



**IN THE MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

STATE OF MISSOURI, )  
 )  
 Respondent, )  
 ) **WD80797**  
 v. )  
 ) **OPINION FILED:**  
 ) **October 30, 2018**  
 LEWIS SHAWN COX, )  
 )  
 Appellant. )

**Appeal from the Circuit Court of Buchanan County, Missouri  
The Honorable Patrick K. Robb, Judge**

**Before Division Two: Alok Ahuja, Presiding Judge, and  
Thomas H. Newton and Mark D. Pfeiffer, Judges**

Mr. Lewis Shawn Cox (“Cox”) appeals from the order of the Circuit Court of Buchanan County, Missouri (“motion court”), denying, without an evidentiary hearing, his post-conviction motion for DNA testing. We affirm.

**Factual and Procedural History<sup>1</sup>**

Cox was charged by felony information with three counts of statutory sodomy in the first degree, one count of statutory rape in the first degree, and one count of rape in the first degree.

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<sup>1</sup> A motion for DNA testing, as authorized by section 547.035, is a post-conviction motion. *Weeks v. State*, 140 S.W.3d 39, 43 (Mo. banc 2004). On appeal from the denial of post-conviction relief, we view the facts in the light most favorable to the motion court’s judgment. *Robertson v. State*, 502 S.W.3d 32, 35 (Mo. App. W.D. 2016) (citing *Rousan v. State*, 48 S.W.3d 576, 579 (Mo. banc 2001)). “When reviewing a motion court’s ruling, we presume the motion court’s findings are correct.” *Id.* (citing *Barton v. State*, 432 S.W.3d 741, 748 (Mo. banc 2014)).

When the State tried to file an amended information to correct the charging period on three of the counts, Cox filed a motion for continuance. The circuit court would not allow the State to proceed on the amended information without a continuance. The prosecutor therefore dismissed those three counts and proceeded to trial on the remaining two counts for statutory sodomy and rape.

Cox's case went to trial before a jury, the Honorable Patrick K. Robb, presiding. Viewed in the light most favorable to the verdict, *State v. Baumruk*, 280 S.W.3d 600, 607 (Mo. banc 2009), the following evidence relevant to this appeal was adduced.

In February 2010, Cox took custody of his biological daughter, S.S.,<sup>2</sup> after her mother was incarcerated. S.S. was eleven years old at the time. Shortly after S.S. went to live with Cox, he began sexually abusing her.<sup>3</sup> S.S. told her prior custodian about the abuse soon after it began. S.S. also told a girlfriend, T.B., about the abuse but asked her not to tell anyone. Then, in September 2014, when S.S. was spending the night at a friend's house, she told her friend's mother, R.W., that Cox had been sexually abusing her. R.W. called the police.

Officer Sarah Nolte came to R.W.'s home. R.W. explained to the officer that S.S. told her that S.S.'s father may have sexually assaulted her. Officer Nolte interviewed S.S. and took a four-page statement from her about what had happened to her with her father. Officer Nolte observed that S.S. was crying and upset. Officer Nolte and another officer took S.S. to the hospital where she underwent a sexual assault examination. Other officers were dispatched to Cox's residence. When the officers arrived, they told Cox that they were there to investigate a claim of sexual assault, and Cox consented to a search of his apartment. The officers found evidence that corroborated certain details of S.S.'s statement to Officer Nolte.

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<sup>2</sup> Pursuant to section 595.226.1, RSMo 2016, we have used initials to identify the victim so as to protect the victim's identity.

<sup>3</sup> Because the details of the sexual abuse are not necessary to our analysis, we will not recite them.

Cox was arrested and taken to the Buchanan County Jail where he was interviewed by Detective Frank Till. Detective Till asked Cox about body fluids being on his bed. Cox said there should be body fluids from him and from two women with whom he had recently been involved. When asked if S.S.'s body fluids would be found on his bed, Cox said that S.S. and her girlfriend, T.B., had slept in his bed about three weeks earlier and therefore their bodily fluids might be found on his bed. When asked if his body fluids or pubic hairs would be found inside S.S., Cox said not unless it had come off his boxer shorts because she had been wearing them. Later, Cox said that his body fluids would not be inside S.S. unless she had wiped herself with a rag into which he masturbated. Cox said that he did not know if S.S. knew what the rag was for but then said, "Well, maybe she does." When Detective Till asked Cox if he had ever had sex with S.S., Cox stated that he had not had sex with S.S. but that he had flirted with some of her friends. He also told Detective Till that he once had walked in on S.S. and T.B. in a sexual situation.

