

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

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

FILED
APR 29 2009

MARIANO V. FAVAZZA
CLERK, CIRCUIT COURT
BY _____ DEPUTY

DONNELL PENDLETON,)
)
Movant,)
)
vs.)
)
STATE OF MISSOURI)
)
Respondent.)

PCR No. 0722-CC07327
Cause No. 22031-4199
Division No. 12

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Movant was found guilty in Cause No. 22031-4199 of Robbery First Degree and Armed Criminal Action and was sentenced to concurrent sentences of ten and three years. These convictions were affirmed on appeal. State v. Pendleton, 253 S.W.3d 133 (Mo.App.E.D. 2008).

Movant timely filed his motion in the present cause pursuant to Rule 29.15. Counsel was appointed to represent Movant and an amended motion was filed. A hearing was held on December 12, 2008 at which Movant appeared. Having heard the testimony and having examined the records and files in this case, the Court now finds as follows:

FINDINGS OF FACT

1. The charges in this case arose out of a robbery outside a Shop 'N Save store in the City of St. Louis at approximately 5:10 a.m. on the morning of December 12, 2003. The Shop 'N Save store is located at the intersection of Chippewa and Kingshighway. The robbery was committed by two persons. A Monte Carlo vehicle and cash were taken from the victim. The victim said one of the perpetrators was wielding an AK-47 assault rifle. Police received an all points bulletin about 5:20-5:25 in the morning of December 12 that a white Monte Carlo had been taken in a robbery carjacking. (Tr. 258-259). The broadcast indicated that the vehicle was last seen in the area of Chippewa and Broadway. An officer found the vehicle in an alley off of Indiana and Keokuk. (Tr. 230-232) An officer saw two persons standing in the vestibule of a Hardees restaurant. Officers went into the restaurant and arrested Eddie Lewis and Movant, who were found in restrooms at Hardees.

2. Movant testified at the hearing that he had no prior convictions other than traffic tickets and that in the time he was on bond before trial he had not been in any trouble. Movant met with his trial attorney, Robert Taaffe, numerous times. In December 2003 Movant was living with Tammy LaGrande. He was not

working and was looking for work at the VA Hospital. He saw a job opening posted in Job News in a store. He spoke with the human resources department and they told him to come and fill out an application and they would interview him at that time. They told him to be there by 8 a.m. At that time Movant was being supported by his mother and fiancée, Tammy LaGrand. His fiancée did not mind because she knew he was looking for work but his mother did not like providing support. He had a week to prepare for the interview and he picked out his clothes and the route he would take. He had no other transportation than the bus at that time. Tammy told him which buses to take and when they ran. He wore a black hooded jacket with a vertical zipper, khaki pants and a casual shirt. He left Tammy's at 5:30 a.m., and the first bus came between 5:35-5:40 a.m. He got off the bus at the Chippewa, Jefferson and Broadway intersection because he had to transfer to S. Broadway. When he got off the bus it had stopped by a Hardees restaurant. He asked the cashier at the Hardees, Jennie Williams, about buses, she did not know. He then left the Hardees but returned because of the cold weather. Prior to that date he had never seen Ms. Williams. He went in alone and was able to see the bus stop from inside. Eddie Lewis came into Hardees, he was sweating and out of breath, he talked to Movant

and babbled on about how he was in some trouble. Movant tried to get away from him because something did not seem right. He went into the men's restroom to distance himself from Lewis. Movant later went back to the Hardees restaurant after he was out on bond. He was looking for the woman who was in Hardees that morning to establish that he was alone. He gave her name to his attorney. Movant was prepared to testify at trial but did not because his attorney did not believe that he needed to after Eddie Lewis testified he did not know Movant. When asked whether he felt the need to explain why he was at Hardees at 5:30 in the morning he said he did but that he listened to his attorney. On cross-examination Movant testified that he had been working but was laid off in 2002. Tammy was not frustrated with his lack of employment and was not pressuring him to contribute. After 18 to 19 months of unemployment he wanted a decent job rather than a laborer's job and he had the fact that he had no felonies going for him. This interview was not the only time he had looked for a job in the last 18 months. Movant got his GED while incarcerated. Tammy told him when the buses ran. It was noted that he was arrested in 2002 for sexual assault, though there was no further action taken. When arrested in 2003 he gave his correct name to the police. The police thought he was using an

