IN THE
SUPREME COURT OF MISSOURI

JOSE LOPEZ-MCCURDY, JR.,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. SC 91713
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL FROM THE CIRCUIT COURT OF
DENT COUNTY, MISSOURI
FORTY-SECOND JUDICIAL CIRCUIT, DIVISION ONE
THE HONORABLE WILLIAM C. SEAY, JUDGE

APPELLANT'S SUBSTITUTE STATEMENT, BRIEF, AND ARGUMENT

Mark A. Grothoff, MOBar #36612
Attorney for Appellant
1000 West Nifong
Building 7, Suite 100
Columbia, Missouri 65203
(573) 882-9855/FAX (573) 882-9468
E-Mail: Mark.Grothoff@mspd.mo.gov

INDEX

TABLE OF AUTHORITIES

Page

***CASES*:**

***CONSTITUTIONAL PROVISIONS*:**

***RULES*:**

JURISDICTIONAL STATEMENT

On May 23, 2006, after a jury trial, appellant was found guilty of forcible rape. On July 25, 2006, appellant was sentenced to a prison term of twenty years.

Appellant appealed his conviction to the Missouri Court of Appeals, Southern District. On October 27, 2008, the Missouri Court of Appeals, Southern District affirmed appellant's conviction and sentence, and on November 13, 2008, the Missouri Court of Appeals, Southern District issued its mandate.

Appellant untimely filed his pro se Rule 29.15 motion on February 17, 2009. The motion court appointed counsel to represent him on July 10, 2009. On September 25, 2009, appellant's counsel filed a statement in lieu of an amended motion.

An evidentiary hearing concerning appellant's motion was held on January 20, 2010. On May 3, 2010, the motion court issued its judgment denying appellant's Rule 29.15 motion. On May 24, 2010, appellant timely filed his notice of appeal.

On appeal, the Missouri Court of Appeals, Southern District vacated the motion court's judgment on the merits, and remanded with directions to dismiss appellant's Rule 29.15 post-conviction case for the untimely filing of appellant's pro se Rule 29.15 motion. Lopez-McCurdy v. State, No. SD 30586, 2011 WL 1119069 (Mo. App. S.D. 2011).

On May 31, 2011, this Court sustained appellant's application for transfer, and transferred this case to this Court. Consequently, this Court has jurisdiction over appellant's appeal. Article V, Section 10, Missouri Constitution; Rule 83.04.

STATEMENT OF FACTS

Appellant was charged by amended information with two counts of forcible rape, two counts of first-degree statutory rape, and two counts of incest (L.F. 26-29).[1] The forcible rape counts alleged appellant had sexual intercourse with A.M. by forcible compulsion on May 18 and 27, 2005 (L.F. 27-28). The statutory rape counts alleged appellant had sexual intercourse with T.M. twice between November 7, 2003 and May 31, 2005 (L.F. 28). The incest counts were based on the statutory rape counts (L.F. 28).

The case proceeded to trial before a jury on May 23, 2006 (Tr. 1; L.F. 6). The following evidence was adduced at trial.

Appellant and his half-sister, T.M., along with her two brothers, were adopted by their late mother's brother, David McCurdy, and his wife Martina (Tr. 152-153). The family moved from Idaho to St. Roberts, Missouri in May, 2003, then to a home outside Salem, Missouri in November, 2003 (Tr. 260-262). The large extended family living in the McCurdy household at that time also included

[1] The record on appeal will be cited as follows: the transcript from appellant's trial will be (Tr.); the legal file from appellant's direct appeal will be (L.F.); the transcript from the evidentiary hearing on appellant's post-conviction motion will be (PCR Tr.); and the legal file for this appeal of appellant's post-conviction motion will be (PCR L.F.).

David's daughter, A.M., among several other children of one or both parents; plus David's brother, Tim; and T.M. and A.M.'s grandmother (Tr. 90-91, 141, 153). In May, 2005, appellant's girlfriend, Brianna Koller, and their six-month old child were also living in the McCurdy home (Tr. 118, 154, 203, 263).

On a night around May 18, 2005, a night on which A.M.'s sister, Sierra, was in the hospital due to a ruptured appendix, several of the children in the McCurdy household were outside playing hide and seek after dark (Tr. 95, 107). Appellant had a bottle of beer and A.M. drank some (Tr. 95, 110-111). Appellant did not make her drink it (Tr. 110-111). A.M. drank enough that she was "pretty dizzy." (Tr. 111). A.M. was 14 at the time and appellant was 15 (Tr. 90, 114).

