

SUPREME COURT OF LOUISIANA

No. 16-KH-0471

STATE EX REL. EDWARD MORGAN

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). As to the remaining claims, the courts below correctly found they are barred by La.C.Cr.P. art. 930.4. In addition, 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. Feli

SERVICE

TWENTY FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON
STATE OF LOUISIANA

RECEIVED
NOV 23 2015

NO. 10-447

DIVISION "H" P.D. 20

STATE OF LOUISIANA

VERSUS

E.J.M., III¹

FILED: NOV. 12, 2015

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DEPUTY CLERK

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Legal Programs Department

ORDER

This matter now comes before this court on the petitioner's APPLICATION FOR POST-CONVICTION RELIEF, STAMPED AS FILED ON SEPTEMBER 24, 2015 AND THE STATE'S RESPONSE, STAMPED AS FILED ON OCTOBER 29, 2015.

The petitioner was convicted after trial by jury of attempted indecent behavior with a juvenile (LSA-R.S. 14:27/81), molestation of a known juvenile (LSA-R.S. 14:81.2), and aggravated incest upon a known juvenile (LSA-R.S. 14:78.1). He was also adjudicated a three-time felony offender under LSA-R.S. 15:529.1.

The petitioner's convictions were upheld on original appeal. *State v. E.J.M., III*, 119 So.3d 648 (La.App. 5 Cir. 5/23/13). Following remand for resentencing as a third felony offender, the petitioner was sentenced to life in prison. On a second appeal, his convictions and sentence were again upheld in *State v. E.J.M., III*, 167 So.3d 79 (La.App. 5 Cir. 12/16/14).

CLAIMS RAISED

The petitioner's application for post-conviction relief alleges three specific claims:

- (1) "Violation of due process, violation of equal protection, ex post facto application of law,"
- (2) "Violation of due process: that is a right to a fair trial,"
- and
- (3) "Violation of right to effective assistance of counsel – US Const. 5 and 6."

The state concedes the timeliness of this petition. The state responds in some cases with procedural objections and also on the merits to each claim.

APPLICATION OF LAW TO FACTS

Claim One: "Violation of due process, violation of equal protection, ex post facto application of law"

The petitioner contends that the responsive verdicts set for in the statutes of 1990, the date of the crimes, should have been read at his trial in 2010. He concludes that the jury charges listing the 1990 responsive verdicts constituted an ex post facto violation. The state responds both procedurally and on the merits.

¹ In order to protect the identity of the minor victim of sexual abuse and pursuant to the authority of LSA-R.S. 46:1844(W)(3), this court will entitle this pleading with only the petitioner's initials.

The state notes that the petitioner knew of this claim but failed to raise it in proceedings prior to conviction. The claim is thus barred by application of LSA-C.Cr.P. art. 930.4(B). The court agrees and finds this claim procedurally barred.

The state also asserts that even if the merits of the claim were reached, the petitioner would not be entitled to relief. As authority, the state cites *State v. Reese*, 85-115 (La.App. 5 Cir. 6/3/85), 472 So.2d 76, for the proposition that responsive verdicts are procedural and thus the law in effect at the time of trial controls. Significantly, the Fifth Circuit Court of Appeal has reviewed the facts proven at trial. The Court found the evidence sufficient to support a conviction of aggravated rape.

The court agrees and finds this claim without merit.

Claim Two: "Violation of due process: that is a right to a fair trial"

The petitioner contends that the indictment was defective by failing to sufficiently identify the two separate victims in the three counts charged.

Notably, the petitioner did not raise any challenge connected with this issue prior to trial. Before conviction, the petitioner did not file a motion to sever or to quash the indictment. Even in the instant application for post-conviction relief, he fails to demonstrate he was unaware of the victims' identities.

The state raises the procedural bar of LSA-C.Cr.P. art. 930.4(B) and urges this court to find the claim is not preserved for review. By statute, if a post-conviction 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. LSA-C.Cr.P. art. 930.4(B).

The court agrees that this claim is procedurally barred from belated review and finds the petitioner's failure to raise the claims in a timely manner precludes further review.

Claim Three: "Violation of right to effective assistance of counsel – US Const. 5 and 6."

The petitioner contends that his criminal defense attorney, Alex D. Lambert, was constitutionally deficient in representing him at trial, primarily by failure to file certain pre-trial motions.

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 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. 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.

After reviewing the extensive pleadings filed in this case and relevant jurisprudence, the court concludes that the petitioner has failed to demonstrate either of the two mandatory prongs of the *Strickland* test.

The petitioner fails to establish that relief would have been granted had his attorney filed the pre-trial motions in question. Even more importantly, he has utterly failed to establish that the results of his trial would have been different if his attorney had filed these motions.

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CONCLUSION

Under the authority of LSA-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. The petitioner has not met his heavy burden on his claims.

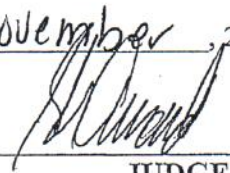
The petitioner had a fair trial with reliable results. He has had judicial review of his convictions and sentence. He has failed to prove the existence of constitutional errors grave enough to warrant post-conviction relief.

The court will deny relief.

Accordingly,

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

Gretna, Louisiana this 12th day of November, 2015.




JUDGE

PLEASE SERVE:

Defendant: Edward Morgan, #18837, Louisiana State Penitentiary, Angola, LA 70712.

District Attorney: Juliet Clark, Paul Connick, Terry Boudreux, 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