



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

DIVISION FOUR

CLARENCE BURGESS,)	No. ED94641
)	
Appellant,)	Appeal from the Circuit Court
)	of St. Louis County
vs.)	
)	Hon. Tommy W. DePriest, Jr.
STATE OF MISSOURI,)	
)	
Respondent.)	FILED: February 22, 2011

Clarence Burgess (“Movant”) appeals from the dismissal of his Rule 24.035 motion for post-conviction relief based on Movant’s waiver of his right to seek post-conviction relief as part of the plea agreement. Movant also appeals the motion court’s denial of his motion for a change of judge. We would affirm; however, in light of the general interest and importance of the issues involved, we transfer the case to the Missouri Supreme Court, pursuant to Supreme Court Rule 83.02.

Movant was charged with discharging a firearm at a building, Section 571.030, RSMo Cum. Supp. 2009. Movant subsequently entered an Alford¹ plea of guilty to the charge. In exchange for Movant’s guilty plea and Movant’s waiver of his right to file any future post-conviction relief under Rule 24.035, the State recommended a fifteen-year

¹ North Carolina v. Alford, 400 U.S. 25 (1970).

sentence with a suspended execution of the sentence and a five-year probationary term.²

Movant acknowledged understanding the range of punishment and the recommendation. He further agreed that that was his understanding of what the State's recommendation would be.

The plea court then addressed the voluntariness of Movant's plea. Movant denied that any threats or promises had been made to him or his family to induce his guilty plea. Movant also affirmed his satisfaction with plea counsel's services. The plea court also informed Movant of the rights of a jury trial he was relinquishing by pleading guilty. Movant advised the plea court that he understood those rights and that he was waiving those rights by pleading guilty. The plea court accepted Movant's plea and sentenced him to fifteen years' imprisonment, suspended execution of sentence, and placed Movant on probation for five years.

The plea court then addressed Movant's waiver of his right to seek post-conviction relief under Rule 24.035. Movant, along with plea counsel and the prosecutor, had signed a document entitled "Waiver of Right to Proceed under Rule 24.035 for Post Conviction Relief." The written waiver contained acknowledgements by Movant that he had been informed of his right to file a Rule 24.035 motion, that he understood the various claims that could be raised in that motion, and that Rule 24.035 is the exclusive procedure by which he could file those claims, including "[i]neffective assistance of trial [] counsel." After some confusion with the plea court's questioning regarding the waiver of his rights under Rule 24.035, Movant acknowledged he had read, understood, and

² The crime of discharging a firearm at a building has a mandatory fifteen-year sentence. Section 571.030.8, RSMo Cum. Supp. 2009, Section 558.011, RSMo Cum. Supp. 2009.

signed the waiver document. Movant's plea counsel affirmed that the waiver of his right to seek post-conviction relief under Rule 24.035 was part of the plea agreement.

Movant's probation was subsequently revoked and the plea court executed his fifteen-year sentence. Thereafter, Movant filed a *pro se* Rule 24.035 motion for post-conviction relief on May 13, 2009. The motion court appointed motion counsel, and appointed counsel filed an amended motion. In his motion, Movant alleged his plea counsel was ineffective because she pressured Movant to accept the guilty plea. Movant also alleged his plea counsel had a conflict of interest in advising him to waive his post-conviction rights, and therefore, the waiver of his right to seek relief under Rule 24.035 was invalid. Movant also filed a motion for change of judge, alleging the motion court judge could not be fair and impartial to Movant after certifying Movant as an adult and accepting the waiver of his post-conviction rights. The motion court denied Movant's motion for a change of judge.

The State filed a motion to dismiss Movant's Rule 24.035 motion in accordance with his prior waiver. Thereafter, the motion court dismissed Movant's motion based on Movant's waiver of his right to seek post-conviction relief under Rule 24.035. This appeal follows.

In his first point, Movant asserts the motion court erred in dismissing Movant's Rule 24.035 motion for post-conviction relief without an evidentiary hearing because he alleged facts showing Movant's waiver of his post-conviction rights was invalid due to plea counsel's conflict of interest.

"A movant can waive his right to seek post-conviction relief in return for a reduced sentence if the record clearly demonstrates that the movant was properly

informed of his rights and that the waiver was made knowingly, voluntarily, and intelligently.” Jackson v. State, 241 S.W.3d 831, 833 (Mo. App. E.D. 2007).