alias and that he was really Myron, his cousin. He did not give the name Myron to the police, but the officer asked about Myron. Movant testified that Myron was his cousin and that Myron had been in extensive trouble so he would not have wanted the police to think he was Myron. Movant testified that he did not believe a strong identification had been made or that the jacket or gun had been linked to him at trial. He did not believe other factors pointed to him as being responsible and he believed the State's case was weak. His decisions, including the decision not to testify, were based on his attorney's advice with which he agreed.

3. Robert Taaffe, Movant's trial attorney, testified that he has practiced as a criminal defense attorney for ten years. Prior to Movant's trial he had tried approximately thirty to forty other criminal trials. He was retained six months to one year prior to Movant's trial and he met numerous times with Movant prior to trial. Movant was not in custody prior to trial. Mr. Taaffe had the police report prior to trial but was no longer in possession of the report at the time of the hearing because the file was left at his former law firm and he had not seen the report recently. Mr. Taaffe remembered the facts of the case. He recalled that the robbery occurred around 5-5:10 a.m. at a

Shop 'N Save at around the time Hardees was opening but did not occur at Hardees. The perpetrator had a shotgun and robbed the victim at gunpoint when the victim was coming back to his vehicle. The victim did not get a long view of the perpetrator and there was not a strong identification. The thirteen page police report contained a limited description of the perpetrator - a black male, in a black jacket and stocking cap, who pointed a shotgun, with no further description. When counsel met with Movant, counsel was told that on the date of the robbery Movant had been looking for a job, caught a bus, got food and was on his way to a job interview. With regard to whether he investigated this story, Mr. Taaffe testified that he endorsed Tammy, but that there was no way to verify the bus trip or stop because the security videotape had been taped over. He stated there were only two ways to verify Movant's story, videotape which was not feasible, and Tammy who could only testify to Movant's stated intentions that he was leaving for an interview when he left her that morning. Movant told his attorney that he was traveling by bus and that he had some time to kill before the interview, but Mr. Taaffe did not recall all the details Movant told him. Mr. Taaffe agreed that the timing of Movant being at the Hardees was incriminating and that Movant needed to explain his presence.

Mr. Taaffe did not believe after the State's evidence that Movant would be convicted, especially because Lewis did not identify Movant as the other person who participated in the crime. Mr. Taaffe believed they would win the case after the State rested and he then decided to shut the case down and that defendant would not testify. He was shocked at the verdict. There was a stipulation read at trial. Mr. Taaffe stated that he recalled the victim said the perpetrator's jacket had zippers, but he did not recall whether the jacket was introduced at trial (Exhibit 7 had zippers). Taaffe testified that it was clear that Movant had been wearing a black jacket but he could not recall whether Exhibit 7, the jacket, was blue or black. Reading from the police report, Taaffe said it stated that a cap and black jacket were seized from Movant. Eddie Lewis had a cotton hooded jacket, but the police report did not describe the jacket as having a zipper and it could not be determined from the police report what Lewis was wearing. He believed it had been established that Eddie had been wearing Exhibit 7. The victim, Mr. Hawthorne, was robbed of \$140 and the stipulation reflected that the cash was found on Eddie.

The officer's testimony was vague and inconsistent as to the apprehension of the suspects. Regarding the two bathrooms, an

officer said one person was in one bathroom and the other person in the other and then changed his testimony saying both could have been in the same bathroom. Taaffe agreed that testimony indicating that Movant was in the women's bathroom was incriminating but it was unclear which bathroom Movant was in. Taaffe did not talk to the officers prior to trial. Officer Koenhe authored the report but later suffered a stroke. (There were no depositions)

