No. SC90918

In the

Supreme Court of Missouri

ANTHONY C. MOORE,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the City of St. Louis Circuit Court

Twenty-Second Judicial Circuit

The Honorable Bryan L. Hettenbach, Judge of Division 11

APPELLANT'S SUBSTITUTE REPLY BRIEF

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JURISDICTIONAL STATEMENT

Appellant Anthony C. Moore adopts the jurisdictional statement set out in Appellant's Substitute Brief, Statement and Argument, filed on July 19, 2010, in this Court in SC90918.

STATEMENT OF FACTS

Appellant Anthony C. Moore adopts the statement of facts set out in Appellant's Substitute Brief, Statement and Argument, filed on July 19, 2010, in this Court in SC90918. Appellant Anthony C. Moore will cite to the record on appeal as follows: Legal File, "(L.F)"; Trial Transcript, "(Tr.)"; Supplemental Transcript, "(Supp. Tr.)"; Sentencing Transcript, "(S. Tr.)"; Post-conviction Legal File, "(PCR L.F.)"; Appellant's Brief, "(App. Br.)"; and, Respondent's Brief, "(Resp. Br.)."

REPLY POINT

Mr. Moore received untimely notice of the issuance of the appellate court's mandate due to counsel's overt, intentional, willful, or negligent acts and these acts actively interfered with the timely filing of Mr. Moore's *pro se* Rule 29.15 motion. Because appellate counsel's acts constituted the type of active interference recognized in *McFadden v. State*, 256 S.W.3d 103 (Mo. banc 2008) as an exception to the timeliness requirements of Rule 29.15, this Court should reverse the motion court's judgment, and remand to the motion court for consideration of Mr. Moore's Rule 29.15 motion on the merits.

McFadden v. State, 256 S.W.3d 103 (Mo. banc 2008);

In re Coleman, 295 S.W.3d 857 (Mo. banc 2009);

In re Haggerty, 661 S.W.2d 8 (Mo. banc 1983);

Frye v. State, 311 S.W.3d 350 (Mo. App. W.D. 2010);

Rules 4, 29.07, & 29.15.

REPLY ARGUMENT

Mr. Moore received untimely notice of the issuance of the appellate court's mandate due to counsel's overt, intentional, willful, or negligent acts and these acts actively interfered with the timely filing of Mr. Moore's *pro se* Rule 29.15 motion. Because appellate counsel's acts constituted the type of active interference recognized in *McFadden v. State*, 256 S.W.3d 103 (Mo. banc 2008) as an exception to the timeliness requirements of Rule 29.15, this Court should reverse the motion court's judgment, and remand to the motion court for consideration of Mr. Moore's Rule 29.15 motion on the merits.

Respondent incorrectly states in its brief that "[Mr. Moore] has alleged . . . untimely advice" excuses his untimely *pro se* Rule 29.15 filing (Resp. Br. 16). To the contrary, Mr. Moore alleges that untimely notice excused his untimely *pro se* filing under Rule 29.15 (App. Br. 26). It is this allegation that distinguishes Mr. Moore's case from *Bullard v. State*, 853 S.W.2d 921, 923 (Mo. banc 1993) and *Clark v. State*, 261 S.W.3d 565, 568 (Mo. App. E.D. 2008), cases which Respondent cites for the proposition that Mr. Moore's untimely *pro se* filing is inexcusable.

In *Bullard*, the movant unsuccessfully sought to excuse his failure to timely file his *pro se* Rule 29.15 motion on counsel's incorrect advice that he could file his *pro se* Rule 29.15 motion after the appellate court ruled on the direct appeal.

853 S.W.2d at 922. But movant received his sentence before January 1, 1996, and as a consequence, movant's *pro se* Rule 29.15 filing was due within 30 days after the filing of the transcript on appeal under Rule 30.04. Rule 29.15(b) (2003); Rule 29.15(m).

