

NOT DESIGNATED FOR PUBLICATION

NOV 13 2002

STATE OF LOUISIANA

NO. 00-KA-1170

VERSUS

FIFTH CIRCUIT

MICHAEL WILLIAMS

COURT OF APPEAL

STATE OF LOUISIANA

ON REMAND FROM LOUISIANA SUPREME COURT

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 96-2599, DIVISION "N"
HONORABLE SUSAN M. CHEHARDY, JUDGE

NOVEMBER 13, 2002

**THOMAS F. DALEY
JUDGE**

Panel composed of Judges Edward A. Dufresne, Jr.,
James L. Cannella, and Thomas F. Daley

PAUL D. CONNICK, JR.,
DISTRICT ATTORNEY
TERRY BOUDREAUX,
ASSISTANT DISTRICT ATTORNEY
24th Judicial District
Parish of Jefferson
Gretna Courthouse Annex
Gretna, Louisiana 70053
ATTORNEYS FOR PLAINTIFF/APPELLEE

WILLARD J. BROWN, SR.
631 St. Charles Avenue
New Orleans, Louisiana 70130
ATTORNEY FOR DEFENDANT/APPELLANT

**AFFIRMED;
REMANDED WITH INSTRUCTIONS**

T.D.
S.A.
J.C.

STATEMENT OF THE CASE

This case is before this Court on remand from the Louisiana Supreme Court.

On April 25, 1996, the Jefferson Parish Grand Jury indicted the defendant, Michael Williams, for the second degree murder of Ms. Michelle Gallagher. LSA-R.S. 14:30.1. On May 3, 1996, defendant was arraigned and entered a not guilty plea to the charge.

After waiver of a jury trial, defendant was tried before the trial court judge on July 1-3, 1997. The trial judge found defendant guilty as charged.

On July 14, 1997, the defendant filed a Motion for a New Trial. Also on that date, defendant was sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. With regard to the Motion for New Trial, the trial judge indicated that she would take the matter under advisement and thereafter issue a judgment, with written reasons. Later that day, the trial judge granted the defendant's Motion for New Trial.

On July 18, 1997, the defendant filed a Motion for Appeal, which was granted on July 22, 1997.

On January 13, 1998, appointed counsel filed an Anders brief and sought dismissal from his appointment alleging that he could not find any non-frivolous issue to raise on appeal. Anders v. California, 366 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). The Clerk's Office notified the defendant of his right to file a supplemental pro se brief. On February 26, 1998, the defendant filed a pro se brief raising three Assignments of Error.¹

On March 18, 1998, this Court issued a Rule to Show Cause why the case should not be remanded to the trial court for a new trial, since the Motion for New Trial had been granted by the trial judge on July 14, 1997.

On March 19, 1998, the trial judge ex proprio moto, issued an order stating that the Motion for New Trial was granted in error and was "hereby denied." Thereafter, this Court ordered the parties to address the issue of the effect of the district court's order. The parties each responded that the appeal should proceed, as the trial judge had now denied the Motion for New Trial..

On May 21, 1998, this Court dismissed defendant's appeal and remanded the matter to the trial court for a new trial in accord with the trial court's order of July 14, 1997. State v. Williams, 97-KA-1181 (La. App. 5 Cir. 5/21/98).

On June 19, 1998, following the remand and pursuant to a Motion for Reconsideration of the Motion for New Trial, the trial court conducted a hearing. At the hearing, the trial judge explained that it was always her intent to deny a new trial in this case and the granting of the motion was a ministerial mistake, which she sought to correct on March 19, 1998, when she denied the second Motion for New Trial filed

¹Defendant, pro se, raises the following issues, which will be discussed herein: (1) Insufficient evidence to convict; (2) Prejudice of the trial court judge and; (3) Ineffective assistance of counsel.

with her court. Defense counsel indicated that he would appeal the ruling, but no appeal followed.

