



SUPREME COURT OF MISSOURI
en banc

DAVID GLENN LATHAM,) *Opinion issued September 11, 2018*
)
Appellant,)
)
v.) No. SC96315
)
STATE OF MISSOURI,)
)
Respondent.)

APPEAL FROM THE CIRCUIT COURT OF JASPER COUNTY
The Honorable Gayle L. Crane, Judge

David Latham appeals from the motion court’s judgment overruling his motion for postconviction relief. Mr. Latham timely filed his *pro se* Rule 24.035¹ motion after revocation of his probation and execution of his sentence for the class A felony of trafficking drugs in the second degree, section 195.223,² for possessing six grams or more of cocaine base. On appeal, Mr. Latham asserts he was abandoned because his postconviction counsel filed a statement in lieu of an amended motion beyond the 60-day deadline in Rule 24.035(g) for filing an amended motion. Alternatively, he contends his *pro se* pleading filed in reply to the statement in lieu of an amended motion filed by his

¹ Unless otherwise noted, all rule citations are to the Missouri Court Rules (2014).

² Unless otherwise noted, all statutory citations are to RSMo Supp. 2010.

counsel should be treated as a timely amended motion, and the motion court erred by concluding his plea counsel was not ineffective. He asserts he would not have pleaded guilty had plea counsel noticed and explained that the laboratory report showed the state had insufficient evidence to convict him of the class A felony of trafficking cocaine base.

Although Mr. Latham's postconviction counsel filed a statement in lieu of an amended motion, it was not filed within the 60-day deadline in Rule 24.035(g) for filing an amended motion. The purpose of a statement in lieu of an amended motion is to make a record that postconviction counsel has performed the responsibilities imposed by Rule 24.035(e) so a presumption of abandonment does not arise when no amended motion is filed by Rule 24.035(g)'s 60-day deadline. That purpose is not satisfied when a statement in lieu of an amended motion is filed after the 60-day deadline. Accordingly, to fulfill its purpose, a statement in lieu of an amended motion must be filed by the date on which an amended motion is due.

The failure of Mr. Latham's postconviction counsel to file either an amended motion or a statement in lieu of an amended motion within the 60-day deadline in Rule 24.035(g) created the presumption his postconviction counsel failed to comply with the postconviction rules and, thereby, abandoned Mr. Latham. Because a presumption of abandonment arose, Mr. Latham is entitled to an abandonment hearing to determine whether his postconviction counsel's lack of performance was the result of Mr. Latham's action or inaction. The motion court's judgment, therefore, is reversed, and the case is remanded.

On remand, if the motion court finds Mr. Latham's postconviction counsel abandoned him and postconviction counsel failed to act on his behalf, the motion court shall appoint new counsel and allow time for new counsel to perform the responsibilities required by Rule 24.035(e). If postconviction counsel acted on Mr. Latham's behalf but did so untimely under the postconviction rules, the motion court shall treat the statement in lieu of an amended motion as timely and consider Mr. Latham's subsequent *pro se* pleading as his reply to counsel's statement in lieu of amended motion. The motion court shall then determine whether Mr. Latham's initial *pro se* motion could have been made legally sufficient by amendment or whether there were other grounds for relief known to Mr. Latham not included in his initial *pro se* motion. If so, the motion court must direct postconviction counsel to file an amended motion within the time allotted by the motion court.

Factual and Procedural Background

In 2010, the state filed a criminal complaint against Mr. Latham alleging he possessed six or more grams of cocaine base on June 6, 2010. In 2011, Mr. Latham was charged with the class A felony of trafficking drugs in the second degree, section 195.223. The information charged that Mr. Latham "possessed 6 grams or more of a mixture or substance containing a cocaine base, a controlled substance, knowing of its presence and nature." Mr. Latham subsequently pleaded guilty and was sentenced to 15 years in prison. The plea court suspended execution of his sentence and imposed a five-year term of supervised probation. On August 12, 2013, the plea court found Mr. Latham violated his probation and ordered execution of his 15-year sentence.

