

Summary of SC94622, *Richard D. Davis v. State of Missouri*

Appeal from the Jackson County circuit court, Judge Marco A. Roldan
Argued and submitted October 21, 2015; opinion issued April 5, 2016

Attorneys: Davis was represented by Kent Denzel of the public defender's office in Columbia, (573) 777-9977, and the state was represented by Richard A. Starnes 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 murder and sentenced to death appeals the circuit court's judgment denying him post-conviction relief. In a unanimous decision written by Judge George W. Draper III, the Supreme Court of Missouri affirms the judgment. The man's trial counsel were not ineffective for using strategic decisions regarding expert witnesses when the record reflects the man failed to cooperate with his defense team or the mental health experts retained to evaluate him. The man failed to show he would have been found incompetent to proceed had his attorneys presented the testimony of a particular expert. The court did not err in not granting the man relief on his claims that his trial attorneys should have presented testimony from this same expert regarding certain mental health-based defenses. The circuit court also did not err in overruling the man's claims about his trial counsel's preparation of him to testify during his trial.

Facts: Police discovered the body of Marsha Spicer in May 2006 in a shallow grave and identified Richard Davis as a suspect. An investigation ultimately uncovered videotapes showing Davis and his girlfriend repeatedly physically and sexually assaulting Spicer and another woman. One videotape recorded the moment of Spicer's death while being sexually assaulted by Davis' girlfriend. Davis confessed to killing Spicer during the assault and dumping her body in the shallow grave. The state charged Davis with 26 counts, including first-degree murder for Spicer's death and multiple counts of first-degree assault, forcible rape and forcible sodomy of Spicer and the other woman. The jury convicted Davis of all except one assault charge involving the other woman. Following the penalty phase of the trial, the jury found all three aggravating factors had been met – that Davis had one or more serious assaultive convictions, that Spicer's murder involved depravity of mind and that Spicer's murder occurred while Davis was committing rape – and recommended he be sentenced to death. The trial court entered judgment accordingly, and this Court affirmed the judgment on direct appeal. Davis subsequently sought post-conviction relief, which the circuit court denied after an evidentiary hearing. Davis appeals.

AFFIRMED.

Court en banc holds: (1) The circuit court did not clearly err in overruling Davis' claim that his counsel should have called an expert to present his complete psychosocial, psychosexual and trauma history in the penalty phase of trial as mitigating evidence. Trial counsel's selection of which experts to call as witnesses at trial is generally a question of trial strategy and is virtually unchallengeable. An expert Davis suggests should have been called admitted that she recognized issues with Davis' credibility about his history and that she was unable to corroborate his

allegations that he had been sexually abused as a child. The circuit court categorically rejected her testimony, finding she was not a credible witness. This Court defers to the circuit court's credibility determinations and finds the circuit court did not clearly err in reaching this decision. The circuit court also found the psychologist who did testify on Davis' behalf was more than qualified to diagnose Davis and offer his opinions at trial. Trial counsel were not ineffective for failing to shop for a more favorable expert who would present evidence that was cumulative to that presented at trial. Further, trial counsel were not ineffective for employing strategic decisions regarding expert witnesses when the record reflects Davis failed to cooperate with the defense team or the mental health experts retained to evaluate him.

(2) The circuit court did not err in overruling Davis' claim that his counsel should have presented an expert's testimony to challenge Davis' competency to stand trial. The expert whose testimony Davis suggests should have been presented, however, did not diagnose Davis with any mental diseases or disorders before trial that would indicate Davis was incompetent to stand trial and concluded he could not determine beyond a reasonable degree of medical certainty that Davis was not competent to stand trial. After trial, he apparently changed his opinion, but the circuit court concluded this proposed expert was not credible as a witness for multiple reasons, especially to the extent the expert was relying on Davis to provide information underlying his opinion. Davis fails to demonstrate he would have been found incompetent to stand trial.

(3) The circuit court did not clearly err in overruling Davis' claim that his trial counsel should have called a particular expert during the guilt phase of trial to support a diminished capacity defense. Counsel's failure to present this defense, however, was reasonable trial strategy. The pretrial assessments of two experts – including the one whose testimony Davis suggests should have been presented – found there was no evidence of diminished capacity. Further, one of Davis' trial attorneys testified that, given the overwhelming weight of evidence – including the fact that Spicer's murder was captured on videotape – he did not think the jury would believe a diminished capacity defense. Trial counsel will not be found ineffective for choosing to pursue one reasonable trial strategy to the exclusion of another.

(4) The circuit court did not clearly err in overruling Davis' claim that his trial counsel should have presented expert testimony during the penalty phase that Davis had bipolar disorder. The circuit court, however, explicitly rejected the proposed expert's opinion that Davis suffered from bipolar disorder because the expert's resources, methodology and reliance on Davis as a credible reporter of his symptoms were suspect and not credible. Further, the record shows trial counsel gathered as much mitigating evidence as they could because they believed Davis' case was better tried in the penalty phase due to the overwhelming weight of evidence demonstrating his guilt. Counsel specifically investigated whether Davis suffered from any mental illness that would serve as a statutory mitigating factor, and both the proposed expert and another expert told counsel prior to trial that Davis did not. In light of the evidence presented in support of the death penalty, there is no reasonable probability the proposed testimony would have resulted in a different sentence.

(5) The circuit court did not err in not granting Davis relief on his claim that his trial counsel should have called a particular expert during the guilt phase to support a defense of not guilty by reason of mental disease or defect. The proposed expert, however, said he did not have enough

information before trial to determine whether that was a viable defense, and neither that expert nor another found any evidence in examining Davis before trial that he had any mental disease or defect that would relieve him of responsibility for Spicer's murder. Further, this Court defers to the circuit court's findings that the proposed expert was not a credible witness.

(6) The circuit court did not clearly err in overruling Davis' claim that his trial counsel should have called the same particular expert during the guilt phase to support a defense of either involuntary intoxication or diminished capacity based on particular medication Davis was prescribed at the time of the crimes. The expert told counsel before trial that the medication defense was not viable because Davis planned the crimes and his girlfriend also was involved in them. This Court will defer to the circuit court's finding that the proposed expert's later testimony about his discussions with defense counsel was not credible. Further, the record shows Davis did not present evidence at the evidentiary hearing to support his claim that he was involuntarily intoxicated at the time of Spicer's murder. Counsel was not ineffective for not calling the proposed expert after fully investigating the issue.

(7) The circuit court did not clearly err in overruling Davis' claims that his trial counsel should have prepared him to testify in both the guilt and penalty phases of the trial. The record reflects that, in the guilt phase, the trial court examined Davis extensively about his right to testify, and he ultimately stated he did not want to testify because his attorneys would not ask the questions he wanted them to ask. Further, Davis was not prejudiced by not testifying in the guilt phase. He did not explain what the substance of his testimony would have been, and there is ample evidence in the record that Davis' lack of cooperation with his attorneys prevented them from formulating appropriate topics for questioning. During the penalty phase, Davis testified against the advice of counsel. The record shows Davis was allowed time to provide additional questions to his attorneys before testifying. Further, Davis was not prejudiced by his testimony during the penalty phase. He did not explain how his testimony would have been different or what specific questions he wished his counsel would have asked him.