04/08/2016 "See News Release 019 for any Concurrences and/or Dissents."

SUPREME COURT OF LOUISIANA

No. 15-KH-0233

STATE EX REL. DARYL SMITH

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 trial and appellate 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 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. 10-5168 DIVISION "N"

STATE OF LOUISIANA

VERSUS

DARYL SMITH
a.k.a. DARYL VINET

FILED: 10/8/14

DEPUTY CLERK

ORDER

This matter comes before the court on petitioner's **APPLICATION FOR POST-CONVICTION RELIEF, STAMPED AS FILED JULY 31, 2014, AND THE STATE'S RESPONSE, STAMPED AS FILED SEPTEMBER 29, 2014.**

The petitioner was convicted by jury of being a felon in possession of a weapon, a violation of LSA-R.S. 14:95.1 (count #1), possession with the intent to distribute heroin, a violation of LSA-R.S. 40:966A, (count #4), and possession with the intent to distribute cocaine, a violation of LSA-R.S. 40:967A, (count #5).

On December 9, 2010, the court sentenced petitioner on count #1 to 15 years imprisonment at hard labor, on count #4 to 30 years, and on count #5 to 30 years, all to run concurrently. The sentences were also ordered to run concurrently with case # 06-1031, and 06-2016. Petitioner pled guilty to the multiple bill as a fourth felony offender as to counts #4 and #5, and the court re-sentenced him on each count to 30 years, to run concurrently with count #1, and also cases 06-1031 and 06-2016.

The petitioner appealed. His convictions and sentences were affirmed on direct appeal. *State v. Smith,* 12-247 (La. App. 5 Cir. 12/11/12), 106 So.3d 1048; *writ denied, State ex rel. Smith v. State*, 2013-494 (La. 7/31/13), 118 So.3d 1120.

The petitioner has filed an application for post-conviction relief, raising four issues, specifically:

1. Ineffective assistance of trial counsel by failure to interview, investigate, and prepare a defense for the preliminary investigation and trial,
2. Ineffective assistance at trial by failure to hold the state to the adversarial testing, related to confrontation and probable cause,
3. Ineffective assistance at trial by failure to present an entrapment defense, and
4. Ineffective assistance of appellate counsel by failure to present appealable issues.

Law of Ineffective Assistance of Counsel

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.

Exhibits "A"

Furthermore, there is a strong presumption that counsel's performance is within the wide range of effective representation. 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 the specific claims of ineffective assistance made in petitioner's application and argued in the memorandum in support.

Claim One: Ineffective assistance of trial counsel by failure to interview, investigate, and prepare a defense for the preliminary investigation and trial

Petitioner first claims that defense counsel, Michael Kennedy, was not prepared at the preliminary hearing and at trial. Specifically, the petitioner asserts that his sister should have been interviewed and further that she would have been able to corroborate his claim of threats from the police, thus rendering his confession involuntary. The petitioner attaches an affidavit (Exhibit J) from his sister in which she states the police told her brother that everyone in the house would go to jail unless he admitted ownership of the drugs, weapons, and cash. She states her brother told her he had given her cell phone number to his attorney but that she never heard from the attorney.

Notably, the petitioner's signed Waiver of Rights (introduced as state's exhibit 1) asserts that he had not been threatened or pressured or promised anything to confess. Detective Anclede testified that no promises or threats were made. Detective Anclede testified that the petitioner "took possession of everything" and advised that no one else knew anything and that all the contraband was his. Thus even had Petitioner's sister testified, the trier-of-fact would have had sufficient evidence to conclude the admission was entirely voluntary.

From the circumstances of the arrest and petitioner's admissions, as reflected in trial testimony, defense counsel made a strategic decision to counter the state's case by introducing support that the drugs were possessed by the petitioner for his personal use. Counsel's strategic decisions are inappropriate considerations for post-conviction relief. *State v. LaCaze*, 99-0584 (La. 1/28/02), 1082.

Petitioner fails to prove any prejudice in counsel's performance. The petitioner admitted ownership of the cocaine, heroin, guns, and cash. These items were found in the room he was sleeping in. The jury heard evidence that the drug dog alerted on drugs in the petitioner's room but nowhere else in the house. The guns and cash were found only in the petitioner's room; the drugs were found in his clothing. The jury heard the defense theory that the drugs were for individual, personal use, not distribution. Despite that theory, the evidence was sufficient to convict and the petitioner has not proven that the results of his trial were unreliable.

The petitioner has not met his burden of proof under *Strickland*. He has not shown that counsel's performance was deficient, nor has he shown the results of his trial would have been different if counsel had performed differently.

Claim Two: Ineffective assistance at trial by failure to hold the state to the adversarial testing

Petitioner contends that his trial attorney was ineffective and that he failed to hold the state to adversarial testing by virtue of failing to confront the confidential informant or sufficiently challenging the search warrant, which he asserts was based on the informant's disclosure.

The record reveals that defense counsel did in fact challenge the state's case. During the preliminary hearing, defense counsel inquired if the basis for the search warrant was a confidential informant (CI). Detective Anclede testified that a reliable CI was used in this investigation. Anclede further testified that a controlled buy of drugs was set up with marked funds. Detective Anclede personally witnessed a hand-to-hand transaction between the petitioner and the CI. Upon the return of the CI, Anclede tested the substance the CI obtained, which was positive for heroin. This testimony and the written application for a search warrant, which was granted, fully supports probable cause. As such, despite counsel's efforts, the results of the search were properly admitted into evidence and considered by the jury.

At the trial, defense counsel established that these marked funds were not confiscated by the police when they executed the search warrant. Counsel established that a portion of the heroin and of the cocaine was individually packaged. Defense counsel established that there was

no identifying feature to indicate ownership of the jacket in which these drugs were found. Counsel established that the defendant's identification revealed he lived at a different address from where the drugs were recovered.

