

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

TYRONE EUGENE HENDERSON

APPELLANT,

v.

STATE OF MISSOURI

RESPONDENT.

DOCKET NUMBER WD73317
**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

DATE: April 03, 2012

Appeal From:

Jackson County Circuit Court
The Honorable William Stephen Nixon, Judge

Appellate Judges:

Division Three: Karen King Mitchell, P.J., James M. Smart, Jr., and Gary D. Witt, JJ.

Attorneys:

Ruth Sanders, Kansas City, MO, for **appellant**.

Mary H. Moore and Shaun J. Mackelprang, Jefferson City, MO, for **respondent**.

MISSOURI APPELLATE COURT OPINION SUMMARY

**MISSOURI COURT OF APPEALS
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v.

STATE OF MISSOURI,

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No. WD73317

Jackson County

Before Division Three: Karen King Mitchell, P.J., James M. Smart, Jr., and Gary D. Witt, JJ.

Tyrone Henderson was convicted by a jury of first-degree murder, armed criminal action, and unlawful use of a weapon. After this court reversed his convictions and remanded for a new trial, Henderson agreed to plead guilty to a reduced charge of second-degree murder and to the other two original charges in exchange for the State's agreement to recommend a specific sentence. At the plea hearing, the trial judge established the factual basis for the pleas, accepted the plea agreement, and imposed the agreed-upon sentences. Henderson's attorney presented a document Henderson had signed that specified the time limitations for filing a post-conviction motion under Rule 24.035. The court asked Henderson to confirm that he had signed the document and that he understood it. After questioning Henderson, the judge found no probable cause for ineffective assistance of counsel. Henderson was delivered to the custody of the Department of Corrections the day of the plea hearing. One hundred and ninety-five days later, Henderson filed a *pro se* Rule 24.035 motion. Although this was outside the 180-day time limit for him to file such a motion, the State did not contest the issue of timeliness. Henderson alleged that he received ineffective assistance of counsel and was coerced into pleading guilty due to trial counsel's failure to file a motion to suppress identification. At the evidentiary hearing, Henderson testified that he pleaded guilty only because he did not want to go to trial represented by counsel who was unprepared. The motion court denied Henderson's post-conviction motion, finding that his claims were refuted by the guilty plea record. Henderson appeals.

VACATED AND REMANDED.

Division Three holds: The State says Henderson's appeal should be dismissed because his *pro se* motion was not timely filed. Under Rule 24.035(b), where no direct appeal is filed (as in this case), a person seeking relief under the Rule must file his motion within 180 days of the date he is delivered to the custody of the Department of Corrections, and failure to file within that time period "shall constitute a complete waiver of any right to proceed . . . and a complete waiver of any claim that could be raised in [such] a motion." Ordinarily, if the motion is not timely filed,

the motion court is compelled to dismiss it. Henderson's *pro se* motion was filed fifteen days late, but the State did not raise the timeliness issue with the motion court. The Missouri Supreme Court recently addressed a split among the districts of the Missouri Court of Appeals. It found that a trial court has a duty to raise the issue of the timeliness of a motion for post-conviction relief regardless of whether the State has raised the issue. *Dorris v. State*, ___ S.W.3d ___, 2012 Mo. LEXIS 5, at *10 (Mo. banc Jan. 17, 2012). Because the circumstances of this case are essentially the same as those the *Dorris* Court examined, the trial court should have dismissed Henderson's Rule 24.035 motion. In accordance with the holding in *Dorris*, the judgment is vacated and the cause is remanded to the trial court with instructions to dismiss the motion.

Opinion by James M. Smart, Jr., Judge

April 03, 2012

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