

SUPREME COURT OF LOUISIANA

No. 15-KH-1332

STATE EX REL. PHILLIP DUSSETT

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 hereof the District Court's written reasons for 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.

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NO. 09-375

TWENTY FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON
STATE OF LOUISIANA

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W.F.P.S.O.

DIVISION "H"

STATE OF LOUISIANA

VERSUS

PHILLIP DUSSETT

FILED: March 26, 2015

JRO
DEPUTY CLERK

ORDER

This matter comes before the court on the petitioner's APPLICATION FOR POST-CONVICTION RELIEF, STAMPED AS FILED AUGUST 19, 2014, PETITIONER'S SUPPLEMENT, STAMPED AS FILED SEPTEMBER 30, 2014, STATE'S OPPOSITION, STAMPED AS FILED FEBRUARY 6, 2015, AND PETITIONER'S TRAVERSE, STAMPED AS FILED MARCH 9, 2015.

The petitioner seeks post-conviction relief from his 2011 conviction for attempted first degree murder. The petitioner appealed his conviction and forty-year sentence, arguing that his attorney was ineffective for failure to file a motion to reconsider the sentence and his sentence was excessive. Relief was denied. *State v. Dussett*, 12-356 (La.App. 5 Cir. 12/18/12), 106 So.3d 1203. His writ application to the state's highest court was denied in *State v. Dussett*, 2011-1307 (La. 7/22/11), 67 So.3d 479.

In his original and supplemental applications, the petitioner raises a large number of claims. For ease of reference, the court will use the numbering system made by the state in response.

ISSUES

Issues raised in the petitioner's original application for post-conviction relief:

1. Petitioner's Sixth Amendment right to effective assistance of appellate counsel was violated where:
 - A. The filing of counsel constituted an inappropriate *Anders* brief,
 - B. Appellate counsel failed to challenge the sufficiency of the evidence to support a conviction for attempted first degree murder,
 - C. Counsel failed to challenge the trial court's ruling allowing the State to elicit testimony that petitioner was a suspect in the Frankie Williams' murder because the probative value of the prior, uncharged crime was substantially outweighed by its prejudicial effect,
 - D. Appellate counsel failed to raise as errors the trial court's denial of a motion for mistrial because of: (1) impermissible testimonial reference that associated petitioner with a gang, (2) impermissible testimonial reference to other crimes, and (3) impermissible testimonial reference to petitioner having been shot, and,
 - E. Appellate counsel failed to obtain transcripts of opening statement, closing argument, jury charges, and voir dire.

2. Petitioner's Sixth Amendment right to effective assistance of trial counsel was violated where:

- A. Counsel failed to examine telephone recordings from the Jefferson Parish Correctional Center where counsel would have discovered a telephone conversation between the victim and the petitioner with the victim acknowledging that petitioner did not shoot him, and,
- B. Counsel failed to inform the petitioner of a favorable plea bargain.

Issues raised in the petitioner's supplemental application for post-conviction relief:

1. Petitioner was denied the effective assistance of counsel as guaranteed by the Sixth Amendment where trial counsel failed to conduct pre-trial investigation and interview alibi witnesses,
2. Petitioner received ineffective assistance of counsel during plea-bargaining,
3. The bill of information failed to properly inform him of the nature and cause of the accusation,
4. Counsel was ineffective in failing to move to quash the indictment and/or move for a mistrial and/or seek writs against the introduction of Frankie Williams' death as an issue, and
5. He is actually and factually innocent in both the "substantive and procedural context."

ANALYSIS OF ORIGINAL CLAIMS

One A: Petitioner's Sixth Amendment right to effective assistance of appellate counsel was violated where the filing of counsel constituted an inappropriate Anders brief

In addressing this and many of the petitioner's claims, important case law regarding effective assistance of counsel must be reviewed. First, a criminal defendant has a Sixth Amendment right to effective legal counsel. Under the well-known standard set forth 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.

To be successful in arguing a claim of ineffective assistance of counsel at any level, 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.

