

18-9758
NO.

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES
TERM

LAVELL CONERLY
Petitioner,
In Pro Se

FILED
NOV 30 2018
OFFICE OF THE CLERK
SUPREME COURT, U.S.

v.

WILLIS CHAPMAN
Respondent.

PETITION FOR WRIT OF CERTIORARI

ON PETITION FOR WRIT OF CERTIORARI FROM
THE MICHIGAN COURT OF APPEALS.

PREPARED AND SUBMITTED BY:

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DATED: NOVEMBER 30, 2018

QUESTIONS PRESENTED

- I. WAS IT REVERSIBLE ERROR VIOLATING THE PETITIONER'S CONSTITUTIONAL RIGHT TO HAVE DUE PROCESS OF LAW DURING CLOSING ARGUMENTS TO INTRODUCE HIS INculpatory STATEMENT MADE TO POLICE, WHERE DEFENDANT'S STATEMENT WAS OBTAINED WITHOUT THE BENEFIT OF MIRANDA WARNINGS AND IN VIOLATION OF HIS RIGHT AGAINST SELF-INCrimINATION?
- II. WAS THE DEFENDANT DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHT TO HAVE THE ASSISTANCE OF COUNSEL, WHERE TRIAL COUNSEL FAILED TO OBJECT DURING THE PROSECUTOR'S TO INTRODUCTION OF THE DEFENDANT'S INculpatory STATEMENT MADE TO POLICE AS THE STATEMENT WAS OBTAINED WITHOUT THE BENEFIT OF MIRANDA WARNINGS AND IN VIOLATION OF HIS RIGHT AGAINST SELF-INCrimINATION?

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REFERENCE TO OPINIONS BELOW

The January 24, 2012, Opinion and Order from the Michigan Court of Appeals is unpublished as People v. Conlerly No 301804 (Mich Ct. App. 2012). The Michigan Supreme Court affirmed this decision in an unpublished opinion and Order. See Appendix 1.

The United States District Court Opinion and Order No. 1:13-CV-617 denied relief on January 2, 2018. See Appendix 2.

The United States Court of Appeals for the Sixth Circuit Opinion and Order No. 18-1625 also denied petitioner relief on October 5, 2018. See Appendix 3.

JURISDICTION

[] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was October 5th 2018.

[] No petition for rehearing was timely filed in my case.

[] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix ____.

[] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. __ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[] For cases from **state courts**:

The date on which the highest state court decided my case was 1-24-2012. A copy of that decision appears at Appendix C.

[] A timely petition for rehearing was thereafter denied on the following date: 6-25-2012, and a copy of the order denying rehearing appears at Appendix C.

[] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. __ A ____.

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

CONSTITUTIONAL PROVISIONS

UNITED STATES CONSTITUTION AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or life; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

UNITED STATES CONSTITUTION AMENDMENT XIV, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of law.

STATEMENT OF FACTS

The Armed Robbery of Joseph Williams

According to complainant Joseph Williams, on April 15, 2010, Defendant pulled up next to him while he was walking. (II/3, TT pg 51) Defendant then demanded money while pointing the tip of a shotgun out his truck window. (II/3 TT pg 31-32). Williams claimed that defendant then "snatched the money from [him] while [defendant] was in his truck." (II/3, TT pg 55). About '15 or 20 minutes later' Williams called police (II/3, TT pg 59). Allegedly, defendant took \$1,200.00' or "something like that." (5/10 PE pg 26). From Williams, Williams also testified to being "Schizophrenia," requiring case managers, guardianship and a couple organizations to help him take care of himself. (TT Vol II pg 18-19). Williams explained he takes four different medications-Depakote, Haldol injection, Cogentin, Zyprexa (II/3 TT pg 19). Williams admitted that on April 15, 2010 he had been off his medication and "missed dates [he] was supposed to receive [his] injection," (II/3 TT pg 39-40).

The Arrest and Search of Defendant Lavell Conley

Shortly after the alleged robbery, Williams informed police where defendant lived and the description of his truck. (II/3 TT pg 62-63), Officer Michael Murphy with the Saginaw County Police Department was dispatched to defendant's residence. (II/3 TT pg 67). When defendant's girlfriend arrived, she called defendant on the cell phone and defendant "had come walking down the street with dogs and put them in the yard." (II/3 TT pg 91) Defendant was then detained in the "back seat of [Officer Murphy's] cruiser " (II/3 TT pg 93). Later at defendant's trial, Officer Murphy testified that he attempted to gain consent to search [defendant's] house." however, [defendant] refused " (II/3 TT pg 93-94) Eventually, Officers obtained a search warrant and after searching defendant's "entire house" (II/3 TT pg 84), "several rounds of ammunition" were located and two shotguns (II/3 TT pg 95-103). Murphy noted that one of "the shotguns was loaded," (11/3 TT pg 103) and that defendant had only "\$87 00 on him" when he was arrested and taken to the jail. (II/3 TT pg 85).

