

SUPREME COURT OF LOUISIANA

No. 15-KH-1561

STATE EX REL. JAMAL K. COX

v.

STATE OF LOUISIANA

**ON SUPERVISORY WRITS TO THE TWENTY-SECOND
JUDICIAL DISTRICT COURT, PARISH OF ST. TAMMANY**

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). Relator's remaining claims are unsupported and/or repetitive. 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 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 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.

FILED

FEB 05 2015

MALISE PRIETO - CLERK
Deputy 

STATE OF LOUISIANA

NUMBER: 476669

DIVISION "G" CRIMINAL

VERSUS

22ND JUDICIAL DISTRICT COURT

PARISH OF ST. TAMMANY

JAMAL K. COX

STATE OF LOUISIANA

ORDER AND REASONS

This matter is before the Court pursuant to an Application for Post Conviction Relief (the "Application") filed pro se by Jamal K. Cox ("Petitioner" "Defendant" or "Cox"). Petitioner asserts five claims for relief¹, 1) ineffective assistance of appointed trial and retained appellate counsel with regard to the use of "other crimes" evidence; three claims involving an unidentified witness, namely; 2) prosecutorial misconduct for failure to have the witness testify; 3) ineffective assistance of trial counsel for the same failure; 4) ineffective assistance of trial counsel in failing to investigate to establish that person's identity; and lastly, 5) ineffective assistance of trial counsel in failing to inform Petitioner of a favorable plea offer. For the reasons which follow, this court finds that Petitioner has failed to meet his burden of proof and therefore, dismisses the Application.

On August 30, 2009, a Mr. Andrew Hartman reported the theft of his motorbike/cycle from a hotel/motel in Slidell. The victim indicated that he still had all the keys and that the bike had Mississippi plates. However, he did not have the

¹Petitioner's Application lacks page numbers. Petitioner's third claim begins at the end of one page and continues logically onto the page containing his signature attesting to the facts. Claims 4 and 5 appear on a separate sheet of paper. This court merely points out this inconsistency for any later review. The Application and the Memorandum in Support do not parallel each other but this court has attempted to address all of the claims asserted, and will do as it deems most efficient.

SCANNED

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VIN or license plate number and the vehicle therefore, could not be entered into a stolen items data base. The motel provided the police with a copy of surveillance tape of the night in question showing a black male in a camouflaged shirt.

Mid day the next day, August 31, 2009, two Slidell Police Officers were parked on routine patrol near the Kings Point residential neighborhood and encountered a black man in a camo shirt and blue jeans operating a motorbike without a helmet. Both officers testified that they had clear, close and unobstructed view of the driver. They stated that they intended to tell the driver to walk the bike home instead of charging him on the helmet violation.

After turning on the cruiser's flashing lights, the shot gun seated officer exited the cruiser to speak with the motorcycle operator. At that point, the bike rider furtively fled, driving through a vacant lot and eventually colliding with a parked school bus. The driver then continued his flight on foot through yards and over several fences. The officer at the wheel activated his siren and both officers continued in hot pursuit. The officers admitted that they temporarily lost sight of the driver but radioed for assistance with a description of the perpetrator and his path.

During the pursuit, the officers came into contact with an individual in the neighborhood, inquiring about the commotion - this being the unidentified witness subject of several of Cox's claims herein, "Mr. X." That person pointed the officers to a residence at 122 Trafalgar Square indicating that he had seen a person matching the description entering that house. Three officers knocked on the front door and several others positioned themselves in the rear of the residence.

When the officers knocked on the front door, Petitioner's thirteen year old son answered. When asked who was in the house, the boy stated he was alone with

his dogs. While that questioning was going on, officers in the rear of the residence saw Cox attempting to exit through a window. After being chased back into the house, Cox fled down the hall, and locked himself in a bathroom. Hearing the commode flush several times, and suspecting an attempt to destroy evidence, the officers entered the house. When the officers eventually gained entrance to the bathroom, they found Petitioner seated on the commode. He was arrested and booked into the Parish Jail.

Petitioner was originally charged by Bill of Information with Illegal Possession of Stolen Things, namely the motorcycle, a violation of R.S. 14:69. During pendency of those charges, the State added a second count to the Bill, that being Aggravated Flight from an Officer under R.S. 14:108.1. Cox's appointed counsel filed a Motion in Limine to exclude evidence of the crime first charged, after the State indicated it would only try Petitioner on the flight charges. The court granted Petitioner's Motion and the State nolle prossed Count 1.

