IN THE
MISSOURI SUPREME COURT

THOMAS PEIFFER,	)	
	)	
Appellant,	)	
	)	
vs.	)	Appeal No. SC84307
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT FOR ST. LOUIS COUNTY, MISSOURI
THE HON. STEVEN GOLDMAN, JUDGE
AT POSTCONVICTION PROCEEDINGS

APPELLANT'S SUBSTITUTE REPLY BRIEF

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Jurisdictional Statement and Statement of Facts

Appellant restates and incorporates by reference his Jurisdictional Statement and Statement of Facts previously filed with this Court in his Substitute Brief.

Points Relied On[1]

I.

The motion court clearly erred when it denied Point 8a. of appellant's motion for postconviction relief pursuant to Missouri Supreme Court Rule 24.035 because appellant alleged facts not refuted by the record which, if proven, would entitle him to relief. Appellant alleged that the Fifth and Fourteenth Amendments' guarantee against double jeopardy prohibited him from being charged and convicted of stealing a motor vehicle in St. Louis County and tampering in the first degree in the City of St. Louis. The two charges were the same offense for double jeopardy purposes and appellant could not be prosecuted for both of them. Therefore, the Circuit Court of St. Louis County was prohibited from convicting and sentencing appellant, and the motion court had to vacate his conviction and sentence.

McIntyre v. Caspari, 35 F.3d 338 (8th Cir. 1994), cert. denied, 514 U.S. 1077, 115 S.Ct. 1724 (1993),

State v. Brown, 950 S.W.2d 930 (Mo.App. E.D. 1997)

State v. Morton, 971 S.W.2d 335 (Mo.App. E.D. 1998)

Section 570.030.3 RSMo

Section 556.061(22) RSMo

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[1] Appellant has chosen to reply only on Point I. He does not thereby waive any of his arguments in his other points.

Section 556.046.1 RSMo

Black's Law Dictionary, (Deluxe 5th Ed.) (1979)

Argument

I.

The motion court clearly erred when it denied Point 8a. of appellant's motion for postconviction relief pursuant to Missouri Supreme Court Rule 24.035 because appellant alleged facts not refuted by the record which, if proven, would entitle him to relief. Appellant alleged that the Fifth and Fourteenth Amendments' guarantee against double jeopardy prohibited him from being charged and convicted of stealing a motor vehicle in St. Louis County and tampering in the first degree in the City of St. Louis. The two charges were the same offense for double jeopardy purposes and appellant could not be prosecuted for both of them. Therefore, the Circuit Court of St. Louis County was prohibited from convicting and sentencing appellant, and the motion court had to vacate his conviction and sentence.

The State makes six arguments in opposition to the grant of appellant's postconviction motion. See: Respondent's Brief, p 13-41 (hereinafter "Resp.Br."). As none of these arguments have merit, this Court should reverse the motion court's denial of Point 8a of appellant's motion. Appellant addressed a number of them in his brief in chief, but others call for further discussion.

First Degree Tampering is a Lesser-Included Offense of Stealing a Motor Vehicle

Respondent argues that appellant could be convicted of both tampering first degree and stealing a motor vehicle because the former offense is not a lesser

included offense of the latter. Resp.Br., 18-22. Because tampering first is a lesser included offense of stealing a motor vehicle, Respondent's argument fails.

An offense is a lesser included offense of another if it is so denominated by statute, is an attempt to commit the offense or it "is established by proof of the same or less than all the facts required to establish the commission of" the greater offense. Section 556.046.1 RSMo. Respondent argues that under the "statutory elements" test of 556.046.1(1) RSMo, the greater offense must "encompass all the legal and factual elements of the lesser crime" Resp. Br., 20. In other words – it must be impossible to commit **any form** of the greater offense, as defined by the statute, without committing the lesser offense . As applied to stealing and tampering, Respondent's argument goes as follows: "A person who steals property, services or anything other than a motor vehicle certainly would not be guilty of tampering" Resp. Br., 20.

Respondent argues that the fact that what was stolen was a motor vehicle is not actually an element of the offense, but rather a "evidentiary fact" analogous to the value of the property taken in a stealing over $750 case, which elevates the stealing to a felony Resp.Br., 21. The error in the Respondent's argument is this: in making the determination of whether one charge is a lesser included offense of the other, Missouri courts will look at how the case was brought and the facts, not at any possible way that offense could be charged in other situations.

