



# In the Missouri Court of Appeals Eastern District

## DIVISION FOUR

ANTHONY C. MOORE,	)	No. ED93330
	)	
Appellant,	)	Appeal from the Circuit Court
	)	of the City of St. Louis
v.	)	
	)	
STATE OF MISSOURI,	)	Honorable Bryan L. Hettenbach
	)	
Respondent.	)	Filed: April 6, 2010

### Introduction

Anthony C. Moore (Movant) appeals from the motion court's dismissal of his Rule 29.15<sup>1</sup> motion for post-conviction relief based on its untimely filing. This Court affirmed Movant's convictions, following a bench trial, of two counts of the class A felony of murder in the first degree, in violation of Section 565.020, RSMo 2000,<sup>2</sup> in Movant's direct appeal. State v. Moore, 264 S.W.3d 657 (Mo. App. E.D. 2008). Finding no clear error, we affirm.

### Background

On April 26, 2007, the trial court found Movant guilty of two counts of the class A felony of murder in the first degree for suffocating his two children, ages nine months and twenty-four months. Movant was sentenced to two concurrent terms of life imprisonment without the possibility of probation or parole.

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<sup>1</sup> All subsequent rule references are to Mo. R. Crim. Pro. 2009, unless otherwise indicated.

<sup>2</sup> All subsequent statutory references are to RSMo 2000, unless otherwise indicated.

When Movant appealed his convictions, this Court affirmed the trial court's judgment in State v. Moore, 264 S.W.3d at 657. This Court's mandate was issued on October 16, 2008.

On May 22, 2009, Movant filed his pro se Rule 29.15 motion in the Circuit Court for the City of St. Louis. Attached to his pro se motion was a letter from Movant's appellate counsel to Movant, dated March 12, 2009, in which appellate counsel informed Movant that she had mistakenly failed to timely advise Movant of the issuance of the mandate, causing Movant to miss the deadline to timely file for post-conviction relief, and recommending that, should Movant wish to file for post-conviction relief, he do so "as soon as possible."

On June 10, 2009, the motion court dismissed the Rule 29.15 motion as untimely. On June 18, 2009, Movant filed a Rule 75.01 motion for reconsideration of judgment and motion to reinstate his Rule 29.15 motion, which the motion court denied on July 8, 2009. In its order, the motion court found that the pro se motion was not prepared and mailed by Movant until four months after the ninety-day time limit had expired, and more than sixty days after Movant was advised by counsel of the issuance of the mandate in October 2008. The motion court distinguished Movant's case from those cases cited by Movant, in which the movants had in fact prepared and mailed their Rule 29.15 motions to the court within the time frame provided by the rule, only to later discover that their motions were untimely filed with the court through no fault of their own.

Movant filed his timely notice of appeal on July 20, 2009. This appeal follows.

#### Point on Appeal

In his sole point on appeal, Movant argues that the motion court clearly erred in concluding that it had no jurisdiction to entertain Movant's Rule 29.15 motion, and subsequently dismissing Movant's Rule 29.15 motion based on untimely filing of Movant's pro se Rule 29.15

motion. Relying on the Supreme Court's recent discourse on jurisdiction in J.C.W. ex rel. Webb v. Wyciskalla, 275 S.W.3d 249 (Mo. banc 2009), Movant posits that the motion court erred in concluding that it lacked jurisdiction over his post-conviction motion, and that appellate counsel's failure to inform Movant of the appellate court's issuance of its mandate excused Movant's untimely filing. Movant further alleges that the motion court's error deprived Movant of his rights to due process of law and to access to the courts, in violation of the First, Fifth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 14 of the Missouri Constitution. Movant argues that this Court must reverse and remand for reinstatement of his Rule 29.15 motion.

#### Standard of Review

Appellate review of the denial of a motion for post-conviction relief is limited to a determination of whether the findings and conclusions of the motion court are clearly erroneous. Gehrke v. State, 280 S.W.3d 54, 56 (Mo. banc 2009). Clear error occurs where a review of the entire record leaves the reviewing court with the definite and firm impression that a mistake has been made. Id. at 56-57.

#### Discussion

Rule 29.15 requires that a motion for post-conviction relief to vacate, set aside or correct a judgment or sentence be filed under the rule within ninety days after the date the appellate court issues its mandate affirming the judgment or sentence. Rule 29.15(b). The time limits imposed by Rule 29.15 are constitutional, valid, and mandatory. Day v. State, 770 S.W.2d 692, 695 (Mo. banc 1989); State v. Story, 901 S.W.2d 886, 900 (Mo. banc 1995). Generally, a movant is entitled to post-conviction relief under Rule 24.035 or Rule 29.15 if the movant files a meritorious motion within the time limits set forth in those rules. Gehrke, 280 S.W.3d at 57.

Failure to file a motion within the time limits set forth in the rules constitutes a complete waiver of any right to proceed and a complete waiver of any claim that could be raised in a motion filed pursuant to Rule 29.15. Rule 29.15(b). "When a motion is filed outside the time limits, the motion court is compelled to dismiss it." Gehrke, 280 S.W.3d at 57. A court may not consider a Rule 29.15 motion filed more than ninety days after the issuance of the mandate by the appellate court because to do so conflicts with the express limits provided for the remedy of post-conviction relief under Rule 29.15.

