IN THE SUPREME COURT OF MISSOURI

No. 83906

STATE OF MISSOURI,

Respondent,

vs.

THOMAS J. NORSWORTHY,

Appellant.

Appeal from the Circuit Court of Newton County, Mo
The Honorable Greg Stremel, Judge

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from a conviction for two counts of property damage in the first degree, §569.100 RSMo 2000, obtained in the Circuit Court of Newton County and for which appellant was sentenced to two consecutive terms of five (5) years' imprisonment in the Missouri Department of Corrections. This appeal involves the validity of §558.019(5), which is being challenged on the grounds that said section is void for vagueness. Therefore, the Supreme Court of Missouri has exclusive appellate jurisdiction. Article V, § 3, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Thomas J. Norsworthy, was charged by amended information with two counts of property damage in the first degree (L.F. 5-6). Appellant entered a plea of guilty to both counts, as well as an assault charge in Cause Number CR497-1888FX on October 24, 1997, in the Circuit Court of Newton County, the Honorable Greg Stremel presiding (L.F. 21; Tr. 1, 4-6).

If the cause would have proceeded to trial, the State was prepared to show that appellant used an ax to damage a 1990 Mercury Sable and a 1994 Chevrolet Monte Carlo (Tr. 8). Appellant also used the ax to damage the windows and door of a residence in Newton County (Tr. 8).

The court accepted appellant's plea as voluntarily and intelligently made and pursuant to a plea agreement, sentenced appellant to two consecutive terms of five (5) years' imprisonment on the property damage charges and four (4) years' imprisonment on the assault charge, with the assault sentence to run consecutively to the property damage for a total sentence of fourteen years (L.F. 8-9; Tr. 6, 9, 13). The court further ordered those sentences be served concurrently with a pending charge in Barry County (Tr. 6, 13).

Appellant filed a Rule 29.07(d) motion to withdraw his guilty plea on May 3, 2001, alleging that he suffered manifest injustice as a result of his plea (L.F. 10-16). This motion was denied on May 31, 2001 (L.F. 21). This appeal follows.

POINTS RELIED ON

I.

THIS COURT SHOULD DECLINE TO REVIEW APPELLANT'S CLAIMS THAT THE MOTION COURT ERRED IN DENYING HIS RULE 29.07 MOTION TO WITHDRAW HIS GUILTY PLEA BECAUSE HIS MOTION WAS UNTIMELY.

SHOULD THIS COURT ELECT TO REVIEW APPELLANT'S CLAIM, HE IS UNENTITLED TO RELIEF AS THE RECORD REFUTES HIS CLAIM THAT HIS GUILTY PLEA WAS INVOLUNTARY BASED UPON HIS BELIEF THAT HIS CONSECUTIVE SENTENCES WOULD BE CONVERTED TO CONCURRENT SENTENCES UNDER §558.019.5 BECAUSE SUCH BELIEF WAS UNREASONABLE IN THAT THE RECORD REFLECTS THAT APPELLANT UNDERSTOOD HIS PLEA AGREEMENT AND SENTENCE TO BE CONSECUTIVE TERMS OF IMPRISONMENT AND THAT NO MENTION WAS MADE OF §558.019.5 OR THE POSSIBILITY OF PAROLE.

ADDITIONALLY, § 558.019.5 RSMo 1994, THE STATUTE UPON WHICH APPELLANT ALLEGEDLY RELIED WHEN ENTERING HIS PLEA IS NOT UNCONSTITUTIONALLY VAGUE BECAUSE SAID STATUTE PROVIDES DEFINITE AND EXPLICIT STANDARDS FOR ITS ENFORCEMENT.

State v. Pendleton, 910 S.W.2d 268 (Mo.App., W.D. 1995);

State v. Rice, 887 S.W.2d 425 (Mo.App., W.D. 1994);

Redeemer v. State, 979 S.W.2d 565 (Mo.App., W.D. 1998);

Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 22 (1972);

Section 558.019.5, RSMo 1994;

Supreme Court Rule 24.035(a);

Supreme Court Rule 29.07(d)

II.

