



Missouri Court of Appeals  
Southern District

Division Two

JOSHUA DANIEL HEWITT,	)	
	)	
Movant-Appellant,	)	
	)	
vs.	)	No. SD35134
	)	Filed: May 15, 2018
STATE OF MISSOURI,	)	
	)	
Respondent-Respondent.	)	

APPEAL FROM THE CIRCUIT COURT OF SCOTT COUNTY

Honorable Scott T. Horman, Associate Circuit Judge

**REVERSED AND REMANDED WITH DIRECTIONS**

Joshua Daniel Hewitt (“Hewitt”) appeals from a judgment of the motion court denying his amended Rule 24.035<sup>1</sup> motion to set aside his convictions of tampering with a motor vehicle and forgery. Because the motion court failed to comply with this Court’s opinion and mandate, pursuant to *Hewitt v. State*, 518 S.W.3d 227 (Mo.App. S.D. 2017),<sup>2</sup> we reverse and remand with directions.

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<sup>1</sup> All rule references are to Missouri Court Rules (2018).

<sup>2</sup> The dispositive issue before us is narrow, and we discern no utility in an extensive recitation of facts that do not impact our resolution of that issue. A more thorough recitation of the facts in this matter may be found in *Hewitt*, 518 S.W.3d at 228-31.

This Court issued its opinion in *Hewitt* on February 14, 2017. We observed that Hewitt’s amended motion was not timely filed, and that the motion court failed to conduct an independent abandonment inquiry, pursuant to *Moore v. State*, 458 S.W.3d 822, 827 (Mo. banc 2015). We reversed the motion court’s judgment, and remanded “to the motion court with directions that it conduct an independent inquiry into whether [Hewitt] was abandoned by any or all of his appointed counsels and *for further proceedings consistent with the outcome of those inquiries.*” *Hewitt*, 518 S.W.3d at 232 (emphasis added).

In that opinion, this Court indicated the manner of those “further proceedings,” as applicable, based on the outcome of the motion court’s independent abandonment inquiry:

[**NO ABANDONMENT:**] If any delay in the filing of an amended motion or statement in lieu thereof is attributable to the negligence or intentional conduct of the movant, *late filing of an amended motion will not be permitted*, and *movant is entitled to no relief other than that which may be afforded upon the pro se motion*[.]

[**ABANDONMENT:**] If a court finds that a movant has been abandoned, then the proper remedy is to put the movant in the place where the movant would have been if the abandonment had not occurred. The *only way* to restore the motion court and parties to the position Rule 24.035(e) intends for them is *for the motion court to appoint new counsel and allow additional time for this counsel to perform the duties required under the rule.*

*Id.* (internal quotations and citations omitted) (emphasis added).

Mandate issued on March 24, 2017. In relevant part, the mandate stated that

the judgment rendered by the Circuit Court of Scott County is reversed, and that said cause is remanded to the said Circuit Court of Scott County with directions to the motion court that it conduct an independent inquiry into whether [Hewitt] was abandoned by any or all of his appointed counsels and *for further proceedings consistent with the outcomes of those inquiries*, and *consistent with the opinion of this Court* herein delivered[.]

(Emphasis added).

On August 4, 2017, the motion court conducted an abandonment inquiry. That same day, the motion court issued its “Order After Abandonment Inquiry,” which found that “Hewitt was abandoned by post-conviction counsel[s.]” However, in contravention to this Court’s opinion and mandate, the motion court did not “appoint new counsel and allow additional time for this counsel to perform the duties required under [Rule 24.035].” *Hewitt*, 518 S.W.3d at 232 (internal quotation and citation omitted). Instead, the motion court ordered that its “Judgment and Findings of Fact and Conclusions of Law issued on February 26, 2016 remain in effect and the Court reissues those Findings of Fact and Conclusions of Law.”

“The scope of the trial court’s authority on remand is defined by the appellate court’s mandate, and the [motion] court must [act] in accord with our mandate and opinion.” *Welman v. Parker*, 391 S.W.3d 477, 483 (Mo.App. S.D. 2013) (internal quotation and citation omitted).

The mandate serves the purpose of communicating the judgment to the lower court, and the opinion, which is a part thereof, serves in an interpretative function. It is well settled that the mandate is not to be read and applied in a vacuum. The opinion is part of the mandate and must be used to interpret the mandate itself.

*Id.* (internal quotations and citations omitted). See *State v. Doss*, 503 S.W.3d 290, 292 (Mo.App. W.D. 2016).

The motion court failed in its duty to comply with the directions of this Court’s opinion and mandate—when the motion court found that Hewitt was abandoned, it was required to appoint new counsel for Hewitt, and to allow such appointed counsel time to file an amended motion (or statement in lieu thereof) on Hewitt’s behalf. See *Hewitt*, 518 S.W.3d at 232. The motion court had no authority to do otherwise.

For the reasons discussed in this opinion, the judgment of the motion court is reversed and remanded. On remand, the motion court is specifically directed to: (1) appoint new counsel for Hewitt, for purposes of filing an amended Rule 24.035 motion (or statement in lieu thereof) on

Hewitt's behalf; (2) order that newly appointed counsel shall have 60 days—from the time of counsel's appointment—in which to file an amended motion (or statement in lieu thereof); (3) grant no extensions to newly appointed counsel except as authorized by Rule 24.035; and (4) hold such further proceedings as are warranted and authorized by Rule 24.035, in light of newly appointed counsel's amended motion (or statement in lieu thereof).

WILLIAM W. FRANCIS, JR., J. – OPINION AUTHOR

NANCY STEFFEN RAHMEYER, C.J./P.J. – Conkurs

JEFFREY W. BATES, J. – Conkurs