

The Supreme Court of the State of Louisiana

STATE OF LOUISIANA

No.2019-KP-01674

VS.

ELZIE BALL

IN RE: Elzie Ball - Applicant Defendant; Applying For Supervisory Writ, Parish of
Jefferson, 24th Judicial District Court Number(s) 96-4222;

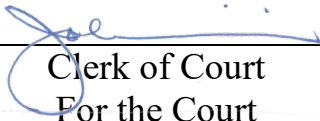
November 24, 2020

Writ application denied. See per curiam.

JLW
JDH
JTG
JBM
WJC

Johnson, C.J., would grant.

Supreme Court of Louisiana
November 24, 2020



Clerk of Court
For the Court

11/24/20

SUPREME COURT OF LOUISIANA

No. 2019-KP-01674

STATE OF LOUISIANA

versus

ELZIE BALL

**ON SUPERVISORY WRIT TO THE TWENTY-FOURTH
JUDICIAL DISTRICT COURT, PARISH OF JEFFERSON**

PER CURIAM:

Writ denied. In 1997, a Jefferson Parish jury found petitioner, Elzie Ball, guilty of the first degree murder of Bernard “Ben” Scorsone. After finding Ball guilty as charged, jurors unanimously agreed to impose a sentence of death, in light of the aggravating circumstances that Ball engaged in the perpetration or attempted perpetration of an armed robbery, and that the offender had been previously convicted of an unrelated armed robbery. This court affirmed. *See State v. Ball*, 00-2277 (La. 1/25/02), 824 So.2d 1089 (Johnson, J., dissents; Calogero, C.J., and Kimball, J., dissent and assign reasons), *cert. denied*, *Ball v. Louisiana*, 537 U.S. 864, 123 S.Ct. 260, 154 L.Ed.2d 107 (2002).

The evidence presented at trial showed that on May 15, 1996, Bernard “Ben” Scorsone was shot and killed during an armed robbery at The Pub Lounge in Gretna. On the morning of the shooting, Elsie Depew, owner of the Pub Lounge, opened her business at 10:00 am. Defendant arrived about 10 minutes later as her first customer. Elsie’s husband, Herman, came into the bar briefly and saw a black man sitting at the bar. Elsie set up her cash register and engaged the stranger in conversation. During this time, Toby Theriot and Elwood Kishbaugh, employees of the gaming

company that serviced the bar, arrived to remove the money from the bar's pool table, poker machines, and jukebox. After working for an hour, Theriot finished his count, and he gave Elsie the bar's portion of the money removed from the machines, approximately \$1700, and then he and Kishbaugh left. Steve Combs, a regular customer, entered the bar between 11:15 and 11:45 a.m. He sat down, ordered a beer, talked to the bar's owners, and to the other customer, a black male wearing a cap, whom he did not know. He recalled that the man had several homemade tattoos. After Theriot and Kishbaugh left, Combs saw the other customer get up, walk to the front door, look out, and sit back down.

The bartender, Jerrie Twinn, arrived at the bar around noon, and she noticed that a black man she had never seen before was sitting with Steve Combs. She counted her register, and after Elsie and Herman Depew left the bar around 12:30–12:40 p.m., only Jerrie Twinn, Steve Combs, and the customer later identified as Ball remained in the bar. Ball ordered another drink and offered to buy a beer for Steve Combs. Ball then got up, went outside and came back in. He stopped at the cigarette machine and then pointed a chrome-plated revolver, cocked it, and hit Combs beside the head. He told Twinn, "This is a hold up," and told Combs, "You, you, into the bathroom." Combs complied and asked Ball to be cool. Ball told Twinn where to get all the money because he had observed the bar's procedures all morning. Twinn placed the money in two money bags, then put one bag inside the other.

