No. SC96032

IN THE

Supreme Court of Missouri

JAKIB PROPST,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the St, Francois County Circuit Court
Twenty-fourth Judicial Circuit
The Honorable Wendy Wexler Horn, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Mr. Propst appeals the dismissal of his Rule 24.035 motion, which was dismissed as untimely filed (*see* L.F. 55-56). He asserts that the untimely filing should have been excused because post-conviction counsel actively interfered with the timely filing of the motion (App.Sub.Br. 12).

* * *

The State charged Mr. Propst with burglary in the second degree (L.F. 7). On January 17, 2014, Mr. Propst pleaded guilty (L.F. 13-16). Pursuant to a plea agreement, the court sentenced Mr. Propst to five years' imprisonment, suspended execution of sentence, and placed him on probation (L.F. 15-16).

On April 25, 2014, Mr. Propst appeared for a probation revocation hearing (L.F. 17). The State alleged that he had "used drugs and violated Condition No. 6" of his probation, and that he had violated "Condition No. 2, travel" (L.F. 17). Mr. Propst admitted that he had violated "Condition No. 2, travel," in that he did not "obtain advance permission from [his] probation officer before leaving the state or the area in which [he was] living" (L.F. 17). The court revoked his probation and executed his sentence (L.F. 17). The court advised him of his right to seek post-conviction relief pursuant to Rule 24.035, and the court told him that he had to file his motion "within 180 days after [his] delivery to the Department of Corrections" (L.F. 18).

Mr. Propst was delivered to the Department of Corrections on April 30,

2014 (Tr. 17). On October 28, 2014—181 days after delivery—he filed a *pro se* motion pursuant to Rule 24.035 (L.F. 21, 24).[1] In his motion, he alleged that, at the time his probation was revoked, he was eligible for the Court Ordered Detention Sanction (CODS) program pursuant to § 559.036.4 and, accordingly, he should have been placed in a 120-day program pursuant to CODS (L.F. 25-26).

On October 30, 2014, the motion court appointed the Public Defender to represent Mr. Propst (L.F. 30). On March 19, 2015, Mr. Propst filed an amended motion and a separate "Motion to Allow Movant to Proceed with his Rule 24.035 Post-conviction Cause Despite the Untimeliness of his *pro se* Filing" (L.F. 33, 40). He alleged in the latter motion that "he did not know that he had a sentencing complaint until District Defender Wayne Williams came to visit him on October 27, 2014 with a Form 40 for him to sign" (L.F. 36). He alleged, "Mr. Williams informed Movant that he had a sentencing issue with his counsel and advised him to sign the Form 40 so that counsel could file it on his behalf" (L.F. 36-37). He alleged that "[d]espite having Local

[1] Although Mr. Propst signed the motion, it had been prepared by a public defender (*see* Tr. 7-8; L.F. 28). The public defender who had represented Mr. Propst in his criminal case signed the certificate of service attached to the *pro se* motion (*see* L.F. 27, 29).

Rule 4.4, which allows fax filing, Mr. Williams did not file Movant's Form 40 until October 28, 2014" (L.F. 37). He stated that he did "not know why his Form 40 was not filed on its due date on October 27, 2014" (L.F. 37).

On June 19, 2015, the motion court conducted a hearing on the motion seeking to excuse the untimely filing (Tr. 3-21). The district public defender, Wayne Williams, testified that, although he had not represented Mr. Propst in his criminal case, "it was brought to [his] attention" that Mr. Propst "did not receive CODS" and that Mr. Propst "had not waived CODS" (Tr. 5). This issue came to Mr. Williams's attention "somewhere on or relatively soon after October 15, 2014" (Tr. 6). Mr. Williams then "scheduled an appointment for October 27, 2014," and met with Mr. Propst at the DOC facility in Cameron, Missouri (Tr. 6-7).

Mr. Williams testified that he advised Mr. Propst of the issue involving CODS (Tr. 7). He testified that he told Mr. Propst that he "had a Form 40 that was prepared" (Tr. 7). He testified that he explained the CODS issue to Mr. Propst and told him they "might try to address that problem with a Form 40" (Tr. 7). He testified that the Form 40 had been prepared by his office, that Mr. Propst signed it, and that it was notarized by personnel at the prison (Tr. 7-8). He testified that they talked about "just letting [the CODS issue] go and maybe he gets out on parole," but he stated that Mr. Propst ultimately stated that "it was his desire to pursue it" (Tr. 8).

