Missouri Court of Appeals
Southern District

In Division

AUSTIN TYLER GRAY,

Defendant-Movant,

v.

STATE OF MISSOURI,

Plaintiff-Respondent.

No. SD38721

Filed: November 18, 2025

APPEAL FROM THE CIRCUIT COURT OF GREENE COUNTY

Honorable Jerry A. Harmison, Judge

AFFIRMED IN PART, VACATED AND REMANDED

Austin Tyler Gray ("Movant") appeals the denial of his Amended Rule 29.15[1] motion without an evidentiary hearing. Movant claims the reviewing court erred in failing to hold an evidentiary hearing regarding his claims that: 1) counsel was ineffective for failing to interview and call a witness who was present "on the night in question" and would have contradicted testimony from the Victim and her Mother; 2) counsel was ineffective for failing to strike a juror who might have been biased in favor of law

[1] Unless otherwise noted, all rule references are to Missouri Court Rules (2021).

enforcement; and 3) the State failed to disclose a medical examination of Victim that was in its possession. We affirm the findings of the motion court as to the challenged juror, as that holding is not clearly erroneous. We agree, however, that the motion court should have held an evidentiary hearing on the other two allegations as they are not clearly refuted by the record, and we vacate and remand that portion of the ruling to the motion court for such hearing.

Timeliness

Before reaching the merits of Movant's appeal, we must address the issue of whether Movant's amended motion was timely filed. Under the Missouri Supreme Court's holding in ***Scott v. State***, 719 S.W.3d 723, 727 (Mo. banc 2025), the version of Rule 29.15 in effect at the time of Defendant's sentencing on June 24, 2021 controls the timetable for filing for post-conviction relief.

The mandate of the appellate court denying Movant's direct appeal was entered on April 5, 2023, and Movant timely filed his *pro se* motion on June 6, 2023. On June 8, 2023, the motion court appointed the public defender to represent Movant. Under the applicable version of Rule 29.15, Movant had sixty days from June 8, 2023 to file his amended motion and was allowed to request two extensions of time, not to exceed thirty days each.

Movant timely asked for an initial thirty-day extension on June 26, 2023. On July 13, 2023, the trial court purported to grant Movant a *sixty*-day extension to file his amended motion, even though such an extension was neither requested by Movant nor permitted under the applicable version of Rule 29.15. Movant did not raise this issue with

the motion court. While Movant timely requested a second thirty-day extension on August 28, 2023, Movant did not pursue this request further and the motion court never granted a second thirty-day extension. As such, Movant's amended motion, filed on October 6, 2023, was untimely under the applicable version of Rule 29.15.

We need not, however, remand the case to the motion court for an abandonment hearing or for further analysis of Movant's claims. As the record demonstrates that the untimeliness of the amended motion was due to counsel's miscalculation of the due date, and the motion court incorrectly determined that the amended motion was timely and addressed all the claims in the amended motion without an evidentiary hearing, we find that Movant was abandoned, excuse the late filing of the amended motion and proceed to address Movant's claims. ***Sauter v. State***, 719 S.W.3d 143, 147-48 (Mo. App. S.D. 2025) (citing ***Nelson v. State***, 719 S.W.3d 729, 735 (Mo. banc 2025)).

Standard of Review

"Appellate review of the motion court's ruling is limited to whether its findings and conclusions are clearly erroneous." ***Dent v. State***, 662 S.W.3d 792, 797 (Mo. App. E.D. 2023) (citing ***McLemore v. State***, 635 S.W.3d 554, 559 (Mo. banc 2021)). "When reviewing the denial of post-conviction relief, this Court interprets the facts in the light most favorable to the verdict." ***Id.*** at 797. "A movant is entitled to an evidentiary hearing on his Rule 29.15 motion only if: (1) the movant pleaded facts, not conclusions, warranting relief; (2) the facts alleged are not refuted by the record; and (3) the matters complained of resulted in prejudice to the movant." ***Id.*** "An evidentiary hearing may only be denied when the record conclusively shows that the movant is not entitled to relief."

Wilkes v. State, 82 S.W.3d 925, 927-28 (Mo. banc 2002) (emphasis omitted). "[C]ircuit courts have broad discretion to hold an evidentiary hearing in these types of cases and, when in doubt, should err on the side of having a hearing. In fact, a circuit court can never commit reversible error by having an evidentiary hearing." ***Shepard v. State***, 658 S.W.3d 70, 80 (Mo. App. E.D. 2022).

"To obtain post-conviction relief on the basis of ineffective assistance of counsel, a movant must satisfy the two-pronged ***Strickland*** standard." ***Dent***, 662 S.W.3d at 797 (citing ***McFadden v. State***, 619 S.W.3d 434, 445 (Mo. banc 2020) (citing ***Strickland v. Washington***, 466 U.S. 668, 687, (1984)). "If a movant fails to satisfy either prong, we need not consider the other." ***Id.***

> A movant must first demonstrate that counsel's performance was deficient. ***McFadden***, 619 S.W.3d at 445. Performance is "deficient" if it fails to rise to the level of skill and diligence that would be demonstrated by a reasonably competent attorney under similar circumstances. ***Id.*** Second, a movant must prove he was prejudiced by counsel's deficient performance. ***Id.*** "Prejudice" occurs when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. ***Id.***

Dent, 662 S.W.3d at 797.

