

SUPREME COURT OF LOUISIANA

No. 16-KH-2169

STATE EX REL. JASON MIZELL

v.

STATE OF LOUISIANA

**ON SUPERVISORY WRITS TO THE TWENTY-SECOND
JUDICIAL DISTRICT COURT, PARISH OF WASHINGTON**

PER CURIAM:

Denied. Relator fails to show that 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). 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

VERSUS

JASON MIZELL

FILED: _____

RECEIVED - FILED
JIMMY D. GRAIN - CLERK
NO. 10-CR5-107063 "B"

22ND JUDICIAL DISTRICT COURT

PARISH OF WASHINGTON

STATE OF LOUISIANA

DEPUTY CLERK

**JUDGMENT ON POST-CONVICTION
WITH INCORPORATED REASONS**

On October 19, 2015, petitioner Jason Mizell filed a timely application for post-conviction relief. After considering the application and the applicable law, the Court finds the application may be dismissed upon the pleadings pursuant to La. C.Cr.P. art. 928.

The record shows Mizell was charged by grand jury indictment with one count of aggravated rape, a violation of La. R.S. 14:42, and pleaded not guilty. Following a jury trial, he was found guilty as charged by a unanimous verdict. He was sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. His conviction and sentence were affirmed on appeal, and the Louisiana Supreme Court denied writs. *State v. Mizell*, 2012-2045 (La. App. 1 Cir. 12/27/13); 2013 WL 7122540 (not reported); 2014-0237 (La. 10/10/14); 150 So.3d 894.

Mizell filed an application for post-conviction relief on March 26, 2015, along with a motion for evidentiary hearing. The Court denied the motion for evidentiary hearing on April 17, 2015. The clerk's office sent to Mizell a letter dated July 13, 2015 in response to a status request, informing him no action had been taken on his application for post-conviction relief because it lacked an order. Mizell files this second application for post-conviction relief, raising 41 claims.

All of the petitioner's claims raise issues of counsel effectiveness. Mizell asserts he received constitutionally ineffective assistance of counsel during every aspect of his trial, on appeal, and through inmate counsel in post-conviction. All of the claims must be reviewed under the standards enunciated in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under *Strickland*, a petitioner claiming ineffective assistance of counsel must show: (1) counsel's performance was deficient, falling below an "effective standard of reasonableness," and (2) the deficient performance prejudiced the petitioner. *Id.*, 466 U.S. at 687-688, 104 S.Ct.

at 2065. In order to show prejudice, the petitioner must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.*, 466 U.S. at 694, 104 S.Ct. at 2068. In order for a claim of ineffective assistance of counsel to be successful, both prongs of the analysis must be shown. Each of the 41 claims will be discussed within the following categories, and examined for deficient attorney performance and prejudice resulting therefrom.

Post-conviction

In Claim 1, the petitioner asserts he received ineffective assistance of counsel on his first post-conviction application by inmate "counsel" with the prison legal programs. He claims there was a time delay between the time he filed his first application for post-conviction relief and when he found out it had been denied. The Court finds there is no constitutional right to an attorney in state post-conviction proceedings. *See Coleman v. Thompson*, 501 U.S. 722, 752, 111 S.Ct. 2546, 2566, 115 L.Ed.2d 640 (1991). Consequently, "a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings." *Id.* Such a ruling would also extend to Mizell's claim against a person who was not an attorney.

Moreover, inmate counsel had nothing to do with any time delay between the filing of the first application for post-conviction relief and when Mizell discovered it had not been acted upon. It appears from the record that there may have been a miscommunication with regard to the Court's ruling on the motion for an evidentiary hearing. However, Mizell has not been prejudiced by the perceived delay. Mizell's current, second application for post-conviction relief was timely-filed and raises substantially similar claims as the first application for post-conviction relief. This Court has not denied the second filing as repetitive but is, in fact, addressing each of the petitioner's claims. This claim is without merit.

