

**SUPREME COURT OF LOUISIANA**

**No. 16-KH-0693**

**STATE EX REL. COREY LYNN GAY**

**v.**

**STATE OF LOUISIANA**

**ON SUPERVISORY WRITS TO THE FIRST  
JUDICIAL DISTRICT COURT, PARISH OF CADDO**

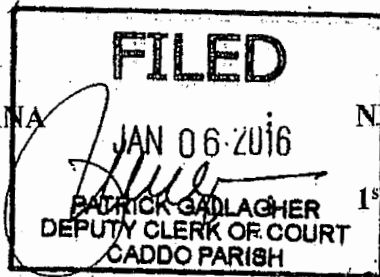
**PER CURIAM:**

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's challenge to the sufficiency of the evidence is repetitive. La.C.Cr.P. art. 930.4. *See also State v. Gay*, 48,832 (La. App. 2 Cir. 2/26/14), 136 So.3d 919, writ denied, 14-0605 (La. 10/24/14), 151 So.3d 600. Finally, relator does not show that a stay of the matter is required, and thus his motion to stay these proceedings is likewise denied. 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 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.

STATE OF LOUISIANA  
VERSUS  
COREY L. GAY



NUMBER: 299083 -- SECTION 5  
1<sup>st</sup> JUDICIAL DISTRICT COURT  
CADDO PARISH, LOUISIANA

RULING

Before the Court is a post-conviction relief application filed December 1, 2015 by Corey Gay ("Gay"). For the reasons stated hereinafter, Gay's application is denied.

On July 11, 2012, Gay was convicted by a jury of distribution of methamphetamine. The State then filed a habitual offender bill of information. Gay was convicted of being a habitual felony offender. On May 6, 2013, Gay was sentenced to life in prison without the benefit of probation, parole or suspension of sentence. Gay appealed unsuccessfully. *State v. Gay*, 48,832 (La. App. 2 Cir. 2/26/14), 136 So.3d 919, writ denied, 2014-0605 (La. 10/24/14), 151 So.3d 600 ("Gay"). Among other things, Gay contended on appeal that it was not proven beyond a reasonable doubt that *he* is the person who perpetrated this crime.

Gay alleges the facts of the instant charge are as follows: on June 24, 2011 a black male sold a substance containing methamphetamine to an undercover police officer in Shreveport, Louisiana; two weeks later the undercover officer identified Gay in a photo lineup as the person who had sold the drugs to him; and Gay was ultimately arrested, charged with and convicted of distribution of methamphetamine.

Gay's application makes two claims of ineffective assistance of counsel: (1) his trial counsel failed to sufficiently subject the prosecution's evidence to adversarial testing, and that such, if done, would have rendered the evidence insufficient; and (2) his trial counsel did not challenge juror Rebecca McCullough ("McCullough") for cause (or peremptorily strike her) even though she made statements in voir dire which, in Gay's opinion, showed that she was prejudiced against him as a person charged with distributing narcotics. Gay asserts that trial counsel's performance in jury selection was thus unconstitutionally substandard.

To succeed on an ineffective assistance of counsel claim, Gay must satisfy the test set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, he must show that: (1) counsel's performance was deficient; (2) the deficiency

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prejudiced him; and (3) counsel's error was so serious that it violated the accused's right to effective assistance of counsel as guaranteed by the Sixth Amendment of the United States Constitution. *Id.* at 686. Gay must prove actual prejudice before relief will be granted. It is not sufficient for the Petitioner to show that the error had some conceivable effect on the outcome of the proceedings. *Id.* at 693. Rather, he must show that, but for counsel's unprofessional errors, there was a reasonable probability the outcome would have been different. *Id.*

**(1) Failure to sufficiently subject prosecution's evidence to adversarial testing.**

Gay makes various factual arguments attacking the sufficiency of the prosecution's evidence against him. He also makes related arguments regarding how his trial counsel should have, but did not, challenge various items of the prosecution's evidence. Gay challenged the sufficiency of the evidence on direct appeal. The Second Circuit held: "[w]e conclude Agent Alkire's testimony alone identifying the defendant as the perpetrator was sufficient evidence upon which the jury could convict the defendant." *Gay*, 927. Gay makes no argument as to what his counsel should have done differently regarding Agent Alkire's testimony. Accordingly, Gay has failed to show that he was prejudiced by his trial counsel's performance.

How counsel could have damaged the viability of Agent Alkire's identification is not explained. Nothing comes to the mind of this Court.

**(2) Failure to challenge the juror.**

During voir dire, Rebecca McCullough ("McCullough"), a prospective juror, made statements which Gay claims showed that she could not be impartial regarding someone accused of distributing methamphetamine. Gay claims that his trial counsel's failure to challenge this juror for cause (or peremptorily strike her) constituted ineffective assistance of counsel. However, Gay simply has not shown that McCullough could or should have been successfully challenged for cause. As shown hereinafter, the statements Gay cites do not show an inability to be fair and impartial on the part of McCullough.

Gay first argues McCullough could not judge his credibility as he would not testify because she said "[y]ou can look at somebody by the way they move, you know, if they're telling the truth or not. Depends on how many times, you know, you asked him the same question stuff. I'm not good at all with this. Ask somebody else." (Transcript, p. 277)

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(emphasis added) This is a non-issue. If he does not testify (as he did not), his credibility need not be evaluated.

