No. 85269

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IN THE
MISSOURI SUPREME COURT

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STATE OF MISSOURI,

Respondent,

v.

ANDREW LYONS,

Appellant.

_____

Appeal from the Circuit Court of Scott County, Missouri
The Honorable W.H. Winchester, III, Judge

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RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from the denial of a Request for a Nunc Pro Tunc Order, in the Circuit Court of Scott County, Missouri, the Honorable W.H. Winchester, III presiding. The convictions were for two counts of murder in the first degree, §565.020, RSMo 2000, and one count of involuntary manslaughter, §565.024, RSMo 2000, for which the sentences were death for each count of murder, and seven years for involuntary manslaughter in the custody of the Missouri Department of Corrections. Because sentences of death were imposed, the Missouri Supreme Court has exclusive appellate jurisdiction. Article V, §3, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Andrew Lyons, was convicted of two counts of murder in the first degree, §565.020.1, RSMo 2000, and one count of involuntary manslaughter, §565.024.1, RSMo 2000[1]. State v. Lyons, 951 S.W.2d 584, 587 (Mo. banc 1997), cert. denied, 522 U.S. 1130 (1998). The facts were summarized by this Court as follows:

> **As of September 1992, Andrew Lyons and Bridgette Harris had been living together for three years in Cape Girardeau, Missouri. Their eleven-month old son, Dontay, lived with them, as did Bridgette's two children from a previous relationship, seven-year-old Demetrius and four-year-old Deonandrea. Approximately one week before the murders, Lyons told a longtime friend that he was having problems with Bridgette. Lyons told the friend that "he just felt like killing" and that the "best thing for [Bridgette] to do . . . was to get killed . . . ." Around the same time,**

[1]In this appeal, "D.A. L.F." will designate the direct appeal legal file; "D.A. Tr." will designate the direct appeal transcript; "PCR Tr." will designate the post-conviction transcript; "PCR L.F." will designate the post-conviction legal file; and "L.F." will designate this legal file.

Bridgette moved out of the house she shared with Lyons. She and the three children moved in with Bridgette's mother, Evelyn Sparks.

Two days before the murders, Lyons drove his truck alongside Bridgette and her older sister while they were walking on a sidewalk. He stopped the truck and pulled forward the passenger's seat, revealing a shotgun. The women ran away and reported the incident to the police.

The day before the murders, Lyons told another friend that Evelyn was interfering with his relationship with Bridgette and that "she should leave them alone or he would kill her." That night, he told Bridgette's best friend that "I am going to end up killing [Evelyn]." Around midnight, Lyons told yet another friend that he was going to shoot Evelyn with his shotgun and "catch a train out of here."

On the morning of Sunday, September 20, 1992, Lyons went to Evelyn's house, where Bridgette was staying. He and Bridgette argued. Lyons left, went back to his house, and grabbed his shotgun and a duffel bag packed with clothes and ammunition. Shortly after 10 a.m., Lyons returned to Evelyn's house. Evelyn was in the kitchen. Bridgette, Demetrius, Deonandrea, and Dontay were downstairs in the basement. Demetrius heard a loud noise from upstairs and went to see what had happened. On his way, he passed Lyons coming down the stairs carrying a shotgun. Demetrius saw his grandmother lying on the kitchen floor and

ran to his room. In the basement, Lyons shot Dontay once and shot Bridgette once.

Lyons then drove to the house where his half-brother, Jerry DePree, was staying. Lyons asked DePree to follow him to the house of his friends John and Gail Carter so that he could drop off his truck. Upon arriving at the Carters's house, Lyons went in to talk to Gail. He told her that he had killed Bridgette and Evelyn and that he had shot Dontay by accident. Lyons went back outside and transferred the shotgun and duffel bag from his truck to DePree's car. Lyons got into DePree's car and told him to drive away. DePree asked him what was wrong, and Lyons told him that he had shot some people and that the police would probably be looking for him. DePree dropped Lyons off at Trail of Tears State Park. Lyons left his shotgun in DePree's car.

Back at Evelyn Sparks's house, another of Evelyn's daughters arrived around 11 a.m. She found her mother on the kitchen floor and called the police. The police discovered Bridgette and Dontay in the basement. All three were dead. Evelyn died from massive hemorrhaging and tissue destruction caused by a gunshot wound above her left hip. Bridgette died from massive hemorrhaging and tissue destruction caused by a gunshot wound below her right shoulder. Dontay died from extensive brain tissue damage secondary to a contact gunshot wound to the left eye.

