

Summary of SC90554, *Miguel Vaca v. State of Missouri*

Appeal from the Platte County circuit court, Judge Owens Lee Hull Jr.

Argued and submitted April 15, 2010; opinion issued June 15, 2010

Attorneys: Vaca was represented by Susan L. Hogan of the public defender's office in Kansas City, (816) 889-7699, and the state was represented by Daniel N. McPherson of the attorney general's office in Jefferson City, (573) 751-3321.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A man convicted of three armed robberies appeals the circuit court's denial of post-conviction relief. In a 6-1 decision written by Chief Justice William Ray Price Jr., the Supreme Court of Missouri affirms the circuit court's decision in part, reverses it in part and remands (sends back) the case for further proceedings. Although defense counsel was not ineffective in introducing evidence of a fourth robbery as trial strategy to try to show another person committed all four robberies, defense counsel was ineffective in failing to consider whether to introduce – during the sentencing phase of trial – a psychologist's testimony or report about the man's mental condition, especially after the jury asked about the man's mental condition during the earlier guilt phase of trial. Judge Zel M. Fischer dissents. He would hold that the man failed to demonstrate prejudice from counsel's failure to introduce the psychologist's testimony or report.

Facts: Miguel Vaca was charged with committing three armed robberies in October and November 2002 in Platte County that all followed the same pattern. When defense counsel first visited Vaca, the county jail psychiatrist already had been treating Vaca for suspected mental illness. Counsel enlisted the services of a licensed clinical and forensic psychologist to determine Vaca's competency to stand trial and whether he had diminished capacity. After interviewing Vaca and conducting various psychological tests, the psychologist concluded Vaca had schizophrenia and borderline intellectual functioning, both of which could have affected his understanding of his conduct. Vaca's trial was bifurcated (separated) into two phases by the newly codified procedure for non-capital cases in section 557.036, RSMo Supp. 2008. During the first phase – to determine whether Vaca was guilty – the state preemptively excluded any evidence of Vaca's mental condition before the defense presented its case, and defense counsel did not call the psychologist to testify or attempt to submit his report into evidence. During guilt phase deliberations, the jury sent four questions to the court, including whether Vaca was given psychological testing, whether he was compliant with his medications before his arrest and whether he was on any medications at the time of trial. The court did not answer the questions, and the jury found Vaca guilty of all charges. During the second phase of the trial – to determine how Vaca should be sentenced – defense counsel did not call the psychologist to testify or attempt to submit his report into evidence. Vaca was sentenced to consecutive terms totaling life plus 102 years in prison. Vaca's conviction and sentence were affirmed on appeal. *State v. Vaca*, 204 S.W.3d 754 (Mo. App. 2006). Vaca subsequently filed a motion for post-conviction relief, arguing his defense counsel was ineffective in not submitting the psychologist's testimony or report during his trial. The circuit court overruled Vaca's motion; he appeals.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.

Court en banc holds: (1) Vaca's defense counsel was constitutionally ineffective during the sentencing phase of trial because he possessed evidence detailing Vaca's mental condition, was apprised of the jury's interest in Vaca's mental condition, and yet failed to consider whether to present such records or testimony to the jury. The state concedes that the psychologist was known by defense counsel, was available and was willing to testify at trial, satisfying the first three elements of proving a claim of ineffective assistance of counsel under *Hutchison v. State*, 150 S.W.3d 292, 304 (Mo. banc 2004). As to the fourth element, submission of mental health history – subject to counsel's strategic judgment – is a viable defense during a bifurcated sentencing phase. Here, however, defense counsel admitted that he gave no consideration to calling the psychologist to testify and that there was no strategic reason for not calling him. This omission – in front of this particular jury – undermines this Court's confidence in the sentencing phase outcome. Counsel was ineffective not for failing to call the psychologist but for failing to consider whether to call him.

(2) Defense counsel was not ineffective in entering into evidence a fourth uncharged robbery at another Kansas City-area business. Counsel's theory was that the state's witnesses had identified the wrong person and that another person had committed this robbery along with the three with which Vaca was charged. Although this trial strategy ultimately failed, counsel weighed the risks and rewards of admitting evidence during the guilt phase that later might be damaging during the sentencing phase. Vaca is not entitled to post-conviction relief on this point.

Dissenting opinion by Judge Fischer: The author would hold that Vaca failed to prove he was prejudiced, pursuant to *Strickland v. Washington*, 466 U.S. 668, 686-88 (1984), because he failed to demonstrate the result of the proceeding would have been different had his counsel considered whether to introduce the psychologist's testimony or report. To demonstrate ineffective assistance of counsel, however, prejudice must be definite and identifiable, but here, the principal opinion's concession that the psychologist's testimony may have helped Vaca – or may have embittered the jury – confirms that its conclusion is speculative. Further, the circuit court's finding of fact that defense counsel pursued reasonable trial strategy regarding his concerns about Vaca's mental competence is supported by the record and is not clearly erroneous.