No. SC100921

IN THE

Supreme Court of Missouri

CEDRIC D. MACK,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the Circuit Court of Harrison County
3rd Judicial Circuit
The Honorable Ryan W. Horsman, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Defendant appeals a Harrison County Circuit Court judgment denying his amended Rule 29.15 motion for postconviction relief, which sought to set aside a conviction for driving while intoxicated. (D18).

In the underlying criminal case, Defendant was charged with the class D felony of driving while intoxicated in Count I, for operating a motor vehicle while under the influence of alcohol; and the class A misdemeanor of driving while license suspended or revoked in Count II; for events occurring on or about October 21, 2016. (L.F. 42). Before trial, the State filed a nolle prosequi as to Count II. (D1, p. 27; L.F. 45). The trial court found Defendant to be a persistent offender and a persistent DWI offender. (Tr. 96-99). The jury found Defendant guilty as charged. (D1, p. 27; L.F. 70; Tr. 175). On April 20, 2017, the trial court sentenced Defendant to 4 years' imprisonment. (D1, p. 29; L.F. 76; Tr. 187).

Viewed in the light most favorable to the verdict, the evidence presented at trial showed the following:

A corporal with the Missouri State Highway Patrol testified that on the evening of October 21, 2016, he received a call from dispatch relaying a report that a silver vehicle with black racing stripes and a particular Iowa license plate was "driving in a careless and imprudent manner" while northbound on the interstate. (Tr. 112-13, 141, 143). The trooper testified that he believed that the call specified that it was a silver Chevrolet, but that a copy of the dispatch

log would have it recorded. (Tr. 143). The trooper testified that there were actually two separate calls reporting that the vehicle was driving erratically. (Tr. 142, 151-53, 157). He testified that the first call reported that the vehicle was "swerving all over the road and speeding up and slowing down" while driving northbound from the 71 mile marker, but that another trooper was unable to locate the vehicle in response. (Tr. 142, 152). The second call reported the same vehicle description, with a specific license plate number, this time at the 105 mile marker. (Tr. 141-43, 153, 157). The trooper again noted that the particular license plate number would be recorded in the dispatch log. (Tr. 157). At the time he received the call from dispatch, the trooper was at the southbound weigh station of the interstate highway at the 110 mile marker. (Tr. 113, 157).

As he was exiting the weigh station to enter the southbound lanes of the interstate, the trooper saw a vehicle matching the reported description come to a stop halfway on the shoulder and halfway in the northbound driving lane of the highway just north of the exit for the northbound weigh station. (Tr. 113-14, 143, 153, 157). Shortly after it stopped, the trooper saw the vehicle re-enter the roadway and continue northbound. (Tr. 114). The trooper subsequently pulled into the crossover, waited for traffic to clear, and then turned north to follow the vehicle, before succeeding in getting behind it and activating his patrol vehicle's emergency lights in order to conduct an investigative stop at

the 111 mile marker. (Tr. 114, 136, 152). The car responded by pulling over to the shoulder and ultimately stopping with its driver's-side tire almost touching the white fog line. (Tr. 135).

The trooper made contact with Defendant, who was the driver of the vehicle, and noticed the odor of alcohol coming from the vehicle. (Tr. 114-15). The trooper asked Defendant for his driver's license, and Defendant instead handed him a credit card. (Tr. 115). Defendant was unable to provide the trooper with a license or identification. (Tr. 115). After the trooper asked Defendant to come back to his patrol vehicle, he observed Defendant stumble, noticeably sway while walking, and fail to walk straight. (Tr. 116). Once inside the patrol vehicle, the trooper continued to smell the odor of alcohol coming from Defendant as he spoke and observed that Defendant's speech was slurred and that his eyes were bloodshot. (Tr. 116-17, 120). Defendant stated that he had been driving for about an hour. (Tr. 146). When asked about his identity, Defendant initially provided a false name. (Tr. 117-19).

Defendant refused to submit to a preliminary breath test. (Tr. 119). The trooper asked Defendant to recite the alphabet from A to Z without singing, and while Defendant attempted to comply, he skipped several letters and concluded by saying, "[N]ow I know my ABCs will you sing them to me?" (Tr. 119-20). When asked to count backward from 64 to 48, Defendant did so slowly while using his fingers for every number. (Tr. 120). The trooper conducted the

horizontal gaze nystagmus test and observed six clues, which indicated that Defendant was impaired. (Tr. 121-28). The trooper also observed vertical nystagmus in both of Defendant's eyes, which indicated that his BAC was particularly high for him. (Tr. 127). The trooper then asked Defendant to exit the vehicle and perform the one-leg-stand test, during which Defendant put his foot down three times, started swaying with his hands in the air, and hopped around, again indicating that he was impaired. (Tr. 128-30). The trooper attempted to instruct Defendant on performing the walk-and-turn test, but he abandoned the attempt out of a concern for Defendant's safety due to Defendant's repeated inability to even stand in the initial position for the test. (Tr. 130-32).

The trooper then placed Defendant under arrest for driving while intoxicated. (Tr. 132). The trooper told Defendant that his vehicle would have to be moved further onto the shoulder because it was positioned so close to the driving lane of the highway that there was a good chance that it would be struck by a passing vehicle. (Tr. 135). Defendant subsequently admitted that he had been drinking and that there was a container of alcohol in the car. (Tr. 135). The trooper testified that he found an empty alcohol container in the back seat area of Defendant's vehicle. (Tr. 136, 150). The trooper then moved Defendant's vehicle further onto the shoulder. (Tr. 136). After being advised of implied consent, Defendant refused to submit to a breath test. (Tr. 134-35,

141). Defendant subsequently fell asleep. (Tr. 156).

State's Exhibit 5, a dashcam recording of the stop of Defendant's vehicle, was admitted into evidence and played for the jury. (Tr. 136-40). The trooper testified that the recording did not show Defendant's vehicle driving in the northbound lane until he got behind it because the recording was triggered by the activation of his patrol vehicle's emergency lights. (Tr. 136-37). The trooper testified that the recording did not include him receiving the initial call from dispatch about the vehicle. (Tr. 157). He also testified that the video did not show anything "going on to the side of [his] car" due to the direction of the camera. (Tr. 136-37).

The recording started 30 seconds before the trooper's vehicle's lights were activated and the stop of Defendant's vehicle was initiated. (State's Ex. 5 at 22:34:09-39). At the beginning of the recording, the trooper passed other vehicles and accelerated, before he caught up to Defendant's vehicle approximately 15-10 seconds before the stop. (State's Ex. 5 at 22:34:09-29). Prior to the stop, Defendant's vehicle twice approached the fog line, either touching or almost touching the line with the passenger-side tires. (State's Ex. 5 at 22:34:29, 22:34:38).

After making contact with Defendant and having him come back to his patrol car, the trooper told Defendant that they had had "several complaints" that Defendant was "all over the road." (State's Ex. 5 at 22:37:21-26, 22:38:02-

04). The trooper later said that he stopped Defendant because they had had some "major complaints" about him, including that he had stopped on the interstate. (State's Ex. 5 at 22:48:07-15). The trooper told Defendant that he could easily cause a crash with the way he was driving. (State's Ex. 5 at 22:57:13-19). The trooper also told Defendant that when the trooper was pulling out of the scale house, he saw Defendant pull over to the shoulder, but stay halfway in the road, before pulling back into the road. (State's Ex. 5 at 22:38:05-15; 22:48:13-14). The trooper similarly told the assisting trooper later that he saw Defendant do "exactly what they were talking about" and stop partially in the road and partially on the shoulder next to "H2." (State's Ex. 5 at 23:20:57-23:21:16). The trooper told Defendant that when Defendant stopped and pulled over, there were three vehicles, including two semis, who had all slowed down and gotten in the same lane behind Defendant to allow the trooper to catch up to Defendant, and that they were probably the ones who had called. (State's Ex. 5 at 22:57:20-42). Defendant initially said nothing in response. (State's Ex. 5 at 22:38:15). Later, Defendant responded by telling the trooper that he would not drive anymore and that he could have someone get the car. (State's Ex. 5 at 22:48:17-25).

Defendant did not testify on his own behalf or present any evidence. (Tr. 160-61, 163).

Postconviction Proceedings

The Court of Appeals affirmed Defendant's conviction on direct appeal in *State v. Mack*, 560 S.W.3d 29 (Mo. App. W.D. 2018), and it issued its mandate on December 5, 2018. (D1, p. 41). Defendant timely filed his pro se Rule 29.15 motion[1] on January 14, 2019, 40 days after the mandate had issued. (D1, p. 5; D2, p. 1). *See* Rule 29.15(b).

