

**IN THE CIRCUIT COURT OF GREENE COUNTY, MISSOURI
Division 2**

)	
Movant,)	
)	
vs.)	Case No. 1531-CC00791
)	
STATE OF MISSOURI,)	
Respondent.)	

ORDER

Pending before the Court is a motion by the Movant pursuant to Rule 29.15. On January 12, 2017, an evidentiary hearing was conducted on this matter. At that hearing, Movant’s counsel sought leave to supplement the record on or before April 17, 2017. On April 17, 2017, the supplemental record was filed. On May 1, 2017, suggestions were filed by both parties. Additional suggestion were filed by the parties in November of 2018.

Movant was convicted after trial of robbery, burglary, and armed criminal action. As a result of those convictions, Movant was sentenced to twenty years in the Department of Corrections on each count with said sentences ordered to run consecutively to one another. Those convictions were later affirmed on appeal. *State v. Hicks*, 456 S.W.3d 426 (Mo. App.S.D. 2015). Following the affirmation on appeal, Movant filed a timely Rule 29.15 motion. An amended motion was subsequently filed by counsel.

In that amended motion, Movant raises a series of issues. First, Movant contends that the State failed to disclose *Brady* material, made misrepresentations at trial about the ownership of a vehicle, and destroyed said vehicle before Movant's counsel could examine it.

The Court has considered the evidence at the hearing, together with arguments of counsel, and the supplemental record. After due consideration, the Court finds that no *Brady* violation occurred.

In order to succeed on a *Brady* claim, the Movant is required to establish that the evidence in question would have been favorable to him. In addition, Movant must establish that he was prejudiced by not receiving the evidence. In other words, Movant must show that the evidence was material to his case and that “there is a reasonable probability that its disclosure to the defense would have caused a different result in the proceeding.” *State v. Dormire*, 304 S.W. 3d 120, 128 (Mo. banc 2010); *Strickler v. Greene*, 527 U.S. 263, 280 (1999).

However, in the instant matter, Movant has failed to establish that the evidence in question was material. Rather, the issue at trial was the Movant's possession and use of the vehicle. On that issue, there was substantial evidence to support the State's argument that Movant possessed and used the vehicle including: (1) Movant's close proximity to vehicle near the time of the robbery; (2) Movant's admission that the vehicle belonged to his cousin's “baby daddy” named “Ray”; (3) Movant's reference to the vehicle as “my

car” when talking to the investigative officer; (4) Movant’s DNA being found on clothing inside the car; (5) Movant’s possession of the ignition key to the vehicle; and, (6) Movant giving of consent to the police to search the vehicle. As such, the State’s assertions concerning the Movant’s possession and use of the vehicle were proper and do not form a basis for relief.

Movant has also failed to establish that disclosure of the evidence in question would have caused a different result in the proceeding. Despite Movant’s assertions to the contrary, the record is clear that both Movant and his trial counsel were aware prior to trial that he was not the owner of the vehicle in question. In addition, testimony was introduced at trial that Movant was not the owner of the vehicle. Finally, trial counsel stated during his closing argument that [REDACTED] was the owner of the car. As such, Movant has failed to establish that he was prejudiced by not receiving the vehicle information in advance of trial since it is clear that he did have the information.

As noted, a review of the trial transcript reveals that the State’s case against the Movant was extremely strong. In light of this substantial evidence Movant’s use of the vehicle near the time of the robbery and the identification of the Movant by the victim, there is nothing to support the Movant’s proposition that the disclosure of the ownership paperwork prior to trial would have altered the outcome of this case.¹ Indeed, trial

¹ There is also nothing to suggest that exculpatory evidence existed in the vehicle prior to its destruction. As noted, the vehicle was destroyed by the owner of the vehicle prior to the preliminary hearing. Thus, any argument that the vehicle would have yielded exculpatory evidence is merely speculative at this point.

counsel testified at the hearing that the evidence relating to the car's ownership would not have altered his trial strategy. The Court finds this testimony to be credible.

