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Court of Appeal, First Circuit

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Notice of Judgment and Disposition

April 24, 2015

Docket Number: 2014 - KA - 1706

State Of Louisiana
versus
Andrew Weary

TO:

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In accordance with Local Rule 6 of the Court of Appeal, First Circuit, I hereby certify that this notice of judgment and disposition and the attached disposition were transmitted this date to the trial judge or equivalent, all counsel of record, and all parties not represented by counsel.

Peggy J. Landry

CHRISTINE L. CROW
CLERK OF COURT

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

WCBW
TMH
PMC

NO. 2014 KA 1706

STATE OF LOUISIANA

VERSUS

ANDREW WEARY

Judgment Rendered: APR 2 4 2015

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On Appeal from the
22nd Judicial District Court
In and for the Parish of Washington
State of Louisiana
Trial Court No. 00 CR5 79804

Honorable August Hand, Judge Presiding

* * * * *

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* * * * *

BEFORE: WHIPPLE, C.J., McCLENDON, AND HIGGINBOTHAM, JJ.

HIGGINBOTHAM, J.

The defendant, Andrew R. Weary, was charged by bill of information with armed robbery, a violation of Louisiana Revised Statutes 14:64 (count 1), and attempted first degree murder, a violation of Louisiana Revised Statutes 14:27 and 14:30 (count 2). He pled not guilty and, following a jury trial, was found guilty as charged on both counts. Before sentencing was held, the State instituted habitual offender proceedings against the defendant. The defendant was adjudicated a second-felony habitual offender based upon his armed robbery conviction and a 1991 felony conviction. The district court sentenced the defendant to seventy-five years at hard labor without the benefit of parole.

The defendant appealed. This Court affirmed the defendant's armed robbery conviction, habitual offender adjudication, and sentence. However, because the district court failed to sentence the defendant on his conviction for attempted first degree murder, the matter was remanded for resentencing on that count. See **State v. Weary**, 2001-2286 (La. App. 1st Cir. 5/10/02), 826 So.2d 654 (unpublished), writ denied, 2002-1925 (La. 6/20/03), 847 So.2d 1228. On remand, the district court sentenced the defendant to twenty-five years at hard labor for his conviction for attempted first degree murder. The defendant appealed, and this Court affirmed his conviction and sentence for attempted first degree murder. See **State v. Weary**, 2005-2042 (La. App. 1st Cir. 5/5/06), 930 So.2d 1240 (unpublished), writ denied, 2006-1799 (La. 2/2/07), 948 So.2d 1076.

The defendant subsequently submitted an application for post-conviction relief to the district court, but was denied relief. He sought review of that denial in this Court, which denied his application due to his failure to attach documents necessary for review. See **State v. Weary**, 2008-1822 (La. App. 1st Cir. 12/19/08) (unpublished). The defendant then sought review with the Louisiana Supreme Court. While the defendant's application with the Louisiana Supreme

Court was pending, he submitted another writ application to this Court, which was denied. See **State v. Weary**, 2009-0328 (La. App. 1st Cir. 6/8/09) (unpublished). On January 22, 2010, the Louisiana Supreme Court denied the defendant's writ application seeking review of this Court's December 19, 2008 denial. See **State ex rel. Weary v. State**, 2009-0277 (La. 1/22/10), 25 So.3d 138.

The defendant then filed a petition for federal habeas corpus relief alleging, among other things, that he was exposed to double jeopardy. The federal court held that the defendant's convictions on both counts 1 and 2 violated double jeopardy, and the proper remedy for the double jeopardy violation was to grant the defendant's writ of habeas corpus only as to the double jeopardy claim unless the state court, within ninety days: (1) vacated the sentences imposed for the armed robbery and attempted first degree murder convictions; (2) vacated the conviction for one of the offenses; and (3) resentenced the defendant on the remaining offense. See **Weary v. Cain**, 2012 WL 601862, (E.D.La. 2012) (unpublished).

The state district court held proceedings on May 23, 2012, to comply with the federal court's order. The State dismissed count 2 (the defendant's attempted first degree murder charge), the district court vacated the sentences previously imposed, and the defendant was resentenced as a second-felony habitual offender to seventy-five years without the benefit of parole.

The defendant filed a motion in federal court to reopen his civil action on the basis that the state district court did not follow the directive of the federal court in that it did not vacate either of his convictions and that the proceedings were held outside of the time period dictated by the federal court. The federal court noted that the transcript of the state district court proceedings from May 23, 2012, revealed that the district court did not vacate the conviction for one of the defendant's offenses; rather, the State chose to nol pros the attempted first degree

murder count. The federal court found that this action was error and allowed the state district court additional time to remedy the error. See **Weary v. Cain**, 2013 WL 4499021, (E.D.La. 2013), affirmed by, 587 Fed.Appx. 797 (5th Cir. 2014).