As Twinn was handing the money bag to Ball, Ben Scorsone, the Budweiser delivery man, walked into the bar to make his delivery. Ball told Scorsone to get in the women's bathroom. Twinn saw Scorsone grab the gun and a struggle ensued. Scorsone was knocked to the floor face down, and Ball stood over him and shot three times. Scorsone got up off the floor and walked out of the bar, telling Twinn to call 911. Combs exited the bathroom and then went outside of the bar, finding Scorsone

gasping on the ground with foam and blood coming from his mouth. Scorsone was dead when EMT personnel arrived.

Witnesses at the park across the street from the bar heard shots and saw a maroon Buick, Oldsmobile or GM-type car drive away. The police arrived at the scene at the bar and took several witness statements, including a description from each of the people who had encountered Ball that morning. Nine days later, the homicide department received a Crimestoppers tip naming Elzie Ball as a suspect. Detective Russell Lloyd developed a photographic lineup containing Ball's driver's license picture and five similar fill-ins. Detective Lloyd showed the line-up to Jerrie Twinn, Steve Combs, Toby Theriot, and Elsie and Herman Depew. In separate interviews, all five witnesses picked Ball as the man who sat in The Pub Lounge for approximately two and a half hours before robbing the bar and killing Ben Scorsone. Based on these positive identifications, Detective Lloyd obtained a warrant for Ball's arrest, and a search of his residence during his arrest yielded photographs of Ball with tattoos, a wallet, and a Federal .38 special round of ammunition.

After his conviction and sentence became final, post-conviction proceedings were initiated in 2003 when Ball filed a pro se application for post-conviction relief and request for counsel. Ball timely filed his first amended and supplemental petition for post-conviction relief and request for evidentiary hearing on June 8, 2017, asserting claims of *Batson* violations, ineffective assistance of counsel, Confrontation Clause violation, the constitutionality of the death penalty, and his right to a fair clemency process. The State timely filed its opposition on April 2, 2018, and Ball filed his reply on June 11, 2018.

On May 28, 2019, the district denied relief with written reasons, denying several claims on procedural grounds and finding the remaining claims meritless. We have reviewed Ball's claims and find no reason to disturb the district court's ruling.

First, Ball fails to show that the district court erred in finding that claims of *Batson*¹ violations were fully litigated on appeal and procedurally barred. La.C.Cr.P. art. 930.4(A); *State v. Ball*, 00-2277 (La. 1/25/02), 824 So.2d 1089.

Ball contests the district court's procedural ruling as it relates to prospective juror, Stephanie Richardson. He urges that his *Batson* claim was not fully litigated and procedurally barred by La.C.Cr.P. art. 930.4. On appeal, this court considered Ball's *Batson* claim as it related to prospective juror, Stephanie Richardson, and found that the trial court had not found a *Batson* violation, and that the prosecutor had stated race neutral reasons for this specific peremptory challenge. *Ball*, 00-2277, pp. 4–11, 824 So.2d at 1097–1101. In support of this challenge, Ball argues that the voir dire transcript did not contain the judge's ruling because it had been made off the record in the judge's chambers. A thorough assessment of Ball's post-conviction claim reveals further that, even assuming the district court erroneously dismissed this *Batson* claim as repetitive, the claim does not warrant further review, as explained below.

In support of his argument, Ball provides a sworn affidavit from the former trial court judge, in which the judge states, in part:

3. During voir dire, the prosecution attempted to use five of its first eight peremptory challenges on African American jurors. Defense counsel raised *Batson* objections to each peremptory strike.

4. When the prosecution attempted to strike its fifth African American juror, Stephanie Richardson, defense counsel objected again, and a lengthy argument between counsel ensued.

5. Based on all the evidence presented, including my opportunity to observe and assess the demeanor and credibility of the parties, I determined that the prosecution struck Ms. Richardson from the venire because of her race, in violation of *Batson*. As a result, I ruled that the prosecution had violated *Batson* and could not strike Ms. Richardson: "All right, Ms. Richardson stays."

6. After further argument about Stephanie Richardson ensued, the parties and I continued the discussion off the record in my chambers.

