

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

DONALD RAY GERLT

APPELLANT,

**v.
STATE OF MISSOURI**

RESPONDENT.

DOCKET NUMBER WD72225

DATE: April 12, 2011

Appeal From:

Howard County Circuit Court
The Honorable Scott A. Hayes, Judge

Appellate Judges:

Division Three: Cynthia L. Martin, Presiding Judge, James E. Welsh, Judge and Gary D. Witt,
Judge

Attorneys:

Kent Denzel, Columbia, MO, for appellant.

Shaun J. Mackelprang and James B. Farnsworth, Jefferson City, MO, for respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY

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Howard County

Before Division Three: Cynthia L. Martin, Presiding Judge, James E. Welsh, Judge and Gary D. Witt, Judge

Donald Ray Gerlt pleaded guilty to one count of driving with a revoked license. Gerlt filed a post-conviction motion for relief under Rule 24.035, claiming that his trial counsel was ineffective for not advising him of a potential defense to the claim to which he pleaded guilty. An evidentiary hearing was held by the motion court which denied Gerlt's motion. Gerlt now appeals.

WE AFFIRM

First, we must consider the effect of Gerlt's filing of his motion for post-conviction relief out of time. The State raises this issue for the first time on appeal. The timeliness of the filing of a post-conviction motion for relief is not a jurisdictional issue but one of trial error. Like other matters of trial error, the State waives its objection to an untimely filing of a post-conviction motion by failing to object on that basis to the motion court. Accordingly, the State here has waived its objection to Gerlt's untimely filing and we will decide the case on the merits. In Point One, Gerlt argues the motion court erred in denying his motion because the evidence before the motion court showed Gerlt's trial counsel was ineffective because he failed to advise Gerlt of a defense to the charge to which he pleaded guilty. Gerlt claims he had a defense to the charge of driving with a revoked license in that he cooperated with a police officer who had "apparent authority" to "get rid of the ticket," and the doctrine of equitable immunity, therefore, provided him a defense. Gerlt cites no authority for the proposition that under the doctrine of equitable immunity the prosecutor is bound by promises made by a police officer. Counsel cannot be found to be ineffective for failure to advise his client of a non-existent defense. Point One is denied.

In Point Two, Gerlt claims the motion court erred by failing to enter specific findings of fact and conclusions of law of as to a particular claim as required by Rule 24.035(j). Gerlt failed to file a motion to amend the judgment as required by Rule 78.07(c). We hold that Rule 78.07(c) does apply to post-conviction claims of error. Therefore, by failing to file a motion to amend the judgment, Gerlt has not preserved his claim of error for appellate review. Point Two is denied.

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