



SUPREME COURT OF MISSOURI

en banc

TERRY T. WATSON,) *Opinion issued January 16, 2018*
)
Appellant,)
)
v.) No. SC96103
)
STATE OF MISSOURI,)
)
Respondent.)

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS CITY, MISSOURI

Honorable Bryan Hettenbach, Judge

Terry T. Watson appeals the motion court's order overruling his Rule 29.15 motion for postconviction relief. Finding counsel failed to timely file an amended motion, this Court reverses and remands for a determination of abandonment.

I. FACTUAL AND PROCEDURAL BACKGROUND

Mr. Watson was convicted of first-degree robbery, resisting arrest, and second-degree trafficking. He was sentenced to concurrent terms of imprisonment, the longest of which was 18 years. The convictions and sentences were affirmed on appeal, and on February 11, 2013, Mr. Watson filed a timely pro se motion for postconviction relief under Rule 29.15. The motion alleged Mr. Watson received ineffective assistance of counsel in that counsel (1) failed to notify Mr. Watson of the existence of a plea offer and

(2) opted to take Mr. Watson's case to trial because of a mistaken belief that a conviction under the first-degree robbery statute required the use of a weapon to forcibly take property and cause bodily harm.

The motion court notified the public defender's office that Mr. Watson had filed a pro se motion on March 16, 2013, but did not appoint counsel. A special public defender entered her appearance on Mr. Watson's behalf on March 20, 2013. On April 12, 2013, she filed a "Motion for Leave to File Amended Answer," in which she requested "a period of 45 days *from the date of filing* within which to file an amended petition." (Emphasis added). The motion court issued an order stating only "Motion Granted So Ordered."

The issue now before this Court is to determine exactly when the amended motion was due and whether an amended motion filed by the special public defender on May 30, 2013, was timely. If timely, then this Court will reach the merits. If untimely, then this Court must remand for a determination of abandonment.

II. STANDARD OF REVIEW

When an appellate court reviews a motion for postconviction relief, such review "is limited to a determination of whether the motion court's findings and conclusions are clearly erroneous." *Eastburn v. State*, 400 S.W.3d 770, 773 (Mo. banc 2013). The motion court's findings and conclusions are clearly erroneous only "if, after reviewing the entire record, this Court is left with the definite and firm impression that a mistake has been made." *Id.* The filing deadlines for postconviction relief "are mandatory, and cannot be waived." *Cox v. State*, 445 S.W.3d 131, 134 (Mo. App. 2014). When a motion for

postconviction relief is filed untimely, “the motion court should not reach the merits of the motion.” *Turner v. State*, 935 S.W.2d 393, 394 (Mo. App. 1996).

III. TIMELINESS OF THE AMENDED MOTION

A. Requirements for an Amended Rule 29.15 Motion

Rule 29.15(e) requires a movant seeking postconviction relief to first file a pro se motion. The appointment of counsel for an indigent movant or entry of appearance of counsel for a movant triggers the running of the time for counsel to file an amended motion under Rule 29.15(g). See *Creighton v. State*, 520 S.W.3d 416, 421 (Mo. banc 2017); *Rule 29.15(e)*. Under Rule 29.15(g), the amended motion must be filed:

[W]ithin sixty days of the earlier of: (1) the date both the mandate of the appellate court is issued and counsel is appointed or (2) the date both the mandate of the appellate court is issued and an entry of appearance is filed by any counsel that is not appointed but enters an appearance on behalf of movant.

Moore v. State, 458 S.W.3d 822, 825 (Mo. banc 2015), quoting, *Rule 29.15(g)*.

At the time Mr. Watson filed his motion, Rule 29.15(g) further provided the “court may extend the time for filing the amended motion for one additional period not to exceed 30 days.” No other extensions were permitted.¹ Failure to file either a timely amended motion or a statement in lieu of an amended motion explaining why an amended motion was unnecessary “raises a presumption of abandonment by appointed counsel.” *Vogl v. State*, 437 S.W.3d 218, 230 (Mo. banc 2014).

¹ Effective January 1, 2018, the rules allow further extension of the time for filing an amended motion, “with no extension exceeding 30 days individually and the total of all extensions not to exceed 60 days.” *Rule 29.15(g)* (effective January 1, 2018); see also *Rule 24.035(g)*.

Here, because no public defender was appointed, the time for filing the amended motion began to run under Rule 29.15(g) when the special public defender filed her entry of appearance on March 20, 2013.² Absent the grant of an extension, her amended motion was due 60 days later on May 19, 2013.

On April 12, 2013, more than three weeks after filing her entry of appearance, the special public defender filed a pleading titled “Motion for Leave to File Amended Answer,” which requested “a period of 45 days from the date of filing within which to file an amended petition.” The motion court specifically granted the motion in an order that stated only: “Motion Granted So Ordered.” The parties disagree as to when the amended motion was due under the motion court’s order.

