STATE OF LOUISIANA	*	**NO. 2000-KA-1757**
VERSUS	*	**COURT OF APPEAL**
JERMAINE H. HUDSON	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
	*	

* * * * * * *

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 407-888, SECTION "G"
HONORABLE JULIAN A. PARKER, JUDGE

* * * * * *

JAMES F. MC KAY, III
JUDGE

* * * * * *

(Court composed of Judge Joan Bernard Armstrong, Judge James F. McKay, III, Judge Dennis R. Bagneris, Sr.)

HARRY F. CONNICK
DISTRICT ATTORNEY OF ORLEANS PARISH
LESLIE P. TULLIER
ASSISTANT DISTRICT ATTORNEY OF ORLEANS PARISH
New Orleans, Louisiana
Attorneys for Plaintiff/Appellee

SHERRY WATTERS
LOUISIANA APPELLATE PROJECT
New Orleans, Louisiana

Attorney for Defendant/Appellant

AFFIRMED

STATEMENT OF CASE

On July 1, 1999, Jermaine H. Hudson was charged in a two count bill of information with armed robbery, a violation of La. R. S. 14:64, and being a felon in possession of a firearm, a violation of La. R.S. 14:95.1. At his arraignment on July 8, 1999, he pled not guilty. Probable cause was found and the Motion to Suppress Identification was denied on August 30, 1999. On March 22, 2000, a twelve-member jury found the defendant guilty of armed robbery. On April 12, 2000, the trial court sentenced the defendant to ninety-nine years at hard labor, without benefit of parole, probation or suspension of sentence, with credit for time served, sentence to run concurrently with any other sentence imposed. That same day, the court denied the defendant's motion for new trial. On April 14, 2000, the defendant was adjudged a second felony offender. The court vacated his original sentence and sentenced him to ninety-nine years, at hard labor, without benefit of parole, probation or suspension of sentence, with credit for time served, sentence to run concurrently with any other sentence imposed.

STATEMENT OF FACT

At approximately 11:00 p.m. on March 1, 1999, Officer Bennett Williams received a call concerning an armed robbery at Hyman and McArthur Boulevard. Officer Williams interviewed Robert Gumpright, the victim, at the victim's residence, and obtained a description of the perpetrator. The description was a black male, blue cap, black short-sleeve shirt and blue jeans. The officer broadcasted the description to other units in the area; however, a canvas of the area produced no suspect.

Officer Melissa Gregson met with the victim on May 5, 1999, at his place of employment, and presented him with a photographic lineup from which the victim immediately identified the defendant as his assailant. Officer Gregson learned that the armed robbery occurred less than two blocks from the defendant's residence.

Robert Gumpright testified that on March 1, 1999, at approximately 10:45 p.m. as he rode his bicycle home from work, the defendant stepped from the curb and asked him what time the bus stopped running. The victim stopped his bike, looked at his watch to respond to the defendant's question, and when he looked up, he saw the defendant pointing a gun at his face. The defendant yanked the victim's chain and St. Christopher medal from his neck, ordered the victim to empty his pockets, and lie face down in the street. The defendant warned the victim not to look at his face. As the

victim complied, he heard the defendant rifling through the victim's backpack, and then run away.

ERRORS PATENT

A review for errors patent on the face of the record reveals none.

ASSIGNMENT OF ERROR NUMBER 1

The defendant contends his constitutional rights under the fifth and sixth amendments were violated by defense counsel's refusal to call two subpoenaed alibi witnesses.

Prior to resting its case, defense counsel requested a side bar during which the following transpired:

Defense Counsel:

> The defendant wants me to call a witness who I do not feel comfortable in calling for the simple reason I know the witness not to be telling the truth. I know this from independent investigation he's not going to be telling the truth.

The Court:

> This is a violation of your oath as an attorney?

Defense Counsel:

> Right.

Though not couched in terms of ineffective assistance of counsel, that is the thrust of this assignment of error.

