

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

**FILED**  
JAN 19 2011

22<sup>ND</sup> JUDICIAL CIRCUIT  
CIRCUIT CLERK'S OFFICE  
BY \_\_\_\_\_ DEPUTY

GREGORY BONNETT,                    )  
  )  
  Movant,                    )  
  v.                                    )  
  )  
STATE OF MISSOURI,                )  
  )  
  Respondent.                )  
  )

Cause No: 1022-CC00026

Division No. 16

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND ORDER**

On March 23, 2007, Gregory Bonnet (hereinafter "Movant") was charged by indictment with one count of Forcible Rape. On July 1, 2008, a jury returned a Guilty verdict. On August 29, 2008, this Court sentenced Movant to twenty-five (25) years in the Missouri Department of Corrections, in Cause No. 0722-CR02858-01. Movant timely filed his Notice of Appeal with the Eastern District Court of Appeals. In the case of *State of Missouri v. Gregory Bonnet* (#98191, Mo. App. E.D. 2009), the Court of Appeals affirmed the conviction and judgment. The mandate was issued on December 18, 2009.

Movant timely filed his Pro se Motion to Vacate, Set Aside or Correct Judgment or Sentence on December 28, 2009. This Court appointed the public defender to allow Movant time to file an amended pleading. An amended pleading, along with a request for a hearing, were timely filed. The Court granted Movant's request for hearing and same was held on November 18,

2010. All parties announce<sup>3d</sup> ready to proceed, testimony was taken and evidence adduced. The Court took the matter under advisement and this judgment now follows:

### FINDINGS OF FACT & CONCLUSIONS OF LAW

Movant contends he was denied his rights to due process of law, to effective assistance of counsel, to present a defense, and to a fair trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article I - Sections 10 and 18(a) of the Missouri Constitution. Movant's complaints center on the following specifics:

1. Trial counsel was ineffective for failing to allow Movant to testify on his own behalf. Movant contends he wished to testify at his trial but that his attorney convinced him not to do so (*Pet., par. 8 (a), page 2*).

2. Trial counsel was ineffective for failing to adduce evidence of prior consensual sex between the victim and Movant which would in turn assist Movant's "consent" defense. Movant believes this evidence should have been admissible pursuant to 491.015, RSMo (*Pet. Par. 8(b), page 3*).

3. Trial counsel failed to preserve issue for appeal (*Pet. Par. 8(c)*).

4. That the Appellate counsel was ineffective for failing to raise the trial court's error excluding the evidence of prior sexual encounter (*Pet. Par. 8(d)*).

In order to prevail on a claim of ineffective assistance of counsel, a movant must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2<sup>nd</sup> 674, 693 (1984), requiring proof by a preponderance of the evidence that:

- (1) Movant's counsel failed to exercise the customary care, skill and diligence that reasonable competent attorney would perform under similar circumstances; and
- (2) Movant was prejudiced. (*Eddy v. State*, 176 S.W. 3<sup>rd</sup> 214, 217 {Mo. App.

2005))

If neither prong is met, then the court need not consider the other, and Movant's claim fails.

To prove the prejudice prong of the test, a movant must show reasonable probability that but for counsel's supposed errors, the result of the proceeding would have been different. (State v. Hall, 982 S.W. 2<sup>nd</sup> 675 {Mo. Banc 1998}). Movant faces a heavy burden in establishing a claim for ineffective assistance of counsel. Not only must he prove his allegations by a preponderance of the evidence, but Movant must also overcome the Court's presumption that counsel is competent. (Yoakum v. State, 849 S.W. 2<sup>nd</sup> 685, 687 {Mo. App. 1993}).

The first allegation in Movant's Amended Motion is that his trial counsel was ineffective for failing to allow Movant to testify. At the Post-Conviction Relief Hearing, Movant testified to the following (*per transcript: page 15, lines 7-17*):

- Q: Okay. And did you talk about whether or not you wanted to testify?  
A: Yes.  
Q: Did you want to testify, or did you - - -  
A: Yes, I did.  
Q: You did. Okay. And did Miss Hermann tell you ultimately it's your choice whether to testify?  
A: No.  
Q: Did she give you advice as to whether or not you should testify?  
A: No.

The decision of whether or not a defendant testifies at trial is treated as a matter of trial strategy. See Burke v. State, 989 S.W. 2<sup>nd</sup> 194 (Mo. Ct. of App. E.D. 1999). Trial strategy cannot serve as a basis for ineffective assistance of counsel. "Reasonable choices of trial strategy, no matter how ill-fated they appear in hindsight, cannot serve as a basis for a claim of ineffective assistance of counsel. (Cole v. State, 152 S.W. 2<sup>nd</sup> 267, 270 {Mo. Banc. 2004}).

