

12/16/2016 "See News Release 076 for any Concurrences and/or Dissents."

SUPREME COURT OF LOUISIANA

No. 15-KH-1928

STATE EX REL. CALVIN J. BRYANT

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). 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 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.

TWENTY FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON
STATE OF LOUISIANA

NO. 11-781

DIVISION "C"

STATE OF LOUISIANA

VERSUS

CALVIN J. BRYANT

FILED: June 23, 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 DECEMBER 29, 2014, AND THE STATE'S RESPONSE, STAMPED AS FILED JUNE 8, 2015.

On November 16, 2011, the petitioner was convicted after trial by jury of forcible rape, a violation of LSA-R.S. 14:42.1. The court sentenced him to twenty years imprisonment at hard labor. The state filed a multiple offender bill and, after a contested hearing, the court found the petitioner to be a four-time felony offender. He was resented to life in prison. The petitioner's conviction and sentence were affirmed on direct appeal. *State v. Bryant*, 12-591 (La. App. 5 Cir. 2/21/2013), 110 So.3d 1191.

Post-conviction Claims

The petitioner filed a timely application for post-conviction relief, alleging ineffective assistance of counsel at trial and on appeal. The state has responded on the merits to these claims.

Claim One: Petitioner's Sixth Amendment Right to effective assistance of trial counsel was violated where counsel:

- (a) Failed to inform petitioner of a favorable plea bargain offer;
- (b) Failed to object to the prosecutor's introduction of evidence that prejudicial effect outweighed its probative value;
- (c) Failed to object to the prosecutor's improper appeal to the emotions, sympathy, and prejudice of the jury;
- (d) Failed to object to the prosecutor's improper vouching for the credibility of victim and expressing opinion concerning petitioner's guilt; and
- (e) Failed to move for a mistrial, or alternatively ask the court to admonish the jury where the prosecutor openly used petitioner's silence as substantive evidence of guilt.

Claim Two: Petitioner's Sixth Amendment right to effective assistance of appellate counsel was violated where counsel failed to raise assignment of error on appeal that the trial court erroneously closed the courtroom during pre-trial motion hearing.

Analysis

Five of the petitioner's six claims are that his trial attorney was constitutionally ineffective. There is an enormous body of case law on this commonly-raised issue.

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

ISSUED C.C. ORDER

DATE 6/24/15

Cherie G. Bell
DEPUTY CLERK

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 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.

With the general law in mind, the court will turn to the specific instances of ineffective assistance raised against defense attorney Joseph Perez.

Claim One A: Petitioner's Sixth Amendment Right to effective assistance of trial counsel was violated where counsel failed to inform petitioner of a favorable plea bargain offer.

In the portion of the transcript the petitioner quotes, the prosecutor states there had never been any formal offers made to the defense. She states there had been discussions, but no offers. (Transcript of June 1, 2011, p. 2).

The burden of proof in all post-conviction cases is on the petitioner. LSA-C.Cr.P. art. 930.2. The petitioner cannot meet this burden on this issue. The transcript establishes that no formal offers were made and therefore, as a factual matter, trial counsel was not ineffective in not relating an offer never made.

Claim One B: Petitioner's Sixth Amendment Right to effective assistance of trial counsel was violated where counsel failed to object to the prosecutor's introduction of evidence that prejudicial effect outweighed its probative value.

The specific contention here is that the prosecutor asked the victim why she did not have anal sex with the petitioner in the context of their previous consensual sexual relationship. The victim, who was 23, testified that she had been anally raped as a twelve-year old and did not participate in anal sex. (Transcript of November 15, 2011, p. 173).

The court finds this argument wholly without merit. There is no possibility the jury was confused between the past action by a different perpetrator and the crime for which the petitioner was on trial. There was no reason for trial counsel to raise an objection. Furthermore, the court affords counsel wide discretion in choosing where to raise objections. This argument is unpersuasive and the court will deny relief.

