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No. SC96152

IN THE SUPREME COURT OF MISSOURI

WILLIE JOHNSON,

Relator,

v.

HON. CALEA STOVALL-REID,

Respondent.

Petition for Writ of Prohibition to the Supreme Court of Missouri
from the Circuit Court of St. Louis City, Missouri
Twenty-Second Judicial Circuit, Division 26
The Honorable Calea Stovall-Reid, Judge

RELATOR'S STATEMENT, BRIEF, AND ARGUMENT

Respectfully Submitted,
Brian J. Cooke, No. 67469
212 S. Bemiston, Ste. 200
Clayton, MO 63105
(314) 669-9954 (Phone)
(314) 261-9071 (Fax)
BrianCookeLaw@gmail.com

Attorney for the Relator

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Jurisdictional Statement

In the Circuit Court of St. Louis City, Cause No. 1322-CR02418, Relator pled guilty to one count of Unlawful Use of a Weapon. Respondent suspended imposition of sentence and placed Relator on three years' probation on September 11, 2013. On November 21, 2016, Relator filed a motion to terminate probation, which was subsequently denied.

Relator then filed a writ with the Court of Appeals Eastern District, which was denied on December 15, 2016. Relator filed a writ with this Court on January 10, 2017. Jurisdiction lies in the Supreme Court of Missouri. Mo. Const., Art. V, Sec. 5; Rule 97.01.

Statement of Facts

On September 11, 2013 Relator pled guilty to one count of the Class D Felony of Unlawful Use of a Weapon. Respondent suspended imposition of sentence and placed Relator on supervised probation for three years. (Appendix 2-4). On July 13, 2015, the Respondent extended Relator's probation for two years (Appendix 5). The order does not indicate that a hearing was held prior to Respondent ordering the extension. (Appendix 5).

On June 1, 2016, Relator's probation officer, Matthew Bochantin, filed an initial violation report alleging that Relator had violated conditions #1 Laws and #6 Drugs. This reported notified the Respondent and Circuit Attorney's Office that Relator had an

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optimal discharge date of September 1, 2016 and an earned discharge date of November 19, 2016. (Appendix 6-8). During the month of July, neither the court nor the circuit attorney's office filed a motion to revoke relator's probation. Furthermore, probation and parole did not file an initial violation report alleging any new violations. As a result, Relator received a 30 day reduction of his probation term, resulting in an earned discharge date of October 20, 2016. (Appendix 9-10).

On August 29, 2016, Respondent suspended Relator's probation, issued a warrant for his arrest and scheduled a revocation hearing date of October 7, 2016. (Appendix 11). Relator was incarcerated as of August 31, 2016, if not earlier. (Appendix 26-28). On October 6, 2016, Counsel for Relator made a motion for bond reduction, which was denied. (Appendix 12). On that date, Respondent continued the revocation hearing to December 2, 2016. (Appendix 13).

On November 21, 2016, Counsel for Relator filed a motion to discharge probation, stating that Respondent lacked the statutory authority to revoke Relator's probation and citing that Relator's optimal and earned discharge dates had both passed (Appendix 14-17). On November 28, 2016, Relator's motion to discharge probation was heard and denied. Relator filed a petition for a writ of prohibition, or in the alternative, a writ of mandamus, in the Missouri Court of Appeals, Eastern District. The Eastern District denied the writ without issuing an opinion on December 15, 2016. (Appendix 29).

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Point Relied on – I

The trial court erred in denying Relator's motion to terminate probation because Respondent no longer has jurisdiction over Relator, in that Relator's probation ended by operation of law on October 20, 2017 due to Respondent's failure to make every reasonable effort to conduct the revocation hearing prior to that date and no facts in the record support any reasonable grounds for continuing the hearing past the expiration of Relator's probationary term.

Stelljes v. State, 72 S.W.3d 196, 200 (Mo. App., 2002)

State ex rel. Strauser v. Martinez, 416 S.W.3d 798, 801 (Mo. banc. 2014)

Section 559.036.8 RSMo

Bd. of Pub. Utils. of City of Springfield v. Fenton, 669 S.W.2d 612, 614 (Mo. App. S.D. 1984)

Argument - I

Respondent has lost jurisdiction to revoke Relator's probation because neither Respondent nor the State made every reasonable effort to conduct the revocation hearing prior to the expiration of his probation.

Normally, the court's authority to revoke probation only extends through the duration of the probation term. *Stelljes v. State,* 72 S.W.3d 196, 200 (Mo. App., 2002). "When the probation term ends, so does the court's authority to revoke probation*". State ex rel. Strauser v. Martinez,* 416 S.W.3d 798, 801 (Mo. banc. 2014) (citation omitted).

