JOSHUA PRESTON	NO. 18-KH-120
VERSUS	FIFTH CIRCUIT
DARREL VANNOY, WARDEN, LOUISIANA	COURT OF APPEAL
STATE PENITENTIARY	STATE OF LOUISIANA

June 25, 2018

Susan Buchholz
First Deputy Clerk

IN RE JOSHUA PRESTON

APPLYING FOR SUPERVISORY WRIT FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT, PARISH OF JEFFERSON, STATE OF LOUISIANA, DIRECTED TO THE HONORABLE GLENN B. ANSARDI, DIVISION "H", NUMBER 12-1119

Panel composed of Judges Fredericka Homberg Wicker,
Marc E. Johnson, and Stephen J. Windhorst

WRIT GRANTED IN PART FOR LIMITED PURPOSE; WRIT DENIED IN PART

In this criminal *pro se* writ application, relator seeks review of the trial court's denial of his application for post-conviction relief ("APCR"). Because we find that the trial court failed to rule on one of relator's claims raised in his APCR, we grant the writ in part for the limited purpose to remand to the trial court and instruct the trial court to rule on relator's remaining claim (#8). For the following reasons, we find that the trial court did not otherwise err in its denial of relator's APCR and we deny the writ.

On June 26, 2014, relator, Joshua Preston, was convicted by jury of the second-degree murder of Alfonso Silva in violation of La. R.S. 14:30.1, the armed robbery of Tiffany French in violation of La. R.S. 14:64, and of being a felon in possession of a firearm in violation of La. R.S. 14:95.1. On July 10, 2014, the trial court sentenced relator to life imprisonment at hard labor without benefit of probation, parole, or suspension of sentence for his second-degree murder conviction, forty years imprisonment without benefit of probation, parole, or suspension of sentence for his armed robbery conviction, and twenty years at hard labor without benefit of probation, parole, or suspension of sentence, for his felon in possession of a firearm conviction. Relator appealed his convictions and sentences and this Court affirmed relator's convictions and sentences on appeal. *See State v. Preston*, 15-306 (La. App. 5 Cir. 10/28/15), 178 So.3d 207. The Louisiana Supreme Court subsequently denied relator's writ. *See State v. Preston*, 15-2169 (La. 11/18/16), 210 So.3d 283.

Within two years of the Louisiana Supreme Court's denial of relator's writ application, relator filed an APCR in the trial court, asserting nine claims. Relator raised seven claims of ineffective assistance of counsel on various grounds, including failure to pursue an alibi defense, failure to investigate and present material evidence and witnesses at trial, failure to object to an erroneous jury instruction, and failure to argue insufficiency of the evidence to support his second degree murder conviction in a motion for new trial. In his APCR, relator further asserted prosecutorial misconduct, contending the state allowed its witness to give perjured testimony at trial, as well as the trial court's failure to sever the charges. After the trial court ordered the state to respond to the APCR, the trial court summarily denied relator's APCR on October 5, 2017. This writ application follows.

In his APCR and in this writ application, relator asserted that he was not provided his constitutional right to effective assistance of counsel at trial. A criminal 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. *State v. Johnson*, 08-1156 (La. App. 5 Cir. 4/28/09), 9 So.3d 1084, 1092, *writ denied*, 09-1394 (La. 2/26/10), 28 So.3d 268. To prove ineffective assistance of counsel, a defendant must prove both that his attorney's performance was deficient and that he was prejudiced by the deficiency. *Id*., 9 So.3d at 1092-93 (*citing Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)). In order to show prejudice, a defendant must demonstrate that but for counsel's deficient performance, the outcome of the proceedings would have been different. *Id*.

