

IN THE
MISSOURI SUPREME COURT

ANDREW L. LEMASTERS,)	
)	
Appellant,)	
)	
v.)	No. SC97878
)	
STATE OF MISSOURI,)	
)	
Respondent.)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF NEWTON COUNTY, MISSOURI
THE HONORABLE TIMOTHY W. PERIGO, JUDGE

APPELLANT'S SUBSTITUTE REPLY BRIEF

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JURISDICTIONAL STATEMENT

Appellant adopts the jurisdictional statement from his opening substitute brief.

STATEMENT OF FACTS

Appellant adopts the statement of facts from his opening substitute brief.

ARGUMENT

All of the issues in this reply brief pertain to Mr. Lemasters' Point I, which respondent addresses in separate points labeled I and II (Resp. Br. at 20, 38).

Premature Pro Se Motion (Point II of Resp. Br.)

Respondent accurately quotes this Court's resolution of Mr. Lemasters' direct appeal: "[T]he judgment...by the said Circuit Court of Newton County rendered is affirmed in part and in part vacated and remanded in part..." (Resp. Br. at 39) (D111:3) (emphasis added). Nevertheless, respondent goes on to argue that "this Court issued a mandate affirming th[e] judgment." (Resp. Br. at 41). Having mischaracterized the direct appeal mandate as a simple affirmance, respondent quotes the Rule 29.15(b) deadline for a pro se motion following a simple affirmance (90 days from the mandate), as opposed to the other deadline possibilities, as if the selection from among the three possibilities is obvious (Resp. Br. at 41).

While Mr. Lemasters concedes that an order *nunc pro tunc* does not constitute a "new judgment," which would seemingly preclude application of the 180-day deadline for direct appeals resulting in remand for entry of a new judgment, the Court's mandate was not a straightforward affirmance either, which would seemingly preclude application of the 90-day deadline that the state advocates for.

The wording of the Court's direct appeal mandate ("affirmed in part and in part vacated and remanded in part") makes it difficult to say which Rule 29.15(b) deadline applies—the deadline for affirmances, or the deadline

for remands.¹ The trial court’s covert amended judgment, which would have made the point on direct appeal moot had the Court been aware of it, further complicates the issue because it also would have changed the Court’s mandate.

Respondent concludes that the trial court’s premature, unannounced, and unpublished amended judgment effectively carried out this Court’s mandate, and “Defendant fails to explain why remanding the case [to the motion court for entry of the *nunc pro tunc*] would be necessary in order to comply with this Court’s direct-appeal mandate.” (Resp. Br. at 44-45). Carrying out the mandate in the proper order (after it is handed down) is vitally important because the prospective postconviction movant, having read the mandate, would be waiting for the trial court to carry it out as the triggering mechanism for the filing of his postconviction motion.

Third-Party Interference (Point I of Resp. Br.)

If the Court concludes that Mr. Lemasters only had 90 days from the direct appeal mandate to file his pro se Rule 29.15 motion, the Court must then consider how to address his motion to treat the pro se motion as timely filed.

Respondent claims that the allegations of third-party interference were insufficiently pleaded to warrant a hearing on the issue because “Defendant

¹ In other direct appeal cases resulting in *nunc pro tunc* orders, the appellate courts have used wording that more clearly communicates how the mandate should be characterized for purposes of establishing a Rule 29.15 deadline. *E.g.*, *State v. McClurg*, 543 S.W.3d 78, 83 (Mo. App. 2018) (“The trial court’s judgment is affirmed. We remand with instructions solely to correct the written judgment...”); *State v. Boss*, 577 S.W.3d 509, 521 (Mo. App. 2019) (“The trial court’s judgment is remanded for the limited purpose of correcting clerical mistakes in the written judgment...The trial court’s judgment is affirmed in all other respects”).

failed to allege sufficient facts...that he did all that he reasonably could do to ensure that his motion would be timely filed.” (Resp. Br. at 32). On the contrary, Mr. Lemasters pleaded that the prison did not provide a notary until the last day for filing a motion, that he was at the mercy of the institution, and that the delay in securing a notary was “at no fault” of Mr. Lemasters (D63:2-3).

Respondent next argues that the alleged facts regarding the notary are irrelevant because a notary is not required to file a pro se postconviction motion (Resp. Br. at 33-34). The state points out that the only page requiring notarization is the forma pauperis affidavit, and it claims that “the Forma Pauperis Affidavit was both structurally and functionally separate from the pro se Rule 29.15 motion[.]” (Resp. Br. at 34). An examination of the official form leads to the opposite conclusion.

The Form 40 that Mr. Lemasters filled out is labeled at the bottom as OSCA form CV-145, and it has six pages labeled “1 of 6” through “6 of 6” (D57:1; D57:18; D57:21-23; D58:1). The instructions on page 1 state that “[i]n order for this motion to receive consideration...it shall set forth in concise form the answers to each applicable question[.]” and “Movant should exercise care to assure that all answers are true and correct.” (D57:1). Most importantly, the form states,

If the movant is taken in forma pauperis, [the motion] shall include an affidavit setting forth information that establishes that movant will be unable to pay costs of the proceedings. When the motion is completed, the original and two copies shall be mailed to the Clerk of the Circuit Court from which to movant was sentenced.

(D57:1) (emphasis added). Moreover, page 6 of 6 (the affidavit) says, “See instructions page 1 of this form” (D58:1) (emphasis added).

Given the structure and contents of the form, it was more than reasonable for Mr. Lemasters to believe that he had to have the affidavit completed in order to submit the form. The delay in submitting the form was to complete the very last page of the packet, which suggest that the form was otherwise completed and would have been mailed sooner if it were not for that delay.

The facts alleged are sufficient to warrant a hearing on the issue of third-party interference.

CONCLUSION

For the reasons stated herein, in addition to the reasons stated in Mr. Lemasters' opening substitute brief, Mr. Lemasters respectfully requests that this Court reverse the findings of the motion court and remand the case until a final judgment is entered in the underlying criminal case. If the Court believes the amended motion was untimely, the Court should remand the case for a hearing on the issue of third-party interference. If the Court reaches the amended motion, this Court should grant a new trial based on Claim E or dismiss the appeal so the motion court can issue written findings of fact and conclusions of law on Claim B.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Tyler P. Coyle, 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 Century Schoolbook size 13 point font. Excluding the cover page, the signature block, this certificate of compliance, and appendix, the brief contains 1,041 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

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