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Section 559.036.8 RSMo allows the court to revoke probation beyond the term of probation only in limited circumstances. Section 559.036.8 RSMo provides:

> The power of the court to revoke probation shall extend for the duration of the term of probation designated by the court and for any further period which is reasonably necessary for the adjudication of matters arising before its expiration, provided that 1) some affirmative manifestation of an intent to conduct a revocation hearing occurs prior to the expiration of the period and that 2) every reasonable effort is made to notify the probationer and to conduct the hearing prior to the expiration of the period.

"Unless the court meets both of these conditions, it cannot hold a revocation hearing after probation expires." *State ex rel. Strauser v. Martinez*, 416 S.W.3d 798, 801 (Mo. banc. 2014).

Respondent did manifest an intent to conduct a revocation hearing during the probation term by initially scheduling a hearing October 7, 2016. (Appendix 11). However, Respondent did not make every reasonable effort to hold the revocation hearing before Relator's probation ended on October 20, 2016. (Appendix 9-10). Respondent received the initial violation report in June of 2016 (Appendix 6-8). Respondent took no action until August 29, 2016, when she suspended Relator's probation, issued a warrant, and set a revocation hearing for October 7, 2016. (Appendix 11.

Counsel filed a motion for bond reduction which was heard on October 6, 2016 and denied. (Appendix 12). After denying the motion for bond reduction, Respondent

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continued the October 7, 2016 revocation hearing to December 2, 2016. *See:* Appendix 13 ("On October 7 [sic] this court continued the probation revocation hearing to December 2, 2016." [1]). There is no indication from the record that there were any reasonable grounds for continuing the matter such as an unavailable witness or scheduling conflicts.

Following the June 1, 2016 initial violation report, Respondent had over four months to hold a revocation hearing prior to the expiration of Relator's probation on October 20, 2016—but failed to do so. Respondent could have held the revocation on October 7, 2016, but elected not to. Respondent could have continued the hearing to a date prior to October 20, 2016, but chose instead to continue it to December 2, 2016—six weeks after the expiration of Relator's probation on October 20. Therefore, Respondent did not make "every reasonable effort to conduct the hearing prior to the expiration of Relator's probation" on October 20, 2016 and, as a result, lost the authority to revoke his probation under section 559.036.8 RSMo.

ARGUMENT – II

Relator was not required to object to the court continuing his case beyond the expiration of probation

Relator anticipates Respondent will argue that the court retained jurisdiction to revoke because Relator did not object to the court continuing the revocation hearing on October 6, 2016. A defendant does not have a duty to ensure that the trial court rules on

[1] The court actually continued the case on October 6, 2016. *See:* Appendix 13.

the pending revocation motion. *State ex rel Strauser v. Martinez,* 416 S.W.3d 798, 803 (Mo. banc. 2014). Notably, the state was also present on October 6, 2016 and could have objected to Respondent continuing the hearing past Relator's expiration date—but did not. (*See:* Appendix 13). Furthermore, "[n]othing in section 559.036.8 suggests that the defendant must prove he or she is ready to proceed. Rather, the language clearly states that the 'power of the court' to hold a revocation hearing only extends beyond a probation term if the two conditions listed in the statute are met." *State ex rel Strauser v. Martinez,* 416 S.W.3d 798, 803 (Mo. banc. 2014). Therefore, Respondent did not retain the authority to revoke Relator's probation past its expiration simply because he did not object to her failure to comply with the requirements of Section 559.036.8 RSMo.

ARGUMENT III

Respondent's claims about the reason for the continuance are both beyond the record and inconsistent with the record.

In Respondent's "Answer to Relator's Amended Petition for Writ of Prohibition, or in the alternative, Writ of Prohibition" on this cause, Respondent states:

> "Respondent denies the case was continued *sua sponte*. After the [October 6] bond reduction hearing, Counsel for Relator made off the record statements in chambers regarding potential resolution of Relator's pending felony charges prior to Respondent holding a revocation hearing. Respondent advised counsel that she would continue the probation revocation hearing to December 2, 2016 so that Relator's pending felony case could be resolved." (p. 4)

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First, this statement consists of facts beyond the record. Neither respondent's order continuing the revocation hearing, have Respondent's ordered denying Relator's motion to terminate probation, nor Respondent's filings in the Eastern District allege that counsel made "statements in chambers regarding potential resolution of Relator's pending felony charges prior to Respondent holding a revocation hearing." (*See*: Appendix 13; Appendix 18; Appendix 34 and 40.) The appellate court will not look beyond the record on appeal for facts necessary to resolve the issues that the case presents. *Bd. of Pub. Utils. of City of Springfield v. Fenton*, 669 S.W.2d 612, 614 (Mo. App. S.D. 1984). "An appellate court must accept the record as absolute verity; if the record does not reflect the facts, it should have been corrected in the trial court." *In re Marriage of Wright*, 990 S.W.2d 703 (Mo. App. S.D., 1999). "Documents or other exhibits never presented to or considered by the trial court may not be introduced into the record on appeal." *Marc's Restaurant, Inc. v. CBS, Inc.*, 730 S.W.2d 582 (Mo. App. E.D., 1987) (Citation omitted).

