

MIKE ALVAREZ

NO. 18-KH-345

VERSUS

FIFTH CIRCUIT

STATE OF LOUISIANA

COURT OF APPEAL

STATE OF LOUISIANA

September 12, 2018

Susan Buchholz

First Deputy Clerk

IN RE MIKE ALVAREZ

APPLYING FOR SUPERVISORY WRIT FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT, PARISH OF JEFFERSON, STATE OF LOUISIANA, DIRECTED TO THE HONORABLE DONALD A. ROWAN, JR., DIVISION "L", NUMBER 07-2136

Panel composed of Judges Fredericka Homberg Wicker,
Stephen J. Windhorst, and Marion F. Edwards, Judge Pro Tempore

**WRIT GRANTED IN PART FOR THE LIMITED PURPOSE OF
REMANDING FOR EVIDENTIARY HEARING**

Defendant, Mike Alvarez, seeks supervisory review of the trial court's April 19, 2018 denial of his Application for Post-Conviction Relief (APCR). For the following reasons, we grant the writ in part for the limited purpose of ordering an evidentiary hearing on the merits of the claims in the APCR.

On June 17, 2010, defendant was convicted of three counts of aggravated crime against nature. He was subsequently sentenced to fifteen years imprisonment on each count, to be served consecutively, without benefit of parole, probation, or suspension of sentence. This Court affirmed defendant's convictions and amended the original sentences to reflect that they were to be served at hard labor. *State v. Alvarez*, 10-925 (La. App. 5 Cir. 6/29/11), 71 So.3d 1079. On December 13, 2010, the trial court found defendant to be a second felony offender. On that same date, the trial court vacated the original sentences and resentenced defendant to thirty years imprisonment without benefit of probation or suspension of sentence on each count to run consecutively. This Court affirmed defendant's multiple offender adjudication and enhanced sentences and remanded the matter for correction of the commitment to reflect that the sentences were to be served at hard labor. It also noted that the commitment correctly indicated that the enhanced sentences were to be served without benefit of parole, probation, or suspension of sentence. *State v. Alvarez*, 11-223 (La. App. 5 Cir. 11/15/11), 78 So.3d 265. On

April 13, 2012, the Louisiana Supreme Court denied writs. *State v. Alvarez*, 11-2767 (La. 4/13/12), 85 So.3d 1245.

On June 7, 2012, defendant filed his first APCR that was subsequently denied by the trial court, and on April 10, 2013, this Court denied writs. *State ex rel. Alvarez v. Cain*, 13-KH-227 (La. App. 5 Cir. 4/10/13) (unpublished writ disposition) (JJ. Liljeberg, Chehardy, Windhorst).

On October 16, 2017, defendant filed his second APCR alleging prosecutorial misconduct and actual innocence based on recent affidavits from two witnesses, one who he believed recanted his trial testimony and the other who had new pertinent information. On April 2, 2018, the trial court initially set the matter for an evidentiary hearing; however, on April 19, 2018, the trial court vacated that Order and denied the APCR. The trial court found that the APCR was untimely under La. C.Cr.P. art 930.8, that defendant did not prove that he exercised diligence in attempting to discover any post-conviction claims that may exist under La. C.Cr.P. art. 930.8(A)(1), and that defendant's APCR was successive under La. C.Cr.P. art. 930.4(E).

La. C.Cr.P. art. 930.8(A)(1) provides that no application shall be considered if it is filed more than two years after the judgment of conviction and sentence has become final unless the application alleges, and the petitioner proves or the State admits, that the facts upon which the claim is predicated were not known to the petitioner or his prior attorneys. Further, the petitioner shall prove that he exercised diligence in attempting to discover any post-conviction claims. *See* La. C.Cr.P. art. 930.8(A)(1).

The application may be dismissed without an answer if the application fails to allege a claim which, if established, would entitle the petitioner to relief. La. C.C.P. art. 928. If the court determines that the factual and legal issues can be resolved based upon the application and answer, and supporting documents, including relevant transcripts, depositions, and other reliable documents submitted by either party or available to the court, the court may grant or deny relief without further proceedings. La. C.Cr.P. art. 929(A). An evidentiary hearing for the taking of testimony or other evidence shall be ordered whenever there are questions of fact which cannot properly be resolved pursuant to Articles 928 and 929. La. C.Cr.P. art. 930.

In the instant case, we find that defendant's APCR and supporting documentation sufficiently demonstrate that the facts upon which his claims are predicated were not known to defendant or his attorney, and therefore, the exception to the post-conviction limitation period applies. We also find that defendant has argued persuasively that the nature of this new evidence is not such that it should have been discovered by the exercise of due diligence and, thus, it is not untimely pursuant to La. C.Cr.P. art. 930.8(A)(1). (*See State v. Hurst*, 15-455 (La. 9/18/15), 209 So.3d 701 (per curiam); *State v. Crawford*, 17-0481, 2017 La.

App. LEXIS 1676 (La. App. 4 Cir. 9/20/17)). We further find that there are questions of fact which cannot be properly resolved pursuant to Articles 928 and 929.

Based on the foregoing, we grant the writ in part for the limited purpose of ordering an evidentiary hearing on the merits of the claims in the APCR.

Gretna, Louisiana, this 12th day of September, 2018.