In addition to the *Strickland* standards, when appellate performance is an issue, there are other specific requirements. In reviewing claims of ineffective assistance of counsel on direct appeal, the Supreme Court of the United States has expressly observed that appellate counsel "need not advance every argument, regardless of merit, urged by the defendant. *Evitts v. Lucey*, 469 U.S. 387, 394, 105 S.Ct. 830, 834-5, 83 L.Ed.2d 821 (1985). The Court gives great deference to professional appellate strategy and applauds counsel for "winnowing out weaker arguments on appeal and focusing on one central issue if possible, and at most a few key issues. *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). This is true even where the weaker arguments have merit. *Id.* at 751-2.

When the claim of ineffective assistance of appellate counsel is based on failure to raise the issue on appeal, the prejudice prong of the *Strickland* test requires the petitioner to establish that the appellate court would have granted relief, had the issue been raised. *United States v. Phillips*, 210 F.3d 345, 350 (5 Cir. 2000).

The court finds no merit to petitioner's claim of ineffective appellate counsel. Appellate counsel is limited to the record and is ethically bound to raise only issues supported by the law and evidence.

The court finds no merit to this claim, as petitioner fails to prove that appellate counsel, Frederick Kroenke, Jr., was deficient, or that any prejudice resulted. Petitioner fails to establish that the appellate court would have granted relief.

One B: Petitioner's Sixth Amendment right to effective assistance of appellate counsel was violated where appellate counsel failed to challenge the sufficiency of the evidence to support a conviction for attempted first degree murder

The petitioner argues his attorney was ineffective for failing to raise the issue of sufficiency of the evidence on appeal. Although the issue of sufficiency was not raised, the Court of Appeal summarized the facts:

During the evening of October 18, 2008, Officer Brad Boyd of the Kenner Police Department responded to reports of gunfire in the 3100 block of Helena Street in Kenner. When he arrived, Officer Boyd discovered a deceased black male, later identified as Frankie Williams. Detective George Hoffmann of the Kenner Police Department, the lead investigator of the Williams murder, conducted an interview with Conway Dennis concerning the Williams murder. Mr. Dennis told Detective Hoffmann that he observed defendant and Mr. Trim in the area prior to the murder. At trial of the instant matter, Mr. Dennis testified that he was with Frankie Williams, his cousin, moments before he was shot. He stated that he left Frankie to go to the store, and as he walked away, he saw defendant, Mr. Trim, and two other individuals walking in Frankie's direction. On his way back from the store, Mr. Dennis learned that Frankie had been shot. At trial, surveillance footage from an apartment complex near the murder scene was played. The video was time stamped at 11:13 p.m. on October 18, 2008, and Mr. Dennis identified defendant and Mr. Trim in the footage.

Approximately one month later, on November 20, 2008, around 8:00 p.m., Mr. Dennis was on his bike on his way to meet a friend when he encountered a man named Tyson on Clemson Drive, about a mile from the Frankie Williams murder scene on Helena Street. Tyson, who had known Mr. Dennis since he was younger, told him, "I think it's about time for you to leave—leave from around here." Mr. Dennis got on his bike and started to leave when he noticed defendant and Mr. Trim approaching him. As he attempted to elude them, both defendant and Mr. Trim, each with a gun, started shooting at him. Mr. Dennis escaped without physical injuries and reported the incident to the police soon after he got home.

Later that evening, Officer Boyd responded to a report of gunfire in the 200 block of Clemson Drive. When Officer Boyd arrived on the scene, he located eleven spent 9-mm shell casings. A witness on the scene advised Officer Boyd that he had observed two black males running from the scene firing weapons at somebody else who was running ahead of them.

Mr. Dennis identified defendant and Mr. Trim as his assailants. Defendant was subsequently arrested and denied any knowledge of Frankie Williams' murder or the attempted murder of Mr. Dennis. At trial, Mr. Dennis stated that he was one hundred percent sure that defendant shot at him on November 20, 2008.

State v. Dussett, at 1206, emphasis added.

