

**MISSOURI COURT OF APPEALS-WESTERN DISTRICT
SPECIAL DIVISION
MARK D. PFEIFFER, PRESIDING JUDGE
ALOK AHUJA, JUDGE
THOMAS N. CHAPMAN, JUDGE**

**MARK D. PFEIFFER, PRESIDING JUDGE
ALOK AHUJA, JUDGE
JEFF HARRIS, SPECIAL JUDGE
(SITTING ON WD84279, BROWN V. BARNES)**

**NOVEMBER 9, 2019
WESTMINSTER COLLEGE
FULTON, MISSOURI**

**WD84074
Alonzo Thorpe, Appellant,
vs.
State of Missouri, Respondent.**

Alonzo Thorpe appeals the circuit court's judgment denying his Rule 29.15 motion for post-conviction relief after an evidentiary hearing. Thorpe was tried and convicted of eight counts of child molestation in the first-degree and two counts of enticement of a child. The specific facts of the alleged crimes are not relevant to the issues on appeal. In the underlying criminal action, Thorpe was originally charged in Randolph County Circuit Court with twenty counts relating to four different victims. Thorpe's attorney made a motion for change of venue, contending that Thorpe could not receive a fair trial in Randolph County. The case was transferred to Chariton County. The evidence at trial established that Thorpe sexually abused two sisters, who were under the age of fourteen at the time. Both girls testified at trial to the various sexual acts Thorpe performed on them. Faith Kummerfeld, a forensic interviewer for the Rainbow House, also testified at trial regarding her interviews of the children. The jury convicted Thorpe of all ten counts, and the court sentenced Thorpe to ten years' imprisonment on each count to be served consecutively. This Court affirmed Thorpe's convictions on direct appeal. Thorpe filed a *pro se* motion to vacate, set aside, or correct the judgment and sentences pursuant to Rule 29.15. Post-conviction counsel was appointed by the circuit court, and Thorpe's post-conviction counsel filed an Amended Rule 29.15 motion. The amended motion alleged, in part, that trial counsel was ineffective for requesting that the case be transferred to a different county and for failing to object to the testimony of Kummerfeld. Both of Thorpe's attorneys from trial testified at the evidentiary hearing. Thorpe's first trial counsel testified that he requested transfer of the case because he was concerned about being able to find a fair jury in Randolph County because of the number of friends and family members Thorpe had in Randolph County. He testified that he never considered Thorpe's race when deciding whether to request a change of venue. Thorpe's second trial counsel testified that, in response to Kummerfeld's testimony, he offered testimony critical of Kummerfeld. The motion court found that the

decision to transfer the case to Chariton County was a reasonable trial strategy. It also found that, although Kummerfeld's testimony was impermissible, Thorpe failed to show that he was prejudiced. This appeal followed.

Appellant's points on appeal:

- (1) The motion court erred in denying relief on Claim 8(a) of Appellant's Amended Motion to Vacate, because trial counsel's error was a mistake that prejudiced Appellant, in that a reasonable probability exists that, but for counsel's failure to object to the inadmissible expert opinion testimony of Faith Kummerfeld, the result of Appellant's underlying proceeding would have been different.
- (2) The motion court erred in denying relief on Claim 8(e) of Appellant's Amended Motion to Vacate, because trial counsel's error was a mistake that prejudiced Appellant, in that a reasonable probability exists that, but for counsel's choice to change venue, the result of Appellant's underlying proceeding would have been different.

WD84394

State of Missouri, ex rel. John L. Putnam, M.D., Appellant,

v.

State Board of

**Registration for the Healing Arts and the Administrative Hearing
Commission, Respondents.**

John Putnam appeals the circuit court's judgment quashing preliminary writs of prohibition which had prohibited the Administrative Hearing Commission from requiring that Putnam turn over certain patient medical records to the Missouri State Board of Registration for the Healing Arts ("Board") for use in an administrative proceeding seeking to discipline Putnam's medical license. During the disciplinary proceeding, the Board served interrogatories and a request for production of documents on Putnam seeking documents and information about five patients and their treatment. Putnam objected, contending that the Board is only authorized to obtain patient records with written authorization from the patient or through the issuance of a subpoena. Because the Board had neither, Putnam argued he was not obligated or permitted to turn over the records. The Administrative Hearing Commission overruled the objections and ordered Putnam to answer the disputed discovery within 30 days. Following this ruling, Putnam filed a Petition in Prohibition in the Circuit Court of Cole County. Preliminary writs were issued on December 6, 2019, but on November 30, 2021, the court entered judgment in favor of the Board, denying Putnam's request for a permanent writ and quashing the preliminary writs. This appeal followed.

