

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

RYAN FERGUSON

APPELLANT,

**v.
STATE OF MISSOURI**

RESPONDENT.

DOCKET NUMBER WD71264

DATE: August 31, 2010

Appeal From:

Boone County Circuit Court
The Honorable Mary (Jodie) Capshaw Asel, Judge

Appellate Judges:

Division Three: Victor C. Howard, Presiding Judge, Thomas H. Newton and Gary D. Witt,
Judges

Attorneys:

Samuel Henderson and Kathleen Zellner, St. Louis, MO, for appellant.

Shaun J. Mackelprang, Jefferson City, MO, for respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY

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v.

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No. WD71264

Boone County

Before Division Three Judges: Victor C. Howard, Presiding Judge, Thomas H. Newton and Gary D. Witt, Judges

In 2004, Ryan Ferguson was charged with the class A felony of murder in the first degree and the class A felony of robbery in the first degree. Ferguson's case proceeded to a jury trial on October 14, 2005. Charles Erickson testified that he and Ferguson robbed and murdered Kent Heitholt.

On October 18, 2005, the jury found Ferguson guilty of felony murder in the second degree and robbery in the first degree. The trial court subsequently sentenced him to consecutive terms of thirty years on Count I and ten years on Count II. This Court affirmed Mr. Ferguson's convictions and sentences on June 26, 2007. *State v. Ferguson*, 229 S.W.3d 612, 614 (Mo. App. W.D. 2007).

On November 14, 2007, Ferguson filed a *pro se* motion for post-conviction relief, which was subsequently amended by counsel. An extensive evidentiary hearing was held on the motion on July 16 to July 18, 2008. On June 12, 2009, the motion court issued its Findings of Fact, Conclusions of Law, and Judgment, which denied Ferguson's post-conviction relief motion.

AFFIRMED.

Division Three holds:

Ferguson filed with this Court a Motion to Remand Based Upon Newly Discovered Evidence (Remand Motion) in February 2010. The basis of the Remand Motion is that Ferguson's co-defendant, Charles Erickson, has provided a sworn statement (written and videotaped) that he alone robbed and murdered the victim and Ferguson, while present, did not participate. Because he argues that this newly discovered evidence demonstrates that his conviction rests solely on perjured testimony, Ferguson requests that this Court stay the pending appeal (WD71264) and remand the case to the trial court so that the new evidence provided by Erickson can be considered and a decision rendered by the trial court as to whether a new trial is warranted. We must reject Ferguson's Remand Motion because Missouri law is clear that he is not entitled to file another motion for new trial at this time. Even when taking all of the

averments in his Remand Motion as true, this Court is unable to grant Ferguson the relief that he requests.

In Point One, Ferguson argues that the motion court erred in denying his motion for post-conviction relief in light of the fact that “he was denied a fair trial because the State failed to disclose to the defense Clarence Mabon’s statements regarding his involvement in Mr. Heitholt’s murder.” Even if the State’s failure to disclose this information constituted a *Brady* violation, Ferguson’s inability to demonstrate prejudice from this alleged *Brady* violation is dispositive of this Point Relied On. Simply put, Ferguson has failed to demonstrate that the motion court’s relevant findings and conclusions in rejecting this claim were somehow in error.

In Point Two, Ferguson argues that the motion court erred in denying his motion for post-conviction relief because the State failed to disclose to the defense Shawana Ornt’s exculpatory statement that neither Ryan Ferguson nor Charles Erickson was the man she saw near Kent Heitholt’s body the night of the murder. We must deny Ferguson’s second *Brady* claim for a similar reason as we denied his first *Brady* claim, namely that the motion court made detailed findings that the evidence in question was not credible and thus was not a basis for a meritorious *Brady* claim.

In Point Three, Ferguson argues the motion court erred in adopting, in substantial part, the State’s proposed findings of fact and conclusions of law in its judgment, thereby demonstrating a lack of independent judgment in assessing the evidence and applicable law when considering his Rule 29.15 motion. Adopting one party’s proposed findings of fact and conclusions of law has become a common practice in Missouri courtrooms and raises no constitutional problems so long as the court, after independent reflection, concurs with the contents of the proposed findings and conclusions. While the motion court did adopt a significant percentage of the State’s proposed findings of fact and conclusions of law, it is undisputed that the motion court also made substantive changes that reflect that it thoughtfully and carefully considered Ferguson’s claims.

In Point Four, Ferguson argues the motion court clearly erred in denying his post-conviction claim because his trial counsel was ineffective for failing to investigate and call multiple witnesses who would have impeached the credibility of Charles Erickson and Jerry Trump, and had his counsel called these witnesses to the stand, it would have changed the outcome at trial. In rejecting Ferguson’s claims as it pertains to *each* of these witnesses, the motion court made a specific finding and conclusion that these witnesses would not have provided a viable defense for Ferguson to the charged crimes and thus would not have changed the outcome at trial. After a careful review of the record on appeal, we conclude that the motion court did not clearly err in refusing to grant Ferguson post-conviction relief in this regard.

The judgment of the circuit court, denying Ferguson’s post-conviction relief motion, is hereby affirmed. That is not to say that the issues of this case do not give us pause. The sole evidence tying Ferguson to the crime was the testimony of Erickson and the identification from Trump. There is no physical evidence that ties Ferguson to this murder. However, we are mindful that Ferguson has other legal avenues to bring forth his claims of newly discovered

evidence. Rule 29.15 does not provide Ferguson the relief he seeks. However, habeas corpus review is still available to him to raise the issues in the appropriate forum.

Opinion by: Gary D. Witt, Judge

August 31, 2010

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