Taaffe and Movant discussed whether he would testify and Taaffe ultimately determined during trial not to put him on the stand. Taaffe characterized his decision as bad judgment. The jury indicated that they were deadlocked 11-1 but it was not known which way they were split. Based on the evidence at trial Taaffe asked the Court to give the "hammer" instruction, which was given over the objection of the State's attorney. Tammy was present at trial. Taaffe believed, given the fact that Lewis had not identified Movant as the person with him at the robbery, that the jury would not convict Movant. The perpetrator's face was not visible to the victim. The police report did not contain any fingerprint references and Taaffe did not recall but believed there may have been forensic fingerprints on the car. He never spoke to the fingerprint examiner. An officer testified that he

saw two black men walking in the foyer of Hardees. Taaffe testified that he did not believe the State established that the jacket, Exhibit 7, was worn by Movant. When asked whether this affected his decision he answered that it was a reason he shut the defense down. His reasons for shutting the defense down were that the identification was tentative; the description was vague; Eddie Lewis did not identify Movant; and there was a stipulation that the person who took the money from the victim was Lewis. An additional factor that went into his decision was the description of the jacket. He stated he was not a fan of alibi defenses because they lead the jury to consider whether they believed the defendant and to weigh his credibility, which is especially problematical where the alibi witness is a family member or close friend. He stated that the jury then votes on their belief as to credibility rather than on the strength of the State's case. Based on what he saw in Court he decided to proceed as he did but he stated he was wrong. Taaffe sent an investigator to the restaurant to track down the individual to testify whether Movant came in with Lewis, but he did not view this as a huge point because Movant was in the Hardees. Which bathroom Movant was found in or the lack of fingerprints seemed irrelevant because they could be explained away (ie. It was cold outside therefore

he would have been wearing gloves). He did send investigators out, he believed the trial was going well and felt good about an acquittal but he stated apparently he was wrong. Movant agreed with him about the evidence and did not testify upon his attorney's advice. After both sides closed he still had a positive feeling about the outcome.

4. Jennie Williams, who worked at the Hardees restaurant at the time of the incident, testified that she worked the night shift from 9 p.m. to 5 a.m. and got off work at 5 a.m. She recalled that Movant came in around 5 a.m. and asked what time the bus came. The second man came in after Movant and asked for change to use the bus. She stated that Movant left, then the other man asked for change for the bus but the man was asked to leave because he scared Ms. Williams and her manager, and looked suspicious and was getting mad. She did not see Movant and the other man come in together or interact.

5. Tammy LaGrand, Movant's fiance, testified at the hearing that she had known Movant for seven years and that she remembered the day of his arrest in 2003. Movant was living with her at the time of this incident though he still returned to his home on West Florissant to check on his mother at times. Movant was looking for work in 2003. In 2003 Ms. LaGrand was employed at

Webster University as a department assistant. She did not have a vehicle at that time and took the bus. Movant was looking for work at the VA Hospital at Jefferson Barracks. There was a job opening and they asked him to interview the morning he was arrested. He left her home about 5:25-5:30 a.m. She woke him up, he told her when he left, and she left the home around 7 a.m. for work. They discussed which buses he would take to the interview. He was to take the Chippewa bus which came at about 5:35 a.m. Movant said he was told to come to the interview as early as possible and at least by 8:00 a.m. She did not see him get on the bus. She gave this information to Robert Taaffe. She was in the courthouse during the trial but not in the courtroom. Mr. Taaffe told her he was not sure if she would testify. On cross-examination at the hearing she testified that at the time of Movant's arrest they were just dating. She discussed with Movant when the bus came, which was around 5:35 and he left about 5:25-5:30. It would take two buses to get to his interview. Hardees was about 5 to 6 blocks from her home and the bus he took was about a block away. They discussed his interview at the VA Hospital. She did not have specific recall of what he wore. At that time her address was 1922 Ohio. The bus stop was at the opposite corner of the next block. 1922 Ohio is located in south

St. Louis near the intersection of Russell and Jefferson. The Chippewa bus is the main route and Movant would have taken the Chippewa bus and S. Broadway bus. He needed to leave at 5:30 a.m. in order to arrive at the VA Hospital by eight o'clock. Movant let her know he was leaving and she later learned of his arrest from his mother.

