

IN THE
SUPREME COURT OF MISSOURI

TERRY T. WATSON,)	
)	
Appellant,)	
)	
vs.)	No. SC96103
)	
STATE OF MISSOURI,)	
)	
Respondent.)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF
ST. LOUIS CITY, MISSOURI
TWENTY-SECOND JUDICIAL CIRCUIT
THE HONORABLE BRYAN L. HETTENBACH, JUDGE

APPELLANT'S SUBSTITUTE REPLY BRIEF

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ARGUMENT

Point I. (Abandonment due to late filing of amended motion)

A. The Amended Motion was Untimely Filed

Mr. Watson's initial brief argued that this case should be remanded for an abandonment hearing due to the fact that the amended motion was filed out of time. (App. Brf. 24-30). Although motion counsel could have requested a longer period of time to file the amended motion, she instead only requested a period of forty-five days from when she filed her extension request.

In its substitute Respondent's brief, the State argues that "the motion court's order granting the 45-day extension request should not be interpreted as granting an eight-day extension of time from May 20 to May 28, 2013." (Rsp. Brf. 19). However, there was no "extension request" in the traditional sense of the phrase. In fact, the word "extension" never appears in motion counsel's "MOTION FOR LEAVE TO FILE AMENDED ANSWER." (PCR L.F. 17). The motion only "requests a period of 45 days from the date of filing within which to file an amended petition." (PCR L.F. 17). Instead of issuing a separate order granting an extension request, the motion court simply wrote on the motion, "Motion Granted." (PCR L.F. 18).

In *Moore v. State*, the amended motion was initially due on August 20, 2012. 458 S.W.3d 822, 825 (Mo. banc 2015). Had a thirty day extension been granted, the amended motion would have been due on September 19, 2012, which was when the amended motion was actually filed. *Id.* This Court held that the amended motion was nonetheless

untimely due to the fact that the record failed “to show that Mr. Moore’s appointed counsel requested, or that the motion court on its own motion granted, an extension.” *Id.*

In the present case, there is similarly nothing in the record to show that the motion court granted an extension beyond forty-five days past the date the “MOTION FOR LEAVE TO FILE AMENDED ANSWER” was filed.

The State asserts that this Court should assume that motion counsel was requesting a forty-five day extension from the original due date of the amended motion. (Rsp. Brf. 19-20). Although the State describes a forty-five day extension as “standard practice,” it is actually fifteen days longer than a motion court is authorized to give pursuant to Rule 29.15(g). This Court should not assume that a forty-five day extension was requested when there is no language within the motion asking for such an extension. Furthermore, this Court should not assume that a forty-five day extension was granted when the motion court can be presumed to know it had no authority to grant such an extension. This Court should therefore reverse the motion court’s order and remand the case for an abandonment inquiry.

B. The Abandonment Doctrine Applies to Mr. Watson’s Case

The State argues that the abandonment doctrine “has been held applicable only in cases where counsel has been appointed.” (Rsp. Brf. 17). The State further points out that this Court is currently considering the question of whether the abandonment doctrine applies to retained counsel in *Gittemeier v. State*, No. SC95953. (Rsp. Brf. 17).

Even assuming that this Court holds in *Gittemeier* that the abandonment doctrine does not apply to retained counsel, the abandonment doctrine should still apply in Mr. Watson's case. Rule 29.15(e) states:

When an indigent movant files a pro se motion, the court shall cause counsel to be appointed for the movant. Counsel shall ascertain whether sufficient facts supporting the claims are asserted in the motion and whether the movant has included all claims known to the movant as a basis for attacking the judgment and sentence.

In the present case, Mr. Watson signed a "Forma Pauperis Affidavit" when he filed his Form 40. (PCR L.F. 14). Thereafter, the motion court notified the public defender's office that Mr. Watson had filed a Form 40, and that the Form 40 was accompanied by an affidavit of indigency. (PCR L.F. 15). In motion counsel's "MOTION FOR LEAVE TO FILE AMENDED ANSWER," she stated that her firm "was appointed as Specific Public Defender to represent Terry Watson." (PCR L.F. 17).

The State does not argue that motion counsel was "retained" by Mr. Watson, because it is clear that she was not. Instead, the State argues that motion counsel was not "appointed" because the public defender system was instead "notified" of Mr. Watson's Form 40. (Rsp. Brf. 17). It is true that this Court recently distinguished between a motion court "appointing" the public defender system and merely "notifying" the public defender system about the existence of a Form 40 in *Creighton v. State*, 2017 WL 1496952, *2-*4 (Mo. banc 2017). However, this Court distinguished between these two concepts only for purposes of calculating the due date for an amended motion. *Id.*

This Court also pointed out in *Creighton* that “[t]he requirement that the motion court ‘shall cause counsel to be appointed’ neither prohibits the motion court from providing a notification nor compels the conclusion that a notification must be deemed an appointment.” *Id.* at *3. Under this logic, a notification is consistent with the motion court causing counsel to be appointed. This Court went on to state later in the paragraph that “Rule 29.15(e) provides only that, at some point, the court must ensure counsel is appointed to represent an indigent movant.” *Id.* This is exactly what occurred in the present case.

Here, motion counsel entered an appearance pursuant to procedures acceptable under Rule 29.15(e). Mr. Watson filed a *pro se* Form 40, and the motion court “cause[d] counsel to be appointed” by notifying the public defender system of the existence of the Form 40. The abandonment doctrine should therefore apply to Mr. Watson’s case.

Points II, III, and IV.

For the remaining points, undersigned counsel stands by the arguments made in Mr. Watson's initial brief.

CONCLUSION

Because the motion court clearly erred in failing to conduct an abandonment inquiry to determine whether Mr. Watson was abandoned by the late filing of the amended motion, and which motion should be adjudicated, as set out in Point I, this Court should reverse the motion court's order and remand the case for an abandonment inquiry. Because the motion court clearly erred in denying Mr. Watson's Rule 29.15 motion, and denying his motion to amend the judgment, as set out in Point II, the judgement and order must be vacated and the cause remanded for a hearing to determine whether Ms. Carson complied with the responsibilities imposed by Rule 29.15(e). Because the motion court clearly erred in denying Mr. Watson's Rule 29.15 motion without an evidentiary hearing, as set out in Points III and IV, the judgment of the motion court must be reversed and the cause remanded for an evidentiary hearing.

Respectfully submitted,

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Certificate of Compliance and Service

I, Samuel Buffaloe, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2010, in Times New Roman size 13 point font. Excluding the cover page, the signature block, and this certificate of compliance and service, the reply brief contains 1,164 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

On this 1st day of June, 2017, electronic copies of Appellant's Substitute Reply Brief were placed for delivery through the Missouri e-Filing System to Shaun Mackelprang, Assistant Attorney General, at Shaun.Mackelprang@ago.mo.gov.

/s/ Samuel Buffaloe

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