In the Missouri Court of Appeals
Eastern District

DIVISION TWO

CLETUS GREENE,	)	ED105282
	)	
Appellant,	)	Appeal from the Circuit Court of
	)	Cape Girardeau County
v.	)	16CG-CC00055
	)	
STATE OF MISSOURI,	)	Honorable Michael E. Gardner
	)	
Respondent.	)	Filed: December 19, 2017

Cletus Greene ("Movant") appeals from the denial, without an evidentiary hearing, of his Rule 29.15 post-conviction relief motion. Movant contends his counsel was ineffective in: (I) failing to file and argue a pre-trial motion to suppress evidence, and (II) failing to raise on direct appeal a variance between Movant's charging document and the jury instructions. We affirm.

BACKGROUND

In May 2014, officers working with the drug task force in Jackson, Missouri responded to an anonymous tip reporting drug activity at the Townhouse Inn. Detective Bobby Sullivan and Officer Chris Newton approached the second-floor balcony where Movant was standing with Matthew Robinson. Movant was smoking a cigarette. Officer Newton spoke with Movant, who initially gave him a false name. Since Detective Sullivan personally knew Movant, he addressed him by his real name and asked if he "had anything on him." Movant responded, "Yes, I've got

marijuana." The officers handcuffed Movant and searched him. They found marijuana and a pack of cigarettes in his pocket. These items were placed in Movant's hat, transported to an adjacent room, and secured by members of the task force.

Officer Mike Alford arrived on the scene some time later. He entered the adjacent room and examined the items seized from Movant, Robinson, and others. Officer Alford opened the pack of cigarettes from Movant's pocket and discovered something "secured or taped to the top of the flip top on the inside." He removed the object and examined it. It was a small, plastic baggie containing an off-white substance. Officer Alford performed a field test, which indicated the substance was methamphetamine. This was later confirmed by a laboratory test.

The State charged Movant, by way of information, with one count of the class C felony of possession of a controlled substance, in violation of Section 195.202 RSMo Cum. Sup. 2014, alleging that "on or about May 13, 2014 . . . [Movant] possessed *amphetamine*, a controlled substance, knowing of its presence and nature" (emphasis added). The information was amended twice thereafter, each time listing amphetamine as the controlled substance.

However, at trial, the State's case in chief for the charge was for possession of methamphetamine. The State presented testimony from Detective Sullivan, Officer Alford, and Officer Newton, each of whom testified to the presence of a methamphetamine pill in the cigarette pack found in Movant's pocket. The results of the field and laboratory tests, each of which confirmed the presence of methamphetamine and the methamphetamine pill itself were introduced into evidence. Movant did not object at any time during trial to the State's introduction of evidence of methamphetamine rather than amphetamine.

Jury Instruction 5 stated, in relevant part:

> If you find and believe from the evidence beyond a reasonable doubt: First, that on or about May 13, 2014 . . . [Movant] possessed methamphetamine, a controlled substance . . . then you will find [Movant] guilty under Count I.

Movant did not object to the submission of Jury Instruction 5, which also included reference to methamphetamine rather than amphetamine. The jury found Movant guilty, and the court sentenced him to a total of ten years imprisonment. Movant's convictions were affirmed on direct appeal. *See State v. Greene*, 476 S.W.3d 309 (Mo. App. E.D. 2015). Movant filed a motion for post-conviction relief, which was denied without evidentiary hearing. The present appeal followed.

DISCUSSION

Standard of Review

Appellate review of a Rule 29.15 proceeding is limited to a determination of whether the motion court's findings and conclusions are clearly erroneous. Rule 29.15(k). The findings and conclusions of the motion court are clearly erroneous if after review of the entire record, we are left with the definite and firm impression that a mistake has been made. *Mallow v. State*, 439 S.W.3d 764, 768 (Mo. banc 2014). The judgment should be affirmed if sustainable on any grounds. *Swallow v. State*, 398 S.W.3d 1, 3 (Mo. banc 2013).

