

IN THE
MISSOURI SUPREME COURT

STEVEN CRENSHAW,)	
)	
Appellant,)	
)	
v.)	No. SC 88584
)	
STATE OF MISSOURI,)	
)	
Respondent.)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, MISSOURI
TWENTY-SECOND JUDICIAL CIRCUIT, DIVISION 4
THE HONORABLE JULIAN L. BUSH, JUDGE AT TRIAL
AND POST-CONVICTION PROCEEDINGS

APPELLANT'S REPLY BRIEF

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JURISDICTIONAL STATEMENT

Appellant Steven Crenshaw adopts the jurisdictional statement set out in Appellant's Brief, Statement and Argument, filed on December 7, 2007.

STATEMENT OF FACTS

Appellant Steven Crenshaw also adopts the statement of facts set out in Appellant's Brief, Statement and Argument, filed on December 7, 2007. Mr. Crenshaw will cite to the record as follows: Legal File (ED 78958), "(L.F.)"; Transcript (ED 78958), "(Tr.)"; Post-conviction Legal File (ED 88500), "(PCR L.F.)"; Abandonment Hearing Transcript (ED 88500), "(A. Tr.)"; Evidentiary Hearing Transcript (ED 88500), "(H. Tr.)"; and, Respondent's Brief (SC 88584), "(Resp. Br.)."

REPLY POINT

This Court should not dismiss this appeal for lack of jurisdiction because the motion court had jurisdiction to reopen Mr. Crenshaw's Rule 29.15 proceedings, and *Flowers v. State*, 618 S.W.2d 655 (Mo. banc 1981) and *Fenton v. State*, 200 S.W.3d 136 (Mo. App. W.D. 2006) granted the motion court the authority to remedy post-conviction counsel's abandonment of Mr. Crenshaw on post-conviction appeal by granting Mr. Crenshaw time to file a notice of appeal.

Flowers v. State, 618 S.W.2d 655 (Mo. banc 1981);

Fenton v. State, 200 S.W.3d 136 (Mo. App. W.D. 2006);

Daugherty v. State, 159 S.W.3d 405 (Mo. App. E.D. 2005);

State ex rel. Nixon v. Jaynes, 63 S.W.3d 210 (Mo. banc 2001);

Rules 27.26 and 29.15.¹

¹ Appellant Crenshaw specifically responds to Point I, Argument I of Respondent's brief, but does not waive any of the points or arguments previously made in Appellant's Statement, Brief, and Argument, filed on December 7, 2007.

REPLY ARGUMENT

This Court should not dismiss this appeal for lack of jurisdiction because the motion court had jurisdiction to reopen Mr. Crenshaw's Rule 29.15 proceedings, and *Flowers v. State*, 618 S.W.2d 655 (Mo. banc 1981) and *Fenton v. State*, 200 S.W.3d 136 (Mo. App. W.D. 2006) granted the motion court the authority to remedy post-conviction counsel's abandonment of Mr. Crenshaw on post-conviction appeal by granting Mr. Crenshaw time to file a notice of appeal.

Appellant Crenshaw specifically responds to Point I, Argument I of Respondent's brief, but does not waive any of the points or arguments previously made in Appellant's Statement, Brief, and Argument, filed on December 7, 2007.

Respondent, in its brief, states that this Court should dismiss Mr. Crenshaw's appeal for lack of jurisdiction (Resp. Br.19, 22-23). In support, Respondent erroneously relies on *Swiney v. State*, 27 S.W.3d 498 (Mo. App. E.D. 2000). *Swiney* attempted an untimely appeal from the motion court's denial of an *untimely filed* Rule 24.035 motion, and although the appellate court dismissed Swiney's appeal based on the untimeliness of his appeal, rather than the untimeliness of his Rule 24.035 motion, it is clear that dismissal was the only outcome on appeal for Swiney. 27 S.W.3d at 499.

Failure to timely file a *pro se* motion to vacate (or Missouri Department of Corrections Form 40) constitutes a complete waiver of any claim that could be raised in a motion filed under Rule 24.035 or Rule 29.15. *See* Rule 29.15(b); *see also* Rule 24.035(b). If the Rule 24.035 or Rule 29.15 motion was untimely filed, then the motion court has no jurisdiction to consider it. *Matchett v. State*, 119 S.W.3d 558, 559 (Mo. App. S.D. 2003); *Patterson v. State*, 164 S.W.3d 546, 548 (Mo. App. E.D. 2005). Moreover, because the motion court lacks jurisdiction to consider the untimely filed Rule 24.035 or Rule 29.15 motion, the appellate court likewise lacks jurisdiction to hear an appeal of any ruling on the untimely filed motion and must dismiss the appeal. *Bollinger v. State*, 144 S.W.3d 335, 338 (Mo. App. E.D. 2004); *Patterson*, 164 S.W.3d at 548.

