

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**WILLIAM D. CONE,
APPELLANT**

vs.

**STATE OF MISSOURI,
RESPONDENT**

DOCKET NUMBER WD70432

DATE: APRIL 27, 2010

Appeal from:

Lafayette County Circuit Court
The Honorable Dennis A. Rolf, Judge

Appellate Judges:

Division Two: Joseph M. Ellis, P.J., Victor C. Howard and James E. Welsh, JJ.

Attorneys:

Rebecca L. Kurz, for Appellant

Daniel McPherson, for Respondent

MISSOURI APPELLATE COURT OPINION SUMMARY

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

WILLIAM D. CONE, APPELLANT

v.

STATE OF MISSOURI, RESPONDENT

WD70432

Lafayette County, Missouri

Before Division Two Judges: Joseph M. Ellis, P.J., Victor C. Howard and Cynthia L. Martin, JJ.

William D. Cone appeals from the denial of his Rule 29.15 motion for post-conviction relief following an evidentiary hearing.

AFFIRMED.

Division Two holds:

- (1) Cone was tried and convicted under the statutory definition of “incapacitated” in § 556.061(13) which was in effect when he had sexual intercourse with his victims. Contrary to Cone’s contentions, the trial court did not overrule existing law or otherwise expand the statutory language. Any claim of a breach of due process was, therefore, meritless and trial and appellate counsel cannot be deemed ineffective for failing to raise such a challenge.
- (2) The record supports the motion court’s finding that trial counsel conducted a reasonable investigation seeking to find a psychiatric expert to testify on behalf of the defense and acted competently in deciding to proceed to trial. The mere fact that the defendant was able to later obtain an expert that would have provided an opinion supporting the defense does not establish that counsel could have found such an expert at the time of trial or that they were ineffective for failing to do so.
- (3) Even if *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d (1978) applies to challenges to arrest warrants, Cone failed to identify any evidence that would have been suppressed as fruit of his arrest warrant and, therefore, established no prejudice that could have resulted from counsel’s failure to raise such a challenge. Moreover, nothing in the affidavit indicates that the doctors or the special prosecutor applied a definition of incapacitated different from the applicable statutory language.

Opinion by: Joseph M. Ellis, Judge

Date: April 27, 2010

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