NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

VERSUS

CLIFTON B. AYCHE

COURT OF APPEAL, FIFTH CIRCUIT

FILED MAY 29 2002

NO. 01-KA-1260

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 97-2299, DIVISION "S"
HONORABLE M. JOSEPH TIEMANN, JUDGE

MAY 29 2002

THOMAS F. DALEY
JUDGE

Panel composed of Judges James L. Cannella,
Thomas F. Daley, and Walter J. Rothschild

PAUL D. CONNICK, JR.,
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AFFIRMED; REMANDED WITH INSTRUCTIONS

This is defendant's second appeal in this case. A jury found Clifton Ayche guilty of possession of cocaine on August 26, 1997. On September 8, 1997, the trial court sentenced him to five years at hard labor. The State subsequently filed an habitual offender Bill of Information. On October 8, 1997, the trial court found defendant to be a fourth felony offender. On the same day, the court sentenced defendant to a mandatory term of life imprisonment without benefit of parole, probation, or suspension of sentence. Defendant appealed his conviction and sentence to this Court. He raised seven Assignments of Error, including a claim that his trial counsel was ineffective in failing to pursue a ruling from the trial court on his Motion to Suppress Evidence.

On review, this Court affirmed defendant's conviction, vacated the habitual offender finding, and remanded the case to the trial court because the State had violated the provisions of LSA-R.S. 15:529.1 by alleging a juvenile conviction as one

of defendant's prior offenses. This Court also noted as patent error that the trial court had failed to vacate the original sentence before imposing the habitual offender sentence. See, State v. Ayche, 98-191 (La. App. 5 Cir. 7/28/98), 717 So.2d 1218. The State's application for rehearing was denied.

The defendant applied for writs to the Louisiana Supreme Court from this Court's ruling of July 28, 1998. In a Per Curiam, the Supreme Court held:

> Writ granted in part; otherwise denied; case remanded to the district court. Given that the only evidence introduced by relator at trial addressed the legality of his investigatory stop, the district court is ordered to appoint counsel for relator for purposes of conducting an evidentiary hearing at which it will determine whether trial counsel's failure to pursue relator's motion to suppress constituted ineffective assistance of counsel under the standard set out in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Relator may again appeal from any adverse ruling on his claim in the district court. In all other respects, the application is denied.

State v. Ayche, 98-2345 (La. 1/15/99), 723 So.2d 952. (Emphasis added).

Meanwhile, pursuant to this Court's ruling of July 28, 1998 and the Supreme Court Per Curiam, the State conducted a new habitual offender proceedings, resulting in the defendant being found as a second felony offender on March 22, 1999. On that day the court vacated defendant's prior sentence and imposed an enhanced sentence of six years at hard labor, without benefit of probation, or suspension of sentence.[1]

Pursuant to the Supreme Court's ruling, the District Court held an evidentiary hearing on December 15, 2000. The court found that defendant's trial counsel was not ineffective under the Strickland standard. Defendant made a timely oral Motion for Appeal. He filed a written Motion for Appeal on December 20, 2000. The motion was granted on December 22, 2000.

[1]Though defendant appealed his finding as a second felony offender, his appellate counsel filed a supplemental brief on February 11, 2002, stating that he examined the supplemental exhibits, and found no appealable errors in the habitual offender proceeding. Defendant does not, therefore, challenge the trial court's habitual offender finding or his enhanced sentence.

FACTS

The following underlying facts are found in this Court's opinion in defendant's original appeal, State v. Ayche, 98-191, pp. 2-4, 717 So.2d at pp. 1219-1220:

