

IN THE SUPREME COURT OF MISSOURI

BRUCE WATSON,)	
)	
Appellant,)	
)	
v.)	No. SC95665
)	
STATE OF MISSOURI,)	
)	
Respondent.)	

APPEAL FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
TWENTY-SECOND JUDICIAL CIRCUIT
THE HONORABLE MARGARET M. NEILL, JUDGE

APPELLANT'S SUBSTITUTE REPLY BRIEF

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JURISDICTIONAL STATEMENT

Appellant, Mr. Bruce Watson (“Mr. Watson”) adopts the jurisdictional statement set out in Appellant’s Substitute Brief, Statement and Argument.

STATEMENT OF FACTS

Mr. Watson adopts the statement of facts set out in Appellant’s Substitute Brief, Statement and Argument.

REPLY POINT

The motion court clearly erred and violated Mr. Watson’s right to due process of law and effective assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, §§ 10, 14, and 18(a) of the Missouri Constitution in denying Mr. Watson’s Rule 29.15 motion for post-conviction relief claim without an evidentiary hearing because he alleged facts, not refuted by the record, which, if true, warranted relief, in that Mr. Watson alleged that he was denied his rights to due process of law and effective assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 10, 14 and 18(a) of the Missouri Constitution when his trial counsel, Mr. Srikant Chigurupati, was ineffective for failing to submit a lesser-included offense instruction for the class B felony of robbery in the second degree, pursuant to § 569.030, and for failing to submit a lesser-included offense instruction for the class C felony of stealing, pursuant to either § 570.030.3(1), RSMo. Cum. Supp. 2008 or § 570.030.3(2), RSMo. Cum. Supp. 2008 in relationship to Count I – the class A felony of robbery in the first degree (§ 569.020) and Mr. Watson alleged that trial counsel’s ineffectiveness prejudiced him, in that, but for trial counsel’s ineffectiveness, there is a reasonable probability that the outcome of Mr. Watson’s trial would have been different.

Strickland v. Washington, 466 U.S. 668 (1984);

State v. Santillan, 948 S.W.2d 574 (Mo. banc 1997);

State v. Pond, 131 S.W.3d 792 (Mo. banc 2004);

State v. Jackson, 433 S.W.3d 390 (Mo. banc 2014);

Rule 29.15;

U.S. Const., Amend. V;

U.S. Const., Amend VI;

U.S. Const., Amend. XIV; and,

Mo. Const., Art. I, §§ 10, 14, and 18.

REPLY ARGUMENT

Preservation

Mr. Watson adopts the Preservation Statement set out in Appellant's Substitute Brief, Statement and Argument, and further states as follows:

The State suggests that the history of post-conviction litigation in Missouri refutes the ABA standard's position that having a time limit for post-conviction review is unsound (Respondent's Substitute Brief at 11-12). The State may not think much of the ABA's standards of practice, but the United States Supreme Court does. "We have long recognized the '[p]revailing norms of practice as reflected in the ABA standards and the like . . . are guides to determining what is reasonable . . .'" *Padilla v. Kentucky*, 550 U.S. 356, 366 (2010) (citing *Strickland v. Washington*, 466 U.S. 668, 688 (2010)). The State cites a twenty-seven year old case to suggest that the time limits found in Rule 29.15 are perfectly reasonable (Respondent's Substitute Brief, 11-12). Putting aside the age of the policy behind the State's position and the question of whether that contemporary policy and practice support such an interest, the State's position fails to reconcile the needs of the courts with the constitutional rights of Mr. Watson and other individuals similarly situated. The State's position fails to explain how a mandatory and virtually inexcusable statute of limitations on postconviction remedies in Missouri even attempts to balance the State's interests of avoiding the litigation of stale postconviction claims with the constitutional rights of a person ill-advised by a sentencing court about his post-conviction filing deadline.

Additionally, the State reads the ABA Standards out of context. The American Bar Association's standard on postconviction remedies has other provisions touching on issues related to the statute of limitations of postconviction remedies that seek to protect the State from prejudice from inmates seeking to gain an advantage by waiting to litigate their post-conviction claims. *See* ABA Standard 22-2.4(b) (barring persons with tenable or meritorious claims from litigating those claims if they deliberately or inexcusably withhold presentation of those claims until the occurrence of an event that he or she believes prevents successful reprosecution or correction of the vitiating error; calling such an action of abuse of process and suggesting that it should be an affirmative defense to the postconviction claims) and ABA Standard 22-2.4(c) (dealing with stale postconviction claims). In short, the unconfirmed need of the State to avoid litigating stale postconviction claims can be balanced against the constitutional rights of Mr. Watson and others imilarly situated persons with a less draconian statute of limitations on post-conviction actions than the mandatory and virtually inexcusable one currently utilized. The State's position may very well lead to additional litigation for the State of Missouri. "... [A] right or privilege, claimed under the Constitution or laws of the United States was distinctly and sufficiently pleaded and brought to the notice of a state court, is itself a federal question, in the decision of which this court, on writ of error, is not concluded by the view taken by the highest court of the state. *Carter v. State of Texas*, 177 U.S. 442, 447 (1900) (citing *Neal v. Delaware*, 103 U.S. 370, 396 (1880)). Generally, civil litigants filing medical malpractice claims in Missouri get two years to file their initial pleadings. § 516.105, RSMo. Cum. Supp. 2006. Other civil litigants in

