STATE OF LOUISIANA	*	**NO. 2000-KA-0820**
VERSUS	*	**COURT OF APPEAL**
AARON C. HILL	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
	*	

*** * * * * * ***

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 407-887, SECTION "F"
HONORABLE DENNIS J. WALDRON, JUDGE
* * * * * *
JAMES F. MC KAY, III
JUDGE
* * * * * *

(Court composed of Judge James F. McKay, III, Judge Dennis R. Bagneris, Sr., Judge Michael E. Kirby)

HON. HARRY F. CONNICK
DISTRICT ATTORNEY OF ORLEANS PARISH
ANNE M. DICKERSON
ASSISTANT DISTRICT ATTORNEY OF ORLEANS PARISH
New Orleans, Louisiana
Attorneys for Plaintiff/Appellee

DWIGHT DOSKEY
New Orleans, Louisiana
Attorney for Defendant/Appellant

AFFIRMED

STATEMENT OF THE CASE

On July 1, 1999, the State filed a bill of information charging the defendant with possession of a firearm by a felon, a violation of La. R.S. 14:95.1. On July 15, 1999, he pleaded not guilty. On August 20, 1999, a hearing on the motions was held. The trial court found probable cause and denied the motions to suppress. On September 1, 1999, trial was held. The jury found the defendant guilty as charged. On September 8, 1999 the court ordered a pre-sentence investigation, but the defendant waived the pre-sentence report and requested immediate sentencing. The trial court sentenced the defendant to ten years at hard labor without benefit of parole, probation, or suspension of sentence with credit for time served and a fine of $1,000.00. Defense counsel orally moved for an appeal, and a return date of November 15, 1999, was set. New counsel filed an application for post conviction relief on July 11, 2000. On July 19, 2000, this Court issued an order staying the appeal, and remanding the case for the purposes of the application for post conviction relief. The hearing was continued several times. On August 4, 2000, and August 16, 2000, the hearing on the post conviction application was held. On September 1, 2000, the trial court

denied the defendant's application for post conviction relief. Counsel filed a motion to withdraw on October 3, 2000, and this Court remanded the case for determination of counsel. Pursuant to appellate counsel's motion to supplement, on February 5, 2001, the record was supplemented with the transcript of the August 20, 1999 pre-trial hearing on the motions, the August 4, 2000 and August 16, 2000 post conviction hearing, and the September 1, 2000 ruling on that application for post conviction relief.

STATEMENT OF THE FACTS

Officer Paul Coleman testified that on June 15, 1999, he and his partner, Officer Damond Harris, received a domestic disturbance call at 7113 Boston Street. When they responded to the call, they observed the defendant standing in front of the residence. As the officers approached the defendant, they smelled a strong odor of alcohol on his breath. He was "being belligerent", and the officers arrested him. When Officer Harris was asked why he arrested the defendant initially, he stated that he could not leave a drunk person involved in a domestic situation. His reason was the safety of the defendant's wife or girlfriend and the officers. As soon as Officer Harris arrested the defendant for public drunkenness, he patted the defendant down and found the .22 caliber loaded chrome handgun. Officer Coleman identified the defendant in court, as well as the gun and magazine, which his

partner removed from the defendant. However, the officer up until that time had referred to the defendant as Daniel Hill instead of Aaron Hill. At that point he explained that the defendant had no identification; he gave his name as Daniel Hill; and he provided Daniel Hill's address. Officer Coleman stated that he did not find out the defendant's real name until he received the subpoena for the case.

On cross-examination Officer Coleman discussed customary procedure with a domestic disturbance call. He noted that he and his partner encountered the defendant outside the residence, and his partner, who wrote the report, apparently went inside and found the woman. Officer Coleman stayed outside and ran the defendant's name through the computer. The officer said that Officer Harris patted down the defendant and found the .25 caliber gun. On redirect the officer stated that he was sure that Officer Harris pulled the gun from the defendant' s waistband.