6. Kevin Bergdorf, owner of an investigative firm, testified that he had been employed in private investigation since 1995 after retiring from the St Louis Police Department after 21 years. He worked for another private investigation firm and then opened his own. When he was employed by the police department he worked in the first district in south St. Louis. Mr. Bergdorf was retained by the State Public Defender's Office for this post-conviction case and was asked to look into the bus schedule and routes for 2003. He was not able to find records for 2003. The present bus schedule has two stops close together within a half block. To get to the VA Hospital a rider would have to transfer to a second bus and come down Jefferson 24 blocks. In 2003 the transfer point was located at the bus terminal at Gasconade and S. Broadway. In 2003 there was a Hardees restaurant at Meremac and Broadway about one and one-half blocks from the transfer point. He was able to ascertain, as of 2008, that the Jefferson

bus stops at Russell and Jefferson, runs north and south and that this bus stop is within one-half block of the residence at 1922 Ohio. The bus stopped at Jefferson and Russell at 5:31 am. If a person caught that bus, he would make a transfer for the VA Hospital and the entire trip would take approximately 40 minutes.

On cross-examination Mr. Bergdorf testified that he did not interview any bus drivers. There was no video footage available to determine who was on the bus because there were no cameras on most buses in 2003, therefore he could not know if a particular individual was on a bus. Mr. Bergdorf traveled the route and did a time track to see if the times matched. The first leg of the trip was 8 minutes from Jefferson and Russell to the intersection where Jefferson, Chippewa and Broadway meet. The second bus you would take was the 5:45 a.m. bus at Broadway and Meremac. After the first leg of this trip, one would walk one block to the Broadway and Meremac bus stop which left at 5:45 a.m. If one caught the 5:45 bus at Broadway and Meremac one would be at Jefferson Barracks at approximately 6:15-6:20 a.m. The Hardees restaurant is located across the street from the bus stop at Broadway and Meremac.

CONCLUSIONS OF LAW

1. In order to establish ineffective assistance of counsel, movant must establish that: 1) his counsel did not demonstrate the customary skill and diligence that a reasonably competent attorney would provide under the circumstances; and 2) 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). If defendant fails to satisfy either prong of the test the other need not be considered. Buckner v. State, 35 S.W.3d 417, 420 (Mo.App.W.D. 2000). To demonstrate prejudice movant must establish that but for counsel's deficient performance there is a reasonable probability that the outcome of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674; Wilkes, supra.; Sidebottom v. State, 781 S.W.2d 791, 796 (Mo.banc 1989). Movant faces a heavy burden in establishing a claim of ineffective assistance of counsel. Not only must the defendant prove his or her allegations by a preponderance of the evidence, but the defendant must overcome the court's presumption that counsel is competent. Yoakum v. State, 849 S.W.2d 685, 687 (Mo.App. 1993).

2. The first allegation in Movant's amended motion is that his attorney failed to present evidence that Movant was not the person wearing the jacket identified by the victim, State's Exhibit 7, and failed to present evidence that the jacket Movant was wearing on the morning of the robbery, was a dark nylon jacket with a vertical zipper, not a horizontal zipper as described by the victim, and counsel failed to demonstrate that Movant's jacket was unlike the one worn by the robber. This allowed the jury to infer that Movant could have been the robber as attested to by the victim.

Though there was evidence of differences in the jackets worn by Eddie Lewis and Movant, the Court does not believe that the evidence was sufficiently clear or certain to find that Movant was prejudiced by the failure of his counsel to present or emphasize such evidence, or that the jackets were clearly distinguished, or that the jacket as described by the victim was clearly distinguishable from the one worn by the robber. On direct examination at trial the victim was asked if he remembered anything about what the person who had the weapon was wearing and he answered "I knew he had like a jacket, and then had like a zipper in the front of him. It was a dark color." (Tr. 200) When asked "did you notice --you said you noticed something about

the clothing of the guy who was pointing the assault rifle at you? A. Uh-huh. Q. What type of clothing was he wearing, or top? A. I mean it was dark and then it had like a pocket in the front of it. Q. Was he wearing --the person you identified at the Hardee's, was he wearing the same outfit? A. Yes Q. I'd like to show you what's been marked as state's Exhibit 7 and ask if you recognize this item? A. Yes, It was similar to that. Q. Okay. And what is it that you recognized about that particular item as far as what he was wearing on the top? A. Well, it was the zipper. Because once we got to the Hardee's they brought him down and I asked about my money. So they unzipped the pocket and dug into the pocket and pulled the money out and pulled the bullets out. Q. Out of this top? A. Uh-huh. (Tr. 211)

