

No. SC87885

IN THE SUPREME COURT
OF MISSOURI

MARY H. STEVENS,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the Circuit Court of St. Francois County, Missouri
The Twenty-Fourth Judicial Circuit
The Honorable Sandra Martinez, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Appellant appeals from a St. Francois County Circuit Court judgment overruling her Rule 24.035 motion for post-conviction relief. Appellant pleaded guilty and was convicted of possession of a controlled substance, § 195.202, and second-degree robbery, § 569.030.¹ Following the issuance of a per curiam order and memorandum opinion by the Missouri Court of Appeals, Eastern District, affirming Appellant's conviction, this Court ordered this appeal transferred to it. Therefore, jurisdiction lies in this Court. Mo. Const. art. V, § 10; Rule 83.04.

¹ All statutory citations are to RSMo 2000 unless otherwise noted.

STATEMENT OF FACTS

Appellant, Mary Stevens, was charged with possession of a controlled substance, § 195.202 and second-degree robbery, § 569.030.² (Pr. App. L.F. 24, 62).³

On July 9, 2003, Appellant appeared before the Honorable Sandra Martinez and entered pleas of guilty in both of the cases against her. (G.P. Tr. 2-4). Appellant agreed that she understood

² This appeal arises from Appellant's convictions in two separate cases out of St. Francois County. In case no. 03CR612251-01, Appellant was charged with possession of a controlled substance. In case no. 03CR612252-01, Appellant was charged with second-degree robbery.

³ Citations to the record will include references to the following: Appellant's brief in the present case, (App. Br.); the legal file in the present case, (L.F.); the supplemental legal file in the present case, (Supp. L.F.); the transcript of the guilty plea hearing, (G.P. Tr.); the transcript of the sentencing hearing, (Sent. Tr.); the legal file from Appellant's prior appeal, ED83495, (Pr. App. L.F.); Appellant's brief from her prior appeal, (Pr. App. Br.); Appellant's application for transfer to this Court, (App. Tr.).

that she could be sentenced to up to eight years total imprisonment, and that the court alone would determine her sentence. (G.P. Tr. 21).

For the second-degree robbery charge, Appellant admitted that she pushed a store employee while trying to leave a Dollar General Store after stealing a number of items. (G.P. 26-27). On the possession of a controlled substance charge, Appellant admitted that police searching her house had found cocaine residue in a pipe, and that she had known it was cocaine. (G.P. Tr. 27). The plea court accepted Appellant's guilty pleas. (G.P. Tr. 34).

About a month later, on August 11, 2003, Appellant filed Rule 29.07(d) motions in both cases requesting leave to withdraw her guilty pleas. (29.07 L.F. 33, 69).

On September 11, 2003, a hearing was held before the plea judge (Judge Martinez). (Sent. Tr. 1). After hearing testimony and argument, Judge Martinez overruled Appellant's Rule 29.07(d) motions to withdraw her guilty pleas. (Sent. Tr. 66-67). The court then proceeded with Appellant's sentencing, and Appellant was sentenced to concurrent terms of seven years on the robbery

charge and eight years on the drug charge. (29.07 L.F. 39, 76; Sent. Tr. 70-71). Appellant was informed by the court that if she wished to file a Rule 24.035 motion for post-conviction relief she would have 90 days to do so if she appealed the judgment of her conviction and sentence, or 180 days if she did not appeal the judgment of her conviction and sentence. (Sent. Tr. 71-72). Appellant was transferred to the Department of Corrections immediately following sentencing.⁴ (Sent. Tr. 78).

On September 15, 2003, Appellant filed her notice of appeal.⁵ (Pr. App. L.F. 42, 80).

On September 21, 2004, the Eastern District affirmed the trial court's overruling of Appellant's Rule 29.07(d) motion to withdraw her guilty plea. *State v. Stevens*, 149 S.W.3d 463 (Mo. App. E.D. 2004). Appellant's application for transfer to this Court was denied. On December 23, 2004, the Eastern District issued its

⁴ The 180-day time limit for Appellant to file a Rule 24.035 motion without a direct appeal from the judgment and sentence expired on to March 9, 2004.

⁵ This appeal, *State v. Stevens*, 149 S.W.3d 463 (Mo. App. E.D. 2004), will be referred to hereafter as the "prior appeal."

mandate.

On February 18, 2005, Appellant filed Rule 24.035 motions in both of her underlying cases. (L.F. 4, 45). On May 13, 2005, the motion court dismissed Appellant's Rule 24.035 motions as untimely filed. (L.F. 33-34, 74-75).

