



In the Missouri Court of Appeals Eastern District

DIVISION FOUR

SHEILA A. GARCIA,	)	No. ED108726
	)	
Appellant,	)	Appeal from the Circuit Court
	)	of the City of St. Louis
vs.	)	
	)	Honorable Steven R. Ohmer
STATE OF MISSOURI,	)	
	)	
Respondent.	)	FILED: February 23, 2021

Sheila A. Garcia (“Movant”) appeals the motion court’s judgment denying her *pro se* and amended Rule 29.15¹ motions for post-conviction relief without an evidentiary hearing. Movant contends the motion court clearly erred in finding that appointed counsel did not abandon Movant pursuant to *Sanders v. State*, 807 S.W.2d 493 (Mo. banc 1991). Because the record is insufficient for us to review the motion court’s express finding that Movant was not abandoned by appointed counsel, we reverse and remand.

Background

Movant was convicted, following a jury trial, of unlawful possession of a firearm and received a sentence of 15 years in the Missouri Department of Corrections. This Court affirmed Movant’s conviction and sentence on direct appeal in *State v. Garcia*, 561 S.W.3d 856 (Mo. App. E.D. 2018), and issued its mandate on December 21, 2018.

¹ All rule references are to the Missouri Supreme Court Rules (2017).

On May 9, 2017, more than 19 months before this Court issued its mandate, Movant prematurely filed her *pro se* Rule 29.15 motion. See Rule 29.15(b); *McKay v. State*, 520 S.W.3d 782, 787 (Mo. banc 2017) (holding that a premature post-conviction motion should be considered filed on the date the time for filing arises). The following day, the motion court appointed counsel to represent Movant. On June 8, 2017, Movant's counsel filed an entry of appearance and requested a 30-day extension for the filing of an amended motion, which the motion court granted. On August 15, 2019, Movant filed an untimely amended motion. That same day, Movant filed a "Motion for Court to Consider Movant's Amended Motion as Timely Filed," which contained an affidavit from Movant's counsel stating that Movant was not at fault for the late filing and that Movant's counsel was solely responsible in that she "needed additional time to file the motion and was overburdened by an excessive caseload due to unforeseen office turnover."

On November 1, 2019, after an off-the-record hearing with counsel, the motion court made the following docket entry:

Parties appear by counsel. Arguments made and Movant's request for an evidentiary hearing denied. Record left open for counsel to submit abandonment inquiry affidavit or telephone deposition. Court finds counsel did not abandon movant.

Five days later, on November 6, 2019, the motion court entered its order and judgment. Although the judgment denied both Movant's *pro se* and amended Rule 29.15 motions, it only addressed the claims made in the untimely amended motion. The judgment did not discuss the *Sanders* abandonment argument Movant had raised.

Movant filed a motion to amend the judgment along with an affidavit she had signed. In the motion, Movant again requested the motion court to find the untimely filing of the amended motion was due to abandonment by her appointed counsel. Movant's affidavit stated the late filing

was caused by her counsel and “was not the fault of Movant.” The motion court did not rule on the motion to amend the judgment.

Standard of Review

“Review of a Rule 29.15 judgment is limited to a determination of whether the motion court’s findings of fact and conclusions of law are clearly erroneous.” *Moore v. State*, 328 S.W.3d 700, 702 (Mo. banc 2010). “Findings and conclusions are clearly erroneous if, after reviewing the entire record, there is a definite and firm impression that a mistake has been made.” *Id.*

Discussion

Movant asserts three points on appeal, but her third point, in which she claims the motion court clearly erred in finding that her appointed counsel did not abandon her, is dispositive. The State concedes we must reverse and remand because the record is insufficient for us to determine whether the motion court clearly erred in determining appointed counsel did not abandon Movant.

