

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 KA 1075

STATE OF LOUISIANA

VERSUS

LEONARD EMANUEL BLACKBURN

Judgment Rendered: December 22, 2010.

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On Appeal from the
22nd Judicial District Court,
in and for the Parish of Washington
State of Louisiana
District Court No. 08 CR10 97839

The Honorable William J. Knight, Judge Presiding

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BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

CARTER, C.J.

The defendant, Leonard Emanuel Blackburn, was charged by bill of information with possession with intent to distribute cocaine, a violation of La. R.S. 40:967A(1) (count one), and possession of hydrocodone, a violation of La. R.S. 40:967C (count two). The defendant pled not guilty and, following a jury trial, was found guilty as charged on both counts. The defendant was sentenced to fifteen years at hard labor. The State subsequently filed a multiple offender bill, and the defendant was adjudicated a fourth-felony habitual offender on his conviction for possession with intent to distribute cocaine. The trial court vacated the previously imposed fifteen-year sentence, and sentenced the defendant to twenty years at hard labor. The defendant appealed.

On June 12, 2009, in an unpublished opinion, this court rendered judgment affirming the possession of cocaine with intent to distribute conviction, habitual offender adjudication, and sentence, and remanding the matter to the trial court for imposition of sentence on the possession of hydrocodone conviction. **State v. Blackburn**, 09-0178 (La. App. 1 Cir. 6/12/09), 11 So. 3d 1244 (unpublished).

On remand, the trial court sentenced the defendant to five years at hard labor for the possession of hydrocodone conviction. The court ordered that the sentence be served concurrently with the sentence on count one. The trial court also denied the defendant's motion for a new trial. The defendant now appeals the possession of hydrocodone conviction and sentence. He designates the following assignments of error by counseled brief:

1. The trial court erred in imposing an excessive sentence.

2. The trial court erred by failing to comply with the sentencing mandates of La. Code Crim. Proc. art. 894.1.
3. The defendant-appellant was denied effective assistance of counsel as a result of counsel's failure to file a motion to reconsider sentence to preserve for appellate review his right to object, on specific grounds, to the excessiveness of the sentence.
4. The trial court erred in its treatment of the motion for new trial.

By pro se brief, the defendant also urges a claim of ineffective assistance of counsel.

We affirm the possession of hydrocodone conviction. However, finding error under La. Code Crim. Proc. art. 920(2), we vacate the possession of hydrocodone sentence and remand for resentencing.

REVIEW FOR ERROR

In reviewing the record for error under La. Code Crim. Proc. art. 920(2), we note the following error. On remand, in open court, the defendant filed pro se motions for a determinate sentence, a new trial, and an appeal. The trial court accepted the motions into the record. The court then granted the motion for a determinate sentence and immediately imposed the sentence on count two. The trial court did not rule on the defendant's motion for a new trial until after the sentence was imposed.

Louisiana Code of Criminal Procedure article 873 provides that if a motion for a new trial is filed, a sentence shall not be imposed until at least twenty-four hours after the motion is overruled. However, if the defendant expressly waives a delay provided in Article 873 or pleads guilty, sentence may be imposed immediately. **Id.** The trial court erred by sentencing the defendant without waiting twenty-four hours after the denial of the motion for a new trial. Nothing in the record indicates the defendant waived this

time period.¹ Prejudice will not be found if the defendant has not challenged the sentence imposed and the twenty-four hour delay violation is merely noted on review for error under La. Code Crim. Proc. art. 920(2). See State v. Ducre, 604 So. 2d 702, 709 (La. App. 1st Cir. 1992). On appeal, the defendant has not assigned as error the trial court's failure to observe the twenty-four hour delay. However, the defendant, through his counseled assignments of error (which include a claim of ineffective assistance of counsel for failure to file a motion to reconsider the sentence) has contested the sentence imposed. In State v. Augustine, 555 So. 2d 1331, 1333-34 (La. 1990), the Louisiana Supreme Court held that a trial court's failure to observe the twenty-four hour delay is not harmless error if the defendant challenges the sentence on appeal.

Accordingly, we vacate the sentence imposed on count two (possession of hydrocodone) because we find that the trial court violated Article 873. We remand the matter to the trial court for resentencing on that count, and we pretermitt discussion of counseled assignments of error 1-3, which all relate to the count two sentence.

COUNSELED ASSIGNMENT OF ERROR #4

In this assignment of error, the defendant contends the trial court erred in considering the merits of his motion for a new trial. Specifically, he argues that the claims raised in the motion were not claims that could be decided on the trial record and were more appropriately raised in an application for post conviction relief. He asserts the trial court should have

¹ When the matter came before the court for count two sentencing on remand, the defendant requested that the matter be reset until a later date so that he could secure the presence of his trial attorney at the sentencing. The trial court denied the request. The defendant clearly did not intend to waive sentencing delays.

considered the motion as an application for post conviction relief and treated it accordingly. As the state correctly notes in its brief in response to this claim, the defendant's motion for a new trial, filed before sentencing, could not possibly have been treated as an application for post conviction relief. La. Code Crim. Proc. art. 924.1 provides, "[a]n application for post conviction relief shall not be entertained if the petitioner may appeal the conviction and sentence which he seeks to challenge, or if an appeal is pending." Thus, any application for post conviction relief filed before the sentencing would have been premature. Furthermore, as the state also notes, once the defendant timely filed the motion for a new trial, the trial court was required to dispose of the motion before sentencing. See La. Code Crim. Proc. art. 853.

