

OPINION SUMMARY

MISSOURI COURT OF APPEALS EASTERN DISTRICT

CHRISTIAN A. WHITE, Appellant,) No. ED97805
) Appeal from the Circuit Court of
vs.) the City of St. Louis
) Honorable Elizabeth Byrne Hogan
STATE OF MISSOURI, Respondent.) Filed: October 23, 2012

Christian White (Movant) appeals the judgment of the Circuit Court of the City of St. Louis denying his Rule 29.15 motion for post-conviction relief. Movant asserts that the motion court erred in denying, without an evidentiary hearing, his claims that trial counsel was ineffective for failing to: (1) make a record reflecting that Movant was shackled during voir dire and trial; and (2) interview and subpoena a witness.

REVERSED and REMANDED.

Division Four Holds: The record does not refute Movant's claim that his counsel was ineffective for failing to make a record reflecting that Movant was shackled during voir dire and trial. The mere absence of any reference to shackling on the record does not negate Movant's allegation. Dickerson v. State, 269 S.W.3d 889, 893 (Mo. banc 2008). The motion court's reliance on its staff's affidavits and custom and practice was an implicit determination that, at a minimum, a hearing was needed to determine whether shackling occurred, whether it was visible to the jury, and whether it was justified. See id. Likewise, the record does not refute Movant's claim that his counsel was ineffective for failing to interview and subpoena Calvin Williams, the only person present at his arrest other than the police officers who testified at trial. Movant pleaded facts alleging that: (1) counsel should have known of Mr. Williams's existence; (2) counsel could have located Mr. Williams; (3) Mr. Williams was willing to testify; and (4) Mr. Williams would have testified, contrary to the arresting police officers' testimony, that Movant "was never in possession of any drugs in his pants," thus negating an element of the marijuana possession offense. See Vaca v. State, 314 S.W.3d 331, 335-36 (Mo. banc 2010). Because the record does not refute Movant's claims, he is entitled to an evidentiary hearing.

Opinion by: Patricia L. Cohen, J.
Lawrence E. Mooney, P.J., and Kurt S. Odenwald, J., concur.

Attorney for Appellant: Mark Dean

Attorney for Respondent: Mary H. Moore

THIS SUMMARY IS NOT PART OF THE OPINION OF THE COURT. IT HAS BEEN PREPARED FOR THE CONVENIENCE OF THE READER AND SHOULD NOT BE QUOTED OR CITED.