

IN THE CIRCUIT COURT OF ST. LOUIS CITY
STATE OF MISSOURI

STATE OF MISSOURI,)	Cause No. 1422-CR02160-01
Plaintiff)	
)	Division No. 13
v.)	
)	
JAMES T GREEN,)	
Defendant)	

**MOTION FOR RECONSIDERATION OF JUDGMENT UNDER
RULE 75.01 AND MOTION TO REINSTATE BOND**

Comes now, Defendant, Mr. James T. Green, by and through undersigned counsel, Julia Fogelberg, and moves this Honorable Court for reconsideration of judgment under Rule 75.01, as Mr. Green’s rights were denied with respect to due process of law, to fair and impartial sentencing, to cruel and unusual punishment, and to equal protection of the law, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 10, 18(a), and 21 of the Missouri Constitution. As grounds for this motion, counsel for Mr. Green states as follows:

1. Under Rule 75.01, this Court “retains control over its judgments during the thirty day period after entry of judgment and may after giving the parties an opportunity to be heard and for good cause, vacate, reopen, correct, amend, or modify its judgment within that time.”
2. On November 18, 2015, the jury returned a guilty verdict for each of the four (4) counts of Unlawful Possession of a Firearm with which Mr. Green was charged.
3. On December 08, 2015, defense counsel filed its Motion for Judgment of Acquittal Notwithstanding the Verdict, Or, In the Alternative, for New Trial (“Motion for New Trial”).
4. On February 25, 2016, this court denied Defendant’s Motion for New Trial, and sentenced Mr. Green to four (4) consecutive fifteen-year terms of

imprisonment in the Missouri Department of Corrections, for a total term of imprisonment not to exceed sixty years.

- a. On the same date, the State filed its Memorandum in Support of State's Recommended Sentence of 7 Years in the Missouri Department of Corrections.
 - b. Assistant Circuit Attorney Alexandria Burns supported her written motion by recommending a sentence of seven years during the sentencing hearing on February 25, 2016.
5. The Missouri Board of Probation and Parole prepared a Sentencing Assessment Report ("SAR") in advance of Mr. Green's sentencing date.
- a. The SAR noted that Mr. Green was orphaned at a young age. He was unable to complete elementary school.
 - b. The SAR noted that Mr. Green has an above-average risk score, due to his age, medical conditions and lack of violent criminal history, indicating he is less likely to reoffend and that he is a potential candidate for probation.
 - c. The SAR recommended, among other things: probation; or a term of imprisonment to be served pursuant to 559.115 (Institutional Treatment).
 - d. The SAR noted that the average term of imprisonment for the charges in this case is 4.3 years in the Missouri Department of Corrections.
6. On March 7, 2016, Defendant's Notice of Appeal was timely filed.
7. Prior to the commencement of trial, the State made no formal offers to defense counsel relating to a potential sentence if Mr. Green were to plead guilty. It was made clear, however, that if Mr. Green were to proceed to trial, the State would recommend incarceration, rather than probation, if the jury were to find Mr. Green guilty.
- a. It is fundamental that a court cannot be permitted to punish a defendant more harshly merely because the defendant exercised his right to plead not guilty. State v. Lindsey, 996 S.W.2d 577, 579 (Mo. App. W.D.

1999). The trial court cannot use the sentencing process to punish a defendant by increasing his sentence because he decided to go to trial. Vickers v. State, 17 S.W.3d 632, 634 (Mo. App. S.D. 2000). “Whether a defendant exercises his or her constitutional right to trial by jury to determine one’s guilt or innocence must have no bearing on the sentence, and the court may not use the sentencing process to punish a defendant, guilt notwithstanding, for exercising his or her right to receive [a] full and fair trial.” Id. In Vickers, the appellate court reversed and remanded the case for re-sentencing where the “trial judge expressly found that Appellant ‘received a twenty-year sentence because he rejected the State’s initial plea offer and chose to proceed to trial.’” Id. at 636.

- b. Here, the court made it clear after the jury found Mr. Green guilty of all four (4) charges that going to trial was a mistake, and Mr. Green’s sentence would reflect the court’s opinion about the mistake of proceeding to trial.
 - c. The court erred in creating a manifest injustice by sentencing Mr. Green to the maximum term of imprisonment allowable under the enhanced range of punishment as a prior and persistent offender, especially where the State was only seeking a seven-year term of imprisonment. The disparity between the sentence the court imposed and the sentence recommended by the State reflects that Mr. Green was punished for exercising his constitutional right to a trial.
8. The facts in evidence at trial pertaining to Mr. Green’s previous felony charges included, but are not limited to, the following:
- a. In 2006, Mr. Green was charged with, pleaded guilty to and received a Suspended Imposition of Sentence (SIS) for Possession of a Controlled Substance for events which occurred in Cape Girardeau, Missouri (Case No. 06G9-CR00187-01). In 2010, the court revoked Mr. Green’s probation due to his failure to pay court costs and sentenced him to sixty

days in jail. Mr. Green was not represented by counsel during these probation revocation proceedings and his signature is not reflected on any of the revocation paperwork. Defense counsel maintains the court erred in allowing the State to use this conviction as the basis for the felon-in-possession charges, an issue of fact which should be presented to the jury.