Accordingly, we find no error in the trial court's denial of the motion for a new trial. This assignment of error lacks merit.

PRO SE ASSIGNMENT OF ERROR
INEFFECTIVE ASSISTANCE OF COUNSEL

In his pro se brief, the defendant argues he was denied his Sixth Amendment right to effective assistance of counsel. Specifically, he asserts his trial counsel was ineffective in failing to be adequately prepared to try the case and to present a defense, and in failing to move for a continuance.

A claim of ineffective assistance of counsel is more properly raised by an application for post-conviction relief in the district court where a full evidentiary hearing may be conducted. **State v. Williams**, 632 So. 2d 351, 361 (La. App. 1st Cir. 1993), writ denied, 94-1009 (La. 9/2/94), 643 So. 2d 139. However, if the record discloses the evidence needed to decide the issue of ineffective assistance of counsel and that issue is raised by

assignment of error on appeal, the issue may be addressed in the interest of judicial economy. **Williams**, 632 So. 2d at 361.

A defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution and Article I, § 13 of the Louisiana Constitution. In assessing a claim of ineffectiveness, a two-pronged test is employed. **Strickland v. Washington**, 466 U.S. 668, 687 (1984). The defendant must show that (1) his attorney's performance was deficient, and (2) the deficiency prejudiced him. **Strickland**, 466 U.S. at 687. The error is prejudicial if it was so serious as to deprive the defendant of a fair trial, or "a trial whose result is reliable." **Strickland**, 466 U.S. at 687. In order to show prejudice, the defendant must demonstrate that, but for counsel's unprofessional conduct, the result of the proceeding would have been different. **Strickland**, 466 U.S. at 694; **State v. Felder**, 00-2887 (La. App. 1 Cir. 9/28/01), 809 So. 2d 360, 369-70, writ denied, 01-3027 (La. 10/25/02), 827 So. 2d 1173. Further, it is unnecessary to address the issues of both counsel's performance and prejudice to the defendant if the defendant makes an inadequate showing on one of the components. **State v. Serigny**, 610 So.2d 857, 860 (La. App. 1st Cir. 1992), writ denied, 614 So. 2d 1263 (La. 1993).

The defendant claims, among other things, his trial counsel was ineffective because he was not adequately prepared for trial, he failed to properly investigate the case and present an adequate defense (for instance failed to secure a crime lab report), and/or request a continuance. These shortcomings, the defendant asserts, show that his counsel failed to "exercise the skill, judgment, and diligence of a reasonably competent defense

attorney.” These particular allegations of ineffective assistance of counsel cannot be sufficiently investigated from an inspection of the record alone. It is well settled that decisions relating to investigation, preparation, and strategy require an evidentiary hearing and cannot possibly be reviewed on appeal. See e.g. State v. Martin, 607 So. 2d 775, 788 (La. App. 1st Cir. 1992). Only in an evidentiary hearing in the district court, where the defendant could present evidence beyond that contained in the instant record, could these allegations be sufficiently investigated.² See State v. Albert, 96-1991 (La. App. 1 Cir. 6/20/97), 697 So. 2d 1355, 1364. Accordingly, these allegations are not subject to appellate review. Albert, 697 So. 2d at 1364.

The remaining ineffective assistance of counsel claims (failure to object to the presentation of “perjured” testimony by a state’s witness and failure to object to improper comments by the prosecutor during closing remarks) can be reviewed on this record.

Inconsistent Testimony by a State’s Witnesses

First, the defendant claims his counsel should have entered an objection when Sergeant Kendall Bullen testified at the trial that he was not sure who was driving the vehicle on the night in question. The defendant argues that this testimony is in direct conflict with testimony provided by Deputy Charles McDaniel at the hearing on the motion to suppress. The defendant notes that Deputy McDaniel testified at the suppression hearing that the vehicle was being driven by “a subject known to us as Jasmine Brown.” He further testified that Jasmine Brown had been spotted by

² The defendant would have to satisfy the requirements of La. Code Crim. Proc. art. 924 et seq. in order to receive such a hearing.

Sergeant Bullen "in the vehicle, getting in the vehicle." The defendant notes that at the trial, however, Sergeant Bullen initially corroborated Deputy McDaniel's account of the events but later "changed his testimony" and indicated that he was not sure who was driving the vehicle on the night in question. The defendant argues his counsel should have objected to Sergeant Bullen's inconsistent trial testimony as evidence of perjury.

