

STATE OF MISSOURI )  
 ) SS  
CITY OF ST. LOUIS )

MISSOURI CIRCUIT COURT  
TWENTY-SECOND JUDICIAL CIRCUIT  
(City of St. Louis)

**FILED**  
FEB 04 2010

MARIANO V. FAVAZZA  
CLERK, CIRCUIT COURT  
BY \_\_\_\_\_ DEPU

JOHNNIE GATES, )  
 )  
Movant, )  
 )  
vs. ) PCR No. 0822-CC0861  
 )  
STATE OF MISSOURI, ) Division No. 8  
 )  
Respondent. )

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Movant was charged in Cause No. 051-01881 with Assault First Degree, Armed Criminal Action and Stealing a Motor Vehicle. Movant was found guilty of Assault First Degree and Armed Criminal Action and was sentenced as a prior and persistent offender to concurrent thirty year terms. These convictions were affirmed on appeal. State v. Gates, 276 S.W.3d 909 (Mo.App.E.D. 2009).

Movant timely filed his motion in the present cause pursuant to Rule 29.15. Counsel was appointed to represent Movant and an amended motion was filed. Having examined the records and files in this case, the Court now finds as follows:

CONCLUSIONS OF LAW

1. Movant has requested an evidentiary hearing. To be entitled to an evidentiary hearing the movant must plead facts, not conclusions, which are not refuted by the record, which if

true would entitle movant to relief, and the matters complained of must have resulted in prejudice. Wooldridge v. State, 239 S.W.3d 151, 154 (Mo.App.E.D. 2007). A movant is not entitled to a hearing where the motion, files and record of the case conclusively show that the movant is not entitled to relief. Rule 29.15 (h); State v. Fraction, 782 S.W.2d 764, 769 (Mo.App. 1989); Welch v. State, 770 S.W.2d 441 (Mo.App. 1989). This Court has reviewed the files and transcript in this case and finds that Movant has failed to allege grounds that would entitle him to relief if true and that are not refuted by the record. Movant is therefore not entitled to an evidentiary hearing.

2. In order to establish ineffective assistance of counsel, movant must establish that: 1) his counsel did not demonstrate the customary skill and diligence that a reasonably competent attorney would have provided under the circumstances; and 2) that he was thereby prejudiced. Williams v. State, 168 S.W.3d 433, 439 (Mo.banc 2005); Wilkes v. State, 82 S.W.3d 925, 927 (Mo.banc 2002). If movant fails to satisfy either prong of the test the other need not be considered. Buckner v. State, 35 S.W.3d 417, 420 (Mo.App.W.D. 2000). To demonstrate prejudice movant must establish that but for counsel's deficient performance there is a reasonable probability that the outcome of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674; Wilkes, supra.; Sidebottom v. State, 781 S.W.2d 791, 796 (Mo.banc

1989). Movant faces a heavy burden in establishing a claim of ineffective assistance of counsel. Not only must the movant prove his or her allegations by a preponderance of the evidence, but the movant must overcome the court's presumption that counsel is competent. Yoakum v. State, 849 S.W.2d 685, 687 (Mo.App. 1993).

3. The first allegation in Movant's amended motion is that his trial counsel failed to spend sufficient time preparing for trial with Movant. Movant alleges that counsel only came to discuss the case with him a few times prior to trial and that this time was insufficient because had he had sufficient time to prepare Movant would have given counsel Sequoia's phone number. Movant states that Sequoia is the man that the complaining witness claimed he got the tire rims from and who would have impeached the complaining witness' story, and further that trial counsel failed to investigate where the complaining witness actually obtained the rims or how they were mounted to the truck to impeach the complaining witness.

