

SUPREME COURT OF LOUISIANA

No. 15-KH-1359

STATE EX REL. DARRYL PUDERER

v.

STATE OF LOUISIANA

**ON SUPERVISORY WRITS TO THE CRIMINAL
DISTRICT COURT, PARISH OF ORLEANS**

PER CURIAM:

Denied. Relator fails to show he was denied the effective assistance of counsel during plea negotiations under the standard of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Relator's remaining claims are repetitive and/or unsupported. La.C.Cr.P. art. 930.2; La.C.Cr.P. art. 930.4. We attach hereto and make a part hereof the District Court's oral 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 La.C.Cr.P. art. 930.4 to make the procedural bars against successive filings mandatory. Relator's claims have now been fully litigated in state collateral proceedings 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.

1 STATE OF LOUISIANA CRIMINAL DISTRICT COURT
2 VERSUS PARISH OF ORLEANS
3 DARRYL PUDERER SECTION: "E"
4 DOCKET NO: 496-717
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7 TRANSCRIPT OF THE ABOVE-REFERENCED MATTER, HELD ON
8 MARCH 3, 2015, BEFORE THE HONORABLE KEVA
9 LANDRUM-JOHNSON, JUDGE PRESIDING.
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11

12 APPEARANCES:

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14 REPRESENTING THE STATE:

15 KYLE DALY ESQ.
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17 REPRESENTING THE DEFENDANT:

18 JUSTIN HARRELL, ESQ.
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32 REPORTED BY: DONNA COLEMAN, CCR, RPR

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COURT'S RULING

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1 THE COURT:

2 All right. This is for Mr. Puderer.
3 It's the ruling on the post-conviction. And I
4 believe on the last dated, you-all did do, like,
5 oral argument on the record. And then the court
6 recessed for the ruling this morning. If you-all
7 will just make your appearances for me.

8 MR. HARRELL:

9 Good morning, Your Honor. Justin
10 Harrell on behalf of Mr. Darryl Puderer, who is
11 present in court.

12 MR. DALY:

13 Kyle Daly with the State. Good morning,
14 Your Honor.

15 THE COURT:

16 Good morning. All right. So this might
17 be a minute because we had several different
18 issues that were filed in both -- Mr. Puderer, he
19 had filed a pro se. And then there was a
20 counseled application as well as, and we kind of
21 joined them both. But let me just kind of go
22 through, in the beginning, a factual history of
23 where we are.

24 In 2010, the State filed a bill of
25 information charging Mr. Puderer with two counts
26 of forcible rape and two counts of second-degree
27 kidnapping. On August 7th, 2010, Mr. Puderer pled
28 guilty to all of these charges, and he was
29 sentenced on each count to 20 years in the
30 department of corrections at hard labor. On
31 September 5th, 2014, the defendant, through
32 counsel, filed the present application for

1 post-conviction relief. On September 9th, 2014,
2 the defendant filed a pro se application for
3 post-conviction relief. On October 14, 2014, the
4 State filed its response to the counseled
5 application, and on December 12th, the State filed
6 its response to the pro se application.

7 Now, the main question here is whether
8 or not the Court should grant the defendant's
9 application for post-conviction relief. In the
10 defendant's first pro se and counseled argument,
11 they both assert that the defendant was denied
12 ineffective assistance of counsel as guaranteed by
13 the Sixth Amendment. Specifically, the defendant
14 argues that he received ineffective assistance
15 because -- and there was eight issues that he
16 raised, the first being that counsel failed to
17 apply for supervisory writing of Court's denial of
18 the motion to quash; that the counsel failed to
19 obtain suppression of the 2008 lineup; that
20 counsel failed to obtain exclusion of prier
21 evidence; that counsel failed to file a motion to
22 quash Count 3 of the bill of indictment or
23 information; that counsel failed to raise an
24 ulterior motive by the alleged victim of the 2008
25 case; sixth, that counsel failed to raise that the
26 prosecution of one count had expired pursuant to
27 Code of Criminal Procedure article 572; his
28 seventh, was that counsel failed to raise an ex
29 post facto clause in reference to the
30 constitutionality of article 572, the DNA general
31 exception -- the general time limitation,
32 exception to the general time limitation, excuse

1 me; and Count 8, that counsel failed to reserve
2 any issues or appeal pursuant to State v. Crosby.

