No. 85272

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IN THE
MISSOURI SUPREME COURT

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ANDREW LYONS,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

_____

Appeal from the Circuit Court of Scott County, Missouri
The Honorable W.H. Winchester, III, Judge

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RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from the denial of a Motion to Reopen Appellant's Supreme Court Rule 29.15 proceedings, in the Circuit Court of Scott County, Missouri, the Honorable W.H. Winchester, III presiding. The convictions sought to be vacated were for two counts of murder in the first degree, §565.020, RSMo 2000, and one count of involuntary manslaughter, §565.024, RSMo 2000, for which the sentences were death for each count of murder, and seven years for involuntary manslaughter in the custody of the Missouri Department of Corrections. Because sentences of death were imposed, the Missouri Supreme Court has exclusive appellate jurisdiction. Article V, §3, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Andrew Lyons, was convicted of two counts of murder in the first degree, § 565.020.1, RSMo 2000, and one count of involuntary manslaughter, § 565.024.1, RSMo 2000[1]. State v. Lyons, 951 S.W.2d 584, 587 (Mo. banc 1997), cert. denied, 522 U.S. 1130 (1998). The facts were summarized by this Court as follows:

> **As of September 1992, Andrew Lyons and Bridgette Harris had been living together for three years in Cape Girardeau, Missouri. Their eleven-month old son, Dontay, lived with them, as did Bridgette's two children from a previous relationship, seven-year-old Demetrius and four-year-old Deonandrea. Approximately one week before the murders, Lyons told a longtime friend that he was having problems with Bridgette. Lyons told the friend that "he just felt like killing" and that the "best thing for [Bridgette] to do . . . was to get killed . . . ." Around the same time,**

[1]In this appeal, "D.A. L.F." will designate the direct appeal legal file; "D.A. Tr." will designate the direct appeal transcript; "PCR Tr." will designate the post-conviction transcript; "PCR L.F." will designate the post-conviction legal file; and "L.F." will designate this legal file.

Bridgette moved out of the house she shared with Lyons. She and the three children moved in with Bridgette's mother, Evelyn Sparks.

Two days before the murders, Lyons drove his truck alongside Bridgette and her older sister while they were walking on a sidewalk. He stopped the truck and pulled forward the passenger's seat, revealing a shotgun. The women ran away and reported the incident to the police.

The day before the murders, Lyons told another friend that Evelyn was interfering with his relationship with Bridgette and that "she should leave them alone or he would kill her." That night, he told Bridgette's best friend that "I am going to end up killing [Evelyn]." Around midnight, Lyons told yet another friend that he was going to shoot Evelyn with his shotgun and "catch a train out of here."

On the morning of Sunday, September 20, 1992, Lyons went to Evelyn's house, where Bridgette was staying. He and Bridgette argued. Lyons left, went back to his house, and grabbed his shotgun and a duffel bag packed with clothes and ammunition. Shortly after 10 a.m., Lyons returned to Evelyn's house. Evelyn was in the kitchen. Bridgette, Demetrius, Deonandrea, and Dontay were downstairs in the basement. Demetrius heard a loud noise from upstairs and went to see what had happened. On his way, he passed Lyons coming down the stairs carrying a shotgun. Demetrius saw his grandmother lying on the kitchen floor and

ran to his room. In the basement, Lyons shot Dontay once and shot Bridgette once.

Lyons then drove to the house where his half-brother, Jerry DePree, was staying. Lyons asked DePree to follow him to the house of his friends John and Gail Carter so that he could drop off his truck. Upon arriving at the Carters's house, Lyons went in to talk to Gail. He told her that he had killed Bridgette and Evelyn and that he had shot Dontay by accident. Lyons went back outside and transferred the shotgun and duffel bag from his truck to DePree's car. Lyons got into DePree's car and told him to drive away. DePree asked him what was wrong, and Lyons told him that he had shot some people and that the police would probably be looking for him. DePree dropped Lyons off at Trail of Tears State Park. Lyons left his shotgun in DePree's car.

