

IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

JEFFREY WEINHAUS,)	
)	
Appellant,)	
)	
vs.)	No. ED 103834
)	
STATE OF MISSOURI,)	
)	
Respondent.)	

APPEAL TO THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
FROM THE CIRCUIT COURT OF FRANKLIN COUNTY, MISSOURI
TWENTIETH JUDICIAL CIRCUIT
THE HONORABLE KEITH M. SUTHERLAND, JUDGE

APPELLANT'S STATEMENT, BRIEF, AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal arises from the denial of appellant's Rule 29.15 motion without an evidentiary hearing in the Circuit Court of Franklin County, Missouri, the Honorable Keith M. Sutherland presiding. As this appeal does not involve any of the issues reserved for the exclusive jurisdiction of the Missouri Supreme Court, jurisdiction lies in the Missouri Court of Appeals, Eastern District. Article V, Section 3, Missouri Constitution; Section 477.050, RSMo. 2000.

STATEMENT OF FACTS

Appellant was charged by information in lieu of indictment with felony possession of a controlled substance, tampering with a judicial officer, misdemeanor possession of a controlled substance, two counts of attempted first-degree assault of a law enforcement officer, two counts of armed criminal action, and resisting arrest (L.F. 23-25).¹ The case proceeded to trial before a jury on October 8, 2013 (Tr. 1). The following evidence was adduced at trial.

On August 18, 2012, Missouri Highway Patrol Sergeant James Folsom received a telephone call from Judge Kelly Parker (Tr. 168). Judge Parker had concerns about a YouTube video that had been posted by appellant (Tr. 168-169). Judge Parker felt that appellant's video threatened some judicial officers, including Judge Parker, and he asked Sergeant Folsom to investigate (Tr. 169).

Sergeant Folsom met with other officers to "determine the validity of the threats" contained in appellant's video (Tr. 171). They determined that most of

¹ The record on appeal will be cited as follows: the transcript from appellant's trial will be (Tr.); the transcript from appellant's sentencing will be (S.Tr.); the legal file from appellant's direct appeal will be (L.F.); the legal file for this appeal of appellant's post-conviction motion will be (PCR L.F.); and exhibits from appellant's trial will be (Ex.).

the comments appellant made in the video constituted free speech (Tr. 171).

However, they decided to contact appellant to discuss the video and determine if he actually intended to harm anyone or himself (Tr. 171).

Sergeant Folsom and Corporal Scott Mertens went to appellant's home in Franklin County (Tr. 173). They knocked and appellant opened the door (Tr. 173). Sergeant Folsom testified that he smelled a strong odor of marijuana coming from the house and from appellant (Tr. 173). Sergeant Folsom asked appellant to step down from the porch to a carport area (Tr. 174).

Appellant spoke with the officers for approximately 25-30 minutes (Tr. 174). He assured them that he was a peaceful person who was trying to call people to arms and wake up America (Tr. 174). He said that he was planning to remove corrupt officials in a peaceful manner; however, he also said that this is why the Second Amendment was created (Tr. 175). According to Sergeant Folsom, appellant would waver between peaceful statements and statements that his army was going to take over America because the Constitution had failed (Tr. 175). He made radical statements about the government and his beliefs (Tr. 175). He accused several officials of treason and asked Sergeant Folsom and Corporal Mertens if they knew that the punishment for treason was death (Tr. 175). Appellant gave the officers a copy of his "Bulletin" and he explained his personal beliefs about Jesus (Tr. 176).

When appellant turned towards his house, Sergeant Folsom asked him to stop, and said that he smelled "pot" (Tr. 176). Sergeant Folsom asked appellant if

there was pot in the house and appellant denied it (Tr. 176). Appellant tried to step around Sergeant Folsom, but Sergeant Folsom blocked him and told him to turn around to be handcuffed (Tr. 176). Appellant immediately submitted to being placed in handcuffs, holding his wrists out (Tr. 176). Sergeant Folsom told appellant that it was for safety, and that he was going to apply for a warrant (Tr. 176).

Appellant shouted for someone in the house to help him, saying that the cops were going to search the house for drugs (Tr. 177). Appellant's wife came to the door and Corporal Mertens contacted her (Tr. 177,378). She denied that there was anything illegal in the house (Tr. 378). When additional officers arrived, Sergeant Folsom removed appellant's handcuffs and told him that he was free to leave, but that he could not reenter the house (Tr. 177). Sergeant Folsom left to apply for a warrant (Tr. 177, 379).

Sergeant Folsom returned with the search warrant and showed it to appellant (Tr. 179). During the search, officers seized laptop equipment and video cameras (Tr. 180). They found a loaded handgun in a nightstand drawer in the master bedroom, along with paperwork indicating that appellant's wife owned the gun (Tr. 180). A green Army holster was with the gun (Tr. 180, 380). The officers did not seize this gun because it was legally registered, it was not evidence of a crime, and it was legal to have in the home (Tr. 181).

In a common area of the basement sat a desk with a computer, and cameras and banners behind it (Tr. 183, 269). This was where appellant's videos were

made (Tr. 183, 381). Also in the basement was a bedroom belonging to appellant's teenaged son (Tr. 266-267). Inside a desk drawer, the officers located drug paraphernalia, a set of scales, and a container of marijuana (Tr. 184, 384). They also found a small metal tin which contained 1½ morphine pills (Tr. 185, 196-197, 200, 204-205).

Sergeant Folsom provided appellant with the search inventory, along with Sergeant Folsom's business card (Tr. 206). Thereafter, appellant began emailing Sergeant Folsom asking for his computer back (Tr. 207). He asked Sergeant Folsom for the name of his attorney where he could serve a writ of replevin to get his computers back (Tr. 207, 272). Sergeant Folsom claimed that appellant posted a video denouncing Sergeant Folsom, and that appellant had called Sergeant Folsom's supervisors to complain that Sergeant Folsom had stolen items from his home (Tr. 209-210, 273). Appellant referred to Corporal Mertens, however, as "a very professional officer." (Tr. 397).