For example, a defendant is charged with Class C felony stealing by means of taking property worth a certain amount of money, if the facts arguably show

that the property was not worth that sum, misdemeanor stealing is a lesser included offense and must be submitted to the jury for consideration. State v. Westfall, 710 S.W.2d 408 (Mo.App. E.D. 1986); State v. Saffold, 563 S.W.2d 127 (Mo.App. K.C.D. 1978). It makes no difference that felony stealing could be charged any number of ways – for example by stealing from the person of the victim or by stealing a will, deed, credit card or firearm, Section 570.030.3 RSMo. – it is how the offense is actually charged that matters. Characterizing the amount or type of property taken as an "element" or an "evidentiary fact" makes no difference in which lesser offenses can and should be given.

The Eastern District's opinion in State v. Brown, 950 S.W.2d 930 (Mo.App. E.D. 1997) does not offer Respondent the support it seeks. In that case, Brown was convicted of stealing a motor vehicle, having been charged with robbery first degree. Id. at 931. He argued that stealing was not a lesser included offense, since it contained an additional element that robbery did not: the property taken must be a motor vehicle. Id. at 932. The Court of Appeals disagreed not because – as the State would have it – the property taken was not an element and therefore did not figure into the determination (Resp.Br., 21), but rather because the taking of "property" required by robbery first degree was "broad enough to encompass any property, regardless of its character." Id. at 932, citing State v. Littlefield, 594 S.W.2d 939 (Mo. banc 1980). Interestingly enough, the Brown court also did not follow the State's theory – that any permutation of the lesser offense must be included in the greater – in rendering its decision. Had it done so,

it would have concluded that stealing could **not** be a lesser included offense of robbery, since – as Respondent emphasizes – stealing can be accomplished through deceit or through other means not involving a physical taking, but robbery requires a "forcible stealing" Resp. Br., 22.

In a nutshell, Missouri courts do apply the "statutory elements" test, but not like Respondent would have this Court hold. For the greater offense, the courts look at what part of the statute the State chooses to charge it under, not every variation contained in the statute as a whole. For the lesser offense, the courts will conduct a similar analysis – they will look at how the lesser offense is proffered, not at any possible way it could be.

The State charged appellant with committing tampering first degree by "unlawfully possess[ing] an automobile" and stealing the automobile by "appropriat[ing]" it (PCRLF, 52). "Possessing" an item means

> [h]aving actual or constructive possession of an object with knowledge of its presence. A person has actual possession if such person has the object on his or her person or within easy reach and convenient control. A person has constructive possession if such person has the power and intention at a given time to exercise dominion or control over the object either directly or through another person or persons.

Section 556.061(22) RSMo. Obviously, it would have been impossible for appellant to "appropriate" the car – i.e. transfer possession of it from the dealer to himself – without possessing it, either before, during or after the appropriation.

The hypotheticals posited by both the State and the motion court judge in this case are irrelevant, since, again, they do not reflect how this case was brought.

The Convictions Were Based on the Same Conduct

Next, the State argues that the convictions for tampering and stealing the motor vehicle were not based on the same conduct, and therefore do not constitute double jeopardy Resp.Br., 23-27. The Eighth Circuit, in McIntyre v. Caspari, 35 F.3d 338, 339 (8th Cir. 1994), cert. denied, 514 U.S. 1077, 115 S.Ct. 1724 (1993), examining virtually exactly the same fact scenario, held to the contrary. "[T]he Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units . . . Here, too, we reject the State's argument that the offenses of tampering and stealing are different offenses merely because they occurred on different days" (internal quotes omitted). The Double Jeopardy Clause is a much more robust protection against multiple charges than the State would have us believe.

Permitting the sort of multiple charging that the State advocates would effectively gut the Double Jeopardy Clause. If appellant drove the car to a gas station, got out, paid for the gas, got back in, drove two feet, realized he forgot his wallet at the counter, got out, retrieved his wallet, and got back in, would he be charged with a separate tampering count for each time he sat down in the driver's seat and moved the car? See: Resp.Br., 25. Could appellant have been charged with a count of tampering first degree for every hour he drove the car? For every

minute? For every second? If he drove it from the City of St. Louis to Kansas City, could he be charged in every county along Interstate 70? What are the minimum "temporal or special units" that the State would exploit to gain hundred-count indictments and life sentences for simple theft?

Again, the State posits a hypothetical that is not relevant to the facts at hand – a defendant being charged with multiple shots into a house being charged with multiple counts of unlawful use of a weapon Resp.Br., 24. Each count would, of course, not be a lesser included offense of the other, and it would be possible to commit each count without the other. In this case, appellant could not have committed the stealing a motor vehicle, as charged, without also committing a tampering first degree, as charged.

