

18-8001

No. _____

Supreme Court, U.S.

FILED

AUG 08 2016

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM FYKES - PETITIONER

vs.

STATE OF WEST VIRGINIA - RESPONDENT(S)

ON MOTION FOR A WRIT OF CERTIORARI TO

WEST VIRGINIA SUPREME COURT OF APPEALS

PETITIONER FOR WRIT OF CERTIORARI

ORIGINAL

WILLIAM FYKES

Mount Olive Correctional Complex

One Mountainside Way, Box 5

Mount Olive, WV 25185

QUESTION(S) PRESENTED

- (1) Whether Petitioner's rights under the due process of law of the US Constitution's XIV Amendment and W.Va. Constitution Art. III, §10, were violated where the trial Court committed reversible error by refusing to provide jurors with additional instruction, despite counsel's objection, when jurors signaled that did not comprehend the Court's Instructions and were struggling with the critical element of intent.
- (2) The Prosecutor committed plain error by questioning the Petitioner about his post arrest silence in a case that rested on credibility. Petitioner was denied his State and Federal rights against self-incrimination and rights to due process of law due to the improper line of questioning by the Prosecutor. US Const. Amend. V and XIV; WV Const. Art. III §§5 and 10.

LIST OF PARTIES

[X] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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Petitioner, Pro se:

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One Mountainside Way, Box 5
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APPENDIX A

Decision of State Supreme Court Denying Review.

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix ____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix ____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ court appears at Appendix ____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

From **state court**:

The date on which the highest state court decided my case was June 10, 2016. A copy of that decision appears at Appendix A.

There was no petition for rehearing filed.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

Fifth Amendment, U.S. Constitution

Fourteenth Amendment, U.S. Constitution

Article III §5, West Virginia Constitution

Article III §10, West Virginia Constitution

STATEMENT OF THE CASE

On the 29th day of March, 2012 Petitioner was indicted by a Grand jury charging him with committing the offenses of, (3) counts of Kidnapping, (3) counts of First Degree Robbery, and (2) counts of Malicious Wounding, resulting from an incident at the Stonewall Nightclub in Huntington, W.Va..

No one, including Petitioner disputes the incident occurred. The major disagreement is whether the incident was a real robbery. Petitioner contends it was planned, and therefore he lacked the requisite intent.

Petitioner's trial began on the 5th day February, 2013 lasting through until the 8th day of February, 2013. Petitioner was found guilty of three (3) counts of Kidnapping, three (3) counts of First Degree Robbery, and one (1) count of Unlawful Wounding, and one (1) count of Battery. Petitioner was sentenced to a combined term of 92 years, plus an additional two (2) Life sentences in prison on April 4, 2013.

Petitioner filed his direct Appeal before the Supreme Court of Appeals of West Virginia on February 27, 2015, and the appeal was affirmed on June 10, 2016. It is from that appeal to which Petitioner seeks relief.

STATEMENT OF FACTS

Petitioner avers that the Supreme Court of Appeals of West Virginia unconstitutionally denied him relief based on due process, the right to a fair trial as guaranteed by both the United States Constitution, U.S. Const. Amend. XIV, and West Virginia Constitution, art III §10.

During deliberations the jury posed a question to the court. The question asked by the jury was legal in nature and demonstrated that the jury was, at a minimum, confused regarding the applicable law, and therefore, the Judge was obligated to clarify the Legal implication of a conspiracy.

The West Virginia Supreme Court has stated that the jury in the Petitioner's case did not fail to comprehend its instruction on any critical element of the crime or with respect to any Constitutionally protected right. The Supreme Court further stated that counsel for the Petitioner withdrew his conspiracy instruction, and he did not thereafter request that the jury be given a instruction indicating that any conspiracy or collusion involving the victims was a defense to the charge. Therefore, there was no error. The jury question in no way demonstrated that it had failed to comprehend any instruction read to them.

Petitioner asserts it was reversible error for the trial Court not to answer the Juror's question.

