

No. 19-5794

ORIGINAL

Supreme Court, U.S.
FILED

AUG 20 2019

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

DAZZLE YOUNG — PETITIONER
(Your Name)

vs.

FRANCISCO J. QUINTANA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

SIXTH CIRCUIT COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

DAZZLE YOUNG
(Your Name)

P.O. BOX 14500
(Address)

LEXINGTON KENTUCKY 40512
(City, State, Zip Code)

(Phone Number)

(g)

QUESTION(S) PRESENTED

- (1) Could Mr. Young be tried and convicted by the use of "Tampered" evidence in violation of due process and violation of his Fifth and Fourteenth Amendments Rights.
- (2) Could Mr. Young be sentenced over the maximum 10 year sentence when he was not sentenced under the Armed Career Criminal Act.

(h)

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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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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 B 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[] is unpublished.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 C 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[] is unpublished.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 _____ 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[] is unpublished.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[] is unpublished.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

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

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: July 01/2019, and a copy of the order denying rehearing appears at Appendix A.

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 _____. A copy of that decision appears at Appendix _____.

A timely petition for rehearing was thereafter denied 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. § 1257(a).

STATEMENT OF THE CASE

On July 11, 2011, Mr. Young, was charged with being a felon in possession of a firearm and ammunition, in violation of 18 USC Sec. 922(g)(1). (R.1: Indictment, Page ID 1-2).

For most proceedings stemming from the charges Mr. Young was represented by Assistant Federal Defender Charles Flemings. (R.23: Notice of Appearance, Page ID 107). On November 23, 2011, Young filed a series of motions, including motion in limine to exclude an audio recording of the controlled purchase of the firearm that Young allegedly sold the informants. (R. 32: Motion, Page ID 134-38). Young argued that the recording was unclear and sounded if it could have been tampered with. (Id.). On November 30, 2011, he supplemented his motion with an "expert report" concluding that the recording was in fact tampered with.(R. 36: Supplement, Page ID 154-57). The government filed a response to Young's motion on that same day. (R. 37: Government's Response, Page Id 158-63). Following a pretrial hearing and after the government's own "expert analysis which came back basically identical with defense "experts" report that "selective transfer" occurred on the tape. The Government decided it would not introduce the tape at trial based on possible technical problems. (R. 107: Hearing Tr., 1/18/12, Page ID 589-98). The true reason the government did not submit the tape is because what their "expert" determined was "Selective Transfer;" That is where two tapes are spliced together to make one.

On January 20, 2012, 19 days before trial began, Young filed a renewed motion in limine in which he moved to exclude the testimony of law enforcement officer Shawn Brown ("Brown"), who monitored the firearm transaction and would testify that Young made the gun sale. (R. 53: Renewed motion, Page ID 215).

STATEMENT OF THE CASE-2

Brown had been present at a previous controlled purchase of heroin where Young was present and therefore could identify Young's distinct voice. (R. 74: Trial TR., Brown Voir Dire, Page ID 311-468). Before the Court conducted a Voir Dire of Brown to determine the admissibility of his testimony. (Id.). The District Court admitted Brown's identification of Brown's identification of Young's voice under Federal Rule of Evidence 901(b)(5), and denied Young's amended motion. (Id., Page ID 331). This was reversible error in that Brown had sole possession of both controlled buys and was responsible for the "Selective Transfer" of the tapes. Never was Brown even questioned by the prosecutor nor the judge concerning this fabricated evidence. The Government subsequently presented Brown's testimony at trial even though the judge knew or should have known that Brown was involved in misconduct. The prosecutor stated at the voir dire hearing that this tape was the only corroboration of the government's witnesses in this case.

The jury subsequently found Young guilty and on May 3, 2012, the Court sentenced Young to 188 months of imprisonment and three (3) years of supervised release. (R. 112: Sentencing Tr., Page ID 617-30; R. 84: Judgment, Page ID 526-32). Young appealed his sentence to the Sixth Circuit on May 11, 2012, and on January 31, 2014, the appeal Court affirmed his conviction and sentence. Though Mr. Fleming was well aware of the tape being tampered with he failed to call his expert to trial or raise this as an issue before the Sixth Circuit, thus, withholding exculpatory evidence on his client in violation of Young's Sixth Amendment rights.

STATEMENT OF THE CASE-3

Mr. Young timely filed a 2255 motion arguing that counsel was ineffective for failing to interview witnesses who were present at the alleged gun sale and could have provided him with alibi. (R. 116: Motion to vacate, Brief in Support. Page ID 667-69). Further, Young argued that his attorney was ineffective for moving to suppress the audio recording when he should have allowed it to come in and impeached it and Officer Brown before the jury which would have shredded the government's case against Young. (Id., Page 671). On January 5, 2015, the government responded refuting Young's allegations. Once again the issue with the tape did not come up, even though Young made an issue of this in his 2255. "Next Friend" assisting Young discovered the tampered evidence in the voir dire hearing transcript.

