NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2006-KA-0955**
VERSUS	*	**COURT OF APPEAL**
DARLENE M. JONES	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

*** * * * * * ***

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 411-082, SECTION "I"
Honorable Raymond C. Bigelow, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Judge Charles R. Jones, Judge Dennis R. Bagneris, Sr., and Judge Max N. Tobias, Jr.)

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CONVICTION AFFIRMED; THE MULTIPLE OFFENDER ADJUDICATION AND SENTENCE VACATED; MATTER REMANDED

On December 2, 1999, the State filed a bill of information charging Darlene M. Jones with aggravated battery, a violation of La. R.S. 14:34. The defendant pled not guilty at her arraignment on December 16, 1999. On January 12, 2000, the trial court found probable cause and denied the motion to suppress the evidence. A six-member jury found the defendant guilty of second degree battery on April 25, 2000. On May 5, 2000, the State multiple billed the defendant. On September 13, 2000, the defendant pled guilty to the multiple bill, and the trial court adjudged her a second felony offender. On September 22, 2000, the trial court sentenced the defendant pursuant to La. R.S. 15:529.1 to two years and six months at hard labor, with credit for time served. That same day, the trial court granted the defendant's oral motion for appeal and motion for appeal bond. Defense counsel supplemented the oral Motion for Appeal with a written motion on September 25, 2000. The trial court set the motion for hearing on December 8, 2000. The trial court granted the defendant's Motion for Out of Time Appeal. Defendant now appeals.

STATEMENT OF FACT

Venus-Rosita Jones, the victim, testified that she, Nicole Harris, Trenice Johnson, Philip Johnson and the defendant played cards at the defendant's house on the night of October 8, 1999. The group was enjoying itself and drinking daiquiris as they played. However, when the victim and Nicole Harris, the victim's card partner, began to win, the defendant became angry and began to taunt the victim telling her she was "garbage, s--t and didn't know how to play cards." The victim and the defendant bickered back and forth exchanging profanities until the defendant ordered the victim to leave the house. As the victim put her coat on, the defendant came up behind her and began choking her. The victim freed herself from the defendant's grip by flipping the defendant over. At that point, their friends separated them, and the victim exited the defendant's house.

The following day, the victim ate lunch with her friend Trenice Johnson at Trenice's house. She received a message that someone wanted to see her at the front door. As she went to the door, the victim saw the defendant standing by the side of the house. The defendant stepped to the door and said to the victim, "Bitch, you said you were going to sneak me." The victim denied that she intended to harm the defendant and turned around to go back in the house. As she did, she felt the defendant hit her on the arm

with a pipe or tire jack. Immediately thereafter, the victim felt blood on her face and realized the defendant had also struck her in the head. The defendant jumped into her car and sped away. One of the victim's friends rushed her to the hospital. The doctors closed the victim's head wound with five internal and ten external stitches in her scalp plus five staples. The victim related the facts of the assault to NOPD Officer Kevin Penn, who took a report from her at the hospital.

The defendant testified that the victim, not her, began the verbal altercation the night of the card game. The defendant stated that the victim became belligerent because she had been drinking, and did not know the rules by which the defendant and her partner played the game. The victim threw her cards on the table and began a loud, verbal altercation with Philip Johnson. The defendant asked the victim to lower her voice. When the victim began to address Philip Johnson with profanities, she made the defendant leave the house. The defendant denied arguing with the defendant and denied that she choked or touched the victim that night.

The following day the defendant drove Philip Johnson to his brother's house on Marais Street. As the defendant parked her vehicle, the victim approached her with a bottle in her hand and said, "You're not at your house now, bitch. What's up?" With that, the victim hit the defendant, and the

two fell to the ground fighting. The defendant stated that she did not have any type of weapon and denied causing the victim physical injury. Philip Johnson separated the combatants, and he and the defendant drove away. The defendant surmised that the victim might have caused her own injuries when she fell. The defendant theorized that the victim might have hit her head on the ground or fallen on the glass bottle she was holding at the time she attacked the defendant.

Philip Johnson testified on behalf of the defense and corroborated the defendant's testimony.

A review for errors patent on the face of the record reveals none.

ASSIGNMENT OF ERROR NUMBER 1

In her first assignment of error, the defendant complains that she was denied her constitutional right of appeal because of the unreasonable delay in processing her appeal. In support of her argument, the defendant cites La. C.Cr.P. art. 843 and La. R.S. 13:961(C).

La. C.Cr.P. art. 843 provides:

Recording of proceedings

> In felony cases, in cases involving violation of an ordinance enacted pursuant to R.S. 14:143(B), and on motion of the court, the state, or the defendant in other misdemeanor cases tried in a district, parish, or city court, the clerk or court stenographer shall record all of the proceedings, including the examination of prospective jurors, the testimony of witnesses, statements, rulings, orders, and charges by the court, and

objections, questions, statements, and arguments of counsel.

