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22ND JUDICIAL CIRCUIT
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**MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(City of St. Louis)**

RAMON SANCHEZ,)
)
 Movant,)
) No. 1722-CC11099
 vs.)
) Division No. 14
 STATE OF MISSOURI,)
)
 Respondent.)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Movant timely filed a motion pursuant to Rule 24.035 on August 23, 2017.¹ Counsel was appointed to represent movant on August 29, 2017, the transcript of movant's guilty plea and sentencing was filed on October 5, 2017, counsel was granted an additional thirty days in which to file an amended motion, and counsel filed the amended motion one day late on January 4, 2018.

An evidentiary hearing was held on June 13, 2019, at which movant appeared and testified. Having examined the records and files in this case and having considered the evidence presented at the evidentiary hearing, the Court now finds as follows:

¹ Movant has filed with the Court a letter from the department of corrections stating movant was received on July 12, 2017.

FINDINGS OF FACT

1. Movant was charged in Cause No. 1522-CR03789-01 with six counts of first degree robbery and six counts of armed criminal action.

2. Movant pled guilty to all twelve counts on July 29, 2016, not pursuant to an agreement with the State.

3. Movant was represented by Matthew Bell and the State was represented by Dwight Warren.

4. Movant understood the rights he was waiving by his guilty pleas.

5. The record reflects that movant understood that he had been charged with six counts of robbery first degree and six counts of armed criminal action.

6. Movant understood the ranges of punishment on the charges. Movant understood the range of punishment for robbery first degree was ten to thirty years or life, and movant understood for armed criminal action the range of punishment was three years up to an infinite number of years. Movant understood he would have to serve three years for the armed criminal action counts before being eligible for parole. Movant understood that, without a plea agreement, he could get up to twelve consecutive life sentences.

7. Movant said he was making his pleas without any promises.

8. Movant admitted the facts recited by Mr. Warren were true. Movant admitted that on August 31, 2015 at 2:25 a.m., he confronted [REDACTED] at gun point and took his Apple phone, wallet, credit card, and currency; at 2:35 a.m., he encountered [REDACTED] and [REDACTED] and took a Chevrolet Tahoe from [REDACTED] and a cell phone from [REDACTED] at 2:40 a.m., he accosted [REDACTED] and took a Ford Taurus at gunpoint; and, at 6:00 a.m., after wrecking the Taurus, he accosted [REDACTED] and [REDACTED] and took a car, a wallet, and jewelry from [REDACTED] and a watch from [REDACTED]. A firearm was used in all six robberies.

9. Movant testified that he was not under the influence of any alcohol, drugs or narcotics. He testified that he did not have any health or hearing problems. He also testified that he had never been diagnosed with a mental problem by a psychiatrist.

10. Movant testified that his attorney had fully advised him as to all parts of his case, had told him his legal rights, and his attorney had not refused to do anything movant asked. Movant testified he was satisfied with his attorney's services and he had no complaints. Movant testified he had no witnesses.

11. Movant testified that nobody had threatened him or intimidated him to get him to plead guilty.

12. Movant appeared for sentencing on September 9, 2016. At that time, Mr. Warren asked the Court to sentence movant to twenty-five years. Mr. Warren noted that movant was twenty-one at the time of his guilty pleas and was twenty years old at the time of the crimes. Defense counsel argued that movant was an adolescent "with a not fully developed brain as the science shows us, who lost that guiding force in his life, reached out for it to people - on his street." Counsel said movant had an individualized education plan. Counsel further argued that several other people had been arrested, but movant was the only one who accepted responsibility by pleading guilty. Counsel argued movant was ashamed of what he did and was remorseful. Counsel asked the Court to impose a sentence of ten years. Movant also addressed the Court.

13. Defense counsel filed a nine page sentencing memorandum which focused on movant's age, characteristics of youthful offenders, including neuroscientific and social factors regarding adolescent development and amenability to rehabilitation, and pointed out that while in school movant had

an individual education plan,² and that movant had been working at the Zoo and then Elite Staffing until the time of the crimes.

14. Movant was sentenced to a total of twenty-five years.

15. Movant was questioned by the Court after being sentenced. Movant asked that Mr. Bell leave the courtroom during this questioning. Movant testified his attorney went over the police reports with him, movant said he had no witnesses with whom his attorney should have spoken, and his attorney explained his options to go to trial or plead guilty. Movant testified he understood the ranges of punishment, and his attorney talked to him about trying to get a plea deal. Movant stated he wanted a combination of probation with a backup sentence, and movant said he would have been willing to accept eighteen to twenty years. Mr. Warren said he did not believe an official offer was ever made. Movant testified he thought he would get a sentence of twelve or fifteen years if he pleaded blind. Movant was somewhat unclear in his testimony, but he appeared to believe there was an offer of eighteen to twenty years. Judge Dierker found, at the conclusion of the hearing, that Mr. Bell was ineffective for failing to conduct plea negotiations in

² Counsel filed several hundred pages of these records, covering a time period up to 2013.

accordance with movant's directions and that movant was thereby prejudiced.