When DePree learned later in the day that Evelyn, Bridgette, and Dontay had been shot to death, he turned over Lyons's shotgun to the police. The shell casing found in the shotgun and the two shell casings found at Evelyn's house matched the shell casings of cartridges fired from the shotgun by the State's firearms examiner.

Lyons was arrested in the afternoon and confessed to shooting Evelyn, Bridgette, and Dontay that morning. At trial, the jury found Lyons guilty of murder in the first degree for the deaths of Evelyn Sparks and Bridgette Harris and guilty of involuntary manslaughter for the death of Dontay Harris. The jury could not agree on a punishment for the murder of Evelyn Sparks. The jury recommended a sentence of death for the murder of Bridgette Harris and seven years incarceration for the death of Dontay Harris. The trial court sentenced Lyons to death for the murder of Evelyn Sparks and accepted the jury's recommendations as to the deaths of Bridgette and Dontay.

Id. at 587-588. This Court affirmed appellant's convictions and sentences on August 19, 1997. Id.

On December 26, 1997, appellant filed his pro se motion for post-conviction relief (PCR L.F. 1, 5-10). On March 30, 1998, appointed counsel filed an amended motion and requested an evidentiary hearing (PCR L.F. 1, 16-99).

An evidentiary hearing was held on August 12, 1999 (PCR Tr. 2). Thereafter, on December 30, 1999, the motion court issued findings of fact and conclusions of law denying appellant's motion (PCR L.F. 3, 143-221).

On appeal, this Court affirmed the denial of appellant's post-conviction motion. Lyons v. State, 39 S.W.3d 32 (Mo. banc 2001), cert. denied, 534 U.S. 976 (2001).

Nearly two years later, on March 17, 2003, appellant filed a motion in the trial court, entitled "Request for Order Nunc Pro Tunc Granting Mr. Lyons New Trial due to Mental Incompetence at Time of Trial, with Suggestions in Support." (L.F. 1-35)[2]. The motion court entered it's order, denying appellant's motion (L.F. 36). Appellant appeals that order.

In the meantime, on June 3, 2003, appellant filed a petition for writ of habeas corpus in this Court alleging that he had received ineffective assistance of direct appeal counsel for failing to raise the claim that he was incompetent at trial; that he was abandoned by his post-conviction counsel because post-conviction counsel failed to

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[2] Appellant filed a second motion on the same day, entitled, "Request for Leave of Court to Reopen Rule 29.15 Motion due to Abandonment of Counsel Concerning Issues of Ineffective Appellate Assistance of Counsel and Mental Incompetence at Time of Trial, Supplemental Petition Presenting the Additional Grounds and Requesting Relief, and Request for Hearing, with Suggestions in Support." This was also denied by the motion court. Appellant is appealing that denial as well. See Lyons v. State, SC85272.

raise this issue in his Rule 29.15 motion; and that he was not competent during his direct appeal. Lyons v. Roper, SC85319. This Court denied appellant's writ on August 26, 2003. Id.

ARGUMENT

THE MOTION COURT DID NOT ERR IN DENYING APPELLANT'S REQUEST FOR AN ORDER NUNC PRO TUNC BECAUSE WHETHER APPELLANT WAS COMPETENT AT THE TIME OF TRIAL IS NOT A "CLERICAL ERROR" WHICH MAY BE CORRECTED BY AN ORDER NUNC PRO TUNC; THERE WAS SUFFICIENT EVIDENCE PRESENTED DURING THE PRE-TRIAL COMPETENCY HEARING TO FIND APPELLANT COMPETENT IN THAT DR. HOLCOMB, A PSYCHOLOGIST WITH THE DEPARTMENT OF MENTAL HEALTH WHO EVALUATED APPELLANT, TESTIFIED THAT APPELLANT COULD UNDERSTAND THE PROCEEDINGS AND COULD ASSIST IN DEFENSE; AND APPELLANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF DIRECT APPEAL COUNSEL IS NOT COGNIZABLE IN THIS PROCEEDING.