They went to a neighbor's yard and hid by a tree (Tr. 95). A.M. said appellant had her lie down, then he took off her pants and had sexual intercourse with her (Tr. 95). He ejaculated on her pants, which she said were down her legs (Tr. 95-96). Before and after that testimony, she said that he took them off and they were on the ground when he ejaculated on them (Tr. 112-113). A.M. did not consent (Tr. 96). When asked if appellant used force she said yes, then when asked what kind, said he used his weight and sat on her (Tr. 96). Neither of them said anything (Tr. 96). Appellant did not say anything afterward, and he made no threats against A.M. (Tr. 96-97). She put the pants she was wearing in the closet, and did not wear them again or wash them before turning them over to the officers (Tr. 116).

She said it happened again about a week later, in the afternoon (Tr. 97, 117). Appellant had his baby asleep on his bed and asked A.M.to watch him while appellant went to the bathroom (Tr. 97, 117). When he came back, she was lying on the bed with the baby, and he locked the door behind him (Tr. 97). Appellant got on the bed, sat on Ashley, took her pants off, and "raped" her again (Tr. 97). She did not consent and when asked what force he used, said, "Again he just sat on top of me." (Tr. 97). Also again, neither said anything (Tr. 98). She later answered "yes" when asked, "And you stated that appellant used force and held you down?" (Tr. 101).

A.M. first said that only her father was at home at the time of the second alleged rape (Tr. 117). When asked if she was sure she said that the other family members had not left yet on their trip to the store (Tr. 117). At the point where appellant was taking her pants off, T.M. came to the door and said that her mother wanted the cell phone (Tr. 117, 120). Appellant told T.M. through the door that he had left the phone in the dining room; A.M. did not say anything (Tr. 120).

During the state's second redirect examination of Ashley, its third round of questioning her, the prosecutor asked, "[A.M.] you did state that he was on you and held you down is that correct?" (Tr. 135-136). He did not specify which incident he was addressing. A.M. answered, "Yes." (Tr. 136). Appellant's counsel then asked during further cross-examination and A.M. confirmed that she was held down "just because he was laying [sic] on" her (Tr. 136). Counsel asked, "he was just laying [sic] on you, the weight of him was what held you down?" (Tr.

136). A.M. answered, "He had a hold of my wrists." (Tr. 136). This exchange led the state to ask A.M.in its third round of redirect where appellant had held her wrists; she responded, "Up here above my head." (Tr. 137). The question did not specify which incident.

A.M. was afraid of appellant because he was a lot bigger and stronger than she was (Tr. 101). He had not hit her anytime just prior to the alleged rapes, but he had done so "a while back" (Tr. 101-102). Appellant never threatened A.M. while they lived in Dent County, though he had made some threats when they lived in Idaho (Tr. 98). A.M. again did not immediately tell anyone what had happened (Tr. 98).

Appellant left home during the early morning hours of May 31, 2005, taking Brianna and their baby (Tr. 122, 311). Appellant and David had had a fight the night before; it was pretty intense (Tr. 122, 126). A.M. thought it was about a week after the second alleged rape (Tr. 122). She and T.M. ran away the next day, because A.M. wanted to give appellant a "head start", so the authorities would be looking for them and not appellant (Tr. 103). That way, A.M. might never have had to see appellant again (Tr. 103). T.M. said they did not talk about why they were running away, just about the fact of doing it (Tr. 149-150).

A.M. and T.M. went to the home of Mary Sloan, a substitute teacher whom T.M. had had in school (Tr. 123-124, 171, 329). T.M. also knew Sloan's children (Tr. 171). They told Sloan that they ran away because their father was beating them (Tr. 124-125). A.M. did not want to tell her the real reason (Tr. 124-125).

T.M. denied telling Sloan that she was afraid to go home because appellant was gone and he was her protector, though that was what Sloan said the girls told her (Tr. 184, 336). The police eventually came to get the girls that evening and David McCurdy had to spend that night in a motel due to the allegations against him (Tr. 126).

T.M., born August 28, 1993, also accused appellant of raping her (Tr. 140, 143). She said it happened four times, then changed it to five (Tr. 143-144). The court excluded evidence of uncharged incidents, and T.M. described two occasions where appellant took her pants off without saying anything, then had sexual intercourse with her (Tr. 145-147). She said one time happened while they were outside playing hide and seek, and the other was in her bedroom (Tr. 145-147).

A.M. thought she first told her mother what appellant had done about two months after appellant left home (Tr. 100). She said she and T.M. were talking, and T.M. told A.M. what appellant had done to her; they then told Martina McCurdy (Tr. 99). T.M. testified that she told A.M. when they were in the car on the way home after running away to Sloan's (Tr. 149).