THE MOTION COURT DID NOT CLEARLY ERR IN RULING UPON APPELLANT'S MOTION TO WITHDRAW HIS GUILTY PLEA BECAUSE A) TO THE EXTENT THAT THE CLAIM CHALLENGES THE MOTION COURT'S JURISDICTION IT IS NOT COGNIZABLE IN THAT IT WAS UNTIMELY AND SHOULD HAVE BEEN RAISED ON DIRECT APPEAL, AND B) JUDGE STREMEL, THE ASSOCIATE CIRCUIT COURT JUDGE ASSIGNED TO APPELLANT'S CASE, HAD JURISDICTION TO HEAR APPELLANT'S PLEA AND RULE UPON HIS MOTION PURSUANT TO §478.070 AND §478.220, RSMO 1994.

Soutee v. State, 51 S.W.3d 474 (Mo.App., S.D. 2001);

State v. Romeiser, 46 S.W.3d 656 (Mo.App., W.D. 2001);

Perry v. State, 11 S.W.3d 854 (Mo.App., S.D. 2000);

State v. Williams, 46 S.W.3d 35 (Mo.App., E.D. 2001);

Section 478.070, RSMo 1994, Article V, § 17;

Section 478.072.1;

Section 478.220, RSMo 1994.

III.

THE MOTION COURT DID NOT CLEARLY ERR IN FAILING TO ISSUE APPELLANT A WRIT OF HABEAS CORPUS PURSUANT TO §532.070 RSMo 2000 BECAUSE THE MOTION COURT WAS WITHOUT JURISDICTION TO ISSUE SUCH A WRIT IN THAT APPELLANT IS INCARCERATED IN COLE COUNTY AND THE MOTION COURT IS IN NEWTON COUNTY.

State v. McKee, 39 S.W.3d 565 (Mo.App., S.D. 2001);

Reynolds v. State, 939 S.W.2d 451 (Mo.App., W.D. 1996);

Section 532.070, RSMo 2000;

Supreme Court Rule 91.02(a);

Supreme Court Rule 91.06.

ARGUMENT

I.

THIS COURT SHOULD DECLINE TO REVIEW APPELLANT'S CLAIMS THAT THE MOTION COURT ERRED IN DENYING HIS RULE 29.07 MOTION TO WITHDRAW HIS GUILTY PLEA BECAUSE HIS MOTION WAS UNTIMELY.

SHOULD THIS COURT ELECT TO REVIEW APPELLANT'S CLAIM, HE IS UNENTITLED TO RELIEF AS THE RECORD REFUTES HIS CLAIM THAT HIS GUILTY PLEA WAS INVOLUNTARY BASED UPON HIS BELIEF THAT HIS CONSECUTIVE SENTENCES WOULD BE CONVERTED TO CONCURRENT SENTENCES UNDER §558.019.5 BECAUSE SUCH BELIEF WAS UNREASONABLE IN THAT THE RECORD REFLECTS THAT APPELLANT UNDERSTOOD HIS PLEA AGREEMENT AND SENTENCE TO BE CONSECUTIVE TERMS OF IMPRISONMENT AND THAT NO MENTION WAS MADE OF §558.019.5 OR THE POSSIBILITY OF PAROLE.

ADDITIONALLY, § 558.019.5 RSMo 1994, THE STATUTE UPON WHICH APPELLANT ALLEGEDLY RELIED WHEN ENTERING HIS PLEA IS NOT UNCONSTITUTIONALLY VAGUE BECAUSE SAID STATUTE PROVIDES DEFINITE AND EXPLICIT STANDARDS FOR ITS ENFORCEMENT.

In his first point on appeal, appellant contends that the motion court clearly erred in denying his motion to withdraw his guilty plea because he believed that his sentence of two consecutive five (5) year terms of imprisonment would be converted, pursuant to §558.019.5

RSMo 2000, to two concurrent five (5) year terms (App.Br. 13). As part of this claim, appellant alleges that §558.019.5 is unconstitutionally vague (App.Br. 12).

Based upon these factors, appellant argues that his plea was involuntary and that he should have been permitted to withdraw it (App.Br. 10).

A defendant does not have an absolute right to withdraw a guilty plea. State v. Pendleton, 910 S.W.2d 268, 270 (Mo.App., W.D. 1995). Rather, a defendant should be permitted to withdraw his plea only upon a showing that such relief is necessary to correct manifest injustice. Id. Whether to permit a defendant to withdraw a plea of guilty is within the sound discretion of the trial court. Sharp v. State, 908 S.W.2d 752, 754 (Mo.App., E.D. 1995), cert. denied 518 U.S. 1007 (1996). In reviewing the denial of a motion to withdraw a guilty plea, this Court must determine whether the trial court abused that discretion or was clearly erroneous. Pendleton, 910 S.W.2d at 270. It is the defendant's burden to show by a preponderance of the evidence that the trial court erred. Id.

