No. SC97622

In the Supreme Court of Missouri

DONNIE HOUNIHAN,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from Pemiscot County Circuit Court
Thirty-Fourth Judicial Circuit
The Honorable W. Keith Currie, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT OF FACTS

Donnie Hounihan is appealing the denial of his Rule 29.15 motion which sought to vacate his conviction and sentence for one count each of the class B felony of driving while intoxicated (chronic offender), section 577.010, RSMo Cum, Supp. 2010, and the class D felony of driving with a suspended license, section 302.321, RSMo Cum. Supp. 2011 (D.16 p.1). Appellant waived his right to be tried by a jury and was tried on August 3, 2015, by Judge Fred W. Copeland. (D.17 p.7; D.26 pp.6-7). Viewed in the light most favorable to the verdict, the following evidence was adduced at trial:

Hayti Police Officer David Maclin was patrolling Highway North J on September 18, 2014, when he saw a white Buick Roadmaster cross the center line three or more times. (D.26 pp.12-13). Maclin stopped the car, which was being driven by Appellant. (D.26 pp. 13). As Officer Maclin spoke to him, Appellant looked straight forward and avoided eye contact with the officer. (D.26 pp.13-14). A strong odor of alcohol came from the car. (D.26 p.14). Officer Maclin noticed a lot of cigarette ashes in Appellant's lap. (D.26 p.14).

When Officer Maclin asked Appellant for his driver's license and insurance, Appellant replied that he did not have either one. (D.26 p.14). Appellant stated a belief that his license had been revoked. (D.26 p.14).

Officer Maclin asked Appellant to walk back to his patrol vehicle. (D.26 p.14). Appellant swayed as he walked, and his footing was uncertain. (D.26

p.14). After Appellant got into the patrol car, Officer Maclin saw that his eyes were blood-shot, watery, and glassy. (D.26 p.15). The officer noticed a "really strong" odor of alcohol coming from Appellant. (D.26 p.15). Appellant admitted that he had drunk three beers and a pint of "LTD." (D.26 p.15).

Officer Maclin arrested Appellant and read him the *Miranda*[1] warnings and the implied consent law. (D.26 pp.15-16). Appellant admitted that he had been driving the car. (D.26 p.16). He said that during the three hours preceding the stop, he had been drinking whiskey before the Cardinals game and drinking beer and whiskey during the game. (D.26 pp.16-17). Appellant consented to a blood draw, and Officer Maclin took him to the Pemiscot Memorial Hospital to have that done. (D.26 pp.15-16, 20-21). Testing on the blood sample showed a BAC of .15. (D.26 p.30).

Appellant testified that he had numerous medical conditions, including bulging discs in his back that required him to walk with the assistance of a cane. (D.26 p.32). Appellant said that he could not stand on his feet during the traffic stop because of the problems with his back and legs. (D.26 p.33). Appellant also said that he took several medications that caused his eyes to be watery and red. (D.26 p.33). Appellant admitted on cross-examination that he had consumed whiskey and a few beers on the day of the traffic stop. (D.26

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1 *Miranda v. Arizona*, 384 U.S. 436 (1966).

pp.35-36). Appellant also acknowledged that he had prior DWI convictions, but said one of those had been dropped. (D.26 p.36). Appellant also claimed that he had mailed in his request to have his license reinstated prior to the traffic stop by Officer Maclin. (D.26 p.36).

The court found Appellant guilty beyond a reasonable doubt of the charges of driving while intoxicated and driving while revoked. (D.26 p.39). The court sentenced Appellant to concurrent sentences of seven years imprisonment for driving while intoxicated and four years imprisonment for driving while revoked. (D.26 pp.44-45).

Appellant filed a *pro se* Motion to Vacate, Set Aside or Correct the Judgment or Sentence under Supreme Court Rule 29.15 on November 9, 2015. (D.1 p.3; D.2 pp.1-17). The public defender was appointed to represent Appellant on November 19, 2015. (D.1 p.3). The motion court granted appointed counsel a thirty-day extension of time to file an amended motion. (D.5 pp.1-3). On January 7, 2016, Appellant was granted leave to file a late notice of appeal of his conviction and sentence. (D.23 pp. 1-2; D.25 p.1). The motion court thereafter granted appointed post-conviction counsel's motion to hold open the post-conviction case until the completion of the direct appeal case. (D.7 pp. 1-3). The Court of Appeals affirmed the conviction and sentence on direct appeal and issued its mandate on January 6, 2017. (D.13 p.2).

