

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

CARLA KAY CLAY

APPELLANT,

**v.
STATE OF MISSOURI**

RESPONDENT.

DOCKET NUMBER WD70592

DATE: May 11, 2010

Appeal From:

Randolph County Circuit Court
The Honorable David C. Mobley, Judge

Appellate Judges:

Division One: Karen King Mitchell, Presiding Judge, Lisa White Hardwick and Cynthia L. Martin, Judges

Attorneys:

Timothy J. Forneris, St. Louis, MO, for appellant.

Shaun J. Mackelprang and James B. Farnsworth, Jefferson City, MO, for respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY

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WESTERN DISTRICT**

CARLA KAY CLAY,

APPELLANT,

v.

STATE OF MISSOURI,

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No. WD70592

Randolph County

Before Division One Judges: Karen King Mitchell, Presiding Judge, Lisa White Hardwick and Cynthia L. Martin, Judges

Carla Clay appeals the motion court's judgment denying her Rule 29.15 motion for post-conviction relief after an evidentiary hearing. Clay was found guilty of two counts of first degree murder and sentenced to two terms of life imprisonment without the possibility of parole. Clay contends that the trial court erred in denying her motion for post-conviction relief because trial counsel was ineffective for failing to: (1) object to expert witness testimony; (2) file a motion to sever the two counts of murder in the first degree; and (3) depose Clay's father.

AFFIRMED.

Division One holds:

(1) The allegation of error with respect to the lack of objection to the expert witness testimony raised on appeal is materially different from the allegation raised in Clay's post-conviction motion. We do not review claims which were not raised in the post-conviction motion. However, even were we to reach the merits of Clay's claim, Clay would be unable to sustain her burden to demonstrate ineffective assistance of counsel by showing that the objection would have been meritorious and that the failure to object substantially deprived her of a fair trial.

(2) Clay has not established by a preponderance of the evidence that her trial counsel's strategic decision not to file a motion to sever the two counts constitutes ineffective assistance of counsel. Further, Clay presented no evidence that, even had a motion to sever been filed, the trial court would have favorably entertained the motion or would have been found to have abused its discretion had it denied the motion.

(3) Trial counsel's failure to depose Clay's father prior to his death is not ineffective assistance of counsel where trial counsel is accused of not having the foresight to appreciate that a witness might die before trial. In any event, Clay made no showing whatsoever during her post-conviction hearing that her father's testimony would have impacted a jury's determination of

her guilt. Clay's father's testimony would have been merely cumulative to the testimony of other defense witnesses.

Opinion by: Cynthia L. Martin, Judge

May 11, 2010

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