



Missouri Court of Appeals
Southern District

Division One

PATRICK L. BAKER,)	
)	
Movant-Appellant,)	
)	
v.)	No. SD34809
)	
STATE OF MISSOURI,)	Filed: Dec. 29, 2017
)	
Respondent-Respondent.)	

APPEAL FROM THE CIRCUIT COURT OF PHELPS COUNTY

Honorable William E. Hickle

AFFIRMED

Patrick L. Baker (“Movant”) appeals the denial, after an evidentiary hearing, of his amended Rule 29.15 motion seeking post-conviction relief.¹ Movant’s single claim on appeal is that the motion court clearly erred in finding trial counsel not ineffective in

¹ Movant was convicted in the underlying criminal case of driving while intoxicated, and he was sentenced as a chronic offender. See section 577.010. All statutory references are to RSMo 2000. All rule references are to Missouri Court Rules (2017). This court affirmed Movant’s conviction and sentence in *State v. Baker*, 437 S.W.3d 834, 835 (Mo. App. S.D. 2014), and we entered our mandate on August 28, 2014. Movant timely filed his *pro se* motion on October 27, 2014. See Rule 29.15(b). Counsel was appointed to represent Movant on October 30, 2014 and was granted a thirty-day extension for filing an amended motion. See Rule 29.15(g). Although the amended motion was not filed within the time allowed, the motion court properly allowed the late filing after finding that Movant had been abandoned by his post-conviction counsel. See *Moore v. State*, 458 S.W.3d 822, 826 (Mo. banc 2015) (Fischer, J., concurring).

“request[ing] relief in addition to the mistrial request, thus resulting in the alternative relief – not the mistrial – being considered.” Finding no merit in this claim, we affirm.

Background

On March 29, 2009, Officer Harry Eckman observed Movant make a left-hand turn against a red light. Officer Eckman stopped the vehicle and noted a strong odor of alcohol on Movant’s breath. After having Movant perform numerous field sobriety tests, Officer Eckman arrested Movant for operating a motor vehicle while impaired. The officer searched Movant’s vehicle and found a bottle of Bacardi Rum, a large bottle of Coca-Cola, a cooler filled with ice, and a cup.

At Movant’s trial, the prosecutor told the jury in opening statement that Officer Eckman “found a cup on the floorboard that had spilled that had some residue left in it that he sniffed and it smelled like rum and Coke.” Trial counsel objected to the statement, claiming that it was the first time he had heard that the cup smelled of rum and Coke. The trial court instructed the prosecutor not to mention the cup any further in opening statements and instructed the jury to disregard what the prosecutor had said.

After the attorneys had finished their opening statements, the trial court ordered a recess to further address the cup located in Movant’s vehicle. Trial counsel stated, “I would actually ask for a mistrial since it was already brought to the jury’s attention, but if that is not granted, then I’ll ask that it be excluded.” The trial court denied counsel’s request for a mistrial, but it excluded the presentation of any evidence that the cup smelled of rum and Coke. Further, the trial court instructed both parties not to mention anything about the contents of the cup or what the cup smelled like.

Officer Eckman was the State's only witness. After testifying that he found a bottle of rum in Movant's vehicle, the prosecutor asked, "And what else did you find in the vehicle at that point?" The officer responded, "Okay. Found a -- there was a cup that had -- it was partially filled with some substance." Trial counsel objected and stated, "I'd ask that that be stricken, that there be a mistrial at this point or that he [sic] be stricken." The trial court denied a mistrial but ordered the jury to disregard Officer Eckman's answer and struck the testimony from the record.

Applicable Principles of Review and Governing Law

We presume that the motion court's findings and conclusions are correct, *Davis v. State*, 486 S.W.3d 898, 905 (Mo. banc 2016), and we will reverse only if we determine that they are clearly erroneous. *Skillicorn v. State*, 22 S.W.3d 678, 681 (Mo. banc 2000). To prove ineffective assistance of counsel, a movant must show that counsel's performance did not conform to the degree of skill, care, and diligence of a reasonably competent attorney, and that the movant was thereby prejudiced. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In doing so, the movant must overcome a strong presumption that trial counsel's conduct was reasonable and effective. *Davis*, 486 S.W.3d at 906. To establish the necessary prejudice, the movant "must show that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

A mistrial is a drastic remedy reserved only for the most extraordinary circumstances, *State v. Barnett*, 980 S.W.2d 297, 305 (Mo. banc 1998), and should only be granted when the prejudice to the defendant cannot otherwise be removed. *State v. Ward*, 242 S.W.3d 698, 704 (Mo. banc 2008). "Reversal is necessary only where

denying a mistrial prevents a fair trial.” *State v. Gilbert*, 103 S.W.3d 743, 751 (Mo. banc 2003).

Analysis

No Ineffective Assistance in Requesting Alternative Relief

Movant claims the motion court clearly erred in finding that trial counsel was not ineffective for requesting alternative relief in addition to the mistrial request because “the trial court would have granted a solely mistrial request, since the second mention at trial of the recovered cup partially filled with some substance created a prejudice that could not be removed by mere instruction to the jury to ‘disregard’ it[.]”

At the hearing on the amended motion, trial counsel testified that he initially asked for a mistrial, but he could tell that the judge wasn’t inclined to grant it. Because of that impression, trial counsel accepted the court’s suggestion that it instruct the jury to disregard the statement. While trial counsel testified that he wanted the mistrial, he had a “good belief” that the judge was not going to grant it. As a result, he thought it would be better for the jury to disregard the evidence of the alcohol in the cup rather than to get no relief at all.

Further, Movant has failed to demonstrate that he was prejudiced by trial counsel’s request for alternative relief. The trial court ordered the jury to disregard Officer Eckman’s testimony about the cup and struck it from the record. Jurors are presumed to follow the instructions given by the trial court. *State v. Wheeler*, 219 S.W.3d 811, 817 (Mo. App. S.D. 2007). The amended motion was also heard and ruled by the same judge who presided over Movant’s trial, and he expressly found that “[t]he trial court would almost certainly not have granted a mistrial regardless of how expressly

[sic] trial counsel requested it, and regardless of whether trial counsel asked for alternative relief in addition to the mistrial.”

Movant’s point is denied, and the denial of post-conviction relief is affirmed.

DON E. BURRELL, J. – OPINION AUTHOR

MARY W. SHEFFIELD, P.J. – CONCURS

GARY W. LYNCH, J. – CONCURS