

STATE OF LOUISIANA

*

NO. 2001-K-0442

VERSUS

*

COURT OF APPEAL

MICHAEL ROBINSON

*

FOURTH CIRCUIT

*

STATE OF LOUISIANA

*

*

ON SUPERVISORY WRIT DIRECTED TO
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 364-405, DIVISION "F"
HONORABLE DENNIS J. WALDRON, JUDGE

JOAN BERNARD ARMSTRONG

JUDGE

(Court composed of Judge Joan Bernard Armstrong, Judge Steven R.
Plotkin and Judge David S. Gorbaty)

LAURIE A. WHITE
LAW OFFICE OF LAURIE A. WHITE
633 CARONDELET STREET
NEW ORLEANS, LA 70130

COUNSEL FOR DEFENDANT-RELATOR

WRIT DENIED.

On July 8, 1993, the defendant-relator was indicted for one count of aggravated rape. On January 25, 1994, at the close of a two-day trial, a twelve-member jury found him guilty of forcible rape. On July 22, 1994, the trial court found him to be a second offender, and on July 27, 1994 he was sentenced to serve forty years at hard labor without the benefit of parole, probation, or suspension of sentence. On appeal, this court affirmed his conviction and sentence in an unpublished opinion. State v. Robinson, 95-1642 (La. App. 4 Cir. 4/24/96).

On April 27, 1999, the defendant filed an application for post conviction relief and, by the trial court's leave, he filed a supplemental application on December 2, 1999. The matter was reset several times, and the court overruled the State's procedural objections. The court held hearings on the application on September 28, 2000 and November 17, 2000. At the conclusion of the November 17, 2000 hearing, the court denied the application. On December 1, 2000, the defendant noted his intent to seek writs and was granted until March 1, 2001 to do so. His application was mailed on March 1, 2001 and received by this court on March 6, 2001.

Initially, it must be noted that the post conviction application that

formed the basis of the ruling from which the relator seeks relief was timely filed in the trial court. The relator's conviction and sentence became final on May 8, 1996, fourteen days after this court rendered its opinion in this case. The application was filed in the trial court on April 27, 1999, less than three years after the conviction and sentence became final. See La. C.Cr.P. art. 903.8, as it existed in 1996. Thus, the trial court properly considered the merits of the application.

In his application before this court, the relator makes four arguments: (1) the trial court erred by refusing to admit the victim's statement to the police and to medical personnel that she had been raped twice previously; (2) counsel was ineffective for failing to conduct an investigation into the victim's prior allegations of rape; (3) the State withheld exculpatory evidence by not providing information concerning the victim's prior allegations of rape; and (4) the relator's due process rights were violated because the trial court failed to impose an original sentence prior to adjudicating him a multiple offender and imposing a sentence in accordance with this adjudication. With respect to the last claim, the relator is estopped from raising this claim in an application for post conviction relief. See State ex rel. Melinie v. State, 93-1380 (La. 1/12/96), 665 So.2d 1172.

The first three claims arise from the discovery that when the victim

was taken to Jo Ellen Smith Hospital, she told medical personnel there she had been raped twice previously. This information was contained in a supplemental police report which was produced for the defense prior to trial. By his first claim, he argues that the trial court erred by refusing to allow him to introduce this evidence to impeach the victim. By his second claim, he argues counsel was ineffective for failing to investigate these prior rapes. By his third claim, he contends the State withheld exculpatory evidence because it did not investigate and turn over evidence of these prior rape claims.

The first claim was raised and rejected in the relator's appeal, based primarily upon this court's holding that such evidence is not allowed under La. C.Cr.P. art. 412. This court stated:

Defendant asserts that the trial court erred by refusing to admit evidence of the conflicting histories given by R.C. in her medical reports. Specifically, he refers to the medical report of JoEllen Smith Hospital, wherein it is reported that R.C. informed a nurse that she had been raped twice in the past. He notes that the medical report from Charity Hospital contains no such statement. Defendant insists that the absence of a similar statement in the Charity report constitutes a prior inconsistent statement which could have been used to impeach R.C.'s credibility. Defendant contends that because the only issue was whether the sexual activity was consensual and the physical evidence was "ambiguous" on this point, it was imperative that he be allowed to impeach R.C.'s credibility.