Appellant claims that the motion court erred in denying his request for an order nunc pro tunc "granting [appellant] a new trial due to mental incompetence at time of trial" (App. Br. 13). Appellant claims that he was incompetent at the time of trial and that "one means available to correct the error of suffering Mr. Lyons to proceed to trial while incompetent is through order nunc pro tunc, correcting that error regarding competence, and thereby nullifying the other proceedings, including Mr. Lyons' convictions and sentences"(App. Br. 14). Appellant also claims that his direct appeal counsel was ineffective for not arguing on appeal that the trial court erred in finding him competent to proceed (App. Br. 34-36).

Order Nunc Pro Tunc Not Proper Remedy

Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time after such notice, if any, as the court orders. Supreme Court Rule 29.12(c). In order for Rule 29.12(c) to apply, the error about which defendant complains must have been a clerical mistake. State v. Carrasco, 877 S.W.2d 115, 117 (Mo.banc 1994). A judgment may be corrected nunc pro tunc only if it is a clerical error rather than a judicial error and, generally, only if the intention of the judge to do otherwise clearly appears in the record. Id. The trial court may not enter a new judgment or sentence but may only "amend or supply and record in accordance with the fact." Id. A nunc pro tunc order is used to make the record conform to what actually occurred when, as here, there is a basis in the record supporting such an amendment. McDonald v. State, 77 S.W.3d 722, 728 (Mo.App. S.D. 2002).

For example, in State v. Bulloch, 838 S.W.2d 510 (Mo.App. W.D. 1992), the trial court had failed to announce whether the defendant's sentences were to run consecutively or concurrently during the oral pronouncement of sentence. The State later requested the court to issue an order nunc pro tunc to reflect that the sentences were to run consecutively rather than concurrently which they would have done by operation of law. Id. The trial court issued an order nunc pro tunc changing the judgment and sentence to show that the sentences were to run consecutively. Id. On appeal, the Western District reversed the trial court's order, holding that "It is not

proper to amend an order nunc pro tunc to correct judicial inadvertence, omission, oversight or error, or show what the court might or should have done as distinguished from what it actually did, or to conform to what the court intended to do but did not do." Id quoting Bruton v. Floyd Withers, Inc.,716 S.W.2d 823 (Mo.App. E.D. 1986). The Court of Appeals then held that although it may have been the trial court's intent to run the sentences consecutively, he did not express that intent either verbally or by written order before the judgment was entered; thus, the trial court could not now correct his oversight nunc pro tunc. Bulloch, supra.

In the case at bar, appellant is challenging the trial court's denial of appellant's request for an order nunc pro tunc to change the trial court's finding of appellant's competency prior to trial. A nunc pro tunc order is not the proper remedy. Appellant is not requesting the trial court to correct some clerical error; rather, appellant is alleging trial court error in its finding of appellant's competency and is requesting that the trial court change its finding of competence to incompetence and set aside appellant's convictions and sentences. This is not a clerical error but a substantive change. A nunc pro tunc is not the proper remedy.

Appellant recognizes that a nunc pro tunc order is used to remedy clerical errors but argues that United States v. Nichelson, 550 F.2d 502, 504 (8th Cir. 1977), United States v. Renfroe, 825 F.2d 763, 767 (3rd Cir. 1987), and State v. Carroll, 543 S.W.2d 48, 51 (Mo.App. Spg. Dist. 1976), support his position that a nunc pro tunc order may be used to "remedy a failure by the Court to properly conduct a process, at time of trial,

for determining mental incompetence to stand trial" (App. Br. 37). However, none of these decisions are relevant because they do not deal with the cognizability of issues in nunc pro tunc actions under Missouri law.

These decisions only stand for the obvious proposition that in a direct appeal, appeals courts have the power to decide whether a trial court erred in denying a defendant's request for a competency hearing. In Renfroe, Nichelson, and Carroll, the defendants each appealed their convictions, claiming as error that the trial court failed to conduct a competency hearing prior to trial, after the defendant's request to do so. In each of the above cases, the appeals courts reversed, finding that based on the record on appeal there were sufficient facts to warrant a competency hearing, that the trial courts erred in failing to conduct a competency hearing prior to trial and ordered the trial courts to conduct a competency hearing to determine whether the defendant was competent prior to trial. Renfroe, supra at 767; Nichelson, supra at 504; Carroll, supra at 51. The Court in Renfroe held that "we must next consider the appropriate remedy for this violation. Given the inherent difficulties in retrospective competency determinations, such nunc pro tunc evaluations are not favored. However, such a determination may be conducted if a meaningful hearing on the issue of the competency of the defendant at the prior proceedings is still possible." Renfroe, supra at 767 (citations omitted). The Court in Nichelson, supra used similar language. In Carroll, supra, the Court stated:

We believe the proper relief in this case is to remand the case to the trial court so that it may hold a hearing to determine whether defendant was competent to stand trial on December 1, 1975 [the time of trial]. Although the United States Supreme Court has recognized the hazards of retrospective competency hearings, there is no per se rule against such. The trial was held only one year ago, and the trial court will have the benefit of its own recollections and the trial transcript in evaluating defendant's competency as of that time. In addition, the psychiatric report from Fulton and presumably the examining doctors will be available to shed some light on the issue.

In view of the foregoing, we reverse the judgment and remand the cause with directions that the trial court hold the 'hearing on the issue' as provided in §552.020(6) and after determination of that issue, then, depending upon its findings, accord defendant allocution, re-sentence him and enter a new judgment or take the action contemplated by par. 7 of §552.020, and such other action as is proper under the circumstances.

Carroll, supra (citations omitted). The Court in Carroll never discussed or referred to a nunc pro tunc.

As can be seen in the language by the appeals courts above, the Courts were not referring to nunc pro tunc orders. Rather, the Courts were using the term "nunc pro tunc" to refer to the ability to conduct a retrospective hearing to determine

competency. "Nunc pro tunc" is defined by Black's Law Dictionary as "having retroactive legal effect" and is Latin for "now for then." The Courts were going to use a competency hearing conducted after trial and appeal-the "now," to determine the defendant's competency prior to trial-the "then." They were not ordering the trial court to correct some clerical error or to even change their finding of competency. Nichelson, Carroll, and Renfroe, do not support appellant's position and do not change the meaning of nunc pro tunc orders in the Missouri Courts.

Moreover, unlike Nichelson, Carroll, and Renfroe, this is not a direct appeal from appellant's conviction where appellant is challenging the trial court's denial of a competency hearing. Appellant was convicted more than seven years ago and has already had his direct appeal and his post-conviction hearing and appeal. Appellant was given a competency hearing prior to trial. The State's psychologist, who evaluated appellant, testified that appellant was competent and appellant's psychologist, who evaluated appellant as well, testified that appellant was not competent. The trial court determined, based on the evidence presented, that appellant was competent to proceed to trial. This is not a case like Nichelson, Carroll, and Renfroe, above, where the trial court failed to conduct a competency hearing prior to trial and the defendant claimed this error in his direct appeal.

No Trial Court Error where Evidence established Appellant's Competence

Although, as discussed above, appellant cites to no authority that he can challenge his competency to stand trial in an independent nunc pro tunc motion years

after his trial, appeal, and post-conviction litigation, even assuming that the trial court had jurisdiction to consider this request for an order nunc pro tunc, the trial court did not err in denying appellant's request because the record at trial established that appellant was competent to proceed.

Appellant was originally charged on October 5, 1992, with three counts of murder in the first degree and the State filed its notice of its intent to seek the death penalty (D.A. L.F. 15-19). In April of 1993, upon an order for a psychiatric evaluation, appellant was found not competent to proceed to trial and was committed to the Director of the Department of Mental Health (D.A. L.F. 3, 42). The trial court found that appellant was diagnosed with major depression, recurrent, severe with probable psychotic features, "to the extent that at this time he does not have the mental capacity to understand the proceedings against him or to assist his attorney in his own defense" (D.A. L.F. 42).

In June of 1994, Fulton State Hospital and the Department of Mental Health filed a Motion to Proceed, stating that "defendant's unfitness to proceed no longer endures and that this individual does have the capacity to understand the proceedings against him and assist in his own defense (D.A. L.F. 44-45). The State filed a "Motion for Finding of Competency to Stand Trial," and appellant requested a separate psychological evaluation to determine competency (D.A. L.F. 49-54).

