

STATE OF LOUISIANA

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NO. 2002-K-1945

VERSUS

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COURT OF APPEAL

DARRIN HAYES

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FOURTH CIRCUIT

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STATE OF LOUISIANA

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ON APPLICATION FOR WRITS DIRECTED TO
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 366-876, SECTION "E"
HONORABLE CALVIN JOHNSON, JUDGE

JUDGE MICHAEL E. KIRBY

(Court composed of Judge James F. McKay III, Judge Dennis R. Bagneris,
Sr., Judge Michael E. Kirby)

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STATEMENT OF THE CASE

The defendant was charged by indictment with second degree murder. A jury found him guilty as charged on October 19, 1994. On November 8, 1994 he was sentenced to life imprisonment without benefit of parole, probation, or suspension of sentence. On January 15, 1997 this Court affirmed his conviction and sentence. State v. Hayes, 95-0147, unpub. (La. App. 4 Cir. 1/15/97), writ denied, 97-0564 (La. 10/31/97), 703 So.2d 16. The defendant submitted his application for post conviction relief to the trial court on October 27, 2000. On November 6, 2001 the trial court granted the petition in order to set a hearing for November 20, 2001 on the issue of the constitutionality of the grand jury selection process. The trial court denied the petition as to all other claims. The court appointed counsel to represent the defendant and granted a motion to provide funds for expert witnesses.

A hearing was eventually set for May 6, 2002. On that date the State filed a motion for dismissal of the defendant's application for post conviction relief. On May 17, 2002 defense counsel filed a motion for discovery and inspection requesting grand jury records from the State. On May 28, 2002 the State filed a response to the defendant's application. On

May 31, 2002 the State filed a motion to quash the subpoena duces tecum and deny defendant's petition for post conviction relief. The hearing was set and reset on June 4, 2002, June 14, 2002, and June 20, 2002. On July 17, 2002 the State filed a motion to quash the order granting an evidentiary hearing on the defendant's application for post conviction relief. A memorandum asking that the request for a hearing and the claim itself be denied accompanied the Motion to Quash. The trial court heard arguments from both sides and granted the State's motion. According to the July 17, 2002 minute entry, the return date for the defense writ was set on August 19, 2002. According to the motion and order for extension of return date (filed on August 16, 2002), the trial court extended the return date to September 23, 2002. Appointed defense counsel timely filed the defendant's writ application on September 23, 2002. The State filed a response on October 8, 2002.

STATEMENT OF THE FACTS

The writ involves an application for post conviction relief, and the facts are not relevant.

DISCUSSION AND RECOMMENDATION

Defense counsel argues that the trial court erred by hearing untimely State objections seeking to quash an already granted evidentiary hearing involving racial discrimination in the selection of grand jury forepersons. Counsel also contends that the trial court erred by denying the evidentiary hearing. Defense counsel claims that the trial court erred by failing to rule on his ineffective assistance of counsel claim, and the defendant is entitled to an evidentiary hearing. The State argues that a claim of racial discrimination in the selection of grand jury forepersons is procedurally barred because the defendant failed to file a pretrial motion to quash the indictment. The State cites Michel v. Louisiana, 350 U.S. 91, 76 S.Ct. 158 (1955), and argues that the defendant's ineffective assistance of counsel claim lacks merit.

The State has provided copies of documents not provided by the defense, including: the motion for dismissal of petitioner's post conviction application (the standard blanket motion including every argument from repetition to untimeliness) dated May 5, 2002; the defense motion for discovery and inspection (requesting information relating to the grand jury forepersons from 1987 to 2000); and the State's motion to quash the subpoena duces tecum and deny defendant's petition for post conviction relief dated May 31, 2002 and memorandum.

