

## **Summary of SC88279, *David Zink v. State of Missouri***

Appeal from the St. Clair County circuit court, Judge William J. Roberts.

**Attorneys:** Zink was represented by William Swift of the public defender's office in Columbia, (573) 882-9855; and the state was represented by Andrew W. Hassell and Shaun J. Mackelprang of the attorney general's office in Jefferson City, (573) 751-3321.

*This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.*

**Overview:** The circuit court overruled the postconviction relief motion of a man convicted of first-degree murder and sentenced to death. In a unanimous decision written by Judge Patricia Breckenridge, the Supreme Court of Missouri affirms the circuit court's judgment. The man failed to show his trial counsel was ineffective, and he fails to show he was prejudiced by any of the alleged errors. The man's claim that his postconviction counsel provided ineffective assistance is categorically unreviewable, and this Court already held, on direct appeal, that the man voluntarily waived his right to counsel during his trial. The circuit court did not err in signing the findings of fact and conclusions of law in the man's case. He fails to show his appellate counsel's failure to raise a meritless claim prejudiced him. Finally, the man's challenge to the constitutional validity of the method of execution is not yet ripe.

**Facts:** The state charged David Zink with first-degree murder for the abduction and death of a woman whose car he had rear-ended in July 2001 near Stafford. Certain individuals suggested that Zink's attorneys arrange for him to undergo a PET (positron emission tomography) scan of his brain prior to trial. After being informed of what the PET scan could show, trial counsel chose to focus his case on other issues, including the testimony of numerous other mental health experts. Zink represented himself during the guilt phase of the trial – held in July 2004 – with assistance from the public defender's office and allowed the public defender's office to represent him during the penalty phase of the trial.

A jury found Zink guilty as charged, and the trial court sentenced him to death in accordance with the jury's recommendation. This Court affirmed his conviction and sentence on direct appeal. *State v. Zink*, 181 S.W.3d 66 (Mo. banc 2005). Zink subsequently sought postconviction relief. For the purpose of his postconviction proceeding, Zink underwent a PET scan in July 2006. The circuit court dismissed some of the claims without an evidentiary hearing, held an evidentiary hearing on the remaining claims and then denied all the claims. Zink appeals.

### **AFFIRMED.**

**Court en banc holds:** (1) Zink failed to show his counsel was ineffective in not obtaining a PET scan of Zink's brain or in not calling a particular medical doctor to testify as to its results during the guilt phase of the trial. Zink failed to show the PET scan results or a doctor's testimony about them was admissible. He did not show there is generally accepted scientific evidence to link the results to any of his diagnosed personality disorders. Further, there is no link between the results and Zink's behavior at the time of the murder. Counsel cannot be ineffective for not introducing

inadmissible evidence during the guilt phase of the trial. Even had it been admissible to confirm Zink's personality disorders, there still is overwhelming evidence – including his calm and articulate description of the crime during his own videotaped confession – that Zink killed with deliberation. As such, the circuit court properly found there is no reasonable probability that the PET scan evidence would have resulted in the jury returning a verdict of not guilty on the first-degree murder charge.

(2) Given the evidence supporting the jury's finding of three aggravating factors, there is no reasonable probability that the PET scan results and a medical doctor's testimony about them would have persuaded the jury to impose a punishment less than death. The mitigating value of the PET scan evidence is limited because, as discussed above, there is no generally accepted scientific link between Zink's brain abnormalities the PET scan showed and his diagnosed personality disorders. Even if the PET scan results did support the personality disorder diagnoses, Zink's cognitive abilities are normal, casting doubt on the mitigating value of the personality disorders. Similarly, the mitigating value of brain abnormality evidence itself, apart from the personality disorder diagnoses, is limited because there was no evidence Zink's intellectual functioning was impaired. Finally, the evidence in support of the aggravating factors was weighty.

(3) The motion court properly refused to find trial counsel ineffective for not challenging Zink's competency to stand trial. The record supports the circuit court's finding – based on the evidence it found credible and when viewed from trial counsel's perspective at the time of trial – that it was reasonable for trial counsel to decide not to request an additional competency examination. The doctor who conducted one competency examination of Zink, ordered before trial, found that, despite certain personality disorders, Zink was competent to stand trial. All the mental health experts testified that Zink had the cognitive ability to understand the function of the prosecutor, his attorneys, the judge and his possible defenses. The record demonstrates Zink was intelligent and interested in formulating strategy about his defense and that, despite disagreements with his counsel about his defense, he did consider and follow other advice of counsel when deciding what defense to pursue and whether to represent himself. In addition, the judge – relying on his own observations during the case – determined that Zink was capable of rationally consulting with trial counsel and that Zink understood the proceedings, his possible defenses, and the significance and consequences of representing himself. The record further supports the circuit court's finding that, even had counsel challenged Zink's competency to stand trial, Zink would not have been found incompetent; therefore, he cannot show prejudice.