If the motion court granted the relief specifically requested – that is, leave to file an amended motion “45 days from the date of filing” – then the amended motion was untimely because 45 days from the date the motion for leave was filed was May 28, 2013,³ and

² At the time of the events at issue in this case, Rule 29.15(e) provided, “When an indigent movant files a pro se motion, the court shall cause counsel to be appointed for the movant.” The rule did not provide a specific time within which the appointment of counsel needed to be made, and some courts simply notified the office of the public defender of the filing of a pro se motion but made no appointment. This Court clarified in *Creighton*, 520 S.W.3d at 418-19, that a motion court’s “memorandum notifying the public defender that [a m]ovant filed a pro se motion” does not constitute appointment and does not trigger the running of the time period for filing an amended motion. When no counsel is appointed, the Rule 29.15(g) filing deadlines “are measured from the date counsel ... enters an appearance.” *Id.* at 421. This Court has implemented a rule change effective January 1, 2018, providing, “Within 30 days after an indigent movant files a pro se motion, the court shall cause counsel to be appointed for the movant.” *Rule 29.15(e)* (effective January 1, 2018); *see also Rule 24.035(e)*.

³ Forty-five days from the time the motion for leave was filed was actually May 27, 2013. But because May 27, 2013, was Memorial Day, the deadline was pushed back one day later to May 28, 2013. Regardless, the amended motion filed on May 30, 2013, was untimely.

counsel did not file the amended motion until May 30, 2013. This interpretation is consistent with the plain language and wording of the motion for leave, which does not ask for an extension of the actual filing deadline, but instead requests permission to file an amended motion 45 days from the date “of filing.”

The State argues this Court nonetheless should interpret the motion for leave as seeking a 45-day extension beyond May 19, 2013, which is the date the amended motion otherwise would have been due under Rule 29.15. But at the time the special public defender filed the motion, Rule 29.15(g) did not permit a 45-day extension. Rule 29.15(g) expressly provided the maximum extension was 30 days from the date a post-trial motion otherwise would be due, and only a single extension could be sought. *Id.* The State’s interpretation, therefore, would require this Court to ignore the date on which the special public defender asked the 45-day period begin to run, and either ignore the limit on the length of extension Rule 29.15(g) permits to be granted or assume, even though the motion court said it was granting the motion for leave, it was actually granting it only in part. This Court would then be required to further assume the motion court sub silencio modified the motion for leave so the time requested would begin and end on different, and unspecified, dates than those requested. This simply is not a reasonable interpretation of what occurred.

The dissenting opinion notes the motion court has the authority to grant a 30-day extension and argues it would be consistent with the motion court’s treatment of the motion as timely to assume the motion court sua sponte granted a 30-day extension rather than the nine-day extension expressly requested. The problem with this argument is the record affirmatively shows that the motion court granted the motion filed by defense counsel. Its

order is specific: “Motion Granted So Ordered.” The order did not say the court was granting an additional extension on its own motion, nor does the record otherwise reflect such an extension, and to infer the court did so would be contrary to the express language of its order that it was granting counsel’s motion. While *Moore*, 458 S.W.3d at 825, suggests that a court can extend the filing deadline on its own motion, the motion court did not do so here. This case is like *Moore* itself – in both cases, the record failed to show that the motion court had “on its own motion granted an extension.” *Id.*

For these reasons, the only reasonable interpretation of the motion for leave is it requested 45 days from the April 12, 2013, date on which it was filed, and the deadline it requested was 45 days later, i.e. May 28, 2013. This is the extension the motion court necessarily granted when it entered its order stating “Motion Granted So Ordered.” Because the amended motion was not filed until May 30, 2013, it was untimely.

B. A Presumption of Abandonment Arose from the Failure to File a Timely Postconviction Motion

The untimely filing of an amended motion by postconviction counsel creates a presumption of abandonment. *Vogl*, 437 S.W.3d at 230. Accordingly, this case must be “remanded for the motion court to conduct the independent inquiry to determine if Mr. [Watson] was abandoned.” *Moore*, 458 S.W.3d at 826; see *Sanders v. State*, 807 S.W.2d 493, 495 (*Mo. banc 1991*) (“The appropriate forum for addressing claims regarding failure of postconviction counsel to comply with the time requirements of Rule 29.15[] is in the circuit court where the motion is being prosecuted by movant”).

IV. CONCLUSION

For the reasons set out above, this Court holds Mr. Watson's counsel untimely filed an amended motion under Rule 29.15, resulting in a presumption of abandonment. This Court remands for a determination whether Mr. Watson was abandoned.

LAURA DENVIR STITH, JUDGE

Draper, Wilson, Russell and Breckenridge, JJ., concur; Fischer, C.J., dissents in separate opinion filed; Powell, J., concurs in opinion of Fischer, C.J.



SUPREME COURT OF MISSOURI

en banc

TERRY T. WATSON,)
)
Appellant,)
)
v.) No. SC96103
)
STATE OF MISSOURI,)
)
Respondent.)