Defense counsel alleges that the trial court first granted the

defendant's application and then denied it. Counsel cites State v. Clayton, 96-1658 (La. 2/7/097), 687 So.2d 996, where the Louisiana Supreme Court reversed a trial court's decision to grant a defendant's application for post conviction relief after first denying the application. The Supreme Court noted that the defendant had not taken writs from the first ruling, and therefore the first ruling had to stand. Id. However, here it appears that on November 6, 2001 the trial court granted an evidentiary hearing on the issue of the constitutionality of the grand jury selection. Although the judgment technically provides that the defendant's "petition for post-conviction relief is GRANTED as to the issue of the constitutionality of the grand jury selection," clearly the trial court was ruling only that the issue had merit and warranted an evidentiary hearing. If the court had been granting the application as to that issue, there would have been no need for a hearing. The State points to the defendant's prayer "that this Honorable Court grant an evidentiary hearing, and order a new trial after hearing evidence in support of his claims." The defendant had the burden of proof, and he had not provided the expert testimony and evidence necessary to prevail prior to that hearing. The trial court did not reverse its decision on the issue. However, once the State filed the motion to quash the order granting an evidentiary hearing and argued that the defendant had not filed a pretrial

motion to quash and had raised the issue for the first time in an application for post conviction relief, the trial court was convinced that the defendant could not prevail on the issue, and a hearing was not necessary. The court granted the State's motion. Nothing presented at the hearing would or could change the trial court's ruling. At the July 17, 2002 hearing the trial court noted that "procedurally, regardless of what I do, you [the State] win." The court went on to say:

The bottom line is regardless of what I – regardless of what I do here, that is, if I – if I do something here that, in any ways [sic], disagrees with your position, you win. That's what you're telling me. And I think based on everything I've seen and heard, you're correct. You're absolutely correct. And so what I'm going to do is I'm going to grant your motion to quash.

(Footnote added)

According to La. C.Cr.P. art. 927A, if an application alleges a claim, which, if established, would entitle the petitioner to relief, the court shall order the custodian, through the district attorney in the parish in which the defendant was convicted, to file any procedural objections or an answer (if there are no procedural objections) within a specified period not to exceed thirty days. Defense counsel argues that the State's procedural objections were untimely; however, here the trial court did not comply with art. 927 and order the State to file any procedural objections or an answer. The State

did not argue the procedural bar until months after the trial court had granted the defendant an evidentiary hearing. However, trial courts do not routinely order the State to file procedural objections to applications for post conviction relief; therefore, the thirty-day limitation set out in La. C.Cr.P. art. 927A is not generally considered. In this case there was no court order that the State file procedural objections or an answer. The State notes that it was never ordered to file procedural objections; however, it did so in May 2002.

Defense counsel correctly alleges that the State's motion for dismissal of petitioner's post conviction application filed in the beginning of May 2002 did not mention the failure to file a pretrial motion to quash; however, that was a standard motion covering every problem from untimeliness to vagueness. Defense counsel correctly claims that the first time the State noted the lack of the pretrial motion to quash was its response filed at the end of May 2002. Nonetheless, the State filed its procedural objections prior to the evidentiary hearing.

The State was correct when it argued that defense counsel could not prevail on the issue of discrimination in grand jury selection because no pretrial motion to quash had been filed in this case. In State v. Woodberry, 2002-0994, pp. 4-5 (La. App. 4 Cir. 6/5/02), 820 So.2d 638, 642, this Court

held that a challenge to the grand jury indictment, including one based on racial discrimination in the selection of the foreperson, must be raised pretrial in a motion to quash or it is waived. See also La. C.Cr.P. arts. 521 and 535; Deloch v. Whitley, 96-1901 (La. 11/22/96), 684 So.2d 349; State ex rel. Roper v. Cain, 99,2173 (La. App. 1 Cir. 10/26/99), 763 So.2d 1, writ denied, 2000-0975 (La. 11/17/00), 773 So.2d 733. It appears that the trial court did not err by granting the State's motion to quash the order granting an evidentiary hearing.

Defense counsel also argues that trial counsel was ineffective because counsel failed to file a pretrial motion to quash the grand jury indictment. Counsel claims that the trial court erred by failing to consider that claim, and the defendant is entitled to an evidentiary hearing. However, on November 6, 2001 when the trial court granted the evidentiary hearing on the grand jury issue and denied the petition "as to all other claims for relief made," it appears that the court technically denied relator's ineffective assistance of counsel claims. The defense did not seek supervisory review of the trial court's decision. Although defense counsel now argues that the trial court did not rule on the ineffective assistance of counsel claim, arguably the court denied those claims with the other ones raised in the post conviction application.

