

IN THE SUPREME COURT OF MISSOURI

No. SC91613

**LESTER F. KRUPP, JR.,
Respondent**

v.

**STATE OF MISSOURI
Appellant**

**On Appeal from the Circuit Court of St. Louis County
Twenty-First Judicial Circuit
The Honorable Colleen Dolan, Judge**

REPLY BRIEF OF APPELLANT LESTER F. KRUPP, JR.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... 3

STATEMENT OF JURISDICTION 4

STATEMENT OF FACTS..... 5

POINTS RELIED ON 6

ARGUMENT 7

CONCLUSION..... 10

CERTIFICATE OF SERVICE AND COMPLIANCE 11

TABLE OF AUTHORITIES

Cases

McCracken v. Wal-Mart Stores E., LP, 298 S.W.3d 473 (Mo. banc 2009) 9

Reynolds v. Carter Cnty., 323 S.W.3d 447 (Mo. App. S.D.2010) 9

Snyder v. State, 334 S.W. 3d 735 (Mo App. W.D. 2011) 9

Thurman v. State, 859 S.W.2d 250 (Mo. App. W.D. 1993) 8

Statutes, Rules and Other Authority

Missouri Supreme Court Rule 55.08 9

Missouri Supreme Court Rule 83.08 7

JURISDICTIONAL STATEMENT

Appellant, Lester F. Krupp, Jr., adopts and incorporates the jurisdictional statement in his opening brief.

STATEMENT OF FACTS

Appellant adopts and incorporates the statement of facts in his opening brief.

POINTS RELIED ON

Appellant adopts and incorporates the points relied on in his opening brief.

REPLY ARGUMENT

The Respondent is incorrect in arguing that Appellant cannot now challenge the validity of his waiver when he failed to do so in the motion court or in the Court of Appeals.

The Respondent argues Appellant waived his rights to post-conviction relief when he pled guilty in exchange for a waiver of said post-conviction rights. The Respondent contends Appellant has now, in this Court, only just raised his objection to Appellant's seeming waiver and should be precluded from doing so under Rule 83.08(b) (sub-point A of Respondent's Argument). Respondent argues Appellant did not raise the issue of Appellant's waiver (Point I of Appellant's Substitute Brief) in either the motion court or the Court of Appeals, thus he is prohibited from doing so now.

This argument is incorrect. Appellant has, at no point, avoided the issue of the waiver of Appellant's post-conviction rights. The motion court, while mentioning the waiver in its findings, implicitly rejected it as being an invalid waiver when it ruled on the merits of the case. And, it should be noted, the Eastern District Court of Appeals transferred this case to this Court for the very purpose of *deciding the waiver issue*. Appellant mentioned this issue at every stage of the proceedings, and when the motion court implicitly found the waiver was invalid, and ruled on the merits of Appellant's case, Appellant reasonably

considered the matter settled. Appellant briefed the issue as a separate point on appeal for the very practical reason that it was the issue the Respondent and the Court of Appeals considered a threshold matter. Surely the Respondent cannot be surprised by Appellant's briefing of an issue injected by it.

Moreover, Appellant wonders how his appointed counsel, consistent with counsel's ethical duties, might have raised the issue of Appellant's alleged waiver? Not only was the supposed waiver part of the record and extracted by the sentencing court, but post-conviction counsel took the extra precaution of mentioning it in his amended motion. *See Thurman v. State*, 859 S.W.2d 250 (Mo. App. W.D. 1993)(admonishing appellate counsel for omitting "relevant and decisive facts" for not mentioning the successive nature of Thurman's post-conviction filing). After the motion court refused to enforce the waiver and instead ruled on the merits of the case, Appellant surely could not have appealed a favorable ruling. This specter of a waiver of post-conviction remedy was before every court below this one, and inasmuch as the motion court ruled on the merits, and the Court of Appeals transferred this case to this Court on this very issue, it is hard to fathom how the Respondent can now allege Appellant has raised this issue for the first time in this Court. If any party is raising a new issue, it may be the Respondent.

The State effectively waived the issue of Appellant's waiver by not moving to dismiss in circuit court. Appellant made an argument regarding the validity of

the waiver in his amended motion, the State filed no response to this motion, and did not object at any time in an effort to enforce the waiver. Appellant contends that this failure by the State to even register an objection to the hearing on the merits of Appellant's case constitutes a waiver by the state to litigate this issue. The state made no record to enforce the waiver of Appellant's post-conviction rights, so Appellant would argue the State has waived this issue completely.

This Court has held that "if a matter is not jurisdictional but rather is a procedural matter required by statute *or rule* or an affirmative defense of the sort listed in Rule 55.08, then it generally may be waived if not raised timely."

McCracken v. Wal-Mart Stores E., LP, 298 S.W.3d 473, 476 (Mo. banc 2009);

see also Reynolds v. Carter Cnty., 323 S.W.3d 447, 452 (Mo. App. S.D.2010).

Thus, even the rules of court may be waived. Snyder v. State 334 S.W. 3d 735 (Mo. App. W.D. 2011). The Western District Court of Appeals is correct in its reasoning in Snyder; there, the State's failure to object in a timely fashion essentially waived an issue of timeliness. Here, once the motion court heard and ruled Appellant's arguments on the merits, waiver issue was moot.

The respondent is incorrect in arguing that Appellant cannot now challenge the validity of his waiver when he failed to do so in the motion court or in the Court of Appeals. As noted previously, the motion court obviously had reservations about the validity of Appellant's waiver of post-conviction relief. That court did not require Appellant to show cause why his Rule 29.15 motion

should not be dismissed. It did not enforce the waiver, though it recognized one might exist, and it instead ruled on the merits of Appellant's post-conviction claims. And the State did not raise the issue of the waiver with the motion court, effectively waiving its right to argue it in later proceedings.

Appellant also notes that even though he is replying to only one issue in this reply brief, he does not waive any of the issues raised in his Substitute Brief, or any other issue before this Court in his case.

CONCLUSION

Appellant requests This Court address the merits of Appellant's case or remand for the Court of Appeals to do so.

Respectfully Submitted:

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CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rules 84.06(g) and 83.08(c), I hereby certify that on this 18th day of July, 2011, two true and correct copies of the foregoing Reply Brief and a floppy disk containing the foregoing brief were mailed postage prepaid to Ms. Jayne T. Woods of the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102. In addition, pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the word count limitations of Rule 84.06(b). This brief was prepared with Microsoft Word for Windows, using Times New Roman 13-point font. The word-processing software identified that this brief contains 1,298 words. Also, the enclosed diskette has been scanned for viruses with a currently updated version of McAfee VirusScan Enterprise 7.1.0 software and found to be virus-free.

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