

SUPREME COURT OF LOUISIANA

NO. 2016-KP-1631

STATE OF LOUISIANA

VERSUS

JERMAINE CARTER

**ON SUPERVISORY WRITS TO THE 40TH JUDICIAL DISTRICT COURT
FOR THE PARISH OF ST. JOHN THE BAPTIST**

CRICHTON, J., additionally concurs and assigns reasons:

I agree with this Court's denial of the writ application by the State of Louisiana and write separately to highlight the district court's excellent analysis of this post-conviction matter and thorough reasons for judgment. *See* May 19, 2016 Judgment, *State v. Carter*, (No. 2012-CR-14) (attached hereto). As recognized by Judge Mary Becnel, the right to counsel is fundamental and constitutional; it assigns fairness and legitimacy to our adversarial process. But in this case, Judge Becnel found that the defendant showed a reasonable probability that counsel's errors upset that adversarial balance between prosecution and defense, causing the verdict to be unreliable.

This Court receives many collateral actions alleging ineffective assistance of counsel. For the Court—these are serious; and for the counsel involved—these are embarrassing. After a thorough review of these claims, most are denied. However, in my view, this case presents a near textbook example of a valid claim under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) because the defendant established that (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; and (2) counsel's inadequate performance prejudiced him to such an extent the trial was rendered unfair and the verdict suspect. Because of the deficient

representation by counsel, I cannot trust the validity of the jury's verdict. And, in my view, the defendant is entitled to a new trial.

THE FORTIETH JUDICIAL DISTRICT COURT

STATE OF LOUISIANA

PARISH OF ST. JOHN THE BAPTIST

NO. 2012-CR-14

DIVISION "B"

STATE OF LOUISIANA

VERSUS

JERMAINE CARTER

Deputy Clerk

ERIK L. DEPTAROSCHI - CLERK OF COURT
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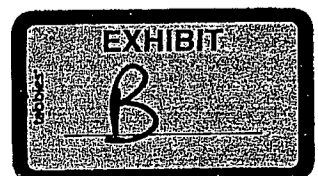
JUDGMENT

Considering petitioner's *Application for Post Conviction Relief* filed with this Court on July 30, 2014:

On June 20, 2012, petitioner Jermaine Carter was found guilty of First Degree Robbery and Attempted First Degree Robbery through a trial by jury. On August 20, 2012, the Court held a multiple bill hearing, and the petitioner was sentenced to 30 years and 15 years, respectively, at hard labor with the Department of Corrections to run concurrently. The conviction was affirmed by the Fifth Circuit Court of Appeals on October 30, 2013, and affirmed by the Louisiana Supreme Court on April 25, 2014. Petitioner has now filed for post conviction relief.

In his application to the Court for post conviction relief, petitioner's claim is ineffective assistance of counsel. Specifically, petitioner alleges his counsel was ineffective by failing to be properly and adequately prepared, review the file, investigate and interview witnesses, subpoena witnesses, move for a mistrial, communicate with petitioner, and inform petitioner as to the ramifications of his failures. On March 3, 2016, the State filed a *Memorandum in Opposition to Post-Conviction Relief Application on Behalf of the State of Louisiana* asserting that the petitioner's claims are without merit and are unsupported by evidence.

In assessing a claim of ineffective assistance of counsel, a two-pronged test is employed. In order to prevail, the defendant must show both that counsel's representation fell below an objective standard of reasonableness, and that there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). Stated another way, the defendant must show that (1) his counsel's performance was deficient, and (2) the deficiency prejudiced him. *Id.* To show prejudice, the defendant must demonstrate that,



but for the unprofessional conduct, the outcome of the proceeding would have been different. *State v. Soler*, 636 So. 2d 1069 (La. Ct. App.), writ denied, 637 So. 2d 450 (La. 1994), and writ denied, 94-1361 (La. 11/4/94), 644 So. 2d 1055. Therefore, the defendant must show a reasonable probability that counsel's error so undermined the proper functioning of the adversarial process that the trial court cannot be relied upon as having produced a just result. *Id.*