Martina said the girls told her four or five days after appellant left (Tr. 263-264). She reported it the same day (Tr. 277). David said he heard about the allegations two or three weeks after they ran away (Tr. 284-285). After they talked to Martina, A.M. gave her the pants she was wearing during the first alleged rape, a month or two before, and had kept in the closet (Tr. 131-132). Sheriff's

Deputy Rodney Jackson became involved in the investigation on June 22 (Tr. 194). He collected the pants after Martina brought them in to the Sheriff's Department (Tr. 195-196). A.M. told him that she wore the pants inside-out to play hide and seek because they had white markings on the outside (Tr. 196).

When Deputy Jackson interviewed appellant on July 7, he denied having sex with either girl (Tr. 202-203).

DNA testing of a stain located on the outside rear of the pants, about three to four inches above the crotch revealed that at least two people contributed (Tr. 213-214, 228, 235-236, 239). The stain was positive for semen (Tr. 210-211). The DNA of the major contributor was consistent with A.M.'s DNA (Tr. 229). There were some, but not all, markers of the minor contributor (Tr. 233-234). Those markers were consistent with appellant, but not all of his markers were present (Tr. 239). A sample of Brianna's DNA was collected, but was never opened for testing by the lab (Tr. 198, 200, 226).

A pediatric nurse practitioner who examined A.M. and T.M., both of whom were normal, said that she sees physical findings in about five percent of cases (Tr. 241-242, 244, 246). When asked what her conclusions were, she said, "That there were no physical findings, but the history . . ." (Tr. 248). Appellant's counsel objected that anything further called for an opinion (Tr. 248). The objection was overruled, and the nurse continued, "Their history and behavior as reported by the

CAC [Child Advocacy Center] were consistent with sexual assault." (Tr. 248). Her conclusion was based solely on statements from the CAC and the two girls (Tr. 257).

After deliberation, the jury found appellant guilty of the forcible rape of A.M. on May 18 (the first incident, as described by A.M.), but found him not guilty of all other counts (Tr. 383-384; L.F. 49-54). After hearing testimony from David and Brianna in the punishment phase, the jury recommended imprisonment for 20 years (Tr. 413; L.F. 59).

In his amended motion for new trial, appellant alleged that he had discovered since the trial that the pants that A.M. testified she wore during the rape for which appellant was convicted actually belonged to Brianna, not A.M., and that this could account for the presence of appellant's semen (L.F. 64-65).

On July 25, 2006, the court conducted a hearing on appellant's motion for new trial, at which Brianna testified without objection that from what she had heard of the evidence, the pants A.M. described were actually hers (Tr. 423). She did not know what the pants admitted into evidence looked like until after she testified (Tr. 424). A.M. did not have any pants like them and the other girls in the household always took Brianna's clothes to wear (Tr. 423-424). It was quite possible that Brianna wore the pants after having sexual intercourse with appellant, because she wore the sweatpants as pajama pants all the time (Tr. 424-425).

The state asked no questions, arguing that the defense could have brought up the issue at trial (Tr. 425). The court overruled the motion for new trial without comment (Tr. 426). The court then sentenced appellant in accordance with the jury's recommendation of 20 years (Tr. 439; L.F. 67-69).

On July 31, 2006, appellant filed a notice of appeal of his conviction (L.F. 71-73). On October 27, 2008, this Court issued an opinion affirming appellant's conviction, and this Court's mandate was issued on November 13, 2008 (PCR L.F. 5, 13).

On February 17, 2009, appellant filed a pro se motion to vacate, set aside, or correct his judgment or sentence (PCR L.F. 1, 4-9). September 25, 2009, appellant's appointed counsel filed a statement in lieu of an amended motion (PCR L.F. 2, 10-12). Appellant's motion alleged, inter alia, that appellant received ineffective assistance of counsel in that his trial counsel failed to obtain a laboratory analysis of the sample of Brianna's DNA that had been collected by the police (PCR L.F. 5, 7).

On January 20, 2010, an evidentiary hearing was held concerning appellant's post-conviction motion (PCR Tr. 1; PCR L.F. 2). Appellant was the lone witness at the hearing (PCR Tr. 4).

Appellant testified that the DNA sample that the police collected from Brianna was not analyzed by the laboratory (PCR Tr. 12). Appellant also testified that he brought up the issue of the DNA with his trial counsel, but his counsel did not have the DNA tested and he did not bring it up at trial (PCR Tr. 12, 17).

Appellant stated that the analysis would have shown Brianna's DNA on the pants A.M. allegedly wore, providing an explanation for the only physical evidence the state had (PCR Tr. 12-13). Appellant further testified that his counsel never explained why he did not pursue the issue of Brianna's DNA (PCR Tr. 14, 17).

On May 3, 2010, the motion court issued findings of fact and conclusions of law denying appellant's motion for post-conviction relief (PCR L.F. 2, 13-16). On May 24, 2010, appellant filed a notice of appeal (PCR L.F. 3, 18-19).

