

IN THE  
MISSOURI SUPREME COURT

JAKIB PROPST,	)	
	)	
Appellant,	)	
	)	
v.	)	No. SC96032
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT  
FROM THE CIRCUIT COURT OF ST. FRANCOIS COUNTY  
STATE OF MISSOURI  
TWENTY-FOURTH JUDICIAL CIRCUIT, DIVISION 1  
THE HONORABLE WENDY HORN  
JUDGE AT POST-CONVICTION PROCEEDING

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APPELLANT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

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Timothy Forneris  
Missouri Bar No. 53796  
Assistant Public Defender  
1010 Market Street, Suite 1100  
St. Louis, Missouri 63101  
(314) 340-7662  
Fax: (314) 340-7685  
Tim.Forneris@mspd.mo.gov  
  
ATTORNEY FOR APPELLANT

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## **JURISDICTIONAL STATEMENT**

The State charged Appellant, Jakib Propst, with one count of burglary in the second degree in violation of Section 559.170.<sup>1</sup> On January 17, 2014, Appellant pled guilty to the charge. The Honorable Kenneth Pratte sentenced him to five years, suspended execution of the sentence, and placed Appellant on five years of supervised probation. On April 25, 2014, Judge Pratte revoked Appellant's probation and ordered his five-year sentence executed.

On April 30, 2014, Appellant was delivered to the Department of Corrections. On October 28, 2014, Appellant untimely filed his *pro se* motion for post-conviction relief pursuant to Missouri Supreme Court Rule 24.035. Appellant filed a motion to allow movant to proceed with his Rule 24.035 despite the untimeliness of his *pro se* filing. The motion court held a hearing on June 19, 2015.

The motion court dismissed Appellant's post-conviction case in Findings of Fact and Conclusions of Law and Order issued on June 25, 2015. Appellant timely filed notice of appeal on August 3, 2015. After an opinion reversing judgment by the Court of Appeals, Eastern District, this Court ordered transfer on

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<sup>1</sup> All statutory references are to RSMo 2000 unless otherwise indicated. The Record on Appeal will be cited to as follows: Legal File, "(L.F.)" and Hearing Transcript, "(Tr.)."

May 30, 2017 after Respondent's application. Mo. Const. Art. V, Sec. 9; Rule 83.04.

## **STATEMENT OF FACTS**

The State charged Appellant with one count of burglary in the second degree (L.F. 7-8). On January 17, 2014, Appellant pled guilty to the charge (L.F. 12-16).<sup>2</sup> The court sentenced him to five years, suspended execution of the sentence, and placed Appellant on five years of supervised probation (L.F. 16; Tr. 15). On April 25, 2014, the Honorable Kenneth Pratte revoked Appellant's probation and ordered his five-year sentence executed (L.F. 17-18; Tr. 18, 22).

On April 30, 2014, Appellant was delivered to the Department of Corrections (Tr. 17). On October 28, 2014, Appellant untimely filed his *pro se* motion for post-conviction relief pursuant to Missouri Supreme Court Rule 24.035 (L.F. 24-29). Appellant filed a motion to allow movant to proceed with his Rule 24.035 despite the untimeliness of his *pro se* filing (L.F. 33-39). The motion court held a hearing on June 19, 2015 (Tr. 1-22).

At the hearing, Wayne Williams, the District Defender ("District Defender") of the Farmington Public Defender Office, testified (Tr. 1-17). District Defender is the supervising attorney of the Farmington trial office (Tr. 4). District Defender testified that he did not personally represent Appellant at his plea, but that he became aware of his case (Tr. 4-5, 13). Appellant had two cases pending

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<sup>2</sup> The guilty plea and sentencing transcript is condensed to four pages per one legal file page. For this Court's convenience, Appellant will cite both the legal file page as well as the condensed page when referring to the transcript "(Tr.)."

in the office (Tr. 5). Different attorneys represented Appellant in the separate cases (Tr. 5).

District Defender found out that in Appellant's Washington County case, Appellant had a probation violation, had received CODS,<sup>3</sup> and was committed to the Missouri Department of Corrections (Tr. 5). At around the same time, Appellant had this case pending for a probation violation, where he did not receive CODS and received his suspended sentence (Tr. 5).

After the cases were closed in his office, District Defender found out that Appellant was not released from the Department of Corrections after he served the time required for CODS (Tr. 5, 13-14). District Defender believed there was a problem with this case because Appellant qualified for CODS, but his attorney never made the court aware of this possibility (Tr. 6). District Defender acted because he wanted to try to rectify that problem with a Form 40 (Tr. 6, 14).

