



# In the Missouri Court of Appeals Eastern District

## DIVISION TWO

|                      |   |                                  |
|----------------------|---|----------------------------------|
| LOWELL CLYDE MILNER, | ) | ED105490                         |
|                      | ) |                                  |
| Appellant,           | ) | Appeal from the Circuit Court of |
|                      | ) | Madison County                   |
| v.                   | ) | 16MD-CC00057                     |
|                      | ) |                                  |
| STATE OF MISSOURI,   | ) | Honorable Sandra Martinez        |
|                      | ) |                                  |
| Respondent.          | ) | Filed: November 21, 2017         |

Lowell Milner ("Movant") appeals from the dismissal of his Rule 24.035 (Mo. Sup. Ct. R. 2016) motion for post-conviction relief, contending the motion court erred in failing to rule on his amended motion and in dismissing his original *pro se* motion. The judgment of the motion court is reversed and the matter is remanded with instructions to conduct an independent inquiry, on the record, on abandonment.

## **BACKGROUND**

On September 14, 2014, Movant pleaded guilty to two counts of failing to register as a sex offender, in violation of Sections 589.400 and .425 (RSMo Cum. Sup. 2014). The court sentenced Movant to 8 years of imprisonment, suspended execution of his sentence, and placed him on 5 years of probation. On February 4, 2016, Movant's probation was revoked, his sentence was executed; he was delivered to the Department of Corrections the next day.

On April 11, 2016, Movant timely filed his *pro se* motion for post-conviction relief, pursuant to Rule 24.035. Movant alleged three grounds for relief: (1) a claim as to the State's recommended sentence during his guilty plea; (2) a claim of bias on the part of the plea court; and (3) a vague claim concerning the effectiveness of his plea counsel.

The same day, counsel ("PCR Counsel") was appointed for Movant. On April 29, 2016, PCR Counsel entered her appearance. The transcript from the guilty plea and sentencing hearing was filed on May 24, 2016. On September 30, 2016, the State requested the motion court dismiss Movant's *pro se* motion. On October 5, 2016, PCR Counsel requested a continuance, which the motion court granted.

On November 2, 2016, PCR Counsel filed an amended motion for post-conviction relief ("Amended Motion"), presenting a claim of ineffective assistance of plea counsel for failing to present a defense to the failing-to-register charges because Movant was hospitalized, as well as a claim that his sentences should have been reduced by the time spent in pre-trial incarceration. PCR Counsel also requested the Amended Motion be filed out of time, alleging the delay in its filing was due to PCR Counsel's inability to timely obtain the hospital records which were destroyed by plea counsel. PCR Counsel contended the hospital records would vindicate Movant by demonstrating that Movant was hospitalized and unable to register as a sex offender on the date of the offenses, and she therefore needed to obtain the records directly from the hospitals. The hospital records were ultimately submitted to the motion court on January 5, 2017.

On March 2, 2017, the motion court denied Movant's request to file the Amended Motion out of time, without a hearing, and dismissed Movant's *pro se* motion.

This appeal follows.

## DISCUSSION

In both of his points on appeal, Movant contends the motion court erred in denying his request to file the Amended Motion out of time, by way of its finding that Movant was not abandoned by PCR Counsel. Specifically, Movant maintains the reason for the late filing of the Amended Motion was not due to his inadvertence, but was due solely to PCR Counsel's ineffectiveness. Movant asserts he was thereby deprived of his right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution. We agree.

### **Points I and II—Evidentiary Hearing on Abandonment Is Required**

#### Standard of Review

Appellate review of the dismissal of a Rule 24.035 motion is limited to determining whether the motion court's findings and conclusions are clearly erroneous. *See* Rule 24.035(k). The findings and conclusions are clearly erroneous if a review of the entire record leaves this court with the definite and firm impression that a mistake has been made. *Creighton v. State*, 520 S.W.3d 416, 418 (Mo. banc 2017).

#### Analysis

Before reaching the merits of a movant's motion for post-conviction relief, a motion court must determine whether to adjudicate a movant's *pro se* motion or, if one is filed, an amended motion. *Moore v. State*, 458 S.W.3d 822, 825 (Mo. banc 2015). Rule 24.035(g) governs the time constraints for filing an amended motion. Relevant to this appeal:

If no appeal of the judgment sought to be vacated, set aside, or corrected is taken, the amended motion shall be filed within 60 days of the earlier of the date both a complete transcript consisting of the guilty plea and sentencing hearing has been filed in the trial court and (1) Counsel is appointed . . . .

Rule 24.035(g); *Creighton*, 520 S.W.3d at 418.

Despite the strict deadlines for filing an amended motion, the Missouri Supreme Court has recognized a narrow exception that permits the adjudication of an untimely amended motion if it is determined a movant has been "abandoned" by post-conviction counsel. *Moore*, 458 S.W.3d at 825 ("[W]hen post-conviction counsel is appointed to an indigent movant, an amended motion filed beyond the deadline in Rule 29.15(g) can constitute 'abandonment' of the movant."). Thus, abandonment by appointed counsel extends the time limitations for filing an amended motion. *Id.* at 826 ("[T]he inquiry into abandonment determines which motion—the initial motion or the amended motion—the court should adjudicate.").