Pursuant to the federal court's directive, a hearing was held on September 16, 2013, wherein the state district court clarified its sentence. The district court vacated any prior sentence and conviction as to the defendant's attempted first degree murder conviction. The court also vacated any prior sentence as to the defendant's armed robbery conviction and resentenced him to serve seventy-five years at hard labor without the benefit of probation, parole, or suspension of sentence.

The defendant now appeals. For the following reasons, we affirm the defendant's sentence on his armed robbery conviction, and we grant defense counsel's motion to withdraw.

FACTS

The facts surrounding the defendant's offense are derived from the record, as revealed in our original opinion, and are as follows. On April 5, 2000, Luther Lee Harris, a seventy-nine year old Bogalusa resident and the victim in this matter, received a telephone call from the defendant, a neighbor he had known for several years. The defendant indicated that he would come to Harris's home and repay him money he had borrowed. When Harris opened the door, the defendant struck him with a tire iron and continued to hit him several times in the head. While trying to protect himself, the tip of one of Harris's fingers was severed. Finally, Harris fell to the floor, and the defendant went into the bedroom for a few minutes. After the defendant left, Harris was able to contact the police. The police discovered a large amount of blood in the living room and kitchen. Fearing that he would not live, the police contacted emergency medical services, and Harris was rushed to the hospital. Harris was able to tell police the name of his attacker.

Harris's relatives later discovered that his wallet, which had contained seven dollars in cash, was empty. Relatives were also unable to find cash that Harris hid under his mattress after he cashed his Social Security check. The defendant was subsequently arrested in Lake Charles. See **Weary**, 2001-2286 at p. 2.

DISCUSSION

Defense counsel has filed a brief containing no assignments of error and a motion to withdraw from this case. In her brief and motion to withdraw, referring to the procedures outlined in **Anders v. California**, 386 U.S. 738, 744-45, 87 S.Ct. 1396, 1400, 18 L.Ed.2d 493 (1967) and **State v. Jyles**, 96-2669 (La. 12/12/97), 704 So.2d 241, 241-42 (per curiam), defense counsel indicated that after a conscientious and thorough review of the district court record, she could find no non-frivolous issues to raise on appeal. See also **State v. Mouton**, 95-0981 (La. 4/28/95), 653 So.2d 1176, 1177 (per curiam); **State v. Benjamin**, 573 So.2d 528 (La. App. 4th Cir. 1990).

The **Anders** procedure followed in Louisiana was discussed in **Benjamin**, 573 So.2d at 529-31, sanctioned by the Louisiana Supreme Court in **Mouton**, 653 So.2d at 1177, and expanded by the Louisiana Supreme Court in **Jyles**. According to **Anders**, 386 U.S. at 744, 87 S.Ct. at 1400, "if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw." To comply with **Jyles**, appellate counsel must not only review the procedural history of the case and the evidence, but his brief also must contain "a detailed and reviewable assessment for both the defendant and the appellate court of whether the appeal is worth pursuing in the first place." **Jyles**, 704 So.2d at 242 (quoting **Mouton**, 653 So.2d at 1177). When conducting a review for compliance with **Anders**, an appellate court must conduct an independent review of the record to determine whether the appeal is wholly frivolous.

Herein, the brief filed on behalf of the defendant by defense counsel complied with all of the requirements necessary to an **Anders** brief. Defense counsel reviewed the procedural history and record of the case. Defense counsel concluded in her brief and motion to withdraw that there were no non-frivolous issues for appeal. Further, in her motion to withdraw, defense counsel certified that defendant was served with a copy of her motion to withdraw as counsel of record, and was notified of his right to file a pro se brief. The defendant has filed a pro se brief raising four assignments of error.

PRO SE ASSIGNMENT OF ERROR NUMBER ONE

In his first pro se assignment of error, the defendant argues that he was denied effective assistance of counsel. Specifically, he contends that his appellate counsel did not appeal the sentence imposed on September 16, 2013.[1]

A claim of ineffective assistance of counsel is more properly raised by an application for postconviction relief in the district court, where a full evidentiary hearing may be conducted. However, where the record discloses sufficient evidence to decide the issue of ineffective assistance of counsel when raised by assignment of error on appeal, it may be addressed in the interest of judicial economy. **State v. Carter**, 96-0337 (La. App. 1st Cir. 11/8/96), 684 So.2d 432, 438.

