

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

KENNETH G. MIDDLETON,

Movant

v.

STATE OF MISSOURI,

Respondent,

Case No. CV91-23437

Division 12

FINDINGS OF FACT AND CONCLUSIONS OF LAW

NOW on this 26th day of May, 2005, the Court takes up and considers Movant's Motion to Reopen Previously Filed Rule 29.15 Motion, filed on July 16, 2003 and Movant's Motion for Post-conviction relief, also filed on July 16, 2003, and issues the following Findings of Fact and Conclusions of Law as to both motions:

FINDINGS OF FACT – JURISDICTION

A hearing was held on December 18, 2003 solely to address the issue of this Court's jurisdiction to re-open Mr. Middleton's 1991 "29.15" proceeding. The following facts precede the Court's Conclusions of Law:

1. Movant Kenneth Middleton is currently incarcerated at Crossroads Correctional Center in Cameron, Missouri, following his convictions in case number CR90-0348 for Murder in the First Degree, in violation of RSMo. 565.020, and Armed Criminal Action, in violation of RSMo. 571.015. He was sentenced on April 5, 1991 to terms of confinement in the Missouri DOC for concurrent periods of life without parole and 200 years. (Court file.)
2. The precise date Mr. Middleton was delivered to the Department of Corrections is unknown. However, that date is jurisdictionally irrelevant because Movant timely filed a *pro se* motion for post-

A. Ground No. 1: Movant's trial counsel was ineffective, in violation of the Sixth and Fourteenth Amendments, for failing to conduct a reasonable investigation and produce evidence contradicting or discrediting the state's wholly circumstantial case.

As noted above, Movant must overcome the presumptions that counsel's actions were sound trial strategy and that counsel rendered adequate assistance and made all significant decisions in the exercise of professional judgment. *Vogel*, at 135. While strategic decisions are usually accorded great deference, this is so only if they are made after a thorough investigation. *Yoksh v. State*, 75 S.W.3d 375, 379 (Mo.App. W.D. 2002). In Missouri, trial counsel has a duty to undertake reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *State v. Griffin*, 810 S.W.2d 956, 958 (Mo.App.1991). The failure to pursue even a single piece of important evidence may demonstrate ineffectiveness and prejudice sufficient to warrant a new trial. *State v. Wells*, 804 S.W.2d 746 (Mo. 1991); *Clay v. State*, 954 S.W.2d 344, 349 (Mo. App. E.D. 1997). Further, where the prosecution's case is built almost exclusively upon the interpretation by experts of circumstantial evidence, it may amount to ineffective assistance not to consult with an independent expert. *Cravens v. State*, 50 S.W.3d 290 (Mo. App. S.D. 2001) (counsel's failure in murder trial to investigate propriety of obtaining experts to testify regarding distance from which shot was fired is unreasonable and constitutes incompetence).

12) The cumulative effect of Mr. Duncan's errors and omissions should be weighed by the Court.

The Court, having now considered eleven separate allegations of Mr. Duncan's ineffectiveness, and having found that no one alleged failure, standing alone, is sufficient to warrant the grant of a new trial to Movant, now considers the prejudicial impact of trial counsel's performance as a whole. Such an analysis of *Strickland* prejudice by considering the defense given Mr. Middleton as a whole, rather than piece-meal, is mandated by *Kyles v. Whitley*, 115 S.Ct. 1555, 514 U.S. 419, 131 L.Ed.2d 490 (1995).

An attorney's "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-91. Although courts generally afford great deference to an attorney's informed strategic choices, close scrutiny is nonetheless to be applied when examining an attorney's preparatory activities. *Foster v. Lockhart*, 9 F.3d 722, 725-26 (8th Cir. 1993). Failing to interview witnesses or discover exculpatory evidence relates to trial preparation, not trial strategy. *Chambers v. Armontrout*, 907 F.2d 825, 828-29 (8th Cir. 1990), *cert. denied*, 111 S.Ct. 369 (1990); *Schlup v. Bowersox*, 1996 WL 1570463 (E.D. Mo.). A defense counsel's practice of not interviewing witnesses contravenes the attorney's essential duty to make an adequate factual investigation and is an "absurd and dangerous policy which can only be viewed as an abdication - not an exercise - of his professional judgment." *McQueen v. Swenson*, 498 F.2d 207, 216 (8th Cir. 1974).

In the case at bar, Mr. Middleton's trial counsel, Robert G. Duncan, took no depositions, nor did he seek independent testing of the handgun or any other piece of evidence revealed by the State in discovery. He failed to follow up on his request for the results of gunshot residue tests on Mrs. Middleton's left hand. Mr. Duncan further failed to interview a single witness about whom he learned from Mr. Middleton, including Cliff Middleton, Michelle Brockman, and various character witnesses. (Ex. 9 - Affidavit of Kenneth Middleton; Ex. 10 - Affidavit of Kenneth Middleton.) Finally, Mr. Duncan failed to obtain any medical records relating to Mr. Middleton's history of epilepsy and seizures, as will be discussed further below. When considering these failures together, it cannot be said that Mr. Duncan's performance conformed to the degree of skill, care and diligence of a reasonably competent attorney under similar circumstances. Had Mr. Duncan not been ineffective with respect to his handling of the pre-trial

investigation of this case, there is a reasonable probability that the outcome of the trial would have been different. Therefore, the Court sets aside Mr. Middleton's convictions and sentences, and grants him a new trial.

As set forth above in the Court's holdings with respect to re-opening the Rule 29.15 proceeding, the claims abandoned by Mr. Middleton's trial and post-conviction counsel, Robert G. Duncan, have now been stated by Mr. Middleton's current counsel and considered by the Court. This point is denied as moot.

CONCLUSION

WHEREFORE, in light of the above and foregoing, this Court finds Mr. Middleton was abandoned by post-conviction counsel, thus providing just cause to re-open his Rule 29.15 proceeding. Further, in light of the evidence and law presented at hearing and in the briefs submitted by counsel, the Court finds that Movant was denied effective assistance of counsel and orders Mr. Middleton's convictions and sentences vacated and set aside, and grants Mr. Middleton a new trial.

IT IS SO ORDERED.

5/26/05
Date

Edith L. Messina
Honorable Edith L. Messina
Division 12

Clerk of Court of Jackson County, Missouri
Court Administrator
Teresa J. York
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