

**Summary of SC91564, *Kenneth Baumruk v. State of Missouri***

Appeal from the St. Charles County circuit court, Judge Lucy D. Rauch  
Argued and submitted Feb. 16, 2012; opinion issued April 17, 2012

**Attorneys:** Baumruk was represented by William J. Swift of the public defender's office in Columbia, (573) 882-9855; 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 sentenced to death for the murder of his wife during a hearing regarding the dissolution of their marriage appeals the denial of post-conviction relief. In a 7-0 decision written by Judge Zel M. Fischer, the Supreme Court of Missouri affirms the circuit court's judgment. The circuit court did not clearly err in overruling the man's claims. Some of the man's claims lacked merit, others involved strategic decisions by counsel and did not result in ineffective assistance and, as to others, the man did not show he was prejudiced by his counsel's alleged action or inaction.

Judge Ann Mesle, a circuit judge in the 16th Judicial Circuit (Jackson County), sat by special designation in place of Judge George W. Draper III.

**Facts:** In May 1992, Kenneth Baumruk secretly carried two handguns in his briefcase into the St. Louis County circuit court for a hearing regarding the dissolution of his marriage. During the hearing, he drew the guns and opened fire, killing his wife; injuring his wife's attorney, his own attorney, a bailiff and a security guard; and shooting at the judge, an investigator for the county prosecutor's office and three police officers. Police officers returned fire, hitting Baumruk nine times, including two shots to the head. He was charged with first-degree murder, first-degree assault and armed criminal action. After his case was moved to Macon County, he was declared incompetent to stand trial due to the brain injuries he sustained in the shootout with police, and this Court ordered the charges be dismissed as a result. *State ex rel. Baumruk v. Belt*, 964 S.W.2d 443 (Mo. banc 1998) (*Baumruk I*). The state subsequently indicted Baumruk, and he was declared competent to stand trial. Baumruk again sought to change venue, and the trial court overruled his motion. A jury found him guilty and recommended the death penalty. On appeal, this Court reversed the judgment, remanding (sending the case back) with directions to sustain Baumruk's motion to change venue. *State v. Baumruk*, 85 S.W.3d 644, 648 (Mo. banc 2002) (*Baumruk II*). The St. Louis County circuit court transferred the case to the St. Charles County circuit court, which determined Baumruk was competent to stand trial. Following a 2007 retrial, the jury found Baumruk guilty, and he was sentenced to death. After this Court affirmed his conviction and sentence on direct appeal, *State v. Baumruk*, 280 S.W.3d 600 (Mo. banc 2009) (*Baumruk III*), he sought post-conviction relief, which the circuit court denied. Baumruk appeals.

**AFFIRMED.**

**Court en banc holds:** (1) Baumruk was not prejudiced when counsel in his first competency hearing successfully sought to have the charges against him dismissed, which he argues allowed the state to refile charges and obtain a conviction and death sentence against him. As this Court held in *Baumruk I*, the circuit court was required to dismiss the charges against Baumruk once it determined he was incompetent. Furthermore, even without counsel actively pursuing dismissal of the charges, the court in which the charges were filed would have been able to proceed on them once it determined Baumruk was competent to stand trial, and section 552.020, RSMo, permitted the state to reraise the issue of Baumruk’s competency at any time.

(2) The circuit court did not clearly err in overruling Baumruk’s claims that his counsel was ineffective for failing to move to suppress statements Baumruk made to a social worker. The circuit court found that the statements were not the product of a custodial interrogation and that any reference to the social worker’s conversations with Baumruk were made after Baumruk raised the issue of his mental competency by claiming he was not guilty by reason of mental disease or defect. Consistent with the United States Supreme Court’s recent ruling in *Howes v. Fields*, 565 U.S. \_\_\_, No. 10-680, slip op. at 1 (Feb. 21, 2012), about how to determine whether a prisoner is in custody at the time of making statements, Missouri courts have determined that a person’s status as a prison inmate does not necessarily make an interview with prison officials “custodial interrogation” requiring the protections set out in *Miranda v. Arizona*, 384 U.S. 436 (1966). Nothing in the record indicates that the social worker’s interviews with Baumruk took place in a coercive atmosphere, that any coercive techniques were used or that Baumruk was forced to meet with the social worker, and the record is clear that Baumruk was free not to meet with the social worker or to leave the interview at any time. Further, the social worker did not violate Baumruk’s Sixth Amendment right to counsel in interviewing Baumruk. The social worker’s statements were not used with regard to whether Baumruk shot his wife, which is undisputed. Additionally, the record refutes any claim that Baumruk’s counsel had not been notified of the meetings between Baumruk and the social worker. Rather, the record shows that counsel hoped the social worker would testify on Baumruk’s behalf during the penalty phase.

(3) Counsel was not ineffective for failing to file a meritless motion that his counsel should have moved to suppress Baumruk’s statements to a police officer during an investigation into Baumruk’s complaint that someone was stealing his newspapers. The statements were used to support the conclusion of the state’s expert that Baumruk had some memory of the shootings and was competent to stand trial. The circuit court during the first trial determined that this interview did not violate Baumruk’s *Miranda* rights.

