

SUPREME COURT OF LOUISIANA

No. 16-KH-1548

STATE EX REL. ALFRED JONES

v.

STATE OF LOUISIANA

**ON SUPERVISORY WRITS TO THE CRIMINAL
DISTRICT COURT, PARISH OF ORLEANS**

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 his remaining claims, 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 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.

STATE OF LOUISIANA

CRIMINAL DISTRICT COURT

VERSUS

PARISH OF ORLEANS, SEC. "B"

ALFRED JONES

CASE NO. 470-161

POST CONVICTION RELIEF JUDGMENT

Denied.

Mr. Alfred Jones' application for Post Conviction Relief is denied. On August 19, 2010, Mr. Jones was convicted via jury trial for two (2) counts of a violation of Louisiana Revised Statute 14:30, First Degree Murder. On September 10, 2010, Mr. Jones received life imprisonment with the Department of Public Safety and Corrections, without the benefit parole, probation, or suspension of sentence. On July 21, 2011, the Louisiana Appellate Project filed an appeal on behalf of Mr. Jones and on February 15, 2012, the Court of Appeal, Fourth Circuit affirmed Mr. Jones' conviction and sentence.¹ On September 24, 2012, the Louisiana Supreme Court denied writs, thereby rendering Mr. Jones' conviction and sentences final.

On August 1, 2013, Mr. Jones filed an application for Post Conviction Relief. Within this application, Mr. Jones presents the following nine (9) claims: (1) "[t]he trial court erred in allowing jurors to walk in and out of the courtroom while trial was in progress, in violation and contradiction of the sequestration." (2) "[t]he trial court erred in failing to investigate or question the jurors whether they were 'hung' when they notified the court that they 'could not come together on a verdict tonight.'" (3) "[t]he trial judge denied Jones' right to a fair trial and constructively denied him effective assistance when instructing Mr. Tessier not to request for another witness." (4) "[p]rosecutorial misconduct when the State withheld evidence of another eye witness." (5) "[p]rosecutorial misconduct during closing arguments when the prosecutor made reference to the attorney's previous

¹ State v. Jones, 85 So.3d 224 (La. App. 4 Cir. 2012).

Clerks Office the attorney's previous
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Hon. Arthur A. Morrell
Clerk of Criminal District Court
Orleans Parish

client being testified against by the victim.” (6) “[p]rosecutorial misconduct when the prosecutor made personal statement, that ‘find him not guilty is the worst thing that could happen to the justice system.’” (7) “[i]neffective assistance of counsel when counsel failed to investigate; and/or request for continuance to secure the witness withheld by the State or Motion for New Trial based upon newly discovered information, *i.e.*, eye witness.” (8) “[w]hen the attorney gave inaccurate (important) details during opening that contradicted details given during trial and changed again during closing arguments abandoning Jones’ defense.” and (9) “[i]neffective assistance of appellate counsel’s failure to assign as error new information, previously withheld from trial counsel, *i.e.*, witness.”² On, June 15, 2015, Criminal District Court Section “B” denied Mr. Jones’ first application for Post Conviction Relief based on the following: (1) failure to raise Claims 1-6 and Claim 9 on direct appeal; and (2) failure to meet his burden of proof to establish ineffective assistance of counsel for Claims 7 and 8. On September 29, 2015, the Fourth Circuit vacated the judgment and remanded the case back to the District Court to give Mr. Jones an opportunity to explain why he did not raise the seven (7) defaulted claims on appeal.³ On November 20, 2015, Section “B” ordered Mr. Jones to file a memorandum stating his reasons for failure to raise the defaulted claims. On January 19, 2016, Mr. Jones filed his “Reasons for Not Raising Claims on Direct Appeal,” and this Court subsequently ordered the District Attorney to respond to Mr. Jones’ application for Post Conviction Relief. On January 20, 2016, based on a literal reading of Art. 930(4)(F), Section “B” denied Mr. Jones

² Jones Mot. at. 5-6.

