

**IN THE
MISSOURI SUPREME COURT**

LOUIS W. HILL,)	
)	
Appellant,)	
)	
vs.)	No. 91767
)	
STATE OF MISSOURI,)	
)	
Respondent.)	

**APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF IRON COUNTY, MISSOURI
FORTY-SECOND JUDICIAL CIRCUIT, DIVISION II
THE HONORABLE KELLY W. PARKER, JUDGE**

APPELLANT’S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from the denial of a motion brought under Rule 24.035. Appellant, Louis W. Hill, pled guilty in the Circuit Court of Iron County to statutory rape, § 566.032 RSMo 2000.¹ He received a suspended imposition of sentence and, after probation was revoked, was sentenced to twenty years imprisonment. After the Missouri Court of Appeals, Southern District, issued its opinion, this Court granted application for transfer pursuant to Rule 83.04. This Court has jurisdiction of this appeal under Article V, Section 3, Mo. Const. (as amended 1976).

¹All statutory citations are to RSMo 2000 unless otherwise specified. All Rule references are to Missouri Court Rules (2006), unless otherwise indicated.

STATEMENT OF FACTS

Guilty Plea Proceedings

Appellant, Louis W. Hill, was charged with three counts of statutory rape, § 566.032, in the Circuit Court of Wayne County (L.F. 13). After an initial plea of not guilty and change of venue to Iron County, he appeared in court for a change of plea (L.F. 25). The state agreed to enter a nolle prosequi to Counts I and II, and appellant agreed to enter an *Alford* plea² to Count III.

The trial court explained appellant's constitutional rights and ascertained that his plea was not a result of any threats or promises (L.F. 26-29). Appellant also agreed that he had not received any promises about the sentence that he would receive (L.F. 30).

The court asked the state to outline its case against appellant, and the state indicated that the complainant, J.I., who was less than 14 years old, would testify that appellant resided in the home of her foster mother (L.F. 31). Appellant took her into the back yard where a tent was set up and had sexual intercourse with her (L.F. 31). The state further told the court that J.I. was taken for a SAFE examination, and “that evidence of the SAFE exam did in fact indicate that there had been sexual intercourse with this young girl” (L.F. 31).

Appellant told the court that he was satisfied with defense counsel’s representation (L.F. 32). The state recommended that the court suspend

² *North Carolina v. Alford*, 400 U.S. 25 (1979).

imposition of sentence and place appellant on five years probation (L.F. 32). Appellant's probation was later revoked, and he was sentenced to twenty years imprisonment on March 20, 2006 (L.F. 5)

Postconviction Proceedings

Appellant filed a motion to vacate, set aside, or correct judgment or sentence pursuant to Rule 24.035 on May 5, 2008 (L.F. 39-52). Counsel was appointed, and filed a motion to rescind the appointment (L.F. 7) Appellant challenged counsel's motion, claiming that his motion was not out of time because he had previously tendered two *pro se* motions to the motion court (L.F. 53-56). He claimed that his girlfriend had in fact hand-delivered his first *pro se* motion to the circuit court on August 24, 2006, which would make it timely filed under Rule 24.035(b) (L.F. 53-56).

Appointed counsel filed a timely amended motion (L.F. 58-63). This motion alleged that trial counsel rendered ineffective assistance of counsel in failing to object when the state provided false information to the trial court upon which that court relied in accepting the guilty plea (L.F. 59). The false information was that he SAFE examiner found that J.I. had engaged in sexual activity (L.F. 60). In fact, the report indicated "physical findings present but inconclusive regarding abuse at this time" (L.F. 60).

On September 23, 2009, the state filed a motion to dismiss for lack of jurisdiction (L.F. 9). That motion was set for hearing November 17, and that date the state withdrew its motion to dismiss (L.F. 10).

The motion court held an evidentiary hearing, and Kimberly Haley, a family nurse practitioner, testified that she performed a SAFE examination on J.I. (Tr. 7). The determination was not “black and white” because J.I. was an adolescent (Tr. 10). There was a notch on the hymen that could “very likely” have been caused by estrogen (Tr. 9). No other abnormalities were found (Tr. 10).

The examination took place twelve days after the alleged offense, so most likely any bruising or bleeding would have healed (Tr. 10). The majority of findings in these cases are negative (Tr. 10). Haley did not make any finding that sexual activity had occurred (Tr. 12). The findings were inconclusive (Tr. 15).

After the motion court heard all the evidence, it questioned the parties about the timeliness of appellant's motion (Tr. 19). The motion court noted that the state had withdrawn its motion to dismiss and at that time a different judge had ruled that the motion could be filed (Tr. 19). The court asked what happened (Tr. 19).

