

**FILED**  
OCT - 1 2019

22<sup>ND</sup> JUDICIAL CIRCUIT  
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BY \_\_\_\_\_ DEPUTY

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

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

\_\_\_\_\_, )  
 )  
Movant, )  
 ) No. 1522-CC11163  
vs. )  
 ) Division No. 9  
STATE OF MISSOURI )  
 )  
Respondent. )

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Movant filed his motion in the present cause pursuant to Rule 29.15 prematurely on November 23, 2015.<sup>1</sup> Counsel entered his appearance on December 21, 2015, counsel was granted a thirty day extension in which to file an amended motion, and counsel was appointed to represent movant and counsel timely filed an amended motion ninety days after the mandate was issued, on March 29, 2016.

A hearing was held on May 30, 2019 at which movant appeared and testified. Having heard the testimony and having examined the records and files in this case, the Court now finds as follows:

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<sup>1</sup> The mandate for his direct appeal was issued on December 30, 2015.

## FINDINGS OF FACT

1. Movant was charged as a prior and persistent offender in Cause No. 1222-CR06520-01 with murder first degree and armed criminal action.

2. The evidence at movant's trial was that [REDACTED] and [REDACTED] went to play in a dice game in the garage at a friend's house. [REDACTED] left with another friend to go to a store, and when [REDACTED] heard gunshots outside the garage he saw movant chasing [REDACTED] into the yard. [REDACTED] knew movant from the neighborhood, and he saw movant chasing [REDACTED] with a gun in his hand. [REDACTED] then heard [REDACTED] asking movant not to shoot him, and [REDACTED] saw movant shoot Reed several times. [REDACTED] saw the shooter's face and he was sure it was movant.

3. Movant did not testify at his trial and the defense called no witnesses.

4. Defense counsel argued that movant was misidentified as the shooter. Counsel argued among other things that [REDACTED] was not credible, and counsel contended it was dark outside the garage and [REDACTED] view of what happened was obstructed through the garage window which had bars on it.

5. Movant was found guilty and was sentenced to concurrent terms of life without the possibility of parole and life with

the possibility of parole. At the sentencing hearing, movant's attorney asked the Court to have movant evaluated to determine whether movant was competent to proceed to trial and to understand the ramifications of a first degree murder guilty verdict. The Court denied this request.

6. Following pronouncement of movant's sentences, the Court questioned movant about the assistance he received from his attorney. Movant indicated he understood when the Court explained a motion for post-conviction relief and he said he had no questions about the process. Movant stated that he reserved his rights when questioned further about the assistance he received.

7. These convictions were affirmed on appeal. State v. Boykins, 477 S.W.3d 109 (Mo.App.E.D. 2015).

8. Movant now seeks post-conviction relief pursuant to Rule 29.15. Movant alleges his trial attorney was ineffective for failing to investigate and call [REDACTED] and [REDACTED] as alibi witnesses, and for failing to investigate movant's competence to stand trial. Movant alleges his appellate counsel was ineffective for failing to raise movant's lack of competence to stand trial in his direct appeal.

9. Dan Rousseau, movant's trial attorney, testified at the evidentiary hearing that the facts underlying the charges against movant were that several people had been drinking and playing dice when a person came along and shot the victim. Movant was identified as the shooter, and the defense strategy was misidentification. Mr. Rousseau said movant provided the names of alibi witnesses, including [REDACTED] and one other person, but Mr. Rousseau did not recognize the name [REDACTED]. [REDACTED]. Movant told Mr. Rousseau that his alibi witnesses would have said movant was with them at the time of the shooting. Mr. Rousseau said he recalled [REDACTED] giving a statement to the police but he did not recall whether he deposed her. Mr. Rousseau said [REDACTED] conflicting statement to the police would not have helped with an alibi, and even if she had testified at the trial her statement to the police would have been a problem. [REDACTED] was the mother of a child with movant, and there was another woman mentioned in the police report who was a mother of a child with movant, and the two women provided conflicting statements to the police.