Appellate

In Claim 2, the petitioner argues appellate counsel provided ineffective assistance of counsel by failing to include as an assignment of error the trial court's denial of trial counsel's motions for post-verdict judgment of acquittal and for new trial.

The record shows that appellate counsel argued instead that the trial court erred in failing to grant a motion for mistrial which trial counsel raised during the state's closing argument. In addition, the appellate court reviewed the record for errors patent and found the trial court's

failure to wait twenty-four hours after denying the post-verdict motions before imposing sentence was not reversible error.

The petitioner fails to show either deficient performance or resulting prejudice which would entitle him to relief. The record shows the Court denied the motion for new trial with the comment: "Reasonable minds could not differ as to [the jury's] findings." Tr. p. 740. The motion for post-verdict judgment of acquittal was similarly denied, the Court finding "no justifiable reason to overturn or overrule the jury's verdict." Tr. p. 742. Mizell "fails to show appellate counsel 'ignored issues ... clearly stronger than those presented,' ... and that there was a 'reasonable probability' that [he] would have prevailed on the omitted claim on appeal." *State v. Hebert*, 2015-0965, p. 1 (La. 10/2/15); ___So.3d___ (2015 WL 5840645), citing *Smith v. Robbins*, 528 U.S. 259, 288, 120 S.Ct. 746, 765, 145 L.Ed.2d 756 (2000). The Court finds this issue has no merit.

Pretrial Issues

The following issues were raised concerning trial counsel's performance in pretrial matters:

In Claim 4, the petitioner appears to argue generally that counsel did not do enough to prepare a defense.¹ The exhibits to which the petitioner refers include a page of the state's closing argument wherein the prosecutor commented that the victim's testimony was clear and the defense motion for disclosure of evidence favorable to the defense. A post-conviction petitioner must specify with reasonable particularity the factual basis for relief. *See* La. C.Cr.P. art. 926. It is unclear what additional information the petitioner believes his trial counsel should have obtained in order to prepare his defense. Mizell fails to allege a claim which, if established, would entitle him to relief. *See* La. C.Cr.P. art. 928.

In Claim 5, the petitioner asserts he was not afforded a preliminary examination which would have allowed trial counsel to be informed of evidence against him. La. C.Cr.P. art. 292 states that if the charge against the defendant is made by grand jury indictment, a preliminary examination is not mandatory. The record reflects that the grand jury returned an indictment against the petitioner. The petitioner does not show what additional information his trial counsel

¹ Petitioner's specific argument is: "Before trial counsel should have argued see Exhibit D & E to prepar [sic] a defence [sic]."

would have gleaned from a preliminary examination that was not otherwise disclosed through discovery. Mizell has failed to specify with reasonable particularity the factual basis for relief as to this claim. *See* La. C.Cr.P. art. 926.

In Claim 6, the petitioner asserts his trial counsel failed to take a writ on the trial court's denial of a motion in limine regarding the admissibility of other crimes evidence. The record shows the state gave notice two weeks before trial of its intent to introduce evidence of similar sex offenses committed by the petitioner on two other victims. The record shows defense counsel was aware of these other individuals before trial. Additionally, the state advised in multiple pretrial conferences its intent to prove lustful disposition. As a general matter, counsel's decisions as to which motions to file or pursue form a part of trial strategy. *See, e.g., State v. Hoffman*, 1998-3118, p. 38 (La.4/11/00), 768 So.2d 542, 578. The petitioner cannot show that trial counsel's chosen strategy in this regard constituted an unreasonable decision simply because the strategy failed. *See State v. Felde*, 422 So.2d 370, 393 (La.1982).

In Claims 8, 29 and 37, the petitioner asserts trial counsel failed to file a motion to suppress the CAC videotape. The petitioner argues there were inconsistencies between the CAC videotape and the victim's live testimony at trial. Rather than file a motion to suppress the CAC videotape, trial counsel argued the inconsistencies to the jury in closing argument and pointed out some of the questions posed to the victim during his interview were leading. As a general matter, counsel's decisions as to which motions to file or pursue form a part of trial strategy. *See Hoffman, supra*, 1998-3118, p. 38; 768 So.2d at 578. The petitioner does not show any grounds upon which his counsel could have successfully suppressed the CAC videotape. Mizell cannot show that his trial counsel's chosen strategy in this regard constituted an unreasonable decision simply because the strategy failed. *See Felde*, 422 So.2d at 393.

