04/13/2017 "See News Release 022 for any Concurrences and/or Dissents."

SUPREME COURT OF LOUISIANA

No. 15-KH-2175

STATE EX REL. STEVEN HOLDEN

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). In addition, relator's claim of prosecutorial misconduct is procedurally barred. 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.

TWENTY FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON
STATE OF LOUISIANA

NO. 09-5901 DIVISION "I"

STATE OF LOUISIANA

VERSUS

STEVEN HOLDEN

FILED: 8-5-13 DEPUTY CLERK

ORDER

This matter comes before the court on petitioner's **APPLICATION FOR POST-CONVICTION RELIEF, STAMPED AS FILED MARCH 11, 2013; AND STATE'S RESPONSE, STAMPED AS FILED MAY 3, 2013.**

On September 21, 2010, the petitioner was convicted of two counts of LSA-R.S. 14:64, relative to armed robbery. On October 12, 2010, the court sentenced him on each count to 50 years imprisonment at hard labor, to run concurrently. On December 3, 2010, the court found him to be a multiple offender as to count #1, and re-sentenced him under the multiple bill on that count to 75 years imprisonment at hard labor, to run concurrently with the previous sentence for count #2. His conviction was affirmed on appeal, and remanded for resentencing and clarification on sentencing under the firearm enhancement. *State v. Holden,* 11-497 (La. App. 5 Cir. 12/28/11) 83 So.3d 1140, writ denied, 2012-283 (La. 5/18/12) 89 So.3d 1191.

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

1. Ineffective assistance of trial counsel for failing to object to *Allen* jury charge, and failure to object when judge spoke to jurors outside the presence of petitioner and his attorney.
2. Ineffective assistance of trial counsel for failure to file Motion for Mistrial or Motion for New Trial when judge committed reversible error in Allen jury charge and speaking to jury outside the presence of petitioner and his attorney.
3. Fifth Circuit Court of Appeal violated petitioner's due process rights and right to direct appeal when erroneously treated appellate claims as prosecutorial misconduct and *Brady* violations as belated trial objections, and at least raises *defacto* ineffective assistance of counsel claim which cannot be imputed to petitioner.
4. Ineffective assistance of trial counsel for failure to subject State's charges to any "adversarial testing," and put forth no defense after State rested its case.

Procedural Objection – Claim #3

As the State surmises in its response, this claim should have been raised with the Louisiana Supreme Court on direct appeal. This claim is procedurally barred from review on post-conviction.

If the application raises a claim the petitioner knew about, but inexcusably failed to raise prior to conviction, the court may deny relief. LSA-C.Cr.P. art. 930.4(B). Additionally, if the application alleges a claim that was raised at trial, but was inexcusably not pursued on appeal, the court may deny relief. LSA-C.Cr.P. art. 930.4(C). The petitioner's claims should be barred because they could have been, but were not, raised on appeal. Under LSA-C.Cr.P. art. 930.4, such claims should be denied.

Additionally, the court finds that under *State ex rel. Rice v. State*, 749 So.2d 650 (La. 1999), petitioner's proper use of the Uniform Application satisfies the requirement of LSA-C.Cr.P. art. 930.4(F). Petitioner claims ineffective assistance of counsel for failing to raise this claim. The court finds no merit to this, as petitioner filed writs with the Louisiana Supreme Court *pro se*. The court finds these claims are procedurally barred from judicial review.

Ineffective assistance of counsel – Claims # 1, #2, and #4

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.

APPENDIX

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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 argues that trial counsel was ineffective for failing to object to an *Allen* jury charge, for failing to object when the judge spoke to jurors outside the presence of petitioner and his attorney, and for failing to request a mistrial or new trial.

