MISSOURI COURT OF APPEALS
WESTERN DISTRICT

COMPLETE TITLE OF CASE:

MARK JARVIS

Appellant

v.

STATE OF MISSOURI

Respondent

DOCKET NUMBER WD77679

DATE: October 6, 2015

Appeal From:

Circuit Court of Lafayette County, MO
The Honorable Dennis Allen Rolf, Judge

Appellate Judges:

Division Two
Thomas H. Newton, P.J., Victor C. Howard, and Mark D. Pfeiffer, JJ.

Attorneys:

Amy Bartholow, Columbia, MO — Counsel for Appellant

Attorneys:

Dora Fichter, Jefferson City, MO — Counsel for Respondent

MISSOURI APPELLATE COURT OPINION SUMMARY
MISSOURI COURT OF APPEALS, WESTERN DISTRICT

MARK JARVIS, Appellant, v. STATE OF MISSOURI, Respondent

WD77679 **Lafayette County**

Before Division Two Judges: Newton, P.J., Howard, and Pfeiffer, JJ.

Jarvis was charged with two counts of statutory sodomy and one count of child molestation. Jarvis appeared before the court on a continuance motion and was informed that his case was set for trial. At this hearing and under an open plea agreement, Jarvis entered a guilty plea to the three counts, which the court accepted as freely, voluntarily and intelligently entered. During the sentencing hearing, the court deviated from the State's recommendation and sentenced Jarvis to life in prison on both counts of first degree statutory sodomy and fifteen years on the third degree child molestation.

Jarvis filed a timely *pro se* motion for post-conviction relief under Rule 24.035 alleging that the plea court violated Rule 24.02(d)(4) by neither advising him of the right to withdraw his guilty plea nor allowing him the opportunity to withdraw. He also argued that his attorney was ineffective for failing to inform him of his right to withdraw. Post-conviction counsel amended the motion to claim Jarvis's plea was not knowingly, intelligently or voluntarily entered because the plea court violated Rules 24.02(d)(1)(a) and (b) and 24.02(d)(4). The circuit court denied Jarvis's motion. Jarvis appeals.

DISMISSED.

Division Two holds:

To preserve an issue for appellate review it must be included in the post-conviction motion. Jarvis argues on appeal, that the court violated Rule 24.02(d) because the plea court did not advise Jarvis that his plea could not be withdrawn if the court did not adopt the State's recommendation. The State argues that Jarvis's point on appeal differs from the claim raised in his amended motion and is therefore not preserved for our review. We agree.

In his amended motion, the rules Jarvis claims the court violated apply to binding plea agreements. These rules, 24.02(d)(1)(a) and 24.02(d)(4), explain that if the court chooses to reject the sentence prescribed by a binding plea agreement, the court must inform the parties of the deviation in sentencing and give the defendant an opportunity to withdraw. On appeal, however, the rule that Jarvis claims the court violated applies to non-binding plea agreements. In non-binding plea agreements the defendant agrees to plead guilty although the court can still do whatever it chooses within the lawful range of punishment. In non-binding pleas, the prosecution simply makes a sentencing recommendation; the actual sentence, however, is left to the court's discretion. In non-binding pleas, the defendant does not have a right to withdraw his plea if the court deviates from the State's recommendation because the nature of a non-binding plea allows the court this sentencing freedom in exchange for the defendant's guilty plea.

It is clear that the two rules are very different. One rule, argued in the amended motion, applies to binding pleas and provides a right to withdraw if the court deviates from the sentencing agreement. The other rule, argued on appeal, applies to non-binding pleas and alerts the defendant that he has no right to withdraw regardless of the court's acceptance of or deviation from of the sentencing recommendation.

Therefore, we dismiss the appeal.

Opinion by Thomas H. Newton, Presiding Judge October 6, 2015

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THIS SUMMARY IS UNOFFICIAL AND SHOULD NOT BE QUOTED OR CITED.