On appeal, the Missouri Court of Appeals, Southern District vacated the motion court's judgment on the merits, and remanded with directions to dismiss appellant's Rule 29.15 post-conviction case for the untimely filing of appellant's pro se Rule 29.15 motion. Lopez-McCurdy v. State, No. SD 30586, 2011 WL 1119069 (Mo. App. S.D. 2011).

Appellant filed an application for transfer to this Court. On May 31, 2011, this Court sustained appellant's application for transfer, and transferred this case to this Court.

POINT RELIED ON

I.

This Court has jurisdiction over appellant's Rule 29.15 motion, and authority to hear and determine it on the merits, despite the untimely filing of appellant's pro se Rule 29.15 motion, because a challenge to the timeliness of a pro se Rule 29.15 post-conviction motion is a non-jurisdictional affirmative defense that is waived if not timely asserted, and the state waived this defense by failing to assert it in either the motion court or appellate court.

J.C.W. ex rel. Webb v. Wyciskalla, 275 S.W.3d 249 (Mo. banc 2009);

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

Gerlt v. State, No. WD 72225, 2011 WL 1363898 (Mo. App. W.D. 2011);

Rule 29.15.

POINT RELIED ON

II.

The motion court clearly erred in denying appellant's Rule 29.15 motion for post-conviction relief because a review of the record leaves a definite and firm impression that appellant was denied effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution in that his trial counsel failed to obtain a laboratory analysis of the sample of Brianna Koller's DNA that had been collected by the police. Appellant was prejudiced because such an analysis would have shown Brianna Koller's DNA on the pants A.M. allegedly wore during the sexual assault, which would support the argument that the pants actually belonged to Koller, who wore them after having sexual intercourse with appellant, thereby providing an explanation for appellant's DNA on the pants, the only physical evidence adduced by the state. If appellant's trial counsel had obtained a laboratory analysis of Brianna Koller's DNA sample, a reasonable probability exists that the result of appellant's trial would have been different.

State v. Wells, 804 S.W.2d 746 (Mo. banc 1991);

Johnson v. State, 125 S.W.3d 872 (Mo. App. S.D. 2003);

Moore v. State, 827 S.W.2d 213 (Mo. banc 1992);

State v. Hamilton, 871 S.W.2d 31 (Mo. App. W.D. 1993);

U.S. Const., Amends. VI and XIV;

Mo. Const., Art. I, Sect. 18(a); and

Rule 29.15.

ARGUMENT

I.

This Court has jurisdiction over appellant's Rule 29.15 motion, and authority to hear and determine it on the merits, despite the untimely filing of appellant's pro se Rule 29.15 motion, because a challenge to the timeliness of a pro se Rule 29.15 post-conviction motion is a non-jurisdictional affirmative defense that is waived if not timely asserted, and the state waived this defense by failing to assert it in either the motion court or appellate court.

A reviewing court has a duty to determine sua sponte whether it has jurisdiction to hear an appeal. Smith v. State, 63 S.W.3d 218, 219 (Mo. banc 2001); Chromalloy Am. Corp. v. Elyria Foundry Co., 955 S.W.2d 1, 3 (Mo. banc 1997). This Court's jurisdiction is predicated on that of the motion court, and if the motion court lacked jurisdiction to rule on appellant's Rule 29.15 motion on the merits, then this Court has no jurisdiction to review the matter appealed on its merits. State v. Ortega, 985 S.W.2d 373, 374 (Mo. App. S.D. 1999).

Subject-matter jurisdiction of a court is purely a question of law, which this Court reviews de novo. Missouri Soybean Association v. Missouri Clean Water Commission, 102 S.W.3d 10, 22 (Mo. banc 2003).

Rule 29.15(b) provides in pertinent part:

> *If an appeal of the judgment or sentence sought to be vacated, set aside or corrected was taken, the motion shall be filed within 90 days after the date the mandate of the appellate*

court is issued affirming such judgment or sentence.

* * * *

Failure to file a motion within the time provided by this Rule 29.15 shall constitute a complete waiver of any right to proceed under this Rule 29.15 and a complete waiver of any claim that could be raised in a motion filed pursuant to this Rule 29.15.

Appellant concedes that he untimely filed his pro se Rule 29.15 motion. His pro se Rule 29.15 motion was due on February 11, 2009, but he filed it a mere six days later on February 17, 2009 (PCR L.F. 1, 4-9). Rule 29.15(b). This Court nonetheless has jurisdiction over appellant's untimely-filed Rule 29.15 motion.

