

**MISSOURI COURT OF APPEALS-WESTERN DISTRICT  
SPECIAL DIVISION  
THOMAS N. CHAPMAN, PRESIDING JUDGE,  
EDWARD R. ARDINI, JR., JUDGE  
W. DOUGLAS THOMSON, JUDGE  
TERRY TSCHANNEN, SPECIAL JUDGE  
OCTOBER 4, 2021  
LINN COUNTY COURTHOUSE  
LINNEUS, MISSOURI**

**WD83864**

**William Eugene Emry, Appellant,**

**v.**

**State of Missouri, Respondent.**

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William Emry appeals from the circuit court's judgment denying his Rule 24.035 motion for post-conviction relief after an evidentiary hearing. In his underlying criminal case, the State charged Emry with violating section 577.010, RSMo 2016, by committing the class C felony of driving while intoxicated as a chronic offender. To charge Emry as a chronic offender, the State included in the Information four prior convictions for driving while intoxicated, including two offenses that occurred in 1983 and 1984. Emry pled guilty to the class C felony of driving while intoxicated. The circuit court sentenced Emry to five years' imprisonment. Emry filed a Rule 24.035 motion for post-conviction relief, alleging that his plea counsel was ineffective for failing to inform him that he would have to serve 80 percent of his sentence before being eligible for parole. Additionally, Emry alleged that his plea counsel was ineffective for failing to properly investigate his prior convictions because, had counsel investigated, counsel would have found that the State would be unable to prove sufficient facts to demonstrate that the 1983 and 1984 offenses constituted the present-day crime of driving while intoxicated. Such proof would be necessary to use the prior offenses for purposes of enhancement. The motion court found that plea counsel was not ineffective for failing to inform Emry as to the percentage of time he would have to serve before becoming eligible for parole because it was a collateral consequence of the plea. Additionally, the motion court found that plea counsel was not ineffective because it was speculative to presume the 1983 and 1984 offenses could not be used because the prior convictions were state not municipal convictions. Further, Emry sought to plead guilty, admitting the prior convictions. This appeal followed.

Appellant's points on appeal:

1. The motion court clearly erred in denying Claim 8/9(a) of William Emry's Rule 24.035 motion for post-conviction relief, thereby violating his rights to due process and effective assistance of counsel as assured by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, by finding Mr. Emry's plea counsel was not ineffective for failing to investigate Mr. Emry's prior intoxication-related traffic offenses in light

of *State v. Gibson*, 122 S.W. 3d 121 (Mo. App. W.D. 2003) and advise Mr. Emry the State could not meet their burden to enhance the offense to that of a C felony, because the motion court erroneously held that Mr. Emry's 1983 and 1984 convictions qualified to enhance his status to that of a chronic DWI offender, in that the motion court misconstrued *Gibson* and incorrectly ruled *Gibson* was distinguishable from Mr. Emry's case on the basis that *Gibson* involved municipal convictions while Mr. Emry's case involved state convictions.

2. The motion court clearly erred in denying Claim 8/9(b) of William Emry's Rule 24.035 motion for post-conviction relief, thereby violating his rights to due process and effective assistance of counsel as assured by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, by finding Mr. Emry's plea counsel was not ineffective for failing to conduct an adequate investigation and file a Motion to Dismiss in Mr. Emry's case, because the State could not have proven Mr. Emry was a chronic DWI offender pursuant to §577.023 using Mr. Emry's prior intoxication-related traffic offenses in light of *State v. Gibson*, 122 S.W.3d 121 (Mo.App. W.D. 2003) and the motion court was wrong to distinguish *Gibson* on the ground that *Gibson* involved a municipal case, in that this Court has applied *Gibson* to a state statute and *Gibson*'s rationale applies equally in Mr. Emry's case.
3. The motion court clearly erred in denying Claim 8/9(c) of William Emry's Rule 24.035 motion for post-conviction relief, thereby violating his rights to due process and effective assistance of counsel as assured by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, by finding Mr. Emry's plea counsel was not ineffective for misadvising Mr. Emry on the minimum amount of time he would serve in the Department of Corrections before he became eligible for parole because counsel was not required to inform Mr. Emry of the percentage of time he would have to serve before becoming parole eligible, in that counsel affirmatively misadvised Mr. Emry he would serve a minimum of two years before becoming parole eligible.

