

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

BYRON C. CASE,)
)
 Movant,)
)
 -vs-) **04CV233413**
)
 STATE OF MISSOURI,) **Division 10**
)
 Respondent.)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

COMES NOW, on this 7th day of October, 2005, Movant, Byron Case, appears in person and with counsel, Stephen M. Patton. Respondent, State of Missouri, appears by Assistant Prosecuting Attorney Theresa Crayon. Pursuant to Rule 29.15, RSMo, this cause comes on for hearing. Evidence is presented and entered. This cause was taken under advisement.

Findings of Facts

Trial

1. On June 21, 2001, the State of Missouri filed an indictment charging Movant with murder in the first degree, Section 565.020, RSMo, 2000, and armed criminal action, Section 571.015, RSMo, 2000.

2. Movant was charged with murdering Anastasia Witbolsfeugen on October 22, 1997 by shooting her with a gun in front of two witnesses, Kelly Moffett and Justin Bruton. Justin Bruton died soon thereafter leaving Ms. Moffett the sole eye witness available for trial.

3. On April 17, 2002, the State filed an application for an order granting Moffett witness immunity in exchange for her testimony at Movant's trial. The application was sustained and an order was issued granting Moffett immunity.

4. On April 29, 2002, Movant was tried before a jury on the charges.

5. During trial, Moffett was the sole eye witness who testified that Movant killed the victim.

6. Moffett also testified that on June 5, 2001, she recorded conversations with Movant.

7. As part of its case in chief, the State played the recordings to the jury and gave the jurors a transcript of the conversations.

8. The defense objected to this testimony and evidence, arguing that the statements were not tacit admissions.

9. During trial, Don Rand was called as a defense witness to support Movant's version of events and to impeach Moffett's testimony.

10. On May 2, 2002, the case was submitted to the jury..

11. On the same day, the jury found Movant guilty of murder in the first degree and armed criminal action.

Motion for New Trial

12. On May 22, 2002, the defense filed a motion for new trial.

13. On June 28, 2002, this Court overruled the motion for judgment of acquittal or a new trial.

Sentence

14. This Court sentenced Movant to concurrent sentences of life without parole for murder in the first degree and life in prison for armed criminal action.

Appeal

15. Notice of Appeal was timely filed on July 3, 2002.

16. On May 7, 2003, appellate counsel filed a brief on behalf of Movant.

17. On April 13, 2004, the Court of Appeals, Western District, affirmed Movant's convictions.

18. In its written opinion, the Court of Appeals found that this Court was in error in denying the defense objection to the June 7th conversation and admitting that part of the taped recording and transcript into evidence.

19. The Court of Appeals found that during the June 7th conversation, Mr. Case never made a tacit admission. Ms. Moffett never accused, directly or indirectly, Movant of murder. Therefore, Movant's response could not have been a tacit admission.

20. However, the Court of Appeals wrote that Movant was not prejudiced by the admission of the evidence. The Court of Appeals concluded that the statement was not nearly as inculpatory as Ms. Moffett's eyewitness testimony.

21. The Court of Appeals found the trial court did not violate Movant's Fifth Amendment rights by allowing the State to introduce evidence of his silence as substantive evidence of guilt.

22. The Appellate Court held that there was sufficient evidence to convict Movant of first degree murder and armed criminal action.

23. The Court of Appeals issued its mandate on August 26, 2004.

Postconviction Relief Motion

24. On November 8, 2004, Movant timely filed his *pro se* Rule 29.15 motion.

25. On April 5, 2005, Movant timely filed his Amended Motion to Vacate, Set Aside, or Correct Judgment and Sentence.

26. Movant's amended motion alleged that he received ineffective assistance of counsel for the following reasons:

(i) Trial counsel was ineffective for failing to properly cross-examine the state's witness, Kelly Moffett. This claim was included in claim 8(A) of the amended motion.

(ii) Trial counsel was ineffective for failing to request a mistrial after the state's witness, Kelly Moffett, told the jury that she took a lie detector test. This claim was included in claim 8(B) of the amended motion.

(iii) Trial counsel was ineffective for failing to properly object to State's exhibits 10 and 10A, recordings made by Kelly Moffett of conversations between her and Movant. This claim was included in claim 8(C) of the amended motion.