In response to the Petitioner position on this matter, the State responds that jury's question was factual and was therefore improper for the court to answer. However, the jurors did not ask whether a conspiracy existed; they instead ask, what the legal

implication was if a conspiracy existed. "If we feel this is a conspiracy [sic] does it negate any of the charges[?]" This question was a legal question and the trial court was obligated to provide a response. State v. Lutz, 183 W.Va. 234, 235, 395 S.E.2d 478, 479 (1988) ("[I]t was reversible error for the judge to deny defendant's motion orally to re-instruct the jury in light of the jury's evident confusion over the law."); Shafer v. South Carolina, 532 U.S. 36, 44, 121 S.Ct. 1263, 1269 (2001) (A trial judge's duty is to give instructions sufficient to explain the law even when that requires giving supplemental instructions on issues not covered in original charge). The trial court's decision was error as is simply told the jurors to reread the instructions they found to be confusing and did not clarify the legal issue raised by the jurors. Therefore, Petitioner is entitled to a new trial.

The State correctly asserts that counsel did not complain about the initial charges given to jury. State's brief at 16. In fact, the State spends a tremendous amount of time discussing the initial charge from the trial court, who submitted what instruction, and the applicable law regarding the initial charge to the jury. However, all of these issues discussed by the State are immaterial to the narrow issue present in Mr. Fykes' case.

The issue before the court, and that which the court must decide is: whether the trial court was obligated to formulate and give a supplemental instruction based on the specific legal question posed by the jurors during deliberations?

This Court has previously answered this question in the affirmative by stating: "...where, as here, the judge is called

upon to answer a well framed question following the initial charge. Quite often, the judge must tailor, mold and even sculpt the law in fashioning an answer to fit the question." State v. Davis, 220 W.Va. 590, 596, 648 S.E.2d 354, 360 (2007) (emphasis added) (internal citations omitted)

It is immaterial that Petitioner was not charged with conspiracy or that the court had not previously instructed on conspiracy. Again, the jury's question which the court needed to answer was, what was the legal effect if the "victims" were acting in concert with the defendant?

Upon receiving this question from the jury, the trial court was obligated to respond in a way that would clear up any confusion which the jurors expressed in their note to the court. See State v. McClure, 163 W.Va. 33, 37, 253 S.E.2d 555,558 (1979) ("...where it clearly and objectively appears in a criminal case from the statements of the jurors that the jury has failed to comprehend an instruction on a critical element of the crime of a constitutionally protected right, the trial court must on the request of defense counsel, reinstruct the jury.") The question posed by the jurors clearly indicated that the jurors were contemplating Mr. Fykes' defense and were seeking further guidance from the trial court in order to apply the law as given to them in the original charge.

In Bollenbach v. United States, 326 U.S. 607, 612-13, 66 S.Ct. 402, 405 (1946), a case where jurors requested supplemental instructions from a trial court, the United States Supreme Court held the jury's ability to draw the appropriate legal conclusion

in a case depends on the trial court providing the proper guidance in the form of a lucid statement of the relevant legal standards. The Court further explained that "[w]hen a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." *Id.*, 326. See also Alcindor v. United States, 818 A.2d 499, 501 (D.C. 2003) ("When a jury sends a note which demonstrates that it is confused, the trial court must not allow that confusion to persist."); People v. Mainer, 197 P.3d 254, 259 (2008) (internal citations omitted) (It is the trial court's duty to instruct the jury on all matters of law, and if a question cannot be answered by directing their attention to the original instructions, the trial court has an obligation to clarify the matter in a concrete and unambiguous manner.) The trial court failed to clear the confusion in Petitioner's case. This failure by the court required the jury to deliberate without a clear understanding of the law it was required to apply.

In Gray v. United States, 79 A.3d 326, 341 (D.C. 2013), a case similar to Petitioner's case, the jury ask the court a question that indicated it was considering the defendant's theory of defense, and, just like Petitioner's case, the answer to the question required the court to discuss the controlling issue in the case. Over counsel's objection, the trial court did not answer the question posed by jurors. Instead, the court responded by rereading an instruction in the original charge which did not answer the question. Gray's conviction was reversed based on the trial court's failure to answer the specific question. The Gray Court reasoned that reversal was necessary because as instructed,

it was possible that the jurors were accepting Gray's defense but still convicted him due to their confusion. The court held that "...an answer to a jury note that is adequate to dispel jury confusion on a controlling issue of a case is such an important aspect of due process of law that we [must] be satisfied beyond a reasonable doubt that an omission to provide [such an answer] was harmless before we [can] conclude that it did not violate the verdict." *Id.* at 340 (internal citations omitted).