A. Appellant's Rule 29.07(d) motion was untimely.

Appellant entered his plea of guilty on October 24, 1997 (Tr. 4-6). On May 3, 2001, appellant filed a motion to withdraw his guilty plea pursuant to Supreme Court Rule 29.07(d) (L.F. 10-20, 21). In his motion, appellant claimed that his plea was involuntary because it was induced by the "false hope" that his two consecutive five (5) year sentences would be converted to concurrent terms pursuant to §558.019(5) (L.F. 14-15). The motion court denied appellant's motion to withdraw his plea on May 31, 2001 (L.F. 21).

Although Rule 29.07(d) "itself imposes no time restrictions on the granting of relief

under that rule . . . Rule 29.07(d) must be read in pari materia with Rule 24.035, ... which declares itself to be the 'exclusive procedure' for challenging the validity of a guilty plea in a felony case in the sentencing court." Reynolds v. State, 939 S.W.2d 451, 454 (Mo.App., W.D. 1996).

Rule 24.035 provides, in part, that:

> (a) A person convicted of a felony on a plea of guilty and delivered to the custody of the department of corrections who claims that the conviction or sentence imposed violates the constitution and laws of this state or the constitution of the United States, including ... that the court imposing the sentence was without jurisdiction to do so, or that the sentence imposed was in excess of the maximum sentence authorized by law may seek relief in the sentencing court pursuant to the provisions on this Rule 24.035. This Rule 24.035 provides the exclusive remedy by which such persons may seek relief in the sentencing court for the claims enumerated.

Supreme Court Rule 24.035(a).

Because appellant's claim raises a challenge to his sentence, his claim should have been raised under Rule 24.035. In cases where the allegations of the Rule 29.07(d) motion and the relief sought are such that could be sought under a Rule 24.035 pleading, the motion is subject to the terms and conditions of Rule 24.035, including time limitations. Logan v. State, 22 S.W.3d 783, 785 (Mo.App.,W.D. 2000); State v. Pendleton, 910 S.W.2d 268, 271 (Mo.App., W.D. 1995). To require otherwise "would emasculate Rule 24.035 and constitute Rule

29.07(d) an escape hatch through which any claim procedurally barred by Rule 24.035 could scurry into courts." Logan, 22 S.W.3d at 785 (quoting State v. Ryan, 813 S.W.2d 898, 902 (Mo.App., S.D. 1991).

Rule 24.035 provides that all such claims must be filed within 90 days of the date the person is delivered to the custody of the department of corrections. Here, although the record does not reflect the exact date that appellant was delivered to the custody of the Department of Corrections, the docket shows that he was incarcerated in Fulton Reception Center on November 10, 1997 (L.F. 21). Appellant's Rule 29.07(d) motion was filed on May 3, 2001(L.F. 10-20). As it has now been more than ninety days (in fact more than three years) since appellant was delivered to the custody of the Department of Corrections, his motion is untimely. Appellant cannot use an extremely untimely Rule 29.07(d) motion to end run his way past a Rule 24.035 claim that was time-barred. Therefore, appellant is not entitled to seek relief on his claim in a motion to withdraw his plea filed pursuant to Rule 29.07(d). Reynolds v. State, 939 S.W.2d at 455; State v. Pendleton, 910 S.W.2d at 271; State v. Ryan, 813 S.W.2d at 901-902.

In the event this Court elects to review appellant's Rule 29.07 motion, the merits of his claims will be discussed below.

B. Appellant's claim that his plea was entered involuntarily is unreasonable in light of the record.

Appellant contends that his plea was involuntary because he believed that, pursuant to §558.019(5), the Board of Probation and Parole (hereinafter "the Board") would convert his

consecutive sentences to concurrent sentences. However, appellant's belief is unreasonable in light of the record and his claim must fail.