La. R.S. 13:961 provides in pertinent part:

Court reporters, generally

> C. The duties of the official court reporter shall be to report in shorthand, stenotype, or any other recognized manner, and transcribe into longhand by typewriting all the testimony taken in all civil appealable cases tried in the judicial district served by the court reporters, when ordered so to do by the presiding judge, and to furnish for the purpose of appeal, the necessary carbon copies of the testimony required by law for such appeal. In criminal cases tried in the judicial districts, the official court reporter shall record all portions of the proceedings required by law or the court and shall, when required by law or the court, transcribe those portions of the proceedings required, which shall be filed with the clerk of court in the parish where the case is being tried.

The foregoing provisions deal with a defendant's right to a complete transcript of trial proceedings. However, the defendant is not complaining that she has not had benefit of a complete transcript for appeal purposes. Instead, she maintains that her rights have been violated by the delay between her sentencing and lodging of appeal with this Court, but her argument is without merit.

On September 22, 2000, the trial court sentenced the defendant, granted her Motions for Appeal and Appeal Bond, and set a return date of December 8, 2000 for the appeal. The record does not show any activity on the case from December 8, 2000 until September 13, 2002, when the court

set a hearing on appeal status for September 19, 2002. From that date, appeal status hearings were reset six times because the defendant failed to appear. On November 8, 2002, defense counsel appeared for a status hearing on behalf of the absent defendant. On November 20, 2002, the court issued a warrant for the defendant's arrest. The defendant was arrested on December 12, 2004. On December 16, 2004, the trial court placed the defendant under twenty-four hour house arrest when she was not working. On January 4, 2005, defendant and her counsel appeared for an appeal status hearing. On January 12, 2005, defense counsel filed a Motion for Out of Time Appeal. Between January 12, 2005, and May 20, 2005, status hearings were reset seven times because the defendant or her counsel or both failed to appear. On May 5, 2005, the status hearing was continued by request of the defense. On June 3, 2005, and July 1, 2005, defendant and her counsel appeared for status hearings. On July 11, July 14 and July 15, 2005, the defendant failed to appear for status hearings.

The above chronology of events shows that the defendant was responsible for retarding the progress of her appeal for approximately four and a half years. For four of those years, the defendant was free on bond. The defendant does not argue that her appeal was compromised by the delay, i.e., destruction of evidence, loss of witnesses, record irregularity, etc.

Further, the defendant cannot show undue mental distress or financial loss because she was not incarcerated for four years after her sentencing and came to court only after the court issued a warrant for her arrest.

The record indicates that the defendant created the problem about which she complains. This assignment is without merit.

ASSIGNMENT OF ERROR NUMBER 2

In her next assignment, the defendant contends she was denied appeal counsel. She argues she was prejudiced by the trial court's failure to appoint appeal counsel for her during the four and a half year period after her trial counsel withdrew from the case.

The record disproves the defendant's assertion.

The defendant remained free on bond for approximately four years during which time she made no attempt to advance her appeal. There is nothing in the record to indicate that the defendant requested court appointed counsel. She was arrested on December 9, 2004, and less than one month later, counsel appeared on the defendant's behalf. On July 15, 2005, the trial court granted the defendant's Motion for Out of Time Appeal and Designation of Record and set the return date for the appeal for September 15, 2005. The defendant's appeal was lodged with this Court on July 19, 2006.

There is no merit to this assignment.

ASSIGNMENT OF ERROR NUMBER 3

In her final assignment, the defendant complains of ineffective assistance of counsel during the multiple offender proceedings. Defendant claims counsel was ineffective in failing to object to the introduction of documentary evidence offered by the State at the multiple bill hearing. The defendant maintains that the State's evidence was insufficient to prove she was advised of her *Boykin* rights prior to pleading guilty.

Ordinarily, an ineffective assistance claim is better addressed in an application for post-conviction relief filed in the trial court in which a full evidentiary hearing can be held. *State v. Howard*, 98-0064, p.15 (La.4/23/99), 751 So.2d 783, 802. However, where the record is sufficient to permit a determination of counsel's effectiveness at trial, the claims may be addressed on appeal. *State v. Wessinger*, 98-1234, p.43 (La.5/28/99) 736 So.2d 162, 194; State *v. Bordes*, 98-0086, p.7 (La.App. 4 Cir. 6/16/99), 738 So.2d 143, 147; *State v. McGee*, 98-1508, p.4 (La.App. 4 Cir. 3/15/00), 758 So.2d 338, 341; *State v. Causey*, 96-2723, p.10 (La.App. 4 Cir. 10/21/98), 721 So.2d 78, 84. Indeed, when the appellate record is sufficient, "the interests of judicial economy justify consideration of the issues on appeal." *State v. Kanost*, 99-1822, p. 6 (La.App. 4 Cir. 3/29/00), 759 So.2d 184, 188.