The introduction of prior sexual activity of a rape victim is controlled by La. C.E. art. 412, which provides:

A. Opinion and reputation evidence. When an accused is charged with a crime involving sexually assaultive behavior, reputation or opinion evidence of the past sexual behavior of the victim is not admissible.

B. Other evidence; exceptions. When an accused is charged with a crime involving sexually assaultive behavior, evidence of specific instances of the victim's past sexual behavior is also not admissible except for:

(1) Evidence of past sexual behavior with persons other than the accused, upon the issue of whether or not the accused was the source of semen or injury; provided that such evidence is limited to a period not to exceed seventy-two hours prior to the time of the offense, and further provided that the jury be instructed at the time and in its final charge regarding the limited purpose for which the evidence is admitted; or

(2) Evidence of past sexual behavior with the accused offered by the accused upon the issue of whether or not the victim consented to the sexually assaultive behavior.

C. Motion. (1) Before the person

accused of committing a crime that involves sexually assaultive behavior may offer under Paragraph B of this Article evidence of specific instances of the victim's past sexual behavior, the accused shall make a written motion in camera to offer such evidence. The motion shall be accompanied by a written statement of evidence setting forth the names and addresses of persons to be called as witnesses.

(2) The motion and statement of evidence shall be served on the state which shall make a reasonable effort to notify the victim prior to the hearing.

D. Time for a motion. The motion shall be made within the time for filing pre-trial motions specified in Code of Criminal Procedure Article 521, except that the court shall allow the motion to be made at a later date, if the court determines that:

(1) The evidence is of past sexual behavior with the accused, and the accused establishes that the motion was not timely made because of an impossibility arising through no fault of his own; or

(2) The evidence is of past sexual behavior with someone other than the accused, and the accused establishes that the evidence or the issue to which it relates is newly discovered and could not have been obtained earlier through the exercise

of due diligence.

In the instant case, we find that the trial court was justified in denying defendant's motion for two reasons. First, defendant did not comply with the procedures set forth in Article 412. No written motion was filed. The record shows defendant waited until the second day of trial before indicating that he wanted to introduce evidence of "prior inconsistent statements." See, *State v. Billings*, 93-1542 (La. App. 3rd Cir. 5/4/94), 640 So.2d 500, *writ den.*, 94-1437 (La. 10/7/94), 644 So.2d 631.

Second, even assuming that the issue had been properly and timely raised, the trial court still did not err in refusing to admit the evidence. Evidence of the two earlier rapes would not be admissible under either of the two exceptions mandated in article 412. The source of the semen was not in dispute. Defendant admitted having sex with R.C. Nor did the evidence concern prior sexual acts between defendant and R.C. Instead, the evidence only concerned alleged rapes in the past by other men. Defendant argues that this evidence constitutes evidence of "prior inconsistent statements" for impeachment purposes. We disagree.

The victim's reporting of the prior rapes to Jo Ellen Smith Hospital and not to Charity Hospital does not render the statement inconsistent. The victim may have failed to mention them to the Charity personnel or the Charity personnel may have failed to record the statements. Regardless, the fact that whether [sic] R.C. had been previously been raped is not relevant to the issue of whether she was raped by defendant. There was absolutely no probative value in the evidence sought to be introduced. Physical evidence was found that corroborated

forced sex. The victim had marks on her neck consistent with attempted strangulation. She sustained bruises on her thighs and two lacerations in the vaginal area. Defendant's trial testimony that the sex was gentle and that R.C. did not have these marks on her when she left his apartment are not consistent with the physical evidence. Simply put, this is not a case of the victim's word against the defendant's word.

State v. Robinson, 95-1642 pp. 6-8 (La. App. 4 Cir. 4/24/96).

