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No. ED108193

IN THE

Missouri Court of Appeals

Eastern District

STATE OF MISSOURI,

Respondent,

v.

LAMAR JOHNSON,

Appellant.

Appeal from the St. Louis City Circuit Court
Twenty-second Judicial Circuit
The Honorable Elizabeth B. Hogan, Judge

RESPONDENT'S BRIEF

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Electronically Filed - EASTERN DISTRICT CT OF APPEALS - November 20, 2019 - 11:04 PM

TABLE OF CONTENTS

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - November 20, 2019 - 11:04 PM

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - November 20, 2019 - 11:04 PM

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - November 20, 2019 - 11:04 PM

JURISDICTIONAL STATEMENT

Mr. Johnson appeals the dismissal of a motion for new trial that was filed on July 19, 2019—more than twenty-four years after he was found guilty by a jury and nearly twenty-four years after he was sentenced in his underlying criminal case (*see* L.F. 98:1; 99:1; L.F. 173:1-4). The trial court dismissed the motion for new trial "based on [its] lack of authority to entertain the motion" (L.F. 167:16). Because Mr. Johnson's notice of appeal was not timely filed after the entry of judgment in his criminal case, and because the trial court's dismissal of the untimely motion for new trial was not a final, appealable judgment, this Court lacks appellate jurisdiction and should dismiss Mr. Johnson's appeal.

* * *

On July 12, 1995, a jury found Mr. Johnson guilty of murder in the first degree and armed criminal action (L.F. 90:14; 173:1-4). On September 29, 1995, the court sentenced Mr. Johnson for those offenses (L.F. 173:1-4). Thus, the judgment in Mr. Johnson's underlying criminal case was final on September 29, 1995. "A judgment in a criminal case becomes final when a sentence is imposed." *State ex rel. Zahnd v. Van Amburg*, 533 S.W.3d 227, 230 (Mo. 2017).

By long-standing rule, Mr. Johnson had ten days to file a notice of appeal after the entry of a final judgment in his criminal case. *See* Rule

30.01(a) (1995) ("After the rendition of final judgment in a criminal case, every party shall be entitled to any appeal permitted by law."); Rule 30.01(d) (1995) ("No such appeal shall be effective unless the notice of appeal shall be filed not later than ten days after the judgment or order appealed from becomes final."). In the present appeal, however, Mr. Johnson filed his notice of appeal on September 3, 2019—nearly twenty-four years after the October 9, 1995, deadline.

"The timely filing of a notice of appeal is jurisdictional." *Fuller v. State*, 485 S.W.3d 768, 770 (Mo.App. W.D. 2016). " 'If a notice of appeal is untimely, the appellate court is without jurisdiction and must dismiss the appeal.' " *Id*. Here, because Mr. Johnson did not file his notice of appeal within ten days of the judgment in his criminal case, his notice of appeal was not timely filed, and this Court must dismiss his appeal for lack of appellate jurisdiction.

Mr. Johnson may argue in reply that his notice of appeal was timely because it was filed within ten days of the trial court's dismissal of his most recent motion for new trial. The record reflects that the trial court dismissed Mr. Johnson's motion for new trial on August 23, 2019, and that Mr. Johnson filed his notice of appeal on September 3, 2019 (the day after Labor Day) (*see* L.F. 167:16; 170:1).

However, the trial court's August 23, 2019, dismissal of Mr. Johnson's motion for new trial was not a final, appealable judgment. "There is no right

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - November 20, 2019 - 11:04 PM

to an appeal without statutory authority." *State v. Sturdevant*, 143 S.W.3d 638, 638 (Mo.App. E.D. 2004). In criminal cases, appeal lies only from a final judgment, which occurs "only when sentence is entered." *State v. Famous*, 415 S.W.3d 759, 759 (Mo.App. E.D. 2013); *see* § 547.070, RSMo 2016 ("In all cases of final judgment rendered upon any indictment or information, an appeal to the proper appellate court shall be allowed to the defendant, provided, defendant or his attorney of record shall during the term at which the judgment is rendered file his written application for such appeal."). Here, because no sentence was entered, the dismissal of the motion for new trial was not a final judgment, and Mr. Johnson had no right to appeal it.

Moreover, the Missouri Supreme Court has long held that "a circuit court 'exhausts its jurisdiction' over a criminal case once it imposes sentence." *Zahnd*, 533 S.W.3d at 230; *see State ex rel. Fite v. Johnson*, 530 S.W.3d 508, 510 (Mo. 2017) ("[O]nce judgment and sentencing occur in a criminal proceeding, the trial court has exhausted its jurisdiction."); *State ex rel. Simmons v. White*, 866 S.W.2d 443, 445 (Mo. 1993). " '[The circuit court] can take no further action in that case [unless] expressly provided by statute or rule.' " *Zahnd*, 533 S.W.3d at 230. " 'To allow otherwise would result in a chaos of review unlimited in time, scope, and expense.' " *Id*. "Accordingly, any action taken by a circuit court after sentence is imposed is a 'nullity' and 'void' unless specifically authorized by law." *Id*.

