

No. SC92432

IN THE
Supreme Court of Missouri

BRANDON L. SWALLOW,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the St. Louis County Circuit Court
21st Judicial Circuit
The Honorable Richard Bresnahan, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

This appeal arises from the dismissal of Brandon Swallow's ("Defendant's") Rule 24.035 post-conviction motion following the motion court's determination that the motion was untimely filed.

In January 2006, Defendant pleaded guilty to first-degree assault and armed criminal action ("ACA") (L.F. 4, 8-9, 16-50). Both charges were based on an incident in which Defendant seriously injured a young man by stabbing him in the side with a knife (L.F. 8-9, 22-23, 36-40). Defendant conceded that he committed the charged offenses and agreed to a "blind" plea (L.F. 17, 22-23, 31-32).

The plea court sentenced Defendant to concurrent terms of 20 years for the assault and three years for ACA (L.F. 43). The court suspended the execution of the 20-year sentence, however, and placed Defendant on five years of supervised probation for that offense (L.F. 43-44). After pronouncing sentence, the court advised Defendant that, pursuant to Rule 24.035, he had a right to file a motion to vacate, set aside, or correct the judgment of conviction or sentence, but, if he did not appeal, his motion had to be filed "within 180 days after [his] delivery to the Missouri Department of Corrections." (L.F. 45). Defendant was delivered to the Department of Corrections ("DOC") on March 10, 2006, to begin serving his 3-year sentence

for ACA (L.F. 90, 101). Defendant did not appeal the judgment, nor did he file a Rule 24.035 post-conviction motion within 180 days of his delivery to DOC (L.F. 70).

On July 6, 2008, Defendant was released from prison, having completed his 3-year ACA sentence (L.F. 90, 101). He remained on probation for the assault conviction (L.F. 12-14, 52). In March 2010, the court revoked Defendant's probation and executed the 20-year sentence that had previously been imposed (L.F. 52-54). Defendant returned to DOC on March 31, 2010, to serve his sentence for the assault (L.F. 90, 101).

On September 10, 2010, Defendant filed a *pro se* Rule 24.035 motion for post-conviction relief (L.F. 58-63). Appointed counsel subsequently filed an amended motion (L.F. 69-84). In his amended motion, Defendant asserted that his plea counsel was ineffective for failing to pursue a motion to suppress his confession and for failing to petition the court, after Defendant's probation was revoked and he was to be returned to DOC, for an order requiring that Defendant be psychologically examined (L.F. 72-82). Defendant's motion did not limit itself to requesting relief from the assault conviction—he alleged that he was convicted of first-degree assault and ACA, and he requests that his conviction and sentence be vacated (L.F. 69-70, 84).

The State filed a motion to dismiss Defendant's post-conviction motion on the ground that it was untimely filed (L.F. 85-87). The motion court

agreed (L.F. 96-99). In its findings of fact, conclusions of law, and judgment, the motion court found that Defendant was initially delivered to DOC on March 10, 2006, and Defendant's post-conviction motion was filed more than four years and six months later (L.F. 98). Accordingly, the motion court dismissed Defendant's post-conviction motion as untimely (L.F. 98).

STANDARD OF REVIEW

This Court’s “review of the denial of a post-conviction motion under Rule 24.035 is limited to a determination of whether the findings and conclusions of the motion court are clearly erroneous.” *Cooper v. State*, 356 S.W.3d 148, 152 (Mo. banc 2011); *see* Rule 24.035 (k). “The motion court’s findings and conclusions are clearly erroneous only if, after a review of the record, the appellate court is left with the definite and firm impression that a mistake has been made.” *Id.*

ARGUMENT

The motion court did not clearly err in dismissing Defendant's post-conviction motion as untimely filed. (Responds to Defendant's Points I and II).

In each of Defendant's two points on appeal, he argues that the motion court clearly erred in dismissing his motion as untimely, and he also reiterates the substantive arguments that he raised in his post-conviction motion. App. Br. at 16-26, 27-35. The only issue before this Court is timeliness—if the motion court erred in dismissing Defendant's motion as untimely, the case must be remanded for findings and conclusions on the substantive points.

