

Summary of SC95363, *Steven D. Green v. State of Missouri*

Appeal from the Greene County circuit court, Judge Thomas Mountjoy
Argued and submitted April 13, 2016; opinion issued August 9, 2016

Attorneys: Green was represented by Samuel E. Buffaloe of the public defender's office in Columbia, (573) 777-9977, and the state was represented by Dora A. Fichter 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 defendant appeals the circuit court's denial of post-conviction relief in a judgment that addressed only the claims raised in the amended motion for relief that the defendant's appointed counsel filed and not the two remaining issues the defendant had made in his original motion for relief. In a 5-2 decision written by Judge Mary R. Russell, the Supreme Court of Missouri dismisses the appeal for lack of a final judgment. By physically stapling the original motion to the amended motion, the defendant effectively incorporated his prior claims into the amended motion in compliance with the relevant rule. A rule requiring a defendant to raise, in a motion to amend the judgment prior to appeal, allegations about the form or language of a judgment does not apply because the issue here is not with the judgment's form or language but whether the judgment adjudicated all the defendant's claims. Because it did not, the judgment is not a final judgment, and the appeal must be dismissed.

Judge Zel M. Fischer dissents. He would find that the circuit court's judgment was final and that the defendant waived his right to appellate review by failing to ask the circuit court to amend its judgment to make specific findings of fact and conclusions of law about certain issues. Stapling the original motion to the amended motion was not sufficient to bring all the defendant's original issues properly before the circuit court. The court's failure to address those issues, therefore, does not affect the finality of its judgment.

Facts: After Steven Green's convictions were affirmed on direct appeal, he filed a pro se motion (on his own, without an attorney), pursuant to Rule 29.15, stating claims for post-conviction relief. Appointed counsel timely filed an amended motion raising five claims of ineffective assistance of counsel to which counsel stapled Green's pro se motion. The five claims counsel raised encompassed all but two of Green's pro se claims for relief. During a hearing, Green presented evidence for the claims in both the amended motion and the pro se motion. In denying relief, the circuit court made findings of fact and conclusions of law only on the five claims in the amended motion. Its judgment contained no acknowledgment, discussion or adjudication of the two pro se claims not covered by the amended claims. Green appeals.

APPEAL DISMISSED.

Court en banc holds: (1) Green's amended motion complied with Rule 29.15(g), which permits counsel to incorporate into an amended motion for post-conviction relief the allegations and claims made in the pro se motion by physically attaching the pro se motion to the amended

motion. This Court held in its 1999 decision in *Reynolds v. State* that the rule’s general ban on incorporation by reference simply precludes counsel from referencing a defendant’s earlier claims as set out in documents. In *Reynolds*, the Court stated the “obvious purpose” of this preclusion was to ensure the circuit court would not have to search the records for documents “not immediately at hand.” Counsel’s act of physically stapling Green’s pro se motion to the amended motion, the body of which referenced the pro se claims, meets all the concerns raised by *Reynolds* and Rule 29.15(g). This type of physical attachment is the common practice that resulted from the holding of *Reynolds*, evidenced by the fact that the state never alleged an invalid incorporation of Green’s claims. The incorporation by physical attachment was effective to incorporate Green’s pro se claims into the amended motion.

(2) Rule 78.07(c) – otherwise requiring allegations of error in the “form or language” of a judgment, including the failure to make statutorily required findings, must be raised in a motion to amend the judgment to be preserved for appellate review – does not apply. There is a difference between the “form or language” of a judgment with ambiguous findings of fact or conclusions of law on an adjudicated claim and the error here, which is the judgment’s failure to dispose of or adjudicate a claim. Rule 78.07(c) can address the form or language issue but not a failure to adjudicate a claim. In accordance with the form used for Rule 29.15 motions, Green’s amended motion raised separate claims, designating them into individually enumerated paragraphs. The amended claims incorporated all but two of the original claims, which the circuit court failed to adjudicate.

(3) Because the circuit court’s judgment is not a final judgment, the appeal must be dismissed. Rule 74.01(b) governs the finality of judgments in civil actions. Under Rule 74.01(b), a judgment that adjudicates fewer than all the claims shall not terminate the action as to any claim or party unless the court makes an express determination that there is no just reason for delaying a judgment on fewer than all claims. This rule enhances the purposes of Rule 29.15, which is to allow a defendant to have all claims for relief efficiently adjudicated. Rule 74.01(b) does not conflict with Rule 29.15(k)’s statement that an order sustaining or overruling a motion filed under Rule 29.15 “shall be deemed a final judgment for purposes of appeal,” as subdivision (k) presumes the circuit court actually adjudicated all claims presented in the motion. As such, Rule 74.01(b) governs the finality of judgments in a Rule 29.15 proceeding. Under Rule 74.01(b), failure to adjudicate all claims results in a lack of a final judgment because it leaves some claims for future determination.

Dissenting opinion by Judge Fischer: The author would find the circuit court entered a final judgment and would not dismiss the appeal. This Court never before has held that Rule 74.01(b) applies to post-conviction relief proceedings – that is because it conflicts with Rule 29.15(k), which explicitly controls what is considered a final judgment in a post-conviction relief proceeding: “An order sustaining or overruling a motion filed under the provisions of this Rule 29.15 shall be deemed a final judgment for purposes of appeal” It provides no further qualification. Because the circuit court expressly overruled Green’s motion, that judgment is a final judgment for purposes of appeal. Past cases have examined whether a circuit court’s failure to issue findings of fact and conclusions of law on all issues presented requires an appellate court to remand (send back) the case for the circuit court to make the findings. In these cases, this Court considered only whether the failure required remand – it did not dismiss for lack of a final

judgment. Here, Green waived his opportunity for appellate review by failing to move for an amended judgment, as required by Rule 78.07(c), with respect to any issues he believed remained unaddressed. Under Rule 73.01, all facts not specifically set out in the judgment are presumed found in accordance with the judgment. Further, Green's incorporation by physical attachment was not sufficient to bring his pro se issues properly before the circuit court. Unlike what this Court has found acceptable in past cases, the amended motion here did not include Green's pro se issues within its body, nor did it attach the pro se motion before its request for relief. This was an attempted incorporation by reference, which is not permitted. The circuit court's failure to acknowledge or address the issues not included in the amended motion could not have affected the finality of its judgment.