Second, Relator respectfully submits this statement is *inconsistent* with Respondent's statements in both the trial court record and prior proceedings in this matter. In Relator's motion for discharge, counsel for Relator stated that "the court, on its own motion, continued the case to December 2, 2016…". (Appendix 14-17; Appendix 18; Appendix 34 and 40). Respondent's order denying this very motion states "On October 7 [sic], this Court continued the probation revocation hearing to December 2, 2016." (Appendix 18). Similarly, in Respondent's Suggestions in the Eastern District, Respondent stated "The Court also continued the case to December 2, 2016 for a probation revocation hearing" and "Counsel for Relator *was notified of the continuance*

did [sic] not object to the hearing being moved to December 2, 2016." (Appendix 34 and 40) (Emphasis added).

Relator respectfully submits that these discrepancies do not need to be resolved by this court because they are beyond the record. However, should the court deem it necessary to resolve them, Relator requests leave to file an affidavit concerning the events of October 6, 2016.

POINT RELIED ON – II

Respondent erred in ruling that an order suspending probation had the effect of tolling Relator's earned discharge date of October 20, 2016, because suspension does not toll the expiration of probation beyond the maximum period allowed by statute and, furthermore, does not cure Respondent's failure to comply with the requirements of Section 559.036 RSMo.

Section 217.703 RSMo

State v. Robinson, No. E.D.103627 Mo. App. E.D. slip. op. (November 1, 2016)

Section 559.016 RSMo

Section 559.036.8

State ex rel Strauser v. Martinez, 416 S.W.3d 798, n. 3 (Mo. banc. 2014)

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Argument – I

Relator was entitled to an earned discharge date of October 20, 2017. The order suspending Relator's probation did not make Relator ineligible for compliance credits which had accrued prior to Respondent's order suspending his probation.

Relator anticipates that Respondent will argue that Relator is not entitled to earned compliance credits which were awarded prior to the suspension of his probation on August 29, 2016. Respondent relies on an excerpt from the August 31, 2016 violation report ("Johnson is not eligible for earned compliance credits as his probation is currently suspended.") and Section 217.703 RSMo ("…Earned compliance credits shall continue to be suspended for a period of time during which the court or board has suspended the term of probation.") for this proposition. Section 217.703.3 RSMo, provides:

> Earned compliance credits shall reduce the term of probation, parole, or conditional release by thirty days for each full calendar month of compliance with the terms of supervision. Credits shall begin to accrue for eligible offenders after the first full calendar month of supervision.

While section 217.703.5 RSMo suspends the award of any future compliance credits once probation has been suspended, the statute does not authorize the rescission of previously earned compliance credits, unless "the court…revokes the probation or parole or the court places the offender in a department program under subsection 4 of section 559.036." Because the court has not yet revoked relator's probation or sentenced him to a program under section 559.036 RSMo, he is entitled to all previously earned compliance

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credits. Accordingly, Relator's earned compliance credits, which resulted in an earned discharge date of October 20, 2016, were not rescinded by the court's August 29, 2016 order suspending his probation.

Argument – II

The order suspending Relator's probation did not toll his earned discharge date of October 20, 2016.

Respondent argues that the August 29, 2016 suspension "tolled the running of Relator's probationary period" and that Respondent may properly revoke his probation because it remains suspended, relying solely on *State v. Robinson*, No. E.D.103627 Mo. App. E.D. slip. op. (November 1, 2016). *See*: State's Answer to Petition, E.D. No. 15050. However, Respondent takes the holding in *Robinson* out of context and misapplies it to the present case.

In *Robinson*, the defendant was sentenced to two years' probation for a felony. *Id. at* 1. Although not specifically addressed by the Eastern District, Robinson would have been ineligible for earned compliance credits under section 217.703.7 RSMo[2]. During the two year term, Robinson's probation was suspended for 42 days before being reinstated.

[2] Section 217.703.7 provides: "…once the combination of time served in custody, if applicable, time served on probation, parole, or conditional release, and earned compliance credits satisfy the total term of probation, parole, or conditional release, the board or sentencing court shall order final discharge of the offender, *so long as the offender has completed at least two years of his or her probation*…" (emphasis added).

