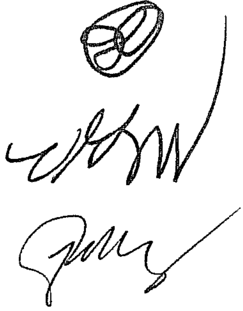
NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT



2007 KA 1026

STATE OF LOUISIANA

VERSUS

ROBERT LEE MARSHALL

Judgment Rendered: December 21, 2007

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On Appeal from the 22nd Judicial District Court
In and For the Parish of St. Tammany
Trial Court No. 383667, Division "J"

Honorable William J. Knight, Judge Presiding

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In Proper Person

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BEFORE: WHIPPLE, GUIDRY, AND HUGHES, JJ.

HUGHES, J.

The defendant, Robert Lee Marshall, was charged by grand jury indictment with second degree murder, a violation of LSA-R.S. 14:30.1. The defendant entered a plea of not guilty. The trial court denied the defendant's motion to suppress his statement. Upon a trial by jury, the defendant was found guilty as charged. The defendant was sentenced to life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence. He now appeals, urging, in an assignment of error raised in the original-counseled brief, the trial court erred in denying the motion to suppress his statement made to Detective Ralph Saacks of the St. Tammany Parish Sheriff's Office. In a pro se brief, the defendant additionally argues that his trial counsel was ineffective. In a supplemental-counseled brief, the defendant argues that the trial court erred in denying the motion to suppress his statement made to Sergeant Stanley Paulis of the St. Tammany Parish Sheriff's Office. For the foregoing reasons, we affirm the conviction and sentence.

STATEMENT OF FACTS

The victim, Kenneth Pierre, suffered multiple gunshot wounds from a shooting that occurred on or about May 13, 2004. Just prior to the shooting, the defendant knocked on the victim's apartment door. The victim's girlfriend, Regina Spencer, opened the door and the defendant (also known to her as "Little Bit") entered the apartment. The victim ultimately exited with the defendant and they began to converse just outside the apartment. Approximately ten minutes after their exit, Spencer heard gunshots. Spencer opened the door and observed the defendant with what she guessed to be a gun. The defendant then fled from the scene. The victim entered the apartment and collapsed. The defendant was convicted of the murder of the victim.

COUNSELED ASSIGNMENT OF ERROR NUMBER ONE

In the assignment of error raised in the original-counseled brief, the defendant contends that the trial court erred in denying the motion to suppress his statement made to Detective Saacks. The defendant specifically argues that Detective Saacks did not scrupulously honor the defendant's invocation of his right to remain silent. Thus, the defendant contends that his statement that he knew nothing about the shooting and was at home at the time should have been suppressed. The defendant notes that these remarks, in light of Spencer's testimony, were in direct contravention of the defense presented at the trial. The defendant concludes that the admission of the statement impacted the jury's verdict as they were led to believe that the version of the events offered by the defense at trial was a fabrication.

The State bears the burden of proving that an accused who makes an inculpatory statement or confession during custodial interrogation was first advised of his constitutional rights and made an intelligent waiver of those rights. **State v. Davis**, 94-2332, p. 8 (La. App. 1 Cir. 12/15/95), 666 So.2d 400, 406, writ denied, 96-0127 (La. 4/19/96), 671 So.2d 925. In **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the Supreme Court promulgated a set of safeguards to protect the therein delineated constitutional rights of persons subject to custodial police interrogation. The warnings must inform the person in custody that he has the right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. **Miranda**, 384 U.S. at 444, 86 S.Ct. at 1612. In addition to showing that the **Miranda** requirements were met, the State must affirmatively show that the statement or confession was free and voluntary, and not made under the influence of fear, duress, intimidation, menaces,

threats, inducements or promises in order to introduce into evidence a defendant's statement or confession. LSA-R.S. 15:451.

