

Summary of SC92432, *Brandon L. Swallow v. State of Missouri*

Appeal from the St. Louis County circuit court, Judge Richard C. Bresnahan
Argued and submitted Sept. 13, 2012; opinion issued May 14, 2013

Attorneys: Swallow was represented by Lisa M. Stroup of the public defender's office in St. Louis, (314) 340-7662; and the state was represented by James B. Farnsworth of the attorney general's office in Jefferson City, (573) 751-3321.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A man appeals the circuit court's judgment dismissing his Rule 24.035 motion for post-conviction relief. In a 5-0 decision written by Judge Patricia Breckenridge, the Supreme Court of Missouri affirms the circuit court's judgment.

Facts: Brandon Swallow was arrested and charged with first-degree assault and armed criminal action. He pleaded guilty to both charges and was sentenced to 20 years in prison for assault and three years for armed criminal action. The sentence for armed criminal action was executed, but execution of his assault sentence was suspended and he was placed on five years probation for that sentence. Swallow did not appeal and did not file a Rule 24.035 motion within 180 days of his delivery to the department of corrections. He was released after serving his sentence for armed criminal action and remained on probation for the assault conviction, but his probation was revoked and his previously imposed, 20-year assault sentence was executed. Within 180 days after Swallow was delivered to the department to serve the assault sentence, he filed a Rule 24.035 motion. Swallow claimed that counsel who represented him when he entered his guilty plea was ineffective for failure to advise him of and pursue a defense that the police unconstitutionally obtained incriminating statements when interviewing him, and that assistance of counsel at his probation revocation hearing was ineffective for failing to ask the court to order a psychological examination after his delivery to the department to serve his assault sentence. The circuit court sustained the state's motion to dismiss Swallow's Rule 24.035 motion as being filed untimely. Swallow appeals. Swallow asserts that Rule 24.035 permits serial post-conviction relief motions challenging a single judgment when the movant is delivered to the department of corrections at different times to serve separate sentences within that judgment and claims the filing deadline is 180 days from delivery to the department for each individual sentence.

AFFIRMED

Court en banc holds: The circuit court did not err in dismissing Swallow's motion for post-conviction relief.

Absent an appeal, Rule 24.035(b) requires a person seeking to correct, vacate, or set aside a judgment or sentence to file a motion under the rule within 180 days of the date the person is delivered to the custody of the department of corrections. The judgment at issue in this case convicted and imposed sentence on Swallow for two counts – armed criminal

action and assault. A Rule 24.035 motion must include “every claim known to the movant for vacating, setting aside, or correcting the judgment or sentence.” The term “judgment” encompasses all convictions and all sentences against the movant. The rule also expressly prohibits successive motions.

When a court suspends the execution of sentence, only the act of executing the sentence has been suspended; a criminal conviction has been entered and the sentence has been assessed. At the time Swallow was delivered to the department to serve his sentence for armed criminal action, Rule 24.035 required him to file a motion within 180 days that raised all of his known challenges to the judgment against him, which encompassed both convictions and both sentences that were imposed, whether executed or not. Swallow’s claim of ineffective assistance of guilty plea counsel was waived because it was not filed timely. His other claim of ineffective assistance of counsel at his probation revocation hearing is not cognizable in a Rule 24.035 proceeding.