

WD # 67823

**IN THE
MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

DAVID GEHRKE,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the Denial of Postconviction Relief
from the Circuit Court of Jackson County, Missouri
16th Judicial Circuit, Division 11
The Honorable J.D. Williamson, Jr., Judge

APPELLANT'S BRIEF

RUTH B. SANDERS, #53256
Appellate District Defender
Office of the Public Defender
Western Appellate/PCR Division
818 Grand Blvd., Suite 200
Kansas City, Missouri 64106-1910
Tel: 816.889.7699
Fax: 816.889.2001
Email: ruth.sanders@mspd.mo.gov
Counsel for Appellant

INDEX

Table of Authorities	1
Jurisdictional Statement	2
Statement of Facts	4
Point On Appeal.....	6
Argument on Appeal.....	7
Conclusion	13
Certificate of Compliance	14

TABLE OF AUTHORITIES

CASES

<i>Brown v. State</i> , 179 S.W.3d 404 (Mo. App. S.D. 2005).....	8
<i>Carroll v. State</i> , 131 S.W.3d 907, 908 (Mo. App. S.D. 2004).....	7
<i>Crenshaw v. State</i> , 2007 WL 1052480 (Mo. App. E.D. April 10, 2007).....	8-11
<i>Fenton v. State</i> , 200 S.W.3d 136 (Mo. App. W.D. 2006).....	7, 8, 10-11
<i>Fincher v. State</i> , 795 S.W.2d 505, 506 (Mo. App. W.D. 1990).....	11
<i>Flowers v. State</i> , 618 S.W.2d 655 (Mo. banc 1981).....	8, 9-10
<i>Schleeper v. State</i> , 982 S.W.2d 252, 253 (Mo. banc 1998).....	11

MISSOURI SUPREME COURT RULES

Rule 24.035.....	8, 11
Rule 29.15.....	9, 11
Rule 27.26.....	8, 9, 10-11

CONSTITUTIONAL PROVISIONS

United States Constitutional Amendments V and XIV	11
Missouri Constitution, Article I, Section 10	11

JURISDICTIONAL STATEMENT

Appellant, David Gehrke, appeals from the Circuit Court's denial of his motion to reopen his Rule 24.035 motion. Mr. Gehrke pleaded guilty, in *State v. David Gehrke*, CR97-03810, in the Circuit Court of Jackson County, to one count of forcible sodomy, four counts of furnishing pornographic material to a minor, one count of deviate sexual assault, four counts of statutory sodomy in the first degree, four counts of child molestation in the first degree, and one count of child molestation in the second degree. He was sentenced to the following terms of imprisonment: seven years for forcible sodomy, seven years for deviate sexual assault, twenty years for two counts of statutory sodomy and thirty years for the other two counts of statutory sodomy, and seven years for each count of child molestation in the first degree. He was also sentenced to one year for each of the misdemeanor counts.

Mr. Gehrke was delivered to the Missouri Department of Corrections on January 11, 1999. On February 20, 1999, he timely filed a *pro se* postconviction motion. Appointed counsel timely filed an amended motion on June 2, 1999. The Circuit Court denied the amended motion without a hearing on May 17, 2000. In *Gehrke v. State*, WD58742, this Court remanded the cause for an evidentiary hearing.

Before the evidentiary hearing, Mr. Gehrke hired W. Geary Jaco to represent him. The evidentiary hearing was held on August 24, 2001. The Circuit Court issued Findings of Fact, Conclusions of Law and a Judgment on September 7, 2001. There was no appeal from that decision.

On August 10, 2006, Mr. Gehrke filed a motion to reopen his postconviction case. The motion court initially denied that motion on September 14, 2006. Mr. Gehrke timely filed a notice of appeal, but this Court dismissed that appeal (WD67598) because the Circuit Court’s denial was denominated “Order” instead of “Judgment.” The Circuit Court reissued its denial of the motion as a judgment, and Mr. Gehrke timely filed a notice of appeal.

This appeal does not involve any of the categories reserved for the exclusive appellate jurisdiction of the Missouri Supreme Court, therefore jurisdiction lies in the Missouri Court of Appeals, Western District. Article V, Section 3, Mo. Const.; Section 477.070, RSMo 2000¹.