Appellant's counsel explained that at that time, “when we were here...we were going to have a hearing that day regarding the timeliness issue...and with further discussions with [the prosecutor] he ultimately withdrew that motion [to dismiss]” (Tr. 19). Appellant's counsel further pointed out that “we were here for

the purpose of the hearing on that issue before Your Honor and I had four or five witnesses here ready to testify which today I am not prepared to do” (Tr. 20).

The state did not contradict any of counsel’s assertions on this point (Tr. 20). It replied that whether appellant had presented a timely motion was irrelevant: “I don’t think it’s something that requires evidence” (Tr. 20).

Appellant's counsel then informed the court that “[i]f that be the case I believe we’ve been sandbagged when we were prepared to provide the court with evidence that I believe would show it was timely filed and Mr. Ramshur withdrew his motion to dismiss” (Tr. 20).

The motion court addressed the merits of appellant's motion, finding that the state’s mistaken claims at the plea hearing were “surplus” and unnecessary to establish a basis for the plea (L.F. 64-65). There was an adequate basis apart from the state’s misrepresentation (L.F. 64-65). The motion court accordingly denied relief on the merits (L.F. 65).

Appellant appealed the motion court’s order, and the Missouri Court of Appeals, Southern District, vacated the motion court’s judgment and remanded with directions to dismiss appellant's motion as untimely. *Hill v. State*, No. SD 30530 (Mo. App., S.D. April 15, 2011). This Court sustained appellant's application for transfer.

POINTS RELIED ON

I.

This Court has jurisdiction over appellant's Rule 24.035 motion and authority to hear and decide it on the merits, because a challenge to timeliness of a postconviction motion is a non-jurisdictional, affirmative defense that is waived if not timely asserted and which, furthermore, was explicitly waived by the state when the state withdrew its previously filed motion to dismiss, so that even if the timeliness was non-waivable, appellant should be afforded a chance to establish that his motion was tendered in a timely manner, which he would have done except for his reliance on the state's action in withdrawing its motion to dismiss.

***McCracken v. Wal-Mart Stores East, LP*, 298 S.W.3d 473**

(Mo. banc 2009);

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

***Howard v. State*, 289 S.W.3d 651 (Mo. App., E.D. 2009);**

Rule 24.035;

Rule 55.08;

Rule 55.27; and

Rule 55.09.

II

The motion court clearly erred in denying appellant's rule 24.035 motion because he established that he was found guilty as a result of ineffective assistance of counsel, in that he showed that his plea attorney did not act as a reasonably competent attorney, in derogation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, when counsel failed to object to the state's misstatements that the physical evidence corroborated J.I.'s claims on a crucial matter, and that he was prejudiced by counsel's inaction in that the trial court relied upon the state's misrepresentation, and thus had an incorrect factual basis for conviction, resulting in a denial of due process.

State v. Taylor, 929 S.W.2d 209 (Mo. banc 1996);

Sales v. State, 700 S.W.2d 131 (Mo. App. S.D. 1985);

United States Constitution, Amendments 6;

United States Constitution, Amendments 14;

Missouri Constitution, Article I, § 10;

Missouri Constitution, Article I, § 18(a); and

Rule 24.02(e).

ARGUMENT

I.

This Court has jurisdiction over appellant's Rule 24.035 motion and authority to hear and decide it on the merits, because a challenge to timeliness of a postconviction motion is a non-jurisdictional, affirmative defense that is waived if not timely asserted and which, furthermore, was explicitly waived by the state when the state withdrew its previously filed motion to dismiss; so that even if the timeliness was non-waivable, appellant should be afforded a chance to establish that his motion was tendered in a timely manner, which he would have done except for his reliance on the state's action in withdrawing its motion to dismiss.

While it is true that a reviewing court must ascertain its jurisdiction and authority to hear an appeal, it does not automatically follow that an untimely postconviction action should be ordered dismissed on appeal. That is especially true where, as here, the timeliness issue was raised and then waived by the state. This Court has authority to hear this appeal.

Standard of Review; Jurisdiction

The Court's authority and jurisdiction to hear a case is a question of law and is subject to *de novo* review. ***McCracken v. Wal-Mart Stores East, LP***, 298 S.W.3d 473, 476 (Mo. banc 2009). The question of jurisdiction has two aspects.

“Personal jurisdiction” refers to the power of the court to require a defendant to respond to a legal proceeding; “subject matter jurisdiction” vests the court with authority to render a judgment in certain cases. *Webb ex rel. J.C.W. v.*

Wyciskalla, 275 S.W.3d 249 (Mo. banc 2009). Here, the circuit court possessed jurisdiction on both counts. *Moore v. State*, 328 S.W.3d 700, 703 n.2 (Mo. banc 2010).