Mr. Williams testified that he told Mr. Propst that he would file the Form 40 for him (Tr. 8). He initially testified that he did not know exactly when Mr. Propst had been delivered to the Department of Corrections (Tr. 8). He then stated that he did not "recall knowing the exact time" (Tr. 8). He testified that he recalled "doing some sort of calculations on the time" and thinking he "had enough time to file the Form 40" (Tr. 8). He testified that he knew the time was running, and he stated that his intent, "if [Mr. Propst] wanted to pursue this," was "to have the form ready so he could sign it, and then [Mr. Williams] could cause it to be filed shortly thereafter" (Tr. 11). He stated that he "knew [he] was close on the deadline" (Tr. 11-12). He testified that the trip to visit Mr. Propst was "a long trip, and [he] didn't get back until after-hours" (Tr. 12). He said that he "thought [he] was within the deadline," inasmuch as he "thought the next day was the deadline" (Tr. 12). He stated that because he got back "late in the evening," he waited until the next day to file the Form 40 (Tr. 12). He testified that, under a local rule, he could have fax filed the Form 40 after business hours (Tr. 12). He stated that he did not fax file because he thought the deadline was the next day (Tr. 12-13). He testified, "I miscalculated the time I assume" (Tr. 13).

Mr. Williams testified that he had not been appointed to represent Mr. Propst (Tr. 10). He stated that he gave Mr. Propst legal advice about filing the Form 40, and he stated that Mr. Propst was "completely unaware of the

issue involved" (Tr. 10). He testified that it was Mr. Propst's desire that he file the Form 40 (Tr. 10-11).

On cross-examination, Mr. Williams again testified that he was not Mr. Propst's attorney (Tr. 13). He stated that he took action in the case because "there was no one else to act," except for Mr. Propst (Tr. 14). He testified that he did not enter an appearance, but that he did give Mr. Propst legal advice "[a]s an attorney" (Tr. 14-15). He testified that he never spoke to Mr. Propst before their October 27, 2014, meeting (Tr. 16). He said that he explained to Mr. Propst that "if he wanted to file the Form 40 and pursue the issue that our appellate division could be appointed to represent him" (Tr. 17).

On June 25, 2015, relying on *Price v. State*, 422 S.W.3d 292, 302 (Mo. 2014), the motion court found that Mr. Propst's *pro se* motion was untimely and dismissed the motion (L.F. 55-56).

ARGUMENT

I.

The motion court did not clearly err in dismissing Mr. Propst's post-conviction motion as untimely filed.

Mr. Propst asserts that the motion court should have excused the untimely filing of his post-conviction motion because the late filing was "beyond [his] control and due to the active interference of counsel who assumed the duty of filing the *pro se* motion" (App.Sub.Br. 12). He asserts that the public defender who visited him in prison and agreed to file his Form 40 "actively interfered by failing to timely file [his] Form 40 by fax filing it pursuant to St. Francois County Local Rule 4.4" (App.Sub.Br. 12). He asserts that if counsel "had not miscalculated the due date and if he had filed the Form 40 when he returned from his visit with [Mr. Propst], the Form 40 would have been timely filed" (App.Sub.Br. 13).

A. The standard of review

"Appellate review of a judgment entered under Rule 29.15 'is limited to a determination of whether the motion court's findings of fact and conclusions of law are clearly erroneous.' " *Price v. State*, 422 S.W.3d 292, 294 (Mo. 2014) (quoting *Moore v. State*, 328 S.W.3d 700, 702 (Mo. 2010)). " 'Findings and conclusions are clearly erroneous if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been

made.' " *Id.* (quoting *Moss v. State*, 10 S.W.3d 508, 511 (Mo. 2000)).

B. Mr. Propst's motion was untimely, and there was no "active interference" that excused the untimely filing

Absent an appeal, a person seeking relief pursuant to Rule 24.035 shall file a motion to vacate, set aside, or correct the judgment or sentence within 180 days of the date the person is delivered to the custody of the department of corrections. Rule 24.035(b). "Failure to file within the time provided by this Rule 24.035 shall constitute a complete waiver of any right to proceed under this Rule 24.035 and a complete waiver of any claim that could be raised in a motion filed pursuant to this Rule 24.035." *Id.*

The parties agree that Mr. Propst's *pro se* motion was untimely (*see* App.Sub.Br. 14). Mr. Propst was delivered to the Department of Corrections on April 30, 2014, making his *pro se* motion due on October 27, 2014—180 days after he was delivered. *See* Rule 24.035(b). Mr. Propst filed his motion on October 28, 2014 (L.F. 24). Thus, absent a recognized exception to the mandatory time limit of the rule, the motion was one day late, resulting in a complete waiver of the right to proceed under Rule 24.035.