Therefore in Petitioner's case, because the question asked by jurors dealt with the controlling issue and it appeared as though the jurors were considering Petitioner's defense, it was extremely important that the trial court answer the question. Simply pointing jurors in the direction of the original charge, which did not contain the answer, was not sufficient. See Lovell v. State, 702 A.2d 261, 279, 347 Md. 623, 660-61 (1997) (A trial court must respond to a question from a deliberating jury in a way that clarified the confusion evidenced by the query when the question involves an issue central to the case.); Bircher v. State, 109 A.3d 153, 160, 221 Md. App. 376, 388 (2015); People v. Tomes, 672 N.E.2d 289, 284 Ill. App. 3d 514 (1996) ("The ... giving of a response that provides no answer to the particular question of law posed "by the jury" has been held to be prejudicial error.") The Petitioner's jury was seeking clarification and guidance from the court in a central issue to ensure that it was "clearly and properly advised of the law in order ... to render a true and lawful verdict." State v. McClure, 163 W.Va. 33, 37, 253 S.E.2d 555, 558 (1979). The trial court incorrectly asserted that it "did

not have the ability to instruct the jury on "specific areas of law that we have not previously dealt with." Counsel's objection was specific and requested specific action from the court. Therefore, the trial court was given ample opportunity to cure this issue before the jurors returned a verdict.

"Ultimately, the responsibility to ensure in criminal cases that the jury is properly instructed rests with the trial court." State v. Lambert, 173 W.Va. 60, 312 S.E.2d 31 (1984). In Petitioner's case the jurors' confusion was evident in the written question. By refusing to respond to the jurors' question in a manner to clear up any confusion, the trial court forced the jurors to speculate as to the proper application of applicable law, thereby denying Petitioner the right to due process and the right to a fair trial. Therefore, Petitioner is entitled to a new trial.

As well the prosecution committed further plain error by questioning the Petitioner about his post-arrest silence in a case that rested on credibility.

It is well-settled that the State's use of defendant's post-arrest silence for impeachment purposes, i.e., at the time of arrest and after he received Miranda warnings, violates due process and the privilege against self-incrimination. Doyle v. Ohio, 426 U.S. 610, 611, 96 S.Ct. 2240, 2241 (1976). See Syl.Pt. 1, State v. Boyd, 160 W.Va. 234, 233, S.E.2d 710 (1977) ("...it is reversible error for the prosecutor to cross-examine a defendant in regard to his pretrial silence or to comment on the same to the jury.") That fundamental rule was violated in the Petitioner's

case currently before this court, when the prosecutor cross-examined Petitioner regarding his post-arrest silence.

During cross examination the prosecution ask the Petitioner the following:

Pros: So this story you are telling me today, wouldn't you agree that this is the first time you have told this story to anyone other than your lawyers?

Mr. Fykes: Well, nobody ever ask me for it. I mean I did not get an interview from a detective.

Pros: But this is the first time anybody else has heard it other than them?

Mr. Fykes: Right.

Notability, Petitioner was arrested immediately upon first contact with law enforcement personnel. Accordingly, this case did not present the investigation phase during which Petitioner's silence could be an evidentiary, rather than a constitutional, factor. Unfortunately, counsel did not object to this line of questioning by the prosecutor, making it necessary for this court to review this issue under the plain error doctrine.

The prosecutor's questioning of the Petitioner regarding his exercise of a fundamental right that is among the most basic of constitutional guarantees, in a blatant attempt to discredit him before the jury, satisfies the plain error standard. By asking Petitioner these questions, the prosecutor indicated to the jury that Petitioner's testimony was not credible because he had not told the same story to the police.

