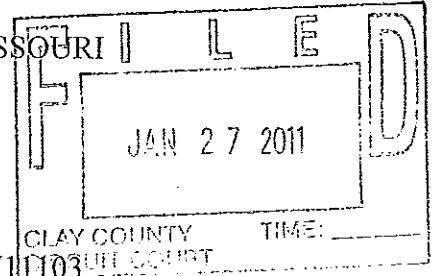


IN THE CIRCUIT COURT OF CLAY COUNTY, MISSOURI



SERGIO P. WYATT, )  
 )  
Movant, )  
 )  
vs. )  
 )  
STATE OF MISSOURI, )  
 )  
Respondent. )

Case No. 08CY-CV1103  
Division 4

FINDINGS OF FACT AND CONCLUSIONS OF LAW  
ORDER AND JUDGMENT

Movant was convicted by a jury of two counts of assault in the first degree, Class A Felonies and assault in the second degree, a Class B felony, in 7CR104-4090F. Judge Michael Maloney presided over the trial.\* On June 2, 2005, Judge Harman overruled Movant's Motion for a New Trial and sentenced Movant to eighteen (18) years in the Missouri Department of Corrections on one count of assault in the first degree, twenty-five years (25) years in the Missouri Department of Corrections on a second count of assault in the first degree, and six (6) years in the Missouri Department of Corrections on a count of assault in the second degree. Movant appealed his convictions to the Missouri Court of Appeals, Western District, who affirmed the conviction on July 15, 2008. The mandate was issued on August 19, 2008. Movant was represented at every phase of the criminal trial by George Wheeler, Esq. Movant was represented by Daniel Ross, Esq., during the appellate stage. Movant timely filed a Rule 29.15 action and was represented by Ron Partee, Esq.

\* Judge Maloney retired shortly after the trial.

Movant claims that he did not receive the effective assistance of counsel during the trial and was also denied effective counsel on direct appeal. An evidentiary hearing on the 29.15 motion was held on October 15<sup>th</sup>, 2010.

Movant's Amended Motion to Vacate, Set Aside or Correct the Judgment or Sentence sets forth the following claims: (1) The movant was denied due process of law, a fair trial, and effective assistance of counsel, in violation of the 5<sup>th</sup>, 6<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution and Article I, Sections 10, 18(a) and 22(a) of the Missouri Constitution. He claims trial counsel was ineffective because he conducted no investigation; lost credibility with the jury when he repeatedly demonstrated that he was unfamiliar with the basic facts of the case; and was incapable of impeaching the state's witnesses. (2) Movant's rights to effective assistance of trial counsel were denied by trial counsel's failure to investigate and introduce mitigating evidence during the sentencing stage of his trial. (3) Movant also contends his rights to due process of law and a fair trial may have been denied if the State failed to provide trial counsel with Brady/Giglio materials thereby violating Rule 25.03. (4) Movant's rights to effective assistance of Counsel on direct appeal were denied by appellant counsel's failure to raise the Brady/Giglio and Rule 25.03 Violations.

Movant's first two points allege ineffective assistance of trial counsel.

The burden of proof on the Movant for ineffective assistance of trial counsel is set forth in Strickland v. Washington, 466 U.S. 668 (1984). Movant must show "that trial counsel failed to exercise the customary skill and diligence of a reasonably competent attorney under similar circumstances, and second that counsel's deficient performance prejudiced the defense," Strickland at 687-688. The prejudice must show that "there is a reasonable probability that, but

for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland at 694. "Missouri appellate courts indulge in a strong presumption that defense counsel's conduct falls within the wide range of reasonable professional assistance." Sanders v. State, 738 S.W.2d 856 (Mo.banc 1987) *citing* Strickland at 689. Movant is entitled to an evidentiary hearing only when his motion meets three requirements: "First, the motion must allege facts, not conclusions, warranting relief; Second, the facts alleged must raise matters not refuted by the files and record in the case; and Third, the matters of which movant complains must have resulted in prejudice." Morrow v. State, 200 WL 777257, 1 (Mo.banc) *citing* State v. Brooks, 960 S.W.2d 479, 497 (Mo.banc 1997).

