

COUNSEL FOR PLAINTIFF/APPELLEE

CONVICTION AND SENTENCE AFFIRMED

On 22 August 1985, the grand jury indicted the defendant, Wendell Martin (“Martin”), for the second degree murder of Leo Purnell, a violation of La. R.S. 14:30.1. On 22 January 1986, a jury found Martin guilty as charged. The trial court sentenced him on 10 February 1986 to life imprisonment without benefit of parole, probation, or suspension of sentence, with credit for time served. On appeal, this court conditionally affirmed the conviction and remanded the case to the trial court. *State v. Martin*, 508 So.2d 152 (La. App. 4 Cir. 1987). Thereafter, Martin and appellate counsel filed separate applications for review before the Louisiana Supreme Court. Both applications were denied. *State v. Martin*, 519 So.2d 112 (La. 1988).

On initial appeal of this case, this court could not determine from the record whether the plaintiff was present during all phases of the proceedings as mandated by C.Cr.P. art. 831, therefore it remanded the matter, explaining:

A review of the record reveals a great deal of confusion and incompleteness. The January 15, 1986 minute entry describes the voir dire of jurors as the first day of trial with the

jurors adjourned to January 16, 1986. No mention is made of defendant's presence on January 15th and no minute entry exists for January 16th nor is there any trial transcript or transcript of any kind, lodged in this Court or in the district court, of any trial or other proceedings on either the 15th or 16th of January. The only evidence in the record that trial was held on dates prior to January 21, 1986 is the trial court's opening remark to the jurors on page one of the trial transcript of January 21st, "welcome again" and the minute entries of January 21st and 22nd referring to these dates as the third and fourth days of trial. We cannot determine if defendant was present on the unrecorded trial dates and his presence is not noted on any of the recorded dates. We can only be sure he was present on the date he testified. . .

Under these circumstances, we conclude that a contradictory hearing is necessary to determine if the defendant was in fact present at all phases of his trial and, if not, if he affirmatively and knowingly waived his presence.

Since we find no trial error except for the deficiencies in the trial court minutes and transcript, it is not necessary at this time to reverse the conviction and order a new trial, because the error might be eliminated upon a contradictory proceeding below. We reserve to the trial judge the power to grant a new trial should she determine that the defendant was not present at all stages of the proceedings as required by C.Cr.P. Art. 831. If, on the other hand, the trial judge determines, after a contradictory hearing that the defendant was present as required by Art. 831, or absent as provided by Art. 832, the right to appeal from such ruling is reserved to the defendant.

508 So.2d at 157-158.

On remand, the trial court conducted an evidentiary hearing on 7 July 1987 and found that "the defendant had been present during all staages (sic) of the proceeding from the time questioning of the jurors started until the verdict was rendered. Testimony was taken by the court of [Assistant

District Attorneys] Mr. McCusker and Mr. Richard Olsen . . . as well as Mr. Raleigh Ohlmeyer, who was one of the defense attorneys for the defendant.”

This ruling is commemorated in a 7 July 1987 minute entry.

On 6 October 1993, Martin filed an application for post-conviction relief on the basis of evidence “which was hidden by the prosecution and was not disclosed until after his direct appeal was finalized.” Relief was denied. On 14 August 2000, the trial court granted Martin an out of time appeal.

Because the facts of the crime are described adequately in the previous published appeal, *State v. Martin*, 508 So.2d 152 (La. App. 4 Cir. 1987), they are not repeated herein.

ERRORS PATENT

A review of the record for errors patent reveals none.

COUNSEL ASSIGNMENT OF ERROR

In this assignment, counsel argues that the loss of the transcript of all trial court proceedings in support of Martin’s conviction has curtailed his constitutional right to appellate review because no court of appeal has ever considered the merits of any appeal in this matter based upon a complete record. Counsel claims that “the missing testimony was extremely

significant, if not the heart of the state's case, for on the 16th the jury heard the testimony of Nettles and Johnson [who] testified that they saw [the defendant] kill [the victim].”

The State's case in this matter was predicated on the testimony of two witnesses – Donna Nettles and Marilyn Johnson - and Sheila Robertson, to whom the defendant confessed to having shot the victim. In his initial appeal before this court, Martin raised two assignments of error, both found to be without merit. One assignment contested the trial court's refusal to allow Martin, as co-counsel, to question himself or speak with other trial counsel before submitting to redirect examination. The second assignment addressed the trial court's refusal to allow an expert witness to opine as to the State's witness' propensity to fabricate and/or lie. Neither assignment of error pertained to Nettles' or Johnson's testimony.

Considering that Martin did not assign error with respect to Nettles' or Johnson's trial testimony in his initial appeal, nor raise a sufficiency claim, and noting that in this subsequent appeal, Martin fails to specify how the absence of the testimony prejudices him; Martin's counsel's bald assertion that the lack of the transcript of that testimony adversely impacts Martin's right of appellate review at this time is non persuasive. If there was no error for Martin to assign as to Nettles and Johnson at the time of his initial

appeal, it is extremely unlikely that the subsequent loss of the transcription of those witnesses' trial testimony would adversely impact appellate review of an issue not raised in the first instance. In addition, this court conditionally affirmed his conviction in the earlier appeal, remanding the case for the sole purpose of determining whether Martin was present during all phases of the trial. Thus, the scope of the present appeal is limited to that particular issue and Martin is precluded from raising any other issue in this appeal. Therefore, any omission of the testimony from the prior appeal record is not relevant to this appeal.