In Claim 11, the petitioner asserts his trial counsel did not talk to Matthew Simmonds, Jr. and the people who lived in the house with the victim. He asserts his counsel was not working for him. A post-conviction petitioner must specify with reasonable particularity the factual basis for relief. *See* La. C.Cr.P. art. 926. The petitioner does not show what information his counsel would have gleaned from discussions with these people (assuming they did not occur) that would have aided his defense. Mizell fails to specify with reasonable particularity a factual basis for relief and thus, fails to allege a claim which, if established, would entitle him to relief. *See* La.

C.Cr.P. arts. 926 and 928.

In Claim 14, the petitioner asserts his trial counsel did not find out why it took so long for the victim's family members to call police after hearing the victim's accusation. Instead, he argues they waited until Mizell arrived at their house, then confronted, threatened and struck him. Mizell does not explain how this information was relevant to his defense. Mizell fails to specify with reasonable particularity a factual basis for relief and thus, fails to allege a claim which, if established, would entitle him to relief. *See* La. C.Cr.P. arts. 926 and 928.

In Claims 16 and 20, the petitioner asserts his trial counsel did not investigate certain social activities (bonfires, celebrating the Fourth of July together, cutting down trees) or actions (Mizell purchasing small gifts for the victim) which witnesses described at trial. The petitioner denies that those activities or actions occurred. However, the petitioner does not include how counsel could have found out contrary information through investigation or to whom counsel should have spoken. A post-conviction petitioner must specify with reasonable particularity the factual basis for relief. *See* La. C.Cr.P. art. 926. Since Mizell fails to supply this information, he fails to allege a claim which, if established, would entitle him to relief. *See* La. C.Cr.P. art. 928.

In Claim 23, the petitioner points to a possible discrepancy in the date that the mother of the victim took him to the police department. The petitioner asserts his trial counsel did not find out the reason for this discrepancy because it was covered up by perjury of several witnesses. The petitioner does not otherwise explain the possible importance of the alleged discrepancy. Mizell fails to specify with reasonable particularity a factual basis for relief and thus, fails to allege a claim which, if established, would entitle him to relief. *See* La. C.Cr.P. arts. 926 and 928.

In Claim 26, the petitioner asserts the information in the affidavit for search warrant was not true. He includes a copy of a 2000 incident report, portions of trial testimony, and a copy of the affidavit for search warrant and argues trial counsel did not want the jury to know that one of the police officers handling this matter was also involved in the 2000 investigation of the petitioner for similar accusations against him. Without more information or explanation, it is not possible to discern the possible importance of this information. Mizell fails to specify with reasonable particularity a factual basis for relief and thus, fails to allege a claim which, if established, would entitle him to relief. *See* La. C.Cr.P. arts. 926 and 928.

In Claim 30, the petitioner asserts his trial counsel failed to suppress the victim's statement, failed to quash the bill of indictment and failed to have the charges against him dropped. As a factual basis for this claim, Mizell includes a portion of the trial testimony during the cross-examination of the victim. Mizell marked the portion of the victim's testimony when he stated no one told him what to say to the police, no one else was with him when he talked to the police chief, and he just told the police chief the truth. The petitioner does not otherwise explain what other information his counsel may have accessed which would have given counsel grounds to suppress the victim's statement, or to support a motion to quash the charges against him. Mizell fails to specify with reasonable particularity a factual basis for relief and thus, fails to allege a claim which, if established, would entitle him to relief. *See* La. C.Cr.P. arts. 926 and 928.