Back at Evelyn Sparks's house, another of Evelyn's daughters arrived around 11 a.m. She found her mother on the kitchen floor and called the police. The police discovered Bridgette and Dontay in the basement. All three were dead. Evelyn died from massive hemorrhaging and tissue destruction caused by a gunshot wound above her left hip. Bridgette died from massive hemorrhaging and tissue destruction caused by a gunshot wound below her right shoulder. Dontay died from extensive brain tissue damage secondary to a contact gunshot wound to the left eye.

When DePree learned later in the day that Evelyn, Bridgette, and Dontay had been shot to death, he turned over Lyons's shotgun to the police. The shell casing found in the shotgun and the two shell casings found at Evelyn's house matched the shell casings of cartridges fired from the shotgun by the State's firearms examiner.

Lyons was arrested in the afternoon and confessed to shooting Evelyn, Bridgette, and Dontay that morning. At trial, the jury found Lyons guilty of murder in the first degree for the deaths of Evelyn Sparks and Bridgette Harris and guilty of involuntary manslaughter for the death of Dontay Harris. The jury could not agree on a punishment for the murder of Evelyn Sparks. The jury recommended a sentence of death for the murder of Bridgette Harris and seven years incarceration for the death of Dontay Harris. The trial court sentenced Lyons to death for the murder of Evelyn Sparks and accepted the jury's recommendations as to the deaths of Bridgette and Dontay.

Id. at 587-588. This Court affirmed appellant's convictions and sentences on August 19, 1997. Id.

On December 26, 1997, appellant filed his pro se motion for post-conviction relief (PCR L.F. 1, 5-10). On March 30, 1998, appointed counsel filed an amended motion and requested an evidentiary hearing (PCR L.F. 1, 16-99).

An evidentiary hearing was held on August 12, 1999 (PCR Tr. 2). Thereafter, on December 30, 1999, the motion court issued findings of fact and conclusions of law denying appellant's motion (PCR L.F. 3, 143-221).

On appeal, this Court affirmed the denial of appellant's post-conviction motion. Lyons v. State, 39 S.W.3d 32 (Mo. banc 2001), cert. denied, 534 U.S. 976 (2001).

Nearly two years later, on March 17, 2003, appellant filed a motion, entitled "Request for Leave of Court to Reopen Rule 29.15 Motion due to Abandonment of Counsel Concerning Issues of Ineffective Appellate Assistance of Counsel and Mental incompetence at Time of Trial, Supplemental Petition Presenting the Additional Grounds and Requesting Relief, and Request for Hearing, with Suggestions in Support" (L.F. 1-45)[2]. The motion court entered it's judgment and order, denying appellant's motion (L.F. 46). Appellant appeals that judgment.

In the meantime, on June 3, 2003, appellant filed a petition for writ of habeas corpus in this Court alleging that he had received ineffective assistance of direct appeal counsel for failing to raise the claim that he was incompetent at trial; that he was abandoned by his post-conviction counsel because post-conviction counsel failed to

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[2] Appellant filed a second motion on the same day, entitled, "Request for Order Nunc Pro Tunc Granting Mr. Lyons New Trial due to Mental Incompetence at Time of Trial, with Suggestions in Support." This was also denied by the motion court. Appellant is appealing that denial as well. See Lyons v. State, SC85269.

raise this issue in his Rule 29.15 motion; and that he was not competent during his direct appeal. Lyons v. Roper, SC85319. This Court denied appellant's writ on August 26, 2003. Id.

ARGUMENT

THE MOTION COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO REOPEN HIS SUPREME COURT RULE 29.15 PROCEEDINGS BECAUSE APPELLANT WAS NOT ABANDONED BY HIS POST-CONVICTION COUNSEL IN THAT ALTHOUGH COUNSEL DID NOT RAISE ONE PARTICULAR CLAIM, COUNSEL FILED AN AMENDED MOTION RAISING OVER TWENTY CLAIMS, COUNSEL REQUESTED AND CONDUCTED AN EVIDENTIARY HEARING, AND APPEALED THE MOTION COURT FINDINGS. APPELLANT'S CLAIM THAT COUNSEL ABANDONED HIM IS MERELY A CLAIM OF INEFFECTIVE ASSISTANCE OF POST-CONVICTION COUNSEL WHICH IS CATEGORICALLY UNREVIEWABLE.