Three days later, Cox called Detective Till wanting to give a DNA sample to compare against any evidence that might be found in the sexual assault examination kit done on S.S. Detective Till went to Cox's apartment and obtained a DNA sample from him. Two days later, Cox contacted Detective Till and told him that he had found something behind the toilet that he wanted the detective to look at. Detective Till asked Cox what it was, but Cox was evasive and wanted the detective to examine it himself. When Detective Till refused to come over and look at the item, Cox said that he believed the item was a used condom that he had thrown in the trash after using it to have sex with a woman the night before S.S. made the allegation against him. Cox said the used condom was on a wooden hammer handle behind the toilet.

Sometime later, Cox called Detective Till again and said that the condom was still there and that he hadn't touched it. Detective Till asked Cox why he would want to come get a used condom. Cox said he believed that after he had sex with the woman, he discarded the condom in the trash and threw the trash in the dumpster. Cox believed that S.S. had retrieved the condom out of the dumpster, put it in the freezer, and then later turned it wrong-side-out and put it on the hammer handle and inserted the hammer handle inside of her so that his semen would be inside of her and show up in the sexual assault examination kit.

Laboratory tests revealed the possibility of semen on the vaginal swab taken from S.S. Seminal fluid and sperm cells were detected on S.S.'s underwear. Nothing was detected on the wooden handle. Semen was present on the used condom. The DNA profile of the sperm cells found on S.S.'s underwear was consistent with Cox's DNA. Cox also could not be eliminated as the source of the major contributor to the DNA mixture profile from the outside of the condom.

The jury found Cox guilty of first-degree statutory sodomy and first-degree rape. Cox waived jury sentencing, and the trial court sentenced him to two consecutive thirty-year prison terms. Cox appealed, and this court affirmed Cox's convictions on direct appeal in a *per curiam* order. *State v. Cox*, 531 S.W.3d 587 (Mo. App. W.D. 2017).

On August 25, 2016, Cox filed a *pro se* post-conviction motion for DNA testing pursuant to the provisions of section 547.035.<sup>4</sup> He also filed a motion to recuse Judge Robb. On December 9, 2016, Cox filed a notice to remove his DNA motion to federal court. On May 3, 2017, the United States district court's order remanding the motion for DNA testing to the Buchanan County Circuit Court was filed in the circuit court. On May 12, 2017, the motion court, without an evidentiary hearing, entered an order denying Cox's post-conviction motion for

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<sup>4</sup> All statutory references are to the REVISED STATUTES OF MISSOURI 2000, as updated through the 2015 non-cumulative supplement.

DNA testing. The motion court found that DNA testing was conducted from the evidence collected in the case, and a DNA analyst testified at trial that analysis of the DNA profile found it was consistent with Cox's DNA. The motion court concluded that any additional DNA testing of other items in evidence would not result in the development of exculpatory evidence.

Cox timely appealed.

### **Procedural Deficiencies**

Before addressing Cox's claims on appeal, we note that there are significant deficiencies in his appellate brief and in the record on appeal. This court struck his initial brief because the points relied on were not in compliance with the specific requirements of Rule 84.04(d). Cox subsequently filed an amended brief.

Cox appeals *pro se*. "*Pro se* appellants are held to the same standards as lawyers." *MoBay Props., LLC v. White*, 540 S.W.3d 876, 878 (Mo. App. W.D. 2018). "Although this court is mindful of the difficulties that a party appearing *pro se* encounters in complying with rules of procedure, *pro se* appellants must be required to comply with these rules." *Id.* "It is not for lack of sympathy, but rather is necessitated by the requirement of judicial impartiality, judicial economy, and fairness to all parties." *Id.* (internal quotation marks omitted).