The cross-examination of prosecution witnesses reveals that defense counsel challenged the state's case in a thorough and consistent manner. No deficiency in performance is proven and the petitioner fails to prove the incompetence standard of *Strickland.*

The trial transcript establishes competent and protracted efforts by defense counsel to test the state's case. Despite these efforts, the drugs, guns, and cash were linked to the petitioner beyond a reasonable doubt. The petitioner has made no showing that the results of his trial would have been different if counsel had performed differently. Petitioner has failed to establish the prejudice prong of *Strickland.*

Claim Three: Ineffective assistance at trial by failure to present an entrapment defense

The petitioner next complains that his defense attorney should have pursued an entrapment defense at trial. Petitioner argues "Counsel should have question whose idea was it to devise a plan, because factually the C.I. manipulated the circumstances." (Memo in Support, p. 15).

A legitimate entrapment defense may be raised when a law enforcement officer or undercover agent acting in cooperation, for the purpose of obtaining evidence of a crime, originates the idea of the crime and then induces another person to engage in conduct constituting the crime, when the other person is not otherwise disposed to do so. W. LaFave & A. Scott, *Criminal Law* § 48 (1972); *State v. Batiste*, 363 So.2d 639 (La.1978). The entrapment defense is designed to deter the police from planting criminal ideas in innocent minds and thereby promoting crimes which would not otherwise have been committed. R. Perkins, *Criminal Law*, Ch. 10, § 9 (1969).

The entrapment defense has two elements: (1) an inducement by a state agent to commit an offense, and (2) the lack of the accused's predisposition to commit the offense. The accused bears the burden of proving by a preponderance of evidence that a state agent induced him to commit a crime. If the defendant meets this burden of proof, the state must prove beyond a reasonable doubt that the defendant was predisposed to commit the crime prior to the government's involvement. *State v. Lewis*, 01–1084, p. 6 (La.App. 5 Cir. 3/13/02), 815 So.2d 166, 171, *writ denied*, 02–1053 (La.11/15/02), 829 So.2d 424.

It is not entrapment, however, if the officers or agents merely furnish a defendant who is predisposed to commit the crime with the opportunities to do so. As stated by the Louisiana Supreme Court, "In entrapment cases, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal." *State v. Brand*, 520 So.2d at 116; *State v. Petta, supra.*

Upon review, the court finds that defense counsel's decision not to raise an entrapment defense was a strategic choice. For the reasons stated above, the petitioner could not have met his burden and such a defense would not have been successful. Trial counsel has no duty to raise a non-meritorious claim.

Petitioner has failed to meet his burden of proving either deficient performance by counsel or unreliability of the results of the trial.

Claim Four: Ineffective assistance of appellate counsel by failure to present appealable issues

The petitioner complains that retained appellate counsel, Rachel Yazbeck, was ineffective for two reasons. He complains that (1) his attorney did not apply for a writ of certiorari to the Louisiana Supreme Court after his appeal was denied and (2) that in briefs on appeal, his attorney did not assign as error a Fourth Amendment violation.

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).

For the reasons enumerated in addressing the petitioner's other claims, the petitioner would not have achieved relief had such issues been raised. If the substantive claims petitioner wishes had been raised do not have merit, a claim of ineffective assistance of appellate counsel also has no merit. *State v. Williams*, 613 So.2d 252, 256-7 (La.App. 1st Cir. 1992).

The petitioner complains that his attorney did not seek writs from the Supreme Court to challenge the ruling of the Fifth Circuit. However, the petitioner filed a pro se writ application with the Supreme Court, which was denied. Thus the state's highest court had the opportunity to review any substantive claims. The Court did not afford relief.

The petitioner fails to prove that the appellate court would have granted relief to any of these claims on appeal, as these claims were raised in petitioner's pro se brief and were litigated on direct appeal. Petitioner does not meet his burden of proof and relief will be denied on this claim.

CONCLUSION

For the reasons stated above in addressing each claim, this court finds the petitioner is not entitled to relief on his individual claims. Furthermore, Petitioner is not entitled to relief under a cumulative error theory.

The law is clear that the combined effect of assignments of error, none of which warrant reversal individually, does not deprive a defendant of his right to a constitutionally fair trial. Louisiana's Supreme Court has noted that the "cumulative error" doctrine has lost favor in the Louisiana courts. In *State v. Manning*, 03–1982 (La.10/19/04), 885 So.2d 1044, *cert. denied*, 544 U.S. 967, 125 S.Ct. 1745, 161 L.Ed.2d 612 (2005), the Court quoted with approval language from *Mullen v. Blackburn*, 808 F.2d 1143, 1147 (5th Cir.1987) where the federal Fifth Circuit rejected the cumulative error doctrine by noting that "twenty times zero equals zero."

The court has reviewed the record, pleadings, and relevant law. The court finds petitioner has not met his burden of proof and relief will be denied.

Accordingly,

IT IS ORDERED BY THE COURT that petitioner's application be and is hereby **DENIED**.

Gretna, Louisiana this 8 day of Oct., 20 14.

JUDGE

S/STEPHEN D. ENRIGHT, JR.

PLEASE SERVE:

PRISONER: Daryl Smith, a.k.a. Daryl Vinet, DOC # 435403, Rayburn Correctional Center, 27268 Hwy. 21, Angie, LA 70426

Terry Boudreux, Andrea L. Long, District Attorney's Office, 200 Derbigny St., Gretna, LA 70053

A TRUE COPY OF THE ORIGINAL ON FILE IN THIS OFFICE

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

clc
10/9/14