Also on June 19, 1998, following this hearing, the State sought Supervisory Writs to the Louisiana Supreme Court requesting a review of this Court's order of May 21, 1998 in 97-KA-1181, remanding the matter to the district court for a new trial. State v. Williams, 98-OK-1666 (La. 6/24/98). On June 24, 1998, the Louisiana Supreme Court denied the writ as moot. Thereafter, the State sought a clarification of this ruling. The Louisiana Supreme Court, with one concurring opinion, denied the request for clarification. The concurrence indicated that the State's Application for Writs was denied because the State was granted relief by the trial court when, on June 19, 1998, that court denied defendant's Motion for a New Trial. State v. Williams, 98-OK-1666 (La. 6/24/98).

On July 6, 1998, defendant appeared before the court for re-sentencing because his original sentence imposed on July 14, 1997 was improper, having been imposed immediately following the denial of the Motion for New Trial. On July 6, 1998, defendant was sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence, but with credit for time served.

On October 16, 1998, defense counsel filed a Motion to Quash and Dismiss the Prosecution on the basis that the district court lacked jurisdiction to reconsider the new trial motion after this Court remanded the case, reasoning that, under these facts, the prosecution had failed to commence a new trial within the time specified by law. On December 18, 1998, a hearing was held and the Motion to Quash was denied. The judgment denying the Motion to Quash was the subject of a Motion for Appeal filed by defendant on January 5, 1999 that was granted by the trial court judge that date. The sole issue in the second appeal was the propriety of the denial of the defendant's Motion to Quash. On July 27, 1999, this Court dismissed the appeal for lack of

jurisdiction, and remanded the case to the district court, after finding that an Application for Supervisory Writs and not an appeal was the proper procedural vehicle to pursue this claim. The case was remanded for the taking of an out-of-time appeal on the merits of the case and for an Application for Writs from the denial of the Motion to Quash. State v. Williams, 99-216 (La. App. 5 Cir. 7/27/99), 740 So.2d 225.

On January 31, 2000, defendant filed a pro se Motion to Quash with the district court. The motion was denied on February 10, 2000. Thereafter, defendant sought writs with this Court for mandamus, seeking to have this Court's Order of July 27, 1999, which dismissed the appeal and remanded the case for the taking of an out-of-time appeal, complied with by the district court. State v. Williams, 00-KH-269 (La. App. 5 Cir. 3/17/00). On March 17, 2000, this Court remanded the case to the trial court for its compliance with this Court's prior order. On March 20, 2000, defendant was granted an out-of-time appeal. In an unpublished opinion, this Court found that its original remand of the case was solely for the purpose of a new trial and the district court didn't have jurisdiction to deny the new trial. The State was given one-year from the date of this Court's opinion to commence the second trial. State v. Williams, 00-KA-1170 (La. App. 5 Cir. 2/14/01). On March 1, 2001, the defendant sought a writ of certiorari to review the ruling of this Court in defendant's latest appeal. State v. Williams, 01-K-554 (La. 3/1/01). Thereafter, on March 14, 2001, the State also sought a writ of certiorari. State v. Williams, 01-K-667 (La. 3/13/01).

On January 11, 2002, the Louisiana Supreme Court granted writs in each of the two cases and ordered briefs filed. State v. Williams, 01-554 (La. 1/11/02), 806 So.2d 652 and 01-667 (La. 1/11/02), 806 So.2d 653. The Louisiana Supreme Court consolidated the Applications for Writs and issued an opinion on May 14, 2002. In its opinion, the Louisiana Supreme Court reversed the decision of this Court wherein it had ordered a new trial. The high court remanded the matter to this court for

consideration of the merits of defendant's original appeal. State v. Williams, 01-0554 c/w 01-0667 (La. 5/14/02), 817 So.2d 40.

The matter is now before this Court on remand.

