



Missouri Court of Appeals

Southern District

Division One

DAVID COLE NASH,	)	
	)	
Movant-Appellant,	)	
	)	
v.	)	No. SD36501
	)	
STATE OF MISSOURI,	)	Filed: January 27, 2021
	)	
Respondent-Respondent.	)	

APPEAL FROM THE CIRCUIT COURT OF PULASKI COUNTY

Honorable Kerry G. Rowden, Special Judge

AFFIRMED

David Cole Nash (“Movant”) brings an appeal of the denial of his amended Rule 29.15 motion claiming that his appellate counsel was ineffective; Movant claims his appellate counsel should have appealed the failure of the trial court to *sua sponte* order a mental evaluation of Movant.¹ We find no error and affirm the denial of his motion.

In reviewing the denial of a Rule 29.15 motion for post-conviction relief, we limit our review to a determination of whether the findings and conclusions of law supporting

¹ This Court has independently verified the timeliness of Movant’s post-conviction motions. See *Moore v. State*, 458 S.W.3d 822, 825-26 (Mo. banc 2015); *Dorris v. State*, 360 S.W.3d 260, 268 (Mo. banc 2012). Movant filed his *pro se* Rule 29.15 motion on April 27, 2017. Counsel for Movant entered an appearance on June 12, 2017, and filed an amended motion August 11, 2017.

the decision are clearly erroneous. Rule 29.15(k); *McDaniel v. State*, 608 S.W.3d 763, 766 (Mo.App. S.D. 2020). We presume the motion court’s findings are correct.

Anderson v. State, 196 S.W.3d 28, 33 (Mo. banc 2006). 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. banc 2017).

In order to prevail on a claim of ineffective assistance of counsel, a movant must show that: (1) counsel failed to perform with the level of skill and diligence that a reasonably competent attorney would have exercised in a similar situation (“the performance prong”); and (2) but for counsel’s unprofessional errors, there is a reasonable probability the result of the proceeding would have been different (“the prejudice prong”). *McGuire v. State*, 523 S.W.3d 556, 563 (Mo.App. E.D. 2017) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).

Prior to trial, Movant was advised by the trial judge that there had been issues with Movant disrupting court proceedings; if Movant did so while the jury was present, the trial court told him he would be removed and the trial would continue without him. Despite that warning, Movant again interrupted the pre-trial proceedings. When his trial counsel advised Movant to be quiet, he responded with vulgarity and threats to his trial counsel and was removed by the trial judge. Movant was given the opportunity to return after the jury was selected, however, Movant stated to the bailiff that he was not coming back up and would fight if he came back up. He informed the bailiff that he wanted to represent himself but refused to wear leg restraints. Movant told the bailiff he needed to go back to jail before he snapped and hurt someone, specifically, defense counsel. The

trial proceeded without him. A jury convicted Movant of two counts of domestic assault in the second degree in violation of section 565.073, RSMo 2000, and Movant found to be a prior and persistent felony offender pursuant to section 558.016, RSMo Cum.Supp. 2005.

At the sentencing hearing, Movant's new counsel told the court that Movant requested a psychological evaluation to assist the sentencing court in evaluating his mental health. Movant claimed a history of bipolar disorder and a methamphetamine use disorder that was in remission since he had been in prison. Movant was on medication at the time of sentencing and stable in his behavior.

At the subsequent Rule 29.15 hearing, Movant testified that he no longer needed medication when he got to prison because he had been to anger management classes. Movant explained his prior behavior as being the result of his prior diagnosis and lack of medication.

Movant's rationale on appeal is he was denied a fair trial because: Movant had serious mental disease at the time of the trial. Had the trial judge *sua sponte* ordered a psychological exam, Movant would have been given medication, which would have changed Movant's behavior at the trial. Because Movant would not have disrupted the trial, Movant would not have been removed from the trial. Movant then contends that appellate counsel would have been successful had this claim been raised on appeal and therefore counsel was ineffective in failing to raise it. Movant misses the mark on many levels.

As the motion court noted:

The Court had observed Movant in two previous trials and there was no indication of incompetency. In fact, he was directing his defense

in all three trials this Court tried. The outburst resulting in Movant's removal from trial was following a denial by the Court to remove trial counsel for some unspecified conflict, which had been denied previously. The further statements and accusations by [M]ovant against trial counsel were completely unbelievable and incredible. Further Movant had assaulted prior counsel and was able to obtain different counsel by that means. Movants [sic] had filed a motion for speedy trial and then tried to create a conflict with his counsel believing a delay would be in his interest. When asked if the Movant would withdraw his motion for speedy trial if he was granted a new Public Defender, [t]he Movant stated he would not. Movant[']s actions were not only not those of a competent man but a defendant trying to manipulate the system.

Finally, had [defense counsel Koch] raised the issue on appeal that this Court should have *sua sponte* ordered a mental evaluation is misguided.

Movant[']s actions were not only not those of a competent man but a defendant trying to manipulate the system and seeking relief he was not entitled to receive (i.e.,] a different defense attorney). Court notes the Movant had several different Public Defenders throughout the pendency of the 3 cases, all due to circumstance the Movant created. (allegedly assaulted the prior attorney in the jail) [sic] Not part of this trial record but mentioned in the March 29, 2019 hearing, were two prior trials involving Trial Counsel, Paul McMahon. Mr. McMahon successful[ly] obtained two not guilty verdicts on two prior felony cases with this court. Movant has not argued he was incompetent during those trials and those trials had the same trial Judge.

The motion court also noted that there was no testimony at the motion hearing that indicated that Movant was incompetent to stand trial or that he was suffering from a mental disease or defect at the time of trial. Thus, Movant fails in each prong of the analysis. He did not show that he was incompetent to stand trial thus there was no obligation on the part of the trial court to order a psychological exam – even if it had been requested but certainly not *sua sponte*. Movant's behavior as determined by the motion court² was much more likely the result of a manipulative defendant than that of a mentally incompetent defendant. The trial judge had no reason to order a mental evaluation based on Movant's behavior. Further, it is unlikely that Movant's claim that

² The motion court judge was also the trial judge.

the trial court should have *sua sponte* ordered a mental examination would have been successful on appeal. Movant's claim of ineffective assistance of counsel fails for all these reasons.

The judgment is affirmed.

Nancy Steffen Rahmeyer, P.J. – Opinion Author

Jeffrey W. Bates, J. – Concur

William W. Francis, Jr., J. – Concur