The relator acknowledges that this court so ruled, but he argues that later jurisprudence from the Supreme Court proves he should have been allowed to introduce this evidence. He cites State v. Smith, 98-2045 (La. 9/8/99), 743 So.2d 199, where the court considered the defendant's right to impeach the victim of a sexual crime with evidence that she had made prior *false* allegations of sexual abuse by another person. The court held: "We conclude that when a defendant seeks to introduce evidence that the victim made prior false allegations of molestation, the issue is one of credibility and La. C.E. art. 412 is inapplicable." Id. at p.1, 743 So.2d at 200. The Court reasoned that the purpose of introducing evidence of prior false allegations of sexual abuse was not to show the victim had engaged in sexual activities in the past, as prohibited by art. 412, but rather its introduction was for impeachment purposes. The Court stated: "Because the evidence defendant attempted to introduce did not concern the victim's prior sexual behavior,

history, or reputation for chastity, we conclude that prior false allegations of sexual assault by the victim do not constitute ‘past sexual behavior’ for purposes of our rape shield statute.” *Id.* at p. 5, 743 So.2d at 202. The Court noted that because such evidence does not fall within the purview of art. 412, there is no need to hold a hearing as set forth in art. 412 prior to the introduction of such evidence. The Court instead set forth the following standard for determining the admissibility of such evidence:

[W]hen considering the admissibility of such evidence, the question for the trial court is not whether it believed the prior allegations were false, but whether reasonable jurors could find, based on the evidence presented by defendant, that the victim had made prior false accusations. See *Huddleston v. United States*, 485 U.S. 681, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988) (in ruling on the admissibility of other crimes evidence, the district court "neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance, [but] simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact ... by a preponderance of the evidence"). In *Ellison v. State*, 198 Ga.App. 75, 400 S.E.2d 360, 361 (1990), the court reviewed a trial court's ruling that the defendant failed to carry his burden of proving that previous allegations were false. The court stated,

In our view, the trial court abused its discretion in determining that there was no reasonable probability that the prosecutrix had made prior false allegations. The prosecutrix admitted the prior accusation (albeit she did not

concede that the accusation was false) and defendant presented the testimony of an independent third party that the prior accusation was false. Defendant could hardly have made a clearer showing. The trial court erred in excluding the defendant's evidence of prior false accusations.

Likewise, in the instant case, the victim admitted, and other witnesses agreed, that she had accused her cousin of improper sexual behavior. Defendant presented the testimony of M.S. who stated that shortly after making accusations which T.S. denied, the victim recanted those accusations. We conclude the evidence presented by defendant is sufficient to allow reasonable jurors to find that the victim has made false allegations of molestation in the past. As such, this evidence directly concerning the victim's credibility could have been admitted provided the trial court determined it met all other standards for admissibility.

Id. at p. 6, 743 So.2d at 203. The Court further noted that any evidence of a false claim of sexual assault must also meet the requirements of La. C.E. arts. 403 (exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time), 404 (character evidence), and 607, 608, and 613 (impeachment evidence) in order to be admissible. Because the victim had admitted she had falsely accused her cousin of sexually assaulting her, the Court found that the trial court erred by not allowing the defense to present this evidence.

In State v. Judge, 99-1109 (La. App. 3 Cir. 3/1/00), 758 So.2d 313, the defendant was accused of sexual battery. The trial court refused to allow the defense to present evidence that the victim had told a police officer that she had been raped a few years earlier, but she had not reported the crime. The defendant proffered the victim's testimony, wherein she testified an ex-boyfriend had raped her a few years earlier, but she did not tell anyone until much later that it had happened. On appeal, the defendant contended the trial court erred by not allowing this evidence to be presented to the jury. The appellate court found no error, noting:

In the present case, there was no such evaluation of evidence by the trial court, although he permitted a proffer which consisted of the victim's testimony. However, the evidence proffered by the Defendant was not sufficient for a reasonable juror to find that the victim had made a prior false allegation. *No evidence was presented to rebut the victim's testimony that she was previously raped.* The fact that she did not report the rape to the police does not, by itself, indicate that the event did not occur. Therefore, we find no error in the trial court's decision to exclude evidence of prior rape allegations by L.L.

Id. at p. 9, 758 So.2d at 319 [emphasis added].