District Defender found out about this problem somewhere around October 15, 2014 (Tr. 6). District Defender made a special appointment to meet with

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<sup>3</sup> The Court Ordered Detention Sanction (CODS) is a 120 day program placement within the Division of Adult Institutions by the Court as a violation response. See Section 559.036.4(1) and Missouri Department of Corrections, *Supervision Strategies and Treatment Alternatives*, <https://doc.mo.gov/Documents/prob/SupervisionStrategies.pdf> (last visited June 30, 2017).



Appellant at the Western Missouri Correctional Center in Cameron, Missouri (Tr. 6, 10). This was the first time that District Defender had talked to a client after closing a client's case (Tr. 10). District Defender acknowledged that he was not appointed by the court to undertake this task (Tr. 10).

District Defender met Appellant on October 27, 2014 (Tr. 6, 14). Because of the weather, District Defender estimated it was a fifteen-hour round-trip (Tr. 7).

District Defender met Appellant around 11:00 a.m. in the morning (Tr. 7). He advised Appellant of the situation and advised him that he had prepared a Form 40 for Appellant (Tr. 7). District Defender showed him the Form 40, discussed the legal issues involved with the mistake made in this case, and how they might try to address that problem with a Form 40 (Tr. 7, 14). Appellant was completely unaware of the issue involved (Tr. 7).

District Defender gave legal advice to Appellant (Tr. 10). After being advised of his options, Appellant told District Defender that he wanted to pursue the Form 40 (Tr. 8, 10-11). District Defender explained to Appellant the legal issue and advised him that if he wanted to pursue it, the Missouri Public Defender appellate division would be appointed to represent him (Tr. 17). District Defender recalled that the Form 40 was prepared by his office (Tr. 8).

Appellant signed the Form 40 with a notary present (Tr. 8). District Defender told Appellant that he would file the Form 40 (Tr. 8). District Defender did not recall knowing the exact date that Appellant was delivered to the Department of Corrections, but he did recall doing some calculations and thought

he had enough time to file the Form 40 (Tr. 8). District Defender acknowledged the Form 40 listed three different delivery dates: April 30, 2014, May 13, 2014, and July 18, 2014 (Tr. 9; L.F. 24).

District Defender thought he was within the time frame to file the Form 40 (Tr. 11-12). He knew he was close on the deadline and thought the next day was the deadline (Tr. 12). District Defender returned late in the evening of October 27, 2014 after the courthouse closed (Tr. 12). District Defender was aware of St. Francois County Local Rule 4.4 which allows for fax filing (Tr. 12). In October of 2014, the St. Francois County Clerk's office had not implemented the e-filing system (Tr. 12). District Defender agreed that if he faxed the Form 40 to the circuit clerk's office after business hours, the circuit clerk would file the motion that day, despite the hour (Tr. 12). District Defender did not fax file Appellant's Form 40 because he thought he had until the next day to file the Form 40 (Tr. 13). He thought the last day to file the Form 40 was October 28, 2014 (Tr. 13). District Defender never filed an entry of appearance and did no further work in this case (Tr. 15-16).

The motion court dismissed Appellant's Form 40 for its untimeliness in Findings of Fact and Conclusions of Law and Order issued on June 25, 2015 (L.F. 55-56; A1-A2). The motion court applied Price v. State, 422 S.W.3d 292, 302 (Mo. banc 2014), finding nothing in Appellant's case occurred to make it different than the Price case (L.F. 56; A2).

The notice of appeal from the motion court's dismissal was timely filed on August 3, 2015 (L.F. 59-61). To avoid repetition, additional facts may be adduced in the argument portion of this brief.

**POINT RELIED ON**

**I.**

The motion court erred in overruling Appellant's motion to proceed despite the untimeliness of his Form 40 and dismissing his post-conviction motion denying his rights to due process of law and to effective assistance of counsel in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution in that Appellant's untimely motion was beyond Appellant's control and due to the active interference of counsel who assumed the duty of filing the *pro se* motion and actively interfered by failing to timely file Appellant's Form 40 by fax filing it pursuant to St. Francois County Local Rule 4.4, which is and should be considered a recognized form of exception discharging the time limits of Rule 24.035(b).

McFadden v. State, 256 S.W.3d 103 (Mo. banc 2008);

Rule 24.035;

U.S. Const. Amend. V, VI, XIV; and,

Mo. Const. Art. I, Sections 10 and 18(a).

## ARGUMENT

### I.

The motion court erred in overruling Appellant's motion to proceed despite the untimeliness of his Form 40 and dismissing his post-conviction motion denying his rights to due process of law and to effective assistance of counsel in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution in that Appellant's untimely motion was beyond Appellant's control and due to the active interference of counsel who assumed the duty of filing the *pro se* motion and actively interfered by failing to timely file Appellant's Form 40 by fax filing it pursuant to St. Francois County Local Rule 4.4, which is and should be considered a recognized form of exception discharging the time limits of Rule 24.035(b).