Officer Harris testified that on June 15, 1999, at around 5:30, he and his partner received the domestic disturbance call and responded to it. They observed the defendant standing in front of the residence, exited the police car, and asked what was going on. Due to the smell of alcohol on the defendant's breath and his slurred speech, Officer Harris asked if the defendant had been drinking. The defendant became irate, and the officers

placed him under arrest. The officer thought that the defendant's name was Daniel Hill until he went to court for motions in the current case and learned that his name was Aaron Hill. Officer Harris stated that after he arrested the defendant, he handcuffed him and searched him. The officer said that he "felt a blunt object in the right side of his waistband." He raised the defendant's shirt and removed the loaded pistol. The officer then placed the defendant into the back of the police car and knocked on the front door of the residence. A lady answered the door and said that she and the defendant had "got into a verbal altercation." The lady told the defendant to leave, and he did. Then the officers arrived and found him there. Officer Harris asked her if she owned a handgun, and she answered negatively. The officer explained that a gun had been found on the defendant. The officers found no record when the gun was run through the computer. Officer Coleman ran through the computer the name given by the defendant, Daniel Hill, and the birthdate he gave. He logged into evidence the gun, the live rounds, and the magazine.

On cross-examination Officer Harris said that he met with the defendant's girlfriend or wife in the house after the defendant had been arrested. The officer stated that he and Officer Coleman both approached the defendant and he asked him what was going on and whether he made the

domestic disturbance call to the police. The defendant stated that his "old lady" made the call; she was "tripping." The defendant was outside in front of the residence. The officer said that he put in his report that he met the defendant in front of the house. However, when defense counsel provided the report, he conceded that the report merely read: "Upon arrival at 7113 Boston, officers met with Daniel Hill…." After talking to the defendant, the officers placed him under arrest for public intoxication. After placing the seized and unloaded handgun in the front seat of the police car, he knocked on the door to speak to the person who called in the complaint. The lady stated that she and her boyfriend, the defendant, "got into a verbal altercation, and ah, he then became angry." She then asked him to leave. He refused to leave, and she called the police. The officer asked the lady if the boyfriend was the man they had placed in the police unit, and she answered affirmatively. Officer Harris said that the lady was inside the residence when the officers first arrived.

The defense called Alma Rosemond, who testified that she had been living at the Boston Street address with the defendant and her three children in June 1999. Defense counsel conferred with Ms. Rosemond in the judge's chambers. Defense counsel informed the court that Ms. Rosemond feared criminal prosecution based on the testimony she might give. The court

advised her that if she felt that something might incriminate her, she need not testify, and that no one could have her invoke a privilege in the presence of the jury. Ms. Rosemond declared that she wanted to go forward and tell the truth about everything. The court advised her that if she felt that she should not answer, she had the right to say that she did not wish to answer. The court indicated that it would then decide whether she could raise a privilege.

Ms. Rosemond testified in open court that the U.S. Department of Agriculture for almost nineteen years had employed her. She said that on June 15, 1999, the defendant called her at work, and she could tell that he had been drinking. When she went home after work, she found a couple of broken dishes and cookies scattered about. She found the defendant asleep in the bed. Ms. Rosemond stated that she wanted the police to arrest the defendant; therefore, she planted an old gun on the defendant's right side and called the police. She said that she was very angry with the defendant, who had stayed out the night before gambling and arrived at home drunk. She waited outside in her car for about twenty minutes until the police arrived. She then went back inside and let the police in. The officers asked what had happened. Ms. Rosemond told them that she wanted the defendant removed. She went upstairs, and the officers followed her to her bedroom.

The defendant was "knocked out." The officers "kind of fundle (sic) around or was touching at him." When the officer found the gun, he shook the defendant and asked him what the gun was. The defendant denied that the gun belonged to him, but the officer handcuffed him. She said that the gun was a little silver automatic weapon. Ms. Rosemond declared that the officers did not arrest the defendant outside of the residence.

