

SUPREME COURT OF LOUISIANA

No. 16-KH-0323

STATE EX REL. HASSAN A. ABDUL, IV

v.

STATE OF LOUISIANA

**ON SUPERVISORY WRITS TO THE TWENTY-FOURTH
JUDICIAL DISTRICT COURT, PARISH OF JEFFERSON**

PER CURIAM:

Denied. Relator's claims regarding the sufficiency of the evidence and those related to his waiver of counsel are repetitive. La.C.Cr.P. art. 930.4. *See also State v. Abdul*, 11-0863 (La. App. 5 Cir. 4/24/12), 94 So.3d 801, *writ denied sub nom. State ex rel. Abdul v. State*, 12-1224 (La. 10/12/12), 99 So.3d 41, and *State ex rel. Abdul v. State*, 12-1226 (La. 10/12/12), 99 So.3d 41. As to the remaining claims, relator fails to satisfy his post-conviction burden of proof. La.C.Cr.P. art. 930.2. In addition, many of the claims are not preserved for review by contemporaneous objection and relator cannot complain his self-representation was inadequate. *Faretta v. California*, 422 U.S. 806, 834, 95 S.Ct. 2525, 2541, n.46, 45 L.Ed.2d 562 (1975); *see also State v. Dupre*, 500 So.2d 873, 878 (La. App. 1 Cir. 1986). We attach hereto and make a part hereof the district court's written reasons denying relief.

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

NO. 09-4415

DIVISION "C"

STATE OF LOUISIANA

VERSUS

HASSAN ABDUL

FILED:

October 16, 2015

Cherie G. Bell
DEPUTY CLERK

ORDER

This matter comes before the court on the petitioner's APPLICATION FOR POST-CONVICTION RELIEF, STAMPED AS FILED JUNE 30, 2015, AND THE STATE'S RESPONSE, STAMPED AS FILED OCTOBER 9, 2015.

In this pro se application, the petitioner challenges his conviction for attempted second degree murder. The petitioner's conviction and sentence have twice been upheld by the Fifth Circuit Court of Appeal. *State v. Abdul*, 11-863 (La.App. 5th Cir. 04/24/12), 94 So.3d 801), writ denied, 12-1224 (La. 10/12/12), 99 So.3d 41 and *State v. Abdul*, 13-566 (La.App. 5th Cir. 12/12/13), 131 So.3d 365, writ denied, 14-0249 (La. 10/10/14), 150 So.3d 895.

ISSUES

The petitioner raises eight claims for relief. They are:

- (1) Insufficient evidence to support the offense of attempted second degree murder, prosecutor failed to provide to the court forensic evidence, and direct evidence to establish the guilt of attempted second degree murder.
- (2) Insufficient evidence on the basis of actual innocence.
- (3) Judge denied petitioner the right to counsel and subjected the petitioner to self-representation without a proper hearing.
- (4) Petitioner was denied effective assistance of counsel.
- (5) The trial judge erred in failing to declare a mistrial due to remarks made by a juror during trial that were clearly biased and prejudicial.
- (6) 911 tapes should have been excluded because statement violates confrontation clause, hearsay provisions, and evidentiary rules prohibiting evidence of other crimes.
- (7) During prosecutor's closing and rebuttal argument, the state argued facts not in evidence, improperly vouched for an expert witness, improperly asserted prosecutor's opinion, and improperly attacked the petitioner's character.
- (8) The trial judge should have quashed the arrest warrant because affidavit contains false and misleading information.

ANALYSIS

The state raises procedural objections seven of the eight claims. By law, if the state timely files procedural objections, no answer on the merits may be ordered until the procedural objections have been considered and the ruling becomes final. LSA-C.Cr.P. art. 927(A).

Claims One and Two

The petitioner's first two claims challenge the sufficiency of the evidence. Under *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), a reviewing court must determine "whether, after viewing the evidence in the light most favorable to

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Cherie G. Bell

the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

Both claims of insufficiency were raised on appeal. In his original appeal, the Fifth Circuit detailed the evidence produced against the petitioner. *State v. Abdul*, 94 So.3d at 810-12. The court specifically rejected the argument that the evidence was insufficient and found that a rational trier of fact could find the evidence met the *Jackson* standard.

The state urges this court to find these claims barred by application of LSA-Cr.P. art. 930.4(A). That provision requires "Unless required in the interest of justice, any claim for relief which was fully litigated in an appeal from the proceedings leading to the judgment of conviction and sentence shall not be considered."

The court finds this claim was fully litigated on appeal and is therefore barred from post-conviction review.