This Court has recognized a narrow exception to the time limit for filing in cases where there is "active interference" with the filing of a motion that otherwise would have been timely filed. *See Price*, 422 S.W.3d at 301-02; *McFadden v. State*, 256 S.W.3d 103, 108-09 (Mo. 2008). Pursuant to this

exception, "where an inmate writes his initial post-conviction motion and takes every step he reasonably can within the limitations of his confinement to see that the motion is filed on time, a motion court may excuse the inmate's tardiness when the active interference of a third party beyond the inmate's control frustrates those efforts and renders the inmate's motion untimely." *Price*, 422 S.W.3d at 302.

The facts in *Price* were similar to the facts in Mr. Propst's case. There, the movant argued that his failure to timely file should have been excused because he "hired private counsel to draft and file his Rule 29.15 motion and then relied entirely on that counsel to ensure that a timely motion was filed." *Id.* at 295. Counsel stated that he misunderstood the deadline to file the motion. *Id.*

This Court refused to apply the active interference exception because the movant had not done all that he could have done to effect a timely filing. *Id.* at 302. The Court observed that the movant "did not write his initial post-conviction motion and took no steps to meet (or even calculate) the applicable filing deadline for his motion." *Id.* The Court found that the untimeliness of the movant's motion was the result of counsel's failure "to comprehend the applicable deadline," and the Court held that, under those facts, the active interference exception did not apply. *Id.* at 301, 303.

The same conclusion is warranted in Mr. Propst's case. As in *Price*, Mr.

Propst did not "take[] every step he reasonably" could have taken to effect a timely filing of his motion before the deadline. He did not write or prepare his initial motion; rather, the public defender's office prepared the motion, and, on the day the motion was due, counsel took the motion to Mr. Propst for his review and signature (*see* Tr. 7-8). It was only then, after consulting with counsel and receiving legal advice, that Mr. Propst even decided to pursue the motion and accepted counsel's offer to file it (*see* Tr. 7-8, 10-11, 14-15).

Prior to counsel's visiting Mr. Propst on the day the motion was due, Mr. Propst was "completely unaware" of any purported sentencing issue related to CODS, and there was no indication that Mr. Propst had taken any steps toward filing a *pro se* post-conviction motion, such as drafting a *pro se* motion and ascertaining the deadline (*see* Tr. 8). And, as in *Price*, the reason the motion ultimately was not timely filed—either by hand or by fax—was because counsel miscalculated the deadline (*see* Tr. 8, 11-13).

Mr. Propst acknowledges the decision in *Price*, but he asserts that his case is more like *McFadden*, *supra*, where this Court held that a public defender had actively interfered with the timely filing of the movant's post-conviction motion (*see* App.Sub.Br. 15-18). Mr. Propst points out that in *Price*, the movant "had private counsel whom he hired," whereas "in *McFadden*, [the movant] had a public defender whom he did not hire" (App.Sub.Br. 16). He also points out that the movant in *Price* "had his choice of counsel[] and he

was bound by his choice of counsel and his counsel's conduct" (App.Sub.Br. 17) (footnote omitted). He notes, "Presumably, an indigent defendant has no choice of counsel because counsel is appointed for him" (App.Sub.Br. 17).

But while there are some similarities between Mr. Propst's case and *McFadden*, there are important differences. In *McFadden*, similar to this case, a public defender initiated contact with the movant while the movant was incarcerated. *Id.* at 105. The public defender then directed the movant to send his post-conviction motion "directly to her and told him she would hand file it before the due date." *Id.* The deadline to file the motion was October 11, 2006. *Id.* The movant "prepared, signed, and notarized his *pro se* motion on September 25, 2006, and placed it in the mail to the public defender." *Id.* The public defender received the movant's motion on September 28, but did not file the motion until October 12, 2006. *Id.*

This Court applied the active interference exception under those facts and allowed the movant to proceed on his untimely motion. *See id.* at 109. The Court found that the movant "timely prepared his motion for post-conviction relief and provided this motion to counsel well before it was due," and that the reason for its untimeliness was because counsel "actively interfered with the timely filing." *Id.* The Court found that the defendant "did all he could do to express an intent to seek relief under Rule 29.15, took all steps to secure this review, and was free of responsibility for the failure to

comply with the requirements of the rule." *Id.*[2]

Critical to the Court's holding in *McFadden* was the fact that the movant had prepared his motion before the deadline and done everything he reasonably could have done to effectuate a timely filing. As the Court later clarified in *Price*, "*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." 422 S.W.3d at 307.

