

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA * **NO. 2017-K-0909**
VERSUS *
DUVANDER HURST * **COURT OF APPEAL**
* **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**
* * * * *

ON APPLICATION FOR WRITS DIRECTED TO
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 408-643, SECTION "H"
Honorable Camille Buras, Judge

* * * * *

JAMES F. MCKAY III
CHIEF JUDGE

* * * * *

(Court composed of Chief Judge James F. McKay III, Judge Terri F. Love, Judge Sandra Cabrina Jenkins)

JUSTIN CAINE HARRELL
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WRIT GRANTED; RELIEF DENIED

FEBRUARY 21, 2018

Defendant, Duvander Hurst, seeks supervisory review of the denial of his application for post-conviction relief, which was based on the recantation of an eyewitness's trial testimony over a decade later. After considering defendant's writ application, relief is denied.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On June 27, 2000, defendant was found guilty of the second degree murder of Allen Delatte. This Court affirmed the conviction in *State v. Hurst*, 2001-1817 (La. App. 4 Cir. 9/25/02, 828 So.2d 1165. The Louisiana Supreme Court denied defendant's subsequent writ. *State ex rel. Hurst v. State*, 2003-0709 (La. 3/19/04), 869 So. 2d 840.

In April 2005, defendant filed an application for post-conviction relief wherein he raised six claims of ineffectiveness of counsel either at trial or on appeal. The trial court denied his application on May 4, 2005. This Court denied defendant's writ application, finding that the claims were time-barred, *State v. Hurst*, unpub., 2005-1176 (La. App. 4 Cir. 8/24/05), and the Supreme Court subsequently denied defendant's writ from this court's ruling, *State ex rel. Hurst v. State*, 2006-0260 (La. 8/18/06), 935 So. 2d 136. Defendant filed writ of habeas to the federal court, but it was dismissed as untimely. *Hurst v. Cain*, unpub., 2006-3045 (E.D. La. 9/18/08), 2008 WL 4286503.

On February 6, 2014, defendant filed the present application for post-conviction relief based on the April 2013 recantation by the eyewitness to the murder, William Varnado ("Varnado"). The trial court dismissed the application as untimely. Defendant sought a writ (2014-K-1313), which this Court denied on February 2, 2015. However, in *State v. Hurst*, 2015-455 (La. 9/18/15), 209 So. 3d

701, the Supreme Court granted defendant's writ, finding the application to be timely. The matter was remanded to the trial court for an evidentiary hearing on the merits. In a *per curiam* opinion, the Supreme Court stated:

Relator, whose conviction and sentence became final in 2002, filed an application for post-conviction relief in 2014 alleging that the primary witness against him had recanted. In support, he provided an affidavit from the witness in which he stated that he had falsely testified and alleged police and prosecutorial misconduct. The district court denied the application as procedurally barred and the court of appeal denied writs based on relator's failure to allege that the facts upon which the claim was predicated were not known to his trial attorney. *State v. Hurst*, 14–1313, p. 5 (La. App. 4 Cir. 2/2/15) (unpub'd) (“Without even an assertion that his attorneys did not know of these facts, the trial court did not err by sustaining the State's procedural objections as to timeliness of the claims under La. C.Cr.P. art. 930.8.”).

The court of appeal and the district court erred. The affiant stated that he had not previously revealed the information to any investigator or attorney representing relator. Under the circumstances, it is reasonable to infer that trial counsel was unaware of the facts upon which the instant claim is based, although relator did not explicitly allege that trial counsel lacked the knowledge. Relator's application and supporting materials sufficiently demonstrate that the facts upon which his claims are predicated were not known to relator or his prior attorney and therefore the exception to the post-conviction limitations period applies. *See* La. C.Cr.P. art. 930.8(A)(1).

The matter is remanded to the district court for an evidentiary hearing on the merits of relator's claims. (Citations omitted).
On remand to the trial court, evidentiary hearings were held on April 15,

2016, and June 10, 2016. The court denied defendant's application for post-conviction relief on September 8, 2017. Defendant's timely writ application followed.

STATEMENT OF THE FACTS

THE TRIAL

The following fact summation is taken from this Court's opinion in the appeal of defendant's conviction:

Allen Delatte, nineteen, was killed outside the New Orleans Superdome following an event known as the Super Fair on June 7, 1999. He was shot from the back from some distance in a manner that indicated he may have been running when he was wounded.