On November 20, 2013, Mr. Latham timely filed his *pro se* Rule 24.035 motion for postconviction relief. His *pro se* motion alleged three claims: (1) counsel was ineffective for failing to investigate why his preliminary hearing³ was waived; (2) counsel was ineffective for failing to spend sufficient time with him to defend him at the revocation hearing; and (3) counsel was ineffective in that she misled him into believing she would request long-term drug treatment at his sentencing hearing. On December 11, 2013, the motion court appointed the public defender's office⁴ to represent Mr. Latham. Because the transcript of his guilty plea was filed on March 25, 2014, Mr. Latham's amended motion was due May 27, 2014.⁵

Mr. Latham's postconviction counsel did not file an amended motion by the 60-day deadline in Rule 24.035(g). Instead, on June 20, 2014, postconviction counsel filed a statement in lieu of an amended motion. In the statement, postconviction counsel said he had requested all pertinent documents for review, including transcripts, motions, and case files. He further stated his associate interviewed Mr. Latham by phone on May 21, 2014. Counsel concluded by stating, although he originally believed Mr. Latham might have an ineffective assistance of counsel claim regarding "the elements of the crime charged,"

³ From the record, it appears Mr. Latham is referencing waiver of his section 217.722 preliminary hearing following his probation violation.

⁴ The record reflects that, on January 9, 2014, the public defender's office contracted with a private attorney to represent Mr. Latham. The private attorney did not enter his appearance in the case until February 17, 2014.

⁵ The 60-day period for filing the amended motion ended Saturday, May 24, 2014. The following Monday, May 26, 2014, was Memorial Day. Pursuant to Rule 20.01(a) and Rule 44.01(a), the 60-day period was extended until Tuesday, May 27, 2014.

further research proved Mr. Latham “was sentenced under the old law prior to the change becoming effective.”

Three days later, on June 23, 2014, Mr. Latham filed a *pro se* pleading titled “Amended Motion to Vacate, Set Aside, or Correct Judgment and Sentence and Request for Evidentiary Hearing.” In the pleading, Mr. Latham stated he filed the pleading “because counsel refused to amend said motion” and alleged “[c]ounsel did not send movant a statement allowing him the opportunity to reply to it, so in the alternative, movant has filed this Amended Motion Pro Se.” The *pro se* pleading alleged 16 claims of ineffective assistance of counsel, including plea “counsel failed to investigate and prove, for the sake of instructing [him] to offer a Guilty Plea, both the Possession prong and the Knowledge prong in this case for Trafficking.”

The motion court conducted an evidentiary hearing on the claims alleged in both Mr. Latham’s initial *pro se* motion and his subsequent *pro se* pleading.⁶ At the hearing, Mr. Latham’s plea counsel was asked whether she discussed with him that the laboratory report showed the substance in his possession was cocaine salt but he was charged with trafficking cocaine base and did not possess enough cocaine salt to be charged with a class A trafficking felony under section 195.223.⁷ Mr. Latham’s plea counsel testified she would

⁶ Mr. Latham was represented at the evidentiary hearing by his postconviction counsel who filed the statement in lieu of an amended motion.

⁷ At the time of Mr. Latham’s offense, possession of cocaine salt constituted a class A felony of trafficking drugs in the second degree if the person possessed more than 450 grams. Section 195.223.2(2). Possession of cocaine base, however, constituted a class A felony of trafficking drugs in the second degree if the person possessed more than six grams. Section 195.223.3(2). The laboratory report identifies the substance in Mr. Latham’s possession as six grams of cocaine salt. Mr. Latham, therefore, did not possess

have discussed that with him and advised him to plead guilty because the state could have charged him as a prior and persistent offender and added a weapons charge for the gun found with the drugs. Mr. Latham testified plea counsel never informed him he was improperly charged or that there are different thresholds and penalties for trafficking cocaine base versus cocaine salt.⁸

The motion court found the claims in Mr. Latham's initial *pro se* motion were not cognizable in a Rule 24.035 proceeding. The motion court also overruled the claims raised in his subsequent *pro se* pleading. Mr. Latham appealed. After an opinion by the court of appeals, the case was transferred to this Court. Mo. Const. art. V, sec. 10.