On cross-examination Ms. Rosemond admitted that she and the defendant currently had a good relationship, and felt "real bad" that he was in jail because of her scars from the past. She stated that she was afraid because she saw the broken dishes and knew that the defendant was drunk. Therefore, she planted a loaded gun in his waistband and called the police. She was not sure whether she had informed the officers that the defendant was drunk, but he staggered as he got up from the bed. When asked why she had not told the State that she had planted the gun, she said that she told the A.D.A., who called and asked her to testify for the State, that she could not testify against him because she had been wrong. She did not say that she planted the gun on the defendant. She said that this was the first time she had told anyone from the State that she had planted the gun on the defendant. When the A.D.A. said that he did not understand it, Ms. Rosemond stated: "I don't either, but I – that's what happened."

On redirect Ms. Rosemond answered affirmatively when she was asked if she had been afraid of being arrested, which was the reason that she had not stated before that she planted the gun. On recross-examination Ms. Rosemond stated that she planned on a future with the defendant, and she said that the defendant did not deserve to go to jail because it was not his fault.

The defendant testified that on June 15, 1999, he had worked on his van and then he called a friend, who was to cut his hair. He and the friend consumed twelve beers before and during the haircut. He then called Ms. Rosemond at work and intended to go back to work on his van. Because he felt "a little tipsy", he went upstairs and fell asleep on the bed. When he awoke, there were police officers in the bedroom. Someone poked him in the back. Then an officer was swinging a little pistol. The defendant denied that he had ever seen the gun before. When the defendant stood up pursuant to an officer's request, he was handcuffed and arrested in the bedroom of the residence.

On cross-examination the defendant stated that he worked on the van from about 8:00 a.m.; therefore, he started drinking beer around 1:00 p.m. or 1:30 p.m. He was off that day, and he and his friend drank more than twelve beers. He went upstairs around 2:00 p.m. and was awakened by the police

officers around 5:00 p.m. He was not sure where the gun had been planted. He first saw it on the officer's finger. He did not recall breaking plates or ransacking Ms. Rosemond's house. In the police car the officer told him that he had been arrested for public drunkenness and illegal carrying of a firearm. The defendant said that the officers found his brother's driver's license in his wallet because his brother had left it when he was visiting from Alabama. The defendant claimed that his identification with his picture was also in the wallet.

When the State asked him what his prior conviction involved, defense counsel noted that there had been a stipulation. The trial court noted that once the defendant became a witness, he was subject to cross-examination on the issues. The court noted an objection for the defense. The defendant admitted that he pleaded guilty to a plea bargain for distribution of cocaine and was placed on probation for five years from 1990 to 1995.

On rebuttal Officer Harris testified that Officer Coleman drove the police car up to the residence. The defendant was standing outside the residence slightly to the left of the door. He never went upstairs or into the bedroom. After the defendant had been arrested, he knocked on the door of the residence. A lady answered, and he talked with her in the hallway. Officer Harris stated that he was positive that he did not arrest the defendant

in the bedroom. The officer said that Officer Coleman issued a citation for public drunkenness because the defendant was outside. He then searched the defendant incident to arrest and found the firearm in his waistband. On cross-examination defense counsel asked how the defendant could be perfectly coherent and publicly intoxicated. Officer Harris stated that the defendant understood what was being said and provided his name, address, and birthdate. However, he smelled of alcohol and had slurred speech. The defendant "was very obnoxious" and "became unruly…." That was why he was arrested for disturbing the peace by public drunkenness. The report did not state that he entered the residence because that did not involve the arrest of the defendant outside. There was no need for a supplemental report because the defendant had already been arrested.

ERRORS PATENT

A review of the record reveals no error patent.

DISCUSSION

ASSIGNMENT OF ERROR NUMBER 1

The defendant argues that the trial court erred by denying the continuance, and alternatively, that the trial court erred by finding at the hearing on the post conviction application that defense counsel was effective at trial.

On the morning of trial the defendant was late, and the trial court held him in contempt. Defense counsel requested a continuance "to seek out material evidence in this matter." In response to the trial court's question as to what evidence was missing, counsel stated: "Your Honor, there's some factual investigation that has come to my attention this week that needs to be performed in this matter in order to adequately defend Mr. Hill." Counsel indicated that he was searching for a missing witness, but the person was unknown to him. The trial court denied the continuance, and noted the defendant's objection.