Officer Bradley Tollefson said that when he arrived at the scene, there was a large crowd leaving the fair, and that several of the victim's friends and family were present. These people said they were with the victim, heard the shots, and were running with him when he was hit. No witness could identify the perpetrator. Tollefson learned from Detective Davillier, who was also on the scene, that two black men, who had later left the scene, reported to them that two perpetrators had driven by in a red 1993 Oldsmobile with primer paint on the right door.

A 911 tape was played to the jury which revealed that minutes after the shooting the car was described as a 1993 Oldsmobile Cutlass with primer paint on the passenger door.

Detective Archie Kaufman, Homicide, took over the case. He learned from Detective Norman McCord that the suspect's nickname was "Chevy" or "Duvan". He spoke with Detectives Jerry Kuhn, Jerry Farve and Walter Powers of the Second District. He learned that "Duvan-Chevy" was Duvander Hurst. He prepared a photographic line-up. He also obtained a search warrant for the defendant's house and an arrest warrant for his person. During the search of the house, he found a receipt for Johnny's Auto Repair, a car body repair shop that was a short walk from defendant's residence. He found the vehicle inside the shop and spoke to the owner of the shop, Johnny Yrle. Yrle said he had pulled the car inside the shop from the street that morning, June 8; and that although the car had been at the shop since June 3, it had been left on the street unsecured prior to that time. The area of the car where the spots of primer had been was being worked on. A search of the vehicle revealed it was registered to Louis J. Silva, Jr. and Duvander Hurst. A picture of a man holding a large amount of cash was also seized from the vehicle.

Later, Kaufman went to the Second District to speak to William Varnedo¹ who was in custody at the time. Varnedo told investigators there that he wanted to speak to the investigator handling the Superdome incident. During his conversation with Kaufman, Varnedo identified the defendant as the killer. Varnedo said he lived in the same neighborhood as the victim and had been at the Superdome the night the incident occurred. He identified the defendant in the photographic lineup and said his nickname was Chivas or Chevy.

¹ The proper spelling is Varnado.

The defendant turned himself in. In a statement, he said that on the night of the crime he had gotten a ride to the Superdome with Albert Luckettee and Corey Madison, who owned a red four door Buick Skylark in which they were driving. After the fair, the three went to Rally's on Carrollton Avenue and then went home. He said he was not present during the shooting.

Corey Madison's mother contacted Kaufman. Kaufman spoke with Madison. He learned that the defendant had attempted to call Madison ten times from Orleans Parish Prison after he was arrested for this crime.

Also, Luckettee told Kaufman the defendant had tried to contact him.

Davillier said he was working a paid detail the night of the crime. He was in the area breaking up fights between fair attendees when he heard two shots. The area was packed with people, and Davillier did not see the victim fall. The crowd stampeded. Witnesses pointed Davillier in the direction from which the shots had come, and he found two casings in the street. Two men told him that "the car" was red with primer paint on it, and that it had headed in the direction of Interstate 10. Davillier did not see the car. The men left the scene.

The defendant's mother, Ethel Hurst, said she learned about the shooting on television the next day. She did not remember a reporter coming to her house prior to the defendant's arrest. After she watched a tape of the broadcast played to the court room, she said that in fact she had been interviewed. She said the defendant had in fact told her that he had been at the Superdome and had heard the shots, but that he had not been involved in the crime. She said he could not have been in his red car the night of the crime because it was in the shop. She did not actually see the car in the shop, but she had a "paper" to show that it was indeed in the shop. She did not know Louis Silva. She had never seen the defendant with a gun, although he had been arrested for armed robbery. She said she remembered that he had been arrested for marijuana possession, but she did not remember he had been arrested for cocaine.

Yrle said the defendant took the car to his shop June 3, but that he left the car outside on the street. Yrle pulled the car into the shop ten minutes before the police arrived.

William Varnedo testified; but before he did, the trial court, upon motion, cleared the court room of members of the defendant's family and friends because the court heard evidence that the witness and his family had been threatened. Varnedo then said he was at the fair, and that a fight broke out as the fair was ending between "Pigeon Town and some dudes from Philip and Claverie in the Third Ward."

Varnedo did not engage himself in the fight because his girlfriend was accompanying him. The defendant, "Chevas", however, was in the fight. The police arrived and broke up the fight, and the crowd separated. Varnedo saw the red Cutlass pass. The defendant was driving. A man jumped out of the front driver's seat and fired the shots. Varnedo said the car depicted in photographs he was shown at trial looked like the defendant's car.