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - November 20, 2019 - 11:04 PM

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - November 20, 2019 - 11:04 PM

Here, on July 19, 2019—more than twenty-four years after the jury's verdict—the Circuit Attorney filed a motion for new trial on behalf of Mr. Johnson, and Mr. Johnson joined in that motion (*see* L.F. 98:1; 99:1). However, that motion was not "specifically authorized by law." To the contrary, Rule 29.11 specifically provides that a motion for new trial must be filed within fifteen days of the jury's verdict or twenty-five days if the trial court grants the allowable ten-day extension of time. Rule 29.11(b). A motion for new trial that is filed outside of that time limit is not authorized, and Missouri courts have long recognized that an untimely motion for new trial is a "nullity." *See State v. Williams*, 504 S.W.3d 194, 197 (Mo.App. W.D. 2016) ("Procedurally, an untimely motion for new trial is a nullity.").

Because the untimely motion for new trial was not authorized by law, and because the motion was a "nullity," the motion for new trial "did not extend the jurisdiction of the circuit court after the original sentences were imposed[.]" *See Zahnd*, 533 S.W.3d at 230 (stating that Rule 29.12(b) motions did not extend the trial court's jurisdiction). "The only action the circuit court could take was to exercise its inherent power to dismiss the motions for lack of jurisdiction." *Id*.

This Court has recognized in various contexts that "[o]rders entered in criminal cases after the judgment has become final which deny motions requesting various types of relief are not appealable." *State v. Payne*, 403

S.W.3d 606, 607 (Mo.App. S.D. 2011) (collecting cases). Thus, in *Payne*, where a movant who pleaded guilty in 1995 asked the trial court fifteen years later to vacate his conviction based on a claim of "actual innocence," the Court concluded that the order was not appealable, and it dismissed the appeal. *Id*. The Court observed that there was no statutory authority for the appeal, and the Court noted that the movant had not timely filed his notice of appeal after the final judgment was entered. *Id*. at 607, 607 n. 3.

Here, likewise, the Court should conclude that the trial court's dismissal of the untimely motion for new trial was not an appealable judgment. No new sentence was entered when the motion for new trial was dismissed, and the untimely motion for new trial did not extend the trial court's jurisdiction to enter a judgment. Thus, it follows that the circuit court did not enter an appealable judgment in dismissing the untimely motion for new trial due to a lack of jurisdiction.

In his Jurisdictional Statement, Mr. Johnson relies on arguments that the Circuit Attorney presented to this Court in an Intervenor's Brief (*see* App.Br. 7). In her brief, the Circuit Attorney cited *Dorris v. State*, 360 S.W.3d 260 (Mo. 2012), and asserted that this Court "has jurisdiction to determine whether the trial court errored [sic] in concluding it has no authority to hear

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - November 20, 2019 - 11:04 PM

the State's Motion for New Trial" (Interv'r.Br. 10).[1]

However, while the Court in *Dorris* affirmed the general principle that the Court had "subject matter jurisdiction to determine whether the motion court correctly or incorrectly exercised its authority" in dismissing certain post-conviction motions as untimely filed, the Court did not address the issues that are present in Mr. Johnson's case. The dismissal orders that the Court reviewed in *Dorris* wholly disposed of the underlying civil cases (i.e., they constituted final judgments for purposes of appeal), and there is no indication that any of the movants filed untimely notices of appeal. Thus, like any other civil litigants, the movants in *Dorris* had a right to appeal. It is not, therefore, remarkable that the Court stated that it had jurisdiction to review whether the circuit court correctly exercised its authority in dismissing the post-conviction motions.

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[1] This Court granted the Circuit Attorney leave to intervene and redesignated her brief as "Intervenor's Brief" (Interv'r.Br.). Respondent notes that the Intervenor's Brief (which was originally filed as "Brief of Appellant State of Missouri") includes many assertions that purport to represent the State's position in this case. However, the Circuit Attorney's various assertions along those lines do not represent the State's position. The Attorney General represents the State in this appeal. *See* § 27.050, RSMo 2016.

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - November 20, 2019 - 11:04 PM

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - November 20, 2019 - 11:04 PM

Here, by contrast, the order denying the motion for new trial was not an order that had the effect of ending the litigation of Mr. Johnson's criminal case in the circuit court. The litigation of Mr. Johnson's underlying criminal case in the circuit court ended—and a final judgment was entered—when the circuit court imposed sentence in 1995. After that point in time, unless expressly authorized by law, the circuit court lacked jurisdiction to take any further action. *See Zahnd*, 533 S.W.3d at 230. The circuit court's exercise of its inherent power to dismiss the motion due to lack of jurisdiction did not create a new, appealable judgment. *See Payne*, 403 S.W.3d at 607.

The Circuit Attorney also argues that this Court has the power "to remand the case for a new trial if it finds 'extraordinary circumstances' " (Interv'r.Br. 10). The Circuit Attorney cites *State v. Williams*, 504 S.W.3d at 194; *State v. Williams*, 673 S.W.2d 847 (Mo.App. E.D. 1984); and *State v. Mooney*, 670 S.W.2d 510 (Mo.App. E.D. 1984), as examples of that power (Interv'r.Br. 10-12).

The Circuit Attorney's reliance on those cases is misplaced. In those cases, the appellants filed their motions for new trial before review of the judgments in their criminal cases was completed on direct appeal. In such cases, Missouri courts have recognized that an appellate court that is reviewing a judgment in a criminal case "has the inherent power to prevent a miscarriage of justice or manifest injustice by remanding a case to the trial

court for consideration of newly discovered evidence presented for the first time on appeal." *State v. Terry*, 304 S.W.3d 105, 109 (Mo. 2010).