(4) Because Baumruk’s motion does not contain sufficient allegations to establish the needs for certain brain scans and the allegations it does make regarding the scans are refuted by the record, the circuit court did not clearly err in overruling this motion. The record contained ample evidence of the brain injuries Baumruk suffered, and the scans would have been speculative and cumulative to evidence already presented. Further, a psychiatrist testified that the scans alone – without an examination of Baumruk, continued collection of information about him and the linking together of the information and examination – would not be sufficient to understand the effects of Baumruk’s brain injury.

(5) Strategic decisions such as the ones by Baumruk's counsel not to call a particular psychiatrist and physician, made after thorough investigation, are virtually unchallengeable. Their testimony would have been cumulative to other evidence already presented, would not have proven Baumruk's incompetence and would have impeached the testimony of Baumruk's other doctor who more recently had evaluated his condition.

(6) The circuit court did not clearly err in overruling Baumruk's claim that his trial counsel should have objected to an emergency room doctor's testimony about a statement Baumruk made while he was being treated for the gunshot wounds to his head. Baumruk cannot show an objection based on the physician-patient privilege would have been successful because he waived any such claim of privilege when he placed his mental condition at issue by arguing he was not guilty by reason of mental disease or defect.

(7) The circuit court did not clearly err in overruling Baumruk's claim that his counsel failed to move to suppress statements Baumruk made to one of the police officers who arrested him. The record makes clear that these statements were unsolicited and not the product of a custodial interrogation. His counsel cannot be ineffective for failing to file a meritless motion.

(8) The circuit court did not clearly err in determining that impeachment of a psychiatrist who examined Baumruk – whose dissolution of marriage was pending before the judge at whom Baumruk had shot – would not have provided a viable defense or changed the outcome of the trial.

(9) Baumruk's counsel cannot be ineffective for failing to make a meritless motion or objection seeking to disqualify the St. Louis County prosecutor's office because Baumruk shot at one of the office's investigators and because the investigator's wife was an attorney in the office. The evidence presented showed that the investigator had left the prosecutor's office before Baumruk's first trial and that neither the investigator nor his wife had any meaningful participation in investigating or prosecuting Baumruk's case. Accordingly, any motion or objection to the prosecutor's office on this ground would have been overruled. Baumruk cannot show prejudice as to this point.

(10) Because trial strategy is not a ground for ineffective assistance of counsel, the motion court did not clearly err in overruling Baumruk's claim that his counsel should have moved to suppress statements he made to a corrections officer after Baumruk struck a medical assistant. The officer's question to Baumruk was not an interrogation, the trial court's admission of the statement did not violate *Miranda*, and counsel made a strategic decision to defend Baumruk on the ground that he was not guilty by reason of mental disease or defect. Further, it was reasonable strategy for Baumruk's counsel not to object to a particular answer during cross-examination by the officer to avoid highlighting an incident in which Baumruk stabbed a social worker with a pencil.

(11) The circuit court did not err in overruling, without an evidentiary hearing, Baumruk's claim that his counsel failed to present evidence that Baumruk told an emergency medical technician that he was sorry. The technician would not have been able to offer any testimony that would withstand a hearsay objection. Even if the facts Baumruk alleges as to the technician were true

and were not inadmissible hearsay, Baumruk still cannot demonstrate he was prejudiced by his counsel because the aggravating factors the jury found are such that no reasonable probability exists that the outcome of the penalty phase would have been different.

(12) The circuit court did not clearly err in overruling Baumruk's claim that his counsel should have called an expert to testify about the precise areas of his brain damage and how these injuries affected his decision making and ability to control impulsivity. As noted in paragraph 4 above, the brain scans Baumruk wanted would have been insufficient to help the jury understand how Baumruk would be affected by his brain injuries. The record also supports the court's finding that it was a strategic decision by Baumruk's counsel not to present this evidence because it would open the door to more evidence of the shoot-out with the police that caused the injuries. This evidence was presented in Baumruk's first trial to no avail, and so it was a reasonable strategic decision for counsel to present different mitigating evidence during Baumruk's retrial. Further, the scans only would demonstrate Baumruk's mental problems he had after the shooting, not at the time of the shooting.

(13) As to his claim that his counsel should have presented certain expert testimony during the penalty phase regarding numerous life stressors he was facing at the time of the shooting, Baumruk failed to plead facts showing he was entitled to relief. The failure to produce evidence that was cumulative to other evidence already presented is not a sufficient basis for a finding of ineffective assistance of counsel. The fact that counsel did not call additional witness to provide more testimony about the life stressors was a trade-off that trial counsel was in the best position to assess.

(14) Baumruk's counsel made a strategic decision and, therefore, was not ineffective, in not calling certain nurses who treated Baumruk. Counsel had investigated the use of the nurses as witnesses and decided not to call them as witnesses after the state chose not to call another nurse as a witness.

(15) The circuit court correctly found that Baumruk's trial counsel could not be ineffective for failing to preserve for appeal Baumruk's argument about a repeated slide show shown to the jury during the state's closing argument because this argument lacked merit. The slide show consisted of 11 photographs, each of which already had been admitted into evidence and already had been seen by the jury. The court also correctly found that Baumruk's appellate counsel was not ineffective in not raising this argument during the direct appeal. Appellate counsel has no duty to present every issue, and here Baumruk's appellate counsel testified she could not argue effectively that the trial court erred in allowing the state to present the slide show. The circuit court's finding of fact on this post-conviction claim is sufficient to permit appellate review and does not violate Rule 29.15(j).