STATE OF LOUISIANA	*	**NO. 2001-K-2290**
VERSUS	*	**COURT OF APPEAL**
ALBERT SOUBLET	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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ON SUPERVISORY WRIT DIRECTED TO
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 268-481, SECTION "G"
HONORABLE JULIAN A. PARKER, JUDGE

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JUDGE MICHAEL E. KIRBY

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(Court composed of Judge Steven R. Plotkin, Judge James F. McKay III, Judge Michael E. Kirby)

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STATEMENT OF THE CASE

The relator, Albert Soublet, was charged by bill of information on January 25, 1979, with armed robbery, a violation of La. R.S. 14:64. After trial on May 31, 1979, a twelve-member jury found him guilty as charged. He was sentenced on June 27, 1979 to serve forty-four years at hard labor as a second felony offender. He appealed, and in a per curiam decision the Supreme Court affirmed his conviction and sentence. State v. Soublet, 412 So. 2d 105 (La. 1981). Because that was an errors patent appeal, he was granted another appeal pursuant to Lofton v. Whitley, 905 F.2d 885 (5th Cir. 1990). In that subsequent appeal three assignments of errors were made: the appellant in a pro se brief argued that his counsel was ineffectual in not objecting to his appearing at trial in prison garb and also that the State did not prove at his multiple offender hearing that he was the same person convicted in 1973; defense counsel contended that the appellant received an illegally lenient sentence.

In State v. Soublet, unpub., 94-1276 (La. App. 4th Cir. 7/26/95), this Court affirmed the relator's conviction, but found that the relator's forty-four year sentence was illegally lenient because the trial court failed to stipulate

that it was to be served without benefits of parole, probation, or suspension of sentence as provided by La. R.S. 14:64. This Court remanded the case to the trial court to be treated as a motion to correct an illegal sentence.

On August 10, 1995, the trial court resentenced the relator to serve forty-four years without benefit of parole, probation, or suspension of sentence. The relator sought review in the Supreme Court, and on May 30, 1997, that Court denied his application for supervisory writs in a 4-3 ruling. In denying the writ, the Court stated that the relator could reurge the issue of ineffective assistance of counsel in an application for post conviction relief. The opinion further noted that Chief Justice Calogero, Justice Kimball and Justice Johnson would grant an evidentiary hearing. State v. Soublet, 95-2167 (La. 5/30/97), 694 So.2d 230.

Following that decision, the relator filed an application for post conviction relief with the trial court rearguing his ineffective assistance of counsel claim, specifically, that his counsel was ineffective for failing to object to his appearance at trial in prison garb. On November 24, 1997, the trial court denied relator's application for post conviction relief. Relator pro se sought review of that decision; this Court denied relief in an unpublished per curiam, 98-K-0036 (La. App. 4 Cir. 2/20/98), but the Supreme Court disagreed, granted the writ in part, and ordered the trial court to conduct an

evidentiary hearing at which it must determine whether the relator was wearing identifiable garb at trial, and if he was, whether counsel's failure to timely object constituted ineffective assistance of counsel. State ex rel Soublet, 98-1097 (La. 6/18/99), 745 So. 2d 611.

Pursuant to the Supreme Court's order, the trial court appointed counsel for the relator in February 2000 and set the matter for an evidentiary hearing. The hearing was finally held on November 17, 2000 at which time the sole witness to testify was the relator. The trial court did not rule at that time. Instead, on March 15, 2001, the court heard extensive argument and then denied the relator's claim. Counsel for the relator, at that time Elizabeth Cole as supervising attorney at the Tulane Law Clinic, objected and gave notice of intent to seek writs; the court gave the relator thirty days to file a writ. However, no writ was filed. Instead, on November 9, 2001, the new supervising attorney at Tulane, Ms. Cole having retired, appeared and filed a motion for an "out of time" return date, acknowledging that the prior time had run. The assistant prosecutor indicated that the State did not object, and the court set a return date of December 10, 2001. This application follows.

DISCUSSION

The trial court in this case was directed to determine whether the relator was tried in identifiable prison garb. If the court determined the answer to that question was yes, the court was then required to determine whether the relator's trial counsel was ineffective in not raising a timely objection. In the writ application, the relator extensively argues the second claim. However, a review of the transcript of the court's ruling shows without doubt that the court found the relator was **not** tried in identifiable prison garb; thus the effectiveness of counsel was no longer an issue.

The sole witness at the evidentiary hearing was the relator. He testified that he went to trial three times; the first two times he was represented by Loyola Law Clinic and was dressed in a suit. Those trials ended in mistrials. The third time, for reasons unknown to the relator, Loyola no longer represented him; instead he was represented by Thomas Ford, an attorney from Orleans Indigent Defender Program. According to the relator, on the morning of the third trial, he was wearing a gold jumpsuit which had OPP on it. The relator testified that he asked the deputy "on the docks" about his civilian clothes, specifically the suit which his family had provided previously for the trials, and was told that "they were going to be used in evidence." The relator told Mr. Ford what the deputy had said and in reply, "he told me to just sit here and just wait. He was going to check into

that." Mr. Soublet did not get his suit back.

