

IN THE
MISSOURI SUPREME COURT

MARK DOUGAN,)
)
 Appellant,)
)
 vs.) No. SC 85274
)
 STATE OF MISSOURI,)
)
 Respondent.)

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF BOONE COUNTY, MISSOURI
THIRTEENTH JUDICIAL CIRCUIT, DIVISION ONE
THE HONORABLE GENE HAMILTON, JUDGE

APPELLANT'S SUBSTITUTE REPLY BRIEF

Mark A. Grothoff, MOBar #36612
Attorney for Appellant
3402 Buttonwood
Columbia, Missouri 65201-3724
Telephone (573) 882-9855
FAX (573) 875-2594

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JURISDICTIONAL STATEMENT

Appellant adopts and incorporates by reference the Jurisdictional Statement from his Substitute Brief.

STATEMENT OF FACTS

Appellant adopts and incorporates by reference the Statement of Facts from his Substitute Brief.

POINT RELIED ON

I.

The motion court clearly erred in dismissing appellant's Rule 29.15 motion on the basis that appellant has not been incarcerated. The motion court's dismissal of appellant's motion was in violation of Rule 29.15 in that appellant had timely filed a notice of appeal of his conviction to the Western District Court of Appeals and his post-conviction motion was timely filed sixty-four days after that court's mandate was issued. Appellant was prejudiced and denied his rights to due process of law and access to the courts under the Fourteenth Amendment to the United States Constitution and Article I, Sections 10 and 14 of the Missouri Constitution because he is entitled to proceed in accordance with the provisions of Rule 29.15 but the motion court's actions deprived him of this right.

State v. Geiler, 866 S.W.2d 863 (Mo. App. E.D. 1993);

U.S. Const., Amend. XIV;

Mo. Const., Art. I, Sects. 10 and 14; and

Rule 29.15.

ARGUMENT

I.

The motion court clearly erred in dismissing appellant’s Rule 29.15 motion on the basis that appellant has not been incarcerated. The motion court’s dismissal of appellant’s motion was in violation of Rule 29.15 in that appellant had timely filed a notice of appeal of his conviction to the Western District Court of Appeals and his post-conviction motion was timely filed sixty-four days after that court’s mandate was issued. Appellant was prejudiced and denied his rights to due process of law and access to the courts under the Fourteenth Amendment to the United States Constitution and Article I, Sections 10 and 14 of the Missouri Constitution because he is entitled to proceed in accordance with the provisions of Rule 29.15 but the motion

In its substitute brief, the state apparently agrees with appellant’s contention, and the holding in State v. Geiler, 866 S.W.2d 863 (Mo. App. E.D. 1993), that Rule 29.15 applies to a person convicted of a felony without regard to the penalty imposed. However, the state also posits that, because appellant voluntarily dismissed his direct appeal, he was precluded from filing a Rule 29.15 motion (Respondent’s Substitute Brief, pp. 11-14).

While the paragraph of Rule 29.15(b), which deals with the deadline for filing a motion states, “...ninety days after the date the mandate of the appellate court is issued affirming such judgment or sentence”, the same sentence begins

with the language, “If an appeal of the judgment or sentence sought to be vacated, set aside, or corrected was taken”. Likewise the very next sentence begins, “If no appeal of such judgment or sentence was taken”. No reference to the term “affirming”. Thus, it is not clear whether the one use of the word “affirming” was intended to preclude someone whose direct appeal was dismissed from filing of Rule 29.15 motion.

Moreover, appellant suggests that the affect of a “dismissal” and of an “affirmance” is the same. A “dismissal” does not reverse a judgment; it does not remand a judgment. The judgment of the lower court is maintained; it remains in full force and effect. Thus, in practical effect, a mandate “dismissing” a judgment and a mandate “affirming” a judgment are the same.

In addition, appellant notes that, if this court would agree with the state’s position, it would be encouraging frivolous direct appeals. Appellate attorneys would be obliged to proceed with non-meritorious direct appeals simply to protect their clients’ Rule 29.15 rights. Even those sentenced to incarceration would be affected. An appellate attorney would likely not determine that no non-frivolous direct appeal issues existed until well after the deadline of ninety days after delivery to the Department of Corrections had passed.

Therefore, appellant respectfully requests that this Court reverse the dismissal of his Rule 29.15 motion and remand with directions to the motion court to reinstate appellant’s motion for post-conviction relief.

CONCLUSION

For the reasons discussed above, and in appellant's Substitute Brief, appellant respectfully requests that this Court reverse the motion court's dismissal of appellant's Rule 29.15 motion and remand with directions to the motion court to reinstate appellant's motion.

Respectfully Submitted,

Mark A. Grothoff, MOBar #36612
Attorney for Appellant
3402 Buttonwood
Columbia, Missouri 65201-3724
(573) 882-9855

Certificate of Compliance and Service

I, Mark A. Grothoff, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b) and Special Rule 1(b). The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 763 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in April, 2003. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this 18th day of August, 2003, to John M. Morris, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

Mark A. Grothoff