However, an appellate court's inherent power to correct a manifest injustice in a circuit court's judgment necessarily resides in the appellate court's power to review the circuit court's judgment at all, i.e., it depends on the appellate court's having appellate jurisdiction. *See State v. Warden*, 753 S.W.2d 63, 65 n. 3 (Mo.App. E.D. 1988) (distinguishing cases like *Williams*, 673 S.W.2d 847, and *Mooney*, because, "In each case, after the judgment of the trial court was final *and the case was pending on direct appeal*, the defendant filed an untimely motion for new trial based on newly discovered evidence either with the trial court or with this court" (emphasis added).); *see also Ferguson v. State*, 325 S.W.3d 400, 408 (Mo.App. W.D. 2010) (observing that "*Terry* and *Mooney* were cases that were pending on *direct* appeal when the evidence in question was discovered"); *Clemmons v. State*, 795 S.W.2d 414, 418 n. 4 (Mo.App. E.D. 1990) (noting that, in *Warden*, the Court held "that *Mooney* did not apply where the direct appeal is final.").

Here, as outlined above, the judgment in Mr. Johnson's criminal case was entered on September 29, 1995. His direct appeal was final in 1999. *See State v. Johnson*, 989 S.W.2d 238 (Mo.App. E.D. 1999). Thus, the notice of appeal that Mr. Johnson filed on September 3, 2019, was not timely, and this Court lacks appellate jurisdiction to review the judgment for any alleged

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - November 20, 2019 - 11:04 PM

manifest injustice.

The Court should dismiss Mr. Johnson's appeal for lack of jurisdiction.

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - November 20, 2019 - 11:04 PM

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - November 20, 2019 - 11:04 PM

STATEMENT OF FACTS

Mr. Johnson appeals the dismissal of a motion for new trial that was filed on his behalf by the Circuit Attorney more than twenty-four years after he was found guilty by a jury and nearly twenty-four years after he was sentenced in his underlying criminal case (*see* L.F. 98:1; 99:1; L.F. 173:1-4). The circuit court dismissed the motion for new trial "based on [its] lack of authority to entertain the motion" (L.F. 167:16).[2]

* * *

In 1995, a jury found Mr. Johnson guilty of murder in the first degree

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[2] The Statement of Facts in the Intervenor's Brief relies on allegations and information included in the motion for new trial (*see* Interv'r.Br. 16-47). However, there has been no evidentiary hearing or fact-finding on that motion, and the allegations therein remain unproven. The Intervenor's Statement of Facts also contains extensive argument about those purported facts and inferences to be drawn from them. Due to these violations of Rule 84.04(c)—which requires that "[t]he statement of facts . . . be a fair and concise statement of the facts relevant to the questions presented for determination without argument"—the Court should disregard the Intervenor's Statement of Facts and should not take it as a fair statement of established or agreed-upon facts.

and armed criminal action (*see* L.F. 173:1-4). *See State v. Johnson*, 989 S.W.2d 238 (Mo.App. E.D. 1999) (per curiam order). Mr. Johnson filed a post-conviction motion pursuant to Rule 29.15 (which motion was denied), and, on April 6, 1999, in a consolidated direct and post-conviction appeal, this Court affirmed both the judgment of the trial court and the judgment of the post-conviction motion court. *Id*.

Since then, Mr. Johnson has sought further review of his convictions in state and federal courts (*see* L.F. 167:15-16, citing *Johnson v. Dwyer*, No. 04CV746835 (Mississippi County); *State ex rel. Johnson v. Dwyer*, No. SC86666 (Missouri Supreme Court); and *Johnson v. Luebbers*, No. 4:00CV408CAS/MLM (United States District Court for the Eastern District)). Each court that has reviewed his claims—which, as the circuit court found, included "many of the same claims he raises here"—found that Mr. Johnson had failed to prove his innocence or the existence of any error that would justify reversing his convictions (*see* L.F. 167:15-16).

On July 19, 2019, the Circuit Attorney of the City of St. Louis filed a motion for new trial on behalf of Mr. Johnson, and Mr. Johnson joined in the motion (*see* L.F. 98:1; 99:1). The motion contained various factual allegations, and various supporting exhibits were attached to the motion (*see* L.F. 99).

On July 29, 2019, the circuit court appointed the Attorney General to appear on behalf of the State (L.F. 146:1). On August 1, 2019, the court held a

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - November 20, 2019 - 11:04 PM

status conference (L.F. 148:1). The court then ordered the parties to brief the issue of the circuit court's authority to entertain the motion for new trial (L.F. 148:1). The court granted the Circuit Attorney's request and Mr. Johnson's request that the court provide "written reasons for appointing the Attorney General's Office" (L.F. 148:1). The court stated that it would issue its "written reasons" after the receipt of additional filings (L.F. 148:1). Mr. Johnson later filed a "Motion for Written Order Explaining Appointment of Missouri Attorney General's Office and Memorandum in Support," and the Circuit Attorney joined in that request (L.F. 151:1; 152:1).

