



# In the Missouri Court of Appeals Eastern District

## DIVISION IV

LESTER KRUPP, JR.,	)	No. ED95024
	)	
Appellant,	)	Appeal from the Circuit Court
	)	of St. Louis County
v.	)	
	)	
STATE OF MISSOURI,	)	Honorable Colleen Dolan
	)	
Respondent.	)	Filed: March 8, 2011

### Introduction

Lester F. Krupp, Jr. (Krupp) appeals from the motion court's judgment denying his amended Rule 29.15 motion for post-conviction relief on the merits, without an evidentiary hearing. Krupp was convicted by a jury of felonious restraint, four counts of deviate sexual assault, and one count of sexual misconduct in the first degree. Krupp pled guilty to charges that had originally been severed from those charges for which he was tried – one count of felonious restraint and one count of second-degree domestic assault. This Court dismissed Krupp's direct appeal based upon Krupp's waiver of appeal in circuit court. State of Missouri v. Krupp, Jr., ED92150 (Mo. App. E.D. 2009). Krupp files this motion for post-conviction relief alleging that he received ineffective assistance of counsel because his trial counsel failed to present the testimony of a witness, failed to submit instructions for sexual misconduct in the first degree as a lesser-included offense for deviate sexual assault, and gave errant advice regarding Krupp's

parole eligibility. Upon our review of the record, we would dismiss Krupp's appeal and remand this matter to the motion court with directions to vacate its judgment and dismiss Krupp's amended post-conviction motion because Krupp waived his right to file a petition for post-conviction relief as part of his plea and sentencing agreement; 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.

### Background

A jury convicted Krupp of one count of felonious restraint, four counts of deviate sexual assault, and one count of first-degree sexual misconduct. The jury acquitted Krupp of one count of forcible rape and one count of sexual assault. Following the entry of the verdicts, Krupp waived his right to a jury sentencing and entered guilty pleas to two counts that had been previously severed, one count of felonious restraint and one count of second-degree domestic assault, in accordance with a negotiated agreement with the State of Missouri (State). The prosecutor announced to the trial court the following:

Your Honor, the State's recommendation is for the Court to sentence the defendant on all the charges for a total of 15 years. In exchange for all of that, the defendant will waive his right to file a Post Conviction Relief Motion and waive his appeals on all the charges, and in some form or another the sentence will be a three [-year sentence], with a five [-year sentence] consecutive to that, with a seven [-year sentence] consecutive to that, for a total of 15 years, Your Honor.

Defense counsel then added that the State also agreed not to file any additional charges.

The court next addressed Krupp:

The Court: Did you just hear the announcements made by your attorney?

[Krupp]: I did.

The Court: Has he explained to you that you are entitled to have a jury make a recommendation as to the sentences that should be imposed regarding the counts they found you guilty of last evening?

[Krupp]: Yes.

The Court: Is it true you wish to waive your right to jury sentencing and submit to sentencing by the Court pursuant to an agreement your attorney has reached with the office of the Prosecuting Attorney?

[Krupp]: Yes.

The Court: Is it also true you wish to waive your right to a trial on the remaining two counts and enter a plea of guilty to both of those pursuant to the State's recommendation?

[Krupp]: Yes.

The Court: Is it also part of the agreement that you are agreeing to waive your right to an appeal, a Motion for New Trial, or Post Conviction Relief proceeding in this trial?

[Krupp]: Yes.

The court then conducted the guilty plea hearing, which is the subject of a separate appeal under Rule 24.035, case No. ED95023. During the plea hearing, Krupp informed the court that he had a college education and was not under the influence of any drugs or alcohol. Krupp denied having any illness or injury affecting his ability to understand the proceedings. After the State discussed the charges and range of punishment, the court solicited the State's recommendation. Krupp acknowledged the State's recommendation and indicated that it was as he expected. Krupp then denied the existence of any threats or promises in exchange for his guilty pleas and affirmed that his counsel had done everything Krupp had asked him to do. Krupp indicated that his counsel answered all of his questions, that he had sufficient time to discuss the case with his counsel, and that he had no complaints or criticisms of defense counsel. Krupp denied knowing of anything his counsel could have done that he failed to do or of any witnesses counsel could have contacted that he failed to contact. Krupp indicated that his counsel had fully investigated the case to which Krupp was pleading guilty to his satisfaction. Furthermore, Krupp told the court that his counsel had fully advised him as to all aspects of his case, including his legal

rights, and the possible consequences of his plea. Krupp informed the court that his counsel had adequately, completely, and effectively represented him in his defense to the charges. The court reminded Krupp of his various rights associated with a trial, and Krupp acknowledged that he understood them and that he was waiving them by pleading guilty. Krupp indicated that it was his desire to waive those rights and plead guilty.

Krupp advised the court that he understood all of the questions that had been asked of him, and he denied being advised by anyone to lie to the court. The court then accepted Krupp's guilty pleas and moved into the sentencing phase.