DISSENTING OPINION

The dispositive issue in this case is not whether this Court should enforce the mandatory filing deadline of Rule 29.15(g)—it should—but rather whether this Court should interpret the motion court's order granting the request for the one extension permitted by that rule as either a nine day extension as the principal opinion holds or as a full 30 day extension permitted by the rule. Because the motion court necessarily interpreted its own order to grant the full extension permitted, I would defer to that interpretation and hold the motion was timely filed. Therefore, I respectfully dissent.¹

¹ The interpretation of a court order is a legal question. *Lodahl v. Papenberg*, 277 S.W.2d 548, 551 (Mo. 1955). "It may be presumed that the court intended to render a valid, not a void judgment; and, where it is reasonably possible to do so, such construction should be adopted as will give force and effect to the judgment . . ." *Jeans v. Jeans*, 314 S.W.2d 922, 925 (Mo. App. 1958). To the extent a court order is ambiguous, a reviewing court will "examine the record to determine the intent of the ordering court." *Jeffus v. Jeffus*, 375 S.W.3d 862, 868 (Mo. App. 2012).

Unless extended by the motion court, the initial 60 day filing period mandated by Rule 29.15(g) required Watson's amended motion to be filed on or before May 19, 2013. On April 12, 2013, Watson filed a motion requesting "a period of 45 days from the date of filing within which to file an amended petition." The motion court entered an order stating only "motion granted so ordered." The principal opinion holds the "only reasonable interpretation" is that the motion court extended the filing deadline for 45 days from the date of the motion, establishing a May 28, 2013, filing deadline. Under the principal opinion's interpretation of the motion court's order, Watson's amended motion was filed out of time on May 30, 2013, resulting in a presumption that his public defender abandoned him. The principal opinion gives no weight or deference to the fact that the motion court necessarily determined the motion was timely filed because it adjudicated the motion on the merits. In my view, the principal opinion rests on the unstated and incorrect premise that the motion court's authority under Rule 29.15(g) to extend the filing period by "one additional period not to exceed thirty days" is limited to the time specifically requested by the movant. Neither the plain language of Rule 29.15(g) nor this Court's precedent supports the principal opinion's result.

This Court enforces the post-conviction rules as they are written. *Dorris v. State*, 360 S.W.3d 260, 268 (Mo. banc 2012). Rule 29.15(g) provides, "The court may extend the time for filing the amended motion for one additional period not to exceed thirty days." This language unequivocally, and without limitation, vests the motion court with authority to grant one additional 30 day period for filing a timely amended motion. The rule authorizes the motion court to grant an extension at the movant's request or on its own

motion. *Moore v. State*, 458 S.W.3d 822, 825 (Mo. banc 2015). Because Rule 29.15(g) authorized the motion court to extend Watson's filing deadline by 30 days from May 19, 2013, to June 19, 2013, the dispositive issue is the interpretation of the court's order sustaining Watson's motion for an extension.

The record in this case demonstrates the motion court had the authority to and did extend Watson's filing deadline to June 19, 2013, as authorized by Rule 29.15(g). The court sustained Watson's motion for an extension of time to file an amended motion and thereafter adjudicated the motion on the merits. The best evidence of the intended scope of the motion court's order granting the extension is the motion court's interpretation of its order. The principal opinion gives no weight or deference to the motion court's interpretation of its own order, and remands the case for an abandonment hearing. In addition to frustrating the purpose of the mandatory Rule 29.15 filing deadlines by delaying resolution of Watson's claim, the result of the principal opinion serves no practical purpose. *Thomas v. State*, 808 S.W.2d 364, 366 (Mo. banc 1991); *Price v. State*, 422 S.W.3d 298 (Mo. banc 2014). Unlike the unique situation in *Moore*, in which the motion court's adjudication of the amended motion may not have resolved all of the movant's pro se claims, Watson's amended motion included all of his pro se claims. Consequently, the principal opinion's remand for an abandonment hearing is pointless because, even if the court determines Watson was abandoned, the proper remedy would be to "treat the tardy amendment as timely" and once again adjudicate the same amended motion the court already overruled on the merits following an evidentiary hearing. *Price*, 422 S.W.3d at 298.

Given the record and the purpose of the mandatory filing deadlines, it is unreasonable to conclude the motion court intended only to grant nine additional days rather than grant Watson until June 19, 2013, to file his amended motion.² By reaching out to indulge a presumption of abandonment when there is none, the principal opinion subjects Watson's public defender to potential discipline and unnecessarily delays a final resolution of Watson's claims. In my view, the motion was timely filed and the judgment should be affirmed.

Zel M. Fischer, Chief Justice

² The record in this case refutes the principal opinion's assertion this case is similar to *Moore*. In *Moore*, this Court held an amended motion filed beyond the initial 60 day filing period was untimely because the record did not include a motion for an extension of time or any indication the court extended the filing period on its own initiative. *Moore*, 458 S.W.3d at 825. The record in *Moore* showed no action whatsoever to extend the initial 60 day filing period. By contrast, in this case, the record shows Watson moved for an extension, the motion court granted an extension, an amended motion was filed within the time period mandated by Rule 29.15(g), and the motion court adjudicated the motion accordingly.