



In the Missouri Court of Appeals Eastern District

DIVISION THREE

ANTONIO D. JONES,	)	No. ED108508
	)	
Appellant,	)	Appeal from the Circuit Court of
	)	the City of St. Louis
vs.	)	1822-CC11685
	)	
STATE OF MISSOURI,	)	Honorable Steven R. Ohmer
	)	
Respondent.	)	Filed: December 22, 2020

Angela T. Quigless, P.J., Kurt S. Odenwald, J., and James M. Dowd, J.

Introduction

Antonio Jones appeals the judgment denying without an evidentiary hearing his Rule 24.035¹ motion for post-conviction relief. Jones pled guilty pursuant to *North Carolina v. Alford*, 400 U.S. 25, 37 (1970) to felony unlawful possession of a firearm in violation of § 571.070.² Jones was sentenced as a prior and persistent offender to 15 years in the Missouri Department of Corrections but execution of his sentence was suspended subject to Jones's completion of 5 years of probation. On October 4, 2018, Jones's probation was revoked for violations of the conditions of his probation and the previously imposed sentence was executed. On October 10, 2018, Jones was delivered to the Missouri Department of Corrections to serve his 15-year sentence. Jones timely filed his *pro se* Rule 24.035 motion, and appointed counsel

¹ All rule references are to the Missouri Supreme Court Rules (2013) unless otherwise indicated.

² All statutory references are to RSMo 2012 unless otherwise indicated.

timely filed an amended motion alleging three claims, which the motion court denied without an evidentiary hearing.

In this appeal, Jones alleges the motion court clearly erred in two respects. In his first point, Jones argues his 15-year sentence exceeds the maximum sentence authorized by law because the finding that Jones was a prior and persistent offender was based upon insufficient proof. And in his second point, Jones argues his plea and sentencing counsel was ineffective because counsel acknowledged on the record without Jones's consent that his prior convictions were felonies, which acknowledgement the sentencing court used to make its finding that Jones was a prior and persistent offender. Finding no clear error by the motion court, we affirm.

Background

On October 14, 2015, Jones was charged by grand jury indictment with the class C felony of unlawful possession of a firearm in violation of § 571.070. The indictment alleged that on March 12, 2015, Jones knowingly possessed a .40 caliber semi-automatic handgun and that Jones had been previously convicted of a felony. Further, the indictment asserted that Jones was a prior and persistent offender and therefore punishable to an extended term of imprisonment under § 558.016 and § 557.036. The indictment recited that Jones was found guilty on October 23, 2012, of felony resisting arrest (Cause No. 1022-CR01962) and that Jones pled guilty on June 21, 2010 to felony possession of a controlled substance (Cause No. 0922-CR02561).

The charge of unlawful possession of a firearm, a class C felony, is punishable from 1 day up to 7 years in the Missouri Department of Corrections. § 571.070. But, if sentenced as a prior and persistent offender under § 558.016 and § 557.036, the charge carries the sentence of a class B felony of up to 15 years in the Missouri Department of Corrections. § 558.016.

At his January 10, 2017, plea hearing, Jones entered an *Alford* plea of guilty to the class C felony of unlawful possession of a firearm. In response to the plea court's inquiry, Jones demonstrated he was of sound mind and understood the rights he was waiving by entering a plea of guilty. When asked about the range of punishment for the crime, the State expressed its intent that Jones be sentenced as a prior and persistent offender and recited his prior convictions on the record. When Jones was asked if his priors were read correctly, plea counsel objected, arguing Jones's 2012 resisting arrest conviction should not be considered a felony because he was found not guilty at trial of the accompanying charge that led to his arrest and he was sentenced to only 1 year. Nevertheless, plea counsel acknowledged that the court record showed the resisting arrest conviction was a felony and that no appeal was taken. Counsel also acknowledged that Jones was convicted in 2010 of felony possession of a controlled substance.

Rejecting counsel's complaint that the 2012 conviction should not be treated as a felony, the plea court found that Jones had two prior felony convictions and therefore found him to be a prior and persistent offender. Jones indicated that he understood the plea court's decision.

At the March 3, 2017, sentencing hearing, plea counsel reiterated Jones's frustration that his conviction for resisting arrest had been classified as a felony but conceded that the 2012 judgment unequivocally classified it as a felony. After the State recommended a 10-year sentence, plea counsel asked for probation and suggested that if the court were to consider probation, Jones was "willing to take any time on [a] backup [sentence] that would [be given]." The court sentenced Jones as a prior and persistent offender under § 558.016 and 557.036, to 15 years based on his two prior felony convictions, but suspended execution of the sentence subject to Jones's successful completion of 5 years supervised probation.

