



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

TRAVIS M. STANLEY,)	No. ED97795
)	
Appellant,)	Appeal from the Circuit Court of
)	Perry County
vs.)	
)	
STATE OF MISSOURI,)	Honorable Benjamin F. Lewis
)	
Respondent.)	Filed: December 4, 2012

Introduction

Travis Stanley (Movant) appeals the judgment of the Circuit Court of Perry County denying without an evidentiary hearing his Rule 24.035 motion for post-conviction relief. Movant claims the motion court clearly erred in denying his claims that: (1) plea counsel provided ineffective assistance because she induced Movant to plead guilty by convincing him the court would accept the State’s recommended sentence; and (2) the motion court failed to inform Movant that he could not withdraw his guilty plea if the court rejected the State’s recommendation. We reverse and remand.

Factual and Procedural Background

The State charged Movant in two separate cases with failure to register as a sex offender. On February 5, 2010, Movant pleaded guilty pursuant to a non-binding plea agreement.¹ Under

¹ When the prosecutor and a criminal defendant enter a plea agreement under Rule 24.02(d)(1)(B), often referred to as a “non-binding” agreement, the prosecutor agrees to “[m]ake a recommendation, or agree[s] not to oppose the defendant’s request, for a particular disposition,

the plea agreement, the prosecutor agreed that, if Movant entered a guilty plea, the prosecutor would recommend maximum concurrent sentences of three years' imprisonment and would allow Movant to request probation.

At the plea hearing, Movant informed the court that he wished to plead guilty. When the court asked Movant, "Has anybody promised you anything other than the plea agreement to get you to plead guilty?," Movant answered, "No, sir." The prosecutor informed the court that, under the plea agreement, "the State has agreed to a cap of three years combined on these two sentences. I think the defendant knows we're going to ask for three years in each case concurrent. They're going to be free to argue for lesser including probation." Movant affirmed that this was his understanding of the agreement.

After the prosecutor and plea counsel expressed uncertainty about the correct classification of the charged felonies and the attendant range of punishment, the prosecutor stipulated that the maximum sentence was four years, and the court asked Movant the following questions:

[Court]: [T]he parties have agreed to stipulate that the maximum punishment on each of these offenses is four years. That means the maximum I could possibly impose would be eight. Now, I'm not saying I'm going to do that, but today I can't promise that I won't. Do you understand that?

[Movant]: Yes, sir.

[Court]: Because what I need to find out is what's going on with you and what's going on – what are the exact circumstances of these charges and we're not set up to do that today. I'm going to order a sentencing assessment report, bring you back here in March and then I'll know and we'll all talk about it. Do you understand that?

[Movant]: Yes, sir.

with the understanding that such recommendation or request shall not be binding on the court." Rule 24.02(d)(1)(B); see also Dodson v. State, 364 S.W.3d 773, 776 n.1 (Mo.App.W.D. 2012). "In cases where there is a non-binding recommendation, the defendant leaves the decision of the actual sentence to the discretion of the court, and the defendant *does not* retain the right to withdraw the plea." Trammell v. State, 284 S.W.3d 625, 627 (Mo.App.W.D. 2009) (quotation omitted) (emphasis in original).

[Court]: But it could be as much as eight years. Do you understand that?

[Movant]: Yes, sir.

[Court]: Understanding that, is it still your intention to plead guilty to these charges?

[Movant]: Yes, sir.

The court explained to Movant his right to a jury trial, and Movant affirmed that he understood those rights and the consequences of pleading guilty. Movant stated that he was satisfied with the services provided by plea counsel and that “she negotiated these pleas to [his] satisfaction.”

Movant informed the court that he had read the petitions to enter pleas of guilty and that the statements contained therein were true. After Movant signed the petitions, the plea court found that Movant had pleaded guilty freely and voluntarily and accepted Movant’s guilty plea.