Appointed counsel timely filed an amended motion on April 6, 2017. (D.1 p.6; D.8 pp. 1-13). The amended motion raised two claims: (1) that trial counsel was ineffective for failing to present testimony from Appellant's attending physician about Appellant's physical ailments and the symptoms and side effects of his medications that made Appellant appear intoxicated when he was arrested, and (2) that direct appeal counsel was ineffective for failing to raise a claim that there was insufficient evidence to convict Appellant of the enhanced class D felony of driving while revoked. (D.8 pp. 2-7, 7-10). The motion court denied those claims following an evidentiary hearing. (D.13 pp. 1-11). Additional facts specific to Appellant's claims of error will be set forth in the argument portion of the brief.

STANDARD OF REVIEW

Appellant raises two points in which he alleges that the motion court clearly erred in denying the amended Rule 29.15 motion after an evidentiary hearing because Appellant received ineffective assistance of trial and appellate counsel. The following standard of review applies to those points.

In reviewing the overruling of a Rule 29.15 motion, the motion court's findings are presumed correct. *Johnson v. State*, 406 S.W.3d 892, 898 (Mo. 2013). A motion court's judgment will be overturned only when either its findings of fact or its conclusions of law are clearly erroneous. Supreme Court Rule 29.15(k). A motion court's findings are clearly erroneous if, after reviewing the entire record, this Court is left with the definite and firm impression that a mistake has been made. *Tisius v. State*, 519 S.W.3d 413, 420 (Mo. 2017). The motion court's findings should be upheld if they are sustainable on any grounds. *Swallow v. State*, 398 S.W.3d 1, 3 (Mo. 2013).

A movant is entitled to post-conviction relief for ineffective assistance of trial counsel upon establishing that: (1) counsel failed to exercise the level of skill and diligence that a reasonably competent counsel would in a similar situation, and (2) the movant was prejudiced by that failure. *Tisius*, 519 S.W.3d at 420; *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Both prongs of the *Strickland* test must be shown by a preponderance of the

evidence in order to prove ineffective assistance of counsel. *Tisius*, 519 S.W.3d at 420.

To satisfy the *Strickland* performance prong, a movant must overcome the strong presumption that counsel's conduct was reasonable and effective. *Id.* This presumption is overcome if the movant identifies specific acts or omissions of counsel that, in light of all the circumstances, fell outside the wide range of professional assistance. *Id.* This Court has never found that a failure to litigate a trial perfectly constitutes ineffective assistance of counsel. *Strong v. State*, 263 S.W.3d 636, 650 n.7 (Mo. 2008). "[N]or does this Court believe a 'perfect' litigation to be possible." *Id.* Just because a jury returns a guilty verdict does not mean that counsel was ineffective. *Johnson*, 406 S.W.3d at 901.

To establish *Strickland* prejudice, a movant must prove that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Tisius*, 519 S.W.3d at 420. A reasonable probability exists when there is a probability sufficient to undermine confidence in the outcome. *Id.*

To prevail on a claim of ineffective assistance of appellate counsel, a Rule 29.15 movant must show that his counsel failed to raise a claim of error that a competent and effective lawyer would have recognized and asserted. *Williams v. State*, 386 S.W.3d 750, 753 (Mo. 2012). Appellate counsel is not,

however, required to raise every possible issue asserted in the motion for new trial, and is under no duty to present non-frivolous issues where counsel strategically decides to winnow out arguments in favor of other arguments. *Baumruk v. State*, 364 S.W.3d 518, 539 (Mo. 2012). Therefore, a Rule 29.15 movant must also show that the claimed error was sufficiently serious to create a reasonable probability that, if it was raised, the outcome of the appeal would have been different. *Williams*, 386 S.W.3d at 753.

ARGUMENT

I.

Appellant was not prejudiced by counsel's failure to call his doctor to testify at trial.

Appellant claims that trial counsel was ineffective for not calling his doctor to testify to his physical ailments and medications that caused some of the symptoms that led the arresting officer to conclude that he was intoxicated. But Appellant was not prejudiced by counsel's performance in light of the substantial evidence of intoxication that could not be explained away by those ailments and medications.