"Mistaken beliefs about sentencing may affect a defendant's ability to knowingly enter a guilty plea if: 1) the mistake is reasonable, and 2) the mistake is based upon a positive representation upon which movant is entitled to rely." Robinson v. State, 952 S.W.2d 315, 318 (Mo.App., E.D. 1997). "While an individual may proclaim he had a certain belief and may subjectively believe it, if it was unreasonable for him to entertain such a belief at the time of the plea proceeding, relief should not be granted." State v. Rice, 887 S.W.2d 425, 428 (Mo.App., W.D. 1994). In the case at bar, appellant's belief that his consecutive sentences would be converted to concurrent sentences was unreasonable and as such appellant is not entitled to relief.

At the plea hearing, appellant's attorney announced that appellant entered into a plea bargain wherein appellant would be sentenced to consecutive terms of five (5) years imprisonment on both of the property damage counts, and a consecutive term of four (4) years on the assault charge in Case Number 1888FX (Tr. 6). Appellant's attorney also announced that those sentences would run concurrent with a seven (7) year sentence in Barry County (Tr. 6). Following this announcement, the following exchange occurred:

> BY THE COURT: Okay, you've been present here beside your attorney whenever he announced the plea bargain, is that what your understanding of it is?
>
> BY THE WITNESS: 5, 5, and 4.
>
> BY THE COURT: Okay.

BY THE WITNESS: Consecutive concurrent with my 7 in Barry County, correct.

BY THE COURT: I think you understand what the plea bargain is because you corrected your attorney whenever he misspoke what is was.

BY THE WITNESS: Yes.

(Tr. 6-7). Shortly thereafter, the prosecutor stated that appellant requested the correct plea which was "5 years, plus 5 years, plus 4 years, for a total of 14 years" (Tr. 9). The prosecutor also stated that these sentences were to run concurrent with the Barry County case (Tr. 9).

The court found that appellant's plea was voluntarily and intelligently made, that the plea bargain was disclosed on the record, and noted that appellant was "already confined" for five (5) years and five (5) years on the property damage charges, as well as four (4) years on the assault charge (Tr. 10).

In light of the foregoing, the record refutes appellant's claim that his consecutive sentences would be converted to concurrent sentences. There were no agreements reached with the State under which appellant would receive concurrent sentences. Nor was there any discussion or mention of "conversion" of sentences to which appellant could rely in entering his plea. Appellant testified that he understood his sentence to be two consecutive five year terms, a consecutive four year term, and a seven year sentence from Barry County to be served concurrently with the charges at bar from Newton County. As such, any belief that he had regarding the possibility of converted sentences is unreasonable in light of the record.

Moreover, following sentencing, appellant testified that he understood his plea agreement to mean that he would serve five years, five years, and four years, consecutively,

but concurrent with his Barry County charge (Tr. 13). Appellant further testified that this was the sentence he expected to receive as a result of the plea bargain, and that no threats or promises were given to him in order to get him to plead guilty (Tr. 15). Thus, the record provided no positive representations upon which appellant could rely to support his belief regarding his sentence, and appellant's mere hope that he would receive a lesser sentence does not render his plea involuntary. Redeemer v. State, 979 S.W.2d 565, 572 (Mo.App., W.D. 1998); Smith v. State, 922 S.W.2d 29, 31 (Mo.App., E.D. 1996). As a result, appellants' claim must fail.

C. §558.019(5) was not applicable to the voluntariness of appellant's guilty plea.

Additionally, appellant's belief was unreasonable because §558.019(5), the statute upon which he allegedly relied when entering his plea, was not applicable to his case. That statute reads as follows:

> For purposes of this section, the term **"minimum prison term"** shall mean time required to be served by the defendant before he is eligible for parole, conditional release or other early release by the department of corrections. Except that the board of probation and parole, in the case of consecutive sentences imposed at the same time pursuant to a course of conduct constituting a common scheme or plan, shall be authorized to convert consecutive sentences to concurrent sentences, when the board finds, after hearing with notice to the prosecuting or circuit attorney, that the sum of the terms results in an unreasonably excessive total term, taking into consideration all factors related

to the crime or crimes committed and the sentences received by others similarly situated.

(emphasis in original). Appellant alleges that this statute confers power upon the Board convert his consecutive sentences to concurrent sentences, and that he relied upon that power when entering his plea (App.Br. 13). However, appellant was not entitled to rely upon this section because it does not apply to his case.