FACTS

On the evening of March 6, 1966, Dewey Bruce Jr. was making house-to-house deliveries for *The Times-Picayune* newspaper in the area of River Road, bounded by George Streets and Dandelion Streets, in an area known as Kennedy Heights in Jefferson Parish. On this night he noticed a girl, later identified as Michelle Gallagher, as she staggered into the road in the 8600 block of River Road. According to Mr. Bruce, the girl appeared to be drunk. Mr. Bruce had often seen Ms. Gallagher between the hours of 3:00 a.m. and 5:00 a.m. as she drank beer and visited with various black and/or white men. When he first saw Ms. Gallagher on the night in question, she had stuck her head inside an older vehicle, a 1980 model, apparently to talk to the vehicle's occupant. According to Mr. Bruce, there was someone inside the vehicle, but because it was dark, he could not see the person clearly. She was first seen at the intersection of Dandelion Street and River Road.

Thereafter, Mr. Bruce proceeded along his newspaper route and, when he returned to the area of George Street and River Road, he noticed Ms. Gallagher lying in the middle of River Road. Mr. Bruce estimated that it was 10 to 15 minutes between the first and second time he saw Ms. Gallagher that day.

Mr. Bruce approached Ms. Gallagher to see if she had been hit by a car. The victim was incoherent. Her jeans were unzipped and her T-shirt was raised to the level of her bra. According to Mr. Bruce, he had no idea what happened to Ms. Gallagher.

The police were summoned at approximately 10:48 p.m. that night. Deputy Fredrick Yorsch of the Jefferson Parish Sheriff's Office Third District Patrol Unit

responded to the call of a possible hit and run incident on River Road. When Officer Yorsch arrived at 6625 River Road, he found Ms. Gallagher in the roadway being attended to by EMS workers. Officer Yorsch asked the victim if she had been struck by a car and, according to the officer, she responded "no." He next asked if she had been thrown from a car and she said "yes." According to the investigating officer, Ms. Gallagher appeared highly intoxicated and had a cut on her upper lip and her navel was filled with blood. Officer Yorsch thought there could be a possible aggravated battery involved and, therefore, he called the homicide division for assistance. Ms. Gallagher was transported to the hospital, but she expired at the hospital from her injuries.

An autopsy of the body was conducted the following day by the Jefferson Parish Coroner's Office. The victim died from a stab wound to the abdomen. The wound appeared to come from a single edged blade that left a penetration wound of between three and one-half and four inches. The lethal blow to the abdomen perforated the abdominal aorta causing extensive internal bleeding. Other injuries included puncture wounds of the arms, injury to the mouth, fractured teeth and old bruises. The victim was found to have cocaine in her system that had been ingested two to four hours before death. Additionally there was evidence of the consumption of alcohol, muscle relaxants, nicotine, and cold medicine found.

On the night of this incident, Officer Yorsch engaged in crowd control while at the scene. Officer Yorsch searched for witnesses, but was only successful in finding Mr. Bruce, from whom he took a statement. The officer summoned the Crime Scene Unit and thereafter wrote an incident report, which was given to Homicide Detective Gray Thurman.

Detective Thurman visited the crime scene after being advised of Ms. Gallagher's death. It was approximately 11:45 p.m. on March 6, 1996. Detective

Thurman spoke with Mr. Bruce and set up a roadblock in an attempt to find anyone who had witnessed this incident. No leads were found. The detective did ascertain from the victim's relatives that Ms. Gallagher was addicted to crack cocaine and would frequent the Kennedy Heights area where she would often trade sex for drugs.

According to Detective Thurman, after the date of this incident, he received information from a confidential informant that Ms. Katherine Ryman had advised the informant that Ms. Ryman knew from Christopher Landry that he had knowledge concerning Ms. Gallagher's death. After receiving this information from the confidential informant, Detective Thurman verified the information with Ms. Ryman.

On March 11 or 12, 1996, Detective Thurman spoke with Christopher Landry. Thereafter, on March 21, 1996, Detective Thurman took his statement.