16. Movant now seeks post-conviction relief pursuant to Rule 24.035. Movant claims his attorney was ineffective for failing to advise him that he had a viable motion to suppress his confession; his attorney was ineffective for failing to advise him that he had a defense to the armed criminal action charges in that he used a BB gun rather than a real firearm; the Court erred in accepting his guilty pleas to the armed criminal action charges because there was a lack of a factual basis for those charges; his attorney was ineffective for failing to object to the lack of a factual basis for the armed criminal action charges; and, his attorney was ineffective for failing to present movant's individualized education plan in mitigation at sentencing.

17. Counsel filed a motion asking that the Court accept the amended motion because the untimeliness was due to a miscalculation on counsel's part of the due date. Counsel restated at the evidentiary hearing that the untimeliness of the amended motion was due to counsel's miscalculation.

18. Matthew Bell, movant's trial attorney, testified at the evidentiary hearing that movant's case involved several

robberies over a period of hours on the same day. Mr. Bell testified that, early on, movant wanted to go to trial, but movant later authorized him to make a ten year offer. Mr. Bell said he spoke informally with Mr. Warren, who said the State was looking for eighteen to twenty years, and Mr. Bell relayed this to movant. Mr. Bell thought he may have taken the discussion with Mr. Warren more seriously than intended. Mr. Bell did not think a string of robberies was an ideal case for a trial, but the ultimate decision to plead without a plea agreement was movant's decision. Mr. Bell noted that, even without the armed criminal action counts, movant had six concurrent twenty-five year terms.³

19. Mr. Bell testified he did not pursue a motion to suppress movant's confession because, after reviewing it and discussing the issue, he thought movant would be found guilty without the confession, so a guilty plea would be a better course of action. Mr. Bell said he did extensive research and decided not to pursue it. Movant told him he had not been in a good state of mind due to injuries and maybe drugs at the time of the confession.

³ These sentences are subject to an 85% minimum term.

20. Mr. Bell said he reviewed the statute and instructions on armed criminal action. He said he does not believe a BB gun is a deadly weapon, but the victims thought movant had a deadly weapon, and the prosecutor stated during his recitation at the guilty plea that movant used a deadly weapon. No gun was recovered, but Mr. Bell testified the witnesses said a gun was involved and nobody said the gun was a BB gun. Mr. Bell testified that if a BB gun had been recovered he would have thought differently, but he also acknowledged movant told him it was a BB gun.

21. Mr. Bell testified that the sentencing memorandum had been prepared by Matt Mahaffey, who has specialized training in social work.

22. Movant testified at the evidentiary hearing that he met with Mr. Bell three times prior to the plea hearing. Movant said Mr. Bell never discussed pretrial motions with him. Movant testified he brought up the issue of a motion to suppress, but Mr. Bell never followed through. Movant said the victims' statements were inaccurate, and the victims said a different kind of weapon was involved. Movant said he had injuries with a two to three month recovery, and he talked to detectives on the day he was released. Movant said he was advised of his Miranda

rights, and after movant said he would wait to answer questions until after he got an attorney, the detectives continued to question him. Movant said the weapon was a BB gun, and if some of the charges had been dropped, he would have gone to trial. He said he would not have pled guilty had he known a BB gun did not fall within the armed criminal action statute. Movant also testified he knew he was facing twelve consecutive life sentences.

CONCLUSIONS OF LAW

1. The timeliness of the amended motion was addressed at the evidentiary hearing, and the Court finds that movant was abandoned by counsel when counsel erroneously miscalculated the due date for the filing of the amended motion. The Court will accept the amended motion and address the claims contained therein.

2. Movant first claims his attorney was ineffective for failing to advise him that he had a viable motion to suppress his confession.

After a plea of guilty the effectiveness of counsel is only cognizable and relevant as it affects the voluntariness of the plea. Coke v. State, 229 S.W.3d 638, 641 (Mo.App.W.D. 2007);

Salinas v. State, 96 S.W.3d 864, 865 (Mo.App.S.D. 2002). The movant must show that, but for his counsel's errors, he would not have pled guilty and would have insisted on going to trial. Zarhouni v. State, 313 S.W.3d 713, 716 (Mo.App.W.D. 2010).

