

SUPREME COURT OF LOUISIANA

No. 14-KH-2140

STATE EX REL. WARREN SINCENO

v.

STATE OF LOUISIANA

**ON SUPERVISORY WRITS TO THE TWENTY-FOURTH
JUDICIAL DISTRICT COURT, PARISH OF JEFFERSON**

PER CURIAM:

Denied. Relator fails to show he received ineffective assistance of counsel under the standard of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). We attach hereto and make a part hereof the District Court's written reasons denying relator's application.

Relator has now fully litigated his application for post-conviction relief in state court. Similar to federal habeas relief, see 28 U.S.C. § 2244, Louisiana post-conviction procedure envisions the filing of a second or successive application only under the narrow circumstances provided in La.C.Cr.P. art. 930.4 and within the limitations period as set out in La.C.Cr.P. art. 930.8. Notably, the Legislature in 2013 La. Acts 251 amended that article to make the procedural bars against successive filings mandatory. Relator's claims have now been fully litigated in accord with La.C.Cr.P. art. 930.6, and this denial is final. Hereafter, unless he can show that one of the narrow exceptions authorizing the filing of a successive application applies, relator has exhausted his right to state collateral review. The District Court is ordered to record a minute entry consistent with this per curiam.

RECEIVED

JUL 28 2014

W.F.P.S.O.

TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON
STATE OF LOUISIANA

NO. 09-2789

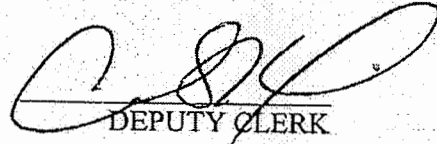
DIVISION "E"

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JUL 28 2014 VERSUS

Legal Programs Department WARREN SINCENO

FILED: 7-21-14


DEPUTY CLERK

ORDER

This matter comes before the court on petitioner's APPLICATION FOR POST-CONVICTION RELIEF, STAMPED AS FILED FEBRUARY 11, 2014, AND STATE'S RESPONSE, STAMPED AS FILED JUNE 2, 2014.

On April 27, 2011, the petitioner was convicted of count #1, LSA-R.S. 14:30.1, second degree murder, and count #2, LSA-R.S. 14:95.1, felon in possession of a firearm. On May 12, 2011, the court sentenced him on count #1 to life imprisonment at hard labor, and on count #2 to 15 years, consecutively. The Fifth Circuit Court of Appeal affirmed on direct appeal. *State v. Sinceno*, 12-118 (La. App. 5 Cir. 7/31/12), 99 So.3d 712; writ denied, *State ex rel. Sinceno v. State*, 2012-2024, (La. 1/25/13), 105 So.3d 713.

Petitioner now files an application for post-conviction relief, alleging the following claims:

1. Denial of due process, fair trial, and right to confront accusers when State revealed to jury the police statement of only alleged witness to crime, despite witness's refusal to testify to contents of statement.
2. Denial of due process, equal protection, judicial review, and ineffective assistance of counsel when appellate counsel failed to assign and brief meritorious errors from trial record.
3. Denial of due process, equal protection, judicial review, and ineffective assistance of counsel when trial counsel failed to conduct adequate pretrial investigation, failed to bring to court's attention evidence discovered after trial but before sentencing, and failed to raise confrontation clause violation in Motion for New Trial.

Claim #1

The court finds this claims procedurally barred from review, as the claim was not raised at trial or on appeal. The defendant had knowledge of the claim, objected at trial, and failed to raise it on appeal. Under LSA-C.Cr.P. art. 930.4, if the application alleges a claim which the petitioner had knowledge and inexcusably failed to raise in the proceedings leading to conviction, the court may deny relief. Additionally, if the application alleges a claim that was raised at trial, but was inexcusably not pursued on appeal, the court may deny relief. LSA-C.Cr.P. art. 930.4(C). As the State points out in its response, the petitioner's claim is barred because it could have been, but was not, raised on appeal. Under La.C.Cr.P. art. 930.4, such claims should be denied.

Furthermore, the court finds that under *State ex rel. Rice v. State*, 749 So.2d 650 (La. 1999), petitioner's use of the Uniform Application satisfies the requirement of LSA-C.Cr.P. art. 930.4(F). The court finds these claims procedurally barred from review in post-conviction relief.

Claims #2 and #3

It is clear that the petitioner has a Sixth Amendment right to effective legal counsel. Under the well-known standard set out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and *State v. Washington*, 491 So.2d 1337 (La.1986), a conviction must be reversed if the defendant proves (1) that counsel's performance fell below an objective standard of reasonableness under prevailing

APPENDIX
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professional norms, and (2) counsel's inadequate performance prejudiced defendant to the extent that the trial was rendered unfair and the verdict suspect. *State v. Legrand*, 2002-1462 (La.12/3/03), 864 So.2d 89.

