

Summary of SC93371, *Walter Barton v. State of Missouri*

Appeal from the Cass County circuit court, Judge R. Michael Wagner
Argued and submitted February 4, 2014; opinion issued May 13, 2014

Attorneys: Barton was represented by William J. Swift of the public defender's office in Columbia, and the state was represented by Gregory L. Barnes 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 sentenced to death for murder appeals a circuit court's judgment denying him post-conviction relief. In a unanimous decision written by Judge Zel M. Fischer, the Supreme Court of Missouri affirms the judgment. On the record as a whole, the circuit court did not clearly err in its findings and conclusions that all of counsel's trial strategy was reasonable, noting that the man's counsel were both well experienced and well prepared and had specific reasons for the things they did or did not do during the man's trial. It is well-settled law that reasonable choices of trial strategy cannot serve as a basis for a claim of ineffective assistance. Counsel is not ineffective for pursuing one trial strategy to the exclusion of another.

Facts: Following a trial and several retrials, Walter Barton was convicted of first-degree murder for the 1991 stabbing death of Gladys Kuehler in her Ozark, Missouri, home in the trailer park she managed. On the jury's recommendation, Barton was sentenced to death. He subsequently filed a motion for post-conviction relief, alleging his trial counsel provided him ineffective assistance. The circuit court overruled his motion. Barton appeals.

AFFIRMED.

Court en banc holds: After reviewing the record as a whole, the circuit court's findings and conclusions denying Barton post-conviction relief are not clearly erroneous. It is well-settled law that reasonable choices of trial strategy cannot serve as a basis for a claim of ineffective assistance. Counsel is not ineffective for pursuing one trial strategy to the exclusion of another. The circuit court found that all of Barton's counsel's trial strategy was reasonable, noting that Barton's counsel were both well experienced and well prepared and had specific reasons for the things they did or did not do during Barton's trial.

(1) The circuit court did not clearly err in rejecting Barton's claim that his counsel were ineffective in not cross-examining Kuehler's granddaughter with regard to prior statements about when she called Kuehler the day she died and how long they spoke. Mere failure to impeach a witness does not entitle a movant to post-conviction relief. Barton has not met his burden to overcome the presumption that his counsel's decision not to impeach was a matter of trial strategy. Counsel made a strategic decision not to cross-examine the granddaughter because she was emotional, and they were concerned that cross-examining her could have distinct negative consequences.

(2) The circuit court did not clearly err in rejecting Barton's claim that his counsel were ineffective in not calling a particular witness who lived in Kuehler's trailer park. Barton has not overcome the presumption that trial counsel's decision not to call the witness was a matter of reasonable trial strategy, nor has he explained how the witness's testimony would have provided him with a viable defense, given that the witness's testimony would not have been inconsistent with the state's theory about the time when the murder occurred.

(3) Barton fails to overcome the presumption that his counsel's decision not to impeach another witness was a matter of trial strategy. His point that counsel should have impeached the woman, whom he visited before and after the murder, about her prior inconsistencies in describing changes in his mood that day lacks merit because Barton's counsel did impeach the woman using statements she made at one of Barton's previous trials. His point that counsel should have impeached the woman about statements she made at prior proceedings that Barton had been working on a car to explain the length of time he spent washing his hands at her trailer also lacks merit because the woman made the same statement at Barton's most recent trial. To the extent he also claims his counsel should have impeached the woman regarding certain details, counsel explained they did not wish to impeach over every single discrepancy. Further, the lack of impeachment did not prejudice Barton, who failed to prove the impeachment would have made the outcome of his trial different.

(4) The circuit court did not clearly err in finding that Barton received effective assistance of counsel based on counsel's failure to object to the prosecutor's closing argument, which the court also found was not improper. Generally, failure to object during closing argument is not error but rather a function of trial strategy. The evidence presented at the hearing regarding Barton's post-conviction relief motion supports the circuit court's finding. Defense counsel testified they made conscious decisions not to object, believed the prosecutor was not someone who intentionally would try to mislead the jury and did not wish to risk highlighting a statement to the jury by objecting to it. Barton, therefore, has not overcome the presumption that counsel acted pursuant to a proper trial strategy.

(5) The circuit court did not clearly err in finding that Barton's counsel were not ineffective in failing to call a blood spatter expert. At the hearing, defense counsel's testimony demonstrates that they conducted a thorough investigation and specifically decided that calling an expert would be detrimental to Barton's defense. Counsel feared that such testimony could be inconsistent with Barton's story about how the blood got onto his clothing and that, if they hired the expert, the state could use the defense expert to bring out the three different types of stains on Barton's clothing, further undercutting his story. Instead, defense counsel used the cross-examination of the state's expert to attempt to discredit the entire field of blood spatter analysis, calling it a "junk science." On this record, Barton has not carried his burden of proving either that counsel's investigation of blood spatter experts was insufficient or that counsel's decision not to call a blood spatter expert was a matter of trial strategy.