The Supreme Court in **Miranda** explained what is meant by custodial interrogation: the questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. **Rhode Island v. Innis**, 446 U.S. 291, 298, 100 S.Ct. 1682, 1688, 64 L.Ed.2d 297 (1980). The concern of the Court in **Miranda** was that the "interrogation environment" created by the interplay of interrogation and custody would "subjugate the individual to the will of his examiner" and thereby undermine the privilege against compulsory self-incrimination. **Innis**, 446 U.S. at 299, 100 S.Ct. at 1688. The special procedural safeguards outlined in **Miranda** are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation. **Innis**, 446 U.S. at 300, 100 S.Ct. at 1689. The term "interrogation" under **Miranda** refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. **Innis**, 446 U.S. at 301, 100 S.Ct. at 1689-90.

The Supreme Court in **Miranda** stated that if the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. When a defendant exercises his privilege against self-incrimination, the validity of any subsequent waiver depends upon whether the police have scrupulously honored his right to remain silent. **State v. Taylor**, 2001-1638, p. 6 (La. 1/14/03), 838 So.2d 729, 739, cert. denied, 540 U.S. 1103, 124 S.Ct. 1036, 157 L.Ed.2d 886 (2004). The Court identified the critical safeguard in the right to remain silent as a

person's "right to cut off questioning." **Michigan v. Mosley**, 423 U.S. 96, 103, 96 S.Ct. 321, 326, 46 L.Ed.2d 313 (1975). Through the exercise of his option to terminate questioning he can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. **Mosley**, 423 U.S. at 103-04, 96 S.Ct. at 326.

The exercise of the right to remain silent does not act as a complete bar to further questioning. Whether the police have "scrupulously honored" a defendant's "right to cut off questioning" is a determination made on a case-by-case basis under the totality of the circumstances. **Mosley**, 423 U.S. at 101-06, 96 S.Ct. at 325-28; **Taylor**, 2001-1638 at pp. 6-7, 838 So.2d at 739; **State v. Brooks**, 505 So.2d 714, 722 (La.), cert. denied, 484 U.S. 947, 108 S.Ct. 337, 98 L.Ed.2d 363 (1987). Factors going into the assessment include: (1) who initiates further questioning, although, significantly, the police are not barred from reinitiating contact; (2) whether there has been a substantial time delay between the original request and subsequent interrogation; (3) whether **Miranda** warnings are given before subsequent questioning; (4) whether signed **Miranda** waivers are obtained; (5) whether the later interrogation is directed at a crime that had not been the subject of the earlier questioning; and (6) whether or not pressures were asserted on the accused by the police between the time he invoked his right and the subsequent interrogation. **Brooks**, 505 So.2d at 722. The invocation of the right to counsel during custodial interrogation has greater protection than the invocation of the right to remain silent, as police may not thereafter question the defendant unless he initiates further contact. **Taylor**, 2001-1638 at p. 7, 838 So.2d at 739.

Trial courts are vested with great discretion when ruling on a motion to suppress. Consequently, the ruling of a trial judge on a motion to suppress will not be disturbed absent an abuse of that discretion. **State v. Leger**, 2005-

0011, p. 10 (La. 7/10/06), 936 So.2d 108, 122, cert. denied, ___ U.S. ___, 127 S.Ct. 1279, 167 L.Ed.2d 100 (2007). In determining whether the ruling on the defendant's motion to suppress was correct, we are not limited to the evidence adduced at the hearing on the motion. We may consider all pertinent evidence given at the trial of the case. **State v. Chopin**, 372 So.2d 1222, 1223 n. 2 (La. 1979).

The testimony presented at the motion to suppress hearing indicates that on May 13, 2004, Detective Joe Picone of the St. Tammany Parish Sheriff's Office advised the defendant of his rights and executed a **Miranda** rights form. The defendant stated that he understood his rights and signed the form as further indication that he understood his rights. The second portion of the **Miranda** rights form consists of a waiver of rights. The defendant declined to waive his rights. He then stated that he was not involved and was at home when the shooting occurred. Detective Picone ceased any attempt to question the defendant. The questioning began at 11:18 p.m. and ended at 11:19 p.m.