In the first point, Movant claims he was denied due process of law, a fair trial and effective assistance of counsel in violation of the 5<sup>th</sup>, 6<sup>th</sup> and 14<sup>th</sup> Amendments to the Constitution because trial counsel failed to conduct an investigation; lost credibility with the jury when he repeatedly demonstrated he was unfamiliar with the basic facts of the case; and was incapable of properly impeaching the state's witnesses, presumably due to an unfamiliarity with rules of evidence.

This court finds that Movant was denied the effective assistance of counsel, and that such denial prejudicially and materially affected his right to a fair trial. Trial counsel did not interview material witnesses who, according to their deposition testimony in the co-defendant's case, would have provided evidence in direct contradiction of the State's evidence. Trial counsel did not attend those depositions, nor receive copies of the transcripts. In effect, trial counsel had no idea of how the witnesses appeared, their demeanor, or the substance of their testimony. Defendant had made express statements that their testimony would be beneficial to his defense.

It is true that whether or not to call a witness is generally trial strategy. The decision to call, or not call, a witness at trial cannot be reasonably made if the witness has not been interviewed, nor their deposition reviewed, absent extraordinary circumstances. The record in this case does not reveal any circumstances why no statements, interviews, or depositions were not taken. This failure of trial counsel amounted to ineffective assistance and materially prejudiced Movant's rights to a fair trial.

At his first meeting with Movant, trial counsel knew Movant did not match the description of the shooter. Counsel knew various police reports regarding the timing of events the night of the shooting were not consistent. This knowledge shows his basic understanding of the case and is similar to what Movant is alleging: he is innocent, none of the witnesses could positively identify him, and there was no physical evidence linking him to the crime. Defendant was not in a suspect vehicle that was pulled over allegedly a short time after the shooting. A gun was found in the car. Defendant claimed alibi and told trial counsel of alibi witnesses.

Trial counsel's decision to not call to testify "alibi" witnesses may be a part of the planned trial strategy, which does not constitute ineffective assistance of counsel. *Houston v. State*, 623 S.W.2d 565, 567 (Mo. App. E.D. 1981). Courts have given discretion to trial counsel to draw from their experience the sufficiency of alibi testimony.

This court finds in this case that trial counsel's failure to interview alibi witnesses was ineffective counsel and materially prejudiced Movant's rights to a fair trial. While counsel is granted discretion in deciding whether or not to call any particular witness, that decision could not be reasonably made in this case if the potential witnesses are not interviewed or deposed.

Movant also raises an issue addressed by the Missouri Court of Appeals Western District, in the direct appeal. The Court of Appeals affirmed the judgment of Movant's convictions for first degree assault, with serious physical injury, on Michael Thomas. Issues that were raised on direct appeal cannot be brought up again in a post-conviction relief proceeding by changing the issue into a claim of ineffective assistance of counsel. *Seals v. State*, 141 S.W.3d 428, 433 (Mo. App. S.D. 2004).

The appellate court, while affirming the convictions, was, however, critical of trial counsel's representation of Movant.

Trial counsel did file a motion to suppress Movant's "statements". Said motion was denied, probably because there was no evidence that Movant ever gave a statement, admission, or confession to law enforcement authorities. No alleged statement attributed to the defendant was offered by the prosecutor.

Trial counsel did file a motion to suppress identification based upon a *photo array* shown to the State's witnesses. Said motion was denied. The record does not reflect this issue was preserved and protected for appeal.

Trial counsel, at the 29.15 hearing, testified he filed a motion to suppress *in-court identification*, but the record does not reflect such a motion was ever filed.

In the second point, Movant contends he was denied effective assistance of counsel because his trial counsel failed to investigate or introduce mitigating evidence during the sentencing stage of the trial.