At the sentencing hearing on March 5, 2010, the prosecutor informed the court that the State was recommending “a three year sentence in each of these cases concurrent with one another to serve.” Plea counsel responded that Movant “understands what the recommendation of the prosecuting attorney is in this case and he is respectfully requesting that the court grant him probation.” Despite the State’s recommendation of a maximum three-year-sentence, the court sentenced Movant to consecutive four-year terms, for a total of eight years’ imprisonment.²

Movant filed a timely pro se motion for post-conviction relief on April 12, 2010. The court appointed the Office of the Public Defender to represent Movant, and Movant’s first post-conviction counsel entered his appearance on July 22, 2010. The court reporter filed the transcript of the plea and sentencing hearing on August 9, 2010, and counsel timely filed Movant’s first amended motion for post-conviction relief on September 30, 2010. In the first amended motion, Movant alleged that: (1) the motion court violated Rule 24.02(d)(4) when it

² After announcing Movant’s sentence, the court informed Movant of his right to proceed under Rule 24.035, but did not conduct the required Rule 29.07(b) examination regarding “the assistance of counsel received by the defendant.” Rule 29.07(b)(4).

failed to inform the parties that it rejected their plea agreement and failed to afford Movant the opportunity to withdraw his guilty plea; (2) plea counsel was ineffective in failing to specify in the written plea petition that the State was recommending concurrent sentences; (3) plea counsel was ineffective in “failing to thoroughly explain [to Movant] the concept that the court was free to reject the plea”; and (4) plea counsel was ineffective in failing to object to the imposition of consecutive four-year sentences at the sentencing hearing. Movant did not allege in his first amended motion that, but for counsel’s alleged error, he would not have pleaded guilty and would have insisted on going to trial.

On January 7, 2011, Movant’s first post-conviction counsel withdrew from his case. Movant’s second post-conviction counsel entered his appearance on April 13, 2011. Counsel filed a second amended Rule 24.035 motion on July 21, 2011 and, the following day, the court granted Movant’s oral motion to file a second amended motion. In his second amended motion, Movant alleged that: (1) the plea court failed to inform Movant that, should it reject the State’s recommendation, Movant could not withdraw his guilty plea; (2) plea counsel provided ineffective assistance by failing “to clarify the promise made by the state was not a promise for probation and by not explaining that should the Court reject the recommendation[, Movant] could not withdraw his plea of guilty”; (3) the plea court failed to explain to Movant that his plea agreement was for a non-binding recommendation and not a specific disposition; and (4) plea counsel was ineffective in “failing to explain to Movant that, should the Court fail to follow the [State’s] recommendation, the judge could give him more time than what the prosecutor promised.” Unlike in the first amended petition in which he did not plead prejudice, Movant alleged that, had he understood he was pleading to a non-binding agreement that could not be withdrawn, he would not have pleaded guilty and would have insisted on a trial.

On November 4, 2011, the court dismissed Movant's second amended motion without an evidentiary hearing. Movant appeals.

Standard of Review

Our review of the motion court's denial of post-conviction relief pursuant to Rule 24.035 is limited to a determination of whether the motion court's findings and conclusions are clearly erroneous. Rule 24.035(k). "The findings and conclusions are clearly erroneous only if, after a review of the entire record, the appellate court is left with the definite impression that a mistake has been made." Dobbins v. State, 187 S.W.3d 865, 866 (Mo. banc 2006) (internal quotations omitted).

Discussion

We address Movant's points relied on out of order for ease of analysis. In his second point on appeal, Movant claims the motion court clearly erred in denying his Rule 24.035 motion without an evidentiary hearing because the court failed to advise him that he would not be permitted to withdraw his guilty plea if the court rejected the State's sentencing recommendation. Movant further asserts that he reasonably believed his plea agreement was binding and "the motion court failed in its responsibility to ensure [that Movant] understood the agreement was a mere recommendation." The State counters that Movant waived his claim because he first presented it in his untimely second amended Rule 24.035 motion.³

³ The State concedes that, under Rule 24.02(d)(2), the plea court "*was* required to tell [Movant] that his plea could not be withdrawn if the court did not adopt the state's recommendation or [Movant's] request." (emphasis in original). The State also acknowledges that "[t]he record does not reflect that the court ever advised [Movant] that his plea could not be withdrawn." Where, as here, the prosecutor and a criminal defendant enter a plea agreement pursuant to Rule 24.02(d)(1)(B), "the court shall advise the defendant that the plea cannot be withdrawn if the court does not adopt the recommendation or request." Rule 24.02(d)(2); see also Dodson, 364 S.W.3d at 778.

