

**MISSOURI COURT OF APPEALS-WESTERN DISTRICT  
DIVISION IV  
KAREN KING MITCHELL, CHIEF JUDGE, PRESIDING,  
VICTOR C. HOWARD, JUDGE, AND  
GEORGE E. WOLF, III, SPECIAL JUDGE  
OCTOBER 2, 2018  
MISSOURI WESTERN STATE UNIVERSITY  
ST. JOSEPH, MISSOURI**

**WD81546**

**Bryant Kiley, Respondent,**

**v.**

**Adair County Circuit Court, Adair County Prosecuting Attorney, Kirksville Police Department, Adair County Sheriff's Office, Defendants; Missouri State Highway Patrol, Appellant; and FBI CJIS, Defendant.**

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The Missouri State Highway Patrol appeals from the circuit court's judgment granting Bryant Kiley's petition to expunge his record of arrest for passing a bad check. In response to Kiley's Petition for Expungement of Arrest Record, the Highway Patrol filed an answer objecting to Kiley's petition on the grounds that (1) Kiley had subsequent misdemeanor convictions, which prevented Kiley from meeting the requirements to expunge his arrest for passing a bad check, and (2) Kiley failed to comply with the pleading requirements for expungement in that the petition did not include the date of the arrest for which expungement was sought. At trial, the evidence established that, on October 25, 2009, Kiley wrote a check on a closed account. He was subsequently arrested for the offense of passing a bad check and charged on August 27, 2010, in Adair County. The charge was dismissed by the State on September 17, 2010. Kiley testified at trial that he did not remember the specific date of his arrest. He also said that he had contacted the Adair County Sheriff's Office and asked for that information, but the Sheriff's Office could not provide the information. During the trial, the Highway Patrol offered to admit records from the Fine Collection Center as proof of Kiley's alleged prior and subsequent misdemeanor convictions and infractions. Kiley objected to the admission of the records, and the circuit court conditionally admitted the exhibits. Thereafter, the circuit court entered its judgment granting Kiley's petition to expunge his arrest record for passing a bad check. The circuit court found that Kiley's arrest was based on false information, that there was no probable cause to believe that Kiley committed the offense, and that no charges were pursued as a result of the arrest. The circuit court also found that the Highway Patrol's exhibits offered for the purpose of establishing that Kiley had been convicted or one or more misdemeanor traffic offenses were "inadmissible" and struck the exhibits from the evidentiary record, "along with all testimony regarding the same." The court concluded that "[t]he evidence did not establish that [Kiley] has any prior or subsequent misdemeanor or felony convictions." The Missouri State Highway Patrol now appeals.

Appellant's points on appeal:

1. The Circuit Court erred in excluding the records of the Fine Collection Center because those records are admissible under § 490.130, RSMo, in that they are

records of a proceeding of a court of Missouri contained within the statewide automated record-keeping system established by the Supreme Court of Missouri.

2. The Circuit Court erred in issuing a Judgment for Expungement because Respondent does not qualify for expungement under § 610.122, RSMo, in that Respondent has prior and subsequent misdemeanor convictions that render his arrest record ineligible for expungement.
3. The Circuit Court erred in issuing a Judgment for Expungement because Respondent failed to satisfy the requirements of § 610.123, RSMo, in that Respondent failed to provide the date of the arrest for which he seeks expungement.

