NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2005 CA 2570

JOHN G. AUGMAN

VERSUS

M. CRAIG COLWART

Judgment Rendered: November 3, 2006

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On Appeal from the Sixteenth Judicial District Court
In and For the Parish of St. Mary
State of Louisiana
Docket No. 109,950

Honorable Gerard B. Wattigny, Judge Presiding

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John G. Augman Allen Correctional Center Kinder, LA	Plaintiff/Appellant In Proper Person
Joel E. Gooch Lafayette, LA	Counsel for Defendant/Appellee M. Craig Colwart

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BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

McCLENDON, J.

During the criminal trial of Mr. John G. Augman, he was represented by an attorney from the Parish of St. Mary Indigent Defender Office. At that time, Mr. M. Craig Colwart was the Chief Indigent Defender for the program, and provided some assistance to Mr. Augman's defense. After Mr. Augman was convicted of being a felon in possession of a firearm, Mr. Augman filed a petition alleging legal malpractice, and named Mr. Colwart as the defendant.

Mr. Augman and Mr. Colwart filed cross motions for summary judgment. After a hearing on the motions, the trial court found an absence of factual support for essential elements of Mr. Augman's malpractice claim, specifically the claim that attorney negligence caused Mr. Augman to be convicted. The court granted the motion filed by Mr. Colwart and dismissed Mr. Augman's suit. Mr. Augman appealed.[1] Finding no genuine issue of material fact, and that Mr. Colwart was entitled to judgment as a matter of law, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On January 16, 2001, Mr. Augman was a passenger in a car driven by Mr. Oscar Lacoste. Following a tip that Mr. Augman, a convicted felon, had a gun, the car was stopped by police officers. After Mr. Lacoste consented to a search of the vehicle, the police officers found a gun under the passenger seat that Mr. Augman had occupied. Mr. Augman was arrested

[1] While his appeal was pending, Mr. Augman filed a motion for an emergency correction of an erroneous minute entry. Finding no proof that Mr. Augman properly notified the opposition, we do not consider the motion. However, even assuming proper notification, Mr. Augman has not been prejudiced. With the advent of modern recording devices for transcripts, typed transcripts generally prevail over conflicting minute entries. Here, the transcript admittedly contained the trial court's correct ruling. See **State v. Watson**, 2000-1580, p. 3 (La. 5/14/02), 817 So.2d 81, 83 n.4.

and charged with a violation of LSA-R.S. 14:95.1, possession of a firearm by a convicted felon.

Lacoste Consent

At the suppression hearing in Mr. Augman's criminal proceeding, the trial court found probable cause for the stop of the car in which Mr. Augman was a passenger. During the hearing, two police officers testified that they could not remember if the driver of the car, Mr. Lacoste, was handcuffed, but stated that he had consented to the search of the vehicle. No evidence was submitted to show that the consent was gained through the use of force or coercion. The trial court found that the stop was justified and not an illegal detention. The motion to suppress the gun was denied.

At Mr. Augman's criminal trial, Mr. Lacoste testified for the state. Although Mr. Lacoste was not specifically questioned about his consent to the search, he did not deny giving permission to search. He did testify that Mr. Augman had the gun in the car and placed it under the passenger seat.

Misdemeanor Plea Bargain

Also prior to the criminal trial, Mr. Augman asserted that he had been offered the opportunity to plead guilty to a misdemeanor. Although the state had offered a felony plea bargain, which Mr. Augman turned down, the state denied offering any misdemeanor plea bargain. When Mr. Augman presented his claim of a negotiated misdemeanor plea agreement to the criminal trial court, the trial court found that no such plea bargain was accepted by the state.

Guidry Stipulation

At the criminal trial, Mr. Augman admitted that he possessed the gun, but asserted that he was justified in carrying the gun to protect himself from Mr. Melvin Brown. Mr. Augman's sister and a police officer both testified

that Mr. Augman was apprehensive about Mr. Brown. Also during the criminal trial, the state and defense counsel entered into a stipulation that, if called, Mr. Jerome Guidry would testify that Mr. Augman was afraid of Mr. Brown. However, the stipulation was not read to the jury.

In response to Mr. Augman's defense of justification, the state countered that a claim of apprehension or fear was not sufficient. Justification requires a showing that Mr. Augman knew he was in imminent danger and that he had no reasonable alternatives at the time he possessed the firearm. See **State v. Jackson**, 452 So.2d 776, 779 (La.App. 4 Cir. 1984). However, Mr. Augman submitted no evidence to show that he was in imminent danger from Mr. Brown at the time of the arrest or that Mr. Augman believed Mr. Brown was in the immediate vicinity.

After his criminal conviction in 2001, Mr. Augman appealed. He argued that his conviction should be overturned for many reasons, including the failure to read the "Guidry stipulation" to the jury, the claim that a consent to search given by a man in handcuffs could not be voluntary, and that the misdemeanor plea bargain agreed to by the state should have been enforced. This court found no merit in Mr. Augman's assignments of error, including his claim of ineffective assistance of counsel, and affirmed the conviction. See **State v. Augman**, 2002-0657 (La.App. 1 Cir. 5/9/03), 844 So.2d 424 (unpublished opinion), writ denied, 2003-2338 (La. 8/20/04), 882 So.2d 581.