On May 30, 2006, the Court of Appeals for the Eastern District affirmed the motion court's dismissal of those post-conviction motions in a per curiam opinion. *Stevens v. State*, No. ED86762, Memo. Op. 5 (Mo. App. E.D. 2006).

ARGUMENT

The motion court did not clearly err in overruling Appellant's Rule 24.035 motions for post-conviction relief after an evidentiary hearing because the motion court lacked jurisdiction to consider the motion in that Appellant's motion was untimely filed 526 days after her delivery to the Missouri Department of Corrections.

Appellant's Rule 24.035 motions were filed more than 180 days after her delivery to the Department of Corrections, making them untimely filed. Appellant's appeal of the plea court's overruling of her Rule 29.07(d) motion did not toll the 180-day time limit for the filing of a Rule 24.035 motion. Neither did her prior appeal constitute an appeal of the "judgment and sentence sought to be vacated," thereby invoking the 90-day time limit from the issuance of an appellate mandate for such an appeal. Consequently, Appellant's Rule 24.035 motions were untimely filed, and the motion court properly dismissed them for lack of jurisdiction.

A. Standard of Review

"This Court's review of denial of a post-conviction motion under Rules 29.15 and 24.035 is limited to a determination

whether the motion court's findings of fact and conclusions of law were clearly erroneous." *Weeks v. State*, 140 S.W.3d 39, 44 (Mo. banc 2004). "The motion court's findings and conclusions are clearly erroneous only if, after the review of the record, the appellate court is left with the definite and firm impression that a mistake has been made." *Id.*

B. Rule 24.035 time limits

The time limits of Rule 24.035 are constitutional and mandatory, representing a strict guideline for the filing of post-conviction motions. *Day v. State*, 770 S.W.2d 692, 695 (Mo. banc 1989). The time limits to file a Rule 24.035 motion are to be strictly enforced and may not be extended. *Unnerstall v. State*, 53 S.W.3d 589, 591 (Mo. App. E.D. 2001). Demonstration of a timely filing is a condition precedent to pleading a claim for post-conviction relief. *Id.* Failure to file a timely motion constitutes a complete waiver of any right to proceed under Rule 24.035 and a complete waiver of any claim that could be raised in a motion filed pursuant to the Rule. *Id.*

Rule 24.035 provides two possible deadlines which might apply to a defendant's Rule 24.035 motion. Which one applies is

based on whether “an appeal of the judgment or sentence sought to be vacated, set aside or corrected was taken” Rule 24.035(b). If such an appeal was taken, Rule 24.035(b) provides that “the motion shall be filed within 90 days after the date the mandate of the appellate court is issued affirming such judgment or sentence.” Rule 24.035(b). However, if no such appeal was taken, “the motion shall be filed within 180 days of the date the person is delivered to the custody of the department of corrections.” Rule 24.035(b).

C. Relevant Facts

On September 11, 2003, a hearing was held before Judge Martinez. (Sent. Tr. 1). After hearing testimony and argument, the trial court overruled Appellant’s Rule 29.07 motion to withdraw her guilty plea. (Sent. Tr. 66-67). The trial court then proceeded with Appellant’s sentencing, and Appellant was sentenced to concurrent terms of seven years and eight years, respectively. (Pr. App. L.F. 39, 76; Sent. Tr. 70-71). Appellant was transferred to the Department of Corrections immediately following sentencing. (Sent. Tr. 78).

On September 15, 2003, Appellant filed her notice of appeal.

(Pr. App. L.F. 42, 80).

On September 21, 2004, the Eastern District affirmed the trial court's overruling of Appellant's pre-sentence Rule 29.07(d) motion to withdraw her guilty plea.⁶ *State v. Stevens*, 149 S.W.3d 463 (Mo. App. E.D. 2004). Appellant sought transfer to this Court, but her application was denied. On December 23, 2004, the Eastern District filed its mandate.

On February 18, 2005, Appellant filed Rule 24.035 motions in both of her underlying cases. (L.F. 4, 45). On May 13, 2005, the motion court dismissed Appellant's Rule 24.035 motions as untimely filed. (L.F. 33-34, 74-75).

D. Analyzing the nature of Appellant's prior appeal

When Appellant first appealed the dismissal of her 24.035 motions, it was not entirely clear whether she was asserting that the prior appeal had been: A) a direct appeal from the final judgment and sentence, or B) an appeal from the plea court's judgment overruling her Rule 29.07 motion to withdraw her guilty plea. Appellant specifically argued in her brief in this case that

⁶ The court of appeals opinion did not address the issue of whether the trial court's ruling was an appealable judgment.

