



In the Missouri Court of Appeals
Eastern District
DIVISION ONE

CARL S. GOLDBERG,	)	No. ED109430
	)	
Appellant,	)	Appeal from the Circuit Court
	)	of Monroe County
vs.	)	
	)	Honorable David C. Mobley
STATE OF MISSOURI,	)	
	)	
Respondent.	)	FILED: November 9, 2021

Introduction

Carl S. Goldberg (“Goldberg”) appeals from the motion court’s judgment denying his Rule 24.035¹ motion for post-conviction relief. In his sole point on appeal, Goldberg argues the motion court erred in denying his Rule 24.035 motion because plea counsel was ineffective in failing to communicate Goldberg’s acceptance of the State’s plea offer before it was revoked. The core issue before us is the timeliness of Goldberg’s filing. Because the motion court clearly erred in considering the merits of a claim that was untimely filed under the mandatory deadlines of Rule 24.035(b), we reverse the motion court’s judgment and remand with instructions to dismiss.

¹ All Rule references are to Mo. R. Civ. P. (2018), unless otherwise noted.

Factual and Procedural History

The offense underlying this appeal involved the shooting death of Goldberg's father, Carl Maxwell ("Father"). The State's investigation alleged Goldberg had fraudulently taken large sums of money from Father before killing him. A friend of Goldberg's ("Friend") testified that he became suspicious when Goldberg asked him not to tell the neighbors about Father's death. The State arrested Goldberg and charged Goldberg with murder in the second degree and armed criminal action. Goldberg moved to have venue transferred from Marion County to Monroe County due to local media coverage, and the circuit court granted his motion.

While in custody, Goldberg informed police that he shot his Father with a hunting crossbow during an argument over the abuse Father inflicted on Goldberg as a child. Goldberg explained that he then placed Father's body in a freezer.

Following plea negotiations, Goldberg pleaded guilty to second-degree murder in an open plea before the court in Monroe County. The State agreed to dismiss the charge for armed criminal action. The plea court accepted Goldberg's plea, finding it was made knowingly, intelligently, voluntarily, with understanding of the nature of the charge, and with the knowledge of the range of punishment and consequences of the plea on his rights. The plea court ordered a sentencing assessment report ("SAR").

Hearings were thereafter continued and scheduled by agreement of the parties in Ralls County following technical difficulties with recording in Monroe County. At the sentencing hearing on June 7, 2018, in Ralls County, Goldberg presented a mitigation evaluation by Dr. Jacqueline Landess of St. Louis University ("Dr. Landess"), who conducted a psychiatric interview of Goldberg and reviewed his records. Dr. Landess concluded that Goldberg had suffered egregious abuse by Father as a child. Further, Dr. Landess's report detailed a life history of trauma and abuse. The court sentenced Goldberg to life in prison and informed

Goldberg that his Rule 24.035 motion in the form of Criminal Procedure Form No. 40 “has to be filed with this Court within 180 days.” The court explained that failure to file the motion within the time limits would constitute a complete waiver of his rights to proceed under Rule 24.035.

The motion court received Goldberg’s pro se motion for post-conviction relief in Monroe County 307 days later on April 10, 2019. The motion court entered an order finding that Goldberg’s Rule 24.035 motion was untimely filed. The motion court noted Goldberg alleged that he mistakenly filed a timely motion in Ralls County rather than Monroe County. The motion court found that, upon further inquiry, the court clerk of Ralls County stated no post-conviction motion was filed by Goldberg with the court in Ralls County. The motion court determined that, even though it appeared Goldberg’s motion was untimely, the court would appoint post-conviction counsel to investigate Goldberg’s motion.

Goldberg’s amended motion raised three claims, one of which is the subject of his appeal. Goldberg argued plea counsel was ineffective for misadvising him about the plea offer. In particular, Goldberg averred that plea counsel did not tell him that the State’s offer of a seven-year sentence in return for a plea of guilty to involuntary manslaughter could expire and that plea counsel failed to timely accept the offer on Goldberg’s behalf before it was revoked. Regarding the timeliness of his pro se motion, Goldberg alleged in his amended motion that he timely mailed his pro se motion in September to Ralls County as directed by both plea counsel and the sentencing court. Goldberg alleged that another inmate later told him that he needed to file his pro se motion in the county where his case originated, and then he completed a new pro se motion and mailed it to Monroe County.

