

SUPREME COURT OF LOUISIANA

No. 16-KH-0895

STATE EX REL. CODY SMOOT

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). We attach hereto and make a part hereof the district court's written reasons denying relief.

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. J.

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TWENTY FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON
STATE OF LOUISIANA

NO. 11-4275

DIVISION "L"

STATE OF LOUISIANA

VERSUS

CODY SMOOT

FILED:

12/3/15

Slater
DEPUTY CLERK

ORDER

This matter comes before the court on petitioner's APPLICATION FOR POST-CONVICTION RELIEF, STAMPED AS FILED SEPTEMBER 1, 2015, AND STATE'S RESPONSE, STAMPED AS FILED OCTOBER 20, 2015.

On January 24, 2013, the petitioner was convicted of LSA-R.S. 14:30.1, second degree murder. On January 31, 2013, the court sentenced him to life imprisonment. His conviction was affirmed on appeal. *State v. Smoot*, 13-KA-453 (La. App. 5 Cir. 1/15/14), 134 So.3d 1; writ denied, 2014-KO-297 (La. 9/12/14) 147 So.3d 704.

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

1. Ineffective assistance of counsel at trial when counsel failed to file a motion to suppress search warrants.
2. Ineffective assistance of counsel at trial when trial counsel failed to object to hearsay identification.

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

Petitioner claims that counsel was ineffective for failing to file a motion to suppress the search and arrest. The Louisiana Supreme Court recently explained,

In evaluating ineffective assistance of counsel claims based on a failure to pursue a motion to suppress, courts normally require a petitioner to show the overlooked motion to suppress would have been meritorious and that there is a reasonable probability the jury would have reached a different verdict absent the introduction of the unlawful evidence.

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Ortiz-Sandoval v. Clarke, 323 F.3d 1165, 1170 (9th Cir.2003) (citing *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986)). Thus, if a reasonably competent attorney could have suppressed the evidence and as a result, the State would have dismissed the charges, the petitioner may show a basis for relief. See *Northrop v. Trippett*, 265 F.3d 372, 383-84 (6th Cir.2001) (*en banc*) (conviction vacated based on ineffective assistance: "[d]uring his representation, [counsel] knew that police had arguably seized Northrop based upon no more than an anonymous tip without any supporting verifiable detail.... Without the inadmissible cocaine evidence, Michigan would obviously have failed to meet its burden of proving Northrop possessed the cocaine."); *State v. Reichenbach*, 153 Wash.2d 126, 101 P.3d 80, 87 (Wash.2004) (because contraband was illegally seized there existed no tactical basis for failing to move to suppress it; counsel's performance clearly prejudicial).

State v. Lee, 2014-2374 (La. 9/18/15).

Petitioner first argues that counsel was ineffective for failure to file a motion to suppress the evidence found in petitioner's home and challenges the warrant. However, as the State points out in its response, the detective presented evidence to the commissioner to justify a reasonable belief that petitioner committed the crime, and that evidence of the crime could be found at the residence, especially considering that petitioner was seen leaving the residence minutes before the gunshots were heard. Upon the search, ammunition was recovered, establishing a nexus between the crime and the residence. Probable cause was established.

Furthermore, the Louisiana Supreme Court has held that as long as an officer acting in good faith reasonably believes he is providing a magistrate with sufficient information for issuance of a search warrant, suppression of evidence is not required due to a later finding of lack of probable cause. *State v. Long*, 2003-KK-2592 (La. 9/9/04), 884 So.2d 1176. Hence, in this case, even if with insufficient probable cause, there would be no basis for a motion to suppress, and any motion would be without merit.

Petitioner argues that counsel was ineffective for failure to file the motion to suppress the evidence found in petitioner's vehicle. The finds no merit to this claim, as the officers presented evidence sufficient to establish probable cause that evidence of the crime could be found in petitioner's vehicle, and insinuates that the officers acted in bad faith in presenting probable cause to the magistrate. Petitioner also argues that the officers searched the vehicle prior to obtaining the search warrant. As the State points out in its response, the Fifth Circuit Court of Appeal has held that a search of a suspect's vehicle parked in front of a residence was valid pursuant to warrant authorizing the search of a residence:

Based on our review of the application, the warrant and the jurisprudence, we find that defendant's argument on this issue is without merit. Although the affidavit on which the warrant was based refers several times specifically to the Monte Carlo, the warrant itself does not refer to any vehicles. However, a warrant authorizing the search of a particularly described premises permits the search of a vehicle located on the premises targeted for the search and subject to the authority of the warrant. *State v. Smith*, 02-1842, p. 1 (La.9/20/02), 827 So.2d 1122, 1123 (*per curiam*); *State v. Carter*, 10-973, p. 8 (La.App. 5 Cir. 8/30/11), 75 So.3d 1, 5. The rationale behind this holding is that the vehicle is capable of concealing the sought-after contraband. *Id.* Accordingly, the search of defendant's vehicle was valid pursuant to the warrant since it was parked in front of the residence which was the target of the search and which was particularly described in the warrant. This assignment of error is without merit.

State v. Washington, 11-716 (La. App. 5 Cir. 3/13/12), 90 So. 3d 1157, 1161 (La. Ct. App. 2012). Hence, any motion filed to contest the search of the vehicle would be without merit.

Petitioner fails to meet the Strickland requirements for proving ineffective assistance of counsel, as he fails to show that counsel acted deficiently, or that any prejudice resulted.

Claim #2

Petitioner claims that counsel was ineffective for failing to object to hearsay identification testimony of Detective Goff during the hearing on the Motion to Suppress Identification and at trial.

Regarding the hearing on the Motion to Suppress Identification, hearsay evidence is admissible. *State v. Chisolm*, 12-2278 (La. 10/22/12), 99 So.3d 48.

Regarding the testimony of presented at trial, under La. C.E. art. 801(D)(1)(c), a statement is not hearsay if... the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is ... one of identification of a person made after perceiving the person.

As such, the statements made by Det. Goff at trial are statutorily not hearsay. The court finds no deficiency in counsel's performance in not objecting to this testimony, as any objection would have clearly been overruled and without merit. Furthermore, petitioner fails to prove prejudice.

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. The petitioner has not presented sufficient evidence in support of any of these claims, and thus has not met his burden.

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 3 day of December, 2015

Ronald A. Carter

JUDGE

A TRUE COPY OF THE ORIGINAL
ON FILE IN THIS OFFICE.
Starter

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

PLEASE SERVE:

Petitioner: Cody Smoot, DOC # 586141, Louisiana State Penitentiary, Angola, LA 70712

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Issued 12/7/15