Appellant claims that the motion court erred in denying his motion to reopen his Supreme Court Rule 29.15 proceedings (App. Br. 14). Appellant claims that he was abandoned by his post-conviction counsel because counsel failed to raise a claim of ineffective assistance of direct appeal counsel for failing to raise on appeal that the trial court erred in finding him competent to stand trial (App. Br. 14).

Trial Court's Jurisdiction in Entertaining Motion to Reopen Proceedings

Nearly two years after this Court affirmed the denial of appellant's post-conviction motion, appellant filed a motion to reopen his Rule 29.15 proceedings in the trial court, claiming abandonment of post-conviction counsel (L.F. 1). The trial court denied appellant's request to reopen his proceedings (L.F. 46).

Claims of abandonment of post-conviction counsel have normally been brought during the pendency of the Rule 29.15 proceedings, either at the motion court level or during the appeal. See Sanders v. State, 807 S.W.2d 493 (Mo. banc 1991) (appellant raised claim of abandonment on appeal from denial of post-conviction motion); Luleff v. State, 807 S.W.2d 495 (Mo. banc 1991) (appellant raised claim of abandonment on appeal from denial of post-conviction motion); Vicory v. State, 81 S.W.3d 725 (Mo.App. S.D. 2003) (Appellant raised claim of abandonment in the motion court during the pendency of the Rule 29.15 proceedings and also raised the claim on appeal).

However, this Court recognized in State ex. rel. Nixon v. Jaynes, 63 S.W.3d 210 (Mo. banc 2001), that a defendant may move to reopen his original motion under Rule 29.15 in the sentencing court, provided that the original motion was timely filed, in order to raise a claim of abandonment of post-conviction counsel. In Jaynes, the movant was denied post-conviction relief without a hearing in 1988, and no appeal was taken. Id. Ten years later, Jaynes sought habeas corpus relief, alleging that his post-conviction counsel had a conflict of interest and had abandoned him during his post-conviction proceeding. Id. at 213. Although this Court denied Jaynes habeas relief, this Court stated that nothing in its decision precluded Jaynes from seeking Rule 29.15 relief in the motion court based on abandonment. Id. at 217. This Court stated that the movant "may wish to move to reopen his original motion under Rule 29.15 in the sentencing court, provided that his original motion was timely filed." Id. at 217-218; see also Brown v. State, 66 S.W.3d 721 (Mo. banc 2002); Daugherty v. State, 116 S.W.3d

616, 617 -618 (Mo.App. E.D. 2003) ("Under Jaynes, courts where original post-conviction motions were filed have jurisdiction to consider motions like Daugherty's, which seek to reopen post-conviction proceedings to address claims of abandonment")[3].

With the exception of abandonment claims, respondent has failed to find any cases where a circuit court has jurisdiction to entertain a motion to reopen a Supreme Court Rule 29.15 proceeding after the judgment has become final. That makes sense because the special purpose of Supreme Court Rule 29.15 is to achieve finality in criminal proceedings. State v. Owsley, 959 S.W.2d 789 (Mo. banc 1997), citing, White

[3]Unlike Daugherty and Jaynes, however, appellant did file an appeal from his original 29.15 proceeding which this Court affirmed. Appellant offers no explanation why he did not or could not have raised his allegation of abandonment in that appeal. Appellant was represented by different counsel on appeal from his Rule 29.15 motion than at the hearing level. Appellant does not claim that his post-conviction appellate counsel abandoned him or was ineffective.

