



Missouri Court of Appeals  
Southern District

Division Two

LOUIS W. HILL,	)	
	)	
Movant-Appellant,	)	
	)	
vs.	)	No. SD30530
	)	
STATE OF MISSOURI,	)	<b>Filed: April 15, 2011</b>
	)	
Respondent-Respondent.	)	

APPEAL FROM THE CIRCUIT COURT OF IRON COUNTY

Honorable Kelly W. Parker, Circuit Judge

**VACATED AND REMANDED WITH DIRECTIONS**

Louis W. Hill ("Movant") appeals from an order denying his amended Rule 24.035<sup>1</sup> motion for post-conviction relief. We vacate the judgment and remand the cause with directions to dismiss the motion because Movant failed to timely file his *pro se* motion as required by Rule 24.035(b).

Movant pled guilty to one count of statutory rape in the first degree on July 20, 2004, for which he received a suspended imposition of sentence and five years

<sup>1</sup> All rule references are to Missouri Court Rules (2010), and all references to statutes are to RSMo 2000, unless otherwise specified.

probation.<sup>2</sup> On March 20, 2006, Movant's probation was revoked and Movant was sentenced to twenty years imprisonment. Movant alleged he was delivered to the Department of Corrections on March 24, 2006. On May 5, 2008, Movant filed a *pro se* Rule 24.035 motion for post-conviction relief. Appointed counsel subsequently filed an amended motion arguing, among other things and for the first time, that the plea counsel provided ineffective assistance by failing to object when the State provided false information to the trial court upon which the court relied on in accepting the guilty plea. Following an evidentiary hearing, the motion court denied Movant's post-conviction claim for relief on the merits.

Rule 24.035(b) reads, in part:

If no appeal of such new judgment or sentence is taken, the motion shall be filed within 180 days of the later of:

- (1) The date the person is delivered to the custody of the department of corrections;
- (2) The date the new judgment or sentence was final for purposes of appeal.

Failure to file a motion within the time provided by this Rule 24.035 shall constitute a complete waiver of any right to proceed under this Rule 24.035 and a complete waiver of any claim that could be raised in a motion filed pursuant to this Rule 24.035.

Rule 24.035(b).

"The time limitations contained in Rules 24.035 and 29.15 are valid and mandatory." *Day v. State*, 770 S.W.2d 692, 695 (Mo. banc 1989). "[A]n untimely *pro se* motion for post-conviction relief is a fatal defect that cannot be cured by filing a timely amended motion." *Swofford v. State*, 323 S.W.3d 60, 62 (Mo. App. E.D. 2010) (vacating

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<sup>2</sup> Movant entered an *Alford* plea on the count. *North Carolina v. Alford*, 400 U.S. 25 (1970). An *Alford* plea is a guilty plea, "even though the defendant protests that he or she is innocent of the crime charged." *Nguyen v. State*, 184 S.W.3d 149, 152 (Mo. App. W.D. 2006). For the purposes of our review of the denial of a Rule 24.035 motion for post-conviction relief, "an *Alford* plea is not treated differently from a guilty plea." *Id.*

a judgment denying a Rule 29.15 motion for post-conviction relief and remanding the cause with directions to dismiss the motion because the movant failed to timely file a *pro se* motion as required by Rule 29.15). A court may not consider an untimely filed post-conviction motion. *Id.*

In this case, to be timely, Movant was required to file his Rule 24.035 motion "within 180 days of the later of: (1) The date the person is delivered to the custody of the department of corrections; [or] (2) The date the new judgment or sentence was final for purposes of appeal." Rule 24.035(b). In his motion, Movant alleged that he was delivered to the custody of the Department of Corrections on March 24, 2006. Movant's twenty-year sentence was final for purposes of appeal on March 20, 2006.

Movant, however, failed to file his *pro se* Rule 24.035 motion for post-conviction relief until May 5, 2008, more than 180 days after the March 20, 2006 date that the sentence was final for purposes of appeal or the March 24, 2006 date that Movant alleged he was delivered to the custody of the Department of Corrections. As such, the motion was untimely. Rule 24.035(b). Movant waived his right to proceed with his Rule 24.035 motion because he did not timely file his *pro se* motion. *Swofford*, 323 S.W.3d at 64.