In Claim 31, the petitioner asserts his trial counsel did not discover why the victim would lie on a CD about being at his home when the victim was not there. Mizell asserts the indictment arose from that CD. The petitioner does not otherwise explain this allegation. Mizell fails to specify with reasonable particularity a factual basis for relief and thus, fails to allege a claim which, if established, would entitle him to relief. *See* La. C.Cr.P. arts. 926 and 928.

During trial, the victim testified he had found a dildo under Mizell's bed at some time before any of the criminal incidents occurred. In Claim 33, the petitioner asserts his trial counsel did not let him know the police did not find one during the execution of a search warrant. The petitioner does not explain why counsel's failure to inform him of this fact constituted deficient performance or in what way this fact prejudiced him. Mizell fails to specify with reasonable particularity a factual basis for relief and fails to allege a claim which, if established, would entitle him to relief. *See* La. C.Cr.P. art. 928.

After carefully examining the several claims raised regarding the alleged ineffective assistance of trial counsel during pretrial matters, the Court finds that the petitioner has failed to show that his counsel's performance fell below an effective standard of reasonableness or that there is a reasonable probability that, but for counsel's alleged unprofessional errors, the result of the proceeding would have been different.

Trial issues

In undertaking the review of claims asserted against counsel for his conduct during trial,

a petitioner on post-conviction must “overcome the strong presumption that [counsel's actions] ‘might be considered sound trial strategy.’ ” *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 164, 100 L.Ed. 83 (1955)). In *State v. Hoffman*, 1998-3118, p. 40 (La. 4/11/00); 768 So.2d 542, 579, the Louisiana Supreme Court stated:

The *Strickland* test of ineffective assistance affords a “highly deferential” standard of review to actions of counsel to eliminate, as far as possible, “the distorting effects of hindsight, to reconstruct the circumstances of counsel's conduct, and to evaluate the conduct from counsel's perspective at the time.” *Strickland* 466 U.S. at 689, 104 S.Ct. at 2065. This Court therefore “does not sit to second-guess strategic and tactical choices made by trial counsel.” *State v. Myles*, 389 So.2d 12, 31 (La.1979). The [petitioner] has obviously not demonstrated that counsel's performance rendered his trial unfair or that the result is unreliable. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064; *Lockhart*, 506 U.S. at 372, 113 S.Ct. at 844.

Bearing in mind this deferential standard of review, the Court will now review the following issues raised concerning trial counsel's performance during trial.

In Claim 3, the petitioner asserts his trial counsel failed to object to the inconsistencies he perceives between the victim's statement to police and the victim's statement during his CAC interview. The Court finds the petitioner has failed to overcome the strong presumption that counsel's actions were strategic and tactical choices made by counsel which this Court will not second-guess.

In Claims 7 and 13, the petitioner asserts his trial counsel failed to argue the defendant's statements, made to Chief Culpepper and the victim's family at the time of his arrest, were the result of duress. The Court finds the petitioner has failed to overcome the strong presumption that counsel's actions were strategic and tactical choices made by counsel which this Court will not second-guess.

In Claim 9, the petitioner asserts his trial counsel should have called two named witnesses to the stand in his defense. One of the witnesses was a young man who had been named by the victim as another possible victim of sexual abuse by the petitioner. The other witness was the petitioner's aunt. Although the petitioner includes as evidence in support of his argument a police report which shows the young man denied he had been sexually abused, the petitioner does not show about what either witness could have testified with regard to the charges pending against him. Mizell fails to specify with reasonable particularity a factual basis for relief and fails to allege a claim which, if established, would entitle him to relief. *See* La. C.Cr.P. art.

928.

In Claim 10, the petitioner asserts his trial counsel failed to ask where was the iPhone he allegedly gave to the victim. The Court finds the petitioner has failed to overcome the strong presumption that counsel's actions were strategic and tactical choices made by counsel which this Court will not second-guess.

In Claim 12, the petitioner asserts his trial counsel failed to ask for a mistrial when one of the witnesses alluded to something which happened in her own past. The excerpt of trial testimony supplied by the petitioner shows defense counsel did object and the Court sustained the objection. The petitioner's claim in this regard is factually inaccurate.