On July 13, 2015, the District Court held an evidentiary hearing and refused to appoint Young counsel in violation of Rule 8(c) of the rules governing 2255 motions. The government called Mr. Fleming Young's former attorney as its sole witness trying to sweep this fraud upon the Court under the proverbial rug. Young called his Daughter as a witness. Two days later the District Court denied Young's Sec. 2255 motion.

Young then filed an emergency motion for another evidentiary hearing on the basis that the court committed structural error when it failed to provide Young with legal representation for his initial Sec. 2255 hearing. (R. 124: Emergency Motion, Page ID 706). The District Court denied this motion on August 5, 2015, based on the fact that Young did not have a right to counsel as a Sec. 2255 petitioner. (R. 125: Opinion and order, 8/5/15. Page ID 707).

On August 27, 2015, Young filed a timely notice of appeal to

STATEMENT OF THE CASE-4

the Sixth Circuit aurguing that the District court erred in denying his Sec. 2255 Petition. (R. 131: Notice of Appeal, Page ID 717-19). Further Young stated that the District Court should have appointed him counsel at the evidentiary hearing. (Id.). The Court granted a Certificate of Appealability and remanded for a new evidentiary hearing with the appointment of counsel. (R. Appeal Order.).

Young faired no better at this hearing in that counsel would not argue the issues raised in Young's petition before the Court namely ineffective assistance of counse about the fraud committed on the Court by "tampering with evidence."

REASON FOR GRANTING PETITION

It is Young's contention that the use of "fabricated evidence" and "perjured testimony" during his trial violated his right to due process of law. See e.g. Burke, 425 F.3d 400 (7th Cir. 2005); and Phillips V. Woodford, 267 F.3d 966(9th Cir. 2001) ("government's knowing use of false testimony, failure to correct testimony, violates due process"). A person's reputation, good name, honor, and integrity are among the liberty interests protected by the due process clause of the Fourteenth Amendment"). The only way Officer Brown could identify Young's voice from the tape was by a previous recording of a controlled buy of heroin which he selectively transferred to the tape of the firearm transaction, so Brown's testimony was suspect and the government knew or should have known from its own expert's findings that it was suspect. See e.g. Daniels V. Lee, 316 F.3d 477 (4th Cir. 2003); U.S. V. Haese, 162 F.3d 359 (5th Cir. 1998) ("Defendant's convictions must be reversed on due process grounds where the government knowingly elicits, or fails to correct, materially false statements from its witnesses"). Rochin V. California, 342 U.S. 165, 96 L.Ed 183, 72 S. Ct. 205, 25 ALR2d 1396(1952).

"substantive due process refers to certain actions that the government may not engage in, no matter how many procedural safeguards it employs ." It is Young's contention that the use of "Fabricated evidence" falls into this category.

It is Young's position that law enforcement officer Shawn Brown ("Brown") who monitored the alleged firearm transaction and had sole custody of this tape that was later manufactured to place Young's voice on it, which is obvious to the most casual of observers that Young's voice was not on the original tape or why would ("Brown") have to "Selective transfer" it from the other

REASON FOR GRANTING PETITION-2

previous recording, misled the prosecution through negligent and reckless investigation and critical omissions of material evidence.

Officer Brown has made knowing or reckless false statements and has falsified or fabricated evidence in the course of setting this prosecution in motion against Young.

Thus, the evidence of Officer Brown's actions prior to and independent of his trial testimony may call into question his credibility before the jury. See e.g. Thompson V. Calderon, 109 F.3d 1358 (9th Cir. 1996) ("Prosecutor may not obtain criminal conviction through use of false evidence"). U.S. V. Goodson, 165 F.3d 610 (8th Cir. 1999) ("The prosecutor may not use or solicit false evidence, or allow it to go uncorrected") Hayes V. Woodford, 301 F.3d 1054 (9th Cir. 2002) ("Prosecutor has constitutional duty to correct evidence he knows is false"); Hall V. Director of Corrections, 343 F.3d 976 (9th Cir. 2003) (Denial of due process occurs where state allows false evidence to go uncorrected"). Boyle V. Million, 201 F.3d 711 (6th Cir. 2000); Berger V. United States, 295 U.S. 78, 88, 79 L.Ed. 1314, 55 S. Ct. 629 (1935) ("While a prosecutor is clearly authorized to strike hard blows in an earnest and vigorous prosecution, he or she is not at liberty to strike foul ones"); U.S. V. Nyhuis, 211 F.3d 1340 (11th Cir. 2000) ("Law enforcement techniques that are shocking to the universal sense of justice mandated by the due process clause violate the constitution").

