

IN THE
SUPREME COURT OF MISSOURI

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

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF ST. FRANCOIS COUNTY, STATE OF MISSOURI
TWENTY-FOURTH JUDICIAL CIRCUIT
THE HONORABLE WENDY WEXLER HORN, JUDGE

APPELLANT'S SUBSTITUTE REPLY BRIEF AND ARGUMENT

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INDEX

TABLE OF AUTHORITIES..... 3

JURISDICTIONAL STATEMENT.....4

STATEMENT OF FACTS.....4

REPLY ARGUMENT5-8

CONCLUSION.....9

CERTIFICATE OF SERVICE AND COMPLIANCE10

TABLE OF AUTHORITIES

Cases

Barton v. State, 486 S.W.3d 332 (Mo. banc 2016).....6

Luleff v. State, 807 S.W.2d 495 (Mo. banc 1991)..... 5

McFadden v. State, 256 S.W.3d 103 (Mo. banc 2008).....6

Price v. State, 422 S.W.3d 292 (Mo. banc 2014).....5-7

Sanders v. State, 807 S.W.2d 493 (Mo. banc 1991) 5

Rules

Rule 24.035..... 5

JURISDICTIONAL STATEMENT

Appellant Jakib Propst adopts the jurisdictional statement set out in Appellant's Substitute Brief, Statement and Argument, filed on June 30, 2017, in this Court.

STATEMENT OF FACTS

Appellant Jakib Propst adopts the statement of facts set out in Appellant's Substitute Brief, Statement and Argument, filed on June 30, 2017, in this Court.

Appellant Propst (Propst) will cite to the appellate record as follows: Legal File, "(L.F.)"; Hearing Transcript, "(Tr.)"; Appellant's Substitute Brief, "(App. Br.)"; and, Respondent's Brief, "(Resp. Br.)."

REPLY ARGUMENT

Respondent states that the “suggestion that this case should turn on whether counsel was a private attorney chosen by the movant versus a public defender . . . is not well taken” (Resp. Br. 15). Respondent overlooks that the post-conviction rules themselves make salient distinctions between private counsel and public defenders (i.e., appointed counsel), as well as indigent versus non-indigent post-conviction movants. Those distinctions, which are evident and well-established, should guide this Court’s resolution of Propst’s case.

Rule 24.035 grants indigent movants like Propst a right to counsel that is not extended to non-indigent movants like Price and Rule 24.035(e) places affirmative duties and obligations on appointed counsel that it does not place on private counsel. *Price v. State*, 422 S.W.3d 292, 297 (Mo. banc 2014). Rule 24.035(e). When appointed counsel, or a public defender representing an indigent movant, fails to comply with the duties and obligations of Rule 24.035(e), such failure constitutes abandonment. *Id.* at 298; *see also Luleff v. State*, 807 S.W.2d 495, 497-98 (Mo. banc 1991); *Sanders v. State*, 807 S.W.2d 493, 495 (Mo. banc 1991).

The same is not said of private counsel’s deficient performance in the representation of a non-indigent post-conviction movant. In such a circumstance, private counsel’s deficient performance constitutes neither ineffective assistance nor abandonment or a violation of Rule 24.035 for one single reason – non-

indigent post-conviction movants have no right to counsel under the federal and state constitutions or rules [*emphasis added*]. *Barton v. State*, 486 S.W.3d 332, 336 (Mo. banc 2016); *Price*, 422 S.W.3d at 297. Non-indigent movants, such as Price, who being financially able, elect to retain counsel of their choice to file their Form 40s, are, like all other civil litigants, bound by the actions or inactions of their retained counsel. *Price*, 422 S.W.3d at 302.

Unlike *Price*, Propst, who was both indigent and incarcerated, had a right to representation by counsel on post-conviction. District Defender Williams, a public defender, initiated contact with him and undertook representation of him (Tr. 6-8). He presented Propst with a prepared Form 40, convinced Propst of the merit of filing it, told Propst he (i.e., District Defender Williams) would file it, took it, and then failed to file it on time (Tr. 6-8, 10-11, 13). The District Defender's actions constituted the type of active interference beyond the inmate's control that excuses the untimely filing of a *pro se* Rule 24.035 motion or Form 40. See *McFadden v. State*, 256 S.W.3d 103, 109 (Mo. banc 2008).

Respondent argues that Propst should not be able to avail himself of the active interference exception because he did not decide to pursue a Form 40 on his own volition, and did not write or prepare his own Form 40 so as to effect a timely filing (Resp. Br. 11). The impetus for filing the Form 40 and the identity of the writer and preparer of the Form 40, however, should not be dispositive of whether

the active interference exception applies. It is not how the Form 40 came to be that is at issue.

Rather, at question are whether Propst did all he could to reasonably ensure that the prepared Form 40 was filed on time and whether the untimely filing of the Form 40 resulted solely from the active interference of the District Defender. *Price*, 422 S.W.3d at 307 (stating “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[.]”) Both questions must be answered in the affirmative.

Respondent is not wrong in suggesting that Propst might not ever have filed a Form 40, but for the District Defender’s active interference. However, it is, likewise, true that but for that same interference, Propst’s Form 40 might have been timely filed. On October 27, 2014, the due date of Propst’s Form 40, the District Defender went to see Propst with a prepared Form 40, presented it to him for signature, advised Propst of a cognizable post-conviction claim of which Propst was seemingly unaware, and offered to file the Form 40 for Propst (Tr. 6-8, 10).

At that time, Propst could not reasonably have done anything more within the limitations of his confinement to ensure the timely filing of the Form 40, other than signing the Form 40 and entrusting it to someone else to physically file or file via facsimile that day. Propst, whom the public defender had represented prior to

his incarceration, could not have hired a private lawyer for this purpose. He could have, that day (i.e., the due date of the Form 40), enlisted the aid of someone other than the District Defender such as a family member, friend, or correctional officer at the facility in faxing or physically delivering the Form 40 to the court and that person might have succeeded at timely filing the Form 40.

But Propst did not have to try to contact a family member or friend or attempt to enlist the aid of correctional officers at the facility in faxing, delivering, or filing the Form 40 because the District Defender offered his services to the indigent, incarcerated movant and induced Propst's reliance on the District Defender's representation to file it.

The District Defender testified that he undertook to act because "there was no one else to act" but him and Propst (Tr. 14). The District Defender "talked to [Propst] as an attorney," "gave him legal advice," and told Propst that he would file the Form 40 for him (Tr. 8). The District Defender filed the Form 40 out of time (Tr. 8).

Because the District Defender overtly acted, interfering so as to not only imbue a desire to file a Form 40, but also to cause that Form 40's untimely filing, this Court should allow Propst to proceed with his Rule 24.035 post-conviction cause.

CONCLUSION

WHEREFORE, based on his arguments in his opening and reply briefs, Appellant Jakib Propst respectfully requests that this Court reverse the judgment of the motion court and remand, allowing Propst to proceed with his Rule 24.035 post-conviction cause, despite the untimeliness of his *pro se* filing.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(b), I hereby certify that on Thursday, September 07, 2017, a true and correct copy of the foregoing was e-filed with this Court and sent to Assistant Attorney General Shaun Mackelprang at Shaun.Mackelprang@ago.mo.gov, the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102 per the Missouri E-Filing System Clerk. In addition, I hereby certify that this brief includes the information required by Rule 55.03. This brief was prepared with Microsoft Word for Windows, uses Constantia FB 13 point font, and contains 1,456 words.

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