In Claim 15, the petitioner asserts his trial counsel did not want to put on the record or ask the victim's mother about her knowledge of similar accusations that had been brought against the petitioner in 2000. The record shows defense counsel specifically asked the victim's mother about this issue. The petitioner's claim in this regard is factually inaccurate.

In Claim 17, the petitioner asserts his trial counsel misled the jury in his closing argument.² The Court finds the petitioner has failed to overcome the strong presumption that counsel's actions were strategic and tactical choices made by counsel which this Court will not second-guess.

In Claim 18, the petitioner asserts his trial counsel failed to object to a portion of closing argument or to do anything to overcome the arguments made. The trial excerpt about which the petitioner complains shows this portion of the defense closing argument exhorted the jurors not to base their decision on passion, prejudice or sympathy. The trial judge likewise instructed the jurors that their decision was not to be based on passion, prejudice or sympathy. This was a proper argument and there is no factual support for the petitioner's claim.

In Claim 19, the petitioner asserts his trial counsel failed to cross-examine a witness on information found in a police report. The witness, one of the young men who had been sexually assaulted by the petitioner in the past, initially denied the allegations of sexual abuse and this was reflected in a police report. The record shows the witness was questioned about his initial denial. Whether the information was elicited by the prosecutor or defense counsel, this information was elicited for the jury's consideration. The Court finds the petitioner has failed to

² The two non-continuous pages of transcript in support of this claim shows defense counsel was pointing out to the jury what he believed were the inconsistencies in the victim's testimony and the argument that anytime the victim was asked questions outside the original story, the victim claimed he could not remember.

overcome the strong presumption that counsel's actions were strategic and tactical choices made by counsel which this Court will not second-guess.

In Claim 21, the petitioner asserts his trial counsel failed to cross-examine the parents of the victim about how their family confronted the defendant. The Court finds the petitioner has failed to overcome the strong presumption that counsel's actions were strategic and tactical choices made by counsel which this Court will not second-guess.

In Claim 22, the petitioner asserts his trial counsel failed to ask the victim's father if he believed the defendant would hurt the victim and failed to ask the victim's mother if she would have her children lie to make her happy. The Court finds the petitioner has failed to overcome the strong presumption that counsel's actions were strategic and tactical choices made by counsel which this Court will not second-guess.

In Claim 24, the petitioner asserts his trial counsel's questions to the victim about school only helped the state and gave the jury more information on which to exercise passion, prejudice or sympathy; the victim was home-schooled after his classmates found out about the allegations of sexual abuse. The Court finds the petitioner has failed to overcome the strong presumption that counsel's actions were strategic and tactical choices made by counsel which this Court will not second-guess.

In Claim 25, the petitioner asserts his trial counsel did not want the jury to know the reasons given for obtaining the search warrant. The Court finds the petitioner has failed to overcome the strong presumption that counsel's actions were strategic and tactical choices made by counsel which this Court will not second-guess.

In Claim 27, the petitioner claims his trial counsel failed to cross-examine the victim about his mother's testimony. The Court finds the petitioner has failed to overcome the strong presumption that counsel's actions were strategic and tactical choices made by counsel which this Court will not second-guess.

In Claim 28, the petitioner asserts his trial counsel failed to cross-examine the victim as to his own testimony. The trial excerpt supplied in support of this argument is a portion of the victim's direct examination. Mizell does not indicate with specificity the subject matter of which the victim should have been cross-examined. Mizell fails to specify with reasonable particularity the factual basis for relief and fails to allege a claim which, if established, would entitle him to

relief. *See* La. C.Cr.P. arts. 926 and 928.

In Claim 32, the petitioner asserts his trial counsel failed to explore the fact that the victim claimed he once met one of the other young men who testified about sexual abuse by the petitioner, but that young man denied knowing the victim. The Court finds the petitioner has failed to overcome the strong presumption that counsel's actions were strategic and tactical choices made by counsel which this Court will not second-guess.

