



**In the
Missouri Court of Appeals
Western District**

DERRON A. WHITE,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

WD83247

OPINION FILED:

NOVEMBER 10, 2020

**Appeal from the Circuit Court of Cass County, Missouri
The Honorable William B. Collins, Judge**

**Before Division Four: Cynthia L. Martin, Chief Judge, Presiding, Gary D. Witt, Judge,
Anthony Rex Gabbert, Judge**

Derron A. White appeals the denial, after an evidentiary hearing, of his Rule 29.15 motion for post-conviction relief. He contends the motion court, 1) clearly erred in overruling his motion because White's trial counsel was ineffective in lacking an awareness of a critical issue of law, which led to trial counsel opening the door to highly damaging evidence which prejudiced White, and 2) clearly erred in failing to conduct an abandonment hearing after White's amended motion was untimely filed. We reverse and remand for an abandonment inquiry.

Background and Procedural Information

In 2012, White was charged (as a prior and persistent offender) with robbery in the first degree under Section 569.020¹, and armed criminal action under Section 571.015. White was convicted, as charged, after a jury trial. He was sentenced to concurrent terms of twenty-five years in prison for the robbery, and ten years in prison for the armed criminal action. This court affirmed those convictions and sentences in *State v. White*, 462 S.W.3d 915, 923 (Mo. App. 2015). Our mandate was issued July 1, 2015.

On August 31, 2015, White filed a pro se Rule 29.15 motion for post-conviction relief. On September 1, 2015, the motion court appointed the Office of the Missouri State Public Defender (“Public Defender”) to represent White. Nearly a year and a half later, on February 8, 2017, the Public Defender entered an appearance, asking to be reappointed and requesting an extension of time to file an amended motion. The motion alleged that, the appointment went undiscovered until June 1, 2016, and the Public Defender unintentionally abandoned White. Further, due to the heavy caseload of the Western Appellate/PCR Division, and because the office had been understaffed for most of the last calendar year, counsel would need an additional thirty days to investigate White’s claims and file a properly amended Rule 29.15 motion (“for a total of ninety (90) days from the date of the Court’s order”).

On April 3, 2017, the motion court issued an order reappointing the Public Defender. The court did not grant the requested thirty-day extension. The motion court’s order directed that, “any amended motion shall be filed within sixty (60) days of the earlier of: (1) the date both a complete transcript consisting of the guilty plea and sentencing hearing has been filed in the trial court and

¹ All statutory references are to the Revised Statutes of Missouri, as updated through 2011, unless otherwise noted.

counsel is appointed, or (2) the date both a complete transcript has been filed in the trial court and an entry of appearance is filed by any counsel that is not appointed but enters an appearance on behalf of the movant.” One day later, April 4, 2017, the Public Defender filed another motion requesting a thirty-day extension to file an amended motion, asking for “a total of ninety (90) days from the date of re-appointment, until July 3, 2017, in which to file to file an amended motion under Rule 29.15.” The motion court did not rule on this motion.

On July 3, 2017, post-conviction counsel filed an amended Rule 29.15 motion. On June 18, 2019, the motion court held an evidentiary hearing. Neither the timeliness of the amended motion nor the issue of abandonment was raised at the hearing. On September 6, 2019, the motion court issued findings of fact and conclusions of law, denying White’s claims on the merits. This appeal follows.

Point II²

White argues in his second point on appeal that, if the motion court did not grant an extension of time to file the amended Rule 29.15 motion, he was abandoned by postconviction counsel. He concedes that, if he only had sixty days after counsel’s appointment to file his amended motion, counsel did not timely file the motion. Although he acknowledges that the court did not grant an extension on the record, he contends the motion court “likely intended to grant the extension of time, or granted the extension without creating a record.” He understands, however, that “a record of this ruling is necessary on appeal” and requests that the matter be remanded for the motion court to make an explicit record that it granted White’s extension of time, or for an abandonment inquiry.

² As Point II is dispositive and requires remand to the motion court, we do not address Point I.

The State argues that, because the record does not show the motion court granted an extension of time for filing an amended motion, the case must be remanded for an abandonment inquiry without considering the merits of White's post-conviction claims.

We agree that the motion court's judgment must be reversed, and this matter remanded for an abandonment inquiry. As acknowledged by both parties, "extensions will not be presumed to have been granted without a record thereof." *Staten v. State*, 540 S.W.3d 873, 876 (Mo. App. 2018) (quoting *Frazee v. State*, 480 S.W.3d 442, 445 (Mo. App. 2016)). Because White's motion was untimely, the motion court was under a duty to make an independent inquiry to determine if abandonment occurred. *Moore v. State*, 458 S.W.3d 822, 825 (Mo. banc 2015). "If the amended motion filed by appointed counsel is untimely, but there has been no independent inquiry into abandonment, then the case should be remanded to the motion court for such inquiry." *Price v. State*, 500 S.W.3d 324, 327 (Mo. App. 2016).

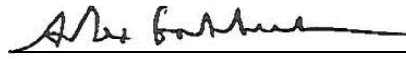
We think it important to note that, even if presumptions *were* allowed, the record does not support the contention that an extension was likely granted off the record in this case. The court first appointed counsel in September 2015. Nearly one year later, on August 8, 2016, White sent a letter from prison to the circuit court clerk expressing concern that he had not heard from the Public Defender. White sent a letter to the judge on September 30, 2016, "to bring the issue of abandonment to your attention." On November 16, 2016, White personally filed "Movant's Motion Requesting Sua Sponte Inquiry into Abandonment by Court Appointed PCR Counsel," explaining how White had been abandoned by counsel, requesting the appointment of new counsel, and requesting time to file an amended Rule 29.15 motion. On February 1, 2017, White sent a letter to the circuit court clerk requesting the same.

On February 8, 2017, the Public Defender entered an appearance and requested reappointment, advising that the Public Defender first learned of the appointment to White's case on June 1, 2016. This, essentially, was an admission by the Public Defender that, although notice was received June 1, 2016, the Public Defender waited *another eight months* to formally acknowledge receipt of the appointment, admit that White had been abandoned, and request reappointment so that it could act on White's behalf. With this admission, the Public Defender then requested an additional thirty days under Rule 29.15(g) to file an amended motion. On March 20, 2017, the Public Defender filed "Movant's Notice of Abandonment Hearing," wherein the Public Defender noticed the case for hearing on April 3, 2017, expressing a desire to conference with the motion court about reappointment due to abandonment, and discuss the Public Defender's request for a filing deadline extension.

On April 3, 2017, the court expressly rejected the Public Defender's request for an extension of time when it reappointed the Public Defender to White's case and ordered the amended Rule 29.15 motion filed within sixty days. The following day, without any reference to or acknowledgment of the portion of the court's April 3, 2017 order discussing the filing deadline, the Public Defender filed another request for a thirty-day extension, which the court did not rule on. Given the record, if presumptions were allowed with regard to the court's silence regarding this motion, we would presume that the court declined to address the Public Defender's motion because the request within that motion had been overruled the previous day.

Conclusion

The judgment is reversed, and the case is remanded to the motion court for an independent inquiry into whether White was abandoned by post-conviction counsel, and for further proceedings consistent with the outcome of the inquiry.

A handwritten signature in black ink, appearing to read "A. Rex Gabbert", written over a horizontal line.

Anthony Rex Gabbert, Judge

All concur.