Pursuant to Rule 81.12, Cox was required to provide this court with a sufficient record on appeal for our review. Rule 81.12(a) specifically requires an appellant to file a record on appeal containing "all of the record, proceedings and evidence necessary to the determination of all questions presented, by either appellant or respondent, to the appellate court for decision." Cox asserts that the motion court erred by not addressing a timely filed motion to recuse Judge Robb; however, Cox did not include his recusal motion in the legal file. Documents that are not contained in the legal file "do not constitute part of the record on appeal, and will not be

considered in deciding an appeal.” *Moreland v. Div. of Emp’t Sec.*, 273 S.W.3d 39, 41 n.1 (Mo. App. W.D. 2008).

Furthermore, *pro se* appellants must comply with Supreme Court Rule 84.04, which sets forth various requirements for appellate briefs. *MoBay Props., LLC*, 540 S.W.3d at 878. “Compliance with the briefing requirements of Rule 84.04 is mandatory to ensure that the appellate court does not become an advocate by speculating on facts and arguments that have not been made.” *Id.* We have the discretion to dismiss an appeal for briefing deficiencies that violate the rule. *Id.* However, “[t]hat discretion is generally not exercised unless the deficiency impedes disposition on the merits. It is always our preference to resolve an appeal on the merits of the case rather than to dismiss an appeal for deficiencies in the brief.” *Id.* (quoting *J.L. v. Lancaster*, 453 S.W.3d 348, 350 (Mo. App. W.D. 2015)).

Cox’s brief violates Rule 84.04(d), concerning points relied on. The rule provides that each point must identify the *trial court ruling or action* being challenged, state concisely the legal reasons for the claim of reversible error, and explain in summary fashion why, in the context of the case, the legal reasons support the claim of reversible error. Rule 84.04(d). The rule further provides that “[t]he point shall be in substantially the following form: ‘The trial court erred in [identify the challenged ruling or action], because [state the legal reasons for the claim of reversible error], in that [explain why the legal reasons, in the context of the case, support the claim of reversible error].’” *Id.* “The purpose of the briefing requirements regarding points relied on is to give notice to the party opponent of the precise matter which must be contended with and answered and to inform the court of the issues presented for resolution.” *MoBay Props., LLC*, 540 S.W.3d at 879 (internal quotation marks omitted).

Cox's first point relied on "is clearly multifarious, containing more than one basis for reversal." *Kirk v. State*, 520 S.W.3d 443, 450 n.3 (Mo. banc 2017) (internal quotation marks omitted). "A point relied on violates Rule 84.04(d) when it groups together multiple, independent claims rather than a single claim of error, and a multifarious point is subject to dismissal." *Id.* "Multifarious points relied on are noncompliant with Rule 84.04(d) and preserve nothing for review." *Id.* See also *Thummel v. King*, 570 S.W.2d 679, 688 (Mo. banc 1978) (a point relied on violates Rule 84.04(d) when it groups together multiple contentions not related to a single issue).

Moreover, the first assertion in Cox's first point relied on is that *this court* violated his constitutional rights by harassing him, as a *pro se* litigant proceeding *in forma pauperis*, with the requirement to file multiple copies of his appellate brief. Cox's first assertion does not identify trial court error; instead, it is a matter that originated on appeal.

Additionally, Cox's argument relating to the issue of recusal in Point I is defective. Compliance with Rule 84.04 briefing requirements is mandatory in order to ensure that appellate courts do not become advocates by speculating on facts and on arguments that have not been made. *State v. Shipley*, 517 S.W.3d 37, 38 (Mo. App. W.D. 2017). Under Rule 84.04(e), the brief must contain an argument section that discusses the point relied on. The argument should demonstrate "how the principles of law and the facts of the case interact." *Id.* at 39 (internal quotation marks omitted). Cox's argument on the recusal issue under Point I consists of one sentence: "That defect [jurisdiction], together with the failure of Judge Robb to even address the timely motion to recuse him[self] in the DNA, is a defect[] that cannot be waived." Cox cites three cases but does not explain either their relevance or how they apply to the applicable facts.

*Id.* at 40. Generally, “[w]e deem points not developed in the argument section to be abandoned.”  
*Id.* (internal quotation marks omitted).

Nevertheless, we will exercise our discretion to review Cox’s defective point *ex gratia*, *Kirk*, 520 S.W.3d at 450 n.3, “separat[ing] [his] contentions, as best we can discern them, and respond[ing] to each one individually,” *Wennihan v. Wennihan*, 452 S.W.3d 723, 728 (Mo. App. W.D. 2015) (internal quotation marks omitted).