FHW
MFE

WINDHORST, J., DISSENTS WITH REASONS

I respectfully disagree with the majority's disposition granting this writ application and remanding the matter for an evidentiary hearing. In my opinion, the writ application, on the showing made, should be denied for the following reasons.

In this writ application, relator alleges prosecutorial misconduct and actual innocence based on the affidavits of two witnesses. In one affidavit, J.B., the victim's brother, allegedly recanted his trial testimony stating that he was facing armed robbery charges at the time and the district attorney promised to dismiss the charges in exchange for his testimony. J.B. stated that the district attorney told him what he needed to say, defendant was never at his house, and his sister never told him that defendant committed the alleged sexual offenses against her. In the second affidavit, T.R., the victim of the 1997 carnal knowledge of a juvenile conviction, stated that while waiting to testify, the victim's grandmother told her that she manufactured the allegations against defendant to gain custody of her grandchildren, the victim in this case and J.B.

First, relator's writ application is untimely. Relator's conviction became final in April 2012, and relator's second application for post-conviction relief (APCR) was not filed until October 16, 2017, more than two years after his conviction and sentence became final and relator did not meet any of the exceptions for delayed filing. La. C.Cr.P. art. 930.8. Specifically, relator failed to establish that there was new evidence that could not have been known to him. J.B., the State's witness, was known to relator before, during, and after the trial. Additionally, whether defendant was ever at the victim's house was a defense at trial and relator presented witnesses as to this defense. Thus, while relator now introduces J.B.'s affidavit recanting his trial testimony on this same issue, this allegation is not new. Also, T.R.'s affidavit merely provided unverified hearsay statements of the victim's grandmother. T.R.'s affidavit does not recant her trial testimony concerning relator's prior sexual conduct with her. Therefore, on the showing made, the trial court did not err in denying relator's second APCR without conducting an evidentiary hearing.

Secondly, even if this Court were to find that the two affidavits were newly discovered evidence and met an exception for delayed filing under La. C.Cr.P. art. 930 A(1), relator's second APCR claims based on the two affidavits are without merit. On the showing made, relator has only made conclusory allegations of prosecutorial misconduct and innocence through the use of the affidavits. Recantations "are highly suspicious" and except in rare exceptions, a new trial should not be granted on the basis of a recantation because it is tantamount to perjury so as to discredit the witness at a later trial. State v. Clayton, 427 So.2d 827, 822 (La. 1982); State v. McClain, 04-98 (La. App. 5 Cir. 06/29/04), 877 So.2d 1135, writ denied, 04-1929 (La. 12/10/14), 888 So.2d 835. It is my opinion that the affidavits do not concern key witness recantations that would entitle relator relief such that an evidentiary hearing is necessary.

For instance, in his traverse of the State's objections to his APCR, relator acknowledged that J.B.'s recantation only "strongly suggests felonious wrongdoing" by J.B. and the State. Moreover, even if the substance of J.B.'s affidavit could be considered newly discovered evidence since he changed his testimony more than six years later, this "new testimony" does not exculpate relator as to his culpability to the commission of the crimes. J.B.'s affidavit does not state that relator did not commit the sexual offenses. Rather, J.B.'s trial testimony was provided to show that defendant frequently visited the residence and that the victim told him about the incidents one or two months later. Thus, it appears the State used J.B.'s testimony to corroborate the victim's testimony. However, J.B.'s corroborating testimony was not necessarily needed. The testimony of the victim alone can be sufficient to establish the elements of the sexual offense, even where the State fails to introduce physical evidence to substantiate the commission of the offense. Alvarez, supra; State v. Vincent, 07-239 (La. App. 5 Cir. 12/27/07), 978 So.2d 967, 972. On appeal, this Court found that P.B., the victim, testified consistently that relator made her perform the sexual acts alleged on three occasions and positively identified relator. Thus, there was other direct evidence against relator in the underlying matter.

Additionally, relator's APCR, J.B.'s affidavit, and this writ application do not provide any evidence and/or supporting documentation showing that any leniency was given to J.B. in exchange for his testimony against relator for the underlying offense. Moreover, J.B.'s armed robbery charged was raised at trial. T.R.'s affidavit provides only unverified hearsay statements that the victim's grandmother allegedly made to T.R. during the trial. T.R.'s affidavit does not state that relator did not commit the sexual offenses in this case.

J.B. and T.R. were known witnesses to relator before, during and after the trial, and their affidavits do not exculpate relator of the offenses for which he was convicted. The affidavits at best re-assert defenses raised by relator at trial, *i.e.*, that he was never at the residence and he did not commit the alleged sexual offenses.

Since relator's second APCR raising the claims of prosecutorial misconduct and actual innocence are untimely, and relator failed to show an exception applied, it is my opinion that the trial court did not err in vacating its prior order for an evidentiary hearing and denying relator's second APCR.

Accordingly, on the showing made, I would deny relator's writ application.

SJW

SUSAN M. CHEHARDY
CHIEF JUDGE

FREDERICKA H. WICKER
JUDE G. GRAVOIS
MARC E. JOHNSON
ROBERT A. CHAISSON
STEPHEN J. WINDHORST
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JUDGES



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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 **09/12/2018** 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-345

E-NOTIFIED

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