

SUPREME COURT OF LOUISIANA

No. 16-KH-0962

STATE EX REL. JOSE MENDEZ

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, relator shows no error in the thorough analysis of the courts below. 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.

TWENTY FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON
STATE OF LOUISIANA

NO. 11-6046

DIVISION "M"

STATE OF LOUISIANA

VERSUS

JOSE MENDEZ

106991
CIAI

FILED: 11-30-15

[Signature]
DEPUTY CLERK

ORDER

This matter comes before the court on petitioner's APPLICATION FOR POST-CONVICTION RELIEF, STAMPED AS FILED JULY 23, 2015, STATE'S RESPONSE, STAMPED AS FILED SEPTEMBER 4, 2015, AND PETITIONER'S TRAVERSE, STAMPED AS FILED SEPTEMBER 22, 2015.

The petitioner was convicted of count #1, LSA-R.S. 40:967F, possession of cocaine 28-200 grams, and count #2, LSA-R.S. 40:1238.1, possession of a legend drug (Viagra). On April 1, 2013, the court sentenced him on count #1 to 20 years imprisonment at hard labor, and on count #2 to 5 years, to run consecutively with his parole time. On May 28, 2013, the court re-sentenced him under the multiple bill on count #1 to 25 years imprisonment at hard labor, and count #2 to 5 years, concurrently, and both counts to run consecutive with parole time. His conviction was affirmed on appeal. *State v. Mendez*, 13-KA-909 (La. App. 5 Cir. 4/23/14), 140 So.3d 284; writ denied, 2014-KO-1085 (La. 1/9/15) 157 So.3d 596.

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

1. Petitioner's conviction was obtained in contravention of the rights against illegal search and seizure and the doctrine announced under the Franks doctrine.
2. Ineffective assistance of counsel at trial and on appeal.
3. Violation of rights of confrontation and compulsory process by withholding the identification of the informant.
4. Denial of due process and equal protection during multiple offender proceedings.

The court denied claim #4 in its order dated August 19, 2015, and ordered the State to respond to the remaining claims.

Claim #1

Petitioner claims that his conviction was obtained pursuant to an illegal search and seizure. Petitioner contests the warrant, and claims that the confidential informant was unreliable and untested. Petitioner further argues that both trial and appellate counsel was ineffective in relation to this claim.

The court finds this claim procedurally barred under LSA-C.Cr.P. art. 930.4(C), which states that if the application alleges a claim of which the petitioner raised in the trial court and inexcusably failed to pursue on appeal, the court shall deny relief.

However, even if the court were to address the merits of this claim, it would be denied. Petitioner relies on *Franks v. Delaware*, where the United States Supreme Court addresses whether a defendant in a criminal proceeding ever have the right, under the Fourth and Fourteenth Amendments, subsequent to the *ex parte* issuance of a search warrant, to challenge the truthfulness of factual statements made in an affidavit supporting the warrant. *Franks v. Delaware*, 438 U.S. 154, 155, 98 S. Ct. 2674, 2676, 57 L. Ed. 2d 667 (1978). The Court explained the process for contesting the affidavit:

There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine.

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CLERK OF COURT

There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing. Whether he will prevail at that hearing is, of course, another issue.

Id., 438 U.S. 154, 171-72, 98 S. Ct. 2674, 2684-85, 57 L. Ed. 2d 667 (1978)

In this case, the court conducted a Suppression Hearing, and petitioner had ample opportunity to litigate this claim. The court heard detailed testimony regarding a controlled buy, which provided sufficient probable cause in granting the warrant. After extensive cross-examination and argument, the court denied petitioner's Motion to Suppress Evidence. No evidence to the contrary was presented at the pre-trial hearing. Likewise, petitioner presents no evidence or any proof of falsehood or reckless disregard for the truth in his application for post-conviction relief.

Petitioner provides no evidence in support of this claim. His allegations are speculative and conclusory. Additionally, he provides no evidence of deficiency of counsel, or that counsel would have been successful had this claim been pursued on appeal. Thus, this claim will be denied.

Claim #2

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.

Petitioner claims that trial counsel was ineffective for failure to call key defense witnesses who he claims were material to the defense. Petitioner fails to provide information, facts, or evidence in support of this claim. The court finds petitioner's claim speculative and conclusory. Petitioner fails to prove that counsel acted deficiently, or that any prejudice resulted.

Petitioner claims that counsel was ineffective in that counsel should have sought writs and a stay to the Court of Appeal to protect defendant's rights and to prepare for trial. Petitioner also claims that counsel was deficient in requesting a continuance as counsel failed to inform the court of the need for the witness testimony. Again, petitioner does not provide any specifics regarding this claim. The court finds the claim speculative and conclusory. Petitioner fails to prove any deficiency in counsel's performance or prejudice resulting.