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. In assessing a claim of ineffectiveness, a two-pronged test is employed. The defendant must show that (1) his attorney's performance was deficient, and (2) the deficiency prejudiced him. The error is prejudicial if it was so serious as to deprive the defendant of a fair trial, or "a trial whose result is

[1] In his pro se brief, the defendant complains about his September 13, 2013 "resentencing." However, our review of the minutes reveals that hearing was actually held on September 16, 2013.

reliable." **Strickland v. Washington**, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). In order to show prejudice, the defendant must demonstrate that, but for counsel's unprofessional conduct, the result of the proceeding would have been different. **Strickland**, 466 U.S. at 694, 104 S.Ct. at 2068; **State v. Felder**, 2000-2887 (La. App. 1st Cir. 9/28/01), 809 So.2d 360, 369-70, writ denied, 2001-3027 (La. 10/25/02), 827 So.2d 1173. Further, it is unnecessary to address the issues of both counsel's performance and prejudice to the defendant if the defendant makes an inadequate showing on one of the components. **State v. Serigny**, 610 So.2d 857, 860 (La. App. 1st Cir. 1992), writ denied, 614 So.2d 1263 (La. 1993).

In her brief, appellate counsel discusses the defendant's most recent sentencing hearing, which was held on May 23, 2012. At that hearing, the State dismissed count two on the defendant's bill of information (attempted first degree murder), and the court vacated all prior sentences and resentenced the defendant on count one (armed robbery) as a second-felony habitual offender. Counsel points out that although the court failed to "follow with precision the directive of the federal court," by failing to vacate one of the defendant's convictions and sentences itself, she found no support for advancing a non-frivolous claim of error. Appellate counsel failed to note that the sentence imposed on May 23, 2012, was clarified on September 16, 2013. That day, the district court vacated any prior sentence and conviction as to attempted first degree murder, vacated its prior sentence as to armed robbery, and resentenced the defendant to a term of seventy-five years at hard labor without the benefit of probation, parole, or suspension of sentence. The clarification made in September remedied the issue defense counsel noted in her appellate brief. No substantive changes were made to the sentence that was imposed on May 23, 2012. Thus, the sentence on which appellate counsel relied in preparing her brief is the same as that imposed at the

clarification hearing. Therefore, the defendant was not prejudiced by the alleged deficient performance. Accordingly, he has failed to make the required showing of sufficient prejudice and, as such, his claim of ineffective assistance of counsel is without merit.

PRO SE ASSIGNMENT OR ERROR NUMBER TWO

In his second pro se assignment of error, the defendant contends that the sentence imposed on September 16, 2013,[2] was in violation of his right to counsel. Specifically, he complains that he did not have the same counsel at the May 2012 and September 2013 hearings. He also argues that his counsel at the September 2013 hearing was not his trial counsel, did not consult with him, and had no knowledge of the facts of the case.

The United States and Louisiana Constitutions guarantee the *assistance* of counsel, not merely the *presence* of counsel. See U.S. Const. amend. VI; La. Const. art. I, § 13; see also **United States v. Cronic**, 466 U.S. 648, 654, 104 S.Ct. 2039, 2044, 80 L.Ed.2d 657 (1984). An accused has the right to the assistance of counsel at every stage of criminal proceedings, including sentencing, unless this right is intelligently waived. See U.S. Const. amend. VI; La. Const. art. I, § 13; **McConnell v. Rhay**, 393 U.S. 2, 3-4, 89 S.Ct. 32, 33-34, 21 L.Ed.2d 2 (1968) (per curiam); **State v. White**, 325 So.2d 584, 585 (La. 1976). There are some circumstances in which, although counsel is present, "'the performance of counsel may be so inadequate that, in effect, no assistance of counsel is provided.'" **Cronic**, 466 U.S. at 654 n.11, 104 S.Ct. at 2044 n.11. Actual or constructive denial of assistance of counsel is presumed as a matter of law to have resulted in prejudice. See **Strickland**, 466 U.S. at 692, 104 S.Ct. at 2067. A sentence

[2] As noted above, although the defendant complains about his September 13, 2013 "resentencing," our review of the minutes reveals that hearing was actually held on September 16, 2013.

imposed in the absence of counsel is invalid and must be set aside. See **State v. Austin**, 255 La. 108, 114-15, 229 So.2d 717, 719 (1969).