History

Movant was convicted of statutory rape in the first degree under §566.032[2], enticement of a child under §566.151 and child molestation under §566.068. All of these acts were charged to have occurred between July 21, 2017 and July 20, 2018, but no

[2] Unless otherwise noted, all statutory references are to RSMo 2016, as amended through July 20, 2018.

specific date on which these acts occurred was identified. Movant's direct appeal of these convictions was denied by this Court in ***State v. Gray***, 662 S.W.3d 115 (Mo. App. S.D. 2023).

At trial, the State relied on the testimony of four witnesses: 1) the Victim; 2) the Victim's mother ("Mother"); 3) the forensic interviewer who testified to the foundation for the recorded interview with Victim; and 4) a law enforcement officer who testified to the foundation for the recorded interview with Movant. All three of Movant's points rely on different operative facts, and such facts will be discussed within the analysis of each point below.

Analysis

Point 1

Movant's first point alleges that the motion court erred in failing to conduct an evidentiary hearing with respect to his allegation that trial counsel was ineffective for failing to investigate and call Gary Greco ("Greco") as a witness. To assert a claim of ineffective assistance of counsel for failure to call a witness, a movant must show that:

(1) trial counsel knew or should have known of the existence of the witness,

(2) the witness could be located through reasonable investigation,

(3) the witness would testify, and

(4) the witness's testimony would have produced a viable defense.

Thompson v. State, 167 S.W.3d 271, 273-74 (Mo. App. W.D. 2005).

At trial, Victim testified both in person and through a recorded interview played for the jury pursuant to Chapter 491. Victim stated that on the night of the incident, her

"Uncle Gary" had taken Mother to work and left her and Movant home alone. Victim testified that while she was playing video games, Movant directed her to take off her clothes and lay on a bed and told her he would give her some candy if she did. After she did so, Victim testified Movant removed his pants and then touched her, including touching her "down-there" with his "down-there." This went on for several minutes, after which Victim said Movant told her not to tell anyone and then sent her to a babysitter's house. Movant testified in his own defense at trial and denied the allegations against him.

In his amended motion, Movant alleges that he informed trial counsel of Greco, provided contact information and suggested that Greco could corroborate Movant's testimony and counter the testimony of Victim and Mother. The amended motion alleges that at trial Victim testified that "Uncle Gary" took Mother to work the night of the alleged incident. The amended motion alleges that trial counsel did not contact or interview Greco, even though he was available and willing to testify. Movant alleges that if Greco had been called to testify, he would have stated that he was at the house "on the night in question." Greco would have also testified that he took Mother to work and came back, at which time Movant told him he could stay and Movant went up to bed. Greco would have further testified that Victim repeatedly tried to go lay down with Movant, but Greco would not let her.

Movant's amended motion asserts sufficient factual allegations to warrant an evidentiary hearing. The amended motion alleges counsel knew of the existence of Greco, where he was located and that he would testify. The alleged testimony from Greco, that he remained at the house after taking Mother to work, that Movant went to

bed and that he prevented Victim from going to lie down with Movant, could potentially contradict both Victim's testimony at trial as well as her recorded interview. As the State's evidence against Movant relied heavily on testimony from Victim and Mother, Greco's testimony could have affected the jury's determination of the credibility of that testimony and provided a viable defense.

We are not persuaded by the motion court's finding, and the State's argument, that Movant's failure to identify a particular date on which Greco was present meant an evidentiary hearing was unnecessary. Movant was not charged with committing the offense on a specific date, and neither Victim nor Mother identified a specific date on which the offense occurred. Only one incident was charged, and the testimony related to only one incident that occurred on a particular unidentified night. Further, both Victim and Mother confirmed in their testimony that Greco was present at the house on the night the incident occurred. Thus, Movant's factual allegation that Greco was present on "the night in question" is not clearly refuted by the record. *See* ***Thompson***, 167 S.W.3d at 274 (remanding case for evidentiary hearing because allegations in post-conviction motion were not refuted by the record and thus it was impossible for the motion court to determine that the movant did not receive ineffective assistance of counsel without an evidentiary hearing.) As the motion court should have conducted an evidentiary hearing, Movant's Point 1 is granted.