Trial counsel must make a reasonable investigation of all possible mitigating evidence in the sentencing stage of a trial, or, make a reasonable decision that a further investigation is not

necessary. *State v. Miller*, 851 S.W.2d 715, 718 (Mo. App. E.D. 1993). Movant must show how he was prejudiced by trial counsel's alleged failure to present mitigating evidence. *Cook v. State*, 193 S.W.3d 378, 388 (Mo. App. S.D. 2006). Counsel's actions may be reasonable if there is a valid reason for not introducing certain evidence. *See Betts v. State*, 876 S.W.2d 802, 804 (Mo. App. W.D. 1994). The absence of mitigating evidence must be so significant it affects the sentencing and prejudices Movant. In this case, there was mitigating evidence available.

On May 2, 2005, Mr. Wyatt's trial commenced. At the close of the State's evidence Movant told trial counsel he wanted to testify. Movant and trial counsel did not discuss his testimony prior to testifying.

Trial counsel did not obtain the medical records of any of the three victims. The records of Liberty Hospital for Michael Thomas revealed "no acute osseous or soft tissue abnormality is seen". Trial counsel testified he thought it would be detrimental for the jury to hear the shooting victims went to the hospital. Apparently this witness walked with difficulty in the presence of the jury. A witness was available to testify, however, she had cell phone video of Mr. Thomas walking without an aid or limp outside the courthouse during trial. Trial counsel ignored this proffered testimony.

Bobby Davis (a co-defendant) testified at the 29.15 hearing that he told Movant's trial counsel he would testify for Movant at trial. He discussed this with his own attorney who did not object to his testifying. His testimony would have been beneficial to Movant if believed by the jury. Trial counsel testified he simply believed Davis would not testify since he had already been convicted and his case was on appeal. No other reason was given by trial counsel as to why he did not interview or call the co-defendant at trial.

Trial counsel presented no evidence during the penalty phase of the trial. He did no investigation and did not discuss with Movant or his family any mitigation evidence prior to trial.

Mitigation evidence existed, and witnesses were available to testify. Mitigating evidence would have shown Wyatt has a six year old daughter with whom he had regular contact and a close relationship. He was current in his child support. He lived with his elderly grandparents in Chicago before he moved to Kansas City, was employed and helped support them. He paid them rent to help with the household expenses. He assisted with housework, maintenance and repairs. He ran running errands for them. He had a job in Kansas City and his employer would have testified he was a very dependable and excellent worker. Neither the jury, nor the judge heard this evidence.

In his third and fourth point, Movant claims he was denied his rights to due process of law and a fair trial when the State failed to provide trial counsel with *Brady/Giglio* Materials and violated Missouri Criminal Procedure Rule 25.03.

If the State suppresses evidence that may be favorable to a defendant, due process is violated if the evidence is found to be material to the guilt or punishment of the defendant. *State v. Parker*, 274 S.W.3d 551, 553 (Mo. App. W.D 2008). The three components that must be present in a *Brady* violation include: exculpatory or impeaching evidence favorable to the accused; evidence suppressed by the State, willfully or inadvertently; and prejudice because of the suppression. *Merriweather v. State*, 294 S.W.3d 52, 54 (Mo. en banc 2009). “[E]vidence is material if it would have provided the Movant with plausible and persuasive evidence to support a theory of innocence or would have enabled the defendant to present a plausible, different theory of innocence.” *Buchli v. State*, 242 S.W.3d 449, 454 (Mo. App. W.D. 2007).

If the two parties are in disagreement about whether information was disclosed, the Court is entitled to believe all, some or none of the evidence presented decide what testimony they choose to believe. *Parker*, 274 S.W.3d at 554.

Case law dictates that the information required to be disclosed must either be exculpatory or impeaching evidence, not just helpful evidence. In addition it must be material to prove innocence or a plausible theory of innocence. Movant fails to allege specific facts of what information was suppressed and how that information was material to his innocence. Movant generally alleges that it would have been helpful, but never establishes that prejudice did occur by the non-disclosure of the materials.

In his fourth and final point, Movant asserts he was denied effective assistance of counsel on direct appeal because his Counsel failed to raise the *Brady/Gigilo* and Rule 25.03 violations.