When Detective Saacks (the lead detective in the case) arrived, he consulted Detective Picone and determined that the defendant was informed of his rights.[1] Detective Picone relinquished the defendant to Detective Saacks. Detective Saacks had personal contact with the defendant at approximately 1:30 a.m. Detective Saacks asked the defendant if he would be willing to answer questions and the defendant responded positively.[2] Detective Saacks confronted the defendant with the facts of the case and informed the defendant that he had been identified as the shooter. Detective Saacks specifically

[1] At the trial, Detective Picone's testimony indicated that he also informed Detective Saacks that the defendant did not waive his rights.

[2] At the trial, Detective Saacks testified that initially he asked the defendant if he was still aware of his rights before asking the defendant if he would be willing to answer questions. The trial testimony consistently indicates that Detective Saacks knew that Detective Picone had already informed the defendant of his **Miranda** rights and Detective Saacks did not reinform the defendant of his rights.

testified, "And to that he replied that he didn't know anything about it. He was at home when it occurred. That nothing I said was going to make him change his story. And ... he had nothing else to say." The defendant put his head down and Detective Saacks terminated the interview.

In **State v. Taylor**, 490 So.2d 459 (La. App. 4 Cir.), writ denied, 496 So.2d 344 (La. 1986), the accused told the police he did not want to make any statements or talk after he had been informed of his **Miranda** rights, but one officer explained to the defendant what the investigation of the robbery would entail. The defendant then agreed to talk about the robbery, but he refused to give a written statement. The Fourth Circuit found that the police did not violate the defendant's right to silence but instead were giving the defendant information so that he could reconsider his decision not to make a statement. **Taylor**, 490 So.2d at 460-61.

In **State v. Daniel**, 378 So.2d 1361, 1366 (La. 1979), the defendant told the police he did not want to talk, but an assistant district attorney told the defendant, "[b]efore you make up your mind one way or the other as to whether or not you want to talk to us, let me tell you what we've got." Thereafter, the defendant was informed of the evidence the police had indicating that he killed two people, and the defendant confessed to the murders and took the police to the area where the shotgun used in the murders was hidden. The Louisiana Supreme Court relied upon **Mosley** to rule that the trial court should have denied the motion to suppress: "Nothing in **Miranda** prevents an accused party from changing his mind and giving a statement after he has previously declined to do so, so long as the statement is voluntary and intelligently made." **Daniel**, 378 So.2d at 1366.

Based on the record before us, we find that the trial court did not err in denying the motion to suppress the statement contested herein. The defendant

initially made the contested statement to Detective Picone contemporaneously with his invocation of the right to remain silent. Thus, we find the State's reference to the defendant's remarks would pose no constitutional violation. See **State v. Duplichan**, 2006-852, p. 12 (La. App. 3 Cir. 12/6/06), 945 So.2d 170, 178, writ denied, 2007-0148 (La. 9/28/07), 964 So. 2d 351. Moreover, the defendant waived his rights prior to any further custodial interrogation by Detective Saacks. See **State v. Holmes**, 467 So.2d 1177, 1184-85 (La. App. 2 Cir.), writ denied, 470 So.2d 119 (La. 1985) (court reluctant to call officer's questioning of defendant an "interrogation" about the crime when he only asked defendant whether he understood his rights and would waive them). There was a substantial time delay between the defendant's original invocation and the subsequent contact by Detective Saacks. There is no showing that Detective Saacks approached defendant with the intention of browbeating him into making a statement and no evidence suggested the defendant was pressured or coerced into making a statement. Both officers abruptly ceased their attempt to question the defendant upon the invocation of his right to remain silent. The record supports the trial court's denial of the defendant's motion to suppress the statement at issue herein. This counseled assignment of error lacks merit.

