

IN THE  
SUPREME COURT OF MISSOURI

---

VIVIAN HALL,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. SC96079
	)	
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

---

APPEAL TO THE SUPREME COURT OF MISSOURI  
FROM THE CIRCUIT COURT OF BARTON COUNTY, MISSOURI  
28TH JUDICIAL CIRCUIT  
THE HONORABLE JAMES R. BICKEL, JUDGE

APPELLANT’S SUBSTITUTE REPLY BRIEF

Christian E. Lehmborg, MOBar #68527  
Attorney for Appellant  
Woodrail Centre, 1000 West Nifong  
Building 7, Suite 100  
Columbia, Missouri 65203  
Telephone (573) 777-9977, ext. 319  
FAX (573) 777-9974  
E-mail: Christian.Lehmborg@mspd.mo.gov

**INDEX**

	<u>Page</u>
TABLE OF AUTHORITIES.....	2
JURISDICTIONAL STATEMENT.....	3
STATEMENT OF FACTS.....	3
ARGUMENT .....	4
CONCLUSION .....	10

**TABLE OF AUTHORITIES**

	<u>Page</u>
<b><u>CASES:</u></b>	
<i>Dorris v. State</i> , 360 S.W.3d 260 (Mo. banc 2012).....	4, 5, 6, 7
<i>Luleff v. State</i> , 807 S.W.2d 495 (Mo. banc 1991) .....	7, 8
<i>State v. O'Connell</i> , 726 S.W.2d 742 (Mo. banc 1987) .....	9
<i>Vogl v. State</i> , 437 S.W.3d 218 (Mo. banc 2014).....	8
<b><u>RULES:</u></b>	
Rule 24.035.....	7, 8
Rule 29.15.....	7, 8

## **JURISDICTIONAL STATEMENT**

Appellant, Vivian Hall, incorporates herein by reference the Jurisdictional Statement from her opening brief as though set out in full.

## **STATEMENT OF FACTS**

Ms. Hall incorporates herein by reference the Statement of Facts from her opening brief as though set out in full.

## ARGUMENT

**If this court finds that Ms. Hall did not prove by a preponderance of the evidence that her *pro se* motion was timely, the appropriate remedy is to remand to motion court to hear evidence on whether the motion was timely. In the alternative, if this court finds the motion to be timely, and this Court chooses to reach the merits, then the trial court erred when it sentenced Ms. Hall as an aggravated offender because the trial court lack the factual basis to make such a finding.**

### *Timeliness*

This Court held in *Dorris v. State*, 360 S.W.3d 260 (Mo. banc 2012): 1) if a defendant files their *pro se* motion out of time, the defendant completely waives his right to proceed on his post-conviction relief claims, *Id.* at 267-68; and 2) the state cannot waive the time limits created for post-conviction relief, *Id.* at 268. Three defendants filed post-conviction motions, arguing a number of claims on the merits, but all their claims were dismissed as they were untimely. *Id.* at 263-65. Ultimately the three defendants' cases were consolidated as they presented the same issue. *Id.* at 263. In each case, the question was whether the State could waive noncompliance with the time limits for filing a motion for post-conviction relief. *Id.* at 263-65. This Court pronounced its holding and determined the results would be different for two of the movants but not the other. Jesse Dorris' ("Dorris") and Jose Lopez-McCurdy's ("Lopez") cases were remanded to the

motion courts to be dismissed as they were untimely. *Id.* at 270. This Court reasoned movant Louis Hill's ("Hill") case should be remanded and "the court shall determine whether his motion was timely filed and proceed accordingly." *Id.* This Court's reasoning was not explicit for why these results should be different; "Hill alleges that his motion was misfiled by the court but claims he did not have an opportunity to prove that fact. Because the motion court did not hear evidence as to when Hill's motion was filed, the judgment in his case is vacated and the case is remanded." *Id.*

Respondent believes the reason these movants were treated differently is important in resolving this case. Respondent argues that Ms. Hall is not like the movant in *Dorris*, Hill, "where Appellant planned to present evidence demonstrating timeliness, but was induced not to do so because of an affirmative action by the State." Resp't's Br. 20. Instead, this case is more like the other two movants, *Dorris* and *Lopez*, "where the State did not raise the issue of timeliness and the movant simply neglected to present evidence on that issue." Resp't's Br. 20.

Respondent's explanation for why this Court treated the movants differently and why that distinction is important in this case is unavailing. After reading this Court's opinion in *Dorris* and the briefs submitted by the three

movants,<sup>1</sup> the clear distinction in Dorris' and Lopez's cases is that they conceded the *pro se* motion was untimely, but they argued the state waived the objection when they did not raise it below. *Id.* at 263-64. Hill claimed the state waived the objection to timeliness, and thus, it could not be raised on appeal. *Id.* at 264-65. What Hill did not do was concede the motion was untimely; instead, Hill explained why the motion was timely, due to an error on the part of the circuit clerk, but evidence was not heard at the evidentiary hearing as to this issue, because the state withdrew its objection that the motion was untimely. *Id.*

Assuming this Court finds the *pro se* motion was untimely due to the record being silent as to when Ms. Hall was delivered to the Department of Corrections, that would put Ms. Hall in a very similar position as Hill, because in both cases the motion court did not hear evidence as to whether the motion was timely, thus the record was silent as to whether the motion was timely, and movants did not concede timeliness. Whether the state withdrew their motion to dismiss, thus signaling that they no longer objected to the timeliness of motion, as in Hill's case, or the state stayed silent on the issue, as in Ms. Hall's case, is irrelevant as counsel for Ms. Hall must still prove by a preponderance of the evidence that the motion was timely. *See Id.* at 267. If the motion court did not hear evidence as to whether

---

<sup>1</sup> The briefs in *Dorris* may be found on Casenet: Dorris can be found at case number SC91652; Lopez can be found at SC91713; and, Hill can be found at case number SC91767.

the motion was timely, the appeals court should remand for a finding as to whether the motion was timely. *Id.* at 270.