Movant's counsel at trial was Ms. Cynthia Hermann. Ms. Hermann testified at the hearing

that she had talked to Movant "at least several times" about testifying at trial and he was the one who made the decision not to testify and she agreed with his decision. (*Per Transcript; page 8, lines 15-24*).

The Court finds this allegation is without merit. As the *Burks* court points out, the ultimate decision to testify is in the hands of the defendant (movant). It is clear from Ms. Hermann's testimony that counsel did not block Movant from testifying as he alleges, but rather that Movant chose not to testify as a matter of trial strategy. Defense counsel is not the only one involved in matters of trial strategy; defendants, like Movant, participate too. See *Burks at 195*.

The Court is convinced by the testimony of Ms. Hermann when she stated the issue of Movant's testimony was discussed several times and that it was Movant who decided not to testify. Movant's claim fails the first prong of *Strickland* in that a reasonably competent attorney would advise a defendant of his right not to testify, which Ms. Hermann did in this instance, and Movant made his *strategic* decision not to testify after consulting with his attorney. This point is **DENIED**.

The second allegation in Movant's Amended Petition is that his trial counsel was ineffective for failing to adduce evidence and for failing to convince the Court in allowing the Movant to introduce evidence of prior oral sex between Movant and the victim earlier on the same day of the rape as an exception in the "Rape Shield" statute, 491.015, RSMo,

Essentially what Movant is claiming is that defense counsel should have been successful in convincing the Court to allow evidence of the prior consensual sexual contact into evidence. This is another way of getting around trial court error, which is not cognizable in Rule 29.15 claims.

At trial, the State filed a Motion in Limine seeking a ruling to keep out any evidence of the previous sexual contact between the victim and defendant (Movant). In response, in chambers

and off the record, trial counsel did bring to the Court's attention her intention to introduce evidence of the prior consensual sex (*see testimony of trial counsel, PCR Hearing, pages 6-8*). The Motion was granted by the Court and the evidence was excluded.

Despite the bar on trial court error claims in Rule 29.15, the Court will examine the efforts of defense counsel, pursuant to Strickland.

A reasonably competent attorney would have sought to admit the prior activity through her admission to police and in her deposition taken immediately before trial, like Ms. Hermann intended. (*PCR transcript; page 5 – lines 24-25, page 6 – lines 1-21, page 7 – lines 12-16*.) Unfortunately, the Court ruled against her. A reasonably competent attorney, such as Ms. Hermann, had developed the defense of consent, and one of the components of the defense was the prior sexual contact, but it was not to be. Counsel demonstrated the customary skill and diligence required under the circumstances.

Movant's allegation that counsel failed to preserve this second point on for appeal is also **DENIED** since this is not a cognizable issue in a Rule 29.15 proceeding. See State v. Beckerman, 914 S.W. 2<sup>nd</sup> 861, (Mo. Ct. App. E.D. 1996).

Movant's final claim is that Appellate counsel was ineffective for failing to raise the trial court's error in excluding evidence of the prior sexual encounter earlier in the day of the rape. To support a Rule 29.15 motion due to 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 and asserted it. To be entitled to relief, Movant must show that the error not raised on appeal was so substantial as to amount to a manifest injustice or to a miscarriage of justice. (Moss v. State, 10 S.W. 3<sup>rd</sup> 508, 514 (Mo. Banc 2000); citing Reuscher

*v. State*, 887 S.W. 2<sup>nd</sup> 588, 591 {Mo. Banc 1994}; *Helmig v. State*, 42 S.W. 3<sup>rd</sup>, 658, 682 {Mo. App. E.D. 2001}).

The Missouri "Rape Shield" statute is enclosed in 491.015, RSMo, and states in its pertinent part:

1. ...opinion and reputation evidence of complaining witness' prior sexual conduct is inadmissible; evidence of specific instances of the complaining witness' prior sexual conduct or the absence of such instances or conduct is inadmissible, except where such specific instances are:
  - (1) Evidence of the sexual conduct of the complaining witness with the defendant to prove consent is a defense to alleged crime and the evidence is reasonably contemporaneous with the date of the alleged crime.

At the PCR Hearing, Movant stated under oath that if he would have testified, he would have told the jury that he had known the victim for just a few months and they had sex on at least ten (10) occasions before the date of the rape. He stated their trysts consisted of having sex and getting high. (*PCR transcript; page 16, ins. 1-20.*)

Movant stated on the day of the rape, he met her (victim) very early in the morning while she was still out from the night before. Movant stated they both went back to his house and "got high, had sex, drank some alcohol, you know . . ." "They then woke up, got high and had sex again. (*PCR transcript; page 17, ins. 9-13.*) Finally, they took a break and Movant stated they went shopping for clothes. (*PCR transcript; page 17, ins. 16-24.*) When they returned from shopping, according to Movant, they got high again and had sex again (*PCR transcript, page 18, ins. 1-4*); however, according to Movant, while attempting to have sex with victim for the fourth time, he was unable to perform, leading victim to become upset. Movant, after drinking and smoking more (presumably "Crack") decided to leave his own house. He stated Movant got very upset and started "messing with my things on my shelf" and continued to get high without him.

