

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 0957

GEORGE ROLAND, JR.

VERSUS

**RICHARD STALDER, SECRETARY, DEPARTMENT OF
PUBLIC SAFETY AND CORRECTIONS, AND VENETIA MICHAEL,
WARDEN, DAVID WADE CORRECTIONAL CENTER**

**On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, Louisiana
Docket No. 559,291, Section 27
Honorable Todd W. Hernandez, Judge Presiding**

**George Roland, Jr.
Homer, LA**

**Appellant
In Proper Person**

**Susan Wall Griffin
Baton Rouge, LA**

**Attorney for Appellee
Louisiana Department of Public
Safety and Corrections¹**

BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

Judgment rendered March 25, 2011

¹ Although the petition names defendants as shown in the suit caption above, the only proper party defendant is the Louisiana Department of Public Safety and Corrections. See LSA-R.S. 15:1177(A)(1)(b).

PARRO, J.

George Roland, Jr., an inmate in the custody of the Louisiana Department of Public Safety and Corrections (DPSC), appeals a judgment that dismissed his petition for judicial review. For the following reasons, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On November 3, 1987, George Roland, Jr. was indicted by a grand jury for the offense of second-degree murder with a firearm; the indictment referred to LSA-R.S. 14:30.1, LSA-R.S. 14:95.2, and LSA-C.Cr.P. art. 893.1.² On April 14, 1988, following a four-day trial, a jury unanimously found Roland guilty of second-degree murder and further found that he used a firearm in the commission of the crime. This verdict was rendered in the First Judicial District Court (1st JDC), Parish of Caddo, in Shreveport, Louisiana. Roland appeared in court with counsel on May 3, 1988, at which time his motions for new trial and post-verdict judgment of acquittal were denied, and his attorney waived the 24-hour delay for sentencing. The trial judge then sentenced him to the mandatory penalty of life imprisonment at hard labor in the custody of DPSC without benefit of probation, parole, or suspension of sentence. Since Roland had also been indicted and found guilty of committing the crime with a firearm, the judge imposed an additional sentence of two years at hard labor in the custody of DPSC without probation, parole, or suspension of sentence. The judge further concluded that the sentence of life imprisonment without parole, probation, or suspension of sentence, being the maximum sentence provided by law, satisfied the sentencing requirements of Article 893.1. On May 5, 1988, Roland timely filed a motion to appeal his convictions; the convictions were affirmed by the Second Circuit Court of Appeal, and the Louisiana Supreme Court denied his writ application.³

² LSA-R.S. 14:30.1, as charged in Roland's case, stated that second-degree murder is the killing of a human being when the offender has a specific intent to kill or inflict great bodily harm; it was punishable by a mandatory sentence of life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. In 1987, LSA-R.S. 14:95.2 stated, in pertinent part, that the mandatory sentence for any person convicted of using a firearm at the time he committed the crime of second-degree murder was a term of two years' imprisonment for the first conviction. At the time of Roland's convictions and sentences, Article 893.1 stated that when the court found that a firearm had been used in the commission of a felony and when suspension of sentence was not otherwise prohibited, the court was required to impose a sentence not less than five years if the maximum sentence was five years or more. The imposition or execution of such sentence could not be suspended and the offender would not be eligible for probation or parole.

³ State v. Roland, 543 So.2d 1089 (La. App. 2nd Cir.), writ denied, 551 So.2d 1318 (La. 1989).

On September 5, 2007, Roland filed a petition for judicial review in the Nineteenth Judicial District Court (19th JDC) in East Baton Rouge Parish, after exhausting his administrative remedies through the Administrative Remedy Procedure (ARP) available at the prison where he was in custody.⁴ He claimed in his petition for judicial review that: (1) DPSC had executed his sentences without proper writ process; (2) a suspensive appeal prohibited DPSC from executing the sentence; (3) a "consent decree or judgment" in his favor, acknowledging violations of his rights under the 6th and 14th Amendments to the United States Constitution, had the effect of rescinding his conviction and sentence, placing him back in the position as if no trial had ever taken place; and (4) the "consent decree or judgment" created a right to be transferred back to the custody of Caddo Parish for a bail hearing pursuant to the statutes governing post-conviction relief. DPSC filed an answer to the petition, along with a copy of the ARP record, showing that Roland's ARP had been rejected at the institution on the grounds of vagueness. DPSC averred that it had the legal authority to retain Roland in custody, pursuant to his convictions and sentences.