On September 10, 2012, the Highway Patrol determined that they would arrest appellant on drug and tampering charges (Tr. 207). Sergeant Folsom did not want to be involved in the arrest because he felt that appellant was personally agitated with him for taking his computers (Tr. 274). Sergeant Folsom said it was not his idea to arrest appellant and he did not believe it was appropriate under the circumstances, but he was just following orders (Tr. 274, 276). Sergeant Folsom obtained an arrest warrant (Tr. 208, 274).

Sergeant Folsom and Corporal Mertens devised a ruse where they would tell appellant that they wanted to meet with him to return his computers, but they would take him into custody instead (Tr. 208, 385). They called appellant and arranged to meet in public, at an MFA gas station near appellant's home (Tr. 209-210).

Unknown to the officers, appellant wore a video camera watch on his left wrist (Tr. 229; Ex. 15). The entire twelve second interaction between appellant and the officers is on this video, as well several minutes before and after (Tr. 229; Ex. 15).

Appellant tried to find someone to accompany him to the MFA station (Ex. 15). He contacted some pastors in the area, but could find no one to accompany him (Ex. 15). He spent time praying and singing hymns on the way to meet the officers (Ex. 15).

Sergeant Folsom and Corporal Mertens were not expecting any trouble from appellant (Tr. 216). They did not think appellant was a dangerous or violent person, and Sergeant Folsom described him as "a non-confrontational philosophical religious man" (Tr. 286, 293). While appellant had a history of making ultimatums, he had never used violence against anyone (Tr. 294, 401). Sergeant Folsom and Corporal Mertens did not wear bullet-proof vests because they did not deem appellant to be a threat (Tr. 216,295,389). They were not afraid of him (Tr. 372).

As appellant pulled into the parking lot, Sergeant Folsom and Corporal Mertens got out of their car (Tr. 213, 217). Sergeant Folsom told Corporal Mertens to go to their trunk and open it in order to maintain the ruse that they had appellant's computer equipment (Tr. 218, 390).

Appellant exited his car wearing a shirt and tie, and Sergeant Folsom observed that both of appellant's hands were empty; he also observed that appellant was openly carrying a holstered gun on his right hip, which he is legally entitled to do (Tr. 219, 304, 403). Sergeant Folsom unholstered his own weapon and questioned appellant about his gun (Tr. 219, 317; Ex. 15). Appellant replied by asking Sergeant Folsom what Sergeant Folsom was doing with a gun (Tr. 220, 317; Ex. 15). Sergeant Folsom told appellant that he was authorized to have a gun, and appellant replied that he also was authorized to have a gun (Tr. 220, 317; Ex. 15). Sergeant Folsom thought appellant was being a smart-aleck (Tr. 318).

According to Sergeant Folsom, appellant manipulated the flap of the holster with his right hand (Tr. 220). Sergeant Folsom was familiar with the holster because he used one in the Army; it is designed for 100% retention of the weapon and it is very difficult to open (Tr. 220, 306-308). Sergeant Folsom stated that appellant pulled down on the safety ring to disengage the flap, swept the flap up and placed his hand on the butt of the gun (Tr. 221).

Corporal Mertens saw appellant reach down and pull on the flap of the holster, which released it (Tr. 391). Then he saw appellant put his hands straight

down to his side and he had a tremor (Tr. 391). Then Corporal Mertens saw appellant put his hand under the flap and grab the butt of the gun (Tr. 392).

Sergeant Folsom and Corporal Mertens ordered appellant to the ground (Tr. 222, 329, 392, 414). Sergeant Folsom testified that when he ordered appellant to the ground, just before appellant attempted to draw his weapon, appellant had changed from a “bladed” position² to one where “he was squared up to me, we were squared face to face, toe to toe” (Tr. 221).

According to Sergeant Folsom, appellant started shaking and said, “You’re going to have to shoot me,” and he began to pull the weapon from the holster (Tr. 223, 321, 327). The gun never came free of the holster (Tr. 421).

Seconds after ordering him to the ground, and before appellant had removed his gun, Sergeant Folsom shot appellant twice in the chest and twice in the head (Tr. 223, 227, 330, 339, 349; Ex. 15). After Sergeant Folsom began shooting, Corporal Mertens also shot appellant (Tr. 393). Appellant fell to the ground (Tr. 224, 394).

Sergeant Folsom went to appellant and rolled him over (Tr. 228). Sergeant Folsom said the gun was lying underneath appellant, just out of the holster, and that appellant’s hand was not near the trigger (Tr. 228). Sergeant Folsom said he

² A “bladed position” was described by Sergeant Folsom as “standing sideways with [appellant’s] left foot in front of his right foot at a 45 degree angle” (Tr. 219).

put the gun back into the holster to secure it (Tr. 228). Corporal Mertens did not see Sergeant Folsom put the gun back in the holster (Tr. 432-433). Corporal Mertens saw Sergeant Folsom throw the gun with the holster in it behind him (Tr. 433-434). Sergeant Folsom handcuffed Appellant (Tr. 229). Sergeant Folsom received a written reprimand for this incident and is no longer allowed to work as a State Trooper (Tr. 254-255).

At the close of the state's case, the trial court granted defense counsel's motion for judgment of acquittal on the judicial tampering and resisting arrest counts (Tr. 544-545). After deliberation, the jury found appellant not guilty of the first-degree assault of Corporal Mertens and the accompanying armed criminal action (Tr. 652; L.F.199-200). But the jury found appellant guilty of the first-degree assault of Sergeant Folsom, the accompanying armed criminal action, and both drug possession counts (Tr.651; L.F.195-198).