**WD84046**  
**Destynie Wright, Appellant,**  
v.  
**State of Missouri, Respondent.**

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Destynie Wright appeals from the circuit court's judgment denying her Rule 29.15 motion for post-conviction relief after an evidentiary hearing. Following a jury trial, Wright was convicted of involuntary manslaughter, assault in the second degree, two counts of armed criminal action, and one count of tampering with physical evidence. The evidence established that Wright and her friend, Kierra Ramsey, attended a New Year's Eve party at a dance hall in Kansas City. There they got into an argument with the victim, Sederick Jones, Ramsey's ex-boyfriend. Jones followed Wright and Ramsey into the women's restroom, blocking their exit until a member of the cleaning

staff forced them to leave the building. Wright and Ramsey then tried to leave in Wright's car, but Jones got into the backseat and continued to argue with Wright and Ramsey. Wright then texted her boyfriend, Ramon Boyd, that Jones would not leave her car, had a gun, and asked Boyd to come help. Boyd arrived and shot Jones four times, killing him, and shot Ramsey twice. Wright fled the scene in her car and met up with Boyd later that night. Wright did not call 911 following the shooting. The jury found Wright guilty on a theory of accomplice liability. Wright was sentenced to a total of 32 years' imprisonment. This Court affirmed Wright's convictions on direct appeal. Wright filed a *pro se* motion to vacate, set aside or correct the judgment and sentences pursuant to Rule 29.15. Post-conviction counsel was appointed by the circuit court, and Wright's post-conviction counsel filed an Amended Rule 29.15 motion. The amended motion alleged, in part, that trial counsel was ineffective for failing to properly object to Jury Instruction 11, the verdict director for involuntary manslaughter, and Jury Instruction 23, the verdict director for assault in the second degree. Trial counsel had objected to the instructions on the basis that they were inconsistent theories, lessened the burden on the State, and could have led to non-unanimous verdicts, and later raised those arguments on direct appeal. Wright asserted, however, that trial counsel was ineffective for failing to object on the basis that there was insufficient evidence to support Instructions 11 and 23 or that Instructions 11 and 23 did not comply with the applicable Missouri Approved Jury Instruction. Trial counsel testified at the evidentiary hearing that he did not raise these issues because he felt the other issues were stronger arguments and that he was concerned with the page limitations on appellate briefs. The motion court found that trial counsel was not ineffective since he had challenged the verdict directors on what he believed to be stronger basis and had submitted his own instructions. This appeal followed.

Appellant's point on appeal:

The motion court clearly erred in denying Appellant's Amended 29.15 Motion Claim 8(a), alleging ineffective assistance of trial and appellate counsel for his failure to properly object at trial, and raise on appeal, that there was no substantial evidence to support the giving of verdict directors 11, for involuntary manslaughter, and 23, for assault in the 2nd degree, and that those verdict directors did not comply with the MAI-CR3rd and its Notes on Use, thereby violating Appellant's rights to due process and the effective assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution and by Article I, §§10 and 18(a) of the Missouri Constitution because the motion court's denial of relief was erroneous in that counsel's explanation for his failure to raise these two issues at trial and on appeal was unreasonable, the claims were meritorious, and Appellant was prejudiced by counsel's ineffective representation.

The State contends that the Amended Rule 29.15 motion was untimely filed. As such, the State argues that the Court should not address the merits of Wright's point on appeal. Instead, the State contends the case must be remanded to the circuit court for a determination on whether Wright was abandoned by postconviction counsel.