The motion court did not appoint postconviction counsel. (D1, p. 5). On March 4, 2019, postconviction counsel, from the "Office of the State Public Defender," entered an appearance. (D1, p. 5; D3, p. 1; D23). Fifty-nine days later, on May 2, 2019, postconviction counsel requested a 30-day extension to file an amended motion. (D1, p. 5; D3). On May 6, 2019, sixty-three days after postconviction counsel had entered an appearance, the motion court untimely granted the request for a 30-day extension to file an amended motion. (D1 p. 6; D4). On Monday, June 3, 2019, which was 91 days after both the mandate of this Court was issued and postconviction counsel entered an appearance, non-appointed postconviction counsel untimely filed an amended motion. (D1,

[1] Defendant's pro se motion raised one claim: "I did [sic] have a fair trial overruling the motion to suppress my statements[.]" (D2, p. 2). The pro se motion included a Forma Pauperis Affidavit, which stated, "I need a Public Defender to take my case please because I have no funds." (D2, p. 6).

pp. 5-6; D5).

The amended motion claimed, inter alia, that trial counsel was ineffective for "failing to file and litigate prior to trial a motion to suppress the evidence obtained as fruits of law enforcement's stop of [Defendant's] vehicle without reasonable suspicion." (D5, p. 2). The amended motion alleged that "[the trooper] stopped [Defendant] based on two call[s] received from dispatch about erratic driving and the two times [Defendant's] passenger wheels briefly touched the fog line." (D5, p. 5). The amended motion alleged that "[t]he reporting parties were not identified to [the trooper] and he did not talk with any eyewitnesses to the [Defendant's] alleged erratic driving." (D5, p. 4). The amended motion alleged that "[t]he [trooper] had not adequately corroborated the anonymous tips about [Defendant's] driving before pulling him over" and that "[n]o erratic driving, traffic or state law violations had been personally observed by the [trooper] before stopping [Defendant]." (D5, pp. 5-7). The amended motion alleged that "[t]he two dispatches and [the trooper's] mere observation of [Defendant's] passenger tire briefly and barely touching the fog line twice is insufficient to provide the reasonable suspicion necessary for the stop." (D5, p. 7). The amended motion alleged that "[i]f trial counsel would have litigated a motion to suppress the stop and evidence obtained as illegal fruit[s] thereof, there is a reasonable likelihood that the evidence would have been suppressed and [Defendant's] case dismissed prior to trial." (D5, p. 7).

An evidentiary hearing was held on February 20, 2020. (D1, p. 8; PCR1 Tr. 1-2). Postconviction counsel first asked the motion court to review the trial transcript, which was admitted as Movant's Exhibit 1, specifically in regards to the trooper's testimony. (PCR1 Tr. 2, 4, 6-7; D1, p. 8). Postconviction counsel also asked the motion court to review the recording of the stop, which had been admitted at trial as State's Exhibit 5 and was admitted at the postconviction hearing as Movant's Exhibit 2. (PCR1 Tr. 2-4; D1, p. 8). Postconviction counsel asked the court to take judicial notice of the underlying criminal file, along with the exhibits admitted at trial, and of the direct-appeal case, which it agreed to do. (PCR1 Tr. 2-4). Finally, postconviction counsel stated that she would be filing an affidavit by trial counsel in lieu of live testimony, by agreement with the State, and the motion court stated that it would wait to rule until the affidavit was filed. (PCR1 Tr. 2, 7-8).

The prosecutor noted for the motion court that "the . . . testimony at trial indicated that the [t]rooper saw additional indicia of activity by the defendant that is not viewable on the video," "action that occurred prior to the time of the video starting," which the prosecutor argued was relevant to the claim that there was a lack of reasonable suspicion for the stop. (PCR1 Tr. 6).

Trial counsel's affidavit was filed on February 25, 2020. (D1, p. 8; D6, p. 1). Trial counsel testified in her affidavit that "[she] did not allege that law enforcement lacked probable cause to conduct a traffic stop because, to the best

of [her] recollection, the video showed [Defendant's] vehicle suddenly slow and begin to pull onto the right shoulder **before** [the trooper] activated his emergency lights, and [the trooper's] written statement was in accord with the video evidence." (D6, p. 2) (emphasis in original). Trial counsel concluded that "[she] therefore did not consider this a meritorious suppression issue." (D6, p. 2).

The motion court denied the amended motion. (D1, p. 9; D7, p. 1).

On appeal, the Court of Appeals reversed the judgment and remanded for further proceedings consistent with its opinion. (D14; D15, p. 10). Specifically, the Court reversed "[b]ecause the amended motion was not timely filed, the motion court did not conduct an abandonment inquiry, and the motion court failed to make findings of fact and conclusions of law . . . ." (D15, pp. 1, 6, 8). In finding that the amended motion had been untimely filed, the Court noted that "[n]othing in the record showed that the motion court appointed counsel" and that postconviction counsel instead "entered an appearance." (D15, pp. 2, 6-7). The Court's opinion held that "the judgment is reversed" and that "the case is remanded for the motion court to conduct an abandonment inquiry and for further proceedings consistent with the outcome of that inquiry." (D15, p. 8). It further held that "on remand the motion court must issue findings of fact and conclusions of law on the claims in [Defendant's] *pro se* motion or his amended motion, whichever the motion court adjudicates after its

abandonment inquiry." (D15, p. 10).

Following the remand, postconviction counsel filed a motion for the court to find abandonment and to consider the amended motion. (D1, p. 11; D16). The motion alleged that "[t]he untimeliness of this amended motion is in no way attributed to [Defendant], who has been conscientious, forthwith, and fully cooperative with counsel" and that "[r]ather, the untimeliness is a direct reflection of the workload of counsel and his ability to accomplish the task assigned in a timely manner." (D16, p. 1). The motion requested that "the untimely filing of [Defendant's] amended motion in this cause be found as a result of counsel's abandonment, by no fault of [Defendant's], and that the [motion court] . . . permit the out of time filing as the proper[ ] remedy to cure said abandonment." (D16, p. 2). The motion was notarized. (D16, p. 3).

At a hearing on March 31, 2023, substitute postconviction counsel argued that the motion court should find that postconviction counsel had abandoned Defendant based on postconviction counsel's notarized motion. (D1, p. 12; PCR2 Tr. 3-4).

The motion court signed the proposed order, sustaining the motion and finding that "[Defendant] was abandoned by counsel's failure to timely file an amended motion as required" and that "the appropriate remedy is to consider the untimely filed amended motion on the merits." (D1, p. 12; D17; D18, p. 3).

The motion court subsequently denied Defendant's amended motion. (D18,

pp. 1, 3, 9). The motion court found that after receiving the call from dispatch about the vehicle driving in a careless and imprudent manner, "[the trooper] saw a vehicle matching that description briefly come to a stop on the shoulder and partially in the driving lane" and "pull back onto the highway and continue northbound." (D18, pp. 5-6). The motion court also found that "with the exception of the officer's observation of [Defendant] briefly stopping his vehicle, the entire observation period, stop, investigation and arrest were recorded on video cam," which was admitted at trial as State's Exhibit 5. (D18, p. 5). The motion court also found that "the video shows [Defendant's] back passenger wheel briefly touch the fog line two times." (D18, p. 6). The motion court noted that "at trial, [the trooper] did not specifically testify what factors formed the basis of the stop." (D18, p. 7). The motion court found that "the calls along with the [Defendant's] operation of the vehicle weaving within its lane touching the lane boundary lines and pulling over to the side of the road prior to the initiation of [the trooper's] lights is sufficient to establish reasonable suspicion necessary for a 'Terry Stop.'" (D18, p. 7). The motion court also found that "[the trooper's] observation of [Defendant's] vehicle briefly stop partially on the shoulder of the road coupled with the dispatch calls was sufficient to form the reasonable suspicion necessary for a lawful stop." (D18, p. 8). The motion court concluded that "counsel did not fail to exercise the customary skill and diligence that a reasonably competent attorney would exercise under the same

or similar circumstances in failing to file a suppression motion related to this issue prior to trial" and that "[Defendant] . . . was not prejudiced" because there was "not a reasonable probability the Court would have sustained the motion resulting in suppression of the fruits of the stop and a different outcome to [Defendant]." (D18, p. 8).

