STATE OF LOUISIANA	*	**NO. 2000-K-2798**
VERSUS	*	**COURT OF APPEAL**
CARL JONES	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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ON WRIT OF CERTIORARI DIRECTED TO
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 396-094, SECTION "L"
HONORABLE TERRY ALARCON, JUDGE
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JUDGE MICHAEL E. KIRBY
* * * * * *

(Court composed of Judge Michael E. Kirby, Judge Terri F. Love, Judge David S. Gorbaty)

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STATEMENT OF THE CASE

On March 5, 1998, relator was charged with possession of cocaine.

He entered a plea of guilty as charged on July 15, 1998, and the court sentenced him to serve five years at hard labor. The State then filed a multiple bill to which relator pled guilty. Relator's original sentence was vacated and set aside, and the court sentenced him under the provisions of La. R.S. 15:59.1 as a triple offender to serve ten years at hard labor to run concurrently with the sentence in another case.

The relator subsequently filed two pro se writs in this Court, 99-K-0546 and 99-K-2361, neither of which is relevant to the disposition of this writ. On July 14, 2000, retained counsel filed a new application for post conviction relief raising another claim of ineffective assistance of counsel. The trial court set it for a hearing, and on October 19, 2000 testimony was taken from the relator's trial counsel. The trial court took the matter under advisement. On November 16, 2000 the trial court issued a judgment denying the application; the relator gave notice of intent to seek writs.

STATEMENT OF THE FACTS

The relator has provided a copy of the transcript of the motion to suppress hearing held on May 19, 1998. Detective Warren Gibson testified at that hearing. He stated that on November 5, 1997 he and Sergeant

Mornay of Narcotics responded to complaints at 2624 Ursuline Street. The specific complaint was from the manager of the rooming house who stated that narcotics offenders were loitering on the property. The officers arrived at the location and saw the defendant and another person standing on the front porch. The officers questioned them about why they were there. According to Detective Gibson, the defendant failed to give an adequate response, stating only that he was hanging out. The officer then ran the defendant's name through the N.C.I.C. computer and learned that he was wanted on a parole violation from Baton Rouge; he also had several municipal attachments for non-appearance. The defendant was arrested for the parole violation, and in a search incident to arrest, a white tube containing six pieces of crack cocaine was found. Detective Gibson further testified that the tube was found in the defendant's left front pocket; the tube was white with a green cap; and the drugs were actually seized by Sergeant Mornay.

Over the advice of appointed counsel, the defendant testified at the motion hearing. He testified that he was walking out of the building after visiting a friend when the officers told him and his companions to go back inside. Once inside, Officer Gibson searched him, including his pocket, but did not find anything. The defendant further testified that the officers

questioned him about two people who deal drugs in the area; the defendant repeatedly told them that he did not know the dealers. The officers then transported him to the precinct police station where they continued to question him. According to the defendant, the officers then ran his name in the computer and found that he was wanted for failure to report to his parole officer, at which point the officers transported him to Central Lock-Up. The defendant stated that Officer Gibson had the little tube "in the lock-up" and did not get it from him. On cross-examination, the defendant was unable to give the last name of the persons he was visiting; he did know that the name of one of the girls with him was Lynn Brown. The defendant admitted that he knew the two drug dealers the officers asked him about, but that he did not know them "personally." He admitted he lied when he told the officers he did not know them. The defendant also admitted that he had about five felony convictions which were plea bargains. The defendant stated that they were theft and possession of cocaine. The defendant denied a conviction for armed robbery, but admitted that he was "probably arrested" for simple robbery in 1982, a case which apparently was heard in Section "G" of Criminal District Court. The defendant stated that he was not in possession of drugs when arrested because he had already used them that night.

Officer Gibson was called on rebuttal. He reiterated his testimony

that it was Sergeant Mornay who searched the defendant, not himself. The officer also stated only one female was with the defendant and her name was Lynn Davis, not Lynn Brown.

After the State finished presenting its rebuttal witness, the trial court allowed the defendant to make a further statement. The defendant spoke to the court and admitted that he is a drug user, had committed crimes and been convicted before, "[b]ut that still don't (sic) give a (sic) officer the right" to violate his rights as a person. The court denied the motion to suppress but stated that he would ask the district attorney's office to consider allowing the defendant to plead to being a double or triple offender so that he could avoid a life sentence. The court suggested that defense counsel talk to the defendant "and see if we can do some reality therapy."