He also said that he told the officers what he knew about the crime after he had been arrested for possession of crack. He did not know he would have to testify in court. He said he did not want to have anybody to be forced to spend his life in prison because he himself had been in prison and hated it. He felt "everybody should be forgiven."

On cross, he said that he had in fact told the officers in his initial interview that the shooter got out of the back seat of the car. He said that he knew from media reports, before he talked to the officers, that the defendant was a suspect in the crime. He admitted that he had been given the benefit of the diversionary program as a first offender in the cocaine case for which he was currently in custody, even though he had been offered diversion previously as a heroin offender.

The defense called Bobby Williams, cousin of the victim, who said he witnessed the crime, and that the shooter was six feet tall and looked nothing like the defendant. Williams admitted he was in jail in connection with the retaliation killing of Timothy Stovall.

Keyon Minor said he witnessed the shooting, and that the shooter was a "tall red dude", not the defendant.

Christopher Scott said the perpetrator was a tall man, not the defendant.

State v. Hurst, 2001-1817, pp. 2-5, 828 So. 2d at 1167-1169.

WILLIAM VARNADO'S 2013 AFFIDAVIT

Varnado's affidavit states as follows:

1. My name is William Varnado and I live in Crowley, Texas.
2. I testified as a state witness in in State of Louisiana versus Duvander Hurst for June 7th 1999 murder of Allen Delatte June 7th 1999 outside the Superdome just after the Super Fair.
3. During my testimony at the trial, I stated that I saw Duvander Hurst at the Superdome and that I also saw him driving a car that was involved in the murder of Allen Delatte.
4. The truth is I was never at the Superdome the night of the Super Fair and I never saw Duvander Hurst or anyone shoot Allen Delatte.

5. I lied at trial because the assistant district attorney, Linda Van Davis, threatened to take back the deal I received for the cocaine distribution charge if I did not testify.
6. About a year before the murder, I was arrested for possession of Heroin in May of 1998. Because it was my first offense, I was placed in the drug diversion program.
7. The following year, June 16th 1999, I was arrested by police after they observed me making a cocaine deal in my neighborhood.
8. While on the way to central lockup, one of the officers told me: "if you help us, we will help you."
9. At that point, they asked me if I knew anything about the Super Fair murder. I informed them that I heard people in the neighborhood talking about it.
10. At the time, I was strung out on heroin and I was willing to do anything to get back out of police custody and back on the streets.
11. After we made it to the station. Detective Kaufman entered the room with a tape recorder.
12. Detective Kaufman asked me if I knew about the shooting. I told him I knew about it because I heard about it on the news.
13. Detective Kaufman gave me a scenario to lead me into a story of what happened the night of the murder then he started the tape recorder.
14. I replied to his scenario with a story I made up. Detective Kaufman stopped the tape and then said, "no. that ain't right."
15. He rewinded the tape and hit record again and I then came up with another made up version of what happened and Kaufman said, "alright."
16. After we completed that process a few times, it was late in the night before I signed a statement. I could not understand the majority of the information in the statement because I could barely read and write at that time. Kaufman coached me through the entire process.
17. I remained in jail after that night for a couple of weeks. However, detectives kept a close watch over me. I was frequently picked up by NOPD Detectives in unmarked cars. I wasn't really trying to keep in touch with them so they had to come and find me.
18. When they picked me up, they'd bring me in to continue coaching on the story we made it up.
19. In the months after providing the statement, I became stressed out. I started using drugs heavily. I recognized that my whole life was about to change and that I had to get out of New Orleans.
20. The detectives would drop me off at Carrolton and Claiborne at the Burger King so no one in the neighborhood would see me with them. They always gave me money when they dropped me off.
21. By the time I testified before the Grand Jury, I had the story down pat. I was acting. The story brought tears to the eyes of some of the grand jurors.
22. I remember sweating during the testimony and thinking to myself, "I hope this good enough because I'm ready to go" I was coming down and I needed another fix. I was using heroin at the time."
23. The detectives again gave me money and dropped me off at the Burger King on Carrolton and Claiborne.
24. I disappeared a couple of months before the trial. My plan was just to disappear altogether and not testify at all.

