

**Summary of SC93168, *Brian J. Dorsey v. State of Missouri***

Appeal from the Boone County circuit court, Judge Christine Carpenter

Argued and submitted December 4, 2013; opinion issued November 12, 2014, and modified on the Court's own motion December 23, 2014

**Attorneys:** Dorsey was represented by Kent Denzel of the public defender's office in Columbia, (573) 882-9855; 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 first-degree murder and sentenced to death appeals the circuit court's judgment overruling his motion for post-conviction relief. In a unanimous decision written by Judge Patricia Breckenridge, the Supreme Court of Missouri affirms the judgment. The man failed to preserve for review certain claims relating to DNA evidence, and the circuit court did not clearly err in overruling the man's other claims that the state failed to disclose certain evidence and that counsel provided ineffective assistance.

**Facts:** Brian Dorsey pleaded guilty to first-degree murder for the December 2006 shooting deaths of his cousin and her husband in Callaway County. Evidence also showed his cousin had been sexually assaulted. Following a penalty-phase trial, a jury recommended he be sentenced to death for each murder. The trial court entered judgment accordingly. In 2010, this Court affirmed the judgment. Dorsey subsequently sought post-conviction relief, alleging that his trial counsel provided him with ineffective assistance and that the state failed to disclose exculpatory evidence (evidence that exonerates or tends to exonerate a criminal defendant). Following a hearing on the motion, the circuit court denied relief. Dorsey appeals.

**AFFIRMED.**

**Court en banc holds:** (1) The circuit court did not clearly err in finding that Dorsey waived his claims regarding "peaks" in a DNA profile that he alleges exonerate him from the rape of his cousin. Although he presented evidence at the hearing regarding these claims, his amended motion for post-conviction relief failed to raise these claims, and pleading defects cannot be remedied by presenting evidence and refining a claim on appeal. Claims not raised in a motion for post-conviction relief are waived on appeal.

(2) The circuit court did not err in overruling Dorsey's claim that the state failed to disclose that the Y-chromosome DNA profile developed by personnel in the highway patrol's crime laboratory from a vaginal swab taken from Dorsey's cousin matched four other males in addition to Dorsey. One of those other matches was found before his trial, and both the defense and the jury were advised of the identity of the other male matching the profile as well as the probability that a single Y-chromosome profile would match 2.3 out of 1,000 white males. The laboratory did not find the other three matches until after Dorsey's trial. Regardless, Dorsey's counsel could not have argued that one of those other men committed the sexual act against Dorsey's cousin

because there was no evidence connecting any of the men besides Dorsey to the crime. As such, there was little to no likelihood that the outcome of the trial would have been different, and Dorsey was not prejudiced.

(3) The circuit court did not clearly err in overruling Dorsey's claim that his counsel should have challenged the state's Y-chromosome profile with expert testimony discounting the accuracy of the test in comparison with a the more precise full autosomal profile. The jury was aware of the probability that the Y-chromosome profile would match other males as well as the fact that such profiles are not as precise as full autosomal profiles. There also is a question whether the state had sufficient biological evidence from which to conduct the differential extraction necessary to produce a full autosomal profile. The state is not required to gather or present certain types of evidence, and Dorsey would not have been permitted to argue an adverse inference from the fact that the state did not perform a differential extraction. In addition, there is substantial evidence that Dorsey committed the murders. Dorsey has not shown a reasonable probability that he would have not pleaded guilty or that the jury would not have recommended the death penalty had his trial counsel investigated and presented evidence regarding the full autosomal profile in comparison with the Y-chromosome profile. As such, he has not demonstrated prejudice.

(4) Dorsey could not have been prejudiced by his trial counsel's failure to object to the prosecutor's questions of a DNA analyst implying that another man matching the Y-chromosome profile was in prison at the time of the murders. The analyst answered that he had no information as to the other man's location at the time of the murders. In addition, counsel's strategy was that Dorsey accept responsibility and seek mercy rather than to place blame on others, making the location of the other man matching the profile irrelevant. Further, the jury was instructed not to assume as true any fact solely because it was included in or suggested by a question, and this Court assumes the jury followed the trial court's instructions.

(5) The circuit court did not clearly err in concluding that counsel's trial strategy not to pursue a diminished capacity defense was reasonable. Before advising Dorsey to plead guilty, counsel had received a significant amount of discovery and mitigation evidence, including Dorsey's history of depression, suicide attempts and substance abuse. A neuropsychologist whom counsel hired to evaluate Dorsey found no serious mental disease or organic defect. Further, there was substantial evidence that Dorsey acted intentionally and deliberately in killing his cousin and her husband, including that he took a single-shot shotgun from their barn, locked the door to keep the couple's daughter out, reloaded the shotgun to kill the husband, poured bleach on his cousin's body to hide evidence, stole property from the couple to sell, and turned himself into police, identifying himself as the one they needed to talk with about the murders. Counsel also was aware that, on the night of the murders, Dorsey was heavily intoxicated and that, by itself, voluntary intoxication cannot provide the basis for a diminished capacity defense. Counsel concluded, after this investigation, that the best trial strategy to avoid the death penalty was for Dorsey to accept responsibility by pleading guilty. This strategy was not unreasonable.

