

No. SC91652

**In the
Supreme Court of Missouri**

JESSE DORRIS,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the Circuit Court of Mississippi County

Thirty-Third Judicial Circuit

The Honorable T. Lynn Brown

APPELLANT'S SUBSTITUTE REPLY BRIEF

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JURISDICTIONAL STATEMENT

Appellant Jesse Dorris adopts the jurisdictional statement set out in Appellant's Substitute Brief, Statement and Argument, filed on May 16, 2011, in this Court in SC91652.

STATEMENT OF FACTS

Appellant Jesse Dorris adopts the statement of facts set out in Appellant's Substitute Brief, Statement and Argument, filed on May 16, 2011, in this Court in SC91652. Appellant Dorris will cite to the record on appeal as follows: Legal File (SD29094), "(L.F.)"; Trial Transcript (SD29094), "(Tr.)"; Post-conviction Legal File (SD30491), "(PCR L.F.)"; Hearing Transcript (SD30491), "(H. Tr.)"; Appellant's Brief, "(App. Br.)"; and, Respondent's Brief, "(Resp. Br.)."

REPLY POINT – I.¹

Requiring the State to timely assert that the post-conviction movant's motion filing is untimely, as required by Rules 55.08 and 55.27(a), would (1) provide the post-conviction movant with formal notice that the State will seek dismissal of his or her post-conviction motion on the basis that the movant's post-conviction motion is untimely, (2) present the post-conviction movant with the opportunity to contest the State's assertion of untimeliness in the motion court, the preferred forum for litigation of the timeliness issue, and (3) place the court on notice that there is an issue about the timeliness of the movant's motion filing, so that the motion court may hear evidence and argument on the issue, if it so chooses, and make a prompt but judicious disposition of the issue and the movant's motion. By doing so, the application of Rules 55.08 and 55.27(a) to post-conviction proceedings would enhance the purposes of the post-conviction rules by promoting the prompt and accurate determination of those movants who are permitted by law to adjudicate their claims on post-conviction, and

¹ Appellant Dorris does not waive the allegation of motion court error presented in Point II of his previously filed substitute brief, but specifically replies to Respondent's Argument addressing Point I.

those who have waived their rights to adjudicate their post-conviction claims through their untimely motion filings.

Snyder v. State, 334 S.W.3d 735 (Mo. App. W.D. 2011);

Thomas v. State, 808 S.W.2d 364 (Mo. banc 1991);

Roth v. Roth, 176 S.W.3d 735 (Mo. App. E.D. 2005);

Laseter v. Griffin, 968 S.W.2d 774 (Mo. App. S.D. 1998);

Rules 24.035, 29.15, 55.08, & 55.27.

REPLY ARGUMENT – I.

Requiring the State to timely assert that the post-conviction movant's motion filing is untimely, as required by Rules 55.08 and 55.27(a), would (1) provide the post-conviction movant with formal notice that the State will seek dismissal of his or her post-conviction motion on the basis that the movant's post-conviction motion is untimely, (2) present the post-conviction movant with the opportunity to contest the State's assertion of untimeliness in the motion court, the preferred forum for litigation of the timeliness issue, and (3) place the court on notice that there is an issue about the timeliness of the movant's motion filing, so that the motion court may hear evidence and argument on the issue, if it so chooses, and make a prompt but judicious disposition of the issue and the movant's motion. By doing so, the application of Rules 55.08 and 55.27(a) to post-conviction proceedings would enhance the purposes of the post-conviction rules by promoting the prompt and accurate determination of those movants who are permitted by law to adjudicate their claims on post-conviction, and those who have waived their rights to adjudicate their post-conviction claims through their untimely motion filings.

In its brief, Respondent argues that application of Rules 55.08 and 55.27(a) to require the State to timely assert a *pro se* filing is untimely is inconsistent with

the procedures outlined in the post-conviction rules, and inconsistent with the purpose of the post-conviction rules (Resp. Br. 13-33). Specifically, Respondent argues that application of these rules to post-conviction proceedings would make mandatory the State's filing of a responsive pleading in all post-conviction proceedings and that absent a response, the State would admit all factual allegations in the post-conviction motion (Resp. Br. 21-24). Respondent cites Rules 55.01 and 55.09 as support (Resp. Br. 21-24).