Initially the Court notes that an attorney's competence is not based solely upon the amount of time spent interviewing the client; the movant must also show that he was prejudiced by the lack of contact with the attorney. Tritico v. State, 767 S.W.2d 563 (Mo.App. E.D. 1988). In the instant case trial counsel aggressively represented Movant at trial. Prior to trial, Movant's counsel deposed the victim Bruce Johnson and a person on the parking lot who witnessed the shooting, Bobby Polk. Bobby

Polk did not see the shooter's face but testified that the person who shot at the victim pointed the gun at the victim. Accordingly these were the witnesses who testified that the shooting was not in the air but rather aimed at the victim. Trial counsel raised the issue of Sequoia on cross-examination of the victim and again raised the issue in closing argument, arguing that the victim was not being truthful about his purchase of the rims. Though the issue of where the victim obtained the rims on his truck might have impeached the victim, there is no reasonable probability that such impeachment, even if true, would have changed the outcome of the trial and further it would not have provided Movant with a defense for his actions. It is not enough for the movant to show that the errors had some conceivable effect on the outcome of the proceeding, rather movant must show that there is a reasonable probability that, but for the error by counsel, the fact finder would have had a reasonable doubt. Sidebottom v. State, 781 S.W.2d 791, 796 (Mo.banc 1989). There is no reasonable probability that the result of this trial would have been different had this issue been raised.

4. The second allegation in Movant's amended motion is that his trial counsel failed to properly cross-examine and impeach witnesses Bruce Johnson, Bobby Polk and William Henderson. Trial counsel took depositions of Johnson and Polk and Movant alleges that based on these depositions he prepared numerous questions for his counsel to ask at trial but that counsel failed to use

them or ask the questions she had asked during the depositions. Movant contends the witnesses told three different stories, in their statement to the police, the depositions and at trial and that these differences were not made clear to the jury and thus their credibility was not sufficiently attacked.

Initially the Court notes that Movant has not alleged what questions his counsel failed to ask or what differences she failed to make clear to the jury to attack the witnesses' credibility. The extent of cross-examination is generally a matter of trial strategy. Kelley v. State, 24 S.W.3d 228, 233 (Mo.App.S.D. 2000). See also Thomas v. State, 761 S.W.2d 246, 252 (Mo.App. 1988); Swearingin v. State, 629 S.W.2d 560, 563 (Mo.App. 1981). The mere failure to impeach a witness does not automatically entitle a moving to relief. The movant must establish the impeachment would have provided a defense or changed the outcome of the trial. Lobbing v. State, 242 S.W.3d 761, 765-766 (Mo.App.S.D. 2008). To prevail on a claim that counsel was ineffective for failing to present impeachment evidence, movant must show that the failure was outside the realm of trial strategy and that the evidence would have presented a viable defense. Movant must show specific discrepancies that could have been pointed out through preparation; otherwise the court is merely speculating as to prejudice. State v. Jones, 863 S.W.2d 353, 360 (Mo.App.W.D. 1993). The decision to impeach an opposing witness is a choice of trial strategy. Where counsel is aware of impeachment witnesses and what their testimony will be

and decides not to call them, counsel cannot be called ineffective. State v. Garrett, 813 S.W.2d 879, 882 (Mo.App. 1991). Additionally this Court notes that trial counsel strenuously cross-examined Bruce Johnson, Bobby Polk and William Henderson and attempted to impeach their testimony. Further at sentencing Movant expressed complaints regarding the issues and questions he had wanted his attorney to raise at trial from the depositions. This Court found these complaints to be without merit for reasons stated in the sentencing transcript and largely because they would not have afforded Movant a defense.

5. Movant's third allegation is that his trial counsel failed to properly impeach and/or cross-examine William Henderson, or depose him, which would have allowed her to impeach Johnson and Polk, who told three separate stories of what had happened. Movant alleges that Henderson's tape recorded statement would have been used to impeach him because on the tape he did not say he was there but at trial he said he had seen Mr. Gates committing the crimes with which he was charged. Movant states that Mr. Henderson testified that he did not know Movant but that Henderson had a child with Movant's sister and bought a car from Movant, and also that Henderson testified he was at the club but was underage at the time and trial counsel did not question him about this. Movant also alleges that Henderson testified that Movant and Larry were in the truck in Brooklyn, but Brooklyn Officer David Davis testified that only one person was in the truck.