To plead a failure to use a *Brady* violation in a Rule 29.15, Movant must specify what the exculpatory evidence not disclosed would be and cite “facts, not conclusions, which if true would entitle the Movant to relief.” *State v. Ferguson*, 20 S.W.3d 485, 503 (Mo. en banc 2000). A *Brady* violation claim may not be “speculative and conclusive”. *Id.* If Movant only pleads a *Brady* violation generally an evidentiary hearing is not necessary because the State should not disclose its entire file for the defendant to examine it and decide if a *Brady* violation has in fact occurred. *Id.* It must first be established that the evidence was exculpatory, helpful to impeach a witness, or that prejudice resulted. *Id.* at 504.

Movant failed to overcome the burden that trial counsel or appellate counsel failed to meet the standard of a reasonable, competent attorney regarding Movant’s claimed “*Brady*” violation.



## CONCLUSIONS OF LAW

Mr. Wyatt's trial counsel did not perform effectively, and failed to investigate and prepare a defense for Mr. Wyatt. Trial counsel failed to investigate and prepare for sentencing. Movant suffered prejudice as a result of the ineffective performance, and there is a reasonable probability the outcome would have been different.

While the weakness in the identification of Mr. Wyatt was readily apparent to defense counsel, as he testified, he nevertheless failed to investigate and prepare a defense. Reasonable, effective measures could have included: (i) moving to suppress the in-court identification, (ii) interviewing and deposing key witnesses before trial and, (iii) properly impeaching the State's key witnesses at trial.

Under Missouri law, trial counsel had the ability to depose all of the State's key identification witnesses, and he failed to do so. Had Mr. Wyatt's trial counsel taken a thorough deposition of these witnesses before trial, he would have been able to place their trial testimony in doubt and had strong impeachment material for use at trial. Trial counsel's failure to take the depositions in this case fell below an objective standard of reasonableness.

Even without taking depositions and performing a proper investigation, Mr. Wyatt's trial counsel had certain information available for use in a cross-examination of the State's witnesses. Trial counsel failed to use this information.

Trial counsel could have at least interviewed potential "alibi" witnesses, but did not do so.

Under Strickland v. Washington, 466 U.S. 668 (1984), for relief to be granted on the basis of ineffective assistance of Counsel, the court must find two things: (i) counsel's

performance was constitutionally ineffective, i.e., based on an objective standard, counsel's performance was not reasonable; and (ii) the ineffective performance resulted in prejudice, i.e., the ineffectiveness must undermine the court's confidence in the outcome of the trial.

In Strickland, the United States Supreme Court stated, "the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as to have produced a just result." Strickland, at 686.

It is apparent in this case that Mr. Wyatt's trial counsel failed to conduct any meaningful investigation into his innocence defense. Trial counsel did not take any depositions. Trial counsel did not attend any depositions. Even though available to him, trial counsel did not read or review depositions taken in Movant's co-defendant's case. Trial counsel did not interview any witnesses. This failure to investigate was unreasonable, and constitutes ineffective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution and in violation of the clear mandate of the United States Supreme Court's decision in Strickland.

That defense counsel's failure to investigate fell below constitutional standards for performance is plain. In Strickland, the Supreme Court made clear that defense counsel has a duty to investigate:

**"Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or make a reasonable decision that makes particular investigations unnecessary."** Strickland, 466 U.S. at 690-91. (Emphasis added.)

In Mr. Wyatt's case, the uncontested facts demonstrate that his trial counsel did nothing to investigate witnesses who might have information supporting Mr. Wyatt's innocence. The Eighth Circuit, in applying Strickland, has explained that a failure to interview witnesses is ineffective assistance of counsel.

"The Supreme Court requires that counsel make a reasonable investigation in the preparation of a case or make a reasonable decision not to conduct a particular investigation. Counsel's "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on the investigation." We have considered these principles in our circuit and have held that counsel must exercise reasonable diligence to produce exculpatory evidence and strategy resulting from a lack of diligence in preparation and investigation is not protected by the presumption in favor of counsel. **Failing to interview witnesses....relates to trial preparation and not trial strategy.**" Kenley v. Armontrout, 937 F.2d 1298, 1304

(8<sup>th</sup> Cir. 1991) (citations omitted; emphasis added.) See also, Chambers v. Armontrout, 907 F.2d 825, 828 (8<sup>th</sup> Cir.) (en banc) cert. denied 498 U.S. 950 (1990).