On August 15, 2019, the parties filed their responses (L.F. 161:1). In brief, the Circuit Attorney filed a pleading that asserted that the circuit court had jurisdiction to entertain the motion for new trial (L.F. 162:2). Mr. Johnson filed a motion to join in the Circuit Attorney's pleading (L.F. 160:1). A group of amici curiae ("43 Prosecutors") filed a separate brief in support of the Circuit Attorney's motion for new trial (L.F. 155:1). The Attorney General filed a response that asserted that the circuit court had no jurisdiction over the motion for new trial (L.F. 161:1). On August 16, 2019, the Circuit Attorney filed a "Motion to Strike Attorney General's Response to Court Ordered Briefing," and Mr. Johnson joined in that motion (L.F. 164:1; 165:1).

On August 23, 2019, the circuit court issued an order denying the motion for new trial (L.F. 167:1-16). In response to the earlier request for

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - November 20, 2019 - 11:04 PM

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - November 20, 2019 - 11:04 PM

"written reasons" for appointing the Attorney General, the circuit court stated its reasons (which included concerns about the possible improper contact of jurors and a possible conflict of interest on the part of the Circuit Attorney), and the court explained that it "believed the appointment of the Attorney General was necessary to protect the integrity of the legal process" (*see* L.F. 167:3-10). The court observed that it had not disqualified the Circuit Attorney (L.F. 167:9). The court stated that its appointment of the Attorney General was a valid exercise of the court's inherent authority and that the Attorney General had, as a matter of law, "a right to be heard in this matter, with or without a court order" (L.F. 167:9-10). However, the circuit court also noted that "other issues may be dispositive of this case, making its reasons for the appointment [of the Attorney General] moot" (L.F. 167:3).

The circuit court then addressed its authority to entertain the motion for new trial (L.F. 167:10-16). The court first found no binding authority to support the Circuit Attorney's claimed right to file a motion for new trial (L.F. 167:10-11). The court then concluded that, even if the Circuit Attorney could file a motion for new trial, the motion for new trial was not filed within the time limits of Rule 29.11 and was, therefore, a nullity (*see* L.F. 167:11-12). The court concluded that the time limits of Rule 29.11 imposed "a limit on the Court's authority," and it rejected the Circuit Attorney's suggestions that various cases and Rule 29.12 permitted it to review for "plain error"

(L.F. 167:13-14). The circuit court cited *State ex rel. Zahnd v. Van Amburg*, 533 S.W.3d 227, 230 (Mo. 2017), in part for the proposition that "a trial court exhausts its jurisdiction when sentence is imposed, and any action taken after sentence is imposed is null and void" (L.F. 167:14). The circuit court dismissed the motion for new trial "based on [the circuit court's] lack of authority to entertain the motion" (L.F. 167:16).

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - November 20, 2019 - 11:04 PM

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - November 20, 2019 - 11:04 PM

ARGUMENT

I.

The circuit court lacked jurisdiction to grant or deny a motion for new trial filed outside the time limits of Rule 29.11; thus, the circuit court properly dismissed Mr. Johnson's motion for new trial, which was filed more than twenty-four years after the jury returned its verdicts. (Responds to Points I-IV of Mr. Johnson's brief.)[3]

At the time of Mr. Johnson's criminal trial, the substantive right to file a motion for new trial was granted to defendants by § 547.010, RSMo 1994. The statute provided (and still provides): "Verdicts may be set aside, and new trials awarded *on the application of the defendant*" (emphasis added).

As is evident, the right to file a motion for new trial in a criminal case belongs to the defendant. Nothing in Rule 29.11 changes that substantive right: procedural rules promulgated by the Missouri Supreme Court do "not change substantive rights[.]" MO. CONST., Art. V, § 5. Accordingly, the Circuit Attorney was not authorized under Rule 29.11 to file a motion for new trial.

However, while the Circuit Attorney did not have statutory authority to file a motion for new trial, the record shows that Mr. Johnson moved to join

[3] Respondent makes this argument in the alternative to the argument outlined in Respondent's Jurisdictional Statement.

the Circuit Attorney's motion and adopted it in its entirety (*see* L.F. 98:1-2).

The question, here, is whether the circuit court could—approximately twenty-five years after sentencing Mr. Johnson—entertain that motion for new trial and grant or deny that motion based on the merits of its claims. In resolving that issue, the circuit court concluded that, because the motion was filed outside the time limits of Rule 29.11, it lacked "authority to entertain the motion" (L.F. 167:16).

The circuit court did not err. " 'Rule 29.11(b) provides that, in a criminal case, a motion for new trial must be filed not later than fifteen days after the verdict is returned, and for good cause shown, the court may extend the time for filing by one additional period not to exceed ten days.' " *State v. Vickers*, 560 S.W.3d 3, 23 (Mo.App. W.D. 2018); *see* Rule 29.11(b) (1995); *see also* § 547.030, RSMo 1994 (requiring the motion to be filed "within four days after the return of the verdict" and permitting one extension of thirty days).

Here, Mr. Johnson did not file his motion for new trial within the time limits of the rule. He filed his motion more than twenty-four years after the jury returned its verdicts (*see* L.F. 98:1; 99:1; 173:1-4). As such, Mr. Johnson's motion was untimely and, as Missouri Courts have repeatedly held, it was a "procedural nullity." *Id.*

" 'The time limitations in Rule 29.11(b) for filing a motion for new trial in criminal cases are mandatory.' " *Vickers*, 560 S.W.3d at 23. Moreover, the

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - November 20, 2019 - 11:04 PM

fact that claims are not known before the deadline has passed is irrelevant. " 'Rule 29.11(b) "does not make an exception extending the time to file a motion, even where the newly discovered evidence on which the motion for a new trial is predicated is not discovered until after the filing deadline has passed." ' " *Id*.

