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JUL 10 2019
22ND JUDICIAL CIRCUIT
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STATE OF MISSOURI)
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**MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(City of St. Louis)**

RANDY COLLIER,)
)
 Movant,)
) No. 1722-CC00482
 vs.)
) Division No. 3
STATE OF MISSOURI)
)
 Respondent.)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Movant timely filed his motion in the present cause pursuant to Rule 29.15 on February 10, 2017.¹ Counsel was appointed to represent movant on February 16, 2017, counsel was granted a thirty day extension in which to file an amended motion, and an amended motion was timely filed on May 17, 2017, the ninetieth day from the appointment of counsel.

An evidentiary hearing was held on August 17, 2017 before the Honorable Robert H. Dierker, Jr. The undersigned judge has succeeded Judge Dierker on the bench and the parties have agreed that this Court may rule on the motion based on a transcript of the evidentiary hearing.

ENTERED
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JLW

¹ The mandate from his direct appeal was issued on December 15, 2016.

Having reviewed the testimony and having examined the records and files in this case, the Court now finds as follows:

FINDINGS OF FACT

1. Movant was charged as a prior and persistent offender in Cause No. 1422-CR04127-01 with robbery first degree and armed criminal action. The indictment listed prior guilty pleas to robbery first degree in July 2003, to robbery second degree in October 1996, and to distribution of a controlled substance in October 1996.

2. The evidence at movant's trial was that movant had been working for a local business, performing various jobs in exchange for cash. On October 25, 2014, movant went to work in the morning and, while preparing to unload some acetylene tanks from a truck, movant asked the business owner if he could use the owner's phone. The owner gave movant his cell phone and, while the owner was maneuvering a dolly, movant turned around, shook a butcher knife at the owner, demanded the owner's wallet and said "I'll kill you." The owner turned over his wallet, movant knocked him down with the dolly, and movant fled the scene with the victim's cell phone and wallet. The defense

called one witness at movant's trial, but movant decided not to testify himself at his trial.

3. Movant was found guilty of both charges and was sentenced to consecutive terms of fifteen years.

4. These convictions were affirmed on appeal. State v. Collier, 502 S.W.3d 770 (Mo.App.E.D. 2016).

5. Movant now seeks post-conviction relief pursuant to Rule 29.15. Movant's amended motion contains one claim, that his attorney was ineffective for failing to impeach the victim of the crimes with a 1987 conviction for felony stealing and a 2007 conviction for driving while license revoked.

6. An evidentiary hearing was held on August 17, 2017, at which the only witness was movant's trial attorney, Brian Horneyer. Mr. Horneyer testified that the defense theory at trial was that movant and the victim had an argument, and the victim fabricated the robbery story because he was afraid movant would report him for paying employees under the table. Mr. Horneyer said it had been his intention to point out inconsistencies in the victim's story, that the victim was paying movant in cash and not reporting it to the government, and that this conduct was illegal. Mr. Horneyer said

undermining the victim's credibility was very important for the defense.

7. On the morning of trial, Mr. Horneyer received information about the victim's prior convictions, which included a stealing conviction and a driving while revoked misdemeanor conviction. When asked why he did not make use of the prior convictions to impeach the victim, Mr. Horneyer said he generally does not impeach witnesses with driving convictions because "I don't find any value in that personally." With respect to the stealing conviction, Mr. Horneyer said the victim was very sympathetic in that he was an older gentleman who had taken movant off the street and given him a job, and Mr. Horneyer did not think an old conviction would be valuable for impeachment. Mr. Horneyer further said the prosecuting attorney told him the victim did not remember the thirty year old conviction and he did not want to get into a battle with the victim over whether the conviction was real or not. Mr. Horneyer acknowledged he could have called a court clerk to prove the prior conviction without appearing to beat up on the victim.

CONCLUSIONS OF LAW

1. The only claim in movant's amended motion is that his attorney was ineffective for failing to impeach the victim of the crimes with a 1987 conviction for felony stealing and a 2007 conviction for driving while license revoked.

2. 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, supra at 927-928 (Mo.banc 2002); Guese v. State, 248 S.W.3d 69, 72 (Mo.App.S.D. 2008).

3. 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). A criminal shoulders a heavy burden in proving ineffective assistance of counsel because there is a presumption that his counsel was competent, and the movant must prove every allegation by the preponderance of the evidence. Lingar v. State, 766 S.W.2d 640 (Mo.banc 1989); Marschke v. State, 185 S.W.3d 295, 302 (Mo.App.S.D. 2006).

4. The choice of witnesses and defense tactics are ordinarily matters of trial strategy and will not support a claim of ineffective assistance of counsel. State v. Henderson, 826 S.W.2d 371, 378 (Mo.App. 1992).

5. The Court finds that movant's only claim is without merit for the reason that counsel articulated valid strategic reasons for not impeaching the victim with the two prior convictions, and the Court does not believe presenting the jury with a thirty year old stealing conviction that the victim did not remember would have changed the outcome of the trial, particularly in light of the strong evidence of movant's guilt.

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 the claim set forth in movant's Rule 29.15 Motion, has reviewed the records from movant's trial and appeal, and considered the testimony presented at the evidentiary hearing, and 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:



Joseph P. Whyte, Judge

Dated: July 10, 2019