(4) Trial counsel was not ineffective for not objecting to the sheriff's requirement that Zink wear a leg restraint concealed under his pants during trial. Although jurors were aware Zink walked with an altered gait, they could not see the restraint. The United States Supreme Court's decision in *Deck v. Missouri*, 544 U.S. 622 (2005), does not aid Zink's claim that his counsel was ineffective. First, that case is limited to the use of visible restraints. Deck visibly was restrained by a belly chain, leg irons and handcuffs, implying to the jury that he was a dangerous man who needed to be restrained. In contrast, Zink was well dressed and his restraint was concealed, and one juror testified he thought Zink looked as though he could have been appearing in court merely on a bad check charge. Second, Zink was tried before *Deck* was decided, and counsel generally will not be held ineffective for failing to anticipate a change in the law.

(5) Zink's counsel was not ineffective in not objecting to certain statements the prosecutor made during the guilt and penalty phase closing arguments, and even assuming, *arguendo*, that counsel should have objected, Zink cannot demonstrate these arguments prejudiced him. By his own admission, Zink's guilt is indisputable. He twice admitted to police that he murdered the victim, he led police to the body, he described his actions and the thought process that resulted in her death. As to the challenged statements made during the penalty phase arguments, two constituted the prosecutor's personal opinion as to whether the death penalty should be imposed, and such opinions are permissible when they are based fairly on the evidence. As to two other statements, arguments of "societal self-defense" are permissible and do not violate a defendant's right to a fair trial because mercy is a valid sentencing consideration. Counsel is not ineffective for not making objections that would lack merit. Zink also fails to demonstrate these statements during the penalty phase closing argument prejudiced him because he cannot show there is a reasonable probability the jury would have recommended a lesser sentence.

(6) Zink's claim that his postconviction counsel provided ineffective assistance of counsel is categorically unreviewable.

(7) Trial counsel was not ineffective for not objecting to testimony and closing argument regarding the autopsy report. The medical examiner who conducted the autopsy was unavailable at trial because he was seriously ill with cancer. A medical examiner testified about the report after reading it, examining autopsy photographs of the victim and discussing the autopsy with the examiner who prepared the report. Such testimony does not violate Zink's right to confront witnesses against him as recognized in *Crawford v. Washington*, 541 U.S. 36 (2004). Zink's trial occurred four months after the *Crawford* decision and, at that time, there was no precedent in Missouri that an autopsy report is testimonial in nature such that the protections of *Crawford* would apply. To date, this Court has not ruled on this issue. Counsel's conduct is measured by the law at the time of the trial. Zink's counsel's performance was consistent with existing law, and he was not required to predict whether autopsy reports would be found to be testimonial in nature and entitled to the protections of *Crawford*.

(8) This Court will not consider Zink's claim that his decision to represent himself was forced on him and, therefore, not voluntary. While he now raises different factual bases for his claim, the underlying claim is the same as what he raised on direct appeal, when this Court held that Zink was competent to waive counsel and that his waiver was given voluntarily, knowingly and intelligently. There are no rare or exceptional circumstances that permit him to raise additional factors he should have raised on direct appeal, and Zink cannot show prejudice from his counsel's failure to challenge Zink's competency to waive counsel. Zink's additional claim – that his counsel should have advised him prior to waiving counsel that the trial court could require him to be shackled and not permit him to approach witnesses if he waived counsel – lacks merit because Zink suffered no prejudice. He was aware he could change his mind and be represented by the public defenders, and the trial court told him he could withdraw his waiver, but he chose to continue to represent himself.

(9) The circuit court did not err in signing the findings of fact and conclusions of law the attorney general's office prepared in Zink's postconviction case. The record supports the parties' proposed findings and, as such, there is no evidence of any constitutional problems.

(10) Zink fails to demonstrate how his appellate counsel's failure to raise a meritless claim – that the penalty phase instructions violated his constitutional rights – would have resulted in a different outcome on direct appeal. This Court, however, previously has recognized that the jury need not find, beyond a reasonable doubt, whether the aggravation evidence warrants death and whether the evidence in mitigation outweighed aggravation. Only findings of fact that increase the penalty for a crime beyond the prescribed statutory maximum must be found by a jury beyond a reasonable doubt.

(11) Zink's claim challenging the constitutional validity of the method of execution is not yet ripe, and the circuit court did not err in denying discovery and a hearing on an unripe claim.