Similarly, in *Clark*, the movant unsuccessfully sought to excuse his failure to timely file his *pro se* Rule 29.15 motion on counsel's incorrect advice that the filing deadline for his motion was tolled while he sought a petition for writ of certiorari to the United States Supreme Court. 261 S.W.3d at 568, 571.

Mr. Moore, however, does not make the same allegations that Clark or Bullard did. Rather, Mr. Moore acknowledges that counsel's advice about the time limitations for filing a *pro se* Rule 29.15 motion was correct. Counsel informed Mr. Moore that his *pro se* Rule 29.15 motion was due within 90 days of the appellate court's mandate (PCR L.F. 37). Consequently, Mr. Moore's case is not one in which counsel failed to accurately inform Mr. Moore about that which Mr. Moore presumably already knew by virtue of the trial court's Rule 29.07(b)(4) examination after sentencing.

Rule 29.07(b)(4) states that where a defendant has a right to proceed under Rule 29.15 or Rule 24.035 "the court at the conclusion of final sentencing shall advise the defendant of such right." Although not required to do so, courts typically advise the defendant about the time limitations under the rule in the

course of advising the defendant of his right to proceed under Rule 29.15 or Rule 24.035. *Reed v. State*, 781 S.W.2d 573, 573 (Mo. App. E.D. 1989) (stating Rule 29.07(b)(4) does not specifically require the trial court to inform the defendant of the 90-day filing deadline under Rule 29.15); *Hawkins v. State*, 807 S.W.2d 214, 215 (Mo. App. W.D. 1991) (same). The trial court did so in this case (L.F. 88-89).

Mr. Moore does not allege that the court's or counsel's advice about the filing deadline under Rule 29.15 was incorrect. Mr. Moore alleges that counsel, knowing that "[he] wanted to be informed when the time was right to file his post-conviction forms if necessary," failed to inform him of the issuance of the mandate in time for him to timely file his *pro se* Rule 29.15 motion (PCR L.F. 22).

In response to Mr. Moore's allegation, Respondent states:

> None of [counsel's] actions prevented [Mr. Moore] from filing a post-conviction motion before that notice. He could have written to the court or his attorney at any time to inquire about the progress of his case. Instead he simply waited for counsel.

(Resp. Br. 16).

In so stating, Respondent overlooks that Rule 4-1.4(a) of the Rules of Professional Conduct burdens counsel with the affirmative duty of (1) keeping the defendant reasonably informed about significant developments affecting the

time and substance of representation, and (2) promptly complying with the client's reasonable requests for information. Counsel's failure to comply with this duty is unjustifiable unless the defendant's own conduct made compliance impossible. *Frye v. State*, 311 S.W.3d 350, 356 (Mo. App. W.D. 2010). For example, in *Cherco v. State*, 309 S.W.3d 819, 826 (Mo. App. W.D. 2010), the Western District relied, in part, on the defendant's failure to remain in touch with his attorney in denying the defendant's post-conviction claim that trial counsel was ineffective for failing to call his character witnesses at sentencing.

In contrast, there is nothing in the record to suggest that Mr. Moore did not remain in contact with appellate counsel. Appellate counsel's letter to Mr. Moore, dated March 12, 2009, indicates that Mr. Moore wrote to appellate counsel to inquire about his case, just as Respondent stated he could do (PCR L.F. 13; *see also* Resp. Br. 16). Mr. Moore wrote appellate counsel four days before the January 14, 2009 filing deadline under Rule 29.15 (PCR L.F. 13). The reference line in appellate counsel's March 12, 2009 letter to Mr. Moore stated, "Your January 10, 2009 letter" (PCR L.F. 13).

Notably, counsel's March 21, 2009 letter began with an apology, "Excuse me for taking so long to write you back" (PCR L.F. 13). And, it ended with yet another apology, "I am sorry that I caused you to miss the deadline to timely file for post-conviction relief" (PCR L.F. 13).

Despite that appellate counsel blamed herself, and not Mr. Moore, for Mr. Moore missing the Rule 29.15 filing deadline, Respondent argues that appellate counsel's acts did not excuse Mr. Moore's untimely *pro se* Rule 29.15 filing (Resp. Br. 16-21). Respondent argues that Mr. Moore could have filed his *pro se* Rule 29.15 motion prematurely, or before the Rule 29.15 filing deadline.

