

SUPREME COURT OF LOUISIANA

No. 16-KH-0521

STATE EX REL. WILLIE FRANKLIN

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). In addition, relator fails to show counsel labored under a conflict of interest. La.C.Cr.P. art. 930.2. Finally, relator's claims regarding the admission of his transcribed confession and the sufficiency of the evidence are repetitive. La.C.Cr.P. art. 930.4. 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.

W. *File*

TWENTY FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON
STATE OF LOUISIANA

SERVICE
RECEIVED

DEC 03 2015
DIVISION "A"
W.F.P.S.O.

NO. 10-4468

STATE OF LOUISIANA

VERSUS

WILLIE FRANKLIN

R E C E I V E D

DEC 07 2015

FILED: 11-20-15

Michael Legal Programs Department
DEPUTY CLERK

ORDER

This matter comes before the court on the petitioner's APPLICATION FOR POST-CONVICTION RELIEF, STAMPED AS FILED SEPTEMBER 2, 2015 AND THE STATE'S RESPONSE, STAMPED AS FILED NOVEMBER 13, 2015.

The petitioner was found guilty on April 13, 2013 of two counts of armed robbery and receiving stolen things. His appeal was denied on the merits on the armed robbery charges but the conviction for illegal possession of a stolen thing was vacated.

The petitioner filed an application for post-conviction relief, alleging the following claims:

1. Did the trial court err when it allowed the law clerk to read an alleged transcribed statement into the record supposedly given by Mr. Franklin,
2. Did the trial court commit reversible error when it accepted the jury's guilty verdict against Mr. Franklin despite the fact that the record reflects that Mr. Franklin was not a participant in the armed robbery of Ms. Barrera,
3. Mr. Franklin contends that defense counsel was ineffective for failing to disclose that he had previously worked as an assistant district attorney in Orleans Parish which created a conflict of interest, and
4. Mr. Franklin contends that his appellate counsel was ineffective for (1) failing to recognize and address issue of trial counsel's conflict of interest and (2) failing to challenge the validity of alleged transcribed statement.

The state has filed its response, raising procedural objections to the first two claims and responding on the merits to the final two claims.

CLAIMS

Claim One: Did the trial court err when it allowed the law clerk to read an alleged transcribed statement into the record supposedly given by Mr. Franklin

In his brief, the petitioner argues a lack of foundation or corroboration of the confession given to Detective Gray.

The state argues that this claim is procedurally barred by application of LSA-C.Cr.P. art. 930.4(B). This statute provides that "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 may deny relief."

The court finds the state's objection well-founded. Although known, this claim was not raised during the trial. The trial judge was never given an opportunity to rule on the issue and the claim may not now be raised in a collateral proceeding.

Claim Two: Did the trial court commit reversible error when it accepted the jury's guilty verdict against Mr. Franklin despite the fact that the record reflects that Mr. Franklin was not a participant in the armed robbery of Ms. Barrera

In his brief, the petitioner argues that the trial court erred in accepting the jury's verdict when he was not a participant in the robbery. As the state notes in response, regardless of the phrasing, this claim is actually one of sufficiency of the evidence.

On direct appeal, the Court of Appeal itemized the evidence introduced against the petitioner at trial. The Court found the evidence constitutionally sufficient to convict. 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 the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

This sufficiency claim was fully litigated on direct appeal after the petitioner's conviction and sentence. As such, under the provisions of LSA-Cr.P. art. 930.4(A), this claim is procedurally barred.

Claim Three: Mr. Franklin contends that defense counsel was ineffective for failing to disclose that he had previously worked as an assistant district attorney in Orleans Parish which created a conflict of interest and failed to investigate why the petitioner was charged with the robbery

In this claim, the petitioner complains that his attorney, Graham Bosworth, did not disclose that he had previously served as an assistant district attorney in Orleans Parish. The petitioner contends that this prior employment in another parish created an actual conflict of interest.

The state relies on general case law on the subject of conflicts of interest. Notably, the Supreme Court case of *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), requires a defendant to 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."

The state points to the capital case of *Hernandez v. Johnson*, 108 F.3d 554 (5th Cir. 12/12/97). In that case, a criminal defendant was represented by an attorney who had previously worked for the district attorney's office in the jurisdiction in question. Counsel had signed documents in past prosecutions against the defendant. The federal appeals court rejected a claim that the prior representation created an actual conflict of interest.

In the petitioner's case, an insufficient claim of conflict of interest is made. His trial attorney served in another jurisdiction and there is no assertion he had any involvement in any prior case of the petitioner. The petitioner fails to cite to any improper relationships. The petitioner entirely fails to suggest an actual conflict of interest.

Claim Four: Mr. Franklin contends that his appellate counsel was ineffective for (1) failing to recognize and address issue of trial counsel's conflict of interest and (2) failing to challenge the validity of alleged transcribed statement

The petitioner's final claim has two parts, both alleging ineffective assistance of appellate counsel. On direct appeal, the petitioner was represented by Margaret Sollars, an experience member of the Louisiana Appellate Project.

The petitioner contends that his appellate attorney was constitutionally deficient in representation because she failed to raise the issue of trial counsel having a conflict of interest and his failing to challenge the transcription of his statement.

As to the first complaint, the petitioner cannot demonstrate a conflict of interest on the part of his trial attorney, as explained above. Appellate counsel's decision not to raise a non-worthy issue does not constitute ineffectiveness. 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). This the petitioner cannot do.

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.

Regarding the challenge to the transcription entered into evidence despite the loss of the original microcassette, counsel on appeal (or at trial) did not raise an issue of its admissibility. However, appellate counsel raised the issue of the trial court's refusal to instruct the jury on the theory that lost evidence, in this case the microcassette, was favorable to the prosecution.

In its opinion on appeal, the Fifth Circuit summarized the background of the missing microcassette:

During trial, several State witnesses testified that the microcassette tape of Defendant's second recorded statement, taken by Detective Cedric Gray on August 18, 2010, could not be located. Detective Gray testified that after taking Defendant's statement, he placed the tape on the secretary's desk for transcription. Lyndi Kimble, a transcription secretary with the Jefferson Parish Sheriff's Office, testified that she transcribed the statement at issue. Detective Gray stated that he reviewed the transcript for inaccuracies and found none. He testified that State's Exhibit 39 was an accurate reflection of what was on the tape.

Franklin, 142 So.3d 302-3.

The petitioner is unable to show the transcript of his statement was improperly introduced at trial. He is also unable to show relief would have been granted if appellate counsel had raised the issue.

CONCLUSION

Under the authority of LSA-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 his claims.

The petitioner had a fair trial with reliable results. He has had judicial review of his convictions and sentence. He has failed to prove the existence of constitutional errors grave enough to warrant post-conviction relief.

The court will deny relief on all claims.

Accordingly,

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

Gretna, Louisiana this 18 day of November, 2015.


JUDGE


#294430

PLEASE SERVE:

DEFENDANT: Willie Franklin, #294458, Louisiana State Penitentiary, Camp D, Falcon 1, Angola, LA 70712

DISTRICT ATTORNEY: Paul Connick, Gail D. Schlosser, Terry Boudreux, 200 Derbigny St., Gretna, LA 70053

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


DEPUTY CLERK
24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON

subscribed