STATE OF LOUISIANA	*	**NO. 2016-K-1252**
VERSUS	*	**COURT OF APPEAL**
TROY TAYLOR	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

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ON APPLICATION FOR WRITS DIRECTED TO
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 503-161, SECTION "I"
Honorable Karen K. Herman, Judge

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JUDGE SANDRA CABRINA JENKINS
* * * * * *

(Court composed of Judge Roland L. Belsome,
Judge Madeleine M. Landrieu, Judge Sandra Cabrina Jenkins)

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DEFENDANT/RELATOR/IN PROPER PERSON

WRIT GRANTED;
CONVICTION AND SENTENCE VACATED

APRIL 6, 2017

Defendant Troy Taylor seeks supervisory review of the district court's September 22, 2016 written judgment that denied his *pro se* application for post-conviction relief. At the direction of this court, the state filed a response to Taylor's writ application. For the reasons that follow, we grant the writ application, reverse the judgment of the trial court denying Taylor's application for post-conviction relief on his claim of ineffective assistance of counsel, and vacate Taylor's conviction and sentence on the charge of forcible rape.

In August 2011, Taylor was tried and convicted of the 1994 forcible rape[1] and second degree kidnapping of the victim, S.B. Taylor had been identified as a suspect in 2008 after the Combined DNA Index System ("CODIS") matched his DNA with DNA taken from the victim. The district court imposed concurrent terms of 40 years imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. On direct appeal, this court affirmed Taylor's forcible rape conviction and sentence, but reversed his conviction for second degree kidnapping, finding that the trial court abused its discretion in denying Taylor's

[1] La. R.S. 14:42.1, as amended by La. Acts 2015, No. 184, § 1, effective August 1, 2015, now classifies forcible rape as "second degree rape." *State v. Jones*, 15-0123, p. 1 n.2 (La. App. 4 Cir. 12/2/215), 182 So.3d 251, 257.

motion to quash the kidnapping charge as untimely instituted. *State v. Taylor,* 12-0345 (La. App. 4 Cir. 6/26/13), 118 So.3d 65, *writ denied*, 13-1830 (La. 2/28/14), 134 So.3d 1169. On February 26, 2016, Taylor timely filed an application for post-conviction relief, which the district court denied in a judgment dated September 22, 2016. Taylor filed his writ application in this court on December 7, 2016.

One of the grounds of Taylor's application for post-conviction relief is a claim of ineffective assistance of counsel. This claim relates to La. C.Cr.P. art. 572(B), which provides an exception to the prescriptive period for prosecution of sex offenses in which the offender's identity is established through DNA testing.

La. C.Cr.P. art. 572 provides, in pertinent part:

> A. Except as provided in Articles 571 and 571.1, no person shall be prosecuted, tried, or punished for an offense not punishable by death or life imprisonment, unless the prosecution is instituted within the following periods of time after the offense has been committed:
>
> (1) Six years, for a felony necessarily punishable by imprisonment at hard labor. . . .[2]
>
> B. (1) Notwithstanding the provisions of Article 571.1 and Paragraph A of this Article, prosecutions for any sex offense may be commenced beyond the time limitations set forth in this Title if the identity of the offender is established after the expiration of such time limitation through the use of a DNA profile. . . .
>
> (4) This Paragraph shall have retroactive application to crimes committed prior to June 20, 2003.

Taylor argues that the retroactive application of La. C.Cr.P. art. 572(B) to revive his already prescribed forcible rape charge violates the Ex Post Facto Clauses of the U.S. and Louisiana Constitutions. According to Taylor, his attorney's failure to move to quash the charge of forcible rape on ex post facto

[2] The offense of forcible rape (now second degree rape) is punishable at hard labor for not less than five nor more than forty years. La. R.S. 14:42.1.

grounds constituted ineffective assistance of counsel, which requires that his conviction and sentence for forcible rape be vacated.