> On the night of March 12, 1997, agents Mike Crossen and Billy Matranga of the Jefferson Parish Sheriff's Office Narcotics Division, were on patrol in an unmarked police car. The officers wore "raid" jackets which bore police badges. Their assignment was to target high crime areas on the Westbank. At about 8:45 p.m., the officers turned off the Westbank Expressway onto Garden Road in Marrero, and pulled into the parking lot of Kim's Grocery. The store was known to the officers as a regular site for drug transactions.
>
> Crossen and Matranga saw defendant leaning on a soft drink machine in front of Kim's. As they exited their car, defendant pulled a white cigarette, which Crossen thought might be a marijuana cigarette, from behind his ear and place it in a front pocket of his pants. As the officers began walking toward defendant, he turned and ran into the store. The officers followed, and Crossen restrained defendant by grabbing his hands. Crossen took defendant outside and placed his hands on the police car. He then conducted a pat-down search of defendant, and he also retrieved the cigarette from defendant's pocket. He broke the cigarette open and found what appeared to be tobacco, mixed with small pieces of an off-white substance. Crossen performed a field test on the white substance, and the result was positive for cocaine.
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> Darren Poche, an expert in the analysis of controlled dangerous substances, testified at trial that he had tested the white substance for cocaine, and received positive results. Poche found the brown vegetable substance inside the cigarette to be tobacco.
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> Defense witness Darius Trufant testified that he was at Kim's Grocery on the evening of March 12 to give his father, Leroy, a ride home. He went inside the store with the defendant and they played video games. Fifteen to twenty minutes later, police officers entered the store and ordered the two men to go outside. Darius testified that the officers searched them and then he was allowed to go, while defendant was placed under arrest.
>
> Darius Trufant's father, Leroy, testified that he and his friend, Gerald Comeaux, were waiting in Darius' car in the parking lot of Kim's Grocery while defendant and Darius were inside playing video games. One or two unmarked police cars arrived at the store, and officers went inside and retrieved defendant and Darius. The officers allowed Darius to go, but arrested defendant.

ASSIGNMENT OF ERROR NUMBER ONE

The issue here is whether the trial court erred in ruling that defendant's trial counsel was not ineffective in failing to pursue a ruling on defendant's Motion to Suppress Evidence prior to trial. Appellate counsel argues that the Motion to Suppress, if heard pre-trial, may have been dispositive of the charge against the accused or at the very least developed the testimony of one or more of the State's witnesses, and thus, the defendant would have had access to a transcript for later use in cross examination at trial. Appellate counsel admits in brief, "the value of the pre-trial transcript is admittedly speculative."

A defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution and Article I §13 of the Louisiana Constitution of 1974. The defendant must show that (1) his attorney's performance was deficient, and (2) the deficiency prejudiced him.[2] To show "prejudice" as required in order to establish ineffective assistance of counsel, the defendant must demonstrate that, but for counsel's unprofessional conduct, the outcome of the trial would have been different.[3] Effective assistance of counsel does not mean errorless counsel, or counsel who may be judged ineffective on mere hindsight.[4]

In State v. Pendelton,[5] this Court held that "[f]or purposes of an ineffective assistance of counsel claim, the filing of pretrial motions is squarely within the ambit

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[2]Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Campbell, 97-369 (La. App. 5 Cir. 11/25/97), 703 So.2d 1358.

[3]Strickland v. Washington, supra; State v. Soler, 93-1042 (La. App. 5 Cir. 4/26/94), 636 So.2d 1069, writs denied, 94-0475 (La. 4/4/94), 637 So.2d 450, 94-1361 (La. 11/4/94), 644 So.2d 1055.

[4]State v. Graffagnino v. King, 436 So.2d 559, 564 (La. 1983).

[5]96-367, p. 23 (La. App. 5 Cir. 5/28/97), 696 So.2d 144, 156, writ denied, 97-1714 (La. 12/19/97), 706 So.2d 450

of the attorney's trial strategy, and counsel is not required to engage in futility."[6] The courts have further held that an attorney's level of representation may not be determined by whether a particular trial strategy has been successful.[7]

At the evidentiary hearing on December 15, 2000, the defendant called defendant's original trial counsel as a witness. Defendant also testified. The defendant and the State entered transcripts of the trial testimony of Darius and Leroy Trufant, and Agents McCrossen and Matranga as joint exhibits.

Defendant's trial counsel testified that he has practiced law in Jefferson and Orleans Parishes for 25-30 years. He further stated that he has handled hundreds of Motions to Suppress. The trial court accepted defendant's trial counsel as an expert witness in the defense of drug charges and motions to suppress.

Defendant's trial counsel said that when he files a motion to suppress on behalf of a client, he generally moves the court to hear it prior to trial. He did not recall why he did not pursue defendant's Motion to Suppress prior to trial. He recalled that the motion was referred to the merits of the case. He noted that the trial judge and the Assistant District Attorney assigned to that division commonly encouraged that procedure. Defendant's trial counsel stated that he did not ask for a ruling from the judge on the Motion to Suppress during the course of the trial. He testified that, in retrospect, it would have been prudent for him to request that the trial court hear the Motion to Suppress prior to trial. Nonetheless, he felt such action would have been fruitless, as the court would have simply denied the motion.