The commissioner to whom Roland's case was assigned⁵ granted his request for oral argument, and a videoconference hearing was held on March 17, 2008. Three subsequent videoconference hearings were held, in order to allow the parties to produce additional evidence. After the final videoconference hearing on October 27, 2009, the commissioner took the matter under advisement. On January 5, 2010, the commissioner submitted his report to the district court, recommending that Roland's requests for relief be denied and that his petition be dismissed. Roland filed a timely traversal of that recommendation. A judgment in accordance with the commissioner's recommendation was signed on January 27, 2010, and this appeal followed. See LSA-R.S. 15:1177(A)(10).

Roland makes a number of arguments on appeal. First, he contends his 1988 transfer from the Caddo Parish jail to DPSC for execution of his sentences was not

⁴ See LSA-R.S. 15:1171-1179.

⁵ The office of commissioner of the 19th JDC was created by LSA-R.S. 13:711 to hear and recommend disposition of criminal and civil proceedings arising out of the incarceration of state prisoners. The commissioner's written findings and recommendations are submitted to a district court judge, who may accept, reject, or modify them. LSA-R.S. 13:713(C)(5).

legally accomplished, because there was no commitment order or other required documentation authorizing the transfer. Second, he claims that because the Second Circuit affirmed only his convictions, and not his sentences, the sentences could not be enforced and he should have been retained in the Caddo Parish jail until those sentences were affirmed. Third, he argues that a motion to appoint new counsel, which he filed in the 1st JDC after he was sentenced in 1988, constituted an application for post-conviction relief, and the district court's granting of that motion on June 21, 1988, entitled him to a stay of execution of his sentences until an evidentiary hearing on that application could be held. In the alternative, he contends that the district court's granting of that motion was a final judgment on the merits of his claim that his counsel was inadequate, entitling him to a transfer back to Caddo Parish for a bail hearing and new trial in the 1st JDC. Fourth, he claims that his motion for summary judgment on the claims in his petition for judicial review should have been granted by the 19th JDC, because DPSC presented no evidence to controvert his claims. Fifth, he claims that his right to trial by jury was violated in the 1st JDC, as evidenced by the sentencing transcript, which shows that the district court judge sentenced him. Sixth, he makes an argument that he was subjected to "double jeopardy" in his trial in the 1st JDC, because the statute under which he was convicted of second-degree murder has two alternative definitions, either because the offender had a specific intent to kill *or* to inflict great bodily harm, while the indictment charged him with second-degree murder *and* the use of a firearm in the commission of that offense.

DISCUSSION

Underlying several of Roland's claims is his contention that after he was convicted and sentenced, his transfer to the custody of DPSC was not legally accomplished, because there was no commitment order. See LSA-R.S. 15:566 and LSA-Cr.P. art. 892. He argues that, since only a trial court judge can order the execution of a sentence, placing him in the custody of DPSC and keeping him there without the proper documentation is a violation of his rights. Roland's evidence for this claim consists of a January 12, 2001 letter from him to the Louisiana State Penitentiary Records Office, seeking a copy of "the commitment papers and Court Order" that

ordered the execution of the sentencing judgment in his case. A memo in response to his request, dated January 26, 2001, stated, "Your record does not contain the document you are requesting. In order to obtain it you need to contact the Clerk of Court in the parish where you were convicted." There is no indication in the record that Roland followed up on this suggestion. Instead, he simply maintains there was no such order, and therefore, the execution of his sentence is illegal.

As the petitioner in this case, Roland bore the burden of proving his claim that, due to a lack of proper documentation, his transfer to the custody of DPSC was improper. While this involves proving a negative, which is literally impossible, he could have taken further steps to establish his claim by a preponderance of the evidence. However, there is no evidence in the record that Roland did anything beyond this one letter to the custodian of his prison record. The fact that the documentation was not located in the one place where he looked falls far short of proving that the commitment order never existed. As a practical matter, the commitment order is a standard, fill-in-the-blanks form, which is completed after conviction and sentencing and signed on behalf of the judge by a deputy clerk of the court for the parish where the criminal conviction occurred. It directs the sheriff of the parish to deliver the convicted person to DPSC and authorizes and directs DPSC to keep that person in custody for a specified term of years under certain conditions, as set out in the sentence imposed by the court. DPSC would not have taken Roland into custody without such a document, nor would it have known the details of his convictions and sentences in order to properly enter the terms and conditions of his confinement into its records. See LSA-R.S. 15:566(C). Finally, even if proper documentation had not been prepared and delivered to DPSC in accordance with LSA-C.Cr.P. art. 892, that failure would not affect the validity of Roland's prosecution, convictions, or sentences. See LSA-C.Cr.P. art. 892(D). Accordingly, we find no merit in this claim or the arguments based on it.