To be successful in arguing a claim of ineffective assistance of counsel, a post-conviction petitioner must prove deficient performance to the point that counsel is not functioning as counsel within the meaning of the Sixth Amendment. A petitioner must also prove actual prejudice to the point that the results of the trial cannot be trusted. It is absolutely essential that both prongs of the *Strickland* test must be established before relief will be granted by a reviewing court.

Furthermore, there is a strong presumption that counsel's performance is within the wide range of effective representation. Effective counsel, however, does not mean errorless counsel and the reviewing court does not judge counsel's performance with the distorting benefits of hindsight, but rather determines whether counsel was reasonably likely to render effective assistance. *State v. Soler*, 93-1042 (La.App. 5 Cir. 4/26/94), 636 So.2d 1069, 1075.

Mindful of controlling federal and state jurisprudence, this court now turns to petitioner's specific claim of ineffective assistance made in petitioner's application and argued in the memorandum in support, as well as the State's response.

Petitioner first claims that appellate counsel was ineffective for failing to raise the confrontation clause issue from claim #1. In reviewing claims of ineffective assistance of counsel on direct appeal, the Supreme Court of the United States has expressly observed that appellate counsel "need not advance every argument, regardless of merit, urged by the defendant. *Evitts v. Lucey*, 469 U.S. 387, 394 (1985). The Court gives great deference to professional appellate strategy and applauds counsel for "winnowing out weaker arguments on appeal and focusing on one central issue if possible, and at most a few key issues. *Jones v. Barnes*, 463 U.S. 745 (1983). This is true even where the weaker arguments have merit. *Id.* at 751-2.

When the claim of ineffective assistance of appellate counsel is based on failure to raise the issue on appeal, the prejudicial prong of the *Strickland* test requires the petitioner to establish that the appellate court would have granted relief, had the issue been raised. *United States v. Phillips*, 210 F.3d 345, 350 (5 Cir. 2000).

The court finds no merit to petitioner's claim of ineffective appellate counsel. As the State surmises in its response, defense counsel had the opportunity to cross-examine the witness. This witness claimed to have no recollection of events surrounding the murder. The witness's claimed memory loss clearly appeared attributable to his unwillingness to cooperate, and not actually loss of memory. As the State points out, the Confrontation Clause does not guarantee successful cross-examination, but instead the opportunity to cross-examine.

Petitioner next claims that appellate counsel should have raised the court's denial of motion to quash offenses and motion to quash based upon misjoinder. The court finds no merit to these claims. As the State points out in its response, the court properly denied defendant's Motion to Quash based on prejudicial joinder of the offenses of LSA-R.S. 14:91 and 14:30.1, as petitioner's argument have been rejected by the appellate courts in similar cases. *State v. Jones*, 2009-12-7, 2009 WL 5647226 @ *2-3 (La. App. 1 Cir. 12/23/09)(unpublished opinion); *State v. Washington*, 00-1542 (La. App. 5 Cir. 2/14/01), 782 So.2d 639, 644. Petitioner fails to prove any deficiency in appellate counsel's performance or any prejudice resulting.

Petitioner next claims that trial counsel was ineffective for failure to adequately investigate, failed to bring to court's attention evidence discovered after trial but before sentencing, and failed to raise confrontation issue in Motion for New Trial.

However, petitioner fails to prove how further investigation would have changed the outcome of the verdict. The court finds petitioner's claim speculative and conclusory, as petitioner does not prove that counsel was unaware of the evidence prior to trial. Additionally, the hiring of an investigator goes to the diligence defense counsel. Petitioner fails to prove how this information could have been used to his benefit at trial, or after trial. Furthermore, petitioner does not prove that a Motion for New Trial would have been granted had this information been brought forth. Petitioner fails to prove deficiency in counsel's performance, or prejudice resulting.

Under LSA-C Cr.P. art. 929, if the court determines that the factual and legal issues can be resolved based upon the application and answer, and supporting documents, the court may grant or deny relief without further proceedings.

Accordingly,
IT IS ORDERED BY THE COURT that petitioner's application for post-conviction relief be and is hereby DENIED.

IT IS FURTHER ORDERED BY THE COURT that petitioner's request for an evidentiary hearing be and is hereby DENIED.

Gretna, Louisiana this 21st day of July, 2014


JUDGE

S/JOHN J. MOLAISSON, JR.

PLEASE SERVE:
DEFENDANT: Warren Sinceno, DOC # 514996, Louisiana State Penitentiary, Angola,
LA 70712

Terry Boudreaux, Andrea Long, District Attorney's Office, 200 Derbigny St., Gretna, LA
70053

A TRUE COPY OF THE ORIGINAL
ON FILE IN THIS OFFICE.
CLERK
24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, LA