

SUPREME COURT OF LOUISIANA

No. 15-KH-1184

STATE EX REL. ANDRE PRESTON

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). 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 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.

TWENTY FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON
STATE OF LOUISIANA

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MAR 25 2015

W.F.P.S.O.

DIVISION "I"

NO. 10-1116

RECEIVED

MAR 30 2015


STATE OF LOUISIANA

VERSUS

Legal Programs Department

ANDRE PRESTON

FILED: 3-16-2015


DEPUTY CLERK

ORDER

This matter comes before the court on petitioner's APPLICATION FOR POST-CONVICTION RELIEF, STAMPED AS FILED JANUARY 5, 2015, THE STATE'S RESPONSE, STAMPED AS FILED MARCH 2, 2015, AND THE PETITIONER'S MOTION TO AMEND HIS THIRD CLAIM, STAMPED AS FILED MARCH 12, 2015.

The petitioner was convicted after trial by jury of second degree murder of seven-year old P.D. and attempted second degree murder of Cary Smoot. He was sentenced to life in prison for the murder and to fifty years in prison for the attempted murder. The petitioner's convictions and sentences were affirmed on direct appeal. *State v. Preston*, 118 So.3d 1129 (La. 5 Cir. 5/16/13), writ denied, 130 So.3d 318 (La. 1/10/14).

The petitioner filed a pro se application for post-conviction relief. The court ordered the state to respond, which was done. The petitioner filed a request to amend his third claim, which the court will grant. Due to the nature of the amendment and its closeness to the original language, the court does not find it necessary to have the state respond again. The court will proceed to address the procedural objections and merits of the issues, as appropriate.

ISSUES

The petitioner raises four specific issues in his pro se application for post-conviction relief, to wit:

- (1) He was denied a fair and impartial jury, specifically raising a *Batson* claim,
- (2) he was denied the effective assistance of counsel at trial by counsel's failure to object during jury selection,
- (3) he was denied the effective assistance of counsel by failure to object to introduction of gang affiliation, and
- (4) he was denied due process and equal protection by the existence of prosecutorial misconduct.

ANALYSIS OF CLAIMS

Issue One: Denial of a fair and impartial jury when the state made peremptory challenges based on race and/or gender in violation of Batson v. Kentucky

The state raises a procedural objection to this claim, specifically that this claim was known but not raised prior to conviction. Under LSA-C.Cr.P. art. 930.4(B) a petitioner is procedurally barred from raising a claim in post-conviction proceedings if he had knowledge and inexcusably failed to raise the claim in proceedings leading to conviction.

The court has reviewed the petitioner's application carefully, noting he does not provide an explanation in the uniform application or his memorandum in support. The court finds that the

petitioner has had an opportunity to provide an explanation, as noted in *State ex rel. Rice v. State*, 99-496 (La. 11/12/99), 749 So.2d 650. Claims such as this should be made in the trial court, who could grant relief immediately, if warranted. It is not proper to wait until after conviction to present such a claim.

The court finds this claim is procedurally barred by failure to present it to the trial court prior to conviction.

Issue Two: Ineffective assistance of counsel by counsel's failure to object to the peremptory challenges

The petitioner contends his defense attorney was constitutionally ineffective by failing to object to the state's use of peremptory challenges. He asserts potential jurors were excused because of race or gender.

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 petitioner 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.

To be successful in arguing 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. Significantly, effective counsel 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.

In addition to the high burden of proving counsel was ineffective, the court also finds the petitioner's reliance on *Batson* misplaced. In *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed. 69 (1986), the United States Supreme Court held that the use of peremptory challenges to exclude persons from a jury based on their race violates the Equal Protection Clause. There are a number of steps that must each be proven in order to prevail on a *Batson* claim. The Louisiana legislature passed LSA-C.Cr.P. art. 795(C) which prohibits the use of peremptory challenges based solely on race or gender.

To prevail on a *Batson* claim, it must be proven that the peremptory challenges on race or gender were in fact made, if so, the prosecutor is given an opportunity to state a race-neutral reason for the strike. If the prosecutor fails to do so, the trial court must decide if the defendant met his burden of proving intentional racial discrimination. See *State v. Green*, 655 So.2d 272, 287 (La. 1995).