Effects of Amendments to Stealing Statute

Next, the State argues that, because the Legislature did not amend the stealing statute to override State v. McIntyre, 749 S.W.2d 420 (Mo.App. E.D. 1988), the Legislature, in effect, "ratified" that decision and displayed its intent to permit multiple punishments for stealing and tampering Resp.Br., 28. One notes, however, that the McIntyre v. Caspari was decided six years *after* State v. McIntyre, and before all the amendments to the statutes that the State cites Resp.Br., 28. If the Legislature could establish multiple punishments as the State argues, it certainly could have amended the statutes to circumvent McIntyre v. Caspari and "ratify" State v. McIntyre. It did not do so. The United States Supreme Court declined certiorari in McIntyre v. Caspari, which means that the

Eighth Circuit was certainly the "court of last resort" in that case. It would seem logical that if the Legislature was concerned about challenges in Federal court to Missouri statutes, it would have acted. But it did not. The State's argument in this case also fails.

Jeopardy Attaches at Guilty Plea

Next, the State argues that jeopardy did not attach in these cases until appellant was sentenced Resp.Br., 31-32. Respondent cites State v. Morton, 971 S.W.2d 335, 339 (Mo.App. E.D. 1998) for the proposition that jeopardy attaches at sentencing, not when the defendant pleads guilty, but rather when he is sentenced Resp.Br., 31-32. However, the court in Morton merely **assumed** that jeopardy attaches when the defendant is sentenced. Morton, supra, at 340, citing Jones v. State, 771 S.W. 349, 351 (Mo.App. E.D. 1989). The Jones court, in turn, relied upon a statement in Ricketts v. Adamson, 483 U.S. 1, 107 S.Ct. 2680, 2685, 97 L.Ed. 1 (1987). However, this was not the Court's holding in Ricketts, and should not have been relied upon by Missouri's appellate courts.

In Ricketts, the defendant was charged with first degree murder and proceeded to trial. 483 U.S. at 3, 107 S.Ct. at 2682. During jury selection, the defendant and the prosecution reached an agreement by which Ricketts would plead guilty to second degree murder and would testify against his codefendants. Id. at 483 U.S. 3-4, 107 S.Ct. at 2682. The guilty plea was accepted, but sentencing was deferred. Id. The codefendants were convicted, and while their convictions were pending, Ricketts was sentenced. 483 U.S. at 4, 107 S.Ct. at

2683. The codefendants' convictions were overturned on appeal, and Ricketts refused to testify at the retrials. Id. The prosecution asserted that Ricketts was in breach of the plea bargain, and charged him with first degree murder. 483 U.S. at 5, 107 S.Ct. at 2683. Ricketts asserted that his right to be free from double jeopardy barred the State's reprosecution of him. Id.

The Supreme Court held that Ricketts' actions violated the plea bargain, which removed the double jeopardy bar to him being retried. 483 U.S. at 12, 107 S.Ct. at 2687. In the course of its discussion, the Court noted that "We may **assume** that jeopardy attached **at least** when [Ricketts] was sentenced . . . on his plea of guilty to second-degree murder." 483 U.S. at 8, 107 S.Ct. at 2685 (emphasis added). In other words, the Supreme Court stated that that the **latest** point at which jeopardy could have attached would have been at sentencing. The distinction between plea and sentencing was also entirely unnecessary to the Court's ultimate decision – Ricketts had pled and been sentenced by the time the State began its second prosecution – and therefore it was dicta. See: Black's Law Dictionary, (Deluxe 5th Ed.) (1979), at 409 ("Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand are *obiter dicta* and lack the force of an adjudication").

Therefore, the State's assertion that jeopardy attached at sentencing, not guilty plea, is based upon an assumption stemming from a misreading of the Ricketts Court's opinion by Missouri's appellate courts, and should not be relied

upon. It is far more logical – and consistent with the purposes of the prohibition against double jeopardy – to hold that jeopardy attaches with the guilty plea, not at sentencing. As the Morton court noted, "Jeopardy means exposure to danger and it was a principle of the common law that a man should not be brought into danger of his life or limb for one and the same offense more than once." Morton, supra, at 339. Once someone pleads guilty, he is obviously "exposed to the danger" of being sent to prison. Nothing stands between him and his sentence.