PRO SE ASSIGNMENT OF ERROR[3]

In a supplemental pro se brief, the defendant argues his trial counsel was ineffective in that during cross-examination counsel did not ask the police officers why they failed to perform gunshot-residue testing. The defendant notes that he was arrested fifteen minutes after the shooting. The defendant contends that if the police had performed a gunshot residue test on his hands,

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[3] In his pro se brief, the defendant labels this assignment of error "Claim Three."

in all likelihood the test would have established that he did not commit the crime. The defendant concludes that a new trial is warranted as he was deprived of a fair and reliable trial.

A defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution and Article I, § 13 of the Louisiana Constitution. In assessing a claim of ineffectiveness, a two-pronged test is employed. The defendant must show that (1) his attorney's performance was deficient; and (2) the deficiency prejudiced him. **Strickland v. Washington**, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). The error is prejudicial if it was so serious as to deprive the defendant of a fair trial or "a trial whose result is reliable." **Strickland**, 466 U.S. at 687, 104 S.Ct. at 2064. In order to show prejudice, the defendant must demonstrate that, but for counsel's unprofessional conduct, the result of the proceeding would have been different. **Strickland**, 466 U.S. at 694, 104 S.Ct. at 2068; **State v. Felder**, 2000-2887, pp. 10-11 (La. App. 1 Cir. 9/28/01), 809 So.2d 360, 369-70, writ denied, 2001-3027 (La. 10/25/02), 827 So.2d 1173. Further, it is unnecessary to address the issues of both counsel's performance and prejudice to the defendant if the defendant makes an inadequate showing on one of the components. **State v. Serigny**, 610 So.2d 857, 860 (La. App. 1 Cir. 1992), writ denied, 614 So.2d 1263 (La. 1993). A claim of ineffectiveness is generally relegated to post-conviction proceedings, unless the record permits definitive resolution on appeal. **State v. Miller**, 99-0192, p. 24 (La. 9/6/00), 776 So.2d 396, 411, cert. denied, 531 U.S. 1194, 121 S.Ct. 1196, 149 L.Ed.2d 111 (2001).

Under our adversary system, once a defendant has the assistance of counsel, the vast array of trial decisions, strategic and tactical, which must be made before and during trial, rest with an accused and his attorney. The fact

that a particular strategy is unsuccessful does not establish ineffective assistance of counsel. **State v. Folse**, 623 So.2d 59, 71 (La. App. 1 Cir. 1993). Decisions relating to investigation, preparation, and strategy cannot possibly be reviewed on appeal. Only in an evidentiary hearing in the district court, where the defendant could present evidence beyond that contained in this record, could such allegations be sufficiently considered.[4] **State v. Eames**, 97-0767, p. 8 (La. App. 1 Cir. 5/15/98), 714 So.2d 210, 216, writ denied, 98-1640 (La. 11/6/98), 726 So.2d 922.

During the cross-examination of Detective Saacks, the defense attorney inquired as to the time of the shooting and the time the defendant was taken into custody.[5] The defendant's trial counsel asked Detective Saacks if he was familiar with paraffin testing and Detective Saacks responded positively and stated that it was referred to as GSR (gunshot residue). Detective Saacks defined the testing as follows, "Where you swab the hands. And the backs and fronts of the hands to check for gunpowder residue to see if a weapon has been fired." Detective Saacks further explained such a test is normally performed on a suspected shooter and/or the victim, but noted that in this case he did not believe that such a test was performed. The defendant's trial counsel then specifically asked, "So Robert Marshall was not given a paraffin or a nitrate test?" Detective Saacks responded, "No, sir. They don't do it. St. Tammany Parish Sheriff's Office does not do that." The defendant's trial counsel then stated that had such a test been given it would have indicated whether or not the defendant had fired a gun from the tested hand, adding "is that correct?" Detective Saacks explained that such testing is not absolute or completely

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[4] The defendant would have to satisfy the requirements of LSA-C.Cr.P. art. 924, et seq., in order to receive such a hearing.