But the motion court did not err in dismissing Defendant's motion. Defendant's suggestion that a single criminal judgment may be attacked piecemeal, with separate post-conviction actions required for each count on which a defendant is delivered to DOC, is contrary to the plain language of Rule 24.035, the policies underlying the post-conviction rules, and general principles of civil procedure.

Discussion

The question posed by this appeal is as follows: When a criminal defendant is convicted of multiple offenses in a single judgment, but is

initially delivered to DOC only on some of those counts, must the defendant file a post-conviction motion within 180 days of the initial delivery and challenge the validity of the judgment as a whole, or may the defendant split the judgment and challenge the various individual convictions within the judgment one-by-one in separate post-conviction motions, with different time limits based on different delivery dates? For the reasons that follow, this Court should adopt the former rule—to comply with the time limits of the post-conviction rules, a defendant must file a post-conviction motion challenging the applicable judgment within 180 days of his delivery to DOC on that judgment, even if one or more counts included in the judgment has not yet been executed.

Rule 24.035 imposes strict, mandatory time limits governing the period during which a post-conviction motion may be filed. *See Dorris v. State*, 360 S.W.3d 260, 265-66 (Mo. banc 2012); Rule 24.035(b). If no appeal is taken from the judgment, a Rule 24.035 post-conviction motion must be filed “within 180 days of the date the person is delivered to the custody of the department of corrections.” Rule 24.035(b). The failure to file a motion within the time provided constitutes “a complete waiver of any right to proceed” under the rule. Rule 24.035(b); *Dorris*, 360 S.W.3d at 266.

In this case, the judgment imposing the 20-year assault sentence and the 3-year ACA sentence was entered on March 3, 2006 (L.F. 11-14). One

week later, Defendant was delivered to DOC to serve the 3-year sentence; the execution of his 20-year sentence was suspended and he was placed on probation (L.F. 43-44, 90, 101). Because Defendant did not appeal his judgment of conviction, any post-conviction motion seeking to vacate the judgment was due by September 6, 2006—180 days after his delivery to DOC. But Defendant did not file his motion until September 10, 2010 (L.F. 58), more than four years after the time limit expired.

Defendant argues that his motion should be considered timely filed because, even though he was delivered to DOC to serve his 3-year ACA sentence in 2006, he did not begin serving his 20-year assault sentence until March 31, 2010, after he violated his probation and the previously suspended sentence was executed. App. Br. at 20-26, 30-35. He claims that because his motion was filed within 180 days of this second delivery date, it was timely filed with respect to the second offense for which he was imprisoned (the assault conviction). App. Br. at 24, 33.

Missouri courts have cautioned against splitting a civil action into multiple parts and trying it piecemeal. *See Lay v. Lay*, 912 S.W.2d 466, 472 (Mo. banc 1995) (prohibiting a litigant from seeking substantive relief in one action and attorney fees in a separate, successive action). The prohibition against splitting a cause of action is designed to prevent a multiplicity of

lawsuits and avoid piecemeal appeals. *See id.*; *see also Felling v. Giles*, 47 S.W.3d 390, 395 (Mo. App. E.D. 2001).

The general restriction against splitting a single cause of action into multiple suits is especially important in the post-conviction context, which is governed by rules specifically designed to achieve a single, comprehensive review of criminal convictions. *See e.g. Gehrke v. State*, 280 S.W.3d 54, 60 n.1 (Mo. banc 2009) (Fischer, J., concurring) (“[Rules 29.15 and 24.035] . . . serve the legitimate policy of single comprehensive review and finality.”). To that end, the post-conviction rules specifically bar motion courts from entertaining successive motions. Rule 24.035(l). “Because of the special purpose of a [post-conviction] motion—to achieve finality in criminal proceedings—exceptions should be disfavored.” *Owsley v. State*, 959 S.W.2d 789, 798 (Mo. banc 1997).