Generally, in circumstances such as this, if an amended post-conviction motion is untimely filed, the motion court must conduct an independent abandonment inquiry. *Childers v. State*, 462 S.W.3d 825, 827 (Mo. App. E.D. 2015). "[T]he significance of such a determination is that, in the event the motion court finds that counsel abandoned movant, it will consider the merits of the amended motion, as abandonment extends the time limitations for filing an amended motion." *Mann v. State*, 475 S.W.3d 208, 211 (Mo. App. E.D. 2015). Moreover, inasmuch as a movant bears the burden of demonstrating that the untimeliness is not the result of the negligence or intentional conduct of the movant, but is instead due to counsel's failure to comply with the Rule, "a sufficient record must be made to demonstrate on appeal that the motion court's determination on the abandonment issue is not clearly erroneous." *State v. Isaiah*, 874 S.W.2d 429 (Mo. App. W.D. 1994). Axiomatically, an evidentiary hearing to determine abandonment is necessary where a motion court denies the untimely amended motion *and* the record of the case does not "conclusively show the movant is entitled to no relief[.]" See Rule 24.035(h).<sup>1</sup>

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<sup>1</sup> If a motion court accepts and adjudicates the untimely filed amended motion, an evidentiary hearing to determine abandonment is rendered superfluous.

In this matter, it is undisputed that PCR Counsel failed to timely file the Amended Motion. PCR Counsel requested the motion court accept and adjudicate the untimely Amended Motion under the abandonment doctrine, voluntarily accepting responsibility for the untimely filing. However, the motion court apparently concluded, without conducting an evidentiary hearing on the abandonment issue, that the delay in filing the amended motion was caused by Movant's "fail[ure] to act" and "dither[ing] about." Thus, Movant was summarily denied due process to make a record that the Amended Motion's untimeliness was the fault of PCR Counsel. *See Isaiah*, 874 S.W.2d 429.

In so holding, we are guided by *Hall v. State*, 2017 WL 4001706 (Mo. banc Sept. 12, 2017). Therein, the Missouri Supreme Court held that if a movant alleges his *pro se* post-conviction motion was timely, a motion court may not dismiss said motion as untimely without conducting an evidentiary hearing and entertaining evidence as to timeliness. *Id.* at \*2 (citing *Dorris v. State*, 360 S.W.3d 260, 267-68 (Mo. banc 2012)); *see also Geyer v. State*, 2017 WL 4248398 (Mo. App. E.D. Sept. 26, 2017). Although the mandates set forth in *Hall* and *Geyer* concerned the motion court's obligation to conduct an evidentiary hearing to determine the timeliness of a contested *pro se* post-conviction motion, the same logic applies to determining the timeliness of amended post-conviction motions.

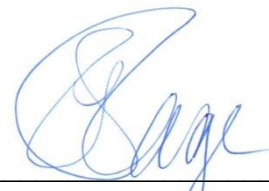
Here, PCR Counsel alleged that she needed certain hospital records in order to file the Amended Motion, and she was not able to obtain them from the hospital until well after the expiration of the sixty-day deadline. The case docket shows that business records were indeed filed prior to the motion court's disposition, but the motion court makes no mention of the records. Further, PCR Counsel voluntarily acknowledged the untimeliness of the Amended Motion was not the fault of movant. Finally, PCR Counsel could have timely submitted the

amended motion prior to receiving the hospital records, as Rule 24.035(e) requires PCR Counsel file an amended motion that "*sufficiently* [allege] the additional facts and claims" (emphasis added). Thus, the record of the case does not "*conclusively* show the movant is entitled to no relief[.]" See Rule 24.035(h) (emphasis added).

Without the benefit of an evidentiary hearing on the record, this court cannot review the propriety of the motion court's gratuitous determination that Movant was the cause of the late filing. See Rule 24.035(h); see also *Ritter v. State*, 119 S.W.3d 603, 604-605 (Mo. App. E.D. 2003) ("Movant should not be deprived of meaningful review where he is not at fault for counsel's untimeliness."); *Wiley v. State*, 368 S.W.3d 236 (Mo. App. E.D. 2012) ("[W]hen post-conviction counsel abandoned the movant, i.e. 'improperly act[ed] or fail[ed] to act to the movant's detriment,'" the motion court should excuse the late filing of an amended motion); *Hammond v. State*, 93 S.W.3d 823 (Mo. App. E.D. 2002) (reversing the motion court's determination that a movant was at fault where counsel was responsible for missing the amended-motion deadline). This denial of due process requires that we reverse the motion court's judgment and remand this matter with instructions to conduct an independent inquiry on abandonment, on the record, as well as for further proceedings consistent with this opinion.

### CONCLUSION

The judgment of the trial court is reversed and remanded with instructions consistent with this opinion.



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Lisa P. Page, Presiding Judge

Roy L. Richter J. and Philip M. Hess, J., concur.