[5] We note that Detective Saacks was a deputy for the Jefferson Parish Sheriff's Office at the time of the trial. Herein, we will continue to refer to him in accordance with his position at the time of the offense and motion to suppress hearing.

reliable, noting that the test must be performed within a certain time frame and that if the suspect has washed or altered his hands the results would be affected. The defendant's trial counsel elicited testimony that the defendant was arrested within fifteen to twenty minutes of the shooting and that a gun was never found.

During the re-direct examination of Detective Saacks, the State addressed the issue of gunshot-residue testing. After asking a general question regarding the accuracy of such a test, the State asked Detective Saacks if he had any information that the defendant "went home and either showered or washed or something like that?" Detective Saacks responded affirmatively, adding that the defendant was at home when he was found.

During closing arguments, the defendant's trial counsel reiterated that gunshot-residue testing had not been performed on the defendant "even though he was arrested within 15 to 20 minute[s] after this happened" adding that the defendant lived a short distance away from the scene. The defendant's trial counsel further reiterated the purpose of such a test. Considering the error alleged and our review of the record, we find that the defendant has failed to show that his trial counsel was deficient. The defendant's trial counsel adequately solicited information regarding the absence of gunshot-residue testing and argued the issue to the jury. Any decision regarding further questioning on the issue falls within the ambit of trial strategy and is not subject to review on appeal. The pro se assignment of error lacks merit.

COUNSELED ASSIGNMENT OF ERROR NUMBER TWO

In the assignment of error raised in the supplemental-counseled brief, the defendant contends that the trial court erred in denying the motion to suppress his statement made to Sergeant Paulis. As the defendant was being booked by Sergeant Paulis, after the above-discussed encounters with

Detective Picone and Detective Saacks, the defendant made the statement at issue in this assignment of error. The defendant argues Sergeant Paulis's subtle questioning of the defendant during booking constituted interrogation. Detective Saacks interviewed Sergeant Paulis regarding the statement at issue. Over the defense's hearsay objection, Detective Saacks was allowed to testify to the substance of the statement on the first day of the motion to suppress hearing. The defendant "conceded" that the statement at issue in this assignment of error was not introduced into evidence at the trial and presents no grounds for appellate relief pursuant to LSA-C.Cr.P. art. 921. The defendant contends, however, that the circumstances of the statement buttresses the arguments raised in the assignments of error in the original-counseled and pro se briefs. Specifically, the defendant argues that the statement at issue further evidences Detective Saacks's failure to scrupulously honor the defendant's exercising of his right to remain silent in that Detective Saacks did not advise the correctional facility officers of the defendant's decision not to answer further questions. On the second day of the motion to suppress hearing, Sergeant Paulis gave an account of the defendant's statement that varied from the account given by Detective Saacks on the first day of the hearing. The defendant argues that Detective Saacks's "embellishment" of the statement made to Sergeant Paulis bolsters the defendant's pro se argument that his trial counsel was ineffective in permitting Saacks to expand upon other statements offered as evidence during the trial. Finally, the defendant concludes that the trial court's ruling on the motion to suppress was clearly erroneous, tacitly sanctioned the police misconduct, and tainted the trial proceedings.

As conceded by the defendant, the statement at issue in this assignment of error was not introduced into evidence during the trial.

Further, the statement at issue was not mentioned in the State's opening or closing arguments. Thus, the defendant was not prejudiced by the denial of the motion to suppress the statement at issue in this assignment of error. The issue became moot when the State did not introduce the evidence. **State v. Wilson**, 432 So.2d 347, 348 (La. App. 1 Cir. 1983). Moreover, we do not find that the arguments presented in this assignment of error have any bearing on the assessment of the arguments raised in the original and pro se briefs. This counseled assignment of error lacks merit.

CONVICTION AND SENTENCE AFFIRMED.