

7. Movant's amended petition was filed on September 16, 2010.

8. On September 23, 2010, this Court set the matter for hearing, but then the matter was subsequently continued until March 3, 2011, where it was partially heard and re-set so a body attachment could be prepared for one of Movant's witnesses (May 21, 2011 Order).

9. The hearing was finally completed on September 15, 2011. Following the hearing, the Court took the matter under submission.

10. Movant claims in his amended motion that he was denied effective assistance of counsel, due process and equal protection of law rights guaranteed by the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Article I, Sections 10 and 18 (a) of the Missouri Constitution.

11. Specifically, Movant alleges he was denied his constitutional right to effective assistance of counsel when his trial counsel (Srikant Chigurupati) failed in the following:

1) In not calling as a witness Mr. Patrick Keefer, whom Movant alleges would have testified at trial that he did not see Movant with a knife or threaten the victim in this case in any way. Movant states Mr. Keefer would have also testified that the victim was not upset at the time of the alleged rape and robbery.

2) Movant, in not calling Mr. Keefer as a witness, is claiming that it was not his decision not to testify and if he had testified, he would have stated to the jury that the victim voluntarily gave him money for drugs and that he did not rob her.

12. For one to be successful in a claim for ineffective assistance of counsel, a Movant must satisfy the two-prong test in Strickland v. Washington, 466 U.S. 668, 687, 104 (S.Ct. 2052, 2064, 80, Ed. 2nd 574, 693 (1984)), requiring proof by a preponderance of evidence that:

1) Movant's counsel failed to exercise the customary care, skill and diligence that a reasonable attorney would perform under similar circumstances;

and,

- 2) Movant was prejudiced. (*Eddy v. State*, 176 S.W. 3rd 214, 217 (Mo. App. 2005).

If neither prong is met, then the Court need not consider the other and Movant's claim fails. This Court may also presume that counsel's conduct was reasonable effective – *Clayton v. State*, 63 S.W. 3rd, 201, 206 (Mo. Banc 2001). "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". *Cole v. State*, 152 S.W. 3rd 267, 270 (Mo. Banc 2004).

13. As to Movant's first claim and counsel's failure in calling witness Patrick Keefer – who was in the apartment when defendant and victim returned following victim's initial violent encounter with Movant.

14. At the PCR Hearing, Mr. Keefer testified that when the victim entered the apartment, her demeanor was "normal" and wasn't distraught (*PCR Tr.*, Pg 55, Lns 3-6).

15. Mr. Keefer also testified that defense counsel had spoken with him before the trial and, at some point, right before he came to testify at trial, he believes he was told by defense counsel "that his presence was not required." (*PCR Tr.*, Pg 61, Lns 16-17)

16. Mr. Keefer also testified that he had told defense counsel that he had suspicions about Movant's presence in the apartment of that time (*PCR Tr.*, Pg 60, Lns 6-25, and Pg 61, Lns 1-4).

17. Mr. Chigurupati testified that he had interviewed Mr. Keefer and had considered calling him as a witness and had, in fact, subpoenaed him (*PCR Tr.*, Pg 32, Lns 20-25, and Pg 33, Lns 1-10). However, defense counsel had concerns which outweighed any benefits to having Mr. Keefer testify, including drug use on the night of the crime (*PCR Tr.*, Pg 30, Lns 22-25, and Pg 32, Lns 6-10, Pg 33, Lns 8-10), and that Mr. Keefer told defense counsel that he was "afraid that

something strange was happening” while Movant was there and that he did not want Mr. Keefer exposed to the jury (*PCR Tr., Pgs 44, Lns 21-25, and Pg 45, Lns 1-25*).

18. Based upon his personal interview of Mr. Keefer, defense counsel made a strategic decision not to call him for fear his testimony may have done more damage than good. Defense counsel realized that calling Mr. Keefer would assist the State in proving Movant was not a “companion” of the victim or was supposed to be in the apartment with Movant. The decision not to call Mr. Keefer was reasonable trial strategy pursuant to Cole.

19. Accordingly, Movant’s first claim is **DENIED**.

20. Movant’s second claim is counsel’s failure in “prohibiting” him from testifying.

21. Movant did not testify at trial.

22. Following his sentencing, Movant stated:

Court: “You have – I cannot count all the convictions you have. You have at least seven previous convictions. Most of them are for robbery and armed criminal action. Did that kind of figure into your decision not to testify?”

Answer: “My lawyer thought it best for me not to testify.”