After a sentencing phase, the jury recommended sentences for appellant of two years, one year, 30 years, and 30 years imprisonment (Tr. 682-683). On November 25, 2013, the court sentenced appellant in accordance with the jury's recommendations, with the sentences to run concurrently (S.Tr. 43-44; L.F.212-214).

On November 27, 2013, appellant filed a notice of appeal of his convictions (L.F. 215-216). On January 27, 2015, this Court issued a per curiam opinion affirming appellant's convictions, and this Court's mandate was issued on April 30, 2015 (PCR L.F. 21).

On May 11, 2015, appellant filed a pro se motion to vacate, set aside, or correct his judgment or sentence (PCR L.F. 1, 5-19). On August 24, 2015, appellant's counsel filed an amended motion for post-conviction relief (PCR L.F. 2, 20-34). Appellant's motion alleged, inter alia, that appellant received ineffective assistance of counsel in that his trial counsel failed to call Gene Gietzen, FBI Agent Michael Maruscak, FBI Agent Patrick Cunningham, Levi Weinhaus, Jim Byrne as witnesses (PCR L.F. 21-29, 32).

On November 12, 2015, the motion court denied an evidentiary hearing and issued findings of fact and conclusions of law denying appellant's motion for post-conviction relief (PCR L.F. 3, 35-37). On December 21, 2015, appellant filed a notice of appeal to this Court (PCR L.F. 4, 39-41).

POINT RELIED ON

I.

The motion court clearly erred in denying appellant's Rule 29.15 motion without granting an evidentiary hearing because appellant's motion pleaded factual allegations which, if proven, would warrant relief and which are not refuted by the record in that appellant claimed he was denied his right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, Section 18(a) of the Missouri Constitution, and that he was prejudiced thereby, because his trial counsel failed to call as a witness a crime scene forensic expert, such as Gene Gietzen, whose testimony would have supported appellant's defense by establishing that appellant's movements on the video of the incident were inconsistent with the testimony of state witness Sergeant James Folsom.

Rotellini v. State, 77 S.W.3d 632 (Mo. App. E.D. 2002);

Holman v. State, 88 S.W.3d 105 (Mo. App. E.D. 2002);

State v. Starks, 856 S.W.2d 334 (Mo. banc 1993);

State v. Ivy, 869 S.W.2d 297 (Mo. App. E.D. 1994);

U.S. Const., Amends. VI and XIV;

Mo. Const., Art. I, Section 18(a); and

Rule 29.15.

POINT RELIED ON

II.

The motion court clearly erred in denying appellant's Rule 29.15 motion without granting an evidentiary hearing because appellant's motion pleaded factual allegations which, if proven, would warrant relief and which are not refuted by the record in that appellant claimed he was denied his right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, Section 18(a) of the Missouri Constitution, and that he was prejudiced thereby, because his trial counsel failed to call as witnesses FBI Agents Michael Maruscak and Patrick Cunningham who would have testified that they did not see a holster on appellant's right hip, thereby supporting appellant's defense by contradicting the testimony of state witnesses Sergeant James Folsom and Corporal Scott Mertens.

Rotellini v. State, 77 S.W.3d 632 (Mo. App. E.D. 2002);

Holman v. State, 88 S.W.3d 105 (Mo. App. E.D. 2002);

State v. Starks, 856 S.W.2d 334 (Mo. banc 1993);

State v. Ivy, 869 S.W.2d 297 (Mo. App. E.D. 1994);

U.S. Const., Amends. VI and XIV;

Mo. Const., Art. I, Section 18(a); and

Rule 29.15.

POINT RELIED ON

III.

The motion court clearly erred in denying appellant's Rule 29.15 motion without granting an evidentiary hearing because appellant's motion pleaded factual allegations which, if proven, would warrant relief and which are not refuted by the record in that appellant claimed he was denied his right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, Section 18(a) of the Missouri Constitution, and that he was prejudiced thereby, because his trial counsel failed to call as a witness Levi Weinhaus who would have testified that appellant would always wear his holster on his left hip when he was driving because the holster would interfere with the seatbelt when worn on the right hip, thereby supporting appellant's defense by contradicting the testimony of state witnesses Sergeant James Folsom and Corporal Scott Mertens.

Rotellini v. State, 77 S.W.3d 632 (Mo. App. E.D. 2002);

Holman v. State, 88 S.W.3d 105 (Mo. App. E.D. 2002);

State v. Starks, 856 S.W.2d 334 (Mo. banc 1993);

State v. Ivy, 869 S.W.2d 297 (Mo. App. E.D. 1994);

U.S. Const., Amends. VI and XIV;

Mo. Const., Art. I, Section 18(a); and

Rule 29.15.

POINT RELIED ON

IV.

The motion court clearly erred in denying appellant's Rule 29.15 motion without granting an evidentiary hearing because appellant's motion pleaded factual allegations which, if proven, would warrant relief and which are not refuted by the record in that appellant claimed he was denied his right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, Section 18(a) of the Missouri Constitution, and that he was prejudiced thereby, because his trial counsel failed to call as a witness a video forensic expert, such as Jim Byrne, whose testimony would have supported appellant's defense by contradicting the testimony of state witness Sergeant James Folsom and establishing that appellant had said, "You don't have to shoot me."

Rotellini v. State, 77 S.W.3d 632 (Mo. App. E.D. 2002);

Holman v. State, 88 S.W.3d 105 (Mo. App. E.D. 2002);

State v. Starks, 856 S.W.2d 334 (Mo. banc 1993);

State v. Ivy, 869 S.W.2d 297 (Mo. App. E.D. 1994);

U.S. Const., Amends. VI and XIV;

Mo. Const., Art. I, Section 18(a); and

Rule 29.15.

