointed, and this Court granted the defendant relief because the master found that if the defendant had known he was ineligible for long term treatment, he would have rejected the plea agreement and gone to trial. "The Special Master's suggestions receive the weight and deference given to a trial court in court tried cases in light of the Master's opportunity to judge and view the credibility of witnesses." *State ex rel. Busch v. Busch*, 776 S.W.2d 374, 377 (Mo. 1989).

In the present case, by contrast, the motion court specifically rejected Appellant's testimony that he would have not pleaded guilty had he known

he was ineligible for the long-term treatment program, finding that it lacked credibility. (L.F. 47). Based on the evidence before it, the motion court found that Appellant accepted the plea offer of eight years to avoid a potentially longer sentence, while hoping to participate in the long-term treatment program. (L.F. 47). This Court should defer to the finding of the motion court that Appellant's testimony was not credible.

Both the record at Appellant's plea and sentencing, as well as the credible evidence presented at the evidentiary hearing, show that Appellant pleaded guilty in order to receive a more favorable sentence than what he could have expected had he gone to trial. As Appellant failed to prove he suffered prejudice, both of Appellant's points should be denied.

CONCLUSION

In view of the foregoing, respondent submits that the motion court's denial of Appellant's Rule 24.035 motion be affirmed.

Respectfully submitted,

JOSHUA D. HAWLEY
Attorney General

/s/Robert J. (Jeff) Bartholomew
ROBERT J. (JEFF) BARTHOLOMEW
Assistant Attorney General
Missouri Bar No. 44473

P. O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
Jeff.Bartholomew@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

CERTIFICATE OF COMPLIANCE

I hereby certify that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 3,810 words as calculated pursuant to the requirements of Supreme Court Rule 84.06(b) as determined by Microsoft Word 2010 software.

/s/ Robert J. (Jeff) Bartholomew
ROBERT J. (JEFF) BARTHOLOMEW
Assistant Attorney General
Missouri Bar No. 44473
P. O. Box 899
Jefferson City, MO 65102
Phone: 573-751-3321
Fax: 573-751-5391
Jeff.Bartholomew@ago.mo.gov
ATTORNEY FOR RESPONDENT
STATE OF MISSOURI