

No. SC90918

In the
Missouri Supreme Court

ANTHONY MOORE,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from St. Louis City Circuit Court
Twenty-Second Judicial Circuit
The Honorable Bryan L. Hettenbach, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from the denial of a Rule 29.15 post-conviction motion in the Circuit Court of the City of St. Louis. The post-conviction motion pertained to Appellant's (Defendant's) convictions of two counts of first-degree murder, § 565.020. Defendant was sentenced to two terms of life imprisonment without the possibility of probation or parole. The Eastern District Court of Appeals affirmed the denial of Defendant's motion, and this Court ordered the appeal transferred to it. Therefore, jurisdiction lies in this Court. Mo. Const. art. V, § 10; Supreme Court Rule 83.04.

STATEMENT OF FACTS

Defendant, Anthony Moore, was convicted of two counts of first-degree murder for suffocating his two young daughters. *State v. Moore*, 264 S.W.3d 657, 658-659 (Mo. App. E.D. 2008). Defendant was sentenced to two terms of life imprisonment without the possibility of parole (L.F. 88-92). At sentencing, the judge informed Defendant of his right to pursue post-conviction relief under Rule 29.15 (L.F. 88-89). Defendant's convictions were affirmed on appeal, *Moore*, 264 S.W.3d at 664, and the Eastern District of the Missouri Court of Appeals issued its mandate on October 16, 2008 (PCR L.F. 9).

Almost five months later, on March 12, 2009, appellate counsel mailed a letter to Defendant informing him that she had failed to tell him when the mandate in his direct appeal had been issued and that the time for filing a post-conviction motion had passed (PCR L.F. 13-14). In that letter, she further recommended "that – if you want to file for post-conviction relief – you do so as soon as possible." (PCR L.F. 13). She also advised him of the possibility of filing a petition for a writ of habeas corpus (PCR L.F. 14).

On May 22, 2009, Defendant filed a pro se motion for post-conviction relief pursuant to Rule 29.15 (PCR L.F. 1). In that motion, Defendant claimed, among other things, that he had been abandoned when direct-appeal counsel failed to inform him that the mandate in his direct appeal had issued (PCR L.F. 4).

The motion court denied Defendant's motion because it was filed out of time (PCR L.F. 26). A public defender filed a motion to reconsider which discussed case law regarding abandonment (PCR L.F. 27-36). The motion court reaffirmed its order on July 8, 2009, and specifically found that Defendant had not alleged facts constituting abandonment (PCR L.F. 41-43).

Defendant appealed that ruling, and the Eastern District Court of Appeals affirmed. *Moore v. State*, ED93330, slip. op. at 1 (April 6, 2010). The Eastern District held that Defendant was not abandoned and that the motion court's use of the word jurisdiction in the order did not render the result incorrect. *Id.* at 4-6. After Defendant's motion for rehearing was denied, this Court granted Defendant's application for transfer.

ARGUMENT

The motion court did not clearly err in dismissing Defendant’s Rule 29.15 motion because the court had no authority to consider it in that it was filed more than ninety days after the Court of Appeals issued its mandate in Defendant’s direct appeal.

Defendant argues that the motion court’s judgment was wrong for two reasons. First, he claims that the time limits of Rule 29.15 are no longer a bar to relief in light of this Court’s holding in *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249 (Mo. banc 2009) (App. Sub. Br. 16-19). Second, he claims that the failure of his direct-appeal counsel to inform him when the mandate in his direct appeal issued entitles him to relief under the concept of abandonment (App. Br. 21-26). The first argument misconstrues the breadth of the holding in *Webb* and the second misapplies this Court’s precedents involving the concept of abandonment.

A. Standard of Review

Appellate review of the denial of a motion for post-conviction relief is “limited to a determination of whether the findings and conclusions of the trial court are clearly erroneous.” Supreme Court Rule 29.15(k). Clear error occurs where a review of the entire record leaves the appellate court “with the definite and firm impression that a mistake has been made.” *Gehrke v. State*, 280 S.W.3d 54, 56-57 (Mo. banc 2009).