¹ *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

During that discussion, I ruled again that the prosecution had violated *Batson*. As a remedy for the Equal Protection Clause violation, I adopted the prosecution's proposal: I permitted the prosecution to strike Ms. Richardson on the condition that another African American juror, Ernestine Gilmore, be added to the jury. The prosecution had previously used a peremptory challenge on Ms. Gilmore. Defense counsel objected to this remedy.

7. After the discussion in chambers, the parties returned to the courtroom. [Trial counsel] placed his objection to the remedy on the record. I explained on the record that I had permitted the State to strike Ms. Richardson and add Ms. Gilmore back to the jury and noted that "this is also in light of *Batson* concerns." By using the phrase, "this is also in light of *Batson* concerns," I intended to convey that I had found a *Batson* violation with respect to the prosecution's peremptory strike of Ms. Richardson and Ms. Gilmore was being added to the jury as a remedy for that violation.

Ball's application, Exhibit C-3. On the basis of the record, had the trial judge actually "intended to convey that [the court] had found a *Batson* violation with respect to the prosecution's peremptory strike of Ms. Richardson," all the judge had to say was that Ball's *Batson* objection was granted. *See id.* The judge never said that. Further, trial counsel did not object to the trial judge's alleged failure to put his sustaining of the *Batson* objection on the record. Counsel merely objected to the "back-accepting" of Ms. Gilmore. This claim lacks merit and warrants no further review.

In a related claim, Ball argues that the district court failed to rule on his claim that trial counsel provided ineffective assistance of counsel with regard to the *Batson* challenges. As an initial matter, although the district court did not specifically rule on counsel's ineffectiveness in relation to the *Batson* challenges, the court's global denial suffices as a denial of the claim.

In *State v. Lee*, 14-2374, pp. 8–9 (La. 9/18/15), 181 So.3d 631, 638, another post-conviction capital case, we explained that an "attempt to re-litigate a claim that has been previously disposed of, by couching it as a post-conviction ineffective assistance of counsel claim, [should be] generally unavailing." As we found in *Lee*, those of Ball's post-conviction ineffective assistance of counsel claims predicated

upon Ball's *Batson* challenges which were in fact considered on appeal are not truly new claims under La.C.Cr.P. art. 930.4(A).² This claim does not warrant remand.

Ball presents additional claims of ineffective assistance of counsel related to a conflict of interest, ineffective assistance of counsel during the guilt phase, and ineffective assistance of counsel during the sentencing phase.

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), and adopted by this 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.

Ball claims that trial counsel had a conflict of interest during his representation. He argues that counsel was conflicted because he sought a job in the district attorney's office. Unless a defendant can demonstrate that there was an actual conflict of interest, he has not established the constitutional predicate for an ineffective assistance claim. *United States v. Horton*, 845 F.2d 1414, 1419 (7th Cir. 1988). In that case, the court found that a situation where an attorney who was being considered for U.S. Attorney indicated, at most, a remote possibility of conflict. *Horton*, 845 F.2d at 1419. The same can be said in this matter. If trial counsel had deliberately "thrown" the trial, his unethical conduct would have been viewed unfavorably by the district attorney's office and he surely would not have gotten the job. Further, according to counsel, by the time of trial, he was no longer interested in the job until he received a phone call offering him the position in December 1997,

² Ball argued that trial counsel was ineffective for failing to inform the trial court that the assistant district attorney had a "well-established history of jury discrimination," for failing to correct the state's "incorrect and prejudicial legal representations," and for failing "to cite the State's false and pretextual explanations for striking Black jurors as evidence of discriminatory intent." Ball's application, p. 16.

seven months after the trial. The district court reached the correct result when it rejected this claim.

Next, Ball argues that trial counsel provided ineffective assistance during the guilt phase. He claims that trial counsel failed to investigate and introduce evidence that he did not have access to the car allegedly involved in the murder because it was in the shop, that he did not have a financial motive for the crime, and that he did not object to the State's shifting of the burden of proof to Ball.