The use of a defendant's post-arrest silence, as was done in the Petitioner's case, is unconstitutional because it penalizes a

defendant for exercising his Miranda rights. As the Untied States Supreme Court noted in Doyle, 426 U.S. 618, 96 S.Ct. at 2245, "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." (footnote omitted). That is what occurred here in the Petitioner's case.

In State v. Boyd, 160 W.Va. 234, 233 S.E.2d 710 (1977), the Court condemned a prosecutor's similar cross-examination and impeachment of a defendant. In Boyd, the prosecutor ask the defendant why he had not disclosed his self-defense story to the police at the jail. Id. at 236, 233 S.E.2d 713. The Boyd Court held that cross-examination of the defendant about his pretrial silence was reversible error. Id., at 240-41, 233 S.E.2d at 716. The prosecutor in Petitioner's case behaved exactly at the prosecutor in Boyd, questioning Petitioner on cross-examination in a way that would make the jurors question his veracity because he did not give a statement to the police.

This line of questioning was highly prejudicial; because the Petitioner's defense at trial was that the robbery was planned. The Petitioner entire case turned on whose version of events was more believable to the jury. Thus, the Petitioner's credibility was crucial to the success of his case. Therefore, the prosecutor's questioning of the Petitioner's believability in front of the jury in this manner was unacceptable. The prosecutor realized that the most effective way to attack and/or destroy the believability of the Petitioner's story in the eyes of the jury was to use his constitutional right to post-arrest silence against

him by asking him why he did not tell his story to officers after his arrest.

While constitutional errors, such as the prosecutor questioning Petitioner about his post-arrest silence, are subject to harmless error review, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828 (1967); See Syl. Pt. 11, State v. Guthrie, 194 W.Va. 657, 671, 461 S.E.2d 163, 177 (1995) ("An appellate court is obligated to see that the guarantee of a fair trial under section 10 of Article III of the West Virginia Constitution is honored. Thus, only where there is a high probability that an error of due process proportion did not contribute to the criminal conviction will an appellate court affirm. High probability requires that an appellate court possess a sure conviction that the error did not prejudice the defendant.")

Because this improper and unconstitutional line of questioning directly influences Petitioner's reliability with the jury, which was the primary issue the jury had to decide, there is a reasonable possibility it contributed to his conviction. Indeed the jurors' question presented to the Court during their deliberations reveals much about the jurors' mind-set during that deliberation period. The jurors were contemplating the defense theory and credibility had to be the linchpin of the decision making process.

The prosecutor's actions in violating the basic constitutional prohibition demonstrates the prosecutor's belief it would be

prejudicial. Therefore, this constitutional error was not harmless beyond a reasonable doubt.

Petitioner was denied his state and federal privileges against self-incrimination and rights to due process of law due to this improper line of questioning by the prosecutor. U.S. Const. amend. V and XIV; W.Va. Const. art. III §§5 and 10.

REASONS FOR GRANTING THE PETITION

Petitioner contends that the West Virginia Supreme Court's reliance on the case of State v. Lutz to deny him relief is a miscarriage of justice. Petitioner further contends that in Issue one (1) The trial court committed reversible error by refusing to provide the jurors with additional instruction, despite counsel's objection.

The question posed by the jurors to the court was one of a legal nature and further demonstrated that the jury was confused as to the applicable law, and therefore the judge was obligated to clarify the legal implication of a conspiracy to the jury. During deliberations the jurors sent the following question to the trial court: "If we feel this is a conspiracy [sic] does it negate any of the charges[?]" The court alerted the parties that jurors had a question.

The State responded that jury's question was factual and was therefore improper for the court to answer. However, the jurors did not ask whether a conspiracy existed; they instead ask, what the legal implication was if a conspiracy existed. Asking, "If we feel this is a conspiracy [sic] does it negate any of the charges[?]" This question was a legal question and the trial court was obligated to provide a response. State v. Lutz, 183 W.Va. 234, 235, 395 S.E.2d 478, 479 (1988) ("[I]t was reversible error for the judge to deny defendant's motion orally to re-instruct the jury in light of the jury's evident confusion over the law.");

In Bollenbach v. United States, 326 U.S. 607, 612-13, 66 S.Ct. 402, 405 (1946), a case where jurors requested supplemental

instructions from a trial court, the United States Supreme Court held the jury's ability to draw the appropriate legal conclusion in a case depends on the trial court providing the proper guidance in the form of a lucid statement of the relevant legal standards. The Court further explained that "[w]hen a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy."

