



**In the Missouri Court of Appeals
Eastern District**

DIVISION THREE

TODD BEARDEN,)	No. ED104464
)	
Movant/Appellant,)	
)	Appeal from the Circuit Court
vs.)	of St. Francois County
)	
STATE OF MISSOURI,)	Honorable Sandy Martinez*
)	
Respondent.)	FILED: March 28, 2017

OPINION

Todd Bearden appeals from the judgment of the circuit court denying, without an evidentiary hearing, his motion for post-conviction relief after a guilty plea, pursuant to Rule 24.035. We reverse and remand for an evidentiary hearing.

Background

In 2013, Movant appeared before the plea court as one of six unrelated defendants in ten separate cases disposed in a “group plea” procedure. All defendants were represented simultaneously by the same public defender. The court began by explaining that the purpose of the group procedure was *to save time*; to that end, the court would pose questions to the group and “move straight down the line” for their responses and, when necessary, would speak to each

* Judge Martinez ruled on Bearden’s post-conviction motion. The underlying plea hearing was conducted by Judge Kenneth Pratte.

defendant individually regarding his or her particular case. Movant was fourth in line. The court asked counsel and each defendant if anyone objected to the procedure, and they all replied no.

Starting with group questions, the court first conducted an inquiry whether the defendants were satisfied with their attorney's services. Twelve questions on this topic were followed by consecutive responses of yes or no, unanimously. For example:

- Q: Has your attorney done all the things that you have requested him to do for you in your case?
A1: Yes, sir.
A2: Yes, Your Honor.
A3: Yes.
A4: Yes, Your Honor.
A5: Yes, Your Honor.
A6: Yes, Your Honor.

The court's subsequent inquiry, comprised of thirteen questions as to the defendants' understanding of their right to a jury trial and the consequences of the waiver of that right, proceeded in the same fashion.

- Q: Do you understand that you have a right to have a jury determine your guilt or innocence of the charges against you at a speedy and public trial?
A1: Yes, sir.
A2: Yes, Your Honor.
A3: Yes.
A4: Yes, Your Honor.
A5: Yes, Your Honor.
A6: Yes, Your Honor.

Several of these queries were in the form of compound questions that would draw a sustained objection if posed by counsel. For example:

- Q: Do you understand that, at a trial of the charges against you, you would be presumed innocent until proven guilty, and that your guilt must be proved by evidence which convinces the jury of your guilt beyond a reasonable doubt, and that all twelve jurors would have to agree as to your guilt?
A1: Yes, sir.
A2: Yes, Your Honor.
A3: Yes.
A4: Yes, Your Honor.

A5: Yes, Your Honor.

A6: Yes, Sir.

Next, the court addressed each defendant individually for allocution. When Movant's turn came, he pleaded guilty to two counts of possession of a chemical with intent to create a controlled substance. In the final group inquiry, the court posed questions about the defendants' competence and willingness to enter their respective pleas, to which all defendants responded identically in succession. For example:

Q: Is it still your desire to plead guilty?

A1: Yes, sir.

A2: Yes, Your Honor.

A3: Yes.

A4: Yes, Your Honor.

A5: Yes, Your Honor.

A6: Yes, Sir.

The "round" after that consisted of individual sentencing. In Movant's case, the court suspended execution of sentence and placed Movant on probation for five years.

In 2015, Movant was charged with violating the terms of his probation. After a hearing, the court ordered Movant's probation revoked and his sentence executed, and Movant was delivered to the Department of Corrections. Movant then sought post-conviction relief claiming, among other grounds, that his counsel was ineffective for failing to object to the group plea procedure. The motion court denied relief without an evidentiary hearing, reasoning that, because the Supreme Court has not declared group pleas impermissible, counsel was not ineffective for acquiescing to the procedure.

Standard of Review

This court reviews the denial of a motion for post-conviction relief to determine whether

the motion court's findings of fact and conclusions of law were clearly erroneous. Rule 24.05(k). Findings and conclusions are clearly erroneous if, after a review of the entire record, this court is left with the definite and firm impression that a mistake has been made. State v. Roll, 942 S.W.2d 370, 375 (Mo. 1997).