*(PCR transcript; page 20, ins. 4-13.)*

While the first prong of Moss is met, since Appellate counsel failed to bring this issue to the attention of the Court of Appeals, the second is not met since there was no manifest injustice. Even if the evidence of one prior oral sexual encounter earlier in the day was admitted, it would have had minimal effect on the jury's decision since the State's case against Movant overwhelmingly showed the subsequent sexual encounter was without victim's consent, revealing a contrived and premeditated rape of victim by Movant.

First, although Movant testified at the PCR Hearing of multiple sexual encounters on that day, the information before the Court and State at the time of the trial led all to believe that Movant's attorney only wanted to ask victim on cross-examination of one act of oral sex earlier in the morning when victim and defendant met on that fateful day *(PCR transcript; page 6, ins. 2-7, and Movant's Motion for New Trial)*.

Second, the victim and corroborating evidence is very compelling. Victim testified she voluntarily stayed with Movant all day prior to the attack. She testified she met the Movant approximately one year earlier when, during that encounter, they got high together. She did not see him again until the day of the attack. On that day, she described a day of Crack-smoking (by him and her), and drinking (by him) beginning at 6:00 a.m. and lasting into the next day at 1:00 a.m. *(Tr. Transcript; page 124, ins. 1-16)*.

The victim went on to tell of her motivation for staying with Movant all day since he made her feel "beautiful" *(Tr. Transcript; page 123, ins. 3-4)*. She knew she was a Crack addict but Movant, by buying her things like clothes and jewelry, made her feel "special" *(Tr. Transcript; page 125m ins. 1-25)*.

Victim further testified that following their legitimate shopping spree, they also bought more

Crack. They went back to Movant's home and smoked all of it.

Sometime after 8:00 p.m., and after the last blast of Crack, the victim began to pick up a "vibe" from Movant, making her feel uneasy (*Tr. Transcript, page 127, ins. 23-25*). He began to watch her every move (*pg 127; 6-10*). She added that soon afterwards, his "tone" changed (*pg 128, 6-8*), and when she tried to leave, he grabbed her arm and said, "Bitch, do you think I did all that (shopping) for nothing? You're not going anywhere without putting out!" (*pg. 128, 18-21*).

Victim testified that in order to calm Movant down, she sat down on the couch with Movant. After some time, she attempted to leave. Movant grabbed her around her neck, told her to stand up, and then proceeded to punch her in the face several time, each time victim dropping to floor. During this time, Movant lost control of her bladder, urinating on the floor (*pg. 129, 17-25; pg. 130, 1-5*).

Movant then told her to remove her clothes and, while she was disrobing, Movant went around the room setting up barricades in front of all exits from room (*pg. 130*). Movant then ordered victim to lie on the couch. When victim objected, Movant stepped on her throat with heavy boots. He then raped her (*pg. 131, 21-25*).

After raping victim, Movant hit her again and then told her to stand in the corner naked for a long period of time. At some point while Movant was distracted, victim took off running "for her life." She got through the barricades and out of the door, but did not have enough time to make it to the outer door; she then jumped off a second story porch, hitting the ground, and then scrambling over a six foot (6') fence, and proceeded running down the street (totally naked). A witness saw the victim running through the yard of Movant's s house. She was followed the whole time by Movant, who had her clothes in hand (*pgs. 133, 5-25, and 150, 23-25*).

Photographs of the scene showing urine stains on the floor and the barricaded room were



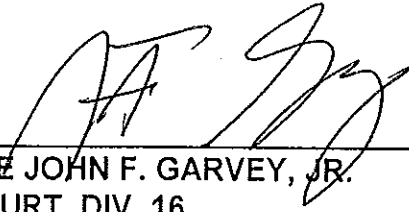
admitted into evidence (pg 136, 8-15, ex. 1-9).

Victim's testimony was compelling and chilling. Even if evidence of one oral sex act was admitted by victim, it would not have made a difference since it is clear that the jury believed the victim's testimony and its corroboration and, therefore, the absence of a review of the prior consensual act was not a miscarriage of justice. Movant's third point is DENIED.

**ORDER**

WHEREFORE, THE COURT ORDERS, ADJUDGES AND DECREES that  
Movant's Motion for Post-Conviction Relief be and hereby is DENIED.

SO ORDERED:



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THE HONORABLE JOHN F. GARVEY, JR.  
22<sup>ND</sup> CIRCUIT COURT, DIV. 16

Dated: 1-19-2011

p.c. Brocca Leah Smith, Attorney for Movant  
Mary Pat Benninger, Attorney for State  
File