v. State, 939 S.W.2d 887, 893 (Mo. banc 1997) ("While courts are solicitous of post-conviction claims that present a genuine injustice, that policy must be balanced against the policy of bringing finality to the criminal process"). In the interest of finality, courts do not allow second amended motions addressing new claims, the courts require specific factual pleadings to receive an evidentiary hearing, and require the motions to be filed timely. White, supra. If movants were allowed to continually file motions to reopen their 29.15 proceedings, there would never be finality of conviction. In the case of abandonment by post-conviction counsel, however, an exception applies because where counsel has abandoned the movant, the movant has not been given an opportunity to proceed under Rule 29.15 and there is no record of whether counsel complied with the rule. Luleff, supra ("Underlying the limitation of the scope of review contained in subsection (j) of Rule 29.15 is the assumption that the motion court and appointed counsel will comply with all provisions of the rule. Absent some performance by appointed counsel, the motion court cannot determine whether the pro se pleading can be made legally sufficient by amendment or whether there are other grounds for relief known to movant but not included in the pro se motion").

Thus, in the case at bar, as appellant claimed that he was abandoned by post-conviction counsel, the trial court had jurisdiction to entertain this motion.

Appellant was not Abandoned by Post-Conviction Counsel

Although the trial court had jurisdiction to entertain appellant's motion, the trial court did not err in denying appellant's motion to reopen the proceedings because

the record refutes any claim appellant was abandoned by his post-conviction counsel. Appellant claims that his post-conviction counsel abandoned him by failing to raise an additional claim in his amended post-conviction motion (App. Br. 21-24). Specifically, appellant claims that his post-conviction counsel should have alleged that his direct appeal counsel was ineffective for failing to claim that the trial court erred in finding him competent to stand trial after a pre-trial evidentiary hearing (App. Br. 21-24).

Under Supreme Court Rule 29.15, claims of ineffective assistance of post-conviction counsel are categorically unreviewable as there is no constitutional right to counsel in a post-conviction proceeding. Barnett v. State, 103 S.W.3d 765 (Mo. banc 2003), cert. denied, 124 S.Ct. 172 (2003); Winfield v. State, 9 S.W.3d 732 (Mo. banc 2002); Krider v. State, 44 S.W.3d 850, 859 (Mo.App. W.D. 2001). The only exception to this rule applies when the record shows that a movant has been abandoned by his appointed post-conviction counsel. Id.; Morgan v. State, 8 S.W.3d 151, 153 (Mo.App. S.D. 1999). There are only two recognized forms of abandonment under Rule 29.15: 1) when post-conviction counsel takes no action on behalf of the movant and therefore it appears that the movant has been deprived of a meaningful review of his post-conviction claims, Luleff v. State, 807 S.W.2d 495, 498 (Mo. banc 1991); and 2) where the record reflects that post-conviction counsel has determined that there is a sound basis for amending the pro se motion but fails to file the amended motion in a timely manner. Sanders v. State, 807 S.W.2d 493 (Mo. banc 1991); Krider, supra; Moore v. State, 934 S.W.2d 289, 291 (Mo. banc 1996). Forms of abandonment have not been extended. State

v. Ervin, 835 S.W.2d 905 (Mo. banc 1992), cert. denied, 507 U.S. 954 (1993). Where, as in the case at bar, the record shows that counsel filed a timely amended motion, the record refutes any claim of abandonment. State v. Givens, 851 S.W.2d 754, 765 (Mo.App. E.D. 1993).

The fact that post-conviction counsel did not raise a potentially viable claim in the amended motion is not "abandonment" but rather an uncognizable claim of ineffective assistance of post-conviction counsel. Id. (Appellant's claim that post-conviction counsel failed to include an allegation in the amended motion was not abandonment but rather a claim of ineffective assistance of post-conviction counsel). The fact that the amended motion may have had "poor content and structure" does not mean that appellant was abandoned. State v. Owsley, 959 S.W.2d 789, 799 (Mo. banc 1997), cert. denied, 525 U.S. 882 (1998); Wright v. State, 14 S.W.3d 612, 613 (Mo.App. E.D. 1999).