The appellate court in *Swiney* dismissed Swiney's appeal for lack of jurisdiction. The motion court initially entered judgment denying Swiney's Rule 24.035 motion as untimely filed, but over thirty days later, the motion court entered findings of fact and conclusions of law denying Swiney's Rule 24.035 motion on the merits. 27 S.W.3d at 499. The appellate court held that the motion court's judgment denying Swiney's Rule 24.035 motion as untimely filed became final after thirty days, that the motion court lacked jurisdiction to modify its judgment after thirty days, and that Swiney, who had not timely appealed from

the denial of his motion as untimely filed, could not appeal from the motion court's subsequent entry of findings of fact and conclusions of law. *Id.*

In contrast to Swiney, Mr. Crenshaw timely filed his Rule 29.15 motion and this Court should not dismiss Mr. Crenshaw's appeal because the motion court had jurisdiction to reopen Mr. Crenshaw's post-conviction proceedings after thirty days and grant additional time to file a notice of appeal. Courts in *Daugherty v. State*, 159 S.W.3d 405, 407 (Mo. App. E.D. 2005), *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 217-218 (Mo. banc 2001), and *Fenton v. State*, 200 S.W.3d 136 (Mo. App. W.D. 2006) have held the motion court retains jurisdiction to reopen proceedings to consider claims of abandonment by post-conviction counsel even after the expiration of the thirty days permitted under Rule 75.01. Under the precedent established in *Jaynes*, *Daugherty*, and *Fenton*, the motion court can reopen a post-conviction proceeding after a decade or more of inactivity. *Jaynes*, 63 S.W.3d at 217-218; *Daugherty*, 116 S.W.3d at 617; *Fenton*, 200 S.W.3d at 140.

Nonetheless, Respondent argues that the motion court had no authority to reopen Mr. Crenshaw's post-conviction proceedings and for support, relies on *State v. Mackin*, 927 S.W.2d 553 (Mo. App. S.D. 1996), a case in which the motion court erroneously vacated its original judgment in a Rule 29.15 action based on the court clerk's failure to provide notice of the judgment to post-conviction

counsel (Resp. Br. 23). In *Mackin*, the motion court issued judgment denying the Rule 29.15 motion on August 5, 1993, but over two years later vacated its judgment and adopted the State's findings of fact to permit a timely appeal of the motion court's judgment. 927 S.W.2d at 557. The Southern District held the motion court had no jurisdiction to do as it had done and dismissed the appeal. *Id.* at 557.

As distinguished from *Mackin*, however, the motion court in Mr. Crenshaw's case did not vacate the judgment based on lack of notice to post-conviction counsel, but attempted to remedy post-conviction counsel's abandonment (PCR L.F. 64-71, 81). Abandonment by post-conviction counsel, as opposed to ineffective assistance of post-conviction counsel, is cognizable and remediable. *State v. Bradley*, 811 S.W.2d 379, 384 (Mo. banc 1991).

Also, despite Respondent's arguments to the contrary, the abandonment doctrine is not limited to cases where the record shows post-conviction counsel took no action on the post-conviction case, or to cases where post-conviction counsel filed an untimely amended motion due to no fault of the movant (see Resp. Br. 27). *Luleff v. State*, 807 S.W.2d 495, 498 (Mo. banc 1991); *Sanders v. State*, 807 S.W.2d 493, 494-495 (Mo. banc 1991). Abandonment may occur when post-conviction counsel files an amended motion so patently defective that it is a nullity. See, e.g., *Bradley*, 811 S.W.2d at 384; *Trehan v. State*, 835 S.W.2d 427, 429

(Mo. App. S.D. 1992) (amended motion merely incorporated *pro se* motion); *Pope v. State*, 87 S.W.3d 425, 428 (Mo. App. W.D. 2002) (amended motion merely restated *pro se* motion). And, abandonment may occur when post-conviction counsel fails to timely appeal from the denial of a post-conviction motion. *Fenton*, 200 S.W.3d at 139-140; *Flowers v. State*, 618 S.W.2d 655, 656-657 (Mo. banc 1981).

