

IN THE CIRCUIT COURT OF CLAY COUNTY, MISSOURI

LARK E. GARDNER, JR.,

Movant,

v.

STATE OF MISSOURI,

Respondent.

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Case No. 10CY-CV02515

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
ORDER, AND JUDGMENT
DENYING AMENDED MOTION
TO VACATE SENTENCE AND JUDGMENT**

Movant pled guilty to count II, Murder in the Second Degree, and count III, Murder in the Second Degree, on October 30, 2009. Count I, robbery in the First Degree was dismissed by the State at sentencing. Movant was sentenced to two concurrent life sentences on January 8, 2010. At sentencing, this Court inquired into ineffective assistance of counsel and found Movant did not receive ineffective assistance of counsel.

Movant filed a Motion to Vacate, Set Aside, or Correct the Judgment or Sentence on March 4, 2010. Counsel filed an Amended Motion to Vacate, Set Aside, or Correct Judgment and Sentence on July 19, 2010. An evidentiary hearing was held on November 3, 2010. Movant's sole point is that trial counsel was ineffective for not presenting any mitigating evidence or witnesses of Movant's medical records from being shot, his prior seizures, and his non-violent past. Movant alleges he would have had affidavits from his family submitted to the Court at sentencing.

Movant may bring a claim of ineffective assistance of counsel concerning the sentencing hearing, without vacating the plea of guilty. *Cherco v. State*, 309 S.W.3d 819, 830 (Mo. App. 2010). To prevail on ineffective assistance of counsel claim in a post-conviction relief motion, the Movant must show (1) "counsel failed to exercise the customary skill and diligence of a reasonably competent attorney under similar circumstances" and (2) movant was prejudiced as a result of counsel's deficient performance. *Worthington v. State*, 166 S.W.3d 566, 572-73 (Mo. banc 2005). To prevail on the performance prong, movant must show that "counsel's representation fell below an objective standard of reasonableness" by referring to specific actions. *Id.* at 573. To prevail on the prejudice prong concerning a sentencing hearing, Movant must show a reasonable probability of a lower sentence would have been granted. *Cherco*, 309 S.W.3d at 830.

Movant relies on *Vaca v. State* where trial counsel was ineffective in the sentencing phase of a jury trial for not considering whether to present mitigating evidence of the movant's mental health. 314 S.W.3d 331, 337 (Mo. banc 2011). *Vaca* is distinguishable from Movant's case because Movant was sentenced by the trial court upon a guilty plea and the proposed evidence and witnesses did not support a mental health issue.

Movant's claim for ineffective assistance of counsel does not satisfy the two prong test for ineffective assistance of counsel.

Part of Movant's claim is that evidence that he was shot by his co-defendant was not evidence at sentencing. At the sentencing hearing, trial

counsel informed the trial court that Movant was shot in the face by his co-defendant. In the sentencing assessment report, Movant stated that he was shot in the back of his neck by the co-defendant. At the post-conviction hearing, Movant offered business records from MAST and St. Luke's Hospital for Movant's medical care as a result of being shot by his co-defendant after the robbery and murders occurred. These records were from December 2006, three years before the plea occurred, and only showed Movant's injuries at that time. Trial counsel testified during the post-conviction hearing that the trial court was aware Movant was shot by his co-defendant. Trial counsel also testified that he did not think about using the medical records and the medical records could have been helpful or mitigating. However, trial counsel did not address how he would of have used the evidence and exactly how the medical records were helpful or mitigating.

The other part of Movant's claim is that Movant wanted affidavits from his family about his seizures and non-violent past. At the sentencing hearing, trial counsel acknowledged Movant's criminal history and how he had a non-violent past. Movant's stated in his sentencing assessment report that he was shot and he "sell[s] drugs and steal[s] cars, I don't do this." At sentencing, Movant addressed the Court at sentencing, and did not mention any medical issues or his non-violent past. At the post-conviction hearing, Movant and his mother testified about his prior seizures, not aware witnesses could testify, and his non-violent past. Trial counsel testified at the post-conviction hearing that he did not talk to witnesses about testifying and did not call any witnesses. Trial counsel

did not recall if Movant requested any witnesses to speak at sentencing. Movant's mother testified at the post-conviction hearing that Movant had seizures and asthma when he was younger, but she did not know how it affected him. Movant's mother also testified that she never contacted his attorney or saw his attorney in the three years the case was pending. Movant testified on his own behalf and acknowledged that he did not say anything about his medical conditions, except being shot, to the probation officer doing the sentencing assessment report or when he spoke at sentencing. Movant did not offer any evidence as to his medical condition at the time of sentencing or the implications he suffered as a result of the shooting.

Trial counsel acted as a reasonably competent attorney would have under the circumstances. As to the medical records, the court was aware that Movant had been shot, the medical records only confirmed that he was in the hospital as a result of being shot, and the medical records did not provide any additional evidentiary or mitigating evidence. A reasonable attorney would not offer evidence, which offered no additional evidentiary worth, when the court was aware of the circumstances. As to evidence of Movant's prior seizures through affidavits of Movant's family, there is no evidence that trial counsel was aware of the prior seizures and Movant failed to raise this issue in his sentencing assessment report or before the trial court. Furthermore, Movant and his mother did not offer sufficient evidence if Movant had a seizure while the underlying case was pending and how Movant's seizures affected him. A reasonable attorney would not offer evidence about the prior seizures without having additional

evidence with evidentiary value. As to the affidavits about Movant's non-violent past, trial counsel addressed Movant's prior convictions and the sentencing assessment report listed Movant's prior convictions. A reasonable attorney would not offer supplemental testimony about Movant's non-violent past when his criminal history does not show a violent past. Movant's trial counsel acted as a reasonably competent attorney.

Movant was not prejudiced in that there is not a reasonable probability Movant would have received a lesser sentence. The Court summarized the reasons for the two life sentences to run concurrent as Movant's "past history here, his long history of convictions, his participation in this robbery, not assisting the State – and this is crucial – not assisting the State as his other two co-defendants have done causes me grave concern." This Court explicitly addressed Movant being shot with "the fact that he himself was shot by Mr. Fulton [co-defendant] afterwards has no bearing on his own conduct."

The medical records showing Movant was shot would not have resulted in a lesser sentence because the Court already said the shooting "has no bearing on [Movant's] own conduct" and the records provided nothing of evidentiary value or mitigating evidence about Movant. Evidence of Movant's seizures would not have reasonably resulted in a lower sentence because there was no evidence as to when the seizures occurred and how it affected Movant. Evidence of Movant's non-violent past would not have resulted in a lesser sentence because the Court stated "I am quite troubled by [Movant's] history of felony convictions even

though they do not appear to be of a violent nature, but his long history of felonies tells me that he's not a good candidate for rehabilitation."

Movant was not prejudiced by trial counsel not offering evidence of being host, his seizures, and his non-violent past, as that evidence would not have reasonably resulted in a lesser sentence.

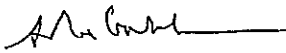
Movant's sole claim is denied.

The record clearly and unequivocally refuses all allegations in the Rule 24.035 Amended Motion to Vacate, Set Aside, or Correct Judgment and Sentence. It is further found that Movant's trial counsel was not ineffective in Movant's criminal proceeding.

For the reasons stated above, it is hereby

ORDERED AND ADJUDGED that Movant's Amended Motion to Vacate, Set Aside, or Correct Judgment and Sentence is denied.

1-30-2012
Date


Judge