Initially, it should be noted that under La. C.Cr.P. art. 707, motions for a continuance shall be in writing, allege specific grounds for the continuance, and, when made by the defendant, be verified by affidavit; they should be filed seven days before trial. In this case, trial counsel orally moved for a continuance on the day of trial, but apparently did not file a written motion before trial commenced. The Louisiana Supreme Court has recognized that an exception to the requirement that motions to continue be in writing exists where the circumstances that allegedly made the continuance necessary arose unexpectedly so that defense counsel did not have an opportunity to prepare a written motion. State v. Parsley, 369 So.2d 1292, 1294, (La.1979); State v. Commodore, 2000-0076 (La. App. 4 Cir.

11/21/00), 774 So. 2d 318.

> To grant or refuse to grant a motion for continuance rests within the sound discretion of the trial court. State v. Martin, 93-0285 (La. 10/17/94); 645 So.2d 190. A ruling will not be disturbed on appeal absent a clear showing of abuse of discretion, and a showing of specific prejudice caused by that denial. State v. Benoit, 440 So.2d 129 (La.1983). When a motion to continue is based upon a claim of inadequate time to prepare a defense, the specific prejudice requirement has been disregarded only when the time has been "so minimal as to call into question the basic fairness of the proceeding." State v. Jones, 395 So.2d 751, 753 (La.1981). The reasonableness of discretion issue turns upon the circumstances of the particular case. State v. Simpson, 403 So.2d 1214 (La.1981).

State v. Porche, 2000-1391, p. 6 (La. App. 4 Cir. 2/14/01), 780 So.2d 1152. See also State v. Ross, 97-0357 (La. App. 4 Cir. 12/10/97), 704 So.2d 920.

According to the docket master and minute entries, Peter Brigandi represented the defendant from July 15, 1999, when he appeared in court with the defendant to plead not guilty. He represented the defendant at the August 20, 1999, hearing on the motions and then at the September 1, 1999 trial. At the August 16, 2000 evidentiary hearing Mr. Brigandi stated that he had been retained about four to six weeks before trial, and the trial court noted that he had represented the defendant from the arraignment on July 15, 1999. Unlike the counsel in State v. Laugand, 99-1124 and 99-1327 (La. 3/17/00), 759 So.2d 34, who was appointed the day before trial and then was given one month during which he had a scheduling conflict and was

involved in a trial in another parish, defense counsel here was retained before July 15, 1999 and had time to prepare. In Laugand, defense counsel orally moved for a continuance on the day of trial and told the court that he had been unable to prepare for trial. When trial proceeded, he cross-examined witnesses and argued the case to the jury. However, the Supreme Court noted that the record showed a missing alibi witness, counsel's lack of a rudimentary knowledge of the facts of the case, and the fact that the trial court had to intervene to keep counsel from pursuing matters which appeared directly adverse to relator's interests. The Court reversed this Court's decision affirming the conviction and sentence, and remanded the case for further proceedings. Id.

In State v. Commodore, 2000-0076, at pp. 6-7, this Court discussed two Supreme Court opinions, where the convictions had been reversed after the defendant was forced to trial subsequent to the denial of a continuance:

> In State v. Simpson, 403 So.2d 1214 (La.1981), the Louisiana Supreme Court found that the trial court abused its discretion in denying the defendant's oral motion for continuance urged immediately before trial. Defense counsel in that case was a member of the Office of the Public Defender and was unaware that he was representing the defendant until the morning of trial. Defense counsel had no time to prepare for trial, and the Office of the Public Defender did not receive notice that the defendant's case was set for trial. The defendant was told that a trial date had been set but he did not communicate with his attorney. The court found that, although generally the defendant must show specific prejudice arising from the trial court's denial of a motion for a continuance, in

> that case, " defendant's right to a fair trial was substantially affected by being forced to go to trial with counsel who had no time to prepare a defense through no fault of his own." State v. Simpson, 403 So.2d at 1216. The court reversed the defendant's conviction without a discussion of whether the defendant showed specific prejudice.
>
> In State v. Knight, 611 So.2d 1381 (La.1993), the New Orleans Indigent Defender Program was appointed to represent defendant, and the case was assigned to a specific attorney. The assigned attorney represented defendant at the pretrial proceedings and succeeded in having evidence suppressed. The case subsequently was called to trial, but defendant's assigned counsel was out of town. Another attorney from the Indigent Defender Program, who was in court that day for the out-of-town attorney just to "cover" his docket, was "in effect" appointed as defendant's new counsel by the trial court. Despite this new defense counsel's ignorance of the case, the trial court denied a continuance and proceeded to trial. The Supreme Court reversed defendant's conviction, stating the trial court had constructively denied defendant counsel.