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[6]See also State v. LeBeau, 621 So.2d 26 (La. App. 2 Cir. 1993), writ denied, 629 So.2d 359 (La. 1993); State v. Gales, 622 So.2d 808 (La. App. 4 Cir. 1993).

[7]State v. Brooks, 505 So.2d 714, 724 (La. 1987), cert. denied, 484 U.S. 947, 108 S. Ct. 337, 98 L. Ed. 2d 363 (1988); State v. Parker, 96-1852 (La. App. 4 Cir. 6/18/97), 696 So.2d 599, writ denied, 97-1953 (La. 1/9/98), 705 So.2d 1097.

Defendant's trial counsel testified that he spent a great deal of time preparing defendant's case. He interviewed witnesses, and went to the scene of the arrest several times. His strategy at trial was to challenge the credibility of the arresting officers. He carried out this strategy by calling Darius and Leroy Trufant as witnesses. Defendant's trial counsel felt the jury simply placed more credence in the testimony of the police officers than in the testimony of the defense witnesses. At the conclusion of the evidentiary hearing on the ineffective assistance, the trial judge ruled, in part:

> I do not believe that based on the evidence we have here, which includes also the trial testimony which is submitted, that the–the failure to have the motion to suppress prior to the trial was such an extent that it, under the standard of Strickland, was ineffective assistance of counsel.

We find that defendant's trial counsel's representation of Mr. Ayche was deficient because he did not pursue the Motion to Suppress. However, counsel's trial performance was not ineffective because the defendant has not demonstrated that the outcome of the trial, had the Motion to Suppress been argued before trial, would have been different. See State v. Addison, 00-1730 (La. App. 5 Cir. 5/16/01), 788 So.2d 608 (failure of defense counsel to object to hearsay evidence was error, but did not affect the outcome and so did not prejudice the defendant); State v. Johnson, 98-604 (La. App. 5 Cir. 1/26/99), 728 So.2d 901, writ denied 99-0624 (La. 6/25/99), 745 So.2d 1187 ("While trial counsel's performance may have been deficient in certain aspects as noted above, the defendant was not prejudiced by that deficiency. The defendant has not met his burden of proof to support a claim of ineffective assistance of counsel.")

As the Supreme Court said in its Per Curiam, the primary focus of the defense was to call into question the validity of the investigatory stop. We have reviewed all

of the testimony germane to the suppression issue, the defendant's testimony at the evidentiary hearing, and the testimony of the fact witnesses called at trial. After review of all the facts we cannot say that it is probable that the trial court or an appellate court would have suppressed the evidence. [8]

Defendant was arrested and evidence was seized from him at Kim's Grocery Store. Agent Crossen testified that the area where Kim's Grocery is located was known to him as a high crime area where drug trafficking was common. Crossen knew of numerous undercover drug purchases that had taken place in front of Kim's. Moreover, the sheriff's office had received numerous telephone complaints about drug activity in the area.[9] The reputation of a neighborhood as a high crime area is an articulable fact upon which an officer may legitimately rely in making a determination as to reasonable cause.[10]

Crossen further testified that when he and Agent Matranga began to approach defendant, he was standing in front of the store leaning against a coke machine. The defendant looked directly at them with an expression of surprise, immediately put a cigarette that was behind his ear into in his pocket, and ran inside the store. Crossen testified that when he saw the cigarette behind defendant's ear, he thought it looked hand-rolled, and suspected it contained marijuana. Officer Matranga testified on direct that the cigarette looked hand-rolled; however, on cross, he described it as a "normal" cigarette. In court, he identified the cigarette as the one he seized from the

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[8]It is noted that in its earlier opinion in this case, this Court found there was no merit to defendant's Motion to Suppress. See, State v. Ayche, 98-191 at p. 9, 717 So.2d at 1222. However, that opinion pre-dates the Supreme Court's Per Curiam opinion directing the trial court to conduct an evidentiary hearing on this issue. Therefore, we must address the issue anew in the context of ineffective assistance of counsel.

[9]Record Number 99-KA-191, pp. 93, 112, 117.

[10]State v. Bradley, 00-1090, p. 5 (La. App. 5 Cir. 6/27/01), 791 So.2d 156, 158; State v. Charles, 666 So.2d at 1150.

defendant and described it as hand-rolled containing tobacco products and off-white fragments of a substance that was cocaine.

