



In the Missouri Court of Appeals Western District

HARRY J. WILLIAM,	)	
	Appellant,	)
v.	)	WD83859
	)	
STATE OF MISSOURI,	)	FILED: October 12, 2021
	Respondent.	)

APPEAL FROM THE CIRCUIT COURT OF CLAY COUNTY THE HONORABLE SHANE T. ALEXANDER, JUDGE

**BEFORE DIVISION ONE: ALOK AHUJA, PRESIDING JUDGE, LISA WHITE HARDWICK
AND ANTHONY REX GABBERT, JUDGES**

Harry William appeals from the judgment denying his Rule 29.15 motion after he was convicted of first-degree statutory rape. William contends the motion court erred in denying his claim that his appellate counsel was ineffective for failing to file a motion in the Missouri Supreme Court to transfer the case to that court after we affirmed his conviction and sentence on direct appeal. For reasons explained herein, we affirm.

FACTUAL AND PROCEDURAL HISTORY

In March 2012, William was arraigned on a charge of first-degree statutory rape. The charge alleged that, between May and June 2010, he knowingly had sexual intercourse with a child less than 14 years old. In September 2014, a jury

convicted him of the charge and recommended a sentence of 18 years in prison, which the court imposed.

On direct appeal, William asserted that the circuit court abused its discretion and violated his constitutional rights in denying his motions for a Pingelapese interpreter and overruling his motion to dismiss when an interpreter could not be found.¹ *State v. William*, 505 S.W.3d 344, 349 (Mo. App. 2016). Because the record did not support his claim that the circuit court ever denied his request for a Pingelapese interpreter (the record showed that the court actually twice granted his motions), we only addressed his claim that the court erred in overruling his motion to dismiss when an interpreter could not be found. *Id.*

In analyzing this issue, we looked first at the relevant statutes, specifically, Section 476.803.1,² which provides, “The courts shall appoint qualified interpreters and translators in all legal proceedings in which the non-English speaking person is a party or a witness.” Section 476.800(3) defines a “non-English speaking person” as “any person involved in a legal proceeding who cannot readily speak or understand the English language.” *Id.* at 350. We noted that no case had applied these sections yet. *Id.* at 350 n.10. We then explained that, before the enactment of these sections in 2004, “the only statutory reference to interpreters was in section 476.060,” which states, “The courts may, from time

¹ William grew up on a small Micronesian island where he and fewer than 2,000 people spoke Pingelapese, an oral language that is neither taught in schools nor used to conduct official government business in the Federated States of Micronesia.

² All statutory references are to the Revised Statutes of Missouri 2016.

to time, appoint interpreters and translators to interpret the testimony of witnesses, and to translate any writing necessary to be translated in such court, or any cause therein.” *Id.* at 350. We noted that, in applying Section 476.060, circuit courts “have been accorded discretion to decide whether an interpreter was needed.” *Id.* From this, we extrapolated that whether an individual meets the definition of a “non-English speaking person” and whether a qualified interpreter “shall” be appointed under Section 476.803.1 is a matter of the circuit court’s discretion; therefore, we determined that we would review for an abuse of discretion the court’s decision that William’s ability to speak and understand the English language was sufficient for constitutional purposes and that no interpreter was necessary to protect his rights. *Id.*

William suggested that Missouri adopt a factor-based test to make this determination. *Id.* at 350-51. Specifically, he proposed that we adopt the factors used to select certified court interpreters,³ or other factors articulated in *Gado v. State*, 882 N.E.2d 827, 830 (Ind. Ct. App. 2008).⁴ We found, however, that not only

³ The court-certified interpreter requirements that William proposed we apply to determine whether a defendant can speak or readily understand English included: “a grasp of a language other than English sufficient to accurately translate proceedings; a native or native-like proficiency in all working languages; knowledge and use of a broad range of vocabulary, including legal terminology, subject-specific terminology, and slang; and a knowledge and use of cultural nuances, regional variations, idiomatic expressions, and colloquialisms in all working languages.” *Id.* at 351 (internal quotations omitted).