Goldberg moved to have his pro se motion considered as if timely filed due to third-party interference from plea counsel and the sentencing court. Goldberg alleged the sentencing court

did not clarify he needed to file his post-conviction motion in Monroe County and that plea counsel gave him a piece of paper directing him to file his post-conviction motion in Ralls County. The motion court granted the motion to consider Goldberg's pro se motion timely filed.

The motion court conducted an evidentiary hearing on July 29, 2020. Plea counsel testified regarding the plea negotiations and produced case notes documenting her communications to Goldberg about the plea negotiations. Goldberg testified about the plea negotiations and his understanding of his plea colloquy. Goldberg presented no evidence at the hearing regarding the timeliness of his pro se motion.

Following the hearing, the motion court reaffirmed its finding that Goldberg's pro se motion was timely filed and denied Goldberg's Rule 24.035 motion on its merits. The motion court concluded that Goldberg failed to show how trial counsel's performance was deficient in that plea counsel informed Goldberg of all plea offers, and that Goldberg rejected the State's offer in favor of continuing negotiations. Goldberg now appeals.

Point on Appeal

In his sole point on appeal, Goldberg claims the motion court erred in denying his Rule 24.035 motion for post-conviction relief because plea counsel was ineffective in failing to communicate his acceptance of the State's plea offer before it was revoked.

Standard of Review

Our review of a motion court's denial of a Rule 24.035 motion is limited to a determination of whether the findings and conclusions of the motion court are clearly erroneous. Rule 24.035(k); Suber v. State, 516 S.W.3d 386, 388 (Mo. App. E.D. 2017) (internal citation omitted). "The motion court's findings and conclusions are presumptively correct and will be overturned only when this Court, after reviewing the entire record, is left with a 'definite and firm impression that a mistake has been made.'" Arnold v. State, 509 S.W.3d 108, 112–13 (Mo.

App. E.D. 2016) (quoting Worthington v. State, 166 S.W.3d 566, 572 (Mo. banc 2005)). We defer to the motion court's credibility determinations. Smith v. State, 413 S.W.3d 709, 715 (Mo. App. E.D. 2013) (internal citation omitted). "After a guilty plea, our review is limited to a determination of whether the movant's plea was knowing and voluntary." Arnold, 509 S.W.3d at 113 (internal citation omitted).

Discussion

The State contends we should dismiss this appeal because Goldberg failed to prove by a preponderance of the evidence that his untimely pro se Rule 24.035 motion was properly excused. Compliance with Rule 24.035 is not waivable, and it is our "duty to enforce the mandatory time limits and the resulting complete waiver in the post-conviction rules." Jackson v. State, 597 S.W.3d 449, 452 (Mo. App. E.D. 2020) (internal quotation omitted).

Following a guilty plea, Rule 24.035(b) prescribes the deadlines for filing an initial pro se motion for post-conviction relief. Kirk v. State, 590 S.W.3d 897, 901 (Mo. App. W.D. 2019) (internal citation omitted). The time limits for filing a pro se motion for post-conviction relief are mandatory. Dorris v. State, 360 S.W.3d 260, 268 (Mo. banc 2012) (internal citation omitted). Rule 24.035 provides that a motion for post-conviction relief "shall" be filed within either 90 or 180 days, and the failure to timely file results in a "**complete waiver**" of any right to proceed on the motion's merits. Rule 24.035(b) (emphasis added); Dorris, 360 S.W.3d at 266–67.

If the motion is sent to the sentencing court by first-class United States Mail and is addressed correctly with sufficient postage and deposited in the mail on or before the last day for filing the motion, the motion shall be deemed to be filed timely. A legible postmark affixed by the United States Postal Service shall be prima facie evidence of the date of the filing of the motion. Failure to file a motion within the time provided by this Rule 24.035 shall constitute a complete waiver of any right to proceed under this Rule 24.035 and a complete waiver of any claim that could be raised in a motion filed pursuant to this Rule 24.035.

