NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2001-KA-1289**
VERSUS	*	**COURT OF APPEAL**
JEROME TAPP	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
	*	

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 419-200, SECTION "J"
Honorable Leon Cannizzaro, Judge
* * * * * *
Judge Patricia Rivet Murray
* * * * * *

(Court composed of Judge Miriam G. Waltzer, Judge Patricia Rivet Murray, Judge Michael E. Kirby)

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AFFIRMED.

Jerome Tapp appeals his conviction of attempted possession of heroin, under La. R.S. 40:966(C)(1) and La. R.S. 14:27, for which he has been sentenced as a second felony offender to serve ten years at hard labor. His sole assignment of error is that his trial counsel's failure to adequately prepare for trial constituted ineffective assistance of counsel. For the reasons that follow, we affirm.

FACTS

On December 28, 2000, at 12:30 p.m., New Orleans Police Department ("NOPD") Officer Jermaine Johnson was on proactive patrol. Officer Johnson was traveling on Walmsley Street heading towards South Carrollton from Broad Street when he observed a vehicle, driven by Mr. Tapp, traveling on Walmsley in the opposite direction. After observing Mr. Tapp's failure to bring his vehicle to a complete stop at the stop sign located on the corner of Walmsley and Octavia streets, Officer Johnson decided to stop him for that traffic violation. To do so, Officer Johnson made a U-turn and then put on his lights. Mr. Tapp eventually stopped his vehicle in front

of a food store located at the corner of Walmsley and S. Rendon Streets.

Officer Johnson followed Mr. Tapp a couple of blocks before he came to a stop, exited his car, and began walking toward the corner store. Given it was daytime, Officer Johnson testified that he was unsure if Mr. Tapp stopped because he saw the patrol car lights following him for several blocks or because he just happened to be going to the corner food store. Officer Johnson's suspicion was the former and that Mr. Tapp's trip to the store was simply a farce.

As Mr. Tapp began walking to the store, Officer Johnson called out to him, and he stopped. When Officer Johnson questioned him regarding the traffic violation, Mr. Tapp responded that he did not have his driver's license with him. Officer Johnson observed that Mr. Tapp was very nervous, sweating profusely, and somewhat incoherent. Based on his police training "to always watch the subject's hands, because that's the most dangerous thing on a subject," Officer Johnson looked at Mr. Tapp's hands, and he observed that Mr. Tapp's "fist was balled." He then observed Mr. Tapp drop a hypodermic needle to the ground. Based on his experience coupled with Mr. Tapp's behavior, Officer Johnson believed the syringe to be drug

paraphernalia. He thus decided to arrest Mr. Tapp.

Since he was on patrol by himself, Officer Johnson ordered Mr. Tapp to put his hands on the patrol car, but he failed to comply. Fearing he might attempt to flee, Officer Johnson ordered Mr. Tapp to get on the ground; he complied. After placing Mr. Tapp under arrest, Officer Johnson retrieved the syringe and noticed it had a light small liquid residue inside the needle.

On January 22, 2001, the State charged Mr. Tapp, by bill of information, with possession of heroin, a violation of La. R.S. 40:966(C). On January 25, 2001, the court appointed counsel for Mr. Tapp, and he plead not guilty. On February 1, 2001, Mr. Tapp, along with court-appointed counsel, appeared for a motion hearing. On that date, defense counsel was given a copy of the police report. Also on that date, defense counsel withdrew the motion for preliminary hearing and all discovery motions.

On February 15, 2001, this matter was tried before a twelve-member jury. At trial, only two witnesses were called; namely, the arresting officer, Officer Johnson; and Officer Harry O'Neal, a drug analyst at the NOPD's Crime Laboratory. After being qualified by the trial court as an expert in the identification and analysis of controlled dangerous substances, Officer

O'Neal testified that he was certain the residue in the syringe was heroin.

In addition to relating the details of the traffic stop set forth above, Officer Johnson testified at trial regarding the conversation he had with Mr. Tapp in the police car on the way to the station. Officer Johnson testified that he made "small talk" with Mr. Tapp and that Mr. Tapp told him several things including that he had "a problem with heroin," that he could "help me find some drugs somewhere else," and that the vehicle belonged to his mother. Officer Johnson further testified that he told Mr. Tapp that he felt sorry for people with a drug problem. As to Mr. Tapp's offer to help him find "some bigger drugs if he could cut a deal," Officer Johnson testified that he told him his sergeant was not interested.

On direct examination of Officer Johnson by the prosecutor, the following colloquy took place:

Q: Did he ever inform you whether or not he had used heroin recently?

[DEFENSE COUNSEL]:

See? That's a leading question.

THE COURT:

I'll sustain that. Restate your question.

[DEFENSE COUNSEL]:

You told him what he said. (Emphasis added).