The Sixth Amendment does not guarantee a defendant errorless counsel or counsel judged ineffective by hindsight. *State v. Cambre*, 05–888 (La. App. 5 Cir. 7/25/06), 939 So.2d 446, 460, *writ denied*, 06–2121 (La. 4/20/07), 954 So.2d 158, citing *State v. LaCaze*, 99–584 (La.1/25/02), 824 So.2d 1063, 1078, *cert. denied*, 537 U.S. 865, 123 S.Ct. 263, 154 L.Ed.2d 110 (2002). There is a strong presumption that counsel's conduct will fall within the wide range of reasonable professional assistance. *State v. Gorman*, 11-491 (La. App. 5 Cir. 2/14/12), 88 So.3d. 590, 600.

In his APCR, relator raised seven claims of ineffective assistance of trial counsel, which we will address in turn:

Claim #1: Counsel failed to pursue an alibi defense

In this claim, relator asserted that his sister and cousin would have testified that he was in Houston at the time of the murder of Alfonso Silva in 2011. Upon review of this claim, we find, as the trial court found, that relator has failed to support his conclusory assertions. Relator did not attach any affidavit from his two relatives asserting that either would have presented testimony to support an alibi defense. Accordingly, we find that the trial court did not err in holding that relator failed to meet his burden to prove ineffective assistance of counsel under the *Strickland* test.

Claim #2: Counsel failed to object to an erroneous jury instruction

In this claim, relator contended that his trial counsel was ineffective for failing to object to the omission of a jury instruction on "expert witnesses" concerning the testimony of forensic pathologist, Dr. Dana Troxclair. Upon review of this claim, the trial court found that "Dr. Troxclair testified to the manner and cause of death, matters which the state had to establish but are not in dispute. It is significant that both parties stipulated to her expertise. As the state points out, her testimony did not relate to the identification of the killer. Furthermore, the general jury charges in the duties of the juror as finders of fact and their right to disregard the testimony of any witness were sufficient." Upon our review of this claim, we find the trial court was correct in its determination that plaintiff could not meet his burden to prove ineffective assistance of counsel because he could not show that the result of the trial would have been any different had the trial court given any additional jury instruction concerning Dr. Troxclair's testimony.

Claim #3: Counsel failed to argue insufficiency of the evidence in

In this claim, relator alleged that his counsel was ineffective for failure to challenge the sufficiency of the evidence presented against relator at trial for his second degree murder conviction.[1] We find, as did the trial court, that relator did not meet his burden to prove ineffective assistance of counsel on this claim.

The question of the sufficiency of the evidence presented to prove the essential elements of the crime charged is considered part of this Court's errors patent review. *State v. Camp,* 446 So.2d 1207 (La.1984); *State v. McIntyre*, 496 So.2d 1204, 1206-07 (La. App. 5 Cir. 1986); *see also State v. Mosley*, 08-1319 (La. App. 5 Cir. 5/26/09), 16 So.3d 398, 403; *State v. Boiteux*, 11-191 (La. App. 5 Cir. 12/13/11), 81 So.3d 123, 127. Both the Louisiana Supreme Court and this Court have conducted patent error reviews for sufficiency of evidence, even where the defendant fails to raise the issue on appeal. *State v. Turner*, 05-60 (La. App. 5 Cir. 5/31/05), 904 So.2d 825, 829; *State v. Raymo*, 419 So.2d 858 (La. 1982). This Court affirmed relator's convictions for both armed robbery and second degree murder on direct appeal and, in doing so, reviewed the sufficiency of the evidence presented against defendant at trial. *See Preston, supra*. This claim has no merit.

Claim #4: Counsel failed to present crucial evidence to the jury

In this claim, relator contended that his trial counsel was ineffective for failing to call Mr. Walter Kinzey as a defense witness at trial. Relator alleged that Mr. Kinzey, the ex-boyfriend of relator's previous girlfriend's mother, Danielle Lathers—who testified against defendant at trial—would have testified at trial that Ms. Lathers told him that she planned to lie and implicate relator in the murder because of relator's relationship with her daughter. Relator did not attach any affidavit from Mr. Kinzey to support the allegations that he would have testified favorably to relator at trial. Upon review of this claim, we find that the trial court did not err in determining that relator's conclusory allegations failed to meet his burden of proof under the *Strickland* test. This claim is without merit.