Mr. Moore acknowledges that the post-conviction movant may file his *pro se* Rule 29.15 motion without penalty before the conclusion of his direct appeal and prior to the Rule 29.15 filing deadline. *Nolan v. State*, 959 S.W.2d 939, 940 (Mo. App. E.D. 1998); *Bird v. State*, 999 S.W.2d 731, 731 (Mo. App. E.D. 1999); *Woods v. State*, 53 S.W.3d 587, 589 (Mo. App. E.D. 2001).

Yet, before the conclusion of his direct appeal, it is impossible for the Rule 29.15 movant to know for certain what, if any, claims of ineffective assistance of appellate counsel he has. The movant's Rule 29.15 motion is the proper vehicle in which to raise ineffective assistance of appellate counsel and the Rule 29.15 movant must include any claims of ineffective assistance of appellate counsel in his Rule 29.15 motion. *State v. Bohlen*, 284 S.W.3d 714, 715 n. 1 (Mo. App. E.D. 2009); *Becker v. State*, 77 S.W.3d 27, 28 (Mo. App. E.D. 2002).

The very existence of such claims of ineffective assistance depends, in large part, upon the final outcome of the movant's direct appeal. In the rare circumstance that the outcome of the appeal is discharge of the defendant from

any conviction and sentence, movant would be loath to make any claim of ineffective assistance of trial or appellate counsel. But in the event of a partial or complete affirmance, claims of ineffective assistance of appellate counsel would become apparent after comparison of the claims of trial court error unsuccessfully raised on appeal with those not raised, or after review of an appellate court order, opinion, or memorandum, faulting appellate counsel for the court's review for plain, rather than preserved, error, for example.

The Rule 29.15 movant whose conviction the appellate court later affirmed may have unwittingly disadvantaged himself by filing prematurely. He would have failed to include claims of ineffective assistance of appellate counsel that he would have included if only he had had the benefit of hindsight. His failure to include in his Rule 29.15 motion the claims that became apparent to him after the appellate court's affirmance may result in his complete waiver of those claims. *See* Rule 29.15(d).

Under the circumstances, it's not difficult to understand why an attorney would advise a client to wait until after the conclusion of the direct appeal to file a *pro se* Rule 29.15 motion. Nor is it difficult to comprehend why a movant would wait until after the issuance of the appellate court's mandate to file his *pro se* Rule 29.15 motion. For a future Rule 29.15 movant who is taking an appeal, waiting until the conclusion of his direct appeal is more advantageous, assuming

that he later files his *pro se* Rule 29.15 motion on time. Mr. Moore waited for appellate counsel to tell him "when the time was right to file his post-conviction forms," and appellate counsel did not tell him in time (PCR L.F. 22).

Respondent argues that appellate counsel's failure to inform Mr. Moore of the appellate court's issuance of its mandate within time for Mr. Moore to timely file his *pro se* Rule 29.15 "cannot be the basis for any claim to relief by [Mr. Moore]" because her obligations in the case ended with the completion of the direct appeal (Resp. Br. 20). Respondent overlooks that the Rules of Professional Conduct required that upon completion of Mr. Moore's direct appeal, appellate counsel act in a manner reasonably practicable to protect Mr. Moore's interests. Rule 4.-1.16(d) provides that "[u]pon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client[.]" *See In re Coleman*, 295 S.W.3d 857, 867 (Mo. banc 2009).

Moreover, the comment to Missouri's rule governing diligence of counsel states:

> [4] Unless the relationship is terminated as provided in Rule 4-1.16, a lawyer should carry through to conclusion all matters undertaken for a client . . . *For example, if a lawyer has handled a judicial or administrative proceeding that*

> *produced a result adverse to the client, the lawyer should advise the client about the possibility of appeal before relinquishing responsibility for the matter* . . .