"As a general rule, claims of ineffective assistance of counsel are

more properly raised by application for post conviction relief in the trial court where a full evidentiary hearing may be conducted if warranted." *State v. Howard*, 98-0064, (La.4/23/99); 751 So.2d 783, 801, *cert. denied*, *Howard v. Louisiana*, --- U.S. ----, 120 S.Ct. 420, 145 L.Ed.2d 328 (1999). However, where the record is sufficient, the claims may be addressed on appeal. *State v. Wessinger*, 98-1234, (La.5/28/99); 736 So.2d 162, 195, *cert. denied*, *Wessinger v. Louisiana*, ---U.S. ----, 120 S.Ct. 589, 145 L.Ed.2d 489 (1999); *State v. Bordes*, 98-0086, (La.App. 4 Cir. 6/16/99); 738 So.2d 143, 147. Ineffective assistance of counsel claims are reviewed under the two-part test of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *State v. Brooks*, 94-2438, (La.10/16/95); 661 So.2d 1333, 1337 (on rehearing); *State v. Rob*inson, 98-1606, (La.App. 4 Cir. 8/11/99); 744 So.2d 119, 126. In order to prevail, the defendant must show both that: (1) counsel's performance was deficient; and (2) he was prejudiced by the deficiency. *Brooks, supra* ; *State v. Jackson*, 97-2220, (La.App. 4 Cir. 5/12/99); 733 So.2d 736, 741. Counsel's performance is ineffective when it is shown that he made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Strickland* at 686, 104 S.Ct. at 2064; *State v. Ash*, 97-2061, (La.App. 4 Cir. 2/10/99), 729 So.2d 664, 669, *writ denied,* 99-0721, (La.7/2/99), 747 So.2d

15. Counsel's deficient performance will have prejudiced the defendant if he shows that the errors were so serious as to deprive him of a fair trial. To carry his burden, the defendant must show that there is a reasonable probability that, but for counsel's deficient performance the result of the proceeding would have been different; "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, at 693, 104 S.Ct. at 2068; *State v. Guy*, 97-1387,(La.App. 4 Cir. 5/19/99), 737 So.2d 231, 236.

Rule 3.3 of the Rules of Professional Conduct provides in part:

> **Candor toward the tribunal**
> (a) A lawyer shall not knowingly:
> * * *
> (4) Offer evidence that the lawyer knows to be false. . .
> * * *
> (c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

Rule 8.4 of the Rules of Professional Conduct provides further:

> **Misconduct**
> It is professional misconduct for a lawyer to:
> * * *
> (c) Engage in conduct involving fraud, deceit, dishonesty or misrepresentation;
> (d) Engage in conduct that is prejudicial to the administration of justice.

The law prohibits the use of fraudulent, false, or perjured testimony or evidence, La. R.S. 14:123, as do the Rules of Professional Conduct. A

lawyer who knowingly participates in the introduction of such testimony or evidence is subject to disciplinary proceedings before the Louisiana State Bar Association, Office of Disciplinary Counsel. Rule XIX, Rules of Supreme Court of Louisiana.

Moreover, the sixth amendment right of a criminal defendant to assistance of counsel is not violated when his attorney refuses to cooperate with defendant in presenting perjured testimony at trial. *Nix v. Whiteside*, 475 U.S. 157, 106 S.Ct. 988, 89 L.Ed. 2d 123 (1986).

The *Nix* court went on to hold:

> Whatever the scope of constitutional right to testify, it is elementary that such right does not extend to testifying falsely.
>
> * * *
>
> In short, the responsibility of an ethical lawyer, as an officer of the court and a key component of a system of justice, dedicated to a search for truth, is essentially the same whether the client announces an intention to bribe or threaten witnesses or jurors or to commit or procure perjury. No system of justice worthy of the name can tolerate a lesser standard.

475 U.S. at 173, 174.

The defendant has not stated how he was prejudiced by counsel's failure to call the alibi witnesses. The defendant admitted he entered the store and fired his gun. Presenting the testimony of an alleged alibi witness would serve no purpose in light of the defendant's admissions. This assignment is without merit.