Christopher Landry, who had previous convictions for shoplifting and possession of drug paraphernalia, indicated that he knew Michael Williams for eight or nine years from the Kennedy Heights area. He also indicated that he knew the victim whom, he described as a drug addict and prostitute. Christopher Landry indicated that he had seen Michael Williams and Ms. Gallagher together many times. He indicated that, on the date in question, March 6, 1996, he was working on a car with some friends at Capital and Ambassador Streets in the Kennedy Heights subdivision. It was at this time that he saw Ms. Gallagher with an old white man. Approximately 25 minutes later, he saw Ms. Gallagher with Michael Williams. This time, Christopher Landry was alone, standing on Federal Street, and, as the couple passed him in the defendant's vehicle, Michael Williams blew the horn on his white Mustang automobile.

According to Christopher Landry, he got on a bicycle that was in a neighbor's yard and he followed Michael Williams' car. He indicated that he knew they were headed to Defourneau Lane and George Street, which is an area where people "do

drugs." Christopher Landry stated that he knew Michael Williams and Ms. Gallagher were going to "do drugs" and have sex, and he followed them because "he was curious." According to Christopher Landry, the couple did drugs that night, but, when Michael Williams demanded sex, Ms. Gallagher refused and the pair argued. Christopher Landry followed Michael Williams' car as it backed up on Gambino Street, took a right on Avondale Garden Road and proceeded to River Road. According to Christopher Landry, it was on River Road, in the vicinity of Phillips Grocery Store, that Michael Williams stopped his car, walked to the passenger side, opened the passenger door, stood Ms. Gallagher up, let her go and she fell to the ground. After witnessing this, Christopher Landry hid between the railroad tracks until Michael Williams left the area. Thereafter, he hurried home on the bike he had borrowed. According to Christopher Landry, he did not see what happened to Ms. Gallagher inside the vehicle, because it was dark. He stated that he could see lighters flickering and hear arguing, but that was all. Christopher Landry indicated the entire incident took 10 to 15 minutes. He did not lose sight of the vehicle except for a period of about 30 seconds.

Following Christopher Landry's statement, Detective Thurman secured warrants for Michael Williams' arrest, a search of his car, and house. Detective Thurman drove to Michael Williams' home for the arrest, but found him and the white Mustang gone from the area. Detective Thurman drove around the subdivision and spotted the vehicle at 444 Federal Street. The officer also noticed two men on the roof and surmised that there was knowledge he was in the neighborhood. Detective Thurman then drove to an area where he could observe, but not be seen. Thereafter, the white Mustang drove past, occupied by Michael Williams' friend, Wally Dillion. The officer stopped the vehicle, questioned the driver and had the vehicle impounded. According

to Mr. Dillion, Michael Williams lent him the car. Mr. Dillion also told the officer that Michael Williams was at his home located in the 400 block of Capital Street.

Officers proceeded to the residence for the arrest. At the time of his arrest, Michael Williams was in the company of Susan Boudreaux, a known drug addict and prostitute. Ms. Boudreaux told officers that there was a knife in Michael Williams' Mustang, between the driver's seat and the console. The murder weapon, which Detective Thurman said was a single-edged knife of three to four inches in length, was not found in the car or in a subsequent search of the house. The car was later searched for blood and seminal fluid, but none was found. No bodily fluids of the victim were found in the car. The blood found on the victim's clothing was not enough to give test results. A search of the vehicle did produce a substance that tested positive for cocaine. Additionally, scouring pad fibers, compatible with drug paraphernalia, was found in the vehicle.

On March 22, 1996, at the time of his arrest and prior to giving a formal statement, Officer Thurman advised Michael Williams of his rights. In the statement, Michael Williams admitted prior ownership of a single-blade pocketknife, which he obtained while working offshore and allegedly lost in the Gulf of Mexico. He also admitted being addicted to cocaine. He alleged that, on the night of the murder, he was drinking and visiting with friends. He denied taking cocaine that day. He admitted he had only seen the victim once and it was that night at the home of his friend Walley Dillion. He said he knew the victim consumed drugs, but did not know if she was a prostitute. He stated that he did not see the victim use drugs and denied having sex with her. He also said she had never been in his car, but he stated that he did lend his car to Mr. Dillion on the night of the murder.