Since the evidence in question was not material and Movant has failed to establish a reasonable probability that the results of this case would have been different if the information concerning the vehicle had been disclosed in advance of trial, Movant's instant motion to vacate his convictions based on *Brady* violations is without merit and must be denied. *State v. Dormire*, 304 S.W. 3d 120, 128 (Mo 2010); *Strickler v. Greene*, 527 U.S. 263, 280 (1999).²

In his amended motion, Movant also contends that his counsel was ineffective by: (1) failing to properly investigate the vehicle in question; (2) failing to depose critical witnesses and victims' claims; and, (3) failing to "adequately" argue for a continuance.

In order to prevail on a claim of ineffective assistance of counsel on a Rule 29.15 proceeding, a Movant must first establish that his "counsel's performance 'did not conform to the degree of skill, care, and diligence of a reasonably competent attorney.'"

Williams v. State, 168 S.W.3d 433, 439 (Mo. banc 2005), quoting *Strickland v.*

Washington, 466 U.S. 668, 687 (1984). In addition, a Movant must establish that he was

² Movant also contends that the State engaged in prosecutorial misconduct by referring the vehicle as "Defendant's vehicle." However, the jury was well aware of the true ownership of the vehicle and the prosecution's reference as such was referring to the Movant's possession of the vehicle versus actual ownership. The Court finds the prosecutor's testimony to be credible on this issue and does not find that the State was attempting to mislead the jury by that reference.

prejudiced by his counsel's actions. To establish prejudice, "a Movant must show that, but for counsel's poor performance, there is a reasonable probability that the outcome of the court proceeding would have been different. " *id.*; *Ringo v. State*, 120 S.W.3d 743, 745 (Mo. *banc* 2003).

At trial, Movant's trial counsel sought a continuance. However, that motion was denied by the trial court. On his direct appeal, Movant challenged the trial court's denial of his continuance request. However, that argument was rejected by the Appellate Court. *State v. Hicks*, 456 S.W.3d 426, 430 (Mo. App. S.D. 2015).

Although Movant now claims that his trial counsel did not "adequately" argue for the continuance, he had failed to offer any evidence to support his contention that further argument by trial counsel would have resulted in a different ruling by the trial court. Moreover, there is nothing to indicate that a continuance would have netted a different result for the Movant at trial.

Prior to Movant's trial on the robbery charge, trial counsel conducted recorded interviews of the witnesses and witnesses and there is nothing in the record to suggest that additional depositions of those witnesses would have affected the eventual outcome of this case. Movant's additional claim that trial counsel was ineffective for failing to depose "police officer witnesses" also fails because the information Movant claims would be discovered through those depositions, to-wit that Mr. [REDACTED] owned the vehicle and that he later had it destroyed, were either already known to trial counsel, or

were not material to the case. Thus, Movant can show no prejudice that depositions of unspecified officers were not taken.³

Movant also claims that trial counsel was ineffective for failing to investigate the vehicle thereby discovering that Movant did not own the automobile and was not driving the vehicle. In addition, Movant claims that proper investigation would have revealed that: (1) the police released the vehicle to its owner; (2) the vehicle was destroyed by the owner after being released by the police; and, (3), the key seized from Movant by the police would not have unlocked both the door and the ignition.

Movant also does not allege what, if any, additional evidence of probative value would have been derived from trial counsel's examination of the vehicle's paperwork if a continuance had been granted. Both Movant and trial counsel were aware that Movant was not the owner of the vehicle. As noted, a witness testified that [REDACTED] was the owner of the vehicle and trial counsel reminded the jury of that fact during his closing argument to the jury. Similarly, the information concerning the key was known to trial counsel at the time of trial and was presented to the jury.⁴

³ Movant's contention concerning the police depositions was not developed by the Movant at the PCR hearing and there is nothing in the pleadings to suggest that a deposition of the police officers would have yielded new information which would have affected the eventual outcome of the trial.

⁴ The fact that the vehicle was released by the police and later destroyed was not material to issues presented at trial and Movant's contention that exculpatory evidence was contained inside the vehicle is, at best, mere speculation on his part and does not serve as a basis for relief.

Finally, trial counsel made it clear in testimony at the hearing that the issues surrounding the ownership of the vehicle would not have caused him to alter his trial strategy. As such, further investigation by Movant's trial counsel on any of these issues would not have yielded material evidence or a change in trial strategy sufficient to negate the overwhelming evidence by the State that Movant operated the vehicle on the night of the robbery.

