Missouri Court of Appeals

Southern District

Division Two

CLAYTON DEAN PRICE,	)	
	)	
Movant-Respondent,	)	
	)	
vs.	)	No. SD31725
	)	
STATE OF MISSOURI,	)	**Filed: December 28, 2012**
	)	
Respondent-Appellant.	)	

APPEAL FROM THE CIRCUIT COURT OF TANEY COUNTY

Honorable J. Edward Sweeney, Senior Judge

AFFIRMED

The State appeals an order granting Clayton Dean Price's ("Movant") untimely filed Rule 29.15 motion to set aside his 2004 jury conviction for first-degree statutory sodomy (see section 566.062).[1] We affirmed Movant's conviction on direct appeal in ***State v. Price***, 165 S.W.3d 568 (Mo. App. S.D. 2005). In two points relied on, the State contends the motion court clearly erred in allowing Movant to file his 29.15 motion late because: 1) Movant "was not 'abandoned' by post-conviction counsel" for purposes of filing the original Rule 29.15 motion; and 2) even if Movant was abandoned, he failed to file his motion "within a reasonable amount of time after the alleged abandonment took place[.]" Because we find the State's second contention was not properly preserved for our review, and because we believe the principles set forth by our high court in

[1] All rule references are to Missouri Court Rules (2012). All statutory references are to RSMo 2000.

McFadden v. State, 256 S.W.3d 103, 106 (Mo. banc 2008), as interpreted by subsequent case law, support the motion court's findings and conclusions, we deny both points and affirm the order granting post-conviction relief.

Applicable Principles of Review and Governing Law

The findings and conclusions of the motion court are presumed correct. ***Wilson v. State***, 813 S.W.2d 833, 835 (Mo. banc 1991). We review findings of fact and conclusions of law supporting an order granting post-conviction relief for clear error. Rule 29.15(k); ***Baumruk v. State***, 364 S.W.3d 518, 525 (Mo. banc 2012). "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." ***Moss v. State***, 10 S.W.3d 508, 511 (Mo. banc 2000). We defer to the motion court on matters of credibility, ***Wagoner v. State***, 240 S.W.3d 159, 163 (Mo. App. S.D. 2007), and it is free to believe or disbelieve any evidence, even undisputed evidence. ***Vanzandt v. State***, 212 S.W.3d 228, 231 (Mo. App. S.D. 2007).

If the underlying conviction at issue was imposed after a trial, and the movant unsuccessfully challenged the conviction by direct appeal, any subsequent 29.15 motion "shall be filed within 90 days after the date the mandate of the appellate court is issued affirming such judgment or sentence." Rule 29.15(b). The failure to timely file the motion "shall constitute a complete waiver of any right to proceed under this Rule 29.15 and a complete waiver of any claim that could be raised in" such a motion. Rule 29.15(b). Our supreme court held in ***Dorris v. State***, 360 S.W.3d 260, 268 (Mo. banc 2012), that "[t]he State cannot waive movant's noncompliance with the time limits in Rules 29.15 and 24.035."

In a case involving highly unusual circumstances, our high court created "a narrow exception" to the seemingly absolute requirement of a timely filing that would apply "when a post-conviction movant is abandoned by counsel." ***McFadden***, 256 S.W.3d at 106. The exception would apply only if it was counsel's action of abandonment, not the movant's own failure to comply with Rule 29.15, that resulted in the untimely filing, and it was not to become "a substitute for an impermissible claim of ineffective assistance of counsel." ***Id.*** "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." ***Crenshaw v. State***, 266 S.W.3d 257, 259 (Mo. banc 2008).

Facts and Procedural Background[2]

The attorney who represented Movant at trial did not appear at Movant's subsequent sentencing hearing. Instead, attorney Thomas Carver ("Attorney") entered his appearance and represented Movant at the sentencing hearing. After pronouncing its sentence, the trial court informed Movant of his Rule 29.15 post-conviction rights. The trial court advised Movant that he would have 180 days to file such a motion if he did not appeal his conviction. The trial court informed Movant that if he unsuccessfully appealed his conviction, he would have only 90 days thereafter to seek such relief. Movant specifically confirmed to the trial court that he understood that if he appealed his conviction and that conviction was subsequently affirmed on appeal, then the 90-day deadline would apply to his 29.15 motion and the time limit would begin to run upon the issuance of "the mandate of the Court."