Claim #6:[2] Failure to present crucial evidence to the jury

[1] As the trial judge references in his judgment denying relator's APCR, defense counsel did file a motion for new trial raising three separate arguments that "were sound strategic decisions of experienced criminal counsel."

[2] In order to address all of relator's ineffective assistance of counsel claims together, we address Claims #6, 7, and 8 prior to Claim #5.

In this claim, relator alleged that his trial counsel was ineffective for failure to interview or present the testimony of the murder victim's roommate, Mr. Flavio Azevedo, at trial. Relator alleged that Mr. Azevedo would have testified that the victim called him for help on his cell phone after he had been shot and that Mr. Azevedo arrived to the scene of the murder and observed a dark colored vehicle that suspiciously made a left and then a right turn off of Roosevelt Blvd., where the murder occurred. Upon review of this claim, the trial court found that relator failed to attach any affidavit or evidence to prove that Mr. Azevedo would have testified favorably for the defense and denied relator's claim.

There is a strong presumption that counsel's conduct will fall within the wide range of reasonable professional assistance. *State v. Gorman*, 11-491 (La. App. 5 Cir. 2/14/12), 88 So. 3d 590, 600. Upon review, we find that relator has failed to meet his burden under the *Strickland* test. While the police report provides only a vague description of a dark colored vehicle, which Mr. Azevedo reported was still near the scene of the murder after the victim had been shot and after Mr. Azevedo arrived to the scene, the police report also indicates that multiple witnesses observed a suspect *on foot* following the victim for several feet prior to the shooting. Further, other witnesses observed a suspect *on foot* approach the victim and, after shooting the victim, flee *on foot* down Roosevelt Blvd. There is no indication from the witnesses present at the time of the shooting that a vehicle was involved or present at the time of the murder. Further, the state presented a witness' physical line-up identification of relator as the suspect that the witness saw nervously running from the scene of the murder moments after she heard the gunshot. We find that counsel's conduct falls within the wide range of reasonable professional assistance and thus does not constitute ineffective assistance of counsel. *State v. Gorman*, 11-491 (La. App. 5 Cir. 2/14/12), 88 So.3d 590, 600; *State v. Mitchell*, 44,008 (La. App. 2 Cir. 2/25/09), 4 So.3d 320, 326-327.

Claim #7: Counsel failed to present evidence of surveillance video footage

In this claim, relator alleged that his counsel was ineffective for failing to investigate and present to the jury the video surveillance footage from the armed robbery. Upon review of this claim, the trial court found, "[t]his claim…is deeply flawed. The record itself contains a description of the video in question….and that no identification can be made [from the video]. The state also points out that the evidence from witness' testimony overwhelmingly establishes the petitioner's guilt in the armed robbery… ." In this Court's opinion on direct appeal, we discussed the fact that a witness identified relator as the individual running from the scene of the murder. The witness, Ms. Sherry Conant, identified relator in a physical lineup after she informed detectives that she was "not very good with photographs" and wanted to be "absolutely positive" before implicating any individual in the murder. *Preston*, 178 So.3d at 211, 215. During the physical lineup, Ms. Conant asked that defendant step forward. She then identified relator as the suspect, "because of his height, his facial appearance, and because he exhibited the 'same nervous tick' of 'sucking his bottom lip' as that of the suspect that passed her house on [the date of the murder]." *Preston*, 178 So.3d at 215-16.

Upon review of this claim, we agree with the trial court's determination that relator cannot meet his burden to prove that presentation of the actual surveillance video footage, from which an identification cannot be made, would have affected the outcome of the trial in this matter given the positive identification of relator as

the suspect during a physical lineup. Therefore, relator cannot meet his burden under the *Strickland* test and this claim is without merit.

