02/03/2017 "See News Release 010 for any Concurrences and/or Dissents."

SUPREME COURT OF LOUISIANA

No. 16-KH-1574

STATE EX REL. KARL PETERS

v.

STATE OF LOUISIANA

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

PER CURIAM:

Writ 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). His cumulative error claim is not cognizable. La.C.Cr.P. art. 930.3. Relator's remaining claims are repetitive and/or unsupported. La.C.Cr.P. art. 930.2; La.C.Cr.P. art. 930.4. 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.

STATE OF LOUISIANA	**CRIMINAL DISTRICT COURT**
VS.	**ORLEANS PARISH**
KARL PETERS	**CASE NO. 491-939 (L)**

RULING

The defendant was convicted by a jury of second degree murder. His conviction was affirmed by the Louisiana Fourth Circuit Court of Appeal on March 13, 2013. The Louisiana Supreme Court denied writs on November 1, 2013. The defendant has now filed an application for post conviction relief raising claims of prosecutorial misconduct, alleging that the prosecution knowingly presented false testimony, made improper closing arguments, that the trial court abused its discretion in allowing the dying declaration and phone calls into evidence, and several claims of ineffective assistance of counsel.

The Facts

The evidence was summarized by the Louisiana Fourth Circuit Court of Appeal as follows:

> According to Raven Roach, the live-in girlfriend of the decedent, Mr. Peters was one of a company of six men who approached Mr. Bart at his home to purchase marijuana from him. They asked Mr. Bart whether they could purchase two bags of marijuana for five dollars; the going rate apparently was one bag for that price. Mr. Bart declined to let the group buy one and get one free. After some additional, brief negotiations, it was agreed to buy one bag for the standard price. After delivery of the bag by Mr. Bart to the group and the exchange of the payment, Ms. Roach upon counting the money realized Mr. Bart, the dealer, had been shortchanged two dollars. In anger Mr. Bart chased after the group, words were exchanged, and Mr. Bart told them never to return to him to buy their marijuana. According to Ms. Roach, the defendant told Mr. Bart words to the effect that they would be back.
>
> A short while later, when Ms. Roach returned from a nearby neighborhood store, she encountered Mr. Bart and an unknown man on the front porch of Mr. Bart's home. While she was urging Mr. Bart into the house, Mr. Peters approached. Although she did not actually see a gun in his hand, she testified that the gunfire came from his direction. The unknown man was hit with a bullet and ran through the shotgun house and out the backdoor; he has never been identified or located. Because no one else saw this man, Mr. Peters questions whether he even existed.
>
> Mr. Bart also ran into the house. He had been shot four times. The forensic medical examiner stated that the location of his wounds was consistent with being shot first in the chest, then of Mr. Bart turning away and shot toward the side, and then two shots, one in the back and one in the heel. Mr. Bart collapsed under the kitchen table. Ms. Roach, too, unwounded ran into the house. Gunfire entered the house, causing two visitors who were playing video games, to also seek safety in the back of the house. The two visitors, Jesus Arce and Stephen Thornsberry, did not witness the shooting of Mr. Bart.
>
> Ms. Roach, Mr. Arce, and Mr. Thornsberry all testified that they were in the kitchen, Mr. Bart was still alive, and that he repeatedly said that "Karl" had shot him. Mr. Bart was pronounced dead at the hospital shortly after the shooting.
>
> Apparently, Ms. Roach had testified at a previous trial [footnote omitted] that the decedent had said "Karl Peters." During this trial she admitted that he had not and she now claimed that she learned Karl's last name later that day at the hospital. Mr. Arce testified that he knew exactly to whom Mr. Bart was referring because they knew Karl from the neighborhood. It was established at trial that Mr. Peters lived just a few blocks away from the decedent's home. Mr. Thornsberry did not know to whom Mr. Bart was referring, did not see him, and did not know him. Mr. Thornsberry, however, did select the defendant in a photographic line-up, but testified that he had been prompted by the actions of Detective Richard Chambers..., Ms Roach and Mr. Arce both testified that they selected Mr. Peters in the photographic line-ups; there was no indication from either that their selections were prompted by the investigator.