(iv) Trial counsel was ineffective for failing to properly investigate Movant's case, for failing to cross-examine Kelly Moffett about her bad character for truth and veracity, and for failing to call Carol Krstulic, Anna Hunsicker, and

Jason White to testify at trial. This claim was included in claim 8(D) of the amended motion.

(v) Trial counsel was ineffective for failing to adequately investigate and interview Sergeant Becker and for failing to call him as a witness during trial. This claim was included in claim 8(E) of the amended motion.

(vi) Trial counsel was ineffective for failing to properly investigate Movant's case, for failing to cross-examine Kelly Moffett about her bad character for truth and veracity, and for failing to properly cross-examine Debbie Moffett at trial. This claim was included in claim 8(F) of the amended motion.

Postconviction Relief Hearing

27. This Court held an evidentiary hearing in this cause on October 7, 2005.

28. During the hearing, this Court took judicial notice of the trial and sentencing transcript and the court's criminal file in the underlying case, State of Missouri v. Case, CR2001-03527, and the Appellate Court's written opinion in State of Missouri v. Case, WD# 61626.

29. During the hearing, the State of Missouri and Movant stipulated that if Kelly Moffet were to testify at the evidentiary hearing, then she would have testified in a manner consistent with her statements to Sergeant Gary M. Kilgore of the Jackson County Sheriff's Department, on October 24, 1997, November 20, 1997, December 10, 1997, August 22, 1998, August 25, 1998, September 21, 2000, and her trial testimony on April 29, 2002, as reflected in Exhibits A, B, C,

D, E, F, and the trial transcript in CR2001-03527. This Court admitted this stipulation into evidence.

30. Sergeant Joseph Becker testified at the evidentiary hearing that he assisted the Kansas City fugitive apprehension unit in arresting Movant. He testified that initial contact was made by the Kansas City officers inside the house while he waited outside. Sergeant Becker testified that he did not observe Movant's initial contact with law enforcement. When he first saw Movant, Movant was already in handcuffs and at that time was not resisting in any manner.

31. Sergeant Becker also testified that he wrote an arrest report. In his report, Sergeant Becker did not indicate that Movant resisted during the arrest. Sergeant Becker's arrest report was admitted into evidence as Movant's Exhibit G.

32. Sergeant Becker testified that, if he had been subpoenaed, he would have been available in April, 2002 to testify at trial.

33. Trial counsel, Horton Lance, testified that he represented Movant during the trial.

34. Trial counsel testified that defense strategy was to discredit the State's sole witness, Kelly Moffett. The strategy was to show that Moffett was telling the truth the first five times she spoke to Detective Kilgore. In each of those five statements, Moffett said the victim got out of the car at Truman Road and I-435 and that was the last time she saw the victim. The strategy was to show that it was only after Movant moved to St. Louis, Missouri that Moffett made the accusations that implicated Movant in the murder.

35. Trial counsel testified that while he recognized there exist different approaches to cross examining a witness, his trial strategy regarding cross-examination of Kelly Moffett with respect to her statements to Detective Kilgore, was to use the “hammer approach” and use broad strokes in questioning Moffett.

36. Trial counsel also indicated he believed the strongest point of their evidence was the testimony of Don Rand, a witness who testified that he observed a young woman get out of a car at Truman and I-435 that night and that she appeared to be in a confrontation when she got out of the car.

37. Trial counsel testified that during the trial, Moffett, while testifying, told the jury that she had taken a lie detector test or voice stress test. Trial counsel testified that he objected that Moffett had violated this Court’s preliminary ruling in a motion in limine.

38. Trial counsel testified that after a discussion at the bench, the court recessed court to give him some time to discuss and consider available options with his client. Trial counsel testified that during that recess he discussed the option of requesting a mistrial with Movant. Trial counsel testified that two defense witnesses, Abraham Kneisley and Tara McDowell, had flown in from Oregon and California. Trial counsel testified that he was aware of scheduling difficulties these witnesses had experienced in appearing for trial. Trial counsel testified he considered them to be important witnesses in the defense case and he was concerned that those witnesses would not be able to appear for another trial if a mistrial were granted.