Court: “Did he tell you that the jury would have found out about those convictions if you did testify?”

Answer: “Yes.”

Court: “It was your decision not to testify.”

Answer: “I mean, upon his recommendation, yeah.”

Court: “So you said, look, after listening to him or talking to him, you said, ‘I don’t want to testify’, correct?”

Answer: “No. I wanted testify, but. . . .”

Court: “You did?”

Answer: “Yes, but he thought that it was best that I not because of my previous convictions.”

(*Sentencing Tr., Pg 17, Lns 8-25, and Pg 18, Line3 1-6*).

23. The decision of whether or not a defendant testifies at trial is treated as a matter of trial strategy. See Burke v. State, 989 S.W. 2nd 196 (Mo. Ct of App. E.D. 1999). Now, at the PCR Hearing, Movant testified he, again, wanted to testify but was told by both defense counselors that he shouldn’t because of his “past”. (*PCR Tr., Pgs. 12-13*)

24. To be sure, according to the Board of Probation and Parole's Pre-Sentence Report made part of the court file, Movant had been convicted of the following prior to the time he "wanted" to testify at the trial:

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|-----|------|---|
| 1) | 1987 | Tampering First Degree (felony) |
| 2) | 1987 | Possession of Stolen Motor Vehicle (felony) |
| 3) | 1988 | Robbery First Degree (felony) |
| 4) | 1988 | Robbery First Degree (felony) |
| 5) | 1988 | Robbery First Degree (felony) |
| 6) | 1988 | Attempt Robbery First Degree (felony) |
| 7) | 1989 | Robbery First Degree (felony) |
| 8) | 1989 | Armed Criminal Action (felony) |
| 9) | 1989 | Robbery First Degree (felony) |
| 10) | 1989 | Armed Criminal Action (felony) |
| 11) | 1989 | Robbery First Degree (felony) |
| 12) | 1989 | Armed Criminal Action (felony) |
| 13) | 1989 | Robbery First Degree (felony) |
| 14) | 1989 | Armed Criminal Action (felony) |
| 15) | 1989 | Robbery First Degree (felony) |
| 16) | 1989 | Armed Criminal Action (felony) |
| 17) | 1989 | Robbery First Degree (felony) |
| 18) | 1989 | Armed Criminal Action (felony) |
| 19) | 1989 | Robbery First Degree (felony) |
| 20) | 1989 | Armed Criminal Action (felony) |
| 21) | 1999 | Delivery/Poss. of Drugs in a Correctional Facility (felony) |

25. At the PCR Hearing, defense counsel testified he was aware of Movant's conviction history and remembers discussing the subject with Movant prior to trial. He also could not specifically recall whether he told Movant it was his choice he testified but that it was something he routinely did in all cases (*PCR Tr., Pgs 36-38*).

26. Movant clearly wants it both ways in tendering a position that he wanted to testify and then not actually testifying at trial.

27. Clearly counsel advised him that a defendant with twenty-one (21) felony convictions, most for the very crime he was charged with in the instant case, would have a difficult time on stand.

28. The Court finds Movant's allegation is without merit. As *Burks* points out, the

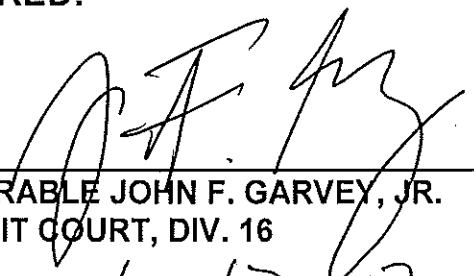
ultimate decision to testify is the Movant's (*Burks at 195*). It was clear from his testimony that defense counsel had advised Movant that taking the stand was a bad idea, and Movant heeded his advice.

29. Movant's claim fails the first prong of *Strickland*, in that a reasonably competent attorney would advise defendant of his right not to testify, and it was Movant who made the strategic decision not to depose his "past" to the jury. Point **Denied**.

ORDER AND JUDGMENT

WHEREFORE, the Court orders, adjudges and decrees that Movant's Motion for Post-Conviction Relief be and hereby is **DENIED**.

SO ORDERED:



THE HONORABLE JOHN F. GARVEY, JR.
22ND CIRCUIT COURT, DIV. 16

Dated: 1-17-12

p.c. Lisa M. Stroup, Attorney for Movant
Srikant Chigurupati, Asst. Public Defender
Office of the Circuit Attorney
File