

SUPREME COURT OF LOUISIANA

No. 15-KH-2128

STATE EX REL. TROY GREENUP

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). 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.

W. Felle

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TWENTY FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON
STATE OF LOUISIANA

AUG 12 2015
W.F.P.S.O.
DIVISION "C"

NO. 11-810

STATE OF LOUISIANA

VERSUS

TROY GREENUP

FILED: August 4, 2015

Cherie A. Ball
DEPUTY CLERK

ORDER

This matter comes before the court on the petitioner's APPLICATION FOR POST-CONVICTION RELIEF, STAMPED AS FILED JUNE 22, 2015, AND THE STATE'S RESPONSE, STAMPED AS FILED JULY 30, 2015.

On July 20, 2012, the petitioner was convicted after trial by jury of the aggravated rape of a victim under age thirteen, a violation of LSA-R.S. 14:42. The court sentenced him to life imprisonment at hard labor.

The petitioner's conviction and sentence were affirmed on direct appeal. *State v. Greenup*, 12-881 (La. App. 5 Cir. 2013), 123 So.3d 768, and *State v. Greenup*, 13-2300 (La. 3/21/14), 135 So.3d 617.

The petitioner now files a timely application for post-conviction relief, alleging ineffective assistance of counsel at trial and on appeal.

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ISSUES

Legal Programs Department

The specific arguments made by the petitioner, copied verbatim, are as follows:

1. Trial counsel was ineffective assistance of counsel for failing to object to the anomaly in the jury's verdict poll;
2. Trial counsel was ineffective assistance of counsel for failing to object to nurse being qualified as an expert in child sexual abuse;
3. Trial counsel was ineffective assistance of counsel for failing to call an expert for the defense at trial to rebut the state's experts; and,
4. Trial and appellate counsel were ineffective assistance of counsel, and the trial court erred for failing to raise or consider appointed trial counsel's conflict of interest in the case.

LAW OF EFFECTIVE ASSISTANCE

All claims relate to the frequently-raised issue of assistance of counsel. 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 the 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, 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. In addition, a petitioner must 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 legal presumption that defense counsel's performance is within the wide range of effective representation. Most 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.

As these cases show, the petitioner faces a heavy burden in attempting to establish ineffective assistance of counsel. The burden of proof in this proceeding rests with the petitioner alone. LSA-C.Cr.P. art. 930. 2.

SPECIFIC ISSUES

Issue One: Trial counsel was ineffective assistance of counsel for failing to object to the anomaly in the jury's verdict poll

The petitioner argues a juror wrote a note on a polling slip, "Yes, but a less charge." The record shows that the court held a bench conference to address this note. The trial court counted this reply as a "no" vote, concluding that the petitioner was convicted by a 10-2 vote.

The court's decision to count the reply as a "no" vote was favorable to the defense. Notably, LSA-C.Cr.P. art. 782(A) authorizes the vote of ten of twelve jurors as sufficient to convict. The petitioner can show no prejudice from the court's action. The petitioner can show no deficiency on counsel's part.

Issue Two: Trial counsel was ineffective assistance of counsel for failing to object to nurse being qualified as an expert in child sexual abuse

The petitioner next argues that his defense attorney, Andrew Duffy, was constitutionally deficient in his representation by failing to object to the qualification of a forensic nurse practitioner as an expert witness.

In his brief, the petitioner urges a violation under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 590, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). The state distinguishes the holding of this case, noting that *Daubert* addresses the admissibility of new techniques for expert testimony, not the question of whether an individual is qualified by education and experience to give expert testimony.

The witness in question, Anne Troy, was overwhelmingly qualified to give expert testimony. She had a master's degree as a family nurse practitioner, was a teacher of nursing at LSU for 17 years, had over 500 hours of clinical experience with physicians in the field of child abuse, and had been accepted as an expert witness in fourteen previous cases.

In light of the extensive experience and education of the witness, the court finds no basis for believing that defense counsel could have prevented Ms. Troy from being qualified as an expert witness in the field of child sexual abuse.

Issue Three: Trial counsel was ineffective assistance of counsel for failing to call an expert for the defense at trial to rebut the state's experts

The petitioner's next argument is that his attorney was ineffective because he did not call a rebuttal expert to the state's expert witness, Anne Troy. As noted above, Ms. Troy was qualified as an expert in the field of child sexual abuse.

The petitioner fails to inform the court in what way a defense expert might have testified. This claim is speculative and does not support relief. Furthermore, the petitioner fails to acknowledge that defense counsel conducted a thorough cross-examination of Ms. Troy, thus challenging her findings.

The overriding reason to deny this claim, however, is the well-settled principle that the choice of which witnesses to call belongs to defense counsel. A reviewing court should and will defer to reasonable strategic decisions of defense counsel. *State v. Strickland*, 94-25 (La. 1996), 683 So.2d 218, 233.

Issue Four: Trial and appellate counsel were ineffective assistance of counsel, and the trial court erred for failing to raise or consider appointed trial counsel's conflict of interest in the case.

This claim raises an issue of conflict of interest by both trial and appellate counsel. The petitioner's argument is that his attorney and/or his attorney's investigator, had a conflict of interest because they started a chain of events which led to the investigation of the aggravated rape charge.

In deciphering this claim, the contention is that attorney Andrew Duffy represented the defendant in a different case, a charge of molestation of a juvenile. It was after questioning wit-

nesses in the molestation case that the victim in this case told his mother the petitioner raped him.

Pursuant to the Supreme Court case of *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), a defendant must show "both an actual conflict of interest and an adverse effect even if the trial court failed to inquire into a potential conflict about which it reasonably should have known."

After reviewing the petitioner's claim of a conflict of interest by trial counsel, the court finds he has failed to meet his burden of proof in showing an actual conflict of interest or an adverse effect.

In a related vein, the petitioner contends appellate counsel was ineffective in failing to argue on appeal that trial counsel had a conflict of interest.

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 (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 (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. The petitioner fails to meet that burden.

The petitioner fails to show either prejudice or deficient performance.

CONCLUSION

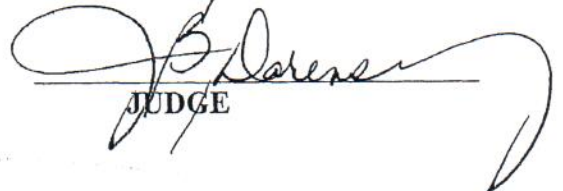
The record establishes that the petitioner had a fair trial. A careful review of his claims in this post-conviction proceedings reveals that he is not entitled to have the results of his trial set aside.

A petitioner in an application for post-conviction relief bears the burden of proof. LSA-Cr.P. art. 930.2. The petitioner has failed to meet this burden and he is not entitled to post-conviction relief.

Accordingly,

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

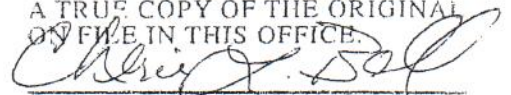
Gretna, Louisiana this 4th day of August, 2015.


JUDGE

PLEASE SERVE:

Defendant: Troy Greenup, DOC # 600654, Louisiana State Penitentiary, Angola, LA 70712

State: Thomas J. Butler, Terry Boudreux, District Attorney's Office, 200 Derbigny St., Gretna, LA 70053

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OF FILE IN THIS OFFICE.

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