- b. In 2008, Mr. Green was charged with, pleaded guilty to and received a Suspended Imposition of Sentence (SIS) for Property Damage First Degree for events which occurred in St. Louis City, Missouri (Case No. 0822-CR05235-01). Mr. Green successfully completed his probation and was subsequently terminated from probation. Mr. Green does not have a conviction on his record relating to the property damage offense.
 - c. Mr. Green has never been charged with a violent felony.
 - d. Mr. Green is not alleged to have stolen the guns at issue in the aforementioned case.
 - e. Mr. Green is not alleged to have used the guns at issue in the aforementioned case.
 - f. Mr. Green is not alleged to have offered the guns at issue in the aforementioned case up for sale, nor is he alleged to have sold firearms of any kind in the past.
9. Defense counsel maintains that it was error for the court to allow the State to charge Mr. Green as a prior and persistent offender midway through the State's Case-in-Chief, for the following reasons:
- a. The revocation proceedings which resulted in Mr. Green's felony conviction were flawed, in that Mr. Green was not represented at the time of the revocation and his signature does not appear on any of the revocation or sentencing paperwork. Said revocation, therefore, violated Mr. Green's constitutional rights to due process of law, to be free from cruel and unusual punishment and equal protection of the law, under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States

Constitution and Article I, Sections 2, 10, 18(a), and 21 of the Missouri Constitution.

- b. Defense counsel stated on the record that she had not advised Mr. Green of the enhanced range of punishment (up to sixty years) he would be subject to as a prior and persistent offender, thereby resulting in ineffective assistance of counsel.
10. The facts in evidence at trial pertaining to Mr. Green's physical well-being included, but are not limited to, the following:
- a. Mr. Green is sixty-seven years old.
 - b. Mr. Green has advanced diabetes, for which he is insulin-dependent.
 - c. Prior to his incarceration, Mr. Green received Social Security Income and Disability benefits due to his ongoing medical problems.
11. At trial, Mr. Green testified that the guns at issue in the case belonged to his nephew, Mr. Louis T. Bond, who was originally named as a co-defendant in the case.
- a. Mr. Bond passed away prior to the commencement of the trial.
 - b. Defense counsel for Mr. Green presented to the court an affidavit Mr. Bond executed prior to his death, wherein Mr. Bond took full responsibility for all of the firearms recovered from 3921 Greer. Said Affidavit is attached herein and incorporated by reference as Defense Exhibit A.
 - c. Mr. Bond was represented by counsel, Mr. William Waller, at the time said Affidavit was executed, and therefore was fully advised of the consequences of taking responsibility for said firearms.
 - d. This court precluded defense counsel from entering said Affidavit into evidence at trial, ruling it was inadmissible hearsay. Defense counsel maintains the court erred in this ruling, and the Affidavit should have been presented to the jury at trial.
12. On or about June 4, 2014, Mr. Green was arrested for the charges alleged herein. His bond was set at \$30,000 cash only.

13. Mr. Green's previous attorney, Ms. Sarah Lambright, filed two (2) Motions for Bond Reduction, on July 24, 2014 and September 25, 2014, respectively.
14. Mr. Green was held in custody for almost six (6) months prior to posting bond on November 25, 2014. Mr. Green remained on bond until he was taken into custody after the jury returned its verdict on November 18, 2015.
15. Given the nature of the charges in this matter, Mr. Green's lack of violent criminal history, age, and medical condition, defense counsel respectfully requests that the court reconsider the sentence imposed on February 25, 2016.
 - a. To date, Mr. Green has been in custody on this case for 305 days, or forty-three weeks and four days, as of the date this motion is filed.
 - b. The sentence imposed by the court exceeds the State's recommended term of imprisonment by fifty-three years.
 - c. The sentence imposed by the court exceeds the average term of imprisonment noted in the Sentencing Assessment Report by over fifty-five years.
 - d. Mr. Green has demonstrated his ability to comport with rules, regulations and laws of the State of Missouri where he has successfully completed probation in the past and where he did not incur any additional charges during the time period while he was on bond pending the outcome of this case.
16. Defense counsel respectfully requests this court take all of the aforementioned factors into consideration and asks that this court impose a sentence more akin to the State-wide average for this type of offense, or more akin to the State's recommended sentence.

WHEREFORE, Defendant, Mr. James T. Green, through counsel, and hereby requests this Honorable Court reconsider the sixty-year term of imprisonment previously imposed and, pursuant to Missouri Supreme Court Rule 75.01, impose a lesser sentence, as Green's constitutional rights were denied with respect to due process of law, to fair and impartial sentencing, to cruel and unusual punishment, and to equal protection of the law, as guaranteed by the Fifth, Sixth, Eighth, and

Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 10, 18(a), and 21 of the Missouri Constitution and for other such further relief as the Court deems just and proper.

Respectfully submitted,

/s/ Julia Fogelberg

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Certificate of Service

I hereby certify that on this 28th day of March, 2016, an electronic copy of the foregoing was sent through the Missouri e-Filing system to counsel of record.

/s/ Julia Fogelberg

Julia Fogelberg