On June 23, 1998, Gary Wainwright enrolled as retained counsel for the relator. Trial was reset to July 15, 1998. The relator appeared on that date with Mr. Wainwright who informed the court that the matter had "been subject to extensive discussions with both the State and the court." Mr. Wainwright placed on the record the fact that a plea bargain for a determinate sentence as a third offender had been agreed upon; counsel specifically noted that there had been a review of the predicate documents and those documents had been discussed with the defendant. Counsel

further noted that the defendant had executed waiver of rights forms for both the substantive offense and the multiple bill. The trial court then engaged in a colloquy with the defendant during which the court went over the rights form with the defendant. Included during that colloquy was the defendant's express admission that he was in fact guilty of the offense. The defendant also stated that he was satisfied with his counsel. The trial court separately reviewed the waiver of rights form for the multiple bill of information.

DISCUSSION

In the application for post conviction relief at issue in this case, the relator urged two claims. He first claimed that his counsel was ineffective for failing to notice that the police report, the N.O.P.D. evidence card, and Officer Gibson all described the tube seized from the defendant as white with a **green** top, but that the crime lab report described the evidence as a white tube with a **red** top. In the second, he claimed that it had been discovered that no complaint by the manager of the apartment house had ever been made.

Testimony was taken from relator's trial counsel in connection with the first claim. However, no evidence was ever presented as to the second claim. Moreover, the relator makes no argument in his writ application as to

the second claim, and the trial court's judgment makes no reference to it. This claim has thus been abandoned. Even if it had not, the relator argued in his first application for post conviction relief that the evidence should have been suppressed. This Court found that the defendant was not entitled to relief. Considering that the defendant entered an unqualified plea of guilty, any claims relative to the seizure of the evidence were waived and cannot now be raised in post conviction relief.

As to the ineffective counsel claim, Gary Wainwright testified that he did not go to the evidence room and look at the evidence in this case. He also testified that he did not recall seeing the evidence and property card before. He stated that, if he had been aware of the "substantial difference in the description" of what was seized from the defendant from what was described in the crime lab report, he would have felt that the case was more appropriate for trial. Mr. Wainwright also stated that he could not say whether the differences in the description of the top of the tube was an error, but that it was something which could have been used on cross-examination. When specifically asked if he felt he had been ineffective as counsel, Mr. Wainwright stated that he failed to adequately investigate the physical evidence before advising the defendant to plead guilty. He did not testify, however, that he would not have advised his client to plead to ten years to

avoid a possible life sentence; he merely stated that it was something which he would have discussed with the defendant, who would have made the final decision.

On cross-examination, Mr. Wainwright indicated that he assumed that he had reviewed the crime lab report and police report as well as the transcript of the motion hearing. When pressed to state whether, after reviewing these documents, he believed there was a viable defense, Mr. Wainwright explained that he believed he had been ineffective because he missed the difference in the description of the top of the tube and thus did not ever contemplate the viability of that line of cross-examination. Counsel did acknowledge that the defendant had completed the waiver of rights form, which included the statement that he was pleading guilty because he was guilty.

The appropriate standard for review of the relator's claim that his counsel was ineffective for advising him to enter a guilty plea was enunciated in Hill v. Lockhart, 474 U.S. 52, at 56-57, 106 S.Ct. 366, at 369-370 (1985):

> Where . . . a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was "within the range of competence demanded of attorneys in criminal cases." McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763

(1970). . . .

> Our concern in McMann v. Richardson with the quality of counsel's performance in advising a defendant whether to plead guilty stemmed from the more general principle that all "defendants facing felony charges are entitled to the effective assistance of competent counsel." 397 U.S., at 771, and n. 14, 90 S.Ct., at 1449, and n.14; . . . Two Terms (sic) ago, in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), we adopted a two-part standard for evaluating claims of ineffective assistance of counsel. There, citing McMann, we reiterated that "[w]hen a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." 466 U.S., at 687-688, 104 S.Ct., at 2065. We also held, however that "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id., at 694, 104 S.Ct., at 2068. . .
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> Although our decision in Strickland v. Washington dealt with a claim of ineffective assistance of counsel in a capital sentencing proceeding, . . . the same two-part standard seems to us applicable to ineffective-assistance claims arising out of the plea process.

As this Court further noted in State v. Carr, 95-1118, pp. 3-4 (La. App. 4 Cir. 11/30/95), 665 So. 2d 1234, 1236:

> In McMann v. Richardson, supra, (decided before Strickland) the issue was whether a defendant in federal court may collaterally attack an otherwise valid guilty plea by alleging that plea was motivated by a prior, coerced confession. The Supreme Court characterized the three petitioners'

argument as a claim that they were erroneously advised on the admissibility of their prior confessions and therefore their guilty pleas were unintelligent and voidable. McMann thus considered the range of competence expected by counsel. The Court ultimately held the defendants must demonstrate gross error by counsel in recommending the plea.

Whether a court would retrospectively consider counsel's advice right or wrong is not the determining factor. McMann recognized that "the decision to plead guilty before the evidence is in frequently involves the making of difficult judgments," 90 S.Ct. at 1448, including a judgment on the weight of the state's case.