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

STATEMENT OF FACTS

This is the appeal from the Circuit Court's denial of David Gehrke's motion to reopen his postconviction case. On February 20, 1999, Mr. Gehrke timely filed a *pro se* postconviction motion asking the court to vacate his guilty pleas and sentences in a 1997 criminal case. (L.F. 4). Appointed counsel Tara Jensen of the Appellate Public Defender's Office timely filed an amended motion on June 2, 1999. (L.F. 22, 42). The Circuit Court denied the amended motion without a hearing on May 17, 2000. (L.F. 43, 52). In *Gehrke v. State*, WD58742, on May 29, 2001, this Court remanded the cause for an evidentiary hearing. (L.F. 58, 60).

Before the evidentiary hearing, Mr. Gehrke hired W. Geary Jaco to represent him. (L.F. 67). The evidentiary hearing was held on August 24, 2001. (L.F. 77). The Circuit Court issued Findings of Fact, Conclusions of Law and a Judgment on September 7, 2001. (L.F. 77, 85). There was no appeal from that decision.

On August 10, 2006, Mr. Gehrke filed a motion to reopen his postconviction case. (L.F. 87). He alleged that Mr. Jaco abandoned him by failing to file a notice of appeal after the Circuit Court denied the postconviction motion:

4. On September 14, 2001, the Jackson County Circuit Court file-stamped a notice of appeal in what appears to have been an effort on Mr. Jaco's part to perfect an appeal on Movant's behalf. See Attachment. The notice of appeal was not in proper form, and it was unaccompanied by either an in forma pauperis affidavit or a filing fee. The Jackson County

Circuit Court does not have a record of a notice of appeal being filed in this case.

5. Movant avers that he asked Mr. Jaco to appeal the motion court's denial of his Rule 29.15 motion to the Missouri Court of Appeals, and that Mr. Jaco agreed to do so. He avers that Mr. Jaco represented to him that an appeal had in fact been filed.

(L.F. 88).

Mr. Gehrke attached to the motion Mr. Jaco's unfiled notice of appeal and the Circuit Court's post-hearing findings and conclusions. (L.F. 90-101). The motion court denied Mr. Gehrke's motion to reopen the postconviction proceedings². (L.F. 111).

Mr. Gehrke timely filed a notice of appeal. (L.F. 114). This appeal follows.

² This Court dismissed WD67598, Mr. Gehrke's initial appeal from the Circuit Court's denial that was denominated "Order" instead of "Judgment." (L.F. 104-110).

POINT ON APPEAL

THE MOTION COURT CLEARLY ERRED IN DENYING WITHOUT AN EVIDENTIARY HEARING MR. GEHRKE'S MOTION TO REOPEN HIS RULE 24.035 MOTION AND REISSUE ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW TO PROVIDE MR. GEHRKE WITH THE OPPORTUNITY TO APPEAL THE MOTION COURT'S DENIAL OF HIS POSTCONVICTION CLAIMS, IN VIOLATION OF MR. GEHRKE'S RIGHT TO DUE PROCESS OF LAW, AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE MISSOURI CONSTITUTION, BECAUSE POSTCONVICTION COUNSEL ABANDONED MR. GEHRKE, IN THAT AFTER THE MOTION COURT DENIED MR. GEHRKE'S POSTCONVICTION MOTION, COUNSEL FAILED TO FILE A NOTICE OF APPEAL ON HIS BEHALF, ALTHOUGH MR. GEHRKE WANTED TO APPEAL.

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

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

Brown v. State, 179 S.W.3d 404 (Mo. App. S.D. 2005);

Missouri Supreme Court Rules 24.035, 29.15, and 27.16;

United States Constitution, Amendments V and XIV; and

Missouri Constitution, Article I, Section 10.

ARGUMENT ON APPEAL

THE MOTION COURT CLEARLY ERRED IN DENYING WITHOUT AN EVIDENTIARY HEARING MR. GEHRKE'S MOTION TO REOPEN HIS RULE 24.035 MOTION AND REISSUE ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW TO PROVIDE MR. GEHRKE WITH THE OPPORTUNITY TO APPEAL THE MOTION COURT'S DENIAL OF HIS POSTCONVICTION CLAIMS, IN VIOLATION OF MR. GEHRKE'S RIGHT TO DUE PROCESS OF LAW, AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE MISSOURI CONSTITUTION, BECAUSE POSTCONVICTION COUNSEL ABANDONED MR. GEHRKE, IN THAT AFTER THE MOTION COURT DENIED MR. GEHRKE'S POSTCONVICTION MOTION, COUNSEL FAILED TO FILE A NOTICE OF APPEAL ON HIS BEHALF, ALTHOUGH MR. GEHRKE WANTED TO APPEAL.