(6) The circuit court did not clearly err in finding there was no ineffective assistance of counsel for not setting up a meeting, before the penalty phase of the trial, between a clinical psychologist and Dorsey's parents. Dorsey discussed his depression and substance abuse with the psychologist, whose summary was admitted into evidence that detailed, among other things,

Dorsey's family history, psychiatric history and substance abuse history. The summary noted that Dorsey was genetically predisposed to alcohol and substance abuse.

(7) The circuit court did not clearly err in overruling Dorsey's claim that his counsel should have called a psychiatrist to testify in lieu of or in addition to the licensed clinical psychologist who did testify during the penalty phase of Dorsey's trial. The psychiatrist would have offered nothing significantly additional or different from what the psychologist offered. Their testimonies would have been largely the same – that Dorsey had a long history of depression and drug and alcohol abuse. Even had the psychiatrist's testimony been more favorable, counsel is not required to shop for an expert witness who might provide more favorable testimony.

(8) The circuit court did not clearly err in concluding counsel were not ineffective for not calling a family physician who treated Dorsey for a few years and a psychiatrist who treated him during two successive hospitalizations resulting from suicidal thoughts or attempts. Most testimony these two doctors could have offered would have been substantially cumulative (repetitive) to multiple witnesses – including a psychologist who had reviewed Dorsey's medical records as well as Dorsey's mother and other family members – who testified in detail about Dorsey's long history of depression, addiction to alcohol and drugs, suicide attempts, admissions to psychiatric facilities, and outpatient therapy treatments. The psychologist also testified that Dorsey had been prescribed a number of different medications at different points with minimal benefit. Counsel were not ineffective for not presenting cumulative evidence.

(9) The motion court did not err in overruling Dorsey's claim regarding certain evidence the state presented regarding the crime scene. Results of scientific procedures may be admitted only if they are sufficiently established to have gained general acceptance in the particular field in which it belongs. During the penalty phase, a detective testified he observed what appeared to be a "pour pattern" near the cousin's groin area, and so he used an alternative light source to help look for fluids or trace evidence that are not visible to the naked eye. Photographs he took using the alternative light source were introduced. Dorsey claims his counsel should have requested a hearing to determine the admissibility of this evidence or, alternatively, should have presented the testimony of a professional photographer to challenge whether the substance shown in the photographs was bleach. Dorsey failed to show that his counsel were ineffective or that a different outcome was reasonably probable had his counsel performed as he suggests. The detective did not testify the alternative light source showed it was bleach that had been poured on the cousin. Rather, it was left to the jurors to determine whether the pour marks came from bleach in light of evidence of a strong odor of bleach at the crime scene, a "bleached out" carpet next to the cousin's body and a bottle of bleach in a nearby sink. In addition, the photographer's testimony would not have been effective in countering the state's evidence. Further, counsel's strategy was to prevent the jury from focusing on the sexual crime committed against the cousin.

(10) The circuit court did not clearly err in overruling Dorsey's claim that his counsel should have struck, for cause, a juror who discovered during the trial that he knew the cousin's husband. The juror did not realize he might know the husband until after he saw crime scene and autopsy photographs, and he was not certain of the relationship until after he was told where the husband had been employed. The juror testified their work relationship would not impact his decision. After this exchange between the juror, the attorneys and the judge, the record reflects that

defense counsel deliberated before deciding not to move to strike the juror from serving. It was reasonable for counsel to keep the juror, who gave favorable answers during jury selection and testified that his prior relationship with the husband would not influence his decision.

(11) The circuit court did not clearly err in finding counsel – who were paid a flat fee regardless of whether Dorsey pleaded guilty or went to trial – had no actual conflict of interest that gave rise to ineffective assistance of counsel. No Missouri court has found that a flat-fee arrangement creates a conflict of interest. Dorsey does not demonstrate an actual conflict that adversely affected counsel’s performance, nor does he allege that counsel ever pressured or coerced him into pleading guilty. Counsel requested and were authorized to use additional funds for a DNA expert and an investigator. Additionally, the circuit court found credible counsel’s testimony that they did not make any decision relating to their representation of Dorsey based on their compensation, and it found they expressed a sincere desire to provide Dorsey with an effective defense. The circuit court is in the best position to judge their credibility. Further, as discussed above, Dorsey did not show counsel were ineffective or did not use reasonable trial strategy.