

**IN THE
SUPREME COURT OF MISSOURI**

RICHARD SCOTT MERCER,)	
)	
Appellant,)	
)	
v.)	No. SC 95451
)	
STATE OF MISSOURI,)	
)	
Respondent.)	

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

APPELLANT'S SUBSTITUTE REPLY

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ARGUMENT

A. THIS COURT HAS JURISDICTION

Respondent's brief does not dispute Appellant's assertion that this Court has jurisdiction over the appeal. *See* Appellant's Substitute Brief at 14-16. Nor does it discuss the disagreement between the four dissenting opinions by the Southern District below as to whether or not there was appellate jurisdiction and as to whether the courts of appeals must examine in every case, *sua sponte*, whether or not there is a "final judgment" in light of *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 253 (Mo. banc 2009). *See* Appellant's Substitute Brief at 6-13. Appellant maintains that, in light of *J.C.W.*, as it is not jurisdictional whether or not there is a final judgment, it is inappropriate for an appellate court to raise and examine that issue, *sua sponte*, in every case. *See* Appellant's Substitute Brief at 14-16.

B. MR. MERCER HAS A STATUTORY RIGHT TO APPEAL UNDER § 547.037.6

Respondent's Radical New Statutory Construction

Respondent argues that prisoners who claim DNA testing will prove their innocence cannot appeal unless DNA testing demonstrates the prisoner's innocence. (*See* Resp. at 11). Respondent argues that prisoners have no statutory right to appeal from the denial of a motion for DNA testing. *Id.* Respondent argues that the General Assembly "clearly limited" the right of appeal to cases where DNA testing is performed and demonstrates a prisoner's innocence. (Resp. at 14).

Were this Court to adopt Respondent's novel construction of §§ 547.035 and 547.037 – which were enacted by the legislature fifteen years ago – then the dozens

of appeals from denials of motions for DNA testing heard by the Missouri Court of Appeals and by this Court have been improperly decided.¹ Yet none of these appellate decisions drew the ire of the General Assembly, which has yet to amend either statute. *See* 2001 Mo. Legis. Serv. S.B. 267.²

The crux of Respondent's new argument compares:

¹ By Respondent's statutory construction, this Court and the three districts of the Court of Appeals have each improperly heard numerous appeals from denials of motions for DNA testing. *See, e.g., Weeks v. State*, 140 S.W.3d 39 (Mo. banc 2004); *State v. Ruff*, 256 S.W.3d 55 (Mo. banc 2008); *Belcher v. State*, 299 S.W.3d 94 (Mo. banc 2009); *Clayton v. State*, 164 S.W.3d 111 (Mo. App. E.D. 2005); *State v. Williams*, 466 S.W.3d 31 (Mo. App. W.D. 2015); and, notably, the majority opinion in this case below *Mercer v. State*, ___ S.W.3d ___, WL 9481402 at *2 (Mo. App. S.D. 2015)(specifically citing to § 547.037.6 as providing the statutory right to appeal in this case).

² The long-continued legislative acquiescence in the construction placed upon the statute by the Missouri Supreme Court and every district of the Missouri Court of Appeals should not be ignored in considering Respondent's position that Mr. Mercer has no statutory right to appeal from the denial of his motion for DNA testing under § 547.035. *See Bailey v. Canadian Shield General Ins. Co.*, 380 S.W.2d 378, 381 (Mo. 1964).

§ 547.035.8: The court shall issue findings of fact and conclusions of law whether or not a hearing is held.

with:

§ 547.037.6 The court shall issue new findings of fact and conclusions of law whether or not a hearing is held.

An appeal may be taken from the court’s findings and conclusions as in other civil cases. (emphasis added).

The new question Respondent now raises is whether the “findings and conclusions” from which an appeal may be taken under the last sentence of § 547.037 includes the “findings and conclusions” issued by a sentencing court pursuant to § 547.035.8 when the sentencing court disposes of the case by denying the motion for DNA testing. Respondent argues that § 547.037.6 only gives a statutory right to appeal after the point in the proceedings described in §547.037.1, when “testing ordered pursuant to section 547.035 demonstrates a person’s innocence of the crime for which the person is in custody” and the prisoner seeks release. (Resp. at 11-12). Respondent argues that prisoners have no statutory right to appeal from a denial of a motion for DNA testing filed pursuant to § 547.035. *Id.* This novel interpretation of the applicability of § 547.037.6 fails to give effect to legislative intent as reflected in the plain language of §§ 547.035 and 547.037.