Standard of Review

Appellate review of a motion court's denial of a request to reopen a postconviction proceeding is limited to a determination of whether the findings and conclusions of the motion court are clearly erroneous. *Fenton v. State*, 200 S.W.3d 136, 137 (Mo. App. W.D. 2006). A motion court's actions are deemed clearly erroneous if a full review of the record leaves the appellate court with a definite and firm impression that a mistake has been made. *Carroll v. State*, 131 S.W.3d 907, 908 (Mo. App. S.D. 2004).

Discussion

The motion court clearly erred in denying Mr. Gehrke's motion to reopen his Rule 24.035 motion. Counsel's failure to file a notice of appeal on Mr. Gehrke's behalf constituted abandonment.

In *Fenton v. State*, 200 S.W.3d 136 (Mo. App. W.D. 2006), an inmate appealed the Circuit Court's denial of his attempt to reopen a Rule 27.26 motion that was denied in 1983. *Id.* at 138. This Court, relying on *Flowers v. State*, 618 S.W.2d 655 (Mo. banc 1981) and *Brown v. State*, 179 S.W.3d 404 (Mo. App. S.D. 2005), held that a motion court can reopen an old postconviction case due to abandonment by postconviction counsel. *Id.* at 140. It also held that the failure to file an appeal can "undoubtedly" constitute abandonment by postconviction counsel. *Id.* at 139.

In *Flowers*, the Missouri Supreme Court remanded to the motion court with directions to make a determination as to whether counsel abandoned Mr. Flowers when he failed to perfect an appeal of the denial of the postconviction motion. 618 S.W.2d at 657. It instructed the motion court that if abandonment was found, the motion court should "vacate the 1976 judgment and enter a new judgment therein, with the time for appeal commencing to run from the date thereof." *Id.*

Despite this Court's holding in *Fenton*, The Eastern District recently dismissed an appeal from the denial of a postconviction motion because the motion had been reopened under circumstances similar to Mr. Fenton's and Mr. Gehrke's. In *Crenshaw v. State*,

2007 WL 1052480 (Mo. App. E.D. April 10, 2007)³ the Eastern District, relying on a perceived difference between Rule 27.26 and Rule 29.15, held that the logic of *Fenton* and *Flowers* and *Brown* should be restricted to cases filed under the old Rule. *Id.* at *2.

The Eastern District explained:

At best, the *Fenton* decision applies only to Rule 27.26 proceedings. It relies upon *Flowers v. State*, 618 S.W.2d 655 (Mo. banc 1981). In *Flowers*, the movant was granted leave to file a successive 27.26 motion to allege abandonment by his post-conviction counsel for failing to perfect his appeal. However, after *Flowers*, Rule 27.26, which allowed successive motions, was repealed. Today, Rule 29.15 does not allow successive motions and the failure to include a claim in the initial motion acts as a procedural bar to successive motions or reopening of the motion. *See, Evans v. State*, 782 S.W.2d 402, 403-04 (Mo. App. E.D.1989).

Id.

The Eastern District's reliance on the difference between Rule 27.26 and Rule 29.15 in *Crenshaw* is incorrect for two reasons. First, although it is true that the postconviction movant in *Flowers* "was granted leave to file a successive 27.26 motion," a successive motion was not the remedy in *Flowers*, rather the denial of his successive

³ As of the time of this filing, the Eastern District has denied Mr. Crenshaw's motion to rehear the cause or transfer it to the Missouri Supreme Court, but the mandate has not yet issued. ED88500.

motion was what Mr. Flowers appealed. Mr. Flowers's appointed attorney failed to perfect the appeal of the denial of his 1976 postconviction motion. *Id.* at 656. Mr. Flowers was then granted leave to file a successive motion, and alleged in that motion that his previous attorney abandoned him. *Id.* The remedy in *Flowers* was a remand for new findings and conclusions:

The judgment dismissing the 1978 motion is reversed and the cause is remanded to the trial court with directions to conduct an evidentiary hearing and to make findings of fact and conclusions of law on whether Flowers' counsel abandoned him on appeal from the denial of the 1976 motion or whether Flowers indicated he did not wish to pursue, or waived, the appeal. If the trial court finds the former, then the court should vacate the 1976 judgment and enter a new judgment therein, with the time for appeal commencing to run from the date thereof.

