Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **9th day of July, 2020** are as follows:

PER CURIAM:

2019-KH-00073 STATE OF LOUISIANA VS. ROBERT E. RICARD, JR. (Parish of Tangipahoa)

While it is conceivable that the sentencing range in the molestation jury instruction (to which counsel did not object) had an effect on the outcome of the proceeding, defendant must show 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. It is not enough to show that the errors had some conceivable effect on the outcome of the proceeding. Counsel's errors must be so serious as to deprive the defendant of a fair trial in which the result is reliable. Defendant, who presents only a conceivable possibility, has failed to carry his post-conviction burden of establishing a reasonable probability sufficient to undermine confidence in the verdict. Accordingly, we affirm the denial of relief on collateral review.
AFFIRMED.

Retired Judge James Boddie, Jr., appointed Justice ad hoc, sitting for Justice Clark.

Retired Justice Jeannettte Knoll appointed as Justice ad hoc sitting for Crain, J., recused in case number 2019-KH-00073 only.

Crichton, J., concurs for the reasons assigned by Knoll, J.
Knoll, J., concurs and assigns reasons.

07/09/20

SUPREME COURT OF LOUISIANA

No. 2019-KH-00073

STATE OF LOUISIANA

versus

ROBERT E. RICARD, JR.

ON SUPERVISORY WRIT TO THE TWENTY-FIRST JUDICIAL DISTRICT COURT, PARISH OF TANGIPAHOA

PER CURIAM:[*]

Defendant was indicted with two counts of aggravated rape, La.R.S. 14:42(A)(4) (prior to amendment by 2015 La. Acts No. 184), of his niece, K.M., age 12. Defendant regularly babysat K.M. and her siblings in exchange for lodging in the home of his sister's family. At trial, defendant's younger sister (who was not the mother of K.M.), age 25, testified that defendant had raped her several times when she was 10 years old but that she did not reveal the abuse to her older sister, K.M.'s mother, until she heard the allegations that defendant raped K.M.

With defense counsel's zealous and skilled advocacy, the jury acquitted defendant of one count of aggravated rape, and found him guilty of the lesser offense of molestation of a juvenile, La.R.S. 14:81.2, in response to the second count of aggravated rape. The charged offenses carried a mandatory sentence of life imprisonment without parole eligibility.

The jury was instructed that 10 of 12 jurors must agree to reach a verdict. Upon the jury's return to the courtroom, however, the judge misspoke and asked whether nine jurors concurred in the responsive verdict, but the jury was not

[*] Retired Judge James Boddie, Jr., appointed Justice ad hoc, sitting for Clark, J. Retired Justice Jeannette Knoll appointed as Justice ad hoc sitting for Crain, J., recused.

polled. The jury was also instructed that there are 10 lesser offenses that are responsive to the charged crimes: attempted aggravated rape, forcible rape, attempted forcible rape, simple rape, attempted simple rape, sexual battery, molestation of a juvenile, attempted molestation of a juvenile, indecent behavior with a juvenile, and attempted indecent behavior with a juvenile. Despite being instructed that sentencing is not the function of the jury but rather is the duty and responsibility of the judge, the jury was also informed of the sentencing range for each lesser responsive crime. Unfortunately, the court misinformed the jury that the sentencing range for molestation of a juvenile is five to 20 years imprisonment, when in fact the correct sentence for that crime is much greater because of the victim's age.[1] La.R.S. 14:81.2(D)(1) ("Whoever commits the crime of molestation of a juvenile when the victim is under the age of thirteen years shall be imprisoned at hard labor for not less than twenty-five years nor more than ninety-nine years. At least twenty-five years of the sentence imposed shall be served without benefit of probation, parole, or suspension of sentence.").

Defendant did not object to the jury instructions and did not bring the error to the district court's attention until sentencing when the State objected to the leniency of the 20-year sentence that the court initially imposed. The State subsequently filed a habitual offender bill of information alleging that the

[1] For the other lesser offenses, the jurors were informed of the following sentencing ranges: attempted aggravated rape, up to 50 years imprisonment; forcible rape, not less than five nor more than 40 years imprisonment with at least two years without parole; attempted forcible rape, up to 20 years imprisonment; simple rape, up to 25 years imprisonment without parole; attempted simple rape, up to 12 1/2 years imprisonment; sexual battery, up to 99 years imprisonment with at least 25 years without parole; attempted molestation of a juvenile, up to 10 years imprisonment; indecent behavior with a juvenile, up to 25 years imprisonment with at least two years without parole; and attempted indecent behavior with a juvenile, up to 12 1/2 years imprisonment.

defendant was a third-felony habitual offender.[2] Defendant refused at first to enter a plea to the allegations. After negotiations, however, defendant accepted the State's offer to waive the mandatory minimum sentence of 66 years,[3] in accordance with La.C.Cr.P. art. 890.1(A)(1). Thereafter, defendant admitted the allegations in the habitual offender bill, and the district court sentenced defendant to an agreed-upon sentence of 40 years imprisonment at hard labor without parole eligibility.