The state points to the detailed finding of facts, established at the same trial, in his co-defendant's appeal, wherein the Fifth Circuit outlined the facts against co-defendant Devion Trim and found the evidence sufficient to convict. *State v. Trim*, 12-115 (La.App. 5 Cir. 10/16/12), 107 So.3d 656, 660-661. The court finds this persuasive.

Where the victim testified at trial that the petitioner shot him, the petitioner cannot establish that the evidence was insufficient to convict or that his appeal would have been successful if that issue had been raised. This claim fails.

One C: Petitioner's Sixth Amendment right to effective assistance of appellate counsel was violated where Counsel failed to challenge the trial court's ruling allowing the State to elicit testimony that petitioner was a suspect in the Frankie Williams' murder because the probative value of the prior, uncharged crime was substantially outweighed by its prejudicial effect

The petitioner's next argument is that his appellate counsel should have argued his trial counsel was ineffective by not challenging denial of his motion to exclude reference to the defendant's being a suspect in the murder of Frankie Williams.

This court notes, as did the Fifth Circuit, that the charge and trial were based upon the information that Conway Dennis, the victim, had accused the petitioner of murdering Frankie Williams. As the state points out, this precise issue was reviewed in the appeal of co-defendant Trim.

After a comprehensive review on this issue in the co-defendant's case, the Court of Appeal denied this claim. *State v. Trim*, 107 So.3d at 661. In so doing, the Court found that "this evidence was highly relevant and probative, because the State had to show that defendant was observed at the scene and was somehow connected to the Williams murder in order to prove that his attempt to kill Dennis was to prevent him from testifying about his knowledge of the murder in the future." *Id.* at 656.

After a careful review of this contention, this court finds that the petitioner has not shown either prejudice or deficient performance by appellate counsel. He is not entitled to relief on this claim.

One D: Petitioner's Sixth Amendment right to effective assistance of appellate counsel was violated where Appellate counsel failed to raise as errors the trial court's denial of a motion for mistrial because of: (1) impermissible testimonial reference that associated petitioner with a gang, (2) impermissible testimonial reference to other crimes, and (3) impermissible testimonial reference to petitioner having been shot

The petitioner's next challenge relates to a mistrial. He argues his appellate attorney was deficient by not raising a claim of wrongful denial of a mistrial.

On the issue of reference to a rap gang, the state in response points to the transcript. Conway Dennis testified on direct examination that the defendants were friends with "the lip squad." (Record, Vol. 2, p. 436). Trial counsel moved for a mistrial, which was denied. The issue was not raised on appeal.

On the first part of this complaint, as shown by the transcript, the reference was brief and vague. There was no showing of prejudice and for this reason, appellate counsel had no duty to raise the issue again.

On the second part of this complaint, the petitioner contends a mistrial should have been ordered when a police officer testified that he had stopped the two co-defendants together before. Testimony was clear that the reference was to a traffic stop and notably, there was no objection made at the time. Thus the issue was not preserved for review and appellate counsel was not deficient in not raising it on appeal.

On the third part of this complaint, the petitioner alleges there was an impermissible reference, by a police officer, that he had been shot at. There was an immediate objection and the court found the officer had "blurted out" the remark. The trial court did not rule on the defense objection until the entirety of the witness' testimony on direct examination was complete. The trial court had sufficient information to determine that the defense suffered no prejudice from the isolated reference.

In reviewing this post-conviction claim, the court finds that appellate counsel's strategic decision not to raise this fleeting reference was not ineffective assistance.

One E: Petitioner's Sixth Amendment right to effective assistance of appellate counsel was violated where Appellate counsel failed to obtain transcripts of opening statement, closing argument, jury charges, and voir dire.

The petitioner argues his appellate attorney was ineffective because he failed to obtain transcripts from every part of the trial. This argument is unavailing under the present circumstances because there were no issues in these portions preserved for review.