## **Analysis**

### **Point I – Appellate Procedure**

As discussed above, the first assertion in Cox’s first point is that this court violated his constitutional rights by harassing him, as a *pro se* litigant proceeding *in forma pauperis*, with the requirement to file multiple copies of his appellate brief. This issue is moot.

On January 5, 2018, this court notified Cox that his case had been placed on a dismissal docket for failure to timely file his appellant’s brief, which was due on December 26, 2017. Cox was advised that his appeal would be dismissed unless the brief was filed on or before January 22, 2018. On January 16, 2018, Cox filed a Motion to File Brief Under Protest Out of Time and for Leave to File One Copy of the Brief Because of Undue Hardship and State Interferences. On January 30, 2018, this court denied Cox leave to file one copy of his brief but granted him until February 28, 2018, to file three more copies of his brief, at which time his brief would be deemed filed. On February 9, 2018, this court advised Cox that it had received two additional copies of his brief but that, pursuant to the January 30 ruling, one additional copy was still required before February 28 before his brief would be deemed filed.



On February 22, 2018, this court ordered that Cox's brief be struck because the points relied on were not in compliance with the specific requirements of Rule 84.04(d). This court granted Cox thirty days to file an amended brief correcting the points relied on.

On March 12, 2018, Cox filed a Motion to Recuse the Court on the Grounds the Court and Its Staff Mistreated Appellant by "playing games" with him by twice requiring him to supply more copies of his brief. Also on that date, Cox advised this court, "I am sending you one copy of the new brief as I cannot afford more without causing me extreme hardship." On March 21, 2018, this court advised Cox that his motion to recuse was denied; but we sustained Cox's motion to file only one copy of his brief, which was deemed filed on March 21, 2018.

The Missouri Court of Appeals Western District Special Rules are rules of procedure. "Procedural rules are . . . the means through which we seek to ensure the fair and orderly resolution of disputes and to attain just results." *Heintz v. Woodson*, 758 S.W.2d 452, 454 (Mo. banc 1988). Western District Rule XIII(D), the rule in effect during the briefing dispute from January through March 2018, provided that when a self-represented party filed a brief by *electronic mail attachment*, "three paper copies must be delivered to the clerk of the court no later than five days after the date of filing."<sup>5</sup> The rule did not specifically address the procedure when a self-represented party filed a brief by regular mail. However, the issue raised by Cox is moot in that this court granted him the relief he requested by permitting him to file only one copy of his brief. *See Soto v. Costco Wholesale Corp.*, 502 S.W.3d 38, 53 (Mo. App. W.D. 2016) ("If a court's decision is unnecessary or if granting effectual relief is impossible, the [issue] is moot and should be dismissed."). Therefore, the briefing issue raised in this sub-point of Point I is dismissed.

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<sup>5</sup> Western District Rule 13, as amended February 22, 2018, effective June 29, 2018, now specifically provides: "(E) When self-represented parties file a brief by regular mail, the original and three paper copies of the brief must be delivered to the clerk of the court."

### **Point I – Subject Matter Jurisdiction**

The second assertion in Cox’s first point is that the trial court lacked subject matter jurisdiction when it denied his post-conviction motion for DNA testing on May 12, 2017, because the United States district court had not yet sent a certified remand order to the trial court. “Jurisdictional issues present questions of law, which we review *de novo* and without deference to the circuit court’s determination.” *State ex rel. Nixon v. Moore*, 159 S.W.3d 488, 490 (Mo. App. W.D. 2005).

On August 25, 2016, Cox filed a DNA petition pursuant to section 547.035. On December 9, 2016, he filed a notice to remove his DNA petition to federal court pursuant to 28 U.S.C. 1443. On May 1, 2017, noting that a party who initiates a civil case in state court may not subsequently remove the case to federal court, the United States District Court for the Western District of Missouri remanded Cox’s case to the Circuit Court of Buchanan County. The circuit court docket sheet for Cox’s case records that an order was filed May 3, 2017, whereby the “United States District Court remands motion for DNA testing back to court.” Thereafter, on May 12, 2017, the motion court entered its order denying Cox’s post-conviction motion for DNA testing.