Appellant acknowledges that courts previously held that failure to file a motion within the time limits of Rule 29.15 was a fatal defect that deprived the motion court of "jurisdiction". Howard v. State, 289 S.W.3d 651, 652 (Mo. App. E.D. 2009), quoting Matchett v. State, 119 S.W.3d 558, 559 (Mo. App. S.D. 2003). "Jurisdiction", as applied to criminal courts, "refers to the power of a court to hear and resolve the case of a criminal offense, to render a valid judgment, and to declare punishment." Searcy v. State, 981 S.W.2d 597, 598-599 (Mo. App. W.D. 1998). Subject-matter jurisdiction cannot be conferred by agreement of the parties or waiver. State ex. rel. Director of Revenue v. Rauch, 971 S.W.2d 350, 353 (Mo. App. E.D. 1998); Merriweather v. Grandison, 904 S.W.2d 485, 489 (Mo. App. W.D. 1995). And, unless the court has subject-matter jurisdiction, the court

has no jurisdiction to act, its judgments are invalid, and its proceedings are void. Three Bears Camping, Inc. v. Johnson, 790 S.W.2d 951, 954 (Mo. App. S.D. 1990); State v. Folson, 940 S.W.2d 526, 527 (Mo. App. W.D. 1997).

Because courts ruled that the issue of the timeliness of the pro se filing was "jurisdictional", courts permitted the state to raise the issue for the first time on appeal. Lawrence v. State, 980 S.W.2d 135[1] (Mo. App. E.D. 1998); Roth v. State, 921 S.W.2d 680, 682 (Mo. App. W.D. 1996); Stidham v. State, 963 S.W.2d 351, 353 (Mo. App. W.D. 1998). Also, because the appellate court has an affirmative duty to determine jurisdiction sua sponte, appellate courts dismissed appeals from the denial of untimely-filed post-conviction motions for lack of jurisdiction, regardless of whether the parties ever addressed the timeliness issue in the motion court or on appeal. Murphy v. State, 796 S.W.2d 673, 674 (Mo. App. S.D. 1990); State v. Kinder, 122 S.W.3d 624, 628 (Mo. App. E.D. 2003).

This Court, however, should neither permit the state to raise the untimeliness of appellant's Rule 29.15 motion for the first time on appeal, nor dismiss appellant's Rule 29.15 motion based on his untimely pro se filing because the time limitations under Rules 24.035 and Rule 29.15 are no longer perceived as restrictions on the circuit court's jurisdiction. Moore v. State, 328 S.W.3d 700, 703, n. 2 (Mo. banc 2010).

In J.C.W. ex rel. Webb v. Wyciskalla, 275 S.W.3d 249, 251-253 (Mo. banc 2009), this Court noted that Missouri recognizes only two types of jurisdiction, personal and subject-matter, and stated that both derive from constitutional

principles. "[P]ersonal jurisdiction refers quite simply to the power of a court to require a person to respond to a legal proceeding that may affect the person's rights or interests." Id. at 253. It derives from the due process clause of the Fourteenth Amendment to the United States Constitution. Id. at 252-253.

On the other hand, subject-matter jurisdiction, or "the court's authority to render a judgment in a particular category of case", derives from Article V, Section 14 of the Missouri Constitution, which states that "[t]he circuit court shall have original jurisdiction over all cases and matters, civil and criminal." Id. at 253.

This Court recognized that aside from subject-matter and personal jurisdiction, prior case law purported to create yet another type of jurisdiction called "jurisdictional competence". Id. at 254. An issue of "jurisdictional competence" arises when there is no question about the court's subject-matter jurisdiction over the issue, but there is a question of whether the parties or issues were properly before the court for its resolution at the time. Id. at 254. This Court held that "jurisdictional competence" does not deal with jurisdiction in the true sense, and that it is not derived from constitutional principles. Id. This Court specifically stated, "Because the authority of a court to render judgment in a particular case is, in actuality, the definition of subject[-]matter jurisdiction, there is no constitutional basis for this third jurisdictional concept that would bar litigants from relief." Id.

As a consequence, this Court further directed that Missouri courts should not construe statutory restrictions on claims for relief as restrictions on the court's

subject-matter jurisdiction, or as matters of "jurisdictional competence." Id. This Court indicated that elevating statutory restrictions to matters of "'jurisdictional competence' erodes the constitutional boundary established by article V of the Missouri Constitution, as well as robs the concept of subject[-]matter jurisdiction of the clarity that the constitution provides." Id.