The court of appeal affirmed the conviction, habitual offender adjudication, and sentence. *State v. Ricard*, 15-1855 (La. App. 1 Cir. 9/16/16) (unpub'd), *writ denied*, 16-1880 (La. 9/6/17), 224 So.3d 987. The court of appeal rejected defendant's claim that the error in instructing the jury on the wrong sentencing range for molestation likely influenced the jury's return of that responsive verdict and thereby denied him a fair trial. The court of appeal found that any complaint about the error was waived by the failure to object to the erroneous instruction. The court of appeal also found that defendant's objection at sentencing was to the length of the sentence rather than the instructional error, and that defendant did not protest at sentencing that the jury charge had denied him a fair trial. Finally, the court of appeal found that defendant admitted the allegations in the habitual offender bill and agreed to the 40-year sentence as a third-felony offender. While not stated directly, implicit in this last finding by the court of appeal is that

[2] The State alleged the following predicate felonies: (1) March 9, 2004, guilty plea to simple burglary of an inhabited dwelling, (2) March 9, 2004, guilty plea to attempted simple kidnapping and illegal possession of stolen things; and (3) July 13, 2006, conviction for felon in possession of a firearm. The State conceded that the 2004 convictions could only be counted as a single predicate felony.

[3] The court of appeal, however, found on direct review that the State erred in this calculation and that the correct mandatory minimum sentence under the habitual offender law was life imprisonment because of the nature of the present offense and defendant's predicate felonies.

defendant either waived the claim or that he was not prejudiced by the error.

Defendant's timely application for post-conviction relief was denied by the district court. The court of appeal denied review without comment. *State v. Ricard*, 18-1315 (La. App. 1 Cir. 11/30/18) (unpub'd). Defendant contends, as he did on direct appeal, that he was denied a fair trial because the lesser sentencing range provided in the erroneous jury instruction lured the jury into finding him guilty of that offense. Defendant presents that claim again now by projecting it through the lens of the Sixth Amendment right to counsel and the standard of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), arguing that counsel's error in failing to object to the jury instruction is the root cause of the unfair trial and unreliable verdict here. Defendant also contends that counsel was ineffective for failing to ask that the jury be polled when the district court misspoke and asked whether nine (rather than ten) jurors concurred in the verdict.

The latter claim can be quickly dismissed. The jury was correctly instructed, both verbally from the bench and in written charges that accompanied the jury into deliberations, that 10 of 12 jurors must concur in the verdict. While nonunanimous verdicts are no longer authorized in trials for serious offenses, they were authorized at the time of defendant's trial, and jurors were correctly instructed on what was necessary to reach a verdict at that time. Aside from the district court's isolated misstatement, there is nothing to suggest that only nine jurors concurred in the verdict. On collateral review, the applicant who seeks relief has the burden of proving entitlement to it. La.C.Cr.P. art. 930.2 ("The petitioner in an application for post conviction relief shall have the burden of proving that relief should be granted."). Defendant here cannot simply allege that only nine jurors *might have* concurred in the verdict, and then shift the burden to the State to prove otherwise.

Defendant has failed to carry his burden of showing any deficient performance by counsel in failing to point out the district court's brief misstatement, and failed to show the verdict has been rendered suspect. As the United States Supreme Court found in *Harrington v. Richter*, 562 U.S. 86, 111–12, 131 S.Ct. 770, 791–92, 178 L.Ed.2d 624 (2011), "The likelihood of a different result must be substantial, not just conceivable." The likelihood of prejudice alleged here is only conceivable.

With regard to defendant's primary claim, the prejudice defendant claims to have suffered is also unproved. Furthermore, it is too speculative. An applicant for post-conviction relief who alleges he received ineffective assistance of counsel has the burden of establishing that (1) "counsel's representation fell below an objective standard of reasonableness;" and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See State v. Washington*, 491 So.2d 1337, 1339 (La. 1986) (quoting *Strickland v. Washington*). Assuming for the sake of argument that counsel unprofessionally erred in failing to object to the illegally lenient sentencing range in the jury charge (although it is conceivable that counsel chose to remain silent in the hopes the error would persist through sentencing), defendant here fails to carry his post-conviction burden of showing prejudice under *Strickland*.