An examination of the defendant's shirt seized at the time of his arrest tested positive for cocaine residue found in the shirt pocket.

In defendant's original appeal (97-KA-01181), his defense counsel filed an Anders brief, which presented no errors for review. Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). The State also filed a brief and agreed that there were no non-frivolous errors for review.

Defendant filed a pro se brief wherein he raised four Assignments of Error.

PRO SE ASSIGNMENT OF ERROR NUMBER ONE

The evidence is insufficient to convict defendant of the charged offense.

DISCUSSION

In Assignment of Error Number One defendant alleges that the evidence was insufficient to convict him of the charged offense. He reasons that the evidence was circumstantial and did not exclude every reasonable hypothesis of guilt, as to identity.

In this challenge to sufficiency of the evidence, this Court must decide whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the State proved the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L. Ed.2d 560 (1979); State v. Mitchell, 99-3342 (La. 10/17/00), 772 So.2d 78, 82. In applying this standard, the reviewing court will not access credibility nor reweigh the evidence. State v. Rosiere, 488 So.2d 965, 968 (La. 1985). The trier of fact shall evaluate credibility and when faced with a conflict in testimony, is free to accept or reject, in whole or in part, the testimony of any witness. State v. Silman, 95-0154 (La. 11/27/95), 663 So.2d 27, 35. In the absence of internal contradiction or irreconcilable conflict with physical evidence, one witness's testimony, if believed by the trier of fact, is sufficient support for a requisite factual finding. State v. Stec, 99-633 (La. App. 5 Cir. 11/30/99), 749 So.2d 784, 787.

In cases involving circumstantial evidence, the evidence must exclude every reasonable hypothesis of innocence. LSA-R.S. 15:438. State v. Mitchell, 99-3342 (La. 10/17/00), 772 So.2d 78, 83. In the recent decision of State v. Mitchell, *supra*, at 83, the Louisiana Supreme Court discussed appellate review of such cases:

On appeal, the reviewing court ‘does not determine whether another possible hypothesis suggested by a defendant could afford an exculpatory explanation of the events.’ Rather the court must evaluate the evidence in a light most favorable to the state and determine whether the possible alternative hypothesis is sufficiently **reasonable** that a rational juror could not have found proof of guilt beyond a reasonable doubt.

(Citations omitted; emphasis as found in the original).

In this case, where defendant disputes the proof by the State on the issue of identity, this element of the offense was proven by circumstantial evidence.

The testimony of Christopher Landry established that, on the night of this murder, defendant and the victim were seen together in defendant’s white Mustang. The witness followed the pair to an area of known drug activity. The defendant observed the flicker of light from the defendant’s vehicle that indicated to him the use of drugs by the couple. Christopher Landry heard the defendant and the victim argue after the victim refused to give the defendant sex in payment for the drugs she apparently consumed. He followed the Mustang as it proceeded to River Road, where the defendant was seen as he dumped the victim’s lifeless body on the roadway. A subsequent analysis of the defendant’s clothing revealed cocaine, as did an analysis of his car and the victim’s body. Although the murder weapon was not found, defendant admitted to the prior ownership of a pocketknife that was compatible with the one used to inflict Ms. Gallagher’s fatal wound.

Additionally, Officer Thurman established that the victim was known to trade sex for drugs and that she obtained drugs in the Kennedy Heights area. The testimony of Dewey Bruce, the newspaper deliveryman, established that the victim was alive at a time compatible with when this incident allegedly began. Additionally, Mr. Bruce

found the victim in the roadway near death at a time compatible with when Christopher Landry testified the body was left in the roadway. Mr. Bruce also testified that he had seen a small compact car at Dandelion and River Road on the night of the murder and the victim was talking to the occupant of the car.

In his statement to police, the defendant denied any involvement with the victim except a casual meeting. He also attempted to implicate Walley Dillion in the murder of the victim.