In Commodore, Sandra Alessi, an OIDP attorney, was substituted on the day of trial for the OIDP attorney who had handled the pre-trial matters and was familiar with the case. Counsel orally moved for a continuance because she never had an opportunity to speak to the defendant before the morning of trial, and she had not been able to prepare to go to trial. This Court concluded that in light of Simpson and Knight, the trial court had abused its discretion in denying the motion to continue and reversed the conviction. Id. at p. 7.

Unlike counsel in Laugand and Commodore, here trial counsel did

not allege that he was totally unprepared. He claimed that an investigation had come to his attention the week of trial and that he was looking for an unknown missing witness. Although appellate counsel claims that the witness sought was someone who could support Alma Rosemond's claim that the police were "unwitting dupes" of her attempt to frame Aaron Hill and that the officers lied when they said that they arrested him outside the residence, counsel told the trial court only that there was a missing witness, who was unknown to him. Under the circumstances, the trial court did not abuse its great discretion when it denied the motion to continue.

Alternatively, the defendant argues that the trial court erred by finding that his counsel was effective. Generally, the issue of ineffective assistance of counsel is a matter properly addressed in an application for post conviction relief, filed in the trial court where a full evidentiary hearing can be conducted. State v. Prudholm, 446 So.2d 729 (La. 1984). This Court stayed the defendant's appeal and remanded this case in order for the defendant to file his post conviction application alleging ineffective assistance of counsel and for the trial court to hold an evidentiary hearing and to rule. On September 1, 2000, the court denied the application. The defendant's application for post conviction relief filed by Earl Maxwell asked that "a new trial be granted for the reason that his counsel at trial was

ineffective." The application made no further argument, and no memorandum relating to the application is in the record.

A defendant/petitioner in an application for post conviction relief has the burden of proving that relief should be granted. La. C.Cr.P. art. 930.2. A defendant's claim of ineffective assistance of counsel is to be assessed by the two-part test of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984); State v. Fuller, 454 So.2d 119 (La. 1984). The defendant must show that counsel's performance was deficient and that the deficiency prejudiced the defendant. Counsel's performance is ineffective when it can be shown that he made errors so serious that counsel was not functioning as the "counsel" guaranteed to the defendant by the Sixth Amendment. Strickland, 466 U.S. at 686, 104 S.Ct. at 2064. Counsel's deficient performance will have prejudiced the defendant if he shows that the errors were so serious as to deprive him of a fair trial. To carry his burden, the 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 693, 104 S.Ct. at 2068; State v. King, 2000-0618 (La. App. 4 Cir. 3/7/01), 782 So.2d 654. The defendant must make both showings to prove that counsel was so

ineffective as to require reversal. State v. Porche, 2000-1319, at p. 7.

At the August 4, 2000 evidentiary hearing on the defendant's application for post conviction relief, Sherry Hill, the defendant's sister, testified that Ms. Rosemond called her at work on the day of the arrest. Ms. Rosemond told Sherry that she was calling the police and having the defendant arrested because he was asleep in her bedroom. Sherry called her mother, who picked her up and went to Ms. Rosemond's residence. By the time they arrived, the officers had already arrested the defendant and taken him away.