The Interrogation

While in custody Saginaw County Police Detective Joseph Grigg without issuing

any Miranda warnings, inquired if defendant wished to discuss the incident in question (5/3 PE pg 15-17). However, defendant declined and requested to speak with an attorney, at which point Det Grigg continued the conversation explaining that the Prosecutor's Office would contact him the next day (5/3 PE pg 17). Det Grigg then artfully remarked, "what your's really gonna take a hit on is the guns," in response defendant stated "I know " (II/3 TT pg 70)(5/3 PE pg 16). This incriminating statement was later advocated by the Prosecutor as an admission of guilt during his clothing argument to the jury, where he improperly stated:

"So you have six substantive charges for your consideration. Really you only have four for your consideration because the defendant, by the statement that he made, has admitted to being a felon in possession of a firearm (II/5 TT pg 16)(emphasis added).

No objection was made to the admission of defendant's alleged confession, nor was any objection made to the admission of defendant's refusal to consent to search his home

Verdict and Sentence

Defendant was convicted on November 5, 2010 following a jury trial of 1 count of Armed Robbery MCL 750.529, 1 count of Carrying a Dangerous Weapon MCL 750.226, 1 count of Felon in Possession of a Firearm MCL 750.224(F), and 3 counts of Felony Firearm MCL 750.237(B)(A), before the Honorable Darnell Jackson in the Saginaw County Circuit Court, (II/5 TT pg 61-64) He was sentenced on December 13, 2010 to serve concurrent prison terms of 60 months for each Felony Firearm conviction He was also sentenced to concurrent prison terms of 46-180 months for his Felon in Possession of a Firearm conviction, 46-180 months for Carrying a Dangerous Weapon, and 180-300 months for his Armed Robbery conviction, which were all to be served consecutively to his sentence for the 3 Felony Firearm Convictions. (12/13 TT pg 7-8).

Appeal and Motion for New Trial/ Statement of the Case

On December 22, 2010, defendant was given court appointed Randall Karfonta an appellate counsel to appeal his criminal conviction and sentence. Sometime in April of 2011 'interesting events' unfolded as alleged victim Joseph Williams went to defendant's former trial attorney's office with a letter and had given a

statement retracting and stating that everything he said in trial proceeding was a complete lie and that he had given false statements. Defendant's appellate counsel subsequently filed a motion for a new trial based on newly discovered evidence with Williams's recanted testimony.

On August 8, 2011 pursuant to defendant's motion, the trial court conducted an hearing, where it concluded:

"Well, here's the thing I'm going to make it clear who's responsible for the case from this point forward I'm denying the motion for a new trial, denying the motion for evidentiary hearing" (8/8 EH pg 5).

Therefore, on August 29, 2011 defendant's brief on appeal was filed with the Michigan Court of Appeals, and on January 24, 2012, defendant's convictions and sentence were affirmed by the Michigan Court of Appeals. The Michigan Supreme Court also affirmed defendant's conviction. Subsequently defendant filed a Writ of Habeas Corpus in The Western District of Michigan southern Division, which on January 2, 2018, the court adopted Magistrate Judge Kent's Report and Recommendation in favor of the Respondent and against Defendant. Defendant then filed an application for a Certificate of Appealability in the Sixth Circuit Court of Appeals, which was denied on October 5, 2018.

I. DEFENDANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHT TO HAVE DUE PROCESS OF LAW WAS VIOLATED, WHERE THE PROSECUTOR ERRONEOUSLY ADMITTED HIS INculpatory STATEMENT TO POLICE THAT WAS OBTAINED WITHOUT THE BENEFIT OF ANY MIRANDA WARNINGS AND IN VIOLATION OF HIS RIGHT AGAINST SELF-INCrimINATION.

