

**STATE OF LOUISIANA**

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**NO. 2002-KA-1868**

**VERSUS**

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**COURT OF APPEAL**

**DONALD DEGRUY**

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**FOURTH CIRCUIT**

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**STATE OF LOUISIANA**

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APPEAL FROM  
CRIMINAL DISTRICT COURT ORLEANS PARISH  
NO. 423-502, SECTION "I"  
HONORABLE RAYMOND C. BIGELOW, JUDGE

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**JAMES F. MCKAY III**  
**JUDGE**

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(Court composed of Judge Patricia Rivet Murray, Judge James F. McKay III,  
Judge Edwin A. Lombard)

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**AFFIRMED; MOTION TO WITHDRAW  
GRANTED**

**STATEMENT OF CASE**

The defendant Donald DeGruy was charged by bill of information on July 27, 2001, with armed robbery in violation of La. R.S. 14:64. He pleaded not guilty at his August 14, 2001, arraignment. On January 14, 2002, a twelve-person jury was unable to reach a verdict. On February 21, and 22, 2002, the defendant was re-tried and a twelve-person jury found the defendant guilty as charged. On March 22, 2002, the defendant pled guilty to a multiple bill alleging him to be a triple offender. On that same date, after waiving all delays in sentencing, the defendant was sentenced to sixty-six years without the benefit of probation, parole or suspension of sentence with credit for time served. The trial court granted the defendant's appeal.

**STATEMENT OF FACT**

Emma Porter, an Esplanade Pharmacy employee, testified that on May 8, 2001, at approximately 10:30 a.m. two clean-cut young men entered the pharmacy. One of the men walked to the pharmacy counter in the rear of the store, the other man took a drink out of the drink cooler and walked over to the front counter where Ms. Porter stood near the cash register. Ms. Porter

further testified that as she rang up the man's drink she heard the pharmacist scream. As the pharmacist was screaming, the man up front walked behind the counter with a larger butcher type knife in his hand and demanded that Ms. Porter open the register. After Ms. Porter opened the cash register the man ordered her to get on the floor. Ms. Porter complied. The man from the rear pharmacy counter then joined the man at the front counter and they exited the store.

Gwendolyn Charles, pharmacist and part owner of the Esplanade Pharmacy, testified that on the morning of May 8, 2001, as she was making a phone call a man walked up to the pharmacy counter and said, "Excuse me. How much are valiums?" The man then opened the door of the pharmacy and walked in. The man demanded that she hang up the telephone. Mrs. Charles began to scream when she saw the man had what appeared to be a gun wrapped in a bandana. The man ordered Mrs. Charles to open the cash register. Mrs. Charles testified that when she backed away from the cash register she could see that Ms. Porter was also being robbed. The man in the pharmacy area took the cash out of the register and left the store with the man in the front of the store. Mrs. Charles further testified that her husband must have called the police because they arrived shortly after the men left. Mrs. Charles picked the defendant out of a photo line-up

a few days after the robbery.

Carlton Charles, owner and manager of the Esplanade Pharmacy, testified he was in his office when he heard his wife scream. He immediately called the police because the way the office was situated he was unable to go to her assistance immediately. When Mr. Charles was able to leave his office he saw the perpetrators leaving the store, so he followed them and saw the men leave the scene in a red vehicle.

When the police arrived they took statements from Ms. Porter and Mr. and Mrs. Charles. Mr. Charles also gave the police the video from his surveillance equipment. Mr. Charles testified that the perpetrators were able to take almost eight thousand dollars, because the store also cashed checks.

Detective Eduardo Colmenero, of the New Orleans Police Department, testified that when he arrived on the scene he was briefed by the first officer on the scene. Detective Colmenero also took possession of the surveillance video and called for a crime lab technician to get fingerprints and any other evidence from the scene.

Detective Michael Carambat, of the New Orleans Police Department, testified that he conducted a follow-up investigation in the Esplanade Pharmacy robbery on May 8, 2001. The detective further testified he viewed the surveillance video and had still photographs of the perpetrator printed

from the video. Detective Colmenero gave the surveillance video to the department's Public Information Office for distribution to local television stations in hopes of identifying the perpetrators. The police received an anonymous phone call identifying the defendant as one of the men in the video. As a result of the phone call, the detective prepared a photo line-up for the victims to view. Ms. Porter immediately identified the defendant as the perpetrator with the knife. Mrs. Charles also picked the defendant out of the line-up as the man with the knife, but she was not absolutely certain because of the distance between her and the perpetrator. After the victims' positive identification of the defendant a warrant was issued for his arrest.

Jay Jacquet, of the New Orleans Police Department Crime Lab, testified he was able to lift a partial fingerprint from the front cash register, but he was unable to make an identification from it.

The defendant testified that he was at the home of his mother-in-law at the time of the robbery. The defendant had previously testified that he was at Meadowcrest Hospital with his sister at the time of the robbery.

Kawanda Howard, the defendant's girlfriend, testified corroborating the defendant's testimony.

Melissa Landry, Director of Health Information for Meadowcrest Hospital, testified that she is responsible for maintaining all medical records

for the hospital. She further testified that she had no record of the defendant's sister, Tabalika Forbes, receiving treatment on May 8, 2001, or on any date in the month of May.

### **ERRORS PATENT/COUNSEL'S ASSIGNMENT OF ERROR**

A review of the record revealed there are no errors patent.

