

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA * **NO. 2009-KA-0613**
VERSUS * **COURT OF APPEAL**
ALLEN J. CHANCE, JR. * **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**
* * * * *

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 474-553, SECTION "F"
Honorable Dennis J. Waldron, Judge
* * * * *

Charles R. Jones
Judge
* * * * *

(Court composed of Judge Charles R. Jones, Judge Patricia Rivet Murray, and Judge Edwin A. Lombard)

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**AFFIRMED AND
REMANDED WITH
INSTRUCTIONS**

Allen Chance, Jr., appeals his convictions and sentences of six (6) years and eight (8) months at hard labor with credit for time served for the offense of possession of heroin; and, for the offense of possession of cocaine he was sentenced to five (5) years at hard labor with credit for time served running concurrent with his sentence for possession of heroin. We affirm and order the district court to forward a corrected commitment order to the Department of Corrections concerning Chance's sentence for possession of cocaine.

Chance was charged by bill of information with possession of heroin (count one) and possession of cocaine (count two), violations of 40:966(C)(1) and 40:967(C)(2), respectively to which he pled not guilty. The defense filed motions to suppress the evidence, the statement, the identification and for a preliminary hearing. The district court found probable cause to hold Chance for trial and denied the motion to suppress the evidence. At trial, Chance was found guilty as charged on both counts. Subsequently, the State filed a multiple bill of information on count one charging Chance with being a third felony offender to wit Chance pleaded guilty to the multiple bill. The court sentenced Chance to serve eighty months (six years and eight months) at hard labor with credit for time served.

La.R.S. 15:529.1 (A)(b)(i); G. On count two he was sentenced to serve sixty months (five years) at hard labor with credit for time served and concurrent with his sentence in count one. The court granted Chance's motion for appeal.

On appeal Chance raises one assignment of error that his defense counsel rendered ineffective assistance of counsel by presenting evidence of an improperly obtained confession that the State did not present. He asserts that his trial counsel was ineffective for questioning Detective Rome on cross-examination about the tainted inculpatory statement made by Chance that he would be willing to "help himself" by acting as an informant in subsequent investigations. Chance argues that this line of questioning handed the guilty verdict to the jury "on a platter."

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:

Generally, the issue of ineffective assistance of counsel is more properly addressed in an application for post-conviction relief filed in the trial court, where a full evidentiary hearing can be conducted. *State v. Smith*, 97-2221, p. 14 (La. App. 4 Cir. 4/7/99), 734 So.2d 826, 834, writ denied, 99-1128 (La. 10/1/99), 747 So.2d 1138. Only if the record discloses sufficient evidence to rule on the merits of the claim does the interest of judicial economy justify consideration of the issues on appeal. *Id.* Here, however, we believe the record is sufficient to address defendant's claims, which are essentially evidentiary.

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, 104 S.Ct. 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, 104 S.Ct. 2068.

See also *State v. Crawford*, 2002-2048 (La. App. 4 Cir. 2/12/03), 848 So. 2d 615.

Furthermore, as noted in *State v. Griffin*, 2002-1703, pp. 9-10 (La. App. 4 Cir. 1/15/03), 838 So. 2d 34, 40:

This Court has recognized that if an alleged error falls "within the ambit of trial strategy" it does not "establish ineffective assistance of counsel." *State v. Bienemy*, 483 So.2d 1105 (La.App. 4 Cir. 1986). 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. Brooks*, 505 So.2d 714, 724 (La. 1987).

See also *State v. Myers*, 2004-1219 (La. App. 4 Cir. 11/3/04), 888 So. 2d 1002.

In the instant case, the record does not affirmatively show why counsel chose to question Detective Rome about the inculpatory statement made by Chance and why he gave Chance his phone number. This line of questioning was not elicited by the State on direct-examination. Clearly, however, it appears that this line of questioning was a conscious choice of trial strategy, perhaps to show that Chance was coerced to make the statement. The fact that a strategy proves unsuccessful does not constitute the ineffective assistance of counsel. However,

the question of whether adoption of this strategy constituted ineffective assistance of counsel is best left to post conviction relief, wherein an evidentiary hearing may prove of assistance to the Court.

A review for errors patent reveals errors in Chance's sentence in count one. A person convicted of possession of heroin shall be imprisoned at hard labor for not less than four nor more than ten years and may be ordered to pay a fine of not more than five thousand dollars. La.R.S. 40: 966 (C) (1); 964 (B) (1). A person convicted of being a third felony offender shall be imprisoned for a determinate term not less than two-thirds of the longest term and not more than twice the longest term prescribed for the first conviction without benefit of probation or suspension of sentence. La.R.S. 15: 529.1 (A)(b)(i); G.

In the instant case, the minute entry of Chance's sentencing on June 30, 2008 fails to reflect that Chance's sentence was to be served without probation or suspension of sentence. However, the sentencing transcript of June 30, 2008 correctly reflects that Chance's sentence is to be served without benefit of probation or suspension of sentence. When there are discrepancies between a transcript and a minute entry the transcript prevails. *State v. Lynch*, 441 So. 2d 732 (La. 1983); *State v. Fenner*, 94-1498 (La. App. 4 Cir. 11/16/95), 664 So.2d 1315. The commitment order of July 11, 2008 to the Department of Corrections fails to reflect that Chance's sentence is to be served without benefit of probation or suspension of sentence.

In *State v. Williams*, 2000-1725 (La. 11/28/01), 800 So. 2d 790, the Louisiana Supreme Court ruled that Paragraph A of La. R.S. 15:301.1 self-activates the correction of a defendant's sentence that is silent as to the prohibition of benefits and eliminates the need to remand for a ministerial correction of an

illegally lenient sentence. Hence, this Court need take no action to correct the district court's failure to specify in the commitment orders that Chance's sentence on count one, possession of heroin, be served without benefit of probation or suspension of sentence. The correction is statutorily effected. *State v. Phillips*, 2003-0304 (La. App. 4 Cir. 7/23/03), 853 So. 2d 675. However, the commitment orders fail to reflect Chance's sentence on count two. Accordingly, the district court is ordered to forward a corrected commitment order to the Department of Corrections reflecting Chance's sentence on count two.

DECREE

For the foregoing reasons, the conviction and sentence imposed upon Allen Chance, Jr., is affirmed, and the district court is ordered to forward a corrected commitment order to the Department of Corrections concerning his sentence on count two.

**AFFIRMED AND
REMANDED WITH
INSTRUCTIONS**