



**In the
Missouri Court of Appeals
Western District**

JOHN KIRBY,
Appellant,

**WD85425
OPINION FILED:
July 25, 2023**

v.

STATE OF MISSOURI,
Respondent.

Appeal from the Circuit Court of Saline County, Missouri
The Honorable Richard Brent Elliott, Judge

Before Division Four: Gary D. Witt, Chief Judge, Presiding, Lisa White Hardwick,
Judge, W. Douglas Thomson, Judge

John Kirby ("Kirby") appeals the judgment of the Circuit Court of Saline County, Missouri ("motion court") dismissing his amended motion for post-conviction relief pursuant to Rule 24.035, without an evidentiary hearing. The amended motion was dismissed pursuant to a local rule and the judgment did not include findings of fact and conclusions of law as Rule 24.035(j) requires. However, Kirby did not file a motion to

amend the judgment pursuant to Rule 78.07(c) asking the court to make the required findings. Accordingly, we affirm the judgment of the motion court.

Factual and Procedural Background

The record on appeal in this case only includes filings from the post-conviction case, but, according to the parties' briefs, Kirby pled guilty to several charges as part of an open plea in 2019. Kirby was unhappy with his sentence and with his counsel's performance, both at the plea hearing and at sentencing. Kirby filed a timely pro se motion for post-conviction relief pursuant to Missouri Supreme Court Rule 24.035 on August 13, 2020. Counsel was appointed to assist Kirby with his motion and filed a timely amended motion on April 7, 2021. On April 14, 2022, the motion court set the matter for the dismissal docket to be heard on May 4, 2022. Motion Counsel requested an evidentiary hearing, but on May 4, 2022, the motion court dismissed the matter pursuant to local rule 8.2. The motion court did not issue findings of fact and conclusions of law, but Kirby did not file a motion to amend the judgment requesting the required findings and conclusions pursuant to Rule 78.07(c). This appeal follows.

Analysis

Kirby's motion and amended motion were both filed pursuant to Missouri Supreme Court Rule 24.035. Rule 24.035(j) states, in part:

Findings and Conclusions—Judgment. Whether or not a hearing is held, the court shall issue findings of fact and conclusions of law on all issues presented, including the timeliness of the pro se motion, the timeliness of the amended motion, and, when applicable, whether movant was abandoned by postconviction counsel.

The motion court dismissed Kirby's post-conviction case pursuant to local court rule 8.2 that allows for the dismissal of stale cases. "The Missouri Constitution authorizes circuit courts to adopt local rules, so long as they are consistent with the rules of the Missouri Supreme Court. Mo. Const. art. V, § 15.1." *Perry v. Aversman*, 168 S.W.3d 541, 544 (Mo. App. W.D. 2005). Accordingly, the motion court was arguably within its authority to dismiss the matter in compliance with the local rule, so long as it also complied with all applicable Missouri Supreme Court Rules, including Rule 24.035(j). It did not.

Rule 78.07(c), however, provides that all "allegations of error relating to the form or language of the judgment, including the failure to make . . . required findings, must be raised in a motion to amend the judgment to be preserved for appellate review." Rule 24.035(j) expressly states that "Rule 78.07(c) shall apply to these proceedings." *Johnson v. State*, 388 S.W.3d 159, 168 (Mo. banc 2012). The record on appeal does not reflect that Kirby filed a motion to amend the judgment requesting the required findings and conclusions. (L.F. 1). Accordingly, his points on appeal are not preserved for appellate review.

Conclusion

For the above-stated reason we affirm the judgment of the motion court.



Gary D. Witt, Judge

All concur