

Judge Stewart's Dissent, filed on
November 5, 2001, to follow opinion
rendered October 31, 2001.

No. 35,047-KA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

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STATE OF LOUISIANA

Appellee

Versus

JOSEPH MATTHEW SHOLAR

Appellant

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Appealed from the
Eleventh Judicial District Court for the
Parish of DeSoto, Louisiana
Trial Court No. 993723

Honorable Robert E. Burgess, Judge

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STEVEN R. THOMAS

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Appellant

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Appellee

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Before BROWN, STEWART and PEATROSS, JJ.

STEWART, J., dissents with written reasons.

STEWART, J., dissenting.

I respectfully dissent. The majority is correct in its conclusion that the trial judge erred by resentencing the defendant. However, by remanding the case back to the trial court, the majority essentially forces the court to repeat the same error. In light of the facts presented in the record, I submit that this court should have vacated the defendant's sentence and set aside his guilty plea. At the hearing on January 2, 2001, the trial judge made the following observations: (1) that he considered the Motion to Amend Sentence timely filed and he considered it as a PCR application which allowed for a full evidentiary review of whether the defendant received ineffective assistance of counsel; (2) that the allegations had merit; (3) that he did have the conversations with the defendant's attorney-Mr. Thomas; (4) there are clearly grounds for allowing the guilty plea to be withdrawn; (5) and that Mr. Thomas was incompetent counsel. Since the record is sufficient, this court may consider this claim in the interest of judicial economy on appeal. *State v. Radcliff*, 416 So.2d 528 (La. 1982); *State v. Willars*, 27,394 (La. App. 2nd Cir. 9/27/95), 661 So.2d 673.

In alleging ineffective assistance of counsel, a defendant must satisfy a two-pronged test by showing first, his attorney's performance to be so deficient as to deny him the "counsel" guaranteed by the Sixth Amendment, and second, that those errors are so serious as to deprive the accused of a fair proceeding, i.e., one with a reliable result. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To prevail under the *Strickland* test, the defendant must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would

have been different. *State v. Jones*, 29,805 (La. App. 2nd Cir. 9/24/97), 700 So.2d 1034.

The record contains all pertinent transcripts regarding the defense counsel's ineffective assistance. Affidavits submitted by the defendant's attorney demonstrated that he had been given ineffective assistance of counsel, and that the facts warranted vacating his guilty plea. In fact, but for the defense counsel's self-admitted errors, the defendant would not have pled guilty, and insisted upon going to trial. Defense counsel admitted at the hearing on the motion to amend the sentence and in his affidavit that, but for his communication of such misinformation to the defendant and his parents, and his failure to put what he believed to be the agreement in the record, the defendant would not have pled guilty. Moreover, the trial judge acknowledged that the record was clear that the defendant had been given ineffective assistance of counsel.

The majority asserts that the state objected to the affidavits offered in support of the defendant's contention that he received ineffective assistance of counsel. However, this statement ignores the fact that while the state objected to the affidavits when they were offered at the December 2000 hearing, the state did not counter the allegation at the January 2, 2001, hearing, nor has it ever made an attempt to counter any of the evidence offered. In fact, the state did not address the issue of ineffective assistance of counsel in its brief.

In sum, it is indisputable that the defendant's plea was not free and voluntary insofar as it was given upon the advice of ineffective counsel and should have been set aside.