### Summary of the Argument

Appellant's Form 40 was *one day late* because of the active inference of District Defender (Tr. 12). Appellant's Form 40 was prepared for filing on October 27, 2015, the due date (Tr. 6, 14). District Defender's active interference was failing to physically file it before 5 p.m. or fax file it under the Local Rule 4.4 on that date, October 27, 2015 (Tr. 12). Appellant's tardiness was solely from the active interference of District Defender, which was beyond Appellant's control, and should have been excused. The waiver imposed by Rule 24.035(b) should not be enforced.

### **Preservation of Error and Standard of Review**

Appellant filed a motion to allow movant to proceed with his Rule 24.035 despite the untimeliness of his *pro se* filing (L.F. 33-39). The motion court held a hearing on June 19, 2015 (Tr. 1-22). Because the motion was filed and evidence was adduced, it is preserved for appellate review. See Comstock v. State, 68 S.W.3d 561, 565 (Mo. App. W.D. 2001) (declining plain error review of claim not raised in original or amended post-conviction motions).

Appellate review of a motion court's decision to allow a motion to file a post-conviction motion out of time is limited to a determination of whether the motion court's findings and conclusions are clearly erroneous. Gehrke v. State, 280 S.W.3d 54, 56 (Mo. banc 2009). Findings and conclusions are clearly erroneous if, after reviewing the entire record, this Court is left with the definite and firm impression that a mistake has been made. Eastburn v. State, 400 S.W.3d 770, 773 (Mo. banc 2013).

### **Analysis**

The motion court erred in dismissing Appellant's Form 40 because District Defender "actively interfered" with the timely filing of Appellant's Form 40 (L.F. 56; A2). If District Defender had not miscalculated the due date and if he had filed the Form 40 when he returned from his visit with Movant, the Form 40 would have been timely filed (Tr. 8, 12).

Appellant was delivered to the Missouri Department of Corrections on April 30, 2014 (Tr. 17). Pursuant to Missouri Supreme Court Rule 24.035(b), a

*pro se* motion must be filed within 180 days of the date that Appellant is delivered to the Department of Corrections. See Rule 24.035(b). Appellant's *pro se* motion (Form 40) had to be filed on or before October 27, 2014.

Appellant's Form 40 was untimely because District Defender filed it on October 28, 2014 (L.F. 24-29). Appellant acknowledges that this Court has rejected constitutional challenges to the time provisions found in Rule 24.035 and 29.15. See Day v. State, 770 S.W.2d 692 (Mo. banc 1989).

However, this Court has recognized the "active interference exception," which is very narrow and excuses the time limits in which to file a *pro se* post-conviction motion under both Rule 24.035(b) and Rule 29.15(b). See, generally, McFadden v. State, 256 S.W.3d 103, 105 (Mo. banc 2008).

Pursuant to the "active interference exception," a late *pro se* post-conviction motion shall be pardoned "where an inmate prepares his initial motion and does all that he reasonably can to ensure that it is filed on time," but the filing of the movant's *pro se* post-conviction motion is, nevertheless, tardy as a result solely from the active interference of a third party beyond the inmate's control. Price v. State, 422 S.W.3d 292, 307 (Mo. banc 2014). Specifically, the doctrine only applies under the "specific factual scenario where counsel overtly acted and such actions prevented the movant's timely filing" or when a third party, outside of the movant's control, interferes with the timely filing. McFadden, 256 S.W.3d at 109. The "active interference doctrine" is applied in "unique circumstances." Id.

In this case, Appellant did not know that he had an ineffective assistance of counsel claim until District Defender came to visit him on October 27, 2014 with a Form 40 for him to sign (Tr. 5-6, 13-14). Appellant was incarcerated in Cameron, Missouri (Tr. 6, 10). District Defender was from the Missouri Public Defender's Office in Farmington (Tr. 4). It is at least a five-hour drive from Farmington to Cameron (Tr. 7). District Defender met Appellant around 11:00 a.m. on October 27, 2014 (Tr. 6-7, 14). District Defender informed Appellant that he had a sentencing issue about his counsel and advised him to sign the Form 40 so that District Defender could file it on his behalf (7, 14). Despite knowing Local Rule 4.4, which allowed fax filing, District Defender did not file Appellant's Form 40 until October 28, 2014 (Tr. 12). The motion court erroneously found that the factual scenario did not require the court to hold that District Defender overtly acted and such actions prevented Appellant from timely filing his *pro se* motion (L.F. 56; A2).