The Court would agree that the victim's statement that the person who robbed him was the person from who the money was taken from his zippered jacket at Hardees was a highly significant point undermining the identification of Movant as the robber in as much as the stipulation provided that it was Eddie Lewis from whom the money was taken from his jacket at Hardees. However, because Movant also wore a zippered jacket, the more significant point was the identification of the robber as the one from whom money was taken from a zippered pocket at Hardees. Because

Movant testified that he wore a black hooded jacket with a vertical zipper and because the testimony and evidence regarding the horizontal zipper on Lewis' clothes, taken as a whole, was not clear or consistent, the Court cannot find ineffective assistance of counsel based on this allegation.

3. The second allegation in Movant's amended motion is that his attorney failed to present evidence that Movant was not in the women's bathroom at the Hardee's Restaurant but was in the men's, and further that he was not hiding in the men's room. Counsel's failure to clarify where Movant was located and what he was doing left an implication that implied consciousness of guilt.

This Court has reviewed the evidence presented at trial and the testimony at the 29.15 hearing and finds that it was not clearly established which restroom Movant was found in or alleged to have been found in. There was conflicting reasons given for Movant being in the bathroom; one that he wanted to get away from Lewis and the other that he was using the restroom. The officers' testimony at trial was conflicting as to which bathroom Movant was found in and there was no emphasis placed on Movant being found in the women's restroom at trial. There was no dispute that Movant was found in one of the bathrooms. The Court

also notes that Eddie Lewis testified that he was hiding in the women's restroom. (Tr. 288) While the Court believes that it would have been useful for the jury to have an explanation as to the circumstances of Movant being at Hardees in the early morning, including an explanation as to why he was in the restroom, because, as counsel acknowledged, this arguably indicated a consciousness of guilt, this issue alone would not warrant relief but is a part of the issue which is addressed infra of Movant's testifying at trial.

4. The third allegation in Movant's amended motion is that his counsel was ineffective for failing to call Jennie Williams, a Hardee's employee, as a witness at trial. Ms. Williams would have testified that Movant came into the Hardee's separate and apart from Eddie Lewis, did not appear to be associated with Lewis and further that Movant asked her where or how he could catch the 6:00 a.m. bus for a job interview.

In order to be entitled to relief on the ground that counsel failed to call witnesses movant must identify who the witnesses were, whether or not counsel was informed of their existence, establish that the witnesses could have been located through reasonable investigation, would have testified if called and their testimony would have provided a viable defense. State v.

Smith, 949 S.W.2d 947, 952 (Mo.App.W.D. 1997); State v. Dudley, 819 S.W.2d 51, 56 (Mo.App. 1991). If a potential witness' testimony would not have unqualifiedly supported the movant, the failure to call such witness is not ineffective assistance of counsel. Worthington v. State, 166 S.W.3d 566, 577 (Mo banc 2005).

Jennie Williams testified at the evidentiary hearing as set forth in the findings of fact. Ms. Williams testimony was essentially as alleged in the amended motion and her testimony was credible. When this Court asked Movant at his 29.07 hearing about his discussions with his counsel regarding witnesses they would call at trial, Movant identified Jennie Williams who worked at Hardees, as a witness who could verify that he was in Hardee's when the crime happened and that he was not with Eddie Lewis. Movant found her name in 2005 and discussed Ms. Williams with Mr. Taaffe. He stated he did not know if his trial counsel told him they did not have enough time to subpoena her or get her for trial. (Tr. 414) At his post-conviction hearing Movant testified that he went to the Hardees when he was out on bond to talk to Ms. Williams and he gave her name to his attorney. While this Court does not believe there is a reasonable probability that, based on her testimony alone, the outcome of the trial would have

been different the Court believes it is significant. Her testimony would have confirmed that Movant came into the Hardees alone, asked about the bus schedule, and did not appear to be associated with Mr. Lewis. The Court believes the prejudicial effect of this failure must be considered in conjunction with grounds four and six.