Standard of Review

This Court's review of a motion court's ruling on a Rule 24.035 motion for postconviction relief is "limited to a determination of whether the findings and conclusions of the [motion] court are clearly erroneous." Rule 24.035(k). A motion court's findings and conclusions "are clearly erroneous if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made." *Gittemeier v. State*, 527 S.W.3d 64, 67-68 (Mo. banc 2017) (internal quotation omitted).

any cocaine base and possessed an insufficient amount of cocaine salt to be charged with a class A felony of second degree drug trafficking. The laboratory report would have supported only a class B felony of possession with intent to distribute, section 195.211, or a class C felony of possession of a controlled substance, section 195.202.

⁸ Since Mr. Latham was charged, the thresholds and penalties for the offense of trafficking in the second degree have been amended. *See* Section 579.068, RSMo 2016.

Presumption of Abandonment

On appeal, Mr. Latham raises issues concerning his postconviction counsel's untimely filing of the statement in lieu of an amended motion and the timeliness of his subsequent *pro se* pleading. Mr. Latham asserts his postconviction counsel's failure to file a statement in lieu of an amended motion within 60 days of the transcript being filed created a presumption of abandonment. The state counters that no presumption of abandonment arose because the time requirements for filing an amended motion in Rule 24.035(g) do not apply to the filing of a statement in lieu of an amended motion. But the purpose for requiring the filing of a statement in lieu of an amended motion necessitates application of the 60-day time limitation in Rule 24.035(g).

Rule 24.035(e) sets forth postconviction counsel's responsibilities following a movant's filing of a *pro se* motion and provides:

When an indigent movant files a *pro se* motion, the court shall cause counsel to be appointed for the movant. Counsel shall ascertain whether sufficient facts supporting the claims are asserted in the motion and whether the movant has included all claims known to the movant as a basis for attacking the judgment and sentence. If the motion does not assert sufficient facts or include all claims known to the movant, counsel shall file an amended motion that sufficiently alleges the additional facts and claims. If counsel determines that no amended motion shall be filed, counsel shall file a statement setting out facts demonstrating what actions were taken to ensure that (1) all facts supporting the claims are asserted in the *pro se* motion and (2) all claims known to the movant are alleged in the *pro se* motion. The statement shall be presented to the movant prior to filing. The movant may file a reply to the statement not later than ten days after the statement is filed.

Rule 24.035(e), therefore, requires postconviction counsel to determine whether a movant's *pro se* motion asserts sufficient facts and includes all claims known to the movant for attacking the judgment and sentence. Upon making that determination, Rule 24.035(e)

requires postconviction counsel to file either an amended motion or a statement in lieu of an amended motion.

If postconviction counsel determines a statement in lieu of an amended motion is the appropriate course of action, Rule 24.035(e) requires postconviction counsel to detail, in the statement, the actions counsel took to ensure all facts and claims known to the movant were asserted in the *pro se* motion. Accordingly, under the rule's plain language, the statement in lieu of an amended motion is the mechanism by which postconviction counsel informs the motion court of counsel's determination that an amended motion is unnecessary because, through counsel's actions, postconviction counsel believes all facts and claims known to the movant are included in the *pro se* motion.

