

SUPREME COURT OF LOUISIANA

No. 15-KH-1358

STATE EX REL. WILLIAM ANDERSON

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). Relator's sentencing claims are not cognizable on collateral review. La.C.Cr.P. art. 930.3; State ex rel. Melinie v. State, 93-1380 (La. 1/12/96), 665 So.2d 1172. Relator's remaining claims are repetitive and/or unsupported. La.C.Cr.P. art. 930.2; La.C.Cr.P. art. 930.4. 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.

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TWENTY FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON
STATE OF LOUISIANA

NO. 09-2434

DIVISION "1"

STATE OF LOUISIANA

VERSUS

WILLIAM ANDERSON

FILED: 4-27-15

Janet Ryan
DEPUTY CLERK

ORDER

This matter comes before the court on the petitioner's APPLICATION FOR POST-CONVICTION RELIEF, STAMPED AS FILED DECEMBER 12, 2014, AND THE STATE'S RESPONSE, STAMPED AS FILED APRIL 20, 2015.

On February 21, 2014, the petitioner was convicted of two counts of sexual battery, a violation of LSA-R.S. 14:43.1, oral sexual battery, a violation of LSA-R.S. 14:43.3, and molestation of a juvenile, a violation of LSA-R.S. 81.2. This court sentenced him to fifteen years imprisonment at hard labor on the latter convictions. His convictions were affirmed in original appeal. *State v. Anderson*, 10-779 (La.App. 5 Cir. 3/27/12); 91 So.3d 1080.

However, due to the trial court's failure to delay sentencing for twenty-four hours, the matter was remanded for re-sentencing. After disposing of defense motions, the trial court sentenced the defendant to ten years on the first counts, and to fifteen on the two sexual battery convictions.

The petitioner again appealed. The Fifth Circuit rejected both counseled and pro arguments and denied further relief, as did the Supreme Court of Louisiana. *State v. Anderson*, 12-869 (La. App. 5 Cir. 6/27/2013), 121 So.3d 119 writ denied, 2013-KO-1861 (La. 2/21/2014), 133 So.3d 679.

The petitioner, pro se, now files an application for post-conviction relief, alleging the following thirteen claims, some with sub-parts:

1. 6th Amendment Violation: Ineffective Assistance of Counsel
 - a. Ineffective assistance-pre-trial: failed to object to bill of information
 - b. Failed to prepare for trial, argue motions, investigate, and subpoena,
 - c. Trial ineffectiveness: failed to "object to and proffered hearsay testimony,"
 - d. Failed/refused to present exculpatory evidence,
 - e. Failed to formulate any defense to elements of crime; allowed constructive amendment to the bill of information, on remand refused to assist client,
2. Trial court allowed constructive amendment of bill of information,
3. Constitutional violation: ex post facto violation
4. Fifth Amendment violation: prosecutorial misconduct:
 - a. Falsified notice of intent,
 - b. Falsified bill of information,
 - c. Inflamed and misled jurors,
5. Fifth and fourteenth amendment violations: prosecutorial misconduct, equal protection violation,
6. Fourteenth amendment violation: judicial constitutional violation of equal protection,
7. Fifth amendment violation: double jeopardy in sentencing,
8. Constitutional violation: ex post facto violation in sentencing,
9. Constitutional violation of Fifth amendment right to remain silent and right against self-incrimination,
10. Constitutional violation of Sixth amendment right to cross-examine,
11. Sixth amendment violation: ineffective assistance of appellate counsel,
12. Abuse of discretion: caused Constitutional ex post facto violation, "shall means must,"
13. Constitutional violation: double jeopardy, Count 1 Sexual Battery and Count 2 Sexual

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AVOUELLES PARISH
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Sheriff's Return
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Pursuant to an order to raise any procedural objections or to respond on the merits, the state has responded. The court will issue a response on each claim in turn and issue a final ruling to the application.

ANALYSIS OF CLAIMS

Claim One: 6th Amendment Violation: Ineffective Assistance of Counsel

The beginning of analysis on this large, all-encompassing claim is to review the relevant case law. A criminal defendant 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 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.