" 'In other words, a motion for new trial may not be filed or amended to allege, "as a basis for a new trial, the existence of newly discovered evidence which was not discoverable until after the filing deadline had passed." ' " *Id*. In short, " '. . . an untimely motion for new trial is not an appropriate means to introduce new evidence, preserves nothing for appeal, and is a procedural nullity.' " *Id*.

Not only was the motion a "procedural nullity," but the circuit court lacked jurisdiction—twenty-four years after it imposed sentence—to rule on the merits of the motion. In *State ex rel. Zahnd v. Van Amburg*, 533 S.W.3d 227, 229 (Mo. 2017), for example, a circuit court purported to grant relief to two movants under Rule 29.12(b)—some years after the court had sentenced them in their criminal cases. However, the Missouri Supreme Court held that the circuit court had no "jurisdiction" to grant the motions. *Id*. at 230.

The Court explained that "a circuit court 'exhausts its jurisdiction' over a criminal case once it imposes sentence." *Id*. " 'It can take no further action in that case [unless] expressly provided by statute or rule.' " *Id*. " 'To allow

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - November 20, 2019 - 11:04 PM

otherwise would result in a chaos of review unlimited in time, scope, and expense.' " *Id.*

The Court then observed that Rule 29.12(b) did not authorize the circuit court to take further action in the criminal case after imposing sentence: "Unlike Rule 24.035 or Rule 29.15, the plain language of Rule 29.12(b) does not provide for an independent post-sentence procedure." *Id.* The Court continued: "Instead, Rule 29.12(b) presupposes the criminal case is still pending before the circuit court and provides a mechanism for the circuit court to consider plain errors before imposing sentence, i.e., while it still retains jurisdiction over the criminal case." *Id.*

Accordingly, the Court held that the movants' "Rule 29.12(b) motions did not extend the jurisdiction of the circuit court after the original sentences were imposed, so the circuit court had no jurisdiction to adjudicate the Rule 29.12(b) motions and amend the judgments." *Id.* "Any action the circuit court took pursuant to Rule 29.12(b) after imposing the sentences was a 'nullity' and 'void.' " *Id.* In short, "[t]he only action the circuit court could take was to exercise its inherent power to dismiss the motions for lack of jurisdiction." *Id.*

The same is true here. Like Rule 29.12(b), the language of Rule 29.11 does not authorize any post-sentence procedure. To the contrary, while a defendant is not required to file a motion for new trial, the rule expressly states that sentence cannot be imposed until *after* the time for filing a motion

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - November 20, 2019 - 11:04 PM

for new trial has expired or the motion has been ruled on. "No judgment shall be rendered until the time for filing a motion for new trial has expired and if such motion is filed, until it has been determined." Rule 29.11(c).

Thus, inasmuch as Rule 29.11 does not authorize the trial court to take further action in the criminal case after imposing sentence, the circuit court in Mr. Johnson's case was without jurisdiction to grant or deny a motion for new trial filed outside the mandatory time limits of the rule. "The only action the circuit court could take was to exercise its inherent power to dismiss the motion[] for lack of jurisdiction." *Zahnd*, 533 S.W.3d at 230. Accordingly, this Court should affirm the circuit court's dismissal of Mr. Johnson's motion for new trial. *See State v. Wright*, 391 S.W.3d 893, 894-95 (Mo.App. E.D. 2013) (after holding that the circuit court lacked authority to rule on a motion for new trial that had been filed eight years out of time, the Court vacated the circuit court's purported judgment denying the motion and remanded for dismissal).

In *Wright*, this Court addressed a similar set of circumstance. There, the defendant obtained "newly-discovered evidence" and filed a motion for new trial eight years after Rule 29.11(b)'s deadline. *Id*. The circuit court denied the motion. *Id*. at 894. However, this Court concluded that "the circuit court lacked authority to rule on the motion." *Id*. at 895. Accordingly, this Court vacated the purported judgment of the circuit court and remanded the

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - November 20, 2019 - 11:04 PM

case with instructions to dismiss the motion for new trial. *Id*. Here, as should have occurred in *Wright*, the circuit court correctly dismissed Mr. Johnson's untimely motion for new trial. This Court should affirm that dismissal.

Mr. Johnson asserts—based on the argument presented in Point I of the Intervenor's Brief—that the Circuit Attorney was "duty-bound to act to remedy [his] wrongful conviction" (Interv'r.Br. 50). Mr. Johnson points to examples of a prosecuting attorney's obligation to ensure that criminal convictions are not improperly obtained through false or perjured testimony (Interv'r.Br. 50-52, citing, e.g., *Napue v. Illinois*, 360 U.S. 264 (1959)). He points out that a prosecutor is "a minister of justice and not simply . . . an advocate," that a prosecutor is required to bring to light known perjured testimony, and that a prosecutor must disclose information that casts doubt on the correctness of a criminal conviction (Interv'r.Br. 51-52, citing various cases and Rule 4-3.8, "Special Responsibilities of a Prosecutor").