In either instance, post-conviction counsel's inattention deprives the post-conviction movant of meaningful review of his post-conviction claims in the motion court or on appeal and the post-conviction movant is entitled to relief. If the court finds that counsel abandoned the post-conviction movant at the motion court level, then the court allows time for amendment of the post-conviction movant's *pro se* motion, or considers the untimely amended motion as timely filed. *Luleff*, 807 S.W.2d at 498; *Sanders*, 807 S.W.2d at 495; *Pope*, 87 S.W.3d at 429. Similarly, if the court finds that counsel abandoned the post-conviction movant by failing to timely appeal the denial of the movant's post-conviction motion, then the court permits time for the filing of a notice of appeal. *Flowers*, 618 S.W.2d at 657. That is exactly what the motion court did in Mr. Crenshaw's case (PCR L.F. 82).

Respondent states that Mr. Crenshaw was not entitled to this relief because no rule or statute requires post-conviction counsel to file a notice of appeal from

the denial of a post-conviction motion, and consequently, post-conviction counsel did not abandon Mr. Crenshaw (Resp. Br. 27-28). Yet, no rule or statute requiring the filing of a notice of appeal is necessary because this Court in *Flowers*, and the Missouri Court of Appeals, Western District in *Fenton*, made clear that the failure to file a post-conviction appeal can amount to abandonment by post-conviction counsel. *Fenton*, 200 S.W.3d at 139; *Flowers*, 618 S.W.2d at 656-657.

Respondent acknowledges *Fenton*, but argues that *Fenton* is applicable only to Rule 27.26 proceedings, or that *Fenton* was wrongly decided, and overruled by the Missouri Court of Appeals, Western District *sub silentio* in *Simmons v. State*, No. WD 66861, 2007 WL2766646 (Mo. App. W.D. Sept. 25, 2007) (Resp. Br. 34). One difficulty with Respondent's latter argument is that the Western District is bound to follow the precedent of the Missouri Supreme Court, and since the Western District followed the Missouri Supreme Court's precedent in *Flowers* in rendering its decision in *Fenton*, the Western District could not have incorrectly decided *Fenton*. Mo. Const., Art. 5, § 2; *State v. Rulo*, 976 S.W.2d 650, 653 (Mo. App. S.D. 1998); *see also Fenton*, 200 S.W.3d at 139.

An additional difficulty with Respondent's latter argument is that *Simmons*, the case that Respondent says overruled *Fenton*, does not address the same claim raised in *Fenton*, but addresses a completely different issue. In

Simmons, the issue was whether post-conviction counsel abandoned movant by failing to file a trial brief on a double jeopardy issue, and not whether post-conviction counsel abandoned movant by failing to file a notice of appeal from the denial of a post-conviction motion. *Simmons*, No. WD 66861, 2007 WL2766646, at *4 (Mo. App. W.D. Sept. 25, 2007). The Western District held *Simmons* had raised an uncognizable issue of ineffective assistance of post-conviction counsel, rather than a cognizable claim of abandonment. *Id.* Since *Simmons* addressed an issue of ineffective assistance of post-conviction counsel and made no reference to *Fenton* or abandonment by failing to file a notice of appeal, *Simmons* could not have overruled *Fenton* either explicitly or implicitly.

Currently, *Fenton* and *Flowers* are still good law and their holdings apply with equal force to Mr. Crenshaw's Rule 29.15 proceedings. Respondent's attempts to distinguish *Fenton* and *Flowers* from Mr. Crenshaw's Rule 29.15 proceeding on the basis that *Fenton* and *Flowers* dealt with Rule 27.26 motions are futile. The distinction is tenuous and insignificant.

For the above reasons, this Court should not dismiss this appeal for lack of jurisdiction. The motion court had jurisdiction to reopen Mr. Crenshaw's Rule 29.15 proceedings, and *Flowers* and *Fenton* granted the motion court the authority to remedy post-conviction counsel's abandonment of Mr. Crenshaw on post-conviction appeal by granting Mr. Crenshaw time to file a notice of appeal.

CONCLUSION

WHEREFORE, based on the arguments in Appellant's Statement, Brief, and Argument, filed on December 7, 2007, and on the arguments in this Reply Brief, Appellant Steven Crenshaw requests that this Court reverse the motion court's judgment and discharge him from his conviction and sentence, or remand his cause for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06, I hereby certify that on this 29th day of January 2008, a true and correct copy of the foregoing reply brief and a floppy disk containing the foregoing brief were mailed postage prepaid to the office 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 page limitations of Rule 84.06(b). This brief was prepared with Microsoft Word for Windows, and uses Calisto MT 13 point font. The word-processing software identified that this brief contains 2,151 words, excluding the cover page, signature block, and certificates of service and of compliance. 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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