Elmira Hill, the defendant's mother, testified that Sherry called and told her that Ms. Rosemond would call the police and have the defendant arrested if Sherry did not pick up her brother. By the time she and Sherry arrived, the officers had already arrested her son. Elmira Hill said that she knew about the defendant's trial because Ms. Rosemond called her. Peter Brigandi, defense counsel, did not call her. When she called Mr. Brigandi to find out what happened, he said that "he [sic] under the impression that Aaron had come down to get his court date set back. He didn't know that he was going to trial. And when he got here, he went to trial. And he didn't have no witnesses, just he and Ms. Rosemond." She stated that she was not at trial because she had not been notified. The defendant thought that he was

having his court date set back. When Elmira Hill was asked if there were witnesses who saw what transpired during her son's arrest, she answered affirmatively. She said that she never gave Mr. Brigandi the names because he was withdrawing from the case, and he never asked for the names.

On cross-examination Elmira Hill said that she was not present when her son was arrested. She acknowledged that her son knew the names of the witnesses, and she could not explain why he did not tell his attorney.

Alma Woodfork, Elmira Hill's friend who also knew Alma Rosemond, testified that Ms. Rosemond approached her in June 1999. Ms. Rosemond told Woodfork that she did not want the defendant living with her anymore, and she planted a loaded gun on him in order to get him out of her house. Ms. Rosemond stated that she did not want him to be arrested for a felony; she wanted the police officers to put him out of her house. Ms. Rosemond told Ms.Woodfork that she testified and told the jury the truth, but the jurors did not believe her. Ms. Rosemond told Ms. Woodfork that she met the officers, took them upstairs, and led them into the bedroom where the intoxicated defendant was sleeping. That was where he was arrested.

Denise Burthlong, who knew the defendant from the Winn Dixie store and was not a close friend, testified that on June 15, 1999, she was on her

way to the house of her cousin, Joyce Lafleur, when she saw the defendant in handcuffs exiting a house on Boston Street with two police officers. She stated that she never contacted the defendant, Elmira Hill or Sherry Hill. She spoke to Earl Maxwell, the defendant's attorney, a month before the hearing.

Bennie Bryant, who knew the defendant as an employee in the meat department of Winn Dixie, testified that he saw the defendant and two officers exiting a house as he and his mother drove by on July 15, 1999. The officers were taking the defendant from the house in handcuffs. Lucretia Porter, Bennie's mother, testified that she knew the defendant only because he worked at Winn Dixie. She was driving up Boston Street heading toward her home when she saw the defendant being taken from the house in handcuffs by two police officers. She said that she told the defendant's mother what she had observed that day and was contacted months before the hearing.

On August 16, 2000, Peter Brigandi, defense counsel at trial, testified that he requested a continuance on September 1, 1999, the day of trial, because there "had been some recently discovered witnesses, unidentified witnesses, but I had motioned the Court for time to discover their identity." He spoke to Ms. Rosemond before that day and was aware of what her

testimony would be. Mr. Brigandi stated that he believed that he had notified Ms. Rosemond of the trial date. He had also spoken to the defendant prior to trial and had said that he intended to request a continuance.

On cross-examination Mr. Brigandi stated that he had been retained by the defendant "probably four to six weeks prior to the trial, just knowing the procedures in Division "F" here, but honestly I don't recall." The trial court noted that Mr. Brigandi had represented the defendant at the arraignment on July 15, 1999, and trial was held a little less than two months later on September 1, 1999; he was with the case from the outset. The sources of the unidentified witnesses were the defendant and Ms. Rosemond. However, Mr. Brigandi noted that "subsequent to the trial … numerous witnesses came in contact" with him. However, he did not have a list of those names.

Elmira Hill testified a second time and said that she did not know that the defendant was going to trial on September 1, 1999. He had been told to meet his counsel at court. The State objected to Hill's testimony as repetitive, and the court overruled the objection. Ms. Rosemond called her for a ride from her work to the court because she had been notified that she was needed there. Elmira Hill had been told that the case was being set back

to a later date. The defendant had told her that he did not need witnesses that day because the trial was going to be set back. She said that the defendant did not have a chance to get his witnesses together. When Elmira Hill spoke to Ms. Rosemond again, she was informed that the defendant was in jail. Elmira Hill explained that she did not know that trial was held "[b] ecause we hadn't finished paying Mr. Brigandi and he was going to get the trial set back."