B. Defendant's pro se motion was not timely filed.

Under Rule 29.15 (b), a post-conviction motion that relates to a criminal case where there was a direct appeal must be filed within ninety days of the issuance of the mandate of the court of appeals. “The time limitations of Rules 24.035 and 29.15 are valid and mandatory.” *Day v. State*, 770 S.W.2d 692, 695 (Mo. banc 1989). *See also State v. Simmons*, 955 S.W.2d 752, 771 (Mo. banc 1997); *State v. Storey*, 901 S.W.2d 886, 900 (Mo. banc 1995). These limitations “serve the legitimate end of avoiding delay in the processing of prisoner claims and prevent[ing] the litigation of stale claims.” *Day*, 770 S.W.2d at 695. *See also State ex rel. Nixon v. Daugherty*, 186 S.W.3d 253, 254 (Mo. banc 2006). “Failure to file a motion within the time provided by this Rule 29.15 shall constitute a complete waiver of any right to proceed under this Rule 29.15.” Supreme Court Rule 29.15 (b).

These time limits and restrictions were adopted to address administrative problems faced by the courts under the former post-conviction rules. *Day*, 770 S.W.2d at 695. In *Day*, this Court explained that history:

Missouri was one of the first states to adopt a special procedure for post-conviction review. Former Rule 27.16, patterned after federal law, was adopted by this Court in 1952 and provided a means for state prisoners to challenge the validity of their conviction or sentence. Rule

27.26 was adopted even though there is no federal constitutional requirement that a state provide a means of post-conviction review.

Under Rule 27.26, a motion to vacate, set aside, or correct a judgment or sentence could be filed at any time. Over the years the number of Rule 27.26 motions filed skyrocketed and significant delays developed in processing prisoner's claims. Many of these claims were filed years after conviction. To avoid these delays and to prevent the litigation of stale claims, this Court, upon the recommendation of a special committee, repealed Rule 27.26 and adopted in its stead Rule 24.035 and 29.15. These rules, effective January 1, 1988, were designed to correct the problems which developed under Rule 27.26.

Id. at 693. The Court went on to hold that the time limits of the new post-conviction rules "are valid and mandatory." *Id.* at 695. It arrived at this conclusion because the states had latitude to adopt reasonable procedures governing post-conviction relief and because both federal and state courts have found time limitations in procedural rules to be valid. *Id.*

In the present case, Defendant was informed of his rights pursuant to Rule 29.15 at sentencing (L.F. 88-89). The mandate in Defendant's direct appeal was issued on October 16, 2008 (PCR L.F. 9). Consequently, Defendant's pro se motion had to be filed no later than January 14, 2009. Defendant's pro se motion was filed on

May 22, 2009 (PCR L.F. 1). Therefore, the motion court was correct to deny it as untimely.

This Court's holding in *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249 (Mo. banc 2009), does not change that conclusion. In *Webb*, the Supreme Court merely simplified the terminology associated with certain prerequisites to bringing suit. In the words of the court, the goal of the opinion was "to bring down to earth and clarify the meaning of the magical word 'jurisdiction.'" *Webb*, 275 S.W.3d at 251. The case involved a statute which required a bond as a prerequisite to filing a particular kind of suit. *Id.* at 252. The court held that such a prerequisite was not jurisdictional, but should be construed "as merely setting statutory limits on remedies or elements of claims for relief that the courts may grant." *Id.* at 255. The court then remanded for a hearing to determine whether the factual prerequisite had been met. *Id.* at 258.

What the Court did not hold was that such limitations were invalid. The court simply held that such limitations were not jurisdictional. The effect therefore is merely to mandate that claims involving those limitations be timely raised and to allow courts to review those claims when they are properly raised. *See Schmidt v. State*, 292 S.W.3d 574, 576-577 (Mo. App. S.D. 2009) (holding that a UMDDL claim was not jurisdictional and was therefore waived by a guilty plea); *Hoskins v. State*, --- S.W.3d ---, 2009 WL 4907558, No. WD70413, Slip op. at 2-3 (Mo. App. W.D.

December 22, 2009) (rejecting the movant’s argument that his unpreserved claim of an excessive sentence could be reviewed on appeal because it was jurisdictional). Here, Defendant failed to meet the statutory prerequisite for filing because his motion was untimely.