Claim Three

The petitioner's third claim contends that he was denied the right to counsel and was forced to represent himself.

On direct appeal, the Fifth Circuit devoted considerable scrutiny to this claim. After detailing the history from the record, the Court found this claim unwarranted. *State v. Abdul*, 94 So.3d at 814-16.

The court finds that this claim was fully litigated on appeal and is thus barred by application of LSA-Cr.P. art. 930.4(A).

Claim Four

The petitioner contends that he was denied the effective assistance of counsel by attorney Jake Lemmon and standby counsel Powell Miller. This claim was not raised previously and the state addresses it on the merits.

There is abundance of case law on the constitutional right to effective 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 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.

As shown above, in addition to proving deficient performance, a claim of ineffective assistance of counsel must also establish deficient performance. This the petitioner fails to do.

In this application for post-conviction relief, the petitioner contends that his attorney Jake Lemmon abandoned him prior to trial when he did not file a motion to withdraw. He further contends that his standby counsel failed to disclose exculpatory evidence.

Although the issue was not phrased in terms of effective representation of counsel, the Fifth Circuit has already reviewed the record regarding the issue of self-representation and the factual background of current claims. The Court summarized the facts and petitioner's argument as follows:

[H]e was forced to represent himself with the assistance of the same counsel he sought to replace. Defendant contends that he and his counsel had conflict, which violated his Sixth Amendment right to conflict-free counsel. He asserts that the conflict arose when his counsel told him he was guilty and that God could not help him. Defendant further asserts that once the conflict of interest was made known to the trial judge, an inquiry under *State v. Cisco*, 01-2732 (La.12/3/03), 861 So.2d 118, *cert. denied*, 541 U.S. 1005, 124 S.Ct. 2023, 158 L.Ed.2d 522 (2004), should have been applied. Lastly, defendant indicates that he was compelled to represent himself without the criteria in *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), being met.

On April 1, 2011, defendant filed a motion for substitution of counsel arguing that his attorney, Powell Miller, had not and would not prepare an adequate defense for him on pre-trial issues and at trial. On April 4, 2011, at a hearing on the motion, defendant asked the trial judge for another State-appointed attorney; however, that request was denied because the trial judge explained that defendant did not have the right to pick and choose a particular public defender. She remarked that the trial had been set many times and that his trial was in less than 30 days. The trial judge stated that defendant could hire another attorney. Defendant's counsel noted that defendant's second choice was to represent himself, which the trial judge said defendant could do.

Afterwards, the trial judge told defendant she had to advise him of the dangers and disadvantages of self-representation, and that she had to determine whether he had the capacity to represent himself, and that he was literate and competent. Defendant told the trial judge that he had completed the twelfth grade, after which the trial judge said that self-representation was almost always unwise and may be detrimental. She informed the defendant that he would receive no special treatment and would have to follow all of the rules of law and criminal procedure. Defendant knew the charges against him and that the maximum penalties for attempted second degree murder and possession of a weapon by a convicted felon were fifty years and fifteen years, respectively.

After a lengthy colloquy, the trial judge allowed defendant to represent himself. She thereafter appointed Mr. Powell as standby counsel to assist defendant with the rules of courtroom procedure and to answer legal questions. The trial judge found that defendant's waiver of right to counsel was knowingly, intelligently, and voluntarily made, and that the assertion of the right to represent himself was clear and unequivocal.

The Sixth Amendment to the United States Constitution and Louisiana Constitution Article 1, Section 13 guarantee that in all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense. If a defendant is indigent, he has the right to court-appointed counsel. *State v. Reeves*, 06-2419, p. 37 (La.5/5/09), 11 So.3d 1031, 1057, *cert. denied*, 558 U.S. 1031, 130 S.Ct. 637, 175 L.Ed.2d 490 (2009). The right of a defendant to counsel of his choice has been implemented by LSA-Cr.P. art. 515, which provides in pertinent part that, "Assignment of counsel shall not deprive the defendant of the right to engage other counsel at any stage of the proceedings in substitution of counsel assigned by the court." An indigent defendant does not have the right to have a particular attorney appointed to represent him. An indigent's right to choose his counsel only extends to allowing the accused to retain the attorney of his choice if he can manage to do so, but that right is not absolute and cannot be manipulated so as to obstruct orderly procedure in courts and cannot be used to thwart the administration of justice. *Id.*

State v. Abdul, 94 So.3d 810-2, footnote omitted.