Rule 24.035(b). “[A] movant’s ignorance of the law is no excuse for the failure to assert timely claims for post-conviction relief.” Watson v. State, 520 S.W.3d 423, 431 (Mo. banc 2017) (internal citations omitted). The law is well settled that the movant bears the burden of proving the pro se motion was timely filed. Dorris, 360 S.W.3d at 267; Kirk, 590 S.W.3d at 902 (internal citations omitted).

Despite the seemingly absolute filing deadline for filing a pro se motion seeking post-conviction relief under Rule 24.035, “[t]he Supreme Court has, however, recognized that the untimeliness of a post[-]conviction relief motion will be excused where the untimeliness results from ‘the active interference of a third party beyond the inmate’s control.’” Kirk, 590 S.W.3d at 903 (quoting Price v. State, 422 S.W.3d 292, 301 (Mo. banc 2014)). “The active interference exemption ‘arises out of the practical reality that an inmate cannot comply with [the post[-]conviction relief rules] without relying on a third party to some extent.’” Id. (quoting Price, 422 S.W.3d at 302). The Supreme Court has held the active interference exception applies “where the actions of the court, or the clerk’s office of the court, have prevented the timely filing.” Id. (citing Price, 422 S.W.3d at 301–02) (holding a pro se motion was timely filed under the active interference exception where the court clerk failed to preserve the mailed envelope that would have proved the filing date); see Watson, 520 S.W.3d at 434 (explaining that untimely filing may be excused under the active interference exception where the court misinforms a movant about the appropriate deadlines to file his or her motion during sentencing). However, “[t]his exception only applies when (1) an ‘inmate prepares the motion and does all he reasonably can do to ensure that it is timely filed’ and (2) any tardiness ‘results solely from the active interference of a third party beyond the inmate’s control.’” Pool v. State, 621 S.W.3d 640, 642 (Mo. App. E.D. 2021) (quoting Price, 422 S.W.3d at 301). Both Price and Pool note that mere

reliance on counsel's directions, with no showing that the movant attempted to draft and timely file the pro se motion, does not satisfy the exception. See id. at 642–43 (citing Price, 422 S.W.3d at 302) (holding the motion court lacked authority to consider the merits of the post-conviction motion where the movant failed to plead or prove that he did all he reasonably could to prepare and timely file his pro se motion and that those efforts were thwarted by active interference by counsel).

Here, it is undisputed that Goldberg untimely filed his pro se motion more than 180 days after sentencing was entered. See Rule 24.035(b). The motion court ruled that Goldberg's pro se motion was filed untimely and appointed him post-conviction counsel. The motion court noted Goldberg's excuse for the untimely filing and also noted that the county in which Goldberg claimed to have initially timely filed his pro se motion denied having received that filing. Subsequently, Goldberg alleged in his amended motion, and in his motion to consider his pro se motion timely filed, that the untimeliness of his pro se motion should be excused under the active interference exception. Specifically, Goldberg alleged he initially timely filed in the wrong county based on the sentencing court's directions to file the motion "with this Court within 180 days." The proper place for Goldberg to file his pro se motion was in Monroe County, where Goldberg entered his plea of guilty, rather than Ralls County where the court was sitting when Goldberg was sentenced.² Additionally, Goldberg alleged that plea counsel gave him written directions to file in the wrong county. ***Prior to the evidentiary hearing***, the motion court granted Goldberg's motion to excuse the untimeliness of his pro se motion. The record contains no reason or explanation for the motion court's ruling. The motion court then held an

² The judicial circuit in which Goldberg was charged is within a multi-county judicial district in which the circuit judges travel from county to county, facilitating expedient handling of cases. See, e.g., State ex rel. Davis v. Lewis, 893 S.W.2d 817, 819 (Mo. banc 1995) (discussing the practical effects of multi-county judicial districts on venue transfers).

evidentiary hearing on the post-conviction motion and denied Goldberg's amended motion on its merits.

On appeal, the State contends the motion court erred in finding Goldberg's untimely filed motion was excused under the active interference exception. The State argues Goldberg failed to meet his burden to adduce evidence at his evidentiary hearing supporting his claim that his untimeliness was excused under the active interference exception.