In this case, of course, Defendant did not file multiple post-conviction motions. For whatever reason, he did not file a Rule 24.035 motion seeking to vacate his judgment of conviction after he was delivered to DOC to serve his 3-year ACA sentence.¹ But the rule Defendant asks this Court to adopt would

¹ As a result, any claim with respect to the ACA conviction is waived, and Defendant does not argue otherwise. Even if this Court determines that Defendant is entitled to proceed with his post-conviction motion seeking relief

necessarily open the door to multiple post-conviction motions arising from a single criminal judgment. Defendant argues that if he had sought post-conviction relief from the assault conviction before the sentence was executed, but after he was delivered to DOC to serve his ACA sentence, “the case would have been dismissed as premature because he had not been delivered to DOC *on the first-degree assault conviction*.” App. Br. at 22 (emphasis original). In other words, Defendant believes that in order to obtain relief from both the assault and ACA convictions—arising from the same event and imposed in the same judgment—he would have had no choice but to file two separate post-conviction motions, even if the grounds for seeking relief were identical.

But the plain language of Rule 24.035 suggests that the focus of the post-conviction motion and, by extension, the focus of the time limits is on the *judgment* that is being challenged, not the individual conviction. Rule 24.035(b) states:

A person seeking relief pursuant to this Rule 24.035 shall file a motion to vacate, set aside, or correct the judgment or sentence substantially in the form of Criminal Procedure Form No. 40.

from the assault conviction, he can no longer obtain relief from the felony conviction for ACA.

. . . .

If an appeal of the judgment or sentence sought to be vacated, set aside, or corrected was taken, the motion shall be filed within 90 days after the date the mandate of the appellate court is issued affirming such judgment or sentence.

If no appeal of *such judgment* 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) (emphasis added).

The language of this rule contemplates that in filing a post-conviction motion the movant will challenge his or her judgment of conviction as a whole, not convictions on individual counts within the judgment independent of one another. This is apparent in two ways. First, Criminal Procedure Form 40, which defendants must follow in filing their *pro se* motions, requires the defendant to list all the offenses for which sentence was imposed in a particular case. The motion is to vacate the entire judgment, not just particular parts. Second, if the defendant files an appeal, he or she appeals the entire judgment, and the time limit for filing a post-conviction motion with regard to the entire judgment begins running when the mandate issues, not when the defendant is delivered to DOC on any particular conviction. Rule 24.035(b). There is no reason to allow (or require) a defendant to split

post-conviction claims based on different delivery dates if no appeal is taken, but require the defendant to bring all his or her claims at once in a single post-conviction motion just because a direct appeal was filed.

In his brief, Defendant relies on *Roth v. State*, 921 S.W.2d 680 (Mo. App. W.D. 1996), *Hopkins v. State*, 802 S.W.2d 956 (Mo. App. W.D. 1991), and *Wesbecher v. State*, 863 S.W.2d 2 (Mo. App. E.D. 1993). App. Br. at 22-24, 31-33. All three are distinguishable and do not aid Defendant's position.

In *Roth*, the defendant was sentenced to a term of imprisonment to run concurrently with a federal sentence he was already serving. 921 S.W.2d at 681. He filed a post-conviction motion seeking to vacate his sentence, but had never been delivered to the Missouri Department of Corrections. *Id.* at 681-82. The Western District held that because the defendant had never been delivered to DOC, his post-conviction motion was premature and had to be dismissed. *Id.*

In *Hopkins*, the defendant was convicted of an offense and received a suspended execution of sentence, but his probation was not scheduled to begin until he finished the prison term he was already serving in DOC on an unrelated conviction. 802 S.W.2d at 957. He filed a motion for post-conviction relief seeking to vacate the new judgment while he was still in prison for the unrelated offense. *Id.* The Western District held that because the defendant's

delivery to DOC had been for an unrelated conviction, the post-conviction motion was premature and dismissal was required. *Id.*