Effective counsel has been defined to mean "not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render effective assistance." *Soler*, 636 So. 2d at 1075; *citing State v. Ratcliff*, 416 So.2d 528, 531 (La. 1982). There is a strong presumption that the conduct of counsel falls within the wide range of responsible professional assistance. *Soler*, 636 So. 2d 1069; *citing State v. Myers*, 583 So. 2d 67 (La. Ct. App.), writ denied, 585 So. 2d 576 (La. 1991). If an error falls within the ambit of trial strategy, it does not establish ineffective assistance of counsel. *State v. Bienemy*, 483 So. 2d 1105 (La. Ct. App. 1986). Hindsight is not the proper perspective for judging the competence of counsel's decisions because opinions may differ as to the advisability of a tactic. An attorney's level of representation may not be determined by whether a particular strategy is successful. *State v. Marino*, 2000-1131 (La. App. 4 Cir. 6/27/01), 804 So. 2d 47, writ denied, 2001-2287 (La. 8/30/02), 823 So. 2d 936, and writ denied sub nom. State ex rel. Marino v. State, 2002-1036 (La. 3/21/03), 840 So. 2d 532; *citing State v. Brooks*, 505 So. 2d 714 (La. 1987).

In the present case, petitioner was sequentially represented by Tomy Acosta and Lantz Savage, respectively. Petitioner's post conviction relief application asserts ineffective assistance of counsel against both attorneys. At the post conviction relief hearing, testimony was heard from Don Carter, Tomy Acosta, Lantz Savage, Albert Robertson, Richard Hutchinson, and Charmaine Carter. Don Carter, the Public Defender's investigator assigned to the case, testified that he did not investigate the entire case. (Post Conviction Relief hearing transcript, pages 8-15.)

Petitioner's first attorney, Tomy Acosta, testified that his only interaction with petitioner occurred at the initial interview with petitioner and that he had no interaction with Mr. Don Carter. During the Mr. Acosta's initial and only meeting with petitioner, petitioner provided Mr. Acosta with a list of eyewitnesses who were in Lynn's Grocery Store ("the store") at the same time with petitioner. The witnesses' names were written by Mr. Acosta on the *Initial Interview with Client* form. (Post Conviction Relief transcript, pages 23-28.) Mr. Acosta did not interview any of the witnesses nor provide the names to Mr. Don Carter to interview the witnesses and investigate the

matter. Moreover, the Preliminary Examination proceeding, which was conducted by Mr. Acosta, revealed that there were people in the store not interviewed by the investigating detective, and Mr. Acosta did not review the video or seek to identify the witnesses in the video. (Preliminary Examination transcript, page 8.)

The defendant's second attorney, and trial attorney, Lantz Savage, testified that petitioner never provided any names of witnesses to contact other than Red Magee (whose real name is Albert Robertson), but petitioner later withdrew that name. When specifically asked whether petitioner ever provided the name Richard Hutchinson, Mr. Savage testified that petitioner absolutely did not provide him with Richard Hutchinson's name. However, Mr. Savage's recorded entries on the Public Defender Board's database reveals that on April 5, 2012, approximately two months before trial, Mr. Savage spoke with petitioner and promised to subpoena Charmaine Carter and Richard Hutchinson to testify at the trial per petitioner's request. Mr. Savage admitted that he did not meet Charmaine Carter until the day of the trial, and that he did not know that Ms. Carter had any information that would have been helpful until the day she appeared in the courtroom. (See Post Conviction Relief hearing transcript, pages 75-93.)

Albert Robertson, Richard Hutchinson, and Charmaine Carter claims to be eyewitnesses in the store on the day of the alleged crime and none were subpoenaed to testify at the trial. At the post conviction relief hearing, all three eyewitnesses testified that they never were contacted by anyone, and that on the date of the alleged crime (1) they were present in the store, (2) witnessed the defendant in the store, (3) witnessed the victim participate in a joking manner with the defendant, which was customary between the defendant and the victim, and (4) no robbery occurred.

Albert Robertson further testified that he was in the convenience store on date of the incident for approximately five to six hours, and law enforcement was not called that day because no crime occurred. (See Post Conviction Relief hearing transcript, pages 52-57.)

Richard Hutchinson further testified that on the day of the alleged crime, he and petitioner walked in the store at the same time, petitioner made no attempts to flee the store after his transaction, he and petitioner remained outside of the store for quite some time, and that he would have testified at trial had he been contacted. (See Post Conviction hearing transcript, pages 58-64.)