Likewise, in State v. Frith, 32,796 (La. App. 2 Cir. 12/8/99), 747 So.2d 1269, the defendant was convicted of forcible rape. He sought to present the testimony of another man who would state that the victim had

falsely accused him of having carnal knowledge of her. The man had been charged with sexual battery and had pled guilty to contributing to the delinquency of a minor. The man would testify that the victim had lied about the incident and that he pled guilty to the lesser charge in order to be released from jail. The court excluded this testimony, noting it had taken the man's plea and had learned from the victim's mother that the victim and the man had a sexual relationship. On appeal, the court upheld the trial court's ruling, noting the defense presented no evidence that the victim had ever recanted her allegation nor any independent witness to testify that the allegation was false. The court found that reasonable jurors could not have found that the victim's prior allegation of sexual assault was false. The court further found that even if the trial court's ruling was in error, such error was harmless, given the victim's testimony, the corroborating medical evidence of rape, and the testimony that the defendant bragged about the rape.

In State v. Wallace, 00-1745 (La. App. 5 Cir. 5/16/01), ___ So.2d ___, 2001 WL 520943 (see attached), the defendant was charged with forcible rape and sought to introduce evidence of prior false allegations by the victim of sexual assault. The sole evidence to support this claim was the defendant's testimony that the victim told him he had been abused at school.

The defendant sought to show that the defendant had used this excuse to explain why he missed so much school, and he argued that the victim had falsely accused him of rape in an attempt to avoid punishment for skipping school and running away from home. The court refused to allow the defendant to introduce this testimony. The appellate court upheld this ruling, noting that there was no evidence other than the defendant's own testimony that the victim had made these allegations. The court found that reasonable jurors, hearing this evidence, would not have found that the victim had made prior false accusations.

Here, the relator argues that his right to confrontation was violated because he was not allowed to introduce evidence that the victim stated she had been raped twice in the past. He argues this evidence could have been used for impeachment purposes. However, the trial court did not err by refusing to allow the defense to present evidence of the victim's statement that she had been raped twice in the past because *there was no evidence that this statement was false*. In addition, there is no indication that the victim ever reported these prior rapes. The only possible impeachment value this evidence would provide would be if there was evidence that the victim's allegations were false. In the absence of any indication the victim had falsely accused someone in the past of rape, the evidence that she told

someone she had been raped twice in the past has no impeachment value because the possibility of a prior rape would not impair her credibility. The fact that she may have been raped in the past has no bearing on whether she was raped in the instant case. There was no evidence presented which would have led reasonable jurors to believe the victim had falsely accused anyone of sexual assault in the past. Thus, Smith and its progeny is inapplicable, and the trial court properly barred this evidence.

In his second claim relator argues trial counsel was ineffective for failing to investigate these claims of prior rapes. In State v. Mims, 97-1500 pp. 44-45 (La. App. 4 Cir. 6/21/00), 769 So.2d 44, 72, this court discussed the standard to be used to evaluate an effective assistance of counsel claim:

The defendant's claim of ineffective assistance of counsel is to be assessed by the two-part test announced in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). See *State v. Fuller*, 454 So.2d 119 (La.1984). The defendant must show that his counsel's performance was deficient and that this deficiency prejudiced him. The defendant must make both showings to prove counsel was so ineffective as to require reversal. *State v. Sparrow*, 612 So.2d 191, 199 (La.App. 4 Cir.1992). Counsel's performance is not ineffective unless it can be shown that he or she made errors so serious that he or she was not functioning as the "counsel" guaranteed to the defendant by the 6th Amendment of the federal constitution. *Strickland, supra*, at 686, 2064. That is, counsel's deficient performance will only be considered to have prejudiced the defendant if the defendant shows that the errors were so serious

that he was deprived 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." *Id.* at 693, 2068.