The State unequivocally agrees that a prosecutor must adhere to such principles and that a prosecutor must take appropriate corrective action when confronted with a potential injustice in a criminal case. Thus, for instance, when a prosecutor knows that false testimony has been given at trial, the prosecutor cannot stand silent and must take corrective action at trial. *See Napue*, 360 U.S. at 269-70.

Here, however, the Circuit Attorney's legal and ethical obligations did

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - November 20, 2019 - 11:04 PM

not give the circuit court jurisdiction to grant or deny a motion for new trial filed outside the mandatory time limits of Rule 29.11. A prosecutor's legal and ethical obligations should not be transformed into a license to ignore other substantive and procedural laws that govern the effective and orderly administration of the criminal justice system. Indeed, to the contrary, when a prosecutor ignores such laws, such conduct also reduces public confidence in the criminal justice system and, as a legal "nullity," endangers the due process rights of criminal defendants like Mr. Johnson. In short, when viewed through a broader lens, purporting to alleviate one perceived injustice (an allegedly wrongful conviction) with another injustice (a disregard for governing laws) is both unproductive and damaging to the integrity of the criminal justice system.

Instead, a prosecutor must take appropriate corrective action through proper legal channels, of which there are several. For the purposes of this appeal, a proper legal channel is not a motion for new trial filed by the prosecutor on behalf of the defendant more than twenty-four years out of time in a court without jurisdiction.

Mr. Johnson asserts that "the Circuit Attorney has found that there is clear and convincing evidence [he] is actually innocent of murder and armed criminal action, for which he was convicted in her jurisdiction, and that his conviction was solely obtained through perjured testimony" (Interv'r.Br. 53).

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - November 20, 2019 - 11:04 PM

He asserts, "These facts and the [Circuit Attorney's] findings are unrefuted" (Interv'r.Br. 53). However, as noted above, the purported "facts" in the motion for new trial have not been litigated since the filing of that motion; thus, the facts of Mr. Johnson's alleged wrongful conviction have neither been proved by any proper party nor found by any court. To the contrary, as found by the circuit court, "many of the same claims [Mr. Johnson] raises here" have been previously litigated and found *against* Mr. Johnson (*see* L.F. 167:15-16).

Regardless, no amount of investigation or fact-finding by the Circuit Attorney could grant the circuit court jurisdiction to vacate the judgment in Mr. Johnson's criminal case twenty-four years after the fact. That is not to suggest, however, that the Circuit Attorney had no avenues for fulfilling her legal and ethical obligations if she believed that she had found previously undisclosed exculpatory and impeaching information. One appropriate course of action would have been to follow the plain dictate of Rule 4-3.8, which requires prosecutors in criminal cases to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense[.]" Rule 4-3.8(d). Upon such disclosure, Mr. Johnson—the party subject to the judgment in the underlying criminal case—then would have been free to pursue relief through any available avenues.

Mr. Johnson next asserts that "the deadlines in Rule 29.11 are not

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - November 20, 2019 - 11:04 PM

applicable here" because "Rule 29.11 restricts the remedies available to a *convicted defendant* to challenge his conviction" (Interv'r.Br. 54). Thus, he asserts that, even if he cannot avail himself of Rule 29.11 at this late date, the Circuit Attorney can (Interv'r.Br. 54). He asserts that, to hold that "the Circuit Attorney must act within the deadlines of Rule 29.11 hugely diminishes her express authority under [section] 56.450, . . . which empowers her to 'manage and conduct all criminal cases, business and proceedings of which the circuit court of the city of St. Louis shall have jurisdiction' " (Interv'r.Br. 54).

However, there are multiple problems with Mr. Johnson's argument. First, by conceding that *his* (Mr. Johnson's) remedy was restricted by the time limits of the rule, Mr. Johnson has conceded that the trial court did not err in dismissing his motion. Second, as discussed above, as a matter of substantive law, the right to file a motion for new trial has been granted to defendants; thus, the Circuit Attorney did not have the right to file a motion for new trial. *See* § 547.010, RSMo 2016. Third, Rule 29.11—and its requirement that any motion for new trial be filed within a certain amount of time before sentence is imposed—does not restrict the Circuit Attorney's ability to manage and conduct all criminal cases; rather, it simply limits the time within which a defendant must file his motion for new trial. The Circuit Attorney's general statutory obligation to "manage and conduct all criminal

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - November 20, 2019 - 11:04 PM

cases" is not a license for the Circuit Attorney to ignore other substantive and procedural laws that govern criminal cases.[4] Finally, even if a prosecutor did have the right to file a motion for new trial, the trial court's jurisdiction was exhausted when it imposed sentence; and, consequently, as discussed above, the only action the circuit court could take on the motion was to dismiss it. For the reasons stated above, no "criminal case" existed for the Circuit Attorney to "manage" once the time for filing a post-trial motion had expired.

Mr. Johnson next asserts that, "even if the time requirements in Rule 29.11 apply here, they have been waived" (Interv'r.Br. 55). He cites *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249 (Mo. 2009), for the proposition that "the time limits function as a 'limit on remedies' " (Interv'r.Br. 55). In *Webb*, along those lines, the Court stated, "When a statute speaks in jurisdictional terms or can be read in such terms, it is proper to read it as merely setting

[4] Mr. Johnson's further concern that, if the Circuit Attorney is not permitted to file a motion for new trial, she might be prohibited "from prosecuting the actual perpetrators of a murder when new evidence surfaces regarding the true culprit" (Interv'r.Br. at 54), is only speculation. Also, it is not clear that the Circuit Attorney would not be able to bring a new charge if new evidence pointed to a different perpetrator. Such a circumstance would simply be further information that Mr. Johnson could rely on in seeking relief.