This is consistent with jeopardy attaching when the jury is sworn (at a jury trial) or when the introduction of evidence begins (at a bench trial). Cf. Morton, supra, at 339. There is no logical reason why jeopardy should attach so much later when a defendant pleads guilty than when he pleads not guilty. A guilty plea is essentially a trial in which the defendant waives his rights to a jury and to confront and cross-examine witnesses, then agrees to the prosecutor's recitation of facts. As with a contested trial, the plea proceeding – not the sentencing – presents the risk of a finding of guilt and thereby places the defendant in jeopardy. The Eighth Circuit noted that "as a general rule courts have held that jeopardy attaches when a trial court unconditionally accepts a guilty plea." Bally v. Kemna, 65 F.3d 104, 107 (8th Cir. 1995), citing Fransaw v. Lynaugh, 810 S.W.2d 518, 523 n. 9 (5th Cir 1987) (listing cases).

It is clear that the reliance that Missouri courts have placed on a snippet of dicta from Ricketts is misplaced. The State's contention, therefore, that jeopardy attaches as the sentencing proceeding is without merit – it clearly attached when

he pled guilty in the City of St. Louis, before he pled guilty in St. Louis County. For double jeopardy purposes, he was convicted when he pled guilty, so his subsequent conviction in St. Louis County was barred by double jeopardy. Rost v. State, 921 S.W.2d 629 (Mo.App. S.D. 1996), cited by Respondent, therefore, has no bearing on this case.

The Plea Bargain Does Not Preclude Appellant's Claim

Next, the State argues that appellant's claim is barred by his agreement to the plea bargain Resp.Br., 37-38. However, the State does not point to anything in the record which would hold that his plea bargain included an agreement not to collaterally attack his sentences. In fact, like all defendants who plead guilty, appellant was assured of his rights under Rule 24.035 to challenge the constitutional validity of his convictions and sentences:

> THE COURT: I need to advise you of some additional rights that you have. Under Supreme Court Rule 24.035 you have 90 days to file a motion in this court to vacate, set aside or correct these judgments of conviction or sentences if you claim that your convictions or sentences imposed are in violation of the Constitution or the laws of the State of Missouri or the Constitution of the United States; or that this Court is without jurisdiction to impose the sentences; or that the sentences imposed are in excess of the maximum sentence authorized by law.

(Plea, 15). Nowhere is appellant informed that he cannot challenge his sentences because there was a plea bargain involved.

Further, appellant protested at his sentencing proceeding that he was already being prosecuted for the same car in the City of St. Louis:

> THE COURT: Do you have any cases pending anywhere else right now?
>
> [APPELLANT]: Yes, sir.
>
> THE COURT: Where would that be?
>
> A: St. Louis City.
>
> THE COURT: is that another stealing type case?
>
> A: It's the same vehicle, Your Honor. I've been charged with tampering first degree in the City on the same vehicle I'm being charged with stealing in the County.
>
> THE COURT: You understand - - the reason I bring that up, I don't have any control over what they do in the City.
>
> A: I understand.

(PCRLF, 10). Far from waiving his right to be free from double jeopardy, he attempted to bring it to the judge's attention as best as a layman, lacking formal legal training, could manage.

If it was truly concerned about appellant getting the benefit of the rest of the plea bargain while vacating one of his convictions, the State could have confessed judgment in this case and requested the motion court vacate all of appellant's convictions and sentences in the underlying criminal cause. Thus, both sides would be returned to *status quo ante*. However, Respondent has not done so

and does not urge this Court to do so. The State wants **its** benefit – two convictions for the same crime in violation of the Double Jeopardy Clause.

For the forgoing reasons and for the reasons put forth in appellant's Substitute Brief, appellant prays this Court to vacate the denial of his postconviction motion and direct that his conviction and sentence in the underlying criminal cause be set aside.

Conclusion

Wherefore, for the forgoing reasons, and for the reasons put forth in Appellant's brief in chief, Appellant prays this Honorable Court to reverse the judgment of the motion court and remand this cause with directions that his conviction for stealing a motor vehicle be vacated or, in the alternative, for a hearing.

Respectfully Submitted,

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Certificate of Service

One paper copy and one copy on disk of the forgoing Appellant's Statement, Brief, and Argument were mailed to the Attorney General, State of Missouri, Jefferson City, Missouri 65102 on this 6th day of May, 2002.

Lew Kollias, MOBar #28184

Certificate of Compliance Pursuant to Rule 84.06

The attached reply brief complies with the limitations contained in Rule 84.06. The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certification, and the certificate of service, the reply brief contains 3,429 words, which does not exceed the 7,750 (25% of 31,000) words allowed for an appellant's reply brief.

The floppy disk(s) filed with this brief contain(s) a copy of this brief. The disk(s) has/have been scanned for viruses using a McAfee VirusScan program. According to that program, the disk(s) is/are virus-free.

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