Respondent, however, paints the issue before this Court with too broad of a brush. The issue before this Court is neither whether to require the State to file responsive pleadings in all post-conviction proceedings, nor whether the State's failure to deny each and every factual allegation in a post-conviction motion in a responsive pleading should result in waiver and a default judgment. The issue is also not whether Rule 55.01, Rule 55.09, or Rules 55.01 through 55.34 (inclusive) applies to post-conviction proceedings.

Issue

The narrow issue before this Court is whether a challenge to the timeliness of a post-conviction filing is a non-jurisdictional, affirmative defense that is waived if not timely asserted. Mr. Dorris asserts that this Court should find that a challenge to the timeliness of a post-conviction filing is a non-jurisdictional, affirmative defense that is waived if not timely asserted, and relies on *Snyder v.*

State, 334 S.W.3d 735 (Mo. App. W.D. 2011) as support. In *Snyder*, the Western District reasoned that the civil rules apply to post-conviction cases, and that Rules 55.08 and 55.27(a) dictate that the State set forth in its responsive pleading to the post-conviction motion an assertion that the movant waived his or her right to proceed by untimely filing his post-conviction motion. 334 S.W.3d at 739.

Reply Argument

While Rules 24.035(a) and 29.15(a) state that the rules of civil procedure govern post-conviction proceedings, courts have been selective in determining which civil rules apply to post-conviction proceedings and which do not. To determine whether a rule applies in the context of post-conviction review, the essential inquiry is whether the rule enhances, conflicts with, or is of neutral consequence to, the purposes of the post-conviction rule in question. *Belcher v. State*, 299 S.W.3d 294, 297 (Mo. banc 2009) (citing *State ex rel. Nixon v. Daugherty*, 186 S.W.3d 253, 254 (Mo. banc 2006)). If the rule enhances the purposes of the post-conviction rule or bears a neutral consequence, it applies. *Thomas v. State*, 808 S.W.2d 364, 366 (Mo. banc 1991).

For example, the civil rules of discovery apply to post-conviction proceedings. *State v. Gateley*, 907 S.W.2d 212, 228 (Mo. App. S.D. 1995) (citing *State v. Baker*, 859 S.W.2d 805, 810 (Mo. App. E.D. 1993)); see also *State v.*

Ferguson, 20 S.W.3d 485, 504 (Mo. banc 2000) (stating discovery in post-conviction relief cases . . . is governed by Rule 56.01”).

There is authority indicating that Rule 57.03 of the rules of civil procedure applies to the taking of depositions in post-conviction actions. *Baker*, 859 S.W.2d at 810. And there is authority for the proposition that the rules of civil procedure apply to motions for continuance filed in post-conviction cases. *See, e.g., Usher v. State*, 741 S.W.2d 677, 678 (Mo. App. E.D. 1987) (discussing that motion for continuance did not comply with Rule 65.04); *Malady v. State*, 748 S.W.2d 69, 73 (Mo. App. S.D. 1988) (discussing noncompliance with Rules 65.03 and 65.04).

Courts have further determined that the following rules of civil procedure enhance the purposes of post-conviction rules: Rule 51.10 on the treatment of filings received by the circuit clerk on transfer from another court, *Nicholson v. State*, 151 S.W.3d 369, 371 (Mo. banc 2004); Rules 75.01 and 81.05(a) on the finality of judgments and time limits for filing a notice of appeal, *Thomas v. State*, 180 S.W.3d 50, 54 (Mo. App. S.D. 2005); and Rule 78.07(c) on motions to amend the judgment, *Gerlt v. State*, 339 S.W.3d 578, 585 (Mo. App. W.D. 2011).²

² Also, please note that the filing of unsigned post-conviction pleadings is subject to sanctions under Civil Rule 55.03. *Glover v. State*, 225 S.W.3d 425, 428 (Mo. banc 2007).

This Court should similarly determine that application of Rules 55.08 and 55.27(a) to post-conviction proceedings will enhance and would not be inconsistent with the purposes of Rules 24.035 and 29.15. Rules 55.08 and 55.27(a) serve the purposes of providing notice to the plaintiff of affirmative defenses, and presenting, defining, and isolating the controverted issues. *Roth v. Roth*, 176 S.W.3d 735, 738 (Mo. App. E.D. 2005); *Laseter v. Griffin*, 968 S.W.2d 774, 775 (Mo. App. S.D. 1998).