Rule 4-1.3, Comment 4 (emphasis added).

These rules operated to place an affirmative duty upon appellate counsel to provide Mr. Moore with timely notice of the issuance of the appellate counsel's mandate and timely advice about filing a Rule 29.15 motion. Mr. Moore did not receive timely notice, and appellate counsel's failure to timely inform Mr. Moore of the issuance of the appellate court's mandate resulted in his untimely *pro se* filing under Rule 29.15.

Nonetheless, Respondent argues that appellate counsel's failure does not constitute the type of "active interference," recognized in *McFadden v. State*, 256 S.W.3d 103, 108 (Mo. banc 2008) as an exception to the timeliness requirements of Rule 29.15. In *McFadden*, counsel told McFadden to send his *pro se* Rule 29.15 motion to her and she would file it with the motion court for him. *McFadden*, 256 S.W.3d at 105. Despite that McFadden did as he was told and sent his *pro se* Rule 29.15 motion to counsel almost two weeks prior to the filing deadline, counsel filed McFadden's *pro se* Rule 29.15 motion one day late. *Id*. at 105.

This Court excused McFadden's untimely filing because but for the "active interference" of counsel, McFadden would have timely filed his *pro se* Rule 29.15

motion. *Id*. at 109. Counsel overtly acted and prevented the timely filing of McFadden's *pro se* Rule 29.15 motion; consequently, McFadden was "free of responsibility for the failure to comply with the requirements of the rule," and this Court authorized the motion court to hear and determine the merits of McFadden's motion under Rule 29.15. *Id*.

Mr. Moore is entitled to no less because but for counsel's active interference, Mr. Moore would have timely filed his *pro se* Rule 29.15 motion. Mr. Moore told appellate counsel of his intent to seek relief under Rule 29.15, and told her to tell him "when the time was right to file" (PCR L.F. 22).

Mr. Moore relied on appellate counsel to timely inform him when the appellate court issued its mandate, as he was entitled to do. Clients are entitled to rely on their attorney's honesty and devotion to their (the clients') interests until presented with a reason not to do so. *In re Haggerty*, 661 S.W.2d 8, 10 (Mo. banc 1983); *Willis v. Maverick*, 760 S.W.2d 642, 645-646 (Tex. 1988). Mr. Moore's appellate counsel actively induced this reliance by engaging in a practice of informing Mr. Moore by letter about all of the other developments on appeal, including the appellate court's issuance of its affirmance and her filing of a motion for rehearing (*see* PCR L.F. 37). Upon issuance of the appellate court's mandate, Mr. Moore fully expected appellate counsel to timely inform him in the

same manner as before and appellate counsel did not do so (*see* PCR L.F. 10, 13, 22).

Appellate counsel's actions constituted "active interference." The "active interference" to which this Court referred in *McFadden* exists when an intentional, willful, or negligent affirmative act of counsel prevents the timely filing of a movant's motion under post-conviction rules. *See McFadden*, 256 S.W.3d at 109; *see also State ex rel. Nixon v. Sheffield*, 272 S.W.3d 277, 283 n. 11 (Mo. App. S.D. 2008).

Here, counsel's overt intentional, willful, or negligent acts prevented Mr. Moore from timely filing his *pro se* Rule 29.15 motion. After inducing Mr. Moore's reliance upon her for communication about his case, appellate counsel failed to keep herself apprised of the developments in Mr. Moore's case. She negligently miscalculated the due date for Mr. Moore's rehearing motion, and untimely filed Mr. Moore's rehearing motion on September 11, 2008 (PCR L.F. 11, 39). Once the appellate court struck Mr. Moore's rehearing motion for its untimeliness, counsel filed on October 16, 2008 a motion for reconsideration of the court's order striking Mr. Moore's rehearing motion – a motion that counsel knew, or reasonably should have known, would prove futile (PCR L.F. 10-12, 39).