39. Trial counsel also testified that although he never specifically asked the witnesses if they would be available to appear for trial at a later date, he and Movant jointly decided not to ask this Court for a mistrial.

40. Trial counsel also testified that he did not make a Fifth Amendment objection to the State offering evidence of the recorded conversations made by Moffett between herself and Movant.

41. Trial counsel testified that he had received Sergeant Becker's arrest report in the discovery provided by the State. Trial counsel said that he never considered calling Sergeant Becker as a witness.

42. Movant testified he had discussed with trial counsel whether to request a mistrial after Moffett testified that she took a lie detector test or a voice stress test.

43. Movant testified that he asked his trial counsel to call Sergeant Becker as a witness at trial because he believed Becker's testimony would contradict Detective DeVaulkenere's trial testimony that Movant resisted arrest.

CONCLUSIONS OF LAW

1. This Court has jurisdiction to hear this cause because Movant was convicted of a felony after a trial. Rule 29.15(a).

2. The right to the effective assistance of counsel is mandated by the Sixth Amendment to the United States Constitution and is a fundamental right

guaranteed to state defendants through the Fourteenth Amendment. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 752, 9 L.Ed.2d 799 (1963); Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972).

3. To have his conviction set aside, Movant must show that trial counsel did not demonstrate the customary skill and diligence that a reasonably competent attorney would display rendering similar services under the existing circumstances, and that he was prejudiced thereby. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984); Seales v. State, 580 S.W.2d 733, 736-737 (Mo. banc 1979). To show prejudice, Movant must demonstrate that counsel's omissions had a material effect, deleterious to him, on the outcome of the trial, Love v. State, 670 S.W.2d 499, 503 (Mo. banc 1984), and that a reasonable probability exists that, but for the errors of counsel, the result of the proceeding would have been different. State v. Griffin, 810 S.W.2d 956, 958 (Mo. App. 1991).

Claim 8(A)

1. The Court finds that Movant has failed to show ineffective assistance of trial counsel regarding counsel's cross-examination of State's witness, Kelly Moffett.

2. Trial counsel recognized her credibility was a critical issue in the case. He questioned her about each of the times she spoke to the police and pointed out that she told the police the same thing each time; i.e. that the victim

exited the car at Truman Road and I-435 after an argument with her boyfriend, Justin Bruton, walked east on Truman Road toward a gas station and they never saw her again.

3. Trial counsel also questioned Moffet about the timing of her disclosure to the police that Movant killed the victim. He highlighted that Movant had just moved out of town and stopped taking Moffett's calls, thus angering her and giving her a motive to change her story and implicate Movant in the victim's death. (Tr.)

4. Trial counsel testified that his trial strategy in handling this witness was to use what he described as a hammer approach. (Tr. 28-29)

5. Additionally, trial counsel produced Don Rand as a witness and presented his testimony to the jury.

6. Rand's testimony arguably corroborated Moffett's early statements to the investigating officers. (Tr. 987-89).

7. The extent of cross examination is almost always a matter of trial strategy. Trial counsel is not to be faulted because another attorney may have used a different technique. Cole v. State, 573 S.W.2d 397 (Mo. App. 1978).

8. This Court presumes that any action of trial counsel was a matter of sound trial strategy and that counsel used professional judgment in making his decisions on how to proceed. Vogel v. State, 21 S.W.3d 130 (Mo. App. 2000). Movant has failed to overcome the presumption that counsel acted in a competent manner.

9. The credibility or weight afforded to the evidence is an issue for the jury. State v. Lynch, 131 S.W.3d 422.

10. This Court finds that trial counsel cross-examined Moffett consistent with his trial strategy. He specifically questioned her about the details of what she told the police, when she changed her story and suggested a motive for her to change her story to implicate Movant. Counsel even produced a witness, Don Rand, to support his efforts to discredit Moffett and reinforce Movant's version of events.

11. This Court finds that trial counsel's efforts to discredit Moffett during cross examination conformed with the degree of skill, care and diligence of a reasonably competent attorney. There is no reasonable probability that had trial counsel asked his cross examination questions of Moffett in the fashion suggested by Movant, the jury would have reached a different result.

