

09/15/2017 "See News Release 043 for any Concurrences and/or Dissents."

SUPREME COURT OF LOUISIANA

No. 16-KH-0948

STATE EX REL. ROLAND DAMOND FOSTER

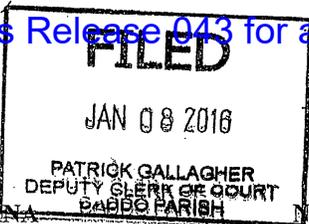
v.

STATE OF LOUISIANA

**ON SUPERVISORY WRITS TO THE FIRST
JUDICIAL DISTRICT COURT, PARISH OF CADDO**

PER CURIAM:

Denied. Relator has previously exhausted his right to state collateral review. *See State ex rel. Foster v. State*, 14-2377 (La. 9/25/15), 174 So.3d 1138. We attach hereto and make a part hereof the district court's written reasons denying relief.



STATE OF LOUISIANA NUMBER 233868; SECTION 5

VERSUS : FIRST JUDICIAL DISTRICT COURT
ROLAND DAMOND FOSTER : CADDOPARISH, LOUISIANA

RULING

Before the Court is a post-conviction relief application of Roland Foster ("Foster") filed December 1, 2015. For the reasons stated hereinafter, Foster's application is **DENIED**.

On October 18, 2007, Foster was convicted of possession of marijuana, third offense, and possession of cocaine with intent to distribute. He was found to be a habitual offender and was sentenced to two years at hard labor for the marijuana conviction to run concurrently with a sentence of 35 years at hard labor without benefit of probation or suspension for the conviction of possession of cocaine with intent to distribute. On appeal, the Second Circuit affirmed Foster's convictions, but vacated his sentences. *State v. Foster*, 43,777-KA (La. App. 2 Cir. 1/28/09), 3 So.3d 595. The Louisiana Supreme Court, however, reinstated the sentences. *State v. Foster*, 2009-0617 (La. 11/25/09), 23 So.3d 885.

Foster filed an earlier application for post-conviction relief which was denied. In this later application, Foster makes two claims. First, he claims that his trial counsel, Anthony Hollis, was ineffective in not properly informing Foster that he was waiving his right to jury trial. Second, Foster claims that he has new evidence of his actual innocence which was heretofore unavailable because the prosecution suppressed it in violation of *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963) ("*Brady*"). Thus, he relies on the "new evidence" exception to the time limitation and the procedural bar against successive applications.

Regarding the third offense marijuana conviction and sentence, this application is moot as the sentence is already complete. Accordingly, the Court only addresses this application as it pertains to the conviction for possession of cocaine with the intent to distribute.

Alleged ineffective assistance of counsel.

Foster claims that his counsel was ineffective because he failed to properly advise Foster of his right to a trial by jury and that counsel's failure to do so resulted in Foster's invalid waiver of his right to a jury trial.

This claim is untimely. The general rule is that a defendant has only two years from the date that the judgment of conviction and sentence become final within which to file a post-

conviction relief application. La. C.Cr.P. art. 930(A). More than two years have passed since Foster's judgment of conviction and sentence became final. Accordingly, Foster's claim is untimely. Thus, Foster is required to prove the applicability of an exception to that general rule if the Court is to consider the merit of this claim. As to this claim, Foster has not proven the applicability of any exception to the two-year time limitation.

Furthermore, in a previous post-conviction relief application, Foster raised this argument. This Court denied it in its November 12, 2010 ruling. Louisiana Code of Criminal Procedure article 930.4(D) provides that "[a] successive application shall be dismissed if it fails to raise a new or different claim." Therefore, this claim is procedurally barred on two grounds: (1) it is repetitive, La. C.Cr.P. art. 930.4(D); and (2) it is untimely, La. C.Cr.P. art. 930.8(A).

Alleged *Brady* violation

Foster alleges that the prosecution suppressed *Brady* information. In particular, he alleges that: (1) John Ashcraft, the confidential informant ("CI") working with the arresting officers on January 29, 2004, informed them that it was Jacoby Foster ("Jacoby"), *i.e.*, the applicant's cousin, who sold the drugs from the residence on that date; (2) the officers – and consequently the prosecution – suppressed the aforementioned statement by stating in the search warrant affidavit only that it was a "black male" who sold the drugs to the CI at the target residence. Foster attaches as evidence the affidavit of a John Ashcraft, who claims to be the aforementioned CI. In relevant part, the affidavit states:

I, John Ashcraft III, on 1-29-04, I [sic] was involved in an undercover drug buy. I was the C. I. Working for Caddo Parish Sheriff official [sic], agent John Witham, and Agent Bailey. After making the drug buy, I had to give a statement to agent Witham identifying the person whom I purchased the drugs from. I informed agent John Witham I informed agent John Witham and Agent Bailey that I bought drugs from Jacoby Foster, who go [sic] by the nickname of GiGi.

