

No. SC85274

**IN THE
SUPREME COURT OF MISSOURI**

MARK DOUGAN,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

**APPEAL FROM THE CIRCUIT COURT OF BOONE COUNTY
THIRTEENTH JUDICIAL CIRCUIT
THE HONORABLE GENE HAMILTON, JUDGE**

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Appellant appeals from a judgment of the Boone County Circuit Court dismissing his Rule 29.15 motion as untimely. Appellant filed this motion seeking to vacate his conviction for tampering with a motor vehicle, for which he was fined \$5000. The sentencing court suspended all but \$500 of the fine and placed Appellant on probation for five years. Following a decision by the Missouri Court of Appeals, Western District affirming the dismissal of Appellant's motion, this Court ordered transfer of this appeal. Therefore, jurisdiction lies in this Court. MO. CONST. art. V, § 10; Rule 83.04.

STATEMENT OF FACTS

After a jury trial, Appellant was convicted in Boone County Circuit Court under § 569.080.1(2), RSMo 2000, for the Class C felony of tampering with a motor vehicle under (L.F. 6, 23-24; PCR L.F. 4).¹ On March 19, 2001, the sentencing court fined Appellant \$5000, but suspended all but \$500 of that fine and placed Appellant on supervised probation for five years with conditions (L.F. 23-24; PCR L.F. 4).

On March 29, 2001, Appellant filed an appeal from this conviction to the Missouri Court of Appeals, Western District (L.F. 4, 27; PCR L.F. 16). But on November 16, 2001, Appellant filed a motion voluntarily dismissing his direct appeal (PCR L.F. 16). On November 20, 2001, the court of appeals issued its mandate dismissing Appellant's appeal (PCR L.F. 16).

Sixty-four days after that mandate was issued, on January 23, 2002, Appellant filed in Boone County Circuit Court a pro se motion under Rule 29.15 seeking to vacate his conviction and sentence (PCR L.F. 1, 4-9). Appellant's motion alleged that

¹“L.F.” refers to the legal file in Appellant's direct appeal (No. WD59820), which he later voluntarily dismissed. “PCR L.F.” refers to the legal file in this appeal from the dismissal of Appellant's Rule 29.15 motion.

the trial court refused to permit certain testimony and that his trial counsel was ineffective for not interviewing witnesses and not objecting (PCR L.F. 5-6). The motion court dismissed Appellant’s Rule 29.15 motion because Appellant had never been “incarcerated” in the Department of Corrections (PCR L.F. 2, 14). The court of appeals affirmed the motion court’s judgment dismissing the motion on the ground that Appellant was precluded from filing a Rule 29.15 motion because he was sentenced only to pay a fine and, thus, had never been “incarcerated.”

ARGUMENT

The motion court's judgment dismissing Appellant's Rule 29.15 motion was not clearly erroneous because Appellant was precluded from filing a Rule 29.15 motion in that this rule required that the motion be filed within ninety days after the issuance of the mandate affirming the conviction, or, if no appeal was filed, within ninety days after the individual's delivery to the custody of the Department of Corrections; and, Appellant voluntarily dismissed the appeal of his criminal conviction before a decision on the merits and he was never delivered to the custody of the Department of Corrections as a result of this conviction.

The issue here is whether the motion court's dismissal of Appellant's Rule 29.15 motion was clearly erroneous. Appellant, who was never delivered to the custody of the Department of Corrections, forfeited his right to proceed under Rule 29.15 when he voluntarily dismissed the appeal of his criminal conviction before it was considered on the merits. Because no mandate was issued affirming Appellant's conviction, and because Appellant, who was sentenced only to a fine and probation, was never delivered to the custody of the Department of Corrections, he was precluded from filing a Rule 29.15 motion under the plain language of that rule.

