

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

ENTERED
MAY 25 2011

**FJS
FILED**
MAY 23 2011

22ND JUDICIAL CIRCUIT
CIRCUIT CLERK'S OFFICE
BY _____ DEPUTY

LEWIS JOHNSON,)
)
)
 Movant,)
)
 v.)
)
 STATE OF MISSOURI,)
)
 Respondent.)
)

Cause No: 1022-CC02899

Division No. 16

**FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND ORDER**

COMES NOW the State of Missouri, by and through Assistant Circuit Attorney Christina Sondermann, and respectfully states the following with respect to Movant's Amended Motion:

1. On September 30, 2010, Movant filed his Amended Motion to Vacate, Set Aside, or Correct Judgment and Sentence and Request for Evidentiary Hearing.

2. On February 10, 2011, this Honorable Court called Movant's Motion for Evidentiary Hearing. On this date, the Court heard testimony from Movant. On this Case, the Court gave each party until an opportunity to file memoranda in support of their positions. The Court would take the matter under submission on March 14, 2011.

3. In his Amended Motion, Movant asserts one ground for post-conviction relief, which deals with the failure to call certain witnesses.

4. In order to prevail on a claim of ineffective assistance of counsel, a criminal

defendant must show first that his attorney failed to exercise the customary skill and diligence that a reasonable competent attorney would perform under similar circumstances and, second, that he was thereby prejudiced. Sanders v. State, 738 S.W. 2nd 856, 857 (Mo. 1987). Courts have held that “a criminal defendant must satisfy both the performance prong and the prejudice prong to prevail on an ineffective assistance of counsel claim.” See Sanders v. State, 857. Essentially, he must show that, “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Lyons v. State, 39 S.W. 2nd 32, 36 (Mo. 2001).

CONCLUSIONS OF LAW

5. Movant claims that trial counsel erred by failing to call Mrs. Lakiesha Thomas to testify as to defendant’s interactions with police on July 24, 2006.

6. To demonstrate ineffectiveness in failing to call a witness to testify, a movant must establish that the attorney’s failure to call the witness was something other than reasonable trial strategy. Terry v. State, 770 S.W. 2nd 723, 724 (Mo. App. 1989). In addition, a movant must establish that the witness could have been located through reasonable investigation and that he/she would have testified if called and that his/her testimony would have provided a viable defense. Childress-Bey v. State, 779 S.W. 2nd 697, 699 (Mo. App. 1989). Courts have long held that the choice of witnesses and defense tactics are ordinarily matters of trial strategy and will not support a claim of ineffective assistance of counsel. Hannah v. State, 816 S.W. 2nd 1 (Mo. App. 1991). A decision not to call a witness by Movant’s attorney is virtually unchallengeable. See Childress, 6, and State v. Kenley, 962 S.W.2nd 250 (Mo. Banc 1997).

7. Mr. Taaffe, attorney for defendant, testified that he did not have contact with Lakiesha Thomas. He further testified that the name Lakiesha Thomas did not come up in his conversations with Movant. (*PCR Transcript; Page 18, Lines 16-25, and Page 19, Lines 1-2.*) While Movant did discuss possible witnesses, the only information he could supply was that the potential witnesses were persons who reside at the Blumeyer Housing Complex at the time of the incident in 2006. (*PCR Transcript, Page 7, Lines 1-9.*) Mr. Taaffe testified that he had no names or addresses for those potential witnesses. (*PCR Transcript, Page 18, Lines 16-20.*) Further testimony by both Movant and Mr. Taaffe established that the Blumeyer Housing Complex was demolished in 2006 and residents were moved to other locations, thus eliminating the possibility of locating the witnesses at the Blumeyer itself. (*PCR Transcript, Page 20, Lines 20-25, and Page 21, Line 1.*) Mr. Taaffe testified that if he had information with which he could contact a potential witness that he would have done so.

8. Movant must establish that the witness could have been located through reasonable investigation and that he would have testified if called and that his testimony would have provided a viable defense. *Childress-Bey v. State*, 779 S.W. 2nd 697, 699 (Mo. App. 1989). Ms. Thomas did not testify at the hearing; therefore, Movant did not show that she was available and would have testified at trial.

9. Given these facts, Movant's trial counsel's actions constituted reasonable trial strategy and, therefore, are not grounds for ineffective assistance claims. Further, Ms. Thomas was not available to testify at trial. Accordingly, the Movant's allegations are without merit and Movant is not entitled to relief.

ORDER

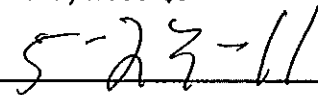
WHEREFORE, THE COURT ORDERS, ADJUDGES AND DECREES that Movant's Motion to Vacate, Set Aside, or Correct Judgment and Sentence, and Request for Evidentiary Hearing be and is, hereby, DENIED.

SO ORDERED:



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

Dated: _____



*p.c. Scott Thompson, Attorney for Movant
Christine Sondermann, Attorney for State
File*