ASSIGNMENT OF ERROR NUMBER 2

In his second assignment of error, the defendant contends the State failed to prove his guilt beyond a reasonable doubt. The defendant attacks the victim's credibility by claiming that the identification was unreliable. He claims the victim had no opportunity to view the assailant; that he (the defendant) did not fit the description provided by the victim; and that the photo lineup conducted two months after the incident, was not based on the description of the perpetrator.

The standard for reviewing a claim of insufficient evidence is whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Rosiere*, 488 So.2d 965 (La.1986). The reviewing court is to consider the record as a whole and not just the evidence most favorable to the prosecution; and, if rational triers of fact could disagree as the interpretation of the evidence, the rational decision to convict should be upheld. *State v. Mussall*, 523 So.2d 1305 (La.1988). Additionally, the reviewing court is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence. *Id.* The trier of fact's determination of credibility is

not to be disturbed on appeal absent an abuse of discretion. *State v. Cashen,* 544 So.2d 1268 (La.App. 4 Cir.1989).

In *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977), the United States Supreme Court set forth a five-factor test to determine whether an identification is reliable: (1) the opportunity of the witness to view the assailant at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the assailant; (4) the level of certainty demonstrated by the witness; and (5) the length of time between the crime and the confrontation. *State v. Green*, 98-1021, (La.App. 4 Cir. 12/22/99), 750 So.2d 343, 350 w*rit denied* 2000-0235, 766 So.2d 1274 (La. 8/3/00).

The evidence establishes that the victim had an excellent opportunity to view the defendant during the crime. The victim testified that he got a "real good look" at the defendant's face for "a minute, two minutes", and said that he would never forget it. The defendant was about five feet from the victim during the assault, and stood approximately five feet eleven inches in height. The victim described the lighting saying that even though the incident occurred ". . . just after 11:00 at night, it was probably the best lighting on that street because there was a light directly across the adjacent corner." Although the victim did not view the photographic lineup until

approximately two months after the incident, under cross-examination he explained why he was good at remembering faces:

> That's my business. That's the only – that's how I make my money [bartending]. I make my money by remembering people's first names and remembering their faces. . .

In addition, Officer Gregson testified at trial that she compiled a six-photograph lineup. She included a picture of the defendant and ". . . five photographs to match [the defendant]in facial features, hair, mustache, no mustache, that kind of thing as closely as possible." When she presented the lineup to the victim, he identified the defendant as his assailant immediately, without hesitation. Officer Gregson testified that she did not suggest that the victim choose the defendant's photograph, nor did she promise him anything in exchange for his identification. The victim's testimony regarding the photographic lineup corroborated that of Officer Gregson. The defendant offered no evidence to refute the State's witnesses' testimony on the issue of identity. Considering all the evidence, defendant has failed to show that the identification was unreliable. This assignment is without merit.

ASSIGNMENT OF ERROR NUMBER 3

In this assignment, the defendant complains that his sentence is constitutionally excessive.

Article 1, Section 20 of the Louisiana Constitution of 1974 provides

that "No law shall subject any person ... to cruel, excessive or unusual punishment." A sentence within the statutory limit is constitutionally excessive if it is "grossly out of proportion to the severity of the crime" or is "nothing more than the purposeless imposition of pain and suffering." *State v. Francis*, 96-2389, (La.App. 4 Cir. 4/15/98), 715 So.2d 457, *writ denied* 98-2360, (La.2/5/99), 737 So.2d 741. Generally, a reviewing court must determine whether the trial judge adequately complied with the sentencing guidelines set forth in La.C.Cr.P. art. 894.1, and whether the sentence is warranted in light of the particular circumstances of the case. *State v. Burns*, 97-1553, (La.App. 4 Cir. 11/10/98), 723 So.2d 1013, *writ denied* 98-3054, (La.4/1/99), 741 So.2d 1282.

To insure adequate review by the appellate court, the record must indicate that the trial court considered the factors set forth in La.C.Cr.P. art. 894.1. *State v. Forde*, 482 So.2d 143, 145 (La.App. 4 Cir.1986); *State v. Caston*, 477 So.2d 868, 871 (La.App. 4 Cir.1985). Although a judge need not specifically recite each of the factors listed in art. 894.1, the record must reflect that the judge adequately considered the sentencing guidelines and that there is an adequate factual basis for the sentence imposed. *State v. Soco,* 441 So.2d 719 (La.1983), *appeal after remand* 508 So.2d 915 (La.App. 4 Cir.1987).