On direct appeal in 2013, this court addressed Taylor's challenge to the constitutionality of the DNA exception in La. C.Cr.P. art. 572(B):

> The general rules governing the procedural requisites for attacking the constitutionality of a state statute govern Taylor's ex post facto claims; therefore, this constitutional challenge had to be properly pled in the district court. *See Johnson v. Aymond*, 97-1446, p. 4 (La. App. 3 Cir. 4/1/98), 709 So.2d 1072, 1074-1075. Additionally, in *State v. Bazile*, 12-2243, p. 8 (La. 5/7/13), --- So.3d --, 2013 WL 1880395, the Louisiana Supreme Court further explained the procedure for raising a constitutional challenge of a state statute:
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> > This court has long held the unconstitutionality of a statute must be specially pleaded and the grounds for the claim particularized. *State v. Hatton*, 2007–2377, p. 14 (La.7/1/08); 985 So.2d 709, 719; [*State v.] Schoening*, 2000-0903, p. 3 [(La. 10/17/00)]; 770 So.2d [762,] at 764. In *Hatton*, the court set out the challenger's burden as a three-step analysis. "First, a party must raise the unconstitutionality in the trial court; second, the unconstitutionality of a statute must be specially pleaded; and third, the grounds outlining the basis of unconstitutionality must be particularized." *Id.*, 2007–2377, p. 14; 985 So.2d at 719. In addition, "the specific plea of unconstitutionality and the grounds therefor must be raised in a pleading." *Id.*, 2007–2377, p. 15; 985 So.2d at 720.
>
> In the instant case, given that Taylor has only raised the Ex Post Facto Clause issue on appeal, the issue of whether La. Code Crim. Proc. art. 572(B), as applied to Taylor, is unconstitutionally ex post facto is not properly before this Court. While this assignment of error may have merit [*See Stogner v. California,* 539 U.S. 607, 123 S.Ct. 2446, 156 L.Ed.2d 544 (2003), wherein the United States Supreme Court held that the application of a California law permitting prosecution for sex-related child abuse within one year of a victim's report to police to offenses whose prosecution was time-barred at the time of the law's enactment was unconstitutionally *ex post facto*], this constitutional ex post facto argument was not raised by Taylor in his written motion to quash based on prescription filed in the district court as to the second degree kidnapping charge, and in that same motion Taylor expressly conceded that the forcible rape charge had not prescribed. There is no indication that Taylor raised the issue at the time the motion was considered and denied in open court with all parties present on August 5, 2011, and there is no indication that the district court considered the issue when denying Taylor's motion to quash from our review of the record.
>
> Finally, **we note Taylor can file an application for post conviction relief alleging ineffective assistance of counsel for failing**

> **to raise the ex post facto argument in his motion to quash as to second degree kidnapping, and also for expressly conceding that the forcible rape charge had not prescribed and for not raising the ex post facto argument as to that charge**. Furthermore, because Taylor has only raised prescription as to the forcible rape charge only once in this court and this claim is not properly before us, he can raise this issue directly in an application for post conviction relief. *See* La. Code Crim. Proc. art. 930.3. Thus, **we expressly reserve unto Taylor his right to raise the issue for the first time in an application for post conviction relief**, wherein he will be able to comply with the procedural requirements set forth in *Bazile*, *supra*.
>
> Accordingly, for the foregoing reasons, we find that Taylor's ex post facto argument attacking the constitutionality of La. Code Crim. Proc. art. 572(B) as applied to him was not preserved for review as to either the second degree kidnapping charge or the forcible rape charge.

Taylor, 12-0345, pp. 50-51, 118 So. 3d at 93-94 (emphasis added).

Under the standard for ineffective assistance of counsel set out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), adopted by the Louisiana Supreme Court in *State v. Washington*, 491 So.2d 1337, 1339 (La. 1986), a reviewing court must reverse a conviction if the defendant establishes that: (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; and (2) counsel's inadequate performance prejudiced the defendant to the extent that the trial was rendered unfair and the verdict suspect.

We find that Taylor's case satisfies both prongs of the *Strickland* test. As recognized by the district court, in *State ex rel. Nicholson v. State*, 13-0072, pp. 3-4 (La. 5/5/15), 169 So.3d 344, 346-47 (per curiam), the Supreme Court in 2015 considered the DNA exception to the statute of limitations, and found that notwithstanding inclusion of the provision indicating that it would operate retroactively, the application of the La. C.Cr.P. art. 572(B) to cases which had prescribed before its enactment violated ex post facto principles.