(6) Because Barton failed to raise – in his amended motion for post-conviction relief – his claim that counsel were ineffective for failing to ask the circuit court to declare a mistrial, his claim is waived and cannot be reviewed.

(7) The circuit court did not clearly err in determining that Barton's counsel were not ineffective in their decision not to call certain witnesses in the penalty phase of his trial. The decision of whether to call a witness presumptively is a matter of trial strategy and ordinarily will not support a claim of ineffective assistance of counsel. Barton's trial counsel made a reasonable strategic decision to focus on residual doubt the jury might have concerning whether Barton actually was guilty of the crime and, therefore, avoided presenting witnesses whose testimony would have made it more likely that he did commit the crime. Rather than showing that this strategy was unreasonable, however, Barton provides an alternative trial strategy – that, instead of focusing on residual doubt to argue against the death penalty, counsel should have presented evidence that a childhood brain injury made him prone to violent outbursts and that he suffered from limited intellectual functioning. To support this alternative strategy, Barton suggests his counsel should have called a doctor who had testified at several of Barton's prior proceedings, as well as a number of his family members. Counsel, however, deliberately chose not to call the doctor, whose testimony was not persuasive, and the family members, who had not been in contact with Barton for many years. The proposed witnesses did not have compelling evidence or information that would have altered the trial's outcome, and counsel's strategy was not to recall the same witnesses who had been unpersuasive in the past.

(8) Barton's counsel's closing argument was not an unreasonable trial strategy under all the circumstances, particularly in light of evidence presented by the prosecution that Barton had been involved in two prior incidents involving violent acts against women and of the grisly nature of the murder. In closing argument, Barton's counsel used the testimony and cross-examination of witnesses, suggested the death penalty was morally repugnant and ignored the feelings of three individuals who testified on Barton's behalf, and coupled this individualized evidence with a plea for mercy.

(9) The circuit court did not clearly err in finding there was no deal in which the prosecution allowed a man to have conjugal visits with the man's former girlfriend in exchange for the man testifying against Barton. Because the man did not testify at Barton's final trial, Barton's claimed prejudice is limited to the alleged prosecutorial misconduct. Testimony of the man and his former girlfriend conflicted in a number of significant ways. The circuit court determined neither witness was credible, and this Court defers to the circuit court's superior opportunity to judge the credibility of witnesses. Based on its credibility findings, the circuit court found the man was permitted to have visits with his former girlfriend, but he never was promised conjugal visits. Absent the testimony of these two witnesses, the only potential evidence Barton presented to indicate the alleged deal had taken place were letters the man sent to his former girlfriend. But at best, these letters create only an inference of an intimate relationship. Even assuming reasonable counsel would have investigated this matter further, Barton was not prejudiced because the circuit court determined the alleged prosecutorial misconduct never occurred.

(10) The circuit court did not clearly err in finding that Barton's due process rights were not violated. Under the United States Supreme Court's decision in *Brady v. Maryland*, due process is violated when the prosecutor suppresses evidence favorable to the defendant that is material – i.e. prejudicial – to either a defendant's guilt or punishment. Evidence is material, or prejudicial, only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

(a) The circuit court did not clearly err in finding that, even assuming the state did not disclose them, two prior misdemeanor convictions of Kuehler's granddaughter would not have undermined her credibility seriously and would not have altered the outcome of Barton's trial. The granddaughter's account of what happened when she, Barton and another resident entered in her grandmother's trailer and found her grandmother dead was corroborated by testimony of the other resident and the state's blood spatter expert, minimizing any damage that might have been done to the granddaughter's credibility due to the introduction of her prior misdemeanor convictions. The record, therefore, provides strong support for the conclusion that Barton would have been convicted and sentenced to death even had the granddaughter been impeached with her prior convictions.

(b) The circuit court did not clearly err in finding there was no *Brady* violation with respect to notes contained in the prosecutor's file that Barton alleges reflects a statement by Kuehler's neighbor about when she heard a radio playing in Kuehler's home. Barton failed to prove the notes are actually from an interview with the neighbor or even who wrote the notes. Barton also failed to demonstrate how these notes could have been used to impeach the neighbor or refresh her recollection. Further, Barton already had access to the neighbor's statement that she heard a radio based on her testimony during a 1992 preliminary hearing in his case. Because the defense knew about the evidence at the time of trial, no *Brady* violation occurred.

(11) By failing to raise, in his amended motion for post-conviction relief, his claim that the delay between sentencing and execution violates the Eighth Amendment, Barton has waived this claim. To the extent he argues the delay violates his rights to due process, his claim lacks merit as he cites no cases addressing a delay between sentencing and execution.