Id. at 657.

The successive motion in *Flowers* was the vehicle for the abandonment allegation; it served the same purpose as Mr. Gehrke's motion to reopen served here. The remedy was the same in *Flowers* as it should be here, a remand to the Circuit Court with direction to issue a new judgment and allow an appeal.

Secondly and more broadly, while the *Crenshaw* court is correct regarding the distinction between the old rule and the new, that distinction has no logical relationship to whether counsel has abandoned a postconviction client by failing to file a notice of appeal. Rules 27.26 and the current rules serve a common purpose to adjudicate the

legality of the conviction and sentence of the defendant, to avoid delay, and to prevent the litigation of stale claims. *Fenton*, 200 S.W.3d at 138; *Brown v. State*, 179 S.W.3d 404, 406 (Mo. App. S.D. 2005); *Schleeper v. State*, 982 S.W.2d 252, 253 (Mo. banc 1998). “Rules 29.15 and 24.035, effective January 1, 1988, replaced Rule 27.26.” *Fincher v. State*, 795 S.W.2d 505, 506 (Mo. App. W.D. 1990). Like the current rules, Rule 27.26 did not allow successive motions on matters that could have been raised in the initial motion. *Flowers*, 618 S.W.2d at 657. But even if Rule 27.26 had allowed unlimited successive motions, it does not follow that the current rule’s prohibition on successive motions mandates a different definition of abandonment.

Additionally, the reasoning in *Crenshaw* results in a situation where postconviction movants can allege abandonment by failure to file a notice of appeal, but only if their original claim was filed before 1988. Mr. Fenton waited nearly twenty-two years to move to reopen his postconviction case. 200 S.W.3d at 137. Mr. Gehrke filed his motion to reopen about five years after counsel should have filed the notice of appeal. (L.F. 77, 85, 87). An arbitrary distinction between the old and new rules should not give Mr. Fenton a pass while penalizing Mr. Gehrke.

Mr. Gehrke’s postconviction counsel failed to file a notice of appeal on his behalf. The motion court’s denial of Mr. Gehrke’s motion to reopen his postconviction case due to abandonment violated Mr. Gehrke’s rights to due process of law, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and by Article I, Section 10 of the Missouri Constitution. Mr. Gehrke requests a remand for an evidentiary hearing on the matter, or a remand for the motion court to reissue its findings

of fact and conclusions of law so that he can have the opportunity to appeal the motion court's decision on the merits.

CONCLUSION

Based on the argument presented, Mr. Gehrke respectfully requests that this Court reverse the judgment of the Circuit Court and remand the cause for an evidentiary hearing on the issue of abandonment or for reissued findings of fact and conclusions of law so that he may have the opportunity to appeal the motion court's decision denying his postconviction claim.

Respectfully submitted,

RUTH B. SANDERS #53256
APPELLATE DISTRICT DEFENDER
Office of the State Public Defender
Western Appellate Division
818 Grand Blvd. Suite 200
Kansas City, Missouri 64106-1910
Tel: 816.889.7699
Fax: 816.889.2001
Email: ruth.sanders@mspd.mo.gov

Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing were mailed, postage prepaid, to Shaun J. Mackelprang, Chief Counsel, Criminal Appeals Division, Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102, on the 7th day of June, 2007.

Ruth B. Sanders

CERTIFICATE OF COMPLIANCE AND SERVICE

I, Ruth B. Sanders, hereby certify as follows:

- ✓ The attached brief complies with the limitations contained in Supreme Court Rule 84.06(b). The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 pt. font. Excluding the cover page, the signature block, this certificate of compliance and service and the appendix, this brief contains 2,661 words, which does not exceed the 31,000 words allowed for an appellant's brief.
- ✓ The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan Enterprise program, which was updated on February 22, 2007. According to that program, the disks provided to this Court and to the Attorney General are virus-free.
- ✓ A true and correct copy of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this 7th day of June, 2007, to Shaun J. Mackelprang, Chief Counsel, Criminal Appeals Division, Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

Ruth B. Sanders

APPENDIX TABLE OF CONTENTS

Judgment	A1
----------------	----