Mindful of controlling federal and state jurisprudence, this court now turns to petitioner's specific claims of ineffective assistance of counsel. The petitioner's first specific claim is that his attorney, Jarmel Williams, was ineffective by failing to object to a defective bill of information. His theory is that the bill was defective in using the same elements for different offenses and in failing to list that force was used in the crimes.

This theory was considered and rejected on direct appeal. The Fifth Circuit addressed sufficiency of evidence at length and specifically rejected the petitioner's pro se claim of double jeopardy, on the merits. The Court found "The record is more than sufficient to show that the defendant committed separate and distinct offenses of sexual battery, oral sexual battery, and molestation of a juvenile against L.L.P." *Anderson*, at 1090.

The petitioner's second claim is that his attorney failed to prepare for trial, to argue motions, to investigate, or to subpoena witnesses. The state addresses the specific contentions, pointing out that trial counsel did make arguments, although unsuccessful, in challenging the application of LSA-C.E. art. 412.2 (allowing for admission of other sexual offense evidence) as applied to the petitioner's offense, which occurred from 1995 through 1997. The case law is overwhelming that the application of C.E. 412.2, adopted in 2001, does not violate the constitution.

The petitioner's next complaint is that his trial attorney failed to persuasively argue that LSA-C.Cr.P. art. 571.1 barred his prosecution and that therefore he suffered an ex post facto application of law. The Fifth Circuit on direct appeal rejected the argument that petitioner's prosecution violated ex post facto protections. "*Anderson*, 91 So.3d at 1088.

The petitioner next argues that his attorney did not call certain witnesses. In all post-conviction proceedings, the burden of proof is on the petitioner. LSA-C.Cr.P. 930.2. The petitioner only identifies two such witnesses, "the victim's mother" and Keith Harris. Even in their case, he fails to indicate what they would testify to if they had been called as witnesses. As the state mentions, he fails to attach affidavits from any witnesses. The court concludes this claim has not been established and that the petitioner has not overcome a strong presumption that counsel was effective in his advocacy and that his decisions of what witnesses to call were matters of trial strategy.

The petitioner next argues that his attorney failed to make certain hearsay objections. In no case does the petitioner establish that these objections would have been sustained. What objections, if any, are to be raised is a clear example of trial strategy. The court will defer to trial counsel's judgment in this regard.

In a related claim, the petitioner argues his attorney failed to introduce a CD jacket that he contends would have shown the victim was in a flooded area on a relevant date. As before, this is entirely speculative. Furthermore, the choice of introducing evidence is a matter for the

sound judgment of trial counsel. The court also finds the failure to attach a copy of the CD or its jacket a deficiency in petitioner's claim. The petitioner has utterly failed to establish the results of his trial would have been different had this evidence been submitted.

In his final claim relating to ineffective assistance of counsel, the petitioner argues his attorney failed to argue the elements of the crime were not proven. This claim is belied by the Fifth Circuit's finding of sufficient evidence on all claims. The petitioner also argues his attorney failed to assist him on remand. This claim is belied by the record, which contains a Motion for Arrest of Verdict, a Motion for New Trial and Alternatively to Arrest the Judgment, and a Motion for Post Judgment Verdict of Acquittal, a Motion for New Trial, a Motion to Reconsider Sentence.

The court finds that the petitioner received quality legal advocacy. He has not met his burden of proof in this application for post-conviction relief.

Claim Two: Trial court allowed constructive amendment of bill of information

The petitioner complains that the trial court allowed a constructive amendment of the bills of information. He further alleges the trial court allowed his conviction to be based on an uncharged element.

The state raises procedural objections. First, the state argues this complaint is not one of the enumerated and exclusive grounds for relief set forth in LSA-C.Cr.P. art. 930.3. The court agrees and finds this claim barred for post-conviction relief.

