IN THE
MISSOURI SUPREME COURT

DONNIE HOUNIHAN,	)	
	)	
Appellant,	)	
	)	
vs.	)	**No. SC97622**
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT FOR PEMISCOT COUNTY, MISSOURI
THE HONORABLE W. KEITH CURRIE, JUDGE AT POST-CONVICTION

APPELLANT'S SUBSTITUTE REPLY BRIEF

Scott Thompson, MOBar #43233
Attorney for Appellant
1010 Market Street
Suite 1100
St. Louis, MO 63101
Phone: (314) 340-7662
Fax: (314) 340-7685
Email:Scott.Thompson[at]mspd.mo.gov

INDEX

TABLE OF AUTHORITIES 3

JURISDICTIONAL STATEMENT 4

STATEMENT OF FACTS 4

POINTS RELIED ON 4

ARGUMENT 4

ARGUMENT IN REPLY 5

CONCLUSION 9

CERTIFICATE OF COMPLIANCE AND SERVICE 10

TABLE OF AUTHORITIES

Cases

Cole v. State, 223 S.W.3d 927 (Mo. App. S.D. 2007) 6

Helmig v. State, 42 S.W.3d 658 (Mo. App. E.D. 2001) 6

Holman v. State, 88 S.W.3d 105 (Mo. App. E.D. 2002) 8

Love v. State, 670 S.W.2d 499 (Mo. banc 1984) 7

McNeal v. State, 500 S.W.3d 841 (Mo. banc 2016) 7

Meiners v. State, 540 S.W.3d 832 (Mo. banc 2018) 6

Seals v. State, 551 S.W.3d 653 (Mo. App. S.D. 2018) 6

Smith v. Murray, 477 U.S. 527 (1986) 8

State v. Hounihan, ___ S.W.3d ___ (SD34286) (Mo. App. S.D. 2016) 7

State v. Sumlin, 820 S.W.2d 487 (Mo. 1991) 5

Tate v. State, 461 S.W.3d 15 (Mo. App. E.D. 2015) 8

Toten v. State, 295 S.W.3d 896 (Mo. App. S.D. 2009) 6

Constitutional Provisions

Missouri Constitution, Article I, Section 10 9

Missouri Constitution, Article I, Section 18(a) 9

U.S. Constitution, Amendment V 9

U.S. Constitution, Amendment VI 9

U.S. Constitution, Amendment XIV 9

JURISDICTIONAL STATEMENT

Appellant adopts and incorporates his Jurisdictional Statement from his initial Brief.

***

Citations to the Legal File and Supplemental Legal File are in the form prescribed by Missouri Supreme Court Rule 84.04(c). Citation to the evidentiary hearing transcript will be "Evid. Tr. __".

STATEMENT OF FACTS

Appellant adopts and incorporates the Statements of Facts contained in his initial Substitute Brief.

POINTS RELIED ON

Appellant adopts and incorporates the Points Relied On contained in his initial Substitute Brief.

ARGUMENT

Appellant adopts and incorporates his Argument from his initial Substitute Brief and adds the following arguments in reply:

REPLY ARGUMENT

Respondent's argument that the motion court may engage in rank speculation to assign a *post-hoc* strategy to appellate counsel's admitted lapse must fail. Case law uniformly references the decisional aspect of counsel strategy in evaluating the effectiveness prong. Although counsel confessed to missing a prejudicial error he should have raised, the respondent concludes counsel could have reasonably rejected a meritorious claim in favor of claims "that would have a more significant impact for appellant." But reasonably competent counsel must evaluate the facts and law to make arguments cogent in law and fact. "Swinging for the fences" with weak claims to the exclusion of meritorious claims is neither prudent nor professional. Permitting the motion court to completely disregard the record and supply its view of what might be a reasonable strategy renders the guarantee of effective assistance of appellate counsel completely theoretical in violation of Mr. Hounihan's rights to due process of law and effective assistance of counsel as guaranteed by the V, VI, and XIV Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution.

> This Court has never held that a counsel must raise every possible claim on appeal. On the other hand, failure to raise a claim that has significant merit raises an inference that counsel performed beneath professional standards.

State v. Sumlin, 820 S.W.2d 487, 490 (Mo. 1991).

The effectiveness of appellate counsel is not merely a question of law. Even if an absent claim is evident from the record and would have resulted in relief, a post-conviction movant must elicit testimony from appellate counsel to assure the motion court that counsel's omission was neither the product of some objectively-reasonable strategy nor "the exercise of reasonable professional judgment". Toten v. State, 295 S.W.3d 896, 899 (Mo. App. S.D. 2009); Cole v. State, 223 S.W.3d 927, 931-932 (Mo. App. S.D. 2007). Not to present evidence from appellate counsel is to abandon the claim. Id. Yet respondent suggests that such evidence is ultimately unnecessary because the motion court is free to supply any strategy it decides is reasonable regardless of the record. (Respondent's Substitute Brief at pp. 21-22).

