

Summary of SC92615, *David A. McNeal v. State of Missouri*

Appeal from the St. Louis circuit court, Judge Michael Mullen

Argued and submitted September 4, 2013; opinion issued November 12, 2013

Attorneys: McNeal was represented by Andrew E. Zleit of the public defender's office in St. Louis, (314) 340-7662; and the state was represented by Shaun J. Mackelprang 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 burglary appeals the circuit court's denial, without a hearing, of post-conviction relief for his claim that his counsel failed to request a jury instruction for the lesser-included offense of trespass. In a 5-2 decision written by Judge Richard B. Teitelman, the Supreme Court of Missouri reverses the judgment and remands (sends back) the case for an evidentiary hearing regarding the man's claims. The man pleaded facts supporting a finding that counsel's performance was deficient in not requesting a trespass instruction, and he has demonstrated prejudice sufficient to entitle him to a hearing of his claims.

Judge Paul C. Wilson dissents. He would hold there is no basis for concluding the man's counsel was ineffective in failing to request a lesser-included trespass instruction and would affirm the circuit court's decision for independent reasons. First, this Court must presume the jury followed the law in convicting the man of burglary. Second, no remand is necessary because this Court should follow prior case law and hold that defense counsel's decision was objectively reasonable.

Judge Mary W. Sheffield, a judge of the Missouri Court of Appeals, Southern District, sat in this case by special designation in place of Judge George W. Draper III.

Facts: While visiting a resident of an apartment complex in May 2008, David McNeal went to another woman's apartment to collect money she allegedly owed him. He was acquainted with the woman and previously had visited her in her apartment. He knocked on her door. No one answered, but he heard a radio playing, so he opened the door and found the apartment empty. Once inside the apartment, he saw a drill and stole it. At trial, although the issue of trespass was raised, his counsel did not request a trespass instruction. The jury convicted him of one count of second-degree burglary and one count of stealing. The court of appeals affirmed his convictions, and he then sought post-conviction relief, alleging his counsel was ineffective for failing to request a trespass instruction as a lesser-included offense of burglary. The circuit court overruled his claim without an evidentiary hearing. McNeal appeals.

REVERSED AND REMANDED.

Court en banc holds: (1) McNeal pleaded facts supporting a finding that counsel's performance was deficient in not requesting a trespass instruction. First-degree trespass – which requires that a person knowingly enter or remain unlawfully in a building – is a lesser-included offense of second-degree burglary – which also requires that the person unlawfully entered the building

with the purpose of committing a crime therein. Here, McNeal testified that he was “in shock” that the woman’s apartment was empty and that he did not decide to steal the drill until he was inside. As such, a trespass instruction would have been consistent with the evidence and counsel’s argument. Counsel effectively conceded trespass but then failed to request a trespass instruction, and the record does not refute clearly McNeal’s claim that counsel lacked an objectively reasonable strategic reason for doing so.

(2) McNeal is entitled to an evidentiary hearing on his claims because he has alleged facts, not clearly refuted by the record, showing he was prejudiced by counsel’s failure to submit the lesser-included offense instruction. Such an instruction is required when the evidence provides a basis for both acquittal of the greater offense and conviction of the lesser offense. Missouri law provides it is reversible error for the trial court to decline to submit a lesser-included offense that is supported by the evidence in the case. The underlying rationale of certain prior decisions – though they involve direct appeals and not claims of ineffective assistance of counsel – is that the failure to provide the jury with the option of a lesser-included offense deprives the defendant of a fair trial, even if the jury ultimately convicts the defendant of the greater offense. There is a substantial risk the jury – if not presented with the option of convicting of a lesser offense instead of acquittal – will not acquit a defendant even if it does not find every element of the offense beyond a reasonable doubt. Here, the jury’s decision to convict on a greater offense does not foreclose all possibility it would have convicted McNeal of the lesser offense.

Dissenting opinion by Judge Wilson: The author would hold there is no basis for concluding McNeal’s counsel was ineffective in failing to request a lesser-included trespass instruction and would affirm the circuit court’s decision for two separate and independent reasons.

(1) McNeal is not entitled to post-conviction relief because he cannot show there is a reasonable probability that, had the instruction been given, his trial’s result would have been different. Never before has this Court held that, because failure to give a lesser-included offense instruction when requested is reversible error on direct appeal, counsel’s failure to request such an instruction also must be prejudicial for the purposes of post-conviction relief. When the defendant did not request a lesser-included offense instruction at trial but later seeks post-conviction relief on the ground that counsel was ineffective for failing to request such an instruction, there is no presumption of prejudice because there was no error. The United States Supreme Court requires a defendant to show counsel was ineffective and that the errors resulted in prejudice, such that – but for counsel’s failure – the defendant would not have been convicted of the greater charge. McNeal cannot prove this. The lesser-included offense instruction would have begun: “If you do not find the defendant guilty of burglary . . .,” but the jury did find McNeal guilty of burglary and so never would have considered the trespass instruction. The United States Supreme Court, however, prohibits this Court from either assuming the jury failed to follow the law in the first trial when it convicted the man of burglary or hypothesizing it might not follow the law in a second trial and convict him only of trespass despite the evidence and, instead, requires this Court to presume the jury acted according to the law.

(2) No remand is necessary because this Court should follow prior case law and hold that defense counsel’s decision was objectively reasonable. The United States Supreme Court has held that counsel is strongly presumed to have rendered adequate assistance and made all significant

decisions in the exercise of reasonable professional judgment, and this Court previously has rejected the same claim McNeal makes, holding the subjective reasons for defense counsel's decision were irrelevant because the reasonableness of defense counsel's decision must be evaluated objectively. Defense counsel frequently make conscious decisions not to request lesser-included instructions as a matter of strategy because it might lead the jury to convict of the lesser offense rather than acquit of the greater offense. Here, counsel's strategic decision to forego the trespass instruction was objectively reasonable. McNeal's entire defense was that he entered the apartment legally to talk with an acquaintance. Had even one juror believed this defense, he would not have been convicted of burglary. By convicting him of burglary, the jury necessarily concluded he entered the apartment for the purpose of finding something to steal. A question the jury sent to the court shows it realized McNeal's guilt turned on the question of whether the felonious intent necessary to convict him of burglary could arise after he opened the door but before he entered the apartment. The court told the jury it must be guided by the instructions, which stated that McNeal's felonious intent only needed to be present when he "entered" the apartment, not when he opened the door. A lesser-included instruction would not have avoided the hole McNeal dug for himself through his inadvertent admission; it only would have made it deeper, and counsel had a reasonable basis to continue with the original defense.