Both State and Federal Constitutions guarantees an accused the right to have due of law. U.S. Const. Ams. V, VI and XIV; Mich. Const. 1963, art. 1 sec. 17. An accused is afforded a Constitutional privilege against compulsory self incrimination. U.S. Const. Am. V; Mich. Const. 1963, art. 1 sec. 17. To protect this Constitutional privilege if a petitioner is subjected to custodial interrogation, the police are required, as a procedural safeguard, to advise an accused of his Constitutional rights before questioning him. Miranda v. Arizona, 384 US 436, 444(1966). The United States Supreme Court in Edwards v. Arizona, 451 US 477, 484-485(1981), established a bright-line rule that once an accused requests counsel officials may not reinitiate questioning "until counsel has been made available" to him. The rule in Edwards is designed to prevent police from badgering an accused into waiving his previously asserted Miranda rights " Minnick v. Mississippi, 498 US 146(1990). Thus, "failure to give Miranda warnings to a person, before the person is subjected to a custodial interrogation, renders any statement made inadmissible " People v. Raper, 222 Mich App 475, 479(1997)."

Petitioner was taken into custody at the Saginaw City Police department in connection with the alleged armed robbery of Joseph Williams. While petitioner was in the holding area, of the Police Department, Det. Joseph Griggs intentionally went down to petitioner cell to ask him "if he was willing to - speak with Detectives. (11/3 TT pg 77-78). In response, petitioner declined and requested to speak with a lawyer (PE pg 17), at which point Det. Griggs continued the conversation stating "he would be meeting with the prosecutor's office the

following day" (II/3 TT pg 78). Petitioner asked one question (which is his Constitutional right,to be informed of the nature and cause of the accusation....under the Sixth Amendment), the well trained Detective then artfully remarked, "What you're really gonna take a hit on is the guns," which the petitioner responded, "I know" (PE pg 16). At no point in time prior, during, or after their conversation did Det. Griggs ever issue petitioner any Miranda warnings. (PE pg 15).

Subsequently during petitioner's trial, this statement was admitted against him before the jury, as an admission of guilt to his pending firearm charge where the prosecutor improperly advocated during his closing statement:

"So you have six substantive charges for your consideration. Really you only have four for your consideration because the defendant, by the statement that he made, has admitted to being a felon in possession of a firearm." (II/5 TT pg 16)(emphasis added).

Petitioner's statement was inadmissible, for the obvious reason, which was never advised of his Miranda rights, a fact which Det. Griggs openly admitted. Furthermore, in the context of Miranda, petitioner had invoked his fifth amendment right to remain silent, when he explicitly requested to speak with a lawyer.

The procedure mandated by Edwards is clear, Police are "not entitled to initiate further interrogations unless they first honor defendant's request for counsel." People v. Bladel (After Remand), 421 Mich 39, 57(1984)(emphasis added).

The exception underlying this rule is if an accused "having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiate further communication, exchanges or conversations with police." Edwards, supra 484. While the Michigan Court of Appeals in this present case correctly points out that nobody physically forced

defendant to say the words, "I Know," in response to Det. Griggs remark, a valid waiver cannot be established merely by showing that an accused who has asked for an attorney, responded to further police initiated custodial interrogation even if he has been advised of his rights." People v. Paintman, 412 Mich 518, 526(1982) Petitioner exercised his rights to be informed of the nature and cause of the accusation, as guaranteed in the Sixth Amendment.

The Sixth Circuit in Bachynski v. Stewart, 813 F3rd 241(2015) held that "after a suspect invokes his right to counsel, police may not initiate an interrogation of the suspect without counsel present. An interrogation occurs when the police should have known that their conduct was reasonably likely to elicit an incriminating response. That definition naturally includes express questioning designed to ferret out the suspect's involvement in the case, but it also includes the functional equivalent of such questioning-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." Also the United States Supreme Court in Dickerson v. United States, 530 US 428, 429(2000), held Miranda requires procedures that will warn a suspect in custody of his right to remain silent and assure him that the exercise of that right will be honored.

If a reasonable jury, using all of the facts and circumstances available, would view the police as attempting to obtain a response to be used at trial it is an interrogation.

Also it should be point out that Det. Murphy was the original Detective who had first contact with the suspect, once the suspect was transported to the jail there are jail personnel there with the jobs to attendant to a person who was been arrested and is in custody. Det. Griggs purpose of the visit was to gain information to use against the suspect at trial,

Based on these reasons, it's apparent that petitioner's inculpatory statement was inadmissible and obtained in violation of Miranda.