Though appellate counsel received notice the day after filing the motion for reconsideration, October 17, 2008, that the appellate court had issued its

mandate, appellate counsel unreasonably failed to inform Mr. Moore of its issuance (PCR L.F. 10, 39-40).[1] Instead, it appears that appellate counsel unreasonably engaged in an exercise in wishful thinking, and willfully waited months for a ruling on the motion for reconsideration (PCR L.F. 10, 39-40).

The appellate court denied the motion for reconsideration on December 22, 2008, 23 days before the expiration of the Rule 29.15 filing deadline of January 14, 2009, but appellate counsel did not inform Mr. Moore of either the issuance of the mandate or the denial of the motion for reconsideration (PCR L.F. 10, 40). Appellate counsel claimed to have misread the December 22, 2008 ruling (PCR L.F. 10, 40). Appellate counsel stated she did not comprehend that the appellate court had denied the motion for reconsideration until February 17,

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[1] In appellate counsel's affidavit, she stated that she did not know the appellate court had issued its mandate on the same date as the filing of the rehearing motion, October 16, 2008, but that she, nonetheless, received notice of the issuance of the appellate court's mandate the next day, October 17, 2008 (PCR L.F. 9-10, 39-40). The record contains no explanation for appellate counsel's failure to inform Mr. Moore of the issuance of the appellate court's mandate after receiving notice of it on October 17, 2008 (PCR L.F. 9-10, 39-40).

2009, when informed of the denial by a court clerk over the telephone (PCR L.F. 10, 40).

Almost a month later, by letter dated March 12, 2009, she first notified Mr. Moore of the denial of the motion for reconsideration and the October 16, 2008 issuance of the appellate court's mandate (PCR L.F. 13-14). Mr. Moore filed his *pro se* Rule 29.15 motion on May 21, 2009, within 90 days of the date of appellate counsel's letter to him about the mandate (PCR L.F. 9-10; PCR L.F. 3-25). May 21, 2009 was 70 days from the date of appellate counsel's March 12, 2009 letter, and four months and seven days from the date on which the time limitations under Rule 29.15 expired.

Under the circumstances, *McFadden* dictates that this Court excuse Mr. Moore's untimely *pro se* Rule 29.15 filing. Appellate counsel induced Mr. Moore's reliance upon her for information about significant developments affecting the time and substance of his representation. Appellate counsel then delayed notifying Mr. Moore of the issuance of the appellate court's mandate and delayed advising him about filing under Rule 29.15 until after her receipt of a ruling on a motion for reconsideration of the court's order striking Mr. Moore's rehearing motion. Appellate counsel's intervening negligent acts of misreading an appellate court order and failing to accurately monitor the court's docket further

delayed notification to Mr. Moore of the issuance of the appellate court's mandate until after the expiration of the time limitations under Rule 29.15.

Because appellate counsel's acts constituted the type of active interference recognized in *McFadden* as an exception to the timeliness requirements of Rule 29.15, this Court should reverse the motion court's judgment, and remand to the motion court for consideration of Mr. Moore's Rule 29.15 motion on the merits. The motion court's error in dismissing Mr. Moore's Rule 29.15 motion as untimely deprived Mr. Moore of his fundamental rights.

CONCLUSION

WHEREFORE, based on the arguments in Appellant's Substitute Statement, Brief, and Argument, filed on July 19, 2010, and on the arguments in this Substitute Reply Brief, Appellant Anthony C. Moore requests this Court to reverse and remand for reinstatement of his Rule 29.15 cause.

Respectfully submitted,

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ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Rule 84.06, I hereby certify that on Wednesday, August 25, 2010, a true and correct copy of the foregoing reply brief and a floppy disk containing the foregoing brief were mailed postage prepaid to Assistant Attorney General Jamie Pamela Rasmussen, Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102. In addition, pursuant to Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the page limitations of Rule 84.06(b). This brief was prepared with Microsoft Word for Windows, and uses Californian FB 14 point font. The word-processing software identified that this brief contains _____ words. Finally, I hereby certify that the enclosed diskette has been scanned for viruses with McAfee VirusScan Enterprise 7.1.0 software and found virus-free.

_____

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