Respondent ignores precedent showing that once strategy has been invoked by counsel or demonstrated in the record, only then the motion court may properly inquire as to whether an objectively-reasonable strategy excuses appellate counsel's lapse. Countless cases state that a strategy must be invoked or apparent for the record **before** it is evaluated for reasonableness. See e.g.; Helmig v. State, 42 S.W.3d 658, 682 (Mo. App. E.D. 2001)("Appellate counsel has no duty to present non-frivolous issues where counsel strategically decides to 'winnow out' some arguments in favor of other arguments"); Meiners v. State, 540 S.W.3d 832, 838 (Mo. banc 2018)("counsel may strategically decide to forgo certain arguments in favor of others" and finding appellate counsel made a "considered, intentional decision"); and Seals v. State, 551 S.W.3d 653 (Mo. App. S.D. 2018)("Appellate counsel is not, however, required to raise every possible claim raised in

the motion for new trial and has no duty to present non-frivolous issues where appellate counsel makes a strategic decision to winnow out some arguments in favor of others").

Respondent's reliance on McNeal v. State, 500 S.W.3d 841 (Mo. banc 2016), to suggest that the motion court may pluck a strategy out of thin air is misplaced. Although the Court stated that whether counsel's lapse was the product of a conscious decision was immaterial (citing Love v. State, 670 S.W.2d 499, 501-02 (Mo. banc 1984)), in McNeal, the Court found that defense counsel "repeatedly explained that requesting a trespass instruction seemed inappropriate to him at the time of trial and confirmed that not requesting a trespass instruction was indeed a strategic decision because the instruction would have been inconsistent with the defense's theory[.]" McNeal, *supra* at 844. Love is likewise factually different from this case. In Love, defense counsel wrongly believed a manslaughter instruction was not legally available, but he explained he did not want the instruction in any event because he perceived it to be inconsistent with his defense. Love, *supra* at 501-02.

Finally, respondent's positing of what it considers objectively reasonable strategy must be rejected for what it is: rank speculation. Respondent suggests "counsel could reasonably have focused his time and attention to the issues that he raised in his brief because they were the most likely to have a meaningful impact." (Respondent's Substitute Brief at p. 21). Impact on whom? The Court of Appeals was unimpressed with the two unpreserved issues briefed to it following this bench trial. State v. Hounihan, ___ S.W.3d ___ (SD34286) (Mo. App. S.D. 2016). And the impact on Mr. Hounihan of reversal for

new trial on the DWI count could just as readily have been a negative impact. Mr. Hounihan faced up to fifteen (15) years in Count One – a range of punishment far exceeding the seven (7) years imprisonment he initially received. But metaphysical discussion of what result provides the most "meaningful" or "significant" impact will be the result if motion courts are to abandon the evidence before them in search of *post hoc* justifications of counsel's conduct. Without being bound to the record, one can always imagine *some* strategy.

Winning a new trial is perhaps the best relief for which an incarcerated criminal defendant might hope.[1] But nowhere can Appellant find a case where appellate counsel consciously rejected meritorious appellate issues in order to raise weaker claims presumed to offer a better "payoff." Indeed, case law shows the opposite strategy is objectively reasonable – rejecting weaker claims, regardless of the relief that might ensue, exemplifies professionalism. *See e.g.*; Holman v. State, 88 S.W.3d 105, 110 (Mo. App. E.D. 2002) ("Culling issues that are not likely to result in reversal promotes judicial economy by focusing the Court's attention on those issues most pertinent to resolving the case"); Tate v. State, 461 S.W.3d 15, 22 (Mo. App. E.D. 2015)(finding appellate counsel made "a strategic decision to omit weaker arguments in favor of stronger claims on appeal"); and Smith v. Murray, 477 U.S. 527, 536 (1986)("winnowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is

[1] Surpassed only by a successful sufficiency claim which would bar retrial for the count that was insufficient.

the hallmark of effective appellate advocacy"). No objectively reasonable strategy excuses appellate counsel's lapse.

CONCLUSION

This Court must reverse the motion court's denial of Mr. Hounihan's motion for post-conviction relief. The motion court's ruling deprived Mr. Hounihan of his rights to due process of law and effective assistance of counsel as guaranteed by the V, VI, and XIV Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution.

Respectfully submitted,

/s/ Scott Thompson

_____

Scott Thompson, MoBar # 43233
1010 Market Street, Suite 1100
St. Louis, MO 63101
(314)340-7662
Scott.Thompson[at]mspd.mo.gov

Attorney for the Appellant

CERTIFICATE OF COMPLIANCE AND SERVICE

I, Scott Thompson, hereby certify to the following. The attached reply brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, in Times New Roman size 13-point font. I hereby certify that this brief includes the information required by Rule 55.03. Excluding the cover page, the signature block, and this certificate of compliance and service, the brief contains 1,413 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

On this 22nd day of May, 2019, an electronic copy of Appellant's Substitute Reply Brief were placed for delivery through the Missouri e-Filing System to Daniel McPherson, Assistant Attorney General, at dan.mcpherson[at]ago.mo.gov.

Finally, I hereby certify that this electronic form of the brief has been scanned for viruses with Symantec Endpoint Protection, with updated virus definitions, and was found virus-free.

/s/ Scott Thompson

_____

Scott Thompson, MoBar # 43233
1010 Market Street, Suite 1100
St. Louis, MO 63101
(314)-340-7662
Scott.Thompson@mspd.mo.gov

Attorney for the Appellant