On February 23, 1995, a hearing was held to determine appellant's competency (D.A. 2/23/95 Tr. 1). The State called Dr. William Robert Holcomb, a forensic

psychologist with Department of Mental Health, who had conducted the psychological evaluation of appellant, which found him competent to proceed to trial (D.A. 2/23/95 Tr. 3-4). Dr. Holcomb saw appellant for the first him in November of 1993, after he was committed to Fulton State Hospital ((D.A. 2/23/95 Tr. 5). Dr. Holcomb spoke with the two examiners who had initially found appellant not competent, spoke with the ward staff, the head nurse, and appellant's treating physician, and also interviewed appellant (D.A. 2/23/95 Tr. 5). At that time, Dr. Holcomb found that appellant continued to be depressed to the point that he was not motivated for treatment or to participate in his own defense, and that he needed further treatment to regain competency (D.A. 2/23/95 Tr. 6).

Appellant's treatment consisted of psychiatric medications, medications for depression, anti-psychotic medication, competency education classes, group therapy, and other activity therapy (D.A. 2/23/95 Tr. 6).

After meeting with appellant in November of 1993, Dr. Holcomb continued to monitor appellant's progress until he conducted the second formal evaluation of appellant on May 30, 1994 (D.A. 2/23/95 Tr. 7). Dr. Holcomb again reviewed all of appellant's medical records, interviewed appellant for approximately an hour and a half, and talked to his therapist, case manager, and nursing staff (D.A. 2/23/95 Tr. 7).

Based on Dr. Holcomb's observations and evaluation, Dr. Holcomb and the staff found that appellant had improved substantially (D.A. 2/23/95 Tr. 8). Dr. Holcomb found that appellant was becoming more active in the various therapies and social

activities; appellant had assumed the job of being in charge of the linens (picking up the dirty ones, returning the clean ones to patients); appellant was eating and sleeping well; other signs of depression that were present when he was first admitted and evaluated were not there; appellant had not been on suicidal precautions for approximately eight months; and appellant played cards with other patients and was more outgoing and friendly with staff (D.A. 2/23/95 Tr. 8-9).

Dr. Holcomb again met with appellant approximately a week before the competency hearing and also met with his therapist and case manger (D.A. 2/23/95 Tr. 9). Based on Dr. Holcomb's personal interviews with appellant, his discussions with the staff at the hospital, and his review of the records, Dr. Holcomb stated that, to a reasonable degree of medical certainty, although appellant still suffered from depression, the depression was in "partial remission" due to the treatment he was receiving (D.A. 2/23/95 Tr. 9). Dr. Holcomb also stated that to a reasonable degree of medical certainty, that appellant understood the proceedings against him and that he was able to assist in his own defense (D.A. 2/23/95 Tr. 10). Dr. Holcomb stated that appellant was "clearly able to articulate what is happening to him in court and the process; that appellant understood the charges, that he did very well in his competency education classes; that he was able to "articulate his own situation and his feelings and what happened to him," that he had demonstrated his ability to communicate; that he had the ability and the capacity for interaction with his attorney and to communicate in a reasonable and rational way, if he chose to do so (D.A. 2/23/95 Tr. 10-11).

Appellant called his own psychologist, Dr. Phillip Johnson, a forensic and clinical psychologist from Louisville, Kentucky (D.A. 2/23/95 Tr. 40-41). Dr. Johnson testified that he conducted an evaluation of appellant on October 29, 1994, spending approximately ten hours with appellant (D.A. 2/23/95 Tr. 45). Dr. Johnson testified that he believed that appellant's depression had existed throughout his life and that it had increased in its intensity as he got older and that the depression that he was suffering from at the time was because of "not only the losses that he has experienced but also because of the legal charges that he is facing" (D.A. 2/23/95 Tr. 49-50).

Dr. Johnson testified that he conducted three tests on appellant and that he found, based on his tests that appellant had depression; that appellant could be very suspicious and guarded; that appellant was a "very non-dominant individual"; that he had a psychological tendency towards alcohol and drug abuse; that he had a cynical outlook on life; that he has auditory hallucinations; and that appellant was very lethargic (D.A. 2/23/95 Tr. 53-62).

Dr. Johnson agreed with Dr. Holcomb that the medication that appellant had been taking was helping appellant improve but added that he believed that appellant needed group counseling (D.A. 2/23/95 Tr. 64). Dr. Johnson also stated that appellant had no will for self-preservation due to his guilt about what transpired and he did not care about what kind of defense was mounted and had no interest in his defense (D.A. 2/23/95 Tr. 67).