In McFadden v. State, 256 S.W.3d 103, 105 (Mo. banc 2008), abrogated by Price v. State, 422 S.W.3d 292 (Mo. banc 2014), the movant gave his *pro se* Rule 29.15 motion to an attorney, who was going to represent the movant in the case, and who instructed him to give his motion to her for filing. Id. The attorney, however, failed to timely file the motion. Id. The motion court dismissed the case for untimely filing. Id. This Court held movant had an attorney-client relationship with the attorney, even though the attorney had not been formally appointed by a court. Id. at 107. The attorney had undertaken representation of the movant in the



case, provided legal advice, and told him to give his *pro se* 29.15 motion to her for filing. Id. The movant timely prepared and gave his motion to the attorney at her express direction. Id. The attorney's actions did not occur due to lack of understanding of Rule 29.15, an ineffective attempt at filing, or an "honest mistake," none of which will justify failure to meet the time requirements. Id. at 109. This Court permitted the movant to proceed under Rule 29.15 because the attorney actively interfered with the timely filing of his motion. Id.

In Price v. State, 422 S.W.3d 292, 307 (Mo. banc 2014), this Court held that McFadden stands only for the proposition that, where an inmate prepares his initial motion and does all that he reasonably can to ensure that it is filed on time, tardiness resulting solely from the active interference of a third party beyond the inmate's control may be excused and the waiver imposed by Rule 29.15(b) not enforced.

Price is distinguishable because Price had private counsel whom he hired. 422 S.W.3d at 294. As in McFadden, Appellant had a public defender whom he did not hire. 256 S.W.3d at 107. Appellant had a public defender who initiated contact with him, told him he had a claim, and then advised him that he would file his Form 40. Id.

Furthermore, Price had his choice of counsel<sup>4</sup> and he was bound by his choice of counsel and his counsel's conduct. Arguably, Price, who could afford private counsel, might have been able to hire another private attorney to file the Form 40 prior to the expiration of the time limits under the rule if the first private counsel was not acting quickly enough.

The situation of prisoners seeking to appeal without the aid of counsel is unique. Such prisoners cannot take the steps other litigants can take . . . to ensure that the court clerk receives and stamps their notices of appeal before the . . . deadline.” Houston v. Lack, 487 U.S. 266, 270-71 (1988).

As in McFadden, Appellant's Form 40 was prepared for filing on October 27, 2015 (Tr. 6, 14). District Defender's active interference was failing to physically file it before 5 p.m. or fax file it when he returned under the Local Rule 4.4 on October 27, 2015 (Tr. 12). Id. at 109. Appellant's tardiness was solely from the active interference of District Defender, which was beyond Appellant's control, and should have been excused. Id. The waiver imposed by Rule 24.035(b) should not be enforced. See Lucious v. State, 460 S.W.3d 35, 38 (Mo. App. E.D. 2015); Price, 422 S.W.3d at 307.

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<sup>4</sup> Presumably, an indigent defendant has no choice of counsel because counsel is appointed for him.

Instead of applying Price, the motion court should have applied McFadden and allowed Appellant to proceed with his Rule 24.035 post-conviction cause, despite the untimeliness of his *pro se* filing.

### **CONCLUSION**

WHEREFORE, based on his argument in Point I of his brief, Appellant requests that this Court reverse the judgment of the motion and remand to allow for Appellant to proceed with his Rule 24.035 post-conviction cause, despite the untimeliness of his *pro se* filing.

Respectfully submitted,

/s/ Timothy Forneris

Timothy Forneris, MO Bar #53796

Attorney for Appellant

1010 Market Street, Suite 1100

St. Louis, MO 63101

Phone: (314) 340-7662

Fax: (314) 340-7685

Tim.Forneris@mspd.mo.gov

ATTORNEY FOR APPELLANT

**CERTIFICATE OF SERVICE AND COMPLIANCE**

Pursuant to Missouri Supreme Court Rule 84.06(h) and Special Rule 333(e), I hereby certify that on June 30th, 2017, a true and correct copy of the foregoing was e-filed with this Court and sent to Shaun Mackelprang, attorney for Respondent, via the Missouri E-Filing System Clerk. In addition, I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the page limitations of Special Rule 360. This brief was prepared with Microsoft Word for Windows, uses Times New Roman 13 point font, and contains 2,873 words.

/s/ Timothy Forneris

Timothy Forneris, MO Bar #53796

Attorney for Appellant

1010 Market Street, Suite 1100

St. Louis, MO 63101

Phone: (314) 340-7662

Fax: (314) 340-7685

Tim.Forneris@mspd.mo.gov