Roland further claims that because the Second Circuit Court of Appeal affirmed only his convictions, and not his sentences, the sentences could not be enforced and he should have been retained in the Caddo Parish jail until those sentences were affirmed. See LSA-R.S. 15:566(B)(4). However, what Roland does not realize is that his

sentences were not assigned as error in his appeal. The only issue raised on appeal was whether the evidence was sufficient to convict him of second-degree murder. He claimed in his appeal that there was no proof he had the specific intent to kill the victim, but rather, that the killing was done in self-defense. The length and legality of his sentences were never called into question. Therefore, once the appellate court concluded that the evidence showed that the prosecution had proven beyond a reasonable doubt that Roland was guilty of second-degree murder, in that he had specific intent to kill the victim and the killing was not justifiable self-defense, the sentences that had been imposed on him by the trial court simply accompanied the convictions, which were affirmed. There was no need for the appellate court to state the obvious. When the Louisiana Supreme Court denied writs, the judgment of the trial court, including the convictions and sentences, became final. See State v. Roland, 543 So.2d 1089 (La. App. 2nd Cir.), writ denied, 551 So.2d 1318 (La. 1989).

Third, he argues that a motion to appoint new counsel, which he filed in the 1st JDC after he was sentenced in 1988, constituted an application for post-conviction relief, and the trial court's granting of that motion on June 21, 1988, entitled him to a stay of execution of his sentences until an evidentiary hearing on that application could be held. In the alternative, he contends that the trial court's granting of that motion was a final judgment on the merits of his claim that his counsel was inadequate, entitling him to a transfer back to Caddo Parish for a bail hearing and new trial in the 1st JDC. A copy of Roland's pro se motion is in the record, and states as his reasons for claiming inadequacy of counsel, "conflicting interests, and violation of my rights under the 6th and 14th amendments of Constitutional law." Roland also submitted a copy of the minutes of the 1st JDC from his criminal trial. According to those minutes, on May 20, 1988, after his motion for appeal had been filed and signed by the trial court judge, "Motion to appoint new counsel was filed this day by the defendant, in proper person." The next minute entry on June 21, 1988, states, "Motion and Order was filed this day and signed by Judge Jeffrey P. Victory. (See Order)." The order is not attached to the minutes. Roland did not submit into evidence the trial court's order of June 21, 1988, and it is not clear from the minutes that the order signed on that date

was in response to the motion for new counsel that Roland filed on May 20, 1988, particularly since the minutes refer to a motion and order "filed this day," not on an earlier date. At the hearing before the commissioner, Roland claimed that the trial court partially granted his motion, which he characterized as a motion for post-conviction relief, by appointing new counsel for his appeal. However, he contends he never had a hearing on his claim of inadequacy of counsel and conflict of interest, and seeks a transfer back to Caddo Parish for a hearing and a decision on that claim. Alternatively, he claims the June 21, 1988 order constituted a final judgment that his counsel was inadequate, entitling him to be transferred to Caddo Parish for a bail hearing and a new trial. Both of these claims depend on the contents of the June 21, 1988 order, which Roland did not submit into evidence, despite the fact that the 19th JDC commissioner delayed a final recommendation and allowed him several hearings in order to give him the time and opportunity to produce whatever evidence he needed to support his claims. It appears that in this order, the trial court judge in the 1st JDC merely granted his motion to appoint new counsel and appointed a new attorney to handle his appeal. However, without that order from the trial court, it is simply impossible for this court to determine which motion was being granted and to what extent it granted the relief sought in the motion. Therefore, Roland has failed to carry his burden of proof on these claims, and the district court did not err in dismissing them.

