

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY**

[REDACTED], Movant,)	
)	
)	Case No. [REDACTED]
)	
vs.)	Division 18
)	
STATE OF MISSOURI,)	
Respondent.)	
)	

FINDINGS OF FACT, CONCLUSTIONS OF LAW AND JUDGMENT

On August 28, 2019, this matter came to hearing upon the Movant’s Amended Motion to Vacate, Set Aside or Correct Judgment and Sentence. Movant, [REDACTED], appeared by and through his attorney, [REDACTED]. Movant’s personal appearance was waived. Respondent, State of Missouri, appeared by and through Assistant Prosecuting Attorney [REDACTED].

The Court took judicial notice of the underlying criminal file State v. [REDACTED] [REDACTED] the trial and sentencing transcripts, and heard testimony from trial counsel, Curtis Winegarner. Upon conclusion of the evidence, this matter was taken under advisement.

Now on this 9th day of December, 2019, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. After a plea of not guilty and a trial by jury, Movant was convicted on December 5, 2016 in case number [REDACTED] of three counts of Murder In The First Degree, three counts of Armed Criminal Action, and one count of Burglary In The First Degree.

2. On January 26, 2017, Movant was sentenced to consecutive terms of life in prison without probation or parole for each count of Murder In The First Degree, 30 years in prison for each count of Armed Criminal Action, and 15 years in prison for Burglary In The First Degree.
3. On July 31, 2018, the Missouri Court of Appeals Western District, affirmed the verdicts of the trial court. *See State v. [REDACTED]*, 560 S.W.3d 3 (Mo. App. W.D. 2018). The Missouri Court of Appeals Western District issued its mandate on December 5, 2018.
4. On October 24, 2018, Movant filed his pro se Rule 29.15 motion.
5. On December 12, 2018, Movant filed for an extension to file an amended motion under Rule 29.15, which this Court granted.
6. On February 19, 2019, Movant filed his amended motion under Rule 29.15.

MOVANT'S CLAIMS

Movant alleges three claims of ineffective assistance of counsel in his Amended Motion to Vacate, Set Aside or Correct Judgment and Sentence. Movant did not attach or incorporate any of his claims from his pro se motion. In Movant's amended motion, he states that counsel, Curtis Winegarner, was ineffective for the following reasons to wit:

Trial counsel was ineffective when he failed to elicit evidence of all of Movant's prior criminal convictions during direct examination of Movant; Movant asserts trial counsel was ineffective when he failed to object to Detective Owen Farris' testimony that confidential informants and cooperating witnesses were generally reliable; and finally, Movant asserts trial counsel was ineffective when he withdrew his request at trial for the Court to instruct the jury with MAI-CR3rd 310.08.

CONCLUSIONS OF LAW

1. This Court has jurisdiction to hear this cause because [REDACTED] was convicted of a felony after a trial. Rule 29.15(a).
2. The right to the effective assistance of counsel is mandated by the Sixth Amendment to the United States Constitution and is a fundamental right guaranteed to state defendants through the Fourteenth Amendment. *Gideon v. Wainwright*, 83 S.Ct. 752 (1963); *Powell v. Alabama*, 53 S.Ct. 55 (1932); *Argersinger v. Hamlin*, 92 S.Ct. 2006 (1972).
3. To have his conviction set aside due to ineffective assistance of trial counsel, Movant must show that trial counsel did not demonstrate the customary skill and diligence that a reasonably competent attorney would display rendering similar services under the existing circumstances, and that he was prejudiced thereby. *Strickland v. Washington*, 104 S.Ct. 2052, 2064 (1984); *Seales v. State*, 580 S.W.2d 733, 736-737 (Mo. banc 1979).¹
4. To show prejudice, [REDACTED] must demonstrate that counsel's omissions had a material effect, deleterious to him, on the outcome of the trial, *Love v. State*, 670 S.W.2d 499, 503 (Mo. banc 1984), and that a reasonable probability exists that, but for the errors of counsel, the result of the proceeding would have been different. *State v. Griffin*, 810 S.W.2d 956, 958 (Mo. App. 1991).
5. A reasonable probability "is a probability sufficient to undermine confidence in the outcome." *Baumruk v. State*, 364 S.W.3d 518, 526 (Mo. banc 2012).
6. Movant "must satisfy *both* the performance prong and the prejudice prong to prevail on an ineffective assistance of counsel claim." *Sanders v. State*, 738 S.W.2d 856, 857 (Mo. banc 1987) (emphasis added).
7. The court, however, is not required to consider both prongs; if movant fails to satisfy the first prong, the court is not required to consider the second. *See id.*; *see also Strickland*, 466 U.S. at 697. Likewise, the court is not required to consider the issue of performance

¹ Movant must meet the "heavy burden" of establishing that his trial counsel's performance was deficient and that the deficiency prejudiced his defense. *See Strickland v. Washington*, 466 U.S. 668, 687, 689 (1984) (heavier burden arises from a presumption that trial counsel is competent).

before the issue of prejudice. *Id.* The court maintains the discretion to address the issue of prejudice without first determining whether counsel's conduct was deficient. *Id.* Prejudice is not presumed from a showing of deficient performance by trial counsel, but rather, must be affirmatively proven. *See Strickland*, 466 U.S. at 693; *see also Sidebottom v. State*, 781 S.W.2d 791 (Mo. banc 1989).