Petitioner claims that counsel was ineffective for failure to discover the confidential informant or to "contest the material falsity during the Franks/type hearing". As discussed above, the court finds no merit to this claim. Petitioner is not entitled to learn the identity of the confidential informant. A confidential informant's identity is privileged, absent exceptional circumstances. *State v. Broadway*, 96-2659 (La. 1999) 753 So.2d 801 at 815 (citing *State v. Oliver*, 430 So.2d 650 (La. 1983)). The courts use a balancing test to determine when the informant's name must be revealed to the defense, and the public interest in protecting the flow of information must be balanced against the individual's right to prepare his defense. *Id.* Petitioner presents no exceptional circumstances that warrant disclosure of the identity of the confidential informant. Furthermore, the reliability of this informant is irrelevant, as the defendant was not charged with the narcotics distributed in the controlled buy. Furthermore, petitioner does not prove that the affidavit in the underlying warrants contains any false statements. The court finds no deficiency in counsel's performance, and no prejudice resulting therefrom.

Petitioner claims that trial and appellate counsel was ineffective in relation to the multiple bill adjudication. This claim is not cognizable in post-conviction relief. Under *State v. Cotton*, the Louisiana Supreme Court ruled that respondent's post-conviction claim that he received ineffective assistance of counsel at his habitual offender adjudication is not cognizable on post-conviction relief.

Writ granted. The appellate court's order granting respondent's writ and remanding the case to the district court is vacated and the district court ruling dismissing the application is reinstated. In *State ex rel. Melinie v. State*, 93-1380 (La.1/12/96), 665 So.2d 1172, this Court construed the provisions of La.C.Cr.P. art. 930.3 and determined that they "provide[] no basis for review of claims of excessiveness or other sentencing error post-conviction." (Emphasis added). Although respondent argues that an unreasonable delay in instituting the habitual offender proceedings provides him with a claim for post-conviction relief under La.C.Cr.P. art. 930.3(4) ("The limitations on the institution of prosecution had expired."), an habitual offender adjudication does not pronounce a separate conviction or institute a separate criminal proceeding, but instead "only addresses itself to the sentencing powers of the trial judge after conviction and has no functional relationship to ... innocence or guilt..." *State v. Walker*, 416 So.2d 534, 536 (La.1982); see also *State v. Dorthey*, 623 So.2d 1276, 1278 (La. 1993) habitual offender bill of information "does not charge a new crime but merely advises the trial court of circumstances...."). An habitual offender adjudication thus constitutes sentencing for purposes of *Melinie* and La.C.Cr.P. art. 930.3, which provides no vehicle for post-conviction consideration of claims arising out of habitual offender proceedings, as opposed to direct appeal of the conviction and sentence. La.C.Cr.P. art. 912(C)(1)(defendant may appeal from a judgment "which imposes sentence"). A fortiori, respondent's claim that he received ineffective assistance of counsel at his habitual offender adjudication is not cognizable on collateral review so long as the sentence imposed by the court falls within the range of the sentencing statutes. Cf. La.C.Cr.P. art. 882.

State v. Cotton, 2009-2397 (La. 10/15/10), 25 So.3d 1030. These claims are not cognizable for review in an application for post-conviction relief, and thus will be denied.

Claim #3

Petitioner claims that his rights to confrontation and compulsory process were denied by withholding of the informant's identification, which was critical to the defense position. The court finds this claim procedurally barred under LSA-C.Cr.P. art. 930.4(C), which states that if the application alleges a claim of which the petitioner raised in the trial court and inexcusably failed to pursue on appeal, the court shall deny relief.

Trial counsel filed a Motion for Disclosure of the Identity of the Confidential Informant on March 4, 2013, which this court denied. Petitioner did not seek writs or raise the claim on appeal. Petitioner further claims that counsel was ineffective for not pursuing this issue on appeal.

The court finds the claim procedurally barred from review. However, because petitioner claims that the failure to raise on appeal was due to ineffective counsel, the court will also address the merits of the claim.

In this case, the informant participated in a controlled buy with defendant, which was not introduced to the jury at trial. Petitioner was not charged with distribution of narcotics. Although the informant was the source of obtaining probable cause for the warrant in this case, that is insufficient for the requisite of disclosure of the informant's identity.

Petitioner's rights were not violated under the Confrontation Clause, as the hearsay testimony of the informant was never introduced or even mentioned at trial. The court finds no merit to this claim, no deficiency in counsel's performance, and no prejudice resulting.