25. Thirty days or so before the trial the detectives picked me up in a grocery store parking lot. They saw me throw the drugs I had on me to the ground. They never went to get the drugs off the ground. I was then arrested on a trespassing or public intoxication charge. I received 30 days for that charge.
26. About a week or two before the trial, assistant district attorney Linda Van Davis came to see me while I was in OPP.
27. I told Davis that I was not at the Superdome and that I did not see the shooting. Davis replied, "you then went too far now...you need to do what you need to do...didn't you make a deal...aren't you looking at twenty years."
28. Linda Van Davis then threatened to take the deal away if I didn't testify even though I told her I didn't see the murder because I wasn't at the Superdome.
29. Because I could barely read and write, Linda Van Davis had to read the false statement to me over and over.
30. After I testified, I wasn't released until the next day.
31. This time there was no ride from detectives and I walked home from the jail. I thought I was going to be killed while walking home. I was scheduled to take a bus the next day to Texas for rehab.
32. The following day, I rode the bus to Texas for Cenikor Rehab in Pasadena, Texas.
33. The state wanted to erase me off the map. They sent me to Cenikor to try to make me disappear. I'm sure they never expected me to survive all that.
34. I was fighting the Cenikor treatment center. I felt the program was abusive, they had me brushing my teeth on the knees and all kinda crazy stuff.
35. Just as they were about to kick me out of the program and a bus was en route to get me, the program manager stopped the process stating that they couldn't let me go back to New Orleans.
36. I eventually was sent to another drug treatment program deeper into Houston. I had no money and no family. I worked but the money I made was taken from me for the drug program.
37. After hurricane Katrina, many people moved to Houston from New Orleans. There were people from my neighborhood living in the same complex as me.
38. I went from treatment center to treatment center until I found one that really helped me to get everything together.
39. I suffered from a lot of anxiety attacks and paranoia because of what they forced me to do. I was constantly watching my back. All of this had a negative impact on my ability to enjoy time with my family in public.
40. I never saw the murder. I wasn't at the Superdome.
41. At the time of the murder I was a Heroin Junkie. The detectives knew this. There was nothing that came out of my mouth that should have been trusted. I didn't know anything, not even myself.
42. I agreed to give the false statement and play along because I didn't want to be sick the next day. I needed to get out so I could get high and I told Kaufman all of this. I told Kaufman I'll do whatever I he wanted me to do.
43. All of this has haunted me for years.
44. This is the first time I have spoken to an investigator concerning Duvander Hurst concerning this information. I have not spoken with any attorneys representing Duvander Hurst.

THE POST-CONVICTION HEARING

John Thomas (“Thomas”), defendant’s attorney during trial, testified at the hearing. Thomas stated that he had just learned that morning that Varnado authored an affidavit in April 2013, recanting his testimony and accusing the NOPD and the DA’s Office of coercing him to testify falsely at trial. Thomas explained that had he been aware of this information prior to trial, he would have changed his trial strategy. Thomas testified that both the lead detective and the prosecutor in this case, Det. Kaufman and Assistant D.A. Lynda Van Davis (“Van Davis”), had respectable reputations.²

Varnado, the state’s sole testifying eyewitness at trial, testified at the post-conviction hearing that he recalled testifying before the grand jury and at defendant’s trial that he had “seen [defendant] in a shooting that happened outside the Superdome.” Varnado stated that his previous testimony was not the truth and that, in fact, he had not seen defendant at the Superdome because he (Varnado) had not actually been present at the Superdome the night of the shooting.

Varnado claimed that, around the time of the incident, he was a heroin user and had been arrested several times for possession of heroin, possession of cocaine, and “was looking at another case coming up.” He explained that during one of his arrests, an officer asked him if he had information on the Superdome shooting and he responded that he had seen it on the news. The officer told him that the police may be able to “help” him out of his current situation if he could provide further information.³ Varnado was then taken to what he described as a pink police station near St. Claude Ave. Varnado testified that he first met Det. Kaufman when he arrived at the station. Varnado stated that he was held at the

² Thomas indicated that Det. Kaufman had since been convicted in Federal Court, but did not give any details.

³ Varnado could not name this officer but described him as a black man.

station for so long that his heroin high was wearing off and he began to fall ill with withdrawal. He told Det. Kaufman he would do whatever it took to be released from custody. Varnado essentially claimed that he was coached through his statement by Det. Kaufman, and rehearsed his statement with Det. Kaufman until it sounded convincing. He also claimed that he was promised leniency and given money in exchange for his statement.