Since the Court's holding in J.C.W., courts no longer perceive statutory or rule limitations on the trial court's ability to act as capable of depriving the circuit courts of subject-matter jurisdiction. See, e.g., State v. Molsbee, 316 S.W.3d 549, 552 (Mo. App. W.D. 2010); Starry v. State, 318 S.W.3d 780, 782 (Mo. App. W.D. 2010); Andrews v. State, 282 S.W.3d 372, 375 n. 3 (Mo. App. W.D. 2009) (stating that the state's argument for the dismissal of the untimely Rule 24.035 motion was "a question of jurisdictional competence," and "not an issue of jurisdiction"); Schmidt v. State, 292 S.W.3d 574, 576-577 (Mo. App. S.D. 2009) (holding that failure to comply with the Uniform Mandatory Disposition of Detainers Law no longer deprives the circuit court of subject-matter jurisdiction); Belfield v. State, 307 S.W.3d 680, 683, n. 3 (Mo. App. E.D. 2010).

Applying the principle in J.C.W., appellant's untimely filing of his Rule 29.15 motion did not deprive the motion court or any subsequent reviewing court of jurisdiction over his Rule 29.15 post-conviction case. A Rule 29.15 post-conviction case is a civil case, governed by the civil rules. Rule 29.15(a). As noted in J.C.W., because the circuit courts have jurisdiction over all civil cases, the circuit court has subject-matter jurisdiction over even an untimely-filed Rule 29.15

motion. J.C.W. ex rel. Webb v. Wyciskalla, 275 S.W.3d at 254. Thus, despite the untimely filing of appellant's Rule 29.15 motion, the motion court had, and this Court has, jurisdiction over appellant's Rule 29.15 post-conviction case.

This Court has the authority to hear and determine appellant's Rule 29.15 motion on the merits, despite the untimely filing of appellant's pro se Rule 29.15 motion, because a challenge to the timeliness of a pro se Rule 29.15 post-conviction motion is a non-jurisdictional affirmative defense that is waived if not timely asserted, and the state waived this defense by failing to assert it in either the motion court or appellate court.

Appellant acknowledges that the courts of appeal are split on the answer to the question of whether post-J.C.W., a challenge to the timeliness of a pro se motion is a non-jurisdictional affirmative defense that is waived if not timely asserted. In Swofford v. State, 323 S.W.3d 60, 62 (Mo. App. E.D. 2010), Swofford untimely filed his pro se Rule 29.15 motion, but the state never raised the untimeliness in the motion court, and the motion court denied Swofford's Rule 29.15 motion on the merits. On appeal, when the motion's untimeliness came to the appellate court's attention, Swofford argued that the untimeliness of the Rule 29.15 was waived because the state never raised the issue of the untimeliness in the motion court and the motion court ruled on the merits of Swofford's untimely-filed Rule 29.15 motion. Swofford, 323 S.W.3d at 62.

The Eastern District Court of Appeals disagreed with this argument, and held that the untimeliness of Swofford's pro se filing under Rule 29.15 was

unwaivable. Id. at 63. The Eastern District held it was authorized to consider and act on the untimeliness of the Rule 29.15 motion, regardless of whether the state had raised the untimeliness in the motion court or on appeal, and without regard for whether the motion court had ruled on the merits of the untimely-filed Rule 29.15 motion. Id. It enforced the Missouri Supreme Court rule, vacated the motion court's judgment, and remanded with directions to dismiss Swofford's Rule 29.15 motion. Id. at 63-64.

And in Mackley v. State, 331 S.W.3d 733, 735 (Mo. App. E.D. 2011), the Eastern District followed Swofford in dismissing an appeal from an untimely-filed Rule 24.035 motion. The Southern District Court of Appeals also followed Swofford in dismissing appeals from untimely-filed post-conviction motions in Hill v. State, No. SD 30530, 2011 WL 1458697 (Mo. App. S.D. 2011), Dorris v. State, No. SD 30491, 2011 WL 742548 (Mo. App. S.D. 2011), and in this instant case, Lopez-McCurdy v. State, No. SD 30586, 2011 WL 1119069 (Mo. App. S.D. 2011) on which this Court took transfer.

Yet, when faced with the same question of whether a challenge to the timeliness of a pro se motion is waivable, the Western District Court of Appeals answered it differently. In Snyder v. State, 334 S.W.3d 735, 737 (Mo. App. W.D. 2011), the state raised the untimeliness of Snyder's pro se Rule 24.035 motion for the first time on appeal from the denial of Snyder's Rule 24.035 motion. As did Swofford, Snyder argued that the state had waived its challenge to the timeliness

of Snyder's pro se Rule 24.035 motion by failing to lodge an objection in the motion court. Id. at 738.