Charmaine Carter further testified that she and petitioner had a running tab at the store with a \$500 limit, which was paid monthly upon receipt of their checks, and this was documented in a

book at the store. After petitioner's arrest, Vu Tran showed Ms. Carter the video despite being told not to show the video. Vu Tran told Ms. Carter that this was done pursuant to his mother-in-law's orders and that he (Vu Tran) tried to explain the situation to the cops but Deputy Keith Carroll ignored Vu Tran's explanation of the video. Ms. Carter also testified that an investigator came to her house the day before trial to discourage her from testifying on behalf of petitioner, but she declined to follow his advice. On the first day of the trial, Mr. Savage informed Ms. Carter that they were selecting a jury, excused her for the day, and told her to return the next day. However, after leaving the courthouse, Ms. Carter was apprehended by petitioner's arresting officer and was not released from jail until immediately after petitioner's trial. (See Post Conviction Relief hearing transcript, pages 30-51.)

There exists a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Three known witnesses were in the store at the time of the alleged crime, Charmaine Carter, Albert Robinson, and Richard Hutchinson. Additional witnesses whose identities never were revealed also were seen on the video. Petitioner's attorneys did not interview or subpoena known witnesses or attempt to identify unidentified witnesses to testify at petitioner's trial. Nevertheless, these witnesses were subpoenaed and sequestered during the Post Conviction Relief hearing and provided consistent testimonies, which likely would have furnished a reasonable doubt that any robbery had been committed.

The right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversary process. *Kimmelman v. Morrison*, 477 U.S. 365, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986); See *E.g., Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S. Ct. 792, 796, 9 L. Ed. 2d 799 (1963). The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect. *Kimmelman*, 106 S. Ct. at 2582. Petitioner's trial apparently failed to provide an adversarial balance, as petitioner had no witnesses and no exculpatory evidence was presented.

Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Strickland*, 104 S. Ct. at 2066. A defendant who asserts a claim of ineffective counsel based upon a failure to investigate must allege with specificity what the investigation would have revealed and how it would have altered the outcome of a trial. *United States v. Green*, 882 F.2d 999, 1003 (5th Cir. 1989); see also *Strickland*, 466

U.S. at 690. Here, a thorough investigation would have revealed the existence of defense witnesses and petitioner's store tab.

Without counsel, the right to a fair trial itself would be of little consequence, for it is through counsel that the accused secures his other rights. *Kimmelman*, 106 S. Ct. at 2584. "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." *Kimmelman*, 106 S. Ct. at 2584. The constitutional guarantee of counsel, however, "cannot be satisfied by mere formal appointment," *Kimmelman*, 106 S. Ct. at 2584, citing *Avery v. State of Alabama*, 308 U.S. 444, 446, 60 S. Ct. 321, 322, 84 L. Ed. 377 (1940). "An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *Strickland*, 466 U.S. at 685. In other words, the right to counsel is the right to effective assistance of counsel.

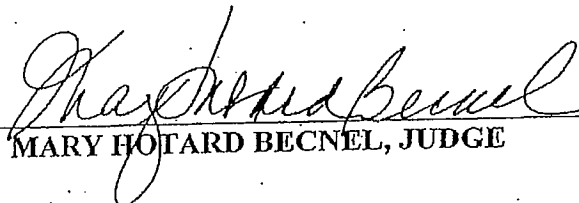
The Court finds that petitioner's attorneys' representations were deficient insofar as investigations and discovery of potential witnesses were concerned, and such deficiency prejudiced the petitioner. Counsel did not investigate the information received from the detective's preliminary examination testimony, interview any witnesses, or issue compulsory process to witnesses named by defendant, leaving petitioner with no defense to present at trial. A thorough investigation would have revealed the existence of several witnesses who would have provided testimony that may have presented reasonable doubt. Consequently, the defendant showed a reasonable probability that counsel's error so undermined the proper functioning of the adversarial process that the trial court cannot be relied upon as having produced a just result. *Soler*, 636 So.2d at 1075.

CONCLUSION

As such, it is hereby **ORDERED, ADJUDGED AND DECREED** that petitioner's *Application for Post Conviction Relief* is **GRANTED**.

READ, RENDERED and SIGNED ON THIS 19 **day of May, 2016 in Edgard,**

Louisiana.



MARY HOTARD BECNEL, JUDGE

Please notify all parties.