The day of trial, the first time Varnado spoke to Van Davis, he explained to her that he did not want to testify because he didn't "really know nothing about this" and "had [gotten] himself in too deep." She responded that he had already said and done "all of this" and if he didn't testify accordingly, she would make sure he served twenty years on his as-of-yet un-adjudicated offenses.

Years later, Varnado claimed that he contacted a private investigator and related this version of events, ultimately authoring an affidavit which he signed and had notarized. At the hearing, Varnado insisted that his affidavit contained a true recitation of the facts and that he had neither been promised nor received anything of value, nor was he threatened or intimidated to provide the instant testimony.

On cross-examination, the state pointed out that Varnado's affidavit indicated that Van Davis came to see him at OPP two weeks before trial, which contradicted his direct examination testimony that the first time he spoke to Van Davis was the morning of trial. Varnado attempted to explain that a representative of the state came to see him while he was in police custody, but he could not recall who. He maintained that, although Van Davis may have indeed come to see him that day, he had not actually spoken to her about substantive matters until the day of trial.

Varnado recalled that the judge in defendant's trial cleared the courtroom prior to his testimony at the state's request, due to allegations that his mother had been receiving threats. The state suggested that Varnado's decision to retract his testimony was out of fear for his and his mother's life; however, Varnado responded that, after seventeen years had passed without injury to himself or his family, his fear had dissipated.

Varnado stated that following Hurricane Katrina in 2005, several people from his New Orleans neighborhood ended up in the Texas town where he resided. Some were familiar with his involvement in defendant's trial.

Varnado admitted that he had been convicted of several crimes since defendant's trial including theft in 2016, misdemeanor harassment in 2014, possession of cocaine in 2008, possession of marijuana in 2005 and again in 2006, assault in 2005, providing a false name in 2004, and resisting an officer in 2001. Varnado testified, he wanted to clear his conscience of what he believed had exacerbated and elongated his drug addiction by finally telling the truth in court.

The state asked Varnado why he would agree to perjure himself in a second degree murder trial in exchange for leniency in prosecution when he was only facing charges of "simple possession of cocaine and simple possession of heroin." Varnado responded that, at the time, he was a teenager with little understanding of the law, and he believed the prosecutor who told him that a heroin conviction did not qualify for probation and could carry up to a life sentence with a subsequent conviction. So when Varnado was arrested for possession of cocaine, he believed he was facing a life sentence. Varnado likewise believed the prosecutor in defendant's case when she threatened to pursue the maximum sentence of twenty years for his combined charges if he failed to testify consistent with his prior

statements. Finally, Varnado affirmatively accused Van Davis of threatening to publicly expose him in the press if his trial testimony was inconsistent with his prior statements.

Mosi Makori (“Makori”), a private investigator, formerly with the New Orleans Innocence Project, testified that he had been retained by defendant’s family to conduct a post-conviction investigation. In 2013, Makori traveled to Texas to speak to Varnado. Based on the information Varnado provided, Makori prepared Varnado’s affidavit, reviewed it with him, and accompanied him to the bank to have it notarized. To the best of Makori’s knowledge, neither he nor any member of defendant’s family either threatened Varnado or promised him anything of value in exchange for his statements. On cross-examination, Makori testified that, although defendant’s cousin had retained him in this investigation, he only learned that Varnado wished to speak to him when Varnado called him, personally.

The state called Det. Kaufman as a witness. Det. Kaufman testified that he first met Varnado a day or two after the shooting when Det. Powers from the second district informed him that “he had somebody at the station that had some information on a homicide that happened in front of the Superdome.” Det. Kaufman testified that, prior to speaking to Varnado, two other witnesses had identified defendant in a photographic lineup and Det. Kaufman had already obtained an arrest warrant for defendant. His recollection was refreshed that information included in his police report indicated that defendant had contacted a friend and asked him to provide an alibi.⁴ Det. Kaufman testified that he was aware of Varnado’s claim that Varnado had informed him at the outset of the

⁴ There is no indication of whether the friend actually provided the alibi or whether it was found to be true or false.

interview that he had not actually witnessed the shooting, but that it was not true, and he was “absolutely positive” that Varnado never told him that he had not been at the Superdome that night. He also denied providing Varnado with the facts contained in Varnado’s original statement.