ARGUMENT

I. (Abandonment)

The motion court clearly erred in finding that non-appointed postconviction counsel had abandoned Defendant and in adjudicating the claims in the untimely filed amended Rule 29.15 motion because the abandonment doctrine applies only to appointed counsel and it therefore did not excuse non-appointed counsel's untimely filing of the amended motion.

A. Standard of review.

"Appellate review of a motion court's decision to allow a motion to file a postconviction motion out of time is limited to a determination of whether the motion court's findings and conclusions are clearly erroneous." *Eastburn v. State*, 400 S.W.3d 770, 773 (Mo. banc 2013). "Findings and conclusions are clearly erroneous if, after reviewing the entire record, this Court is left with the definite and firm impression that a mistake has been made." *Id.* "[T]his includes *de novo* review for errors of law, rejection of factual findings for which there is no substantial evidence, and—in the rarest of cases—rejection of factual findings for which there may be substantial evidence but regarding which the reviewing court, nevertheless, on the entire record, is left with a definite and firm conviction (or impression) that a mistake has been made." *Flaherty v. State*, 694 S.W.3d 413, 419 (Mo. banc 2024).

B. This Court has a duty to enforce the time limits in Rule 29.15 and to therefore consider the issue of whether the abandonment doctrine excuses the untimely filing of an amended Rule 29.15 motion by non-appointed counsel, regardless of whether the State has raised the issue before the motion court.

In *Dorris*, this Court noted that "[t]he State did not raise the issue of timeliness below" and that "[t]he court of appeals [had] split on whether the state can waive the time limits for filing a Rule 29.15 . . . motion." *Dorris v. State*, 360 S.W.3d 260, 263 & 266 (Mo. banc 2012). The Court held that "[i]t is the court's duty to enforce the mandatory time limits and the resulting complete waiver in the post-conviction rules—even if the State does not raise the issue" and that "[t]he State cannot waive movant's noncompliance with the time limits in Rule[ ] 29.15 . . . ." *Id.* at 268. The Court explained that "[t]he Rule[ ] provide[s] for the unique result of 'complete waiver' when a defendant files a post-conviction claim out of time" and that "[w]hen a statute or rule provides what results will follow a failure to comply with its terms, it is mandatory and must be obeyed." *Id.* at 267; *see* Rule 29.15(b) ("Failure to file a motion within the time provided by this Rule 29.15 shall constitute a complete waiver of any right to proceed under this Rule 29.15 and a complete waiver of any claim that could be raised in a motion filed pursuant to this Rule 29.15."). The Court further explained that "[t]he [p]olicy [b]ehind Rule[ ] 29.15

. . . [s]upports the [r]esult of [c]omplete [w]aiver," as the time limits in Rule 29.15 "serve the legitimate end of avoiding delay in the processing of prisoner's claims and prevent the litigation of stale claims" and are, "at least in part, concerned with preserving the finality of judgment," and that "[t]hus, the State may not waive the requirement that movants timely file." *Id.* at 269-70 (internal citation omitted).

In *Stanley*, this Court "first address[ed] the untimeliness of [the movant's] second amended motion and his argument to excuse the late filing because his first post-conviction counsel abandoned him." *Stanley v. State*, 420 S.W.3d 532, 539-40 (Mo. banc 2014). The movant argued on appeal that "the state [had] 'recorded no objection to the [untimely] filing of a second amended motion in circuit court,'" but this Court responded that "[t]he state cannot waive compliance with the time limits . . ., and the lack of an objection is irrelevant," citing *Dorris*, 360 S.W.3d at 268. *Id.* at 540 n.5. The Court reaffirmed that "[t]he post-conviction rules have mandatory time limits because a post-conviction motion is a collateral attack on the final judgment of a court." *Id.* at 541. The Court specified that "[t]he movant is responsible for timely filing the initial motion, and appointed counsel must timely file either an amended motion or a statement that the pro se motion is sufficient." *Id.* at 540. The Court held that "[the first post-conviction counsel's] actions did not constitute

abandonment" and that, "[a]ccordingly, arguments raised only in [movant's] late-filed second amended motion are time-barred . . . ." *Id.* at 543.

In *Price*, this Court recognized that "[t]he deadline and 'complete waiver' provisions of Rule 29.15(b)" "play such an important role in the orderly presentation and resolution of post-conviction claims that the state cannot waive them." *Price v. State*, 422 S.W.3d 292, 297 (Mo. banc 2014) (citing *Dorris*, 360 S.W.3d at 270). The Court stated that both "motion courts and appellate courts have a 'duty to enforce the mandatory time limits . . . .'" *Id.* (quoting *Dorris*, 422 S.W.3d at 297). The Court further noted that "[t]he deadlines for amended motions in Rule 29.15(g) . . . contain no waiver provisions," and so "[a] failure to comply with those deadlines does not bar the inmate from proceeding altogether, as under Rule 29.15(b)," but that "[i]nstead, the inmate is merely limited to those claims already raised in his timely initial motion." *Id.* at 299-300 (citing *Stanley*, 420 S.W.3d at 540); *see* Rule 29.15(i) ("The hearing . . . shall be confined to the claims contained in the last timely filed motion.").

In *Moore*, this Court recognized that "[a]bandonment by appointed counsel 'extend[s] the time limitations for filing an amended Rule 29.15 motion'" and that "the existence of abandonment affects whether the claims in the amended motion have been waived . . . ." *Moore v. State*, 458 S.W.3d 822, 824-25 (Mo. banc 2015) (quoting *Moore v. State*, 934 S.W.2d 289, 290 (Mo. banc 1996)). The

Court further reaffirmed that "[w]hen an untimely amended motion is filed, the motion court has a duty to undertake an 'independent inquiry . . .' to determine if abandonment occurred," and it held that "[w]hen the independent inquiry is required but not done, this Court will remand the case . . . ." *Id*. at 825-26 (quoting *Vogl v. State*, 437 S.W.3d 218, 228-29 (Mo. banc 2014)); *see also Sanders v. State*, 807 S.W.2d 493, 495 (Mo. banc 1991); *McDaris v. State*, 843 S.W.2d 369, 371 n.1 (Mo. banc 1992).

In *Gittemeier*, this Court began by noting, "Before considering the merits of a postconviction motion, however, this Court has a duty to determine whether the postconviction motion was timely filed." *Gittemeier v. State*, 527 S.W.3d 64, 66 (Mo. banc 2017). After finding that the amended motion had been untimely filed, this Court considered, and ultimately agreed with, the State's arguments on appeal that the motion court had erred in adjudicating the amended motion because the abandonment doctrine did not excuse the untimely filing by non-appointed counsel, despite the absence of any reference to such an argument having been previously made by the State before the motion court. *Id*. at 66 & 68-71.

Finally, in *Hatmon*, after noting that the State was arguing for the first time on appeal—despite a prior appeal having taken place—that the movant's pro se motion was untimely, this Court reaffirmed *Dorris*'s holding that "*[i]t is the court's duty* to enforce the mandatory time limits and the resulting

complete waiver in the post-conviction rules—even if the [s]tate does not raise the issue" and that "[o]ur Court cannot waive [ ] non-compliance with the time limits imposed by Rule 24.035." *Hatmon v. State*, 661 S.W.3d 760, 763-65 (Mo. banc 2023) (quoting *Dorris*, 360 S.W.3d at 268; *Greenleaf v. State*, 501 S.W.3d 911, 913 (Mo. App. E.D. 2016)) (emphasis in original). The Court then held that "the mandatory time limit imposed by Rule 24.035 outweighs the law-of-the-case doctrine such that this doctrine does not preclude the motion court from considering the timeliness of [the movant's] pro se motion on remand in accordance with this opinion." *Id.* at 766.

In sum, this Court has repeatedly recognized a duty to enforce the time limits in the postconviction rules and to therefore consider issues such as whether the motion court has clearly erred in finding that non-appointed counsel abandoned Defendant by untimely filing the amended motion and in adjudicating the untimely amended motion, regardless of whether the State has raised the issue before the motion court. *See also Cornelious v. State*, 526 S.W.3d 161, 163-64 (Mo. App. W.D. 2017); *Steele v. State*, 555 S.W.3d 486, 487 & 489 n.5 (Mo. App. S.D. 2018); *Ward v. State*, 705 S.W.3d 727, 733 (Mo. App. W.D. 2025) ("The Missouri Supreme Court has held that the time limits for filing post-conviction relief motions have quasi-jurisdictional status: courts must raise those time limits *sua sponte*, even if the State does not; and the time

limits are not subject to the rules of preservation or waiver which typically apply to non-jurisdictional objections.").

