

Summary of SC95666, *David A. McNeal v. State of Missouri*

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

Argued and submitted October 5, 2016; opinion issued November 1, 2016

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 second-degree burglary and stealing appeals the circuit court's denial of post-conviction relief. In a unanimous decision written by Judge Zel M. Fischer, the Supreme Court of Missouri affirms the judgment. The man failed to show his trial counsel did not perform in an objectively reasonable manner in not requesting a lesser-included instruction that was inconsistent with the defense's theory at trial.

Judge Edward R. Ardini Jr. – a judge on the Missouri Court of Appeals, Western District – sat in this case by special designation in place of Judge George W. Draper III.

Facts: David McNeal was convicted of second-degree burglary and stealing for entering an apartment in May 2008 and taking a drill he found inside the empty apartment. At trial, he testified that he thought a friend lived in the apartment, that it was customary for him to knock and enter without waiting for an answer, and that he did not know his friend no longer lived in the apartment. After the judgment was affirmed on appeal, McNeal sought post-conviction relief. Following an evidentiary hearing, the circuit court denied relief. McNeal appeals.

AFFIRMED.

Court en banc holds: McNeal failed to show his trial counsel was ineffective for not requesting a jury instruction for misdemeanor trespass as an alternate, lesser-included instruction to felony second-degree burglary. To be entitled to post-conviction relief for ineffective assistance of counsel, McNeal first must overcome the strong presumption that counsel's conduct was within the wide range of reasonable assistance and must prove that, under the circumstances, counsel's performance fell below an objective standard of reasonableness. At the hearing, McNeal's trial counsel testified that he did not request a trespass instruction as a matter of trial strategy because doing so seemed inconsistent with the defense's theory at trial. Counsel explained the defense's theory was that McNeal was not guilty because he did not have the intent to steal and because he did not enter the apartment unlawfully. Counsel further explained the defense's theory was that McNeal's entry was not unlawful because McNeal believed he had implied consent from his friend he believed still was living in the apartment. Foregoing an instruction that is inconsistent with the defense's theory falls within the wide range of what may be considered objectively reasonable performance by counsel.