§558.019(5) defines the phrase "minimum prison term" and addresses the minimum sentence a defendant must serve before being eligible for parole or early release. Although that section further states that the Board has the power to "convert" sentences, that power applies to calculating time served as it relates to parole, rather than a defendant's initial sentencing. The Board's conversion power, as set forth in the statute, provides a limited exception to a "minimum prison term," and does not mean, as appellant has seemed to construe it, that the Board can convert all sentences in all cases. Because appellant was entering his plea with no agreement regarding parole or any mention of parole, §558.019(5) was not applicable to his plea and his claim must fail.

D. §558.019(5) is not unconstitutionally vague.

Appellant also contends that the aforementioned statute is unconstitutional and void for vagueness, as it does not identify specific policies and procedures through which the board can identify excessive prison terms (App.Br. 12).

Statutes are presumed to be constitutional. State v. Brown, 660 S.W.2d 694, 697 (Mo.banc 1983). Any doubt regarding the statute is to be resolved in favor of the law's validity

State v. Young, 695 S.W.2d 882, 883 (Mo.banc 1985). If a law is susceptible of any reasonable and practical construction which will support it, it will be held valid. Cocktail Fortune, Inc. v. Supervisor of Liquor Control, 994 S.W.2d 955, 957 (Mo.banc 1999).

The void-for-vagueness doctrine protects against arbitrary and discriminatory enforcement by ensuring that laws provide explicit standards and guidance for those who apply them. Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 22 (1972); Young, 695 S.W.2d at 883; Lester v. Sayles, 850 S.W.2d 858, 873 (Mo.banc 1993). "The test to determine whether a statute is sufficiently definite and certain to be constitutional is whether the words used within the statute are of common usage and are understandable by persons of ordinary intelligence." Roy v. Missouri Department of Corrections, 23 S.W.3d 738, 747 (Mo.App., W.D. 2000). In the case at bar, §558.019(5) is not vague, as the statute provides definite and explicit standards from which the Board can identify excessive sentences.

The language of the statute clearly sets forth a set of circumstances and a procedure from which the Board can identify and potentially correct an excessive sentence. First, the Board's power is triggered in cases where "consecutive sentences are imposed at the same time pursuant to a course of conduct constituting a common scheme or plan." Then, if such consecutive sentences have been imposed, the Board may give notice to the prosecuting attorney and conduct a hearing to determine whether the consecutive sentences result in an excessive sentence. In determining whether the sentence is excessive, the Board is to consider 1) all factors related to the crime or crimes and 2) the sentences received by others similarly situated. Using these factors, the Board may then conclude that the sentence is excessive.

Thereafter, if such a finding is present, the Board has the authority to convert the consecutive sentences to concurrent sentences.

In light of the foregoing, appellant's claim that §558.109(5) is vague because it fails to identify policy and procedure lacks merit. The clear language of the statute indicates that the Board must give notice to the State, conduct a hearing, weigh the factors related to the crime, and review the sentences received by other defendants before concluding that a particular sentence is excessive. Therefore, §558.019(5) provides explicit standards and guidance for the Board to apply and appellant's claim must fail.

II.

THE MOTION COURT DID NOT CLEARLY ERR IN RULING UPON APPELLANT'S MOTION TO WITHDRAW HIS GUILTY PLEA BECAUSE A) TO THE EXTENT THAT THE CLAIM CHALLENGES THE MOTION COURT'S JURISDICTION IT IS NOT COGNIZABLE IN THAT IT WAS UNTIMELY AND SHOULD HAVE BEEN RAISED ON DIRECT APPEAL, AND B) JUDGE STREMEL, THE ASSOCIATE CIRCUIT COURT JUDGE ASSIGNED TO APPELLANT'S CASE, HAD JURISDICTION TO HEAR APPELLANT'S PLEA AND RULE UPON HIS MOTION PURSUANT TO §478.070 AND §478.220, RSMO 1994.

In his second point on appeal, appellant claims that the motion court erred in denying his motion to withdraw his guilty plea because Judge Gregory Stremel, an associate circuit court judge who was assigned appellant's case, lacked jurisdiction to try felony cases (App. Br. 14).[1]

As discussed in Point I, *infra*, appellant's motion to withdraw was untimely and as such appellant is not entitled to relief on his claims stated therein. Additionally, appellant's

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[1]Appellant also submits that the order assigning the case to Judge Stremel was invalid because it did not specify the method by which the record was to be preserved under §478.072.1. However, appellant did not include this claim in his Point Relied On and as such this claim is not preserved for review. Perry v. State 11 S.W.3d 854, 859 (Mo. App. S.D. 2000).

