

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**MITCHELL A. JENSEN,
APPELLANT
vs.**

**STATE OF MISSOURI,
RESPONDENT**

DOCKET NUMBER WD74585

DATE: JANUARY 22, 2013

Appeal from:

The Circuit Court of Johnson County, Missouri
The Honorable Jacqueline A. Cook, Judge

Appellate Judges:

Division One: Thomas H. Newton, P.J., Joseph M. Ellis and Gary D. Witt, JJ.

Attorneys:

Mitchell A. Jenson, Appellant Pro-se

Shaun Mackelprang, for Respondent

MISSOURI APPELLATE COURT OPINION SUMMARY

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

MITCHELL A. JENSEN, APPELLANT

v.

STATE OF MISSOURI, RESPONDENT

WD74585

Johnson County, Missouri

Before Division One Judges: Thomas H. Newton, P.J., Joseph M. Ellis and Gary D. Witt, JJ.

In 1981, Appellant was convicted of capital murder and sentenced to life imprisonment without the possibility of parole for fifty years. His conviction was affirmed on direct appeal, and his motion for post-conviction relief was denied.

In 2011, Appellant filed a *pro se* motion to reopen his Rule 27.26 proceedings. Appellant raised the following five grounds for relief: (1) he was abandoned by his post-conviction relief counsel in that his post-conviction relief counsel filed his amended post-conviction relief motion without a complete transcript of the trial proceedings, making his Rule 27.26 proceedings patently defective; (2) his due process and equal protection rights were violated by the State in that the State failed to provide him with a complete transcript prior to his direct appeal; (3) his right to effective assistance of appellate counsel was violated when his appellate counsel failed to ensure that Appellant received a complete transcript prior to his direct appeal; (4) he was denied effective assistance of appellate counsel when his appellate counsel failed to include in his brief that the trial court erred in refusing to instruct the jury on the lesser included offense of first degree murder; and (5) the burden of proof under Rule 27.26(f) is unconstitutional in that it directly conflicts with the *Strickland* “reasonable probability” standard.

On October 28, 2011, the motion court dismissed Appellant’s motion to reopen his post-conviction relief proceedings, without an evidentiary hearing, for lack of jurisdiction. After reviewing Appellant’s motion and examining his theory of abandonment, the motion court concluded that there were “no grounds presented by [Appellant] which provided [the motion court] jurisdiction to reopen the [Rule] 27.26 proceedings . . . under Missouri law.” Appellant now appeals from the motion court’s dismissal of his motion to reopen his Rule 27.26 proceedings for lack of jurisdiction.

AFFIRMED

Division One holds:

(1) The motion court did not err in dismissing Appellant's motion to reopen his Rule 27.26 proceedings because, even though the motion court erroneously concluded it must dismiss the case for lack of jurisdiction, the motion court clearly reviewed Appellant's motion to reopen prior to dismissing it and correctly found that Appellant made no cognizable claims of abandonment for purposes of reopening his post-conviction relief proceedings and, therefore, properly dismissed Appellant's motion.

(2) The motion court did not err in dismissing Appellant's motion to reopen his Rule 27.26 proceedings because Appellant failed to make a cognizable claim of abandonment under Missouri law in that the fact that his post-conviction relief counsel filed an amended motion without reviewing a complete transcript of the record does not establish that his post-conviction relief counsel completely shirked the duties imposed under Rule 27.26 when the record reflects that Appellant's post-conviction relief counsel conferred with Appellant, amended Appellant's post-conviction relief motion, and ascertained whether the amended motion included all grounds known by Appellant as a basis for attacking his judgment and sentence. Thus, Appellant was not entitled to an evidentiary hearing on his motion to reopen, as no presumption that Appellant's post-conviction relief counsel abdicated his responsibilities under Rule 27.26 arises from the record.

(3) The motion court did not err in dismissing Appellant's motion to reopen his Rule 27.26 proceedings because the four remaining grounds for relief Appellant alleged in his motion all pertain to either the effectiveness of his direct appellate counsel or the constitutionality and fairness of his appellate or post-conviction relief proceedings. Such grounds are not cognizable claims of abandonment for purposes of reopening post-conviction relief proceedings.

Opinion by Joseph M. Ellis, Judge

Date: January 23, 2013

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