Appellant's points on appeal:

- (1) The Circuit Court abused its discretion in quashing the preliminary writs of prohibition by exceeding its authority in that it failed to follow applicable statutes, namely, section 334.097.6, RSMo., which provides that the Missouri State Board of Registration for the Healing Arts shall not obtain a patient medical record without written authorization from the patient to obtain the medical record or the issuance of a subpoena for the patient medical record.
- (2) The Circuit Court abused its discretion in quashing the preliminary writs of prohibition by exceeding its authority in that it failed to follow applicable Supreme Court Rules, namely Rule 56.01(b)(1), which provides that discovery may be had only for non-privileged information, and Rule 41.02, which provides that the Missouri Supreme Court Rules supersede all statutes and existing court rules inconsistent therewith.
- (3) The Circuit Court abused its discretion in quashing the preliminary writs in prohibition by exceeding its authority in that it ordered a physician to produce the medical records of his patients, without an authorization from the patient or a subpoena, in violation of the physician patient privilege and the Missouri Supreme Court's imposition of the highest duty of confidentiality, that of a fiduciary duty to protect the confidentiality of patients' medical records and thereby exposing the physician to potential civil liability.
- (4) The Circuit Court erred in quashing the preliminary writs in prohibition and exceeded its authority in ordering a litigant to summarize the statements of persons with knowledge of matters alleged in an administrative complaint, in that summarizing the statements, by its very nature, requires disclosure of intangible work product in violation of the attorney client privilege.
- (5) The Circuit Court abused its discretion in quashing the preliminary writs in prohibition by exceeding its authority in that it is outside the scope of permitted discovery pursuant to Rule 56.01(b)(1) in ordering a litigant to identify by way of interrogatory, early in the proceedings, the persons that might be called, at the administrative hearing, as identifying the witnesses who might be called to testify, by its very nature, requires disclosure of intangible work product in violation of the attorney client privilege.

WD84140
Cedric Dewayne Mack, Appellant,
v.
State of Missouri, Respondent.

Cedrick Mack appeals the circuit court's judgment denying his Rule 29.15 motion for post-conviction relief. Mack was tried and convicted of driving while intoxicated and sentenced to four years' imprisonment. The evidence established that Mack was driving his vehicle when he was stopped by Missouri Highway Patrolman Ben Hillyard. Corporal Hillyard had received a dispatch call indicating that a vehicle matching Mack's description, silver with black racing stripes and an Iowa license plate, was "driving in a careless and imprudent manner" on northbound Interstate I-35. Corporal Hillyard saw a vehicle matching that description leaving a weigh station. Just after the car exited, it stopped halfway on the shoulder and halfway in the driving lane. When the car reentered traffic, Corporal Hillyard followed the vehicle and witnessed Mack's back passenger wheel touch or come near the fog line two times before Corporal Hillyard activated his emergency lights to initiate a stop. During the stop, Corporal Hillyard noticed the odor of alcohol coming from the vehicle. Corporal Hillyard asked for Mack's driving license, and Mack gave him a credit card and was not able to provide his license or identification. Corporal Hillyard conducted several field sobriety tests, and Corporal Hillyard noted that Mack was unable to properly perform them, including missing several letters of the alphabet, using his fingers to count backwards, unable to balance on one foot, and the walk-in-turn test was abandoned because Mack was unable to even stand in the initial position for the test. Mack refused a preliminary breath test. Corporal Hillyard placed Mack under arrest for driving while intoxicated. Mack subsequently admitted that he had been drinking. After being advised of implied consent, Mack refused to submit to a breath test. Mack was tried and convicted of the class D felony of driving while intoxicated for operating a motor vehicle while under the influence of alcohol. Mack's conviction was upheld by this Court on December 5, 2018. Mack then filed a *pro se* motion to vacate, set aside, or correct the judgment. Post-conviction counsel entered an appearance and filed an Amended Rule 29.15 motion. The amended motion argued, in part, that Mack's trial counsel was ineffective for (1) failing to secure medical records regarding an eye injury that affected Mack's performance on sobriety tests; (2) failing to confirm that the inventory of Mack's car contained the open beer can Corporal Hillyard alleged he found; and (3) failing to file a motion to suppress evidence obtained during the stop because Corporal Hillyard lacked reasonable suspicion to stop Mack. At the evidentiary hearing on Mack's amended motion, Mack presented the dashcam video from Corporal Hillyard's patrol vehicle and an affidavit from trial counsel. The motion court denied Mack's motion. Mack filed a motion to amend the judgment, arguing that the judgment did not address all or any of the claims in Mack's amended motion as required by Rule 29.15. The motion to amend was never ruled upon. This appeal followed.