“[a]n order denying a Rule 29.07 motion to withdraw a guilty plea is an appealable order,” and repeatedly referred to the prior appeal as the “Rule 29.07 direct appeal.” (App. Br. 11, 15-17); *See State v. O’Neal*, 626 S.W.2d 693, 693 (Mo. App. S.D. 1981) (“[A] difference has been recognized between an appeal from an order denying such withdrawal and an appeal from a judgment imposing the sentence upon the defendant.”)

The precise nature of this prior appeal was a critical question, inasmuch as a different time limit applies to Rule 24.035 motions when a direct appeal is taken from the judgment and sentence. Appellant’s Rule 24.035 motion for post-conviction relief would only have been timely filed if her prior appeal was such a direct appeal. After reviewing Appellant’s claim, however, the Eastern District Court of Appeals concluded that Appellant “did not appeal her judgment and sentence after the denial of her Rule 29.07 motion.” *Stevens v. State*, No. ED86762, Memo. Op. 5 (Mo. App. E.D. 2006).

Following the Eastern District’s ruling, Appellant filed an application for transfer to this Court. In her application, Appellant disputes the Eastern District’s conclusion that the prior appeal

was not a direct appeal from her judgment and sentence. (App. Tr. 1). Appellant has adjusted her strategy, and now argues that the prior appeal was not an appeal from the 29.07(d) motion's overruling, but was, rather, a direct appeal from the guilty plea. (App. Br. 5).

E. Rulings on pre-sentencing Rule 29.07(d) are not properly cognizable on appeal

Appellant's strategic realignment highlights the issue of the appealability of pre-sentencing Rule 29.07(d) motions to withdraw a guilty plea. Addressing this issue necessarily involves examination of Rule 29.07(d), and its role in Missouri jurisprudence.

Missouri Supreme Court Rule 29.07(d), formerly Rule 27.25, was based primarily on Federal Rule of Criminal Procedure 32(d).⁷ In 1980, Rule 27.25 was repealed, and Rule 29.07(d) took effect:

A motion to withdraw a plea of guilty may be made only before sentence is imposed or when imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit

⁷ Now Federal Rule of Criminal Procedure 11(e).

the defendant to withdraw his plea.

Rule 29.07(d).

The present case concerns only the first clause of Rule 29.07(d), regarding the right of a defendant to make a pre-sentence motion to withdraw a guilty plea to the trial court.

In 1988, the landscape of guilty plea jurisprudence was altered by the introduction of Rules 24.035 and 29.15 in place of the repealed Rule 27.26. As this Court noted in *Brown v. State*, 66 S.W.3d 721, 725 (Mo. banc 2002), “[t]he application of Rule 29.07(d) to motions to withdraw a guilty plea after sentence became more complex in 1988, when Rule 27.26 was replaced by Rules 29.15 and 24.035.” While in *Brown* this Court was addressing a motion to withdraw which was made following sentencing, the impact of Rule 24.035 was no less significant to cases such as the present one, where the motion was made prior to sentencing.

The language of Rule 29.07(d) provides no specific procedure through which a defendant might obtain appellate review in the event that his Rule 29.07(d) motion is overruled. This is significant, given that “[t]here is no right to appeal without statutory authority.” *State v. Williams*, 871 S.W.2d 450, 452 (Mo.

banc 1994). Section 547.070, RSMo 2000, “allows appeals in criminal cases from a final judgment,” which “occurs only when a sentence is entered.”

Prior to the introduction of Rule 24.035, it was generally held that a trial court’s overruling of a Rule 29.07(d) motion to withdraw a guilty plea was an appealable order. “Where a motion to withdraw a plea of guilty is made before imposition of sentence, an order denying the motion is an appealable order.” *State v. England*, 599 S.W.2d 942, 943 (Mo. App. S.D. 1980); *State v. Nielsen*, 547 S.W.2d 153, 158 (Mo. App. E.D. 1977); *State v. Skaggs*, 248 S.W.2d 635, 636 (Mo. 1952). Respondent is unaware, however, of any case which squarely addresses the issue of whether appellate courts have jurisdiction over appeals from orders overruling Rule 27.09(d) motions.

While this uncertainty may have been satisfactory in the distant past, a more formal post-conviction remedy structure under Rule 24.035 has emerged in recent years. This more formal post-conviction remedy structure conflicts with the highly informal procedure governing Rule 29.07(d) appeals.