It is my understanding that the drug deal on 1-29-04, was with a black male that go [sic] by the name of Jacoby Foster or GiGi. I have been involved with him on multiple drug deals in the years of 2003 and 2004.

The search warrant affidavit, however, does not mention a purchase on 1-29-04, but only refers to two (2) buys on December 11, 2003 and January 26, 2004. The affidavit does not, as it need not, refer to the person who gave the drugs to the CI in exchange for the cash by name. Instead, it accurately refers to the seller as a "black male."

The search warrant affidavit was not misleading or incorrect. The affidavit supports a search warrant, not an arrest warrant. Foster was arrested following events occurring during and after a valid search. The fact Jacoby Foster may have been the black male who sold drugs on two occasions is irrelevant to the validity or results of the search.

Brady holds: "Suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

In *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999), the United States Supreme Court stated:

There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.

Thus, in order to establish a *Brady* claim, petitioner must show that: (1) the defendant requested the evidence in question; (2) thereafter, evidence not known to petitioner and not available to him from another source was suppressed by the prosecution; (3) the evidence was favorable or exculpatory; and (4) the evidence was material to the question of petitioner's guilt. *Brady* at 1196-97. The party alleging a *Brady* violation bears the burden of establishing each of these elements. *Carter v. Bell*, 218 F.3d 581, 601 (6th Cir. 2000).

Element (1): Request, nondisclosure.

The minutes of Court reflect that Elizabeth Gardner initially represented Foster and that she made an oral motion for discovery. The record contains the State's response thereto, and supplemental response thereto, which apparently consisted of a search warrant affidavit and a crime lab report. The response filed by the district attorney, which is contained in the record, indicates that other items may have been disclosed, but such other items are not contained in the record. The record also reflects that Elizabeth Gardner was replaced by Anthony Hollis ("Hollis"), who served as trial counsel for Foster. On May 7, 2004, Hollis filed a written motion for discovery which included an explicit *Brady* request, and filed a motion to compel disclosure of *Brady* material. Apparently, Foster may not have been advised that the "confidential informant" had told the officers the identity of the black male mentioned in the search warrant, if that is true. It is unclear what effect, if any, that non-disclosure had on anything.

Element (2): Suppression, unavailability.

It is inconceivable Foster did not know that Ashcraft could have identified Jacoby Foster, Foster's cousin and witness, as the individual from whom he purchased drugs on December 11, 2003 and January 26, 2004. Since the information about a January 29, 2004 drug sale(s) is not part of the affidavit supporting the search and no drug sale on January 29, 2004 was involved in the arrest of Foster, it is difficult to see how the failure to disclose that Jacoby Foster sold drugs on that day or any other day(s) is favorable to Foster or that it serves to exculpate Foster.

Element (3): Favorability, exculpatory.

The next inquiry is whether Ashcraft's disclosure to the agents that it was Jacoby Foster who sold him the drugs on January 29, 2004, would be materially favorable or exculpatory for the defendant. Again, it seems a drug sale that day or any other by Jacoby Foster does not help Foster.

Element (4): Materiality.

Even assuming Foster did not know about Jacoby Foster's drug sales and that someone could consider that information exculpatory for Foster, it clearly is not material. The Louisiana Supreme Court in *State v. Marshall*, 94-0461 (La. 9/5/95), 660 So.2d 819, 825 stated the legal standard for *Brady* materiality:

[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability was defined as a probability sufficient to undermine confidence in the outcome. (Internal quotation marks and citations omitted.)