The judgment is vacated and the cause remanded with directions to dismiss Movant's Rule 24.035 motion.

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Nancy Steffen Rahmeyer, Presiding Judge

Scott, C.J., concurs in the principal opinion and concurs in separate opinion.

Bates, J., concurs in the principal opinion and in C.J. Scott's separate concurring opinion.

Attorney for Appellant -- Rosalyn Koch

Attorneys for Respondent -- Chris Koster, Atty General, Robert J. (Jeff) Bartholomew

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**CONCURRING OPINION**

Arguably in dicta, our Western District recently opined that “the reasoning of *Swofford* is fundamentally flawed,” *Snyder v. State*, WD72071, 2011 WL 976750 (Mo.App. Mar. 22, 2011), and presumably holds a similar view of our opinions here and in *Dorris v. State*, SD30491, 2011 WL 742548 (Mo.App. Mar. 1, 2011). In pertinent part, our colleagues reason that:

Rule 24.035(a) provides that “[t]he procedure to be followed for motions filed pursuant to this Rule 24.035 is governed by the rules of civil procedure insofar as applicable.” Looking to those rules of civil procedure, Rule 55.08 provides that “[i]n pleading to a preceding pleading, a party shall set forth all applicable affirmative defenses and avoidances, including but not limited to ... statute of limitations, ... waiver, and any other matter constituting an avoidance or affirmative defense.” (Emphasis added.) Likewise, Rule 55.27(a) requires that, aside from certain specified defenses not applicable herein, “[e]very defense, in law or fact, to a claim in any pleading ... shall be asserted in the responsive pleading thereto if one is required.” Thus, Rule 55.08

and Rule 55.27(a) dictate that the State set forth in its responsive pleading to the post-conviction motion an assertion that the movant waived his or her right to proceed under Rule 24.035(b). Otherwise, the State waives its right to claim that Appellant waived his right to pursue post-conviction relief.

*Snyder*, 2011 WL 976750 at \*3.

My difficulty with this analysis stems from my understanding that PCR actions are by motion, not by petition; thus, no responsive pleading is required and Rule 55 is not generally applicable. See *Thomas v. State*, 808 S.W.2d 364, 369 (Mo. banc 1991)(Rendlen, J., dissenting)(noting that “Rule 24.035 does not require a formal answer”); *Clark v. State*, 578 S.W.2d 60, 62 (Mo.App. 1978)(motion under predecessor Rule 27.26<sup>1</sup> was “indeed a motion in form” and required no responsive pleading); *Dean v. State*, 535 S.W.2d 301, 302 (Mo.App. 1976)(no responsive pleading required by Rule 27.26 “nor by Rule 55.01 nor by any Rule of Civil or Criminal Procedure”); *Bonner v. State*, 535 S.W.2d 289, 291-92 (Mo.App. 1976)(similar). See also *Rohwer v. State*, 791 S.W.2d 741, 744 (Mo.App. 1990)(Rule 55.33(b) not applicable in PCR case). Cf. *Hollingshead v. State*, 324 S.W.3d 779, 784 (Mo.App. 2010)(Howard, J., dissenting)(citing various civil rules deemed inapplicable to PCR cases).

Our decision also seems consistent with a PCR movant’s duty of timeliness. The lack of time limits under Rule 27.26 plagued our courts with stale claims and significant delays. Upon a special committee’s recommendation, these were addressed by replacing Rule 27.26 with our current PCR rules and deadlines. *Day v. State*, 770 S.W.2d 692, 693 (Mo. banc 1989). Our supreme court, almost from the outset, has described these as

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<sup>1</sup> Rule 27.26 contained the same “insofar as applicable” language as current PCR rules. See *Thomas*, 808 S.W.2d at 366.

“strictly enforced time constraints which, if not followed, procedurally bar consideration of a movant's claims.” *Thomas*, 808 S.W.2d at 366.

*Snyder*, thus, does not dissuade me from our action here. I concur.

Daniel E. Scott, Chief Judge