MALPRACTICE CLAIMS

In 2002, Mr. Augman filed his petition for malpractice. The petition alleged acts of malpractice by the appointed indigent defender, and by the indigent defender program chief, Mr. Colwart. Although Mr. Augman alleged general acts of negligence, including negligent supervision by Mr.

Colwart of Mr. Augman's primary trial attorney, the essential facts asserted are those surrounding the Guidry stipulation, the Lacoste consent, and the claim of an unenforced misdemeanor plea bargain.

In support of the cross motions for summary judgment, the parties submitted affidavits, pleadings, and the transcripts of the suppression hearing and criminal trial. Mr. Colwart also offered the criminal appeal opinion rendered by this court. More specifically as to the affidavits, Mr. Augman submitted his own affidavits, and those of Mr. Lacoste, Mr. Augman's father, the Reverend Mr. William Augman, and one attorney, who offered an expert opinion on whether the factual claims by Mr. Augman supported findings of malpractice.[2] In one of Mr. Augman's affidavits, he stated that the Guidry stipulation should have been shown to the jury. On the consent to search issue, Mr. Lacoste swore that he was handcuffed at the scene. As to the claim of a plea bargain, Mr. Augman attested that a misdemeanor plea agreement was given, that he relied on Mr. Colwart's representations of an agreement, and that Mr. Colwart refused to confirm an agreement or seek enforcement of the bargain. In his affidavit, Rev. Augman stated that he was told by Mr. Colwart that he would be acting as co-counsel, that Mr. Colwart had arranged a misdemeanor plea bargain with the state, and that, based on the plea agreement, Mr. Augman would be released within a few months.

In Mr. Colwart's affidavit, he admitted that he met with Mr. Augman at various times, and sought a misdemeanor plea agreement from the state on Mr. Augman's behalf. However, Mr. Colwart denied that any misdemeanor

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[2] One attorney opinion was in proper affidavit form, but one was unsigned. A subsequent signed affidavit appears to have been untimely filed under the trial court's pre-trial order. Although Mr. Augman asserts that the trial court improperly failed to consider the opinions of the attorneys, the record on that claim is unclear. However, we need not explore that assignment further. Even if both "opinions" of the attorneys as to what constitutes malpractice in this case are considered, the outcome here would be the same.

plea agreement was reached and denied that he acted as co-counsel. Although he acknowledged a general duty to supervise staff, he stated that the individual attorneys were responsible for their own cases and made their own decisions. Thus, he denied any allegations of negligence or negligent failure to supervise. In further support of that claim, Mr. Colwart offered the affidavit of Mr. Gary LeGros, who served as the Chief Administrative Officer of the Indigent Defender Office. Mr. LeGros attested that the individual staff attorneys are responsible for their own decisions in representing their clients.

After the hearing on the motions for summary judgment, the trial court found that the "evidence submitted did not amount to unprofessional or negligent conduct by Colwart, much less that some different course of action would have led the jury to conclude Augman was innocent." Thus, the trial court granted summary judgment in favor of Mr. Colwart, and Mr. Augman's suit for malpractice was dismissed.

On appeal, Mr. Augman assigns multiple errors to the granting of the summary judgment. Although the assignments include conclusory allegations of fraud and violations of constitutional rights, we note that the essential facts underlying Mr. Augman's specific arguments and claims of malpractice are those surrounding the Guidry stipulation, the Lacoste consent, and the misdemeanor plea bargain.[3]

APPLICABLE LEGAL PRECEPTS

Summary judgment is appropriate only if pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue of material fact and that mover

[3] As to the various arguments of procedural errors that we have not specifically addressed in this opinion, and the general claims of constitutional violations, we found either no support in the record or no abuse of discretion by the trial court in its rulings.

is entitled to judgment as a matter of law. LSA-C.C.P. art. 966B. On a motion for summary judgment, the initial burden is on the moving party. However, on issues for which the moving party will not bear the burden of proof at trial, the moving party's burden on the motion is satisfied by pointing out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, the nonmoving party must produce factual support sufficient to establish that it will be able to satisfy its evidentiary burden of proof at trial. Failure to do so shows that there is no genuine issue of material fact. LSA-C.C.P. art. 966C(2); **Schwehm v. Jones**, 2003-0109, p. 5 (La.App. 1 Cir. 2/23/04), 872 So.2d 1140, 1144. In determining whether summary judgment is appropriate, appellate courts conduct a *de novo* review of the evidence employing the same criteria that govern the district court's determination. **Schwehm v. Jones**, 2003-0109 at p. 5, 872 So.2d at 1144.

To establish a prima facie case of legal malpractice, a plaintiff must prove there was an attorney client-relationship, the attorney was guilty of negligence in handling the client's case, and the attorney's misconduct damaged the client. In determining if the attorney's malpractice caused the damage, the relevant question is whether a proper performance by the attorney would have prevented the damage, such as a criminal conviction. **Schwehm v. Jones**, 2003-0109 at pp. 5-6, 872 So.2d at 1144.