Evidentiary Hearing

To be entitled to an evidentiary hearing, a movant must plead facts, not conclusions, which if true would warrant relief. These allegations must not be refuted by the record, and the matters complained of must have resulted in prejudice to the movant's defense. *Greer v. State*, 406 S.W.3d 100, 104 (Mo. App. E.D. 2013). The circuit court may deny an evidentiary hearing if any of these elements is missing. *Id*.

Ineffective Assistance of Counsel

The Sixth Amendment guarantee of effective assistance of counsel "is simply to ensure that criminal defendants receive a fair trial." *Strickland v. Washington*, 466 U.S. 668, 689 (1984). To prove counsel was ineffective, a movant must demonstrate counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id*. at 687. Counsel will be considered ineffective if he or she failed to conform his or her representation to the degree of skill, care, and diligence of a reasonably competent attorney under similar circumstances, and the movant was prejudiced as a result. *Sanders v. State*, 738 S.W.2d 856, 857–58 (Mo. banc 1987).

To prevail upon the first prong of *Strickland*, counsel's representation must have fallen below "an objective standard of reasonableness." 466 U.S. at 688. This must be established by a preponderance of the evidence. *See* Rule 29.15(i). This burden is a heavy one, as "the movant must overcome a strong presumption that counsel provided competent assistance." *Deck v. State*, 68 S.W.3d 418, 425-426 (Mo. banc 2002).

As to the second prong, "an error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Deck*, 68 S.W.3d at 426 (quoting *Strickland*, 466 U.S. at 691). Rather, the movant must demonstrate a reasonable probability exists that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Deck*, 68 S.W.3d at 426. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*.

Claims concerning the ineffective assistance of appellate counsel are "essentially the same as that employed with trial counsel; a movant is expected to show both a breach of duty and resulting prejudice." *Murray v. State*, 511 S.W.3d 442, 445-46 (Mo. App. E.D. 2017).

Point I—Motion to Suppress Would Not Have Succeeded on the Merits

In his first point, Movant argues Trial Counsel was ineffective in failing to file and argue a motion to suppress the methamphetamine evidence as "fruit of the poisonous tree" pursuant to the Fourth Amendment. Movant claims the arresting officers unreasonably detained and searched him without valid legal justification. Movant maintains the court would have ruled favorably on his motion to suppress, and therefore a reasonable probability exists that the result of the trial would have been different absent this evidence. According to Movant, he was thereby deprived of his right to effective assistance of counsel, right to due process of law, and right to fair trial, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution. We disagree.

To prove ineffective assistance of counsel for failing to litigate a Fourth Amendment claim, Movant must prove both that his Fourth Amendment claim was meritorious and there was a reasonable probability the verdict would have been different if the allegedly inadmissible evidence had been excluded. *Gray v. State*, 378 S.W.3d 376, 381 (Mo. App. E.D. 2012). Counsel will not be deemed ineffective for failing to object to admissible evidence. *Id*. At 381-82.

The Fourth Amendment guarantees the right of people to be free from unreasonable searches and seizures. *State v. Peery*, 303 S.W.3d 150, 153-54 (Mo. App. W.D. 2010). Warrantless searches and seizures are *per se* unreasonable unless the search and seizure fits into a well-established exception. *Id*.

One exception allows police to stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion, supported by articulable facts, that criminal activity may be afoot. *Gray*, 378 S.W.3d at 382 (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). Whether the

officer has a reasonable suspicion is determined based upon common sense judgment and inferences about human behavior. *Id*. Officers are allowed to "draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person." *Id.*

In the present case, as previously discussed, officers working with the drug task force in Jackson, Missouri responded to an anonymous tip reporting drug activity at the Townhouse Inn. Officers encountered Movant who initially gave a false name. When Detective Sullivan, who knew Movant personally, addressed him by his correct name, he asked if Movant "had anything on him." Movant replied he had marijuana. In addition, Movant was standing with Matthew Robinson, who officers observed was in possession of a firearm. A reasonable suspicion of criminal activity was supported by these facts. Thus, the officers' interaction with Movant qualified as a stop pursuant to *Terry*, and the search and seizure of the items in Movant's possession was not unreasonable. *See State v. Lovelady*, 432 S.W.3d 187, 192 (Mo. banc 2014) (officers made initial investigatory stop of defendant based on their observations that he appeared to be carrying a handgun in the waistband of his pants, even though the gun was actually a toy); *State v. Ford*, 445 S.W.3d 113, 122 (Mo. App. E.D. 2014) (where defendant provided officer with information which the officer recognized as false, *Terry* stop was justified).