Taylor's case presented an identical procedural posture to *Nicholson*, i.e., Taylor's forcible rape charge had prescribed before enactment of the DNA exception in 2003. Moreover, although the Supreme Court has long subscribed to the rule that the state may enlarge a prescriptive period and apply it retroactively to a defendant, it may do so only as long as the former and shorter prescriptive period has not already fully run and accrued to the defendant's benefit. *See State v. Rolen*, 95-0347 (La. 9/15/95), 662 So.2d 446; *State v. Ferrie*, 243 La. 416, 144 So.2d 380 (1962).

As set out by the Supreme Court in *Rolen*:

> Our decision in *State v. Ferrie*, 243 La. 416, 144 So.2d 380 (1962) . . . held that the state remains free to prosecute a defendant according to an enlarged prescriptive period adopted after the commission of the offense but only as long as the former and shorter period has not already fully accrued into a complete defense to the charge. At that point, *Ferrie* observed, the defendant would acquire a vested right in that defense which the law could not abridge. *Id*., 144 So.2d at 384. This part of the *Ferrie* decision rests on sound policy reasons flowing from what Judge Learned Hand called 'our instinctive feelings of justice and fair play.' *Falter v. United States*, 23 F.2d 420, 425-26 (2nd Cir.), *cert. denied*, 277 U.S. 590, 48 S.Ct. 528, 72 L.Ed. 1003 (1928). Statutes of limitations are 'designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past.' *Toussie v. United States*, 397 U.S. 112, 114-15, 90 S.Ct. 858, 860, 25 L.Ed.2d 156 (1970). Statutes of limitations therefore at least in part implement the constitutional guarantee of a speedy trial. *State v. Driever*, 347 So.2d 1132 (La. 1977). An individual may rely on the statute to disband his witnesses and discard evidence he would otherwise use to defend himself against the state once the time limit has passed with the assurance that the potential criminal consequences flowing from his act have abated. In this context, 'for the state to assure a man that he has become safe from its pursuit, and thereafter to withdraw its assurance," Judge Hand observed in *Falter,* "seems to most of us unfair and dishonest.' *Id.*, 23 F.2d at 426.

Rolen, 95-0347, pp. 4-5, 662 So.2d at 449.

The United States Supreme Court's subsequent decision in *Stogner v. California,* 539 U.S. 607, 123 S.Ct. 2446, 156 L.Ed.2d 544 (2003), confirmed the underlying rationale of the *Ferrie/Falter* rule. The majority in *Stogner* observed that "like Judge Learned Hand [in *Falter*], we believe that this retroactive application of a later-enacted law is unfair. And, like most other judges who have addressed this issue . . . we find the words 'ex post facto' applicable to describe this kind of unfairness." *Stogner*, 539 U.S at 621, 123 S.Ct. at 2455. As with Taylor's case, the crime for which Stogner was ultimately charged had already fully prescribed before the California legislature enacted a new law in 1993 that allowed prosecution of such crimes if the prosecution was instituted within one year of a victim's first complaint of abuse to the police. In Stogner's case, the new law revived a prosecution that had been prescribed for some 22 years. Stogner moved to quash the prosecution on grounds that it was barred by the Ex Post Facto and Due Process Clauses. The trial court denied the motion and the California Court of Appeal affirmed. The Supreme Court subsequently granted Stogner's application for certiorari to consider his constitutional claims, and held that the 1993 California law violated the second category of ex post facto laws defined in the seminal decision of *Calder v. Bull,* 3 Dall. 386, 1 L.Ed. 648 (1798*), i.e.,* that such laws "inflicted punishments, where the party was not, by law, liable to any punishment." *Stogner*, 539 U.S. at 612-13, 123 S.Ct. at 2450-51. In so holding, the Court in *Stogner* deemed its result consistent with the "numerous legislators, courts, and commentators [who] have long believed it well settled that the Ex Post Facto Clause forbids resurrection of a time-barred prosecution." *Id.,* 539 U.S. at 616, 123 S.Ct. at 2452. "Even where courts have upheld extensions of unexpired statutes of limitations (extensions that our holding today does not affect . . .)," the

Court underscored, "they have consistently distinguished situations where limitations periods have expired." *Id.*, 539 U.S at 618, 123 S.Ct. at 2453.