ARGUMENT

I.

The motion court clearly erred in denying appellant's Rule 29.15 motion without granting an evidentiary hearing because appellant's motion pleaded factual allegations which, if proven, would warrant relief and which are not refuted by the record in that appellant claimed he was denied his right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, Section 18(a) of the Missouri Constitution, and that he was prejudiced thereby, because his trial counsel failed to call as a witness a crime scene forensic expert, such as Gene Gietzen, whose testimony would have supported appellant's defense by establishing that appellant's movements on the video of the incident were inconsistent with the testimony of state witness Sergeant James Folsom.

The motion court clearly erred in denying appellant's Rule 29.15 motion without granting an evidentiary hearing. Review of the motion court's denial is limited to determining whether the findings of fact and conclusions of law of the motion court are clearly erroneous. State v. Parker, 886 S.W.2d 908, 933 (Mo. banc 1994). The motion court's determination is clearly erroneous when the appellate court has a definite and firm impression that a mistake has been made. Moss v. State, 10 S.W.3d 508, 511 (Mo. banc 2000). Appellant has alleged that he received ineffective assistance of counsel in that his trial counsel failed to call a

crime scene forensic expert, such as Gene Gietzen, as a witness on appellant's behalf.

Appellant is entitled to a hearing if he has pled facts in his motion which, if true, would entitle him to relief and such factual allegations are not refuted by the files and records of the case. State v. Starks, 856 S.W.2d 334, 336 (Mo. banc 1993). The issue in this case is whether the motion court erred in refusing to grant appellant an evidentiary hearing on his Rule 29.15 motion, not whether appellant is entitled to relief. State v. Ivy, 869 S.W.2d 297, 299 (Mo. App. E.D. 1994); Masden v. State, 62 S.W.3d 661, 664 (Mo. App. W.D. 2001).

The state's evidence at appellant's trial was that the Missouri State Highway Patrol determined that they would arrest appellant on drug and tampering charges (Tr. 207, 208, 274). Highway Patrol Officers Sergeant James Folsom and Corporal Scott Mertens had previously found the drugs while executing a search warrant at appellant's residence and at that time had also seized computer equipment belonging to appellant (Tr.180). The officers knew appellant wanted his computer equipment back, so Sergeant Folsom and Corporal Mertens decided they would arrest appellant while pretending they were returning his computers (Tr. 207-210, 272-273, 385). They called appellant and arranged to meet in public, at an MFA gas station near appellant's home (Tr. 209-210).

Unknown to the officers, appellant wore a video camera watch on his left wrist (Tr. 229; Ex. 15). The entire twelve second interaction between appellant

and the officers is on this video, as well several minutes before and after (Tr. 229; Ex. 15).

As appellant pulled into the parking lot, Sergeant Folsom and Corporal Mertens got out of their car (Tr. 213, 217). Sergeant Folsom told Corporal Mertens to go to their trunk and open it in order to maintain the ruse that they had appellant's computer equipment (Tr. 218, 390). Appellant exited his vehicle carrying a holstered gun on his right hip (Tr. 219, 304, 403). Sergeant Folsom unholstered his own weapon and asked appellant why he was wearing the gun (Tr. 219, 317; Ex. 15). Appellant asked Sergeant Folsom what he was doing with a gun (Tr. 220, 317; Ex. 15). Sergeant Folsom told appellant that he was authorized to have a gun, and appellant replied that he was also so authorized (Tr. 220, 317; Ex. 15).

According to Sergeant Folsom, appellant manipulated the flap of the holster with his right hand (Tr. 220). Sergeant Folsom was familiar with the holster type; it is designed for retention of the weapon and it is very difficult to open (Tr. 220, 306-308).

Sergeant Folsom stated that appellant pulled down on the safety ring to disengage the flap, swept the flap up, and placed his hand on the butt of the gun (Tr. 221). Corporal Mertens said he saw appellant reach down and pull on the flap of the holster, which released it (Tr. 391). Corporal Mertens saw appellant put his hand under the flap and grab the butt of the gun (Tr. 392). Sergeant Folsom and Corporal Mertens ordered appellant to the ground (Tr. 222, 329, 392, 414).

According to Sergeant Folsom, appellant started shaking and said, “You’re going to have to shoot me,” and he began to pull the weapon from the holster (Tr. 223, 321, 327). Appellant’s gun never cleared the holster (Tr. 421). Sergeant Folsom shot appellant twice in the chest and twice in the head (Tr. 223, 227, 330, 339, 349; Ex. 15). After Sergeant Folsom began shooting, Corporal Mertens also shot appellant (Tr. 393).

Sergeant Folsom testified that when he ordered appellant to the ground, just before appellant attempted to draw his weapon, appellant had changed from a “bladed” position³ to one where “he was squared up to me, we were squared face to face, toe to toe” (Tr. 221). But this assertion by Sergeant Folsom is inconsistent with the video of the incident, which could have been established through crime scene analysis or reconstruction.

Appellant has alleged that he received ineffective assistance of counsel in that his trial counsel failed to call a crime scene forensic expert as a witness. The inconsistency between the video and Sergeant Folsom’s testimony could have been adduced through the testimony of an expert in crime scene analysis and reconstruction, such as Gene Gietzen. If called as a witness, Gene Gietzen would have testified that the movement of appellant’s left arm on the video is

³ A “bladed position” was described by Sergeant Folsom as “standing sideways with [appellant’s] left foot in front of his right foot at a 45 degree angle” (Tr. 219).

inconsistent with appellant moving from a “bladed” position to squaring up face to face with Sergeant Folsom, as was testified by Sergeant Folsom.