After lengthy review of the claims regarding representation made on appeal, the Court of Appeal found no error by the trial court, noting:

Additionally, we find that the trial judge did not abuse her discretion by allowing defendant to represent himself with the assistance of counsel. During the *Faretta* hearing, the trial judge ascertained that defendant knew the nature of the charges and the maximum penalties for the charges. The trial judge also advised defendant of the dangers and disadvantages of self-representation, and defendant indicated that he understood them. In addition, the trial judge determined that defendant had a twelfth grade education. He responded affirmatively when asked if he was positive that he wanted to represent himself. In light of the foregoing, it appears clear that defendant's waiver of right to counsel was knowingly, intelligently, and voluntarily made, and that the assertion of the right to represent himself was clear and unequivocal. This assignment of error is without merit.

State v. Abdul, 94 So.3d 816.

This court, sitting in post-conviction review, finds that the petitioner has failed to meet his burden of proof. He has failed to prove deficient performance by counsel or that the results would have been different, absent errors of counsel. The petitioner's Fourth Claim is denied.

Claim Five

In this claim, the petitioner contends that the trial judge erred in failing to declare a mistrial due to remarks made by a juror during his trial that were clearly biased and prejudicial. He specifically points to a juror disclosing a distant connection with a witness. Notably, the juror was questioned and indicated under oath that she could be impartial. (Tr., p. 86).

The state urges this court to find this claim barred by application of post-conviction procedural rules. By statute, 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 record clearly establishes that the juror made her remarks in the hearing of the petitioner. The petitioner personally informed the trial judge that he was "okay" with the juror. (Tr., p. 91).

The petitioner cannot now contend he is entitled to relief on a procedure he personally agreed to follow. He did not present this issue to the trial court in proceedings leading to conviction. For this reason, this claim is barred by application of LSA-C.Cr.P. art. 930.4(B).

Claim Six

The next complaint raised is that the 911 tapes should have been excluded because statement violates confrontation clause, hearsay provisions, and evidentiary rules prohibiting evidence of other crimes.

The state notes that the petitioner failed to object to the admission of these tapes during trial. Therefore, since the petitioner had knowledge of this claim, his failure to raise it in the proceedings leading to conviction, warrants denial under LSA-C.Cr.P. art. 930.4(B).

The court finds that this claim is barred by application of LSA-C.Cr.P. art. 930.4(B).

Claim Seven

The petitioner next contends that during prosecutor's closing and rebuttal argument, the state argued facts not in evidence, improperly vouched for an expert witness, improperly asserted prosecutor's opinion, and improperly attacked the petitioner's character.

The trial transcript contains curative actions by the trial court. For example, the prosecutor was informed that she could not give examples beyond the record during closing argument. (Tr. p. 648).

The state observes that the petitioner failed to object to these claims during the course of the trial. The state argues that the petitioner cannot properly bring these claims forward in this application for post-conviction relief.

The court agrees. Post-conviction proceedings are collateral review. The failure to raise objections in the trial court, when corrective measures could have been taken if warranted, bypasses proper review. The court finds that this claim is barred by application of LSA-C.Cr.P. art. 930.4(B).

Claim Eight

The petitioner's final post-conviction complaint is that the trial judge should have quashed the arrest warrant because the affidavit contained false and misleading information.

The petitioner failed to file a motion to quash the arrest warrant. He therefore did not properly present the issue to the trial court in pre-trial proceedings. His failure to raise the issue results in the claim being barred for belated review by application of LSA-C.Cr.P. art. 930.4(B).

CONCLUSION

Under the authority of LSA-C.Cr.P. art. 930.2, the petitioner in an application for post-conviction relief shall have the burden of proving that relief should be granted. The petitioner has not met his heavy burden on any of his claims, to include the claim of ineffective assistance of counsel.

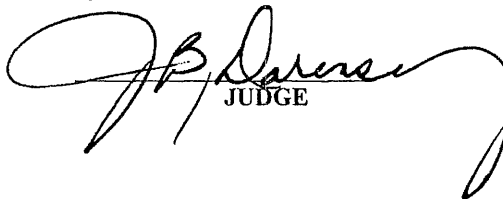
In addition, strict procedural bars prohibit relief on all claims except the assistance of counsel claim (number four).

The court will deny relief.

Accordingly,

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

Gretna, Louisiana this 16th day of October, 2015


JUDGE

PLEASE SERVE:

Defendant: Hassan Abdul, DOC # 384790, Rayburn Correctional Center, 27268 Hwy. 21, Angie, LA 70426

District Attorney: Paul Connick, Gail D. Schlosser, Terry Boudreaux, 200 Derbigny St., Gretna, LA 70053