Point 2

Movant's second point contends his counsel was ineffective for failing to strike a juror, M.C., who was allegedly biased in favor of law enforcement. "To succeed on a

claim that counsel was ineffective for failing to strike a veniremember peremptorily or for cause, [the Movant] must establish that, inter alia, 'a juror who *was actually biased* sat on the petit jury.'" ***Steele v. State***, 551 S.W.3d 538, 547 (Mo. App. E.D. 2018) (emphasis in original). "The mere possibility of bias or prejudice is not sufficient to disqualify a potential juror; instead, the evidence must clearly reveal that the challenged juror was, in fact, bias or prejudiced." ***Id.*** "If the juror at issue was not actually biased, then trial counsel was not ineffective in failing to strike him or her from the jury." ***Id.***

During *voir dire*, Venireperson M.C. indicated on two separate occasions that he would follow the instructions given by the court. In his questions to the panel, Movant's trial counsel asked whether any jurors would believe that a law enforcement officer "is a more credible witness than other civilian lay witnesses *just because of their training and experience* as a law enforcement officer?" (emphasis added). Another panel member indicated that is what police officers are trained to do, and that he thought they might be more credible than a lay witness because of that training. After that response, M.C. stated, "I would believe the same. I have a friend that was a police officer, and I know the training that *he* went through, and I just believe *that he would be*." (emphasis added). M.C. made no further comments on the issue and was not asked any follow up questions. M.C. thereafter served as a juror in the case.

Movant asserts that this exchange establishes that his trial counsel was ineffective for failing to strike M.C. due to a bias in favor of police officers. While Movant cites ***State v. Carnes***, 945 S.W.2d 594, 595-96 (Mo. App. E.D. 1997), in support of this argument, such case is distinguishable. In ***Carnes***, the challenged juror had relationships

with many police officers, admitted that those relationships could have an effect on the juror's service in the case and that an officer would start with "something extra" in determining whether their testimony was credible. ***Id.***

In this case, M.C.'s agreement with the broad statement that officers may be more credible because of their training and experience does not clearly establish actual bias, and is only a recognition of such training and experience. *See* ***State v. Bevly***, 665 S.W.2d 46, 51 (Mo. App. E.D. 1984) ("Police officers are professional investigators and observers and we find no disqualifying bias in a venireman who recognizes that status.") Further, M.C.'s entire response, when read in context, specifically narrows to his friend who was a police officer. M.C. knew the training that "he" (the friend) went through and M.C. believed that "he" (the friend) would be more credible. This single response does not reveal that juror M.C. was actually biased in favor of all law enforcement officers.

Further, the sole law enforcement witness in this case did not provide any of the elements of the State's case and testified only as a foundational witness for the Movant's recorded interview. Movant, therefore, could not establish prejudice even if such a bias was arguably present.[3] *See* ***Carnes***, 945 S.W.2d at 596 (noting that defendants have been

[3] On direct appeal, this Court stated:

> Here, there was no *testimony* to the jury by Detective Hicks regarding Child's credibility, and the State never sought to qualify him as an expert. His testimony at trial was limited to that of a fact witness, which included his job title, job history, and training. At no point did he tell the jury he had any special skills, experience, education, or training that qualified him to assess Child's credibility. Nor did he tell the jury he believed Child was telling the truth.

Gray, 662 S.W.3d at 119-20 (emphasis in original) (footnote omitted).

found not to be prejudiced by a potential law enforcement bias where the officers involved "did not provide any elements of the state's case, where the more important evidence came from other witnesses and where the officer did not testify to any truly contested issues.") The motion court's findings as to this issue were not clearly erroneous. Movant's Point 2 is denied.

Point 3

Movant's third point contends that the motion court clearly erred by denying his request for an evidentiary hearing on his claim of ineffective assistance of counsel and a violation of due process in that the State improperly failed to disclose the contents of a Sexual Assault Forensic Examination ("SAFE exam") of the Victim prior to trial. The motion court denied Movant a hearing on this claim, reasoning that:

> The written portion of this exam was disclosed on November 14, 2019, as Bates stamped pages 46-57, and a letter reflecting the same was filed with the Court on that date. Media associated with the SAFE exam, namely photos of the juvenile victim, were not directly provided to Movant's trial counsel. However, said letter directed Movant's trial counsel to contact the State to view or obtain media evidence, such as photographs, in compliance with Rules 25.03 and 25.07. Rule 25.07(b) provides that disclosure may be made "By the party making disclosure notifying opposing counsel that the material and information may be inspected, obtained, tested, copied, or photographed at a specified time and place[.]" The entirety of the SAFE exam was timely disclosed to Movant's trial counsel. As such, Movant does not assert any facts which warrant relief.

Having reviewed the record, we do not find the evidence supports the motion court's findings. While the November 14, 2019 letter referenced in the Court's filing was included in the record on appeal, it only states that "[t]he attached documents are Bates stamped pages numbered 1 through 74." The letter does not identify any specific

documents that are attached, and none of the documents produced with the letter were included in the record. We have reviewed the remaining evidence and do not find support for the motion court's finding that the written SAFE exam was specifically produced. As the record does not clearly refute Movant's Point 3, we must remand that issue to the motion court for an evidentiary hearing consistent with Rule 29.15.

Conclusion

The ruling of the motion court as to Movant's Point 2 is affirmed. The ruling of the motion court as to Movant's Points 1 and 3 are vacated and the case is remanded to the motion court for an evidentiary hearing on those allegations.

MATTHEW P. HAMNER, J. – OPINION AUTHOR

JEFFREY W. BATES, J. – CONCURS

DON E. BURRELL, J. – CONCURS