Such a rule would be consistent with the principles in the abandonment context in post-conviction cases. In the abandonment context, this Court has said rules 24.035 and 29.15 require appointed counsel to inquire into whether an amended motion should be filed, and either file it on time, as required by the rules, or file a statement in lieu. *Luleff v. State*, 807 S.W.2d 495, 497-98 (Mo. banc 1991). If an untimely motion is filed, the court should, *sua sponte*, inquire into the performance of counsel and movant. *Id.* at 498. If it was no fault of the movant, the court should allow the untimely motion, because counsel failed to comply with the rules, and thus, the motion court cannot determine whether the *pro se* pleading can be made legally sufficient, or whether there are other grounds for relief. *Id.*

The same principle applies here. There is no dispute that, on its face, the *pro se* motion was timely, if one accepts Ms. Hall's allegation about when she was delivered to the Department of Corrections as true. The issue here is whether counsel then proved by a preponderance of the evidence that Ms. Hall's *pro se* motion was timely and, more specifically here, when she was delivered to the Department of Corrections. Although it is not in the record for this Court to consider, evidence does exist that proves Ms. Hall's motion was timely. At the evidentiary hearing, counsel for Ms. Hall failed to even attempt to address the threshold question of whether the *pro se* motion timely. Courts cannot even address whether a movant is abandoned if the *pro se* motion is untimely, and thus,



the issue of the timeliness of the pro se motion is a fundamental threshold question. *Vogl v. State*, 437 S.W.3d 218, 226 (Mo. banc 2014) (“As a threshold to achieving post-conviction relief, the movant first must file a timely Rule 24.035 motion. Rule 24.035(b)”).

Ms. Hall did everything she could for the motion court to hear her claim, but counsel for Ms. Hall failed to follow the rules by failing to answer this threshold question of timeliness. The motion court should have inquired into whether the motion was timely, just as it would be required to determine the basis for the abandonment. *See Luleff v. State*, 807 S.W.2d 495, 498 (Mo. banc 1991) (when a motion court proceeds to rule on a post-conviction motion and there is no record of any activity by appointed counsel on movant’s behalf “the motion court shall make inquiry, *sua sponte*, regarding the performances of both movant and counsel.”). These procedural requirements in Rule 24.035 and Rule 29.15 are requirements of counsel, movants have no control over this matter, and Ms. Hall should not be penalized for counsel’s failure to prove that she was delivered to the Department of Corrections on the date she alleged in her Form 40. When the record is completely silent as to whether the motion was timely filed, appeal courts should presume that counsel failed to follow the rules and should remand for a timeliness hearing.

### *Not a Direct Appeal Issue*

Respondent argues that “[w]hile Appellant fashions her claim as one of an insufficient factual basis for her guilty plea, the gravamen of her complaint is that the information contained incorrect information regarding the September 29, 2003, conviction that was used to plead her status as an aggravated DWI offender.” Resp’t’s Br. 22. Thus, Respondent argues, this claim should have been brought on direct appeal.

To be clear, this is not a claim about the sufficiency of the information. The information is important here, but it is not defective on its face. One has to look to the factual basis the State presented to determine whether the facts the State presented meet what the information alleges; “on or about September 29, 2003, the defendant was convicted of driving while intoxicated *in the municipal court of Lamar, Missouri.*” L.F. 8 (emphasis added). If the State presented evidence that the convictions occurred, as alleged, then there would be a factual basis for the plea. The State attempted to use the information as the basis to establish prior convictions, but that information could never supply the factual basis for the allegations, because Ms. Hall was never convicted for the crime alleged in the municipal court of Lamar, Missouri. Ms. Hall is not claiming that she was not sufficiently informed of the charges against her or that the information did not include the essential elements of the offense. *See State v. O’Connell*, 726 S.W.2d 742, 746 (Mo. banc 1987). This claim is properly brought in a post-conviction motion.

**CONCLUSION**

For the reasons presented here and in Ms. Hall’s opening brief, Ms. Hall respectfully requests this Court to reverse the motion court’s denial of post-conviction relief, and remand for entry of judgment on the class D felony of DWI, or remand to the motion court for a finding on whether Ms. Hall’s *pro se* motion was timely filed.

Respectfully submitted,

*/s/ Christian E. Lehmborg*

---

Christian E. Lehmborg, MOBar #68527  
Attorney for Appellant  
Woodrail Centre, 1000 W. Nifong  
Building 7, Suite 100  
Columbia, Missouri 65203  
Telephone: (573) 777-9977, ext. 319  
FAX: (573) 777-9974  
E-mail: Christian.Lehmborg@mspd.mo.gov

**Certificate of Compliance**

I, Christian E. Lehmborg, 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 in Times New Roman size 13 point font. Excluding the cover page, the signature block, and this certificate of compliance, the brief contains 1,741 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

*/s/ Christian E. Lehmborg*

---

Christian E. Lehmborg