



In the Missouri Court of Appeals Eastern District

DIVISION FOUR

MARCUS GREER,	)	No. ED109340
	)	
Appellant,	)	Appeal from the Circuit Court of
	)	Ste. Genevieve County
vs.	)	20SG-CC00028
	)	
STATE OF MISSOURI,	)	Honorable Wendy Wexler Horn
	)	
Respondent.	)	Filed: October 26, 2021

OPINION

Following his convictions for multiple sex crimes involving three minor girls for which he was sentenced to a total of 128 years in prison, Appellant Marcus Greer filed his amended Rule 29.15 motion in which he alleged that his trial counsel, of which there were three, were ineffective (1) for violating the duty of confidentiality by discussing the State's plea offer with his parents to enlist their assistance in convincing Greer to accept the offer, and (2) for failing to object to allegedly improper remarks made by the prosecutor during closing argument.

On October 26, 2020, the motion court issued its judgment which included findings of fact and conclusions of law denying without an evidentiary hearing Greer's post-conviction motion. This appeal follows.

We have reviewed Greer's second point and find that the motion court did not err in rejecting Greer's claim his counsel was ineffective for failing to object during the State's closing

argument. An extended opinion reciting the detailed facts and restating the principles of law would have no precedential or jurisprudential value. Pursuant to Rule 84.16(b), we have provided the parties with a memorandum, for their information only, setting forth the reasons for our decision on Greer's Point II. However, Greer's appeal of Point I requires our consideration in this published opinion.

Factual and Procedural Background

In the underlying case and in the light most favorable to the jury verdict, the following evidence was adduced: Sometime in April or May 2017, victim J.K., who was 12 years old at the time, went to the home of her friends, victims D.G. and J.G., to play with a volleyball. D.G. and J.G. are the biological daughters of Kate Cheshire with whom Greer lived. When J.K. arrived, Greer told her that the girls were not home, so J.K. left. Later that day, Greer saw J.K. playing outside alone and lured her to his home by convincing her to try on a tank top and shorts he claimed he purchased for J.G. After changing into the clothes, Greer instructed J.K. to enter his bedroom, bend over, and touch her toes. J.K. complied. Greer told her not to tell anyone about the incident.

A couple of weeks later, while J.K. was watching a movie with D.G. and J.G. in their bedroom, Greer convinced J.K. to follow him into the bathroom where he instructed her to expose her breasts which he then touched with his hands. Upon returning to the bedroom, J.K. told D.G., who was 10 years old at the time, that "something weird" happened. Greer, who had been listening from outside the door, later told D.G. not to tell anybody what had happened.

A week or so later, while J.K. and D.G. were together in the yard, J.K. told D.G. what Greer had done to her. D.G. responded that something similar had also happened to her. Later

that day, they both told D.G.'s mother, Katie Cheshire. J.K. also told her own mother, who contacted the Children's Services division.

D.G. told Cheshire that on more than 10 occasions Greer had come into her bedroom at night and sexually assaulted her, which included Greer touching and penetrating D.G. with his fingers and Greer making D.G. touch his private parts. These incidents generally happened while Cheshire was at the gas station, at work, or at school. Greer instructed D.G. to not tell anyone about what he was doing to her.

Cheshire confronted Greer and recorded the conversation on her cell phone. Greer initially denied the allegations. After Cheshire called the police, Greer told D.G. that he was sorry, and implored Cheshire not to take any action. When the police arrived and approached Greer, he said that he was the one they were there for and to put him in cuffs.

A few days later, Cheshire found at her house a phone belonging to Greer. On it she found images of her daughters D.G. and J.G. in their underwear, and photos depicting Greer's hands on J.G.'s private areas. After Cheshire reported what she found to the Division of Family Services, a detective arrived and seized the phone.