In addition, a person may be searched incident to his arrest. *State v. Waldrup*, 331 S.W.3d 668, 676 (Mo. banc 2011). Pursuant to a lawful arrest, a search may be performed of the arrestee's person, as well as the area "within his immediate control," which has been defined as the area from which he might gain possession of a weapon or destructible evidence. *Id*. (citing *Chimel v. California*, 395 U.S. 752, 763 (1969)). At the time of Movant's arrest, officers seizing personal effects from an arrestee could search those items incident to arrest even if the effect was

not in the arrestee's immediate control. *See, e.g., State v. Greene*, 785 S.W.2d 574, 577 (Mo. App. W.D. 1990) ("It is also plain that searches and seizures that could be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention."); *see also State v. Ellis*, 355 S.W.3d 522, 524 (Mo. App. E.D. 2011).

We note that in January 2016, the Missouri Supreme Court abrogated the rule from *Greene* and other such cases allowing for searches of personal effects not in the arrestee's immediate control. In *State v. Carrawell*, 481 S.W.3d 833 (Mo. banc 2016), the Court clarified that incident to arrest, officers may lawfully search the arrestee's person and the area within his immediate control, and limited that phrase to only the area from within which he might gain possession of a weapon or destructible evidence. *Id*. at 838 (citing *Arizona v. Gant*, 556 U.S. 332, 339 (2009). However, in *State v. Hughes*, ED 104884, 2017 WL 4782226 at *3 (Mo. App. E.D. Oct. 24, 2017), this Court held that despite the rule announced in *Carrawell*, the warrantless search of an arrestee's personal effects, conducted while the effects were out of his immediate control, did not require reversal. In so holding, this Court reasoned that at the time of the search, legal precedent authorized the officer to search an arrestee's personal effects as a search incident to arrest even if the effects were not in the immediate control of the arrestee. *Id*. (quoting *Carrawell*, 481 S.W.3d at 846). Thus, *Carrawell* only applies to those searches and seizures occurring after *Carrawell* was decided. *Id*.

As previously noted, the search of Movant's personal effects, particularly the cigarette pack found in Movant's pocket which contained the methamphetamine, occurred when the effects were no longer in his immediate control. However the search, which occurred incident to his arrest in May 2014, was conducted well before the decision in *Carrawell*. At the time, the search of the cigarette pack taken from Movant's pocket was permissible under the *Greene* line

of cases, even though the cigarette pack was outside Movant's immediate control. Therefore, the search was incident to his arrest, and not a violation of his Fourth Amendment rights. *See Hughes*, ED 2017 WL 4782226 at *3.

As a result of the foregoing, Movant has failed to demonstrate counsel was ineffective for failing to file a motion to suppress the methamphetamine evidence. The record refutes Movant's claim of error, and the motion court did not err in denying Movant's claim for post-conviction relief without an evidentiary hearing.

Point I is denied.

Point II—No Manifest Injustice in Variance Between Information and Jury Instructions

In his second point on appeal, Movant contends Appellate Counsel was ineffective for failing to raise the issue of a variance between the charging document listing the controlled substance as amphetamine and the jury instructions listing the controlled substance as methamphetamine on appeal. Movant argues a reasonably competent appellate counsel would have raised the issue on appeal and such challenge would have been successful. Movant asserts he was deprived of his right to effective assistance of counsel, right to due process of law, and right to a fair trial, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution.