The requirement of making a record of whether postconviction counsel acted to fulfill counsel's responsibilities under the postconviction rules in the absence of a timely filed amended motion was first articulated by this Court in *Luleff v. State*, 807 S.W.2d 495 (Mo. banc 1991). In *Luleff*, the Court found the movant's *pro se* motion failed to comply with the requirements of Rule 29.15 and, "[a]bsent some performance by appointed counsel, the motion court cannot determine whether the *pro se* pleading can be made legally sufficient by amendment or whether there are other grounds for relief known to movant but not included in the *pro se* motion." *Id.* at 498. The Court held:

A record that does not indicate whether appointed counsel made the determinations required by *Rule 29.15(e)* creates a presumption that counsel failed to comply with the rule. *Where counsel determines that filing an amended motion is not warranted, counsel should make that determination a part of the record.* At such time as the motion court may proceed to rule a postconviction motion and there is no record of any activity by counsel on movant's negligence or intentional failure to act, movant is entitled to no

relief other than that which may be afforded upon the *pro se* motion. If the court determines, on the other hand, that counsel has failed to act on behalf of the movant, the court shall appoint new counsel, allowing time to amend the *pro se* motion, if necessary, as permitted under *Rule 29.15(f)*.

Id. (emphasis added).

After *Luleff*, this Court amended the postconviction rules⁹ to include the requirement of a statement in lieu of an amended motion detailing the actions taken by postconviction counsel to ensure all facts and claims known to the movant were included in the *pro se* motion. In other words, the rule was amended to require postconviction counsel to file a statement with the motion court detailing the actions that establish postconviction counsel performed counsel's responsibilities under the rule and, thereby, did not abandon the movant. The purpose of a statement in lieu of an amended motion, therefore, is to show that postconviction counsel complied with the requirements of Rule 24.035(e) so that a presumption of abandonment by postconviction counsel does not arise in the absence of an amended motion. It follows that, under the rule, postconviction counsel must file either an amended motion or a statement in lieu of an amended motion or a presumption of abandonment will arise.

In light of this purpose, a statement in lieu of an amended motion must be filed by the same deadline for filing an amended motion. At the time Mr. Latham filed his postconviction motion, Rule 24.035(g) provided:¹⁰

⁹ In 1995, Rule 24.035(e) and Rule 29.15(e) were amended to include the option of filing a statement in lieu of an amended motion. The amended rules became effective in 1996. *See* Rule 24.035(e) (1996); Rule 29.15(e) (1996).

¹⁰ In 2017, Rule 24.035(g) was amended to expressly require that a statement in lieu of an amended motion be filed within the 60-day deadline.

If no appeal of the judgment sought to be vacated, set aside, or corrected is taken, the amended motion shall be filed within 60 days of the earlier of the date both a complete transcript consisting of the guilty plea and sentencing hearing has been filed in the trial court and:

(1) Counsel is appointed; or

(2) An entry of appearance is filed by any counsel that is not appointed but enters an appearance on behalf of movant.

Rule 24.035(g), therefore, expressly set forth time limitations for the filing of amended motions but was silent as to the filing of a statement in lieu of an amended motion.

The state avers Rule 24.035(g)'s silence as to a statement in lieu of an amended motion means such statement was not required to be filed within the 60-day deadline. But the purpose of requiring a statement in lieu of an amended motion is to prevent the presumption of abandonment from arising. A presumption of abandonment arises when postconviction counsel fails to file an amended motion by Rule 24.035(g)'s 60-day deadline. *See Moore v. State*, 458 S.W.3d 822, 825 (Mo. banc 2015). If postconviction counsel does not file the statement in lieu of an amended motion by the 60-day deadline for filing an amended motion, then a presumption of abandonment arises and the purpose of the statement is defeated. Accordingly, either an amended motion or a statement in lieu of an amended motion must be filed by Rule 24.035(g)'s 60-day deadline to prevent a presumption of abandonment from arising.

Consistent with such rationale, this Court has held: "Failure to file either a timely amended motion or a statement in lieu of an amended motion explaining why an amended motion was unnecessary raises a presumption of abandonment by appointed counsel." *Watson v. State*, 536 S.W.3d 716, 718 (Mo. banc 2018). This Court has further held "a

motion court must conduct a sufficient independent inquiry of a post-conviction movant's claim of abandonment" when postconviction counsel has failed to timely file an amended motion *or* "a statement setting out facts that demonstrate counsel's actions to ensure no amended motion is needed." *Vogl v. State*, 437 S.W.3d 218, 228 (Mo. banc 2014).