⁴ In *Gado*, the Court of Appeals of Indiana stated that, to decide whether an interpreter is needed, the circuit court should consider: (1) “the defendant’s understanding of spoken and written English”; (2) “the complexity of the proceedings, issues, and testimony”; and (3) “whether, considering those factors, the defendant will be able to participate effectively in his or her defense.” 882 N.E.2d at 830.

did William fail to ask the circuit court to adopt and apply those factors and fail to introduce evidence to demonstrate his inability to readily speak and understand English on the basis of those factors, but many of his proposed factors go “far beyond the standards applied to any other defendant in a criminal proceeding.” *William*, 505 S.W.3d at 351. Instead, we found that courts in other jurisdictions “have more persuasively applied the test for mental capacity in determining whether a non-English speaking person was unable to participate in his or her defense.” *Id.* Thus, we decided that the proper test is whether the non-English speaking person has “the ability to consult with counsel and to understand the proceedings against him or her.” *Id.*

Applying this test to William, we found that the circuit court did not abuse its discretion in concluding that he would not be denied his constitutional rights without the assistance of an interpreter at trial. *Id.* at 352. Because we found no abuse of discretion in the court’s decision to proceed to trial after ruling that William readily spoke and understood English, we also rejected William’s claim that proceeding to trial without an interpreter constituted a structural error. *Id.* Having found no abuse of discretion in the court’s ruling that William readily spoke and understood English and, therefore, the appointment of an interpreter was not required to protect his constitutional rights, we affirmed his conviction and sentence. *Id.* at 352-53. Following the issuance of our opinion, William’s appellate counsel filed a motion for rehearing, or, in the alternative, an application to transfer the case to the Missouri Supreme Court. We overruled the motion for

rehearing and denied the application to transfer the case to the Supreme Court.

William filed a *pro se* Rule 29.15 motion for post-conviction relief, which was later amended by appointed counsel. In his amended motion, he alleged, *inter alia*, that his appellate counsel was ineffective for failing to file a motion in the Missouri Supreme Court seeking transfer of the case to that court. He asserted that, if his appellate counsel had filed a motion for transfer, there is a reasonable likelihood that the Missouri Supreme Court would have accepted transfer because the meaning of the statutory phrase “readily speak or understand the English language” has been interpreted in “numerous other jurisdictions but never in Missouri.” He further alleged that the Court would have “reversed the decision of the Court of Appeals since it failed to adopt a test,” reversed his conviction and sentence, and remanded his case for a new trial.

An evidentiary hearing was held. During the evidentiary hearing, William’s appellate counsel testified that, after the Court of Appeals denied the motion to transfer the case to the Supreme Court, she “absolutely” intended to file a motion for transfer in the Supreme Court. She failed to put the filing deadline in her calendar, however, and missed the deadline. She testified that this was an “absolute gut-wrenching error,” as her strategy in William’s case was “to take it as far up as [she] needed to.”

The motion court entered its judgment denying William’s amended Rule 29.15 motion. With regard to this claim, the court found that, even if it assumed that the failure to file a motion for transfer in the Supreme Court was objectively

unreasonable, William did not prove that he was prejudiced by that failure. William appeals.

STANDARD OF REVIEW

We review the denial of a post-conviction motion for clear error. Rule 29.15(k). The motion court's findings and conclusions are clearly erroneous only if a review of the entire record leaves us with a definite and firm impression that a mistake was made. *Shockley v. State*, 579 S.W.3d 881, 892 (Mo. banc 2019). We presume the motion court's findings and conclusions are correct. *Id.*

ANALYSIS

In his sole claim on appeal, William contends the motion court clearly erred in denying his claim that his appellate counsel was ineffective for failing to file a motion in the Supreme Court to transfer his case to that court. "The standard for evaluating a claim of ineffective assistance of appellate counsel is the same as the standard for evaluating a claim of ineffective assistance of trial counsel." *Jarrett v. State*, 572 S.W.3d 143, 148 (Mo. App. 2019). "That is, a movant must prove his appellate counsel's performance fell below an objective standard of reasonableness and that his defense was prejudiced by that unreasonable performance." *Id.* "To prevail on a claim of ineffective assistance of appellate counsel, the movant must establish that counsel failed to raise a claim of error that was so obvious that a competent and effective lawyer would have recognized and asserted it." *Anderson v. State*, 564 S.W.3d 592, 617 (Mo. banc 2018) (citation omitted). He must also prove that, "if counsel had raised the claims, there is a

reasonable probability the outcome of the appeal would have been different.” *Id.* (citation omitted). The movant must establish both deficient performance and prejudice, and if he fails to establish one, we need not consider the other.

Dawson v. State, 611 S.W.3d 761, 769 (Mo. App. 2020).

William argues that, if appellate counsel had filed a motion for transfer in the Supreme Court, there is a reasonable probability that the Court would have granted transfer because the case was of “general interest” under Rule 83.02. Specifically, he asserts that the case presented an issue of first impression, “involved the standard all Missouri courts should apply in cases where a criminal defendant’s grasp of English is questionable,” and interpreted statutes that had not been previously construed. He further argues that he was prejudiced by counsel’s failure to file the motion because there is a reasonable probability that, if the Court had taken the case, the Court would have applied the multi-factor test employed in *Gado*, determined that the absence of an interpreter rendered his trial fundamentally unfair, and remanded the case for a new trial.