10. Mr. Rousseau testified that he explained the legal proceeding to movant, including the range of punishment, the process of pleading guilty, how a trial works, and the possible

outcomes. Mr. Rousseau said it appeared that movant understood the process. Mr. Rousseau discussed the case frequently with movant's mother, and the discussions were mostly about what he was doing to prove movant's innocence. He said he had no recollection of discussing movant's competence with her prior to the trial. The first time movant's mother said movant did not understand what sentence movant would receive was after the trial. Mr. Rousseau testified that he would have requested a competency evaluation if he thought there was a reason.

11. Maleaner Harvey, movant's appellate attorney, testified that Mary Fox, who represented movant at sentencing, expressed a concern about movant's competence. Ms. Harvey did not raise the issue of movant's competence in movant's direct appeal because the issue did not come up until after movant's new trial motion had been filed and there was no hearing or showing made in the trial court that would have allowed her to raise the issue as plain error. Ms. Harvey said movant's responses during sentencing would not have put a person on notice that he might not be competent. Movant responded appropriately, and he showed he could follow the advice of his attorney. Movant also brought up that he wanted to testify. Ms. Harvey said she spoke with movant multiple times on the phone, movant was able to explain

the appellate process, he was interested in the process, he asked questions about it and he came forward with issues regarding witness credibility. The only red flag for Ms. Harvey was that movant thought, when he got a copy of the respondent's brief, that it was the decision of the court.

12. Movant testified at the evidentiary hearing that he had been convicted of murder. Movant said he only met with his attorney two times. Movant testified he gave the names of five or six witnesses to Mr. Rousseau who would have testified that he was in the area of the murder but not on the street where the murder occurred. When asked whether he knows what an alibi is, movant responded yes, that they would say where he was. Movant knew that he had been convicted of murder, and he knew that his alibi was that he had been at Kossuth and Fair. Movant was asked about [REDACTED], and he responded her last name is [REDACTED] and he wanted Mr. Rousseau to interview her. Movant said he also provided the name of [REDACTED] to Mr. Rousseau and he wanted Mr. Rousseau to try to find his witnesses. Movant testified that Mr. Rousseau explained legal procedures to him and he understood some of it. He also spoke with other inmates about legal issues and he said he learned more about the case since he has been incarcerated.

13. Movant testified that when Mr. Rousseau first came to see him Mr. Rousseau introduced himself and gave him the police report. Movant said there were names of witnesses in the police report, that he knew an [REDACTED] but not an [REDACTED] and the police officer put the wrong name in the police report.

14. Mary Fox, the District Defender for the St. Louis Public Defender's trial office, testified at the evidentiary hearing that she represented movant at his sentencing. Ms. Fox said she had concerns about movant's competence to be sentenced. Ms. Fox said movant asked her if she thought he could get ten years and he did not understand the range of punishment. Ms. Fox said she had experience with persons having disabilities and such persons can put on a "cloak of competency." Ms. Fox testified she has never gone to trial with a client who does not understand what life without the possibility of parole is, and movant did not appear to understand.

15. Dr. David Coffman testified on behalf of movant at the evidentiary hearing. Dr. Coffman contracted with the Public Defender's Office to perform an evaluation of movant's capacity and defects at the time of his trial. Dr. Coffman is a clinical psychologist. Dr. Coffman concluded that movant suffers from a mental disease or defect and has an intellectual disability.

Dr. Coffman testified he could not form an opinion as to movant's competence at the time of his trial, although an intellectual disability is a lifelong condition. Dr. Coffman said movant's ability to assist his attorney with legal strategies could be impacted. Dr. Coffman said this disability may not be apparent to another person the defendant is interacting with because these persons do not want their impairment to be apparent. Such a person can learn but the person's pace of learning takes longer than for a normal person. Dr. Coffman testified that movant can follow instructions, and could have followed advice whether to go to trial and whether to testify.

16. Dr. Rick Scott, a psychologist, testified at the evidentiary hearing that he does forensic psychology. Dr. Scott evaluated movant as to his competence at trial and sentencing. Dr. Scott found that movant has 1) an intellectual disability mild, the same as Dr. Coffman, and 2) an anti-social personality disorder. Dr. Scott said that in his opinion movant was able to understand the proceedings and to assist in his defense. Movant expressed complaints against his attorney which showed an understanding of what an attorney should do, movant understood the proceedings, the role of the prosecutor, understood



witnesses against him were people he knew, movant understood the role of the jury, and he understood his Fifth Amendment rights and explained why he did not testify.