Moreover, the duty to abide by the time limits within the postconviction rules is not merely a technical requirement. "A judgment in a criminal case becomes final when a sentence is imposed." *State ex rel. Zahnd v. Van Amburg*, 533 S.W.3d 227, 230 (Mo. banc 2017). "Therefore, a circuit court 'exhausts its jurisdiction' over a criminal case once it imposes sentence." *Id.* (quoting *State ex rel. Simmons v. White*, 866 S.W.2d 443, 445 (Mo. banc 1993)). "It can take no further action in that case [unless] expressly provided by statute or rule." *Id.* (quoting *Simmons*, 866 S.W.2d at 445). "Accordingly, any action taken by a circuit court after sentence is imposed is a 'nullity' and 'void' unless specifically authorized by law." *Id.* (quoting *Simmons*, 866 S.W.2d at 445).

Rule 29.15 and Rule 24.035 "provide for an independent post-sentence procedure." *See id.* (contrasting Rule 29.12 with the postconviction rules). But insofar as the circuit court's jurisdiction or authority over the underlying criminal case has been exhausted, a circuit court is confined to acting as "expressly provided" in the postconviction rules, *see id.*, including, for example, that any hearing "shall be confined to the claims contained in the last timely

filed motion."[2] Rule 29.15(i). As such, not only do the courts have an independent duty to abide by and enforce the time limits of Rule 29.15 and Rule 24.035, no party may waive those time limits and thereby give the circuit court jurisdiction or authority over the underlying criminal case that it does not have.

C. The motion court clearly erred in finding that non-appointed postconviction counsel had abandoned Defendant and in adjudicating the untimely amended motion because the abandonment doctrine does not apply to non-appointed counsel.

Defendant concedes both that postconviction counsel entered an appearance without being appointed by the motion court and that counsel's amended motion was untimely filed. (Def's Br. 12, 17, 27; D1, pp. 5-6; D3, p. 1; D5; D23). *See Mack v. State*, 635 S.W.3d 607, 609-13 (Mo. App. W.D. 2021). The motion court found that postconviction counsel had abandoned Defendant by untimely

[2] This Court has recognized a limited exception to the time limit for filing an amended motion, namely, when a movant is abandoned by postconviction counsel; however, as discussed below, that exception grows out of a separate provision of the Rule requiring the appointment of counsel. And, importantly, consistent with the foregoing, that provision has been strictly construed against expanding the circuit court's authority beyond the language of the rule.

filing the amended motion and that "the appropriate remedy [was] to consider the untimely filed amended motion on the merits." (D1, p. 12; D17; D18, p. 3).

In *Gittemeier*, this Court held that "in light of the abandonment doctrine's origins and the limited purpose it was created to serve, the doctrine applies only to situations involving *appointed* postconviction counsel." *Gittemeier*, 527 S.W.3d at 71 (emphasis added). The Court explained that "the abandonment doctrine originated as a means of ensuring appointed counsel complies with Rule 29.15." *Id.* (citing *Luleff v. State*, 807 S.W.2d 495, 497-98 (Mo. banc 1991), and *Sanders*, 807 S.W.2d at 494-95). "[A] presumption of abandonment arises when the record does not indicate 'appointed counsel made the determinations required by Rule 29.15(e).'" *Id.* at 69 (quoting *Luleff*, 807 S.W.2d at 498). "Rule 29.15(e) deals only with appointed counsel and amended motions." *Id.* at 70 (quoting *Price*, 422 S.W.3d at 303). "The abandonment doctrine, therefore, 'was created to excuse the untimely filing of amended motions by *appointed* counsel under Rule 29.15(e).'" *Id.* at 69 (quoting *Price*, 422 S.W.3d at 297) (emphasis added).

Consistently, Rule 29.15(g) now provides, effective November 4, 2021, that "[i]f an amended motion or statement in lieu of an amended motion is not timely filed by *appointed* counsel, then the court shall conduct an inquiry on the record to determine if movant was abandoned by *appointed* counsel." Rule 29.15(g) (emphasis added).

Moreover, this Court has rejected the argument that a "public defender could serve as post-conviction counsel only on appointment by the motion court." *Creighton v. State*, 520 S.W.3d 416, 421 (Mo. banc 2017). Instead, under the plain language of the Rule, when, as here, the motion court does not appoint counsel and the public defender nevertheless voluntarily enters an appearance on Defendant's behalf, he "unquestionably qualifies as 'any counsel that is not appointed but who enters an appearance on behalf of [Defendant].'" *Id.* (quoting Rule 29.15(g)) (emphasis added).

Defendant argues that this Court's decision in *Watson v. State*, 536 S.W.3d 716 (Mo. banc 2018), which was issued subsequent to *Gittemeier*, controls. (Def's Br. 25-26). But as the Court of Appeals recognized in *Kinsella*, the Court's analysis in *Watson* was primarily concerned with the timeliness of the amended motion, and while it concluded by remanding for an abandonment inquiry in light of the untimely amended motion, it did not address the issue of whether the abandonment doctrine should apply to excuse the untimely filing of an amended motion by a non-appointed public defender, nor did it discuss either *Gittemeier* or *Creighton* in consideration of that issue. *See Kinsella v. State*, 698 S.W.3d 858, 863-64 (Mo. App. E.D. 2024); *Watson*, 536 S.W.3d at 717-20. Therefore, as *Kinsella* held, *Watson* did not overrule *Gittemeier* or *Creighton sub silentio*, and those decisions remain binding authority. *Kinsella*, 698 S.W.3d at 864; *see also State v. Harris*, 675 S.W.3d

202, 206 n.6 (Mo. banc 2023) (holding that *State v. Honeycutt*, 421 S.W.3d 410, 413 (Mo. banc 2013), had "no stare decisis effect on the . . . question in [Harris's] appeal" because *Honeycutt* had "presumed, without analysis," a conclusion on the issue, the "issue was not briefed by the parties," and the Court had therefore "inadvertently overlooked" the issue, and the "Court has long recognized a 'presumption against *sub silentio* holdings' due to 'the general preference that precedent be adhered to and decisions be expressly overruled'").

In accordance with *Gittemeier* and *Creighton*, the Court of Appeals has repeatedly held that the abandonment doctrine does not apply to non-appointed counsel, even if counsel is a public defender. *See Kemper v. State*, 681 S.W.3d 611, 613-15 (Mo. App. E.D. 2023); *Kinsella*, 698 S.W.3d at 861-63 (Mo. App. E.D. 2024); *Beerbower v. State*, 699 S.W.3d 556, 557 & 559-60 (Mo. App. S.D. 2024); *Davis v. State*, 2025 WL 516934 at *1-3 (Mo. App. E.D. 2025). *Kemper* held that despite the fact that the defendant in that case "appear[ed] to . . . financially qualif[y] for public defender representation," in that he had filed a forma pauperis affidavit, postconviction counsel was an assistant public defender, and the defendant had been represented by a public defender in his underlying criminal trial and appeal, "because post-conviction counsel had not been *appointed*, [the defendant] was not entitled to an abandonment inquiry nor to have his amended motion considered." *Kemper*, 681 S.W.3d at 613 & 615

(emphasis in original); *see also Kinsella*, 698 S.W.3d at 863 ("[P]ost-conviction counsel's status [as an assistant public defender] by itself did not permit the motion court to apply the abandonment doctrine."); *Beerbower*, 699 S.W.3d at 559-60 ("When counsel voluntarily enters his or her appearance on behalf of a movant, as opposed to being appointed by the court, counsel has voluntarily taken an action indicating he or she has knowledge of the case and intends to represent the client. . . . In such a scenario, there is no meaningful distinction between a privately retained counsel who enters an appearance and a public defender who voluntarily enters an appearance since both have taken an action in the case acknowledging their representation of the movant."); *Davis*, 2025 WL 516934 at *3 ("The abandonment doctrine, in its narrow application for *appointed* counsel, thus does not apply in situations where a post-conviction counsel *voluntarily* enters his or her appearance on behalf of their client. . . . The mere fact that a post-conviction counsel who voluntarily enters on a movant's behalf is a public defender does not trigger the application of the abandonment doctrine.") (emphasis in original).