Here, Movant entered into an agreement to waive his right to seek post-conviction relief in return for a suspended execution of sentence and probation. The record clearly demonstrates Movant was properly informed of his rights and that the waiver was made knowingly, voluntarily, and intelligently. Before entering his guilty plea, Movant signed a document entitled “Waiver of Right to Proceed under Rule 24.035 for Post Conviction Relief.” This document fully advised Movant of his rights pursuant to Rule 24.035. The waiver document included the following language:

a [Rule 24.035] motion could be filed after judgment or sentence to seek relief from claims that the conviction or sentence imposed violates the constitution and laws of this state or the constitution of the United States, including claims of:

1. Ineffective assistance of trial and appellate counsel[;]
2. The Court imposing the sentence was without jurisdiction to do so; or
3. The sentence imposed was in excess of the maximum sentence authorized by law.

The waiver contained an acknowledgement by Movant that he was “aware that relief under Rule 24.035 is the exclusive procedure by which defendant could seek relief for any of the above claims.” By signing the waiver, Movant agreed to waive “the right to file any such motion in return for the State’s agreement to recommend a specific sentence to the Court, or for such other agreements on behalf of the State.” Movant also agreed that “this waiver [was] made knowingly, voluntarily, and intelligently, with a full understanding of the above rights. The waiver document was signed by Movant, plea counsel, the prosecutor, and the plea court.

Furthermore, at the plea hearing, the plea court discussed the waiver with Movant and asked if Movant had read, understood, and signed the waiver. Movant indicated he

had. The plea court also verified that Movant's waiver was part of the plea agreement whereby the State agreed to recommend that the execution of Movant's mandatory sentence be suspended and that he be placed on probation in exchange for his waiver and guilty plea. Movant acknowledged understanding that agreement. In addition, Movant denied that any threats or promises had been made to him to induce his guilty plea.

The record here clearly demonstrates that Movant was properly informed of his rights and the waiver was made knowingly, voluntarily, and intelligently, and that Movant received the benefit of the bargain he made with the State as in Jackson. Movant's voluntary waiver of his right to file a Rule 24.035 motion precludes any review of the merits of that motion. Jackson, 241 S.W.3d at 834. Thus, we would affirm the motion court's dismissal of Movant's Rule 24.035 motion.

However, Movant raises an issue regarding plea counsel's advising Movant to waive his right to seek post-conviction relief for ineffective assistance of counsel pursuant to Rule 24.035. The issue of defense counsel advising a defendant to waive his right to seek post-conviction relief was not raised in the Jackson case and has not been addressed by Missouri case law.

Movant cites to Formal Opinion 126, which was issued on May 19, 2009 by the Advisory Committee of the Supreme Court of Missouri to deal with the subject of waiver of post-conviction relief. Formal Opinion 126 states:

We have been asked whether it is permissible for defense counsel in a criminal case to advise the defendant regarding waiver of the right to seek post-conviction relief under Rule 24.035, including claims of ineffective assistance by defense counsel. We understand that some prosecuting attorneys have expressed intent to require such a waiver as part of a plea agreement.

It is not permissible for defense counsel to advise the defendant regarding waiver of claims of ineffective assistance of counsel by defense

counsel. Providing such advice would violate Rule 4-1.7(a)(2) because there is a significant risk that the representation of the client would be materially limited by the personal interest of defense counsel.

Defense counsel is not a party to the post-conviction relief proceeding but defense counsel certainly has a personal interest related to the potential for a claim that defense counsel provided ineffective assistance to the defendant. It is not reasonable to believe that defense counsel will be able to provide competent and diligent representation to the defendant regarding the effectiveness of defense counsel's representation of the defendant. Therefore, under Rule 4-1.7(b)(1), this conflict is not waivable.

We have also been asked whether it is permissible for a prosecuting attorney to require waiver of all rights under Rule 24.035 when entering into a plea agreement. We believe that it is inconsistent with the prosecutor's duties as a minister of justice and the duty to refrain from conduct prejudicial to the administration of justice for a prosecutor to seek a waiver of post-conviction rights based on ineffective assistance of counsel or prosecutorial misconduct. See, Rules 4-3.8 and 8.4(d).

We note that at least three other states have issued opinions consistent with our view. [The North Carolina State Bar, RPC 129, January 15, 1993; Board of Professional Responsibility of the Supreme Court of Tennessee Advisory Ethics Opinion 94-A-549, November 30, 1994; Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, Opinion 2001-6, December 7, 2001.]

We do not believe the Rules of Professional Conduct prohibit a defense counsel and prosecutor from entering into a plea agreement that involves waiver of other post-conviction rights, unless such a waiver violates the Constitution or other laws. Analysis of whether it would violate the Constitution or other laws is beyond the scope of this opinion.