The petitioner was represented by appellate counsel. The reviewing panel of judges of the Fifth Circuit was able to review mandatory portions of the trial transcript. The petitioner's claim that he had some entitlement beyond those portions that is not well founded. It is well-settled law that:

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Where the record includes a complete transcript of the evidentiary portion of the trial, the appellant's "constitutional right to a judicial review of all evidence" has not been compromised. *State v. Thomas*, 92-1428 (La.App. 4th Cir.5/26/94), 637 So.2d 1272, writ denied, 94-1725 (La.11/18/94), 646 So.2d 376, cert. denied, 514 U.S. 1054, 115 S.Ct. 1437, 131 L.Ed.2d 317 (1995). As to other untranscribed portions of the record, where there were no contemporaneous objections, the errors were not preserved for appeal. *State v. Harrison*, 627 So.2d 231, 233 (La.App. 4th Cir.1993).

State v. Richards, 96-0331 (La.App. 4 Cir. 12/22/99), 750 So.2d 330, 332.

The petitioner received a full review of his trial. His appellate attorney was not constitutionally deficient for failing to order portions of the trial that contained no objections and thus afforded no further review.

Two A: Petitioner's Sixth Amendment right to effective assistance of trial counsel was violated where Counsel failed to examine telephone recordings from the Jefferson Parish Correctional Center where counsel would have discovered a telephone conversation between the victim and the petitioner with the victim acknowledging that petitioner did not shoot him

The petitioner next argues that his trial attorney, Tracy Sheppard, an experienced criminal attorney, was constitutionally ineffective. He states she did not investigate and examine telephone recordings, made from the Jefferson Parish jail, which contained the victim's acknowledgment that the petitioner did not shoot him.

Significantly, even in connection with this post-conviction application, no such recording or transcript, has been provided to the court. By contrast, the record does show that defense counsel called witnesses at trial, including the petitioner's father. Defense counsel withdrew initial objections to the jury hearing the petitioner's telephone recordings from jail. Both the petitioner's father and jailhouse conversations contain references to the victim allegedly indicating at some point that he knew the petitioner did not shoot him.

For this reason, the record establishes that trial counsel knew of the factual claim the petitioner is now making. Counsel's decision on how to present this contention is entitled to great deference under *Strickland*. In addition, even had such evidence existed and had such been introduced, the evidence would still have been overwhelming. The petitioner cannot show the results of his trial would have been otherwise or that its result is unreliable. The court will deny this claim.

Two B: Counsel failed to inform the petitioner of a favorable plea bargain.

The petitioner's next complaint is that his trial attorney did not inform him of a favorable plea offer.

This claim is contradicted by the record. At sentencing, trial counsel addressed the court, stating, "I just want to let the court know that, as this court is well aware, there was a plea offer on the table of ten years which my client did not accept." (Transcript, Vol. 3, page 569). As the state points out in its opposition, the petitioner was present when his attorney made her statement, but he did not contradict its truthfulness.

The court finds this claim of an unreported plea offer factually contradicted. Relief will be denied.

ANALYSIS OF SUPPLEMENTAL CLAIMS

One: Petitioner was denied the effective assistance of counsel as guaranteed by the Sixth Amendment where trial counsel failed to conduct pre-trial investigation and interview alibi witnesses

This supplemental claim relates to the performance of trial counsel. This court has noted that Ms. Sheppard is an experienced criminal trial attorney. Furthermore, the burden is high to establish relief on a claim of ineffective assistance. The petitioner has not shown that counsel

failed to investigate, he has not shown who such witnesses might have been, and he has not shown the results of his trial would have been different.

This claim contends only that trial counsel failed to investigate his case and to call alibi witnesses. However, the petitioner fails to provide the name of any such witnesses or to provide specifics on how they would testify. This claim is speculative and will be denied.

Two: Petitioner received ineffective assistance of counsel during plea-bargaining

The petitioner contends his trial attorney failed to relate to him a favorable plea bargain of a ten-year sentence. This supplemental complaint is the same as the claim made in his original application, addressed above. As shown by the transcript of sentencing proceedings, this claim is factually unfounded. Relief is not warranted on this claim.

Three: The bill of information failed to properly inform him of the nature and cause of the accusation

In this complaint, the petitioner claims that the bill of information did not properly inform him of the nature of the charges.