[2] The State does not challenge the evidence supporting the motion court's findings regarding the two grounds for setting aside Movant's conviction and sentence. As a result, we discuss only the factual findings relevant to the State's points on appeal.

Attorney represented Movant in his unsuccessful direct criminal appeal. ***Price***, 165 S.W.3d at 570. We issued our mandate affirming Movant's conviction on July 15, 2005. Under Rule 29.15(b), Movant's post-conviction motion was thereby due on October 13, 2005. No Rule 29.15 motion was filed prior to the expiration of that deadline.

On January 17, 2006, approximately three months after the deadline had passed, Movant, through a different attorney, filed a motion asking this court to recall its July 15, 2005 mandate. That motion was dismissed on January 26, 2006. Movant next sought a writ of *habeas corpus* from the circuit court for the county in which Movant was incarcerated. The circuit court granted *habeas* relief, and the State appealed. We subsequently quashed the circuit court's writ in ***State ex rel. Nixon v. Sheffield***, 272 S.W.3d 277, 285 (Mo. App. S.D. 2008).[3]

In quashing the writ, we relied on the fact that *habeas* relief is appropriate only upon a showing of "cause and prejudice" resulting from an "'objective factor external to the defense'" or "manifest injustice" -- understood to mean new evidence of "'actual innocence'" -- and found that neither standard had been satisfied. ***Sheffield***, 272 S.W.3d at 281, 284-85 (quoting ***State ex rel. Nixon v. Jaynes***, 63 S.W.3d 210, 215 and 216 (Mo.

[3] In discussing the procedural history of the case, we stated:

> Instead of filing a *pro se* PCR motion, [Movant] hired [Attorney] to handle his case. [Attorney] got his filing time mixed up, thinking he had twice as long (180 days) as he actually had (90 days). *See* Rule 29.15(b). [Attorney] notified [Movant] and his family as soon as he realized that he had missed the deadline. [Movant] hired new counsel, and 13 months later, filed a habeas corpus petition in Texas County where he was imprisoned.

Id. at 280.

banc 2001) (internal quotations omitted)).[4] Our supreme court denied Movant's subsequent motion for transfer "without prejudice to seeking relief, if any, pursuant to [***McFadden***]."

On December 31, 2009, Movant filed a motion with the motion court to "reopen 29.15 proceedings and for permission to file Rule 29.15 motion out of time" on the grounds that "[t]he attorney [Movant] initially retained to handle his Rule 29.15 motion abandoned [Movant] by failing to file his post-conviction motion before the deadline established by Rule 29.15." The motion court held an evidentiary hearing on the motion to reopen in July 2010. In September 2010, the motion court granted Movant leave to file his Rule 29.15 motion out of time. The motion court issued findings of fact and conclusions of law with its order, finding, *inter alia*, that Attorney, "under the press of other business, . . . fail[ed] to pay attention to the correct deadline he had received at the sentencing hearing."[5] It found that Movant also communicated with Attorney through Movant's mother, and Movant's mother "repeatedly had been assured that [Attorney] would make a timely filing."

Additionally, the motion court found that "[Attorney] did not give [Movant] any incorrect legal advice about the deadline for the [Rule] 29.15 motion. The sentencing court had given both [Attorney] and [Movant] the filing deadline." In ruling that the Rule 29.15 motion could be filed out of time, the motion court found that "[Attorney] actively interfered with [Movant's] ability to file a *pro se* 29.15 motion by assuring [Movant],

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[4] The State's argument for a reversal based on ***Sheffield*** is inapposite due to the markedly different standards that apply to a request for *habeas* relief.

[5] The State did not include a transcript of the evidentiary hearing on Movant's motion to reopen. As a result, we presume that the evidence produced at that hearing would support the motion court's factual findings. And because the State challenges only the legal basis for the motion court's ruling, we rely solely on the facts as found by the motion court.

directly and indirectly, that he would timely prepare and file the motion on [Movant's] behalf. [Attorney] abandoned this undertaking and along with it, [Movant]."

After the hearing on the substantive claims raised in Movant's Rule 29.15 motion, the parties filed proposed findings of fact and conclusions of law, and the motion court heard additional argument. The motion court granted post-conviction relief on October 26, 2011, finding that "[c]onstitutional error has been demonstrated" regarding the verdict director submitted to the jury as "[i]t permitted the jury to convict [Movant] without being unanimous as to an occurrence being committed in a specific way." The motion court also found that particular "omissions" by trial counsel during trial could not be attributed to trial strategy and that trial counsel "was constitutionally ineffective." The motion court vacated Movant's conviction and sentence and ordered the State to notify Movant "within 45 days" if it intended to retry him, and it indicated that such a trial was to commence within 180 days absent a mutual agreement to delay it or a claim by Movant that he needed additional time to prepare. The State filed its notice of appeal on November 23, 2011.

Analysis

Point I - Abandonment

The State's first point claims that Movant was not abandoned by Attorney so as to permit a late filing of a 29.15 motion because Attorney's "actions in telling [Movant] that he would file a post-conviction motion and mistaking the deadline were not 'active interference' that prevented [Movant] from filing his motion within the time limits of Rule 29.15."

Before addressing the merits of the claim, we must first deal with Movant's claim that we cannot do so because the State's appeal is untimely. The State filed its notice of appeal after the motion court issued its order granting post-conviction relief. Movant insists that the notice had to be filed earlier -- after the motion court granted Movant leave to file his Rule 29.15 motion out of time. Movant claims the order allowing the late filing, which included a finding that Attorney had abandoned Movant, was a final judgment under Rule 29.15(k), which provides that "[a]n order sustaining or overruling a motion filed under the provisions of this Rule 29.15 shall be deemed a final judgment for purposes of appeal by the movant or the state." We disagree.

Movant's motion for permission to file a 29.15 motion out of time was not itself a motion filed under the provisions of Rule 29.15. Rule 29.15 makes no provision for the late filing of an original motion for post-conviction relief; the possibility of a late filing exists solely by virtue of case law. *See* ***Moore v. State***, 328 S.W.3d 700, 703 (Mo. banc 2010). Because the State's notice of appeal was filed before the October 26, 2011 order granting post-conviction relief became final, it was timely filed, Rule 81.05(b), and we may hear the State's appeal.

The State attempts to distinguish the instant case from ***McFadden***, where a public defender instructed McFadden "to send his Rule 29.15 motion for post-conviction relief directly to her and [she] told him that she would hand-file it before the due date." 256 S.W.3d at 105. McFadden mailed the motion to the public defender as she had requested, and although she received it from McFadden 13 days before the motion's due date, she did not file it until after the deadline had passed. ***Id***. The Court found that "the public defender undertook to represent McFadden and then simply abandoned that

representation." ***Id.*** at 109. As a result, it was the attorney's overt actions that prevented the timely filing of the original petition and "the motion court [was] authorized to reopen the otherwise final post-conviction proceeding." ***Id.***

Generally, "[t]he movant is responsible for filing the original motion, and a lack of legal assistance does not justify an untimely filing." ***Gehrke v. State***, 280 S.W.3d 54, 57 (Mo. banc 2009). ***McFadden*** marked a distinction to this principle, as it was the movant's original motion that counsel undertook to file on his behalf. 256 S.W.3d at 105. The State attempts to distinguish ***McFadden*** on the basis of the Court's statement that "[McFadden's c]ounsel's failure did not occur due to a lack of understanding of the rule, out of an ineffective attempt at filing, or as a result of 'an honest mistake,' ***Matchett v.*** **[*State*]**, 119 S.W.3d 558, 559 (Mo. App. [S.D.] 2003), none of which will justify failure to meet the time requirements." 256 S.W.3d at 109. The State also cites other cases where counsel's inaction or erroneous advice was insufficient to qualify for an exception from Rule 29.15's temporal deadline.[6] None of the cited cases involved a retained attorney who assumed the responsibility to timely file an initial Rule 29.15 motion for an imprisoned client and then failed to do so.

The State points out that while McFadden prepared his own initial Rule 29.15 motion and sent it to counsel, Movant did not prepare and send such a motion to Attorney. As a result, the State asserts that nothing prevented Movant from filing his

[6] *See* ***Moore***, 328 S.W.3d at 702-03 (no abandonment by appellate counsel's failure to inform movant of the issuance of the mandate as appellate counsel had no responsibility to assert post-conviction rights); ***Reuscher v. State***, 887 S.W.2d 588, 589-90 (Mo. banc 1994) (construing former version of rule 29.15; trial counsel informed the movant that counsel would prepare a post-conviction motion for his signature if the movant stated the grounds he wanted raised or that movant could file the motion on his own, but "[t]he pleadings do not disclose whether [the movant] requested [trial counsel] to prepare the motion"); ***Clark v. State***, 261 S.W.3d 565, 567, 572 (Mo. App. E.D. 2008) (appellate counsel erroneously informed the movant that time for filing a Rule 29.15 motion was stayed pending ruling on *certiorari* petition before United States Supreme Court, but "[a]ppellate [c]ounsel was not [the m]ovant's post-conviction counsel").

own *pro se* motion before the deadline expired. In the State's view, the type of "active interference" at issue in ***McFadden*** was not present in Movant's case as "it does not appear that counsel ever instructed [Movant] not to file a motion or otherwise actively prevented him from doing so." The State argues that Movant's case is more closely analogous to ***Bullard v. State***, 853 S.W.2d 921, 922-23 (Mo. banc 1993), where the Court found that an attorney's erroneous advice about the motion's due date under a former version of Rule 29.15 did not constitute abandonment for purposes of an original 29.15 motion. We disagree.

Our supreme court's interpretation of its ***Bullard*** case was that Bullard's retained attorney simply gave Bullard bad legal advice about when his Rule 29.15 motion was due. ***McFadden***, 256 S.W.3d at 108. Here, Movant's retained counsel, like McFadden's attorney, "simply abandoned" the filing obligation that he undertook for his incarcerated client. 256 S.W.3d at 108. Nor can we ignore ***McFadden***'s further observations:

> "The situation of prisoners seeking to appeal without the aid of counsel is unique. Such prisoners cannot take the steps other litigants can take ... to ensure that the court clerk receives and stamps their notices of appeal before the ... deadline." *Houston v. Lack,* 487 U.S. 266, 270–71, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988). Mr. McFadden, having been abandoned by counsel who undertook to perform a necessary filing and then simply failed to do so, was in this same position and is entitled to relief.

Id. at 109. We are unable to avoid concluding that the last quoted sentence applies equally here. Movant, having been abandoned by retained counsel "who undertook to perform a necessary filing and then simply failed to do so, was in this same position and is entitled to relief." ***Id***.

Under these circumstances, we cannot say that the motion court clearly erred in finding, for purposes of determining whether to allow a late Rule 29.15 motion filing,

that Movant had been abandoned by Attorney. *Cf.* ***Ewing***, 360 S.W.3d at 331 n.12 (*habeas* case suggesting that if "trial or appellate counsel agree to assume the mantle of post-conviction counsel for a client" and then does not file timely said motion, a claim for such conduct should not be presented as a type of ineffective assistance of counsel under ***Gehrke***, but as a claim of abandonment under ***McFadden***).[7] Point I is denied.

Point II

The State's second point asserts, without conceding, that if Movant was abandoned by counsel, then "[t]he motion court clearly erred" in permitting Movant's 29.15 motion to "be filed more than four years out of time" because Movant did not file the motion "within a reasonable amount of time" after the abandonment. The State identifies no express time limit for filing a 29.15 motion after being abandoned by counsel. While acknowledging that the one-year rule applicable to late notices of appeal under Rule 30.03 does not control the question, the State argues that 30.03 is at least analogous because the same sort of interests are at stake. Based on that premise, the State now claims that "a reasonable limit on the time for filing should be imposed."[8]

Movant's response is that because the State never presented such a claim to the motion court for its consideration, it cannot be raised for the first time on appeal, arguing that although our high court held in ***Dorris*** that the State cannot waive a late Rule 29.15

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[7] *Also cf.*, ***Moore v. State***, 328 S.W.3d 700, 703 (Mo. banc 2010) (Stith, J., concurring) (suggesting that "where counsel affirmatively has told the client that counsel will take responsibility for a matter, then the client has the right to rely on that statement, as this Court recognized in [***McFadden***]").

[8] Movant cites cases involving delays in excess of four years, but it does not appear that those cases decided the reasonableness of the delay. *See* ***Gehrke***, 280 S.W.3d at 59 n.6 (movant did not explain five-year delay in moving to reopen his post-conviction proceedings, but as abandonment was held not to apply, the delay was not considered); ***Dudley v. State***, 254 S.W.3d 109, 110-11 and 112 (Mo. App. W.D. 2008) (fourteen years elapsed between original judgment and a motion to reopen the post-conviction proceeding; case remanded for further proceedings on alleged abandonment); ***Daugherty v. State***, 116 S.W.3d 616, 617 and 618 (Mo. App. E.D. 2003) (twelve years elapsed between denial of post-conviction relief and *pro se* motion alleging abandonment by post-conviction counsel; case remanded for further proceedings on alleged abandonment).

filing, that does not mean that it cannot waive an argument as to the necessity of imposing a reasonable time limit for the filing of such a motion after abandonment. We agree.[9]

By not first raising its claim to the motion court, the State has failed to preserve its second allegation of error for our review. We "will generally not convict a lower court of error on an issue that was not put before it to decide." ***Smith v. Shaw***, 159 S.W.3d 830, 835 (Mo. banc 2005). The State has failed to persuade us that an exception to that general rule should apply here.

Point II is also denied, and the motion court's order granting post-conviction relief is affirmed.

DON E. BURRELL, J. - OPINION AUTHOR

JEFFREY W. BATES, J. - CONCURS

DANIEL E. SCOTT, P.J. - DISSENTS

[9] ***Dorris*** dealt with "the court's duty to enforce the mandatory time limits[.]" 360 S.W.3d at 268. The State does not claim that any such mandatory time limit applies to the late filing of a 29.15 motion after abandonment.

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APPEAL FROM THE CIRCUIT COURT OF TANEY COUNTY

Honorable J. Edward Sweeney, Senior Judge

DISSENTING OPINION

I initially shared the court's view, but uncertainties regarding ***Bullard***[1] led to further consideration and, eventually, to such doubt that I must respectfully dissent.

Our supreme court repeatedly has said, with reference back to ***Bullard***, that "abandonment by an attorney does not excuse the untimely filing of an original post-conviction motion." ***Smith v. State***, 887 S.W.2d 601, 602 (Mo. banc 1994) ("***Smith IV***") (citing ***Bullard***, 853 S.W.2d at 922-

[1] ***Bullard v. State***, 853 S.W.2d 921 (Mo. banc 1993). Hereafter, for reasons of space, I may omit complete citations of cases fully cited in the court's opinion.

23), *later re-quoted in* ***Smith v. State***, 21 S.W.3d 830, 831 (Mo. banc 2000) ("***Smith V***"). ***Smith IV*** also noted that court's rejection, via transfer and contrary opinion in ***Bullard***, of the view that "an untimely original 29.15 motion can be considered where the late filing results from abandonment of counsel," (***id.***, referring to ***Bullard v. State***, WD45894, 1992 WL 202542 (Mo.App. Aug. 25, 1992)), which had emanated from this court's opinion in ***State v. Werner***, 810 S.W.2d 621 (Mo.App. 1991).[2] ***Bullard*** expressly overruled this aspect of ***Werner***. 853 S.W.2d at 923 n.1.

The significance of these cases, in my view, is seen when considering them chronologically.

Southern District (1991)

Werner had been retransferred to this court, after we dismissed it, for reconsideration in light of cases including ***Sanders v. State***, 807 S.W.2d 493 (Mo. banc 1991). Analogizing ***Sanders***' rule for amended motions, we reasoned that if it was "counsel's duty to timely file an initial motion, counsel

[2] *See* ***Bullard***, WD45894, 1992 WL 202542 at *4. I note this opinion, although it lacks precedential value, because the supreme court did so in ***Smith IV*** and to demonstrate what was "expressly discounted by the supreme court as dispositive in the case." *See* ***Manar v. Park Lane Med. Ctr.***, 753 S.W.2d 310, 313 n.2 (Mo.App. 1988) (similarly noting a vacated opinion for reasons other than precedential value).

This opinion also answered my key question in the current case: Did ***Bullard***'s statement that, "[a]ccording to the motion below, [appellate counsel] also agreed to represent Bullard in his Rule 29.15 proceedings," include counsel's offer or legal obligation to *file* the initial motion? Although the supreme court did not quote "the motion below," the western district did with procedural background indicating that counsel offered, and may have been required by supreme court rule, to file Bullard's motion. *See* WD45894, 1992 WL 202542 at *1, *3; *see also* note 4 and accompanying text *infra*.

in effect abandoned the defendant" by failing to do so. ***Werner***, 810 S.W.2d at 626, *overruled by* ***Bullard***, 853 S.W.2d at 923 n.1.

Western District (1992)

Concluding that Bullard's attorney agreed to and should have filed the initial motion (*see* note 2 *supra*), the western district followed ***Werner***'s lead, holding that "an untimely original 29.15 motion can be considered where the late filing results from abandonment of counsel." ***Smith IV***, 887 S.W.2d at 602.[3]

Supreme Court (1993 and after)

The supreme court eviscerated all the above in ***Bullard*** via transfer, contrary opinion, and express overruling of ***Werner*** in these respects. 853 S.W.2d at 922-23. *See also* ***Smith IV,*** 887 S.W.2d at 602, which cited ***Bullard*** in reiterating that "abandonment by an attorney does not excuse the untimely filing of an original post-conviction motion."

Smith V repeated this rule, then arguably hardened it. "[A]bandonment by an attorney does not excuse the untimely filing of an original post-conviction motion." 21 S.W.3d at 831. This is so even where Rule 29.07(b)(4) requires *counsel* to "timely file" such motion. ***Id***.[4] "The

[3] But only in "the situation where counsel is appointed or retained at the onset. The ruling does not relieve the pro se movant from the time restraints of Rules 29.15 and 24.035, *but acknowledges that once counsel is appointed or retained, the movant has a right to and will rely on the attorney's guidance and counsel.*" WD45894, 1992 WL 202542 at *4 (emphasis in original). *Compare* ***Moore***, 328 S.W.3d at 704 (Stith, J., concurring), which I believe reflects a similar view.

[4] The western district saw Bullard's counsel as subject to this filing obligation due to ineffective assistance allegations against his predecessor. *See* WD45894, 1992 WL

assistance of counsel or lack thereof in filing such an original Rule 29.15 motion does not excuse its untimely filing." ***Id***. (citing ***Smith IV*** and ***Bullard***).

Bullard and ***Smith V*** remain good law. The supreme court cited ***Bullard*** in ***McFadden***, ***Gehrke***, and ***Moore***, in part for the continuing proposition that a movant "is responsible for filing the original motion, and a lack of legal assistance does not justify an untimely filing." ***Gehrke***, 280 S.W.3d at 57.

I read ***McFadden*** to distinguish ***Bullard*** on the basis that McFadden's counsel "actively interfered" and "overtly acted" to "prevent[] the movant's timely filing" (*see* 256 S.W.3d at 109), and Bullard's counsel did not. I cannot tell from ***McFadden*** or later cases whether the court saw counsel's overt, active interference as (1) *physically* taking and failing to file McFadden's *pro se* motion, or (2) merely *telling* her client she would do something, then failing to do it. If it was the former, ***McFadden*** does not govern this case. If it was the latter, ***McFadden*** seemingly should have

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202542 at *1, *3. At all times relevant to cases cited herein, Rule 29.07(b)(4) has stated in pertinent part:

> If the [trial] court finds that probable cause of ineffective assistance of counsel exists, within ten days of the judgment of conviction becoming final trial counsel shall withdraw and the court shall cause new counsel to be appointed if the defendant is indigent. If an appeal is filed, new counsel shall perfect the appeal. Whether or not an appeal is filed, new counsel shall be directed to ascertain whether facts and grounds exist for the filing of a motion pursuant to Rule 24.035 or Rule 29.15. If such facts and grounds exist, new *counsel shall timely file the appropriate motion* [my emphasis].

overruled ***Bullard***, given ***Bullard***'s facts as I understand them, and which I think are materially indistinguishable from the case now before us.

I recognize that I may be reading ***Bullard*** more broadly or at least differently than was done in ***McFadden***, and if so, I am likely in error. I have no personal quarrel with the result reached by the majority, and in terms of professional responsibility, I agree that "the movant has a right to and will rely on the attorney's guidance and counsel"[5] and that "[h]aving undertaken to file the motion for movant, counsel was obligated to complete that task."[6] Yet I read ***Bullard*** and ***Smith V*** as having trumped those considerations (and Rule 29.07(b)(4) in part), for good or ill, and I am not sure ***McFadden*** alters that. As I cannot say that ***Bullard*** and ***Smith V*** do not still govern counsel's default in filing an original PCR motion, I cannot join the court's thoughtfully-reasoned opinion.

DANIEL E. SCOTT, P.J. – DISSENTING OPINION AUTHOR

[5] ***Bullard***, WD45894, 1992 WL 202542 at *4.

[6] ***Moore***, 328 S.W.3d at 704 (Stith, J., concurring).