Claim One C: Petitioner's Sixth Amendment Right to effective assistance of trial counsel was violated where counsel failed to object to the prosecutor's improper appeal to the emotions, sympathy, and prejudice of the jury.

In this argument, related to the earlier claim, the petitioner contends that his attorney should have objected to the state's appeal to sympathy in closing argument. The remarks in question relate to the victim's rape at age twelve.

As discussed above, the evidence of the victim's childhood rape was admitted for a proper purpose, that is, to establish the victim did not engage in consensual anal sex with the defendant in their relationship. There was no confusion relating to responsibility of the crime for which petitioner was on trial.

Claim One D: Petitioner's Sixth Amendment Right to effective assistance of trial counsel was violated where counsel failed to object to the prosecutor's improper vouching for the credibility of victim and expressing opinion concerning petitioner's guilt.

The specific contention in this claim is that the prosecutor improperly vouched for the victim and his defense counsel failed to object. The petitioner argues that counsel's remarks in closing argument should be confined to the evidence or lack of evidence, or to conclusions of fact, or to applicable law. LSA-C.Cr.P. art. 774.

As the state points out in its response, the victim testified to an unrelated childhood rape, thus a reference to that rape was part of the evidence at trial. Furthermore, the defendant gave a pre-trial statement.

Claim One E: Petitioner's Sixth Amendment Right to effective assistance of trial counsel was violated where counsel failed to move for a mistrial, or alternatively ask the court to admonish the jury where the prosecutor openly used petitioner's silence as substantive evidence of guilt

The petitioner argues that the prosecutor made impermissible references to his silence after arrest and that his attorney failed to object.

In that most famous of all Supreme Court cases, *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, the High Court established a requirement that police inform an arrestee of specific fundamental constitutional rights. It is certainly true, as the petitioner states in brief, that the prosecution may not impeach a defendant with post-arrest silence. *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976).

A review of the trial transcript establishes that there was no *Doyle* violation, however. The police gave the required *Miranda* warnings to the petitioner. The petitioner voluntarily waived his *Miranda* rights and spoke to the police. He told police, as he told the jury at trial, that he engaged in consensual sex with the victim.

There was no basis to exclude the petitioner's voluntary statements to the police. There was no improper reference by the state to the petitioner's post-arrest silence. For this reason, defense counsel had no reason to object during trial. Furthermore, the petitioner has not established that if his attorney had objected the results of the proceedings would have been different. The petitioner has not established either prong of the *Strickland* test.

Claim Two: Petitioner's Sixth Amendment right to effective assistance of appellate counsel was violated where counsel failed to raise assignment of error on appeal that the trial court erroneously closed the courtroom during pre-trial motion hearing.

In his final claim, the petitioner next argues that his appellate attorney, Bruce G. Whitaker, was ineffective for failing to argue that the courtroom was improperly closed during a pre-trial hearing and that therefore, his right to public trial was violated. Factually, the record establishes that the trial court closed the courtroom, not in the trial, but in a pre-trial motion in limine to exclude the victim's testimony of a childhood rape.

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, 105 S.Ct. 830, 83 L.Ed.2d 82 (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, 103 S.Ct. 3308, 77 L.Ed.2d 987 (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). Petitioner fails to do so.

The petitioner fails to prove any deficiency on the part of his very experienced appellate attorney. Counsel's brief on appeal raised worthy issues. The petitioner fails to prove any prejudice resulted from counsel's strategic choices of issues, as he does not prove that he would have been successful at arguing this claim on appeal.

Accordingly,

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

Gretna, Louisiana this 23rd day of June, 2015.

JUDGE

PLEASE SERVE:

Defendant: Calvin J. Bryant, DOC # 396372, Louisiana State Penitentiary, Hickory 1, Angola, LA 70712

State: Terry Boudreux, Thomas J. Butler, District Attorney's Office, 200 Derbigny St., Gretna, LA 70053