

No. WD65540

IN THE
MISSOURI COURT OF APPEALS
WESTERN DISTRICT

KENNETH MIDDLETON,
Appellant/ Cross-Respondent,

v.

STATE OF MISSOURI,
Respondent/ Cross-Appellant.

Appeal from the Circuit Court of Jackson County, Missouri
16th Judicial Circuit, Division 12
The Honorable Edith L. Messina, Judge

RESPONDENT/ CROSS-APPELLANT'S
STATEMENT, BRIEF AND ARGUMENT

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B. Failure to “Alert the Jury that no Gunpowder Residue Test was Performed on Ms. Middleton’s Left Hand” /

As discussed in the State’s Point Relied On II, trial counsel argued in closing there was no gunpowder residue found on the victim’s hand to defeat the claim that there was a struggle prior to the killing (State’s A- 52). There is no support for movant’s conclusion that if there were a positive test result, that “could only mean that Mrs. Middleton accidentally fired the weapon, with Mr. Middleton nowhere near her” (Movant’s brief at 45). And, certainly there was no showing of an altered report, and no support for the conclusion in movant’s brief that “[w]hether the evidence was tampered or incompetently handled, that alone would have morally precluded most jurors from convicting on the State’s ‘execution’ theory” (Movant’s brief at 46).

This allegation of error did not support a finding of either a violation of a duty or of prejudice. Indeed, trial counsel’s argument would have been weakened by a positive test.

C. Failure to Challenge the Competency of the Blue Springs Police Department

As indicated in the order of the circuit court (A-21 to A-22) and the testimony of Mr. Peters at the evidentiary hearing (Tr. 80), trial counsel did challenge the competence of the police department. The circuit court’s finding that there was no violation of a duty is not clearly erroneous.


CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 12,448 words, excluding the cover, this certification, the signature block, and the appendix, as determined by WordPerfect 9 software; and
2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and
3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 11th day of January 2006, to:

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