In *Wesbecher*, the defendant pleaded guilty to seven felony counts and the court suspended the imposition of all seven sentences. 863 S.W.2d at 3. The defendant subsequently violated his probation and the court imposed sentences on all seven counts, but suspended their execution. *Id.* Two years later, the defendant violated his probation again and the court executed two of the seven sentences. *Id.* The defendant was delivered to DOC and spent 90 days in prison before he was released again on probation. *Id.* Three more years passed, the defendant violated his probation once more, and then the court entered *two separate judgments*—one executing the two sentences for which the defendant had already served 90 days, and one executing the five remaining sentences for which the defendant had never been delivered to DOC. *Id.* at 4. The defendant filed a post-conviction motion challenging the execution of all seven sentences. *Id.* The State argued on appeal that the post-conviction motion was untimely because it was filed more than the requisite 90 days² after the defendant was delivered to DOC on two of the

² A previous version of Rule 24.035, applicable when *Wesbecher* was decided, required defendants to file their post-conviction motions within 90 days of delivery to DOC if no appeal was taken. *See* Rule 24.035 (1993).

seven counts. *Id.* This Court agreed that the motion was untimely as to the two counts for which the defendant had served some time, but that because the defendant was not delivered to DOC on the other counts until much later, within 90 days of the post-conviction being filed, the motion for those counts was timely. *Id.*

None of these cases involve the precise issue presented here. In *Roth*, *Hopkins*, and *Wesbecher*, the defendants all sought post-conviction relief from sentences imposed in judgments separate from the judgments for which they were delivered to DOC. Defendant, by contrast, wants to split a single judgment and seek post-conviction relief from only part of it, even though he was delivered to DOC years earlier for a conviction within the *same judgment*. Such a maneuver is not supported by the cases upon which Defendant relies and is contrary to the language and purpose of the post-conviction rules.

Finally, in interpreting Supreme Court Rules, the appellate courts “must avoid interpretations that are unjust, absurd, or unreasonable.” *Moxness v. Hart*, 131 S.W.3d 441, 447 (Mo. App. W.D. 2004). Adopting Defendant’s construction of Rule 24.035 would inevitably lead to absurd results. If, for example, Defendant were permitted to proceed with his post-conviction challenge to his first-degree assault conviction, and if he prevailed on the merits of his first point (asserting that counsel was ineffective for

failing to file a motion to suppress his confession), the result would be that his conviction for first-degree assault would be vacated and his guilty plea as to that charge would be withdrawn, but his conviction for armed criminal action, which was necessarily premised on the validity of the assault conviction, would still stand because his post-conviction motion is four years too late to challenge the ACA.

Under Defendant's interpretation of the Rule, he could not have avoided this absurdity by timely challenging the ACA. If he had timely filed a post-conviction motion and succeeded in having his ACA conviction vacated and his guilty plea withdrawn, his assault conviction, for which he had not yet been delivered to DOC, would still be in force. If Defendant's construction of the Rule is correct, he would not be entitled to have his assault conviction vacated until he was delivered to DOC and timely filed a second post-conviction motion, even though he had already proved that his guilty plea was involuntary in an earlier post-conviction challenge to the ACA. On the other hand, if he challenged the constitutionality of his ACA conviction and lost, he would seek a "second bite at the apple" by filing a second post-conviction motion on the same grounds, but challenging his assault conviction rather than the ACA.

This cannot be the proper interpretation of Rule 24.035. The better rule—one supported by the language and policy underpinnings of Rule 24.035

and general principles of civil procedure—is that a single criminal judgment must be challenged in a single, timely post-conviction motion, even if the defendant has not been delivered to DOC on every count therein. Here, Defendant had an opportunity to attack his judgment of conviction after he was delivered to DOC for the ACA charge. He neglected to do so. His subsequent motion, filed four-and-a-half years later, was untimely.

Points I and II should be denied.

CONCLUSION

The motion court's judgment dismissing Defendant's post-conviction motion 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 Supreme Court Rule 84.06, and contains 2,988 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2007 software; and

2. That a copy of this notification was sent through the eFiling system on this 6th day of July, 2012, to:

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