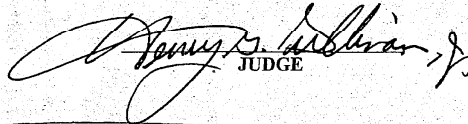
Under LSA-C.Cr.P. art. 930.2, the petitioner in an application for post-conviction relief shall have the burden of proving that relief should be granted. The petitioner has not presented sufficient evidence in support of any of these claims, and thus has not met his burden.

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 30th day of November, 2015.

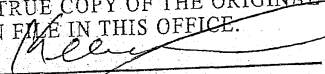

JUDGE

PLEASE SERVE:

Petitioner: Jose Mendez, DOC # 106991, A.V.C., 1630 Prison Road, Cottonport, LA 71327

Terry Boudreau, District Attorney's Office, 200 Derbigny St., Gretna, LA 70053

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JUDICIAL DISTRICT COURT
PARISH OF ORLEANS, LA

TWENTY FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON
STATE OF LOUISIANA

NO. 11-6046

DIVISION "M"

STATE OF LOUISIANA

VERSUS

JOSE MENDEZ

FILED:

8-19-15


DEPUTY CLERK

ORDER

This matter comes before the court on petitioner's APPLICATION FOR POST-CONVICTION RELIEF, STAMPED AS FILED JULY 23, 2015.

The petitioner was convicted of count #1, LSA-R.S. 40:967F, possession of cocaine 28-200 grams, and count #2, LSA-R.S. 40:1238.1, possession of a legend drug (Viagra). On April 1, 2013, the court sentenced him on count #1 to 20 years imprisonment at hard labor, and on count #2 to 5 years, to run consecutively with his parole time. On May 28, 2013, the court re-sentenced him under the multiple bill on count #1 to 25 years imprisonment at hard labor, and count #2 to 5 years, concurrently, and both counts to run consecutive with parole time. His conviction was affirmed on appeal. *State v. Mendez*, 13-KA-909 (La. App. 5 Cir. 4/23/14), 140 So.3d 284; writ denied, 2014-KO-1085 (La. 1/9/15) 157 So.3d 596.

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2. Ineffective assistance of counsel at trial and on appeal.
3. Violation of rights of confrontation and compulsory process by withholding the identification of the informant.
4. Denial of due process and equal protection during multiple offender proceedings.

Claim #4

The court denies claim #4 as this claim is not cognizable in post-conviction relief. These claim deal with sentencing and multiple offender adjudication, and thus is procedurally barred from review. The Supreme Court of Louisiana in *State ex rel. Melinie v. State*, 665 So.2d 1172 (La. 1/12/96), has held that article 930.3 provides no basis for review of claims of excessiveness or other sentencing error in post-conviction proceedings. *See also State v. Hebreard*, 708 So.2d 1291, 98-0385 (La.App. 4 Cir. 3/25/98), which explicitly decreed that a challenge to petitioner's adjudication as a multiple offender was not a proper ground for post-conviction relief. Thus, this claim will not be reviewed by this court in post-conviction relief.

Post-conviction relief law requires that if an application alleges a claim which, if proven, would entitle petitioner to relief, the court shall order the district attorney to file any procedural objections, or an answer on the merits if there are no procedural objections, within 30 days. LSA-C.Cr.P. art. 927. A district court may grant a summary disposition on an application for post conviction relief only after the required answer by the state has been filed. LSA-C.Cr.P. art. 929.

For these reasons, it is the order of this court that the State file a response raising what ever procedural objections it may have, or if no procedural objections, an answer on the merits to petitioner's allegations in claims #1 - #3.

Petitioner also requests appointment of counsel and an evidentiary hearing. He is not entitled to appointed counsel, to an evidentiary hearing, or to be transported to court at this time.

Accordingly,

IT IS ORDERED BY THE COURT that claim #4 is hereby DENIED.

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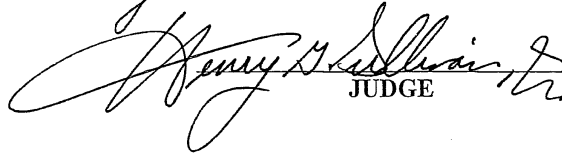
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IT IS FURTHER ORDERED BY THE COURT that petitioner's request for an evidentiary hearing is hereby **DENIED**.

IT IS FURTHER ORDERED BY THE COURT that the State file a response within 30 days raising whatever procedural objections it may have, or if no procedural objections, an answer within 30 days on the merits, as to claims #1, #2, and #3.

Gretna, Louisiana this 19 day of August, 2015.


JUDGE

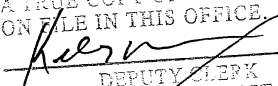
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Terry Boudreux, District Attorney's Office, 200 Derbigny St., Gretna, LA 70053

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24TH JUDICIAL DISTRICT COURT
LAFAYETTE, LOUISIANA