A. Standard of Review

Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law issued by the hearing court are "clearly erroneous." *Morrow v. State*, 21 S.W.3d 819, 822 (Mo.

banc 2000), *cert. denied*, 531 U.S. 1171 (2001); Rule 29.15. Findings and conclusions are “clearly erroneous” only if after a review of the entire record the court is left with the definite and firm impression that a mistake has been made. *Id.*; *State v. Taylor*, 929 S.W.2d 209, 224 (Mo. banc 1996), *cert denied*, 519 U.S. 1152 (1997).

This case turns on the language of Rule 29.15. “In interpreting Rule 29.15, ‘the same standards as those used in the construction of statutes’ is used. The appellate court’s role is ‘to ascertain the intent of the framers of the rule from the language used, and to give effect to that intent. To do so, the words of the rule are considered in their plain and ordinary meaning.’” *Bittick v. State*, 105 S.W.2d 498, 503-04 (Mo. App. W.D. 2003) (citation omitted).

B. The Plain Language of Rule 29.15 Precluded Appellant’s Motion

Rule 29.15, as it read when Appellant was sentenced, provided a different deadline for the filing of the motion depending on whether the underlying conviction was appealed:

If an appeal of the judgment or sentence sought to be vacated, set aside, or corrected was taken, the motion shall be filed within ninety days after the date the mandate of the appellate court is issued affirming such judgment and sentence. If no appeal of such judgment or sentence was taken, the motion shall be filed within ninety days of the date the person is delivered to the custody of the department of corrections.

Rule 29.15(b).² “Failure to file a motion within the time provided by . . . Rule 29.15 shall constitute a complete waiver of any right to proceed under . . . Rule 29.15 and a complete waiver of any claim that could be raised in a motion filed” under this rule.
Id.

Because Appellant appealed his conviction, his Rule 29.15 motion was required to be filed within ninety days after the date the court of appeals issued its mandate affirming Appellant’s judgment and sentence. But Appellant elected not to proceed with his appeal and instead voluntarily dismissed it. By doing so, Appellant prevented the court of appeals from deciding his appeal on the merits and issuing a decision either affirming or reversing his conviction and sentence.

²The complete text of Rule 29.15 as it existed when Appellant was sentenced is contained in the Appendix, pp. A1-A3. Effective January 1, 2003, the filing deadline was extended to 180 days from the date the person was delivered to the custody of the Department of Corrections if no appeal was filed.

Appellant argues that his motion was timely filed because he filed it within ninety days after the court of appeals issued its mandate in his direct appeal. Although this is facially correct, it begs the question presented in this case. To be timely, the motion was required to be filed within ninety days after the appellate court issued its mandate “affirming” the judgment and sentence. The mandate issued by the appellate court in this case did not “affirm” Appellant’s judgment and sentence, but simply ordered that his appeal be dismissed in accordance with the motion for voluntary dismissal he filed.³

Appellant’s reliance on *State v. Kelly*, 966 S.W.2d 382 (Mo. App. E.D. 1998), in support of his argument is misplaced. In *Kelly*, the court held that Rule 29.15 precluded a defendant from filing a motion to recall the mandate on the ground of ineffective assistance of appellate counsel in a case in which the court of appeals had dismissed his direct appeal for failure to file the record on appeal. *Id.* at 383. In dictum, it noted that a Rule 29.15 motion was timely if filed within ninety days after the appellate court issued its mandate. *Id.* at 385. But the language of Rule 29.15 considered in *Kelly* had been amended by the time Appellant was sentenced. Before the amendment, the rule simply provided that if the conviction was appealed, the motion was required to “be filed within ninety days after the date the mandate of the appellate court is issued.” Rule 29.15 (eff. Jan.1, 1996). Thus, the distinction

³Appendix, p. A7.

between simply issuing a mandate and issuing a mandate affirming the judgment and sentence was not at issue in *Kelly*.⁴

⁴The July 1, 2000, amendment to Rule 29.15(b) established the filing deadline at ninety days from issuance of the mandate affirming the conviction and added a new provision concerning cases in which the appellate court remanded the case for entry of a new judgment or sentence. This amendment was apparently intended to avoid the situation described by the court in *Kelly* in which a defendant was forced to file successive Rule 29.15 motions in cases in which a mandate was issued either dismissing the case or remanding it for a new judgment or sentence, and in which the appeal was later reinstated or a subsequent appeal of the new judgment or

sentence was filed, resulting in the issuance of yet another mandate. *See Kelly*, 966

S.W.2d at 385.