As an initial matter, the failure to investigate is a matter of trial strategy. *See Jones v. Jones*, 988 F.Supp. 1000, 1002–03 (E.D. La. 1997) (before a reviewing court will reverse for counsel's failure to investigate, inmate must show that attorney has "fail[ed] to investigate a plausible line of defense or interview available witnesses."). Likewise, counsel's decisions as to when to object also form a part of trial strategy. *See, e.g., State v. Hoffman*, 98-3118, p. 38 (La. 4/11/00), 768 So.2d 542, 577.

Moreover, Ball fails to show his claims have merit. The "evidence" that the car was in the shop was an invoice dated December 28, 1994 (the murder occurred on May 15, 1996). Further, although Ball had settled a civil lawsuit for \$40,000, there was no evidence of how much of that amount Ball actually received after deductions for attorney fees and expenses and how much was paid for medical bills. Thus, Ball fails to show the settlement affected his financial motive at all. Finally, according to a review of the record, the State did not "shift the burden of proof" to Ball. Instead, the prosecutor informed the jury to hold trial counsel to what he said he would prove in his opening, just as it held the State to what it said it would prove.

Last, Ball argues that trial counsel provided ineffective assistance during the sentencing phase by failing to conduct a reasonable mitigation investigation and failing to present compelling mitigation evidence. As explained below, the district court correctly denied this claim. As the district court summarized in its ruling

below, trial counsel conducted a mitigation investigation and introduced mitigation evidence, which included presenting the testimonies of Ball's children. The court overall found that trial counsel was experienced in criminal cases, including death penalty cases, and advocated well, under the circumstances. Defense counsel hired a mitigation expert to conduct an exhaustive psychosocial background investigation and, according to counsel's affidavit, the investigation "did not find a lot of sympathetic material." Ball fails to show any instances of counsel error as to this issue, thus the claim warrants no further review.

Next, Ball argues cumulative error requires reversal. This court has stated that, "Although we have previously reviewed cumulative error arguments, we have never endorsed them," noting that the cumulative error of errors which do not show prejudice does not entitle a defendant to relief. *State v. Reeves*, 18-0270 (La. 10/15/18), 254 So.3d 665, 677. Likewise, the cumulative error here is zero. "[T]wenty times zero is zero." *Mullen v. Blackburn*, 808 F.2d 1143, 1147 (5th Cir. 1987) (rejecting cumulative error claim). This claim warrants no further attention.

Next, Ball fails to show that the district court erred in finding that his claim related to the introduction of former testimony was fully litigated on appeal and procedurally barred. La.C.Cr.P. art. 930.4(A); *Ball*, 00-2277, pp. 25–29, 824 So.2d at 1111–13. He argued below that the state violated the Confrontation Clause when it admitted the transcript of a witness, Salvador Campagna, from Ball's prior armed robbery trial that occurred in 1975. He argues that he has proof that the person whose death certificate was introduced in order to find that the victim was deceased and unavailable, was, in fact, not the victim in the prior case. Although Ball claims he is in possession of new evidence, this court found on direct review that, even if the trial court erred in allowing the introduction of the testimony, the error was harmless. The court found that the state had already introduced evidence establishing the previous armed robbery conviction, and the defense was allowed to introduce the

prior testimony of another witness who testified as to the identity of a different shooter. In addition, this court found that Ball could not argue that his confrontation right was violated because he had the ability to cross-examine the witness during the previous trial. *Ball*, 00-2277, p. 28, 824 So.2d at 1113. Finally, the court noted that the previous armed robbery conviction was introduced as an aggravating factor and the jury found two aggravating factors. *Id.* Relying upon *State v. Martin*, 93-0285 (La. 10/17/94), 645 So.2d 190, the court found that the failure of one aggravating factor does not invalidate a death penalty sentence if another aggravating circumstance is supported by the record. *Id.* The district court correctly rejected this claim.