On cross-examination, Officer Johnson testified that he prepared the police report. Defense counsel questioned Officer Johnson extensively as to why he failed to mention in the police report Mr. Tapp's statement that he had a drug problem. In that regard, Officer Johnson testified as follows:

> Q. That report – unless these old eyes are failing me, that report has no account of Mr. Tapp telling you anything about a drug problem?
>
> THE WITNESS:
>
> May I speak, your Honor?
>
> [DEFENSE COUNSEL]:
>
> Q. Well, first answer the question. . . . That report, that report, does not contain anything about what you just told this jury about Mr. Tapp talking to you about a drug problem; is that correct?
>
> A. Yes, sir. As I mentioned to the – as I mentioned to the D.A. that was irrelevant from the case. I did tell them that.
>
> Q. It was irrelevant?
>
> A. Yeah, right. I asked --
>
> Q. You're telling us now. You think it's relevant now?
>
> A. Are you going to listen to what I'm saying.
>
> Q. Sure.

A. You asked me what the whole conversation was about. I told them, I said it was irrelevant. It wasn't in the report. It wasn't mentioned in the report. I just told them everything. Even the fact that he was – that the car was for his mother and that I was sorry that he was on the drugs. That he was on the drugs is irrelevant.

Q. But unless I'm mistaken, Officer, if someone tells you – a law enforcement officer – that he is a drug addict, he is admitting to a crime of sorts. Confession, huh?

A. Okay.

Continuing with this line of questioning, the defense attorney asked Officer Johnson how the prosecutor could have known to ask him about a conversation if it was not mentioned in the report. Officer Johnson responded that "he asked me what was the conversation about when we was in the car. And I pointed different things that the conversation was about." At this point, Officer Johnson was allowed to review the report. The questioning continued as follows:

Q. We have established, do we not, in this report there is no mention of a conversation with Mr. Tapp; is that correct?

A. Let's see. Pardon me one second.

Q. Sure. Take your time.

A. "Subject Tapp then advised Officer Johnson that he had consumed heroin prior to Officer Johnson stopping the subject."

Q. Okay. Now, he said that?

A. Correct.

Q. Now today you said he told you he had a drug problem; is that correct?

A. He also said that.

Following this colloquy, defense counsel shifted the subject matter of his line of questioning to the traffic stop.

As noted at the outset, the jury found Mr. Tapp guilty of attempted possession of heroin, and the trial court ultimately sentenced him to ten years at hard labor. This appeal followed.

DISCUSSION

A review of the record reveals no errors patent.

Mr. Tapp's only assignment of error is that he received ineffective assistance of counsel due to his trial counsel's inadequate preparation evidenced by his lack of knowledge of the contents of the police report.

Ordinarily, an ineffective assistance claim is better addressed in an application for post-conviction relief filed in the trial court in which a full evidentiary hearing can be held. However, "an evidentiary hearing is not necessary where the record on appeal is sufficient to permit a determination of counsel's effectiveness at trial." *State v. McGee*, 98-1508, p. 4 (La. App. 4 Cir. 3/15/00), 758 So. 2d

338, 341. When the appellate record is sufficient, this court will address such claims. *State v. Causey*, 96-2723, p. 10 (La. App. 4 Cir. 10/21/98), 721 So. 2d 78, 84. Indeed, under those circumstances, "the interests of judicial economy justify consideration of the issues on appeal." *State v. Kanost,* 99-1822, p. 6 (La. App. 4 Cir. 3/29/00), 759 So. 2d 184, 188, *writ denied*, 2000-1079 (La. 11/13/00), 773 So. 2d 726. Such is the case here. Indeed, Mr. Kapp's entire appeal is based on his ineffective assistance of counsel claim.

The standard for assessing an ineffective assistance of counsel claim is well-settled; the two-prong standard enunciated in the seminal case of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), must be applied. *State v. Fuller*, 454 So. 2d 119 (La. 1984). A defendant must establish both that counsel's performance was deficient and that the deficiency prejudiced the defendant. As to the former, the defendant must show that counsel made errors so serious that counsel was not functioning as the "counsel" the Sixth Amendment guarantees. As to the latter, the defendant must show that "counsel's errors were so serious as to deprive him of a fair trial, i.e., a trial whose result is reliable." *McGee*, 98-1508, at p. 5, 758 So. 2d at 342.

An "effective counsel" has been defined as "not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." *State v. Anderson*, 97-2587, p. 7 (La. App. 4 Cir. 11/18/98), 728 So. 2d 14, 19. Given that "`opinions may differ on the advisability of a tactic, hindsight is not the proper perspective for judging the competence of counsel's trial decisions. Neither may an attorney's level of representation be determined by whether a particular strategy is successful.'" *State v. Crowell*, 99-2238, p. 8 (La. App. 4 Cir. 11/21/00), 773 So. 2d 871, 878, *writ denied*, 2001-0045 (La. 11/16/01), 802 So. 2d 622 (quoting *State v. Brooks*, 505 So. 2d 714, 724 (La. 1987)). It follows then "trial strategy" type errors do not constitute ineffective assistance of counsel. *Crowell*, 99-2238, at p. 8, 773 So. 2d at 878 (citing *State v. Bienemy*, 483 So. 2d 1105 (La. App. 4 Cir. 1986)).