"[A] movant seeking post-conviction relief 'must allege facts establishing that the motion is timely filed.'" Jackson, 597 S.W.3d at 452 (quoting Hall v. State, 528 S.W.3d 360, 361–62 (Mo. banc 2017) (quoting Dorris, 360 S.W.3d at 267)). "Dorris plainly holds that the burden of pleading **and** proving facts showing the motion was timely filed rests with the movant." Id. (quoting Hall, 528 S.W.3d at 362 (citing Dorris, 360 S.W.3d at 267)); see also Fields v. State, 625 S.W.3d 479, 482 (Mo. App. W.D. 2021) (citing Dorris, 360 S.W.3d at 267) ("[T]he movant must **allege** facts establishing that the motion is timely filed and must thereafter **prove** that the motion is timely by a preponderance of the evidence.").

The burden of alleging and proving that the motion is timely filed can be met by the movant in one of three ways: (1) by filing the original pro se motion timely so that the file stamp on the motion reflects that it is filed within the time limits [prescribed] in the rule; (2) alleging in the original pro se motion **and proving by a preponderance of the evidence** that the movant's circumstances fall within a recognized exception to the time limits; or (3) alleging in the amended motion and proving by a preponderance of the evidence that the circuit court misfiled the motion.

Jackson, 597 S.W.3d at 452 (alteration in original) (emphasis added) (quoting Vogl v. State, 437 S.W.3d 218, 226 (Mo. banc 2014) (citing Dorris, 360 S.W.3d at 267)).

Presenting evidence of a timely filing or excuse from the time limits is an absolute requirement when the timing of a post-conviction motion is at issue. Critically, "[a]llegations in a post[-]conviction motion are not self-proving." Fields, 625 S.W.3d at 482 (first alteration in

original) (quoting Shockley v. State, 579 S.W.3d 881, 918-19 (Mo. banc 2019)). “Failure to present evidence at a hearing in support of factual claims in a post-conviction motion constitutes abandonment of that claim.” Id. (quoting Shockley, 589 S.W.3d at 918–19). Where a movant alleges facts that the pro se motion should be considered timely filed but does not present evidence proving those facts at the evidentiary hearing, the movant is deemed to have abandoned the claim for relief. Id. (holding the movant failed to satisfy her burden to prove her allegations of active interference of a third party excusing her untimely filing of her pro se motion for post-conviction relief where the movant presented no evidence or argument at her evidentiary hearing regarding her allegations).

In addition to the transcript of the evidentiary hearing, we may look to other evidence in the record, such as reviewing docket entries to confirm the dates of filing. See Jackson, 597 S.W.3d at 452 (citing Allen v. State, 986 S.W.2d 491, 493 (Mo. App. W.D. 1999)). However, affidavits sworn under oath do not meet the movant’s evidentiary burden to prove allegations in a post-conviction motion as to the timeliness of the pro se motion. Fields, 625 S.W.3d at 483 (internal quotation omitted) (“[A]bsent a stipulation of the parties there is no authority for treating such affidavits as evidence, and in determining the issues therefrom.”). Ultimately, “[i]f the timely filing of a[] [pro se] post-conviction motion is not proven, the motion court will regard the untimely motion as a ‘complete waiver’ of any right to proceed under Rule 24.035.” Vogl, 437 S.W.3d at 226–27 (citing Rule 24.035(b); Price, 422 S.W.3d at 296–97). Further, “[w]here the [motion] court improperly considers the merits of claims that are time-barred by Rule 24.035, the proper disposition on appeal is to vacate the judgment and remand with instructions to dismiss.” Greenleaf v. State, 501 S.W.3d 911, 913 (Mo. App. E.D. 2016) (quoting State v.

Johnson, 422 S.W.3d 430, 433 (Mo. App. W.D. 2013)); see also Pool, 621 S.W.3d at 643 (internal citation omitted); Jackson, 597 S.W.3d at 453.