Trial occurred during December, 2010, more than a year after the alleged crime. There was no dispute that someone had committed the crime of Aggravated Flight. Cox testified that he was not that individual. He denied that he had been on the bike earlier that day and opined that the officers had seen his 13 year old son instead. Cox stated that he did not own a camo shirt and that at the time the crime occurred, he was answering nature's call. His attorney pointed out the fact that the booking photo showed Cox wearing a striped, not camo shirt. The State presented testimony explaining that discrepancy.

At trial, Cox was found guilty as charged. Thereafter, the State filed a Habitual Offender Bill of Information pursuant to R.S. 5:529.1. Aggravated Flight

from an Officer is defined as a crime of violence under R.S. 14:2(39). Petitioner had previously been convicted of two other crimes that placed him under the provisions of section A(3)(b) of R.S. 15:529.1. After being arraigned on the Habitual Offender charges, the court sentenced Cox to two years on the underlying offense. The court later found Cox to be a third felony offender. Due to the serious nature of those three convictions, after vacating the original sentence, the court imposed a sentence of life at hard labor without the benefit of probation, parole, or suspension of sentence.

Post trial Motions were denied and an appeal taken. The First Circuit affirmed the conviction, adjudication and sentence and the Supreme Court refused to grant writs. This Application was timely filed.

OTHER CRIMES EVIDENCE

Cox first asserts that his trial and appellate counsel as well as the prosecutor violated certain of his constitutional rights with regard to improper introduction of other crimes evidence. On the morning of trial, knowing that the State only intended to pursue the aggravated flight count, Cox's attorney filed a Motion in Limine seeking to exclude any mention of the circumstances of the original charges. After argument, the court granted the Motion.

During trial, the State introduced a single image taken from the August 30 surveillance tape which showed a black male in a camo shirt (Exhibit S 10). That photo did not show the individual in the process of committing the theft, nor were they of sufficient quality to conclusively identify Cox as the perpetrator. While Cox argues this violated the court's ruling, a review of the record reflects that the State made no mention of "other crimes" until defendant took the stand, exposing himself

to questioning on those issues.

INEFFECTIVE ASSISTANCE OF COUNSEL

In Strickland v. Washington 466 U.S. 668, 104 S Ct. 2052, 80 L Ed. 2d 674 (1984) the Supreme Court set forth the standard for analyzing ineffective assistance of counsel claims as follows:

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

The filing, arguing and prevailing on the Motion in Limine was evidence of counsel's effectiveness. Cox admits that his attorney "strenuously objected" to the other crimes evidence in his brief. Cox's other arguments about the lack of a pre-trial hearing under State v. Prieur 277 So 2d 126 (La. 1973) or C.E. 404B have no merit as to the performance of either his or the State's attorney. There was no other crimes evidence offered. Since none was offered, Cox cannot establish the deficiency element of Strickland at trial or on appeal.

UNIDENTIFIED WITNESS

Cox bases three of his claims on the failure of the neighbor, Mr. X, who directed the officers to 122 Trafalgar to testify at trial. In the heat of the chase, this individual's identity was not established. However, Mr. X was not a witness to the flight. He was only a part of the puzzle the State needed to piece together for a guilty verdict. Mr. X's statements to the officers were not exculpatory and the State

was not required to investigate his identity nor compel his appearance.

The State elected not to expend the resources to find that person, or if they did, to put him on the stand. It was a risk they took that could have resulted in an acquittal. Apparently, the jury was convinced even without Mr. X that the State proved Cox was the individual who fled the two Slidell police officers. As the First Circuit noted, "Positive identification by only one witness is sufficient to support a conviction. It is the factfinder who weighs the respective credibilities of the witnesses." State v. Hughes, 2005-0992 (La. 11/29/06) 943 So. 2d 1047, 1051.

There was no misconduct on the part of the State in this instance.

Cox also faults trial counsel for his failure to identify Mr. X, and compel his attendance at trial. To establish prejudice under Strickland, defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. 466 US at 694, 104 S Ct 2068. "The mere possibility of a different outcome is not sufficient to prevail on the prejudice prong." Ransom v. Johnson, 126 F. 3d 716, 721 (5th Cir 1997) cert denied 522 US 944, 118 S. Ct, 361, 139 L. Ed. 281 (1997).

Objectively viewed, counsel's decision to proceed without Mr. X, even if his identity had been established, was more than likely a strategic one.

A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." See Michel v. Louisiana, *supra*, 350 U.S., at 101, 76 S.Ct., at 164.

There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. See Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U.L.Rev. 299, 343 (1983). Strickland supra.