12. The jury as the ultimate fact finder, by its verdict, chose to believe Moffett's trial testimony and rejected the testimony of Movant and Don Rand.

13. The Court hereby OVERRULES Claim 8(A) of Mr. Case's amended motion.

Claim 8(B)

1. Before trial, the state and the defense agreed that testimony about Moffett taking a lie detector test would not be introduced into evidence. This Court ruled accordingly.

2. During her testimony, Moffett made an unsolicited statement that she took a lie detector test or a voice stress test (Tr. 494). This Court acknowledged that to leave the impression that Moffett passed a lie detector test would be unfair to the defense. (Tr. 499).

3. After an extensive conversation with both parties, trial counsel testified that this Court recessed to give counsel and Movant the opportunity to discuss their options and to decide on what their request of the Court would be. (Tr. 22, 26, 43-44)

4. Trial counsel testified he and Movant discussed various concerns they had regarding the availability of witnesses, future trial dates and Movant's desire to move forward with the case as soon as possible because he was in custody with a high bond. (Tr. 22-26). All of these things are legitimate concerns in deciding whether or not to request a mistrial.

5. Trial counsel testified that he and his client talked about the options and together decided that they would not request a mistrial. (Tr. 44-45).

6. This Court took strong curative action so as to prevent the jury from speculating about the results and the reliability of a lie detector test. (Tr. 507).

7. This Court finds that trial counsel's testimony shows that he exercised due diligence as well as the degree of skill and care a reasonably competent attorney would given the circumstances. He discussed the matter with his client, considered all the options available in light of his trial strategy and made a decision, together with his client, not to request a mistrial. Any concerns

about possible lingering effects of Moffett's testimony were eliminated by the curative instruction given by this Court. There has been no showing by Movant that trial counsel's actions fell below the standard articulated by Vogel and Strickland.

8. The Court hereby OVERRULES Claim 8(B) of Mr. Case's amended motion

Claim 8(C)

1. During trial, the state presented evidence that Moffett recorded conversations between her and Movant (Tr. 533-535). At the time of the recordings, Movant had not been arrested (Tr. 927-928).

2. Trial counsel objected to this testimony and evidence (Tr. 518). The defense argued that the conversations were inadmissible because Movant's statements were not tacit admissions (Tr. 518-519).

3. Movant claims trial counsel should have objected to Movant's recorded statements on the grounds that it violated Movant's Fifth Amendment rights.

4. While some federal courts of appeals have held that a defendant's pre-arrest silence cannot be used as substantive evidence of guilt, Combs v. Coyle, 205 F.3d 269, 283 (6th Cir. 2000), United States v. Burson, 952 F.2d 1196, 1201 (10th Cir. 1991), Coppola v. Powell, 878 F.2d 1562, 1568 (1st Cir. 1989), United States ex rel. Savory v. Lane, 832 F.2d 1011, 1017 (7th Cir. 1987), and United States v. Caro, 637 F.2d 869, 876 (2nd Cir. 1981), Missouri courts have held that a

defendant's pre-arrest silence can be used. State v. Kinder, 942 S.W.2d 313, 326 (Mo. banc 1996) (citing State v. Hornbeck, 492 S.W.2d 802, 808 (Mo.1973)); State v. Davis, 963 S.W.2d 317, 327 (Mo.App.1997).

5. The fact that a meritorious objection is not made does not demonstrate incompetence: rather, there must be a showing that counsel's overall performance fell short of established norms and that this incompetence likely affected the result. State v. Suarez, 867 S.W.2d 583 (quoting Jones v. State 784 S.W.2d 789 (Mo. banc 1990)).

6. The issue of whether Movant's Fifth Amendment rights were violated was reviewed and disposed of by the appellate court in Movant's direct appeal. State v. Case, 140 S.W.3d 80, 90 (Mo. App. 2004). Post conviction motions cannot be used as a substitute for direct appeal nor can they be used to obtain a second appellate review. State v. Jones, 979 S.W.2d 171, 187. There has been no showing that had trial counsel object on Fifth Amendment grounds the results would have been any different. In discussing this point in Movant's appeal and the appellate court found that an "evidentiary error is not automatically a constitutional error" and even if Movant's Fifth Amendment rights were violated by the police doing an end run around his right to remain silent, he did not show he was prejudiced in light of all the other evidence. State v. Case, 140 S.W.3d 80, 88.