“The federal courts are courts of limited jurisdiction, empowered to hear only such cases as are provided by the Constitution and the Constitutionally-authorized acts of Congress.” *State ex rel. Nixon v. Moore*, 108 S.W.3d 813, 816 (Mo. App. W.D. 2003). The jurisdiction of the federal courts is defined in Article III, Section 2 of the United States Constitution. *Id.* “Although Article III does not in terms permit the removal of cases to federal courts, removal was authorized by the First Judiciary Act in 1789 as ‘necessary and proper’ to the execution of the tasks delegated the national government.” *Id.* 28 U.S.C. § 1446 eliminates conflict between

the federal and state systems of courts “by specifying that, once removal has been procedurally effected, any subsequent state action is void, even if it turns out the case was removed improperly.” *Id.* However, if the federal court determines that the case is not appropriate for federal jurisdiction, the court is to remand the case to the state court for further proceedings, with the remand ending federal court jurisdiction. *Id.* (citing 28 U.S.C. § 1447). The procedure for remand is described in 28 U.S.C. § 1447(c), which states:

If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

Thus, before jurisdiction re-attaches in the state court, the federal court must mail a certified copy of the remand order to the state court. *Moore*, 108 S.W.3d at 818.

Cox contends that the motion court lacked subject matter jurisdiction to enter its order denying DNA testing because the remand order had not been certified and mailed by the federal court to the circuit court clerk when the motion court’s order was entered. The record refutes Cox’s claim. The docket sheets in Cox’s case reflect that the United States district court’s May 1, 2017 order remanding the motion for DNA testing to the Buchanan County Circuit Court was filed in the circuit court on May 3, 2017. “[T]he operative jurisdictional event is the certification and mailing of the order.” *Id.* Consequently, the motion court had regained jurisdiction when, on May 12, 2017, it entered an order denying Cox’s post-conviction motion for DNA testing. This sub-point of Point I is denied.

### Point I – Recusal

The third assertion in Cox’s first point is that the motion court erred by not addressing a timely filed motion to recuse the judge on the grounds of unfairness and prejudice. A denial<sup>6</sup> of a motion for recusal for cause is to be affirmed unless that denial constituted an abuse of discretion. *Betts-Lucas v. Hartmann*, 87 S.W.3d 310, 328 (Mo. App. W.D. 2002) (citing *Robin Farms v. Bartholome*, 989 S.W.2d 238, 245 (Mo. App. W.D. 1999)). A trial court abuses its discretion if the trial court’s decision “defies logic under the circumstances, is sufficiently arbitrary and unreasonable to shock the conscience of the court, and exhibits a dearth of careful consideration.” *Id.* “Put another way, if reasonable persons would disagree regarding the appropriateness of [the] trial court’s decision, we must affirm.” *Id.*

Cox alleges in his statement of facts that “[a] timely motion to recuse Judge Robb from hearing DNA was filed (L.F. 27), long before Judge Robb denied DNA (L.F. 65-66). No ruling was issued on such demand.” The circuit court docket sheet records that Cox filed a motion to recuse Judge Robb on August 25, 2016. The table of contents of Cox’s legal file indicates that the recusal motion may be found on page 27; however, the document on page 27 is his notice of removal to federal court.

Rule 81.12(a) provides that “[t]he record on appeal shall contain all of the record, proceedings and evidence necessary to the determination of all questions to be presented, either by appellant or respondent, to the appellate court for decision.” Documents that are not contained in the legal file “do not constitute part of the record on appeal, and will not be considered in deciding an appeal.” *Moreland v. Div. of Emp’t Sec.*, 273 S.W.3d 39, 41 n.1 (Mo. App. W.D. 2008). The recusal motion is not included in Cox’s legal file. Without the recusal

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<sup>6</sup> Rule 81.05(a)(2)(A) regarding finality of judgments provides that all motions not ruled upon shall be deemed overruled ninety days from the date the last timely motion was filed.

motion before us, the record is inadequate for us to review Cox's sub-point that he was entitled to have Judge Robb recused before he ruled on the DNA motion. The omission of the document necessary for a review on the merits is an error fatal to Cox's appeal of this issue.<sup>7</sup> This sub-point of Point I is denied.<sup>8</sup>

Further, Point I, in its entirety, is denied.

### **Point II – Denial of Post-Conviction DNA Testing**

In Cox's second point, he asserts that the motion court erred in denying his motion for post-conviction DNA testing.