#### CONCLUSIONS OF LAW

1. The first two claims in movant's amended motion are that his trial attorney was ineffective for failing to investigate and call [REDACTED] and [REDACTED] as alibi witnesses.

To prevail on a claim of ineffective assistance of counsel, a criminal defendant must show that his counsel's performance failed to conform to the degree of skill, care and diligence of a reasonably competent attorney and 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). The movant must satisfy both the performance prong and the prejudice prong. State v. Boyce, 913 S.W.2d 425, 429 (Mo.App.E.D. 1996). To demonstrate prejudice movant must establish that but for counsel's errors there is a reasonable probability that the outcome of the trial would have been different. Wilkes v. State, 82 S.W.3d 925, 927-928 (Mo.banc 2002).

In order to be entitled to relief on the ground that counsel failed to call witnesses movant must identify who the

witnesses were and prove that counsel knew or should have known of their existence, establish that the witnesses could have been located through reasonable investigation, the witnesses would have testified if called and their testimony would have provided a viable defense. Vaca v. State, 314 S.W.3d 331, 335-336 (Mo.banc 2010); Hutchison v. State, 150 S.W.3d 292, 304 (Mo.banc 2004).

Allegations contained in a post-conviction relief motion are not self-proving and the movant has the burden of proving his asserted grounds by a preponderance of the evidence. Cole v. State, 223 S.W.3d 927, 931 (Mo.App.S.D. 2007); Alhamoud v. State, 91 S.W.3d 119, 120 (Mo.App.E.D. 2002).

The Court finds that movant has failed in his burden of proof as to his first two claims. Movant's two purported alibi witnesses did not appear at the evidentiary hearing and movant presented no evidence that either witness would have been available and willing to testify at his trial.

2. Movant next claims his attorney was ineffective for failing to investigate his competence to stand trial.

The standard for determining an accused's competence to stand trial is the same as the standard for competence to plead guilty. The test is whether he is able to rationally consult

with counsel and the court and understand the proceedings. Chambers v. State, 958 S.W.2d 66, 70 (Mo.App.S.D. 1997); see also, Henderson v. State, 977 S.W.2d 508, 511 (Mo.App.S.D. 1998). Where counsel has an honest belief that the accused lacks the capacity for rational understanding and cooperation counsel has the duty to obtain adjudication of the issue by requesting a mental examination. Hemme v. State, 680 S.W.2d 734, 736 (Mo.App. 1984). However, the suspicion or actual presence of some degree of mental illness does not mean a person is not competent to stand trial. The test is whether the person has sufficient present ability to consult with counsel with a reasonable degree of understanding of the proceedings against him. Gooch v. State, 310 S.W.3d 275, 280 (Mo.App.S.D. 2010).

The Court has considered the testimony of the witnesses at the evidentiary hearing, that of Mr. Rousseau, Ms. Fox, Dr. Coffman and Dr. Scott. The Court has also considered movant's testimony at the evidentiary hearing and when questioned by the Court during his trial. The Court finds this claim is without merit because movant has failed to show that he was not competent to understand the trial proceeding and to assist in his defense, and movant has not shown that Mr. Rousseau was on notice that movant may not have been competent to understand the

proceeding and assist in his defense. The record does not support a finding that Mr. Rousseau was ineffective in this regard.

3. Movant's final claim is that his appellate counsel was ineffective for failing to raise movant's lack of competence to stand trial in his direct appeal. This issue was not timely raised in the trial court and preserved for appeal.

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); Johnson v. State, 330 S.W.3d 132, 142 (Mo.App.W.D. 2010). Counsel is not ineffective for failing to raise unpreserved error. Ivory v. State, 422 S.W.3d 503, 506 (Mo.App.E.D. 2014); Melillo v. State, 380 S.W.3d 617, 623 (Mo.App.S.D. 2012).

The Court finds this claim is without merit because the claim was not preserved for appeal, and because the record before the trial court was not sufficient to support a finding of error on the part of the trial court.

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, has reviewed the records from movant's trial, and has considered the evidence presented at the evidentiary hearing. The Court finds that movant has failed to establish that he is entitled 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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Scott A. Millikan, Judge

Dated: 10-1-2019

cc: Susan DeGeorge, Attorney for Movant  
Krista Boston, Assistant Circuit Attorney