

SUPREME COURT OF LOUISIANA

No. 2008-K-634

STATE OF LOUISIANA

versus

ELIZABETH ZACHARY

**ON WRIT OF CERTIORARI TO THE COURT OF APPEAL
FIRST CIRCUIT, PARISH OF EAST BATON ROUGE**

KIMBALL, J., additionally concurring in the denial of the writ

I write separately to set forth a more complete version of the facts and procedural history leading up to the instant writ application and this court's denial of the defendant's writ application.

The defendant, Elizabeth Zachary, was originally charged with her former co-defendant, Paul Weber, by grand jury indictment with first degree murder, a violation of LSA-R.S. 14:30, following the murder of George Taylor on the evening of July 9, 1993. The state then severed their cases and amended the indictment with respect to the defendant in this matter to charge her with obstruction of justice in violation of LSA-R.S. 14:130.1, thereby removing the charge of first degree murder. After trial before a 12-member jury, defendant was found guilty as charged on January 9, 1998. One month later, on February 19, 1998, the state filed an habitual offender bill, charging defendant as a second offender on the basis of a nolo contendere plea in

Florida to burglary. In response, the defendant filed a motion to quash the habitual offender bill, alleging that the Florida record was devoid of evidence that defendant knowingly and voluntarily waived her rights under *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed. 2d 274 (1969). At the sentencing hearing, the State introduced evidence of defendant's predicate conviction, but had been unable to obtain a copy of the transcript of defendant's Florida plea colloquy. Following a hearing in May, 1998, the trial court took the matter under advisement, and on July 30, 1998, the trial court declined to adjudicate defendant an habitual offender because of defects in the plea form used by the state to prove the Florida conviction and sentenced her to ten (10) years imprisonment at hard labor, half of the minimum penalty the defendant would have faced if adjudicated and sentenced as a second offender under La. R.S. 15:529.1 (A)(1)(a). *State v. Zachary*, 01-3191 (La. 10/25/02); 829 So.2d 405, 406. The defendant moved for reconsideration of her sentence, but the motion was denied.

Thereafter, in September, 1999, the state fortuitously found a transcript of the plea colloquy for the Florida conviction, and at the end of November, 1999, moved to reopen the habitual offender proceedings. The trial court denied the State's motion and the State sought writs. Thereafter, the trial court submitted written reasons, at the State's request, for its decision to refuse to sentence defendant under La. R.S. 15:529.1. The First Circuit granted the State's application and remanded the case to reopen the habitual offender proceedings to allow the State to introduce the Florida

transcript. *State v. Zachary*, 00-0579 (La. App. 1 Cir. 4/24/00). On remand, the trial court conducted a hearing, and the State was permitted to introduce a certified copy of the Florida transcript. Following that hearing, the trial court took the matter under advisement and ultimately rendered an opinion in which it found the State's evidence "constitutionally insufficient to hold a defendant a habitual offender." As a result, the trial court quashed the habitual offender bill against defendant, and the State sought writs. The First Circuit denied the State's writ. *State v. Zachary*, 01-2225 (La.App. 1 Cir. 11/5/01). Thereafter, this court granted the State's writ, reversed the trial court's finding that the State had failed to carry its burden under *State v. Shelton*, 621 So. 2d 769 (La. 1993), of showing that the defendant had entered an informed and voluntary no contest plea in Florida to a crime that is the equivalent of a felony offense in Louisiana, and remanded the matter. *See, State v. Zachary*, 01-3191, p. 6 (10/25/02); 829 So. 2d 405, 408 (per curiam). On remand from this court, the court of appeal reversed the granting of the second motion to quash and remanded the case to the trial court for completion of the habitual offender proceedings. *State v. Zachary*, 01-2225 (La. App. 1 Cir. 6/16/03).

The defendant filed a third motion to quash the habitual offender bill.¹ Following a hearing, the trial court found the defendant to be a second-felony habitual offender. In the meantime, defendant secured her release on parole in 2001.

¹The record does not reflect a ruling on the third motion to quash the habitual offender bill but indicates a hearing on the motion was held, and the matter was continued on motion of the defense.

Eventually, the litigation ran its course and after more delays the trial court resentenced defendant on October 26, 2005, as a second offender to twenty (20) years imprisonment at hard labor, the mandatory minimum term for a second offender convicted of obstruction of justice when the criminal proceeding involves a crime in which a sentence of death or life imprisonment may be imposed. R.S. 14:130.1 (B)(1). Defendant appealed her conviction and sentence to the First Circuit, which affirmed in an unpublished opinion. *State v. Zachary*, 07-0678 (La. App. 1st Cir. 12/21/07). The court of appeal denied rehearing on February 2, 2008. The instant application followed.

While the delays in bringing the habitual offender proceedings to a conclusion are unusual, defendant knew shortly after her conviction that the state would pursue enhanced punishment and the delays stemmed from protracted litigation over a variety of issues, including the sufficiency of the evidence documenting defendant's conviction in Florida used in the present case to enhance her sentence as a second offender. Moreover, as noted by the court of appeal, the delay in completing the habitual offender adjudication cannot be attributed to bad faith or vindictiveness on the part of the State. The delays were largely a result of the defendant's exercise of her right to seek to quash the bill of information and the State's exercise of its right to seek review of adverse trial court rulings with the court of appeal and with this court. Consequently, in my opinion, no due process error has occurred as a result of the various delays in this matter. The majority correctly finds that this writ application

should be denied.