Appellant's points on appeal:

- (1) The motion court clearly erred in overruling Mr. Mack's motion for postconviction relief because appellant was denied effective assistance of trial counsel in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that trial counsel failed to file a motion to suppress the evidence derived from Corporal Hillyard's investigatory stop, because there is a reasonable probability that the evidence from the stop would have been suppressed as the only articulable

facts that of which Corporal Hillyard was aware that would suggest that Mr. Mack was driving while intoxicated was that his vehicle touched the fog line twice, and this alone was not sufficient to create reasonable suspicion that would justify Corporal Hillyard's stop of Mr. Mack's vehicle.

- (2) The motion court clearly erred in entering an order denying Mr. Mack's motion for postconviction relief and motion to amend the judgment, because the court failed to comply with the mandate of Supreme Court Rule 29.15(j) requiring that findings of fact and conclusions of law be made on all issues presented, in that the court made no specific findings with respect to the three claims raised in the amended motion. The court's failure to address all claims violated appellant's right to due process of law, guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that Mr. Mack cannot now obtain meaningful appellate review of his postconviction claims.

WD84279

Joe D. Brown, in his Capacity as Successor Trustee of the George E. Heard Revocable Trust, Dated February 24, 2000, Respondent,

v.

Douglas Lee Barnes and Kyle Barnes, Appellants.

Douglas Lee Barnes and Kyle Barnes appeal the judgment of the circuit court granting summary judgment in favor of Joe Brown, in his Capacity as Successor Trustee of the George E. Heard Revocable Trust, Dated February 24, 2000, (the "Trust") on the Trust's petition for unlawful detainer. The Barneses allege that the property in question was previously owned by George Heard. Heard and the Barneses were friends, and, in addition, the Barneses provided Heard with bookkeeping and farm services. The Barneses began construction of a residence on Heard's property in 1993. The Barneses began living on the property full-time in 1999. The Barneses contend that, at some point between 1993 and 2016, Heard orally gifted them the property because of the labor and funds that the Barneses provided for the construction of the residence. On March 13, 2018, Heard died. At that time, the deeds to the property were in the name of the Trust and had not been transferred to the Barneses. The Trust notified the Barneses that they must vacate the property within 31 days. The Barneses did not vacate the property, and the Trust filed an unlawful detainer action. The court ultimately granted the Trust's motion for summary judgment. This appeal followed.

Appellants' points on appeal:

- (1) The trial court erred in granting summary judgment because there is a genuine issue of material fact in that Respondent failed to prove Respondent was lawfully entitled to immediate possession of the property

and Appellants properly interjected issues in regard to their right to possession of the property.

- (2) The trial court erred in granting summary judgment because there is a genuine issue of material fact in that Respondent failed to prove the parties were in a landlord-tenant relationship and Respondent failed to prove both Appellants were served with demand in accordance with Missouri Revised Statutes, section 534.050.

- (3) The trial court erred in granting summary judgment because there is a genuine issue of material fact that even if the parties were in a landlord-tenant relationship, Respondent failed to prove that Respondent properly terminated the landlord-tenant relationship with both Appellants in accordance with Missouri Revised Statutes, section 441.060.

- (4) The trial court erred in granting summary judgment because there is a genuine issue of material fact in that Respondent's claim for unlawful detainer is barred by the statute of limitations set forth in Missouri Revised Statutes, section 534.300.