



Missouri Court of Appeals
Southern District

Division One

MARK D. VOGL,)	
)	
Appellant,)	
)	
vs.)	No. SD32097
)	Filed: January 16, 2013
STATE OF MISSOURI,)	
)	
Respondent.)	

APPEAL FROM THE CIRCUIT COURT OF JASPER COUNTY

Honorable David C. Dally, Presiding Judge

REVERSED AND REMANDED WITH DIRECTIONS.

Appellant Mark D. Vogl (“Vogl”) appeals the motion court’s denial of his “MOTION TO RE[-]OPEN POST[-]CONVICTION PROCEEDING AND REQUEST FOR HEARING” following the dismissal of his untimely Rule 24.035 motion and the grant of his appointed post-conviction counsel’s request to have his appointment rescinded.¹ We reverse the judgment of the motion court.

¹ All rule references are to Missouri Court Rules (2012).

Factual and Procedural Background

On August 30, 2007, Vogl pled guilty to two counts of the unclassified felony of statutory sodomy in the first degree, violations of section 566.062.² He was then sentenced by the trial court to fifteen years in the Missouri Department of Corrections (“DOC”) on each count with the sentences to run concurrently. Vogl was delivered to the DOC on September 18, 2007, and, per Rule 24.035, he was required to file his request for post-conviction relief “within 180 days of the date [he was] delivered to the custody of the [DOC].” In this instance, his Rule 24.035 motion had to be filed by March 17, 2008.³ According to the docket sheet and the file-stamp, Vogl’s motion was received and filed by the Circuit Court of Jasper County on March 18, 2008—one day past the deadline. Vogl was then appointed post-conviction counsel on April 3, 2008. On April 16, 2008, his appointed post-conviction counsel filed a “MOTION REQUESTING APPOINTMENT OF COUNSEL BE RESCINDED” on the basis that Vogl’s Rule 24.035 motion had been untimely filed such that the motion court lacked authority to proceed in hearing the matter. This request by Vogl’s appointed post-conviction counsel was granted by the motion court, which also specifically found Vogl “failed to comply with Rule 24.035 and file his [Rule 24.035 motion] within 180 days.” The motion court also dismissed Vogl’s Rule 24.035 motion with prejudice.

² All statutory references are to RSMo 2000.

³ Technically, March 16, 2008, would have been the 180th day in computing Vogl’s time to file his motion; however, as March 16 was a Sunday, under Rule 44.01, the actual deadline became March 17, 2008.

After correspondence with the circuit clerk's office⁴ and additional filings with the trial court, Vogl then filed his "MOTION TO RE-OPEN POST[-]CONVICTION PROCEEDING AND REQUEST FOR HEARING[.]" In denying Vogl's request to re-open the proceedings, the motion court noted "this action was previously dismissed with prejud[ic]e for failure to file Motion within the time allowed by the rules." This appeal followed.

While Vogl technically presents two points relied on, we have chosen to address his points conjunctively. As such, the essence of the issues raised within those points is whether Vogl's motion to re-open pled a set of facts such that the motion court was required to grant him an evidentiary hearing.

Standard of Review

As with other Rule 24.035 proceedings, the review of the denial of a motion to reopen post-conviction proceedings is limited to a determination of whether the motion court's findings and conclusions of law are clearly erroneous. *Edgington v. State*, 189 S.W.3d 703, 705 (Mo.App. W.D. 2006). The motion court's findings and conclusions will be deemed clearly erroneous only if we are left with the definite and firm impression that a mistake has been made after reviewing the entire record. *Id.*

Analysis

At the outset we note that while there are significant deficiencies in Vogl's *pro se* brief and in its compliance with the relevant Missouri Rules of Court, we can glean the spirit of his complaints, however, and have chosen to address the issues *ex gratia*.

⁴ In this correspondence with Linda Williams ("Williams"), the Clerk of the Circuit Court of Jasper County in Joplin, Williams specifically set out that what occurred in Vogl's case was that the "Jasper County Circuit Clerk's Office in Carthage determined [his] original case was handled in the Joplin location [and that] any subsequent filings must also be filed in the Joplin location and placed [his] documents in a basket for [their] 'runner' to pick up to deliver to Joplin." The "'runner' picks up every afternoon in Carthage and delivers to the Circuit Clerk's Office in Joplin the following morning." She further related she no longer had the original envelope Vogl used to mail the documents such that there is nothing in the legal file to prove when the envelope was mailed by Vogl or delivered to the court.