To apply *Webb* in any broader sense would be impractical and defeat the purposes for which the time deadlines in the post-conviction rules were adopted: the litigation of stale claims and the lack of finality for criminal convictions. This can be seen by the general terms in which Defendant phrases his argument. He states that “Under *Webb*, the motion court had jurisdiction to entertain the merits of [Defendant’s] untimely filed *pro se* Rule 29.15 motion.” (App. Sub. Br. 20). Defendant places no qualification on this conclusion. To construe *Webb* in this manner would eviscerate the time limits of Rule 29.15 (and Rule 24.035) because it would leave courts without a mechanism for enforcing them. To adopt Defendant’s argument would require courts to hear claims at any time, resulting in a frustration of the purpose of the rule of avoiding the litigation of stale claims. *See State ex rel. Nixon v. Daugherty*, 186 S.W.3d 253, 254 (Mo. banc 2006).

Furthermore, eliminating time constraints on the filing of post-conviction motions would be prejudicial to the State’s legitimate interest in the finality of its judgments “[T]he final judgments of courts should be surrounded with all the safeguards and protections available, lest the barriers be opened for promiscuous and

fraudulent invalidation of judgments and thus more harm would be done in violating the finality of judgments than the worth of aiding the occasional person found in the situation of these defendants.” *Johnson v. Wilson Estate, Inc.*, 256 S.W.2d 297, 300 (Mo. App. St.L.D. 1953). The State’s interest in finality stems from the fact that it cannot realistically be expected to defend a stale conviction. The passage of time can cause the loss of witnesses or their recollections of events. “If witnesses die or disappear during a delay, the prejudice is obvious.” *Barker v. Wingo*, 407 U.S. 514, 532 (1972). “There is also prejudice if . . . witnesses are unable to recall accurately events of the distant past.” *Id.* Allowing an open-ended period for filing post-conviction motions would require the litigation of claims under such unfavorable circumstances. This was not the result this Court intended in deciding *Webb*.

The fact that the motion court here mistakenly phrased its result in terms of jurisdiction is not relevant, even though *Webb* disapproved of the use of that word. “An appellate court’s concern on review is whether the trial court reached the proper result, not the route by which it reached that result.” *Fields v. State*, 950 S.W.2d 916, 918 (Mo. App. S.D. 1997). “[A] proper result will be affirmed even if one of the conclusions is in error.” *White v. State*, 939 S.W.2d 887, 893 (Mo. banc 1997). Here, the motion court properly denied Defendant’s motion as untimely, and the court’s phrasing of the order in terms of jurisdiction is not dispositive of the correctness of the result.

Defendant's reliance on *Andrews v. State*, 282 S.W.3d 372, 374 (Mo. App. W.D. 2009), in support of the proposition that he is entitled to relief because this is not a jurisdictional issue, is misplaced (App. Br. 20). *Andrews* did not hold that the movant was entitled to relief because the issue was improperly characterized. The court merely noted that the characterization of the claim as jurisdictional was no reason to refuse to review the claim. 282 S.W.3d at 375 n. 3. The court went on to find that the pro se motion was timely filed. *Id.* at 376. Since, unlike in this case, the pro se motion was timely filed, and the result in that case is irrelevant to the disposition of this appeal.

Missouri courts have repeatedly upheld the time limits of the post-conviction rules against constitutional challenges. *White v. State*, 779 S.W.2d 571 (Mo. banc 1989); *Day v. State*, 770 S.W.2d 692 (Mo. banc 1989). The logic behind those decisions was not invalidated by the change in terminology enunciated in *Webb*. Defendant did not timely file his motion for post-conviction relief and so the motion court was correct to dismiss it.