³ Mr. Jones’ omitted claims were as follows: (1) “[t]he trial court erred in allowing jurors to walk in and out of the courtroom while trial was in progress, in violation and contradiction of the sequestration.” (2) “[t]he trial court erred in failing to investigate or question the jurors whether they were ‘hung’ when they notified the court that they ‘could not come together on a verdict tonight.’” (3) “[t]he trial judge denied Jones’ right to a fair trial and constructively denied him effective assistance when instructing Mr. Tessier not to request for another witness.” (4) “[p]rosecutorial misconduct when the State withheld evidence of another eye witness.” (5) “[p]rosecutorial misconduct during closing arguments when the prosecutor made reference to the attorney’s previous client being testified against by the victim.” (6) “[p]rosecutorial misconduct when the prosecutor made personal statement, that ‘find him not guilty is the worst thing that could happen to the justice system.’” (9) “[i]neffective assistance of appellate counsel’s failure to assign as error new information, previously withheld from trial counsel, *i.e.*, witness.”

"Motion for Appointment of Counsel" as premature because Mr. Jones had not yet presented claims that entitled him to relief and the appointment of an attorney. On January 29, 2016, the State filed their response. Mr. Jones' application is denied for the following reasons.

I. Failure to Pursue on Appeal

Louisiana Code of Criminal of Procedure Art. 930(4)(F) "Repetitive applications" reads as follows:

If the court considers dismissing an application for failure of the petitioner to raise the claim in the proceedings leading to conviction, failure to urge the claim on appeal, or failure to include the claim in a prior application, the court shall order the petitioner to state reasons for his failure. If the court finds that the failure was excusable, it shall consider the merits of the claim.

Mr. Jones has advised that he should be excused from failing to present Claims 1, 2, 4, 5 and 6 on direct appeal because these issues were not properly preserved for review by the lodging of a contemporaneous objection.⁴ Mr. Jones also asserts that he should be excused from "...failing to present claims 3, and 4, on Direct Appeal because these claims concern allegations of ineffective assistance of counsel."⁵ In addition, Mr. Jones states that "[h]e had cause for not presenting these claims as he relied on the assistance of skilled appointed Appellate Counsel as well as trained Inmate Counsel..."⁶ Mr. Jones notes that at the time of his Direct Appeal, he did not have access to Inmate Counsel or the law library.⁷

⁴ Petitioner's Reason(s) for Not Raising Claims of Direct Appeal at 3.

⁵ *Id.*

⁶ *Id.* at 5.

⁷ *Id.* at 7

The State argues that with the exception of ineffective assistance of counsel, all of Mr. Jones' claims are procedurally barred."⁸ The State strongly urges that the claims asserted by Mr. Jones could have been brought by his appellate counsel or by him in a *pro se* supplemental brief on direct appeal.⁹ The State asserts that while Mr. Jones can argue his counsel was ineffective, he cannot raise the excluded claims now in an application for Post Conviction Relief.

In this instance, for his appeal, Mr. Jones was represented by the Louisiana Appellate Project, which as the sole purpose of their agency conducts extensive reviews of court records and transcripts and lodges appeals where they deem appropriate based on the law and jurisprudence. Therefore, the Appellate Counsel lodged all available claims on behalf of Mr. Jones. Further, based on that appeal, the Fourth Circuit affirmed Mr. Jones' conviction and sentence. As such, this Court find that Mr. Jones' failure to raise Claims 1-6 was not excusable and will only consider his claims in relation to ineffective assistance of counsel.

**INEFFECTIVE ASSISTANCE OF COUNSEL
[CLAIMS 8 AND 9]**

Mr. Jones presents two (2) claims of ineffective assistance of counsel. First in Mr. Jones argues that trial counsel proved ineffective when he "[g]ave inaccurate (important) details during opening that contradicted details given during trial and changed again during closing arguments—abandoning Jones's defense."¹⁰ Second, Mr. Jones urges that appellate counsel (the Louisiana Appellate Project) proved ineffective for "[f]ailure to assign as error new information previously withheld from trial counsel, *i.e.*, a witness."¹¹

Louisiana Code of Criminal Procedure Art. 930.2, "Burden of proof," states:

⁸ State's Procedural Objections and Responses on the Merits to Defendant's Application for Post Conviction Relief.

