12/15/2017 "See News Release 063 for any Concurrences and/or Dissents."

SUPREME COURT OF LOUISIANA

No. 16-KP-1135

STATE OF LOUISIANA

v.

QUOC-KHOI A. PHAM

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

PER CURIAM:

Denied. Relator fails to show that 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). As to the remaining claim, relator fails to satisfy his post-conviction burden of proof. La.C.Cr.P. art. 930.2. 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. 10-895 **DIVISION "E"**

STATE OF LOUISIANA

VERSUS

QUOC-KHOI PHAM

FILED: 3/3/16 **DEPUTY CLERK**

ORDER

This matter comes before the court on petitioner's **APPLICATION FOR POST-CONVICTION RELIEF, STAMPED AS FILED DECEMBER 4, 2015, and STATE'S RESPONSE, STAMPED AS FILED JANUARY 20, 2016.**

On December 7, 2011, the petitioner was convicted of LSA-R.S. 14:31, manslaughter. On December 13, 2011, the court sentenced him to 35 years imprisonment at hard labor. January 31, 2013, the court sentenced him to life imprisonment. His conviction was affirmed on appeal. *State v. Pham*, 12-KA-635 (La. App. 5 Cir. 5/16/13), 119 So.3d 202; writ denied, 2013-K-1398 (La.12/6/13) 129 So.3d 531.

Petitioner, through counsel, files an application for post-conviction relief, alleging the following claims:

1. Ineffective assistance of counsel at trial when counsel failed to move to suppress improperly seized evidence.
2. Conviction obtained was result of illegally seized evidence.
3. Ineffective assistance of counsel at trial as to the testimony and statements of Darius Edmonson.

Claim #1

It is clear that the petitioner has a Sixth Amendment right to effective legal 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 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, 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. Effective counsel, however, 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.

Mindful of controlling federal and state jurisprudence, this court now turns to the specific claims of ineffective assistance made in the instant application and argued in the petitioner's memorandum in support.

Petitioner claims that counsel was ineffective for failure to move to suppress evidence receive from defendant's cell phone, including digital information consisting of text messages and phone records from Sprint Communications.

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The court finds no merit to this claim. As the State submits in its response, the defendant did not have a reasonable expectation of privacy in the call detail records associated with his phone number. (See *State v. Bone,* 12-34 (La. App. 5 Cir. 9/11/12); 107 So.3d 49, 63-4, *writ denied,* 12-2229 (La. 4/1/13), 110 So.3d 574.) The State properly obtained the records from Sprint by obtaining a court order. (See State's trial exhibit 25, attached to State's Response as Exhibit A.) As to the text messages, no warrant was necessary as defendant signed a consent to search his phone. (See State's trial exhibit 47, attached to State's Response as Exhibit C.) A consent to search is an exception to the warrant requirement when the consent is freely and voluntarily given by a person who possesses common authority over or other sufficient relationship to the premises or effects sought to be inspected. *State v. Cambre*, 04-1317 (La. App. 5 Cir. 4/26/05), 902 So. 2d 473, 482 *writ denied,* 2005-1325 (La. 1/9/06), 918 So. 2d 1039 (citing: *United States v. Matlock,* 415 U.S. 164, 171, 94 S.Ct. 988, 993, 39 L.Ed.2d 242 (1974); *State v. Gomez,* 01–717 (La.App. 5th Cir.11/27/01), 802 So.2d 914, 918.) Defendant's valid consent to search is an exception to the warrant requirement. The court notes that petitioner does not contest or challenge his consent. Any motion to suppress this evidence would have been futile. Petitioner fails to prove any deficiency in counsel's performance, or any prejudice resulting.

Claim #2

The court finds no merit to this claim, as petitioner fails to prove that any evidence was seized illegally. As noted above, petitioner had no expectation of privacy in the call detail records associated with his phone number. The State properly obtained a court order to obtain such information. Furthermore, defendant gave consent to search his cell phone, as evidenced by the signed consent form.

Under 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. Petitioner fails to prove his burden as to this claim.

Claim #3

Petitioner claims ineffective assistance of counsel for counsel's failure to have witness Darius Edmonson's Grand Jury testimony transcript and statement to Jefferson Parish Sheriff's Office admitted into evidence at trial. Petitioner argues that the failure to introduce the police statement and transcript in its entirety at trial affected the witness's credibility, and caused his credibility to be diminished by taking select statements out of context. He further argues that Edmonson's statements, observations, and credibility were a determining factor at trial.

As the State points out in its response, and as noted by the Fifth Circuit Court of Appeal, the State sought to use Edmonson's Grand Jury testimony at trial for impeachment purposes regarding whether he saw the victim with a gun, however, the State did not use the Grand Jury testimony. The Grand Jury Testimony was not admitted into evidence nor published to the jury. *Pham*, 119 So.3d at 215-16.