However, on October 4, 2018, after multiple violations of the terms of his probation, Jones's probation was revoked, and he was delivered to the Missouri Department of Corrections to serve his 15-year sentence. Jones timely filed his *pro se* Rule 24.035 motion and appointed counsel timely filed Jones's amended motion seeking to vacate his judgment and sentence. In his amended motion, Jones asserted (1) that the sentence imposed by the plea court exceeded the maximum sentence authorized by law because his prior conviction for resisting arrest should not constitute a felony, (2) that the plea court, in finding Jones was a prior and persistent offender, erred in accepting insufficient proof of Jones's prior convictions, and (3) that plea counsel was ineffective because counsel failed to demonstrate that Jones's 2012 conviction should not have been classified as a felony for purposes of his sentencing. On November 6, 2019, the court issued its findings of fact and conclusions of law denying Jones's post-conviction relief motion without an evidentiary hearing.

This appeal follows.

Standard of Review

A motion court's findings of fact and conclusions of law are presumptively correct. *Mitchell v. State*, 510 S.W.3d 366, 370 (Mo. App. E.D. 2017) (citing *Wilson v. State*, 813 S.W.2d 833, 835 (Mo. banc 1991)). Appellate review of the motion court's action under a Rule 24.035 motion is "limited to a determination of whether the findings and conclusions of the [motion] court are clearly erroneous." Rule 24.035(k); *see also Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); *McLaughlin v. State*, 378 S.W.3d 328, 336-337 (Mo. banc 2012). "'The motion court's findings and conclusions are clearly erroneous only if,' after review of the record, the appellate court is 'left with a definite and firm impression that a mistake was made.'" *Booker v. State*, 552 S.W.3d 522, 526 (Mo. 2018), reh'g denied (Aug. 21, 2018) (quoting *Ross v. State*,

335 S.W.3d 479, 480 (Mo. banc 2011)). A movant is only entitled to an evidentiary hearing if: “(1) he pleaded facts, not conclusions, warranting relief; (2) the facts alleged are not refuted by the record; and (3) the matters complained of resulted in prejudice to the movant.” *McNeal v. State*, 412 S.W.3d 886, 889 (Mo. banc 2013); *Booker*, 552 S.W.3d 526. A hearing does not need to be held when the motion court determines the record conclusively shows the movant is not entitled to relief. Rule 24.035(h).

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

In order to prevail on an ineffective assistance of counsel claim, a movant must show (1) his attorney failed to exercise the customary skill and diligence that a reasonably competent attorney would perform in a similar circumstance, and (2) he was thereby prejudiced. *Sanders v. State*, 738 S.W.2d 856, 857 (Mo. banc 1987) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). When a movant alleges ineffective assistance of counsel following a guilty plea, the claim of ineffective assistance is “immaterial except to the extent it impinges on the voluntariness and knowledge with which a [movant] pled guilty.” *Ventimiglia v. State*, 468 S.W.3d 455, 462 (Mo. App. E.D. 2015) (quoting *Cain v. State*, 859 S.W.2d 715, 717 (Mo. App. E.D. 1993)). The *Strickland* prejudice analysis is applicable to counsel’s representation at the sentencing phase because ineffective assistance that results in any amount of additional jail time has Sixth Amendment significance. *Rush v. State*, 366 S.W.3d 663, 666 (Mo. App. E.D. 2012).

Analysis

I. Jones waived any objections to the sufficiency of proof in connection with his prior offenses when he and his attorney admitted to his prior felony convictions.

In his first point, Jones argues the motion court clearly erred by denying without an evidentiary hearing the claim that his 15-year sentence exceeds the maximum sentence

authorized by law because the sentencing court relied on insufficient proof in finding Jones was a prior and persistent offender. We disagree.

If a defendant, who has been found guilty of a class B, C, D, or E felony, is determined to be a persistent offender, the sentencing court may increase the defendant's prison term by sentencing the defendant pursuant to the authorized term of imprisonment for the offense *one class higher* than the offense for which the defendant was found guilty. § 558.016.7. For example, a defendant determined to be a persistent offender found guilty of a class C felony would be sentenced subject to the authorized term of imprisonment for a class B felony.