A. Underlying Facts.

The amended Rule 29.15 motion alleged that Appellant told trial counsel Inga Ladd that he was not intoxicated on the night of his arrest, but that he was instead afflicted by problems caused by his medication and physical ailments. (D.8 pp. 2-3). The motion alleged that Appellant told Ladd that he suffered dizzy spells and gait impairment because of his hypertension and back and neck problems, and that his medications and physical ailments caused his eyes to water and affected his speech. (D.8 pp. 2-3). The motion alleged that Ladd should have called his attending physician, Dr. Abdullah Arshad, to explain Appellant's physical and mental ailments, and the effects of the medications that he took. (D.8 p.3). The motion alleged that Dr.

Arshad's testimony would have created reasonable doubt as to the weight to be given to Officer Maclin's observations concerning Appellant's unsteady gait, his "straight forward" gaze, and his blood-shot, watery, and glassy eyes. (D.8 p.6).

Trial counsel Ladd testified at the evidentiary hearing that Appellant was adamant that he was too old and sick to go to prison, and he asked her to subpoena Dr. Arshad. (PCR Tr. 7-8). Ladd said that she told Appellant that being old and sick was not an excuse for driving while intoxicated, and that she did not think Dr. Arshad's testimony would be relevant. (PCR Tr. 8). Ladd said that she made a strategic decision not to call him. (PCR Tr. 8). Ladd admitted that she never talked to Dr. Arshad. (PCR Tr. 8).

Ladd went on to testify that Appellant had admitted to her that he had been drinking. (PCR Tr. 9). She said there was never any communication between them that led her to believe that Appellant's positive blood alcohol test after the stop was due to anything other than the alcohol that he had consumed prior to the stop. (PCR Tr. 9).

Ladd said she also had concerns about having Dr. Arshad come to court to testify without having first retained him as an expert witness. (PCR Tr. 11). Ladd acknowledged sending Appellant a letter asking him to pay money up front for an expert fee if he wanted Dr. Arshad to testify. (PCR Tr. 12).

Dr. Arshad testified that he had treated Appellant on and off for over ten years. (PCR Tr. 20). Dr. Arshad testified that Appellant had a degenerative disk condition in the lumbar portion of the spine, osteoarthritis in his knee and back, bulging disks, and peripheral vascular disease. (PCR Tr. 21-22). Dr. Arshad testified that those conditions would cause problems with ambulation, and that Appellant used a cane when visiting his office. (PCR Tr. 22). Dr. Arshad said that neither Appellant nor Ladd talked to him about being a witness at trial. (PCR Tr. 23-24). Dr. Arshad said that he would have testified at trial if asked, that his trial testimony would have been consistent with his testimony at the evidentiary hearing, and that he would not have charged a fee to testify. (PCR Tr. 24). Dr. Arshad admitted on cross-examination that none of the medications that he prescribed for Appellant had a symptom of causing him to smell of an alcoholic beverage. (PCR Tr. 25).

The motion court denied the claim, finding that Appellant was not prejudiced by Ladd's failure to talk to Dr. Arshad or to call him as a witness. (D.13 p.8). The court found that Officer Maclin's field observations, Appellant's admission to consuming alcohol prior to driving, and Appellant's blood alcohol content level were apparently sufficient for the trial court to find beyond a reasonable doubt that Appellant was intoxicated at the time he was arrested. (D.13 p.8). The court concluded that Dr. Arshad could have offered no evidence to refute the evidence of Appellant's intoxication. (D.13

p.8). In summarizing Dr. Arshad's testimony, the motion court placed particular importance on the doctor's admission that he was aware of no medical condition that causes a person to smell of alcohol. (D.13 p.5).

B. Analysis.

Appellant had the burden of proving his claim at the evidentiary hearing by a preponderance of the evidence. Supreme Court Rule 29.15(i). The claim included allegations that Appellant suffered dizzy spells and gait impairment because of his hypertension and back and neck problems, and that his medications and physical ailments caused his eyes to water and affected his speech, and that counsel should have called Dr. Arshad to explain Appellant's physical and mental ailments, and the effects of the medications that he took. (D.8 pp.2-3). Dr. Arshad did testify about Appellant's back and neck problems and his gait impairment, but did not testify about any physical conditions or medications that would have caused his eyes to water and affected his speech. Appellant thus failed to meet his burden as to that aspect of the claim.