Also of note, Martin's counsel's assertion that no appellate court has considered this matter on a complete record is incorrect. The United States Court of Appeal for the Fifth Circuit, in affirming the District Court's dismissal of Martin's writ of habeas corpus, notes in its opinion that "both Nettles and Johnson testified that they saw [the defendant] kill [the victim]. Both faced vigorous cross-examination" See *Martin v. Whitley*, unpub., 91-3416, p. 4, 985 F.2d 557 (5th Cir. 1993). Obviously, the record forwarded to that court contained a transcript of Nettles' and Johnson's testimony. Nevertheless, even if Nettles' and Johnson's testimony were discounted, the State's case would not fall. The trial court heard and denied Martin's motion to suppress the identification. This court is entitled to rely

upon that finding. Moreover, the jury heard, and this court reviewed, Sheila Robertson's, Martin's girlfriend, testimony that Martin admitted to her that he shot the victim. The jury also heard Martin and his alibi witnesses testify, denying that Martin shot the victim. Credibility determinations, as well as the weight to be attributed to the evidence, are soundly within the province of the jury's trial function. *State v. Ancar*, 97-1974 (La. App. 4 Cir. 11/3/99), 746 So. 2d 269, *writ den. State ex rel Ancar v. State*, 2000-0163 (La. 6/30/00), 765 So. 2d 1066. Obviously, the jury favored Ms. Robertson's testimony over that of Martin.

This assignment is without merit.

PRO SE ASSIGNMENT OF ERROR NUMBER 1

In this assignment, Martin argues that the affidavit supporting the warrant for his arrest contained false information which caused the magistrate to erroneously conclude probable cause existed for his arrest.

As discussed and for the reasons explained in the previous assignment, this assignment has not been preserved for appeal. However, even if it was preserved, it has no merit.

An arrest warrant shall be issued when "[t]he person making the complaint executes an affidavit specifying, to his best knowledge and belief, the nature, date, and place of the offense, and the name and surname of the

offender if known, and of the person injured if there be any; and [a] magistrate has probable cause to believe that an offense has been committed and that the person against whom the complaint was made committed it."

La. C. Cr.P. art. 202A (1) and (2).

The arrest warrant and supporting affidavit in this case were dated 24 July 1985, and signed by a magistrate of the Orleans Parish Criminal District Court. The affidavit was prepared and signed by Detective Marco Demma and in pertinent part reads:

On April 24, 1985, at about 10:45 p.m. while standing near the intersection of Erato and S. Rampart Leo Purnell was shot and killed. A follow up investigation conducted by Detective Marco Demma revealed that there were several witnesses to the shooting. Detective Demma was able to locate one of the witnesses at which time a photo line was conducted using six photos of the same general likeness. The witness then viewed the photos and was able to identify the photo of Wendell Martin as the subject that she observed shoot and kill Leo Purnell. Identification was made on July 24, 1985 at about 7:40 p.m.

Martin argues that the supporting affidavit is defective because Detective Demma deliberately misled the magistrate by indicating that there were two eyewitnesses to the shooting, when in fact, the police report of the incident references only one eyewitness. Thus, he claims, the arrest warrant was unsupported by probable cause and therefore grounds for the reversal of his conviction.

The police report indicates that Detective Demma spoke to at least two witnesses on the night of the shooting. He interviewed the victim's girlfriend, Marilyn Johnson, who witnessed the incident, supplied a description of the shooter, and later positively identified Martin. Also on that night, Detective Demma spoke to another witness, Jack Tucker, who, although he did not witness the shooting, gave descriptions of two subjects he saw run from the shooting scene. Approximately two to three months after the shooting, Detective Demma's follow-up investigation produced a second eyewitness who positively identified Martin from a photo line-up as the shooter. Consequently, at the time Detective Demma executed the affidavit for the arrest warrant on 24 July 1985, three months after the shooting, he had received information from two eyewitnesses. No evidence establishes that Detective Demma attempted to defraud the issuing magistrate. At the time of the shooting, Detective Demma had one eyewitness. By the time he applied for the arrest warrant, Detective Demma had located a second eyewitness. All of the information known to the police at the time of the arrest was sufficient to justify a man of ordinary caution in believing Martin had committed a crime.

This assignment is without merit.

PRO SE ASSIGNMENT OF ERROR NUMBER 2

In a second pro se assignment, Martin argues that the State knowingly and intentionally introduced perjured testimony at the trial. He claims that discrepancies in the witnesses' testimony concerning descriptions of the suspect, motive for the killing, and police investigation show the State procured false testimony that affected the jury's verdict to his detriment.

Martin raised these issues in an application for post-conviction relief (motion for new trial), which the trial court denied on 8 September 1995. Martin sought this court's supervisory review of that adverse ruling. On 27 June 1996, this court denied supervisory writs noting:

After a review of the hearing transcript of July 28, 1995, the trial record, and the exhibits provided by relator, this Court finds no error in the district court's judgment denying relator's motion for post-conviction relief. ...

State v. Wendell A. Martin, unpub., 96-0013 (La. App. 4 Cir. 6/27/96).

Because this court has previously considered and rejected the issues raised in Martin's second pro se assignment of error, we will not revisit it here.

CONCLUSION

Accordingly, we affirm Martin's conviction and sentence.

CONVICTION AND SENTENCE AFFIRMED