We must first address the State's assertion that, because Movant's second amended motion was untimely, his point on appeal, which he raised for the first time in the second amended motion, was not properly before the trial court. To request relief pursuant to Rule 24.035, a movant "'shall file a motion to vacate, set aside or correct the judgment or sentence' within specified time limits." Dorris v. State, 360 S.W.3d 260, 265 (Mo. banc 2012) (quoting Rule 24.035(b)). The time limits contained in Rule 24.035 are mandatory and cannot be extended by the motion court or the court of appeals. Wilkins v. State, 802 S.W.2d 491, 504 (Mo. banc 1991); Andrews v. State, 282 S.W.3d 372, 375 (Mo.App.W.D. 2009). "Failure to file a motion within the time provided by this Rule 24.035 shall constitute a complete waiver of any right to proceed under this Rule 24.035 and a complete waiver of any claim that could be raised in a motion filed pursuant to this Rule 24.035." Rule 24.035(b).

When an indigent movant files a pro se Rule 24.035 motion, the court shall appoint counsel for the movant and, if appointed counsel determines that the pro se motion "does not assert sufficient facts or include all claims known to the movant, counsel shall file an amended motion" Rule 24.035(e). Counsel must file the amended motion:

within sixty days of the earlier of: (1) the date both a complete transcript consisting of the guilty plea and sentencing hearing has been filed in the trial court and counsel is appointed or (2) the date both a complete transcript has been filed in the trial court and an entry of appearance is filed by any counsel that is not appointed but enters an appearance on behalf of movant.

Rule 24.035(g). "The court may extend the time for filing the amended motion for one additional period not to exceed thirty days." Id.

We agree with the State that "[a]rguments raised for the first time in an untimely second amended motion are waived and cannot be considered on appeal." Oliver v. State, 196 S.W.3d 643, 645 (Mo.App.S.D. 2006). Moreover, "[t]his Court is authorized to consider and act on the

untimeliness of a post-conviction motion whether or not the state raised the issue in the motion court or on appeal because the state cannot, by failing to object, waive a movant's noncompliance with the time constraints of the post-conviction relief rules." Barnes v. State, 364 S.W.3d 765, 766-67 (Mo.App.E.D. 2012) (quotation omitted); see also Dorris, 360 S.W.3d at 268. Consequently, if Movant's second amended motion "was not timely filed, it must be dismissed, as neither the motion court nor this Court has any authority to address the merits of [Movant's] post-conviction claims." Graves v. State, 372 S.W.3d 546, 548 (Mo.App.W.D. 2012).

The Missouri Supreme Court has recognized limited exceptions to the timeliness requirements. Dorris, 360 S.W.3d at 267. Specifically, a motion court can permit the filing of an untimely amended post-conviction motion and consider a movant's claims if it determines that a movant was abandoned by post-conviction counsel. Castor v. State, 245 S.W.3d 909, 911 (Mo.App.E.D. 2008). Counsel abandons a movant when he or she "is aware of the need to file an amended motion but fails to do so in a timely manner."⁴ Logan v. State, 377 S.W.3d 623, 627 (Mo.App.W.D. 2012). In such a case, the court may consider an untimely post-conviction motion "only when a movant is free of responsibility for the failure to comply with the requirements of the rule." Sanders v. State, 807 S.W.2d 493, 494-95 (Mo. banc 1991).⁵ Generally, when a movant files an untimely amended motion, the appropriate remedy is to remand the case to the motion court to determine the cause of the untimeliness. Castor, 245

⁴ The Supreme Court also recognizes abandonment where post-conviction counsel: (1) takes no action with respect to filing an amended motion, thus depriving the movant of a meaningful review of his claims; or (2) overtly acts in a way that prevents the movant's timely filing of a post-conviction motion. Logan, 377 S.W.3d at 627.