Movant here argues that the motion court clearly erred in ruling that it "has no jurisdiction to entertain a motion filed out of time" and in dismissing movant's Rule 29.15 motion. Movant acknowledges the rulings in Thomas v. State, 31 S.W.3d 23 (Mo. App. E.D. 2000) (untimely filing of pro se motion for post-conviction relief was a fatal defect and could not be cured by an amended motion), and Patterson v. State, 164 S.W.3d 546 (Mo. App. E.D. 2005) (motion filed two days after expiration of ninety-day period following mandate's issue and untimely filing was not excused by movant's incarceration out of state or delay by prison officials), as well as other case law holding that movant's failure to timely file his pro se Rule 29.15 motion mandates dismissal of a Rule 29.15 motion. Despite the clear rulings of these cases, Movant clings to Webb, arguing that such case law is inapplicable because courts may no longer refer to the limitation on their ability to act as conferred by Rule 29.15 as a "lack of jurisdiction." The Webb Court stated that only personal jurisdiction and subject matter jurisdiction are recognized types of jurisdiction derived from constitutional principles, and that Missouri courts should not construe statutory or rule restriction on claims for relief as restrictions on the court's subject matter jurisdiction, or as matters of "jurisdictional competence." Id. at 251-54. Movant significantly overstates the holding and reach of Webb.

We agree with Movant that prior to Webb, courts freely referred to a "lack of jurisdiction" in the context of a court's limitation on the legal ability to act according to a statute or rule. We further acknowledge that the discourse in Webb and its implications has been the subject of much discussion, and at times has resulted in a web of confusion. However, we decline to find that the semantical distinction expressed in Webb alters the outcome of the case at hand. A trial court's judgment is generally sustained if it reaches a correct result, even if its findings are erroneous. Blackmon v. State, 168 S.W.3d 129, 134 (Mo. App. W.D. 2005). Regardless of the motion court's reference to its lack of jurisdiction to act, under the rule, Movant's "[f]ailure 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." Rule 29.15(b). While the motion court may have inartfully used the term "jurisdiction" in light of Webb, the misuse of this term does not require reversal of the motion court's judgment because of the valid and constitutional time constraints imposed by Rule 29.15.<sup>3</sup>

Movant further argues that the motion court clearly erred in its failure to excuse Movant's untimely filing because appellate counsel did not inform Movant of the mandate's issuance. Movant argues that cases such as Nicholson v. State, 151 S.W.3d 369 (Mo. banc 2004), Spells v. State, 213 S.W.3d 700 (Mo. App. W.D. 2007), McFadden v. State, 256 S.W.3d 103 (Mo. banc 2008), and Howard v. State, 289 S.W.3d 651, 653 (Mo. App. E.D. 2009), each of which excused the untimely filings of post-conviction claims, "dictate that this Court permit [Movant] to

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<sup>3</sup>Movant's reliance on State v. Andrews, 282 S.W.3d 372 (Mo. App. W.D. 2009), is misplaced and unpersuasive. Although the Western District discussed the "jurisdictional allegations" of the motion for post conviction relief in light of Webb, the court acknowledged that the issue before it was not of "jurisdiction," but simply of trial error. Id. at 375. The court restated that the time limitation imposed on filing motions for post-conviction relief are constitutionally valid and mandatory, but then continued its analysis of the facts and found that the motion had been timely filed. Id. at 375-76.

proceed with his Rule 29.15 post-conviction action. However, Movant's case here is not one of the "very rare circumstances" in which "our courts have found an improper filing, caused by circumstances beyond the control of the movant, justified a late receipt of the motion by the proper court." McFadden, 256 S.W.3d at 108 (holding that movant had timely prepared his motion and provided it to counsel well before it was due, but counsel's failure to file it on time constituted active interference with the timely filing and an abandonment by counsel). We agree with the motion court that each of the cases argued by Movant are inapplicable because in those cases, the movant timely prepared and sent his motion, but problems later arose through no fault of the movant; here, however, Movant did not prepare and mail his pro se motion until after he had waived his right to proceed under Rule 29.15.

Even accepting as true Movant's assertions that his appellate attorney assumed the duty of timely informing Movant of the issuance of this Court's mandate, failed in her duty, and caused Movant to miss the Rule 29.15 filing deadline, we cannot find that the motion court clearly erred in dismissing Movant's motion for post-conviction relief. The record supports the motion court's findings that Movant's pro se motion was not prepared and mailed by Movant until four months after the ninety day time limit had expired. The motion court did not err in adhering to the mandatory filing limitations imposed by Rule 29.15.

Finally, Movant has not pleaded, nor do we find that Movant was abandoned by his counsel. In his brief, Movant suggests that the facts before us rise to the level of abandonment and entitle him to relief. While we acknowledge that Movant may very well have delayed the filing of his motion for post-conviction relief until notified by his appellate counsel of the issuance of the mandate, it is well settled in Missouri that erroneous advice from counsel has not been classified as abandonment. Bullard v. State, 853 S.W.2d 921, 923 (Mo. banc 1993); Clark

v. State, 261 S.W.3d 565, 570-71 (Mo. App. E.D. 2008). Abandonment is a judicially created exception to the requirement of the timely filing of an *amended* motion and occurs "when (1) post-conviction counsel takes no action with respect to filing an *amended* motion and as such the record shows that the movant is deprived of a meaningful review of his claims; or (2) when post-conviction counsel is aware of the need to file an *amended* post-conviction relief motion and fails to do so in a timely manner." Gehrke, 280 S.W.3d at 57 (emphasis added). We decline Movant's invitation to extend the concept of abandonment beyond the parameters so clearly set by the Supreme Court. Thus, our review of the entire record fails to show that the motion court committed error in dismissing Movant's motion for post-conviction relief.

#### Conclusion

The trial court's judgment is affirmed.

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Kurt S. Odenwald, Presiding Judge

George W. Draper III, J., Concur  
Gary M. Gaertner, Jr., J., Concur