Requiring the State to timely assert that the post-conviction movant's motion filing is untimely, as required by Rules 55.08 and 55.27(a), would do the following: (1) provide the post-conviction movant with formal notice that the State will seek dismissal of his or her post-conviction motion on the basis that the movant's post-conviction motion is untimely, (2) present the post-conviction movant with the opportunity to contest the State's assertion of untimeliness in the motion court, the preferred forum for litigation of the timeliness issue, and (3) place the court on notice that there is an issue about the timeliness of the movant's motion filing, so that the motion court may hear evidence and argument on the issue, if it so chooses, and make a prompt but judicious disposition of the issue and the movant's motion.

Despite that imposing such a requirement on the State would serve the beneficial purposes stated in the preceding paragraph, Respondent argues

against it. Respondent argues that imposing such a requirement would mandate that the State file a response to an untimely-filed Rule 24.035 or Rule 29.15 motion, and that such a mandatory requirement would be inconsistent with Rules 24.035(g) and 29.15(g), which make the filing of such a response optional (Resp. Br. 23-24).

Yet, requiring the State to timely assert that the movant's post-conviction motion is untimely filed, or waive the defect, would have no such effect. The language of Rules 24.035(g) and 29.15(g) would remain unchanged. The State could still opt not to file a response to the movant's post-conviction motion, and could even choose not to file a response where the movant's motion filing under Rule 24.035 or Rule 29.15 is untimely.

Waiver would, of course, be the consequence for the State's failure to file a response to the movant's untimely-filed post-conviction motion, and this consequence would provide an incentive for the State to put an issue that is the subject of increasing litigation before the motion court for the motion court to hear and determine.

Past litigation on appeal of the timeliness of the post-conviction movant's motion filing has resulted in favorable appellate opinions reversing the motion court's dismissal of post-conviction motions that appeared, on their face, to be untimely-filed, but that were, in fact, timely-filed by application of the law. The

law states that in determining the timeliness of the filing, the date the clerk's office received the motion, and not the date the clerk's office file-stamped the motion, is the deciding factor. *Broom v. State*, 111 S.W.3d 563, 566 (Mo. App. W.D. 2003). Though the law holds the movant responsible for timely delivery of his or her motion to the clerk's office, it does not hold the movant responsible for the disposition, or filing, of the document by the clerk's office. *Lewis v. State*, 845 S.W.2d 137, 138 (Mo. App. W.D. 1993). Relying on this law, post-conviction movants have obtained reversal of the motion court's dismissal of their post-conviction motions as untimely-filed by submitting copies of their certified mail receipts showing prompt delivery of their motions to the clerk's office. *See, e.g., Broom*, 111 S.W.3d at 567-568; *Jones v. State*, 24 S.W.3d 701, 703 (Mo. App. E.D. 1999).

Litigation of the issue of the timeliness of the post-conviction movant's motion filing has also increased in recent years as this Court and other appellate courts have recognized that exceptional circumstances beyond the movant's control can excuse the untimely filing of the movant's post-conviction motion. *See, e.g., Nicholson*, 151 S.W.3d at 370 (deeming movant's untimely-filed post-conviction motion timely by virtue of application of Rule 51.10 and section 476.410); *Howard v. State*, 289 S.W.3d 651, 652-654 (Mo. App. E.D. 2009) (holding movant's untimely filing was excusable where movant timely delivered

his *pro se* motion to correctional officials for mailing, and the *pro se* motion was lost in the mail); *Spells v. State*, 213 S.W.3d 700, 701-702 (Mo. App. W.D. 2007) (holding movant's honest mistake in mailing his *pro se* motion to the wrong address excused the motion's untimely filing); *McFadden v. State*, 256 S.W.3d 103, 108-109 (Mo. banc 2008) (holding movant's untimely filing was excusable where he had timely prepared his motion and provided it to counsel "well before" it was due, but counsel had untimely filed it).