To reverse a criminal conviction on the grounds of ineffective assistance of counsel, the defendant must show that counsel made errors so serious that the defense was prejudiced to the extent that the defendant was deprived of a fair trial. The defendant must establish a reasonable probability that, but for the unprofessional or negligent conduct, the result of

the proceeding would have been different. **Schwehm v. Jones**, 2003-0109 at p. 6, 872 So.2d at 1144.

ANALYSIS

From our thorough de novo review of the record on appeal, we find no specific evidence was submitted by Mr. Augman to establish the level of supervision required of Mr. Colwart or any breaches of a general duty to supervise. The only evidence on the issue was from Mr. Colwart, who stated that although the individual indigent defenders received some preliminary assistance from the program, they were fundamentally independent in their representations of their clients. Even assuming Mr. Augman stated a particular duty to supervise or that Mr. Colwart acted as Mr. Augman's co-counsel, we do not find that Mr. Augman sufficiently established his claims or rebutted the showing by Mr. Colwart on the issues of the Guidry stipulation, the Lacoste consent, or the alleged misdemeanor plea agreement.

Specifically, the Guidry stipulation does not prove that Mr. Augman knew that Mr. Brown was at the scene of Mr. Augman's arrest, or that Mr. Augman believed he was in imminent danger without any other recourse to protect himself.[4] Without facts sufficient to prove the requirements of the defense of justification, the failure to publish the stipulation to the jury did not affect or cause the outcome of the criminal trial, and cannot support a claim of malpractice. See **State v. Jackson**, 452 So.2d at 779. Thus, Mr.

[4] Initially, Mr. Augman asserted that the stipulation was favorable to the defense and would have shown that he feared Mr. Brown. However, in his brief, Mr. Augman cites an affidavit by Mr. Jerome Guidry filed in the record after the date of the hearing on the motions for summary judgment. In the affidavit, Mr. Guidry states that Mr. Brown was present at the scene of the arrest, a statement that Mr. Augman believes would have been in the stipulation. However, even if the affidavit was admissible at the summary judgment hearing, and read as establishing awareness and fear of Mr. Brown, presence and generalized fear do not constitute the kind of apparent imminent danger required to state the affirmative defense of justification, especially with armed police officers controlling the scene.

Colwart successfully pointed out the absence of factual support for one of the elements essential to prove that counsel was negligent. In addition, the stipulation that Mr. Augman feared Mr. Brown was duplicative of the testimony of other witnesses.

As to the claim of tainted consent, Mr. Augman does not argue that Mr. Lacoste did not consent to the search. Rather, Mr. Augman has consistently argued that the act of handcuffing Mr. Lacoste is what rendered his consent involuntary. However, the act of handcuffing is not alone sufficient to invalidate consent. The record before us contains no evidence that the consent was coerced or obtained by force or threat. Therefore, we find that Mr. Augman failed to establish an essential element of his claim that defense counsel committed negligence by failing to call Mr. Lacoste at the suppression hearing and failing to prove at trial that Mr. Lacoste was handcuffed.

Our de novo review of the record also affirms the finding that no misdemeanor plea bargain was perfected. The state, through the district attorney, is the official vested with the right to offer and accept a plea agreement. The final phase of the process is the acceptance by the trial court. **State v. Anthony**, 99-0107, pp. 6-9 (La.App. 4 Cir. 4/7/99), 735 So.2d 746, 750-52, writ denied, 99-1360 (La. 6/25/99), 746 So.2d 606; see LSA-C.Cr.P. art. 556 & 556.1. It is undisputed that no plea was presented or accepted by the trial court.

Even if the state had offered a misdemeanor plea, which it has consistently denied, absent a showing of detrimental reliance that prejudiced substantial rights of the defendant or claims of the state's bad faith negotiations, the state was free to withdraw an offer or a preliminary agreement. See **State v. Caminita**, 411 So.2d 13, 16 (La.), cert. denied, 459

U.S. 976, 103 S.Ct. 314, 74 L.Ed.2d 291 (1982); **State v. Anthony**, 99-0107 at p. 6, 735 So.2d at 750. Although Mr. Augman alleged that Mr. Colwart confirmed the existence of a misdemeanor plea agreement, Mr. Augman did not relate any first hand conversations with the state acknowledging such a plea or assert any violations of substantial rights or damage beyond mere expectation and the hope of replacing a felony charge with a misdemeanor plea. Expectation or "dashed" hopes are not sufficient to state the requisite element of damage or unfairness that "shocks the (judicial) conscience." **State v. Caminita**, 411 So.2d at 16. In fact, Mr. Augman was afforded a fair trial by a jury, who, after due deliberation, found him guilty of a felony. Thus, the missing element of harm or damage to Mr. Augman rendered immaterial the factual disagreement over what Mr. Colwart may have told Mr. Augman and his father, and showed that Mr. Colwart was entitled to summary judgment as a matter of law. See LSA-C.C.P. art. 966C(2).

CONCLUSION

For these reasons, we affirm the judgment. The costs of the appeal are assessed to appellant-plaintiff, Mr. John G. Augman.

AFFIRMED.