Claim #8: Failure to investigate evidence relative to a material witness

In this claim, relator contended that his trial counsel was ineffective for failure to investigate and locate a witness, Mr. Brandon Watson, who allegedly submitted a letter to the trial court indicating that he provided investigating authorities false information in implicating relator in the armed robbery.

Upon our review of this writ application, we find that the trial court failed to consider and rule on this claim. Accordingly, we grant this writ for the limited purpose of remanding this matter to the trial court for the court to consider and rule upon relator's Claim #8 in his APCR.[3]

Claim #5: The prosecution allowed perjured testimony

In this claim, relator asserted prosecutorial misconduct, contending that the state allowed a state witness, Ms. Danielle Lathers, to give perjured testimony during trial and that the prosecutor knew of its falsity and failed to correct the testimony. Specifically, relator claimed that Ms. Lathers, relator's then-girlfriend's mother—who implicated relator in the murder—testified that she received nothing in exchange for her testimony but also testified that "it's not about the money," when questioned why she decided to come forward and report relator. Additionally, relator complained that Ms. Lather's gave false testimony when she testified that she was not in the room with her minor son when investigating officers interviewed him about relator's involvement in the murder, in light of the fact that the transcript of the son's statement reflects that Ms. Lather's was present in the room during questioning.[4]

The record reflects that Ms. Lathers testified that she observed a Crimestoppers sketch at a store and immediately knew that her daughter's new boyfriend, relator, was the suspect in the sketch.[5] She further testified that relator subsequently admitted to her that he shot the murder victim. The trial judge found that relator took Ms. Lather's testimony concerning money out of context[6] and that relator failed to show that Ms. Lather's testimony was conclusively false.

Concerning claims of prosecutorial misconduct arising out of alleged perjured testimony, this Court has stated:

> If a prosecutor allows a State witness to give false testimony without correction, a reviewing court must reverse the conviction gained as a result of that perjured testimony, even if the testimony goes only to the credibility of the witness. See *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959); *State v.Broadway*, 96-2659, p. 17 (La. 10/19/99), 753 So.2d 801, 814, cert. denied, 529 U.S. 1056, 120 S. Ct. 1562, 146 L. Ed. 2d 466 (2000); *State v. Williams*, 338 So.2d

[3] The trial court judgment mistakenly identifies Claim #9 as Claim #8.
[4] Based upon the documentation submitted in connection with the APCR, it is unclear whether Ms. Lather's son provided more than one statement.
[5] Relator further claims that Ms. Lather's testimony that she observed the sketch at Brother's Food Mart is false or inconsistent with her statement to detectives in which she stated she was at Wagner's Market when she observed the sketch.
[6] The record indicates that Ms. Lathers also provided a tip to Crimestoppers.

> 672, 677 (La. 1976). However, the grant of a new trial based upon a *Napue* violation is proper only if: (1) the statements at issue are shown to be actually false; (2) the prosecution knew they were false; and (3) the statements were material. *State v. Phillips*, 10-0582, p. 9 (La. App. 4 Cir. 2/17/11), 61 So.3d 130, 136, *writ denied*, 2011-0582 (La. 10/7/11), 61 So. 3d 130, 2011 WL 4949198.

State v. Ventris, 10-889 (La. App. 5 Cir. 11/15/11), 79 So.3d 1108, 1126.

The Louisiana Supreme Court has instructed that, "[t]o prove a *Napue* claim, the accused must show that the prosecutor acted in collusion with the witness to facilitate false testimony." *State v. Broadway*, 96-2659 (La. 10/19/99), 753 So.2d 801, 814. When a prosecutor allows a state witness to give false testimony without correction, a conviction gained as a result of that perjured testimony must be reversed, if the witness's testimony reasonably could have affected the jury's verdict. *State v. Broadway*, 96-2659 (La. 10/19/99), 753 So. 2d 801, 814. Further, "[w]hen false testimony has been given under such circumstances, the defendant is entitled to a new trial unless there is no reasonable likelihood that the alleged false testimony could have affected the outcome of the trial." *State v. Ventris*, 10-889 (La. App. 5 Cir. 11/15/11), 79 So.3d 1108, 1126 (citing *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972)).