5. The fourth allegation in Movant's amended motion was that his counsel was ineffective in failing to call Tammy LaGrand, Movant's fiancée, as a witness at trial. Ms. LaGrand would have testified that he left their home at 5:30 a.m. in the morning of December 12, 2003, which would have been inconsistent with his being at the scene of the robbery when it occurred, and further she would have testified that Movant left the house early that morning because he had a job interview at the Veterans Hospital at 8:00 a.m. Movant further alleges that it was ineffective not to present independent evidence corroborating LaGrand's understanding of the bus route Movant planned to take.

As stated supra, in order to be entitled to relief on the ground that counsel failed to call witnesses movant must identify who the witnesses were, whether or not counsel was informed of their existence, establish that the witnesses could have been located through reasonable investigation, would have testified if

called and their testimony would have provided a viable defense.

This Court's analysis and ultimate finding rests on the failure to call Jennie Williams, Tammy LaGrand and Movant as witnesses (Allegation 6) and much of the analysis and reasoning is overlapping. The timeline of the robbery and carjacking was given as approximately 5:10 a.m. with the officers receiving a radio broadcast of the crime at 5:20 to 5:25 a.m. (Tr. 259). Trial counsel testified that LaGrand could only testify to Movant's intentions in taking the bus and going on the interview. However, LaGrands' testimony would have established that Movant was at home at the time of the robbery and that he left her home at approximately 5:25 to 5:30 on that morning. Accordingly, LaGrand's testimony, if believed, would have made Movant's presence at the scene of the robbery impossible. LaGrand's testimony would also have supported Movant's claim that he was riding the bus early that morning to get to an interview at the Veteran's Hospital, that the interview had been scheduled in advance, that they had discussed bus routes, that she did not have a car at that time to give him a ride, and that she had provided him with information as to bus routes. Additionally as acknowledged by trial counsel, the timing of Movant being at Hardees in the early morning when Eddie Lewis was also present,

was highly incriminating and Movant needed to explain his presence. In the instant case Tammy LaGrand was endorsed as an alibi witness and was present in the courthouse during Movant's trial. LaGrand's testimony would have provided an alibi for Movant's whereabouts at the time of the crime and would have supported other aspects of his testimony.

The Court is aware of the general rule that a decision not to call a witness is a matter of trial strategy that is virtually unchallengeable. Further, if a lawyer believes the testimony of an alibi witness would not unqualifiedly support his client, it is a matter of trial strategy not to call her as a witness.

Garrett v. State, 814 S.W.2d 325, 330 (Mo.App. 1991). A decision not to call an alibi witness is not ineffective assistance if the attorney believes the testimony of the witness would not have unqualifiedly supported his client's position. Brown v. State, 785 S.W.2d 759, 762 (Mo.App. 1990).

In the instant case Tammy LaGrand was endorsed as an alibi witness and was present in the courthouse during Movant's trial. Trial counsel did not indicate that he did not find Ms. LaGrand to be a credible witness. This Court found her testimony at the evidentiary hearing to be credible. LaGrand's testimony would have unqualifiedly supported Movant's position as to his presence

at the time of the robbery and the reason for his presence at the Hardees. Further, as discussed infra, the ultimate decision to shut the defense down was based in large part on the testimony of the alleged co-defendant Eddie Lewis that he did not know Movant and that Movant was not the person who committed the robbery. However, as noted infra, Lewis' testimony was vacillating and inconsistent. Reliance on such testimony to the exclusion of other credible testimony was not reasonable trial strategy.

