NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2000-K-2335**
VERSUS	*	**COURT OF APPEAL**
MICHAEL DICKERSON	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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ON SUPERVISORY WRITS DIRECTED TO
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 313-925, SECTION "G"
Honorable Julian A. Parker, Judge
* * * * * *
Judge Miriam G. Waltzer
* * * * * *

(Court composed of Judge Charles R. Jones, Judge Miriam G. Waltzer and Judge Patricia Rivet Murray)

JONES, J., CONCURS IN THE RESULT

Martin E. Regan, Jr.
Ken Dohre
New Orleans, LA 70130
COUNSEL FOR RELATOR

APPLICATION FOR SUPERVISORY WRIT DENIED.

Relator argues in his latest writ application that his counsel was ineffective for his failure to object to the jury instruction on reasonable doubt.

STATEMENT OF THE CASE

The defendant, along with Ellya F. Ricard and Wiffart Dickerson, was charged by bill of information with attempted second degree murder, a violation of La R.S. 14:27(30.1), attempted forcible rape, a violation of La R.S. 14:27(42.1), and possession of marijuana with the intent to distribute, a violation of La R.S. 40:966. Defendant Michael Dickerson was also charged with attempted aggravated crime against nature, a violation of La R.S. 14:27 (89.1). The original charge of possession of marijuana with intent to distribute was nolle prosequied as to all three defendants prior to trial. After trial, a jury found the defendant guilty of attempted second degree murder and attempted forcible rape but not guilty of attempted aggravated crime against nature. He was subsequently sentenced to fifty years at hard labor on the attempted murder conviction and twenty years at hard labor on the attempted rape conviction with the sentences to run concurrently. The

defendant's conviction and sentence were affirmed. State v. Dickerson, 531 So.2d 1085 (La. App. 4 Cir. 1988), writ denied, 537 So.2d 1160 (La. 1989). The defendant had filed two prior writ applications in this Court (89-K-2082 and 95-K-2354), but he does not allege that those writs relate to the current claim. According to the trial court's judgment, the defendant filed an application for post conviction relief on 5 April 1999 relating to an alleged Cage jury instruction, which was denied by the trial court on 23 August 2000. According to the notice of intent to seek writs, the defendant was given until 24 October 2000 to file for writs. Although that order was signed on 25 August 2000 and set a time period exceeding the maximum thirty day period set by Uniform Rules-Appellate Courts of Appeal Rule 4-3, the defendant filed his application timely on 24 October 2000 (according to the trial court's instructions).

DISCUSSION

The facts of this case have been set out in our appellate opinion and are not necessary to resolve the issue of the reasonable doubt instruction.

The defendant argues that the lack of the contemporaneous objection is not an independent and adequate state procedural ground and quotes from Wilson v. Cain, 97-1551 (E.D. La. 2/18/99), 1999WL670950. He argues

that his counsel was ineffective for his failure to object to the jury instruction on reasonable doubt because there had been opinions even prior to Cage, which put an attorney on notice as to what language was acceptable in a reasonable doubt instruction.

In State v. Penns, 99-2916 (La.12/20/99), 758 So.2d 776, cert. denied, 120 S.Ct. 204 (2000), the Supreme Court discussed and rejected similar claims. In Penns, the Court held that while Humphrey v. Cain, 138 F.3d 552 (5th Cir.1998) (en banc), cert. denied, 525 U.S. 935, 119 S.Ct. 348 (1998), and Wilson are persuasive authority, they are not binding on courts in this state. The Court stated:

> In State v. Smith, 91-0749, p. 13 (La. 5/23/94), 637 So.2d 398, 406, cert. denied, 513 U.S. 1045, 115 S.Ct. 641 (1994), this court held that in light of Victor v. Nebraska, 511 U.S. 1 (1994), a so-called Cage instruction, see Cage v. Louisiana, 498 U.S. 39 (1990)(per curiam), did not require reversal of the defendant's conviction on grounds that it diluted the state's burden of proving the accused's guilt beyond a reasonable doubt in violation of due process guarantees. See also State v. Jarrell, 98-0707 (La. 7/2/98), 721 So.2d 898. We have subsequently made clear that the presence of an "articulation" requirement in a Cage instruction, the factor considered decisive by the court of appeals in Humphrey, 120 F.3d at 533, also did not warrant relief. State v. Williams, 96-1023, p. 17 (La. 1/21/98), 708 So.2d 703, 718 ("[A]n instruction equating reasonable doubt with `a serious doubt for which you could give a good reason' [is] not constitutionally infirm.") (citing Smith, 91-0749 at 2, 637 So.2d at 399); see also State v. Brumfield, 96-2667, p. 47 (La. 10/28/98), 737 So.2d 660, 684-85 (citing Smith).
>
> Unless and until the United States Supreme Court resolves the status of a Cage/Humphrey instruction after Victor,

> our decisions in Smith and Williams, as well as our decision in State ex rel. Taylor v. Whitley, 606 So.2d 1292 (La. 1992), (Cage not retroactively applicable to final convictions subject only to collateral attack), and not the decision in Humphrey, bind the district courts of this state in reviewing claims that trial judges have read erroneous instructions on reasonable doubt.

State v. Penns, pp. 2-3, 758 So. 2d at 777-78. In a footnote the Court additionally declared:

> Additionally, the applications of both relators were untimely. Given that Humphrey provides only persuasive and not binding authority, Penns and Davis pointed to no appellate court ruling "applicable to [their] case[s]" under La.Code Crim. Proc. art. 930.8 A(2), and so nothing excepted their applications from the three-year prescriptive period. La.Code Crim. Proc. art. 930.8; State ex rel. Glover v. State, 93-2330 (La.9/5/95), 660 So.2d 1189. Additionally, even if the jurisprudence on which Penns and Davis relied did apply generally to jury instructions in criminal cases in Louisiana, it would not apply retroactively, either for purposes of timeliness as a matter of La.Code Crim. Proc. art. 930.8 A(2), or for purposes of due process analysis. Taylor, 606 So.2d at 1296-97.
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> Furthermore, the failure of Davis's counsel to object waived any due process claim. State v. Berniard, 625 So.2d 217, 220 (La.App. 4th Cir.1993) (on reh'g); State v. Dobson, 578 So.2d 533, 534-35 (La.App. 4th Cir.1991). That failure to object does not give rise to a claim that Davis's trial attorney rendered constitutionally ineffective assistance of counsel. Though Cage and Humphrey claims ultimately have their basis in In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), a decision nearly ten years old at the time of Davis's trial, and though Winship may thus have provided counsel with the legal basis for an objection, counsel's reasonable perception of the futility of any such objection under prevailing state law cannot constitute deficient performance. See State v. Wolfe, 630 So.2d 872, 883 (La.App. 4th Cir.1993) ("[A]ny objection made by counsel would [be] a vain and useless act and counsel [therefore is] not 'deficient' for failing to object" to such an instruction);

> cf. Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982) ("[T]he Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim.").

Id. at 779.

In State v. Ketchens, 99-3188 (La. App. 4 Cir. 1/26/00), 753 So.2d 328, 330, the trial court had granted the defendant's application for post conviction relief and ordered a new trial. This Court concluded that the defendant's application for post conviction relief was barred by La. C.Cr.P. art. 930.8 because the holding in Humphrey was not binding in this state. This Court additionally stated that the trial court had erred by even considering the application. Id.

Here the defendant's application for post conviction relief was barred by La. C.Cr.P. art. 930.8 because the holding in Humphrey is not binding in this state. Additionally, the lack of the contemporaneous objection waived any due process claim, and counsel's failure to object when Cage had not yet been handed down did not constitute ineffective assistance of counsel. Additionally, there could be no retroactive application because this case was final prior to Cage.

For these reasons the application for supervisory writs is hereby denied.

APPLICATION FOR SUPERVISORY WRIT DENIED.