

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

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

Lindell Briscoe,)
)
Movant,)
)
vs.)
)
STATE OF MISSOURI,)
)
Respondent.)

Criminal Cause # 041-1161
PCR No. 0822-CC01026
Division 8

FILED
JAN 27 2010
MARIANO V. FAVAZZA
CLERK, CIRCUIT COURT
BY _____ DEPUTY

ORDER
FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. Movant Briscoe was a defendant in the St. Louis City Circuit Court No. 22041-001161-01. A jury trial was held on September 11, 2006 through September 15, 2006 before this Court.
2. Robert Taaffe, Attorney-at-Law, represented the Movant throughout his trial in September of 2006
3. On September 15, 2006, a jury found Movant Briscoe guilty of one count of assault in the first degree, a class B felony, in violation of §565.015 and one count of armed criminal action, an unclassified felony, in violation of §571.015.
4. On October 20, 2006, Movant Briscoe was sentenced to concurrent terms of imprisonment of fifteen years on Count 1 and fifteen years on Count 2.

5. Movant Briscoe filed his notice of appeal to the Missouri Court of Appeals Eastern District. The Court of Appeals affirmed Movant's conviction. A mandate was issued on February 7, 2008.
6. On March 21, 2008, Movant Briscoe timely filed his pro se motion. July 24, 2008, Movant filed an amended motion under Missouri Supreme Court Rule 29.15 with the assistance of his newly appointed counsel, Assistant Public Defender Gwenda Robinson.
7. Movant alleged his trial counsel was ineffective on three grounds. First, for failing to call an alibi witnesses, Tiffany Brown, Charles Ceasar, Donald Alexander, and Eugene Roberts. Second, Movant alleged that Mr. Taaffe was ineffective for calling Tiffany Carter and Jennifer Hamilton and for playing Carter's taped statement. Third, Movant alleged that Taaffe was ineffective for failing to present evidence at Movant's new trial hearing substantiating Movant's claim that jurors believed that members of his family or friends were taking cell phone photos of the venire panel.
8. On November 23, 2009 and November 24, 2009, an evidentiary hearing under Rule 29.15 was held. Movant's testimony was taken by deposition and admitted into evidence. Movant's trial counsel, Robert Taaffe, Charles Ceasar, Tiffany Brown, and Eugene Roberts testified at the hearing. Donald Alexander failed to appear. The Court took judicial notice of the Court files. .
9. As to Movant's first allegation, trial Counsel, Robert Taaffe, testified regarding his decision to call alibi witnesses. He explained that his investigation lead him to believe that the witnesses would not have produced a viable defense. The witnesses had been drinking and were unable to recall where Movant was during the time of the

alleged crime. Further, Mr. Taaffe recalled that some of the alibi witnesses had a gang affiliation which was the prosecutor's motive for the assault. It was Mr. Taaffe's belief that the alibi defense would alter the burden of proof and that the jury would automatically convict the defendant. Therefore, as a matter of trial strategy and based upon experience with alibi defenses, he didn't call the witnesses.

10. The Court finds that the testimony of the alibi witnesses was not reasonable under the circumstances. Based on their inconsistencies they could not accurately recall where Movant Briscoe was at the time of the offense. Tiffany Brown testified that Movant left the party with her and stayed the night till the next day. Charles Ceaser said that he did not drink and that he was the designated driver for the evening. That his car starter was messed up and he left for five hours to get another car. Eugene Roberts testified that everyone was drunk, including Charles Ceaser who was vomiting at the end of the night. The last he remembers he and Movant were asleep in the car.
11. The inconsistencies of the witnesses' testimony would not have unqualifiedly supported Movant or provided a viable defense. Additionally, there is no reasonable probability that the result of the case would have been different, in that there was strong evidence of defendant's guilt.
12. Secondly, Movant alleges Mr. Taaffe was ineffective for calling Jennifer Carter and Jennifer Hamilton to testify. Mr. Taaffe explained that he believed their testimony to be so inconsistent and that jurors would not believe their testimony once they heard the inconsistencies. Taaffe explained that the tape played during the trial never

mentioned Movant as the shooter. He said that to the best of his recollection, the Jennifer's kept changing their stories, so that is why he put them on the stand.

