

SUPREME COURT OF LOUISIANA

No. 16-KH-0227

STATE EX REL. JEFFERY DAVIS

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 claims of prosecutorial misconduct are procedurally-barred. La.C.Cr.P. art. 930.4. As to the remaining claim, relator fails to satisfy his post-conviction burden of proof. La.C.Cr.P. art. 930.2. 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.

W. J. Jelle

Service
RECEIVED
NOV 05 2015
W.F.P.S.O.

TWENTY FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON
STATE OF LOUISIANA

NO. 10-2258

DIVISION "N"

STATE OF LOUISIANA

VERSUS

JEFFERY DAVIS

FILED: 10/28/15


DEPUTY CLERK

THE ORDER

This matter comes before the court on petitioner's APPLICATION FOR POST-CONVICTION RELIEF, STAMPED AS FILED MAY 27, 2015, STATE'S PROCEDURAL OBJECTIONS, STAMPED AS FILED AUGUST 17, 2015, AND STATE'S MERITS RESPONSE, STAMPED AS FILED SEPTEMBER 3, 2015.

On October 5, 2012, petitioner was convicted of LSA-R.S. 14:30.1, second degree murder. On October 11, 2012, the court sentenced him to life imprisonment at hard labor.

The Fifth Circuit Court of Appeal affirmed the defendant's conviction. *State v. Davis*, 13-KA-237 (La. App. 5 Cir. 10/30/13), 128 So.3d 1163, writ denied, 2014-K-2751 (La. 5/23/14), 140 So.3d 723.

Petitioner filed an application for post-conviction relief, alleging:

1. Ineffective assistance of trial counsel for:
 - (a) counsel's failure to call Deputy Tomas and Danielle Baydas,
 - (b) presenting bogus defense theory,
 - (c) failure to call John Patton,
 - (d) failure to interview Maurice Williams,
 - (e) failure to interview defendant or present alibi defense,
 - (f) failure to conduct adequate examination, and
 - (g) failure to cross-examine Eunice Williams.
2. Prosecution committed misconduct:
 - (a) with false and misleading statements,
 - (b) allowing false testimony to go uncorrected, and
 - (c) failure to make potentially exculpatory evidence available to defense.
3. Ineffective assistance of appellate counsel for counsel's failure to brief meritorious claim on appeal that verdict was contrary to evidence presented at trial.

RECEIVED
NOV 09 2015
Legal Programs Department

Claim #2(a)

As to the claim regarding prosecutor's misleading statements in closing arguments, as the State surmises in its response, this claim is procedurally barred from review under LSA-C.Cr.P. art. 930.4(C), which states if the application alleges a claim that was raised at trial, but was inexcusably not pursued on appeal, the court shall deny relief. This issue was objected to at trial, was raised in petitioner's motion for new trial, but petitioner failed to raise the claim on appeal. The court finds this claim procedurally barred from review.

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).

Claim #2(b)

As to the claim regarding false testimony of Telly Westerman to go uncorrected, this claim was raised in petitioner's motion for new trial, but petitioner inexcusably failed to raise the claim on appeal. As the State surmises in its response, this claim is procedurally barred from review under LSA-C.Cr.P. art. 930.4(C), which states if the application alleges a claim that was

IMAGED OCT 28 2015

Issued 10/28/15 [Signature]

raised at trial, but was inexcusably not pursued on appeal, the court shall deny relief. The court finds this claim procedurally barred from review.

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).

Claim #2(c)

As to the claim regarding failure to make potentially exculpatory evidence unavailable, the State has provided examples of how defense knew of the issue at trial but inexcusably failed to raise it in the proceedings leading to conviction. Thus, the claim is barred under LSA-C.Cr.P. art. 930.4(B), which states, 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.

Furthermore, the court finds that under *State ex rel. Rice v. State*, 749 So.2d 650 (La. 1999), petitioner's use of the Uniform Application satisfies the requirement of LSA-C.Cr.P. art. 930.4(F).

Claim #1 – Ineffective assistance of counsel at trial

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.

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.

Claim #1(a)

Petitioner claims that counsel was ineffective for failing to call Deputy Thomas and Ms. Baydas, who could have impeached Westerman's testimony. As the State points out in its response, petitioner fails to prove how testimony of Deputy Thomas and Baydas would have been favorable to the defense. Petitioner claims that Ms. Baydas would have testified as to the direction of the parked truck and whether Westerman could see the shooting. However, this is irrelevant as the defense theory was that Westerman was not inside of the truck at the time of the shooting, but rather was in the courtyard, shooting the victim. This does not further the defense's trial strategy. Petitioner does not specify what additional information Ms. Baydas could have provided. Also, petitioner does not demonstrate what information Deputy Thomas would have provided at trial, as he had no first-hand knowledge of the incident. This claim is purely speculative. The court finds no deficiency in counsel's performance and no prejudice resulting as to this claim.

Claim #1(b)

Petitioner claims that counsel was deficient for presenting a bogus defense theory at trial. The court finds no merit to this claim. The defense argued that Westerman and Williams were the real killers, and that three weapons were fired at the victim. This defense's theory of the case was consistent with the evidence found at the scene. The court finds this theory reasonable. Petitioner fails to prove deficient performance or prejudice resulting.

Claim #1(c)

Petitioner claims that counsel was ineffective for failure to call John Patton as a witness. Patton was incarcerated with Westerman prior to trial. Patton informed the State that Westerman had bragged about getting away with murders and how he was testifying for the State. This

information was turned over to the defense. Petitioner argues that had counsel presented this testimony of the admissible letter regarding this information at trial, the outcome of the trial would have been different.