This issue was also raised and rejected by this court in the relator's appeal. The relator now argues trial counsel was ineffective because it was unclear if he investigated the prior rapes claimed by the victim. However, at the September 28, 2000 hearing on the post conviction relief application, trial counsel stated he learned of the victim's statement about the rapes made at Jo Ellen Smith Hospital, but he indicated he never had the opportunity to question the victim about these prior rapes. Counsel indicated he was not able to learn anything else about these alleged rapes. He testified he wanted to introduce evidence that she had made these allegations at the first hospital while not making them at the second hospital, stating he "thought it was very germane to the case that I be able to show that this allegedly happened to her on two other occasions." Counsel incorrectly stated: "There was no bruising, there was [sic] no injuries, there were no allegations of force, other than out of her mouth." He then admitted; "I don't see any evidence that there was a false allegation."

Given this testimony, it does not appear trial counsel was ineffective.

He testified he considered this evidence important but was not able to interview the victim and did not learn any additional information through discovery. He further admitted there was no indication the statement involved false allegations of rape, which as discussed above would be the only basis for the introduction of this evidence. In the absence of any indication this statement involve false claims, the defense can show no prejudice. As noted by this court in the relator's appeal:

If defendant's conviction was based only on R.C.'s testimony, perhaps defendant's argument would be persuasive. However, as we previously noted, the physical evidence corroborates R.C.'s accusations that sex was not consensual.

All the witnesses who observed and examined R.S. testified to the marks and bruises on her neck which were consistent with strangulation as well as to the bruises on her thighs and lacerations to her vagina. Both examining physicians testified that the bruises and marks were not consistent with 'passion marks' and that a great deal of force was used.

State v. Robinson, 95-1642 at p. 10. There was no indication the statement about the prior rapes was false, and the other physical evidence supported a finding of nonconsensual sex. The relator has failed to show prejudice. Thus, the trial court properly denied the ineffective assistance of counsel claim.

By the third claim the relator contends the State withheld exculpatory

evidence. To comport with the dictates of the due process clause of the Fourteenth Amendment, the State must disclose to the defense evidence which is favorable to the defense and is material to guilt or punishment. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963); State v. Porter, 98-0279 (La. App. 4 Cir. 3/15/00), 756 So.2d 1156. Included in this rule is evidence which impeaches the testimony of a witness whose credibility or reliability may determine guilt or innocence. Giglio v. U.S., 405 U.S. 150, 92 S.Ct. 763 (1972). "[T]he prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial, that is, evidence favorable to the defendant which is material to guilt or punishment." State v. Rosiere, 488 So.2d 965, 970 (La. 1986). See also Porter.

Materiality was defined in U.S. v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383 (1985): "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." The same test is to be employed whether or not the defense makes a pretrial request for exculpatory evidence. Bagley; Phillips.

In Kyles v. Whitley, 514 U.S. 419, 434-435, 115 S.Ct. 1555, 1565-1566 (1995), the Court discussed "materiality":

Although the constitutional duty is triggered by the potential impact of favorable but undisclosed evidence, a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculcate the defendant). . . . Bagley's touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the Government's evidentiary suppression "undermines confidence in the outcome of the trial." Bagley, 473 U.S., at 678, 105 S.Ct., at 3381.

The second aspect of Bagley materiality bearing emphasis here is that it is not a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. One does not show a Brady violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

Here, the relator argues the State withheld exculpatory evidence. He argues that the State is required to produce any information of *any* prior report of rape, and he further argues that once the State learned of the victim's statement that she had been raped in the past it had "a duty to investigate whether [the victim's] statements were true or false and provide details of these statements to the defense: i.e. who was the alleged perpetrator, whether charges were filed, were there any witnesses to these incidents, were there ever any formal charges or were these determined to have been made falsely or inaccurately." In essence, he is not alleging that there was anything in the State's possession concerning these prior rapes, but he asserts that Brady and Kyles dictate that the State has an obligation to investigate to find exculpatory evidence. Neither of these cases nor their progeny places upon the State an affirmative duty to find exculpatory evidence; the cases merely compel the State to produce any exculpatory evidence it may have in its possession. In the absence of any indication that there is exculpatory evidence in the State's possession, this claim also fails. It must be reiterated that there was no evidence that the victim made any report of these alleged prior rapes; the statement was merely that she had been raped twice in the past. This claim has no merit.

For the foregoing reasons, the trial court did not err by denying the

defendant-relator's application for post conviction relief. Accordingly, this writ is denied.

WRIT DENIED.