Similarly, here, counsel untimely filed the amended motion after voluntarily entering an appearance on March 4, 2019, without having been appointed. (D1, pp. 5-6; D15, pp. 2, 7; D16, p. 1; D18, pp. 1-2; D23). Because postconviction counsel was not appointed, the abandonment doctrine did not apply and did not excuse the untimely filing of the amended motion so as to

permit its consideration by the motion court. *See Kemper*, 681 S.W.3d at 613; *Kinsella*, 698 S.W.3d at 861; *Beerbower*, 699 S.W.3d at 557; *Davis*, 2025 WL 516934 at *1; *Gittemeier*, 527 S.W.3d at 71.

Defendant argues that "[t]he motion court clearly erred in not appointing counsel for [Defendant] . . . because this violated Rule 29.15(e), in that the motion court was required to appoint counsel since [Defendant] . . . was indigent." (Def's Br. 12). Defendant argues that this Court should therefore accept the motion court's consideration of the untimely amended motion because doing so "would put [Defendant] in the same position as if the motion court had appointed counsel as required by Rule 29.15(e)." (Def's Br. 28). But, as Defendant acknowledges, because he was sentenced in the underlying criminal case on April 20, 2017, which is before January 1, 2018, the applicable version of the Rule was the one in effect on December 31, 2017. (Def's Br. 9 n.2, 15 n.3; D1, p. 29; L.F. 76; Tr. 187). *See* Rule 29.15(m) (effective Jan. 1, 2018). Defendant further acknowledges that the applicable version of the Rule "does not contain a time limit for appointing counsel." (Def's Br. 15 n.3). *See* Rule 29.15(e) (effective July 1, 2017) ("When an indigent movant files a pro se motion, the court shall cause counsel to be appointed for the movant."); *Creighton*, 520 S.W.3d at 420 ("Rule 29.15(e) . . . provides no specific time within which the court must appoint counsel. . . . Rule 29.15(e) provides only that, at some point, the court must ensure counsel is appointed to represent an

indigent movant."). Because the motion court was only required under the Rule to appoint counsel for Defendant "at some point," it did not err in failing to appoint counsel before postconviction counsel entered an appearance on March 4, 2019. (D1, p. 5; D23). *See Kinsella*, 698 S.W.3d at 864.

Moreover, once postconviction counsel entered an appearance, the motion court no longer had a duty to appoint counsel to represent Defendant. "[T]he purpose of Rule 29.15(e) is to eliminate 'undue delay in achieving finality of criminal convictions' by providing indigent movants with legal counsel to review their post-conviction motions." *Kinsella*, 698 S.W.3d at 864 (quoting *Price*, 422 S.W.3d at 297); *see also Fields v. State*, 572 S.W.2d 477, 480 (Mo. banc 1978) ("[T]he . . . rule is designed to discover and adjudicate all claims for relief in one application . . . by providing for the appointment of counsel if . . . the movant is shown to be indigent."). "As this purpose was satisfied by counsel's voluntary entry of appearance in [Defendant's] case, appointment by the motion court was not necessary." *Kinsella*, 698 S.W.3d at 865. This Court should "not interpret Rule 29.15(e) as requiring a motion court to appoint counsel for an indigent movant when it appears from the record that the movant is already represented." *See id.*; *Beerbower*, 699 S.W.3d at 559-60 ("When counsel voluntarily enters his or her appearance on behalf of a movant, as opposed to being appointed by the court, counsel has voluntarily taken an action indicating he or she has knowledge of the case and intends to represent

the client. . . . In such a scenario, there is no meaningful distinction between a privately retained counsel who enters an appearance and a public defender who voluntarily enters an appearance since both have taken an action in the case acknowledging their representation of the movant."); Rule 29.15(f) ("For good cause shown, counsel may be permitted to withdraw upon the filing of an entry of appearance by successor counsel.").

Additionally, it is unnecessary for a public defender to enter an appearance, without having first been appointed, in order to remedy a motion court's perceived failure to appoint counsel for an indigent movant. In cases in which the motion court has merely inadvertently failed to appoint counsel, simply notifying the court of its obligation under the Rule to appoint counsel for the indigent movant, such as through a letter to the court, may well be all that is necessary to obtain appointment. *See State ex rel. Costello v. Goldman*, 485 S.W.3d 397, 400 (Mo. App. E.D. 2016) ("[A]ny confusion certainly could have been resolved when [the movant] and the public defender's officer later fully explained the mistake and made reasonable requests to correct it in their letters . . . to the court."). But even in cases in which the motion court refuses to appoint counsel, the error is remediable by a writ of mandamus. *See Costello*, 485 S.W.3d at 399-402 ("A writ of mandamus is a proper remedy for a court's failure to comply with the mandates of Rule 29.15. . . . Appointment of counsel for an indigent movant is mandatory, not discretionary, under Rule 29.15(e).");

State ex rel. Volner v. Storie, 386 S.W.3d 795, 795-96 (Mo. App. S.D. 2012). Moreover, following *Creighton*, this Court amended the Rule so that it now requires the motion court to appoint counsel within 30 days, providing a movant with the right to a prompt appointment. *See* Rule 29.15(e) (effective Jan. 1, 2018) ("Within 30 days after an indigent movant files a *pro se* motion, the court shall cause counsel to be appointed for the movant."); *Creighton*, 520 S.W.3d 416, 421 n.6 ("The lack of an express timeline for appointing counsel may, in some cases, result in movants remaining incarcerated without the ability to seek full review of the movant's claims with the assistance of counsel. A reasonable solution is for this Court to amend Rule 29.15(e) to require appointment of counsel within a specified period of time."). Finally, in cases in which the motion court refuses or fails to appoint counsel for an indigent movant and then rules on the pro se motion, the movant may seek relief, including the appointment of counsel, on appeal. *See, e.g., Ramsey v. State*, 438 S.W.3d 521, 521-22 (Mo. App. E.D. 2014); *Sanford v. State*, 345 S.W.3d 881, 882 (Mo. App. W.D. 2011); *Naylor v. State*, 569 S.W.3d 28, 31 (Mo. App. W.D. 2018).

While Defendant now claims before this Court that the motion court erred in failing to appoint counsel, he never made such a claim before the motion court. (D1, pp. 5-14; D8; D16). Instead, rather than attempt to secure appointment as provided for under the Rule, postconviction counsel simply

voluntarily entered an appearance on Defendant's behalf without being appointed. (D1, p. 5; D23). Then, after entering an appearance without having been appointed, postconviction counsel untimely filed an amended motion. (D1, pp. 5-6; D5). This Court should therefore, consistent with *Gittemeier*, decline to expand the abandonment doctrine to excuse non-appointed counsel's untimely filing of an amended motion because it is unnecessary as the Rule and the remedies already available are sufficient to ensure both the appointment of counsel for an indigent movant and the prompt resolution of postconviction claims. *See Gehrke v. State*, 280 S.W.3d 54, 58-59 (Mo. banc 2009) ("When considering the scope of abandonment, this Court must balance the need to protect the rights of postconviction movants against the need for finality and a reasonable end to postconviction proceedings. . . . [W]ith the remedies already available, it is unnecessary to expand the abandonment doctrine . . . ."); *Price*, 422 S.W.3d at 298 (stating that the abandonment doctrine is "an exception purposely limited . . . in its rationale (i.e., to enforce the requirements and ensure the benefits of Rule 29.15(e))").

"If a movant files an untimely amended motion for post-conviction relief, and the movant has not been abandoned, 'the motion court should not permit the filing of the amended motion and should proceed with adjudicating the movant's initial motion.'" *Maguire v. State*, 536 S.W.3d 247, 250 (Mo. App. E.D. 2017) (quoting *Moore*, 458 S.W.3d at 825). "Thus, the proper motion for the

motion court to assess is the *pro se* motion." *Id*. But here, "[t]he record reflects that the motion court rendered a judgment based on [Defendant's] amended motion." *Id*. (D18, pp. 1, 3, 9). Moreover, the pro se motion included a claim that was not raised in the amended motion or adjudicated by the motion court—"I did [sic] have a fair trial overruling the motion to suppress my statements[.]" (D2, p. 2; D5, p. 2; D18). "When a motion court fails to 'acknowledge, adjudicate, and dispose of all claims in its judgment,' then the judgment issued is not 'final.'" *Id*. (quoting *Green v. State*, 494 S.W.3d 525, 531-33 (Mo. banc 2016)). "Because the motion court's judgment did not dispose of all claims presented to it in [Defendant's] *pro se* motion, there is no final judgment," and "this appeal must be dismissed." *Id*.; *see also Kinsella*, 698 S.W.3d at 865; *Steele v. State*, 555 S.W.3d 486, 490 (Mo. App. S.D. 2018); *Briggs v. State*, 621 S.W.3d 614, 618 (Mo. App. W.D. 2021).