We find that, under *Stogner,* retroactive application of La. C.Cr.P. art. 572(B) to revive Taylor's time-barred prosecution for forcible rape violates constitutional ex post facto principles. We also note that *Stogner* made no change in Louisiana law. As indicated by the decisions in *Ferrie* and *Rolen,* the Louisiana Supreme Court has long subscribed to the rule that the state may extend the time limits for instituting prosecution and apply them against a particular defendant, but only if the prior limitation period has not expired and abated the criminal consequences of that individual's conduct.

As this court recognized in Taylor's direct appeal, Taylor waived the meritorious ex post facto claim when his counsel did not file a motion to quash the indictment on that basis, and even expressly **conceded** that the forcible rape charge had not prescribed. The district court also acknowledged as much in its post-conviction ruling, finding that "had counsel for Mr. Taylor filed a motion to quash the forcible rape charge, Taylor would ultimately have obtained the same relief that Nicholson did . . . ." The district judge, however, denied relief, finding that the result "was anything but clear in August, 2011, when Taylor's attorney was filing pre-trial pleadings" and accordingly, "in view of the state of the law at the pertinent time" the court was "not of the opinion that Mr. Taylor's counsel was deficient when he did not foresee the change in the law."

As a general matter, the court's proclamation concerning counsel's knowledge and the state of the law in effect is supported by some jurisprudence and indeed, counsel does not err by lacking clairvoyant powers. *See State v. Wolfe*, 630 So.2d 872, 883 (La. App. 4th Cir. 1993) (counsel not ineffective for failing to

anticipate change in jurisprudence or object when under then-law any objection would have been vain and useless act); *see also Sistrunk v. Vaughn*, 96 F.3d 666, 670-71 (3d Cir. 1996) (counsel has "no general duty to anticipate changes in the law") (citation and internal quotation marks omitted); *Lucas v. O'Dea*, 179 F.3d 412, 420 (6th Cir. 1999) (only in "rare cases" and when change in law is "clearly foreshadowed" may court find ineffective assistance based on counsel's failure to raise claim that would have been overruled under then prevailing law).

In the instant case, however, there was well-established precedent, as set forth by both the United States Supreme Court in *Stogner,* and the Louisiana Supreme Court in *Rolen* and *Ferrie,* establishing that La. C.Cr.P. art. 572(B) could not withstand ex post facto scrutiny. On the facts of this particular case, we find that counsel's decision not to move to quash the forcible rape charge fell below "an objective standard of reasonableness," which is the first prong of the *Strickland* test. *Strickland*, 466 U.S. at 688, 104 S.Ct. at 2064.

We recognize that the *Strickland* test of ineffective assistance affords a "highly deferential" standard of review to the actions of counsel to eliminate, as far as possible, "the distorting effects of hindsight, to reconstruct the circumstances of counsel's conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065. This court, therefore, "does not sit to second-guess strategic and tactical choices made by trial counsel." *State v. Myles*, 389 So.2d 12, 39 (La. 1980). But given the absence of any downside to filing a motion to quash the forcible rape charge, particularly when counsel had filed a motion to quash the second degree kidnapping charge, counsel's dereliction in that capacity surely cannot be attributed to strategy.

The second prong of the *Strickland* test is whether counsel's deficient showing prejudiced the defense by depriving the defendant of a fair trial. *Strickland*, 466 U.S. at 687, 104 S.Ct. 2064. "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." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* Had counsel for Taylor filed a motion to quash the forcible rape charge, there is a reasonable probability that Taylor ultimately would have obtained the same relief that Nicholson did, i.e., having his conviction and sentence vacated. Thus, we conclude that Taylor has satisfied both prongs of the *Strickland* test. Accordingly, we vacate Taylor's conviction and sentence on the charge of forcible rape. *State ex rel. Nalls v. State*, 13-2806 (La. 11/7/14), 152 So.3d 164.

For all these reasons, we grant Taylor's writ application, reverse the September 22, 2016 judgment of the trial court denying Taylor's application for post-conviction relief on his claim of ineffective assistance of counsel, and vacate Taylor's conviction and sentence on the charge of forcible rape.

WRIT GRANTED; CONVICTION AND SENTENCE VACATED