A mandate dismissing an appeal, whether voluntary or otherwise, and a mandate affirming the trial court’s judgment and sentence are entirely different. Missouri law recognizes a distinction between an appellate court dismissing a case and affirming a judgment. For example, § 512.160 provides that appellate courts may award damages to a respondent “upon the affirmance of any judgment or order, or upon the dismissal of any case.” Section 512.160.4, RSMo 2000. This distinction has also been recognized by the courts. In *West v. Spencer*, 141 S.W. 586, 238 Mo. 65 (Mo. 1911), the court addressed a motion to dismiss the appeal filed in a case in which it later affirmed the trial court’s judgment. The court acknowledged a distinction between these two remedies by holding that it could not simultaneously dismiss the appeal and affirm the judgment:

Even if that motion [to dismiss the appeal] were found well taken, we cannot very well both dismiss and affirm. That course would be a novel and wild exuberance of judicial power.

141 S.W. at 588. See also *Sechrist v. Hufty Rock Asphalt Co.*, 59 S.W.2d 767, 768 (Spr. 1933) (suggesting that a motion to dismiss, rather than a motion to affirm the judgment, should have been filed when the appellant failed to perfect its appeal).

Because Appellant filed an appeal but later voluntarily dismissed it, he was precluded from filing a Rule 29.15 motion because the court of appeals issued no mandate affirming his judgment and sentence. Appellant’s Rule 29.15 motion, though filed sixty-four days after the court of appeals issued its mandate dismissing

Appellant's appeal, was, therefore, properly dismissed. Appellant forfeited his opportunity to proceed under Rule 29.15 by voluntarily dismissing his direct appeal.

The motion court, as well as the court of appeals, held that Appellant was precluded from filing a Rule 29.15 motion because he was never "incarcerated." Appellant, both in his brief and pro se Rule 29.15 motion, concedes that he was never incarcerated for this conviction and that the ninety-day deadline for individuals who have been delivered to the custody of the department of corrections does not apply to him because he appealed his conviction. Appellant's Brief, p. 11; Appendix, p. A8.⁵ This position is supported by the express language of Rule 29.15(b), which provides that this ninety-day deadline applies only to individuals who did not appeal their convictions. *See also Jackson v. State*, 876 S.W.2d 1, 1 (Mo. App. W.D. 1994).

Moreover, this Court, in construing the phrase "delivered to the custody of the Department of Corrections" contained in Rule 24.035, has held that it requires actual physical delivery and does not apply to an individual who has merely been placed on probation. *See Thomas v. State*, 808 S.W.2d 364, 365 (Mo. banc 1991); *see also Searcy*

⁵Curiously, Appellant's pro se motion also states that he never appealed his conviction (Appendix, p. A9).

v. State, 103 S.W.3d 201 (Mo. App. W.D. 2003). Appellant, however, was precluded from filing a timely Rule 29.15 motion by voluntarily dismissing his direct appeal before the court of appeals had an opportunity to decide the case on the merits and issue a mandate either affirming or reversing his conviction. Finally, Appellant was precluded from proceeding under the ninety-day delivery-to-custody deadline because he was never physically delivered to the Department of Corrections as a result of his conviction.

