

**MISSOURI COURT OF APPEALS-WESTERN DISTRICT
DIVISION 1
EDWARD R. ARDINI, JR., PRESIDING JUDGE
ANTHONY REX GABBERT, JUDGE
THOMAS N. CHAPMAN, JUDGE
OCTOBER 18, 2023
MISSOURI WESTERN STATE UNIVERSITY
ST. JOSEPH, MISSOURI**

WD85640

Jaylen James, Appellant,

v.

State of Missouri, Respondent.

Appellant Jaylen James appeals from the judgment of the Boone County Circuit Court denying his Rule 24.035 motion for post-conviction relief. James pled guilty to conspiracy to commit robbery and was sentenced to 12 years' imprisonment. James filed a *pro se* motion to vacate, set aside or correct the judgment and sentence pursuant to Rule 24.035. Post-conviction counsel was appointed, and counsel filed an amended motion. James admitted that he had planned and shared in the proceeds of an armed robbery of a home, during which his two co-conspirators pointed a gun at the victims and stole their money. The amended motion alleged that James's sentence was a due process violation and cruel and unusual punishment. James alleged that his sentence was disproportionate to that of his co-defendants. Prior to James's sentencing, one of his co-conspirators was sentenced to ten years' imprisonment but execution of sentence was suspended, and he was placed on probation for five years. Despite this fact, at James's sentencing, the prosecutor indicated that both co-conspirators were still awaiting sentencing. Further, after James's sentencing, the court imposed a suspended imposition of sentence on his second co-conspirator and placed him on probation for five years. James's amended motion also alleged that his counsel was ineffective at sentencing for failing to call a number of witnesses who would have testified as to James's good character. The motion court denied James's motion. This appeal followed.

Appellant's points on appeal:

1. The motion court clearly erred in finding that no prosecutorial misconduct occurred when the prosecutor lied to the trial court at sentencing, in that due process of law requires the prosecutor to be candid with the tribunal. Had the misconduct not occurred, there is a reasonable probability of a different outcome at sentencing.
2. The motion court clearly erred in finding that Mr. James's sentence was not disproportionate to those of his co-defendants in violation of Mr. James's right against cruel and unusual punishment, in that Mr. James was not the actual perpetrator and did not have a substantially different criminal history than Mr.

Parker who received probation. Had this violation not occurred, there is a reasonable probability of a different result at sentencing.

3. The motion court clearly erred in finding that Mr. James’s counsel was not ineffective when he failed to present available evidence at sentencing, in that under the *Strickland* standard for effective assistance of counsel, an attorney must present evidence in support of a lower sentence. Had this violation not occurred, there is a reasonable probability of a different result at sentencing.

WD85812

Brandon McNeese, Appellant,

v.

John Wheeler, et al., Respondents.

Appellant Brandon McNeese appeals the judgment of the Circuit Court of Cole County dismissing his claims against Respondents Sheriff John Wheeler and the Cole County Sheriff’s Department which stemmed from an incident in which McNeese was shot in the shoulder while in the custody and care of the Cole County Jail. As alleged in the pleadings, McNeese claimed that the Respondents failed to adequately manage and search inmates, staff, and employees when entering and exiting the jail. Further, McNeese claimed that Respondents failed to adequately supervise and train its officers on how to monitor visitors, inmates, and staff. Sheriff Wheeler and the Cole County Sheriff’s Department filed a motion to dismiss for three reasons. First, Respondents argued that the claims were barred by *res judicata*—the reassertion of a claim or cause of action that has been previously adjudicated. Second, the claims were barred by official immunity and the public duty doctrines. Finally, they argued that the Cole County Sheriff’s Department is not a proper party to be named in the action. The circuit court granted the motion to dismiss “for the reasons explained in [the] Motion.” This appeal followed.

Appellant’s point on appeal:

1. This appeal arises from a single point of error. The trial court erred in the Order and Judgment dismissing Plaintiff’s claim that Defendant was negligent by allowing a gun to be brought into the jail that was ultimately used to shoot the appellant and when the trial court determined that the Defendant was not liable for the actions of his employees because his actions were discretionary and not ministerial.

WD86070

Old American Insurance Company, Appellant,

v.

Victoria L. Amrine and Division of Employment Security, Respondents.