On cross-examination, Det. Kaufman admitted that neither of the other two alleged eyewitnesses who identified defendant in photographic lineups had testified at his trial, and he was not sure if either of them testified before the grand jury.⁵

Det. Kaufman admitted that he pled guilty in federal court on April, 20, 2012 to one count of conspiracy to obstruct justice and one count of falsification of evidence to obstruct justice. In exchange for his guilty plea, he received a three-year sentence, dismissal of his eight remaining federal charges, and an agreement from the State of Louisiana through the New Orleans District Attorney to neither investigate nor pursue charges against him for his involvement in the “Danziger Bridge matter.” As part of the plea agreement, he admitted to knowingly falsifying records and conspiring with other NOPD officers to obstruct justice.

On redirect examination, Det. Kaufman testified that he had no personal connection with the victim or his family in this case and had no reason to frame defendant or falsify evidence against him. Det. Kaufman also noted that he had been indicted on the federal charges in 2010 and Varnado signed his affidavit in 2013.

The state re-called defendant’s trial attorney, Thomas. He admitted that, of all the witnesses he called at defendant’s trial who said they had been at the

⁵ Det. Kaufman testified that he could not remember their names, but he believed they were included in his police report.

Superdome the night of the shooting, he had not asked any of them whether they saw Varnado at the Superdome that night. On cross-examination, Thomas testified that, at the time of defendant's trial, he had no knowledge or indication that Varnado would retract his testimony. He further testified that, had he been aware of any other witnesses who saw Varnado at the Superdome, he certainly would have called them to testify.

2017 AFFIDAVIT OF DOMINIQUE JONES

Dominique Jones executed the following affidavit, which was presented in lieu of her testimony:

1. My name is Dominique Jones.
2. I met William Vanardo⁶ at a Narcotics Anonymous meeting while visiting my father at the end of January 2016. Shortly afterward, he started cutting my boy's hair, and later we started dating.
3. I allowed William and his 10 year-old daughter to move in with me.
4. In February 2016. William got arrested for a gun that he said he found in the bushes. He was charged with Possession of a Firearm.
5. I posted William's bail on Feb. 11, 2016.
6. I paid .Seven Hundred and Fifty Dollars (\$750.00) to Crystal Gayden, Esq. of the Law Offices of Crystal L. Gayden, in Fort Worth, Texas.
7. I also paid a Fifteen Dollar (\$15.00) bond fee.
8. The attached receipts dated February 11, 2016, are a true and accurate depiction of the receipts issued to me when I posted William's bond.
9. During the time that William and I were dating he confessed to me that at a young age he was on drugs and he was threatened to lie on an innocent man to put him in prison. Now, he told me, he wanted to clear his conscious and he was expected to testify in New Orleans.
10. William wanted me to come with him to New Orleans on April 1, 2016 to offer my support when he testified.
11. After his arrest, William asked me to call Duvander "Chevy" Hurst's mom to let her know William was in jail but was still going to try to make it to court on April 1st.
12. "Chevy" then reached out to me through his mother and asked if I needed help paying for William's bond. I told him I already took care of it.
13. William told me his mom recently passed away, that he had custody of his daughter, and that he had gotten out of a long term relationship with his girlfriend Trina.
14. After his arrest, I thought he might be schizophrenic. However, when he went to the John Peter Smith Hospital in Fort Worth, I got a call from a nurse who told

⁶ The proper spelling is Varnado.

me that William had had a large amount of crystal meth in his system, that nothing was wrong with him mentally, and that he had to be released because they did not treat drug addictions.

15. The hospital released William from the psych ward and he later got in contact with me. I picked him up and took him to cash his income tax check and dropped him off at a hotel.

16. I was never threatened, coerced, or promised anything of value in exchange for posting William's bond. I did so because we were dating at the time, I was concerned about his well-being, and I wanted him to be home with his daughter.

17. I was never reimbursed for my bond by Chevy or any members of the Hurst family.

18. William Varnado won custody of his 10-year old daughter.

19. He cut hair real good.

20. The above is true and correct to the best of my knowledge.

LYNDA GREENSTONE (aka VAN DAVIS) INTERROGATORY & ADMISSION RESPONSES

In her responses to the state's interrogatories and requests for admissions, Van Davis indicated that she was the lead prosecutor in defendant's case in 1999. The facts of the case as she recalls them were that a fight broke out at the Super Fair at the Superdome on June 7, 1999, between two rival neighborhoods. Following the fight, "a red car with primer on the side was seen travelling down Poydras towards Claiborne Ave." Gunshots emanated from the vehicle and the victim, Allen Galathe (sic), was struck and killed. "At the scene of the shooting there were no eyewitnesses who could identify the shooter." Once Varnado was arrested for possession of cocaine, he met with homicide detectives and identified defendant as the shooter. Varnado knew defendant's nickname as "Chevy" and said his vehicle looked like the shooter's. Because Varnado cooperated in the murder investigation, he was required only to continue in the diversion program he was already enrolled in for his charge of possession of cocaine.