Next, as to Ball's three claims related to the death penalty and lethal injection, Ball fails to show the district court erred in finding these claims procedurally barred because these claims could have been, but were not, raised at trial. *See* La.C.Cr.P. art. 930.4. In any event, as to the constitutionality of the death penalty, in *Lowenfield v. Phelps*, 484 U.S. 231, 108 S. Ct. 546, 98 L.Ed.2d 568 (1988), the United States Supreme Court found that Louisiana's death penalty statute sufficiently narrowed the class of death-eligible defendants and thus posed no constitutional infirmity. As to the constitutionality of Louisiana's lethal injection protocol, to establish such a claim, relator must show that the procedure "creates a demonstrated risk of severe pain [and] that the risk is substantial when compared to the known and available alternatives." *See Baze v. Rees*, 553 U.S. 35, 61, 128 S.Ct. 1520, 1537, 170 L.Ed.2d 420 (2008). In the instant application, Ball presents nothing to make such a showing, thus the district court did not err in rejecting this claim.³ Finally, as to the

³ Recently, in *Barr v. Lee*, ___ U.S. ___, ___ S.Ct. ___, 207 L.Ed.2d 1044 (2020), in an unsigned three-page per curiam opinion, by a vote of 5-4, the Supreme Court granted the government's request to lift stay orders and allow federal executions to proceed, after finding that the federal death row inmates were not likely to succeed on their Eighth Amendment challenges to the single-dose legal injection protocol (Justice Breyer filed a dissenting opinion in which Justice Ginsburg joined; Justice Sotomayer filed a dissenting opinion, in which Justices Ginsburg and Kagan joined).

constitutionality of executing an individual with brain damage and mental illness, while the Supreme Court determined in *Atkins v. Virginia*, 536 U.S. 304, 321, 122 S.Ct. 2242, 2252, 153 L.Ed.2d 335 (2002), that the Eighth Amendment prohibits the execution of intellectually disabled offenders, in the instant application, Ball offers no evidence that he is exempt from capital punishment under *Atkins*.

Last, as to Ball's arguments that the death penalty is prohibited under international law and that he is entitled to a clemency process that complies with due process, the district court did not err in denying relief. Although international law is relevant in interpreting the Eighth Amendment's ban on cruel and unusual punishment, *see Graham v. Florida*, 560 U.S. 48, 80, 130 S.Ct. 2011, 2033, 176 L.Ed.2d 825 (2010), Ball introduces no authority showing that his execution is prohibited by international law, and insofar as international treaties apply, these treaties, either the ICCPR or the CERD, are not self-executing, meaning the courts may not enforce them in the absence of corresponding state or federal legislation. *See Inapplicability of ICCPR to Death Penalty Case*, 95 Am. J. Int'l L. 878, 879 (2001); *see also* S. Res. of Advice and Consent to Ratification of the ICCPR, 102d Cong., 138 Cong. Rec. S4781, S4783 (daily ed. Apr. 2, 1992) (declaring that "the provisions of articles 1 through 27 of the Covenant are not self-executing."). The district court did not err in rejecting these claims.

Ball has not carried his post-conviction burden of proof and thus, the district court did not err when it dismissed his claims for the reasons it assigned in denying relief. La.C.Cr.P. art. 930.2. It is well-established that the district court may dispose of an application for post-conviction relief without conducting an evidentiary hearing, even if the application states a claim on which relief could be granted, if the issues raised can be resolved on the application, answer, and supporting documents, including relevant transcripts, depositions, and other reliable documents submitted by either party or that are available to the court. La.C.Cr.P. art. 928; La.C.Cr.P. art.

929(A); *see State ex rel. Tassin v. Whitley*, 602 So.2d 721, 722–23 (La.1992) (only “[w]hen there is a factual issue of significance that is sharply contested” need the court hold a hearing); *see also* art. 929 cmt.; Cheney C. Joseph, Jr., *Developments in the Law: Post-conviction Relief*, 41 La.L.Rev. 632, 635–37 (1981) (reporter of Court committee which drafted statute reviews judge’s role in summary rulings).

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