C. Defendant did not allege facts constituting abandonment.

Neither has Defendant pleaded facts that bring his case within the concept of abandonment. The concept of abandonment is a judicially created exception to the requirement of the timely filing of an amended motion. *Gehrke v. State*, 280 S.W.3d 54, 57 (Mo. banc 2009). Abandonment occurs “when (1) post-conviction counsel

takes no action with respect to filing an amended motion and as such the record shows that the movant is deprived of a meaningful review of his claims; or (2) when post-conviction counsel is aware of the need to file an amended post-conviction relief motion and fails to do so in a timely manner.” *Id.* This exception to the time limits of the post-conviction rules does not extend to the pro se motion because “legal assistance is not required in order to file the original motion.” *Bullard v. State* 853 S.W.2d 921, 923 (Mo. banc 1993).

The disposition of this case is controlled by this Court’s ruling in *Bullard*. In *Bullard*, appellate counsel informed the movant that he could file his motion for post-conviction relief after the direct appeal was complete, even though the rule at the time required the post-conviction motion to be filed earlier. 853 S.W.2d at 922. Stated more broadly, mere advice about when to file the pro se motion, even if that advice is erroneous, is not abandonment. *Id.*

The Missouri Court of Appeals has come to the same conclusion in similar circumstances. In *Clark v. State*, 261 S.W.3d 565, 568 (Mo. App. E.D. 2008), the movant’s attorney informed him that the filing deadline for his post-conviction motion was tolled while he sought a petition for writ of certiorari in the United States Supreme Court. 261 S.W.3d at 567. The Eastern District held that the erroneous advice did not bring the case within the abandonment exception. *Id.* at 570-571.

Here, Defendant has alleged, at most, untimely advice. Defendant alleged that his attorney did not inform him of the issuance of the mandate in his direct appeal (PCR L.F. 4). None of her actions prevented him 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. This delay, even if induced by the advice of counsel, does not constitute abandonment. *Bullard*, 853 S.W.2d at 923; *Clark*, 261 S.W.3d at 570-571.

In rare circumstances, the courts have held that the untimely filing of a pro se motion does not preclude review where a post-conviction movant completes a pro se motion which is then not timely filed due to the active interference of some third party. *See McFadden v. State*, 256 S.W.3d 103, 108 (Mo. banc 2008); *Nicholson v. State*, 151 S.W.3d 369, 370 (Mo. banc 2004); *Howard v. State*, 289 S.W.3d 651, 653 (Mo. App. E.D. 2009); *Spells v. State*, 213 S.W.3d 700, 701 (Mo. App. W.D. 2007). However, those cases are different from the present case in one important respect. In each of those cases, the movant's motion was completed and delivered to a third person who undertook to deliver that motion to the court. In *McFadden*, the movant gave the pro se motion to counsel *within the time limits for filing*. 256 S.W.3d at 106. In *Nicholson*, the movant filed the pro se motion in the wrong county *within the time limits for filing*. 151 S.W.3d at 370. In *Spells*, the movant used a prior address for the court, but the motion was originally mailed *within the time limits for filing*. 213

S.W.3d at 702. In *Howard*, the movant delivered the motion to the prison mailroom with appropriate postage *within the time limits for filing*. 289 S.W.3d at 653-654.

These cases do not stand for the generic principle that an untimely filing may be excused any time the post-conviction movant can demonstrate good cause. Rather, they stand for the more narrow principle that a movant is entitled to relief under the concept of abandonment when he demonstrates “active interference” of a third party which prevented his timely filing. *McFadden*, 256 S.W.3d at 109. In the present case, Defendant alleged no such active interference (PCR L.F. 4). Consequently, the facts alleged did not excuse his untimely filing.

This conclusion comports with the purpose the abandonment exception serves within the structure of the post-conviction scheme. Under the post-conviction scheme in this state, the prisoner is responsible for the filing of the original motion. Supreme Court Rule 29.15(a). Only after the motion has been filed and the court has determined that the movant is indigent is counsel appointed. Supreme Court Rule 29.15(e). Once counsel has been appointed, counsel has certain duties. Supreme Court Rule 29.15(g). This scheme leaves no room for failures of counsel prior to the filing of the original motion because counsel is not given duties until after that original motion has been filed. The actions of direct-appeal counsel are not contemplated in this scheme. Nothing in the rules requires direct-appeal counsel, or anyone else, to

inform defendants of the occurrence of events that may trigger filing deadlines for post-conviction actions.