As stated, supra, the extent of cross-examination is generally a matter of trial strategy. Kelly, supra. The mere failure to impeach a witness does not automatically entitle a movant to relief. The movant must establish the impeachment would have provided a defense or changed the outcome of the trial. Lobbing, supra. To prevail on a claim that counsel was ineffective for failing to present impeachment evidence, movant must show that the failure was outside the realm of trial strategy and that the evidence would have presented a viable defense. Movant must show specific discrepancies that could have been pointed out through preparation; otherwise the court is merely speculating as to prejudice. State v. Jones, supra. The decision to impeach an opposing witness is a choice of trial strategy. Where counsel is aware of impeachment witnesses and what their testimony will be and decides not to call them, counsel cannot be called ineffective. State v. Garrett, supra.

In motions prior to trial Movant's counsel stated that she went to see Mr. Henderson but that he would not talk to her without his attorney. Trial counsel requested to speak to him before he testified. With regard to Movant's allegations that Mr. Henderson testified that he did not know Movant, this allegation is refuted by the record. Mr. Henderson testified that he knew Johnnie Gates. (Tr. 342) Additionally trial counsel extensively cross-examined Mr. Henderson with respect to his criminal record, his observations and any deals or expectations

of benefits he had for testifying in his own criminal cases. This allegation is without merit and denied.

6. Movant's fourth allegation is that he repeatedly requested a fast and speedy trial on this case and trial counsel failed to do so. This allegation is without merit and denied. Movant fails to allege how he was prejudiced by the failure to request a speedy trial.

7. Movant's fifth allegation is that Count III, Stealing a Motor Vehicle, with which he had been charged, was not submitted to the jury and that trial counsel did not argue this in closing but that if the jury had known it would have had a positive effect. Movant points to the fact the jury submitted a question regarding this count during its deliberations.

This allegation is without merit and denied. First, it is entirely speculative whether the fact that Movant was charged with Stealing a Motor Vehicle but such charge was not submitted would have had a "positive effect" on the remaining counts. Highlighting the failure to submit this charge could have implied that the other charges had merit. The jury asked for a "not guilty" form relating to this count during deliberations in which it found Movant guilty of first degree assault and armed criminal action. This Court responded "That count was not submitted." As stated supra, it is not sufficient that the action might have had some conceivable effect on the outcome.

8. Movant's sixth allegation is that his trial counsel was ineffective in pursuing a strategy of "defense of others", when



sudden passion arising from adequate cause would have been more effective based on the facts of the case. Movant contends that the circumstances of the fight would have been sufficient to establish that Movant acted under sudden passion arising out of adequate cause, thus allowing the lesser included assault in the second degree to be submitted to the jury.

This allegation is without merit and denied. A lesser instruction of Assault Second Degree was given. The evidence would not have supported a sudden passion submission. Further, there was no evidence of provocation by the victim. See State v. Sheets, 849 S.W.2d 637, 638-639 (Mo.App.E.D. 1993). Sudden passion is defined as "passion directly caused by and arising out of provocation by the victim or another acting with the victim which passion arises at the time of the offense and is not solely the result of former provocation." Section 565.002 (7) RSMo. Additionally, as noted by the Court of Appeals, Movant consistently testified that the shooting was accidental.

9. Movant's seventh allegation is that his trial counsel failed to call Illinois State Fire Marshall, Tony Ventimiglia. Movant alleges that he informed his trial counsel of this witness and that Mr. Ventimiglia would have testified that he was the first one to try to question Movant, that Movant asked for an attorney so Mr. Ventimiglia stopped questioning Movant and that Ventimiglia informed St. Louis detectives Betz and Burgess, that Movant had requested an attorney. Movant contends that this would have supported his motion to suppress statements.

