



**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

STATE OF MISSOURI,)
) **WD80438**
 Appellant,)
 v.) **OPINION FILED:**
)
 KAREN A. BACKUES,) **November 20, 2018**
)
 Respondent.)

**Appeal from the Circuit Court of Platte County, Missouri
Honorable James Walter Van Amburg, Judge**

Before Division One:

Lisa White Hardwick, P.J., Thomas H. Newton, and Edward R. Ardini, JJ.

This court is reconsidering the decision in *State of Missouri v. Karen A. Backues* at the direction of the Missouri Supreme Court's October 30, 2018, order re-transferring the case. We decided the case on direct appeal rather than a writ of mandamus that the State filed in our court while the appeal was pending.

In a similar factual circumstance, *State ex rel. Fite v. Johnson*, 530 S.W.3d 508 (Mo. banc 2017), the Missouri Supreme Court held that the trial court erred in granting the defendant's Rule 29.07(d) motion and allowing the defendant to withdraw a plea of guilty for felony stealing. *Id.* at 510. The State filed an

appeal and a writ of prohibition simultaneously. The court decided to dismiss the appeal and resolve the issue by writ.¹

In our case, a writ division denied the writ of mandamus and a three-judge panel decided the case on direct appeal. The Missouri Supreme Court granted transfer of the case and then re-transferred it to us for reconsideration, citing *Fite*. The Missouri Supreme Court’s order also stated that “Review is by Writ of Prohibition.”

Upon reconsideration and review of the *Fite* decision, because our case was decided by direct appeal as opposed to the writ, we dismiss this appeal.²

/s/ Thomas H. Newton
Thomas H. Newton, Judge

Lisa White Hardwick, P.J., and Edward R. Ardini, J. concur.

¹ “Missouri appellate court[s] have repeatedly exercised jurisdiction over appeals from the denial of motions to withdraw guilty pleas under Rule 29.07(d), where the motions were filed subsequent to the defendant’s sentencing.” *State v. Wilson*, 527 S.W.3d 908, 911 (Mo. App. E.D. 2017) (quoting *McCoy v. State*, 456 S.W.3d 887, 892 (Mo. App. W.D. 2015)); *see also, e.g., Gray v. State*, 498 S.W.3d 522, 527-28 n.8 (Mo. App. W.D. 2016); *State v. Onate*, 398 S.W.3d 102, 107 n.6 (Mo. App. W.D. 2013); *Jack v. State*, 354 S.W.3d 659, 659 (Mo. App. S.D. 2011); *State v. Ison*, 270 S.W.3d 444, 446-47 (Mo. App. W.D. 2008); *Elam v. State*, 210 S.W.3d 216, 219 & n.9 (Mo. App. W.D. 2006) (dictum); *State v. Johnson*, 172 S.W.3d 900, 901 n.3 (Mo. App. S.D. 2005); *State v. Thomas*, 96 S.W.3d 834, 838 (Mo. App. W.D. 2002); *State v. Fensom*, 69 S.W.3d 550, 551 (Mo. App. W.D. 2002) (dictum). This case involves a circuit court’s *grant* of a post-sentencing Rule 29.07(d) motion, not the *denial* of such a motion. Nevertheless, in light of *Fite*, and the supreme court’s re-transfer order in this case, it is unclear whether our prior decisions exercising appellate jurisdiction over the denial of a post-sentencing Rule 29.07(d) motion should continue to be followed.

² After reconsideration of our opinion issued on July 3, 2018, because of the retransfer order by the Missouri Supreme Court on October 30, 2018, we withdraw our previous opinion.