**WD81129**

**Michael D. Birmingham, Appellant,**

**v.**

**State of Missouri, Respondent.**

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Michael D. Birmingham appeals from the circuit court's judgment denying his Rule 24.035 motion for post-conviction relief seeking to set aside his guilty plea to two counts of money laundering and one count of willfully failing to file a state income tax return. During the guilty plea hearing, Birmingham agreed that, on March 31, 2011, he went to a bank and separately cashed two \$3,000 checks that had been given to him by James Escue for the purchase of gold, and Birmingham agreed that he did this with the purpose to conceal and disguise the nature, location, source, ownership, and control of the proceeds of felony criminal activity, which was the stealing of gold and platinum coins belonging to Thomas Evan and Rolly Evans. Birmingham also agreed that, on April 18, 2012, with the intent to defraud, he willingly failed to file an income tax return in the State of Missouri at the time or times required by law. The circuit court accepted these recitations of facts as sufficient to support the money laundering charges and the failure to file a state income tax return charge. The circuit court sentenced Birmingham to two 20-year terms of imprisonment for the money laundering counts and a 5-year term of imprisonment for the failing to file a state income tax return count. The court ordered the sentences suspended and placed Birmingham on 5 years of probation. Further, the circuit court found Birmingham to be a prior and persistent offender, ordered him to pay \$10,000 in restitution, and ordered him to complete 100 hours of community service. The circuit court also ordered the sentences to run concurrently with one another. On March 23, 2015, Birmingham's probation was revoked, and he was delivered to the Department of Corrections on March 26, 2015. Birmingham timely filed his motion for post-conviction relief alleging: (1) his plea counsel failed to advise him that the facts in the money laundering case were insufficient to support a conviction for money laundering; (2) the plea court erred in finding a sufficient factual basis for the money laundering charges, and (3) the plea court erred in finding a sufficient factual basis for the failure to file a state income tax return charge. The circuit court denied Birmingham's post-conviction motion, finding that a sufficient factual basis existed for the money laundering charges and the failure to file a state income tax return charge. Birmingham now appeals.

Appellant's points on appeal:

1. The motion court clearly erred in denying claim 8/9(a) without an evidentiary hearing, because Mr. Birmingham alleged facts, not conclusions, which if true would entitle him to relief and which are not refuted by the record, in that Mr. Birmingham alleged that plea counsel failed to act as a reasonably competent attorney, in violation of Mr. Birmingham's rights to due process of law and effective assistance of plea counsel under the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Sections Ten and Eighteen(a) of the Missouri Constitution, because a factual basis does not conclusively refute the existence of a defense, in that, contrary to the motion court's finding, Mr. Birmingham's admission that he committed the crime of money laundering did not foreclose his claim that plea counsel failed to advise him that his alleged acts did not constitute the crime of money laundering.
2. The motion court clearly erred in denying claim 8/9(b), because the factual basis for money laundering was insufficient, in violation of Mr. Birmingham's right to due process of law under the Fourteenth Amendment to the United States Constitution and Article 1, Section Ten of the Missouri Constitution, in that a factual basis must include an admission to facts that actually constitute the crime charged. Mr. Birmingham's factual basis for money laundering did not include an admission to facts that would constitute a currency transaction with the purpose to conceal the criminal nature, location, source, ownership, or control of those proceeds.
3. The motion court clearly erred in denying claim 8/9(c), because the factual basis for failure to file a tax return was insufficient, in violation of Mr. Birmingham's right to due process of law under the Fourteenth Amendment to the United States Constitution and Article 1, Section Ten of the Missouri Constitution, in that a factual basis must include an admission to facts that actually constitute the crime charged. Mr. Birmingham's factual basis for failure to file a tax return did not include an admission to facts that would constitute willingly, with the intent to defraud, failed to file an income tax return at the time or times required by law.

**WD81326**

**Robert C. Smock, as Trustee of the Robert C. Smock Revocable Living Trust Dated March 19, 1996, et al., Appellants,**

**v.**

**Associated Electric Cooperative, Inc., Respondent.**

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Robert C. Smock, as Trustee of the Robert C. Smock Revocable Living Trust dated March 19, 1996, T&K Smock, LLC, Joshua R. Smock, and Jessie Smock ("the Smocks") appeal from the circuit court's judgment granting summary judgment in favor of Associated Electric Cooperative, Inc., on the Smocks' claims for injunctive relief and for damages for breach of contract, negligence, trespass, and temporary nuisance and inverse condemnation. The Smocks