The defendant testified that Peter Brigandi called him, and that he went to his attorney's office on the last Monday in August. He was told that trial was set for Wednesday, September 1, 1999, but Mr. Brigandi said that he was "going to get a continuation." The defendant was out on bond. He arrived in court on the day of trial at 8:20 a.m. because he was held up in traffic. He was not present for the motions hearing. The defendant stated that he retained Mr. Brigandi at the end of June 1999. He conceded that Mr. Brigandi asked questions at trial, cross-examined the State's witnesses, and called him and Ms. Rosemond to testify. When the defendant was asked whether Mr. Brigandi made an argument or spoke to the jury before or after the trial, he stated that his attorney asked the jurors where they worked and the length of time they worked there. When the defendant was asked if his attorney then helped to pick the jury, he answered that he had no idea what

he was doing. The defendant conceded that Mr. Brigandi was talking to people; he was doing something.

At the end of the hearing, Earl Maxwell noted that there were subpoenas with non-existent addresses, but the testimony of the two additional witnesses would have been repetitious. Counsel waived their appearance.

On September 1, 2000, the trial court noted that defense counsel requested a continuance on September 1, 1999, before trial. The court noted that it reviewed the pertinent portions of Alma Rosemond's trial testimony. The court noted that a motion for a new trial was before it. Defense counsel argued:

> The salient fact of all the witnesses is that Mr. Hill was brought from inside the house in handcuffs which is contradictory to the testimony of the two police officers, and there was one witness that corroborated the testimony of Alma Rosemond, that she was approached and talked to the next day about what she had done. And I think on the basis of all the witnesses as to how he was taken from the house tend to corroborate his testimony and that of Alma Rosemond and that he would be entitled to a new trial.

The trial court then denied the motion.

Appellate counsel makes a number of arguments in brief that were not contained in the defendant's application for post conviction relief and do not appear to have been made before the trial court at the evidentiary hearing.

Appellate counsel contends that trial counsel was unprepared to go to trial on September 1, 1999, and attempted to continue the trial. According to the defense brief, trial counsel needed witnesses to back up Alma Rosemond's testimony that she manipulated the police officers into arresting the defendant by planting a gun on him. Although Ms. Rosemond testified for the defense, her credibility suffered because she started out with the dishonest action of allegedly planting a weapon on the defendant. Because trial counsel had no disinterested witness to support Rosemond's testimony, the defendant testified. Appellate counsel alleges that other witnesses were available to confirm Ms. Rosemond's story, but defense counsel was not prepared to call them at trial. Trial counsel testified at the hearing that he knew about possible witnesses from the defendant and Ms. Rosemond, but he did not have names on the day of trial; however, after trial witnesses contacted him.

Appellate counsel names Alma Woodfork, a family friend to whom Ms. Rosemond confided that she had framed the defendant, and Sherry Hill, the defendant's sister called by Ms. Rosemond on June 15, 1999, and told that the police were being called unless she could remove her brother from Ms. Rosemond's bed where he was sleeping. Appellate counsel alleges that Denise Burthlong, Bennie Bryant, and Lucretia Porter, who only knew the

defendant as an employee at Winn Dixie, could have testified that they saw the defendant in handcuffs being led from the residence on Boston Street. Their testimony would have directly contradicted the testimony of the police officers, who stated that the defendant was arrested outside for public drunkenness, and it would have bolstered the testimony of Ms. Rosemond and the defendant that he was arrested inside the residence. The credibility of Alma Woodfork and Sherry Hill would have been suspect because one was a friend and the other was the defendant's sister. The other witnesses could only have testified that they saw the defendant handcuffed as he was exiting the residence on Boston Street, and their very brief observations occurred as they were driving by. Although appellate counsel argues that trial counsel was not prepared and was thus ineffective, at the evidentiary hearing Mr. Brigandi was not asked why he did not know about the possible "unidentified" witnesses prior to the week of trial or discover their names prior to the trial date. Apparently the trial court was not convinced that the defendant was prejudiced or denied a fair trial in light of the trial counsel's failure to produce those witnesses at trial.

