10/10/2016 "See News Release 053 for any Concurrences and/or Dissents."

SUPREME COURT OF LOUISIANA

No. 15-KH-1747

STATE EX REL. JOE WASHINGTON

v.

STATE OF LOUISIANA

ON SUPERVISORY WRITS TO THE NINETEENTH JUDICIAL DISTRICT COURT, PARISH OF EAST BATON ROUGE

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). In addition, relator's sentencing claim is not cognizable on collateral review. La.C.Cr.P. art. 930.3; State ex rel. Melinie v. State, 93-1380 (La. 1/12/96), 665 So.2d 1172; see also State v. Cotton, 09-2397 (La. 10/15/10), 45 So.3d 1030. 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 Commissioner's Recommendation which the District Court endorsed in its order denying relator's application.

Relator has now fully litigated his second 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.

JOE WASHINGTON
DOC #87827
VS.

* DOCKET NO. 03-11-0290 SEC. V
* 19TH JUDICIAL DISTRICT COURT
* PARISH OF EAST BATON ROUGE
* STATE OF LOUISIANA

N. BURL CAIN, WARDEN

COMMISSIONER'S RECOMMENDATION

On March 7, 2011, the Petitioner, Joe Washington, was charged by bill of information with simple burglary. Following a jury trial he was found guilty and subsequently adjudicated a fourth-felony habitual offender. He was sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. The Petitioner appealed and on November 12, 2012, the First Circuit Court of Appeal affirmed the Petitioner's conviction, habitual offender adjudication, and sentence.

On or about November 7, 2013, the Petitioner filed the instant application for post-conviction relief claiming **(1) the Bill of Information was defective, (2) Illegal Sentence, (3) Ineffective Assistance of Counsel, and (4) Prosecutorial Misconduct**. The State was ordered to respond and filed its procedural objections and motion to dismiss arguing the Petitioner's allegations are factually insufficient to set forth any claim that would entitle him to relief and also that his allegations are contrary to or refuted by the record. The State requests that its procedural objections be granted and that the instant application be dismissed without the necessity of further response from the State and without a hearing pursuant to La. C.Cr.P. art. 926, and 927-929.

For the following reasons, it is the recommendation of this Commissioner that the State's procedural objections should be granted and that the Petitioner's application for post-conviction relief should be dismissed without the necessity of a hearing pursuant to La. C.Cr.P. art. 926, and 927-929.

STATEMENT OF THE FACTS

The following facts were taken from the First Circuit opinion affirming the Petitioner's conviction, habitual offender adjudication, and sentence.[1]

> On the night of October 15, 2010, Paul Edwards, Sr. and several of his friends were tailgating at the Scotlandville High School football game. Outside the stadium, Edwards watched the game from a hill that was in back of the stadium. During the fourth quarter, Edwards noticed a person,

[1] See *State v. Washington*, 2012-0401, 1-2 (La.App. 1 Cir., 11/2/2012).

later identified as the defendant, inside a parked, white Chevrolet Tahoe near the hill. The Tahoe belonged to Scotlandville High School student, Garren Lemon. The defendant, sitting in the front seat with the driver's side door open, was rummaging around in the backseat of the Tahoe. Edwards observed the defendant get out of the Tahoe with a book bag and quickly walk toward a wooded area. The defendant was dropping items, such as books and papers, while he was walking. The defendant then walked into the nearby woods and stopped and smoked a cigarette. Edwards testified at trial that the defendant was wearing a red jacket and a red and blue shirt. Edwards also testified that the person the police had taken out of the woods was the same person Edwards had seen in the Tahoe. Edwards positively identified the defendant in court as the person he saw in Lemon's Tahoe.

When Edwards first saw the defendant walking away from the Tahoe, he pointed the defendant out to his friend, Theresa Griffin. Griffin testified at trial that the person Edwards showed her had on jeans and was carrying a book bag. Griffin called 911, and shortly thereafter, the police arrived and apprehended the defendant in the wooded area near the hill. The defendant was wearing a red and blue striped shirt, but no jacket. Two book bags, papers, notebooks, books, a watch, clothes, Nike shoes and a PSP game system were taken from Lemon's truck. Police recovered some of the items from the wooded area. One of the book bags, a school uniform, the shoes and the PSP wee not recovered. No items were found on defendant. Griffin positively identified the defendant in court as the person she saw walking away from the Tahoe carrying the book bag.