Although such exceptional circumstances are by definition, rare, they exist, and it is preferable that the litigation of the existence of such exceptional circumstances occur in the motion court, rather than on appeal. Generally, appellate courts will not consider evidence outside the record on appeal. 8182 *Maryland Associates, Ltd. Partnership v. Sheehan*, 14 S.W.3d 576, 587 (Mo. banc 2000). "[A]n appellate court sits as a court of review. Its function is not to hear evidence, and based thereon, to make an original determination." *Thummel v. King*, 570 S.W.2d 679, 686 (Mo. banc 1978). The appellate court, in general, does not hear or consider on appeal evidence that the motion court did not hear or entertain below. *Benton v. State*, 128 S.W.3d 901, 904 (Mo. App. W.D. 2004).

The motion court is the proper forum for the hearing of evidence and testimony on all issues raised on post-conviction, including issues raised about the timeliness of the post-conviction movant's motion filing. Indeed, the

provisions in Rule 24.035 (h), (i), and (j) and Rule 29.15(h), (i), and (j) relegate to the motion court the functions of determining whether to grant evidentiary hearings in post-conviction cases, conducting post-conviction hearings on post-conviction issues, preserving the hearing records, and issuing findings of fact and conclusions of law on all issues presented.

Requiring the State to timely assert that the post-conviction movant's motion is untimely, as required by Rules 55.08 and 55.27(a), would ensure that the issue of the timeliness of the post-conviction motion filing would be first addressed in the motion court. Also, requiring timely notice to movant of the timeliness issue would promote litigation of the issue in the motion court, where the parties would have an opportunity to present evidence for and against dismissal of the post-conviction motion as untimely-filed.

Presently, however, because there is no requirement that the State first assert the untimeliness of the post-conviction motion filing in the motion court, the parties sometimes end up litigating the issue of the timeliness of the post-conviction movant's motion filing on appeal. Though the motion court may have decided the post-conviction movant's untimely-filed motion on the merits, the State raises the untimeliness of the post-conviction movant's motion filing for the first time on appeal.

By doing so, the State provides late notice to movant that the State will seek dismissal of the post-conviction motion *and* appeal on the basis of the untimely filing of the motion, and places the post-conviction movant, who would contest the State's assertion of untimeliness through evidence and testimony, at an obvious disadvantage.

Around the time of the post-conviction motion's filing and for a time during the pendency of the post-conviction motion in the motion court, the post-conviction movant may have retained proof of the post-conviction motion's timely delivery to the circuit court, such as a certified mail receipt. At or around that time, the post-conviction movant may also have been able to identify and locate the persons, upon whom the movant relied in delivering the post-conviction motion to the court for filing. For a time, those persons may even have been available to testify about the existence of exceptional circumstances.

But by the time the post-conviction movant's untimely-filed post-conviction motion is on appeal, months and possibly even years have passed. At that date, even should the appellate court agree to receive, as an exception to the general rule, evidence that contests the State's assertion of untimeliness, it is possible that the movant's witnesses will have become unavailable, or that the movant's evidence will have become lost or spoiled due to the passage of time. *State ex rel. Reed v. Reardon*, 41 S.W.3d 470, 473 (Mo. banc 2001) (stating "[i]n

deciding whether a case is moot, an appellate court is allowed to consider matters outside the record”).

If the post-conviction movant is unable to show on appeal that the post-conviction motion filing is timely, or that exceptional circumstances justify the untimely motion filing, then the consequence is dismissal of the appeal and the motion. *Hall v. State*, 992 S.W.2d 895, 898 (Mo. App. W.D. 1999). This is true, regardless of whether the post-conviction movant would have been able to present convincing evidence of timeliness or exceptional circumstances to the motion court that the movant does not then have available to present to the appellate court. Consequently, movants whose post-conviction motions the court would have deemed timely filed but for the unavailability of evidence caused by the late notice, are undeservedly foreclosed from seeking the exclusive remedies provided under post-conviction rules. *See* Rules 24.035(a) and 29.15(a).

Requiring the State to timely give notice to the post-conviction movant that the post-conviction motion filing is untimely would make it less likely that post-conviction movants, who can show that their post-conviction motion filings are timely, or show that exceptional circumstances justify the untimely filing, will undeservedly suffer the consequence of dismissal of their post-conviction actions. Post-conviction movants with timely notice of the filing defect would have more adequate opportunity to identify, locate, collect, and retain evidence

contesting the State's assertion of untimeliness, and more time to prepare their evidence and argument.