Here, in contrast to *McFadden*, Mr. Propst did not take all of the steps that reasonably could have been taken to meet the filing deadline, and, critically, he did not draft his motion and deliver it to counsel for filing well before the deadline. In fact, as outlined above, there was no indication that Mr. Propst took any steps toward filing a post-conviction motion before October 27, 2014, which was the deadline for filing. This stands in stark contrast to the movant in *McFadden*, who prepared, signed, and notarized his

[2] The decision in *McFadden* was also stated in terms of counsel "abandoning" the movant. The Court clarified in *Price* that the decision in *McFadden* was "an application of the active interference exception, not an expansion of the abandonment doctrine[.]" *Price*, 422 S.W.3d at 303.

pro se motion, and who mailed the motion to counsel (at counsel's direction) more than two weeks before the deadline.

In short, this is not a case where counsel *interfered* with the filing of a post-conviction motion that Mr. Propst prepared and would have otherwise timely filed. *Cf. McFadden*, 256 S.W.3d at 108-09. Instead, this is a case where Mr. Propst had no intention to file a post-conviction motion until counsel induced him to do so by providing legal advice and offering to provide legal assistance in drafting and filing a Form 40 on his behalf. In other words, it appears that, but for counsel's last-minute attempt to assist him, Mr. Propst would not have taken any action at all to file a motion. As such, it cannot be said that counsel "actively interfered" with Mr. Propst's efforts to timely file his post-conviction motion.

Finally, the nature of the attorney-client relationship—retained versus appointed—is not the "central issue" in determining whether counsel actively interfered with what otherwise would have been a timely filing of a post-conviction motion by the movant. *See Price*, 422 S.W.3d at 304-05. Rather, the relevant inquiry is whether the movant's efforts to effectuate a timely filing were frustrated by an intervening party. *See id*. As the Court explained in *Price*:

> Ultimately, the central issue in *McFadden* is ***not*** the existence of an attorney-client relationship but the fact that, even

> though it was the inmate's attorney whose active interference caused the inmate's motion to be filed late, the inmate relied on her only to deliver the motion he prepared. This fact—and only this fact—allowed the Court to find that the inmate's untimely filing "did not occur due to a lack of understanding of the rule, out of an ineffective attempt at filing, or as a result of an honest mistake, ***none of which will justify failure to meet the time requirements.***"

Id.

In any event, Mr. Propst's suggestion that this case should turn on whether counsel was a private attorney chosen by the movant versus a public defender appointed by the court is not well taken. First, counsel was not appointed in this case (Tr. 10). Second, while Mr. Propst did not *hire* counsel (or retain counsel's services with payment), Mr. Propst plainly chose to accept counsel's offered services (*see* Tr. 7-8, 10-11, 14-15).

And by agreeing to accept counsel's legal advice and assistance in drafting and filing the Form 40, Mr. Propst was essentially in the same situation as the movant in *Price*, who also retained counsel (albeit with payment) to draft and file his motion. *See Price*, 422 S.W.3d at 302 (". . . the only action Price took with regard to his these responsibilities [to timely file]

was to retain counsel to fulfill them on his behalf.").[3] Accordingly, Mr. Propst "took the same risk that every other civil litigant takes when retaining counsel, i.e., he chose to substitute counsel's performance for his own and bound himself to the former as though it were the latter." *Id.*

In sum, the facts of this case are analogous to *Price*, and the motion court did not clearly err in relying on *Price* to dismiss Mr. Propst's motion as untimely filed.

[3] Respondent acknowledges that Mr. Propst did marginally more than the movant in *Price* by signing the motion that counsel had prepared for him. However, this was not sufficient to satisfy the requirement that Mr. Propst write or prepare the motion and take every reasonable step to effectuate a timely filing before the deadline.

CONCLUSION

The Court should affirm the dismissal of Mr. Propst's Rule 24.035 motion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached substitute brief complies with Rule 84.06(b) and contains 3,417 words, excluding the cover, this certification, and the signature block, as counted by Microsoft Word.

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