Officer Daniel Iverson, with the Baton Rouge Police Department, was dispatched to the scene with a description of the defendant. Within minutes of arriving, Officer Iverson apprehended the defendant in the woods. The defendant was handcuffed and detained in the officer's patrol unit. Officer Iverson did not personally speak to Edwards, but information was relayed to him that Edwards had identified the person in police custody as the same individual he had seen earlier in Lemon's Tahoe.

The defendant testified at trial that he was fifty-six years old, lived with his parents, and was a 1972 Scotlandville High alumnus. He stated that he left his parent's house that night and walked to the game. After the game, he was walking back home and passed the hill where Edwards had been tailgating. When the defendant got to Jones Street, near the edge of the wooded area, he was stopped by the police. He was handcuffed and placed in a police unit. Several minutes later, and after items were found, the defendant was arrested. The defendant denied going into a vehicle and taking items. The defendant had prior convictions for armed robbery, simple burglary of a house (that was blocks away from the instant simple burglary), and several felony thefts. At the time of trial, the defendant was on parole after serving two and one half years in prison. The PSI report indicates that on July 22, 2008, he pled guilty to felony theft and simple battery and was sentenced to fives years imprisonment at hard labor.

DISCUSSION

Claim #1: Defective Bill of Information

In his first claim, the Petitioner argues the Bill of Information in docket number 03-11-0290 is fatally defective and could not be used to convict the Petitioner. Specifically, the Petitioner argues that by failing to state "unauthorized entering" and the Petitioner's intent on the face of the bill, the bill of information failed to

substantially trace the language of the La. R.S. 14:62 (the simple burglary statute) causing the Petitioner to not being fairly informed of the charge against him and subjecting him to prejudice by surprise for lack of including the essential elements of the crime charged.

The State argues, and this Commissioner agrees, that the time to contest the sufficiency of a bill of information is prior to trial. A Petitioner may not raise in post-conviction the insufficiency of an indictment or bill of information when the charging document fairly informed him of the charge against him and the alleged defect did not prejudice him.[2] A defendant must raise a claim that the indictment or bill of information does not provide adequate notice of the charge before going to trial and failure to do so waives the claim.[3] There is no evidence in the record that the Petitioner filed a motion to quash the bill of information nor is there any evidence that the bill of information failed to fairly inform the Petitioner of the offense charged.

The bill of information in the instant case charges that "...on or about October 15, 2011[4], the defendant committed simple burglary of a vehicle belonging to Garren Lemon." The bill of information indicates the statute under which the Petitioner was charged as La. R.S. 14:62 (Simple Burglary) and correctly identifies the Petitioner, Joe Washington, as the named defendant. There is nothing to indicate the Petitioner was not fairly informed of the charges against him. The Petitioner fails to point to any authority requiring a bill of information to track the language of the statute under which a defendant is charged or that failure to do so prejudiced the Petitioner.

Accordingly, I recommend that the State's procedural objection with respect to the Petitioner's first claim should be granted and this claim should be dismissed without the necessity of a hearing.

Claim #2: Illegal Sentence

In his second claim, the Petitioner argues that his conviction and sentence are illegal in that the predicate used in the habitual offender proceedings on October 26, 2011 was not a crime of violence and that the Court applied the wrong version of La. R.S. 15:529.1.

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[2] See *State v. Allen*, 2001-2494 (La. 6/21/02), 824 So.2d 344.
[3] See *State v. Gainey*, 376 So.2d 1240, 1243 (La. 1979).
[4] The bill of information was amended on April 11, 2011 (the date of arraignment) by ADA Jesse Bankston to October 15, 2010.