Furthermore, the state's position that there is no deadline for filing a statement in lieu of an amended motion would render the mandatory deadline for filing an amended motion meaningless. This Court has repeatedly held the time limitations on postconviction relief motions are mandatory and cannot be extended by the motion court. *Gittemeier*, 527 S.W.3d at 68. This is because a postconviction proceeding "is a collateral attack on the final judgment of a court." *Stanley v. State*, 420 S.W.3d 532, 541 (Mo. banc 2014). Courts, therefore, must strictly enforce Rule 24.035's time limitations "to prevent duplicative and unending challenges to the finality of a judgment." *Id.* (internal quotation omitted).

A mandatory deadline for a statement in lieu of an amended motion is also necessary because Rule 24.035(e) requires the statement to be presented to the movant prior to filing and gives the movant 10 days to file a reply. Requiring the statement in lieu of an amended motion to be presented to the movant ensures the movant is provided notice of postconviction counsel's determination that an amended motion is unnecessary. Such notice is also a prerequisite to providing the movant a chance to file a reply. The reply gives the movant an opportunity to respond to postconviction counsel's assertions that all facts and claims known to the movant are included in the *pro se* motion. Inherent in giving a movant the opportunity to respond to the statement in lieu of an amended motion is the possibility the movant has additional facts or claims that would necessitate the filing of an

amended motion. Therefore, the purpose of the reply is to ensure no amended motion is actually necessary.

The lack of a deadline for filing a statement in lieu of an amended motion would delay the movant's time for responding and the motion court's determination regarding whether the filing of an amended motion is necessary. Such delays would only lengthen postconviction proceedings and needlessly extend the time period for collateral attacks on a final criminal judgment.

In sum, both the purpose of requiring postconviction counsel to file a statement in lieu of an amended motion and the process outlined for a movant's reply thereafter support the imposition of Rule 24.035(g)'s 60-day deadline on statements in lieu of amended motions. The failure of postconviction counsel to file either an amended motion or a statement in lieu of an amended motion within the 60-day deadline creates a presumption of abandonment.¹¹

Mr. Latham's Remedy

Having determined a statement in lieu of an amended motion must be filed by the deadline for filing an amended motion or a presumption of abandonment arises, this Court must consider whether a presumption of abandonment arose in this case and, if so, what remedies are available to Mr. Latham.

¹¹ To the extent *Mason v. State*, 488 S.W.3d 135 (Mo. App. 2016), *Scott v. State*, 472 S.W.3d 593 (Mo. App. 2015), and *Pennell v. State*, 467 S.W.3d 367 (Mo. App. 2015), are inconsistent with such a presumption, they should no longer be followed.

The record reflects Mr. Latham's postconviction counsel entered his appearance on February 17, 2014, and his guilty plea transcript was filed on March 25, 2014. The record shows no further action by postconviction counsel until June 20, 2014, when he filed the statement in lieu of an amended motion. Accordingly, when the 60-day deadline passed for the filing of the amended motion on May 27, 2014, there was no performance by postconviction counsel on the record with respect to Mr. Latham's *pro se* motion. Because postconviction counsel failed to file either an amended motion or a statement in lieu of an amended motion within the 60-day deadline, a presumption of abandonment arose. The motion court's judgment, therefore, must be reversed, and the case remanded.

On remand, the motion court must conduct an independent inquiry to determine whether Mr. Latham was actually abandoned. *Moore*, 458 S.W.3d at 825. In determining whether Mr. Latham was abandoned, the inquiry must center on whether postconviction counsel's failure to file a timely amended motion or statement in lieu of an amended motion was due to Mr. Latham's negligence or intentional failure to act. *Milner v. State*, SC96909, 2018 WL 3432653, at *3 (Mo. banc July 17, 2018). This is because a "movant is entitled to no additional relief" if the untimely filing of an amended motion or statement in lieu of an amended motion is the result of a movant's actions or inactions. *Id.*