Ultimately, though, this Court should affirm because the motion court correctly found that Appellant had not established prejudice. A court need not examine counsel's performance before examining for prejudice. *Klarr v. State*, 530 S.W.3d 637, 642 (Mo. App. S.D. 2017). If it is easier to do so, a claim may be disposed of for lack of sufficient prejudice. *Id.* The motion court

correctly found no prejudice because there was substantial evidence of Appellant's intoxication that could not be explained away by any physical conditions or medication. Those included the smell of alcohol emanating from Appellant, his admission on the scene that he had been drinking, and the blood alcohol result of .15. (D.26 p.15-17, 30).

Dr. Arshad's testimony would not have provided Appellant with a viable defense in light of the overwhelming evidence of guilt, Dr. Arshad's testimony regarding Appellant's lack of ambulation would have been cumulative to Appellant's own testimony before the trial court. Appellant's point should be denied.

II.

Appellate counsel was not ineffective.

Appellant claims that direct appeal counsel was ineffective for failing to raise a claim that the State failed to present sufficient evidence of his prior convictions to enhance the offense of driving while revoked from a misdemeanor to a class D felony. But it was reasonable for counsel to be more focused on issues that would have resulted in a new trial, rather than on a claim that would have reduced the sentence on a charge that was running concurrently with another charge that carried a longer sentence.

A. Underlying Facts.

1. *Trial and Direct Appeal Proceedings*.

Appellant was charged with the class D felony of driving while his license was revoked, in violation of section 302.321, RSMo. The statute provides that an offense is a class D felony when, as relevant here:

> [A]ny person with a prior alcohol-related enforcement contact as defined in section 302.525, convicted a third or subsequent time of driving while suspended or revoked or a county or municipal ordinance of driving while suspended or revoked where the defendant was represented by or waived the right to an attorney in writing and where the prior two driving-while-revoked offenses occurred within ten years of the date of the occurrence of the

present offense and where the person received and served a sentence of ten days or more on such previous offenses[.]

§ 302.321.2, RSMo Cum. Supp. 2011. The information alleged the following prior offenses as the basis for the felony enhancement:

> [1] On or about February 4, 2013, the defendant was convicted of driving while revoked in the Circuit Court of Pemiscot County, for events that occurred on January 4, 2013, and
>
> [2] On or about January 13, 2005, the defendant was convicted of driving while revoked in Hayti Municipal Court and the defendant was represented by an attorney or waived counsel in writing, for events that occurred on December 29, 2004, and
>
> [3] On or about December 7, 2010, the defendant was convicted of driving while intoxicated in the Circuit Court of Pemiscot County and, for events that occurred on May 21, 2010, and served a sentence of more than ten days for said conviction.

(D.19 p.2).

At trial, the court took judicial notice of the court file in the Pemiscot County case where Appellant pled guilty to driving while intoxicated on December 7, 2010, and received a prison sentence. (D.26 pp. 10-11). The court

also admitted, without objection, State's Exhibit 1 from the trial, which was a certified copy of Appellant's driving record. (D.26 p. 11).

Appellant was represented on direct appeal by Jedd Schneider. (Movant's Ex. 3). He raised two claims of error in the brief that he filed with the Court of Appeals. (Movant's Ex. 1). The first point was that the trial court plainly erred in questioning a State's witness and Appellant about whether Appellant consented to a blood draw. (Movant's Ex. 1, p. 10). The second claim was that the court plainly erred in summarily denying trial counsel the opportunity to re-cross examine a State's witness. (Movant's Ex. 1, 11).

2. *Rule 29.15 proceeding*.

The amended motion alleged that the certified driving record from DOR was insufficient evidence to establish the prior convictions required to enhance the sentence to a class D felony. (D.8 pp. 9-10). The motion alleged that the error was evident from the record and that reasonably competent counsel would have raised the issue. (D.8 p. 10). The motion alleged that Appellant was prejudiced because this Court would have reversed the conviction on that count and entered a conviction for the misdemeanor class of the offense. (D.8 p.10).

At the evidentiary hearing, Appellant presented an affidavit executed by appellate counsel Schneider. (PCR Tr. 6; Movant's Ex. 3). Schneider said that he agreed that he should have raised the insufficiency claim, and that he

did not do so because he had a mistaken understanding of the quantum of proof necessary for the court to make a finding of enhancement based on the prior convictions. (Movant's Ex. 3). Schneider said that he had no strategic or other legal reason for failing to raise the issue. (Movant's Ex. 3).

The motion court denied the claim. (D.13 p. 11). It found that the alleged error was not obvious from the record, since it had been missed by trial counsel, the prosecuting attorney, the trial court, and by direct appeal counsel. (D.13 pp. 10-11).