Furthermore, the state also contends this claim is barred by application of LSA-C.Cr.P. art. 930.4 (A) which bars post-conviction relief, unless required in the interest of justice, for any claim for relief which was fully litigated in an appeal. The complaints made here regarding the bill of information were reviewed on appeal and thus have been reviewed by a higher court. The court finds the procedural bar of LSA-C.Cr.P. art. 930.4(A) to apply to this claim.

Claim Three: Constitutional violation: ex post facto violation

The petitioner complains that his conviction violates Constitutional ex post facto protections. The Fifth Circuit previously addressed ex post facto issues, thus giving petitioner appellate review of this claim.

This claim is barred as repetitive by application of LSA-C.Cr.P. art. 930.4.

Claim Four: Fifth Amendment violation: prosecutorial misconduct:

The court finds this claim of issues that are not newly discovered to be procedurally barred from review by application of LSA-C.Cr.P. art. 930.4(B): "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."

It is not fair, and is not permitted by law, to bypass review of known claims from the trial court's judgment. The trial court prior to conviction would be in the best position to correct errors, if such were proven.

This court, in conducting post-conviction review, finds this claim barred by application of LSA-C.Cr.P. art. 930.4(B).

*Claim Five: Fifth and fourteenth amendment violations:
prosecutorial misconduct, equal protection violation*

This claim is closely related to the fourth claim addressed above. Specifically, the petitioner contends that he was prosecuted for sexual crimes when the state knew the juvenile victim consented. As shown in his appeal, courts have previously found that the evidence against him was sufficient to convict.

The court finds that this claim fails to state a basis for relief under LSA-C.Cr.P. art. 930.3. Furthermore, as with the related claims made earlier, this contention was not presented to the trial court. Thus application of LSA-C.Cr.P. art. 930.4(B) bars further review.

Claim Six: Fourteenth amendment violation: judicial constitutional violation of equal protection

The petitioner's complaint is that he was denied equal protection of law in sentencing. He contends his sentences are excessive. The Fifth Circuit Court of Appeal disagreed, finding his

maximum sentences were not excessive. *State v. Anderson*, 121 So.2d 119, 128 (La.App. 5 Cir. 6/27/13).

Because the merits of this claim have been considered by an appellate court, review by this district court is barred from post-conviction relief by LSA-C.Cr.P. art. 930.4(D). In addition, sentencing claims are not reviewable in post-conviction applications, and thus the claim is also barred under LSA-C.Cr.P. art. 930.3.

Claim Seven: Fifth amendment violation: double jeopardy in sentencing

The court finds that the petitioner should have raised a double jeopardy claim prior to conviction. Thus belated and untimely review is barred by application of LSA-C.Cr.P. art. 930.4(B).

Furthermore, this claim of double jeopardy has been carefully considered and expressly rejected by the Court of Appeal. Further repetitive review is thus barred by application of LSA-C.Cr.P. art. 930.4(A).

Claim Eight: Constitutional violation: ex post facto violation in sentencing

As noted above, the petitioner bypassed the district court by not bringing such a claim forward in the proceedings prior to conviction. This claim is barred by application of LSA-C.Cr.P. art. 930.4(B).

Claim Nine: Constitutional violation of Fifth amendment right to remain silent and right against self-incrimination

The state asserts this claim, which was raised in the trial court, should have been raised on direct appeal. Since that was not done, the state argues the claim is barred by application of LSA-C.Cr.P. art. 930.4(C).

Significantly, the petitioner has had two appeals. This claim should have been fairly presented to the Court of Appeal. The court finds article 930.4(C) of the post-conviction statutes bars further review.

Claim Ten: Constitutional violation of Sixth amendment right to cross-examine

The state asserts this claim, which was raised in the trial court, should have been raised on direct appeal. Since that was not done, the state argues the claim is barred by application of LSA-C.Cr.P. art. 930.4(C).

As noted, the petitioner has had two appeals. This claim should have been, but was not, presented to the Court of Appeal. The court finds article 930.4(C) of the post-conviction statutes bars further review.

Claim Eleven: Sixth amendment violation: ineffective assistance of appellate counsel

The petitioner argues a long list (a through q) of alleged deficiencies on the part of his appellate counsel, Bruce Whittaker.