Appellant Old American Insurance Company (“Old American”) appeals the decision of the Missouri Labor and Industrial Relations Commission (“Commission”) awarding unemployment

compensation benefits to Victoria Amrine. The facts before the Commission were that Amrine was employed as an Associate Service Representative for Old American from May 2013 to July 10, 2022. Amrine had begun to work remotely during the Covid-19 pandemic. On March 8, 2022, Amrine's supervisor determined that employees in her department would need to return to the office on April 8, 2022. Amrine asked to continue to work remotely because of childcare concerns and because she served as the caregiver for her grandmother. Old American offered to allow Amrine to work remotely three days per week. Amrine rejected that proposal. Old American agreed to allow Amrine to work remotely until May 31, 2022, after which she would be required to return to the office. Amrine returned to the office on May 31, but she missed work from June 1 to June 3 and was late on June 7. Amrine never returned to the office after June 7 and resigned on July 11, 2022. During May and June of 2022, Old American discussed with Amrine the availability of leave under the Family and Medical Leave Act ("FMLA"). Although Old American offered Amrine intermittent FMLA leave to allow Amrine to care for her grandmother, Amrine did not choose to take FMLA leave and instead resigned. Amrine sought unemployment benefits through the Division of Employment Security. A deputy determined she was disqualified from receiving benefits because she left work voluntarily without good cause attributable to work or the employer. An Appeals Tribunal for the Division affirmed that decision. Amrine appealed to the Commission which concluded that Amrine was entitled to benefits because she had not voluntarily quit her position and had not engaged in misconduct connected with work. This appeal followed.

Appellant's points on appeal:

1. The Labor and Industrial Relations Commission erred in reversing the decision of the Missouri Appeals Tribunal and awarding Amrine unemployment benefits, because there was not sufficient competent evidence in the record to establish that the Company committed the last act severing the employment relationship in that the Company offered Amrine FMLA leave and work in the office.
2. The Labor and Industrial Relations Commission erred in reversing the decision of the Missouri Appeals Tribunal and awarding Appellant unemployment benefits, because there was sufficient competent evidence in the record to establish that Amrine did not have good cause attributable to the work or the employer under Mo. Rev. Stat. § 288.050 in that she quit based on her caregiving responsibilities.
3. The Labor and Industrial Relations Commission erred in reversing the decision of the Missouri Appeals Tribunal and awarding Appellant unemployment benefits because even if Amrine was discharged, there was sufficient competent evidence in the record to establish that Amrine engaged in misconduct as defined in Mo. Rev. Stat. § 288.030.1(23) in that she violated her employer's rule requiring in-office work attendance.

WD85751

Z.R., Respondent,

v.

Kansas City Pediatrics, LLC, Appellant.

Appellants Kansas City Pediatrics and Dr. Scott Dattel appeal the judgment of the circuit court granting the motion for new trial filed by Respondent Z.R., by and through her next friends T.R. and R.R. Z.R., through her next friends T.R. and R.R., brought a medical malpractice action against Appellants. Following her birth, from November 14, 2015, to August 9, 2015, various providers at Kansas City Pediatrics, including Dr. Dattel examined Z.R. and believed she was developing normally. No concerns regarding hip dysplasia were raised. On June 15, 2018, ten months after her last visit with Dr. Dattel, Z.R. was seen by a doctor at Children's Mercy Hospital who suspected that Z.R. had developmental hip dysplasia with hip dislocation. Ultimately, Z.R. underwent fixation surgery on both hips, requiring casting, and participated in physical therapy. The malpractice action alleged that the hip dysplasia was present and diagnosable within Z.R.'s newborn phase, and, had such a diagnosis been made during that time, treatment would have required only a Pavlik Harness, and surgery would have been avoided. Following a six-day jury trial, verdict was returned in favor of Dr. Dattel and Kansas City Pediatrics. Z.R. filed a motion for new trial claiming, among other things, that the defendant's causation expert offered new opinions at trial. The circuit court granted the motion for new trial. This appeal followed.

Appellants' point on appeal:

1. The trial court erred in granting plaintiff's motion for new trial because defendant's causation expert did not testify that Z.R. had a teratologic hip nor did he testify that Z.R. could not have been successfully treated with a Pavlik Harness, therefore, the stated basis for the trial court's granting of plaintiff's new trial motion was erroneous and plaintiff could not have suffered prejudice from testimony that was never given.