Roland contends the 19th JDC also erred in denying his motion for summary judgment, because DPSC presented no evidence to controvert his claims. However, as previously discussed, Roland did not present sufficient evidence to support his contentions. He bore the burden of proof on his claims in the ARP; therefore, he bore the burden of proof in his motion for summary judgment, and that burden did not shift to DPSC. See LSA-C.C.P. art. 966(C)(2). The evidence submitted in support of his motion consisted simply of a copy of his May 20, 1988 motion to appoint new counsel, a copy of his letter to the penitentiary records office asking about the commitment order, and a copy of the response directing him to seek the commitment order at the 1st JDC. Since this evidence was not sufficient to establish his claims, DPSC was not

required to provide any evidence in opposition to the motion, and the district court did not err in denying the motion.

Roland claims a violation of his right to trial by jury in his criminal trial, because the sentencing transcript shows that the trial court judge sentenced him on three counts, and the jury only found him guilty on two counts, the commission of second-degree murder and use of a firearm in the commission of the offense. He claims he was never tried and convicted on the third "count" in the indictment. The indictment referred to LSA-R.S. 14:30.1, which is the second-degree murder statute; LSA-R.S. 14:95.2, which in 1987 contained sentencing enhancement provisions for use of a firearm during the commission of second-degree murder; and LSA-C.Cr.P. art. 893.1, which included the substance of the applicable version of LSA-R.S. 14:95.2. The reference to Article 893.1 did not have the effect of charging him with an additional crime; it merely reiterated the sentencing enhancement provisions set out in LSA-R.S. 14:95.2. Therefore, Roland's rights to trial by jury were not violated by his convictions and sentences.

Finally, Roland contends he was subjected to "double jeopardy" in his criminal trial, because DPSC is enforcing both the crime of homicide committed with a "specific intent to kill or inflict great bodily harm," while the indictment charged him with commission of a homicide using a firearm. He claims these are "two distinct crimes for double jeopardy" purposes under the Louisiana and United States Constitutions. Roland clearly does not understand the concept of "double jeopardy." Both the United States Constitution and the Louisiana Constitution provide double jeopardy protection to a criminal defendant. The Double Jeopardy Clause of the Fifth Amendment, applicable to the states through the Fourteenth Amendment, provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." See also LSA-Const. art I, § 15. The protection against double jeopardy applies in three situations: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969); State v. Smith, 95-61 (La. 7/2/96), 676 So.2d 1068; and State v. Mayeux, 498 So.2d

701 (La. 1986). None of these situations appear in Roland's case. The elements of the crime of second-degree murder are a killing when the offender has a specific intent to kill or to inflict great bodily injury. This crime can be committed without the use of a firearm. Therefore, the use of a firearm is not an element of the crime of second-degree murder, and the evidence used to establish second-degree murder does not require evidence that a firearm was used. The elements of the crime of commission of a felony with the use of a firearm are proof of the commission of a felony—in this case second-degree murder—and proof that the felony was committed with the use of a firearm, justifying an enhanced sentence. The proof necessary to establish one of these crimes does not necessarily require proof of the elements of the other crime. In Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), the United States Supreme Court provided a test to be used to determine whether double jeopardy exists, stating: "Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether those are two offenses or only one, is whether each provision requires proof of a fact which the other does not." In other words, if one of the statutes requires proof of an additional fact which the other does not, the double jeopardy clause does not prohibit successive prosecutions or convictions for both offenses.⁶ Therefore, Roland was not subjected to double jeopardy by being convicted of second-degree murder and commission of that crime while using a firearm.

CONCLUSION

For the above stated reasons, we affirm the January 27, 2010 judgment of the district court, which dismissed Roland's request for relief and denied his motions for summary judgment and for transfer to Caddo Parish.

AFFIRMED.

⁶ In addition to this test, Louisiana courts also utilize the "same evidence" test when evaluating double jeopardy claims. Under this test, if the proof required to support a finding of guilt of one crime would also support conviction of another crime, the prohibition against double jeopardy bars a conviction for more than one crime. See State v. Leblanc, 618 So.2d 949, 957 (La. App. 1st Cir. 1993), writ denied, 95-2216 (La. 10/4/96), 679 So.2d 1372. Evaluating Roland's double jeopardy claim using this test also demonstrates that the claim is without merit.