6. Movant's sixth allegation (taken out of order) is that his counsel was ineffective when he failed to call him to testify on his own behalf at trial, particularly in light of the fact that he had no prior convictions and would have testified as to why he was at Hardee's early on the morning of December 12, 2003; what type of jacket he was wearing; where he was located inside the Hardees when he was apprehended by police; and to the fact that he did not know Eddie Lewis, was not with Eddie Lewis and did not commit a robbery with Eddie Lewis.

The reasonableness of trial counsel's action and strategy is evaluated in the light of the circumstances of the case, defense, and trial happenings. Coleman v. State, 256 S.W.3d 151 (Mo.App.W.D. 2008). The relative strength or weakness of the prosecution's case is significant in determining whether any

deficiencies in trial counsel's performance were prejudicial. Clay v. State, 954 S.W.2d 344, 346-357 (Mo.App.E.D. 1997) citing Strickland v. Washington, supra.

At the post-conviction hearing trial counsel acknowledged that the timing of Movant being at Hardees was incriminating and that Movant needed to explain his presence. Counsel did not indicate that he believed Movant would not be a credible witness. As noted, Movant had no prior convictions which would have diminished his credibility in testifying before the jury.

The Court finds that trial counsel's failure to present testimony from Tammy LaGrand and/or Movant regarding his whereabouts early in the morning on December 12 between 5:00 and 5:25 a.m. (the time of the robbery), the reason for Movant's presence early in the morning at the Hardees, and his interview plans, significantly undermines confidence in his convictions for robbery and armed criminal action. Had this evidence been admitted along with the testimony of Ms. Williams, the presence of Movant at the Hardees at such an early hour would have been credibly explained, and the jury would have been given an explanation of the most inexplicable and damning fact of Movant's presence at such an early hour when Eddie Lewis was also present. If this testimony, coupled with testimony from Eddie Lewis that

he did not know Movant and that Movant was not the person with him at the time of the robbery, had been before the jury there is a reasonable probability that the result of the trial would have been different. Trial counsel testified that given the fact that Lewis had not identified Movant as the person with him at the robbery he believed that the jury would not convict Movant. Trial counsel then decided to shut the defense down and not put on testimony of Tammy LaGrand and Movant. Though Eddie Lewis who had plead guilty to this robbery, repeatedly denied knowing Movant or that Movant was the person who committed the robbery with him, this testimony was put in question by Lewis's later testimony that Movant was the person arrested with him at Hardees, and that the person who committed the crime followed him to Hardees and went into the bathroom at Hardees. (Tr. 271-296) Further, the State emphasized these inconsistencies in closing argument. (Tr. 337-339) Relying on this inconsistent testimony alone was not reasonable trial strategy, particularly where there were no specific problems regarding the credibility of either Movant or Ms. LaGrand, no prior criminal convictions, and there was an overriding need to explain Movant's presence at the Hardees at such an early hour, as well as his presence in the restroom. Counsel acknowledged that Movant needed to explain his

presence at Hardees, counsel characterized his decision not to have Movant testify as bad judgment and his decision to shut the defense down as wrong.

For the above stated reasons this Court finds that a reasonable probability exists that the outcome of the trial would have been different but for counsel's deficient trial strategy in relying on the inconsistent testimony of Eddie Lewis and in not offering explanations of Movant's presence at Hardees. As noted previously this Court found the testimony of both Ms. LaGrand and Movant credible. Trial counsel did not express a belief that these witnesses were not credible. If the witnesses were believed by the jury their individual or collective testimony would have been sufficient to change the result of the trial. The absence of these witnesses and this testimony seriously prejudiced Movant and undermines confidence in the outcome of the trial. Further because the State's case against Movant was weak in many areas and evidence of his guilt was not strong, the likelihood of prejudice resulting from this defense was great.