The Western District agreed with the argument. Id. at 739-740. While the Western District acknowledged the contrary law in Swofford, it noted that Swofford conflicted with this Court's prior holding that "if a matter is not jurisdictional but rather is a procedural matter required by statute or rule or an affirmative defense of the sort listed in Rule 55.08, then it generally may be waived if not raised timely." Id. at 738-739, citing McCracken v. Wal-Mart Stores E., L.P., 298 S.W.3d 473, 476 (Mo. banc 2009) and Reynolds v. Carter County, 323 S.W.3d 447, 452 (Mo. App. S.D. 2010). It concluded that this Court's prior holding made clear that "the rules of court may, indeed, be waived," and that, as a consequence, the reasoning of Swofford is "fundamentally flawed." Id. at 739.

The Western District reasoned that the civil rules apply to post-conviction cases, and that Rule 55.08[2] and Rule 55.27(a)[3] dictate that the state set forth in its

---

[2] Rule 55.08 provides: *In pleading to a preceding pleading, a party shall set forth all applicable affirmative defenses and avoidances, including but not limited to accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, comparative fault, state of the art as provided by statute, seller in the stream of commerce as provided by statute, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of*

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. Id.

It concluded that should the state fail to do so, then it waives its right to challenge the timeliness of the post-conviction filing because the time limitation in the post-conviction rule, like the statute of limitations, is a non-jurisdictional defense that can be waived if not asserted by the conclusion of the case. Id.

Based on this rationale, the Western District ruled that the state had waived its right to challenge the untimeliness of Snyder's Rule 24.035 motion by failing to raise the issue in the motion court, and reviewed the motion court's decision to deny the Rule 24.035 motion on the merits. Id. at 739-740.

The Western District recently relied on Snyder in reaching the same conclusion in Gerlt v. State, No. WD72225, 2011 WL 1363898 (Mo. App. W.D. 2011). There, as in Snyder, the state failed to raise the untimeliness of Gerlt's

---

limitations, truth in defamation, waiver, and any other matter constituting an avoidance or affirmative defense.

[3] Rule 55.27(a) provides: *"Every defense, in law or fact, to a claim in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required,"* with the exception of certain named defenses.

pro se motion in the motion court, and the motion court decided the motion on its merits. Id. at 1-2. On appeal, the state raised the issue of the untimeliness of Gerlt's pro se Rule 24.035 motion filing for the first time. Id. at 2.

The Western District reaffirmed its decision in Snyder. Id. at 2-3. It rejected Swofford, and relied on the rationale in Snyder in holding that the state had waived its right to challenge the timeliness of Gerlt's post-conviction motion by failing to raise the issue in the motion court. Id.

This Court should similarly reject Swofford and its progeny, and find that the rationale in Snyder is sound. This Court should hold that a challenge to the timeliness of a pro se Rule 29.15 post-conviction motion is a non-jurisdictional affirmative defense that is waived if not timely asserted.

Because the state waived this defense by failing to assert it in either the motion court or appellate court, this Court has the authority to hear and determine appellant's Rule 29.15 motion on the merits, despite the untimely filing of appellant's pro se Rule 29.15 motion. This Court should hear and determine appellant's Rule 29.15 post-conviction appeal on the merits.

ARGUMENT

II.

The motion court clearly erred in denying appellant's Rule 29.15 motion for post-conviction relief because a review of the record leaves a definite and firm impression that appellant was denied effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution in that his trial counsel failed to obtain a laboratory analysis of the sample of Brianna Koller's DNA that had been collected by the police. Appellant was prejudiced because such an analysis would have shown Brianna Koller's DNA on the pants A.M. allegedly wore during the sexual assault, which would support the argument that the pants actually belonged to Koller, who wore them after having sexual intercourse with appellant, thereby providing an explanation for appellant's DNA on the pants, the only physical evidence adduced by the state. If appellant's trial counsel had obtained a laboratory analysis of Brianna Koller's DNA sample, a reasonable probability exists that the result of appellant's trial would have been different.

The scope of appellate review of the denial of a Rule 29.15 motion is whether the findings of fact and conclusions of law are clearly erroneous. State v. Parker, 886 S.W.2d 908, 933 (Mo. banc 1994). The motion court's determination is clearly erroneous when the appellate court has a definite and firm impression

that a mistake has been made. State v. Nolan, 872 S.W.2d 99, 104 (Mo. banc 1994).

Appellant asserts he received ineffective assistance of counsel in that his trial counsel failed to obtain a laboratory analysis of the sample of Brianna Koller's DNA that had been collected by the police. A claim of ineffective assistance of counsel must meet a two-pronged standard. Under Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984), appellant must show that his counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would under the same or similar circumstances, and that this deficiency prejudiced his defense. Strickland, id.; Sanders v. State, 738 S.W.2d 856, 867 (Mo. banc 1987). The prejudice prong is satisfied when there is a reasonable probability that, but for counsel's ineffectiveness, the result would have been different. Strickland, 466 U.S. 668, 687, 104 S.Ct at 2068. A reasonable probability is "...the minimum standard of undermining confidence in the outcome of the case." Moore v. State, 827 S.W.2d 213, 215 (Mo. banc 1992). Appellant maintains he has met the standard and is entitled to a new trial because of his counsel's failure to obtain a laboratory analysis of Brianna Koller's DNA sample.