"A persistent offender is one who has been found guilty of two or more felonies committed at different times," § 558.016.3, and which were committed prior to the present offense. § 558.016.6. The statute sanctioning the extended term under which Jones was sentenced provides in relevant part:

1. *The court shall find the defendant to be a ... persistent offender, ... if*

(1) The . . . information . . . pleads all essential facts warranting a finding that the defendant is a . . . persistent offender, . . .; and

(2) Evidence is introduced that establishes sufficient facts pleaded to warrant a finding beyond a reasonable doubt that the defendant is a . . . persistent offender, . . .; and

(3) The court makes findings of fact that warrant a finding beyond a reasonable doubt by the court that the defendant is a . . . persistent offender,

§ 558.021.1

There is no dispute that the first and third requirements of § 558.021.1 were met. The indictment plead all essential facts warranting a finding that Jones was a persistent offender and the sentencing court found the evidence established beyond a reasonable doubt that Jones was a persistent offender.

For his part, Jones attacks the second requirement alleging that the evidence introduced did not establish sufficient facts to warrant a finding beyond a reasonable doubt that he was a persistent offender. But the record refutes Jones's claim. At the guilty plea hearing, the State detailed the evidence it would present had the case gone to trial, stating:

STATE: Thank you, Your Honor. Had this case proceeded to trial the State would prove beyond a reasonable doubt that the defendant committed the Class C Felony of unlawful possession of a firearm, in that on/or about March 12th, 2015, in the City of St. Louis, State of Missouri, the defendant knowingly possessed a semi-automatic handgun, a firearm, and on October 23rd, 2012, the defendant was convicted of the felony of resisting arrest in the 22nd Circuit Court of the City of St. Louis, State of Missouri....

The State then detailed additional specific facts of the present offense it would have proven had the case proceeded to trial. After which, the court questioned Jones:

THE COURT: All right. So, Mr. Jones, that's the evidence that the State will present. Now, I understand pursuant to *Alford* you're not admitting those facts as such, but you are admitting that that is the evidence that the State will present to the Jury.

THE DEFENDANT: Yes, sir.

The State further stated the following facts supporting a finding that Jones was a prior and persistent offender:

[STATE]: Yes, Your Honor. The defendant is a prior and persistent offender in that he has pled guilty to, been found guilty of, or been convicted of two or more felonies committed at different times. As stated earlier, on October 23rd, 2012, the defendant was found guilty of the felony of resisting arrest for a felony in the Circuit Court of the City of St. Louis, State of Missouri. And on June 21st, 2010, the defendant pled guilty to the felony of possession of a controlled substance in the Circuit Court of the City of St. Louis, State of Missouri.

THE COURT: Are those facts correct, sir?

[PLEA COUNSEL]: Judge, we're going to pose an objection on the record to the jury verdict on the finding of the resisting arrest. I don't know that we actually ever appealed that, but he was given a year in jail on that. And the facts were the jury did [not] find him guilty of unlawful use of a weapon [sic] and the police officer said that he observed the defendant with a weapon and chased him -- or what he thought was the butt of a weapon, he chased him, observed him discard it, and then the jury found him not guilty of the unlawful use of a weapon. And I think what Mr. Jones' question is, is then how can the

jury find him guilty of the resisting. And I just, for the record, will put an objection to that being a felony, the resisting arrest.

THE COURT: All right. But the year sentence was on the felony at that point.

[PLEA COUNSEL]: Yes, it was.

THE COURT:-- and it was him and also the 2010 possession of a controlled substance was him as well?

[PLEA COUNSEL]: Yes, Your Honor.

THE COURT: All right. I understand that dispute, and again, I can't [un]do [sic] whatever was done there, but I certainly do understand your quarrel with that for sure. But based upon that at this time with the two priors, the Court would find the defendant to be a prior and persistent offender and so then that increases the range of punishment for one day up to 15 years in the Missouri Department of Corrections. Do you understand that, sir?

THE DEFENDANT: Yes, sir.

Objections to the sufficiency of proof in connection with prior offenses may be waived by the admission of a defendant or his attorney. *State v. Johnson*, 837 S.W.2d 39, 41 (Mo. App W.D. 1992). Here, Jones acknowledged his prior felony conviction for resisting arrest. Plea counsel acknowledged both priors on behalf of his client, when presenting Jones's objection and argument against the court recognizing his prior felony conviction for resisting arrest. Thus, Jones waived any objections to the sufficiency of proof in connection with those prior offenses when he and his attorney made those admissions.³ *Johnson*, 837 S.W.2d 41.