challenge to the motion court's jurisdiction is not cognizable. A person who pleads guilty to a criminal offense has a right to attack either the court's jurisdiction or the sufficiency of the information by direct appeal. State v. Romeiser, 46 S.W.3d 656, 657 (Mo.App., W.D. 2001); see State ex rel. Simmons v. White, 866 S.W.2d 443, 446 n.4 (Mo.banc 1993). "'A post-conviction motion does not substitute for a direct appeal.'" Soutee v. State, 51 S.W.3d 474, 480 (Mo.App., S.D. 2001)(quoting State v. Tolliver, 839 S.W.2d 296, 298 (Mo.banc 1992)). Matters that were or should have been raised on direct appeal are not subject to review by motion for post-conviction relief. Id.

In the case at bar, appellant failed to raise his claim on direct appeal, and has failed to allege any rare and exceptional circumstances that suggest review is warranted. Accordingly, this claim is not cognizable, and it should not be considered by this Court. (See Soutee, 51 S.W.3d at 474 (court declined to review appellant's Rule 24.035 challenge to the sufficiency of the information because it should have been raised on direct appeal). However, should this Court review appellant's claim, respondent submits that appellant's claim is without merit.

Appellant's case was initially placed in Division I of the Circuit Court of Newton County (L.F. 5). On October 16, 1997, appellant's case was transferred to Division II, before Judge Stremel (L.F. 7, 21).

Pursuant to §478.220 RSMo 1994, "circuit court judges and associate circuit court judges may hear all cases and matters within the jurisdiction of their circuit courts." Under §478.070, RSMo 1994, and Article V, §17 of the Missouri Constitution, circuit courts have original jurisdiction over criminal and civil cases. Therefore, associate circuit court judges

have jurisdiction over criminal cases and matters related thereto. See State v. Williams, 46 S.W.3d 35 (Mo.App., E.D. 2001). Accordingly, Judge Stremel had jurisdiction to rule upon appellant's motion and appellant's claim must fail.

III.

THE MOTION COURT DID NOT CLEARLY ERR IN FAILING TO ISSUE APPELLANT A WRIT OF HABEAS CORPUS PURSUANT TO §532.070 RSMo 2000 BECAUSE THE MOTION COURT WAS WITHOUT JURISDICTION TO ISSUE SUCH A WRIT IN THAT APPELLANT IS INCARCERATED IN COLE COUNTY AND THE MOTION COURT IS IN NEWTON COUNTY.

In his final point on appeal, appellant contends that the motion court clearly erred by failing to issue him a writ of habeas corpus (App.Br. 20). Appellant also contends that he is illegally confined, and as such that Judge Stremel should have issued him a writ of habeas corpus pursuant to §532.070 RSMo 2000 (App.Br. 21). §532.070 states as follows:

> Whenever any court of record, or any judge thereof, shall have evidence from any judicial proceedings had before such court or judge, **that any person is illegally confined or restrained of his liberty, within the jurisdiction of such court or judge**, it shall be the duty of the court or judge to issue a writ of habeas corpus for his relief, although no application or petition be presented for such writ.

(emphasis added; See also Supreme Court Rule 91.06.)

Here, appellant was not entitled to relief under §532.070. The aforementioned statute holds that a court may issue a writ where a defendant is illegally confined "within the jurisdiction" of that same court. This language also tracks Supreme Court Rule 91.02(a), which states that habeas corpus proceedings must be brought in the court having jurisdiction

over the place of confinement. Appellant claims that his writ should have been issued by Judge Stremel, whose jurisdiction is within Newton County. However, appellant is confined in Algoa Correctional Center, which is located in Cole County (L.F. 23). Thus, Judge Stremel would be without jurisdiction to issue appellant's writ because Newton County is not the county of appellant's confinement. See State v. McKee, 39 S.W.3d 565, 570 (Mo.App., S.D. 2001); Reynolds v. State, 939 S.W.2d 451, 455 (Mo.App., W.D. 1996). Moreover, as discussed in Points I and II, *infra*, appellant's claims which he allege give rise to his illegal confinement are without merit. As a result, appellant's claim must fail.

CONCLUSION

In light of the foregoing, respondent requests that the denial of appellant's Rule 29.07 motion to withdraw his guilty plea be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains _____ words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this _____ day of December, 2001, to:

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