Here, prior to the evidentiary hearing, Goldberg argued to the motion court that the factual circumstances of his filing the pro se motion for post-conviction relief fell within the recognized active interference exception to the mandatory statutory time limits of Rule 24.035(b). In granting Goldberg's motion and deeming his pro se motion to be timely filed, the motion court erred in one critical step. Goldberg had the burden to *prove* the allegations in his amended motion by a preponderance of the evidence before the motion court could issue its final judgment that Goldberg's pro se motion was timely. See Fields, 625 S.W.3d at 482 (internal citation omitted); Jackson, 597 S.W.3d at 452 (internal citation omitted). We agree that Goldberg's alleged facts, *if proven*, may have satisfied the requirements to invoke the active interference exception to the mandatory statutory time limits of Rule 24.035(b). But the record before us lacks *any evidence* upon which the trial court could rely to find Goldberg was entitled to the active interference exception to the mandatory statutory time limits. Fatal to his motion, Goldberg simply did not prove his allegations by a preponderance of the evidence. See Fields, 625 S.W.3d at 482 (internal citation omitted); Jackson, 597 S.W.3d at 452 (internal citation omitted); see also Conner v. State, 629 S.W.3d 108, 111–12 (Mo. App. E.D. 2021) (citing Vogl, 437 S.W.3d at 226).

In particular, we look to the record on appeal for any evidence that could be viewed as support for the motion court's finding that Goldberg's untimely filing was excused under the active interference exception. See Jackson, 597 S.W.3d at 452 (internal citation omitted). The record contains no affidavit or other evidence attached to either the amended motion or the motion to have the pro se motion deemed timely filed. At the evidentiary hearing, Goldberg

presented no evidence from plea counsel on the issue of timeliness. Moreover, Goldberg did not testify on the issue of the timeliness of his pro se motion. Goldberg alleged in his amended motion that he was given written instructions by plea counsel to file his post-conviction motion in Ralls County, but did not produce the purported written instructions. Because the record lacks any evidence which would support the motion court's ruling to excuse Goldberg's untimely filing in Monroe County, we must find the motion court clearly erred in its final judgment treating Goldberg's motion as timely filed.³ See Jackson, 597 S.W.3d at 452 (citing Vogl, 437 S.W.3d at 226). Just as a motion court cannot grant post-conviction relief on the merits of an amended motion absent an evidentiary hearing, a motion court cannot deem an untimely filed pro se motion to be timely filed *absent an evidentiary record* in which the movant proves that the untimeliness of his motion falls within a recognized exception to the mandatory time limits. See Fields, 625 S.W.3d at 482 (citing Shockley, 579 S.W.3d at 918–19); Jackson, 597 S.W.3d at 452 (citing Vogl, 437 S.W.3d at 226). The motion court improperly considered the merits of a post-conviction motion that was time-barred by Rule 24.035 because Goldberg did not present evidence required to apply the active interference exception. For that reason, we reverse the motion court's judgment and remand with instructions to dismiss Goldberg's claim for post-conviction relief. See Pool, 621 S.W.3d at 643 (internal citation omitted); Jackson, 597 S.W.3d at 452 (internal citation omitted); Greenleaf, 501 S.W.3d at 913 (internal citation omitted).

³ The motion court's pre-evidentiary hearing ruling accepting the post-conviction motion as timely filed possibly contributed to the lack of evidence at the evidentiary hearing. We can appreciate that Goldberg may have seen no need to present evidence relating to the timeliness of his filing given the trial court's ruling. But, unfortunately for Goldberg, the motion court's ruling did not relieve him of the burden of making an evidentiary record supporting movant's claim that the untimeliness of his motion falls within a recognized exception to the mandatory time limits. See Fields, 625 S.W.3d at 482. The mandatory filing requirements of Rule 24.035 govern from the inception of the post-conviction proceedings. The motion court lacks authority to exempt the movant from these requirements.

Conclusion

The judgment of the motion court denying Goldberg's Rule 24.035 motion following an evidentiary hearing is vacated. We remand the case to the motion court with instructions to dismiss Goldberg's Rule 24.035 motion.


KURT S. ODENWALD, Presiding Judge

Kelly C. Broniec, J., concurs.
John P. Torbitzky, J., concurs.