Appellant’s counsel rendered ineffective assistance when he failed to call a crime scene forensic expert, such as Gene Gietzen, as a defense witness at trial. A reasonably competent counsel would have called an expert such as Gene Gietzen as a witness to establish that Sergeant Folsom’s testimony was inconsistent with the video of the incident.

Appellant was prejudiced by his trial counsel’s failure to call an expert such as Gene Gietzen as a witness because the jury did not have his testimony to consider during its deliberation. The testimony from Gietzen would have aided appellant’s defense by contradicting the testimony of state witness Sergeant James Folsom and establishing that Sergeant Folsom’s testimony was inconsistent with the video of the incident. Had Gene Gietzen been called to testify, there is a reasonable probability that the result of appellant’s trial would have been different. This allegation presents facts warranting relief under Rule 29.15 by so depriving appellant of effective assistance of counsel that he was thereby denied a fair trial.

The Sixth Amendment’s guarantee that an accused shall have the right to assistance of counsel applies to state prosecutions via the Fourteenth Amendment. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792 (1963). This guarantee would be little more than an empty promise if it did not also require such assistance of counsel to be effective. Cuyler v. Sullivan, 466 U.S. 355, 100 S.Ct. 1708 (1980); Sanders v. State, 738 S.W.2d 856 (Mo. banc 1987).

To establish a violation of his right to effective assistance of counsel, appellant must satisfy a two-pronged test. First, it must be shown that appellant's counsel "failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances." Sanders, 738 S.W.2d at 857, citing Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065 (1984). Second, it must be demonstrated that appellant was prejudiced by the ineffective assistance of counsel. Id. The prejudice prong is satisfied when there is a reasonable probability that, but for counsel's ineffectiveness, the result would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. at 2068. A reasonable probability is "... the minimum standard of undermining confidence in the outcome of the case. Moore v. State, 827 S.W.2d 213, 215 (Mo. banc 1992).

Appellant has alleged that his trial counsel failed to call a crime scene forensic expert, such as Gene Gietzen, as a witness, whose testimony would have contradicted the testimony of Sergeant James Folsom and established that Sergeant Folsom's testimony was inconsistent with the video of the incident. To establish ineffective assistance of counsel for the failure to present a witness, appellant must show that the witness would have testified if called and that the witness' testimony would have aided the defense. Rotellini v. State, 77 S.W.3d 632, 635 (Mo. App. E.D. 2002). An evidentiary hearing would allow appellant to establish that Gene Gietzen was available and willing to testify, and how his testimony would have aided the defense by establishing that appellant's

movements on the video of the incident were inconsistent with the testimony of state witness Sergeant James Folsom.

Though the decision of whether to call a witness may initially be presumed to be trial strategy within the discretion of the trial attorney, establishing facts to overcome such a presumption is exactly why an evidentiary hearing should be held. The post-conviction motion is merely a pleading asserting factual allegations. To overcome a presumption, such facts must be established through evidence and testimony, and that can only be done in an evidentiary hearing.

And the decision in this case to not call Gene Gietzen could have just as easily been an inadvertent mistake on the part of trial counsel. There is no way to know without an evidentiary hearing to determine trial counsel's intentions and state of mind.

Furthermore, an attorney's discretion is not absolute. The choices made by counsel at trial must be reasonable and considered sound trial strategy to defeat a claim of ineffective assistance of counsel. Holman v. State, 88 S.W.3d 105, 110 (Mo. App. E.D. 2002). An evidentiary hearing would provide appellant the opportunity to show his trial counsel's choices were unsound and unreasonable.

Appellant has alleged facts not refuted by the record which demonstrate deficiencies in the performance of his trial counsel. Counsel's errors were critical to the outcome of this case. Appellant should be given the opportunity to establish

his counsel's ineffectiveness, and prejudice arising therefrom, in an evidentiary hearing. Thus, appellant respectfully requests this Court remand this case with direction that an evidentiary hearing be held on appellant's Rule 29.15 motion.

ARGUMENT

II.

The motion court clearly erred in denying appellant's Rule 29.15 motion without granting an evidentiary hearing because appellant's motion pleaded factual allegations which, if proven, would warrant relief and which are not refuted by the record in that appellant claimed he was denied his right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, Section 18(a) of the Missouri Constitution, and that he was prejudiced thereby, because his trial counsel failed to call as witnesses FBI Agents Michael Maruscak and Patrick Cunningham who would have testified that they did not see a holster on appellant's right hip, thereby supporting appellant's defense by contradicting the testimony of state witnesses Sergeant James Folsom and Corporal Scott Mertens.

The motion court clearly erred in denying appellant's Rule 29.15 motion without granting an evidentiary hearing. Review of the motion court's denial is limited to determining whether the findings of fact and conclusions of law of the motion court are clearly erroneous. State v. Parker, 886 S.W.2d 908, 933 (Mo. banc 1994). The motion court's determination is clearly erroneous when the appellate court has a definite and firm impression that a mistake has been made. Moss v. State, 10 S.W.3d 508, 511 (Mo. banc 2000). Appellant has alleged that he received ineffective assistance of counsel in that his trial counsel failed to call FBI

Agents Michael Maruscak and Patrick Cunningham as witnesses on appellant's behalf.

Appellant is entitled to a hearing if he has pled facts in his motion which, if true, would entitle him to relief and such factual allegations are not refuted by the files and records of the case. State v. Starks, 856 S.W.2d 334, 336 (Mo. banc 1993). The issue in this case is whether the motion court erred in refusing to grant appellant an evidentiary hearing on his Rule 29.15 motion, not whether appellant is entitled to relief. State v. Ivy, 869 S.W.2d 297, 299 (Mo. App. E.D. 1994); Masden v. State, 62 S.W.3d 661, 664 (Mo. App. W.D. 2001).

