

**IN THE
MISSOURI SUPREME COURT**

TODD BEARDEN)
)
Appellant,)
)
vs.) **No. SC96515**
)
STATE OF MISSOURI,)
)
Respondent.)

**APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ST. FRANCOIS COUNTY, MISSOURI
24th JUDICIAL CIRCUIT
THE HONORABLE KENNETH WAYNE PRATTE, JUDGE AT PLEA
AND SENTENCING**

APPELLANT’S SUBSTITUTE REPLY BRIEF

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REPLY ARGUMENT FOR FIRST POINT RELIED ON

Timing

Despite the assertions of the state, movant, Todd Bearden timely filed his amended motion through counsel, and a remand for a timing inquiry is unneeded.

The central issue in this case is if executing a sentence is a part of sentencing. The Eastern District has previously treated it as such, while the Southern district has held the opposite. In *Mahone v. State* 504 S.W.3d 71 (Mo App E.D. 2016) the Eastern District computed the due date of an amended motion using the date of the revocation transcript without seeing the need to explain its reasoning under the rule. *Id.* at 74. It remanded the case for an abandonment hearing where the amended motion was filed after that due date. *Id.* In contrast In *Hewitt v. State* 518 S.W.3d 227 (Mo App SD 2014) the Southern district ruled that execution of sentence at a probation revocation was not a part of sentencing for purpose of Rule 24.035(g). The Court ruled that such a transcript should not be seen as part of sentencing. *Id.* at 230-1. The Court held that the provisions of rule 29.07 did not mandate filing the transcript of a probation revocation before the filing of an amended motion. *Id.* This is in stark contrast to the plain language of Rule 29.07.

Rule 29.07 mandates the view held by the Eastern District, as does Rule 24.035. Under Rule 29.07 the sentencing court is not mandated to inform a client of his rights to pursue post-conviction relief until “final sentencing”. Rule 29.07. If sentencing was indeed only one procedure, there would be no need for a final, as opposed to initial, sentencing.

Further, if execution of sentence was not a part of sentencing, the provisions of Rule 29.07(b)(4) would be meaningless for all of the hundreds, if not thousands of Missourians sentenced to a suspended execution of sentence every year. 29.07(b)(4) mandates an examination on the effectiveness of plea counsel only when the defendant has a right to proceed under Rule 29.15 or 24.035. In other words, it mandates this inquiry only when the client is facing a final sentence, to the Missouri Department of Corrections. This is important as the answers during this inquiry are critical to litigating a claim for post-conviction relief. The answers to this inquiry can render an otherwise meritorious claim meritless as refuted by the record. *See e.g., Jackson v. State*, 90 S.W.3d 238, 241 (Mo. App. S.D. 2002)(“A movant is precluded from seeking post-conviction relief based upon a claim of ineffective assistance of counsel when the movant repeatedly assures the court at a Rule 29.07(b)(4) hearing that he is satisfied with counsel’s performance and believes counsel has done everything that he requested.”). This rule was

clearly drafted considering the execution of a sentence as a portion of the sentencing proceedings.

Further, Rule 24.035¹ also mandates the view held by the Eastern District. Rule 24.035 only allows relief after an individual is sent to the Department of Corrections. Without being able to demonstrate delivery, on the case at bar, movant would fail his burden of persuasion. See e.g. *Hall v. State*, ___ S.W. 3d ___ 2017 WL 4001706 (Mo 2017). Although the term of years of a sentence is set when a sentence is imposed, but the execution is suspended final sentencing for purpose of post-conviction relief cannot occur until the sentence is executed. There is no right to proceed under rule 24.035 until such a time as one has been both sentenced, and that sentence is executed.

Todd's amended motion was timely filed by counsel. Todd filed his *pro se* Rule 24.035 motion to vacate, set aside or correct judgment or sentence on August 21, 2013, on time. A transcript in this case was filed on Dec 29, making the 60 ay due date Feb ,29 2016 due to an intervening weekend. A thirty day extension was granted making the amended motion due March 30, 2016. It was filed that day at pm.

¹This appeal deals with the current version of Rule 24.035. This Rule has been amended substantially, with a new version to take effect later this year.

CONCLUSION

Appellant stands on his arguments in appellants brief for his remaining points.

WHEREFORE, based on the argument as set forth in this brief, appellant Todd Bearden respectfully requests that this Honorable Court reverse the decision of the circuit court, remand for an evidentiary hearing, vacate his convictions or such other relief as this court sees fit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of September, 2017 a true and complete copy of the foregoing was submitted to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102, shaun.mackelprang@ago.mo.gov, via the Missouri e-filing system, care of Mr. Shaun Mackelprang, Office of the Attorney General.

/s/ Amy E. Lowe _____
Amy E. Lowe

CERTIFICATE OF COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(c), 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 14 point font, and does not exceed the word and page limits for a reply brief in this court. The word-processing software identified that this brief contains 1139 words, and 8 pages including the cover page, signature block, and certificates of service and of compliance. In addition, I hereby certify that this document has been scanned for viruses with Symantec Endpoint Protection Anti-Virus software and found virus-free. It is in searchable PDF form.

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