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - November 20, 2019 - 11:04 PM

statutory limits on remedies or elements of claims for relief that courts may grant." *See* 275 S.W.3d at 255.

There are serious flaws in Mr. Johnson's argument. First, Mr. Johnson overlooks the fact that the Circuit Attorney filed the original motion for new trial (L.F. 99:1). No principle of waiver would permit *the moving party* to waive a deadline that applied to the moving party's motion.

To the extent that Mr. Johnson is asserting that the Circuit Attorney waived Mr. Johnson's compliance with the deadline, the argument is still without merit. As relevant here, *Webb* simply clarified that circuit courts have subject matter jurisdiction over all civil and criminal cases, i.e., they have power to enter judgments in such cases. 275 S.W.3d at 253-54. Here, there is no question that the circuit court had the power to enter judgment in Mr. Johnson's criminal case.

The question here is whether the circuit court still had jurisdiction to act in the underlying criminal case *after* the imposition of sentence, i.e., after the circuit court's jurisdiction was exhausted. As discussed above, the circuit court did not. *See Zahnd*, 533 S.W.3d at 230. Thus, regardless of any purported waiver of Rule 29.11's time limits, the only action the circuit court could take in Mr. Johnson's case was to dismiss the motion for new trial. *Id.* *Cf. State v. Oerly*, 446 S.W.3d 304, 307-10 (Mo.App. W.D. 2014) (in light of *Webb*, the circuit court's failure to comply with the time limits of Rule 29.11

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - November 20, 2019 - 11:04 PM

before it imposed sentence did not deprive the court of jurisdiction to enter sentence); *cf. also State v. Henderson*, 468 S.W.3d 422, 424-25 (Mo.App. S.D. 2015) (because the State urged the trial court prior to sentencing to consider the defendant's untimely *Brady* claim the State could not assert on appeal that the Court of Appeals should not review the issue).

Mr. Johnson asserts that "the Supreme Court of Missouri recognizes a 'manifest injustice' exception to time bars in cases of newly discovered evidence" (Interv'r.Br. 55-56, citing *State v. Terry*, 304 S.W.3d 105 (Mo. 2010); citing also *State v. Williams*, 673 S.W.2d 847 (Mo.App. E.D. 1984)). He further asserts—based on the argument presented in Point II of Intervenor's brief—that this Court "may conduct plain error review under Rule 30.20 to determine whether 'extraordinary circumstances' exist that justify remand for a new trial because of newly discovered evidence presented in a motion for new trial filed out of time" (Interv'r.Br. 56, citing *State v. Williams*, 504 S.W.3d 194 (Mo.App. W.D. 2016)).

However, none of the cases relied on by Mr. Johnson stand for the proposition that a circuit court can—without express authorization from a higher court—grant or deny a motion for new trial many years after the circuit court has exhausted its jurisdiction. In each of the cases cited by Mr. Johnson, the appellants filed their motions for new trial before review of the judgments in their criminal cases was completed on direct appeal.

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - November 20, 2019 - 11:04 PM

Accordingly, in those cases—where the appellate court had jurisdiction to review the underlying judgment in the criminal case—it was within the appellate court's "inherent power to prevent a miscarriage of justice or manifest injustice" in that judgment. It was in that context that the appellate courts remanded the cases "for consideration of newly discovered evidence presented for the first time on appeal." *Terry*, 304 S.W.3d at 109.

In short, when a higher court that is reviewing the judgment in a criminal case directs a circuit court to take further action in that criminal case, the time limits for filing a motion under Rule 29.11 do not prevent a circuit court from doing so. In such cases, the correctness and finality of the circuit court's judgment has been called into question by the appellate court; thus, pursuant to the appellate court's mandate ordering a remand, the circuit court has limited jurisdiction to determine whether its judgment will stand or be vacated in light of the newly discovered evidence. (This is consistent with cases applying *Webb* (cited above), which have held that non-compliance with the time limits of Rule 29.11 does not deprive the circuit court of its jurisdiction.)

That does not mean, however, that this Court has the inherent power in this case to remand for a hearing on the motion for new trial. As discussed above in the State's Jurisdictional Statement, this court's inherent power to correct a manifest injustice in a circuit court's judgment necessarily resides

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - November 20, 2019 - 11:04 PM

in this Court's power to review the circuit court's judgment at all, i.e., it depends on this Court's having appellate jurisdiction. *See State v. Warden*, 753 S.W.2d 63, 65 n. 3 (Mo.App. E.D. 1988) (distinguishing cases like *Williams*, 673 S.W.2d 847, and *Mooney*, because, "In each case, after the judgment of the trial court was final and the case was pending on direct appeal, the defendant filed an untimely motion for new trial based on newly discovered evidence either with the trial court or with this court" (emphasis added).); *see also Ferguson v. State*, 325 S.W.3d 400, 408 (Mo.App. W.D. 2010) (observing that "*Terry* and *Mooney* were cases that were pending on direct appeal when the evidence in question was discovered"); *Clemmons v. State*, 795 S.W.2d 414, 418 n. 4 (Mo.App. E.D. 1990) (noting that, in *Warden*, the Court held "that *Mooney* did not apply where the direct appeal is final.")

