

## High court orders new hearing over altered plea deal

By: Angela Riley ◉ February 12, 2009

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The Missouri Supreme Court ordered an evidentiary hearing for a man who argued the state altered his plea agreement.

The court decided on Tuesday that the St. Francis County Circuit Court erred when it denied Gary Roberts' motion for post-conviction relief without an evidentiary hearing. The court determined that Roberts had sufficiently pleaded enough evidence and remanded the case for a hearing.

In August 2006, Roberts pleaded guilty to two class C felonies for possession of controlled substances. Roberts was part of a group of eight unrelated criminal defendants entering pleas.

It was Roberts' understanding that the state would not oppose a 120-day drug treatment, with a 14-year backup sentence, something he believed was corroborated by a note his attorney sent to him saying, "I got you an offer for [14] years with no opposition to your receiving drug and alcohol treatment."

At the plea hearing, however, the state said that it did not plan to oppose institutional treatment for Roberts if it was recommended. Roberts was never recommended for institutional treatment and was sentenced to two consecutive seven-year prison terms.

At both the plea hearing and at sentencing, Roberts expressed no dissatisfaction with his attorney and stated that he understood his plea.

Roberts sought post-conviction relief, arguing that his plea was not entered voluntarily because the state altered its agreement to oppose his entering institutional treatment and he was prejudiced when the state changed the terms of the agreement adding the modifying clause "if recommended." He also asserted that his attorney was ineffective for failing to ask for a withdrawal of the plea.

The state argued "that plea agreement wasn't breached and would not argue against institutional treatment if it was recommended, but it wasn't recommended at the sentencing," said Jamie Rasmussen, an assistant attorney general. "There wasn't any prejudice. The prosecutor wasn't arguing against institutional treatment – just clarifying what the [sentencing report] said."

The trial court rejected Roberts' motion because it found his claims were not supported by the record.

When looking at the denial of Robert's motion, the Supreme Court determined that the standard of review was that an evidentiary hearing "may only be denied when the record conclusively shows that the movant is not entitled to relief."

In a 6-1 decision, the court decided that there was sufficient evidence for Roberts to have an evidentiary hearing.

"The record in Movant's case, however, does not show conclusively he was not entitled to relief," Judge Mary Russell wrote for the court. "Movant has sufficiently pleaded facts that, if true, support his allegations that his counsel was ineffective for failing to object or seek withdrawal of his plea after there was a discrepancy between the plea negotiation his counsel had informed him about prior to his plea hearing and the prosecutor's presentation of the plea agreement in court."

The court remanded the decision to the trial court. Roberts still bears the burden of proving that he is entitled to relief at his evidentiary hearing.

In a dissent, Judge William Ray Price, argued that the record conclusively showed Roberts was not entitled to an evidentiary hearing because his plea was voluntary and his counsel was not ineffective. Roberts had affirmed his plea, told the court that he understood his sentence and said he was satisfied with his counsel’s representation.



Price also noted that “The plea agreement provided a fourteen year sentence for two class C felony drug charges and dismissed four class C felony drug charges. Movant received significant consideration for his plea even if institutional treatment was not included. The decision to accept the terms of the plea agreement as plainly stated in the record was strategic.”

Jessica Hathaway, a public defender who represented Roberts on appeal, was out of town and unavailable to comment.

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