The relator also testified that he was in handcuffs and leg irons on the day of trial. He stated that Mr. Ford made no objections to his being so attired.

The relator was not asked what, if anything, Mr. Ford told him about the suit having been seized as evidence.

No other evidence was presented at the evidentiary hearing.

Subsequently, the parties filed memoranda with the trial court. In its opposition, which is attached to the writ application as Exhibit 6, the State argued that the trial transcript did not support the relator's testimony that he was attired in leg irons, handcuffs, and a gold jumpsuit marked OPP. The State noted that the only reference in the trial transcript to attire is when Herman Collins was asked to point out the person who held the gun on him "and describe what he is wearing;" Mr. Collins described the relator as "[t] he young man sitting over there with the gold jumpsuit on." No other witness was asked to describe the relator. The State argued that the testimony of the relator was incredible in light of his failure to raise the issue of prison attire, leg irons, and handcuffs until his second appeal in 1994; he failed to raise the claim in prior applications for post conviction relief. Also, the State argued that the relator's criminal record of four prior felony

convictions including robbery and manslaughter cast doubt on his credibility.

At the March 15, 2001 proceeding wherein the parties made argument substantially based on their memoranda, the court specifically asked the relator's counsel if the court should "believe 21 years later that" the gold jumpsuit was "readily identifiable prison garb" The relator's counsel agreed that the court should do so, although counsel also suggested that the court should consider the relator's testimony on that point, but the court countered that the relator's testimony might be self-serving. Throughout the remainder of the proceedings, the trial court returned to its point that a gold jumpsuit was not readily identifiable prison garb. The court discussed typical OPP uniforms in the late 1970's and early 1980's and noted that in the seventies a gold jumpsuit could have simply been regular clothing. The court informed the defense that it was not prepared to accept factually that a gold jumpsuit was readily identifiable prison garb absent something more. Defense counsel argued only that the trial court should accept the relator's testimony on that point.

During the State's argument, the prosecutor pointed to the lack of corroboration of the relator's testimony that his jumpsuit was marked with OPP and that he was wearing shackles and handcuffs. At that point, the trial

court interjected that it was this testimony about shackles that it found so improbable and caused it to reject all of the relator's testimony as self-serving. The court also noted that the relator's failure to raise this claim from the time of his conviction in 1979 until 1986, when other prisoners had raised similar claims regarding prison attire or shackles, weighed in its determination of the credibility of the witness. The court then summed up its findings:

> [B]ased on what I see in this record, I'm not at all convinced that Mr. Soublet was dressed in jail garb nor am I convinced based on the word of a five time convicted felon that he was wearing handcuffs and shackles where there is absolutely not one iota of evidence anywhere uncovered by anybody in the last 22 years to support that statement. That self serving statement made by the defendant and that is my ruling.
>
> I note your objection and I find as a matter of fact that Mr. Soublet was not, based on any credible evidence in this record other than the self serving testimony of a multiple convicted felon, that he was, in fact, dressed on jail garb. I do not find, as a matter of fact, that this line in a page of a purported trial transcript that indicates that he was dressed in a gold jumpsuit convinces this court by any standard of proof that he was dressed in jail garb.

The trial court is the fact-finder at a motion hearing, and the court's credibility decision should not be reversed unless it is clearly an abuse of discretion. State v. Goodman, 99-2352, pp. 3-4 (La. App. 4 Cir. 10/13/99),

746 So. 2d 693, 695. The relator states that his testimony "was uncontroverted" at the hearing. However, because this is post-conviction relief, the relator bears the burden. Although no one testified that a gold jumpsuit was not prison-issued clothing, no one except the relator testified that the jumpsuit was readily identifiable as such. Furthermore, the court's decision to discount the relator's testimony was based upon the relator suddenly adding the fact that he was allegedly shackled and handcuffed during the trial. The court's suspicion about the relator's credibility cannot be considered an abuse of discretion when the relator totally failed to mention this "fact" previously in his pleadings, including the 1998 writ application to this Court wherein he sought review of the trial court's first denial of his claim.

The trial court was required to make a factual determination of whether the relator was dressed in identifiable prison clothing. The Louisiana Supreme Court apparently was unwilling to find as a matter of fact that a gold jumpsuit in the late 1970s was necessarily **identifiable** as prison clothing. The trial court has resolved the issue adversely to the relator. The court's ruling is affirmed.

For the above and foregoing reasons the writ is granted and relief denied.

WRIT GRANTED; RELIEF DENIED.