In the Michigan Court of Appeals attached unpublished opinion, the Court unreasonable applies the rationale of Miranda, the Michigan Court of Appeals unduly concluded that Det. Griggs questioning of the petitioner "did not constitute an interrogation for the purposes of Miranda, thus no Miranda violation could take place (Michigan Court Of Appeals Unpublished Opinion pg 4 5), In reaching this conclusion the Court cited People v. Raper supra and People v. McCuaig 126 Mich App 754(1983) for the proposition that Det. Griggs remarks were merely informative of defendant's charges, rather than inquisitive, Id. The Court in McCuaig held that an interrogation had not occurred because the statements made by the police officer, which merely advised defendant of the crime with which he was charged and which described the events which led to that charge, cannot be characterized as further interrogation.' Id. at 760. The Court in Raper reached a similar conclusion holding that no interrogation occurred between a police officer and an accused as the Officer's statements were to provide information rather than to elicit a response. Raper, supra at 480.

Petitioner openly concedes that when Det. Griggs informed him that the prosecutor's office would be contacting them the following day, it was only to provide information the Michigan Court of Appeals was correct in reaching that finding, however when Det. Griggs's Tactically remarked, "well, what you're really gonna take a hit on is the guns" (5/3 PE pg 16), he did so with an explicit purpose. The Raper court itself re-enforce that "interrogation, refers to express questioning, and to any words or actions by police that the police should know are reasonably likely to elicit incriminating response." Id. 479.

Det. Griggs came to the petitioner initiate the conversation Det. Griggs well timed remark did constitute an interrogation as it was made for no reason other

than to elicit an incriminating response. Had the good detective wanted to inform petitioner of his future firearm charges he could have done so like any normal person would have stating to petitioner, "your being charged with etc..." A fact which the Michigan Court of Appeals didn't take into consideration. but as Det Griggs being a trained veteran of the Police Department, who most likely specializes in interrogations which is why he went to talk to petitioner in the first place. Can the prosecutor present an alternative motivation behind Det Griggs's remark well, what you're really gonna take a hit on is the guns?" (5/3 PE pg 16). If the Detective never asked this question (ask a question) why did the petitioner state; "I Know."

The Court's holding is also contrary to the prosecutor's actions, as the prosecutor wield petitioner's statement as a confession of guilt to the jury. The prosecutor used petitioner's inculpatory statement, as made in response to Det. Griggs's remark which it was.

Based on these reasons, the Michigan Court of Appeals unreasonable applied Miranda to the particular facts of this case. Petitioner's inculpatory statement was in fact inadmissible as it was obtained in violation of Miranda and in response to express questioning by Det. Griggs reasonably likely to elicit an incriminating response " The "test for prosecutorial misconduct is whether examining the prosecutor's statements in context, they deprived petitioner of a fair and impartial trial." People v. Hill 257 Mich. App. 126. 135(2003). Claims of Prosecutorial misconduct are considered on a case-by-case basis. People v. Rodriguez, 251 Mich. App. 10 29-30(2002). In the present case petitioner was charged with multiple firearm offenses, his statement of "I Know" was nothing short of a confession of guilt to those charges, a fact which the prosecutor avidly pointed out to the jury. This error may have single handedly deprived petitioner a fair trial, as an admission of guilt" is probably the most probative and damaging

evidence that can be admitted against him. Arizona v. Fulminante, 499 US 279, 280(1991).

By introducing petitioner's inculpatory statement, the prosecutor unduly influenced the jury's verdict, tainting the truth seeking process and forever denying petitioner the prospect of a fair trial. While the prosecutor may strike hard blows, 'he is not at liberty to strike foul ones.' It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one People v. Buckey, 424 Mich 1, 33n 26(1985).

The United States Supreme Court in Miranda, explicitly concluded

The prosecution may not use statements whether exculpatory or inculpatory stemming from custodial interrogation of defendant unless it demonstrates use of procedural safeguards effective to secure privilege against self incrimination. Miranda, supra at 436-437 (emphasis added)

In this case the prosecutor's conduct reached an unconstitutional level, denying petitioner due process of law. The only remedy available when a petitioner receives an unfair trial due to prosecutorial misconduct is a new trial. People v Aceval, 282 Mich App 379(2009) Petitioner prays that this Honorable Court will reverse the Michigan Court of Appeals decision, where when petitioner exercised his right to be informed of the nature and cause of the accusation as guaranteed under his Sixth Amendment only to be denied his right Fifth Amendment right against self incrimination, as it's against clearly established Federal law of Miranda, and grant him a new trial with specific instructions that his inculpatory statement to police is to be excluded.

