

23RD JUDICIAL DISTRICT COURT
PARISH OF ASCENSION
STATE OF LOUISIANA

No: 32975

ED
8/21/2018
DIVISION 4A
RECEIVED

STATE OF LOUISIANA
VERSUS
JOSEPH MCKINNEY

APPLICATION FOR POST CONVICTION RELIEF

REASONS FOR JUDGMENT

I. PROCEDURAL HISTORY

The Defendant, Joseph McKinney, was convicted of Molestation of a Juvenile on September 10, 2014. On May 11, 2015 the Defendant was sentenced to serve thirty-five (35) years. Pursuant to the First Circuit Court of Appeal vacating the sentence of the trial court and remanding the case for re-sentencing, the Defendant was re-sentenced on September 11, 2017 to serve thirty-five (35) years at hard labor without the benefit of probation, parole, or suspension of sentence. The Defendant then filed the present Application for Post-Conviction Relief on October 22, 2018.

II. ARGUMENTS OF THE PARTIES

A. Joseph McKinney

The basis of Mr. McKinney's argument is that his trial counsel was ineffective in a number of respects. First, Mr. McKinney alleges that his trial counsel was ineffective in his failure to question the victim on alleged prior false allegations of sexual abuse she made against the Defendant and her grandfather. Also, Mr. McKinney alleges that there was an attorney, Mrs. Kim Landry who represented him in a prior case involving the Department of Child and Family Services (DCFS), who previously stated that there were no instances of sexual behavior or abuse involving Mr. McKinney, but the DCFS attorney was not questioned on this matter at the trial. Lastly, Mr. McKinney argues that his attorney was ineffective for failure to challenge the applicability of the Rape Shield Law in this case through the filing of a motion *in limine* and that, based on this, he was not allowed to present evidence of the accuser's past sexual behavior.

B. State of Louisiana

The State of Louisiana filed an Opposition to Mr. Williams' Application on April 26, 2019.



In its Opposition, the State argues that all three (3) claims of ineffective assistance of counsel made by the Defendant lack merit.

First, the State argues that the Defendant's trial counsel did in fact make multiple requests to present evidence of the victim's alleged prior false allegations. However, the witnesses which were needed to introduce such testimony were not available to testify at the hearing on the issue. Thus, there was no evidence that the Defendant could have presented of the alleged prior false allegations

Secondly, the attorney who represented the Defendant at the DCFS hearings did testify that the victim "had not made any allegations at that time with regard to sexual abuse." Furthermore, this questioning revealed possible impeachment evidence of the victim. However, the State argues that the trial counsel for the Defendant could not control whether the jury found Mrs. Landry to be credible.

Lastly, the State asserts that the issue of the applicability of the Rape Shield Law was thoroughly addressed by the parties prior to and at trial. Ultimately, the Court determined that the Defendant could not discuss, introduce, or make any reference to the alleged sexual activity of the victim. Also, the State argues that even though the Court made this ruling, the Defendant skirted the line regarding this ruling by referring to the victim being with older boys. Related to this argument, the Defendant questioned Anne Troy, a pediatric forensic nurse, and elicited testimony that the bacterial vaginosis that the victim contracted was not necessarily due to a sexual encounter but could be due to anything that may change the "acidic base balance" of an individual's vagina.

III. APPLICABLE LAW

The petitioner in an application for post-conviction relief shall have the burden of proving that relief should be granted.¹

Ineffective assistance claims are determined under the two-part test announced in *Strickland v. Washington*: the defendant must establish that "counsel's representation (1) fell below an objective standard of reasonableness" and (2) prejudiced the defendant.²

IV. ANALYSIS

Mr. McKinney argues three (3) instances of ineffective assistance of counsel: (1) failure of his trial counsel to introduce evidence of alleged prior false allegations of sexual abuse made by the victim; (2) failure of trial counsel to illicit further testimony from the Defendant's prior counsel

¹ La. C.Cr.P. art. 930.2.