If postconviction counsel's failure to timely file an amended motion or a statement in lieu of an amended motion was the result of Mr. Latham's action or inaction, Mr. Latham was not abandoned, and the motion court must proceed to adjudicate only Mr. Latham's *pro se* motion. *See id.* If, however, Mr. Latham's actions or inactions did not cause

postconviction counsel's lack of performance, the motion court must find that Mr. Latham was abandoned. *See id.*

If the motion court determines Mr. Latham was abandoned, it must then consider the available remedies. In remedying abandonment, motion courts look to whether counsel has failed to act on the movant's behalf – i.e. whether postconviction counsel failed to file either an amended motion or a statement in lieu of an amended motion on the movant's behalf. *See Barton v. State*, 486 S.W.3d 332, 338 (Mo. banc 2016); *Moore*, 458 S.W.3d at 825; *Gehrke v. State*, 280 S.W.3d 54, 57 (Mo. banc 2009); *Barnett v. State*, 103 S.W.3d 765, 774 (Mo. banc 2003); *State v. White*, 873 S.W.2d 590, 599 (Mo. banc 1994). If postconviction counsel has failed to act on movant's behalf by failing to file any amended motion or statement in lieu of an amended motion, the motion court should appoint new postconviction counsel and allow new counsel time to file either an amended motion or a statement in lieu of an amended motion. *See Luleff*, 807 S.W.2d at 498. If, however, postconviction acted on movant's behalf but did so untimely under the postconviction rules, the motion court should treat the late-filed amended motion or statement in lieu of an amended motion as timely. *See Sanders v. State*, 807 S.W.2d 493, 495 (Mo. banc 1991).

If the motion court treats the statement in lieu of an amended motion as timely filed, the motion court must also consider Mr. Latham's reply to postconviction counsel's statement in lieu of an amended motion. Mr. Latham filed what he titled a *pro se* amended motion. But Rule 24.035(e) gives a movant 10 days to file a reply to a statement in lieu of an amended motion. In evaluating pleadings, "Missouri courts have looked not to the nomenclature employed by the parties, but to the actual relief requested in the motion."

Berger v. Cameron Mut. Ins. Co., 173 S.W.3d 639, 641 (Mo. banc 2005). Missouri courts do not concern themselves “with the title of the pleading or with a party’s citation to a particular Rule, but . . . look instead to the substance of the pleading.” *Pate v. State*, SD34672, 2017 WL 4856782, at *2 (Mo. App. Oct. 27, 2017).

Here, Mr. Latham states he filed the *pro se* pleading “because counsel refused to amend said motion.” He goes on to state that, under Rule 24.035(e), a movant has 10 days to reply to the statement. He contends “[c]ounsel did not send [him] a statement allowing him the opportunity to reply to it, so in the alternative, [he] has filed this Amended Motion Pro Se.” He then went on to list ineffective assistance of counsel claims that were not included in his *pro se* motion. The substance of Mr. Latham’s “amended motion,” therefore, establishes it is in reply to postconviction counsel’s filing of the statement in lieu of an amended motion. Accordingly, Mr. Latham’s subsequent *pro se* pleading should be treated as a reply to postconviction counsel’s statement in lieu of the amended motion.

After considering the statement in of lieu of the amended motion and Mr. Latham’s reply, the motion court must determine whether Mr. Latham’s *pro se* motion could have been made legally sufficient by amendment or whether there were other grounds for relief known to Mr. Latham not included in his initial *pro se* motion. If so, the motion court must direct postconviction counsel to file an amended motion within the time allotted by the motion court.¹²

¹² Because Mr. Latham’s assertions regarding abandonment are dispositive of this appeal, this Court need not address the merits of his ineffective assistance of counsel claim.

Conclusion

A presumption of abandonment arose when Mr. Latham's postconviction counsel failed to file either an amended motion or a statement in lieu of an amended motion within Rule 24.035(g)'s 60-day deadline. The motion court's judgment is reversed, and the case is remanded.

PATRICIA BRECKENRIDGE, JUDGE

All concur.