The state's evidence at appellant's trial was that the Missouri State Highway Patrol determined that they would arrest appellant on drug and tampering charges (Tr. 207, 208, 274). Highway Patrol Officers Sergeant James Folsom and Corporal Scott Mertens had previously found the drugs while executing a search warrant at appellant's residence and at that time had also seized computer equipment belonging to appellant (Tr.180). The officers knew appellant wanted his computer equipment back, so Sergeant Folsom and Corporal Mertens decided they would arrest appellant while pretending they were returning his computers (Tr. 207-210, 272-273, 385). They called appellant and arranged to meet in public, at an MFA gas station near appellant's home (Tr. 209-210).

Before setting up the ruse computer exchange with appellant, Sergeant Folsom contacted the local FBI office for assistance (Tr. 208). FBI Agents

Michael Maruscak and Patrick Cunningham went to the MFA gas station to assist with serving the arrest warrant.

As appellant pulled into the parking lot, Sergeant Folsom and Corporal Mertens got out of their car (Tr. 213, 217). Sergeant Folsom told Corporal Mertens to go to their trunk and open it in order to maintain the ruse that they had appellant's computer equipment (Tr. 218, 390). According to Sergeant Folsom and Corporal Mertens, appellant exited his vehicle carrying a holstered gun on his right hip (Tr. 219, 304, 403).

But Agents Maruschak and Cunningham both testified in pretrial depositions that they did not see a holster on appellant's right hip, as was testified by Sergeant Folsom and Corporal Mertens. And the holster would have been visible to the Agents from their perspective of where appellant was located.

Appellant has alleged that he received ineffective assistance of counsel in that his trial counsel failed to call FBI Agents Maruschak and Cunningham as witnesses. Appellant's counsel was aware of Agents Maruschak and Cunningham through their pretrial depositions. And both were available and willing to testify.

If called as witnesses, FBI Agents Michael Maruscak and Patrick Cunningham would have testified that they did not see a holster on appellant's right hip, as was testified by Sergeant Folsom and Corporal Mertens. They would have also testified that the holster would have been visible to them from their perspective and view of appellant.

Appellant's counsel rendered ineffective assistance when he failed to call FBI Agents Michael Maruscak and Patrick Cunningham as defense witnesses at trial. A reasonably competent counsel would have called Agents Maruschak and Cunningham as witnesses to contradict the testimony of Sergeant Folsom and Corporal Mertens.

Appellant was prejudiced by his trial counsel's failure to call FBI Agents Maruschak and Cunningham as witnesses because the jury did not have their testimony to consider during its deliberation. The testimony from Agents Maruschak and Cunningham would have aided appellant's defense by contradicting the testimony of state witnesses Sergeant Folsom and Corporal Mertens. Had FBI Agents Maruschak and Cunningham been called to testify, there is a reasonable probability that the result of appellant's trial would have been different. This allegation presents facts warranting relief under Rule 29.15 by so depriving appellant of effective assistance of counsel that he was thereby denied a fair trial.

The Sixth Amendment's guarantee that an accused shall have the right to assistance of counsel applies to state prosecutions via the Fourteenth Amendment. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792 (1963). This guarantee would be little more than an empty promise if it did not also require such assistance of counsel to be effective. Cuyler v. Sullivan, 466 U.S. 355, 100 S.Ct. 1708 (1980); Sanders v. State, 738 S.W.2d 856 (Mo. banc 1987).

To establish a violation of his right to effective assistance of counsel, appellant must satisfy a two-pronged test. First, it must be shown that appellant's counsel "failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances." Sanders, 738 S.W.2d at 857, citing Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065 (1984). Second, it must be demonstrated that appellant was prejudiced by the ineffective assistance of counsel. Id. The prejudice prong is satisfied when there is a reasonable probability that, but for counsel's ineffectiveness, the result would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. at 2068. A reasonable probability is "... the minimum standard of undermining confidence in the outcome of the case. Moore v. State, 827 S.W.2d 213, 215 (Mo. banc 1992).

Appellant has alleged that his trial counsel failed to call FBI Agents Michael Maruscak and Patrick Cunningham as witnesses, whose testimony would have contradicted the testimony of the state witnesses Sergeant James Folsom and Corporal Scott Mertens. To establish ineffective assistance of counsel for the failure to present a witness, appellant must show that the witness would have testified if called and that the witness' testimony would have aided the defense. Rotellini v. State, 77 S.W.3d 632, 635 (Mo. App. E.D. 2002). An evidentiary hearing would allow appellant to establish that Agents Maruschak and Cunningham were available and willing to testify, and how their testimony would have aided the defense by contradicting the testimony of Sergeant Folsom and Corporal Mertens.

Though the decision of whether to call a witness may initially be presumed to be trial strategy within the discretion of the trial attorney, establishing facts to overcome such a presumption is exactly why an evidentiary hearing should be held. The post-conviction motion is merely a pleading asserting factual allegations. To overcome a presumption, such facts must be established through evidence and testimony, and that can only be done in an evidentiary hearing.

And the decision in this case to not call FBI Agents Maruschak and Cunningham could have just as easily been an inadvertent mistake on the part of trial counsel. There is no way to know without an evidentiary hearing to determine trial counsel's intentions and state of mind.

Furthermore, an attorney's discretion is not absolute. The choices made by counsel at trial must be reasonable and considered sound trial strategy to defeat a claim of ineffective assistance of counsel. Holman v. State, 88 S.W.3d 105, 110 (Mo. App. E.D. 2002). An evidentiary hearing would provide appellant the opportunity to show his trial counsel's choices were unsound and unreasonable.