7. The Court hereby OVERRULES Claim 8(C) of Movant's amended motion.

Claim 8(D)

1. Trial counsel was ineffective for failing to call Carol Krstulic, Anna Hunsicker, and Jason White to testify at trial. This claim was included in claim 8(D) of the amended motion.

2. To prevail on a claim of ineffective assistance of counsel for failure to call a witness, a defendant must show that: (1) trial counsel knew or should have known of the existence of the witness; (2) the witness could be located through reasonable investigation; (3) the witness would testify; and (4) the witness' testimony would have produced a viable defense. Hutchison v. State, 150 S.W.3d 292, 304 (Mo. banc 2004).

3. This Court finds there has been no evidence presented to support this claim.

4. This Court hereby OVERRULES Claim 8(D) of Movant's amended motion.

Claim 8(E)

1. During trial, Detective Albert DeValkenaere testified for the State that on June 11, 2001, he was involved in the arrest of Movant (Tr. 758). The detective told the jury that after he had entered Movant's home, he saw Movant coming out of bedroom (Tr. 761). The detective said that as soon as Movant saw him, Movant ran back into the bedroom and resisted arrest. (Tr. 761).

2. Sergeant Joseph Becker testified at the evidentiary hearing that he assisted the Kansas City fugitive apprehension unit in arresting Movant. (Tr. 10-

11). Sergeant Becker testified that when he first saw Movant he was already handcuffed. (Tr. 12). He testified Movant was not resisting at that time. (Tr. 12).

3. In his report, Sergeant Becker did not indicate that Movant resisted during the arrest.

4. Sergeant Becker testified that, if he had been subpoenaed, he would have been available in April, 2002 to testify at trial. (Tr. 14).

5. Trial counsel testified that he had received Sergeant Becker's arrest report in the discovery provided by the State. Trial counsel said he did not consider calling Sergeant Becker as a witness. (Tr. 21).

6. To prevail on a claim of ineffective assistance of counsel for failure to call a witness, a defendant must show that: (1) trial counsel knew or should have known of the existence of the witness; (2) the witness could be located through reasonable investigation; (3) the witness would testify; and (4) the witness' testimony would have produced a viable defense. Hutchison v. State, 150 S.W.3d 292, 304 (Mo. banc 2004).

7. It is clear from the evidentiary hearing that while Sergeant Becker's report was available to defense counsel and he was available to the defense to call as a witness at trial, he would not have produced a viable defense for Movant. Movant has failed to show the fourth prong of test laid out in Hutchinson.

8. At trial, Detective DeVaulkenere testified Movant initially resisted by running from the interior hallway into a bedroom of the residence and attempting to shut the bedroom door to keep officers out. (Tr. 761). Sergeant

Becker testified that he was not present at the time DeVaulkenere made initial contact with Movant inside the residence. (Tr. 11-12, 16-17).

9. There has been no showing that Sergeant Becker's testimony would have in any way contradicted the trial testimony of Detective DeVaulkenere nor would it have would have provided a viable defense for Movant.

10. The Court hereby OVERRULES Claim 8(E) of Mr. Case's amended motion.

Claim 8(F)

1. Movant claims trial counsel was ineffective for failing to properly cross-examine State's witness Debbie Moffett at trial.

2. To prevail on a claim of ineffective assistance of counsel for failure to call a witness, a defendant must show that: (1) trial counsel knew or should have known of the existence of the witness; (2) the witness could be located through reasonable investigation; (3) the witness would testify; and (4) the witness' testimony would have produced a viable defense. Hutchison v. State, 150 S.W.3d 292, 304 (Mo. banc 2004).

3. This Court finds there has been no evidence presented to support this claim.

4. The Court hereby OVERRULES Claim 8(F) of Mr. Case's amended motion.

JUDGMENT

Based on the ruling on the above claims, the Court hereby OVERRULES
Movant's amended motion for postconviction relief.

SO ORDERED THIS ____ DAY OF _____, 2006.

CHARLES E. ATWELL, CIRCUIT JUDGE