The crux of Vogl’s argument in his motion to re-open is that he was abandoned due to his post-conviction counsel’s failure to file an amended Rule 24.035 motion alleging facts that demonstrated his original *pro se* post-conviction motion was actually timely filed, but then misfiled by the clerk. His motion to re-open was denied by the motion court without an evidentiary hearing, thus, Vogl asserts he was denied the opportunity to offer proof on his abandonment claim.

Typically, “[t]he motion court’s jurisdiction to re-open post-conviction proceedings is limited to the thirty days following the court’s ruling in the proceeding.” *White v. State*, 265 S.W.3d 850, 852 (Mo.App. E.D. 2008). “The only exception to this limitation allows the motion court to reopen the proceeding to address a claim of abandonment by post-conviction counsel.” *Id.*; see *Johnson v. State*, 244 S.W.3d 226, 228 (Mo.App. E.D. 2008). Abandonment by post-conviction counsel occurs in only three situations: (1) when post-conviction counsel takes no action with respect to filing an amended motion and the record shows the movant is deprived of a meaningful review of his claims; (2) when post-conviction counsel is aware of the need to file an amended post-conviction relief motion and fails to do so in a timely manner; or (3) when post-conviction counsel overtly acts to prevent the movant’s timely filing of a post-conviction motion. *Gehrke v. State*, 280 S.W.3d 54, 57 (Mo. banc 2009). Further, “[i]t is imperative for relief . . . that the movant in no way be responsible for the failure to comply with the requirements of . . . Rule 24.035[.]” *Id.*

We are concerned here with the first exception relating to an abandonment claim—that post-conviction counsel took no action with respect to filing an amended motion and the record shows the movant is deprived of a meaningful review of his claims. *Gehrke*, 280 S.W.3d at 57.

Vogl has asserted throughout these proceedings that his motion was timely filed and then mistakenly not file-stamped until the following day by the circuit court. He has further maintained his appointed post-conviction counsel was ineffective for taking no action with respect to filing an amended motion, which would have allowed him to prove the timeliness of his motion to the motion court. Missouri case law is clear that in proving the timeliness of a post-conviction motion to a motion court, a movant meets his burden of proof by, *inter alia*, “alleging and proving by a preponderance of the evidence in his amended motion that the court misfiled the motion.” *Dorris v. State*, 360 S.W.3d 260, 267 (Mo. banc 2012).⁵ If the facts alleged by Vogl herein are true, then his post-conviction counsel’s failure to file an amended motion, as required by the Missouri Rules of Court, deprived Vogl of a meaningful review of his claim that his *pro se* motion was, in fact, timely. Accordingly, such a failure would constitute abandonment. This Court cannot say whether Vogl’s assertions of fact are true because he was denied the right to present evidence via an evidentiary hearing. While, as already mentioned, his brief is not the modicum of conformity or comprehension, he does clearly request this matter be “sent back to the [motion] court, for a[n] evidentiary hearing to determine whether he was indeed prejudiced and abandoned by actions of . . . post-conviction counsel.” As such, in that Vogl did allege facts in his motion that, if true, would establish one of the recognized forms of abandonment, he is entitled to an evidentiary hearing to determine if his post-conviction proceeding should be reopened. The motion court’s denial, without an evidentiary hearing of Vogl’s motion to re-open, was clearly erroneous. Vogl’s points have merit.

⁵ The essence of the holding in *Dorris* is that timeliness of a Rule 24.035 motion is to be resolved by the motion court at the post-conviction level and not as part of some sort of later collateral attack. This proposition makes sense in that this Court was unable to find any case law permitting a motion to re-open to be filed solely on the basis of a timeliness argument.

This matter is reversed and remanded to the motion court for the holding of an evidentiary hearing to determine if the motion was timely filed, and proceed accordingly.

WILLIAM W. FRANCIS, JR., J. - OPINION AUTHOR

GARY W. LYNCH, P.J. - CONCURS

NANCY STEFFEN RAHMEYER, J. - CONCURS