A defendant must establish both prongs to prove counsel was so ineffective as to require a reversal. *Kanost*, 99-1822, at p. 7, 759 So. 2d at 189. Yet, "[a] claim of ineffective assistance may be disposed of on the finding that either one of the two *Strickland* criteria has not been met." *State v. Francis*, 96-2389, pp. 8-9 (La. App. 4 Cir.

4/15/98), 715 So. 2d 457, 462, *writ denied*, 98-2360 (La. 2/5/99), 737 So. 2d 741 (citing *State v. James*, 555 So. 2d 519 (La. App. 4th Cir. 1989). "If the claim fails to establish either prong, the reviewing court need not address the other." *Francis*, 96-2389, at p. 9, 715 So. 2d at 462 (citing *Murray v. Maggio*, 736 F.2d 279 (5th Cir. 1984)). In this case, we find Mr. Tapp's failure to establish the first prong dispositive.

Our review of the record reveals that Mr. Tapp's argument that his trial counsel's performance was deficient is factually unsupported. Mr. Tapp's ineffective assistance of counsel claim is built entirely on his allegation that counsel was inadequately prepared. Counsel's inadequate preparation, according to Mr. Tapp, is established by counsel's lack of knowledge of the contents of the police report. And, counsel's failure to read the police report is allegedly established by counsel's surprise upon first learning during cross-examination of Officer Johnson that the report included a statement that Mr. Tapp told the officer that he used heroin immediately before the traffic stop. As to the latter, Mr. Tapp's argument is that defense counsel's "abrupt" shift at that point in his cross-examination to a different, albeit related, topic—the traffic stop—established that counsel was

"dumbfounded" and erroneously believed the police report did not mention any conversation at all between Officer Johnson and Mr. Tapp regarding drug use. The record, however, belies Mr. Tapp's claim.

During the prosecutor's direct examination of Officer Johnson, quoted earlier, defense counsel objected to the leading nature of the following question by the prosecutor: "[whether defendant] ever inform[ed Officer Johnson] whether or not [defendant] had used heroin recently." In objecting, defense counsel remarked: *"[y]ou told him what he said."* Clearly, defense counsel's remark reflects that he was well aware of the statement in the police report that Officer Johnson read aloud on cross-examination. Repeating, the statement in the report reads: "[s]ubject Tapp then advised Officer Johnson that he had consumed heroin prior to Officer Johnson stopping the subject." Defense counsel's follow-up question, which he posed to the officer immediately after the officer read from the report, reflects that counsel was attempting to establish a discrepancy between the officer's trial testimony and his report; particularly, defense counsel then asked "[n]ow today you said he told you he had a drug problem."

As the State points out, defense counsel's extensive questioning of Officer Johnson can be construed as a trial strategy of attempting to show

the jury a discrepancy between the police report, which does not mention a conversation in which defendant told the officer about his drug abuse problem, and the statement in the police report, which states only that Mr. Tapp told Officer Johnson that he had used heroin shortly before the traffic stop.

That defense counsel read the police report is further established by his questioning of Officer Johnson regarding another discrepancy. The second discrepancy was between a statement in the report regarding when he first noticed the syringe in Mr. Tapp's hands. Defense counsel quoted an excerpt from the report that he interpreted to mean that Officer Johnson observed the syringe in Mr. Tapp's hand as he exited the vehicle. Officer Johnson acknowledged that the report could be read that way, but clarified that what he meant to say was that Mr. Tapp exited the vehicle, then after Officer Johnson observed something in Mr. Tapp's hands, he observed Mr. Tapp drop the syringe to the ground. Officer Johnson testified that he had not changed his version of what occurred from that set forth in the police report.

Given the above evidence documenting not only defense counsel's working knowledge of the police report, but also counsel's use of such knowledge at trial, Mr. Tapp's claim that counsel failed to read the report

must fail. Defense counsel's questioning thus "appears to have been strategic rather than merely erroneous." *State v. Keelen*, 95-0668, p. 10 (La. App. 4 Cir. 2/29/96), 670 So. 2d 578, 583. "That defense counsel's strategy did not ultimately produce an acquittal does not by itself render his assistance defective under the Sixth Amendment." 95-0668, at p. 10, 670 So. 2d at 584. Mr. Tapp thus failed to establish the first prong of deficient performance.

Summarizing, the record in this case is sufficient to determine that Mr. Tapp's ineffective assistance of counsel claim is without merit. Our review of the record reveals that not only was defense counsel aware of the contents of the police report, he attempted to use the report to establish two discrepancies between what Officer Johnson wrote in his report and his testimony at trial. Contrary to Mr. Tapp's contention, this is not a case in which trial counsel's questioning of "the state's witnesses at trial . . . revealed lack of even a rudimentary knowledge of the circumstances involving the investigation of the crime and the arrests of relator." *State v. Laugand*, 99-1124, 99-1327 (La. 3/17/00), 759 So. 2d 34. Accordingly, we find Mr. Tapp's claim of ineffective assistance of counsel not supported by the record.

CONCLUSION

For the reasons assigned, Mr. Tapp's conviction and sentence are affirmed.

AFFIRMED.