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Id. Robinson's probation was again suspended near the end of his probation term and he was subsequently revoked. *Id.* at 2. The revocation occurred several months after Robinson's original two year term of probation would have expired. *Id.*

The Court of Appeals held that periods during which Robinson's probation was suspended could toll (and therefore extend) his probation term, because doing so would not result in a term of probation that exceeded the "statutory maximum" term for a felony under section 559.016 RSMo, five years. *Id.* at 3-4. The Court of Appeals emphasized: "…even if tolled, the probationary period cannot be extended indefinitely or even beyond the *five-year statutory maximum* [under section 559.016 RSMo]. But that proposition has no application here because Robinson's probation was revoked well within five years of its imposition[3]." *Id.* at 4 (citations omitted) (emphasis added).

The present case is distinguishable from *Robinson* because, unlike Robinson, Relator received earned compliance credits under section 217.703 RSMo. Section 559.016.1 RSMo provides that:

> *Unless* terminated as provided in section 559.036 or *modified under section 217.703*, the terms during which each probation shall remain conditional and be subject to revocation are: (1) A term of years not less than one year and not to exceed five years for a felony… (emphasis added)

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[3] While not specifically addressed by the Eastern District, Robinson's probation could have been extended by three years (for a total term of five years) by the court without finding that Robinson violated the terms of his probation under section 559.016.3 RSMo.

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Section 217.703 provides that:

> Earned compliance credits shall reduce the term of probation, parole, or conditional release by thirty days for each full calendar month of compliance with the terms of supervision…

Statutory provisions concerning the duration of probation and the court's authority to revoke are not read in isolation, but are construed together. *State ex rel. Strauser v. Martinez*, 416 S.W.3d 798, n. 3 (Mo. banc. 2014). Because Relator was entitled to earned compliance credits, the "statutory maximum" term of probation authorized by section 559.016 RSMo was not five years, as in *Robinson*, but five years less any earned compliance credits. Furthermore, Relator's probation has never previously been suspended and reinstated, so no previous "tolling" has added time to his probation term. (*See*: Appendix 9-10). Accounting for earned compliance credits, Relator's maximum term of probation was three years and 39 days, resulting in a discharge date of October 20, 2016. Respondent's probation therefore could not, as the State argues, be "tolled" past October 20, 2016, because doing so would extend Relator's probation beyond the "statutory maximum" prescribed by sections 559.016 and 217.703 RSMo.

Argument – III

An order suspending probation does not relieve the court from complying with the requirements of 559.036.8 RSMo.

An order for probation suspension "does not relieve a court from meeting both of the conditions provided by section 559.036.8." *State ex rel Strauser v. Martinez,* 416 S.W.3d 798, n. 3 (Mo. banc. 2014). "When sections 559.036.7 and 559.036.8 are read

together, it is clear that a court must rule on the revocation motion before the probation term ends unless it meets the two conditions outlined in the statute." *Id.* Therefore, Respondent's order suspending Relator's probation did not toll (and therefore extend) his probation past October 20, 2016; nor did it cure Respondent's failure to make every reasonable effort to hold revocation hearing before Relator's probation ended.

Conclusion

Relator respectfully submits that Respondent did not make every reasonable effort to conduct a revocation hearing prior to the expiration of Relator's probation, as required by section 559.036.8 RSMo. Following the June 1, 2016 violation report, Respondent had over four months to conduct a revocation hearing prior to the expiration of Relator's probation on October 20, 2016. Instead of conducting the revocation to a date prior to October 20, 2016, Respondent continued the hearing to six weeks after the expiration of Relator's probation. Respondent was not relieved from complying with the requirements of section 559.036.8 simply because Respondent had previously suspended Relator's probation. As such, Respondent is without authority to schedule a revocation hearing and to revoke Relator's probation. Relator prays that the preliminary writ in this cause be made permanent.

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Respectfully Submitted,

/s/ Brian J. Cooke

Brian J. Cooke, #67469
Attorney for the Relator
212 S. Bemiston, Ste. 200
Clayton, MO 63105
Phone: 314-814-5894
Fax: 314-261-9071
BrianCookeLaw@gmail.com

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CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(g), I hereby certify that on this 13th day of March, 2017, a true and accurate copy of the foregoing brief and attached appendix were served via the e-filing system to the St. Louis Circuit Attorney's Office and the Respondent, and by email to Assistant Circuit Attorney Ms. Devon Vincent, at vincentd@stlouiscao.org, and the Hon. Calea Stovall-Reid at Calea.Stovall-Reid@courts.mo.gov. In addition, pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03. This brief was prepared by Microsoft Word for Windows, uses Times New Roman 13 point font, and does not exceed the greater of 15,550 words, 1,100 lines, or fifty pages. The word processing software identified that this brief contains 3,514 words. Finally, I hereby certify that this brief has been scanned for viruses and found to be virus free.

/s/ Brian J. Cooke

Brian J. Cooke, #67469
Attorney for the Relator
212 S. Bemiston, Ste. 200
Clayton, MO 63105
Phone: 314-814-5894
Fax: 314-261-9071
BrianCookeLaw@gmail.com