In the case at bar, appointed counsel filed a timely amended motion on appellant's behalf raising over twenty claims and conducted an evidentiary hearing on appellant's behalf calling approximately thirteen witnesses. The record shows that counsel did not abandon appellant and the trial court was not required to conduct a hearing on abandonment. Thus, because post-conviction counsel did not abandon appellant, the motion court did not err in denying appellant's motion to reopen his Supreme Court Rule 29.15 proceedings.

Post-Conviction Counsel Not Ineffective for Failing to Raise Claim

of Ineffective Assistance of Direct Appeal Counsel

Even assuming that appellant's claim was reviewable, his claim must fail as it is without merit. Appellant alleges that his post-conviction counsel failed to raise the claim that his direct appeal counsel was ineffective for failing to raise, on appeal, that the trial court erred in finding that he was competent to proceed to trial (App. Br. 21-24).

By affidavit, attached to appellant's motion to reopen, appellant's post-conviction counsel states that he failed to raise the issue in the post-conviction motion as he "did not recognize the merits of this claim at the time [he] wrote the motion" (L.F. 37). Appellant's direct appeal counsel, by affidavit as well, states that he did not recall whether he "simply missed the issues regarding competency" or if he "considered and rejected raising the issues" on appeal (L.F. 33)[4].

Even assuming that direct appeal counsel would have raised this issue on appeal, it would have failed as it was a meritless claim.

Appellant was originally charged on October 5, 1992, with three counts of murder in the first degree and the State filed its notice of its intent to seek the death

[4]These affidavits were not admitted into evidence but were attached to appellant's pleadings. There was no stipulation to the admission of these pleadings. State v. Zimmerman, 886 S.W.2d 684 (Mo.App. S.D. 1994) ("[I]n the absence of a stipulation of the parties, an affidavit is not to be treated as evidence").

penalty (D.A. L.F. 15-19). In April of 1993, upon an order for a psychiatric evaluation, appellant was found not competent to proceed to trial and was committed to the Director of the Department of Mental Health (D.A. L.F. 3, 42). The trial court found that appellant was diagnosed with major depression, recurrent, severe with probable psychotic features, "to the extent that at this time he does not have the mental capacity to understand the proceedings against him or to assist his attorney in his own defense" (D.A. L.F. 42).

In June of 1994, Fulton State Hospital and the Department of Mental Health filed a Motion to Proceed, stating that "defendant's unfitness to proceed no longer endures and that this individual does have the capacity to understand the proceedings against him and assist in his own defense (D.A. L.F. 44-45). The State filed a "Motion for Finding of Competency to Stand Trial," and appellant requested a separate psychological evaluation to determine his competency (D.A. L.F. 49-54).

On February 23, 1995, a hearing was held to determine appellant's competency (D.A. 2/23/95 Tr. 1). The State called Dr. William Robert Holcomb, a forensic psychologist with Department of Mental Health, who had conducted the psychological evaluation of appellant, which found him competent to proceed to trial (D.A. 2/23/95 Tr. 3-4). Dr. Holcomb saw appellant for the first time in November of 1993, after he was committed to Fulton State Hospital ((D.A. 2/23/95 Tr. 5). Dr. Holcomb spoke with the two examiners who had initially found appellant not competent, spoke with the ward staff, the head nurse, and appellant's treating physician, and also interviewed appellant

(D.A. 2/23/95 Tr. 5). At that time, Dr. Holcomb found that appellant continued to be depressed to the point that he was not motivated for treatment or to participate in his own defense, and that he needed further treatment to regain competency (D.A. 2/23/95 Tr. 6).

Appellant's treatment consisted of psychiatric medications, medications for depression, anti-psychotic medication, competency education classes, group therapy, and other activity therapy (D.A. 2/23/95 Tr. 6).

After meeting with appellant in November of 1993, Dr. Holcomb continued to monitor appellant's progress until he conducted the second formal evaluation of appellant on May 30, 1994 (D.A. 2/23/95 Tr. 7). Dr. Holcomb again reviewed all of appellant's medical records, interviewed appellant for approximately an hour and a half, and talked to his therapist, case manager, and nursing staff (D.A. 2/23/95 Tr. 7).