In this case, the trier of fact, the trial court judge, apparently rejected the defendant's alibi and believed the testimony given by Christopher Landry and supported by Mr. Bruce. Moreover, the alternative hypothesis presented by defendant (i.e., that Walley Dillion murdered Ms. Gallagher) was not sufficiently reasonable that a rational trier of fact could have found someone other than defendant was the perpetrator of the murder. Under these circumstances, it appears that the evidence presented by the State excluded every reasonable hypothesis of innocence and proved defendant's guilt beyond a reasonable doubt.

PRO SE ASSIGNMENT OF ERROR NUMBER TWO

The defendant was denied a fair trial because the judge evidenced a bias towards him.

DISCUSSION

Defendant contends that comments made by the judge during trial indicated he was biased against the defendant and could not give him a fair trial. In particular the defendant refers to the following discourse during the examination of the State's key witness, Christopher Landry:

DEFENSE COUNSEL:

But, this is the direction he's coming from, right?

WITNESS:

That's the direction he's coming from.

DEFENSE:

Now -

THE COURT:

Mr. Hill [Defense] -

DEFENSE:

I'm going to ask you to do something. If you want to draw on the map too, you're going to have to draw in a different color, okay.

DEFENSE:

I'm sorry.

THE COURT:

It's going to be impossible -

DEFENSE:

Yes, ma'am.

THE COURT:

- - on appeal for anyone to know who was making all these marks.

DEFENSE:

I'll use the blue.

THE COURT:

So, let the, the witness is using a pink marker and let the record reflect that you are using blue.

DEFENSE:

That I'm using blue, Your Honor.

(R., pp. 217-218).

Defendant construes this language to indicate that the judge had already decided he was guilty since the trial judge was referring to appellate review of the case.

The defendant's reasoning is misplaced. The record indicates that the document being used for illustration, a hand-drawn map, had already been used by a previous witness and contained marks that witness had placed on the document for illustration. Clearly, if the document was again marked in the same color by a second

witness, there would be no way for anyone reviewing the document, after the fact (including the Court of Appeal), to discern which witness placed which marks on the document. Hence, the effect of their testimony and the document would be lost. Thus, the judge's statement can reasonably be construed to mean that, in the event of appeal, the markings should be distinguishable because the Court of Appeal may be called upon to review the document.

When taken in context, this statement does not support the defendant's contention of bias on the part of the trial court judge.

PRO SE ASSIGNMENT OF ERROR NUMBER THREE

Trial counsel was ineffective for his failure to move for a mistrial or seek recusal on the basis of the trial judge's partiality.

DISCUSSION

Defendant contends that his counsel was ineffective and his performance fell below professional standards when he did not move for a mistrial or seek recusal of the trial judge, after his comments (discussed in Assignment of Error Number Two) made it apparent he could not give defendant a fair trial.

The United States Constitution and the Louisiana Constitution guarantee effective assistance of counsel. U.S. Const. Sixth Amendment; La. Const. of 1974, Art. I, Section 13. The purpose of the guarantee is not to improve the quality of legal representation, but rather simply to ensure that criminal defendants receive a fair trial. Roe v. Ortega, 528 U.S. 470, 481, 120 S.Ct. 1029, 1037, 145 L.Ed.2d 995, 997 (2000). A claim of ineffective assistance of counsel must satisfy the two-prong test set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), reh'g denied, 467 U.S. 1267, 104 S.Ct. 3562, 82 L.Ed.2d 864 (1984). Under the Strickland test, the defendant must show (1) that his counsel's performance was

deficient, that is that the performance fell below an objective standard of reasonableness under prevailing professional norms; and (2) that counsel's errors or omissions resulted in prejudice so great as to undermine confidence in the outcome. Strickland v. Washington, 466 U.S. at 668, 687-688. In its evaluation, the court must accord great deference to counsel's performance, consider the performance based on the particular facts involved and from the counsel's perspective at the time. Strickland v. Washington, 466 U.S. at 668, 694-695.