Where a motion to suppress is filed and overruled the decision to waive the issue during trial does not constitute ineffective assistance of counsel. Jackson v. State, 537 S.W.2d 211, 214 (Mo.App. 1976). Failure to pursue a motion to suppress is not ineffective assistance if the motion would have been rejected. State v. Vivone, 857 S.W.2d 489, 495 (Mo.App.S.D. 1993).

At sentencing Movant was asked whether he gave his trial counsel the names of address of witnesses he wanted her to contact and he stated that he informed his counsel that the Illinois State Fire Marshal could verify what happened, and how they got his statement but that he was not called. Movant's trial counsel indicated that she had information from which she could have contacted this law enforcement officer but that in her experience they do not cooperate with defense counsel or defense counsel's investigation. Movant clarified that he was referring to when he was brought to St. Louis and that before Detective Martin, Detective Betz questioned him he had been questioned by the Illinois State trooper about the same thing but that when he asked to speak to a lawyer he stopped questioning him.

Trial counsel filed pretrial motions including a Motion to Suppress Identification and a Motion to Suppress Statements. The Motion to Suppress Statements was heard at the time of trial, after voir dire and before the evidence. (Tr. 1, 180) Detective Michael Betz testified that Movant waived extradition in Illinois, was taken into custody and that they brought him to St.

Louis. Detective Betz testified that Movant was brought to the central patrol detective bureau where he and Detective Burgess advised him of the incident, his rights and asked him to make a statement. Betz testified Movant was verbally advised of his rights and also given a warning and waiver form which Movant filed out and signed, and that the statement was also recorded. On cross-examination Betz testified that he had not spoken to the Illinois officer before he transported Movant. Betz testified that an Illinois State Fire Marshal questioned Movant after the St. Louis police, regarding an arson that occurred after the assault and after the audio statement was made to the St. Louis police. Detective Betz clarified that the fire marshal from Illinois was not the same officer that arrested Movant in Illinois. Detective Betz stated that they had orally advised Movant regarding the incident that they wanted to speak to him about and of his rights and that they have the person acknowledge that they are willing to go ahead and then they have them fill out the form. This was not done until Movant came back to the station and Movant did not make any other statements to him regarding the crime other than is on the audio tape. At the time of the hearing on the motion this Court stated that it had no reason to believe that the testimony of the officer was not credible and denied the motion to suppress the statements. Nothing occurred during trial to change the ruling of the Court and the Court finds that this allegation is without merit and denied.

10. Movant's eighth allegation is that his trial counsel failed to obtain the deposition of Anthony Johnson, an unavailable witness, and present his testimony at trial. Movant alleges that Mr. Johnson "made statements to the police at the time of the incident and his police interviews that contradicted the complaining witness's statements. This witness would have served to impeach the complaining witness and the failure to obtain and preserve his testimony at trial impaired Mr. Gates' defense."

This allegation is denied. Movant has failed to allege what statements were made that contradicted the victim's statements. Movant's allegation is conclusory and the Court is unable to determine what if any prejudice would have resulted. Anthony Johnson was unavailable because he was serving in Iraq. Movant does not allege that Anthony Johnson was available for a deposition. At trial counsel stated that she had requested depositions of Anthony Johnson but that he was unavailable because he was in Iraq. (Tr. 333) Trial counsel argued that his testimony was critical because the State said he was not present but he told the police differently and she argued that this was important impeachment. Movant's counsel asked for a mistrial and continuance because of his unavailability which this Court denied. Trial counsel was not ineffective in her actions in attempting to present evidence regarding Anthony Johnson.

11. Movant's ninth allegation is that before trial the State offered Movant a recommendation of twenty years in the Department

of Corrections in exchange for a guilty plea which offer Movant rejected and he chose to go to trial. After trial the Court sentenced Movant to two concurrent sentences of thirty years. Movant contends that he should not have received a greater punishment for going to trial and that a 29.15 motion is the proper procedure where a sentence violates constitutional rights.