In *McCracken*, the Court pointed out that subject matter jurisdiction could not be waived. 298 S.W.3d at 477. On the other hand, “non-jurisdictional defenses that might bar relief...are subject to waiver if not raised timely in a responsive pleading, or as otherwise permitted by Missouri’s rules and case law....” *Id.*

Timeliness

Rule 24.035 (b) provides in pertinent part that a postconviction motion shall be filed within 180 days of the date the person is delivered to the custody of the department of corrections. The rule goes on to provide that failure to file a motion within that time “shall constitute a complete waiver of any right to proceed under this Rule...”

There are recognized exceptions, generally consisting of mitigating circumstances excusing an untimely filing. One circumstance is the mailing to a wrong address or the wrong court. *Nicholson v. State*, 151 S.W.3d 369 (Mo. banc 2004); *Spells v. State*, 213 S.W.3d 700 (Mo. App., W.D. 2007). Other

circumstances relate to inaction by appointed counsel, *McFadden v. State*, 256 S.W.3d 103 (Mo. banc 2008) and errors occurring in the institution's mailroom, *Howard v. State*, 289 S.W.3d 651 (Mo. App., E.D. 2009). Where such situations appear, an untimely filing is excused.

Waiver

Rule 24.035(a) provides that the motions are governed by the rules of civil procedure "insofar as applicable." Pursuant to Rule 24.035(g), "[a]ny response to the motion by the prosecutor shall be filed within thirty days after the date an amended motion is required to be filed."

Rule 55.08 provides that in responding to a prior pleading, a party "shall set forth all applicable affirmative defenses and avoidances," which includes waiver by untimely filing. Specific averments in a pleading to which a responsive pleading is required are deemed admitted if not specifically denied. Rule 55.09.

On the other hand, if a responsive pleading is not required, Rule 55.09 provides that the allegations in the motion are taken as denied. Significantly, Rule 55.09 does not provide that in the same way, possible defenses are deemed to have been specifically raised.

Instead, Rule 55.27(a) reiterates that every defense to a claim must be asserted in a responsive pleading if one is required. That rule provides that if the adverse party is not required to serve a responsive pleading, "the adverse party may assert at the trial any defense in law or fact to the claim for relief."

Under Rule 24.035(g) the state is permitted a responsive pleading, and so may challenge timeliness in that way. Under Rule 55.27(a) the state is permitted to challenge the motion's timeliness at any evidentiary hearing that the motion court might hold. If the matter of timeliness is "not raised timely in a responsive pleading or as otherwise permitted by Missouri's rules...", it is waived.

McCracken, 298 S.W.3d at 477.

The Western District Court of Appeals relied upon these rules and the Court's holding in **McCracken**, holding that the state waives a claim that a postconviction motion was not timely filed if it fails to raise a challenge in the motion court. **Snyder v. State**, 334 S.W.3d 735 (Mo. App., W.D. 2011); **Gerlt v. State**, 339 S.W.3d 578 (Mo. App., W.D. 2011).

On the other hand, the court in **Swofford v. State**, 323 S.W.3d 60 (Mo. App., E.D. 2010), has held that the rules of civil procedure "were established with the purpose of facilitating the business of the court, and to permit counsel to obviate the effect thereof by either a tacit or expressed agreement would leave the court powerless." [citation omitted]

The court in **Snyder** rejected this rationale, pointing out that **McCracken** explicitly held that procedural matters "required by statute *or rule* or an affirmative defense of the sort listed in Rule 55.08" are generally waived if not raised timely. 334 S.W.3d at 738-39 [citing **McCracken**, 298 S.W.3d at 476]. Compliance with the rules can, in fact, be waived by the opposing party's inaction.

Swofford's holding relied upon cases involving collusion between parties to get certain claims or motions heard in a certain way; the rules involved were for the benefit of the courts in making their rulings. The time limits of Rule 24.035, by contrast, were not enacted "for the purpose of facilitating the business of the court," as are rules outlining the requirements of summary judgment. The purpose of the time limits is to "serve the legitimate end of avoiding delay in the processing of prisoners['] claims and prevent the litigation of stale claims." *Day v. State*, 770 S.W.2d 692 (Mo. banc 1989).

This purpose is similar to the interest served by the civil statute of limitations, which were enacted because "[a]llowing a plaintiff unlimited time to bring an action increases the potential for spurious claims and decreases the court's or jury's ability to determine the truth." *H.R.B. v. Rigali*, 18 S.W.3d 440, 446 (Mo. App., E.D. 2000). It is the state, not the court, whose interests are harmed by the filing of stale or late claims and whose interests are thereby vindicated by the time limits. Therefore, as with the civil statute of limitations, the defense of untimeliness can be waived if the state fails to raise them as required by the rules.