Citing **Cronic**, the defendant argues that he was constructively denied his right to counsel because he was unaware of the presence of counsel at his September hearing, counsel did not confer with him, and counsel made no attempt to represent his interests. The defendant quotes statements he claims were made by counsel at the September hearing and notes that counsel participated in a sidebar discussion prior to taking a seat in the courtroom. Thus, it appears that the defendant was aware of his counsel's presence. It also appears that defense counsel did attempt to represent the defendant's interests, as the minute entry states that the defense requested a continuance, which was denied. Moreover, our review of the record reveals that the September hearing was held simply to give the district court an opportunity to formally vacate the defendant's conviction and sentence for attempted first degree murder pursuant to the federal court's directive. The sentence imposed at the May hearing was not altered. According to the minute entry, the defendant appeared not for resentencing, but for "Clarification of Sentence." Thus, the defendant has failed to establish constructive denial of counsel or that he suffered any prejudice by having different counsel at his May and September hearings. See La. Code Crim. P. art. 921.

PRO SE ASSIGNMENT OF ERROR NUMBER THREE

In his third assignment of error, the defendant argues that the sentence imposed by the district court is excessive. Specifically, the defendant argues that because the "multiple offender adjudication is gone[,] the need for a sentencing enhancement [is] removed." Thus, he argues that he should not have been resentenced pursuant to the habitual offender statutes. Contrary to the defendant's assertion, his habitual offender adjudication, which was affirmed by this court, was not abrogated by the district court. Therefore, he was exposed to an enhanced

sentence as a second-felony habitual offender and was sentenced under the appropriate statutes.

The defendant also argues that his sentence should have been for at term of sixty-one years and ten months to reflect the time that he served prior to the resentencing hearing. The record reveals that the defendant was given credit for any time served subsequent to his arrest.

Finally, the defendant claims that pursuant to **State ex rel. Adams v. Butler**, 558 So.2d 552 (La. 1990), his conviction and sentence for armed robbery, rather than attempted first degree murder, should have been dismissed.

The defendant's reliance on **Butler** is misplaced. In **Butler**, the defendant was charged in separate bills of information with armed robbery and attempted first degree murder. He entered into a plea bargain wherein the State agreed that the maximum sentence for his offense of armed robbery was fifteen years without the benefit of probation, parole, or suspension of sentence. He pled guilty to both charges and was sentenced to fifteen years at hard labor without the benefit of probation, parole, or suspension of sentence for his armed robbery conviction and to thirty years at hard labor for the attempted first degree murder conviction. He filed an application for post-conviction relief arguing that the convictions were in violation of the double jeopardy clause of the federal and state constitutions. He was denied relief with the district court, but the court of appeal found a double jeopardy violation, summarily vacated the conviction and sentence of the less severely punishable offense of attempted first degree murder, and affirmed the conviction and sentence of the more severely punishable offense of armed robbery. The Louisiana Supreme Court granted the State's application to review the correctness of that decision and found that although the general rule would require the court to vacate the conviction and sentence for the less severely punishable offense and to affirm the conviction for the more severely punishable

offense and remand for resentencing, the defendant's plea bargain agreement prevented the district court from imposing a sentence more severe than the original fifteen-year sentence. See **Butler**, 558 So.2d at 552-554.

When restructuring the sentence under the general rule is not feasible, courts should affirm the conviction with the more severe actual sentence, even though it may require vacating the conviction for the more severely punishable offense. Because restructuring the sentence under the general rule was not feasible, the Louisiana Supreme Court affirmed the defendant's conviction and sentence for the attempted first degree murder (with the most severe actual sentence of thirty years) and vacated the defendant's conviction and sentence for armed robbery (with the less severe actual sentence of fifteen years). See **Butler**, 558 So.2d at 554-55.

The exception applied by the Court in **Butler** is inapplicable in the instant case, and the district court properly applied the general rule by vacating the defendant's conviction and sentence for attempted first degree murder. This assignment of error is without merit.

PRO SE ASSIGNMENT OF ERROR NUMBER FOUR

The defendant again requests an out-of-time appeal in his fourth pro se assignment of error. He requests the appeal in order to "perfect [his] assignments of error" and argues that he is without counsel. However, a timely counseled brief was filed on the defendant's behalf with this court in December 2014. Moreover, his pro se assignments of error have been addressed herein. Therefore, this assignment of error is without merit.

REVIEW FOR ERROR

In the conclusion of his pro se brief, the defendant requests that this Court examine the record for error under Louisiana Code of Criminal Procedure article 920(2). This Court has conducted an independent review of the entire record in

this matter, including a review for error under Article 920(2). We have found no reversible errors in this case. See **State v. Price**, 2005-2514 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 123-25 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So.2d 1277. Furthermore, our review revealed no non-frivolous issues or district court rulings that arguably support this appeal. Accordingly, the defendant's sentence is affirmed. Further, defense counsel's motion to withdraw is granted.

SENTENCE AFFIRMED; MOTION TO WITHDRAW GRANTED.