

## **Summary of SC93157, *Mark D. Vogl v. State of Missouri***

Appeal from the Jasper County circuit court, Judge David C. Dally

Argued and submitted October 3, 2013; opinion issued August 19, 2014

**Attorneys:** Vogl was represented by Jeannie M. Willibey of the public defender's office in Kansas City, (816) 889-7699, and the state was represented by Andrew C. Hooper 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:** An inmate appeals the circuit court's dismissal, without a hearing or independent inquiry, of his motion alleging his post-conviction counsel abandoned him and requesting a hearing regarding the circumstances of the filing of his post-conviction relief motion, which was deemed untimely but which he alleges in fact was timely. In a 5-2 decision written by Judge Patricia Breckenridge, the Supreme Court of Missouri reverses the circuit court's judgment and remands (sends back) the case. The circuit court clearly erred in overruling the inmate's motion claiming abandonment by post-conviction counsel. Upon his appointment, counsel was required to file either an amended motion for post-conviction relief to compensate for any deficiencies in the inmate's pro se motion or a statement explaining the actions counsel took to ensure no amended motion was needed. The record raises such a presumption because it reflects that the inmate's appointed counsel failed to comply with the rule because, rather than filing one of the two documents that rule requires, he filed a motion to rescind his appointment. As such, the court was required to make an independent inquiry into the inmate's abandonment claims. If the inmate can prove that his pro se motion arrived at either location of the circuit clerk's office on or before the deadline in the rule, his motion was filed timely.

Judge Zel M. Fischer dissents. He would find the inmate's failure to pursue his abandonment claim on direct appeal of the court's first dismissal precludes relief at this time and, therefore, would affirm the circuit court's judgment. Under this Court's precedents and rules, the circuit court should have inquired into the abandonment issue in the inmate's first post-conviction proceeding. If he believed that the court erroneously dismissed his motion or that his counsel abandoned him, he could have filed a motion to vacate the judgment within 30 days, or he could have appealed. He did neither and, therefore, should be precluded from seeking relief now.

Judge Paul C. Wilson also dissents. He would hold that the doctrine of res judicata precludes relitigation of the abandonment issue and, therefore, would affirm the circuit court's judgment. The inmate's appeal of his initial abandonment claims was dismissed because he failed to file the record in that appeal. Nothing in the rules justifies allowing an inmate to file a second motion claiming abandonment.

**Facts:** Mark Vogl was convicted of two felonies after pleading guilty in June 2007 and was sentenced to concurrent sentences of 15 years in prison. He did not appeal his conviction and was delivered to the department of corrections September 17, 2008. Under Rule 24.035, Vogl had 180 days – or no later than March 17, 2008 – to file a motion to seek post-conviction relief.

The docket sheet and file stamp on his motion reflect that it was filed in the Joplin office of the Jasper County circuit clerk on March 18, 2008. The circuit court appointed a public defender to represent Vogl in the post-conviction proceeding, but the area district defender subsequently filed a motion asking the court to rescind the appointment of counsel, alleging Vogl's motion was untimely. Nothing in the record indicates Vogl received notice of the public defender's filing. Without holding a hearing or making an independent inquiry, the court rescinded the order appointing counsel and dismissed Vogl's motion as untimely. In March 2011, Vogl filed a motion alleging his Rule 24.035 motion was filed timely, that the circuit court should have transferred it to the proper office rather than dismissing his motion, and that his appointed counsel abandoned him. Without holding an evidentiary hearing, the circuit court in November 2011 entered an order refusing to take any further action on the basis that it previously had dismissed Vogl's post-conviction proceedings as untimely. In May 2012, Vogl filed a motion asking the circuit court to adjudicate his post-conviction proceedings, alleging his appointed counsel abandoned him, and requesting an evidentiary hearing to determine the merits of his claim of abandonment. He alleged counsel abandoned him by failing to consult with him or investigating the circumstances regarding the filing of his Rule 24.035 motion before asking the court to rescind the appointment order. He alleged that, had he received notice that his counsel intended to ask that the appointment order be rescinded, he would have asked the court for a hearing on the motion. Vogl further alleged that he mailed his Rule 24.035 motion to the Jasper County circuit clerk's office in the county seat of Carthage and that it arrived there on time on March 17, 2008. Attached to Vogl's motion were two letters from the Jasper County circuit clerk explaining that, when it receives documents in one office but determines they should be handled by the other office – as it did in Vogl's case – it uses a runner to deliver the documents between offices. Based on its normal procedures, such a document would be received in the second office the day after it was received in the first office. Although the clerk's office does not keep the envelopes for all the mail received in a particular office, it follows that Vogl's motion was received in Carthage on March 17 – on time, under Rule 24.035 – and then received in the Joplin office the next day, explaining the March 18 file-stamp. The circuit court overruled Vogl's motion and request for an evidentiary hearing, noting his post-conviction action previously had been dismissed as untimely. Vogl appeals.

## **REVERSED AND REMANDED.**

**Court en banc holds:** The circuit court clearly erred in overruling Vogl's motion claiming abandonment by post-conviction counsel.