In the event that this Court disagrees and determines that the motion court properly adjudicated only the claims raised in the amended motion, Respondent addresses the merits of Defendant's second point on appeal in the remainder of this brief.

II. (Failure to File Motion to Suppress Evidence)

If this Court finds that the motion court did not clearly err in adjudicating the untimely amended motion, then the motion court did not clearly err in denying, after an evidentiary hearing, Defendant's Rule 29.15 claim that his trial counsel was ineffective for failing to file a motion to suppress evidence resulting from the stop of Defendant's vehicle because Defendant failed to show that the trooper did not have reasonable suspicion for the stop and that a motion to suppress would have been meritorious.

A. 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); *see* Rule 29.15(k). "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." *Moore*, 328 S.W.3d at 702. "Even if the stated reason for a circuit court's ruling is incorrect, the judgment should be affirmed if the judgment is sustainable on other grounds." *Swallow v. State*, 398 S.W.3d 1, 3 (Mo. banc 2013); *see also Greene v. State*, 332 S.W.3d 239, 246 (Mo. App. W.D. 2010) ("[An appellate court] may affirm the judgment on any legal ground supported by the record if the motion court arrived at the correct result.").

"This Court defers to 'the motion court's superior opportunity to judge the credibility of witnesses.'" *Shockley v. State*, 579 S.W.3d 881, 892 (Mo. banc 2019) (quoting *Barton v. State*, 432 S.W.3d 741, 760 (Mo. banc 2014)). The motion court is "entitled to believe all, part, or none of the evidence presented at the post-conviction hearing." *State v. Hunter*, 840 S.W.2d 850, 863 (Mo. banc 1992). "We view the record in the light most favorable to the motion court's judgment, accepting as true all evidence and inferences that support the judgment and disregarding evidence and inferences that are contrary to the judgment." *Oliphant v. State*, 525 S.W.3d 572, 577 (Mo. App. S.D. 2017) (quoting *Winans v. State*, 456 S.W.3d 912, 916 (Mo. App. S.D. 2015)).

B. The law generally applicable to this claim.

Generally, for a claim of ineffective assistance of counsel, Defendant "must show (1) that his attorney failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances, and (2) that he was thereby prejudiced." *Sanders v. State*, 738 S.W.2d 856, 857 (Mo. banc 1987); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). "In reviewing such a claim, courts are not required to consider both prongs; if a defendant fails to satisfy one prong, the court need not consider the other." *Sanders*, 738 S.W.2d at 857.

"When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below

an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. Additionally, appellate inquiry into an attorney's performance "must be highly deferential." *Id*. at 689. "To satisfy the *Strickland* performance prong, a movant 'must overcome the strong presumption that counsel's conduct was reasonable and effective.'" *Tisius v. State*, 519 S.W.3d 413, 420 (Mo. banc 2017) (quoting *Hoeber v. State*, 488 S.W.3d 648, 655 (Mo. banc 2016)). "Defense counsel has wide discretion in determining what strategy to use in defending his or her client." *Worthington v. State*, 166 S.W.3d 566, 578 (Mo. banc 2005). "Trial strategy decisions may be a basis for finding ineffective assistance of counsel only if that decision was unreasonable." *Watson v. State*, 520 S.W.3d 423, 435 (Mo. banc 2017). "Reasonable choices of trial strategy, no matter how ill[-]fated they appear in hindsight, cannot serve as a basis for a claim of ineffective assistance." *Worthington*, 166 S.W.3d at 573 (quoting *Cole v. State*, 152 S.W.3d 267, 270 (Mo. banc 2004)); *see also Francis v. State*, 183 S.W.3d 288, 301 (Mo. App. W.D. 2005) ("[A] reasonable trial strategy is not ineffective assistance, even if, in hindsight, it was not the best strategy available."). "It is also not ineffective to pursue one reasonable trial strategy to the exclusion of another reasonable trial strategy." *Worthington*, 166 S.W.3d at 573. "This Court . . . has never found that a failure to litigate a trial perfectly constitutes ineffective assistance of counsel, nor does this Court believe a 'perfect' litigation to be possible." *Strong v. State*, 263 S.W.3d 636, 650 n. 7 (Mo. banc 2008).

"To establish *Strickland* prejudice, a movant must prove that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Tisius*, 519 S.W.3d at 420 (quoting *McIntosh v. State*, 413 S.W.3d 320, 324 (Mo. banc 2013)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id*. at 693.

C. Trial counsel was not ineffective for not filing a motion to suppress the evidence resulting from the stop of Defendant's vehicle, nor was Defendant prejudiced as a result.

"The decision as to whether to file a motion to suppress is a matter of trial strategy and generally will not be questioned in a post-conviction relief proceeding." *Buckner v. State*, 35 S.W.3d 417, 421 (Mo. App. W.D. 2000). "Counsel will not be found to be ineffective for failing to . . . file a meritless motion to suppress." *Eddy v. State*, 176 S.W.3d 214, 218 (Mo. App. W.D. 2005).

"The Fourth Amendment of the United States Constitution guarantees the right of the people to be free from unreasonable searches and seizures." *State v. Smith*, 595 S.W.3d 143, 145 (Mo. banc 2020). "The Missouri constitution offers the same level of protection; the same analysis applies to cases under the Missouri Constitution as under the United States Constitution." *State v. Pike*,

162 S.W.3d 464, 472 (Mo. banc 2005). "A temporary, noncustodial traffic stop constitutes an 'unreasonable' 'seizure' under the Fourth Amendment unless the stop is supported by reasonable suspicion or probable cause." *Smith*, 595 S.W.3d at 145; *see also Navarette v. California*, 572 U.S. 393, 396-97 (2014) (quoting *United States v. Cortez*, 449 U.S. 411, 417-18 (1981)) ("The Fourth Amendment permits brief investigative stops—such as the traffic stop in this case—when a law enforcement officer has 'a particularized and objective basis for suspecting the particular person stopped of criminal activity.'"). "The standard [of reasonable suspicion] takes into account 'the totality of the circumstances—the whole picture.'" *Navarette*, 572 U.S. at 397 (quoting *Cortez*, 449 U.S. at 417). "[T]he level of suspicion the standard requires is 'considerably less than proof of wrongdoing by a preponderance of the evidence,' and 'obviously less' than is necessary for probable cause." *Id*. (quoting *United States v. Sokolow*, 490 U.S. 1, 7 (1989)).

"Reasonable suspicion—and therefore a traffic stop—may be based on the officer's observation of a traffic violation." *Pike*, 162 S.W.3d at 473; *see also Smith*, 595 S.W.3d at 145 (quoting *United States v. Bell*, 86 F.3d 820, 822 (8th Cir. 1996)) ("[A]ny traffic violation, even a minor one, gives an officer probable cause to stop the violator."). "A traffic violation, however, is not required to create reasonable suspicion to justify a stop; justification may be based on erratic or unusual operation." *Pike*, 162 S.W.3d at 473.

"We have firmly rejected the argument 'that reasonable cause for a[n investigative stop] can only be based on the officer's personal observation, rather than on information supplied by another person.'" *Navarette*, 572 U.S. at 397 (quoting *Adams v. Williams*, 407 U.S. 143, 147 (1972)). "The 'reasonable suspicion' necessary to justify such a stop 'is dependent upon both the content of information possessed by police and its degree of reliability.'" *Id.* (quoting *Alabama v. White*, 496 U.S. 325, 330 (1990)). "'[A]n anonymous tip *alone* seldom demonstrates the informant's basis of knowledge or veracity[ ]' . . . because 'ordinary citizens generally do not provide extensive recitations of the basis of their everyday observations,' and an anonymous tipster's veracity is 'by hypothesis largely unknown, and unknowable.'" *Id.* (quoting *White*, 496 U.S. at 329) (emphasis in original). "But under appropriate circumstances, an anonymous tip can demonstrate 'sufficient indicia of reliability to provide reasonable suspicion to make [an] investigatory stop.'" *Id.* (quoting *White*, 496 U.S. at 327). "[A]n informant who is proved to tell the truth about some things is more likely to tell the truth about other things, 'including the claim that the object of the tip is engaged in criminal activity.'" *Id.* at 398 (quoting *White*, 496 U.S. at 331).