As the State points out in its response, the record reflects that defense counsel interviewed Patton and made the informed and strategic decision not to have him testify for the defense.

The Supreme Court has emphatically directed that, "in evaluating the performance of counsel, strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-691, 104 S.Ct. 2052, 80 L.Ed.2d 674. The record reflects that defense's trial strategy was to not present this witness on behalf of the defense. The court finds no merit to this claim.

Claim #1(d)

Petitioner claims that counsel was ineffective for failure to call Maurice Williams to testify at trial, and that had he testified consistently with his grand jury testimony, his testimony would have contradicted that of Westerman and provided an alibi for petitioner.

At the time of trial, Williams was facing perjury charges for the testimony he gave during grand jury proceedings in connection with the indictment of petitioner. He later pled guilty to those charges. Petitioner fails to demonstrate that Maurice Williams would have testified at petitioner's trial, or what the content of the testimony would have been. The court finds no merit to this claim.

Claim #1(e)

Petitioner claims that trial counsel was ineffective in failing to interview petitioner and establish an alibi. He blames his trial counsel for him not testifying at trial.

The petitioner fails to provide the necessary requirements to support this claim as required by the Louisiana Supreme Court in *State v. James*, 05-2512 (La. 9/29/06), 938 So.2d 691, which states, "Though this Court recognizes that an attorney's interference with a defendant's desire to testify may violate the defendant's constitutional rights, we also require that the claimant 'allege specific facts, including an affidavit from counsel' and point to record evidence to support his claim." *State v. Hampton*, 00-0522, p. 14-15 (La.3/22/02), 818 So.2d 720, 729-30.

The record reflects that petitioner had numerous opportunities to meet with counsel prior to and during trial. Petitioner's claim is merely speculative. He has not met his burden of proof, and this claim will be denied.

Claim #1(f)

Petitioner claims that trial counsel was ineffective for failure to adequately cross-examine State's witness Angelle Merrille. He argues that counsel's failure to challenge her effectively bolstered Westerman's credibility, and that the defense in no way benefitted from the one question posed by defense counsel.

The court finds that this question goes to trial strategy. Defense counsel's question revealed the inconsistent statements made by Westerman. Furthermore, petitioner fails to prove what further questions would have revealed, or how it would have changed the outcome of trial. Petitioner fails to prove prejudice.

Claim #1(g)

Petitioner claims that counsel was ineffective for failure to cross-examine Eunice Williams. At trial, Ms. Williams invoked her Fifth Amendment right to remain silent. Petitioner contends that trial counsel should have questioned her regarding her son's perjury case and her drug addiction.

Ms. Williams's statement was introduced at trial through the testimony of Sgt. Klein. Upon examination by the prosecution and counsel of co-defendant, Ms. Williams insisted that she had no recollection of making a statement to the police. It was not unreasonable for petitioner's counsel to choose not to attempt to question her again, as she failed to answer any questions from the other attorneys. Petitioner's assumption that Ms. Williams would have responded to his counsel's questions is speculative and conclusory, and is not based on any facts or evidence. Petitioner fails to prove any deficiency in counsel's performance, or prejudice resulting.

Claim #3 – Ineffective assistance of appellate counsel

Petitioner claims that counsel was ineffective for failing to raise on appeal that the "verdict was contrary to the weight of the evidence" presented at trial. 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 petitioner's claim of ineffective appellate counsel. Petitioner cannot prove that had counsel argued sufficiency of evidence on direct appeal, he would have been successful, as the Fifth Circuit Court of Appeal rejected this sole assignment of error in the co-defendant Robbreion Green's direct appeal:

In his sole assignment of error, Defendant claims the evidence was insufficient to support a conviction for second degree murder. He claims the record is devoid of any credible evidence that he and Davis killed Ross. Defendant asserts that Westerman's testimony was too inconsistent and self-serving to be believable.

State v. Green, 13-238 (La. App. 5 Cir. 10/30/13), 128 So. 3d 1172, 1176.

The appellate court addressed the inconsistencies in Westerman's testimony and found sufficient testimony to convict:

Despite the inconsistencies in Westerman's statements and the fact Westerman received a favorable plea bargain in exchange for his testimony, we find that a rational trier of fact could have found that the evidence was sufficient under the *Jackson* standard to support the verdict and that the State negated any reasonable probability of misidentification

Id. at 1177.

There is no reason to believe that the Fifth Circuit Court of Appeal would have reached a different conclusion as to a sufficiency of evidence claim raised by this petitioner, as Petitioner and Green were co-defendants in the same trial, with the same witnesses' testimony and evidence presented and considered. Petitioner fails to prove any deficiency in the performance of appellate counsel, or any prejudice resulting.

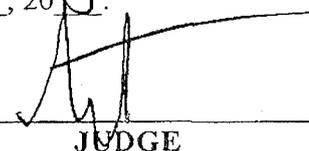
Under LSA- C.Cr.P. art. 930.2, the petitioner in an application for post-conviction relief shall have the burden of proving that relief should be granted. Petitioner fails to prove his burden as to any of his aforementioned claims.

Under LSA-C.Cr.P. art. 929, if the court determines that the factual and legal issues can be resolved based upon the application and answer, and supporting documents, the court may grant or deny relief without further proceedings.

Accordingly,

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

Gretna, Louisiana this 28 day of October, 2015.



JUDGE

STEPHEN D. ENRIGHT, JR.

PLEASE SERVE:

Defendant: Jeffery Davis, DOC # 578873, Louisiana State Penitentiary, Angola, LA 70712

Terry Boudreux, Matthew Caplan, 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.