Interpreting the phrase “findings and conclusions” in § 547.037.6

“This Court's primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute at issue.” *Krispy Kreme Doughnut Corp. v. Dir. of Revenue*, __ S.W.3d __, WL 2343200 at *6 (Mo. banc 2016). Statutory “terms should be viewed in the light of reality and not be stripped of common sense or construed to establish arbitrary loopholes.” *Id.* at *5 (internal quotations omitted). Statutory provisions are not considered in isolation; instead, “the provisions of a legislative act are construed together and read in harmony with the entire act.” *Gash v. Lafayette Cty.*, 245 S.W.3d 229, 232 (Mo. banc 2008)(internal quotes omitted); *Harpagon MO, LLC v. Bosch*, 370 S.W.3d 579, 584 (Mo. banc 2012)(To determine the meaning of a statutory provision, it must be read in context and considered *in pari materia* to related statutory sections “in order to arrive at the true meaning and scope of words.”). “This Court presumes that the legislature did not insert idle verbiage or superfluous language in a statute.” *Alberici Constructors, Inc. v. Dir. of Revenue*, 452 S.W.3d 632, 638 (Mo. banc 2015). This Court also “presumes that the legislature did not intend an absurd result.” *Weeks*, 140 S.W.3d at 47.

The intent of the legislature in enacting §§ 547.035 and 547.037 was to create a process by which DNA testing could be used to identify and release innocent men and women who are being wrongfully imprisoned in Missouri. *See* §§ 547.035-547.037. Both §§ 547.035 and 547.037 describe procedures to be conducted by the sentencing court. After concluding the description of sentencing court procedures,

the legislature provided that “[a]n appeal may be taken from the court’s findings and conclusions as in other civil cases.”³

It is evident from both the plain text and the structure of the statute that the legislature intended for there to be appellate review of denials of motions for DNA testing filed by inmates claiming innocence pursuant to § 547.035. Several of the provisions in § 547.035 contemplate appellate review and would be idle verbiage if there was not appellate review. For example, if the sentencing court orders the prosecutor to show cause, then the clerk must notify the court reporter to prepare a transcript of the trial or guilty plea and sentencing hearing. § 547.035.5. A transcript is an essential component of any record on appeal. *See* Rule 81.14. Further, if there is a hearing on the motion, it must be on the record. § 547.035.6. Requiring the hearing to be on the record contemplates a higher court reviewing the record. Finally, the sentencing court is required to issue findings of fact and conclusions of law whether or not a hearing is held. § 547.035.8. The findings of fact and conclusions of law are what an appellate court reviews for clear error. If there was no appellate court review, there would be no need for the sentencing court to make findings and conclusions. Respondent’s construction does not view the terms in

³ If the legislature intended to limit the “findings and conclusions” that could be appealed to proceedings after the point that DNA testing demonstrates a prisoner’s release (as described in § 547.037.1), it could have simply added the words “under this section” to the last sentence of § 547.037.6. But it did not.

light of the reality that the legislature intended for there to be appellate review of the sentencing court's disposition of a matter initiated pursuant to § 547.035 by an inmate claiming DNA would prove his innocence.

Respondent's construction strips the term "findings and conclusions" of common sense and would yield absurd results. Under Respondent's construction, the State would have a right to appeal if a sentencing court orders the release of an inmate for whom DNA testing demonstrates to be innocent, but an innocent inmate has no right to appeal if a sentencing court refuses to order DNA testing to begin with. This runs afoul of the legislature's purpose in enacting §§ 547.035 and 547.037 in order to put procedures in place to identify and release innocent inmates.⁴

⁴ As an inmate would have no reason to appeal if DNA testing were ordered by a sentencing court, the only purpose that repeating the last sentence of § 547.037 - "An appeal may be taken from the court's findings and conclusions as in other civil cases" - as the last sentence of § 547.035, would be to create an interlocutory appeal for the State when a sentencing court orders DNA testing over the State's objection. The legislature, by omission, evidenced its intent not to give the State a statutory right to two appeals in DNA test proceedings under §§ 547.035-547.037. See *In re Salcedo*, 34 S.W.3d 862, 868 (Mo. App. 2001)(State had no right to appeal from trial court determination that there was no probable cause to believe an individual was a sexually violent predator).

C. SECTION 512.200 IS NOT APPLICABLE

Respondent argues, contrary to the rule of statutory construction that exceptions should be construed narrowly, that § 512.020 does not provide Mr. Mercer with a statutory right to appeal. (Resp. at 12-14). As § 547.035.6 provides Mr. Mercer with a statutory right to appeal, it is unnecessary to address whether this case would fall under § 512.020's exclusion of appeals which are "clearly limited in special statutory proceedings."