Based on Dr. Holcomb's observations and evaluation, Dr. Holcomb and the staff found that appellant had improved substantially (D.A. 2/23/95 Tr. 8). Dr. Holcomb found that appellant was becoming more active in the various therapies and social activities; appellant had assumed the job of being in charge of the linens (picking up the dirty ones, returning the clean ones to patients); appellant was eating and sleeping well; other signs of depression that were present when he was first admitted and evaluated were not there; appellant had not been on suicidal precautions for approximately eight months; and appellant played cards with other patients and was more outgoing and friendly with staff (D.A. 2/23/95 Tr. 8-9).

Dr. Holcomb again met with appellant approximately a week before the competency hearing and also met with his therapist and case manger (D.A. 2/23/95 Tr. 9). Based on Dr. Holcomb's personal interviews with appellant, his discussions with the staff at the hospital, and his review of the records, Dr. Holcomb stated that, to a reasonable degree of medical certainty, although appellant still suffered from depression, the depression was in "partial remission" due to the treatment he was receiving (D.A. 2/23/95 Tr. 9). Dr. Holcomb also stated that to a reasonable degree of medical certainty appellant understood the proceedings against him and that he was able to assist in his own defense (D.A. 2/23/95 Tr. 10). Dr. Holcomb stated that appellant was "clearly able to articulate what is happening to him in court and the process; that appellant understood the charges; that he did very well in his competency education classes; that he was able to "articulate his own situation and his feelings and what happened to him;" that he had demonstrated his ability to communicate; that he had the ability and the capacity for interaction with his attorney and to communicate in a reasonable and rational way, if he chose to do so (D.A. 2/23/95 Tr. 10-11).

Appellant called his own psychologist, Dr. Phillip Johnson, a forensic and clinical psychologist from Louisville, Kentucky (D.A. 2/23/95 Tr. 40-41). Dr. Johnson testified that he conducted an evaluation of appellant on October 29, 1994, spending approximately ten hours with appellant (D.A. 2/23/95 Tr. 45). Dr. Johnson testified that he believed that appellant's depression had existed throughout his life and that it had increased in its intensity as he got older and that the depression that he was suffering

from at the time was because of "not only the losses that he has experienced but also because of the legal charges that he is facing" (D.A. 2/23/95 Tr. 49-50).

Dr. Johnson testified that he conducted three tests on appellant and that he found, based on his tests that appellant had depression; that appellant could be very suspicious and guarded; that appellant was a "very non-dominant individual"; that he had a psychological tendency towards alcohol and drug abuse; that he had a cynical outlook on life; that he had auditory hallucinations; and that appellant was very lethargic (D.A. 2/23/95 Tr. 53-62).

Dr. Johnson agreed with Dr. Holcomb that the medication that appellant had been taking was helping appellant improve but added that he believed that appellant needed group counseling (D.A. 2/23/95 Tr. 64). Dr. Johnson also stated that appellant had no will for self-preservation due to his guilt about what had transpired and he did not care about what kind of defense was mounted and had no interest in his defense (D.A. 2/23/95 Tr. 67).

Dr. Johnson testified that it was his opinion that appellant could not assist in his defense on the basis of his chronic level of depression, with psychotic features (D.A. 2/23/95 Tr. 68). Dr. Johnson testified that appellant "doesn't understand why any of this is occurring, that he simply needs to go forward and ultimately die" and that he was incompetent to stand trial (D.A. 2/23/95 Tr. 68). Dr. Johnson did admit that appellant did understand "what the judge does and what the prosecutor does and the job of the

jury, and so forth, the penalties, the consequences" but that he had "no ability to assist" due to his depression (D.A. 2/23/95 Tr. 68-69).

During cross-examination, Dr. Johnson admitted that appellant was able to answer most of his questions in great detail but stated that he had problems answering questions relating to the criminal charges, which was indicated by dropping his head, only partially answering questions, trailing off into a mumble, and shaking his head (D.A. 2/23/95 Tr. 75-82). Dr. Johnson opined that appellant was incapable of answering those questions, but admitted that it was possible that appellant "simply didn't want to go into details of what had happened" (D.A. 2/23/95 Tr. 82).