When determining whether trial counsel's performance was deficient, this Court must consider whether counsel's conduct was "reasonable." In conducting this inquiry, the Motion Court presumes that counsel is competent. *Amrine v. State*, 785 S.W.2d 531 (Mo. banc 1990). Further, this Court presumes that counsel's challenged acts or omissions were sound trial strategy. *State v. Starks*, 856 S.W.2d 334 (Mo. banc 1993). Reaffirming these aforementioned principles, the *Jones* Court proscribed:

The motion court should make every effort to eliminate the distortion wrought by hindsight and to evaluate the challenged conduct from counsel's perspective at the time of the conduct. There is a strong presumption that criminal defense counsel's conduct falls within the 'wide range of professional assistance,' and a movant must overcome the presumption that certain actions of counsel might be regarded as sound trial strategy.

Jones, 773 S.W.2d at 158.

"Reasonable choices of trial strategy, no matter how ill-fated they appear in hindsight, cannot serve as a basis for a claim of ineffective assistance." *Clayton v. State*, 63 S.W.3d 201, 206 (Mo.Banc 2001); *see also Mann v. State*, 245 S.W.3d 897 (Mo.App S.D. 2008).

"The amended motion shall not incorporate by reference material contained in any previously filed motion." *Self v. State*, 14 S.W.3d 223, 226 (Mo.App S.D. 2000) (quoting Rule 24.035 (g)). Any pro se claims that are not included in the amended motion filed by Movant's counsel are not for consideration. *Id.*

AGRUMENT AND ANALYSIS

Movant's first claims trial counsel was ineffective when he failed to elicit evidence of all of Movant's prior criminal convictions during direct examination of Movant. This argument fails as Movant knew or should have been aware of his prior convictions. Furthermore, even if Movant was unaware of the specific charges, Movant knew or should have been aware that he had more than the three convictions for which he testified to having. Movant, upon testifying under oath during direct examination chose not to disclose this fact. Even, if trial counsel had alternative means, other than trusting Movant himself, by which to determine Movant's prior convictions, this Court finds trial counsel's performance was not deficient.

The Court witnessed the Movant during his testimony and cannot conclude that but for the evidence of Movant's additional priors elicited during cross examination the outcome of the trial would have be different. The Court finds credibility was important to Movant and his strategy of his defense. The Court notes there were many inconsistencies in Movant's testimony during direct examination as well as during cross examination. The Court notes that Movant admitted to some of the inconsistencies during his testimony at trial. The Court finds Movant's credibility was not solely or substantially impacted by the cross examination of additional undisclosed prior convictions but rather Movant's credibility would have been impacted from the totality of his testimony during direct and cross examination. Furthermore, the Court finds the totality of evidence levied against Movant weighed greatly to his disfavor and convictions.

The Court finds that the totality of the evidence levied against Movant as well as the numerous inconsistencies within the record affecting Movant's credibility, thwarts and deflates Movant's arguments. The Court finds Movant has failed to show by a preponderance of the evidence that there is a reasonable probability that but for trial counsel's alleged error, the results of the trial would have been different. Point DENIED.

Movant's next assertion is that trial counsel was ineffective when he failed to object to Detective Owen Farris' testimony that confidential informants and cooperating witnesses were generally reliable.

For Movant to prevail on a claim of ineffective assistance of trial counsel's failure to object he must prove: "(1) failure to object was not strategic, and (2) that the failure to object was prejudicial." *State v. Clay*, 975 S.W.2d 121, 135 (Mo.Banc 1998). "Trial counsel's failure to object to objectionable evidence does not establish a claim of ineffective assistance of counsel unless admission of the objectionable evidence resulted in a *substantial deprivation* of movant's right to a fair trial." *Harrison v. State*, 301 S.W.3d 534, 538-39 (Mo.App. S.D. 2009) (emphasis added). "Reasonable choices of trial strategy, no matter how ill-fated they appear in hindsight, cannot serve as a basis for a claim of ineffective assistance." *Clayton v. State*, 63 S.W.3d 201, 206 (Mo.Banc 2001); *see also Mann v. State*, 245 S.W.3d 897 (Mo.App S.D. 2008).

Movant fails to show that trial counsel did not have a strategic purpose in not objecting during trial. Moreover, Movant fails to show that the statements put forth to the jury reasonably and objectively resulted in a substantial deprivation of Movant's right to a fair trial. Trial counsel is always in the best position to determine when an objection is proper, and there are numerous factors that go into trial strategy for when to object and when not to object. Therefore, this point is DENIED.

Lastly, Movant claims trial counsel was ineffective when he withdrew his request for the trial court to instruct the jury with MAI-CR3rd 310.08. Trial counsel testified at the hearing that the choice not to request MAI-CR3rd 310.08, was trial strategy. Specifically, trial counsel made a full record at trial during formal instruction conference as to his decision and reasoning for not requesting and instructing on MAI-CR3rd 310.08 (Supp. Tr. II, 42, 61-62).

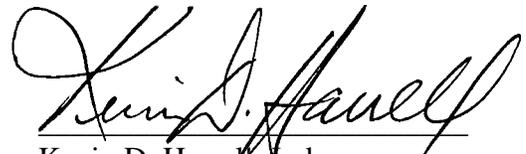
The Court finds that even if trial counsel had requested MAI-CR3rd 310.08, the trial court would have been prohibited from instructing the jury on this instruction based on the “Notes On Use”. MAI-CR3rd 310.08, note #2, specifically states “this instruction should be given only if the verdict directing instruction is patterned after MAI-CR3rd 304.04.” The Court finds the verdict directors submitted for the juries consideration and deliberation were not patterned after MAI-CR3rd 304.04. Therefore MAI-CR3rd 310.08 could not be submitted for the jury’s consideration. This point is DENIED.

CONCLUSION

WHEREFORE IT IS ORDERED, ADJUDGED AND DECREED that for the reasons set forth above, Movant’s Amended Motion for relief pursuant to Missouri Supreme Court Rule 29.15 is DENIED.

12-Dec-2019

Date



Kevin D. Harrell, Judge