3 Specifically, as to the ineffective
4 assistance of counsel, the United States Supreme
5 Court has held that the benchmark for judging any
6 claim of ineffectiveness must be whether counsel's
7 conduct so undermined the proper functioning of
8 the adversarial process that the trial court
9 cannot be relied on as having -- that the trial
10 cannot be relied on as having produced a just
11 result.

12 In particular, the defendant must show
13 that his representation fell below an objective
14 standard of reasonableness and that but for
15 counsel's errors, the results of the trial would
16 have been different. Further, it is unnecessary
17 to address the issues of both the performance and
18 prejudice to the defendant if the defendant makes
19 an inadequate showing on one of those components.

20 In the defendant's first subclaim, he
21 contends that counsel was ineffective for failing
22 to apply for supervisory writs of the court's
23 denial of the motion to quash, which was based on
24 lack of jurisdiction and improper venue. Here,
25 the defendant fails to show that but for counsel's
26 errors, the end result would have been different.

27 In the second and third subclaim, the
28 defendant argues that counsel failed to obtain
29 suppression of the 2008 lineup and failed to
30 obtain exclusion of the prior evidence. However,
31 the defendant fails to show that counsel's
32 representation fell below an objective standard of

1 reasonableness and that, but for counsel's errors,
2 the end result would have been different.

3 Further, the defendant fails to show that this
4 Court made any error in the prior rulings.

5 In the defendant's fourth subclaim, he
6 asserts that counsel failed to file a motion to
7 quash Count 3 of the bill of information.
8 Specifically, the defendant avers that the State
9 had no evidence to prove that the kidnapping
10 occurred in the parish of Orleans. However, a
11 review of the record shows that the victim in
12 Count 3 was alleged to have been taken from the
13 French Quarters, which is located in Orleans
14 Parish. Thus, the defendant has failed to show
15 that counsel's representation fell below an
16 objective standard of reasonableness and that but
17 for counsel's errors, the end results would have
18 been different.

19 In the fifth subclaim, the defendant
20 said that counsel failed to raise an ulterior
21 motive by the alleged victim of the 2008 case.
22 However, since the defendant pled guilty to the
23 2008 charges, the defendant has waived his right
24 to confront and cross-examine the witnesses
25 who accused him of this crime. Thus, the
26 defendant fails to identify any wrongdoing by
27 counsel.

28 In his sixth subclaim, he contends that
29 the defense counsel failed to raise the claim that
30 the prosecution of Count 1 in the bill of
31 information had expired pursuant to Louisiana Code
32 of Criminal Procedure article 572. Conversely, as

1 to this claim, the State argues that had the Court
2 quashed Count 1, there's no substantial
3 probability that the sentence would have been any
4 different. Here the defendant fails to show that,
5 but for counsel's errors, the end result would
6 have been different.

7 And the defendant's seventh subclaim, he
8 asserts that counsel failed to raise the ex post
9 facto clause in reference to constitutionality of
10 Criminal Code of Procedure, article 527, the DNA
11 exception to the general time limitation. Here
12 the defendant fails to show that the application
13 of 572 to this case violates the and ex post facto
14 principal. Thus, the defendant fails to show that
15 counsel's representation fell below an objective
16 standard of reasonableness and that but for
17 counsel's errors, the end result would have been
18 different.

19 And, lastly, in the eighth subclaim, he
20 contends that counsel failed to preserve any plea
21 issues for appeal pursuant to State v. Crosby.
22 Since the Court finds no error in the pre-plea
23 rulings, I find that the defendant cannot show
24 that he was prejudiced as a result of counsel's
25 failure to reserve his right to appeal in
26 accordance with Crosby. Thus, the defendant fails
27 to show that, but for counsel's errors, the end
28 result would have been different. Accordingly,
29 his ineffective assistance of counsel's claims are
30 without merit.

31 In the defendant's second pro se
32 argument, he contends that the State failed to

1 timely institute prosecution of the 2002
2 kidnapping charge. Specifically, the defendant
3 asserts that pursuant to article 572 of the
4 Louisiana Code of Criminal Procedure, one, that
5 the time limitation for bringing prosecution on
6 Count 1 had passed. Here, since second-degree
7 kidnapping is a felony, pursuant to article
8 572(A)(1), the State has six years from the date
9 the offense has been committed to prosecute.
10 Therefore, the State had six years, from
11 February 9th, 2002, in which to prosecute, try, or
12 punish the defendant.