**WD84386**

**Richard Branson, Appellant,**

**v.**

**Patty Pipes and Michael Pipes and State of Missouri, Respondents.**

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Richard Branson appeals from the circuit court's judgment affirming the decision of the Department of Social Services, Director of Family Support Division, which ordered the withholding of Branson's wages to satisfy \$52,900 in child support arrearages. The facts as alleged claim that, on June 6, 2007, the Circuit Court of Boone County entered a Judgment of Paternity, ordering Branson to pay \$575 per month in child support for a minor child. The Judgment of Paternity was modified July 26, 2010, granting sole legal and physical custody to Patty and Michael Pipes, the child's grandparents. The child was adopted by the Pipeses on January 12, 2017. Branson was incarcerated from February 2008 to February 2018. Branson testified that twice during his incarceration he sent correspondence to the Family Support Division requesting a review and modification of his child support obligations. A witness for the Family Support Division testified that it had not received requests for modification or other correspondence from Branson. In 2019, the Pipeses requested child support collection services from the Family Support Division and the Division issued an Income Withholding Order to Branson's employer, payable at \$1,102.08 per month. Branson requested an administrative hearing to contest the withholding. Following a hearing, the Director of the Family Support Division affirmed the withholding order and calculated arrearages owed as \$52,900, which accrued between May 2009 and January 2017. Branson filed a Petition for Review in the Circuit Court of Cole County. Branson's petition also sought equitable relief in the form of a permanent injunction against the Family Support Division to prohibit future collection of child support arrears. The circuit court affirmed the Director's decision and found that the Family Support Division did not have jurisdiction to rule on Branson's equitable claims. This appeal followed.

Appellant's points on appeal:

1. The Director's decision that father owes \$52,900.00 in child support arrearage to grandparents, as well as the Director's decision affirming the agency's decision to issue income withholding order is in error in that the decision is in excess of statutory authority, unsupported by competent evidence, and an abuse of discretion because the Director failed to properly apply and recognize the Division's responsibility pursuant to 13 CSR 40-106 when it failed to review and modify father's child support due to his incarceration for more than one hundred and eighty days.
2. The circuit court's decision affirming the Director's determination that father owes \$52,900.00 in child support arrears is in error in that the circuit court failed to comply with §536.140.3, RSMo, which allows the circuit court to review the action of the agency when it involves the application of the law to the facts, in that the circuit court failed to conduct a de novo review of the agency's decision and thus failed to address the error by the division in failing to comply with 13 CSR 40-106 when requested by father.

3. The circuit court's judgment in its failure to address or rule upon father's equitable claim of permanent injunction is in error in that father's petition for review, which included a request for permanent injunction, is an action in equity that was specifically before the circuit court and said court failed to address said request in that the trial court neither denied nor granted said injunction and thus failed to address father's equitable claim.

**WD84235**

**Wanda L. Alberts, et al., Appellants,**

**v.**

**Turnbull & Stark, P.C. and Stephen Christopher Conway, Respondents.**

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Wanda Alberts, Richard Alberts, Jr., Delores Shirley, Brent Shirley, Richard Griggs, Ronda Griggs, Robin Stone, Roxanne Wilson, and Leslie O'Rourke (collectively "Appellants") appeal from the circuit court judgment dismissing their claims against Turnbull & Stark, P.C. and Stephen Conway (collectively "Respondents") for legal malpractice. The facts as alleged are that in July 2018, Howard Walz hired attorney Stephen Conway to provide estate planning services and change Walz's existing estate plan to include specific distributions to the Appellants. Turnbull & Stark, P.C., employed Conway. After Walz hired Conway, but before the amendments to Walz's estate plan, Walz's health deteriorated, and he was hospitalized on more than one occasion. Conway was informed of Walz's health and the importance of promptly completing the amendments to the estate plan. Walz died on September 11, 2018, before the amendments were made to his estate plan. This resulted in the Appellants not receiving the distributions Walz sought to make in his estate. The Appellants brought suit against the Respondents for legal malpractice. Respondents filed a motion to dismiss contending that Appellants lacked standing to pursue their legal malpractice claims. Following a hearing on the motion, the circuit court dismissed Appellants' petition for failure to state a claim upon which relief could be granted. This appeal followed.

Appellants' point on appeal:

The trial court erred in granting Defendants' motion to dismiss, because the facts contained in Plaintiffs' petition sufficiently stated causes of action for legal malpractice that may entitle Plaintiffs to relief under the principles of *Donahue*, in that Plaintiffs alleged an attorney-client relationship existed in which Defendants agreed to perform services specifically intended by Mr. Walz to benefit Plaintiffs and analysis of the factors in the modified balancing test of *Donahue* weigh in favor of an actionable legal duty owed to Plaintiffs under the facts pled in the petition.