As in the case of allegations of ineffective assistance of trial counsel, there is an enormous body of law concerning appellate representation. 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, had the issue been raised. *United States v. Phillips*, 210 F.3d 345, 350 (5 Cir. 2000).

The court finds no merit to any of petitioner's claims of ineffective appellate counsel. Appellate counsel is limited to the record and may not create issues or facts. Furthermore, to perform effectively, counsel is supposed to determine the most valid claims, not to bring every possible issue before the Court of Appeal.

Of great significance is the fact that in connection with the two appeals, the petitioner himself filed three supplemental briefs. Thus the petitioner had an opportunity, which he exercised, to file any claim he thought desirable. The petitioner had the benefit of counsel AND of raising any other claims pro se. The fact that the petitioner did not receive relief on the pro se claims conclusively demonstrates that, had counsel filed such claims, they would not have been successful. Thus it is abundantly clear that the petitioner has not demonstrated prejudice from counsel's advocacy.

The court finds petitioner's allegations entirely defective and failing to justify relief. The petitioner fails to prove any claims that appellate counsel should have presented on appeal that would have changed the outcome and caused the appellate court to grant relief. The court denies all portions of this claim on the merits.

*Claim Twelve: Abuse of discretion: caused
Constitutional ex post facto violation, "shall means must"*

The petitioner again urges an ex post facto violation relative to amendment of the time limitation for sex offenses contained in LSA-C.Cr.P. art. 571.1.

The petitioner's contention was reviewed on direct, original appeal. The Fifth Circuit Court of Appeal expressly rejected this claim, finding that the prescriptive period had been extended and that the institution of prosecution in the petitioner's case was timely. *State v. Anderson*, 91 So.2d at 1086.

In connection with his second appeal, the Fifth Circuit reiterated their holding and basis for denial. The Court noted that the defendant "has failed to present any new arguments, jurisprudence, or evidence to warrant reconsideration of the same issue . . ." *State v. Anderson*, 121 So.3d at 124.

The petitioner asks this court to grant him relief on a legal theory twice rejected by the Court of Appeal. Post-conviction law does not permit such relief. This claim will be denied pursuant to LSA-C.Cr.P. art. 930.4(A).

*Claim Thirteen: Constitutional violation: double jeopardy,
Count 1 Sexual Battery and Count 2 Sexual Battery*

The final claim made is that the petitioner's convictions for two counts of sexual battery violate constitutional protections against double jeopardy.

The petitioner's double jeopardy claim was raised on direct appeal. The Fifth Circuit Court of Appeal found no merit to it, however, specifically noting that the "record is more than sufficient to show that the defendant committed separate and distinct offenses of sexual battery, oral sexual battery, and molestation of a juvenile against L.L.P." *State v. Anderson*, 91 So.3d at 1088.

This claim was fully litigated on appeal. Thus application of LSA-C.Cr.P. art. 930.4(A) bars further review and the court will deny relief accordingly.

CONCLUSION

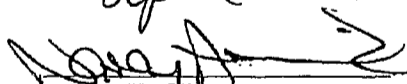
The petitioner received a fair trial with accurate results. He received thorough judicial review on many issues in two direct appeals. He was represented by competent counsel prior to and during trial and on both appeals. In all claims raised, he has failed to meet his burden of proof under LSA-C.Cr.P. art. 930.2.

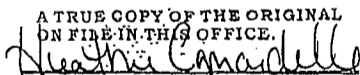
Post-conviction relief will be denied with prejudice, on all claims. Because the court has resolved the matter based on the record and the pleadings, the court further finds that an evidentiary hearing is not warranted.

Accordingly,

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

Gretna, Louisiana this 27th day of April, 2015.


JUDGE

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

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

PLEASE SERVE:

Defendant: William Anderson, DOC # 547436, A.V.C., 1630 Prison Road, Cottonport, LA 71327

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

Custodian: Warden, Avoyelles Correctional Center, 1630 Prison Road, Cottonport, LA 71327