

Summary of SC93118, *Rodney P. McIntosh v. State of Missouri*

Appeal from the St. Louis circuit court, Judge Angela T. Quigless

Argued and submitted October 7, 2013; opinion issued November 26, 2013

Attorneys: McIntosh was represented by Scott Thompson of the public defender's office in St. Louis, (314) 340-7662; and the state was represented by 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: A man convicted of sodomy appeals the circuit court's denial of post-conviction relief without an evidentiary hearing. In a unanimous decision written by Judge George W. Draper III, the Supreme Court of Missouri affirms the circuit court's judgment. As to most of his allegations, the man fails to allege facts proving either that counsel was ineffective or that counsel's acts or inaction prejudiced him. As to his allegation of prosecutorial misconduct, this Court cannot review the claim, which should have been raised on direct appeal.

Facts: Rodney McIntosh was found guilty of first-degree statutory sodomy for inappropriately touching the 3-year-old daughter of a woman with whom he had a close personal relationship. The daughter told her mother, a detective and a forensic interviewer that McIntosh had touched her vagina. After McIntosh's conviction was affirmed on appeal, he sought post-conviction relief, alleging his defense counsel was ineffective for failing to object to certain questions the prosecutor asked during jury selection, to call his roommate as a witness, to offer evidence that the daughter had made a prior sexual abuse allegation; he also alleges the prosecutor made inappropriate comments during closing arguments. The circuit court denied him relief without an evidentiary hearing. McIntosh appeals.

AFFIRMED.

Court en banc holds: (1) McIntosh's motion failed to allege facts not refuted conclusively by the record to support his claims of ineffective assistance of counsel. To be entitled to post-conviction relief on such grounds, he would have to show, by a preponderance of the evidence, that defense counsel failed to meet the two-part test set out by the United States Supreme Court in *Strickland v. Washington* by showing that defense counsel failed to exercise the level of skill and diligence that a reasonably competent counsel would in a similar situation and that this failure prejudiced him. There is a strong presumption in the law that defense counsel's conduct was reasonable and effective, and a decision of trial strategy may be a basis for ineffective counsel only if that decision was unreasonable.

(a) Counsel's decision not to call the roommate as a witness did not rise to the level of ineffectiveness under *Strickland*. Counsel said he did not want to use the roommate as a witness because of concern about some of the things the roommate said during counsel's investigation of him. McIntosh asserts no facts that contradict or rebut counsel's stated

reason, and he cannot demonstrate prejudice because the roommate's testimony would not have provided a viable defense.

(b) The circuit court did not clearly err in denying McIntosh relief for his counsel's failure to object to certain questions the prosecutor asked during jury selection. Most of the questions elicited little or no response when posed, and they are common questions asked during jury trials that have been upheld routinely as an appropriate means of rooting out bias and prejudice that would impair a potential juror's ability to perform his or her duties. As to the question about whether the jury could convict McIntosh based on the sole eyewitness testimony of a 3-year-old child, the diverse responses showed the potential jurors held strong beliefs cutting in favor of both the prosecution and defense. The question, therefore, was appropriate, and defense counsel cannot be ineffective for failing to object to an appropriate line of question. Further, had defense counsel objected, it may have done a disservice to McIntosh given the range of responses offered.

(c) Evidence that the daughter made a prior sexual abuse allegation would have been inadmissible, and defense counsel cannot be found ineffective for failing to offer inadmissible evidence. Before trial, the court sustained the prosecutor's motion to prevent defense counsel from asking any questions or making any suggestions regarding the prior allegation made by the daughter. There is nothing in the transcript about this allegation except the prosecution's and defense's agreement that it had not been proven false. By statute, such allegations are not admissible except under certain limited circumstances, none of which applies here. Further, McIntosh fails to allege facts showing how counsel's failure to offer this inadmissible evidence prejudiced him.

(2) This Court cannot review McIntosh's claim of prosecutorial misconduct for comments made during closing argument, which are not permitted in a post-conviction relief proceeding. Any misconduct was apparent at trial, as any statements the prosecutor made were part of the trial transcript McIntosh had for preparing his direct appeal. As such, the claim cannot be considered under a motion for post-conviction relief. To the extent the circuit court considered the merits of this claim, it did not clearly err in denying the claim without an evidentiary hearing after concluding the prosecutor's conduct was appropriate.