

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

COMPLETE TITLE OF CASE:

CLIFTON A. GABAREE, JR.

Appellant

v.

STATE OF MISSOURI

Respondent

DOCKET NUMBER **WD69551**

DATE: August 11, 2009

Appeal From:

Circuit Court of Jackson County, MO
The Honorable Thomas C. Clark, Judge

Appellate Judges:

Division Two: Thomas H. Newton, C.J., James M. Smart, Jr., and Mark D. Pfeiffer, JJ.

Attorneys:

Laura G. Martin, Kansas City, MO

Counsel for Appellant

Attorneys:

Shaun J. Mackelprang, Jefferson City, MO

Counsel for Respondent

**MISSOURI APPELLATE COURT OPINION SUMMARY
MISSOURI COURT OF APPEALS, WESTERN DISTRICT**

CLIFTON A. GABAREE, JR., Appellant, v.
STATE OF MISSOURI, Respondent

WD69551

Jackson County

Before Division Two Judges: Thomas H. Newton, C.J., James M. Smart, Jr., and Mark D. Pfeiffer, JJ.

Clifton Gabaree, Jr., filed a Rule 29.15 post-conviction relief motion, claiming he was entitled to a new trial because his trial counsel provided ineffective assistance. He contended that trial counsel was ineffective for failing to object to improper bolstering and propensity evidence and for failing to impeach one of the victims. He claimed that he was prejudiced by trial counsel's omissions because there is a reasonable probability that the outcome would have been different but for trial counsel's deficient performance. The circuit court denied relief without an evidentiary hearing. Gabaree appeals.

REVERSED AND REMANDED.

Division Two Holds:

Gabaree argues that the circuit court erred in denying his motion without an evidentiary hearing because he alleged facts and not conclusions that (1) his trial counsel provided ineffective assistance by failing to object to certain evidence and failing to impeach a victim, and (2) that each omission prejudiced him. To be entitled to an evidentiary hearing on a claim of ineffectiveness of counsel, Gabaree had to alleged facts, which the record did not refute, that: (1) trial counsel failed to demonstrate the customary skill and diligence of a reasonable attorney, and (2) counsel's deficient performance prejudiced him. If the records and files conclusively show no entitlement to relief, the circuit court's decision will be upheld.

Our review of Gabaree's motion for post-conviction relief does not conclusively show that he is not entitled to relief. The record did not refute his allegations of trial counsel's omissions, and neither the records nor the files conclusively show trial counsel's omissions to be reasonable trial strategy. Nor did the record refute his allegations of prejudice or conclusively show that he was not prejudiced by these omissions. Gabaree was thus entitled to an evidentiary hearing. The circuit court clearly erred in denying the motion without an evidentiary hearing. Therefore, we reverse and remand for an evidentiary hearing on Gabaree's claims.

Opinion by: Thomas H. Newton, C. J.

August 11, 2009

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