13 In opposition, the State argues that
14 article 930.4 of the Code of Criminal Procedure,
15 Section B and it states that: "This Court shall
16 deny a relief when the defendant alleges a claim
17 of which he had knowledge and inexcusably failed
18 to raise in the proceedings leading to the
19 conviction." This Court finds that the
20 defendant's claim should had been raised in the
21 proceedings leading to the conviction, and
22 defendant's reasons for failing to raise the claim
23 prior to his application for post-conviction
24 relief is inexcusable. Thus, this Court will not
25 consider the merits of the claim pursuant to
26 article 930.4(B) and (F). Therefore -- and,
27 furthermore, the defendant's guilty plea waived
28 any statute of limitation defense. Accordingly,
29 this claim is without merit.

30 In the defendant's third pro se
31 argument, he contends that the application of the
32 enacted acts 2003, No. 487, Section 2, which added

1 paragraph B, to the Louisiana Code of Criminal
2 Procedure, article 527, constitute ex post facto
3 violation. Specifically, the defendant states
4 that the application of 572(B) permitted his
5 prosecution on the charge of forcible rape, Count
6 2, after the expiration of the six-year period of
7 time limitation for that charge.

8 The Louisiana Supreme Court has held
9 that prior to expiration of the statute of
10 limitations effective at the time of alleged
11 offense, the defendant has no substantial right in
12 limitation. And application of longer limitations
13 statute, which was enacted after the offense but
14 during the original limitation period, does not
15 offend the prohibition on the ex post facto laws.
16 And that State v. Ferrie, F-E-R-R-I-E, here, the
17 2003 amendment to 572 was enacted after the
18 defendant's offense but during the defendant's
19 original limitation period. Thus, Acts 2003, No.
20 487, Section 2 does not offend the prohibition on
21 ex post facto laws, and, accordingly, this claim
22 is without merit.

23 In the defendant's fourth pro se argu-
24 -- and counseled argument, they contend the
25 defendant's guilty plea was not knowingly and
26 intelligently made. Specifically, they aver that
27 the defendant was coerced into taking the plea
28 bargain by trial counsel, and that this Court
29 failed to fully advise him of his constitutional
30 rights he was waiving. Additionally, the
31 defendant contends that the charge in count 4
32 calls into question the entirety of the

1 defendant's plea.

2 A review of the record shows that on
3 August 7, 2012, the defendant, his attorney, and
4 this Court properly executed a waiver of his
5 rights plea of guilty form that enumerated the
6 defendant's rights and indicated the sentence he
7 would receive in accordance with the plea bargain.
8 Accordingly and additionally, during the guilty
9 plea colloquy, the Court advised the defendant of
10 his right to a jury trial, the right of
11 confrontation, and the privilege against
12 self-incrimination as required by Boykin.

13 The Court also explained to the
14 defendant the offense with which he was charged
15 and the sentencing range for those offenses. The
16 defendant acknowledged that he understood those
17 rights and was not acting under threat or coercion
18 or duress, and he also indicated that he wished to
19 waive his rights and enter the guilty pleas. The
20 defendant was carefully informed of his rights and
21 the consequences of his pleas. And his pleas were
22 entered in to knowingly and voluntarily.

23 Furthermore, there is nothing in the record to
24 support the defendant's claim that he was misled,
25 and there is no indication that the defendant's
26 pleas were in any way coerced or improperly taken
27 by this Court. Accordingly, this claim by the
28 defendant is without merit.

29 In the fifth pro se argument, the
30 defendant asserts that the State committed
31 prosecutorial misconduct by withholding Brady
32 information. According to Brady, the prosecutor

1 may not suppress evidence which is favorable to
2 the defendant and material to the issue of the
3 defendant's guilt or innocence, and that's Brady
4 v. Maryland. Favorable evidence includes both
5 exculpatory evidence and impeachment evidence.

6 Furthermore, the evidence is material if
7 there is a reasonable probability sufficient to
8 undermine confidence in the outcome that the
9 evidence, if disclosed to the defense, would have
10 changed the outcome of the proceeding or created a
11 reasonable doubt that did not otherwise exist.