Dr. Johnson testified that it was his opinion that appellant could not assist in his defense on the basis of his chronic level of depression, with psychotic features (D.A. 2/23/95 Tr. 68). Dr. Johnson testified that appellant "doesn't understand why any of this is occurring, that he simply needs to go forward and ultimately die" and that he was incompetent to stand trial (D.A. 2/23/95 Tr. 68). Dr. Johnson did admit that appellant did understand "what the judge does and what the prosecutor does and the job of the jury, and so forth, the penalties, the consequences" but that he had "no ability to assist" due to his depression (D.A. 2/23/95 Tr. 68-69).

During cross-examination, Dr. Johnson admitted that appellant was able to answer most of his questions in great detail but stated that he had problems answering questions relating to the criminal charges, by dropping his head, only partially answering questions, trailing off into a mumble, and shaking his head (D.A. 2/23/95 Tr. 75-82). Dr. Johnson opined that appellant was incapable of answering those questions, but admitted that it was possible that appellant "simply didn't want to go into details of what had happened" (D.A. 2/23/95 Tr. 82).

Following the hearing, the trial court found that appellant had the mental fitness to proceed; the trial court vacated the order suspending the criminal proceedings; and the trial court ordered appellant's custody to continue at the hospital for treatment pending trial (D.A. 2/23/95 Tr. 89).

On the morning of trial, appellant's trial counsel stated that although they understood that there was a court order ruling that appellant was competent, counsel

was "not waiving the issue of competency in this case" (D.A. Tr. 55). Counsel did not raise any other concerns about appellant's competency through the remainder of the trial and no further discussion of appellant's competency occurred until after trial. Following trial, appellant's trial counsel again addressed the court when asked if there was any reason why judgment should not be pronounced, counsel stated that they still maintained that appellant was not competent and they were still not waiving that issue (D.A. Tr. 1038). The trial court responded that he had relied on the experts to render his decision (D.A. Tr. 1038). Trial counsel included this claim of error in their motion for new trial (D.A. L.F. 312-330).

"No person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures." Section 552.020.1, RSMo 2000. As similarly expressed by the United States Supreme Court in Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960), the issue is "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and whether he has a rational as well as factual understanding of the proceedings against him." Id., 362 U.S. at 402; see also State v. Wise, 879 S.W.2d 494, 506-507 (Mo. banc 1994), cert. denied 513 U.S. 1093 (1995).

The trial judge is the trier of fact on the question of competency, and evaluations of credibility and demeanor by that court are entitled to deference on appeal:

> **[T]he trial judge's determination of competency is one of fact and must stand unless there is no substantial evidence to support it. . . . In testing sufficiency of the trial court's determination of the defendant's competency, "the reviewing court does not weigh the evidence but accepts as true all evidence and reasonable inferences that tend to support the finding."**

State v. Petty, 856 S.W.2d 351, 353 (Mo.App. S.D. 1993), quoting State v. Wilkins, 736 S.W.2d 409, 415 (Mo. banc 1987), affirmed sub nom. Stanford v. Kentucky, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989). See also State v. Hampton, 959 S.W.2d 444, 450 (Mo. banc 1997).

Appellant attacks the trial court's findings by merely rehashing the evidence, purely from a defense point of view, accompanied by an invitation for this Court to reweigh the evidence and find that the trial court erred in finding appellant competent (App. Br. 29-31). Appellant simply ignores the requirement of deference to the findings of the trial court. If the correct standard of review is applied, no possible dispute exists that the evidence was sufficient to support the trial judge's finding of competency.

Appellant also makes a passing reference that the trial court "never inquired on the matter again until time of sentencing" and that the trial court is required to determine competency at any time during the proceeding if there is reasonable cause to doubt the defendant's competence (App. Br. 20-21, 32-33). However, whereas here, an expert has found the defendant competent to proceed, in order to be entitled to a new

examination or hearing, there must be new circumstances that render the first expert opinion suspect. Woods v. State, 994 S.W.2d 32, 38 (Mo.App. W.D. 1999); see also State v. Hampton, 10 S.W.3d 515, 516-517 (Mo. banc 2000) (absent new evidence of incompetence, defendant who was found competent to stand trial was still competent when he sought to waive his post-conviction remedies); Smith v. Armontrout, 865 F.2d 1502, 1506 (8th Cir. 1988) (once a defendant has been found competent, the State may presume that he remains competent and "may require a substantial threshold showing of insanity merely to trigger the hearing process."); Garrett v. Groose, 99 F.3d 283, 286 (8th Cir. 1996) ("Criminal law presumes that individuals are competent, and a finding of competence, once made, continues to be presumptively correct until some good reason to doubt it is presented.").