At appellant's trial, A.M. testified that during the assault appellant ejaculated on the pants she was wearing (Tr. 95-96). She put the pants in her closet, and did not wear them again or wash them before turning them over to the police (Tr. 116). She and Martina McCurdy brought them in to the Sheriff's

Department (Tr. 195-196). A.M. told the police that she wore the pants inside-out to play hide and seek because they had white markings on the outside (Tr. 196).

DNA testing of a stain located on the outside rear of the pants, about three to four inches above the crotch revealed that at least two people contributed (Tr. 213-214, 228, 235-236, 239). The stain was positive for semen (Tr. 210-211). The DNA of the major contributor was consistent with A.M.'s DNA (Tr. 229). There were some, but not all, markers of the minor contributor (Tr. 233-234). Those markers were consistent with appellant, but not all of his markers were present (Tr. 239). A sample of Brianna Koller's DNA was collected, but was never opened for testing by the lab (Tr. 198, 200, 226).

Appellant's counsel did not have Koller's DNA tested, nor did he bring it up at trial. The failure of defense counsel to pursue a single important item of evidence demonstrates ineffective assistance and prejudice sufficient to warrant a new trial. State v. Wells, 804 S.W.2d 746, 748 (Mo. banc 1991).

An analysis of Brianna Koller's DNA sample, would have shown Koller's DNA on the pants A.M. allegedly wore during the sexual assault, which would support the argument that the pants actually belonged to Koller, who wore them after having sexual intercourse with appellant, thereby providing an explanation for appellant's DNA on the pants, the only physical evidence adduced by the state. Obtaining an analysis of Koller's DNA sample had tremendous potential positives for appellant with no apparent negative possibilities. Such an analysis would have provided appellant with a defense to the charges. If appellant's trial counsel had

obtained a laboratory analysis of Brianna Koller's DNA sample, a reasonable probability exists that the result of appellant's trial would have been different.

Admittedly, the decision of whether to pursue and present particular evidence may appear initially as trial strategy within the discretion of the trial attorney. An attorney's discretion, however, is not absolute. The mere assertion that conduct of counsel was strategy is not sufficient to preclude post-conviction relief based on a claim of ineffective assistance of counsel. State v. Hamilton, 871 S.W.2d 31, 34 (Mo. App. W.D. 1993).

The choices made by counsel at trial must be reasonable and considered sound trial strategy to defeat a claim of ineffective assistance of counsel. Johnson v. State, 125 S.W.3d 872, 876 (Mo. App. S.D. 2003). Trial counsel's decisions in this case were neither reasonable nor sound.

To not have the sample of Brianna Koller's DNA that had been collected by the police analyzed was patently unreasonable. This is particularly so when the test results likely would have been positive for appellant, with no harm to appellant likely, by providing an explanation for the only physical evidence the state had adduced. The failure of appellant's trial counsel to pursue this important evidence establishes his ineffective assistance and the resulting prejudice to appellant. Wells, supra. The probability that obtaining an analysis of Brianna Koller's DNA sample would have affected the result of appellant's case cannot be ignored and meets the minimum standard of undermining confidence in the outcome. Moore, supra.

Appellant has established that his trial counsel failed to exercise the customary skill and diligence of a reasonably competent attorney and that he was prejudiced by his counsel's ineffectiveness. Had appellant's trial counsel obtained an analysis of Brianna Koller's DNA sample, a reasonable probability exists that the result of appellant's trial would have been different. As such, appellant respectfully requests that this Court reverse the denial of his Rule 29.15 motion and order a new trial.

CONCLUSION

For the foregoing reasons, as set out in appellant's Arguments I and II, appellant respectfully requests that this Court reverse the motion court's denial of post-conviction relief and remand for a new trial.

Respectfully submitted,

_____
Mark A. Grothoff, MOBar #36612
Attorney for Appellant
1000 West Nifong
Building 7, Suite 100
Columbia, Missouri 65203
(573) 882-9855/FAX (573) 882-9468
E-Mail: Mark.Grothoff@mspd.mo.gov

Certificate of Compliance and Service

I, Mark A. Grothoff, hereby certify to the following. The attached brief complies with the limitations contained in Supreme Court Rule 84.06(b). The brief was completed using Microsoft Office Word, 2007, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 7,132 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a Symantec Endpoint Protection program, which was updated in May, 2010. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this 8th day of July, 2011, to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

_____

Mark A. Grothoff