In addressing the calls regarding Defendant's erratic driving that dispatch received and relayed to the trooper, Defendant argues that the trooper "only had *anonymous* reports of a car being driven in a careless and imprudent

manner . . . ." (Def's Br. 36) (emphasis added). But Defendant failed to show that the calls reporting Defendant's erratic driving were actually anonymous. Defendant did not call either the trooper or the dispatcher to testify at the postconviction evidentiary hearing about the calls received, nor did Defendant present recordings of the calls themselves or the dispatch log, which the trooper explicitly noted at trial would contain details about the calls. (Tr. 143, 157; PCR1 Tr. 2-3). Instead, Defendant relied merely on the trooper's trial testimony and the dashcam recording of the stop, which the trooper expressly testified at trial did not include him receiving the dispatch. (Tr. 157; PCR1 Tr. 2-3). While the trooper testified at trial to some degree about the calls received by dispatch, he did not have the opportunity to testify at either a suppression hearing or the postconviction evidentiary hearing for the specific purpose of showing that he had reasonable suspicion to justify the stop of Defendant's vehicle. *See Pike*, 162 S.W.3d at 472 ("When reviewing the trial court's overruling of a motion to suppress, this Court considers the evidence presented at both the suppression hearing and at trial to determine whether sufficient evidence exists in the record to support the trial court's ruling."). Nor has Defendant identified anything in the trooper's trial testimony or the recording of the stop that affirmatively indicates that the calls received by dispatch were in fact anonymous. *See Mannino v. Dir. of Revenue*, 556 S.W.3d 667, 672 (Mo. App. E.D. 2018) ("Appellant conflates *unidentified* with *anonymous*. While the

record here is silent as to the 911 caller's identity, nothing in the record indicates the caller was anonymous."). Defendant has therefore failed to prove that had a motion to suppress been filed, the State could not have presented evidence that the calls received by dispatch were not actually anonymous. *See Buckner*, 35 S.W.3d at 424 ("[The motion court] was determining the reasonable *likelihood of success* if [a motion to suppress] had been filed in the case. The motion court was thus trying to decide whether, if a motion had been filed, the state could at that time have presented information which would have demonstrated 'reasonable suspicion' within constitutional standards."); *Tisius*, 519 S.W.3d at 420 (quoting *McIntosh*, 413 S.W.3d at 324) ("To establish *Strickland* prejudice, *a movant must prove* that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'") (emphasis added).

Defendant's failure to prove that the calls received by dispatch were actually anonymous is fatal to his claim for postconviction relief. Defendant argues that "the anonymous tips could not be used to show [the trooper] had a reasonable suspicion [Defendant] was engaging in or had engaged in illegal activity" because they "were not corroborated by [the trooper's] observations." (Def's Br. 36-37, 39). But if the callers' identities were known, they would be best described as "citizen informant[s] who relate[d] direct observation of the offense' and as such, 'may be presumed by the arresting officer to be reliable[.]'"

State v. Long, 417 S.W.3d 849, 854 (Mo. App. S.D. 2014) (quoting *State v. Upshaw*, 619 S.W.2d 925, 927 (Mo. App. W.D. 1981)); *see also State v. Cain*, 287 S.W.3d 699, 706 (Mo. App. S.D. 2009); *State v. Daniels*, 221 S.W.3d 438, 440 n.1 (Mo. App. S.D. 2007) (quoting PHILLIP HUBBART, MAKING SENSE OF SEARCH AND SEIZURE LAW 194 & n.63 (2005)) ("[The self-identified security guard] better fits the category of 'private persons,' whose information courts generally have treated as inherently reliable for probable cause/reasonable suspicion purposes, 'unless, in the unusual case, there is something in the underlying circumstances that would cause a reasonable person to doubt the report.'"); *United States v. Elmore*, 482 F.3d 172, 180 (2nd Cir. 2007) ("The veracity of identified private citizen informants (as opposed to paid or professional criminal informants) is generally presumed in the absence of special circumstances suggesting that they should not be trusted."). Because the trooper quickly located Defendant's vehicle, which matched the callers' description, had the same specific license plate number, and was in the general vicinity and traveling in the direction indicated by the callers, "further corroboration of Defendant's erratic driving was not required." (Tr. 112-14, 136, 141-43, 152-53, 157). *Long*, 417 S.W.3d at 854; *see also Cain*, 287 S.W.3d at 706; *United States v. Saulsberry*, 878 F.3d 946, 950-51 (10th Cir. 2017) ("There was no need for [the officer] to postpone his investigation until he found the caller, obtained his identity, and inquired about his motivation.").

Even if the callers were actually anonymous, Defendant nevertheless failed to show that further corroboration beyond identifying Defendant's vehicle as the same vehicle described by the callers was necessary to justify the investigative stop. In *Navarette*, the Supreme Court of the United States held that even assuming that the caller in that case was anonymous, the call nevertheless "bore adequate indicia of reliability for the officer to credit the caller's account." *Navarette*, 572 U.S. at 398. The 911 caller in *Navarette* reported that a silver Ford 150 pickup truck with a specific plate number was driving southbound on a particular highway at a particular mile marker approximately five minutes before and had run the caller off the roadway. *Id.* at 395. A responding officer subsequently observed the truck traveling southbound at a mile marker 19 miles away from the reported mile marker approximately 18 minutes after the reported incident and stopped the truck shortly thereafter. *Id.* The Court first noted that "[b]y reporting that she had been run off the road by a specific vehicle . . . the caller necessarily claimed eyewitness knowledge of the alleged dangerous driving" and that "[t]hat basis of knowledge lends significant support to the tip's reliability." *Id.* at 399. The Court found that there was also "reason to think that the 911 caller in this case was telling the truth." *Id.* The Court found that the officer's confirmation of the truck's location 19 miles south of the reported location roughly 18 minutes after the call "suggest[ed] that the caller reported the incident soon after she

was run off the road" and that such a "contemporaneous report has long been treated as especially reliable," citing the hearsay exceptions for present sense impressions and excited utterances. *Id*. at 399-400. Finally, the Court held that "[a]nother indicator of veracity is the caller's use of the 911 emergency system" because "[a] 911 call has some features that allow for identifying and tracing callers, and thus provide some safeguards against making false reports with immunity." *Id*. at 400. The Court held that "a reasonable officer could conclude that a false tipster would think twice before using such a system." *Id*.

Similarly, here, the callers' reports bore adequate indicia of reliability for the trooper to credit their accounts of Defendant's dangerous driving. First, based on the nature of the reports, which included a specific description of Defendant's vehicle, a description of the manner of Defendant's driving—"swerving all over the road and speeding up and slowing down," and identification of the particular mile markers of the interstate where Defendant was driving, it was reasonable for the trooper to have believed that the callers were necessarily eyewitnesses to Defendant's alleged dangerous driving. (Tr. 112-13, 141-43, 151-53, 157; State's Ex. 5 at 22:37:21-26, 22:38:02-04, 22:48:07-15). *See United States v. Wheat*, 278 F.3d 722, 734 (8th Cir. 2001) ("[I]n erratic driving cases the basis of the tipster's knowledge is likely to be apparent. Almost always, it comes from his eyewitness observations, and there is no need to verify that he possesses inside information."). Indeed, the trooper

commented to Defendant that there had been a line of three vehicles behind him, including two semis, and that they were probably the ones who had called. (State's Ex. 5 at 22:57:20-42). Second, based on the trooper's testimony that while he was posted at the weigh station he heard the dispatch relaying the second caller's report that Defendant was driving northbound at the 105 mile marker, that the trooper subsequently got into his vehicle and drove onto the entrance ramp to the southbound lanes of the interstate, and then saw Defendant's vehicle at about the 110 mile marker, in addition to the earlier call relating Defendant's driving northbound from the 71 mile marker, it was reasonable for the trooper to have believed that the callers were contemporaneously reporting Defendant's dangerous driving. (Tr. 112-14, 141-42, 152-53, 157). *See Wheat*, 278 F.3d at 728 ("[I]n the erratic driving context the tipster is almost invariably claiming to describe contemporaneously perceived behavior . . . ."). Finally, while the existing trial record is silent as to whether the callers used the 911 system, as opposed to a non-emergency number, based on the nature of the calls and the fact that a dispatcher apparently contemporaneously relayed the calls to responding troopers, Defendant has failed to show that the features associated with the 911 system that support an indication of the callers' veracity did not apply here. (Tr. 112-13, 141-43, 151-53, 157). Additionally, because there were multiple reports of Defendant's driving at different times and locations on the interstate, their

reliability was further enhanced. (Tr. 141-43, 151-53, 157). *See State v. Turner*, 471 S.W.3d 405, 418 (Mo. App. E.D. 2015) ("When hearsay reports . . . come from multiple sources independent of each other, and the reports tend to establish the same facts, it is reasonable to find each independent source credible."). Therefore, like in *Navarette*, under the totality of the circumstances, the indicia of reliability of the callers' reports was sufficient, without the need for further corroboration, to provide the trooper with reasonable suspicion that Defendant had been driving erratically. *See Navarette*, 572 U.S. at 404 ("[A]llowing a drunk driver a second chance for dangerous conduct could have disastrous consequences."); *see also Wheat*, 278 F.3d at 727-28 (recognizing that courts have generally "held that law enforcement officers could pull over a vehicle for an investigatory stop based on a contemporaneous tip of erratic driving that accurately described a given vehicle, even where the officer did not personally witness any moving violations").