> Waiving trial entails the inherent risk that the good-faith evaluations of a reasonably competent attorney will turn out to be mistaken either as to the facts or as to what a court's judgment might be on given facts.

Id. at 1448.

"(F)or the most part, [the matter] should be left to the good sense and discretion of the trial courts ...." McMann v. Richardson, 90 S.Ct. at 1449.

Some considerations for advisability of a guilty plea are the prospect of a plea bargain, the expectation or hope of a lesser sentence, or the convincing nature of the evidence against the defendant. Tollett v. Henderson, 411 U.S. 258, 93 S.Ct. 1602, 1608, 36 L.Ed.2d 235 (1973).

In Carr, this Court concluded that counsel's performance had been deficient and that the deficiency rose to the level required to show prejudice under the two-prong standard of Strickland. The transcript from the codefendant's preliminary hearing showed that there was no link between

the defendant and the crime, unauthorized use of a movable, except for the defendant's presence as a passenger in the vehicle. The police report also contained nothing which implicated the defendant, and no probable cause was found at the codefendant's preliminary hearing. Also, the evidentiary hearing transcript included testimony from the defendant's attorney that his advice had been based on the testimony at the preliminary hearing; however, the record clearly demonstrated that the defendant had never had a preliminary hearing. Finally, the defendant's plea most likely resulted in his incarceration because he was on probation in another parish, and that probation would be revoked upon his guilty plea. In determining that the defendant had demonstrated prejudice, the Court in Carr discussed what is meant by that term when the defendant has entered a guilty plea:

> To satisfy the prejudice element under Strickland relator must show there is a reasonable probability that, but for counsel's error, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, supra, suggests the defendant's testimony is insufficient to prove he would not have pled guilty.
>
> > (W)here the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial.

> Similarly, where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the "prejudice inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial. ... (T)hese predictions of the outcome at a possible trial, where necessary, should be made objectively, without regard for the "idiosyncrasies of the particular decisionmaker." ...
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> Hill v. Lockhart, 106 S.Ct. at 370-371 [citations omitted].

Carr, pp. 5-6, 665 So. 2d at 1237.

In the instant case, the relator did not testify at the evidentiary hearing. There was also no testimony presented regarding the discrepancy in the description of the top of the tube containing the cocaine. As Mr. Wainwright noted, the discrepancy may have simply been an error, albeit one that he could have exploited on cross-examination. The trial court in its written judgment denying the relator's application concluded that the discrepancy could have been explained in a variety of ways from simple clerical error to color blindness. The court further found that a review of the record and the testimony from counsel demonstrated that the paramount reason for the defendant's plea was the bargain as to the sentence. The court found that, even if counsel had noticed the discrepancy, the defendant would still have pled to avoid a life sentence, and thus counsel's deficiency, if any, did not prejudice the defendant.

The trial court's conclusion is sound. The relator did not testify regarding his reasons for pleading guilty nor did he testify that he would not have pled guilty if his counsel had advised him of the possible line of cross-examination. However, at the motion to suppress hearing, the issue of the defendant's possible life sentence was raised by the trial court. The court urged counsel, who at that time was from O.I.D.P. and was not Mr. Wainwright, to discuss a possible plea with the defendant. At that time, the court had an opportunity to hear the defendant testify, including the defendant's admissions regarding a lengthy criminal history arising from his drug use. Furthermore, at that hearing, the defendant admitted that he had entered previous guilty pleas to avoid a life sentence despite the fact that he was not guilty.

This case is also distinguishable from Carr. In Carr the facts and law indicated that the defendant could not be convicted because there was simply no evidence that he committed the crime. Here, in contrast, the relator is arguing that counsel could have attacked the chain of custody because of the discrepancy in the color of the top. Mr. Wainwright similarly testified regarding a possible avenue of cross-examination, not that the State would be unable to lawfully prove that the defendant possessed cocaine. In other words, in Carr, even if the defendant were convicted at trial, the probability

was that such a conviction would have to be reversed because of insufficient evidence. The same is not true here.

We further note that although relator argues that his retained counsel missed the discrepancy, the appointed attorney who handled the motion hearing also apparently either missed the discrepancy or felt it was not significant as he did not cross-examine Officer Gibson about it. Therefore, although Mr. Wainwright testified that he felt he made a mistake in this case in missing the discrepancy, it does not appear that his conduct was any more deficient than appointed counsel's conduct. Finally, Mr. Wainwright never testified that he would have changed his recommendation that the defendant accept a plea bargain of ten years and not risk trial and a life sentence. Therefore, relator did not carry his burden of proving that the outcome would have been different if counsel had been aware of the discrepancy in the description of the top of the tube seized from the defendant.

WRIT APPLICATION GRANTED; RELIEF DENIED.