To prevail on a claim of ineffective assistance of counsel, a movant must show that counsel did not demonstrate the customary skill and diligence that a reasonably competent attorney would display when rendering similar services under the existing circumstances, and that movant was prejudiced as a result. Strickland v. Washington, 466 U.S. 668 (1984). Where a movant's conviction results from a guilty plea, claims of ineffectiveness of counsel are immaterial except to the extent that they infringe upon the voluntariness and knowledge with which the guilty plea was made. McVay v. State, 12 S.W.3d 370, 373 (Mo. App. S.D. 2000).

To receive an evidentiary hearing, a movant's motion for post-conviction relief must allege facts, not conclusions, warranting relief; the facts alleged must not be refuted by the record; and the allegations complained of must have prejudiced the movant. Martin v. State, 343 S.W.3d 744, 746 (Mo. App. E.D. 2011).

Discussion

This court has condemned the circuit court's practice of group pleas on numerous occasions. Citing ten published cases in the past decade and lamenting this particular circuit court's disregard in the matter, we recently held that "a plea counsel's failure to object to a 'group plea' procedure is sufficient, in and of itself, to warrant an evidentiary hearing [on] a Rule 24.035 post-conviction relief motion, as the practice of 'group pleas' inescapably impacts the voluntariness of a defendant's plea." Miller v. State, No. ED103323, 2016 WL 2339049 at *4 (Mo. App. E.D. May 3, 2016). The Missouri Supreme Court granted transfer of that case, and the issue is pending.

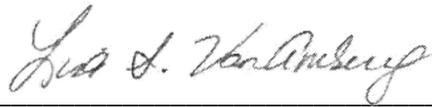
In the interim, the plea court observes that this court's holding in *Miller* is not binding, so the practice remains passable according to Supreme Court dicta in *Roberts v. State*, 276 S.W.3d 833, 837 FN5 (Mo. 2009), and more recently in *DePriest v. State*, No. SC95483, 2017 WL 770975 (Mo. Feb 28, 2017).[†] While we acknowledge that the Supreme Court has not deemed group pleas automatically invalid, we also remain firmly convinced, after thorough and recurrent review, that the practice is "so abhorrent and antithetical to the ideas of justice, due process, and fairness that the mere use of such a practice impinges upon the voluntariness of a defendant's plea." *Miller* at *4. Thus, even if it is not *per se* invalid under all circumstances, it is sufficiently suspect to necessitate an individualized examination of voluntariness in a post-conviction evidentiary hearing. "Whether plea counsel was ineffective for failing to object and whether that potential ineffectiveness prejudiced Movant is left for the motion court's determination after an evidentiary hearing." *Id.*

Contrary to the circuit court's justification that group pleas save time, this practice exemplifies the antithesis of judicial economy. It is the mirror opposite of efficient, only spawning further litigation in the form of appeals, remands, and additional proceedings, all which consume immeasurable public resources and personnel time, not only of the judiciary but also of the already budget-pinned offices of the Public Defender and the Attorney General. In attempting to

[†] In *DePriest*, this court deemed the sibling co-defendants' pleas involuntary on two grounds: (1) the group plea process and resultant confusion and answer-parroting and (2) defense counsel's actual conflict of interest in representing both co-defendants. 478 S.W.3d 494 (Mo. App. E.D. 2015). We reversed and remanded the case to permit the defendants to reconsider their plea offers with the assistance of separate counsel. Our opinion was withdrawn upon transfer to the Supreme Court, which reversed and remanded for an evidentiary hearing as to the voluntariness of the defendants' pleas solely in light of the actual conflict of interest of their shared lawyer. The Court did not rely on the group plea procedure as the basis for its decision but noted that the trial court's failure to inquire about the conflict "should be added to the long and growing list of reasons why this [discredited] practice should be consigned to judicial history." The Court did not provide instruction on the specific question presented in *Miller*.

minimize its personal expenditure of judicial hours, the circuit court has placed a colossal burden onto Missouri taxpayers, including those in its own jurisdiction.

In the absence of determinative Supreme Court instruction on the matter, this court respects its own recent holding in *Miller* and accordingly concludes that Movant is entitled to an evidentiary hearing on the voluntariness of his plea. The motion court's judgment is reversed, and the case is remanded for an evidentiary hearing and further findings by the circuit court consistent with this opinion.



Lisa Van Amburg, Judge

Angela T. Quigless, P.J., and
Robert G. Dowd, Jr., J., concur.