Moreover, the manner of Defendant's driving as described by the callers created reasonable suspicion that Defendant was driving while intoxicated, or otherwise driving erratically, justifying an investigative stop. The trooper specifically testified at trial that the first call reported that Defendant's vehicle was "swerving all over the road and speeding up and slowing down" and that both calls reported that Defendant's vehicle was driving erratically. (Tr. 142,

151-53, 157). The trooper similarly told Defendant that they had had "several complaints" that Defendant was "all over the road." (State's Ex. 5 at 22:37:21-26, 22:38:02-04). The trooper also told Defendant that he had stopped him because they had had some "major complaints" about him, including that he was stopping on the interstate. (State's Ex. 5 at 22:48:07-15). Such erratic driving behavior was sufficient to establish reasonable suspicion that Defendant was driving while intoxicated so as to justify an investigative stop. *See Navarette*, 572 U.S. at 402 (recognizing certain driving behaviors, such as "weaving all over the roadway," as "sound indicia of drunk driving" and holding that "a reliable tip alleging [such] dangerous behaviors . . . generally would justify a traffic stop on suspicion of drunk driving"); *State v. Brown*, 332 S.W.3d 282, 287 (Mo. App. S.D. 2011) ("Defendant's weaving within his lane and twice driving on the center line of the highway within a four-mile stretch provided [the deputy] with sufficient grounds to stop Defendant's vehicle to investigate whether its driver might be impaired."); *State v. Byers*, 551 S.W.3d 661, 669 (Mo. App. E.D. 2018) (holding that "traveling more than ten miles per hour below the posted speed limit, weaving within the lane, and touching the lines on both side of the lane 'several times'" constituted "unusual and erratic movements" that "indicat[ed] the driver may be intoxicated" and established "reasonable suspicion to justify stopping Defendant and investigating whether he was driving while intoxicated").

Even if the callers' reports alone were insufficient to justify the stop, the trooper nevertheless sufficiently corroborated the tips by way of his own independent observation of Defendant's erratic driving prior to the stop. *See State v. Grayson*, 336 S.W.3d 138, 144 (Mo. banc 2011) (quoting *State v. Deck*, 994 S.W.2d 527, 536 (Mo. banc 1999)) ("The police may, . . . 'properly consider [an anonymous tip] if it is in conjunction with … other, independent corroborative evidence suggestive of criminal activity.'")[3]; *Florida v. J.L.*, 529 U.S. 266, 270 (2000) ("[T]here are situations in which an anonymous tip, suitably corroborated, exhibits 'sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop."). The trooper testified at trial that after receiving the dispatch, as he was exiting the weigh station to enter the southbound lanes of the interstate, he saw Defendant's vehicle come to a stop halfway on the shoulder and halfway in the northbound driving lane of the highway just north of the exit for the northbound weigh station, before continuing northbound shortly thereafter. (Tr. 113-14, 143, 153, 157). On the recording of the stop, the trooper can be heard telling the assisting trooper that he saw Defendant do "exactly what [the callers] were talking about" by

[3] *Grayson* was issued in 2011, before *Navarette* was issued in 2014, and it accordingly cited pre-*Navarette* caselaw, such as *Alabama v. White*, 496 U.S. 325 (1990). *Grayson*, 336 S.W.3d at 144.

stopping partially in the road and partially on the shoulder next to "H2." (State's Ex. 5 at 23:20:57-23:21:16). Consistently, the trooper told Defendant that he had stopped Defendant because they had had some "major complaints" about him, including that he had stopped on the interstate. (State's Ex. 5 at 22:48:07-15). Thus, the trooper corroborated "significant aspects" of the callers' descriptions of Defendant's erratic driving, which provided sufficient reason to credit the callers' reports and justify the investigative stop. *See White*, 496 U.S. at 332.

Finally, the trooper's observation of Defendant briefly stopping his vehicle partially on the shoulder and partially on the highway was sufficient in and of itself to justify the traffic stop. "A routine traffic stop based on the violation of state traffic laws is a justifiable seizure under the Fourth Amendment." *Smith*, 595 S.W.3d at 145 (quoting *State v. Barks*, 128 S.W.3d 513, 516 (Mo. banc 2004)). Even if it would have been unreasonable to have considered such an act by Defendant as "driving" on the shoulder and thus a violation of subsection 2 of section 304.015, given the trooper's description of the vehicle as coming to a brief "stop," Defendant's failure to stop his vehicle completely, rather than partially, on the shoulder of the highway nevertheless constituted a violation of subsection 1 of section 304.015. *See id.* at 146 & n.6 ("Section 304.015.1 . . . allow[s] for a driver who intends to stop his or her vehicle to transition from the roadway to the shoulder."). Section 304.015.1 provides that "[a]ll vehicles

not in motion shall be placed with their right side as near the right-hand side of the highway as practicable . . . .” § 304.015.1, RSMo 2016. “State highway” is defined as “including all right-of-way”; “right-of-way” is defined as “the entire width of land between the boundary lines of a state highway, including any roadway”; and “roadway” is defined as “that portion of a state highway ordinarily used for vehicular travel, exclusive of the berm or shoulder[.]” § 304.001, RSMo Cum. Supp. 2021. Thus, section 304.015.1 requires that a vehicle not in motion be placed at least as far right on the shoulder to the right of the roadway as practicable. Here, the trooper testified that Defendant stopped his vehicle partially on the shoulder and partially in the driving lane. (Tr. 113-14, 143, 153, 157; State’s Ex. 5 at 22:38:05-15; 22:48:13-14). That it was practicable for Defendant to have instead placed his vehicle further to the right was established by the trooper’s testimony at trial that during the investigative stop Defendant placed his vehicle almost entirely on the shoulder of the highway with only his driver’s-side tires touching the white line and that the trooper subsequently repositioned the vehicle even further to the right so that it was completely on the shoulder and at less risk of causing a crash, as well as the video showing the width of the shoulder and the relative size of Defendant’s vehicle. (Tr. 135-36; State’s Ex. 5). Moreover, the trooper told Defendant that his behavior of stopping on the highway, as both observed by the trooper and reported by others, could easily cause a crash. (State’s Ex. 5 at

22:57:13-19). Violation of section 304.015 is "deemed a class C misdemeanor unless such violation causes an immediate threat of an accident, in which case such violation shall be deemed a class B misdemeanor . . . ." § 304.015.9, RSMo 2016. Because the trooper personally observed Defendant fail to place his stopped vehicle as near the right-hand side of the highway as practicable, he had probable cause to stop Defendant's vehicle for a violation of section 304.015.1. *See Smith*, 595 S.W.3d at 146-47 & n.8 ("[S]ection 304.015 makes no exceptions for 'momentary' . . . deviations . . . ."); *State v. Gay*, 566 S.W.3d 622, 628 (Mo. App. S.D. 2018); *State v. Hamilton*, 601 S.W.2d 693, 694-95 (Mo. App. W.D. 1980) ("The risk created was undoubtedly the exact risk which the statute seeks to eliminate.").

In sum, the motion court did not clearly err in finding that the trooper's stop of Defendant's vehicle was supported by reasonable suspicion, that trial counsel was therefore not ineffective for failing to file a meritless motion to suppress, and that Defendant was not prejudiced as a result. (D18, p. 8).

Defendant's second point should be denied.

CONCLUSION

For the foregoing reasons, Respondent submits that this Court should dismiss the appeal due to the lack of a final judgment. In the alternative, the motion court did not clearly err in denying Defendant's amended Rule 29.15 motion after an evidentiary hearing, and its judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and contains 13,223 words, excluding the cover, this certification, and the signature block, as counted by Microsoft Word 2016 software; and that pursuant to Rule 103.08, the brief was served upon all other parties through the electronic filing system.

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