Following the hearing, the trial court found that appellant had the mental fitness to proceed; the trial court vacated the order suspending the criminal proceedings; and the trial court ordered appellant's custody to continue at the hospital for treatment pending trial (D.A. 2/23/95 Tr. 89).

On the morning of trial, appellant's trial counsel stated that although they understood that there was a court order ruling that appellant was competent, counsel was "not waiving the issue of competency in this case" (D.A. Tr. 55). Counsel did not raise any other concerns about appellant's competency throughout the remainder of the trial and no further discussion of appellant's competency occurred until after trial. Following trial, appellant's trial counsel again addressed the court regarding appellant's competency; when asked if there was any reason why judgment should not be pronounced, counsel stated that they still maintained that appellant was not

competent and they were still not waiving that issue (D.A. Tr. 1038). The trial court responded that he had relied on the experts to render his decision (D.A. Tr. 1038). Trial counsel included this claim of error in their motion for new trial (D.A. L.F. 312-330).

"No person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures." Section 552.020.1, RSMo 2000. As similarly expressed by the United States Supreme Court in Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960), the issue is "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and whether he has a rational as well as factual understanding of the proceedings against him." Id. 362 U.S. at 402; see also State v. Wise, 879 S.W.2d 494, 506-507 (Mo. banc 1994), cert. denied 513 U.S. 1093 (1995).

The trial judge is the trier of fact on the question of competency, and evaluations of credibility and demeanor by that court are entitled to deference on appeal:

> **[T]he trial judge's determination of competency is one of fact and must stand unless there is no substantial evidence to support it. . . . In testing sufficiency of the trial court's determination of the defendant's competency, 'the reviewing court does not weigh the evidence but accepts as true all evidence and reasonable inferences that tend to support the finding.'**

State v. Petty, 856 S.W.2d 351, 353 (Mo.App. S.D. 1993), quoting State v. Wilkins, 736 S.W.2d 409, 415 (Mo. banc 1987), affirmed sub nom. Stanford v. Kentucky, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989). See also State v. Hampton, 959 S.W.2d 444, 450 (Mo. banc 1997).

Appellant attacks the trial court's findings by merely rehashing the evidence, purely from a defense point of view, accompanied by an invitation for this Court to reweigh the evidence and find that his direct appeal counsel should have challenged the trial court's finding on appeal (App. Br. 29-31). Appellant simply ignores the requirement of deference to the findings of the trial court. If the correct standard of review is applied, no possible dispute exists that the evidence was sufficient to support the trial judge's finding of competency.

The circumstances of this case are indistinguishable from those in Hampton, supra and Wise, supra. In both of those cases, the trial court was required to resolve diametrically contradictory claims by mental health experts regarding the mental status of the defendant. Hampton, 959 S.W.2d at 449; Wise, 879 S.W.2d at 507. In both cases, the trial court made a determination of relative credibility between the experts, and also relied upon its observation of the statements and demeanor of the defendant. Hampton, 959 S.W.2d at 449; Wise, 879 S.W.2d at 507. As was stated in Hampton, "[w]e will not reweigh the evidence and second-guess this factual conclusion supported, as it is, by the expert testimony presented to the trial court and the court's own observation of the defendant's behavior." Id. at 450.

The trial court's decision that appellant was competent to proceed to trial was supported by the evidence, despite appellant's diagnosis, and despite the conflicting testimony of the expert witnesses. In reviewing a case in which the trial court was faced with conflicting evidence regarding the defendant's capacity to stand trial, it must be remembered that it is within the trial court's province to resolve the conflict. Petty, supra at 354; State v. Strauss, 779 S.W.2d 591, 594 (Mo.App. E.D. 1989).

Thus, in the case at bar, because the trial court had sufficient evidence presented to find appellant competent to proceed to trial, direct appeal counsel had no reason to raise an alleged error by the trial court in finding appellant competent. If counsel had raised this issue, it would have been denied as meritless. Counsel cannot be ineffective for failing to make a meritless challenge. State v. Taylor, 831 S.W.2d 266, 272 (Mo.App. E.D. 1992).