Greer was charged, tried by jury, and convicted in the Circuit Court of the Ste. Genevieve County of three counts of the unclassified felony of statutory sodomy in the first degree in violation of section 566.062,¹ the class C felony of child molestation in the third degree in violation of section 566.069, and four counts of the class D felony of possession of child pornography in violation of section 573.037. The trial court sentenced Greer to consecutive terms of imprisonment in the Missouri Department of Corrections of thirty years each on Counts I, II, and III, ten years on Count IV, and seven years each on Counts V, VI, VII, and VIII, for a

¹ All statutory references are to the Revised Statutes of Missouri (2016).

total of 128 years in prison. We affirmed his convictions and sentences in *State v. Greer*, 590 S.W.3d 437 (Mo. App. E.D. 2019) and issued our mandate on January 2, 2020.

Standard of Review

Appellate review of a judgment overruling a motion for post-conviction relief is limited to a determination of whether the findings of fact and conclusions of law issued by the motion court are “clearly erroneous.” Rule 29.15(k);² *see also Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000). The motion court’s findings and conclusions are presumptively correct and will only be considered clearly erroneous if, after a full review of the record, the appellate court is left with the definite and firm impression that a mistake was made. *Id.*; *see also State v. Johnson*, 968 S.W.2d 686, 695 (Mo. banc 1998). Allegations contained in a motion for post-conviction relief are not self-proving; instead, a movant bears the burden of proving his post-conviction claims by a preponderance of the evidence. *State v. Ervin*, 423 S.W.3d 789, 793 (Mo. App. E.D. 2013).

In instances where ineffective-assistance-of-counsel claims for post-conviction relief are the focus of our attention, we apply the *Strickland* test. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Johnson*, 406 S.W.3d at 898. To be entitled to relief, the movant must show by a preponderance of the evidence that (1) his counsel failed to exercise the level of skill and diligence that a reasonably competent counsel would in a similar situation, and (2) he was prejudiced by that failure. *Johnson*, 406 S.W.3d at 898-99. To overcome the strong presumption that counsel’s conduct was reasonable and effective, the movant must identify specific acts or omissions of counsel that, in light of all the circumstances, fell outside the wide range of professionally competent assistance. *Id.* To show prejudice, the movant must demonstrate that

² All rule references are to the Missouri Supreme Court Rules (2020).

there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.* If a movant fails to establish either prong, the claim of ineffective assistance must fail. *Roberts v. State*, 535 S.W.3d 789, 797 (Mo. App. E.D. 2017).

I. Counsel's disclosure of the State's plea offer to Greer's parents did not constitute the ineffective assistance of counsel because the information was not confidential and its disclosure did not prevent Greer from accepting the plea.

In Point I on appeal, Greer argues that counsel was ineffective because he improperly discussed the State's plea offer with Greer's parents without first obtaining his permission to do so. Greer contends this undermined his trust and confidence in his counsel and that but for counsel's conduct in this regard, he would have accepted the State's plea offer which bore a sentence of 20 years, instead of the 128 years he received at trial. We disagree because Greer's assertion is refuted by the record, is illogical, and constitutes rank speculation.

A criminal defendant has no constitutional right to a plea bargain or to a plea agreement. *Rowland v. State*, 129 S.W.3d 507, 510 (Mo. App. S.D. 2004). So, failed plea negotiations do not implicate the Constitution. *Id.* Rather, it is the ensuing plea of guilty arising from such negotiations that is of constitutional significance. *Id.* And to show prejudice where a plea offer has lapsed or been rejected because of counsel's alleged deficient performance, a defendant must demonstrate a reasonable probability he would have accepted the earlier plea offer had he been afforded effective assistance of counsel. *Missouri v. Frye*, 566 U.S. 134, 147 (2012).

Turning to the record here, we find that Greer has failed to demonstrate (1) that his counsel was ineffective when he enlisted Greer's parents' assistance in an effort to convince him to take the plea offer, and (2) that he would have accepted the plea offer but for the contact with his parents.

The State's November 15, 2017, plea offer was that Greer would be sentenced to 20 years in prison in exchange for his guilty pleas to Count I and Count IV along with certain conditions including (1) that he would waive his right to a Sentencing Assessment Report, and (2) that he would plead guilty to Count II and receive a concurrent 5-year sentence. Also, the plea offer carried a deadline that Greer plead guilty and be sentenced by December 19, 2017, and that Greer give the State at least 7 days' notice before entry of his guilty pleas so that the victims could attend.

