

SUPREME COURT OF LOUISIANA

No. 15-KH-1239

STATE EX REL. TRAVIS DAVIS MARCELL

v.

STATE OF LOUISIANA

**ON SUPERVISORY WRITS TO THE THIRTY-SECOND
JUDICIAL DISTRICT COURT, PARISH OF TERREBONNE**

PER CURIAM:

Denied. Relator fails to show entitlement to DNA testing. La.C.Cr.P. art. 926.1. Relator also fails to demonstrate he was denied the effective assistance of counsel during plea negotiations under the standard of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) or that he entered his guilty pleas involuntarily. 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.

STATE OF LOUISIANA	*	32 ND JUDICIAL DISTRICT
VERSUS	*	PARISH OF TERREBONNE
TRAVIS MARCELL	*	STATE OF LOUISIANA
DOCKET NUMBER 630,898	*	DIVISION "A"

ORDER

CONSIDERING Mr. Marcel's application for "Post Conviction Relief:"

IT IS HEREBY ORDERED that Mr. Marcel is not entitled to relief as all material questions of fact and law presented were resolved based on the face of the petition and record negating the need for an evidentiary hearing. This application for Post Conviction Relief failed to demonstrate ineffective assistance of counsel.

THUS, Mr. Marcel's petition is DENIED.

SIGNED this 1st day of April, 2015, Houma, Louisiana

George J. Larke, Jr.

Honorable George J. Larke, Jr.
32nd Judicial District Court, Div. "A"

Please Serve:

Travis Marcel
DOC # 609227
287 Industrial Drive
Jonesboro, Louisiana 71251

FILED

APR 01 2015

Shelley R. Adams

Deputy Clerk of Court
Parish of Terrebonne, LA

STATE OF LOUISIANA	*	32 ND JUDICIAL DISTRICT
VERSUS	*	PARISH OF TERREBONNE
TRAVIS MARCELL	*	STATE OF LOUISIANA
DOCKET NUMBER 630,898	*	DIVISION "A"

**REASONS FOR JUDGMENT DENYING PETITIONER'S MOTION FOR
 POST CONVICTION RELIEF**

Upon information and belief, Petitioner, Travis Marcell, asserts that he has a meritorious constitutional claim to vacate his conviction and sentence. He pled guilty on March 13, 2013. (Pet'r PCR pg1) Petitioner pled guilty to aggravated incest, a violation of La. R.S.14:78.1, and indecent behavior with a juvenile, a violation of La. R.S. 14:81. He was sentenced to twenty years suspended upon serving fifteen years at the Department of Corrections with five years of supervised probation from the moment of release. (Pet'r Felony Boykin Form) Petitioner argues that he received ineffective assistance of counsel in violation of the Federal Constitution's Sixth Amendment and corresponding provision of the Louisiana Constitution.

Petitioner alleges counsel failed to properly defend petitioner on two specific occasions. First, Counsel failed to object when the trial court did not advise him of his rights in open court. Second, Counsel failed to submit the results of a DNA test which allegedly established his innocence. After review and consideration, the trial court believes that all material questions of fact and law can properly be resolved without an evidentiary hearing based solely upon the record. La. C.Cr.P. 928.

LAW: Sixth Amendment and *Strickland*

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right...to have assistance of counsel for his defense." U.S. Const. amend. VI. This guarantee "safeguards...fundamental human rights of life and liberty." *Johnson v. Zerbest*, 304 U.S. 458,462 (1938). It is the very reason why "appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of accused may be affected." *Mempa v. Rhay*, 389 U.S. 128, 134, (1967).

Ineffective assistance claims are determined under *Strickland*'s two-prong test. *Strickland v. Washington*, U.S. 668, 685 (1985). Court defines "the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* 686-

687 (1984). In summary, the Petitioner must meet the high burden establishing "that counsel's performance was deficient" and that "this deficient performance prejudiced his defense." *State v. Pratt*, 26,862 (La. App. 2 Cir. 1995).

Under *Strickland*'s first prong, deficiency turns on whether counsel was reasonably competent, "not perfect." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003). The reasonableness of an attorney is determined by "professional norms" which falls within a "wide range of professional assistance." *Strickland*, U.S. 668, 688 (1984); *Kimmelman v. Morrison*, 477 U.S. 365 (1986). When evaluating the reasonableness standard as applied to ineffective assistance of counsel, the Court will undertake "a detailed examination of the specific facts and circumstances of the case. This is necessary...because effectiveness of counsel cannot be defined in a vacuum, but rather requires an individual, fact-specific inquiry." *State v. Peart*, 621 So. 2d 780, 788 (La. 1993).