Appellant also makes a passing reference that the trial court "never inquired on the matter again until time of sentencing" and that the trial court is required to determine competency at any time during the proceeding if there is reasonable cause to doubt the defendant's competence (App. Br. 27-28, 33). However, whereas here, an expert has found the defendant competent to proceed, in order to be entitled to a new examination or hearing, there must be new circumstances that render the first expert opinion suspect. Woods v. State, 994 S.W.2d 32, 38 (Mo.App. W.D. 1999); see also State v. Hampton, 10 S.W.3d 515, 516-517 (Mo. banc 2000) (absent new evidence of incompetence, defendant who was found competent to stand trial was still competent

when he sought to waive his post-conviction remedies); Smith v. Armontrout, 865 F.2d 1502, 1506 (8th Cir. 1988) (once a defendant has been found competent, the State may presume that he remains competent and "may require a substantial threshold showing of insanity merely to trigger the hearing process."); Garrett v. Groose, 99 F.3d 283, 286 (8th Cir. 1996) ("Criminal law presumes that individuals are competent, and a finding of competence, once made, continues to be presumptively correct until some good reason to doubt it is presented.").

Thus, the question presented for direct appeal counsel's determination of whether to raise this issue on appeal was whether there were sufficient facts establishing that there was "reasonable cause" to believe that circumstances had changed and appellant was no longer competent to proceed. A review of the facts in the record establishes that there was no "reasonable cause" to believe that appellant's competency had changed since the pre-trial competency hearing.

Upon review of the transcript, appellant's trial counsel never approached the court alleging that any circumstances had changed with appellant's behavior or demeanor; the record does not reflect any outbursts by appellant or any incidents which would give question to the court regarding appellant's competency; and appellant was able to appropriately respond to the trial court's questions following sentencing (D.A. Tr. 1037, 1039-1043). The sole evidence that appellant points to which he claims shows that he was incompetent is appellant's statement at sentencing that "[t]here is a lot of things I don't understand about the court" (D.A. Tr. 1043). However, this one comment

is not "reasonable cause" for the trial court to question whether appellant's competency had changed since the competency hearing before trial and does not reflect that appellant was not competent. The record does not reflect any change in appellant's circumstances which would cause the trial court to question appellant's competency and would support a claim for direct appeal counsel to raise on appeal. Direct appeal counsel was not ineffective and appellant's post-conviction counsel did not abandon him by not raising this claim in his Rule 29.15 motion.

Finally, appellant cites to a new psychological evaluation conducted by Dr. Wisner, a psychiatrist from the University of Kansas, in which Dr. Wisner concluded that appellant had been incompetent during his trial (App. Br. 34). However, Dr. Wisner's conclusions were not in front of the trial court during the competency hearing; the conclusions were not part of the trial record in which direct appeal counsel could have used in determining what issues to raise for appeal; and the conclusions were not before post-conviction counsel in determining what issues to raise in the Rule 29.15 motion. Dr. Wisner's evaluations and conclusions are not relevant to this appeal.

Because direct appeal counsel was not ineffective for failing to raise a claim regarding appellant's competency, appellant's post-conviction counsel cannot be deemed ineffective and cannot be considered as abandoning appellant by not raising this meritless claim in the post-conviction motion. The trial court did not err in denying appellant's motion to reopen his Supreme Court Rule 29.15 proceedings.

Based on the foregoing, appellant's claim must fail.

CONCLUSION

In view of the foregoing, respondent submits that the denial of appellant's motion to reopen his Rule 29.15 proceedings should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b)/Local Rule 360 of this Court and contains _____words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this ____ day of December, 2003.

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_____

IN THE
MISSOURI SUPREME COURT

_____

ANDREW LYONS,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

_____

Appeal from the Circuit Court of Scott County, Missouri
The Honorable William L. Syler, Judge

_____

RESPONDENT'S APPENDIX

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