The Louisiana Supreme Court in *State ex. rel. Melinie v. State*, La. C.Cr.P. art. 930.3 "...sets out the exclusive grounds for granting post-conviction relief, [and] provides no basis for review of claims of excessiveness or other sentencing error post-conviction."[5] Furthermore, the Petitioner's efforts to challenge his habitual offender adjudication are misguided in post-conviction in that a habitual offender adjudication constitutes "sentencing" for purposes of *Melinie* and La. C.Cr.P. art. 930.3 and claims arising out of habitual offender proceedings may not be raised in post-conviction.[6]

This Commissioner notes that the Petitioner appealed the determination of his habitual offender status as it was rendered by the Court and without a jury trial. The First Circuit, affirming his habitual offender determination and sentence, stated "it is well settled that a multiple offender proceeding is a status, rather than a criminal proceeding; therefore, the right to a jury trial does not apply as a matter of federal or state constitutional law."[7]

Accordingly, I recommend that the State's procedural objection with respect to the Petitioner's second claim should be granted and this claim should be dismissed without the necessity of a hearing.

Claim #3: Ineffective Assistance of Counsel

In his third claim, the Petitioner argues trial counsel was ineffective in failing to challenge witness testimony and failing to admit photographs. Specifically, the Petitioner argues trial counsel was ineffective for failing to introduce a photo that could have impeached the testimony of Paul Edwards. The Petitioner argues the photo in question would have shown that the distance between the witness (Paul Edwards) and the location of the Tahoe, coupled with the darkness at the time of the burglary would have made it impossible for the witness to see the Petitioner. The Petitioner argues trial counsel was ineffective in failing to amend her discovery to allow her to introduce the photo. The Petitioner also argues there were discrepancies in the initial police report prepared by Officer M. Dukes and the testimony offered by Officer D. Iverson at trial. Specifically, the Petitioner argues the police report mentions two suspects despite the fact that witnesses testified at trial to the presence of only one suspect and that counsel was deficient in failing to use the police report to impeach Paul Edwards' testimony.

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[5] See *State ex rel. Melinie v. State*, 93-1380, 665 So.2d 1172 (La. 1996)
[6] See *State v. Cotton*, 2009-2397 (La. 10/15/10), 45 So.3d 1030.
[7] See First Circuit opinion, p. 10 in *State v. Washington*, 2012-0401, 1-2 (La.App. 1 Cir., 11/2/2012); First Circuit citing State v. McAllister, 366 So.2d 1340, 1344 (La. 1978).

With respect to the police report, the record contradicts the Petitioner's claims that discrepancies in the police report were ignored by his counsel. Trial counsel raised these discrepancies with the witnesses and had Officer Iverson on cross-examination confirm that the report mentioned two suspects. Ultimately, the presence of discrepancies in the police report were raised by trial counsel and these discrepancies were placed before the trier of fact (the jury) for consideration with respect to the credibility of the witnesses.

With respect to his claims that trial counsel failed to introduce aerial photographs to impeach trial testimony, the record indicates the photographs were introduced at trial over the State's objections that trial counsel failed to include the photographs in discovery. Trial counsel used these photographs to examine witnesses. Once again, the Petitioner's arguments are contrary to the record.

Claims of ineffective assistance of counsel are evaluated by the two-prong test set forth in *Strickland v. Washington*.[8] Under *Strickland*, a defendant claiming ineffective assistance of counsel must show both that counsel's performance was deficient and that the deficiency prejudiced the defense. One claiming ineffective assistance of counsel must identify specific acts or omissions and general statements and conclusionary charges will not suffice. There is a strong presumption that the conduct of counsel falls within a wide range of responsible, professional assistance. Hindsight is not the proper perspective for judging the competence of counsel's trial decisions, and an attorney's level of representation may not be determined by whether a particular strategy is successful. In evaluating whether counsel's alleged error has prejudiced the defense, it is not enough for the defendant to show that an error had some conceivable effect on the outcome of the proceeding; rather, the defendant must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. Claims of ineffective assistance of counsel may be disposed of for either reasonable performance of counsel or lack of prejudice and, if one is found dispositive, it is not necessary that the court address the other. (citations omitted)

Once a defendant has the assistance of counsel, the vast array of trial decisions, strategic and tactical, which must be made before and during trial, rest with an accused

[8] See *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

and his attorney. The fact that a particular strategy is unsuccessful does not establish ineffective assistance of counsel.