Coincidentally, Greer's case was set on the trial court's December 19, 2017 docket concerning a matter unrelated to the State's plea offer. On that date, Greer appeared with counsel. The court announced its ruling on the State's motion in limine relating to the admissibility of propensity evidence. The subject of the plea offer was not raised at that appearance. Regardless, Greer had not given the State the 7 days' notice required by the plea agreement. In fact, Greer demonstrated no intention on that date to even bring up the State's plea offer much less enter a guilty plea pursuant to that offer. In addition, Greer expressed no complaint or any notion of a conflict with his counsel prior to or on that date.

In its decision on Greer's post-conviction motion, the motion court placed considerable weight on Greer's silence at the December 19, 2017 court appearance both as to the plea offer and as to any complaints he may have had relating to counsel's contact with his parents. We agree with the motion court's finding in this regard. The court found that there was "nothing in the record that [Greer] had any intention of accepting the plea offer." If Greer wanted to accept the plea or if he was unhappy with counsel's conversation with his parents, he could have and should have brought those matters to the court's attention on December 19, 2017.

We are likewise unpersuaded by Greer's complaint that his counsel violated his ethical duty of confidentiality by involving Greer's parents in an effort to convince Greer to take the plea offer. Not only do we fail to find any ethical violation, but Greer's assertion in this regard appears to be an after-the-fact effort since he did not raise this issue until after the December 19th deadline when the plea offer had already lapsed.

Simply put, we do not believe the information counsel shared with Greer's parents was confidential attorney-client protected communications. The attorney-client privilege attaches to information transmitted by a voluntary act of disclosure; between a client and his lawyer; in confidence; and by a means which, so far as a client is aware, discloses the information to no third parties other than those reasonably necessary for the transmission of the information or for the accomplishment of the purpose for which it is to be transmitted. *State v. Longo*, 789 S.W.2d 812, 815 (Mo. App. E.D. 1990) (internal citations omitted). All four of the above elements must be present for the privilege to apply. *Id.* In addition, surrounding circumstances should be considered as they indicate the existence, or nonexistence, of any one of the elements. *Id.*

The information that counsel discussed with Greer's parents was simply not attorney-client privileged information. The State's plea offer was not confidential information since it was manifestly known by the prosecuting attorney and likely others in that office.

In *White v. State* 939 S.W.2d 887, 895 (Mo. banc 1997), the movant alleged that counsel engaged in unethical and improper conversation with the victim's immediate family members concerning the merits of movant's defense and movant's trial strategy. *Id.* The content of these conversations was conveyed to the State which White claimed resulted in his prejudice. *Id.* The Supreme Court rejected White's allegations as mere conclusions and speculation because he failed to demonstrate how these arguably unethical disclosures resulted in prejudice at trial. *Id.*

Compared to the disclosures in *White* which were effectively to the opposing side of the litigation, the disclosure at issue before us was merely to Greer's parents and was for the purpose of getting Greer to take the plea offer which he now illogically claims caused him to do the opposite. So, if the prejudicial effect of the disclosure in *White* was speculative, the level of speculation Greer proposes is even more so.

Moreover, the record establishes that Greer was aware of and understood the terms of the State's plea offer, but he failed to indicate any intention to accept the deal until well after it had expired. The record also shows that Greer had ample time to accept the November 15, 2017 plea offer before the December 19, 2017 deadline. And Greer's assertion after the deadline had passed that he would have accepted it but for his counsel's conversation with his parents is completely refuted by the record. As in *White*, this Court will not offer relief for speculative allegations made after the fact.

Point I is denied.

Conclusion

Based on the foregoing, we affirm the judgment. A memorandum disposing of Point II, which is not covered in this opinion, has been furnished to the parties pursuant to Rule 84.16(b).

A handwritten signature in black ink, appearing to read 'James M. Dowd', is written over a horizontal line.

James M. Dowd, Judge

Michael E. Gardner, P.J., and
Lisa P. Page, J., concur.