² *Strickland v. Washington*, 466 U.S. 668, 687-88, 691-92 (1984).

related to a DCFS case; and (3) failure of trial counsel to challenge the applicability of the Rape Shield Law and to have other instances of sexual acts of the victim entered into evidence.

There is clearly a two (2) part test that must be met for a defendant to succeed on a claim that trial counsel was ineffective: counsel's representation (1) fell below an objective standard of reasonableness and (2) prejudiced the defendant to an extent that the trial was rendered unfair and the verdict was suspect.³ Further, the likelihood of a different result must be substantial, not merely conceivable.⁴ Indeed, there is a strong presumption that the trial counsel's performance is within a wide range of effective representation.⁵ Also, the Defendant, Mr. McKinney, bears the burden in his application for post-conviction relief to prove that his requested relief should be granted.⁶

Ultimately, Mr. McKinney has failed to meet his burden to prove that his trial counsel was ineffective.

Mr. McKinney has made allegations that his trial counsel failed to have evidence of alleged prior false allegations made by the victim admitted into evidence. However, after review of the record, it is clear that Mr. McKinney's trial counsel did in fact attempt to have such evidence introduced but the witnesses needed to have such information introduced, did not appear for the hearing to testify as to these alleged prior false allegations. This does not rise to the level of ineffective assistance of counsel as trial counsel attempted to have the evidence entered but the failure of the witnesses to appear for the hearing was outside of trial counsel's control. This claim does not meet the first prong of *Strickland* in that trial counsel's representation fell below an objective standard of reasonableness.

Secondly, Mr. McKinney's allegation that his trial counsel was ineffective for failure to question Mrs. Kim Landry, the attorney who represented Mr. McKinney in the DCFS case, about the fact that the victim never made allegations of sexual abuse are without merit. As stated by the State, trial counsel for Mr. McKinney did in fact question Mrs. Landry and elicited testimony that the victim did not make sexual abuse allegations at the time of the DCFS case. While, in hindsight, Mr. McKinney may have preferred a different line of questioning, the "court does not judge counsel's performance with the distorting benefits of hindsight, but rather determines whether

³ *Id.* at 687-88, 691-92; *State ex rel Sparkman v. State*, 15-1726 (La. 2016), 202 So. 3d 488, 491.

⁴ *State v. Curley*, 16-1708 (La. 2018), 250 So. 3d 236, 241.

⁵ *State ex rel Sparkman*, 202 So. 3d at 491.

⁶ La. C.Cr.P. art. 930.2.

counsel was reasonably likely to render effective assistance."⁷ Therefore, again, Mr. McKinney has failed to meet his burden under *Strickland*.

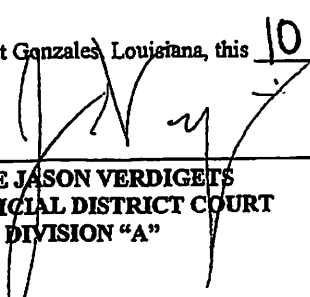
Lastly, Mr. McKinney argues that his counsel was ineffective in his failure to challenge the application of the Rape Shield Law in this case. To the contrary of the assertion made by Mr. McKinney, the Court ruled that the issues of the alleged prior sexual activity of the victim could not be discussed by the Defendant. Therefore, trial counsel for the Defendant was not ineffective to the extent that he fell below an objective standard of reasonableness. Indeed, it would appear that even if the Defendant's trial counsel was ineffective in this regard, there does not appear to be a substantial likelihood of a different result. This is due to the fact that, as is shown through the testimony given at trial, the Defendant skirted around the issue of the victim being involved with older boys. Also, there was the introduction of evidence, through Anne Troy, that the bacterial vaginosis could have been caused by any number of things not solely related to intercourse. Thus, these issues were addressed by counsel for the Defendant and would not appear to state a valid claim under *Strickland*.