Counsel filed a brief requesting a review for errors patent. Counsel complied with the procedures outlined by Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), as interpreted by this Court in State v. Benjamin, 573 So. 2d 528 (La. App. 4th Cir. 1990). Counsel filed a brief complying with State v. Jyles, 96-2669 (La. 12/12/97), 704 So. 2d 241. Counsel's detailed review of the procedural history of the case and the facts of the case indicate a thorough review of the record. Counsel moved to withdraw because he believes, after a conscientious review of the record, that there is no non-frivolous issue for appeal. Counsel reviewed available transcripts and found no trial court ruling which arguably supports the appeal. A copy of the brief was forwarded to defendant, and this Court informed him that he had the right to file a brief in his own behalf.

As per State v. Benjamin, this Court performed an independent, thorough review of the pleadings, minute entries, bill of information, and transcripts in the appeal record. The defendant was properly charged by bill

of information with a violation of La. R.S. 14:64, and the bill was signed by an assistant district attorney. The defendant was present and represented by counsel at arraignment, during the trial, and at sentencing. The jury verdict and the defendant's sentence are legal in all respects. Furthermore, as discussed below the State provided sufficient evidence to prove beyond a reasonable doubt that the defendant committed armed robbery in violation of La. R.S. 14:64. An independent review reveals no non-frivolous issue and no trial court ruling which arguably supports the appeal.

### **PRO SE ASSIGNMENT OF ERROR NUMBER 1**

The defendant complains he was denied a fair trial when the trial judge failed to suppress the suggestive identification.

A defendant who seeks to suppress an identification must prove both that the identification itself was suggestive and that there was a likelihood of misidentification as a result of the identification procedure. State v. Prudholm, 446 So.2d 729, 738 (La. 1984). Fairness is the standard of review for identification procedures, and reliability, is the linchpin in determining the admissibility of identification testimony. Manson v. Braithwaite, 432 U.S. 98, 97 S.Ct. 2243, 2253, 53 L.Ed. 2d 140 (1977). Even if the identification could be suggestive, it is the likelihood of misidentification which violates due process, not merely the suggestive identification procedure. State v. Thibodeaux, 98-1673 (La. 9/8/99), 750 So.2d 916, 932.

State v. Alexander, 02-427 (La. App. 5 Cir.

9/30/02), 829 So.2d 526.

In Manson, id, the U.S. Supreme Court set forth five factors to consider in determining if an identification is reliable: 1) the opportunity of the witness to view the criminal at the time of the crime; 2) the witness' degree of attention; 3) the accuracy of the prior description of the criminal; 4) the level of certainty demonstrated at the confrontation; and 5) the time between the crime and the confrontation.

In evaluating the defendant's argument the reviewing court may consider all pertinent evidence adduced at the trial, as well as the hearing on the motion to suppress the identification. Alexander, id. A trial court's determination of the admissibility of an identification should be accorded great weight and will not be disturbed on appeal unless the evidence reveals an abuse of discretion. State v. Clennon, 98-1370 (La. App. 5 Cir. 6/30/99), 738 So.2d 161.

In the instant case, Ms. Porter testified she stood face to face with the defendant when he first approached the counter with a drink in his hand. Ms. Porter further testified she also got to see the defendant's face clearly as he stood only a few feet away from her as he emptied the cash register. Additionally, Ms. Porter did not hesitate in picking the defendant as the perpetrator when shown the photographic line-up only a few days after the



robbery. Therefore, it does not appear the out of court identification was suggestive and thus deprived the defendant of his right to due process. This assignment of error is without merit.

### **PRO SE ASSIGNMENTS OF ERROR NUMBERS 2 AND 3**

The defendant complains he received ineffective assistance of counsel when trial counsel failed to object to the continuous use of other crimes evidence and for failing to impeach the testimony of Emma Porter.

The Louisiana Supreme Court in State v. Brooks, 505 So.2d 714, 724 (La. 1987) citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) stated that 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.

This court in State v. Jason, 99-2551 (La. App. 4 Cir. 12/6/00), 779 So.2d 865, 871 citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), stated that the claim of ineffective assistance of counsel is to be assessed by the two-part test of Strickland. The defendant must show that his counsel's performance was deficient and that the deficiency prejudiced him. 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. Jason, id. Counsel’s deficient performance will have prejudiced the defendant if he can show that the errors were so serious as to deprive him of a fair trial. To carry this burden, the defendant “must show that there is a reasonable probability that, but for the counsel’s unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Jason, id., citing Strickland, id.

The defendant avers trial counsel was ineffective for not objecting to his alleged deficiencies in the trial proceedings. Generally, the issue of ineffective assistance of counsel is a matter more properly addressed in an application for post conviction relief filed in the trial court where a full evidentiary hearing can be conducted. Only if the record discloses sufficient evidence to rule on the merits of the claim do the interest of judicial economy justify consideration of the issues on appeal. State v. Myers, 1997-2401 (La. App. 4 Cir. 12/6/00), 773 So.2d 884. The record before this court is not sufficient to review the defendant’s claims of effective assistance of counsel. Therefore, this court declines to review these assignments but preserves the defendant’s right to raise the issue via an application for post conviction relief.

For the above and foregoing reasons we affirm the defendant's conviction and sentence. Counsel's motion to withdraw is hereby granted.

**AFFIRMED; MOTION TO WITHDRAW**

**GRANTED**