12 And that's U.S. v. Bagley. Here, the defendant's
13 allegations are general and conclusory. The
14 defendant fails to provide sufficient evidence to
15 support a claim that the State suppressed any
16 exculpatory and material information. Further,
17 the defendant fails to show that the State engaged
18 in any misconduct regarding the defendant's
19 records request. Accordingly, this claim is
20 without merit.

21 In his sixth pro se and counseled
22 argument, the defendant claims that the Court
23 lacked subject matter jurisdiction over Count 4 of
24 the bill of information. Specifically, the
25 defendant asserts that since the named victim in
26 Count 4 could not identify the exact location
27 where she was raped, the Court did not have
28 jurisdiction over that count.

29 Louisiana Code of Criminal Procedure,
30 article 611, provides that: "All trials shall
31 take place in the parish where the offense has
32 been committed unless the venue is changed. If

1 acts constituting an offense or if the elements of
2 an offense occurred in more than one place, in or
3 out of the parish or State, the offense is deemed
4 to have been committed in any parish in the state
5 in which any such act or element occurred. Here,
6 the evidence shows that the elements of threats
7 and/or without the lawful consent were present
8 from the outset of the kidnapping in New Orleans
9 and relevant when the victim was later prevented
10 from resisting the rape. Thus, the act or element
11 of the forcible rape occurred in Orleans Parish.
12 And that's State v. Hester. Thus, the Court did
13 not err in finding it had subject matter
14 jurisdiction over Count 4 of the bill of
15 information. And, accordingly, this claim is
16 without merit.

17 Lastly, the defendant, through counsel,
18 requested an out-of-time appeal. The defendant
19 alleges that trial counsel failed to safeguard his
20 right to appeal. However, as a result of the
21 defendant's guilty plea, he waived his rights to
22 trial and appeal. Thus, the defendant cannot seek
23 an out-of-time appeal.

24 For the foregoing reasons that I've just
25 stated, the application for post-conviction relief
26 is denied.

27 MR. DALY:

28 Thank you, Your Honor.

29 MR. HARRELL:

30 On behalf of Mr. Puderer, Your Honor,
31 please note our objection and our intent to seek
32 writs. I would request a return date of --

1 THE COURT:

2 You can get 30 days.

3 MR. HARRELL:

4 May I have 45? Because I'm not sure if
5 I will be handling --

6 THE COURT:

7 Well, we have to do the 31st, and then
8 you will have to ask for the extension.

9 MR. HARRELL:

10 That's fine. I can handle that, Judge.

11 THE COURT:

12 So I mean, I will give you the
13 extension, but I can only go 30.

14 MR. HARRELL:

15 Okay. Very well.

16 THE COURT:

17 Because they won't consider it if we do
18 it beyond then. So 30 would be April 3rd. Let's
19 do April 2nd, just to be sure, because there are
20 31 days in March. And then on the 2nd or before
21 the 2nd, if you want -- I think you have to the
22 2nd, and then I can extend it again.

23 MR. HARRELL:

24 Very well, Your Honor.

25 THE COURT:

26 All right. So I will note your
27 objection and notice your intent to seek a writ.
28 We will set the return date at this time for
29 April 2nd. And then if you will come by then,
30 then we can extend the date.

31 MR. HARRELL:

32 Thank you.

1 THE COURT:

2 And, let me say this: Mr. Harrell, I'm
3 going to out -- I think court is closed April 3rd,
4 because I think that's Good Friday. So just if
5 you will kind of flag your calendar.

6 MR. HARRELL:

7 Okay. Very well.

8 THE COURT:

9 Thank you. So at this time, then, we
10 will note that you will seek your writ. But the
11 case on my end is closed as to Mr. Puderer, and we
12 don't have any next date because I don't need him
13 back on the 3rd.

14 MR. HARRELL:

15 That's correct.

16 THE COURT:

17 All right. Thank you.

18 MR. DALY:

19 Thank you, Your Honor.

20 (WHEREUPON THIS CONCLUDES THE PROCEEDING)

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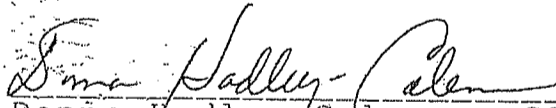
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C E R T I F I C A T E

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