None of these steps were proven in this case. The record establishes that the petitioner was represented at trial by an experienced criminal defense attorney, Letitia J. Davis-Parker. As counsel for the petitioner, it was her duty to raise issues before and during the trial, if she believed them to be well-founded.

There is nothing in this record to cause this court to substitute its judgment for defense counsel's judgment during trial. In fact, it appears trial counsel performed well in her representation of the petitioner, despite overwhelming evidence.

After a careful review on the merits of this claim, the court finds that the petitioner did not meet his heavy burden, under L.S.A.-C.Cr.P. art. 903.2, of proving entitlement to post-conviction relief.

Issue Three: Denial of effective assistance of counsel when counsel failed to object to alleged gang affiliation testimony

In the petitioner's third claim, as amended, he asserts his attorney was ineffective by failing to object to references made by the prosecutor and witnesses to the petitioner's gang affiliation.

This court has reviewed the Fifth Circuit's opinion for a lengthy summary of the facts introduced at trial. The state proved at trial that the petitioner was involved in a gang-related

dispute. The evidence established that the petitioner discharged an AK-47 and fired 17 shots at Cary Smoot, a member of a rival gang. The evidence also established that the petitioner fired a large number of shots in a drive-by shooting that killed seven year old P.D., who was sleeping in her home. As the Fifth Circuit summarized in deciding the petitioner's direct appeal, "the evidence indicates that defendant, planning to test his new Glock handgun, brought this semi-automatic firearm, loaded with multiple rounds, into a residential neighborhood with the intention of discharging it, an act he knew to be illegal." *Preston*, 1138.

The state argues against the petitioner's contention that references to gang affiliation were unwarranted. The state notes that in this case, the evidence from multiple sources of petitioner's gang affiliation was relevant to show his motive and specific intent to commit the crimes.

The court finds the state's reliance on *State v. Weatherspoon*, 06-539 (La.App. 12/12/06), 948 So.2d 215 to be warranted. The evidence produced at trial contained references to gang affiliation, not as an attempt to unfairly prejudice the petitioner, but rather to establish his motives and to provide a complete narrative of actions.

Furthermore, counsel was present and able to judge if she felt objections or curative instructions should be sought. Her decision not to take seek action is entitled to deference, unless ineffectiveness is shown. Ineffectiveness is not shown in this case, because, as argued by the state and held in *Weatherspoon*, the references to gang affiliation were admissible. Thus, had defense counsel raised an objection during trial, it would not have been successful. For this reason, the petitioner has not met his burden under *Strickland v. Washington*. This court will deny this claim on the merits.

Issue Four: Denial of due process and equal protection by the existence of prosecutorial misconduct

In his final claim, the petitioner complains that the prosecutor made references to his gang affiliation. He contends this constituted unfair prejudice against him.

In a portion of its response, the state responds that, due to the petitioner's phrase "the principal issue is whether the improper remarks in closing argument require the setting aside of the sentence," Petitioner may be asserting a sentencing error. It is well-settled that sentencing errors are not cognizable in post-conviction proceedings. The court does not find that the petitioner is asserting a sentencing error. Rather, this pro se argument is directed to alleged prejudice at trial.

For the reasons noted above, the court finds the evidence was in fact admissible and its use did not unfairly prejudice the petitioner. A review of the record and the case on appeal establishes the petitioner had a fair trial.

Furthermore, on this assignment of error, the court does find the state's assertion of a procedural bar warranted. The state contends this claim was not raised in proceedings prior to the conviction. The court agrees and for this reason, finds that this claim is barred by application of LSA-C.Cr.P. art. 930.4(B).

CONCLUSION

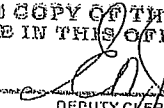
The petitioner had a fair trial and his conviction has been reviewed on direct appeal. This court carefully review each claim made in this post-conviction proceeding, finding some claims barred and some deficient on the merits. The court finds no basis to set aside the petitioner's convictions or to afford any other post-conviction relief.

Accordingly,

IT IS ORDERED BY THE COURT that the petitioner's application for post-conviction relief and all outstanding motions be and are hereby DENIED.

Gretna, Louisiana this 16th day of March, 2015.


JUDGE

A TRUE COPY OF THE ORIGINAL
ON FILE IN THIS OFFICE

DEPUTY CLERK
24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, LA.