⁹ *Id.*

¹⁰ Jones Mot. at 13.

¹¹ Jones Mot. at 16.

The petitioner in an application for post conviction relief shall have the burden of proving that relief should be granted.

The test for effectiveness of counsel is two-pronged: (1) the defendant must show that counsel made errors so serious that he was not functioning as guaranteed by the Sixth Amendment; and (2) the defendant must show that the deficient performance prejudiced the defense by proving that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.¹² The defendant has the burden of showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." A "reasonable probability" is defined as "a probability sufficient to undermine confidence in the outcome."¹³ The assessment of an attorney's performance requires that his conduct be evaluated from counsel's perspective at the time of the occurrence.¹⁴ A reviewing court must give great deference to trial counsel's judgment, tactical decisions and trial strategy, with a strong presumption that counsel has exercised reasonable professional judgment.¹⁵

In *State v. Brooks*, 505 So.2d 714, 724 (La. 1987), the defendant was convicted of First Degree Murder. The defendant appealed his conviction and claimed his lead attorney rendered ineffective assistance of counsel as he was ill-prepared for trial. The Louisiana Supreme Court held that the defendant's attorney was effective. The Supreme Court found that:

As opinions may differ on the advisability of a tactic, hindsight is not the proper perspective for judging the competence of counsel's trial decisions. Neither may an

¹² *Strickland v. Washington*, 466 U.S. 668 (1984); *State ex rel. Busby v. Butler*, 538 So.2d 164 (La. 1988).

¹³ *State v. Porche*, 780 So.2d 1152, 2000-1391 (La. App. 4 Cir. 2/14/01) (quoting *Strickland*, 466 U.S. at 693).

¹⁴ *Mattheson v. King*, 751 F.2d 1432 (5th Cir. 1984).

¹⁵ *Ricalday v. Proconier*, 736 F.2d 203 (5th Cir. 1984); *State v. Thompson*, 544 So.2d 421 (La. App. 3 Cir. 1989) *writ denied*, 550 So.2d 626.

attorney's level of representation be determined by whether a particular strategy is successful.¹⁶

In *State v. Wingo*, 457 So.2d 1159 (La. 1984), the defendant was convicted of First Degree Murder, sentenced to death, and appealed. The Louisiana Supreme Court held that trial court did not err in refusing to allow defense counsel to quote from the prosecutor's prior closing argument (in an unrelated case) during Defense counsel's opening statement. In discussing opening statements, the Supreme Court discussed the following:

When defense counsel chooses to make an opening statement, he is limited to an explanation of the nature of the defense and a discussion of the facts which **might** be proved by admissible evidence. Of course, arguments of counsel are not evidence. [Citations Omitted][Emphasis Added]

First, in this case, Mr. Jones' claim does not rise to the level of proof required to establish a valid claim of ineffective assistance of counsel given that, as stated in *Wingo*, opening statements are not evidence. Therefore, Mr. Jones has not met his burden of proving that but for the contradicting statements made by trial counsel, there was a reasonable probability that the outcome of the proceedings would have been different.


Mr. Jones specifically highlights that appellate counsel "[f]ailed to raise the claim of ineffective assistance of trial counsel where trial counsel learned of a new witness and failed to either investigate, or have this witness called to testify."¹⁷ While Mr. Jones refers to a transcript, no transcript is included with his application. Further, Mr. Jones does not provide any factual evidence in support of this specific claim. Therefore, Mr. Jones' has not met his burden to establish why relief should be granted for any such claims.

¹⁶ *Brooks*, 505 So. 2d at 724.

¹⁷ *Id.*

Based on the foregoing, this Court denies Mr. Jones' application for Post Conviction Relief based on the following:

NEW ORLEANS, LOUISIANA this the 15th day of APRIL, 2016.



TRACEY FLEMINGS-DAVILLIER, JUDGE
ORLEANS PARISH CRIMINAL
DISTRICT COURT SECTION "B"

Clerk's Office 24-5 2016
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by [Signature] Deputy Clerk

Hon. Arthur A. Morrell
Clerk of Criminal District Court
Orleans Parish