The officers testified that they took the cigarette from defendant's pocket based upon their belief that it was a marijuana cigarette because it appeared to be hand rolled, which defendant removed from his ear and placed in his pocket in an attempt to conceal contraband while he ran into the store.

The contraband nature of a hand-rolled cigarette has been found to be immediately apparent. See State v. Harris, 454 So.2d 1223 (La. App. 2 Cir. 1984) (defendant smoking a hand-rolled cigarette at a rock concert). In other cases, a tin-foil cigarette was immediately apparent as contraband. See State v. Jones, 93-1685 (La. App. 4 Cir. 7/27/94), 641 So.2d 688; State v. Clark, 612 So.2d 232 (La. App. 4 Cir. 1992). In other cases, police observed hand-rolled cigarettes involved in what appeared to be hand-to-hand drug transactions, which supported the seizure of the cigarettes as contraband. See, for example, State v. August, 503 So.2d 547 (La. App. 4 Cir. 1987); State v. Mouton, 503 So.2d 651 (La. App. 4 Cir. 1987). In still other cases, the detection of the odor of burning marijuana, coupled with the cigarette in plain view, supported the officer's seizure of the cigarettes. See State v. Freeman, 97-1115 (La. App. 5 Cir. 12/29/98), 727 So.2d 630.

In this case, the officers testified to objective facts supporting their belief that the defendant attempted to conceal illegal contraband by moving it to his pocket. Defendant was present in a high crime area, a location noted for previous undercover drug transactions and which was the subject of numerous citizen complaints, and he fled into the store when he saw police officers. A defendant's flight, in combination with his presence in a high crime area and his action in hiding the cigarette, supports the officers' actions. The officers viewed the cigarette, and suspected it as

contraband, before the defendant placed it into his pocket. These facts establish probable cause for the actions of the police officers.

The defense's version of the facts are very different. Defendant testified at the evidentiary hearing that he was inside Kim's Grocery playing video games when the officers arrived, and that the officers entered the store and accosted Darius Trufant and him. Defendant stated he was never in front of the store, as the officers testified. He testified that the officers conducted a pat-down search of his outer clothing, and that they ran his name on the police computers. The officers found that he was on parole, and they attempted to question him. When he refused to answer their questions, the agents arrested him. Defendant stated that the officers were lying when they testified that they retrieved a cigarette containing cocaine from his pocket. Defense witness Darius Trufant supported defendant's version of the events.

The trial court, after the evidentiary hearing, did not conclude that the Motion to Suppress had merit. Given all of the evidence, the arresting officers' version of the factual events seems more credible than the defense witnesses' version. Defendant has not shown that there is a reasonable probability that but for counsel's failure to pursue the Motion to Suppress the outcome of the criminal prosecution would have been different. Therefore, we determine that trial counsel's deficiency in not requiring a hearing on the Motion to Suppress did not reach the level of ineffective assistance of counsel as per Strickland and a new trial is not warranted.

ASSIGNMENT OF ERROR NUMBER TWO (ERRORS PATENT)

The record on remand was reviewed for errors patent. LSA-C.Cr.P. art. 920.

The transcript of defendant's habitual offender sentencing shows that the trial judge properly ordered the sentence be served without benefit of probation or

suspension of sentence, pursuant to LSA-R.S. 15:529.1G. However, the commitment does not include the limitation of benefits. Generally, where the transcript and the minute entry conflict, the transcript prevails. State v. Lynch, 441 So.2d 732 (La. 1983). We instruct the trial court to amend the commitment to conform to the transcript.

In its original opinion in this case, this Court ordered the trial court to inform defendant of the prescriptive period for post-conviction relief applications as provided in LSA-C.Cr.P. art. 930.8. On remand, the trial court informed defendant he had three years within which to apply for post-conviction relief. The amended article reduces that period to two years. We hereby order the trial court to give defendant written notice of the new prescriptive period. See, State v. Hensley, 00-1448, p. 11 (La. App. 5 Cir. 2/28/01), 781 So.2d 834, 843.

Accordingly, we find no error in the trial court's ruling on the matter of effective assistance of counsel. The case is remanded to the trial court with the above instructions.

AFFIRMED; REMANDED WITH INSTRUCTIONS

EDWARD A. DUFRESNE, JR.
CHIEF JUDGE

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FIFTH CIRCUIT
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