Strickland's second prong requires the Petitioner to establish that counsel's objectively unreasonable performance prejudiced the petitioner a fair trial. Prejudice is present when "reasonable probability existed that, absent errors, the factfinder would have had a reasonable doubt respecting guilt." *Kimmelman*, 477 U.S. 365, 380 (1986); see also *Strickland*, U.S. 668, 695 (1984). The Court in *Strickland* defines reasonable as "probability sufficient to undermine confidence in the outcome." *Id.* At 694. This standard requires more than a mere probability that the defendant would more likely than not have received a different verdict. *Id.* at 694; *Jones v. Cain*, 151 So.3d 781,793 (2014). It demands a showing that the prejudice "undermines the confidence of the outcome." *Id.*

Claim One: Counsel Ineffectively Did Not Object to Trial Court's Failure to Advise

Petitioner alleges that Counsel did not object to trial court's lack of advisement as to his *Boykin* rights at the time of his guilty plea. In felony cases, trial court has a general duty not to accept guilty pleas without (1) first addressing the defendant personally in open court, (2) informing him of his rights and (3) determining he understands his rights. La. C.Cr.P. Art. 556.1. The Constitution requires that a guilty plea be recorded showing that the defendant was informed of and waived his constitutional right against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. *State v. Russell*, App. 2 Cir.2011, 73 So.3d 991, 46,426 (La.App. 2 Cir. 8/17/11), writ denied 82 So.3d 270, 2011-2020 (La. 2/10/12). To find Counsel ineffective Petitioner must establish that his counsel was deficient or unreasonably incompetent for not objecting to trial court's failure to advise petitioner of his rights.

However, here, on March 13, 2013, the trial court did advise petitioner of his rights. The trial court went through a detailed colloquy with the petitioner advising him of his rights and determining his awareness to voluntarily plea to the aforementioned offenses. The transcript of the guilty plea colloquy reflects Petitioner's understanding of his *Boykin* rights and that by pleading guilty he is waiving his right to trial by jury, his right to confront his accusers, and his right against self-incrimination. Furthermore, the Petitioner established these waivers were knowing and voluntary. He articulated that he could read and write the English language. He affirmed his waiver specifically when (1) with his attorney he reviewed and signed a written acknowledgment, (2) orally confirmed his waiver during his colloquy and (3) his attorney attested to the abovementioned acts. Each of these acts indicates that the Petitioner was properly informed and aware of his waiver of the *Boykin* triad. Therefore, Counsel was not deficient since the guilty plea colloquy was properly held and conducted on March 13, 2013.

Yet, petitioner specifically alleges that his main right to a judge trial was not pronounced prior to him accepting his guilty plea. The Louisiana Supreme Court has held that advice as to the right to choose between a judge trial or jury trial is not a constitutional requirement for a valid plea of guilty. *State v. Farinas*, 28 So.3d 1132 (La. App. 5 Cir. 2009). Furthermore, Louisiana courts expressly refuse to broaden the *Boykin* advisement to include all rights defendant may waive or any potential consequences of a guilty plea. *Id.* Therefore, counsel's failure to object to the trial court's omission regarding a judge trial does not rise to the *Strickland* standard of ineffective assistance of counsel.

This assignment of error is without merit and is denied.

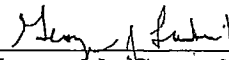
Claim Two: Counsel Failed to Submit DNA Results Establishing Petitioner's Innocence

Petitioner's counsel was not ineffective for failing to submit DNA results to trial court. Any DNA results would not have exonerated the Petitioner. Petitioner pled guilty to 14:78.1: Aggravated Incest. Aggravated incest is codified as "lewd fondling or touching of the person of either the child or the person." La.C.Cr.P.14:78.1. Here, the Petitioner confessed to grabbing his step-daughter's breast, touching her outer genitalia, and digitally penetrating her inner genitalia. (Prosecution: Notice of Intent to Use Inculpatory Statements, pg9, 11, 29, 40). Therefore, Counsel was not deficient for failing to provide DNA results.

This assignment is without merit and is denied.

Petitioner's Post Conviction Application is **DENIED**.

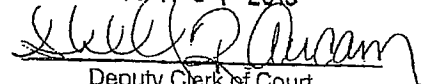
Signed the 1 day of April, 2015 in Houma, Louisiana.


Honorable George J. Larke, Jr.
32nd Judicial District Court, Div. "A"

Please Serve:
Mr. Travis Marcell
DOC # 609227
287 Industrial Drive
Jonesboro, Louisiana 71251

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Deputy Clerk of Court
Parish of Terrebonne, LA

05/27/2016 "See News Release 030 for any Concurrences and/or Dissents."