#### **Standard of Review**

A motion for DNA testing, pursuant to section 547.035, is a post-conviction motion, governed by that standard of appellate review set forth in Rules 24.035 and 29.15. *Weeks v. State*, 140 S.W.3d 39, 43-44 (Mo. banc 2004). Accordingly, "[d]enial of a post-conviction motion for DNA testing is reviewed to determine whether the motion court's findings of fact and conclusions of law were clearly erroneous." *State v. Ruff*, 256 S.W.3d 55, 56 (Mo. banc 2008). A motion court's findings of fact and conclusions of law are clearly erroneous only if a full review of the record leaves us with a definite and firm impression that a mistake has been made. *Id.*

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<sup>7</sup> *Ex gratia*, we note that "[i]t is presumed that a judge acts with honesty and integrity and will not preside over a [case] in which the judge cannot be impartial." *Anderson v. State*, 402 S.W.3d 86, 92 (Mo. banc 2013). Therefore, a post-conviction relief movant has the burden of showing bias or prejudice. *Id.* "Specifically, a disqualifying bias or prejudice is one that has an extrajudicial source and results in an opinion on the merits on some basis other than what the judge learned from the judge's participation in a case." *Id.* at 91 (internal quotation omitted). Whether disqualification is required is a fact-based inquiry. *See id.* "Without the required record, this Court has nothing to review." *Neisler v. Keirsbilck*, 307 S.W.3d 193, 197 (Mo. App. S.D. 2010) (internal quotation marks omitted).

<sup>8</sup> As the concurring opinion notes after performing a Case.net internet search for the recusal motion that was filed with the motion court below, even were we to consider Cox's one-sentence recusal motion that was not properly submitted with Cox's legal file on appeal, *ex gratia*, we note that it is nothing more than a conclusory argument without any legal basis supporting the argument; hence, Cox's recusal argument is likewise without any substantive merit.

## **Analysis**

“Section 547.035.1 authorizes a prisoner in the custody of the Missouri Department of Corrections, who claims that forensic DNA testing will prove that he is innocent of the crime for which he is imprisoned, to file in the sentencing court a post-conviction motion for DNA testing.” *Hudson v. State*, 190 S.W.3d 434, 438 (Mo. App. W.D. 2006). Pursuant to section 547.035.2, upon the filing of a post-conviction motion for forensic DNA testing, an evidentiary hearing shall be afforded to a movant if the motion alleges facts demonstrating, by a preponderance of the evidence, that:

- (1) There is evidence upon which DNA testing can be conducted; and
- (2) The evidence was secured in relation to the crime; and
- (3) The evidence was not previously tested by the movant because:
  - (a) The technology for the testing was not reasonably available to the movant at the time of the trial;
  - (b) Neither the movant nor his or her trial counsel was aware of the existence of the evidence at the time of trial; or
  - (c) The evidence was otherwise unavailable to both the movant and movant’s trial counsel at the time of trial; and
- (4) Identity was an issue in the trial; and
- (5) A reasonable probability exists that the movant would not have been convicted if exculpatory results had been obtained through the requested DNA testing.

Section 547.035.4 provides that the prosecutor will be ordered to show cause as to why the motion should not be granted, unless it appears from the motion that a movant is not entitled to relief or the court determines the file and records of the case conclusively show that a movant is not entitled to relief. “If the court finds that the motion and the files and records of the case conclusively show that the movant is not entitled to relief, a hearing shall not be held.”

§ 547.035.6. Whether or not a hearing is held, the court shall issue findings of fact and conclusions of law. § 547.035.8.

Section 547.035.2(3) requires a movant to allege facts demonstrating that the evidence was not previously tested by him because:

(a) the technology for the testing was not reasonably available to the movant at the time of the trial; (b) neither the movant nor his trial counsel was aware of the existence of the evidence at the time of trial; or (c) the evidence was otherwise unavailable to both the movant and movant’s trial counsel at the time of trial.

*State v. Fields*, 517 S.W.3d 549, 553 (Mo. App. E.D. 2016). “Hence, [t]o be entitled to post-conviction DNA testing, a movant must allege facts demonstrating one of the three alternative justifications set out in the statute as to why he . . . did not previously test the evidence.” *Id.* (internal quotation marks omitted). Cox fails to meet any of the statutory requirements for entitlement to post-conviction DNA testing.

Under prong (a) of section 547.035.2(3), a movant must demonstrate “the technology for the testing was not reasonably available to the movant” at the time of trial. According to the Supreme Court of Missouri, “the test is a *subjective* one, subject to a reasonable *availability* standard, not a question of objective scientific feasibility.” *Fields*, 517 S.W.3d at 553 (quoting *Weeks*, 140 S.W.3d at 47). Cox did not plead that the technology for DNA testing was not reasonably available to him at trial in 2015. His allegations:

- “defense counsel could have called upon experts to testify”;
- “my lawyer would do nothing for me, would not hire other experts on my behalf”;
- “my lawyer never asked for funds for different testing”;
- “my lawyer never invoked lack o[f] proper chain of custody with relation to the alleged victim having the condo[m] in her possession more than sufficient time to tamper with

the condo[m]. In this respect, there has to be other DNA on the outside of the condom because it was somebody else that [Cox] had intercourse with with that condom,” do not satisfy the requirement of prong (a). Clearly, the technology for DNA testing was reasonably available to Cox at the time of trial as DNA testing on the condom was conducted by the State.

As to prong (b), Cox did not plead that he or his trial counsel was unaware of the existence of the evidence at the time of trial. It was Cox who notified police of the existence of the evidence that Cox sought to have tested for additional DNA—the condom. Both Cox and defense counsel were aware of the existence of the condom at the time of Cox’s trial. Cox, therefore, cannot satisfy prong (b) of element (3) of section 547.035.2.

As to prong (c), Cox did not plead that the condom sought to be tested for additional DNA was unavailable to both Cox and defense counsel at the time of Cox’s trial. His allegations regarding defense counsel’s conduct in not having the condom tested, as recounted in our discussion of prong (a), do not establish that the condom was unavailable for testing by the defense. Cox, therefore, cannot satisfy prong (c) of element (3) of section 547.035.2.

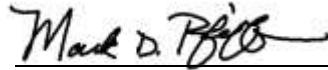
In the order denying Cox’s post-conviction motion for DNA testing, the motion court found that DNA testing was conducted from the evidence collected in the case, and a DNA analyst testified at trial that analysis of the DNA profile found it was consistent with Cox’s DNA. The motion court did not clearly err in concluding that the trial transcript and evidence presented at trial established that Cox was not entitled to an order for additional DNA testing because any additional DNA testing of other items in evidence would not result in the development of exculpatory evidence.

Point II is denied.



### **Conclusion**

The ruling of the motion court, denying Cox's post-conviction motion for DNA testing pursuant to section 547.035, is affirmed.



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Mark D. Pfeiffer, Judge

Thomas H. Newton, Judge, concurs.

Alok Ahuja, Presiding Judge, concurs in separate opinion.



**IN THE MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

STATE OF MISSOURI, )  
Respondent, )  
v. ) **WD80797**  
LEWIS SHAWN COX, ) **FILED: OCTOBER 30, 2018**  
Appellant. )

**CONCURRING OPINION**

I concur in the judgment of the Court. I also concur in the Court’s opinion, with one minor exception. The Court rejects Cox’s claim that Judge Robb erroneously failed to recuse himself, on the basis that Cox failed to include in the legal file the recusal motion he filed in the circuit court. Although this disposition is fully consistent with existing caselaw, I would not reject Cox’s recusal claim solely because of an omission from the legal file. Because all of our circuit courts now use electronic filing, I was able to access the official copy of Cox’s “Motion to Recuse Judge Robb and Change of Venue out of Buchanan County, Missouri” in only a few moments, using only a few keystrokes, while seated at my office computer. Given that the official circuit court record is now directly – and so easily – accessible, I seriously question whether we should refuse to hear an appellant’s claims for the sole reason that the appellant failed to include particular documents in the legal file compiled for this Court’s use.

As the Court notes, Cox’s argument on the recusal issue consists of a single sentence, which provides no basis to conclude that the circuit court abused its discretion in refusing to recuse itself. I would affirm the circuit court’s denial of

Cox's recusal motion on this basis, rather than based on the omission of a single document from Cox's legal file.

  
Alok Ahuja, Judge