The United States Supreme Court elaborated on the *Strickland* standard in *Harrington v. Richter*, in the context of chastising the federal circuit court for failing to afford the requisite deference owed the state court. The court stated:

> To establish deficient performance, a person challenging a conviction must show that "counsel's representation fell below an objective standard of reasonableness." 466 U.S. at 688, 104 S.Ct. 2052. A court considering a claim of ineffective assistance must apply a "strong presumption" that counsel's representation was within the "wide range" of reasonable professional assistance. *Id.*, at 689, 104 S.Ct. 2052. The challenger's burden is to show "that counsel made errors so

> serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.*, at 687, 104 S.Ct. 2052.
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> With respect to prejudice, a challenger must demonstrate "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 694, 104 S.Ct. 2052. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.*, at 693, 104 S.Ct. 2052. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*, at 687, 104 S.Ct. 2052.
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> "Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland*, 466 U.S., at 689–690, 104 S.Ct. 2052. Even under de novo review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." *Id.*, at 689, 104 S.Ct. 2052; *see also Bell v. Cone*, 535 U.S. 685, 702, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Strickland*, 466 U.S., at 690, 104 S.Ct. 2052.

Richter, 562 U.S. at 104–105, 131 S.Ct. at 787–788.

This court also elaborated on the *Strickland* standard in *State v. Curley*, 16-1708 (La. 6/27/18), 250 So.3d 236. This court wrote:

> To prevail on a claim of ineffective assistance, a defendant must first show that "counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687–88, 104 S.Ct. 2052. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error has no effect on the judgment." *Id.* at 691, 104 S.Ct. 2052. *See also Buck v. Davis*, — U.S. —, 137 S.Ct. 759, 775–77, 197 L.Ed.2d 1 (2017) (explaining two prongs of *Strickland*). To satisfy the second prong of *Strickland*, a litigant must also demonstrate prejudice. "The

> purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." *Strickland*, 466 U.S. at 691–92, 104 S.Ct. 2052. Thus, the "defendant must [also] 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 694, 104 S.Ct. 2052.

Curley, pp. 7–8, 250 So.3d at 241.

Here, defendant contends there is a reasonable probability that the jury returned the verdict of guilty of molestation because the jury was incorrectly instructed that the sentencing range for this crime is five to 20 years imprisonment. The flaw in this assertion is that what role, if any, the sentencing range played in jury deliberations is unknowable in this case, and it requires this court to speculate. It is conceivable that the jury ignored their instruction that sentencing is the proper domain of the judge and that they should decide the case based on the evidence presented with regard to the elements of each offense under the reasonable doubt standard. There is also a reasonable probability that the jury correctly performed their duty. There is a reasonable probability that the jury found defendant guilty of molestation—not because of the sentencing range they believed he would face—but because the elements of that crime best fit the evidence presented at trial. Notably, the sentencing ranges for the lesser responsive verdicts do not fall into any neat and convenient pattern descending from greater to lesser. Instead, the ranges are scattershot and overlap. Defendant's claim that the jury likely selected molestation because of the sentencing range ignores the fact the jury had other options with similar and overlapping ranges. Defendant's theory does not explain why molestation was chosen by the jury rather than, for example, simple rape or

indecent behavior.

While it is conceivable that the sentencing range in the molestation jury instruction (to which counsel did not object) had an effect on the outcome of the proceeding, defendant must show 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. It is not enough to show that the errors had some conceivable effect on the outcome of the proceeding. Counsel's errors must be so serious as to deprive the defendant of a fair trial in which the result is reliable. Defendant, who presents only a conceivable possibility, has failed to carry his post-conviction burden of establishing a reasonable probability sufficient to undermine confidence in the verdict. Accordingly, we affirm the denial of relief on collateral review.

Applicant has now fully litigated his application for post-conviction relief in state court. Similar to federal habeas relief, *see* 28 U.S.C. § 2244, Louisiana post-conviction procedure envisions the filing of a second or successive application only under the narrow circumstances provided in La.C.Cr.P. art. 930.4 and within the limitations period as set out in La.C.Cr.P. art. 930.8. Notably, the legislature in 2013 La. Acts 251 amended that article to make the procedural bars against successive filings mandatory. Applicant's claims have now been fully litigated in accord with La.C.Cr.P. art. 930.6, and this denial is final. Hereafter, unless he can show that one of the narrow exceptions authorizing the filing of a successive application applies, applicant has exhausted his right to state collateral review. The district court is ordered to record a minute entry consistent with this per curiam.

