



# Missouri Court of Appeals

## Southern District Division One

JOSE LUIS LOPEZ-McCURDY, JR.,            )  
  )  
          Movant-Appellant,                    )  
  )  
vs.    )        No. SD30586  
  )  
STATE OF MISSOURI,                            )  
  )  
          Respondent-Respondent.            )

APPEAL FROM THE CIRCUIT COURT OF DENT COUNTY

Honorable William C. Seay, Circuit Judge

### JUDGMENT VACATED; CASE REMANDED WITH DIRECTIONS

Jose Luis Lopez-McCurdy, Jr. ("Movant"), appeals the denial of his Rule 29.15 motion for post-conviction relief following an evidentiary hearing. We vacate the judgment and remand the cause with directions to dismiss the motion because Movant failed to timely file his *pro se* motion as required by Rule 29.15(b) and thus has waived the claim he now asserts on appeal.<sup>1</sup>

Following a jury trial, Movant was convicted on one count of forcible rape, *see* section 566.030, RSMo 2000, and sentenced to twenty years' imprisonment. On direct appeal to this Court, Movant's conviction was affirmed in *State v. Lopez*, 266 S.W.3d 874 (Mo.App. 2008), and our mandate issued on November 13, 2008.

---

<sup>1</sup> All rule references are to Missouri Court Rules (2010).

Ninety-six days later, on February 17, 2009, Movant filed a *pro se* motion for post-conviction relief under Rule 29.15. Movant claimed that his trial counsel was ineffective in that "[c]ounsel failed to submit [his girlfriend's] DNA sample." Appointed counsel filed a statement in lieu of an amended motion, pursuant to Rule 29.15(e), attesting that all facts supporting Movant's claims were asserted and that all claims known to Movant were alleged in his *pro se* motion. Following an evidentiary hearing, the motion court issued findings of fact and conclusions of law denying post-conviction relief.

Movant now appeals the denial of his Rule 29.15 motion. Movant contends that the motion court clearly erred in denying his claim that trial counsel was ineffective in that "trial counsel failed to obtain a laboratory analysis of the sample of [Movant's girlfriend's] DNA that had been collected by the police." Movant alleges he was prejudiced because such an analysis would have shown that his girlfriend's DNA was on the pants the victim alleged she wore during the rape, and this evidence would have provided Movant with an explanation for the presence of his DNA on the pants.

Rule 29.15 required Movant to file his motion for post-conviction relief "within 90 days after the date the mandate of the appellate court is issued affirming such judgment or sentence." Rule 29.15(b). Further, "[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." *Id.* Thus, in this case, Movant waived his right to proceed with his post-conviction motion because he did not timely file his *pro se* motion. *See id.; Dorris v. State*, No. SD30458, 2011 WL 742548, at \*1 (Mo.App. S.D. Mar. 1,

2011); *Swofford v. State*, 323 S.W.3d 60, 64 (Mo.App. 2010). In order to enforce the requirements of this court rule, which cannot be waived by the parties, we have the authority to remand this cause to the motion court with directions to dismiss Movant's motion. *Swofford*, 323 S.W.3d at 63-64.

The motion court's judgment is vacated, and the cause is remanded with directions for the motion court to dismiss Movant's Rule 29.15 motion as untimely.

Gary W. Lynch, Judge

Barney, P.J., and Burrell, J., concur.

Division I

Filed March 28, 2011

Attorney for Appellant: Mark A. Grothoff, Columbia, Missouri

Attorneys for Respondent: Chris Koster, Attorney General, and Evan J. Buchheim, Assistant Attorney General, Jefferson City, Missouri