The concept of abandonment was created to assure that appointed counsel complied with the duties imposed by the post-conviction rules. *State v. Gilpin*, 954 S.W.2d 570, 578-579 (Mo. App. W.D. 1997) (citing *Luleff v. State*, 807 S.W.2d 495, 498 (Mo. banc 1991), and *Sanders v. State*, 807 S.W.2d 493, 495 (Mo. banc 1991)). These duties include reviewing the file to determine that all claims have been raised, and, if necessary, timely filing an amended motion. *Id.* However, as the concept of abandonment was merely meant to assure that counsel complied with his duties, this Court noted that “relief should be ordered only when a movant is free of responsibility for the failure to comply with the requirements of the rule.” *Sanders v. State*, 807 S.W.2d 493, 495 (Mo. banc 1991).

These two principles together—the provision for an original pro se filing and the provision that abandonment only applies when the movant is free from any fault—when placed together demonstrate the correctness of the court’s holding in *Bullard*. Erroneous advice cannot be abandonment because by relying on that advice, the movant became complicit in the untimeliness of the pro se motion. This is because, at any time, the movant could have made inquiries into the status of his case and filed a pro se Rule 29.15 motion. Even if Defendant’s motion had been premature, this would have notified the parties of Defendant’s intent to seek relief and appropriate

action could have been taken. *See, e.g., Woods v. State*, 53 S.W.3d 587, 588 (Mo. App. E.D. 2001) (“Premature filing of a motion for post-conviction relief is not, by itself, a ground for dismissal.”); *Nolan v. State*, 959 S.W.2d 939, 939-940 (Mo. App. E.D. 1998) (reversing and remanding for further action where the pro se motion had been filed while the direct appeal was pending); *Roth v. State*, 921 S.W.2d 680, 681-682 (Mo. App. W.D. 1996) (holding that prematurely filed Rule 29.15 motion should be dismissed without prejudice which would allow for refiling at an appropriate time).

Here, Defendant was at least partially responsible for the untimely filing of the pro se motion. At sentencing, Defendant was informed of his rights pursuant to Rule 29.15 (L.F. 88-89). Defendant did not complete a pro se motion or take steps to have it filed until four months after the filing deadline and over two months after his direct-appeal counsel notified him of the problem (PCR L.F. 1, 13-14). Defendant cannot excuse his lack of diligence by pointing to the alleged negligence of an attorney whose representation was neither contemplated nor needed under the rules.

This Court’s ruling in *McFadden v. State*, 256 S.W.3d 103, 107-108 (Mo. banc 2008), did not change the correctness of that result. In *McFadden*, the attorney contacted the movant and undertook to file the pro se motion for the movant. *Id.* The court held that under those limited circumstances, the concept of abandonment could

apply to the filing of the pro se motion because of the attorney's active interference.

Id.

Here, however, there was no such undertaking. Counsel specifically told Defendant he was responsible for filing the pro se motion (PCR L.F. 13-14). She spoke in conditional terms indicating that she had not discussed the issue with Defendant and so did not know whether he was going to pursue post-conviction relief (PCR L.F. 13-14). Her obligations in the case had ended with the completion of the direct appeal. *See In re Disney*, 922 S.W.2d 12, 14 (Mo. banc 1996) (holding that the attorney client relationship ends when a matter is completed). Moreover, no obligation under the post-conviction rules had yet arisen. Supreme Court Rule 29.15(e). Her actions or failures thus cannot be the basis for any claim to relief by Defendant. The motion court did not clearly err in determining that Defendant had not alleged facts justifying relief under the concept of abandonment.

D. Conclusion

The holding in *Webb* did not eliminate the time limits for the filing of post-conviction motions. Moreover, Defendant failed to allege facts constituting abandonment as there is no suggestion that counsel actively interfered with Defendant's timely filing of his motion. Defendant's pro se motion was not timely filed and the motion court was correct to deny it. Defendant's sole point on appeal should be denied.

CONCLUSION

The motion court did not clearly err. The denial of Defendant's Rule 29.15 motion as untimely should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 4,160 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2003 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 this 9th day of August, 2010, to:

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APPENDIX

Order and JudgmentA1

OrderA2