> The *Allen* charge stems from the United State Supreme Court's decision in *Allen v. United States,* 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896). *State v. Caston,* 561 So.2d 941, 942 (La.App. 2 Cir. 5/9/90). In *Allen,* the court approved of a charge designed to break a jury deadlock and achieve jury unanimity. *Caston,* 561 So.2d at 942; *State v. Eugene,* 08–1128, p. 9 (La.App. 5 Cir. 1/27/04), 866 So.2d 985, 991, *writ denied,* 04–0515 (La.1/14/05), 889 So.2d 263 (citing *State v. Collor,* 99–0175, p. 13 (La.App. 4 Cir. 4/26/00), 762 So.2d 96, 104, *writ denied,* 00–1487 (La.3/9/01), 786 So.2d 116). The main focus of the original *Allen* charge was that the jury minority, regardless of whether they were for conviction or acquittal, should reconsider the reasonableness of their opinion, because it was not shared by a majority of the jury. *Caston,* 561 So.2d at 942.
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> The Louisiana Supreme Court has banned the use of the *Allen* charge, and subsequent modifications of it. *Collor,* 99–0175 at 13, 762 So.2d at 104 (citing *State v. Nicholson,* 315 So.2d 639 (La.1975)). While the Supreme Court recognized the authority of a trial court to give further instructions to a jury unable to agree upon a verdict, it found the *Allen* charge problematic for two reasons. *Id.* First, the charge emphasized that the jury had a duty to reach a verdict, implying that the trial judge would not accept a mistrial. *Id.* Second, when the duty to reach a verdict is coupled with an admonition by the trial judge that those in the minority should rethink their position, there exists an almost overwhelming pressure to conform to the majority's view. *Id.* (citing *State v. Campbell,* 606 So.2d 38, 40 (La.App. 4 Cir.1992)). Therefore, if a trial judge gives an *Allen* charge or any "coercive modification" of same, the trial court will have committed reversible error. *Collor,* 99–0175 at 13, 762 So.2d at 104 (citing *Nicholson, supra*).
>
> There is no requirement that a judge declare a mistrial at the initial sign of trouble. *State v. Anders,* 06–589, p. 12 (La.App. 3 Cir. 9/27/06), 941 So.2d 93, 101 (citing *State v. Lowenfield,* 495 So.2d 1245 (La.1985), *cert. denied,* 476 U.S. 1153, 106 S.Ct. 2259, 90 L.Ed.2d 704 (1986)). It is within the discretion of the trial court to urge jurors to come to an agreement. *Anders,* 06–589 at 12, 941 So.2d at 101 (quoting *State v. Governor,* 331 So.2d 443 (La.1976)).

State v. Foster, 09-837 (La. App. 5 Cir. 6/29/10), 44 So. 3d 733, 737 writ denied, 62 So. 3d 84 (La. 2011)

In the case at bar, the court acted within its discretion in ordering the jury to deliberate further. The court never implied that it would not accept a mistrial, and did not coerce the jury members with minority opinions to rethink their positions. The jury had only been deliberating for two hours, and the court to merely stressed the importance of the case. The court finds no deficiency in counsel's performance, as any objection or motion for mistrial or new trial would be frivolous.

As to petitioner's complaint regarding the trial counsel speaking to the jury outside the presence of the petitioner or defense counsel, the court finds no merit. As the State surmises, the court informed the State and defense of the jury's note. The court addressed the jury explaining that they were sequestered and told them about supper. The court ordered the jury back to the courtroom for discussion on the record regarding reading verdicts. The court finds no deficiency in counsel's performance, as any objection would be frivolous.

Petitioner claims that trial counsel was ineffective for failure to subject State's charges to any "adversarial testing," and put forth no defense after State rested its case. He argues that counsel failed to contest the eyewitness identification procedures at trial. The court finds no merit to this claim. As the State points out in its response, defense counsel cross-examined Dep. Collins, dep. Reynolds, and Mr. Meaux at length regarding the show-up identification and procedure employed. The court finds no deficiency in counsel's performance.

Petitioner also claims that adversarial testing would have led trial counsel to attack Chadwick Walton's veracity, by bringing in a third co-conspirator. As the State points out in its response, defense counsel attacked Walton's veracity and credibility during cross-examination. The court finds no deficiency in counsel's performance as to this issue, and no merit to this claim.

In reviewing petitioner's ineffective assistance of counsel claims, the court finds no deficiency in counsel's performance, and no prejudice as a result. Petitioner failed to establish the burden as set forth in *Strickland, supra.* Furthermore, the court finds that counsel acted diligently at pre-trial during motion and especially in negotiating a plea bargain which greatly reduced petitioner's sentencing exposure. 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 has not met this burden, and relief will be denied.

Accordingly,

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

Gretna, Louisiana, this 5th day of August, 20 13

JUDGE

PLEASE SERVE:

PRISONER: Steven Holden, DOC # 415491, Louisiana State Penitentiary, Angola, LA 70712

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