

Summary of SC93878, *Louis Edward Mallow v. State of Missouri*

Appeal from the Phelps County circuit court, Judge Mary W. Sheffield

Argued and submitted May 6, 2014; opinion issued August 19, 2014

Attorneys: Mallow was represented by Laura G. Martin of the public defender's office in Kansas City, (816) 889-7699; and the state was represented by Evan J. Buchheim 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 child molestation appeals the denial of post-conviction relief. In a unanimous decision written by Judge George W. Draper III, the Supreme Court of Missouri affirms the judgment. The circuit court did not clearly err in denying the man post-conviction relief for his claim that the molestation verdict directors violated his right to be free from double jeopardy. He did not argue he was subjected to multiple punishments for the same offense, and he asserted no fact that would lead this Court to believe Mallow will be subject to another trial based on the same facts. His other claim, which he failed to raise in the circuit court, is waived.

Facts: Louis Edward Mallow was charged with two counts of first-degree child molestation and one count of first-degree sodomy for sexual contact he had with a girl who lived across the street from him. At the jury trial, the girl testified about several incidents with Mallow, including at least one when he inappropriately touched her, one when he asked her to dance provocatively for him, one when he asked her to sleep with him and one when he asked her to get into the bathtub with him. Although the girl's trial testimony clearly indicated sexual contact with Mallow, her testimony varied from previous interviews at a child advocacy center in which she said Mallow touched her 11 times. The court, without objection from Mallow's counsel, gave the jury a verdict-directing instruction for each of the two molestation counts. Each instruction asked the jury whether it found, from the evidence, that Mallow touched the girl's genitals "between February 1, 2003 and July 17, 2004." During closing arguments, both the prosecution and defense discussed the discrepancies between the girl's trial testimony and prior interviews. The jury found Mallow guilty of one count of child molestation and acquitted him of the other molestation count and the sodomy count. The court entered judgment and sentenced Mallow to 14 years in prison. The appeals court affirmed his conviction. He then sought post-conviction relief, which the circuit court denied after an evidentiary hearing. Mallow appeals.

AFFIRMED.

Court en banc holds: (1) Mallow failed to give the circuit court the opportunity to review his claim that his trial counsel was ineffective in failing to challenge the unanimity of the jury verdict, arguing it is impossible to know the molestation incident for which the jury found him guilty. In a post-conviction proceeding, all grounds for relief not listed in the motion are waived. Mallow's claim is not preserved for appellate review and, therefore, is waived.

(2) The circuit court did not clearly err in denying the man post-conviction relief for his claim that the molestation verdict directors violated his right to be free from double jeopardy. Double jeopardy protections prevent successive prosecutions for the same offense and multiple punishments for the same offense. Mallow claims his trial counsel and appellate counsel both failed to challenge these instructions, which he claims were vague because they made it impossible to know the incident of molestation for which the jury convicted him and the incident for which they acquitted him. But Mallow fails to explain exactly how he believes the molestation verdict directors subjected him to double jeopardy. He did not argue he was subjected to multiple punishments for the same offense, and he asserted no fact that would lead this Court to believe Mallow will be subject to another trial based on the same facts. If he were to be so charged, he could assert his right to be free from double jeopardy at that time, and an examination of the record would demonstrate clearly the acts for which he was tried.