D. RULE 74.01 IS NOT APPLICABLE

Section 547.035.1 states that "[t]he procedure to be followed for such motions is governed by the rules of civil procedure insofar as applicable."⁵ Rule 74.01 would impose denomination and signature requirements to "any order from which an appeal lies." Rule 74.01; Resp. at 15. As discussed in Appellant's Substitute Brief, the denomination and signature requirements of Rule 74.01 do not fall under the rules of civil procedure which govern "insofar as applicable" because the denomination and signature requirements conflict with the purposes of §§ 547.035 and 547.037. *See* Appellant's Substitute Brief at 19-20.

⁵ Both the provision in § 547.035.1 about the applicability of the rules of civil procedure and the provision about appeals in § 547.037.6 are applicable to both §§ 547.035 and 547.037.

E. RULE 78.07(C) IS INAPPLICABLE IN THIS PARTICULAR CASE

Respondent also argues that Mr. Mercer has not preserved the sentencing court's failure to make statutorily-required findings for appeal because he did not file a **motion to amend the judgment** under Rule 78.07(c). Resp. at 19.

A motion to amend the judgment must be filed within 30 days of the judgment. Rule 78.04. And, with one limited and inapplicable exception, a trial court cannot amend its judgment more than 30 days after it was entered. Rule 75.01.

Here, the sentencing court denied Mr. Mercer's motion on April 21, 2014. (RLF 14). It was not until 179 days later, on October 17, 2014, that the sentencing court mailed Mr. Mercer a copy of the docket sheet, informing him that his motion was denied. (RLF 14-15). The Southern District found that "the delay in filing a notice of appeal was not due to Movant's culpable negligence and that there is good cause for Movant's request." (SApp. 2). Even if Rule 78.07(c) should apply to denials of motions for DNA testing, that Rule should not be applied here, because the sentencing court lacked the authority to hear a motion to amend the judgment in October of 2014, when Mr. Mercer was finally notified that the sentencing court had denied his motion on April 21, 2014. *See* Rule 75.01.

F. IT IS NOT THE ROLE OF THE APPELLATE COURT TO ASCERTAIN NON-EXISTENT FINDINGS AND CONCLUSIONS BY IMPLICATION

Respondent argues that the sentencing court "implicitly concluded that the motion, files, and records conclusively showed that Mercer was not entitled to relief." (Resp. at 17). But findings and conclusions cannot "be supplied by

implication from the trial court's ruling." *Belcher v. State*, 299 S.W.3d 294, 296 (Mo. banc 2009). The plain language of §§ 547.035 and 547.037 expresses the legislature's intent for the *sentencing* court – not the appellate court – to make the findings of fact and conclusions of law, and for the appellate court to review those findings and conclusions on appeal. As the sentencing court failed to make these findings and conclusions, there is nothing for this court to review on appeal and this case should be remanded.

**G. MR. MERCER DID ASSERT THAT DNA TESTING WAS NOT MADE
REASONABLY AVAILABLE TO HIM**

Respondent argues that this Court should deny Mr. Mercer's appeal because his motion did not allege facts in his motion that are required pursuant to § 547.035.2(3). However, Mr. Mercer did assert that DNA testing was not made reasonably available to him despite him requesting that DNA testing be performed. RLF 26. And "[t]he adequacy of [Mercer's] motion must be considered in light of the purpose of section 547.035: to provide inmates an opportunity to have potentially exculpatory DNA tests performed on evidence." *State v. Ruff*, 256 S.W.3d 55, 58 (Mo. banc 2008). Without the assistance of counsel, "shortcomings" in Mr. Mercer's pro se motion for DNA testing may be forgiven in light of this purpose. See *Id.*; *Fields v. State*, 425 S.W.3d 215, 217 n. 2 (Mo. App. 2014).

CONCLUSION

Despite the litany of alternative arguments that Respondent asserts, this is a simple case. This case should be reversed and remanded because the sentencing court did not issue findings of fact and conclusions of law as required by statute when it denied Mr. Mercer's motion for DNA testing.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE
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I, Jennifer K. Bukowsky, 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, Office 2013, 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 2,609 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

On this 5th day of July, 2016, an electronic copy of Appellant's Substitute Reply Brief were placed for delivery through the Missouri e-Filing System to James Layton, Solicitor General, at James.Layton@ago.mo.gov and Karen L. Kramer, Assistant Attorney General, at Karen.Kramer@ago.mo.gov.

/s/ Jennifer K. Bukowsky