The claim is procedurally barred in this post-conviction proceeding. "If the application alleges a claim of which the petitioner had knowledge and inexcusably failed to raise in the proceedings leading to conviction, the court shall deny relief." LSA-C.Cr.P. art. 930.4(B). The court will deny relief on this basis.

Four: Counsel was ineffective in failing to move to quash the indictment and/or move for a mistrial and/or seek writs against the introduction of Frankie Williams' death as an issue

The petitioner argues his trial attorney was ineffective by failing to move to quash the indictment or move for a mistrial in an effort to keep references to Frankie Williams' death out of this trial.

Significantly, the bill of indictment charged that the petitioner attempted to commit first degree murder of Conway Dennis, "wherein Conway Dennis was a witness to the crime of the murder of Frankie Williams"

Factually, the record establishes that trial counsel did in fact try to exclude references to this murder. Prior to commencement of trial, defense counsel filed a Motion in Limine and a Supplemental Motion in Limine to exclude references to Williams' murder. The effort was unsuccessful, due to the admissible nature of the underlying facts.

Upon review, the court finds that the petitioner has not met his burden of proving that trial counsel's efforts were substandard. Furthermore, he has not shown impermissible prejudice because the underlying facts were properly admissible at trial and the evidence against the petitioner was overwhelming. Relief will be denied.

Five: He is actually and factually innocent in both the "substantive and procedural context."

In this final claim, the petitioner urges this court to conclude that he is actually innocent of the attempted first degree murder of Conway Dennis.

It is critical to note that this post-conviction proceeding is a collateral attack on the conviction. Regarding the actual innocence claim, the court notes that a claim of actual innocence does not present a claim for relief in this collateral attack on a jury's verdict. Louisiana law has not recognized that free-standing post-conviction claims of actual innocence not based upon DNA are legally viable.¹

By statute, post-conviction relief may be granted only for the enumerated grounds listed in LSA-C.Cr.P. art. 930.3. Actual innocence is not an enumerated basis. The legislature has not amended the statutory language to allow for such a claim.

The courts of this state have reviewed this aspect of post-conviction law. In so doing, Louisiana courts have declined to override the statutory language and to thus conclude that a

¹ The sole statutory authorization to address innocence as a ground for post-conviction relief is contained in LSA-C.Cr.P. art. 930.3(7), which provides: "The results of DNA testing performed pursuant to an application granted under Article 926.1, proves by clear and convincing evidence that the petitioner is factually innocent of the crime for which he was convicted."

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claim of actual innocence in the absence of DNA exoneration is cognizable in post-conviction review. See *State v. Pierre*, 13-0873 (La.10/15/13), 125 So.3d 403 and *Jones v. Cain*, 151 So.3d 781 (La.App. 4 Cir. 10/8/14). Despite the considerations addressed, no court has deviated from the clear interpretation of statutory language.

The court finds that on this claim, the petitioner fails to state an enumerated basis for relief in this post-conviction proceeding. Relief is denied on this procedural basis.

CONCLUSION

Post-conviction proceedings are collateral review. The burden of proof in a post-conviction proceeding is on the petitioner. LSA-C.Cr.P. art. 930.2.

After a thorough review of the record, all pleadings, and the arguments made, the court finds that the petitioner has not met his burden of proof. Relief should be denied for the reasons stated.

Accordingly,

IT IS ORDERED BY THE COURT that petitioner's application for post-conviction relief be and is hereby **DENIED**.

Gretna, Louisiana this 26th day of March, 2015.

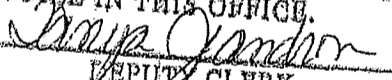


JUDGE

PLEASE SERVE:

PRISONER: Phillip Dussett, DOC # 586710, Louisiana State Penitentiary, Angola, LA 70712

STATE: Jefferson Parish District Attorney's Office, Terry Boudreux, Andrew F. Long, 200 Derbigny St., Gretna, LA 70053

A TRUE COPY OF THE ORIGINAL
ON FILE IN THIS OFFICE.

DEPUTY CLERK
24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON