



**In the Missouri Court of Appeals  
Eastern District  
DIVISION ONE**

JOEVALIS JOHNSON,	)	No. ED108539
	)	
Movant/Appellant,	)	
	)	Appeal from the Circuit Court
	)	of the City of St. Louis
vs.	)	Cause No. 1722-CC11479
	)	
STATE OF MISSOURI,	)	Honorable Steven R. Ohmer
	)	
Defendant/Respondent.	)	Filed: December 1, 2020

**OPINION**

Joevalis Johnson (“Movant”) appeals the judgment of the motion court denying his Rule 29.15 motion for post-conviction relief (“PCR”) following an evidentiary hearing.<sup>1</sup> Movant raises two points on appeal. In his first point on appeal, Movant alleges the motion court clearly erred and abused its discretion in denying Movant’s amended Rule 29.15 motion claim that Movant’s trial counsel was ineffective for failing to object to the prosecutor’s remarks in his opening and closing arguments regarding the rate at which alcohol metabolizes in the body. Movant argues that his trial counsel rendered ineffective assistance because such arguments were irrelevant and improper. In his second point on appeal, Movant argues the motion court clearly erred in failing to make specific findings on Movant’s *pro se* motion dated June 17, 2019

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<sup>1</sup> All references are to Missouri Supreme Court Rules.

because the motion court is required to make findings of fact and conclusions of law on all issues presented, regardless of whether a hearing is held.

We do not reach the merits of Movant's appeal because we must reverse and remand for the motion court to conduct an independent evidentiary inquiry on whether Movant was abandoned by post-conviction counsel.

### **I. Factual and Procedural Background**

Movant was charged with two counts of robbery in the first degree (Counts I and III), two counts of armed criminal action (Counts II and IV), and one count of unlawful possession of a firearm (Count V). After a jury trial, Movant was found guilty of Counts I, II, III, and IV; Count V was severed prior to trial.

On June 30, 2017, the trial court sentenced Movant as a prior and persistent felony offender to terms of imprisonment of 25 years on Counts I and III and 15 years on Counts II and IV. The trial court ordered Counts II and IV to run concurrently with each corresponding robbery count (Counts I and III), but Counts III and IV to run consecutively with Counts I and II, for a total of 50 years. The trial court also mistakenly sentenced Movant to a consecutive term of 10 years of imprisonment on Count V, although this count had not been tried.

Movant appealed his convictions and sentences to our Court. On October 23, 2018, this Court issued its opinion reversing Movant's conviction and sentence on Count V with instructions for that conviction to be vacated on remand, but affirmed Movant's other convictions. *See State v. Johnson*, 559 S.W.3d 423 (Mo. App. E.D. 2018). Our Court issued its mandate in Movant's direct appeal on November 16, 2018. On December 21, 2018, the trial court entered an amended sentence and judgment reflecting that Count V had been dismissed.

Movant prematurely filed his *pro se* Rule 29.15 motion on October 4, 2017. Post-conviction counsel was appointed on October 30, 2017. On November 3, 2017, counsel filed a motion to hold the premature filing open pending the direct appeal. On May 7, 2018, the motion court granted counsel's request for an additional thirty days to file the amended motion. On March 14, 2019, the court granted counsel a second 30-day extension to file the amended motion. The amended motion was filed on March 15, 2019. On June 17, 2019, Movant filed a second *pro se* amended motion asserting claims that post-conviction counsel failed to include in the amended motion.

An evidentiary hearing was held on August 16, 2019. On November 6, 2019, the motion court entered its finding of facts and conclusions of law denying Movant's PCR motion.

This appeal follows.

## **II. Discussion**

Before reaching the merits of an appeal, we are compelled to first examine the timeliness of amended motions in each post-conviction case on appeal. *Childers v. State*, 462 S.W.3d 825, 827 (Mo. App. E.D. 2015). "If the amended motion was untimely, the motion court was required to make a record of an independent inquiry into abandonment before considering the claims and evidence presented in the amended motion." *Barber v. State*, 569 S.W.3d 556, 559 (Mo. App. E.D. 2019). The motion court is required to make a sufficient record of the abandonment inquiry and the record must be clear enough for us to decide if the finding of abandonment was clearly erroneous; "[t]he motion court must independently inquire into post-conviction counsel's claims and the possibility a movant's negligence or failure to act caused the untimely filing of the amended motion." *Id.* at 559–60.

Upon review of the record, if we determine the motion court failed to make an independent inquiry or there is no record for us to review such inquiry, then we must reverse and remand for the motion court to conduct this inquiry. *Brown v. State*, 602 S.W.3d 846, 850 (Mo. App. E.D. 2020). While it is the duty of appellate courts to enforce the mandatory timelines in the post-conviction rules, the motion court is the appropriate forum to conduct an abandonment inquiry. *Blackburn v. State*, 468 S.W.3d 910, 913 (Mo. App. E.D. 2015).

Central to whether Movant's amended PCR motion was untimely filed is which version of Rule 29.15 controls in this case—the 2017 version (applicable at the time of Movant's original sentencing and his filing of his *pro se* motion) or the 2018 amended version (effective when the amended sentence and judgment was entered by the trial court). The result is outcome-determinative as to whether Movant's amended motion was timely filed because Rule 29.15(g) (2017) permitted only one 30-day extension while Rule 29.15(g) (2018) allows two 30-day extensions.

We begin with Rule 29.15(m) (2018) because it expressly provides that the date when a defendant's sentence is pronounced determines which version controls. Specifically, Rule 29.15(m) (2018) states:

This Rule 29.15 shall apply to all proceedings wherein sentence is pronounced on or after January 1, 2018. If sentence was pronounced prior to January 1, 2018, postconviction relief shall continue to be governed by the provisions of Rule 29.15 in effect on the date the motion was filed or December 31, 2017, whichever is earlier.

In the present case, Movant's sentence was pronounced on June 30, 2017—prior to January 1, 2018. Accordingly, Movant's PCR claim is governed by the version in effect when

Movant's PCR motion was filed (October 4, 2017) or December 31, 2017. The earlier date was October 4, 2017, therefore the version of Rule 29.15 in effect in 2017 controls.<sup>2</sup>

Rule 29.15(g) (2017), in relevant part, provides that:

If an 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 the mandate of the appellate court is issued 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.

The court may extend the time for filing the amended motion for one additional period not to exceed 30 days....

Here, post-conviction counsel was appointed on October 30, 2017. Our Court issued its mandate on November 16, 2018, triggering the 60-day countdown. Thus, the initial deadline to file the amended motion was Tuesday, January 15, 2019. Due to the request for an additional 30 days being granted, the amended motion became due by Thursday, February 14, 2019. Because Rule 29.15(g) (2017) expressly provided that the maximum extension was one additional period not to exceed 30 days, the trial court did not have the authority to grant a second 30-day extension. Accordingly, the amended motion filed on March 15, 2019 was untimely.

Consequently, failure to timely file the amended motion raised a presumption of abandonment by appointed counsel and the motion court had a duty to conduct an independent inquiry to determine if abandonment occurred. *See Moore v. State*, 458 S.W.3d 822, 825 (Mo. banc 2015). In the present case, although post-conviction counsel raised concern regarding the

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<sup>2</sup> We acknowledge the trial court entered an amended sentence and judgment on December 21, 2018. However, Movant's convictions and sentences on Counts I-IV were affirmed by our Court. The mandate dated November 16, 2018 instructed the trial court to correct Count V, which was severed before trial, and ordered that Movant's sentences on Counts I-IV be executed. The amended sentence and judgment did not reset the statutory clock for filing the amended motion because the effect of the amended sentence and judgment was solely to correct the conviction and sentence relating to Count V.

timeliness of the amended motion, the motion court made no record of an independent investigation into whether Movant was abandoned by appointed counsel.<sup>3</sup> *See Brown*, 602 S.W.3d at 850. Therefore, we must remand the case because the motion court is the appropriate forum to conduct such an inquiry.<sup>4</sup> *See id.; Moore*, 458 S.W.3d at 826.

On remand, the motion court has the discretion to make this inquiry as formal or informal as it deems necessary to resolve the question of abandonment; “[h]owever, a sufficient record must be made to demonstrate on appeal that the motion court’s determination on the abandonment issue is not clearly erroneous.” *Milner v. State*, 551 S.W.3d 476, 480 (Mo. banc 2018) (internal quotations omitted). “The result of the inquiry into abandonment determines which motion—the initial motion or the amended motion—the court should adjudicate.” *Moore*, 458 S.W.3d at 826.

We emphasize that the “the purposes served by remand are mandatory compliance with Missouri Supreme Court Rules and adherence to jurisdictional limitations.” *Guerra-Hernandez v. State*, 548 S.W.3d 368, 372 (Mo. App. E.D. 2018). Accordingly, the motion court’s judgment is reversed and the case is remanded for the motion court to conduct the independent inquiry to determine if Movant was abandoned.

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<sup>3</sup> The record demonstrates that post-conviction counsel raised the issue of whether the amended motion was timely filed. Post-conviction counsel informed the motion court that it first had to find post-conviction counsel “abandoned [Movant] and then proceed on the amended motion.” The motion court concluded it was “going to proceed for a complete record and let some higher authorities make these decisions.” The State concedes that we must remand the case to the motion court to conduct an abandonment inquiry.

<sup>4</sup> For purposes of judicial economy, we acknowledged the exception established in *Childers*, which provides that remand is not necessary where all of the claims in a movant’s *pro se* PCR motion have been incorporated into and fully adjudicated along with the amended PCR motion. *Childers*, 462 S.W.3d at 828. Here, the *pro se* motion and amended motion significantly differ and the motion court only adjudicated the claim asserted in the amended motion. *See Guerra-Hernandez v. State*, 548 S.W.3d 368, 371 (Mo. App. E.D. 2018). Thus, the *Childers* exception is inapplicable.

### **III. Conclusion**

For the foregoing reasons, the motion court's judgment is reversed and the case is remanded to the motion court to conduct an independent inquiry into whether Movant was abandoned by post-conviction counsel and for further proceedings consistent with the outcome of the motion court's inquiry.

A handwritten signature in cursive script, reading "Colleen Dolan", written in black ink. The signature is positioned above a horizontal line.

Colleen Dolan, P.J.

Mary K. Hoff, J., concurs.

Robert M. Clayton III J., concurs.