⁵ The Sanders Court extended the time limitations for filing an amended Rule 29.15 motion where post-conviction counsel abandons the movant. Sanders, 807 S.W.2d at 495. In Moore v. State, the Supreme Court applied the Sanders analysis to Rule 24.035 motions. 934 S.W.2d 289, 291-92 (Mo. banc 1996).

S.W.3d at 911; see also Sanders, 807 S.W.2d at 495 (“Where insufficiently informed, the court is directed to make independent inquiry as to the cause of the untimely filing.”). When the untimeliness resulted from counsel’s inattention, and not from movant’s negligence or intentional conduct, the motion court shall permit the untimely post-conviction filing. Sanders, 807 S.W.2d at 495.

In the instant case, Movant’s first amended Rule 24.035 motion, filed on September 30, 2010, was timely, but his second amended motion, filed on July 21, 2011, was not. The record on appeal shows that, on July 22, 2011, the motion court granted Movant’s oral motion to file the second amended motion, but reveals neither the grounds on which Movant requested leave to file the second amended motion nor the reasons the court decided to allow it. As a result, the record is insufficient for this court to determine whether the motion court found that Movant’s first post-conviction counsel abandoned him thereby excusing the untimely filing of Movant’s second amended motion. Because Movant first asserted in his second amended motion that the plea court failed to advise him, as required by Rule 24.02(d)(2), that he would not be permitted to withdraw his guilty plea if the court rejected the State’s recommended sentence, we remand for the motion court to determine whether Movant’s late filing of the second amended motion was justified. See, e.g., Wiley v. State, 368 S.W.3d 236, 240 (Mo.App.E.D. 2012).

If the motion court finds that Movant’s second amended motion was untimely due to no fault of Movant, the motion court must permit Movant to withdraw the plea if he chooses to do so. See, e.g., Trammell v. State, 284 S.W.3d 625, 629 (Mo.App.W.D. 2009); Dennis v. State, 116 S.W.3d 552, 556 (Mo.App.W.D. 2003). “It is essential to due process and justice that a defendant understand the true nature of the agreement before his plea is accepted by the court.” Dodson v. State, 364 S.W.3d 773, 778 (Mo.App.W.D. 2012) (quotation omitted). For this

reason, the court must tell the defendant “*clearly and specifically* whether he will or will not be able to withdraw the plea of guilty if the court exceeds the recommendation.” Trammell, 284 S.W.3d at 628 (emphasis in original). As the State concedes on appeal, the motion court did not issue this warning to Movant before he entered his guilty plea.⁶ Point granted.

In his first point on appeal, Movant claims the motion court clearly erred in denying his Rule 24.035 motion without an evidentiary hearing because the record does not refute his allegations that plea counsel induced him to plead guilty “by convincing him the court would accept the State’s recommendation for a three-year cap to run concurrently for both counts while allowing [Movant] to argue for probation.” Movant further contends that his general acknowledgment at the plea hearing that the court could disregard the State’s recommendation and sentence Movant to any sentence within the range prescribed by law did not conclusively refute Movant’s claim and preclude a hearing. The State responds that Movant did not raise this claim before the motion court and therefore waived it.⁷

⁶ As to Movant’s assertion that “the motion court failed in its responsibility to ensure [that Movant] understood the agreement was a mere recommendation,” we conclude that this claim is refuted by the record. The plea court twice told Movant, despite the State’s recommendation that the Movant receive, at most, concurrent three-year sentences, “the maximum [sentence] I could possibly impose would be eight [years].” Movant stated that he understood. Movant further testified that, with the understanding that the court could sentence him to eight years’ imprisonment, he wished to plead guilty. Movant’s dialogue with the plea court shows that the Movant should have understood, and probably did understand, that he could receive a sentence of up to eight years. What is not clear from the record is whether he understood that he could not withdraw his plea if the court deviated from the State’s recommendation. See, e.g., Dennis, 116 S.W.3d at 556.