The day of trial, Varnado's mother claimed she received a threatening phone call⁷ from defendant's relative the night before. As a result, Van Davis requested the courtroom be cleared prior to Varnado's testimony.

Van Davis did not recall “the first or subsequent interactions that [she] had with” Varnado and referred to her notes for the next several responses.

Based on my notes, it appears that the first time I met with Varnado was while he was incarcerated on a public intoxication arrest. The fact that there are very few notes reflecting my interactions with Varnado, I suspect that I first met with him at Orleans Parish Prison TP3 in preparation for trial. The next time I probably spoke to him was right before he took the stand at the trial.

Van Davis issued a blanket denial of all the statements Varnado accused her of making prior to trial and stated, “Varnado, never told me that he was not present the day Allen Delatte was killed or that he didn’t see the shooting incident.” She then admitted that Varnado told her he did not want to testify, but indicated that it was because he feared for his safety. She also admitted she told Varnado that if he refused to testify, the district attorney may revoke his participation in the diversionary program and prosecute him for both drug charges, but maintained he agreed to testify voluntarily. Van Davis stated that she would have read Varnado’s

⁷ The contents of which have not been revealed or alleged.

statement to him if he was not able to read it himself, but she couldn't recall that being the case. She further stated that she would never suborn perjury, never break the law to win a case, and would have dismissed the charges against defendant had Varnado related the information he now asserts.

Van Davis asserted that she had no knowledge of any officer or district attorney giving Varnado money, and had no reason to believe Det. Kaufman supplied the facts of the case to Varnado.

Van Davis stated that her relationship with Det. Kaufman was strictly professional and limited to two or three cases. She was not present for any interaction between Varnado and Det. Kaufman and by the time she was assigned the case, it had already been set for trial. Other than allowing Varnado to remain in the diversionary program for his second drug offense, of which defendant was aware, Van Davis stated she did not know what promises, if any, had been made in exchange for Varnado's testimony.

JAILHOUSE TAPES

Over the defendant's objection, the state introduced transcripts from several of defendant's jailhouse phone conversations. The state maintains that the recorded conversations between defendant and his friends and family strongly indicate that Varnado's recantation was a farce. Based on the record before us, we find, as did the trial court, that assertion has merit.

DISCUSSION

The trial court denied defendant's application for post-conviction relief providing the following written reasons:

On June 27, 2000, following a jury trial, the defendant was convicted of Second Degree Murder. On September 15, 2000, the

defendant was sentenced to life imprisonment in the Department of Corrections.

The Petitioner's Application for Post-Conviction Relief is based on the allegations that the state prosecutors and law enforcement officers engaged in misconduct to obtain a conviction at the expense of the defendant's rights to due process and a fair trial. The instant Application is prefaced upon what the defense has styled as the discovery of new facts, pursuant to La. C.Cr.P. Art. 930.8, namely the discovery and receipt on April 4, 2013, of the affidavit of William Varnado the State's sole eye-witness who placed Petitioner in the vehicle from which the fatal shots were fired and who has since recanted his trial assertions. William Varnado in this affidavit, had recanted his prior statements naming Duvander Hurst as the perpetrator in the killing of nineteen year old Allen Galathe.

In summary, William Varnado alleges in these post-conviction proceedings that (1) Detective Arthur Kaufman provided Varnado of a scenario of what happened on the night of the murder, (2) Varnado was coached by officers before trial, (3) Varnado confided in prosecutor Lynda Van Davis that he was not at the Super Fair the evening of the murder and that Van Davis subsequently threatened to take any "deals" away pertaining to Varnado's drug charges, and that (4) Varnado provided a false statement because he was a heroin junkie that needed to get out of his new charges and that detectives knew this information.

In contrast to these post-conviction assertions, the State contends that the record shows the following: that before William Varnado requested to speak to NOPD investigators regarding the Super Fair murder, two witnesses, Lerman Robinson and Hollis Smith, had already positively identified Duvander Hurst as the perpetrator in photographic lineups, that the defendant's car matched the unique description of the perpetrator's vehicle, and that defendant's mother's own statement placed the defendant at the scene of the murder. Additionally, the State asserts that defendant's claim that he was in fact not at the Superdome the night of the murder was not only negated by his own mother at trial, but was also negated by the defendant's own trial counsel who during the post-conviction hearing proceedings stated an individual named Melvin Owens informed trial counsel that the defendant was at the Superdome that evening.