B. Analysis.

Appellant's prior conviction for driving while intoxicated constituted an alcohol-related-enforcement-contact. § 302.525.3, RSMo Cum. Supp. 2012. The State accordingly had to prove that Appellant received and served a sentence of ten days or more on each of his prior driving while revoked offenses in order for the present offense to be enhanced to a class D felony. § 302.321.2, RSMo Cum. Supp. 2011. The State further had to prove that Appellant was either represented by counsel or waived the right to counsel in his prior conviction out of the Hayti Municipal Court. § 302.321.2, RSMo Cum. Supp. 2011; *Moore v. State*, 318 S.W.3d 726, 735 (Mo. App. E.D. 2010 (construing the statute to find that the language requiring attorney representation or waiver does not apply to state law violations).

The record does not reflect an admission by Appellant that would have relieved the State of its burden of establishing those facts. *Cf. Trevino v. State*, 206 S.W.3d 356, 360 (Mo. App. S.D. 2006) (denying post-conviction relief where defendant's admissions to prior convictions relieved the State of its burden of proving those convictions for enhancement purposes). The only evidence admitted at trial concerning the prior driving while revoked convictions was State's Exhibit 1, a certified copy of Appellant's driving record. (D.26 p.11). That exhibit does not reflect whether Appellant was represented by or waived counsel in his municipal court case, or whether Appellant received and served a sentence of at least ten days on either of his previous driving-while-revoked convictions. (State's Ex. 1).

While it appears that a sufficiency claim would have been meritorious, appellate counsel has no duty to raise every non-frivolous claim on appeal, but may use his professional judgment to focus on the most important issues. *Royer v. State*, 421 S.W.3d 486, 490 (Mo. App. S.D. 2013). The reasonableness of appellate counsel's performance must take into consideration the circumstances of the case. *Morse v. State*, 42 S.W.3d 907, 913 (Mo. App. E.D. 2015). In this case, 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.

Appellant received a seven-year sentence on the driving while intoxicated charge and a four-year concurrent sentence on the driving while revoked charge. The unraised claim of sufficiency of the evidence on the driving while revoked charge would not have vacated that conviction, but would only have resulted in remand for resentencing as a misdemeanor,[2] an action that would not have reduced the time that Appellant would spend in prison. On the other hand, the claims that appellate counsel did raise would, if successful, have resulted in a new trial on both charges and the possibility of an acquittal, or alternatively a favorable plea offer by the prosecutor to avoid expending time and resources on a new trial.

Appellant argues that there was no risk in raising the claim. This Court rejected a similar argument, finding that it is not ineffective assistance of counsel to pursue one reasonable strategy to the exclusion of another reasonable strategy. *McNeal v. State*, 500 S.W.3d 841, 845 (Mo. 2016).

Counsel's insistence that he did not have a strategic reason for not raising the claim does not foreclose a finding that he could have reasonably focused on identifying those claims that would have a more significant impact for the appellant if successful and, in doing so, to give less attention to issues that would have less impact. First, the motion court was not required to

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[2] *State v. Bernard*, 14 S.W.3d 264, 267 (Mo. App. W.D. 2000).

believe counsel's assertion. *Oliphant v. State*, 525 S.W.3d 572, 578 n.6 (Mo. App. S.D. 2017). Second, "whether counsel's performance was the product of a conscious decision is immaterial – what matters is whether counsel's performance was objectively reasonable, however it came about." *McNeal*, 500 S.W.3d at 844. Reviewing courts are therefore obligated to affirmatively entertain the range of possible reasons that counsel may have proceeded as he did. *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011).

In reviewing counsel's performance, it is important to remember that the standard is not perfection. *Strong*, 263 S.W.3d at 650 n.7. The standard is instead whether counsel's actions, at the time they were taken, were reasonable under the circumstances of the case. *Morse*, 42 S.W.3d at 913. Because it was reasonable for counsel to focus on the identifying and raising the most potentially impactful issues, Appellant has not overcome the strong presumption that counsel's conduct was reasonable and effective. *Tisius*, 519 S.W.3d at 420. Appellant's point should be denied.

CONCLUSION

In view of the foregoing, Respondent submits that the denial of Appellant's Rule 29.15 motion should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the attached brief complies with the limitations in Supreme Court Rule 84.06, and contains 4,206 words as calculated under the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2010 software.

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