⁷ The State further argues that Movant failed to plead and prove prejudice because he first pleaded prejudice in his untimely second amended motion. “To satisfy the ‘prejudice’ requirement when challenging a guilty plea, the movant must allege facts showing ‘that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.’” Webb v. State, 334 S.W.3d 126, 128 (Mo. banc 2011) (quoting Coates v. State, 939 S.W.2d 912, 914 (Mo. banc 1997)).

In Movant's first amended motion, he alleged that plea counsel "fail[ed] to thoroughly explain the concept that the Court was free to reject the plea. Movant's knowledge of what the Court could do with reference to the plea was incomplete and said omission on the part of plea counsel affected the voluntary nature of the plea." Movant similarly alleged in his second amended motion that plea counsel was ineffective in "failing to explain to Movant that, should the Court fail to follow the [State's] recommendation, the judge could give him more time than what the prosecutor promised." In contrast, Movant asserts in his point relied on that plea counsel "induc[ed] [Movant] to plead guilty by convincing him the court would accept the State's recommendation." Nowhere in Movant's amended motions did he allege that plea counsel either convinced or persuaded him that the plea court would adopt the State's recommended sentence. "Claims which were not presented to the motion court cannot be raised for the first time on appeal." Amrine v. State, 785 S.W.2d 531, 535 (Mo. banc 1990); see also Gilyard v. State, 303 S.W.3d 211, 214 (Mo.App.W.D. 2010).

Although not included in his point relied on, Movant contends in the argument section of his brief that plea counsel "did not explain prior to [Movant] entering his guilty plea that what [Movant] reasonably believed was a binding plea agreement was actually a mere recommendation that the court was not required to follow." While Movant raised this allegation in his first and second amended motions, he failed to include it in his point relied on. Rule 84.04(e) limits the argument portion of the brief to those errors included in the points relied on. Rule 84.04(e); Helmig v. State, 42 S.W.3d 658, 666 (Mo.App.E.D. 2001). "Claims of error that first appear in the argument portion of a brief but are not included in the point relied on are not preserved for review." Moore v. State, 318 S.W.3d 726, 729 (Mo.App.E.D. 2010).

Even if we were to consider Movant's allegation that he "would not have pleaded guilty if he fully understood the court was free to disregard the [State's] recommendation," this claim is refuted by the record. At the plea hearing, the court advised Movant that it could, in its discretion, sentence Movant to as many as eight years: "That means the maximum that I could possibly impose would be eight. Now, I'm not saying I'm going to do that, but today I can't promise that I won't" Even after Movant stated that he understood that he could receive an eight-year sentence, the court again cautioned Movant, "But it could be as much as eight years. Do you understand that?," and Movant answered "Yes, sir." When the court asked Movant, "Understanding that, is it still your intention to plead guilty to these charges?," Movant replied, "Yes, sir." If, as Movant claims on appeal, plea counsel failed to explain to him that his plea agreement was merely a recommended sentence and that the court could sentence him to more than three years' imprisonment, the plea court clearly disabused him of any misunderstanding.⁸ See, e.g., Allen v. State, 233 S.W.3d 779, 784 (Mo.App. E.D. 2007). Moreover, Movant testified that, despite the possibility that the court could sentence him to eight years' imprisonment, he wished to enter a guilty plea. Point denied.

Conclusion

The judgment of the motion court is reversed and remanded for further proceedings consistent with this opinion.

⁸ Additionally, the written plea petition, which Movant signed, provided: "I know that the sentence I will receive is solely a matter within the control of the Judge. I hope to receive leniency, but I am prepared to accept any punishment permitted by law which the Court sees fit to impose."

Patricia L. Cohen

Patricia L. Cohen, Judge

Lawrence E. Mooney, P.J., and
Kurt S. Odenwald, J., concur.