According to the record, Foster was arrested on the instant charges on the morning of January 29, 2004 when the police executed a search warrant on the residence located at 4118 Martha Street in Shreveport. Foster and Lorna Wilson ("Wilson") were sleeping in the master bedroom of the residence when police entered. In said master bedroom, the officers found: (1) 25 grams of cocaine in a slipper;¹ (2) 35 grams of marijuana in a jacket; (3) approximately 40 grams of marijuana packaged on the floor; (4) \$600 cash in the pocket of a pair of jeans belonging to the defendant; (5) digital scales near the marijuana on the floor; and (6) a partially

¹ Agent John Witham testified that he saw Foster attempting to slide the slipper under the bed, while Foster claimed that was impossible because, as a photograph seemed to indicate, the bed was simply a box spring set on the floor.

smoked marijuana cigarette on the floor. Foster admitted to Agent Witham that the drugs belonged to him. Later, however, Foster contended that he was lying when he made that admission. Foster explained that he had lied in taking responsibility for the drugs because Wilson was in college and he wanted to help keep her out of trouble.

The search warrant affidavit, which was disclosed to Foster, reflects that Agents Witham and Bailey used a confidential informant to make a controlled narcotics purchase targeting the residence in December 2003 and that Agents Witham and Johnson did the same on January 26, 2004. The search warrant application affidavit was submitted January 27, 2004 at 9:46 AM. It makes no mention of a controlled narcotics purchase targeting the residence on January 29, 2004, *i.e.*, the day of Foster's arrest on the instant charges and the day that Ashcraft claims he did a controlled purchase targeting the residence.

Ashcraft's affidavit (quoted *supra*) asserts that: (1) Agents Witham and Bailey were engaged in a controlled narcotics purchase using a confidential informant on January 29, 2004, *i.e.*, the date of Foster's arrest; (2) said purchase was from Jacoby Foster; and (3) Ashcraft had been involved in multiple drug deals with Jacoby in 2003 and 2004. While this seems highly unlikely based on the record, it is even more immaterial.

Jacoby is the defendant's cousin. At the scene of the defendant's arrest, Jacoby approached the officers. According to Agent Witham's trial testimony, Jacoby stated that the marijuana belonged to him, but made no mention of the cocaine. Jacoby testified that only two people lived at the house at that time: himself and his "Auntie." Orlando Foster (defendant's cousin and Jacoby's brother) testified at trial that Jacoby had admitted that everything in the house was his.

Even assuming credibility of the Ashcraft affidavit, Foster has failed to show a reasonable probability that, had he been made aware of John Ashcraft's identification of Jacoby Foster as the person who sold him drugs at the residence in an alleged control narcotics purchase on January 29, 2004, the outcome of the trial would have been different. It does not undermine confidence in the defendant's conviction on the evidence presented. Jacoby Foster's involvement in selling drugs from the residence does not render any less likely the fact that Roland Foster was also selling drugs from the residence. Foster admitted to Agent Witham that the drugs were his, but later contended that he had been lying when he made said admission.

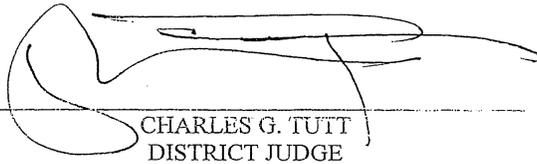
Furthermore, \$600 cash was found in the pants pocket of Foster's blue jeans and an officer testified that such is consistent with narcotics distribution. Ashcraft's affidavit testimony, in light of the other evidence, is not materially exculpatory; it does not undermine confidence in the conviction. The Ashcraft statement, if believed, merely *inculcates* Jacoby Foster in some drug sale(s). In light of all the evidence, and the nature of the crime, such does not diminish confidence that Roland Foster was intending to sell drugs.

The Court finds this supposedly new evidence to be immaterial under *Brady*, and, therefore, does not decide whether or not Foster has satisfied the "new evidence" exception to prescription under Louisiana Code of Criminal Procedure article 930.8(A)(1).

CONCLUSION

Accordingly, this application is **DENIED**. The Clerk of Court is directed to provide a copy of this Ruling to the District Attorney and Petitioner.

Signed this 8 day of January, 2016, in Shreveport, Caddo Parish, Louisiana.



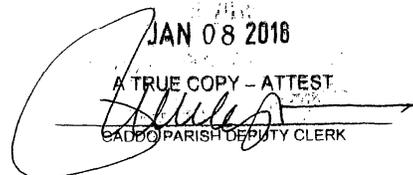
CHARLES G. TUTT
DISTRICT JUDGE

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JAN 08 2016
A TRUE COPY - ATTEST


CADDO PARISH DEPUTY CLERK