Accordingly, courts in recent years have recognized

limitations on claims arising from the overruling of a Rule 29.07(d) motion to withdraw a guilty plea. “A trial court’s ruling of a Rule 29.07(d) motion is not a final judgment and fits within no exception to the final judgment rule and thus not appealable under either the civil or criminal definitions. No sentence is entered and there is no final judgment and the trial court retains jurisdiction.” *State v. Larson*, 79 S.W.3d 891, 893 (Mo. banc 2002); *State v. Fensom*, 69 S.W.3d 550, 551 (Mo. App. W.D. 2002). The *Larson* holding, along with other similar cases, essentially established that appellate review of the overruling of a pre-sentencing Rule 29.07(d) motion to withdraw may not, logically, be obtained through any means other than a direct appeal of the sentence and judgment.

This approach however, creates a significant conflict with Missouri jurisprudence concerning direct appeals from guilty pleas. It is well-established in Missouri that “[t]he only issues cognizable on direct appeal from a guilty plea are the subject matter jurisdiction of the trial court and the sufficiency of the charging instrument.” *State v. Mitchell*, 128 S.W.3d 518, 520 (Mo. App. W.D. 2003); *State v. Curtis*, 171 S.W.3d 763, 765 (Mo. App. E.D. 2005); *See State ex rel. Simmons v. White*, 866 S.W.2d 443, 446 (Mo.

banc 1993) (“Although a plea of guilty ordinarily waives all defenses and errors, direct appeal still is proper to attack either jurisdiction or the sufficiency of an indictment or information.”)

This limitation on direct appeals from guilty pleas, when combined with the holding in *Larson* that appeals from the overruling of a pre-sentencing Rule 29.07(d) motion are not appealable independent of a sentence and judgment, is significant. Under *Larson*, the only avenue of appellate review for an order overruling a pre-sentencing Rule 29.07(d) motion is through a direct appeal of the sentence and judgment; yet, under *White* this avenue is closed because such a claim would not be cognizable.

At first, this conclusion might appear to somehow restrict rights granted to a defendant under Rule 27.09(d). This is not the case, however, for both legal and practical reasons. First, as noted before, Rule 27.09(d) does not specifically provide for any appellate review procedure. The first clause of Rule 29.07(d) merely provides a procedure for a defendant to request that his guilty plea be withdrawn. The mere fact that he or she would not have the ability to appeal the overruling of a 27.07(d) motion would not encroach in any way on the defendant’s ability to take the action

provided for in the rule at the trial court level.

Second, there is no practical reason why the overruling of a Rule 29.07(d) motion should to be appealable. There is simply no situation in which a defendant would be entitled to relief on appeal from a the overruling of a pre-sentence Rule 29.07(d) motion, with no relief available elsewhere. Specifically, relief would always be available under Rule 24.035. To the extent that Appellant argues otherwise, she is mistaken.

In her application for transfer, Appellant specifically describes two claims raised in her Rule 29.07(d) motion as “outside the scope of Rule 24.035(a)’s exclusivity.” (App. Tr. 3). Appellant first refers to alleged “Rule 24.02 irregularities.” However, Rule 24.035 specifically provides that it is the exclusive procedure for “claims that the conviction or sentence imposed violates the constitution and laws of this state.” Rule 24.035(a). Accordingly, allegations of a Rule 24.02 violation have been successfully raised in numerous Rule 24.035 post-conviction relief proceedings. *See Fainter v. State*, 174 S.W.3d 718 (Mo. App. W.D. 2005). In fact, in *State v. Sexton*, 75 S.W.3d 304 (Mo. App. S.D. 2002), the Court concluded that the *only* proper avenue of appellate relief based on

a claim that Rule 24.02 was violated would be Rule 24.035, not Rule 29.07(d). *Id* at 308.

Appellant further alleges that he made “a showing of fraud, mistake, fear, persuasion, or holding out false hopes.” To the extent that these issues would cause a guilty plea to be entered into involuntarily, such claims have been successfully raised in numerous Rule 24.035 post-conviction relief proceedings. *See Dobbins v. State*, 187 S.W.3d 865 (Mo. banc 2006); *Beal v. State*, 51 S.W.3d 109 (Mo. App. W.D. 2001); *Coker v. State*, 995 S.W.2d 7 (Mo. App. E.D. 1999).

In summary, any claim which a defendant might theoretically raise in a Rule 29.07(d) motion to withdraw would be more efficiently and effectively addressed on appeal through the procedures outlined in Rule 24.035. Thus, appeals from pre-sentence Rule 29.07(d) motions are wholly unnecessary, and prior holdings permitting such appeals lead only to confusion among litigants and the courts.