The Petitioner's arguments that trial counsel was deficient in failing to impeach testimony of the witnesses and failing to introduce photographs is contrary to the record. The record clearly shows trial counsel used discrepancies in the initial police report when cross-examining witness and introduced photographs the Petitioner claims were not admitted. The Petitioner's allegations that trial counsel was deficient are not factually supported and clearly contrary to the record.

Accordingly, I recommend that the State's procedural objection with respect to the Petitioner's third claim should be granted and this claim should be dismissed without the necessity of a hearing.

Claim #4: Prosecutorial Misconduct

In his fourth claim, the Petitioner argues he was denied a fundamentally fair trial due to prosecutorial misconduct.[9] The Petitioner argues the prosecutor knowingly used false testimony from Paul Edwards and Officer Duke by presenting a falsified affidavit of probable cause and allowed said testimony to go uncorrected. Specifically, the Petitioner claims that Officer Duke's report falsely states that officers observed items next to the Petitioner but Officer Iverson testified at trial that these items were discovered about twenty feet away from the Petitioner. The Petitioner fails to provide any support that discrepancies between the initial report and testimony at trial over the number of suspects mentioned in the initial report and statements concerning his proximity to the stolen items when observed constitute false testimony. In order to prove a *Napue* claim (prosecutorial misconduct), the accused must show that the prosecutor acted in collusion with the witness to facilitate false testimony. He fails to point to anything that would show the prosecutor acted in collusion with witnesses to facilitate false testimony or that he allowed false testimony to go uncorrected. Discrepancies between the initial police report and testimony tendered at trial were addressed by trial counsel and did not go uncontested. There is no evidence to support a claim that said report and testimony were false or that the prosecutor acted in collusion with the witnesses to facilitate false testimony.

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[9] See *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).

Accordingly, I recommend that the State's procedural objection with respect to the Petitioner's fourth claim should be granted and this claim should be dismissed without the necessity of a hearing.

COMMISSIONER'S RECOMMENDATION

Considering the Petitioner's application for post-conviction relief, the State's response thereto, the record and the law applicable, and for the reason herein stated, it is the recommendation of this Commissioner that the State's procedural objections be granted and that this application for post-conviction relief should be dismissed without the necessity of a hearing La. C.Cr.P. art. 926, and 927-929.

Respectfully recommended, this 5th day of November, 2014 in Baton Rouge, Louisiana.

NICOLE ROBINSON
COMMISSIONER, SECTION A
NINETEENTH JUDICIAL DISTRICT COURT

HEREBY CERTIFY THAT ON THIS DAY A COPY OF THE WRITTEN REASONS/JUDGMENT/ORDER/ COMMISSIONER'S RECOMMENDATION WAS MAILED BY ME WITH SUFFICIENT POSTAGE AFFIXED TO: ALL PARTIES.
DONE AND SIGNED THIS 6TH DAY OF November 2014.
Deputy Clerk Of Court

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JOE WASHINGTON

VERSUS

N. BURL CAIN, WARDEN

NO. 03-11-0290 SEC.V

19TH JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

ORDER DENYING POST CONVICTION RELIEF

Having reviewed the application for post-conviction relief, filed November 7, 2013, the "State's procedural objection and motion to dismiss petitioner's application for post-conviction relief," filed January 10, 2014, "traverse to the commissioner's finding," filed November 21, 2014, and the record in the above captioned matter this Court finds that the application is without merit. Furthermore, this Court finds that the petitioner is not entitled to a hearing thereon and hereby DENIES this application for post conviction relief for the reasons set forth by the Commissioner dated November 5, 2014.

READ AND SIGNED this 28th day of April, 2015.

Louis R. Daniel
Judge, 19th Judicial District Court

CC: Petitioner/Attorney

CERTIFIED TRUE AND CORRECT COPY
MAY 01 2015
East Baton Rouge Parish
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