This allegation is without merit and denied. A defendant in a criminal case has no right to a plea agreement. Rule 29.15 affords movant no basis for relief from movant's decision not to plead guilty. Bryan v. State, 134 S.W.3d 795 (Mo.App.S.D. 2004); Rowland v. State, 129 S.W.3d 507, 510-511 (Mo.App.S.D. 2004). Additionally Movant's sentence as a prior and persistent offender to concurrent terms of thirty years for the assault first degree (Class A Felony) and armed criminal action was within the range of punishment for such offenses. In sentencing Movant to concurrent terms of thirty years this Court was not imposing this sentence because he elected to stand trial. This sentence was based on Movant's actions and the severity of the injuries sustained by the victim.

12. Movant's tenth allegation is that his trial counsel failed to investigate the hotel's policy for letting in non-guests to use the restroom at 2:00 a.m., which information he alleges could have been used to impeach the State's witness at trial and support Mr. Gates' defense.

This allegation is without merit and denied. The allegation is conclusory and does not state how such information would have

supported his defense. Further, as stated *infra*, it is not enough for the movant to show that the errors had some conceivable effect on the outcome of the proceeding, rather movant must show that but for the alleged errors there would have been reasonable doubt. There is no reasonable probability that this information would have changed the outcome of the trial.

13. Movant's eleventh allegation is that his trial counsel failed to cross-examine the complaining witness in this case, who testified he was lying down at one point but Officer Pinkton described his position differently. Movant alleges that "by failing to highlight these differences in the witnesses' versions of events, trial counsel prejudiced Mr. Gates' defense."

This allegation is without merit and denied. The allegation is conclusory and given the facts of the instant case and this alleged difference there is no reasonable probability that such information would have changed the outcome of the trial. Further the extent of cross-examination is almost always a matter of trial strategy and trial counsel was thorough in her defense of Movant and in her cross examination of the witnesses at trial.

14. Movant's final allegation is that "Appellate counsel failed to raise the issues included in Mr. Gates' motion for new trial (see Legal File 120-124). These issues were properly preserved for appeal; had they been raised on appeal there is a reasonable probability the Court of Appeals would have reversed Mr. Gates' case on one or more of the grounds listed therein."

This allegation is conclusory and is denied. To support a

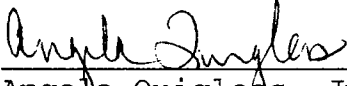
claim of ineffective assistance of appellate counsel strong grounds must exist showing that counsel failed to assert a claim of error which would have required reversal had it been asserted and which was so obvious from the record that a competent and effective attorney would have recognized it and asserted it. Tisius v. State, 183 S.W.3d 207, 215 (Mo.banc 2006). To be entitled to relief, movant must show that the error that was not raised on appeal would have required reversal had it been asserted; the error that was not raised must have been so substantial as to amount to a manifest injustice or a miscarriage of justice. Moss v. State, 10 S.W.3d 508, 514-515 (Mo.banc 2000) (citing Reuscher v. State, 887 S.W.2d 588, 591 (Mo.banc 1994); Helmig v. State, 42 S.W.3d 658, 682 (Mo.App.E.D. 2001)). Counsel does not have a duty to raise every issue asserted in the motion for new trial and no duty to present non-frivolous issues where counsel decided strategically to winnow out arguments in favor of other argument. Storey v. State, 175 S.W.3d 116, 148 (Mo.banc 2005).

#### ORDER

Movant has the burden to establish by a preponderance of the evidence the basis on which he seeks to obtain relief. This Court has considered each allegation set forth in Movant's Rule 29.15 Motion and finds that Movant has failed to allege or to establish facts which, if true, would entitle him to relief.

THEREFORE, the Court orders, adjudges and decrees that the Motion made pursuant to Supreme Court Rule 29.15 is DENIED.

SO ORDERED:

  
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Angela Quigless, Judge

Dated: Sept 4, 2010

cc: Alexandra Johnson, Attorney for Movant  
Melissa Gilliam, Assistant Circuit Attorney