Such is the case here.

The standard for assessing an ineffective assistance of counsel claim is well-settled; the two-prong standard enunciated in the seminal case of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), must be applied. *State v. Fuller*, 454 So.2d 119 (La.1984); *State v. Robinson*, 98-1606, p.10 (La.App. 4 Cir. 8/11/99), 744 So.2d 119, 126. In order to prevail, a defendant must establish both that counsel's performance was deficient and that the deficiency prejudiced the defendant. *State v. Jackson*, 97-2220, p.8 (La.App. 4 Cir. 5/12/99), 733 So.2d 736, 741. As to the former, the defendant must show that counsel made errors so serious that counsel was not functioning as the "counsel" the Sixth Amendment guarantees. *Strickland*, 466 U.S. at 686, 104 S.Ct. at 2064; *State v. Ash*, 97-2061, p.9 (La.App. 4 Cir. 2/10/99), 729 So.2d 664, 669. As to the latter, the defendant must show that "counsel's errors were so serious as to deprive him of a fair trial, i.e., a trial whose result is reliable." *McGee*, 98-1508 at p. 5, 758 So.2d at 342. To carry his burden, the defendant must show that there is a reasonable probability that, but for counsel's deficient performance 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. Guy*, 97-

1387, p.7 (La.App. 4 Cir. 5/19/99), 737 So.2d 231, 236.

An "effective counsel" has been defined as "not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." *State v. Anderson*, 97-2587, p. 7 (La.App. 4 Cir. 11/18/98), 728 So.2d 14, 19 (citing, *State v. Seiss*, 428 So.2d 444 (La.1983)). Given that "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. Crowell*, 99-2238, p. 8 (La.App. 4 Cir. 11/21/00), 773 So.2d 871, 878 (quoting *State v. Brooks*, 505 So.2d 714, 724 (La.1987)). It follows then that "trial strategy" type errors do not constitute ineffective assistance of counsel. *Crowell*, 99-2238 at p. 8, 773 So.2d at 878 (citing *State v. Bienemy*, 483 So.2d 1105 (La.App. 4 Cir.1986)); *State v. Bordes*, 98-0086, p.8 (La.App. 4 Cir. 6/16/99), 738 So.2d 143, 147 (quoting *Bienemy*, 483 So.2d at 1107 (noting that "[t]his court has previously recognized that if an alleged error falls 'within the ambit of trial strategy' it does not 'establish ineffective assistance of counsel.' ")).

In *State v. Shelton*, 621 So.2d 769 (La.1993), the Louisiana Supreme Court reviewed the jurisprudence concerning the burden of proof in habitual

offender proceedings, and found it proper to assign the burden of proof to a defendant who contests the validity of his guilty plea. In *State v. Winfrey*, 97-427 (La.App. 5 Cir. 10/28/97), 703 So.2d 63, 80, the Fifth Circuit Court of Appeal summarized the procedure for determining the burden of proof in a multiple offender hearing:

> If the defendant denies the multiple offender allegations then the burden is on the State to prove (1) the existence of a prior guilty plea, and (2) that the defendant was represented by counsel when the plea was taken. Once the State proves those two things, the burden then shifts to the defendant to produce affirmative evidence showing (1) an infringement of his rights, or (2) a procedural irregularity in the taking of the plea. Only if the defendant meets that burden of proof does the burden shift back to the State to prove the constitutionality of the guilty plea. In doing so, the State must produce either a "perfect" transcript of the *Boykin* colloquy between the defendant and the judge or any combination of (1) a guilty plea form, (2) a minute entry, or (3) and "imperfect" transcript. If anything less than a "perfect" transcript is presented, the trial court must weigh the evidence submitted by the defendant and the State to determine whether the State met its burden of proof that defendant's prior guilty plea was informed and voluntary.

The multiple bill in this case charges that on August 7, 1996, the defendant pled guilty to simple burglary in Jefferson Parish in case no. 96-3764. The only evidence the State offered in support of the multiple bill is the unnotarized affidavit of Michael G. Riehlmann attesting:

> That he was appointed counsel for Darlene Meyers in case number 96-3764 in Division P of the 24th Judicial District Court;
>
> That he advised Darlene Meyers of the rights she was waiving before entering a guilty plea in said case on August 7, 1996;
>
> That he did not advise her that should she be again convicted of a felony offense she could be charged as an habitual offender.

The State did not submit a plea of guilty form, minute entry, docket master or any other official documentation showing the existence of a prior conviction. There is no evidence that the defendant's prior guilty plea was knowing and voluntary. The State failed its burden of proof. This assignment has merit.

For these reasons, we affirm the defendant's conviction, vacate her multiple offender adjudication and sentence and remand the matter for further proceedings relative to her multiple offender status.

CONVICTION AFFIRMED; THE MULTIPLE OFFENDER ADJUDICATION AND SENTENCE VACATED; MATTER REMANDED