13. There was no testimony regarding Movant's third allegation. A movant cannot use the testimony of a juror to impeach the verdict and the limited exception to this rule did not apply to this case (the instant case did not involve juror misconduct). State v. Strong, 263 SW 3rd 636, 643 (Mo. banc 2008).

14. The issue of the jurors experience was thoroughly explored by this court at trial. None of the jurors stated that the experience influenced their verdict.

CONCLUSIONS OF LAW

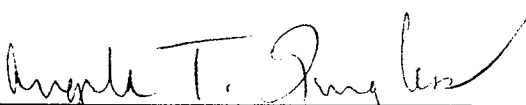
1. To prevail on a claim of ineffective assistance of counsel, Movant must establish by a preponderance of the evidence, that counsel failed to exercise the customary skill and diligence that a reasonable competent attorney would perform under similar circumstances and that he was prejudice thereby. Strickland v. Washington, 466 US 668 (1984). To prove prejudice, Movant must show "a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." State v. Shurn, 866 S.W.2d 447, 468 (Mo. banc 1993).
2. To establish that trial counsel was ineffective for failing to investigate or produce a witness at trial, Movant must show: 1) that the trial counsel knew or should have known of the existence of the witness; 2) that the witness could be located through a reasonable investigation; 3) that the witness would have testified if called at trial; and 4) that the witness' testimony would have provided a viable defense. Glass v State, 227 SW 3rd 463 (Mo. banc 2007); Clayton v. State,

20 S.W.3d 575 (Mo. App. S.D. 2000). If a potential witness's testimony would not unqualifiedly support a defendant, failure to call such a witness does not constitute ineffective assistance. Worthington v. State, 166 SW 3rd 566, 577 (Mo. banc 2005). Furthermore, a decision not to call a witness is presumed trial strategy, unless clearly shown to be otherwise. Winfield v. State, 93 S.W.3d 732 (Mo banc 2002).

3. In the present case, to find in favor of Movant, this Court must find Mr. Taaffe's testimony unbelievable and without merit and find Tiffany Brown, Charles Ceasar, and Eugene Roberts' testimony to be more credible. The Court cannot support that finding in light of the inconsistencies of the alibi witnesses at the evidentiary hearing. Mr. Taaffe testified, without equivocation, he believed if he called these individuals their gang affiliation would be called to light. He also stated that because the witnesses had been drinking their ability to recall the incident would not be believable to the jury. Thus, refuting Movant's claim that the witnesses provided a viable defense. Glass, 227 SW3rd, at 465-69.
4. The second allegation was explained by Mr. Taaffe. His reason for calling these witnesses was to point out inconsistencies in their testimony. He referred to their inconsistent testimony in his opening statement. It was his belief that if the jury heard the inconsistencies they would find the testimony of the Jennifer's not credible. The tape that was played in open court did not specifically say that Movant was the shooter. The decision to play the tape in no way prejudice the defendant given the trial strategy of counsel.

5. As a general rule, the decision to call witnesses is a matter of trial strategy and will not support a finding of ineffective assistance. Whited v. State, 196 SW 3rd 79 (Mo. App. E.D. 2006)
6. Movant failed to establish how he was prejudiced as a result of Mr. Taaffe's alleged ineffectiveness and how the outcome of the trial would have been different had Brown, Cesar, or Roberts testified. Nor did he establish how the outcome would have been different had Mr. Taaffe not called Hamilton or Carter. See State v. Link, supra and Strickland v. Washington, supra. Where, as here, there is overwhelming evidence of guilt, such that it cannot be reasonably said that, but for the challenged actions of counsel, the jury would have found the movant not guilty beyond a reasonable doubt, the movant suffers no prejudice and his claim of ineffective assistance of counsel must be denied. Anderson v. State, 66 SW 3rd 770, 778 (Mo. App. W.D. 2002).
7. Mr. Taaffe exercised the customary skill and diligence that a reasonable competent attorney would perform under similar circumstances. Strickland v. Washington, 466 U.S. 668 (1984), 104 S.Ct. 2052, 2064-65, 80 L.Ed.2nd 674 (1984),
8. THEREFORE, Movant's motion for post-conviction relief pursuant to Supreme Court Rule 29.15 is DENIED.

Respectfully submitted,



Judge: Angela T. Quigless

Cc: Attorneys