Thus, the question is whether there were sufficient facts establishing that there was "reasonable cause" to believe that circumstances had changed and appellant was no longer competent to proceed. A review of the facts in the record establishes that there was no "reasonable cause" to believe that appellant's competency had changed since the initial competency hearing.

Upon review of the transcript, appellant's trial counsel never approached the court alleging that any circumstances had changed with appellant's behavior or demeanor; the record does not reflect any outbursts by appellant or any incidents which would give question to the court regarding appellant's competency; and appellant was able to appropriately respond to the trial court's questions following sentencing (D.A.

Tr. 1037, 1039-1043). The sole evidence that appellant points to which he claims shows that he was incompetent is appellant's statement at sentencing that "[t]here is a lot of things I don't understand about the court" (D.A. Tr. 1043). However, this one comment is not "reasonable cause" for the trial court to question whether appellant's competency had changed since the competency hearing before trial. The mere fact that appellant may not understand some things in the criminal law system does not mean that appellant was incompetent. The record does not reflect any change in appellant's circumstances which would cause the trial court to question appellant's competency and order a new evaluation or hearing. The trial court did not err in finding appellant competent to stand trial and in not ordering a subsequent competency evaluation.

Claim of Ineffective Assistance of Direct Appeal Counsel Non-Cognizable

As well claiming that the trial court erred in finding appellant competent to proceed, appellant also claims, without authority, that he was entitled to a nunc pro tunc order because his direct appeal counsel was ineffective for failing to raise on direct appeal that the trial court erred in finding appellant competent (App. Br. 34-36).

Once again, appellant cites to no authority that he can challenge the effectiveness of his direct appeal counsel in a nunc pro tunc years after his post-conviction litigation. And, as discussed above, a nunc pro tunc is only proper to correct a clerical error. Ineffective assistance of direct appeal counsel is not a clerical error.

In any event, appellant's claim of ineffective assistance of direct appeal counsel must also fail as this claim is not cognizable in this appeal because Supreme Court Rule

29.15 is the exclusive remedy for claims of ineffective assistance of counsel. State v. Wheat, 775 S.W.2d 155, 157-58 (Mo. banc 1989), cert. denied 493 U.S. 1030 (1990); State v. Hurt, 931 S.W.2d 213, 214 (Mo.App. W.D. 1996); State v. Kezer, 918 S.W.2d 874, 877 (Mo.App. E.D. 1996). Appellant has already litigated his Supreme Court Rule 29.15 motion in the motion court, which was denied, and in this Court where the motion court's denial was affirmed.

In any event, as discussed above, the trial court had sufficient evidence to find appellant competent to proceed to trial. Because the trial court's finding of competency was proper, appellate counsel had no reason to raise an alleged error by the trial court in finding appellant competent. If counsel had raised this issue, it would have been denied as meritless. Counsel cannot be ineffective for failing to make a meritless challenge. State v. Taylor, 831 S.W.2d 266, 272 (Mo.App. E.D. 1992).

In arguing that the trial court erred in finding appellant competent and in arguing that appellant's direct appeal counsel was ineffective, appellant cites to an evaluation conducted years after his trial by Dr. Wisner, a psychiatrist, who opined that appellant was incompetent at the time of trial and had been incompetent since that time (App. Br. 33-34). However, Dr. Wisner's evaluation was not before the trial court when it made its determination of competency and was not in front of direct appeal counsel when determining what issues to raise for appeal. Thus, this evaluation cannot be used to charge the trial court or direct appeal counsel with error.

Based on the foregoing, appellant's claim must fail.

CONCLUSION

In view of the foregoing, respondent submits that the denial of appellant's request for an order nunc pro tunc should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b)/Local Rule 360 of this Court and contains _____words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this ____ day of December, 2003.

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_____

IN THE
MISSOURI SUPREME COURT

_____

STATE OF MISSOURI,

Respondent,

v.

ANDREW LYONS,

Appellant.

_____

Appeal from the Circuit Court of Scott County, Missouri
The Honorable William L. Syler, Judge

_____

RESPONDENT'S APPENDIX

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