Gay also complains that McCullough could not be fair because McCullough said: "I've seen what it's [drugs have] done to my little nephew, so I don't know." (Transcript, 287)

Defense counsel asked her to explain why she did not know whether she could be impartial, and McCullough answered:

Well, my little nephew. I've seen him, you know, with the weed then he went to something stronger. And he worked with my husband for a little while, and we would go pick him up and bring him back. And once he got a paycheck, he was gone. Then after he got his fix, he wanted to come back to work. And, I mean, it's just destroyed him. (Transcript, 289)

Gay's argument, however, ignores McCullough's later testimony. McCullough appears to have been open and honest in voir dire. The Court examined McCullough as follows:

THE COURT: Ms. McCullough, I understand you've got a nephew that started smoking dope and then went on to different other drugs, correct?

McCULLOUGH: Yes, sir.

THE COURT: And your nephew's issues have nothing to do with this case; is that correct?

McCULLOUGH: Yes, sir.

THE COURT: And you can listen to the facts and evidence in this case?

McCULLOUGH: Yes, sir.

THE COURT: And apply the law that I give you to the facts and evidence in this case; is that correct?

McCULLOUGH: Yes, sir.

THE COURT: And you can hold the state to their burden of proof by proving the guilt of the accused beyond a reasonable doubt; is that correct?

McCULLOUGH: Yes, sir.

THE COURT: And you can give the defendant the presumption of innocence; is that correct?

McCULLOUGH: Yes, sir.

THE COURT: In other words, making the state prove all the elements of the crime beyond a reasonable doubt?

McCULLOUGH: Yes, sir.

THE COURT: And you think you could be fair and impartial basis [sic] based upon those -- what we've just discussed?

McCULLOUGH: Yes, sir. (Transcript, 305-306)

Later, the Court and lawyers further questioned McCullough, as follows:

THE COURT: I know earlier when Mr. Nickelson was asking you questions because of the fact that you had some issues with your nephew on drugs, you indicated to us that you may have some doubts as to whether or not you could be a fair and impartial juror. But then when I questioned you, you indicated that you could be a fair and impartial juror.

McCULLOUGH: Yes, sir, I can. Yes, sir, I can. Because he has nothing to do with, you know, what's going on in my life. That's his life. (Transcript, 316)

Finally, there were these exchanges:

THE COURT: And if you're accused of a crime and brought before a jury of your peers, would you want people like you to be on that jury?

McCULLOUGH: Yes, sir.

THE COURT: You think you'd be a fair and impartial juror?

McCULLOUGH: Yes.

MR. NICKELSON: Ms. McCullough, what was the concern that caused you to indicate initially that you did not know whether you could be fair and impartial in this case?

McCULLOUGH: I just don't like drugs and all that. But I can -- I could be a jury.

MR. NICKELSON: What's the nature of your nephew's drug problem?

McCULLOUGH: Well, we don't speak that much, so I don't ask questions to know, you know. But I know when I see him, he's all -- his eyes are all sunk in and, you know, I can tell he's on something bad. But I don't ask.

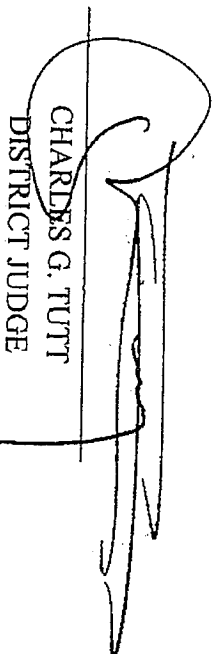
MR. NICKELSON: Do you know what drug he's addicted to?

McCULLOUGH: No, sir. (Transcript, 317)

In light of McCullough's testimony the Court finds that Gay has not shown that it was error for Gay's trial counsel to not challenge McCullough for cause. Indeed, had McCullough been challenged for cause, the Court would have been correct in overruling the challenge.<sup>1</sup> There could be any number of good reasons counsel chose not to exclude McCullough peremptorily. This claim lacks merit and is denied.

Accordingly, this application is **DENIED**. The Clerk of Court is directed to provide a copy of this **Ruling to the District Attorney and Petitioner**.

Signed this 4 day of January, 2016 in Shreveport, Caddo Parish, Louisiana.

  
CHARLES G. TUTT  
DISTRICT JUDGE

<sup>1</sup> In relevant part, Louisiana Code of Criminal Procedure Article 797 (Article 797(2)) provides:

The state or the defendant may challenge a juror for cause on the ground that:

...  
(2) The juror is not impartial, whatever the cause of his partiality. An opinion or impression as to the guilt or innocence of the defendant shall not of itself be sufficient ground of challenge to a juror, if he declares, and the court is satisfied, that he can render an impartial verdict according to the law and the evidence. (emphasis added)

The Court finds the emphasized language to apply with even more force when the juror has not expressed "an opinion or impression as to the guilt or innocence of the defendant," but instead has merely expressed a general dislike for the type of conduct of which the defendant is accused.

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**DISTRIBUTION:**

Corey L. Gay #328263  
Louisiana State Penitentiary  
CBA W/L  
Angola, LA 70712

Caddo Parish District Attorney  
501 Texas Street, 5<sup>th</sup> Floor  
Shreveport, LA 71101

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