Appellate counsel also argues that trial counsel was in a position to impeach the trial testimony of Officer Harris, who stated that he knocked on the door and spoke to Ms. Rosemond after arresting the defendant. Counsel

notes that at the August 20, 1999 hearing on the motions, Officer Harris stated that after the defendant's arrest, the lady, who had called the police, "came home, and I spoke with her." He testified that the defendant's girlfriend had a key. He said: "She went inside and we went inside behind her and spoke with her inside, not in his presence." He later said: "When the owner arrived home, the complainant arrived home, I spoke with her inside the residence." Appellate counsel argues that Officer Harris' hearing testimony would have impeached his trial testimony, and it would have impeached Officer Coleman's trial testimony that he never entered the residence. However, these arguments are not persuasive. At the motions hearing Officer Harris is not clear whether he went inside and spoke to Ms. Rosemond or both he and Officer Coleman went inside. He used "we" at one point and "I" at another point. It is also not clear Ms. Rosemond arrived home after the officers or she exited her car where she waited for the police and let the officer(s) into the residence. Alma Rosemond testified that after she called the police, she went outside and waited in her car about twenty minutes until the police arrived. She testified: "So when the police came, I – then I proceeded to my – and let them inside the house."

Appellate counsel also claims that trial counsel did not know the law because he availed himself of the opportunity afforded by the trial court not

to name the defendant's prior felony because it was stipulated under Old Chief v. United States, 519 U.S. 172, 117 S.Ct. 644 (1997), that he had a prior felony conviction. Counsel correctly notes that the court referred to the stipulation when the prosecutor asked Officer Coleman how the defendant was charged with being a felon in possession of a firearm. Appellate counsel also states that "apparently the nature of the predicate felony (possession with intent to distribute crack cocaine) was not mentioned in voir dire." However, the voir dire examination was not transcribed except for the portion involving the one State objection, which related to trial counsel's statement about reasonable doubt. Appellate counsel did not attempt to supplement the record with that transcription even though counsel filed a motion to supplement the record with the transcripts of several hearings. Yet appellate counsel seeks to use the alleged lack of a reference to the defendant's prior conviction during voir dire to conclude that trial counsel "unwittingly had maneuvered himself into the worst possible position." Appellate counsel argues that Mr. Brigandi did not ask the prospective jurors any questions about their hatred for narcotics dealers, and he allowed the defendant to take the stand and be questioned about the prior crime in order to have the defendant tell the jury that he knew nothing about the gun that appeared on him after he woke up. The trial court was there for

voir dire examination as well as the defendant's trial testimony. Apparently the court was not convinced that trial counsel's lack of knowledge denied the defendant a fair trial.

The decision to call a defendant to the witness stand, in light of his prior convictions, falls "within the ambit of trial strategy" and does not establish ineffective assistance of counsel. State v. Lambert, 98-0730 (La. App. 4 Cir. 11/17/99), 749 So.2d 739, writ denied, 2000-1346 (La. 1/26/01), 781 So.2d 1258. Moreover, as "opinions may differ on the advisability of a tactic, hindsight is not the proper perspective for judging the competence of counsel's trial decisions. Neither may an attorney's level of representation be determined by whether a particular strategy is successful." State v. Bordes, 98-0086, p. 8 (La. App. 4 Cir. 6/16/99), 738 So.2d 143, 147, quoting State v. Brooks, 505 So.2d 714, 724 (La. 1987). See also State v. Harrison, 2000-0213 (La. App. 4 Cir. 2/21/01), 782 So.2d 86.

The defendant was represented by different counsel for the trial (and pre-trial), the application for post conviction relief (and the evidentiary hearings), and the appeal. The trial court was there for the hearing on the motions, the oral motion to continue on the morning of trial, the trial, the sentencing, and the evidentiary hearing on the defendant's application for post conviction relief seeking a new trial. The court was aware of what

happened at all of the proceedings. The defendant failed to prove that there was a reasonable probability that but for his trial counsel's errors, the result would have been different. Under the circumstances, it does not appear that the trial court erred by denying the defendant's application for post conviction relief and not granting him a new trial.

This assignment of error lacks merit.

Accordingly, we affirm the defendant's conviction and sentence.

AFFIRMED