Given time and opportunity, post-conviction movants, who can show that their post-conviction motion filings are timely, or show that exceptional circumstances justify the untimely filing, would likely present their evidence and arguments to the motion court for it to hear and determine. When faced with proof of timeliness or the existence of exceptional circumstances, the motion court would have to permit the movants to proceed with their post-conviction motions, or commit reversible error. *See, e.g., McFadden*, 256 S.W.3d at 108-109.

Decreasing the probability that the court will commit such errors and unfairly deprive a post-conviction movant of his or her right to proceed under post-conviction rules advances the purposes of Rules 24.035 and 29.15. The primary purpose of those rules is "to adjudicate claims concerning the validity of the trial court's jurisdiction and the legality of the conviction or sentence of the defendant." *Thomas*, 808 S.W.2d at 366.

Application of Rules 55.08 and 55.27(a) to require the State to timely assert the untimeliness of the motion filing will promote this purpose by placing the motion court on notice of the timeliness issue, so that the motion court can give prompt and fair consideration to the issue before ruling. By ensuring that the motion court will entertain the issue before ruling on the movant's post-

conviction motion, Rules 55.08 and 55.27(a) would increase the probability of an accurate ruling, and promote prompt disposition of the issue and the movant's motion.

To the contrary, Respondent argues that application of Rules 55.08 and 55.27(a) to post-conviction proceedings will result in the motion court's consideration of the merits of untimely-filed motions by agreement of the parties or simply due to the State's failure to timely assert the untimely motion filing in a responsive pleading (Resp. Br. 27). Respondent, however, assumes the State's nonfeasance. Respondent also ignores that motion courts across the State of Missouri are hearing and determining the merits of untimely-filed motions, and the most plausible reason for their doing so is not agreement of the parties but the court's inadvertence.

The chance that inadvertent review of untimely-filed motions will occur in the future would decrease if the State has to timely assert that a post-conviction movant's motion filing is untimely, or else waive the defect. It's unlikely that State prosecutors would be willing to waive the defect, and to avoid waiver, prosecutors would make concerted efforts to promptly identify untimely-filed motions and timely file responses to those motions. In those timely-filed responses, prosecutors would assert that the movants waived their rights to

proceed under Rule 24.035 or Rule 29.15 by untimely filing their post-conviction motions.

Requiring such efforts on the part of the State, the party opposing the motion, also advances the additional purposes of Rules 24.035 and 29.15. The additional purposes of the rules are to avoid delay in the processing of prisoners' claims and to prevent the litigation of stale claims. *Thomas*, 808 S.W.2d at 366. A motion court that is on notice of the issue will make a more expeditious decision to dismiss a post-conviction motion as untimely filed under Rules 24.035(b) and 29.15(b), or to permit a post-conviction movant to proceed with the untimely-filed motion because the untimely filing is excusable under *Nicholson*, *Howard*, *Spells*, or *McFadden*, for instance.

Consequently, this Court should find that the application of Rules 55.08 and 55.27(a) to post-conviction proceedings would enhance the purposes of the post-conviction rules by promoting the motion court's prompt and accurate determination of those movants who are permitted by law to adjudicate their claims on post-conviction, and those who have waived their rights to adjudicate their post-conviction claims through their untimely motion filings.

CONCLUSION

WHEREFORE, based on the arguments in Appellant's Substitute Statement, Brief, and Argument, filed on May 16, 2011, and on the arguments in this Substitute Reply Brief, Appellant Jesse Dorris respectfully requests this Court to reverse the motion court's judgment, vacate Mr. Dorris' sentence, and remand for resentencing with directions to grant Mr. Dorris the opportunity to file and obtain a ruling on a new-trial motion or to expressly waive his right to do so before resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Rule 84.06, I hereby certify that on Wednesday, August 10, 2011, a true and correct copy of the foregoing reply brief and a floppy disk containing the foregoing brief were mailed postage prepaid to Assistant Attorney General James B. Farnsworth, Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102. In addition, pursuant to Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the page limitations of Rule 84.06(b). This brief was prepared with Microsoft Word for Windows, and uses Californian FB 14 point font. The word-processing software identified that this brief contains 4,212 words. Finally, I hereby certify that the enclosed diskette has been scanned for viruses with Symantec Endpoint Protection software and found virus-free.

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