Our review of the record reveals that at the hearing on the motion to suppress, Deputy McDaniel explained the circumstances surrounding the stop of Jasmine Brown's vehicle on the night in question. He explained that he was patrolling the area when he received information indicating that Jasmine Brown's vehicle had been spotted in the area. Shortly thereafter, Deputy McDaniel participated in the traffic stop. When questioned regarding his ability to identify the driver of the vehicle, Deputy McDaniel explained that he was the second vehicle in line during the traffic stop, and he could not actually see inside the vehicle. He went on to explain that, according to the information he received, Sergeant Bullen had observed Brown getting in the vehicle. At the trial, Sergeant Bullen testified that on the night in question he alerted his group that active warrants existed for the arrest of Jasmine Brown and asked them be on the lookout for her vehicle. Later, as he was patrolling, Sergeant Bullen observed a vehicle he recognized as that of Jasmine Brown, with what appeared to be a female driver, pass by. In response, he radioed to alert the other officers. This radio alert apparently led to Deputy McDaniel's involvement in the traffic stop of Brown's vehicle. Sergeant Bullen testified that due to the late hour, the

direction of travel, and the vehicle's heavily tinted windows, there was no way for him to be sure who was actually driving the vehicle.

Although the record reflects a discrepancy as to whether Sergeant Bullen actually observed Brown enter the vehicle in question, there is nothing to indicate that there was perjury on the part of either McDaniel or Bullen. Deputy McDaniel testified as to what he recalled hearing in the radio dispatch, and Sergeant Bullen told what he personally observed during the street patrol. Thus, it is clear why counsel did not object to the aforementioned testimony as perjury. This argument lacks merit.

Improper Closing Remarks by the Prosecutor

Next, the defendant claims his counsel was ineffective in failing to object when the prosecutor, during closing arguments, vouched for the credibility of the state's witnesses and offered an unsolicited personal opinion on the defendant's guilt.

During closing argument, the prosecutor made the following comment:

You are the judges of the evidence and the credibility of witnesses, so you get to decide whether those police officers told you the truth. I would submit to you that they did and there are a couple of reasons why. You heard them testify. They were forthright; they looked you in the eye; they told you what happened. No three people are going to remember things exactly the same way. I guarantee you that when you-all go back in the jury room and start deliberating, you're going to remember things a little bit differently. Because our brains work in different ways and certain statements, certain facts, are going to be more important and stick out in some of your minds more than others.

The discrepancies are how you know they're telling you the truth. If they came up here and said the exact same thing, the exact same way and in the exact same order, what would you think? Well, that prosecutor helped them[,] and they're

lying. They told you what they remembered. There are things that are important, and there are things that are red herrings.

While a prosecutor may not give his personal opinion regarding the veracity of a witness, it is permissible for a prosecutor to draw inferences about a witness's truthfulness from matters on the record. See La. Code Crim. Proc. art. 774; **State v. Palmer**, 00-0216 (La. App. 1 Cir. 12/22/00), 775 So. 2d 1231, 1236, writs denied, 01-0211 (La. 1/11/02), 807 So. 2d 224, & 01-1043 (La. 1/11/02), 807 So. 2d 229.

Taken in context, we find the aforementioned comments were confined to explaining why the testimony of the officers contained some discrepancies. The comments were based on the evidence and were not personal opinion based on anything outside of the record. Thus, the prosecutor did not improperly vouch for the credibility of the officers. This assignment of error lacks merit.

Next, the defendant claims his counsel was ineffective in failing to object to the prosecutor's expression of her personal opinion regarding the defendant's guilt. The record reflects that, during her rebuttal closing argument, the prosecutor stated to the jury:

Thank you, Your Honor. In my first closing I mentioned red herrings. I want to talk to you a little bit about some of those. Mr. May [defense counsel] did a fine job, and if he hadn't told you this was his first trial, I don't think you would have known that. But his client is guilty. His client is guilty as charged.

Let's consider the facts...

While it is generally considered error for a prosecutor to state an individual belief concerning the accused's guilt when that remark is made in such a way that the jury may conclude that the prosecutor's belief is based on evidence outside the record, the expressing of an opinion based on evidence within the record is permissible. See **State v. Motton**, 395 So. 2d

1337, 1346 (La.), cert. denied, 454 U.S. 850 (1981). Upon review of the record in this case, we find that this challenged comment was based only on matters in the record and, thus, was permissible. The prosecutor's comment regarding her opinion of the defendant's guilt was made during rebuttal closing argument immediately before a repeated summation of the evidence presented at the trial. The defendant did not suffer any prejudice from counsel's failure to object to this comment. This assignment of error lacks merit.

**POSSESSION OF HYDROCODONE CONVICTION
AFFIRMED; FIVE-YEAR SENTENCE VACATED, CASE
REMANDED FOR RESENTENCING.**