This case provides an opportunity for this Court to supply the needed clarification regarding appeals concerning pre-sentencing Rule 29.07(d) motions. Even after Rule 24.035 took effect, this

Court, and other Missouri courts, continued to treat orders overruling pre-sentencing Rule 29.07(d) motions to withdraw as appealable orders. *See State v. Taylor*, 929 S.W.2d 209 (Mo. banc 1996). It does not appear, however, that this Court ever specifically examined the cognizability of such motions. Rather, courts have simply continued to rely on cases predating Rule 24.035, without considering whether those cases still provide effective precedent. *See State v. Taylor*, 929 S.W.2d at 215 (citing *State v. McCollum*, 610 S.W.2d 81, 83 (Mo. App. E.D. 1980)).

Absent clarification from this Court, the courts of appeal will continue to face claims like the one in this case without sufficient guidance. Missouri courts have cited the *Taylor* case for the proposition that a trial court's overruling of a defendant's pre-sentence Rule 29.07(d) motion may be reviewed on appeal for an abuse of discretion. *See State v. Ralston*, 39 S.W.3d 546, 549 (Mo. App. W.D. 2001); *See also State v. Smith*, 99 S.W.3d 1 (Mo. App. E.D. 2002). At the same time, however, these lower courts are bound by this Court's conflicting precedent. Specifically, this Court's rulings that a trial court's decision to overrule a pre-sentence Rule 29.07(d) motion is not appealable independent of a sentence and judgment,

See State v. Larson, 79 S.W.3d at 893, and that such appeals are not cognizable on direct appeal from a guilty plea, given that they are neither jurisdictional, nor concerning the sufficiency of the charging document. *See State ex rel. Simmons v. White*, 866 S.W.2d at 446.

Appellate courts in Missouri are therefore left to address these claims which have evolved into some sort of special appeal status, falling somewhere between an independent appeal, and a direct appeal of the sentence and judgment. The uncertainty created by the conflicting law on the issue of appeals from rulings overruling pre-sentence Rule 29.07(d) motions has led to cases like the present one, where, following a guilty plea, a defendant has been allowed two bites at the proverbial apple on appeal. Conservation of scarce judicial resources, along with Rule 24.035's statement that it is the "exclusive procedure" for seeking such relief, surely should not allow for this.

F. Appellant's Rule 24.035 motion was untimely filed

In Appellant's prior appeal, the Court of Appeals simply assumed that his claim was proper, without addressing the issue of cognizability. The court in the prior appeal overlooked the fact

that Appellant's claims addressed neither the plea court's jurisdiction, nor the sufficiency of the charging document, and thus were not cognizable on a direct appeal from a guilty plea. *State ex rel. Simmons v. White*, 866 S.W.2d at 446.

The fact of the matter, however, is that the Eastern District did review the merits of Appellant's prior appeal, relying on this Court's holding in *Taylor* for the proposition that the overruling of a pre-sentencing Rule 29.07(d) motion is reviewable on appeal under an abuse of discretion standard. In subsequent proceedings, the motion court and the court of appeals for the Eastern District were thereby placed in an ambiguous situation, given that Rule 24.035 time limits are only extended when an appeal is taken from the "judgment and sentence sought to be vacated." Rule 24.035(b). The ambiguity surrounding appeals from orders overruling pre-sentencing Rule 29.07(d) motions has therefore left unaddressed the question of whether these anomalous appeals fall within the language of Rule 24.035(b).

In any event, Appellant's prior appeal was not an appeal of the judgment and sentence, inasmuch as Appellant's claim would not have been cognizable in such a direct appeal. The undefined

appeal status of Appellant's prior appeal should not be construed to fall within the language of Rule 24.035(b). Because Appellant took no appeal from the sentence and judgment in her case, the 180-day filing deadline of Rule 24.035(b) is applicable. Appellant concedes that she was delivered to the custody of the Missouri Department of Corrections on September 11, 2003, (App. Br. 5), and her 180-day window to file her Rule 24.035 motion therefore closed on March 9, 2004. Appellant did not file her Rule 24.035 motion until February 18, 2005, 526 days after she was delivered to the department of corrections. (L.F. 4, 45). As such, her motion for post-conviction relief was untimely filed, and the motion court did not err.

CONCLUSION

The motion court did not err in denying Appellant's Rule 24.035 motion. The court's overruling of the Rule 24.035 motion should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 4,469 words, excluding the cover, certification and 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, postage prepaid, this _____ day of October, 2006, to:

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