AFFIRMED

07/09/20

SUPREME COURT OF LOUISIANA

No. 2019-KH-00073

STATE OF LOUISIANA

VS.

ROBERT E. RICARD, JR.

On Supervisory Writ to the 21st Judicial District Court, Parish of Tangipahoa

CRICHTON, J., concurs for the reasons assigned by Knoll, J.

07/09/20

SUPREME COURT OF LOUISIANA

No. 2019-KH-00073

STATE OF LOUISIANA

versus

ROBERT E. RICARD, JR.

ON SUPERVISORY WRIT TO THE TWENTY-FIRST JUDICIAL DISTRICT COURT, PARISH OF TANGIPAHOA

Knoll, J., concurring

With all due respect, for the following reasons I concur in the result.

The only issue squarely before this Court is whether relator can raise a trial error in a post-conviction proceeding ***after*** he has knowingly pleaded guilty with an agreed-upon sentence under the habitual offender statute with multiple predicate felonies and is presently serving that habitual offender sentence. The jurisprudence is legion that one who pleads guilty with an agreed-upon sentence waives ALL errors and is not entitled to relief.[1]

Here, the relator is complaining of an error that sounds like an unfortunate judicial error from an otherwise outstanding District Judge. Notwithstanding this

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[1] The citation of cases here would quickly become repetitive. However, just a few bear mentioning. A defendant's unconditional guilty plea generally waives all non-jurisdictional defects in the proceedings leading to his conviction. *State v. McKinney*, 406 So.2d 160, 161 (La. 1981); *State v. Crosby*, 338 So.2d 584, 586 (La. 1976). In addition, the United States Supreme Court stated in *Blackledge v. Perry*, 417 U.S. 21, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974), that a guilty plea bars review of many claims, including even "'antecedent constitutional violations'" related to events that had "'occurred prior to the entry of the guilty plea.'" *Blackledge*, 417 U.S. at 30, 94 S.Ct. at 2103 (quoting *Tollett v. Henderson*, 411 U.S. 258, 266–267, 93 S. Ct. 1602, 1607, 36 L.Ed.2d 235 (1973)). Finally, this Court has rejected numerous post-conviction applications because habitual offender adjudications are not cognizable on state collateral review. *See* La.C.Cr.P. art. 930.3; *State ex rel. Melinie v. State*, 93-1380 (La. 1/12/96), 665 So.2d 1172; *see also State v. Cotton*, 09-2397 (La. 10/15/10), 45 So.3d 1030 ("[A] habitual offender adjudication . . . constitutes sentencing for purposes of *Melinie* and La.C.Cr.P. art. 930.3, which provides no vehicle for post-conviction consideration of claims arising out of habitual offender proceedings, as opposed to direct appeal of the conviction and sentence.").

judicial error and a lack of objections by relator's defense counsel and the State, relator knowingly and voluntarily pleaded guilty to the State's habitual offender bill filed against him. The record shows relator was fully aware of the trial error and elected to plead guilty with an agreed-upon 40-year sentence under the habitual offender law. Thus, relator ***waived*** all preceding trial errors when he pleaded guilty.

The majority per curiam discusses trial error issues raised by relator that are inappropriate to the disposition of this case. These issues were waived for the reasons stated above.[2] The majority discussion of trial error at this stage in essence gives relator another bite at the apple where no other similarly-situated defendant has obtained relief.

Moreover, conspicuously missing from relator's claims is any allegation he suffered prejudice that affected his decision to plead guilty to the allegations in the habitual offender bill. Indeed, relator has not even asked that his habitual offender adjudication or sentence be set aside, nor does he show how it prejudiced his plea under the habitual offender bill.[3] Simply stated, all of relator's complaints arise from a trial error he waived when he knowingly pleaded guilty to an agreed-upon sentence under the habitual offender law. Accordingly, relator is not entitled to relief.

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[2] Indeed, this was essentially what the court of appeal suggested on direct review in the context of reviewing the sentencing claim when the panel emphasized defendant had admitted the allegations in the habitual offender bill of information. *See State v. Ricard*, 15-1855, p. 4 (La. App. 1 Cir. 9/16/16), available at 2016 WL 4942350 *8–9.

[3] This demonstrates that relator himself is aware that his habitual offender plea stands as a formidable obstacle to the affording him any relief, let alone his request for a new trial based on an error that preceded his decision to plead guilty to the allegations in the habitual offender bill.