“The untimely filing of an amended motion by post[-]conviction counsel creates a presumption of abandonment.” *Watson v. State*, 536 S.W.3d 716, 719 (Mo. banc 2018). “When appointed counsel fails to file an amended post-conviction motion timely, the motion court is obligated to conduct an independent inquiry to determine whether the movant was actually abandoned.” *Milner v. State*, 551 S.W.3d 476, 479-80 (Mo. banc 2018). “The result of the inquiry into abandonment determines which motion—the initial motion or the amended motion—the court should adjudicate.” *Moore v. State*, 458 S.W.3d 822, 826 (Mo. banc 2015). “If the motion court determines appointed counsel’s apparent inattention to filing an amended post-conviction motion stems from the movant’s negligence or intentional failure to act, the movant is entitled to no additional relief, and the motion court should proceed upon the *pro se* post-conviction motion.” *Milner*, 551 S.W.3d at 480. But if the motion court determines the late filing was due to

abandonment by appointed counsel, “the court is directed to permit the untimely filing” and should consider the merits of the amended motion. *Moore*, 458 S.W.3d at 826.

“To adequately review the issue of abandonment of counsel, the record must be clear enough for the appellate court to decide whether or not the motion court’s finding with respect to abandonment was clearly erroneous.” *Johnson v. State*, 612 S.W.3d 256, 259 (Mo. App. E.D. 2020). As the Supreme Court of Missouri explained in *McDaris v. State*, 843 S.W.2d 369, 371 n.1 (Mo. banc 1992), “[t]he method of making this inquiry may be as formal or informal as the motion court deems necessary to resolve the question of abandonment by counsel, including, but not limited to, a written response and opportunity to reply, a telephone conference call, or a hearing.” But “a sufficient record must be made to demonstrate on appeal that the motion court’s determination on the abandonment issue is not clearly erroneous.” *Id.* Although the list of methods of inquiry discussed in *McDaris* is not exhaustive, “the motion court must make a sufficient record of its inquiry.” *Johnson*, 612 S.W.3d at 259.

“Upon review of the record, if we determine the motion court failed to make an independent inquiry or there is no record for us to review such inquiry, then we must reverse and remand for the motion court to conduct this inquiry.” *Johnson v. State*, 613 S.W.3d 512, 515 (Mo. App. E.D. 2020); *see also Borschnack v. State*, 568 S.W.3d 914, 919 (Mo. App. S.D. 2019) (reversing and remanding to permit “the development of a sufficient record” for appellate review of the motion court’s inquiry and determination of abandonment).

Here, the record is insufficient for us to determine whether the motion court clearly erred in finding Movant was not abandoned by her counsel. There is no record of the abandonment inquiry, and the motion court’s only resulting finding was simply a docket entry stating that “counsel did not abandon Movant.” The untimely filing of the amended motion created a

presumption of abandonment, *see Watson*, 536 S.W.3d at 719, and the only evidence in the record from both Movant’s counsel and Movant herself was that the untimely filing was entirely the fault of counsel. The motion court did not indicate in its docket entry that it did not believe that evidence and it did not make a specific finding that Movant’s negligence or intentional failure to act caused the untimely filing of the amended motion. Additionally, rather than adjudicating the claims in the timely filed *pro se* motion, as it should have done upon finding there was no abandonment, the motion court instead addressed only the claims made in the untimely filed amended motion. *See Milner*, 551 S.W.3d at 480.

Conclusion

The record is insufficient for us to determine whether the motion court’s finding that Movant was not abandoned was clearly erroneous. *See Johnson*, 612 S.W.3d at 260. We reverse and remand to the motion court with instructions to make an independent inquiry on the abandonment issue capable of being reviewed by an appellate court, to make an abandonment determination based on the record made of such inquiry, and then to proceed with the case accordingly.

A handwritten signature in blue ink, appearing to read "M. Gardner", is written over a horizontal line.

MICHAEL E. GARDNER, Judge

Gary M. Gaertner, Jr., P.J., concurs.
Philip M. Hess, J., concurs.