Upon our review of the writ application and attachments thereto, we find that relator has failed to meet his burden to prove a *Napque* claim. First, based upon the documentation submitted in connection with the writ application, we cannot find that the trial court erred in its determination that the testimony cited by relator is taken out of context and does not conclusively show that Ms. Lather's provided false testimony. Second, given the evidence presented against relator at trial, including a positive identification by an independent witness of relator as a suspect in the murder, we find that the trial court did not err in determining that relator failed to meet his burden to prove that the challenged testimony was actually false and that relator's "conviction was gained as a result of that perjured testimony." *Broadway*, 753 So.2d at 814. This argument is without merit.

Claim #9: Denial of Severance of the Charges

In this claim, relator alleged that the trial court erred in failing to sever the armed robbery and second-degree murder charges. The official record reflects that relator filed a motion to sever the charges at the trial court level, which the trial judge initially granted. However, upon motion for reconsideration by the state and the presentation of additional evidence to the court, the trial court granted the state's motion to reconsider and denied relator's request to have the charges severed for trial. Upon review of this claim, the trial court found that relator raised this issue in the trial court but failed to raise this issue on direct appeal. The trial court found relator's claim procedurally barred pursuant to La. C.Cr.P. art. 930.4(C).

Upon our review of the writ application and attachments thereto, we find the trial court did not err in finding that relator's claim is procedurally barred as the claim was known to him at trial but was not raised on direct appeal. An inmate filing an application for post-conviction relief must "'explain why' he may have 'failed to raise [a particular] ground' in earlier proceedings. The Uniform Application thus in most cases both provides an inmate with an opportunity to

explain his failure to raise a claim earlier and provides the district judge with enough information to undertake the informed exercise of his discretion and to determine whether default of an application under La. C.Cr.P. art. 930.4(B), art. 930.4(C), or art. 930.4(E) is appropriate." *State ex rel. Rice v. State*, 99-0496 (La. 11/12/99), 749 So.2d 650. In his APCR, relator failed to explain why he failed to raise this claim on direct appeal and, thus, the trial court did not err in denying relator's claim as procedurally barred under La. C.Cr.P. art. 930.4.[7]

Finally, in his writ application to this Court, relator additionally argues that the trial court erred in failing to hold an evidentiary hearing on the claims raised in his APCR. La. C.Cr.P. art. 929(A) provides that the trial court may grant or deny an application for post-conviction relief without the need for further proceedings if the court determines that the issues raised can be resolved based upon the "application and answer, and supporting documents, including relevant transcripts, depositions, and other reliable documents… ." The official record reflects that the trial judge who denied relator's APCR is the same judge who presided over relator's trial. We find that the trial judge did not err in denying relator's application for post-conviction relief without an evidentiary hearing. This argument is without merit.

Accordingly, for the reasons provided, we grant this writ application for the limited purpose of remanding the matter to the trial court to issue a judgment on Claim #8 raised in relator's APCR within thirty days of the date of this disposition and to forward a copy of the judgment to relator at the facility in which he is housed as well as to this Court. In all other respects, this writ is denied.

Gretna, Louisiana, this 25th day of June, 2018.

FHW
MEJ
SJW

[7] In his APCR, relator further does not assert ineffective assistance of appellate counsel for failure to raise the issue of severance of the charges on direct appeal.

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NOTICE OF DISPOSITION CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE DISPOSITION IN THE FOREGOING MATTER HAS BEEN TRANSMITTED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 4-6** THIS DAY **06/25/2018** TO THE TRIAL JUDGE, THE TRIAL COURT CLERK OF COURT, AND AT LEAST ONE OF THE COUNSEL OF RECORD FOR EACH PARTY, AND TO EACH PARTY NOT REPRESENTED BY

CHERYL Q. LANDRIEU
CLERK OF COURT

18-KH-120

E-NOTIFIED
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