Appellant has alleged facts not refuted by the record which demonstrate deficiencies in the performance of his trial counsel. Counsel's errors were critical to the outcome of this case. Appellant should be given the opportunity to establish his counsel's ineffectiveness, and prejudice arising therefrom, in an evidentiary hearing. Thus, appellant respectfully requests this Court remand this case with direction that an evidentiary hearing be held on appellant's Rule 29.15 motion.

ARGUMENT

III.

The motion court clearly erred in denying appellant's Rule 29.15 motion without granting an evidentiary hearing because appellant's motion pleaded factual allegations which, if proven, would warrant relief and which are not refuted by the record in that appellant claimed he was denied his right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, Section 18(a) of the Missouri Constitution, and that he was prejudiced thereby, because his trial counsel failed to call as a witness Levi Weinhaus who would have testified that appellant would always wear his holster on his left hip when he was driving because the holster would interfere with the seatbelt when worn on the right hip, thereby supporting appellant's defense by contradicting the testimony of state witnesses Sergeant James Folsom and Corporal Scott Mertens.

The motion court clearly erred in denying appellant's Rule 29.15 motion without granting an evidentiary hearing. Review of the motion court's denial is limited to determining whether the findings of fact and conclusions of law of the motion court are clearly erroneous. State v. Parker, 886 S.W.2d 908, 933 (Mo. banc 1994). The motion court's determination is clearly erroneous when the appellate court has a definite and firm impression that a mistake has been made. Moss v. State, 10 S.W.3d 508, 511 (Mo. banc 2000). Appellant has alleged that he

received ineffective assistance of counsel in that his trial counsel failed to call Levi Weinhaus as a witness on appellant's behalf.

Appellant is entitled to a hearing if he has pled facts in his motion which, if true, would entitle him to relief and such factual allegations are not refuted by the files and records of the case. State v. Starks, 856 S.W.2d 334, 336 (Mo. banc 1993). The issue in this case is whether the motion court erred in refusing to grant appellant an evidentiary hearing on his Rule 29.15 motion, not whether appellant is entitled to relief. State v. Ivy, 869 S.W.2d 297, 299 (Mo. App. E.D. 1994); Masden v. State, 62 S.W.3d 661, 664 (Mo. App. W.D. 2001).

The state's evidence at appellant's trial was that the Missouri State Highway Patrol determined that they would arrest appellant on drug and tampering charges (Tr. 207, 208, 274). Highway Patrol Officers Sergeant James Folsom and Corporal Scott Mertens had previously found the drugs while executing a search warrant at appellant's residence and at that time had also seized computer equipment belonging to appellant (Tr.180). The officers knew appellant wanted his computer equipment back, so Sergeant Folsom and Corporal Mertens decided they would arrest appellant while pretending they were returning his computers (Tr. 207-210, 272-273, 385). They called appellant and arranged to meet in public, at an MFA gas station near appellant's home (Tr. 209-210).

As appellant pulled into the parking lot, Sergeant Folsom and Corporal Mertens got out of their car (Tr. 213, 217). Sergeant Folsom told Corporal Mertens to go to their trunk and open it in order to maintain the ruse that they had

appellant's computer equipment (Tr. 218, 390). According to Sergeant Folsom and Corporal Mertens, appellant exited his vehicle carrying a holstered gun on his right hip (Tr. 219, 304, 403).

Appellant has alleged that he received ineffective assistance of counsel in that his trial counsel failed to call Levi Weinhaus as a witness. Appellant had informed his counsel that Levi Weinhaus could testify that appellant would always wear his holster on his left hip when he was driving because the holster would interfere with the seatbelt when worn on the right hip. Appellant had Levi's address in Belleville, Illinois, and Levi was available and willing to testify.

If called as a witness, Levi Weinhaus would have testified that appellant would always wear his holster on his left hip when he was driving. Levi would have also testified that appellant wore his holster on his left hip when driving because the holster would interfere with the seatbelt if worn on the right hip.

Appellant's counsel rendered ineffective assistance when he failed to call Levi Weinhaus as a defense witness at trial. A reasonably competent counsel would have called Levi Weinhaus as a witness to contradict the testimony of Sergeant Folsom and Corporal Mertens.

Appellant was prejudiced by his trial counsel's failure to call Levi Weinhaus as a witness because the jury did not have his testimony to consider during its deliberation. The testimony from Levi Weinhaus would have aided appellant's defense by contradicting the testimony of state witnesses Sergeant Folsom and Corporal Mertens. Had Levi Weinhaus been called to testify, there is

a reasonable probability that the result of appellant's trial would have been different. This allegation presents facts warranting relief under Rule 29.15 by so depriving appellant of effective assistance of counsel that he was thereby denied a fair trial.

The Sixth Amendment's guarantee that an accused shall have the right to assistance of counsel applies to state prosecutions via the Fourteenth Amendment. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792 (1963). This guarantee would be little more than an empty promise if it did not also require such assistance of counsel to be effective. Cuyler v. Sullivan, 466 U.S. 355, 100 S.Ct. 1708 (1980); Sanders v. State, 738 S.W.2d 856 (Mo. banc 1987).

To establish a violation of his right to effective assistance of counsel, appellant must satisfy a two-pronged test. First, it must be shown that appellant's counsel "failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances." Sanders, 738 S.W.2d at 857, citing Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065 (1984). Second, it must be demonstrated that appellant was prejudiced by the ineffective assistance of counsel. Id. The prejudice prong is satisfied when there is a reasonable probability that, but for counsel's ineffectiveness, the result would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. at 2068. A reasonable probability is "... the minimum standard of undermining confidence in the outcome of the case. Moore v. State, 827 S.W.2d 213, 215 (Mo. banc 1992).