Shafer v. South Carolina, 532 U.S. 36, 44, 121 S.Ct. 1263, 1269 (2001) (A trial judge's duty is to give instructions sufficient to explain the law even when that requires giving supplemental instructions on issues not covered in original charge). The trial court's decision was error as it simply told the jurors to reread the instructions they found to be confusing and did not clarify the legal issue raised by the jurors. Therefore, Petitioner is entitled to a new trial.

As well, as to the second issue before this body relating to the prosecution's questioning of the Petition concerning his post-arrest silence in a case that rested on credibility, it is well-settled that the State's use of defendant's post-arrest silence for impeachment purposes, i.e., at the time of arrest and after he received Miranda warnings, violates due process and the privilege against self-incrimination. Doyle v. Ohio, 426 U.S. 610, 611, 96 S.Ct. 2240, 2241 (1976). See Syl.Pt. 1, State v. Boyd, 160 W.Va. 234, 233, S.E.2d 710 (1977) ("...it is reversible error for the prosecutor to cross-examine a defendant in regard to his pretrial silence or to comment on the same to the jury.") That fundamental rule was violated in the Petitioner's case currently before this

court, when the prosecutor cross-examined Petitioner regarding his post-arrest silence.

The use of a defendant's post-arrest silence, as was done in the Petitioner's case, is unconstitutional because it penalizes a defendant for exercising his Miranda rights. As the Untied States Supreme Court noted in Doyle, 426 U.S. 618, 96 S.Ct. at 2245, "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." (footnote omitted). That is what occurred here in the Petitioner's case.

In State v. Boyd, 160 W.Va. 234, 233 S.E.2d 710 (1977), the Court condemned a prosecutor's similar cross-examination and impeachment of a defendant. In Boyd, the prosecutor ask the defendant why he had not disclosed his self-defense story to the police at the jail. Id. at 236, 233 S.E.2d 713. The Boyd Court held that cross-examination of the defendant about his pretrial silence was reversible error. Id. at 240-41, 233 S.E.2d at 716. The prosecutor in Petitioner's case behaved exactly at the prosecutor in Boyd, questioning Petitioner on cross-examination in a way that would make the jurors question his veracity because he did not give a statement to the police.

This line of questioning was highly prejudicial; because the Petitioner's defense at trial was that the robbery was planned. The Petitioner entire case turned on whose version of events was more believable to the jury. Thus, the Petitioner's credibility was crucial to the success of his case. Therefore, the prosecutor's questioning of the Petitioner's believability in

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Because this improper and unconstitutional line of questioning directly influences Petitioner's reliability with the jury, which was the primary issue the jury had to decide, there is a reasonable possibility it contributed to his conviction. Indeed the jurors' question presented to the Court during their deliberations reveals much about the jurors' mind-set during that deliberation period. The jurors were contemplating the defense theory and credibility had to be the linchpin of the decision making process.

The prosecutor's actions in violating the basic constitutional prohibition demonstrates the prosecutor's belief it would be prejudicial. Therefore, this constitutional error was not harmless beyond a reasonable doubt.

Petitioner was denied his state and federal privileges against self-incrimination and rights to due process of law due to this improper line of questioning by the prosecutor. U.S. Const. amend. V and XIV; W.Va. Const. art. III §§5 and 10.

CONCLUSION

Petitioner prays for relief is that this high court find in his favor and reverse the rulings of the West Virginia Supreme Court and Vacate his convictions and ORDER the he be given a new trial forthwith.

For all the reasons noted herein above, the Petition for a Writ of Certiorari should be granted.

Respectfully,

/s/ William Fykes
William N. Fykes