Therefore, Mr. McKinney has failed to meet his burden and has failed to prove his claims of ineffective assistance of counsel pursuant to *Strickland*.

V. CONCLUSION

Therefore, it is the determination of this Court that Mr. Joseph S. McKinney's Application for Post-Conviction Relief is **DENIED**.

THUS DONE AND SIGNED at Gonzales, Louisiana, this 10 day of June, 2019.


JUDGE JASON VERDIGE
23RD JUDICIAL DISTRICT COURT
DIVISION "A"

NOTICE ALL PARTIES OF RECORD

⁷ *Id.* (citing *State v. Solar*, 93-1042 (La. App. 5 Cir. 4/26/94), 636 So. 2d 1069, 1075).

23RD JUDICIAL DISTRICT COURT
PARISH OF ASCENSION
STATE OF LOUISIANA

No: 32975

[Signature]
DIVISION "A"

STATE OF LOUISIANA

VERSUS

JOSEPH MCKINNEY

APPLICATION FOR POST CONVICTION RELIEF

JUDGMENT

After review of the record, the arguments of the parties, and the applicable law:

IT IS ORDERED, ADJUDGED, AND DECREED that Mr. Joseph S. McKinney's
Application for Post-Conviction Relief is **DENIED**.

THUS DONE AND SIGNED at Gonzales, Louisiana, this 16 day of June, 2019.

[Signature]

JUDGE JASON VERDIGETS
23RD JUDICIAL DISTRICT COURT
DIVISION "A"

NOTICE ALL PARTIES OF RECORD



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Notice of Judgment and Disposition

September 03, 2019

Docket Number: 2019 - KW - 0931

State Of Louisiana
versus
Joseph McKinney

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In accordance with Local Rule 6 of the Court of Appeal, First Circuit, I hereby certify that this notice of judgment and disposition and the attached disposition were transmitted this date to the trial judge or equivalent, all counsel of record, and all parties not represented by counsel.

Rodd Naquin
RODD NAQUIN
CLERK OF COURT



STATE OF LOUISIANA
COURT OF APPEAL, FIRST CIRCUIT

STATE OF LOUISIANA

NO. 2019 KW 0931

VERSUS

JOSEPH MCKINNEY

SEP 03 2019

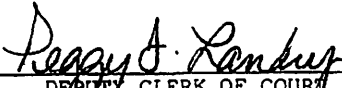
In Re: Joseph McKinney, applying for supervisory writs, 23rd
Judicial District Court, Parish of Ascension, No.
32975.

BEFORE: HIGGINBOTHAM, PENZATO, AND LANIER, JJ.

WRIT DENIED.

TMH
AHP
WIL

COURT OF APPEAL, FIRST CIRCUIT


DEPUTY CLERK OF COURT
FOR THE COURT

The Supreme Court of the State of Louisiana

STATE OF LOUISIANA

No.2019-KP-01569

VS.

JOSEPH MCKINNEY

IN RE: Joseph McKinney - Applicant Defendant; Applying For Supervisory Writ,
Parish of Ascension, 23rd Judicial District Court Number(s) 32975, Court of Appeal,
First Circuit, Number(s) 2019 KW 0931;

May 26, 2020

Writ application denied. See per curiam.

JTG

BJJ

JLW

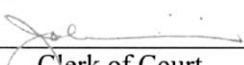
JDH

SJC

WJC

JHB

Supreme Court of Louisiana
May 26, 2020



Clerk of Court
For the Court



05/26/20

SUPREME COURT OF LOUISIANA

No. 19-KP-1569

STATE OF LOUISIANA

v.

JOSEPH McKINNEY

**ON SUPERVISORY WRITS TO THE TWENTY-THIRD
JUDICIAL DISTRICT COURT, PARISH OF ASCENSION**

PER CURIAM:

Denied. Applicant fails to show that he received ineffective assistance of counsel under the standard of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

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.