We need not determine whether appellate counsel’s performance was deficient because William failed to establish prejudice. Assuming that the Supreme Court would have not only granted transfer but also applied the test that William proposes, he has not demonstrated a reasonable probability that the result of his appeal would have been different. William proposes that Missouri courts should apply the three-factor test utilized in *Gado*, 882 N.E.2d at 830, which provides that, in deciding whether an interpreter is needed, the circuit court

should consider: (1) “the defendant's understanding of spoken and written English”; (2) “the complexity of the proceedings, issues, and testimony”; and (3) “whether, considering those factors, the defendant will be able to participate effectively in his or her defense.” The court in *Gado* determined, like we determined in our opinion on direct appeal, that the decision as to whether an interpreter is necessary is a matter of circuit court discretion and, therefore, is reviewed only for an abuse of discretion. *Id.*; *William*, 505 S.W.3d at 350. Additionally, the court in *Gado* found that it was appropriate to “give substantial weight to a trial court’s judgment as to the credibility of witnesses based on its observance of evidence first hand.” 882 N.E.2d at 830-31.

While the test that we articulated on direct appeal, whether the non-English speaking person has “the ability to consult with counsel and to understand the proceedings against him or her,” may not have listed the specific factors from *Gado*, it is abundantly clear that we considered evidence relating to those factors in finding no abuse of discretion in the circuit court’s decision to proceed without an interpreter:

Mr. William had been in this country for some eighteen years, or half of his life, when he was tried, and three witnesses indicated that he spoke English on the job and communicated in English with them. Defense counsel argued that, with just one exception—evidently when explaining the plea offers to Mr. William—his client was able to communicate with counsel in English, albeit at a slower pace than trial. Mr. William has not argued that he did not understand the charges or the proceedings, and, in fact, when he spoke at any length, particularly during sentencing, was clearly able to articulate his thoughts and concerns in English. The circuit court, which had Mr. William before it through at least thirty-three pre-trial hearings

and took evidence on the question of his grasp of the English language, was in the best position to form an opinion on whether, to the extent of being able to communicate with counsel and understand the proceedings against him, he could readily speak and understand English.

Id. at 352. With regard to the first factor from *Gado*, the evidence indicated that, based upon the length of time William had spent in the United States, his speaking English on the job, his conversations with defense counsel, and his 33 pre-trial appearances before the court, William was able to understand spoken and written English.

With regard to the second factor, we specifically addressed William's contention that the complexity of the proceedings, issues, and testimony required that an interpreter be appointed before proceeding. We found that William "*has not argued that he did not understand the charges or the proceedings.*" *Id.* (emphasis added). We also rejected his argument that the court should have considered whether he understood "court-related English," noting that William cited to no case law "requiring that, for due process purposes, a criminal defendant must understand 'court-related English.'" *Id.*

Lastly, with regard to the third factor from *Gado*, William claimed that he was not able to effectively participate in his defense because his lack of confidence in "his ability to fully and accurately express himself in English in response to questions" made him choose not to testify. *Id.* In rejecting this claim, we noted that William cited no case law to support this contention and, furthermore:

With any number of reasons that an individual might not wish to testify, including a fear of public speaking, a speech defect, or a significant stutter, we are unconvinced that an accent or the need for extra time to formulate a response are such liabilities that a due process violation necessarily results from not accommodating them.

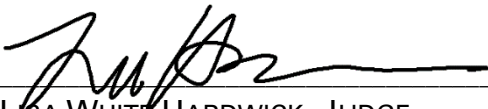
Id.

Thus, while our opinion on direct appeal articulated a different test than the three-factor test stated in *Gado*, the facts supporting our finding of no abuse of discretion essentially addressed those factors. In other words, when the factors from *Gado* are applied to the evidence in this case, the result is the same: a finding that the circuit court did not abuse its discretion in ruling that William readily spoke and understood English and, therefore, the appointment of an interpreter was not required to protect his constitutional rights. Because William has failed to demonstrate a reasonable probability that, but for appellate counsel's failure to file a motion to transfer in the Missouri Supreme Court, the result of his appeal would have been different, the motion court did not clearly err in denying this claim. Point denied.⁵

CONCLUSION

The judgment is affirmed.

⁵ Citing cases including *Wainwright v. Torna*, 455 U.S. 586, 587 (1982), and *Kennedy v. State*, 771 S.W.2d 852, 859 (Mo. App. 1989), the State argues that William had no constitutional right to counsel in connection with a motion seeking discretionary review by the Missouri Supreme Court and, therefore, cannot assert an ineffective assistance claim relating to counsel's failure to file a motion for transfer. Given our disposition, we need not address this issue.



LISA WHITE HARDWICK, JUDGE

ALL CONCUR.