Appellant has alleged that his trial counsel failed to call Levi Weinhaus as a witness, whose testimony would have contradicted the testimony of the state witnesses Sergeant James Folsom and Corporal Scott Mertens. To establish ineffective assistance of counsel for the failure to present a witness, appellant must show that the witness would have testified if called and that the witness' testimony would have aided the defense. Rotellini v. State, 77 S.W.3d 632, 635 (Mo. App. E.D. 2002). An evidentiary hearing would allow appellant to establish that Levi Weinhaus was available and willing to testify, and how his testimony would have aided the defense by contradicting the testimony of Sergeant Folsom and Corporal Mertens.

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ARGUMENT

IV.

The motion court clearly erred in denying appellant's Rule 29.15 motion without granting an evidentiary hearing because appellant's motion pleaded factual allegations which, if proven, would warrant relief and which are not refuted by the record in that appellant claimed he was denied his right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, Section 18(a) of the Missouri Constitution, and that he was prejudiced thereby, because his trial counsel failed to call as a witness a video forensic expert, such as Jim Byrne, whose testimony would have supported appellant's defense by contradicting the testimony of state witness Sergeant James Folsom and establishing that appellant had said, "You don't have to shoot me."

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Unknown to the officers, appellant wore a video camera watch on his left wrist (Tr. 229; Ex. 15). The entire twelve second interaction between appellant

and the officers is on this video, as well several minutes before and after (Tr. 229; Ex. 15).

As appellant pulled into the parking lot, Sergeant Folsom and Corporal Mertens got out of their car (Tr. 213, 217). Sergeant Folsom told Corporal Mertens to go to their trunk and open it in order to maintain the ruse that they had appellant's computer equipment (Tr. 218, 390). Appellant exited his vehicle carrying a holstered gun on his right hip (Tr. 219, 304, 403). Sergeant Folsom unholstered his own weapon and asked appellant why he was wearing the gun (Tr. 219, 317; Ex. 15). Appellant asked Sergeant Folsom what he was doing with a gun (Tr. 220, 317; Ex. 15). Sergeant Folsom told appellant that he was authorized to have a gun, and appellant replied that he was also so authorized (Tr. 220, 317; Ex. 15).

According to Sergeant Folsom, appellant manipulated the flap of the holster with his right hand (Tr. 220). Sergeant Folsom was familiar with the holster type; it is designed for retention of the weapon and it is very difficult to open (Tr. 220, 306-308).

Sergeant Folsom stated that appellant pulled down on the safety ring to disengage the flap, swept the flap up, and placed his hand on the butt of the gun (Tr. 221). Corporal Mertens said he saw appellant reach down and pull on the flap of the holster, which released it (Tr. 391). Corporal Mertens saw appellant put his hand under the flap and grab the butt of the gun (Tr. 392). Sergeant Folsom and Corporal Mertens ordered appellant to the ground (Tr. 222, 329, 392, 414).

According to Sergeant Folsom, appellant started shaking and said, “You’re going to have to shoot me,” and he began to pull the weapon from the holster (Tr. 223, 321, 327). Appellant’s gun never cleared the holster (Tr. 421). Sergeant Folsom shot appellant twice in the chest and twice in the head (Tr. 223, 227, 330, 339, 349; Ex. 15). After Sergeant Folsom began shooting, Corporal Mertens also shot appellant (Tr. 393).

Appellant has alleged that he received ineffective assistance of counsel in that his trial counsel failed to call a video forensic expert as a witness to establish what appellant actually said during the incident. Appellant’s actual statements during the incident could have been adduced through an analysis of the video of the incident by a video forensic expert, such as Jim Byrne. If called as a witness, Jim Byrne would have testified that, through his analysis of the video, he had determined that appellant had actually said, “You don’t have to shoot me.”

Appellant’s counsel rendered ineffective assistance when he failed to call a video forensic expert, such as Jim Byrne, as a defense witness at trial. A reasonably competent counsel would have called an expert such as Jim Byrne as a witness to establish that, during the incident, appellant had actually said, “You don’t have to shoot me”, thereby contradicting the testimony of state witness Sergeant James Folsom.

Appellant was prejudiced by his trial counsel’s failure to call an expert such as Jim Byrne as a witness because the jury did not have his testimony to consider during its deliberation. The testimony from Byrne would have aided appellant’s

defense by contradicting the testimony of state witness Sergeant James Folsom and establishing that appellant had actually said, "You don't have to shoot me," during the incident. Had Jim Byrne been called to testify, there is a reasonable probability that the result of appellant's trial would have been different. This allegation presents facts warranting relief under Rule 29.15 by so depriving appellant of effective assistance of counsel that he was thereby denied a fair trial.

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CONCLUSION

For the foregoing reasons, as set out in appellant's Arguments I-IV, appellant respectfully requests that this Court reverse the motion court's denial of post-conviction relief and remand for an evidentiary hearing.

Respectfully submitted,

/s/ Mark A. Grothoff

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Certificate of Compliance and Service

I, Mark A. Grothoff, hereby certify the following:

This appellant's brief complies with the limitations contained in Supreme Court Rule 84.06(b) and Eastern District Local Rule 360. This appellant's brief was completed using Microsoft Office Word, 2007, in Times New Roman size 13 point font. Excluding the cover page, the signature block, and this certificate of compliance and service, this appellant's brief contains 9,590 words, which does not exceed the 15,500 words allowed for an appellant's brief.

On this 29th day of April, 2016, an electronic copy of the foregoing was sent through the Missouri e-Filing System to Shaun Mackelprang, Assistant Attorney General, at Shaun.Mackelprang@ago.mo.gov.

/s/ Mark A. Grothoff

Mark A. Grothoff