The Southern District has embraced the rationale of *Swofford* and rejected *Snyder. Dorris v. State*, No. SD 30491 (Mo. App., S.D. 2011); *Lopez-McCurdy v. State*, No. SD 30586 (Mo. App., S.D. 2011); along with the instant case. A concurring opinion below reasoned that "PCR actions are by motion, not by

petition; thus, no responsive pleading is required and Rule 55 is not generally applicable.” Concurring opinion at 2.

Rule 24.035 permits but does not require a responsive pleading. Rule 55.27 specifically refers to actions “in which the adverse party is not required to serve a responsive pleading...” Therefore, by its terms Rule 55.09 and 55.27 apply. The rules of civil procedure are to be followed insofar as they are applicable, and Rule 55.27 is applicable.

The state has two options when faced with an untimely postconviction motion. First it may file a response within 30 days of the filing of the amended motion, pursuant to Rule 24.035(g). This would appear to be optional, and nothing is waived if such a motion is not filed.

The second option is to assert this defense at the hearing pursuant to Rule 55.27. This too is optional, but taken in the context of being allowable when a pleading is not required or submitted, if not made at the hearing, would consequently constitute a waiver, inasmuch as these are the only two provisions in the rule for raising the issue. The Court in **McCracken** made it clear that “non-jurisdictional defenses that might bar relief...are subject to waiver if not raised timely in a responsive pleading, *or as otherwise permitted by Missouri’s rules* and case law...” 298 S.W.3d at 477 (emphasis added).

The underlying reason for this is that this is a matter of defense which is properly litigated before the motion court in the first instance. The deadlines

imposed by Rule 24.035 are absolute, but extenuating circumstances exist. “The reality is that pro se prisoners “cannot take the steps other litigants can take ... to ensure that the court clerk receives and stamps their notices of appeal before the ... deadline.” *Howard*, 289 S.W.3d at 654. Their unique situation necessitates that the motion court consider all relevant facts and resolve the issue of timeliness.

A timeliness defense that has neither been pleaded nor tried before the motion court is not a proper subject for appellate review. The motion court had jurisdiction to hear this case and address the merits.

Express Waiver

In this case, the state filed a motion to dismiss appellant's motion (L.F. 9). Appellant claimed that the motion had been properly tendered to the motion court, and there were witnesses (L.F. 53-56, Tr. 19-20). The state withdrew the motion, thus obviating the need and opportunity for appellant to produce evidence (Tr. 19-20).

A party waives a claim by asserting and abandoning it in the lower court. As noted in *Royster v. Royster*, 420 S.W.2d 1, 3 (Mo. App. K.C.D. 1967), “[w]here a party generally appears, defends on the merits, and explicitly withdraws his objections or challenges to the court's jurisdiction, it has always been the law of Missouri that a Circuit Court may render a general personal judgment against such party.”

That occurred in this case. The state moved to dismiss. Appellant was prepared to argue that extenuating circumstances existed to justify addressing his motion on the merits. The state backed down, thereby inducing appellant to forego his evidence and arguments. The motion court rightly proceeded on the merits after appellant relied upon the state's express abandonment of its arguments and waiver of its claims.

Just as with estoppel, appellant relied upon the state's action (and in the process lost an opportunity to prove the timeliness of his motion) and is how without a remedy for this if the Court summarily dismisses his motion as untimely. *See, Birkenmeier v. Keller Biomedical, LLC*, 312 S.W.3d 380, 388-89 (Mo. App., E.D. 2010). Appellant is entitled to have his motion heard. At a minimum, he is entitled to a remand for an opportunity to substantiate his claim that his motion was originally tendered to the court within the time set out in Rule 24.035.

II.

The motion court clearly erred in denying appellant's rule 24.035 motion because he established that he was found guilty as a result of ineffective assistance of counsel, in that he showed that his plea attorney did not act as a reasonably competent attorney, in derogation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, when counsel failed to object to the state's misstatements that the physical evidence corroborated J.I.'s claims on a crucial matter, and that he was prejudiced by counsel's inaction in that the trial court relied upon the state's misrepresentation, and thus had an incorrect factual basis for conviction, resulting in a denial of due process.

The motion court clearly erred in denying appellant's motion for relief. Appellant pleaded and proved that his counsel rendered ineffective assistance of counsel in failing to object to the state's misrepresentation of the facts.