If adequate compliance with art. 894.1 is found, the reviewing court must determine whether the sentence imposed is too severe in light of the particular defendant and the circumstances of his case, keeping in mind that maximum sentences should be reserved for the most egregious violators of the offense so charged. *State v. Quebedeaux*, 424 So.2d 1009 (La.1982) *appeal after remand,* 446 So.2d 1210 (La. 1984).

In the present case, the defendant was convicted of armed robbery. After trial, the State filed a multiple bill charging the defendant as a second felony offender based upon defendant's prior conviction for first-degree robbery. The trial court adjudicated the defendant a second felony offender, and sentenced him to serve ninety-nine years at hard labor without benefit of probation, parole or suspension of sentence. Prior to sentencing the defendant, the trial court noted:

> In connection with case 379-002, Mr. Jermaine Hudson was originally charged in that case with four counts of armed robbery. This was four counts contained in a seven-count bill of information also charged with a co-defendant. The seventh count was nolle prosed as it related to Mr. Washington and the co-defendant.
>
> Later on the tenth day of April, 1996, Mr. Jermaine Hudson entered a plea of guilty as charged to violation of Louisiana Revised Statue 14:64.1 relative to first degree robbery and he was sentenced to serve four years at hard labor in the custody of the Louisiana Department of Corrections.
>
> Thereafter, Mr. Jermaine Hudson was charged with having on the first day of March 1999 armed with a gun, robbed Robert Guthridge, of U. S. currency. This matter proceeded to trial by jury on the 22nd day of March 2000. A second count in the bill of information 407-888 alleged Mr. Hudson possessed a firearm after

> previously being convicted of a felony, particularly, the first degree robbery to which he pled guilty 379-002.
>
> The court has considered the trial testimony and Mr. Hudson's criminal history and finds as follows: That there is an undue risk that during any period of suspension of sentence, probation, or parole, Mr. Hudson would commit another crime. The court is particularly concerned that during any period of probation or parole Mr. Hudson would go back to his crime of choice which was robbery. I find that he is in need of correctional treatment in a custodial environment that can best be provided most effectively by his commitment to state penitentiary. Furthermore, the court finds the underlying facts and circumstances of this case, that any less sentence other than what I'm going to impose would deprecate from the serious nature of the defendant's crime. I found that during the commission of the offense for which Mr. Hudson has been convicted by a jury that he used threats of an actual violence in the commission of this robbery. I find that he used violence, force and threats to convince the victim, to give up his jewelry and his belongings. Furthermore, the jury was convinced and so was I, that Mr. Hudson used a weapon, a handgun in the commission of this offense. My assessment of the victim's testimony and his demeanor on the witness stand convinced me both during and after the trial the victim has suffered psychological and emotional damage as a result of being Mr. Hudson's victim of an armed robbery.

In this case, as a double offender, the defendant was subject to a sentence of forty-nine and one-half years to one hundred and ninety-eight years at hard labor, without benefit of parole, probation or suspension of sentence. His ninety-nine year sentence is in the mid-range of sentencing exposure.

The sentence imposed by the trial court is not unconstitutionally excessive in light of the defendant's criminal history. In addition to the present armed robbery conviction, the defendant pled guilty to two counts of

manslaughter. In each case, the defendant had been charged with first-degree murder and worked out a plea bargain in which he pled guilty to the lesser charge of manslaughter. The trial court was well aware of the defendant's involvement in the armed robbery and the two homicides. Further, lengthy sentences have been upheld for second felony offenders convicted of armed robbery. See *State v. McNeal,* 99-1265, (La. App. 4 Cir. 6/14/00), 765 So.2d 1113, and *State v. Donahue*, 408 So.2d 1262 (La.1982) This assignment has no merit.

Accordingly, we affirm the defendant's conviction and sentence.

AFFIRMED