II. WAS THE DEFENDANT DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHT TO HAVE THE ASSISTANCE OF COUNSEL, WHERE TRIAL COUNSEL FAILED TO OBJECT DURING THE PROSECUTOR'S TO INTRODUCTION OF THE DEFENDANT'S INNULPATORY STATEMENT MADE TO POLICE AS THE STATEMENT WAS OBTAINED WITHOUT THE BENEFIT OF MIRANDA WARNINGS AND IN VIOLATION OF HIS RIGHT AGAINST SELF-INCrimINATION.

Petitioner's inculpatory statement to Det. Grigg was obtained in violation of Miranda and therefore inadmissible. During petitioner's trial, counsel failed to object to both the admission of petitioner's statement on direct examination of Det. Grigg and the prosecutor's use of that statement during his closing argument, where the prosecutor advocated to the jury that petitioner's remark of "I know" in response to questioning, was an admission of guilt to his pending firearm charges.

In reviewing counsel's performance under the two part standard articulated in Strickland v. Washington, 466 US 668(1984), it is self evident that petitioner received ineffective assistance of counsel. "In making this determination, a Court hearing on ineffectiveness claim must consider the totality of the evidence before the judge or jury" Strickland, supra at 695. In the present case counsel's performance fell well below the professional norms, as there is no justification for counsel not at the very least to challenge the admissibility of petitioner's statement. Even if the trial court deemed the statement admissible, or even if counsel was unsure of it's admissibility, counsel should have nevertheless made a timely objection to properly preserve the issue for appellate review, if not allow the trial court to issue curative instructions to the jury.

Further, counsel's failure to make a timely objection does not so much reflect any form of trial strategy, let alone, sound trial strategy, but rather negligent oversight on counsel's behalf. Had counsel conducted a reasonable investigation

into the factual circumstances surrounding the elicitation of petitioner's statement, there is a strong likelihood he would have challenged its admissibility. Simply because an attorney has limited the scope of their investigation for strategic reasons does not automatically justifies a tactical decision. Manson v. Mitchell, 543 F.3d 766, 773(CA 6, 2008). Accordingly, "a reviewing court must consider the **reasonableness** of the investigation said to support that strategy" *Id.* (emphasis added). Thus, counsel's failure to object to the admission of petitioner's inculpatory statement did not constitute "sound trial strategy," as it was supported by unreasonable investigations.

When applied to the prejudice requirement of Strickland counsel's performance similarly fails. "A court making the prejudice inquiry must ask if petitioner has met the burden of showing that the decision reached would reasonably likely have been different absent the errors" Strickland, *supra*. Petitioner submits that there is in fact a reasonable, if not high probability that had counsel made either such above mentioned objection, the result of the proceeding would have been different. Despite the strong presumption of reliability petitioner asserts that counsel's failure to challenge the admission of his inculpatory statement, rendered the proceeding unreliable. An inference can be drawn from the overall devastating effect an accused's confession has on any reasonable juror, which in this case was nothing short of a confession of guilt to petition's pending firearm charges.

The United States Supreme Court in Strickland re-enforced that "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Id.* (emphasis added). Under the facts of this case the prosecutor should not have advocated during closing arguments:

"So you have six substantive charges for your consideration. Really you only have four for your consideration because the defendant, by the statement that he made, has admitted to being a felon in possession of

a firearm " (II/5 TT pg 16)(emphasis added).

At the very least counsel should have made an objection for fresh curative instructions to the jury that the prosecutor's statement were not evidence.

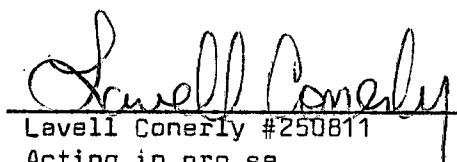
Regardless, counsel's assistance was not that envisioned by the Sixth Amendment, counsel's performance fell below an objective standard of prevailing professional norms. Secondly, there is the existence of a reasonable probability, if not for counsel's errors, the results of petitioner's trial would have been different.

SUMMARY AND RELIEF

For the foregoing reasons, petitioner, Lavell Conerly asks that this Honorable Court reverse this conviction and Remand this case back to the Trial Court for a New trial.

I swear under the penalty of perjury that the enclosed is true and correct to the best of my knowledge and understanding.

Respectfully submitted:



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