During the pursuit, Mr. X indicated that a person fitting the description given by the officers entered 122 Trafalgar. Presumably, at trial, he would testify to the same facts which would be detrimental to Cox's claim of misidentification. While there is a possibility that he would have denied those statements, his credibility as to both statements would then come into question, making his appearance futile.

The only way Mr. X's testimony would have been helpful to Cox would be if he testified that it definitely was not Jamal Cox, Sr. Even then, Mr. X would have to justify to the jury's satisfaction the reasons for his initial positive identification, again raising doubt. Nonetheless, Mr. X did not witness the charged crime being committed. The officers did, and given the sequence of events, their identification was found sufficient for the conviction.

PLEA OFFER

In Cox's last claim he asserts a Strickland claim based on his attorney's failure to convey a favorable plea offer. He insists that an evidentiary hearing would establish that fact. This court assumes that Cox would testify that he would have accepted a more lenient sentence. As evidence he offers a single page of his appellate brief in which counsel states: "In this case, the State wanted to imprison Jamal K. Cox, Sr. for the remainder of his natural life for not accepting a plea offer and maintaining his innocence throughout the course of the trial. Jamal K. Cox, Sr. was offered a small jail sentence without a habitual offender enhancement before trial... the State knew they were placing Jamal K. Cox, SR. in the "triple lifer"

category.” The State did not put Cox in that position. Cox did so by his criminal actions.

In his brief in support of this Application, Cox assigns as error, “Trial counsel’s failure to advice (sic) his client to take a four year plea deal the prosecution had to offer before one o’clock or suffer a life sentence.” Cox maintains that an offer of five² (not the four previously asserted) years was made by the State on September 10, 2010 and that if the “deal” was not accepted, the State “threatened” to amend the Bill to add Count 2 and file a Habitual Offender Bill. Illegal Possession of Stolen Property with the value alleged carried a maximum sentence of ten years. Aggravated Flight carried a maximum sentence of two years.

Cox recounts his conversation with counsel on the day the offer was made. Assuming the accuracy of Cox’s recitation of that conversation, the advice given was a correct interpretation of the law, based on Cox’s confidential response to his attorney’s question about his criminal record. However, Cox was not forthcoming as to his entire criminal history. In truth, he had two prior convictions for serious crimes. Cox maintains that the offer was only good until one o’clock and that he tried to call counsel to no avail.³

Cox appears to quote from his appellate brief when he states “When an inadvertent misunderstanding was present between attorney and client the deal was

² Cox asserts that both four and five year offers were made, exceeding the maximum penalty for aggravated flight. He fails to explain the inconsistency of these two offers calling further question to his representations in this claim. That fact also pointed out the probability of a habitual offender filing and the knowledge by the State of Cox’s criminal past.

³It should be pointed out that defendant was free on bond at this time and therefore, free to make phone calls, visit the Public Defender’s office, or accept the offer when it was made, having knowledge of his actual criminal record, knowing that a multiple offender bill would be filed..

removed off the table.”⁴ The “inadvertent misunderstanding” was caused by Cox’s failure to admit to his criminal past. A review of the record establishes that prior to the amendment of the Bill, the matter was on the docket seven times and that Cox appeared. After the Bill was amended, it was set twice again before trial was commenced. Presumably, plea negotiations were ongoing during those settings.

Cox faults trial counsel for failing to obtain his “rap sheet.” The transcript of the Habitual Offender hearing reveals that the first predicate conviction arguably “linked” by only a matter of days. Even if his trial counsel had the rap sheet, the choice to accept the plea offer was in Cox’s hands. Given that Cox denied he was the perpetrator, the booking photo pointed out a weakness in the State’s case, and the offer was in excess of the maximum penalty absent the Habitual Offender allegations which Cox concealed from his attorney, objectively viewed, the advice to consider the offer was not deficient.

“Courts must judge the reasonableness of counsel’s conduct on the facts of the particular case, viewed as of the time of counsel’s conduct, and scrutiny of counsel’s performance must be highly deferential.” Rose v. Flores-Ortega, 528 US 470, 120 S. Ct 1029, 1034-35, 145 L. Ed. 2d 985 (2000).

Petitioner has failed to meet his burden of proof under C.Cr.P.art. 930.2 and this Application is denied.

Covington, Louisiana, this 3 day of February, 2015.



JUDGE SCOTT GARDNER

⁴Poor grammar and literary skills used by Cox or his current advisors in filing this brief make it difficult to parse out what is a quote and what is argument.

PLEASE SERVE ALL PARTIES
INCLUDING PETITIONER'S CUSTODIAN