Here, the judgment in Mr. Johnson's criminal case was entered on September 29, 1995. Thus, the notice of appeal that Mr. Johnson filed nearly twenty-four years later, on September 3, 2019, was not timely, and this Court lacks appellate jurisdiction to review the judgment. The dismissal of Mr. Johnson's motion for new trial was not a new judgment that can be reviewed for manifest injustice. Points I and II should be denied.[5]

[5] Mr. Johnson also argues at some length that his case presents the sort of "extraordinary circumstances" that would warrant a remand under cases like

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - November 20, 2019 - 11:04 PM

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - November 20, 2019 - 11:04 PM

Mr. Johnson also asserts—based on the argument presented in Point III of the Intervenor's Brief—that the circuit court erred in appointing the Attorney General to represent the State (Interv'r.Br. 62). However, the appointment of the Attorney General is not dispositive, because the circuit court dismissed Mr. Johnson's motion for new trial due to the circuit court's lack of jurisdiction to grant or deny the motion. That lack of jurisdiction was not caused by, or due to, the court's appointment of the Attorney General; thus, this Court need not offer an advisory opinion on the propriety of the circuit court's appointment.

The State observes, however, that it was proper for the circuit court to appoint the Attorney General to appear, in light of the court's stated concerns about the integrity of the criminal justice system (*see* L.F. 167:3-10). The circuit court did not disqualify the Circuit Attorney or "usurp" her authority; rather, the circuit court merely displayed a prudent degree of caution in what was an unusual set of circumstances caused by the Circuit Attorney's

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Terry (Interv'r.Br. 57-62). But inasmuch as the trial court did not adjudicate the merits of Mr. Johnson's claims, the purported facts outlined in his argument have not been litigated since the filing of his motion. The relevant question here is whether the circuit court erred in dismissing the motion for lack of jurisdiction.

disregard of long-standing and well-known substantive and procedural laws. It was not error for the circuit court to seek the views of the Attorney General in a case in which the circuit court perceived *potential* threats to the integrity of the criminal justice system.

Moreover, § 27.060, RSMo 2016, expressly authorizes the Attorney General to "appear and interplead, answer or defend, in any proceedings or tribunal in which the state's interests are involved." Thus, here, because the State's interests were involved, the Attorney General properly appeared in the underlying criminal case—with or without a court order—and defended the State's interests. Vacating the trial court's order appointing the Attorney General would not change the fact that the Attorney General properly entered an appearance and defended the State's interests.

Mr. Johnson argues at some length that the circuit court's concerns about the integrity of the criminal justice system were not valid or warranted (Interv'r.Br. 63-67). However, because the circuit court did not find or conclude that its concerns required disqualification of the Circuit Attorney, these arguments are irrelevant. To obtain the views of the Attorney General, the circuit court's concerns did not have to rise to the level of an actual conflict of interest; it was enough that the State's interests were involved.

The circuit court's appointment of the Attorney General also did not create a "constitutional crisis" (*see* Interv'r.Br.67-69). The legislature granted

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - November 20, 2019 - 11:04 PM

the Attorney General broad statutory authority to defend the State's interests in any case. § 27.060, RSMo. The statutory authority of the Circuit Attorney was not curtailed by the presentation of additional arguments by the Attorney General. Point III should be denied.

Finally, in his fourth point, Mr. Johnson asserts that the trial court erred in dismissing his motion for new trial because (a) he is "actually innocent," (b) his conviction was obtained through "perjured testimony," and (c) the State concealed material exculpatory and impeachment evidence (App.Br. 14-15). In support of these arguments, he cites to the allegations contained in his motion for new trial and in the brief filed by the Circuit Attorney (App.Br. 15-16).

However, the circuit court dismissed Mr. Johnson's motion because it lacked jurisdiction (*see* L.F. 167:16). Thus, it cannot be said that the circuit court erred in denying Mr. Johnson's claims on their supposed merits. There has been no evidentiary hearing or additional fact-finding on Mr. Johnson's claims since the filing of his motion for new trial, and, as found by the circuit court, "many of the same claims [Mr. Johnson] raises here" have been previously litigated and found *against* Mr. Johnson (*see* L.F. 167:15-16). To the extent that they were not already resolved in prior proceedings, this Court should decline to attempt to resolve any outstanding factual issues in the first instance.

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - November 20, 2019 - 11:04 PM

In short, to the extent that this Court has appellate jurisdiction, its review should be limited to reviewing whether the trial court properly exercised its inherent power to dismiss the motion for new trial due to lack of jurisdiction. Point IV should be denied.

Electronically Filed - EASTERN DISTRICT CT OF APPEALS - November 20, 2019 - 11:04 PM

CONCLUSION

The Court should dismiss this appeal for lack of appellate jurisdiction. In the alternative, the Court should affirm the circuit court's dismissal of the motion for new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached brief complies with Rule 84.06(b) and Eastern District Rule 360 and contains 7,243 words, excluding the cover, the table of contents, the table of authorities, this certification, and the signature block, as counted by Microsoft Word; and that pursuant to Rule 103.08, the brief was served upon all other parties through the electronic filing system.

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