own farmland in Holt County, over a portion of which Associated Electric has a power line easement granted by William and Janette Smock in the 1990s. The easement agreement gave Associated Electric a right to build power poles on the land, a right to access those poles, and a right to clear vegetation that might interfere with its power lines. The easement strip is 150 feet wide. At some point between February 1991 and November 1992, Associated Electric began construction of the electric transmission line and cleared a number of trees, brush, and other vegetation from the easement area. The clearing contractor's access to the Smock farm terminated on April 20, 1992, and it is believed that the right-of-way was essentially clear by that date. The Smocks' land is bordered to the east by the Nodaway River. Associated Electric's power lines span across the Smocks' land and then cross the Nodaway River, where the power lines continue over farmland on the other side of the river. In 2005, and possibly even before then, the Smock family became concerned about the stability of their land along the slope of the Nodaway River bank. According to the Smocks, a large portion of their land began to slide towards and into the river, and the landslide continues to grow in length, width, and depth beyond the boundaries of Associated Electric's easement. On March 20, 2014, the Smocks' attorney sent a letter to Associated Electric to alert it about the landslide and asserted that the erosion problem was caused by Associated Electric's placement of the power lines and removal of trees. The letter demanded Associated Electric to take corrective measures to stop the erosion and to maintain the area. Associated Electric hired engineering consultants to inspect the land and determine the cause of the slide. The consultants determined that Associated Electric's actions were not responsible for the landslide. On August 27, 2014, Associated Electric sent a letter to the Smocks' attorney stating that it did not feel "that our activities in any way caused or contributed to the erosion issues your clients are experiencing." On September 11, 2015, the Smocks filed suit against Associated Electric in the Circuit Court of Holt County seeking injunctive relief and damages for breach of contract, negligence, trespass, and temporary nuisance and inverse condemnation. Associated Electric filed a motion for summary judgment asserting that all of the Smocks' claims were barred by the statute of limitations. The circuit court sustained Associated Electric's motion for summary judgment and entered judgment in favor of Associated Electric on all counts. The Smocks now appeal.

Appellants' points on appeal:

1. The trial court erred in entering summary judgment on the Smocks' trespass claim and request for injunctive relief because those claims are not time-barred in that Associated Electric has exceeded the scope of its easement by creating, maintaining, allowing the growth of and refusing to repair the landslide on the Smocks' land which constitutes a continuing trespass that is continuing day-to-day and can be stopped such that the continuing wrong exception applies, making the Smocks' trespass claim and request for injunctive relief timely as to the statutory period immediately prior to filing suit.
2. The trial court erred in granting summary judgment to Associated Electric on the Smocks' temporary nuisance and negligence claims, and their request for injunctive relief relating thereto, because the statute of limitations is not a bar to that claim for the ten years immediately preceding the Smocks' filing suit in that a temporary nuisance claim is, by definition, a continuing wrong under Missouri law and

Associated Electric's motion for summary judgment did not attack the legal and factual sufficiency of that claim, meaning the continuing wrong exception automatically applies.

3. The trial court erred in granting summary judgment on the Smocks' negligence, trespass and temporary nuisance claims and their request for injunctive relief because those claims are not time-barred in that Associated Electric has violated its common law duty to repair the landslide both inside and outside the boundaries of the easement and to maintain the easement so that the landslide does not reoccur which constitutes a continuing wrong as a matter of law that is continuing day-to-day and can be stopped such that the continuing wrong exception applies, making the Smocks' trespass, negligence, and temporary nuisance claims and request for injunctive relief timely as to the statutory period immediately prior to filing suit.
4. The trial court erred in entering summary judgment on the Smocks' breach of contract claim because that claim is not time-barred in that the claim was filed pursuant to a written payment agreement and within ten years after Associated Electric refused to pay the Smocks under the agreement and, alternatively, the continuing wrong exception applies to make the Smocks' breach of contract claim timely as to the ten years immediately prior to filing suit.