During the sentencing hearing, Krupp affirmed that he had pled guilty pursuant to an agreement with the State, and that the agreement contained his decision to waive his right to any post-conviction relief proceeding regarding both the guilty plea and the trial, in exchange for a recommended sentence by the State. Krupp affirmed that his counsel had explained his rights to a motion for a new trial, a direct appeal if that motion were denied, and his right to file a motion for post-conviction relief upon delivery to the Department of Corrections. Krupp acknowledged that he agreed to waive all of those rights in exchange for a fifteen-year sentence on all counts disposed of during trial and the guilty plea. The court addressed Krupp's waiver of his post-conviction relief as follows:

The Court: Mr. Krupp, do you understand that pursuant to Missouri Supreme Court Rule 29.15 you have the right to file a motion in this court seeking to vacate, set aside or correct the judgment of conviction or sentences imposed if you claim that your conviction or the sentences imposed violate the constitution and laws of this state or the constitution of the United States or that this Court is without jurisdiction to impose the sentence or that the sentences to be imposed are in excess of the maximum sentences authorized by law? Did you understand that?

[Krupp]: Yes.

The Court: And did you also understand that you were waiving your right to claim that your attorney rendered ineffective assistance to you during the trial?

[Krupp]: Yes.

The State presented victim impact testimony and then the court sentenced Krupp in accordance with the plea agreement to a total of fifteen years on all counts. Then, acknowledging that Krupp had already agreed to waive his post-conviction remedies, the court nevertheless explained Krupp's rights under the post-conviction rules. The court then examined Krupp regarding the assistance he received from his counsel.

Krupp indicated to the court that he had sufficient opportunity to confer with his counsel during the trial, that his counsel cross-examined all of the State's witnesses, that his counsel called witnesses on Krupp's behalf, that Krupp chose not to testify and was not claiming that counsel prohibited him from doing so, that there were no further witnesses that Krupp wished his counsel to contact or call to testify, that there was nothing his counsel refused to do upon Krupp's request, that his counsel refrained from doing things against Krupp's wishes, and that the decision to waive jury sentencing was Krupp's decision. Krupp acknowledged that his decision to waive jury sentencing and plead guilty to the remaining two counts was based upon the agreement reached between his counsel and the State, and he agreed that the sentences he received were in accordance with that agreement. Krupp expressed complete satisfaction with his counsel's services. The court again verified Krupp's decision to waive his rights to direct appeal and post-conviction relief.

Following his sentencing, Krupp filed both a direct appeal and a pro se motion for post-conviction relief. This Court dismissed Krupp's direct appeal pursuant to the State's motion and Krupp's waiver. After the direct appeal was dismissed, appointed post-conviction counsel filed an amended motion for post-conviction relief, raising three claims of ineffective assistance of Krupp's trial counsel for failing to offer testimony from Krupp's mother to impeach one of the

victims, failing to submit a lesser-included offense instruction, and errantly advising Krupp to waive his right to direct appeal based upon mistaken advice that Krupp would serve only a few months of the agreed-to fifteen-year sentence. Krupp acknowledged that the prior waiver of his right to seek post-conviction relief was part of his plea agreement, but argued that the motion court “undoubtedly recognizes that it was not a knowing and intelligent waiver” based upon language from Formal Opinion 126 of the Advisory Committee of the Supreme Court of Missouri.

The motion court denied an evidentiary hearing on Krupp’s motion and denied Krupp’s requested post-conviction relief. In its findings and conclusions, the motion court first determined that Krupp “effectively waived his right to file a petition for post-conviction relief as part of his plea agreement.” Citing this Court’s opinion in Jackson v. State, 241 S.W.3d 831 (Mo. App. E.D. 2007), the motion court concluded that “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.” The motion court discussed the Jackson opinion in detail before concluding that, “the record refutes [Krupp’s] claims and demonstrates that [Krupp] clearly understood the terms of the plea agreement: he would receive a reduced sentence and no additional charges, and he would waive his right to file a post-conviction relief motion.” The motion court discussed Krupp’s guilty plea, illustrating the voluntary and knowing nature of his waiver and participation in the plea agreement, and determined that Krupp’s “accusations that trial counsel and the assistant prosecuting attorney engaged in unethical conduct are unconvincing.” The motion court noted that Jackson was the prevailing authority at the time the agreement was entered and that Formal Opinion 126 was not issued until more than a year after Krupp’s sentencing date.

The motion court further noted that the Advisory Committee “did not – and could not – reverse or overrule Jackson by filing Formal Opinion 126.”

The motion court then gratuitously addressed the merits of Krupp’s claims of ineffective assistance of counsel presented in his amended motion. The motion court denied the request for an evidentiary hearing and entered written findings of fact, conclusions of law, and judgment denying the amended motion on the merits.

Krupp filed a notice of appeal to this Court. The State has filed a motion to dismiss Krupp’s appeal based upon Krupp’s waiver of his rights to post-conviction relief. We consider this motion with Krupp’s appeal.