(1) The documents attached to Vogl's motion state the practice of the circuit clerk's office is to stamp documents it receives as "filed" only when the document is received by the office where the file for the case is physically located. Under the circuit court's local rule, however, Vogl was permitted to file his Rule 24.035 motion – an independent, civil action – in either Carthage or Joplin. When the circuit clerk receives a pleading, the clerk immediately should stamp the pleading as filed, regardless of whether the clerk believes the pleading should go into a file at the clerk's office in the other location. If Vogl can prove that his motion arrived at either location of the circuit clerk's office on or before March 17, 2008, his motion was filed timely.

(2) The court was required to conduct an independent inquiry of Vogl's claim of abandonment. As a threshold to achieving post-conviction relief, an inmate first must file a timely pro se motion under Rule 24.035. The inmate has the burden of proving the pro se motion was filed on time. If the inmate fails to do so, the rule requires the court to regard the untimely motion as a complete waiver of any right to proceed under Rule 24.035. The only method of proving timeliness available to Vogl under the circumstances was filing an amended motion alleging facts and then proving the court misfiled his pro se motion. Because his appointed counsel, however, did not file an amended motion, Vogl was deprived of the opportunity to employ this method of proof. This Court recently clarified what circumstances will constitute abandonment by post-conviction counsel, reaffirming prior cases and holding that an inmate is abandoned when appointed counsel fails to comply with Rule 24.035 requirement to file either an amended motion to compensate for any deficiencies in the pro se motion or a statement explaining the actions counsel took to ensure no amended motion was needed. When the record raises a presumption of abandonment because appointed counsel failed to comply with these requirements in Rule 24.035, the circuit court must conduct a sufficient independent inquiry of the inmate's claim of abandonment. The record in Vogl's case raises such a presumption because it reflects that Vogl's appointed counsel failed to comply with Rule 24.035 because, rather than filing one of the two documents that rule requires, he filed a motion to rescind his appointment.

**Dissenting opinion by Judge Fischer:** The author would find Vogl's failure to pursue his abandonment claim on direct appeal of the court's first dismissal precludes relief at this time and, therefore, would affirm the circuit court's judgment. Under this Court's prior case holdings and rules, Vogl should have pursued his abandonment claims in a direct appeal of the dismissal of his initial motion for post-conviction relief. But this is the third Rule 24.035 motion he has filed and the second motion claiming abandonment. The circuit court dismissed as untimely his first motion, filed in March 2008. Three years later, he filed his second motion – and his first claiming abandonment by post-conviction counsel. Vogl appealed the circuit court's dismissal of this motion, but he failed to file the record on appeal, and so the appeals court dismissed the appeal. His failure to proceed with the appeal should preclude the abandonment claim he now makes in his third motion, filed in May 2012. Three of this Court's rules are designed to prevent unrestrained relitigation of claims that were, or should have been, brought in earlier proceedings. Rule 75.01 gives a circuit court control over its judgment for 30 days after entering the judgment – allowing an inmate to ask the court to reopen the case or vacate its judgment on any number of grounds, including timeliness of the inmate's pro se motion for post-conviction relief or abandonment of post-conviction counsel – and thereafter prohibits the court from taking any action. Rule 24.035(k) allows an inmate to appeal the circuit court's judgment regarding a post-conviction relief motion, including a dismissal because the court believed the motion was untimely. Rule 24.035(l) requires an inmate to file all claims for post-conviction relief in one motion and expressly prohibits successively filed motions, including those denominated "motions to reopen" or "motions claiming abandonment," neither of which are provided for in this Court's rules. Under these precedents, the circuit court should have inquired in the first post-conviction proceeding into whether Vogl was abandoned by counsel. If Vogl believed the court erroneously dismissed his motion, or that his counsel abandoned him, he could have filed a motion to vacate the judgment within 30 days, or he could have appealed. He did neither and, therefore, should be precluded from seeking relief now. Further, Judge Fischer concurs with

Judge Wilson's dissent that the principal of res judicata precludes relitigation of the abandonment issue.

**Dissenting opinion by Judge Wilson:** The author would hold that the doctrine of res judicata precludes relitigation of the abandonment issue and, therefore, would affirm the circuit court's judgment. Vogl concedes he did not ask the circuit court to reconsider or vacate its dismissal of his initial post-conviction motion under Rules 75.01 or 74.06, and he made no effort to seek appellate review of this dismissal. Further, the motion the principal opinion holds should have been granted was Vogl's second abandonment motion, not his first. His first abandonment motion – filed 14 months earlier – was identical in all material aspects to the present one and included the same correspondence. The circuit court denied that earlier motion, and Vogl appealed, but because he failed to file the record in the appeal, it was dismissed. Accordingly, he should not have another chance to raise his abandonment claim. Even if Rule 24.035 permits an inmate to file a motion claiming abandonment after the denial of an initial motion for post-conviction relief, nothing in the rule justifies allowing an inmate to file a second motion claiming abandonment as the Court is allowing Vogl to do.