The decision by trial counsel not to interview potential witnesses is not a decision related to trial strategy. Rather, it is a decision related to adequate preparation for trial. Reasonable performance of counsel includes an adequate investigation of the facts of the case, consideration of viable theories, and development of evidence to support those theories. Counsel had a duty to investigate all witnesses who allegedly possessed knowledge concerning Mr. Wyatt's guilt or innocence. It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty.

To establish prejudice under Strickland, a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have

been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Strickland, at 694. This of course, is not an outcome-determinative standard:

“We believe that a defendant need not show that counsel’s deficient conduct more likely than not altered the outcome in the case.....This outcome-determinative standard has several strengths....Nevertheless, the standard is not quite appropriate.... An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.” Strickland, 466 U.S. at 693-94.

Applying this standard to Mr. Wyatt’s case, the Court concludes that prejudice occurred.

Mr. Wheeler should have, at a bare minimum, interviewed the eyewitnesses. Because there was no physical evidence connecting Mr. Wyatt to the crime, the identification of Mr. Wyatt several days after the shooting was the cornerstone of the State’s case in chief. (Some witnesses identified Mr. Wyatt only after they had seen him in Court as the charged defendant.). Consequently, information relevant to Mr. Wyatt’s defense might have been obtained through pretrial investigation of the eyewitnesses, and a reasonable lawyer would have made some effort to investigate the eyewitnesses’ testimony. Further, there should have been an investigation of Mr. Wyatt’s alibi defense and those defense witnesses should have been interviewed before trial.

In Mr. Wyatt’s case, trial counsel conducted no meaningful investigation into Mr. Wyatt’s case, and conducted no investigation into mitigating circumstances at all. Trial counsel believed that he would win Mr. Wyatt’s case in the guilt phase, and that he would

never reach the penalty phase. With defendant ultimately being convicted by the jury, Mr. Wyatt suffered prejudice as a result of his trial counsel's failure to investigate and present mitigation evidence.

The United States Supreme Court's decisions in Williams v. Taylor, 529 U.S. 362 (2000) and Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527 (2003) demonstrate persuasively that Mr. Wyatt's trial counsel's performance in the penalty phase of Mr. Wyatt's trial fell below an "objective standard of reasonableness." Strickland, at 687. In both Williams and Wiggins, the Supreme Court made clear that trial counsel have "an obligation to conduct a thorough investigation of the defendant's background." Williams, at 396. Wiggins, 123 S. Ct. at 2535.

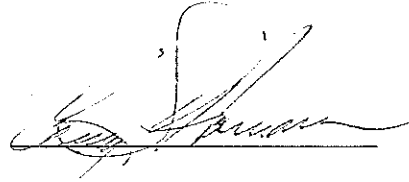
The only "defense" information available to the jury in the sentencing stage was trial counsel's closing argument, consisting of just three transcript pages. (Trial Tr., pp. 842- 845). Substantial evidence existed that could have been presented in the penalty phase of Mr. Wyatt's trial. In determining prejudice during the penalty phase, the Court must "evaluate the totality of the available mitigating evidence.....in reweighing it against the evidence in aggravation." Williams, at 397-98. In doing that here, it is plain that the mitigation evidence available in Mr. Wyatt's case raised "a reasonable probability that the result of the sentencing proceeding would have been different if competent counsel had presented and explained the significance of all the available evidence. Mr. Wyatt suffered prejudice as a result of his trial counsel's failure to investigate and present mitigation evidence.

For the forgoing reasons, Mr. Wyatt's Motion to Vacate and Set Aside the Judgment and Sentence under Rule 29.15 is granted.

It is, therefore, ORDERED AND ADJUDGED that Movant's Motion for Rule 29.15 relief is granted, and the Judgment of Conviction is vacated and a new trial ordered.

1-27-11

Date

A handwritten signature in black ink, appearing to be "K. J. ...", written over a horizontal line.

Judge