> Several days later Detective Chambers obtained a warrant for Mr. Peters. Following his cautioning with *Miranda*, Mr. Peters told the detective that he had an alibi; he was at Disney World with his auntie. When the detective was executing a search warrant at Mr. Peters' home, he encountered Tonja Crawford, who identified herself as Mr. Peters aunt. She told the investigator that she had been to Disney World at that time, but that the defendant was not with her; she repeated this to the jury.
>
> The jury also heard recordings of three telephone conversations between Mr. Peters, who was incarcerated, and others, who were not fully identified.... In one conversation that Mr. Peters was holding with Snake, there was considerable discussion between them about Mr. Peters' mother being his alibi witness to vouch that he was at home. Snake was warning Mr. Peters to make sure that that alibi would stand up to any other evidence and advising that the first step would be to speak with his mother to be certain that she would testify. And Snake pointed out to him that a new alibi would conflict with the one with the aunt.
>
> In another telephone conversation, when Mr. Peters tells the other person that he has encouraging news that a "law man" in the jail read the police report and told Mr. Peters that he would beat the charge because they are not describing him in the report. The other person points out that although they are not describing him, they are giving his name. In the final conversation, the other person asks Mr. Peters if gun powder was found on his clothes to which he replies, "No. They don't got none of that."
>
> The weapon used in the shooting was never recovered. Nothing of any prosecutorial value was obtained pursuant to the search warrant.
>
> The defense noted several inconsistencies in the testimony of the witnesses. Most prominently, Ms. Roach had told the investigators that there were *two* shooters and given information for two sketches, but at trial she said there was only one shooter. Ms. Roach also admitted that she never furnished the investigators with Karl Peters full name, even though she claimed to have known it before the investigators gave her the name. No one but Ms. Roach saw a man at the back door, and no one but she saw the other man on the front porch.

State v. Peters, unpublished op. 2012-KA-0929, pps. 4-7 (3/13/13).

The Issues

A. Dying Declaration and Phone calls

The issue of the phone calls was addressed on direct appeal and therefore will not be addressed again here. This Court finds no error by this Court or in the Fourth Circuit reasoning upholding the ruling. (See State v. Peters, unpublished opinion 2012-KA-0929 pp. 11-14 (La. App. 4th Cir. 3/13/2013)).

As to the dying declaration, the defendant failed to raise this claim in the Appellate Court, which it could have done on his own apart from appellate counsel's brief. Nevertheless, this issue was carefully considered at the trial court level. By ruling of June 8, 2011, the trial Court reasonably found the dying declaration admissible stating:

> Article 804(B)(2) of the Louisiana Code of Evidence clearly allows as an exception to the hearsay rule:
>
> A statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.
>
> It is well settled that dying declarations are admissible if made under circumstances where the declarant is aware of his condition and under a sense of impending death. **State v. Gremillion, 542 So.2d 1074, 1077 (La. 1989).** A victim's statement is admissible, even if elicited by questions. **State v. Verrett, 419 So.2d 455, 456 (La. 1982).** The necessary state of mind may be inferred from the circumstances surrounding the declaration, including medical testimony concerning the victim's deteriorating physical condition; The victim need not express his belief that he is dying if such belief may be reasonably presumed from the facts and circumstances surrounding the declaration.

Cir. 4/3/96), 672 So.2d 1085, 1089. The more serious the injury and the greater the impairment, the more probable is his belief that the end is near:

> [N]o absolute rule can be laid down by which to decide with certainty whether the declarant, at the time of his making his statement, really expected to die, yet when the wound is from its nature mortal, and when, as a matter of fact, the deceased shortly after making his statement died, the courts have uniformly held that the declarant really believed that death was impending, and his statement has been admitted as a dying declaration.

State v. Matthews, 95-1245 (La. App. 4th Cir. 8/21/96), 679 So.2d 977, 981, citing State v. Augustus, 129 La. 617, ____, 56 So.2d 551, 552 (1911). As maintained by the State, the injuries discussed in Matthews, notably a gunshot to the abdomen, are similar to the injuries here. Considering the nature, of the wound, the number of gunshots received, the circumstances of the statement soon after the shooting, prior to transport to the hospital, and that the victim died within an hour and half of the actual shooting, the statement remains ADMISSIBLE under La. C.E. art. 802(B)(2).

> Even if the statement is questioned as being a dying declaration it would nevertheless be admissible as a *res gestae* statement under La. C.E. art. 803 (2) wherein it provides that "a statement relating to a starting event or condition made while the declarant was under the stress of excitement caused by the event or condition" is not considered hearsay. The victim uttered the statement to the occupants of the house in the moments after the shooting while fleeing the shooter. Therefore the statement is also ADMISSIBLE as an excited utterance.

The "dying declaration" was admissible for several reasons and there is no abuse of discretion evident.