Movant also claims that trial counsel was ineffective for failing to request a mistrial after being presented with a venire panel that contained no African-Americans. The Sixth Amendment requires that juries be selected from venires that represent a fair cross-section of the community. *Taylor v. Louisiana*, 419 U.S. 522, 526 (1975).

In order to establish a prima facie violation of the fair cross-section requirement, the defendant must show: “(1) that the group alleged to be excluded is a ‘distinctive’ group within the community, (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community, and (3) that this under-representation is due to systematic exclusion of the group in the jury selection process.” *State v. Anderson*, 79 S.W.3d 420, 430 (Mo. 2002), citing *State v. Kinder*, 942 S.W.2d 313, 337 (Mo. banc 1996).

In order to demonstrate systematic exclusion, a defendant must raise the issue prior to trial and establish unfair under-representation of the excluded group on his venire and in general on other venires in the relevant judicial system near the time of his trial.” *State*

v. Anderson, 79 S.W.3d 420, 430 (Mo. 2002), citing *Singleton v. Lockhart*, 871 F.2d 1395, 1398 (8th Cir. 1989); *State v. Anderson*, 306 S.W.3d 529, 542 (2010).

In this matter, Movant's claim of systematic exclusion was not supported by the evidence. Simply put, no evidence was proffered prior to trial or during the hearing in the instant matter that there was a systematic exclusion of African Americans from jury service in Greene County, Missouri during the time in question. Rather, the only evidence offered by Movant on his new claim of systematic exclusion was that the entire panel was Caucasian.

However, the racial composition of a single jury panel that fails to mirror the make-up of the community does not satisfy the standard required to establish a *prima facie* case of systematic exclusion. *State v. Garrett*, 627 S.W.2d 635, 639 (Mo. banc 1982). Thus, even if trial counsel had sought such a motion for mistrial, the Court would have denied that motion due to the lack of evidence required by the applicable case law. See, *State v. Anderson*, 79 S.W.3d 420, 430 (Mo. 2002); *State v. Anderson*, 306 S.W.3d 529, 542 (2010); *State v. Ringo*, 30 S.W.3d 811, 820 (Mo. banc 2000); *State v. Garrett*, 627 S.W.2d 635, 639 (Mo. banc 1982).

Since there was not sufficient evidence to support a claim of systematic exclusion, trial counsel was not ineffective when he elected to not seek a motion for a mistrial based on the racial composition of the jury. Trial counsel is not required to pursue objections or motions which lack merit and which would be properly denied. *Barton v. State*, 432

S.W.3d 741, 754 (MO. 2015) citing *State v. Clay*, 975 S.W.2d 121, 135 (Mo. banc 1998); *State v. Basile*, 942 S.W.2d 342, 350 (Mo. 1997).

Finally, Movant argues that the cumulative effect of the alleged errors deprived Movant of his due right to a fair trial.” However, Movant has failed to establish that his trial counsel’s performance “did not conform to the degree of skill, care, and diligence of a reasonably competent attorney.” *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

In short, the evidence and arguments advanced by Movant do not support the finding that trial counsel was incompetent. To the contrary, the transcript reveals that Movant received skillful representation from an experienced attorney throughout the course of this matter. Since the Court has determined that none of Movant's points amount to reversible error, there can be no reversible error attributable to their cumulative effect.” *McDaniel v. State*, 460 S.W.3d 18, 34 (Mo. Ct. App. 2014); *See also Henderson v. State*, 789 S.W.2d 498, 504 (Mo. Ct. App. 1990). As such, Movant’s “cumulative effect” argument must fail.

In the instant matter, Movant has failed to establish that his trial counsel’s performance “did not conform to the degree of skill, care, and diligence of a reasonably competent attorney.” *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In light of the evidence against Movant that was introduced at trial and the lack of any *Brady* violation, there is not a reasonable probability that the outcome of the court proceedings would have been different even if trial counsel had obtained a continuance, conducted

depositions, investigated the document concerning the vehicle's ownership, and sought a mistrial. Absent a showing that a different outcome was likely, Movant's motion to vacate his convictions on the ground of ineffective assistance of counsel must be denied.

Williams v. State, 168 S.W.3d 433, 439 (Mo. banc 2005)

WHEREFORE, for the foregoing reasons, Movant's motion pursuant to Rule 29.15 is denied.

SO ORDERED.

Dated December 4, 2017



David C. Jones
Circuit Judge