The court takes special note of the State's introduction of a CD containing recorded jail calls made by the defendant during the pendency of the post-conviction hearings and the transcript of same which outlines conversations regarding William Varnado. These detailed conversations when read against the backdrop of the post-conviction proceedings, taking place over the court (sic) of several months, present a compelling picture that casts doubt over the credibility of William Varnado's post-conviction actions and testimony.

In light of all the testimony and evidence provided to this court, it is this court's opinion that William Varnado's recantation is wholly uncorroborated, suspicious, and is undermined by the overwhelming evidence presented by the state.

Based on the foregoing, Defendant's Motion for Post-conviction Relief is hereby DENIED.

La. C.Cr.P. 930.3 provides in pertinent part:

If the petitioner is in custody after sentence for conviction for an offense, relief shall be granted only on the following grounds:

(1) The conviction was obtained in violation of the constitution of the United States or the state of Louisiana;

Defendant claims that he was denied his constitutional right to due process because (1) the jury's verdict was based on factually incorrect testimony, and (2) he asserts that both the investigators and the state were aware that the now-recanted testimony of the state's only "eye-witness," was false before, during, and after defendant's murder trial, yet intentionally failed to correct the alleged perjured testimony. The Louisiana Supreme Court stated in *State v. Ortiz*, 2011-2799, p. 7 (La. 1/29/13), 110 So. 3d 1029, 1034;

Grounds for post-conviction relief in Louisiana are primarily restricted to constitutional or jurisdictional violations, La.C.Cr.P. art. 930.3, and "the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor ... the aim of due process 'is not punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused.'" *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940, 947, 71 L.Ed.2d 78 (1982) (quoting *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196, 10 L.Ed.2d 215 (1963)).

As a result of the trial court's finding that the circumstances surrounding Varnado's recantation were suspicious and the contents uncorroborated, it does not appear that defendant's due process rights have been violated.

In *State v. Briley*, 2013-1421, p. 21 (La. App. 4 Cir. 10/1/14), 151 So. 3d 633, 647, this Court cited longstanding Louisiana Supreme Court jurisprudence for the proposition that “recantations are highly suspicious,” as they are tantamount to a confession of perjury which “destroys the credibility of the witness” at a later trial, and should be viewed with the utmost suspicion. See *State v. Prudholm*, 446 So. 2d 729, 736 (La. 1984); *State v. Clayton*, 427 So.2d 827 (La. 1982); *State v. Tyler*, 342 So. 2d 574 (La. 1977).

Although the trial court did not cite to the specific facts upon which it relied when finding Varnado’s recantation unconvincing, there was some indication at trial that Varnado and/or his mother had received threats to their safety, although the identity of the maker of the threats was allegedly unknown. Although Varnado testified at the post-conviction hearing that his recantation was a product of his guilty conscience and not due to similar threats to his safety, it was within the district court’s discretion; and moreover, it was its duty, to view the testimony with the utmost suspicion. The trial court had reason to believe that Varnado’s recantation was induced by fear of retribution once his location was discovered by defendant’s associates following Hurricane Katrina.

Additionally, the recorded jailhouse phone calls, while not directly dispositive, taken as a whole, create extremely suspicious circumstances surrounding Varnado’s recantation and the extent to which defendant and/or his associates were involved in its procurement. For instance, anytime it appeared that a party on the line with defendant was about to discuss Varnado’s recantation, defendant would interrupt and command them to stop talking. There is also some indication from the phone conversations that Varnado’s safety would have been placed in danger if he failed to testify at the post-conviction hearing. Finally, it

appears from the recorded phone calls that money may have been paid to an unknown recipient in exchange for Varnado's recantation. In sum, we find that the record supports the trial court's conclusion that the recantation was suspicious and that Varnado lacked credibility.

CONCLUSION

For the foregoing reasons, we find no error in the trial court's denial of defendant's application for post-conviction relief. Accordingly, defendant's writ application is denied.

WRIT GRANTED; RELIEF DENIED

Please Serve:

Office of the Judicial Administrator, c/o Sandy Meadoux, Appellate Clerk
Criminal District Court