The trial court did not err by denying claim four of the defendant's application. The Louisiana Supreme Court recently discussed the defendant's burden in raising an ineffective assistance of counsel claim:

To prevail on a claim of ineffective assistance, a defendant must demonstrate (1) that his attorney's performance fell below an objective standard of reasonableness under prevailing professional norms; and (2) that counsel's errors or omissions resulted in prejudice so great as to undermine confidence in the outcome. The Sixth Amendment does not guarantee "errorless counsel [or] counsel judged ineffective by hindsight," but counsel reasonably likely to render effective assistance. Judicial scrutiny must be "highly deferential" and claims of ineffective assistance are to be assessed on the facts of the particular case as seen from "counsel's perspective at the time," hence, courts must indulge "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."

(Footnotes omitted) State v. Lacaze, 1999-0584, p. 20 (La. 1/25/02), 824 So.2d 1063, 1078-79.

In the writ application defense counsel argues that the indictment would have been quashed in 1994 if counsel had filed the motion to quash the defective indictment and there is a reasonable probability that but for counsel's failure to file the pretrial motion, the result of the proceedings would have been different. Although it does not appear that counsel has carried the defendant's burden of proving such a claim, the defendant did not

so argue in his application for post conviction relief, which was before the trial court. The defendant alleged that counsel was ineffective because counsel did not file a pretrial motion to quash relating to the issues of racial discrimination in the selection of the grand jury foreperson and the defectiveness of the indictment. The defendant had listed four claims in his application: 1) constitutional violations in the racial discriminatory selection of Orleans Parish grand jury forepersons; 2) defective indictment, which fails to cite each essential element of the offense charged; 3) the introduction of letters allegedly sent by the defendant to Iberia Parish officials constituting a constitutional violation; and 4) ineffective assistance of counsel for failure to file a pretrial motion to quash the fatally defective indictment and failure to challenge the introduction of the letters. Under claim four the defendant stated that he felt the need to argue ineffective assistance of counsel because counsel did not file a pretrial motion to quash concerning the unconstitutional selection of grand jury forepersons (counsel did not investigate the issue before trial) and the defective indictment (counsel did not challenge the indictment which did not include the essential elements and/or facts of the offense). The defendant argued that counsel's failure to investigate the issues raised in his first and second claims should not be excused. The defendant did not show how he was prejudiced by

counsel's actions. He then declared: "The petitioner has shown prejudice with his claims though the errors are structural defect [sic], error where a harmless error analysis is inapplicable." The defendant did not allege or prove any prejudice, which is required by the second prong of the test set out in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).

The State also cites Michel v. Louisiana, 350 U.S. at 91, 76 S.Ct. at 158, 1955 U.S. Supreme Court case that involved cases where three defendants, all African-Americans sentenced to death for aggravated rape, challenged only the composition of the grand juries, which indicted them on the ground that there was a systematic exclusion of Negroes from the panels. The U.S. Supreme Court upheld the Louisiana statute requiring that objections to a grand jury be raised before the expiration of the third judicial day following the end of the grand jury's term or before trial, whichever is earlier (La. R.S. 15:202-now repealed). The Court was also faced with an ineffective assistance of counsel claim. The Supreme Court noted that counsel had a reasonable time under the statute to file his motion to quash, but did not do so. The Court accepted the lower courts' findings that counsel was effective and noted that there was little support for the opposite conclusion in the record. Counsel was a well-known criminal lawyer with nearly fifty years of experience at the bar, and there was no evidence of

incompetence. The Supreme Court held that the mere fact that a timely motion to quash was not filed did not overcome the presumption of effectiveness, and the lack of effective counsel would not be inferred from that circumstance alone. The Court noted that “such an inference would vitiate state rules of procedure designed to require preliminary objections to be disposed of before trial.” *Id.* at p. 100, 76 S.Ct. at 164. The 1955 case predates Strickland, and the Louisiana statute involved has been repealed. Relator’s allegations relating to counsel’s ineffectiveness as to the grand jury selection issue do not go beyond the failure to file the pretrial motion to quash.

The trial court was justified in summarily denying those ineffective assistance of counsel claims on November 6, 2001 and the claim relating to the grand jury selection on July 17, 2002.

WRIT GRANTED; RELIEF DENIED.