Point I is denied.

³ Subsequently, at the sentencing hearing, plea counsel made additional admissions in connection with his renewed complaint that Jones's prior resisting arrest conviction should not be treated as a felony. Those admissions were cumulative to the admissions counsel made prior to the court's finding that Jones was a prior and persistent offender at the time of his guilty plea and do not need to be discussed at length here.

II. The record refutes the claim that plea counsel's admissions were without Jones's consent and approval.

In his second point, Jones argues the motion court clearly erred by denying without an evidentiary hearing his claim that his plea counsel was ineffective by admitting to Jones's prior felony convictions without Jones's consent. Jones alleges he never gave plea counsel his permission to admit to his prior convictions and that he suffered prejudice as a result of plea counsel's admission because the court relied on the admission in finding that Jones was a prior and persistent offender in order to enhance his sentence.

In order to prevail on an ineffective assistance of counsel claim, a movant must show (1) his attorney failed to exercise the customary skill and diligence that a reasonably competent attorney would perform in a similar circumstance, and (2) he was thereby prejudiced. *Sanders v. State*, 738 S.W.2d 856, 857 (Mo. banc 1987) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

A defendant who repeatedly assures the trial court that he is satisfied with his counsel's performance and that his counsel had done everything that he requested is barred from obtaining post-conviction relief based on a claim of ineffective assistance of counsel. *Holland v. State*, 990 S.W.2d 24, 31 (Mo. App. E.D. 1999) (citing *Estes v. State*, 950 S.W.2d 539, 542 (Mo. App. E.D. 1997); *Wilhite v. State*, 845 S.W.2d 592, 595–96 (Mo. App. E.D. 1992)).

Here, after plea counsel first acknowledged Jones's two prior felony convictions at the guilty plea hearing and the court found that Jones was a prior and persistent offender, the following exchange occurred:

THE COURT: All right. And has your attorney done everything you've asked?

THE DEFENDANT: Yes, sir.

THE COURT: Satisfied with his services?

THE DEFENDANT: Yes, sir.

THE COURT: Is there anything he's not done that you wanted him to do for you?

THE DEFENDANT: No, sir.

THE COURT: Any complaints against him whatsoever?

THE DEFENDANT: No, sir.

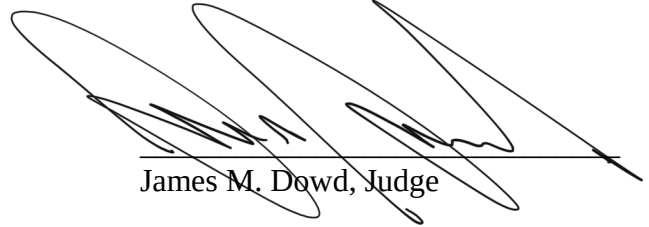
Under the circumstances of this case, we find that Jones's admissions here to be fatal to his argument on this point. Jones admitted on the record that he was satisfied with his counsel's work. He was present as his counsel urged the court to give him probation in part through his argument that the 2012 resisting arrest conviction should not have been classified as a felony. Though that ship has sailed since that felony conviction was not appealed, his counsel's argument seemed to strike a chord with the court which acknowledged that there may be some question about that conviction.

And Jones benefitted from his counsel's advocacy as he received the probation he sought. Now, however, after violating that probation, Jones claims that his counsel was not authorized to speak on his behalf regarding his prior convictions. We are not persuaded, and we look with confidence to his response to the court that he was satisfied with his counsel's representation. Given his counsel's repeated complaint about the 2012 resisting arrest conviction being counted as a felony for prior and persistent status, it is simply not credible that Jones, when asked by the court whether he was satisfied with his counsel's performance, would not have stated then what he urges us to believe now - that he did not authorize his counsel to admit to those two felonies.

As Jones's allegation is refuted by the record, Jones was not entitled to an evidentiary hearing, nor any post-conviction relief. *Booker*, 552 S.W.3d 526. Point II is denied.

Conclusion

For the reasons stated above, we affirm the motion court's judgment.



James M. Dowd, Judge

Angela T. Quigless, P.J., and
Kurt S. Odenwald, J. concur.