#### Discussion

Prior to addressing the substance of Krupp’s three points on appeal alleging ineffective assistance of counsel, we consider the State’s motion to dismiss Krupp’s appeal. Although Krupp did not file a response to the State’s motion to dismiss, in what appears to be his anticipation of the State’s motion, Krupp refers in his brief to his pleadings filed with the motion court in which he argues that the waiver of his post-conviction remedies was not a “knowing and voluntary waiver because it was effectively an uncounseled choice where trial counsel could not ethically advise [Krupp] to waive [Krupp’s] sole means for addressing trial counsel’s effectiveness.” Additionally, Krupp argues in his brief that the motion court’s reasoning that an ethics opinion could not “reverse or overrule” this Court’s decision in Jackson, 241 S.W.3d at 831, “fails to appreciate that that waiver, though legal, may be unethically obtained in the absence of conflict-free counsel.” In its Motion to Dismiss Appeal Based Upon Appellant’s Waiver, the State argues that this Court should “hold [Krupp] to his end of the bargain” and dismiss Krupp’s appeal based upon Krupp’s prior waiver of his right to seek post-conviction relief.

In light of the State’s motion to dismiss, we review first whether Krupp’s waiver of post-conviction relief remedies is valid. Because we find that Krupp knowingly, voluntarily, and intelligently waived his right to seek post-conviction relief under Rule 29.15, and hold that this appeal should be dismissed, we do not reach the merits of Krupp’s claims on appeal.

“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); see also State v. Sanning, 271 S.W.3d 56, 58 (Mo. App. E.D. 2008) (Addressing waiver of direct appeals, this Court noted that “when the defendant agrees to waive his right to appeal in exchange for a reduced sentence, then receives the ‘benefit of the bargain,’ the appellate court will not hesitate to hold the defendant to his part of the bargain.”).

The facts of this case are similar to those in Jackson, 241 S.W.3d at 832. In Jackson, the movant, as part of a plea agreement with the State, pled guilty to two counts of stealing a motor vehicle by deceit and waived his right to file a post-conviction relief motion. In exchange, the State recommended probation. Id. The court thoroughly questioned the movant regarding his rights, his waiver of those rights, his attorney’s representation of him and his understanding of the plea agreement. Id. at 832-33. The court ultimately accepted the movant’s guilty plea and sentenced movant under the terms of the plea agreement. Id. at 833.

Later, after the court revoked the movant’s probation and executed the previously imposed sentences, the movant filed a post-conviction relief motion. Id. The court denied the movant’s request for an evidentiary hearing and entered a judgment denying the motion. Id. The movant appealed, claiming that “his decision to plead was involuntary because he relied on



counsel's 'promise' that the court would impose the maximum [] sentence if he went to trial.”

Id.

This Court then dismissed the Jackson appeal and directed the trial court to dismiss the movant's post-conviction relief motion. Id. at 834. The Court reviewed the record and noted that the movant understood the terms of the plea agreement. Id. at 833-34. The Court found that the trial court had informed the movant of his right to file a post-conviction motion and that the movant waived that right. Id. In light of the waiver, the Court determined that it was needless to address the merits of the trial court's denial of that motion. Id. at 834.

Similarly, the record before us here clearly reflects that Krupp understood the terms of the plea agreement and that he was informed of his rights to file a Rule 29.15 post-conviction motion, the claims of ineffective assistance of counsel that could be made therein, and the exclusivity of that procedure for making those claims. The record further shows that Krupp freely, voluntarily, and knowingly waived those rights. Krupp confirmed the State's recitation of the plea agreement, which included a waiver of Krupp's right to post-conviction relief in exchange for a sentence recommendation and an agreement not to file additional charges. The court specifically questioned Krupp both during the plea hearing and then the sentencing hearing regarding his understanding and his decision to waive his right to post-conviction relief. Krupp denied that any threats or promises had been made to him to induce his guilty plea. Krupp informed the court that he understood that he was waiving his right to claim that his attorney rendered ineffective assistance to him.

We find Krupp knowingly, voluntarily, and intelligently waived his right to seek post-conviction relief under Rule 29.15. Krupp received the benefit of the bargain he made with the State, a limited, fifteen-year sentence for his various crimes, recommended by the State. Krupp's

voluntary waiver of his right to file a Rule 29.15 post-conviction motion would preclude our review of the merits of the motion court’s denial of that motion. Jackson, 241 S.W.3d at 834.

However, Krupp argued before the motion court and suggests in his brief filed with this appeal that his waiver “was not a knowing and intelligent waiver” and that trial counsel “did not and could not ethically advise [Krupp] to waive any post-conviction rights or even counsel him on the subject” based on Formal Opinion 126 from the Advisory Committee of the Missouri Supreme Court, issued on May 19, 2009. 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. 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.<sup>1</sup>

#### Conclusion

We would grant the State’s motion to dismiss Krupp’s appeal with directions to the motion court to vacate its judgment and dismiss Krupp’s Rule 29.15 post-conviction motion. 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.

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Kurt S. Odenwald, Presiding Judge

Robert G. Dowd, Jr., J., Concurs  
Nancy L. Schneider, Sp. J., Concurs

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<sup>1</sup> 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.