OPINION SUMMARY
MISSOURI COURT OF APPEALS EASTERN DISTRICT

DIVISION FOUR

BRIAN McBENGE,	)	No. ED110102
	)	
Appellant,	)	Appeal from the Circuit Court of
	)	St. Charles County
vs.	)	
	)	Honorable Deborah J. Alessi
STATE OF MISSOURI,	)	
	)	
Respondent.	)	Filed: December 20, 2022

Brian McBenge ("Movant") appeals from the judgment of the Circuit Court of St. Charles County denying his Rule 29.15 motion for postconviction relief without an evidentiary hearing. In his amended motion, Movant alleged his trial counsel was ineffective for failing to object to the trial judge sentencing him pursuant to § 557.036.4(2) RSMo (2016), which he claims was erroneous because the State's seventh and final substitute information did not allege he was a prior or persistent offender, rendering the prior informations containing such allegations a nullity; therefore, the jury should have made a sentencing recommendation pursuant to § 557.036.3.

In his sole point on appeal, Movant contends the motion court erred in denying his motion without an evidentiary hearing because he alleged unrefuted facts showing his trial counsel was ineffective for failing to object to the judge sentencing him without a jury recommendation. Movant also argues that his trial counsel failed to advise him of his statutory right to a jury sentencing recommendation, and therefore he "unknowingly and involuntarily" waived this right.

AFFIRMED.

DIVISION FOUR HOLDS: Even if, *arguendo*, Movant's trial counsel was ineffective for failing to timely object and/or advise Movant of his right to a jury sentencing recommendation, Movant has failed to establish the requisite prejudice to obtain any relief. If this issue had been timely raised at trial, there is no reason to believe the State would not have filed an eighth amended information with the necessary allegation and proved that Movant was a prior offender pursuant to § 558.021.1, which it had previously done to the satisfaction of the trial court twice in the underlying criminal proceedings. Movant has also failed to allege facts unrefuted by the record that demonstrate prejudice from the motion court's failure to hold a hearing on this point.

Opinion by: Kelly C. Broniec, P.J.
Philip M. Hess, J. and John P. Torbitzky, J. concur.

Attorney for Appellant: Michael R. Durham

Attorney for Respondent: Evan Buchheim

THIS SUMMARY IS NOT PART OF THE OPINION OF THE COURT. IT HAS BEEN PREPARED FOR THE CONVENIENCE OF THE READER AND SHOULD NOT BE QUOTED OR CITED.