Furthermore, Grand Jury proceedings are strictly secret in nature. LSA-C.Cr.P. art. 434, addresses secrecy of the Grand Jury meetings:

> A. Members of the grand jury, all other persons present at a grand jury meeting, and all persons having confidential access to information concerning grand jury proceedings, shall keep secret the testimony of witnesses and all other matters occurring at, or directly connected with, a meeting of the grand jury. However, after the indictment, such persons may reveal statutory irregularities in grand jury proceedings to defense counsel, the attorney general, the district attorney, or the court, and may testify concerning them. Such persons may disclose testimony given before the grand jury, at any time when permitted by the court, to show that a witness committed perjury in his testimony before the grand jury. A witness may discuss his testimony given before the grand jury with counsel for a person under investigation or indicted, with the attorney general or the district attorney, or with the court.
>
> B. Whenever a grand jury of one parish discovers that a crime may have been committed in another parish of the state, the foreman of that grand jury, after notifying his district attorney, shall make that discovery known to the attorney general. The district attorney or

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> the attorney general may direct to the district attorney of another parish any and all evidence, testimony, and transcripts thereof, received or prepared by the grand jury of the former parish, concerning any offense that may have been committed in the latter parish, for use in such latter parish.
> C. Any person who violates the provisions of this article shall be in constructive contempt of court.

Petitioner fails to provide under what basis of law or circumstance counsel could be able to introduce testimony of the Grand Jury proceedings at trial. Petitioner fails to prove any deficiency in counsel's performance regarding the failure to introduce of Grand Jury transcripts, or prejudice resulting. The court finds no merit to this claim.

Regarding the introduction of the entire police statement, this underlying issue was raised at Fifth Circuit Court of Appeal:

> Next, Defendant argues that Edmonson's entire statement, not just the portions that were used for impeachment purposes, should have been admitted into evidence. First, Edmonson's transcribed police statement was never admitted into evidence. It was through Edmonson's trial testimony that he was impeached with portions of his statement. Defense counsel never objected to the admission or use of the portions of Edmonson's statement for impeachment purposes. Rather, Defendant objected to the denial of his request that the entire statement be admitted. Defendant argued that Edmonson's entire statement should have been admitted under the principle of completeness, so that the jury could have also seen the portions of Edmonson's statement that corroborated his testimony.
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> *State v. Pham*, 119 So. 3d at 220.

The Fifth Circuit addressed the issue and found no prejudice:

> The record in this case evidences that Edmonson was properly impeached with his prior inconsistent police statement. Edmonson admitted that he gave a false statement to the police, identified the statement taken by Detective Burke, was presented with the conflicting account of events, and was given a chance to explain or deny the inconsistencies.
>
> Moreover, as in *Jones, supra,* only a small part of Edmonson's statement was used for impeachment purposes. Defendant has failed to establish how the denial of the utilization of Edmonson's entire statement caused him prejudice. Defense counsel was given the opportunity to rehabilitate Edmonson on cross-examination regarding any explanation or consistencies contained in his statement as compared to his trial testimony. Additionally, prior to denying Defendant's request to admit Edmonson's entire statement, the trial court noted that Defendant had the opportunity to question Edmonson about the portions of his statement that corroborated his trial testimony. No partiality was shown to the State. Furthermore, it is noted that Edmonson testified prior to Defendant putting on his case, thus, defense counsel was permitted to utilize Edmonson's statement in his case as he deemed fit and could have elicited testimony that showed the substance of Edmonson's police statement was largely consistent with his trial testimony.[26] Although the State bears the burden of proof at trial, it is noted that Defendant did not call any witnesses.
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> **32 Accordingly, we find that Defendant suffered no prejudice by the trial court's denial of his request to introduce the entirety of Edmonson's statement into evidence.

State v. Pham, 119 So. 3d at 222 .

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Likewise, petitioner in this application fails to prove any deficiency in counsel's performance, or any prejudice resulting from counsel's failure to introduce the police statement in its entirety. The court finds no merit to this claim.

Under 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 presented sufficient evidence in support of any of these claims, and thus has not met his burden.

Under LSA-C.Cr.P. art. 929, if the court determines that the factual and legal issues can be resolved based upon the application and answer, and supporting documents, the court may grant or deny relief without further proceedings.

Accordingly,

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

Gretna, Louisiana this 3rd day of March, 2016.

JUDGE

PLEASE SERVE:

Petitioner: Quoc-Khoi Pham, please serve through defense counsel:

Defense Counsel: Kevin Boshea, 2955 Ridgelake Drive, Suite 207, Metairie, LA 70002

e Terry Boudreux, Gail Schlosser, District Attorney's Office, 200 Derbigny St., Gretna, LA 70053

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ON FILE IN THIS OFFICE.
DEPUTY CLERK
24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, LA

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