We believe the impact of this formal opinion by the Advisory Committee of the Supreme Court raises an issue of general interest and importance and would be better addressed by the Missouri Supreme Court. Therefore, we transfer this case pursuant to Rule 83.02.³

In his second point, Movant contends the motion court abused its discretion in denying his request for a change of judge. Movant asserts that because the motion court judge previously certified Movant as an adult in this case and accepted the waiver of his

³ The State has filed a motion to dismiss Movant's appeal based upon Movant's waiver of his right to seek post-conviction relief. This motion was taken with the case. Because of our disposition of this case, we hereby deny the State's motion.

post-convictions rights, the judge had prejudged the issue of ineffective assistance of plea counsel and could not be impartial in the case.

A denial of a motion for change of judge is reviewed for abuse of discretion. Smulls v. State, 10 S.W.3d 497, 504 (Mo. banc 2000). In a post-conviction motion, the movant may disqualify a judge on the due process ground that the judge is biased and prejudiced against the movant. Haynes v. State, 937 S.W.2d 199, 202 (Mo. banc 1996). A “disqualifying bias or prejudice must be one emanating from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learns from participation in the case.” Id. There is a strong presumption that judges are impartial and can discern their own bias or prejudice. State v. Tivis, 948 S.W.2d 690, 699 (Mo. App. W.D. 1997).

Here, Movant has not asserted an extrajudicial source giving rise to the appearance of impropriety. Rather, Movant relies upon the language in the Code of Judicial Conduct, specifically Canon 3E, which provides that “[a] judge shall recuse in a proceeding in which the judge’s impartiality might reasonably be questioned.” Rule 2.03, Canon 3E(1). Movant’s reliance on Canon 3E is misplaced. In Haynes, the Missouri Supreme Court rejected the same interpretation of Canon 3E set forth by Movant. Haynes, 937 S.W.2d at 204. The court in Haynes found “the ‘might reasonably be questioned’ standard [] unacceptable” because the “standard, without factual context, is subjective, leaving appellate courts at liberty to find a disqualifying bias from any hostile word, a maximum prison sentence or even an adverse discretionary ruling.” Id. The court found “[s]uch a vague standard [] unworkable.” Id.

Here, Movant seeks to apply the standard rejected in Haynes. Movant asserts the motion court judge's impartiality "might be reasonably be questioned," because the motion court judge ruled adversely to Movant on the court's discretionary decision whether to certify Movant as an adult. This is not the standard as explained in Haynes. Moreover, a judge's regular rulings in the ordinary course of presiding over judicial proceedings properly before the judge will rarely if ever constitute evidence of partiality such as to require the judge in good conscience to recuse himself or herself. Tivis, 948 S.W.2d at 700.

In addition, the motion court judge's acceptance of Movant's waiver of his post-convictions rights as part of his plea agreement does not indicate bias or prejudice. Movant's allegation that the acceptance of his waiver indicated the motion court judge "prejudged the issue of ineffective assistance of [plea] counsel" is not persuasive. The record does not support Movant's allegation.

Because Movant failed to allege the existence of any extrajudicial source of disqualifying or prejudice, we believe the motion court did not abuse its discretion in overruling Movant's motion for change of judge. Thus, we would deny Movant's second point.

Movant raises a third point on appeal. This third point deals with the merits of Movant's Rule 24.035 motion claim that his plea counsel was ineffective for pressuring Movant to plead guilty and that plea counsel's ineffectiveness rendered Movant's guilty plea unknowing, unintelligent, and involuntary. Movant prays that this court send this claim back to the motion court for an evidentiary hearing. However, we cannot make that determination on appeal because appellate review of a motion court's action on the

motion filed under this Rule 24.035 “shall be limited to a determination of whether the findings and conclusions of the trial court are clearly erroneous.” Rule 24.035(k). Here, the motion court did not make any findings of fact or conclusions of law with regard to the merits of Movant’s motion. Moreover, we believe Movant has waived his right to raise this claim. Under the circumstances, we would not address Movant’s third point.

In conclusion, we would affirm the dismissal of Movant’s Rule 24.035 motion and the motion court’s decision to overrule Movant’s motion for change of judge. However, in light of the general interest and importance of the issues involved, we transfer the case to the Missouri Supreme Court, pursuant to Supreme Court Rule 83.02.

ROBERT G. DOWD, JR., Judge

Kurt .S. Odenwald, P.J. and
Robert G. Wilkins, Sp.J., concur.