Claims of ineffective assistance are generally relegated to post-conviction, unless the record permits definitive resolution on appeal. State v. LaCaze, 99-0584, p. 43 (La. 1/25/02), ___ So.2d ___, 2002 La. LEXIS 140.

Mistrial is a device used to insure a fair jury trial. See, LSA-C.Cr.P. arts. 770-775. Initially, it is noted that, since this was a bench trial, a motion for a mistrial would not lie. Hence, defense counsel's performance in not asking for a mistrial on the basis alleged by defendant could not support his claim of ineffective assistance of counsel.

A judge may recuse himself or an attorney may move to recuse a judge if the judge "is biased, prejudiced, or personally interested in the cause to such an extent that he would be unable to conduct a fair trial." LSA-C.Cr.P. arts. 671, 672, 674. For the reasons previously stated in Assignment of Error Number Two, there has been no showing that the trial judge was biased and could not give the defendant a fair trial. Under these circumstances, the defendant's attorney was not ineffective for not moving to recuse the trial judge as no basis for recusal existed in this case.

Accordingly, since defendant has failed to make a showing that the actions of his attorney constitute error, his claim does not satisfy the Strickland test of ineffective assistance of counsel.

ERROR PATENT DISCUSSION

The record was reviewed for errors patent, according to LSA-C.Cr.P. art. 920; State v. Oliveaux, 312 So.2d 337 (La. 1975); State v. Weiland, 556 So.2d 175 (La. App. 5 Cir. 1990). The review reveals one error patent in this case. The record indicates that, at the time of sentencing, the trial judge failed to advise the defendant of the prescriptive period for filing post-conviction relief. LSA-C.Cr.P. art. 930.8. The trial court is directed to send defendant written notice of the prescriptive period and file evidence of this notice and receipt thereof in the district court record. State v. Boles, 99-662 (La. App. 5 Cir. 11/10/99), 750 So.2d 1059, 1062.

**AFFIRMED;
REMANDED WITH INSTRUCTIONS**



EDWARD A. DUFRESNE, JR.
CHIEF JUDGE

SOL GOTHARD
JAMES L. CANNELLA
THOMAS F. DALEY
MARION F. EDWARDS
SUSAN M. CHEHARDY
CLARENCE E. MCMANUS
WALTER J. ROTHSCHILD

JUDGES

Court of Appeal

FIFTH CIRCUIT
STATE OF LOUISIANA

101 DERBIGNY STREET (70053)
POST OFFICE BOX 489
GRETN, LOUISIANA 70054

PETER J. FITZGERALD, JR.
CLERK OF COURT

GENEVIEVE L. VERRETTE
CHIEF DEPUTY CLERK

GLYN RAE WAGUESPACK
FIRST DEPUTY CLERK

JERROLD B. PETERSON
DIRECTOR OF CENTRAL STAFF

(504) 376-1400
(504) 376-1498 FAX

CERTIFICATE

ICERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN MAILED OR DELIVERED THIS DAY NOVEMBER 13, 2002 TO ALL COUNSEL OF RECORD AND TO ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

PETER J. FITZGERALD, JR.
COURT OF COURT

U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

OFFICE-RA-1190

Postage \$

Mr. Willard F. Brown, Sr. rk
Attorney at Law
631 St. Charles Ave
New Orleans, LA 70130

Sent To
Street, Apt. No.,
or PO Box No.
City, State, ZIP+4

PS Form 3800, January 2001 See Reverse for Instructions

7001 2510 0001 0993 9809

U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

OFFICE-RA-1190 E

Postage \$

Mr. Terry M. Boudreaux rk
Assistant District Attorney
Fifth Floor - Annex Bldg.
New Gretna Courthouse
Gretna, Louisiana 70053

Sent To
Street, Apt. No.,
or PO Box No.
City, State, ZIP+4

PS Form 3800, January 2001 See Reverse for Instructions

7001 2510 0001 0993 9799