Standard of Review

The issue before this Court is whether the motion court's judgment denying relief was clearly erroneous. Rule 24.035(k); *Day v. State*, 770 S.W.2d 692, 695 (Mo. banc), *cert. denied*, 493 U.S. 866 (1989). The findings and conclusions of the motion court are deemed to be clearly erroneous, if this Court is left with a

definite and firm impression that a mistake was made. *State v. White*, 798 S.W.2d 694, 697 (Mo. banc 1990).

Ineffective assistance of counsel

The Sixth Amendment's guarantee that an accused shall have the right to assistance of counsel applies to state prosecutions via the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). This guarantee would be meaningless if it did not also require such assistance of counsel to be effective. *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980); *Sanders v. State*, 738 S.W.2d 856 (Mo. banc 1987). "[T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *United States v. Cronin*, 466 U.S. 648, 658, 104 S.Ct. 2039, 2046, 80 L.Ed.2d 657 (1984).

To establish a violation of this right to effective assistance of counsel, appellant must satisfy a two-prong test. First, he must show that defense counsel "failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances." *Seales v. State*, 580 S.W.2d 733, 736 (Mo. banc 1979). Second, he must demonstrate that he was prejudiced by the ineffective assistance of counsel. *Id.* Prejudice exists whenever confidence in the outcome of the case is undermined by counsel's deficient performance. *Moore v. State*, 827 S.W.2d 213, 215 (Mo. banc 1992). Appellant

must prove his allegations by a preponderance of the evidence. *Seales*, 580 S.W.2d at 735.

Once a criminal defendant pleads guilty, effective assistance of counsel becomes irrelevant except to the extent that such effectiveness bore on the issue of the voluntary nature and understanding of the plea. *State v. Rahberger*, 747 S.W.2d 724, 725 (Mo. App., W.D. 1988). All errors are waived by a guilty plea except those which disclose that the plea was entered into unknowingly and involuntarily. *Walker v. State*, 698 S.W.2d 871, 874 (Mo. App., W.D. 1985).

Factual Basis for Plea

Rule 24.02(e) requires a factual basis for a plea of guilty before the court can enter judgment. *State v. Taylor*, 929 S.W.2d 209, 217 (Mo. banc 1996). Strict compliance with Rule 24.02(e) is not constitutionally mandated. *Sales v. State*, 700 S.W.2d 131, 133 (Mo. App. S.D. 1985). Nevertheless, the purpose of Rule 24.02(e) is to aid in the determination that a defendant's plea is knowing and voluntary, which is constitutionally required. *Id.*

Counsel failed to assure a proper basis for the plea

The record shows that counsel did not ensure that the state properly established a correct basis in fact in front of the plea court. The state claimed that the SAFE examination corroborated the complainant's allegations (L.F. 31); appellant established that this was untrue (Tr. 10). Counsel in the course of effective representation was required to assure that the state's representations were proper and correct. The result of the state's violation of Rule 24.02(e) was that the

state misled the court and appellant about the strength of its case against him, casting into serious doubt the knowing and voluntary nature of his plea.

The motion court found that the statements regarding the SAFE exam were “surplus” and “[n]o error is created by the surplusage,” (L.F. 64), citing *Daniels v. State*, 70 S.W.3d 457 (Mo. App., W.D. 2002). *Daniels* stands for the proposition that the method of commission of a crime is a detail of the offense and need not be established to support a guilty plea. 70 S.W.3d at 463. The case does not stand for the proposition that a trial court may rely upon false information in accepting a guilty plea.

As appellant noted in his amended motion, counsel’s dereliction prejudiced him, because the trial court relied upon false information (L.F. 60). Appellant was convicted by a court that relied upon false information. The motion court clearly erred, and the order denying relief should be reversed.

CONCLUSION

For the foregoing reasons, appellant requests that the Court vacate appellant's conviction, and remand the cause for trial. In the alternative, appellant requests this court to remand for a determination as to whether his motion should be deemed timely filed.

Respectfully submitted,

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Certificate of Compliance

I, Rosalynn Koch, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, in 13 point Times New Roman font, and includes the information required by Rule 55.03. According to the word-count function of Microsoft Word, excluding the cover page, table of contents, table of authorities, the signature block, this certificate of compliance and service, and the appendix, the brief contains 4,531 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disks filed with this brief and served on opposing counsel contain a complete copy of this brief, and have been scanned for viruses using the Symantec Endpoint protection program, which was updated in August, 2011. According to that program, these disks 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 2nd day of August, 2011, to Shaun Mackelprang, Assistant Attorney General, P.O. Box 899, Missouri 65102.

Rosalynn Koch

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