A defendant may not be charged with one form of an offense and convicted of another. *State v. Lee*, 841 S.W.2d 648, 650 (Mo. banc 1992). However, a variance between the form of the offense charged by the information and the jury instruction does not universally mandate reversal. *State v. Lemons*, 294 S.W.3d 65, 72 (Mo. App. S.D. 2009). To determine whether reversal is warranted, it is necessary to determine whether the variance between the information and the jury instruction was material and whether it was prejudicial to the substantive rights of

the defendant. *Id*. A variance is material if it affects whether the accused received adequate notice from the information of the offense charged. *Id*.; *see also State v. Darden*, 263 S.W.3d 760, 763 (Mo. App. W.D. 2008) (a variance between the information and instruction is fatal when it "prevents the defendant from receiving adequate notice of the crime with which he is charged"). A variance is prejudicial if it affects the defendant's ability to adequately defend against the charges presented in the information and given to the jury in its instructions. *Lemons*, 294 S.W.3d at 72; *State v. Lee*, 841 S.W.2d 648, 650 (Mo. banc 1992).

As previously noted, Movant was charged by way of information with one count of the class C felony of possession of a controlled substance, in violation of Section 195.202 RSMo Cum. Sup. 2014. The state specifically charged Movant with possession of amphetamine. The information was amended twice thereafter, each time listing amphetamine as the controlled substance. However, at trial, the State's case in chief concerned the possession of methamphetamine, including testimony from officers present at the scene concerning the presence of methamphetamine found in the cigarette pack found in Movant's pocket. Testimony was also presented concerning the field and laboratory tests of the substance, which confirmed the presence of methamphetamine, and the methamphetamine pill itself was introduced into evidence. In addition, Jury Instruction 5 stated, in relevant part:

> If you find and believe from the evidence beyond a reasonable doubt: First, that on or about May 13, 2014 . . . [Movant] possessed methamphetamine, a controlled substance . . . then you will find [Movant] guilty under Count I.

Movant did not object to the introduction of the evidence of methamphetamine, nor did he object to Jury Instruction 5.

Although it is somewhat confusing as to why the State would fail to correct the named substance in the charging document when it revised the document two times prior to trial, Movant

cannot show any manifest injustice resulting from the variance in the information and the jury instruction. There is nothing in the record to indicate Movant lacked the requisite notice that the State sought to prove possession of methamphetamine rather than amphetamine as charged in the information. No evidence was submitted concerning amphetamine, whereas "meth" or methamphetamine was mentioned over 100 times at trial. Movant thoroughly cross examined the State's witnesses regarding the methamphetamine found in the cigarette pack, and his trial strategy centered on creating reasonable doubt as to the ownership of the cigarettes rather than contesting the nature of the substance in the pill found in the pack. Movant cannot demonstrate he suffered a manifest injustice from the State's use of the term amphetamine in the charging document. Thus, a claim of error on direct appeal regarding the variance in the information and the jury instruction would have failed under plain error review. *See Lemons*, 294 S.W.3d 72 (plain error review failed where the appellant did not claim the variance between the information and instructions which identified two different arresting officers "affected his trial strategy or otherwise prejudiced his defense."); *See also State v. Barnes*, 312 S.W.3d 442 (Mo. App. S.D. 2010) (no manifest injustice where record demonstrated defendant was adequately able to defend against the charge in the jury instruction despite variance between it and the charging document).[1]

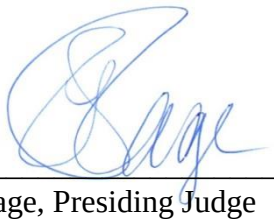
As a result of the foregoing, Movant failed to demonstrate Appellate Counsel was ineffective for failing to challenge the variance between the information and the jury instruction on direct appeal. The record refutes Movant's claim of error, and the motion court did not err in denying Movant's claim for post-conviction relief without an evidentiary hearing.

[1] Movant argues his case is distinguishable from *Barnes* and *Lemons* because those cases only dealt with "minor differences" in the factual allegations. According to Movant, his concerned an "essential element of the offense charged," citing *State v. White*, 431 S.W.2d 182 (Mo. 1968), in support of his argument. However, Movant's argument ignores the fact that the portion of the charging document citing the statutory charge would have read the same regardless of the substance possessed. Therefore, he was clearly on notice as to under which statute he was charged, unlike the defendant in *White*.

Point II is denied.

CONCLUSION

The judgment of the trial court is affirmed.



Lisa P. Page, Presiding Judge

Roy L. Richter, J., and Philip M. Hess, J., concur.