Generally, a guilty plea constitutes a waiver of the claim that movant's attorney failed to have evidence or statements suppressed. Maberry v. State, 137 S.W.3d 543, 547 (Mo.App.S.D. 2004). In the context of a guilty plea, the voluntariness of the plea is the only issue, and not whether the motion would have been meritorious. May v. State, 309 S.W.3d 303 (Mo.App.E.D. 2010), relying on Ramsey v. State, 182 S.W.3d 655, 658 (Mo.App.E.D. 2005).

Allegations contained in a post-conviction relief motion are not self-proving and the movant has the burden of proving his asserted grounds by a preponderance of the evidence. Cole v. State, 223 S.W.3d 927, 931 (Mo.App.S.D. 2007); Alhamoud v. State, 91 S.W.3d 119, 120 (Mo.App.E.D. 2002).

The Court finds this claim is without merit, because counsel did review the possibility of filing a motion to suppress, discussed it with movant, and did not pursue it, because he did not think it was viable. Further, counsel

thought there was sufficient other evidence for movant to be found guilty.

3. Movant next alleges his attorney was ineffective for failing to advise him that he had a defense to the armed criminal action charges, in that he used a BB gun rather than a real firearm.

The Court finds this claim is without merit. While a BB gun may not be a deadly weapon for purposes of armed criminal action, (see Donelson v. State, 34 S.W.3d 827 (Mo.App.E.D. 2000)), movant has not established that he did, in fact, use a BB gun rather than a real gun while committing the crimes; that his attorney knew movant used a BB gun; and, that counsel's advice to plead guilty was ineffective under the circumstances. Movant was not credible at the evidentiary hearing, and counsel's explanation that no gun was recovered and the victims thought movant had a real gun was reasonable. Had the case gone to trial, the jury could easily have found movant guilty of armed criminal action.

4. Movant claims the Court erred in accepting his guilty pleas to the armed criminal action charges because there was a lack of a factual basis for those charges.

The rule requiring a factual basis, Rule 24.02(e), is not constitutionally required, a failure of the court to comply does not render a judgment void for lack of jurisdiction, and a challenge based on the lack of a factual basis for a plea must show not only the lack of a basis, but also that the lack of a factual basis deprived movant of actual knowledge of the basis for the plea. Chipman v. State, 274 S.W.3d 468, 472 (Mo.App.S.D. 2008). A factual basis is established where the indictment clearly charges a defendant with all of the elements of the crime, the nature of the crime is explained to the defendant and the defendant admits guilt. Sanford v. State, 331 S.W.3d 320, 322 (Mo.App.S.D. 2011); Carter v. State, 320 S.W.3d 177, 181 (Mo.App.E.D. 2010). In Sanford v. State, 331 S.W.3d 320 (Mo.App.S.D. 2011), the Court said the State's recitation of the evidence provided a sufficient factual basis, whether the defendant agreed with it or not. The information clearly charged him with all of the elements and he admitted he was guilty of the offense.

Here, the indictment listed the elements of the armed criminal action charges and the facts stated by Mr. Warren were sufficient to provide a factual basis for the guilty pleas.

5. Movant claims his attorney was ineffective for failing to object to the lack of a factual basis for the armed criminal action charges. The Court finds this claim is without merit because Mr. Warren did recite a factual basis for the charges.

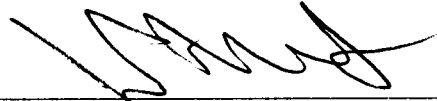
6. Movant's final claim is that his attorney was ineffective for failing to present movant's individualized education plan in mitigation at sentencing. This claim is without merit because it is unlikely movant's sentences would have been different had such evidence been presented. The Court was made aware of movant's learning deficiencies and behavioral problems, both through defense counsel's sentencing memorandum and counsel's argument at sentencing. The comments of Judge Dierker when pronouncing sentence indicate additional evidence would not have affected his sentencing decision.

ORDER

The Court has reviewed the record, relevant case law, the evidence presented at the evidentiary hearing, and movant's Rule 24.035 Motion. The Court finds that movant has failed to establish that he is entitled to relief.

THEREFORE, the Court orders, adjudges and decrees that the Motion made pursuant to Supreme Court Rule 24.035 is DENIED.

SO ORDERED:



Joseph P Whyte, Circuit Judge

Dated: February 6, 2020

cc: Alexandria Shah, Attorney for Movant
Lopa Blumenthal, Assistant Circuit Attorney