

SUPREME COURT OF LOUISIANA

No. 15-KH-1008

STATE EX REL. DANTE CARSON

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 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). 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.

Allen SERVICE

TWENTY FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON
STATE OF LOUISIANA

NO. 11-6313

DIVISION "K"

STATE OF LOUISIANA

VERSUS

DANTE CARSON

FILED: Jan 5, 2015

K. Newby
DEPUTY CLERK

ORDER

This matter comes before the court on petitioner's APPLICATION FOR POST-CONVICTION RELIEF, AND OMNIBUS MOTION TO: REQUEST FOR PUBLIC DOCUMENTS; SET FOR EVIDENTIARY HEARING; APPOINT COUNSEL; COMPEL ANSWER, AND TRANSPORT MOVANT, ALL STAMPED AS FILED JULY 15, 2014, AND THE STATE'S RESPONSE, STAMPED AS FILED SEPTEMBER 18, 2014.

On July 25, 2013, petitioner pled guilty to use of firearm/cds or crime of violence (count 1), a violation of LSA-R.S. 14:95E, and to attempted second degree murder, a violation of LSA-R.S. 14:(27)30.1. The court sentenced him on count #1 to 10 years imprisonment at hard labor, and to thirty years imprisonment on the second count of attempted second degree murder, sentences to run concurrently. The petitioner did not appeal.

The petitioner now comes before the court seeking post-conviction relief, raising the following claims:

1. Ineffective assistance of counsel for failure to investigate.
2. Factually innocent request for DNA pursuant to La. C.Cr.P. art. 927.1.

The court directed that the state file a response raising any procedural objections it may have, or if no procedural objections, to answer on the merits to petitioner's allegations. The state has responded, raising one procedural objection and replying on the merits to the other claim. The court will now address petitioner's claims.

Claim 1: Ineffective assistance of counsel for failure to investigate

The petitioner claims that his attorney, Michael F. Somoza, was ineffective by failing to investigate. In his Uniform Application, Petitioner specifically contends that he was not in the state of Louisiana at the time of the incident. He further states that he informed his attorney of this fact and asked his attorney to check cell phone tower records.

It is fundamental that a criminal defendant has a Sixth Amendment right to effective counsel. Under the 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 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.

Additionally, where the defendant has pled guilty, he must prove that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). The voluntariness of the guilty plea depends on whether counsel's advice was within the wide-range of competence demanded of attorneys in criminal cases. *State ex rel Graffagnino v. King*, 436 So2d 559 (La. 1983).

A plea of guilty normally waives all non-jurisdictional defects in the proceedings prior to the plea. *State v. Crosby*, 338 So.2d 584, 586 (La.1976). It is well settled that a validly entered guilty plea waives any right a defendant might have had to question the merits of the state's case and the factual basis underlying the conviction. *State v. Lemon*, 923 So.2d 794, (La.App. 5 Cir.

Exhibit

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2/11/4/06). (citing *State v. Bourgeois*, 406 So.2d 550, 552 (La.1981); *State v. Lewis*, 01-490 (La.App. 5 Cir.10/30/01), 800 So.2d 1032, 1035.)

In all post-conviction proceedings, the burden of proof is on the petitioner. LSA-C.Cr.P. art. 930.2. In this case, the petitioner fails to meet this burden. He has proven neither prong of the *Strickland* test. Significantly, the petitioner does not assert that he would have insisted on going to trial but for the errors of his attorney. Furthermore, the petitioner attaches absolutely nothing in support of his claim beyond his bare assertion that he was out of state and told his attorney that prior to pleading guilty.

The petitioner's Acknowledgement of Constitutional Rights and Waiver of Rights on Entry of a Felony Plea of Guilty form is in the record, signed by the petitioner, counsel, and the court. Thus the record establishes a voluntary guilty plea and conviction. The voluntariness of the plea of guilty and the total absence of factual support for Petitioner's claim warrants denial of relief on this ground.

For these reasons, and in the interests of justice, the court finds that the petitioner failed to meet his burden of proof under LSA-C.Cr.P. art. 930.2. Upon a review of the record and pleadings, on the merits of the claim, the court finds that the petitioner fails to establish entitlement to post-conviction relief on this claim.

Claim 2: Factually innocent request for DNA pursuant to LSA-C.Cr.P. art. 927.1

The petitioner requests DNA testing, stating in his Uniform Application that he is factually innocent. Significantly, as the state points out, the petitioner does not comply with the statutory requirements.

LSA-C.Cr.P. art 926.1(A) provides that DNA testing is permitted in connection with a post-conviction relief application under certain limited circumstances. Provisions for DNA testing in post-conviction proceedings are highly specific and mandatory.

B. An application filed under the provisions of this Article shall comply with the provisions of Article 926 of this Code and shall allege all of the following:

- (1) A factual explanation of why there is an articulable doubt, based on competent evidence whether or not introduced at trial, as to the guilt of the petitioner in that DNA testing will resolve the doubt and establish the innocence of the petitioner.
 - (2) The factual circumstances establishing the timeliness of the application.
 - (3) The identification of the particular evidence for which DNA testing is sought.
 - (4) That the applicant is factually innocent of the crime for which he was convicted, in the form of an affidavit signed by the petitioner under penalty of perjury.
- C. In addition to any other reason established by legislation or jurisprudence, and whether based on the petition and answer or after contradictory hearing, the court shall dismiss any application filed pursuant to this Article unless it finds all of the following:
- (1) There is an articulable doubt based on competent evidence, whether or not introduced at trial, as to the guilt of the petitioner and there is a reasonable likelihood that the requested DNA testing will resolve the doubt and establish the innocence of the petitioner. In making this finding the court shall evaluate and consider the evidentiary importance of the DNA sample to be tested.
 - (2) The application has been timely filed.
 - (3) The evidence to be tested is available and in a condition that would permit DNA testing.

LSA-C.Cr.P. art. 926.1, emphasis added.

In this case, Petitioner's application for DNA testing is deficient. The court notes that the crime at issue was the attempted murder, by shooting, of Donald Francois. According to the police reports in the record, the victim was shot in the foot by petitioner. Petitioner was not identified by the victim or arrested for the shooting until over a month later. The court fails to see what could be learned from DNA testing of the victim's DNA, relative to the guilt or innocence of the petitioner.

In light of the lack of specificity, the court fails to find the required showing of "the particular evidence" for which DNA material is sought or how any such testing would exonerate the petitioner.

The court also finds that there is no articulable doubt as to the guilt of the petitioner, and there is no reasonable likelihood that the requested DNA testing would resolve doubt and establish innocence of petitioner. LSA-Cr.P. art 926.1(C)(1). Petitioner admitted guilt in this matter.

For these reasons, and in the interest of justice, the court finds this claim procedurally barred.

Accordingly,

IT IS ORDERED BY THE COURT that

Gretha, Louisiana this

StR

day of

Jan.

2015

[Signature]
JUDGE

PLEASE SERVE:

PETITIONER:

Dante Carson, DOC # 614480, Allen Correctional Center, 3751 Lauderdale Woodyard Road, Kinder, LA 70648

Terry Boudreux, Matthew Caplan, Jefferson Parish District Attorney's Office, 200 Derbigny St., Gretha, LA 70053

MAILED
ON FILE IN THIS OFFICE
DEPUTY CLERK
JEFFERSON PARISH DISTRICT ATTORNEY'S OFFICE