B. Prosecutorial misconduct

The defendant argues that the prosecutor knowingly presented false testimony to the jury. He argues the changing story of the witness Raven Roach, who was the only witness present at the time of the shooting, as proof that the witness was lying. Two other witnesses were inside the home and verified a portion of her testimony. While the statements evolved in some details of the shooting, they actually weakened her testimony, not strengthened her testimony. All her inconsistencies were presented to the jury. The inconsistencies speak to her assumptions on such details as the defendant's last name which she inserted into her memory, but which she retracted when questioned more closely. This does not mean she was perjuring herself. Further, the fact that she qualified her statements that she saw gunfire from the defendant's direction without actually seeing the gun speak to her veracity. The fact that the defendant asserts this witness was lying because of inconsistent details does not rise to the State knowingly presenting perjured testimony. This claim is without merit.

In State v. Jackson, 568 So.2d 599, 602 (La.App. 4 Cir.,1990), the Louisiana Fourth Circuit noted

> ...[E]ven if it is found that the prosecutor's arguments contain improper remarks, an appellate court may reverse the conviction **only** if it is thoroughly convinced that the jury was influenced by the remarks, and that the remarks contributed to the verdict. *State v. Byrne,* 483 So.2d 564 (La.1986), cert. denied, *Byrne v. Louisiana,* 479 U.S. 871, 107 S.Ct. 243, 93 L.Ed.2d 168 (1986); *State v. Carroll,* 546 So.2d 1365 (La.App. 4th Cir.1989). [emphasis added]

The defendant highlights two brief arguments by the prosecutor in closing argument. It should be noted that the Court repeatedly admonished the jury that the prosecutors' arguments were not evidence, merely argument. The second statement appears to respond to argument by defense counsel and was cut short. While perhaps not proper argument, it is harmless. The evidence presented to the jury was significant, particularly as his attempts at an alibi fell apart repeatedly.

C. Ineffective Assistance of Counsel

02/03/2017 "See News Release 010 for any Concurrences and/or Dissents."

The petitioner asserts claims of ineffective assistance of counsel. Ineffective assistance of counsel claims are analyzed under the two prong test of **Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).** In order to successfully urge this claim petitioner must demonstrate both (1) that his counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. Failure to establish either prong is fatal to the claim. **Strickland, 466 U.S. at 687, 104 S.Ct. at 2064 (1984); Murray v. Maggio, 736 F.2d 279, 281 (5th Cir. 1984).** The proper standard for judging counsel's performance is that of reasonably effective assistance, considering all the circumstances. **Strickland, 466 U.S. at 689, 104 S.Ct. at 2065; Murray, 736 F.2d at 281.** Scrutiny of counsel's performance must be highly deferential, and every effort must be made to eliminate the distorting effects of hindsight. **Strickland, 466 U.S. at 689, 104 S.Ct. at 2065.**

As for the second prong, a defendant is prejudiced if there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. A "reasonable probability" is probability sufficient to undermine confidence in the outcome. **Id., 466 U.S. at 694, 104 S.Ct. at 2068; Green v. Lynaugh, 868 F.2d 176, 177 (5th Cir. 1989).** However, if the facts adduced at trial point so overwhelmingly to petitioner's guilt that even the most competent attorney would be unlikely to have obtained an acquittal, the claim of ineffective assistance must fail. **Green, 868 F.2d at 177.** The proper standard for judging counsel's performance is that of reasonably effective assistance, considering all the circumstances. **Strickland, 466 U.S. at 689, 104 S.Ct. at 2065; Murray, 736 F.2d at 281.**

Defendant complains that his counsel was ineffective for failure to file pretrial motions, properly investigate his case and to make timely objections. Nothing in the record suggests that the defendant would have succeeded in a motion to suppress, or that further investigation would have exculpated the defendant and yielded a different result. Furthermore, "the filing of pretrial motions is squarely within the ambit of the attorney's trial strategy, and counsel is not required to engage in efforts of futility." **State v. Moore, 2000-2282 , 6 (La.App. 4 Cir., 9/26/2001), 797 So.2d 756, 761, quoting State v. Hollins, 99-278 (La.App. 5 Cir. 8/31/99), 742 So.2d 671.** Actually, the defendant quotes sections which defeat his own argument of ineffective assistance of counsel, because counsel used such issues as the ballistic report showing two guns to raise reasonable doubt.

The record reflects diligent efforts by counsel in pretrial motions on identification, dying declarations and to keep the taped phone calls out. All of defendant's claims are the result of hindsight, and/or appear to be strategy or outright incorrect. The defendant's sweeping allegations do not meet either prong of the **Strickland** test.

JUDGE FRANZ ZIBILICH
SECTION "L"

This 16th day of December, 2014.

New Orleans, Louisiana