Appellant complains that the western district's holding that only incarcerated individuals have standing to file Rule 29.15 motions conflicts with the eastern district's holding in *Geiler v. State*, 866 S.W.2d 863 (Mo. App. E.D. 1994), in which the court stated that the language of Rule 29.15 applies to a person convicted of a felony without regard to the penalty imposed. Although the plain language of the rule supports the court's statement in *Geiler*, the defendant in that case, who was sentenced only to a fine, did not dismiss the direct appeal from his conviction.

Appellant potentially had the opportunity to proceed under Rule 29.15 because he appealed his conviction. But he was precluded from doing so when he voluntarily dismissed his appeal. This was not an issue in *Geiler*, because the defendant did not dismiss his direct appeal. In fact, *Geiler* involves the simultaneous appeal of both the defendant's conviction and the denial of his Rule 29.15 motion. *Id.* at 864. When *Geiler* was decided, the filing deadline under Rule 29.15 was either

thirty days from the date the transcript was filed in the appellate court if a direct appeal was filed, or ninety days from delivery to the custody of the Department of Corrections if no appeal was filed. Rule 29.15(b) (eff. Jan. 1, 1988).⁶ If the defendant in *Geiler*, who was sentenced only to a fine, had dismissed his direct appeal before the transcript was filed, then he, just like Appellant, would have been precluded from proceeding under Rule 29.15.

The western district's statement that only incarcerated individuals may file motions under Rule 29.15 is true insofar as those individuals have either not appealed their convictions or have dismissed their direct appeal before it is decided on the merits. The court of appeals apparently considered Appellant's dismissal of his direct appeal as if he had never filed one at all.

Consequently, Appellant, by his own hand and the plain language of Rule 29.15, was precluded from filing a motion under that rule. His ability to timely file a motion and proceed under that rule was extinguished when he voluntarily

⁶When *Geiler* was decided, Rule 29.15(b) provided, in part: "If an appeal of the judgment sought to be vacated, set aside or corrected was taken, the motion shall be filed within thirty days after the filing of the transcript in the appeal pursuant to Rule 30.04. If no appeal of such judgment was taken, the motion shall be filed within ninety days of the date the person is delivered to the custody of the department of corrections."

dismissed his direct appeal before the court of appeals decided it on the merits. Because he was sentenced only to a fine and a term of probation and was thus never delivered to the custody of the department of corrections, he was precluded from filing a Rule 29.15 motion.

Appellant is not unique in this regard. The deadlines for filing a post-conviction motion under Rule 24.035, relating to felony guilty pleas, are identical to those contained in Rule 29.15. Rule 24.035(b). In several cases, the courts have held that individuals who have pleaded guilty to felonies, but who were never delivered to the custody of the Department of Corrections, do not have standing to file Rule 24.035 motions. See *McGowan v. State*, 949 S.W.2d 657 (Mo. App. S.D. 1997) (individual sentenced to county jail, but later delivered to the Department of Corrections to serve a concurrent sentence on an unrelated conviction, was precluded from filing a Rule 24.035 motion); *Barna v. State*, 918 S.W.2d 417 (Mo. App. E.D. 1996) (individual who was immediately sent to Florida to serve sentences imposed by that state following a guilty plea in a Missouri court was precluded from filing a Rule 24.035 motion because he was never delivered to the Missouri Department of Corrections); *Johnston v. State*, 833 S.W.2d 451 (Mo. App. S.D. 1992) (individual was precluded from filing a Rule 24.035 motion when he was immediately delivered to Oklahoma authorities to serve an unrelated sentence and had never been delivered to the custody of the Missouri Department of Corrections).

CONCLUSION

The trial court did not clearly err in dismissing Appellant's Rule 29.15 motion, and its judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned assistant attorney general hereby certifies that:

- (1) That the attached brief includes the information required under Rule 55.03 and complies with the limitations contained in Rule 84.06(b) in that it contains 2995 words, excluding the cover, the signature block, this certification, and any appendix, as determined by WordPerfect 9 software; and
- (2) That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and
- (3) That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed on August 8, 2003, to:

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