7. Movant's fifth allegation is that he was denied effective assistance of counsel because he failed to interview and/or depose or call as witnesses the other officers present at the Hardee's Restaurant at the time Movant was detained along with

Eddie Lewis. Specifically, he references the failure to interview and depose Officer Donald Koehne, an officer at the scene and the officer who prepared the report, who subsequent to Movant's arrest in the case suffered a stroke and was unavailable to testify at trial. Movant alleges that had his trial counsel deposed Officer Koehne after his arrest and sometime prior to trial and prior to the time of his stroke, the officer's testimony could have been read into the record in lieu of his presence at trial. Movant contends his testimony would have established that Movant's jacket had a vertical zipper and not the horizontal zipper described by the victim. Additionally, he contends that his trial counsel failed to interview Officer Weber who would have testified like Koehne as to the type of jacket worn by Movant as well as the fact that Movant was present in the men's bathroom and was not attempting to hide.

This allegation is without merit and denied. Counsel could not have anticipated that Officer Koehne would suffer a serious stroke and be unavailable. The testimony at trial by Officer Harmon did not leave a clear impression that Movant was in the women's bathroom. Officer Harmon's testimony did suggest the men in the restroom appeared to be hiding. It is merely speculation that Officer Koehne would have testified that Movant was not

hiding in the women's bathroom or would have been able to recall the difference in the jackets. A stipulation was entered as to testimony Officer Koehne would have given. Movant also alleged that trial counsel failed to contact Officer Weber who was at the scene. Officer Weber did not testify at the evidentiary hearing. Allegations are not self proving. The testimony and evidence regarding jackets worn by the robber and by Movant was not clearly established at trial and was arguably confusing. It was not established at the hearing that Officer's Koehne and Weber could or would have provided the testimony alleged.

8. Movant's seventh allegation is that his counsel failed to depose the forensic fingerprint examiner who had dusted the exterior of the car for prints but who had left the State's employ before the commencement of trial and who reportedly did make a positive identification of a print on the exterior of the car which may in fact have belonged to Eddie Lewis and would have excluded Movant and to subsequently utilize the deposition at trial.

As set forth under the third allegation to be ineffective for failing to call a witness it must be established that the witness would have provided a viable defense. To prevail on such a claim regarding an expert witness, movant must demonstrate what

the substance of the witness' purported testimony would have been and how it would have aided his defense. State v. Belcher, 856 S.W.2d 113, 117 (Mo.App.E.D. 1993). Allegations contained in a post-conviction 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 failure to present evidence at a hearing to provide factual support for a claim constitutes abandonment of the claim. Weekley v. State, 265 S.W.3d 319 (Mo.App.S.D. 2008); Watson v. State, 210 S.W.3d 434, 438 (Mo.App.S.D. 2006).

At his 29.07 hearing the issue of the fingerprint examination was raised by Movant. Movant's counsel stated that there was a fingerprint examiner and a report and the report stated that there were some fingerprints which were positive but that it was unclear from the report whether or not she actually dusted the inside of the car or the gun itself. Trial counsel stated that he talked to the Assistant Circuit Attorney, Edward Postawko, about the fingerprints, but not the examiner and did not subpoena the examiner. Trial counsel stated he had discussions with Mr. Postawko about the fingerprints and was informed that the finger print examiner was out of state and not

available. Mr. Postawko stated that she lives in Arizona, left the St. Louis Police Department and has been uncooperative with his office in other cases. Mr. Postawko stated that the information he had was that she only dusted the exterior of the vehicle for fingerprints but did not dust the interior or the weapon. At the post-conviction hearing the fingerprint issue was addressed briefly. Mr. Taaffe noted that the police report did not contain any fingerprint references but he believed there had been forensic fingerprints on the car and he never spoke to the fingerprint examiner. Taaffe noted that the lack of fingerprints seemed irrelevant because this could be explained away in that it was cold outside and the perpetrators would have been wearing gloves. Even assuming arguendo a print was found belonging to Eddie Lewis on the vehicle, such evidence would not exculpate Movant from involvement in the robbery. Movant did not meet his burden of proof with respect to this allegation and also failed to establish prejudice resulting from the absence of the expert's testimony. This allegation is denied.

9. Movant's final allegation is that his trial counsel was ineffective for pressing the Court to give MAI-CR 3d 312.10, the hammer instruction, after it was reported that the jury was divided 11-1 during deliberations, although it was unclear as to