Missouri get five years to file their initial pleadings. § 516.120. *Pro Se* postconviction litigants get 90 days to file their initial pleading (i.e. their Form 40) if they appeal, and arguably have less ability and resources to do so due to their incarceration. Rule 29.15(b).

Additionally, the State argues in its Substitute Brief that Mr. Watson did not do everything he could reasonably do to timely file his motion or that he was prevented from timely filing by the “active interference” of a third party (Respondent’s Substitute Brief at 13-14). As a general rule of thumb, it is difficult to meet a deadline when one is unaware of the existence of that deadline, as Mr. Watson alleged. It is even more difficult to ignore an incorrect method of calculating that deadline when someone of authority (in this case, the sentencing judge) gives you the wrong information to calculate that deadline, as Mr. Watson alleged.

Argument

Mr. Watson adopts the Argument section set out in Appellant’s Substitute Brief, Statement and Argument, and further states as follows:

Stealing is a lesser-included offense to both robbery in the first degree and robbery in the second degree. *See State v. Coleman*, 2014 WL4815414 (Mo. App. W.D. 2014); *Patterson v. State*, 110 S.W.3d 896 (Mo. App. W.D. 2003); *State v. Ide*, 933 S.W.2d 849 (Mo. App. W.D. 1996); *State v. Williams*, 313 S.W.3d 656 (Mo. banc 2010); *Brooks v.*

State, 51 S.W.3d 909 (Mo. App. W.D. 2001).¹ It is here, based on the facts elicited at Mr. Watson's trial, and as alleged by Mr. Watson in Appellant's amended motion.

After conceding that the question may be better answered after an evidentiary hearing, the State alleges in its Substitute Brief that it is apparent from the record that trial counsel employed an "all-or-nothing strategy" in defending against the robbery (Respondent's Substitute Brief at 22-23). The State is correct; the question would be best answered by the testimony of trial counsel at an evidentiary hearing, which is exactly what the motion court denied Mr. Watson, and is exactly what Mr. Watson requests from this Court. The State believes that trial counsel's conduct during closing argument demonstrates that he was pursuing an "all-or-nothing" defense when he conceded that the State proved Mr. Watson was guilty of robbery in the second degree beyond a reasonable doubt, but maintained that Mr. Watson was not guilty of robbery in the first degree (Respondent's Substitute Brief at 23-24). (Tr. 352-353). Nevertheless, this Court should still reverse and remand for an evidentiary hearing. The record does not resolve in any fashion an essential question of fact as to exactly what trial strategy, if any, compelled trial counsel to concede that his client was guilty of robbery in the second degree, but simultaneously not request a lesser-included instruction for that offense. Further, the State's suggestion that the record refutes Mr. Watson's claim leaves another question of law and fact open as to whether the trial strategy used by trial counsel, if trial counsel

¹ This Court's holding in *State v. Bazell*, 2016 WL4444392 (August 23, 2016) may further complicate this issue.

used any, was reasonable under the circumstances. The question remains whether trial counsel's failure to request a lesser-included instruction was reasonable given the fact that trial counsel conceded that Mr. Watson's guilt of something, albeit an uncharged lesser-included offense.

CONCLUSION

WHEREFORE, based on his argument portion of Mr. Watson's opening brief and reply brief, Mr. Watson requests that this Court reverse the motion court's ruling and order and requests that this court remand his case for an evidentiary hearing, so that he may further develop his claim that trial counsel was ineffective for failing to submit a lesser-included offense instruction for either robbery in the second degree or felony stealing.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(g) and Special Rule 361, I hereby certify that on this 30th day of December, 2015, a true and correct copy of the foregoing brief was served via the e-filing system to the Court of Appeals for the Eastern District and opposing counsel, Mr. Shaun Mackelprang, Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102 and was also scanned for viruses with Systematic Endpoint Protection software and found virus-free. In addition, pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the page limitations of Special Rule 360 and is also complaint with Rule 84.06(b). This brief was prepared with Microsoft Word for Windows, uses a double spaced, Times New Roman 13 point font, and does not exceed Twenty-Five Percent of 15,500 words, or 3,875 words. The word-processing software identified that this brief contains **1,999** words.

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