In Claim 34, the petitioner asserts his trial counsel failed to follow-up when the victim testified, "no sir, not really," when asked whether he and the police chief discussed what he would say during his CAC interview. The Court finds the petitioner has failed to overcome the strong presumption that counsel's actions were strategic and tactical choices made by counsel which this Court will not second-guess.

In Claim 35, the petitioner asserts his trial counsel failed to address discrepancies between information in the state's notice of intent to introduce other crimes evidence and trial testimony. The Court finds the petitioner has failed to overcome the strong presumption that counsel's actions were strategic and tactical choices made by counsel which this Court will not second-guess.

In Claim 36, the petitioner asserts his trial counsel failed to object in closing argument about the evidence of similar acts and to remind the jurors he was not on trial for those actions. The Court finds the petitioner has failed to overcome the strong presumption that counsel's actions were strategic and tactical choices made by counsel which this Court will not second-guess.

In Claim 38, the petitioner asserts his trial counsel worked for the state, not for him, from the start of the trial to the end. Mizell fails to specify with reasonable particularity a factual basis for relief and fails to allege a claim which, if established, would entitle him to relief. *See* La. C.Cr.P. art. 928.

In Claim 39, the petitioner asserts his trial counsel moved for a mistrial during the state's closing argument for the use of the words "uncontroverted evidence" instead of arguing other issues. The Court finds the petitioner has failed to overcome the strong presumption that counsel's actions were strategic and tactical choices made by counsel which this Court will not second-guess.

In Claim 40 the petitioner claims his trial counsel failed to cross-examine the victim regarding a portion of the state's opening statement. The Court finds the petitioner has failed to overcome the strong presumption that counsel's actions were strategic and tactical choices made by counsel which this Court will not second-guess.

The Court notes that the petitioner fails to state what benefit the defense would have gained had trial counsel taken any of the actions which form the basis of the asserted claims. After carefully examining the several claims raised regarding the alleged ineffective assistance of trial counsel during the trial, the Court finds that the petitioner has failed to show that his counsel's performance fell below an effective standard of reasonableness or that there is a reasonable probability that, but for counsel's alleged unprofessional errors, the result of the proceeding would have been different.

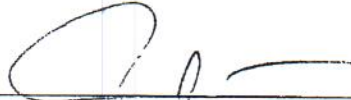
Sentencing

Just before sentencing, defense counsel argued a motion for new trial and a motion for post-verdict judgment of acquittal. For both motions, the defense asserted the evidence was only sufficient to support a conviction for attempted oral sexual battery, but not for aggravated rape. In Claim 41, the petitioner asserts his counsel was ineffective for failing to read the trial transcripts before arguing the post-verdict motions. As earlier stated, the Court denied the motion for new trial with the comment: "Reasonable minds could not differ as to [the jury's] findings." Tr. p. 740. The motion for post-verdict judgment of acquittal was similarly denied, the Court finding "no justifiable reason to overturn or overrule the jury's verdict." Tr. p. 742.

The Court finds the petitioner does not assert or suggest what other grounds could have been urged for the post-verdict motions or what defense counsel would have gleaned from reading the trial transcripts before arguing the motions. The petitioner fails to specify with reasonable particularity the factual basis for relief on this claim. See La. C.Cr.P. art. 926. The petitioner also asserts counsel did not want him to argue the motions. The record reflects the petitioner was represented by counsel, who was the proper person to argue the post-verdict motions. Moreover, the petitioner was afforded an opportunity to address the Court and did so. In this regard, the Court finds the petitioner fails to show counsel's performance fell below an effective standard of reasonableness and that there was a reasonable probability that, but for counsel's alleged unprofessional errors, the result of the proceeding would have been different.

Finding no merit in any of the claims asserted by the petitioner, accordingly, the Court denies and dismisses petitioner Jason Mizell's Application for Post-Conviction Relief in its entirety.

Franklinton, Louisiana, this 3rd day of February, 2016.



Hon. August J. Hand, Judge
22nd Judicial District Court, Division B

A True Copy of Original
This 2-10-16
J. Brice
Clk. Clerk of Court