In the transcript of motion hearing proceeding on December 1, 2011, in front of James S. Gwin United States District Court judge the following exchanges took place. It should also be noted that Judge Gwin was also Mr. Young's trial judge.

Mr. Fleming; "As the court is aware, one of the pretrial motions

REASON FOR GRANTING PETITION-3

that we filed was a motion to exclude an audio recording from the evidence, That was filed last Wednesday, the 23rd."

The basis of that motion was that the government had provided us with a proposed transcript of that audio recording Now, the Court is aware that prior to my being appointed had there been other counsel for about two months. At no time prior to my being appointed had there ever been any allusion with any sort of problem with this audio recording."

The Court: "Let me ask a question, because I'm a little unclear. You said--is their a potential problem with the recording or is it with the transcript?"

Mr. Fleming: "We were--I had listened to the recording several times prior to last week when I was reviewing the recording, I was doing so and scrutinizing it with the transcript to see if the transcript was accurate, because we were trying to determine whether or not we could stipulate. It was at that point that I heard anomalies in the recording that sounded as though the recording had been edited, a possibility. At that moment, I began drafting a motion to exclude it, one. And, two we engaged an expert in audio engineering and forensic to look at and analyze the recording to determine whether it had been altered in any way.

We received a report from that expert on the afternoon of, the 29th, I was actually in a seminar when my secretary brought it to me and the report indicated several different areas in the recording where, what he referred to as "selective transfer" or possible editing.

I immediately, the next morning, filed a motion--a supplemental motion to my motion to exclude and included in that his report. Just so everyone had it in an expediate fashion.

REASON FOR GRANTING PETITION-4

In response to that motion, Mr. Sasse filed a motion and, among other things, asked that he be allowed to get an expert to also review that recording to determine if there any anomalies that that expert detects. We--obviously, because they should have an opportunity to respond, we have no objection to that.

Your honor. the--and the basis for the motion to continue is just that. Number one, the turnaround time in terms of trying to do that, and then determining whether there are additional issues for our expert to look into, is definately going to be probably considerably more than a week."

The Court: Okay.

Mr. Fleming: "Not only that, but with my schedule and continuing concerns with my leg, the chances that I'll even be able to see Mr. Young next week, between my teaching schedule and work, and then trying to deal with anything that might arise with regard to this, it's going to be nearly impracticable for me to be able to deal with that within that time "

The Court: "Do you join in the motion?"

Mr. Sasse: "Yes, Your Honor, I would. I think this is a--you know, this is a very serious allegation. I think it can be explained and set to rest, but I think it really needs to be done before we can go to trial, because we--you know, I don't want anything used that might be questionable, although I think it's not going to be, but it's--it's a bad recording with a--and there ~~are~~ gaps and this that, and the otherthing in it. So, yeah, I would agree."

REASON FOR GRANTING PETITION-5

The Court: "I think grounds have sufficiently been laid out, so I find that the ends of justice do warrant a continuance."

"I find that there's a specific issue as to whether a tape--and I get the impression the tape's relatively important in this case?"

Mr. Sasse: "Oh yes. Yes. It is the only corroboration against two informants with lengthy records."

The Court: "So I find that it's a relatively important piece of, or an important piece of evidence in the case, and the parties, without delay on their parts, have identified a potential issue with regard to it needs explored. So I am going to grant the motion."

At Mr. Young's first evidentiary hearing the following statement from Young's attorney Mr. Fleming transpired: "We hired an expert to review the recording and the expert did, in fact review the recording, and the recording, as I believed had several anomalies in it, several problems that I think the expert referred to it several times in his report as "Selective transfer."

Based on that, I believe it was after my expert came back with his findings, that the government then engaged an expert to also make findings and I believe they were similar findings. And as a result of both of those findings I was then approached by the prosecutor and told they had decided not to introduce the recording, which from our standpoint I thought was a small victory."

Selective transfer is the taking of two tapes and splicing them together to manufacture one. See Document 11, Filed 08/09/2016, at pg. 9, read paragraph one. "Brown had been present at a previous controlled purchase of heroin where Young was present and therefore could identify Young's distinct voice. Mr. Fleming Young's attorney moved for the production of this previous recording on several

REASON FOR GRANTING PETITION-6

occasions which was never produced by the government although it was a vital part of the government's case against Young. The truth of the matter is that tape was destroyed in the manufacture of the one that is the subject matter of this argument is why it could not be produced is because it did not exist anymore.

There you have it you have a learned and seasoned U.S. District Court Judge, a AUSA and a defense lawyer all aware of the fraud being perpetrated against Mr. Young. "Brown" was never questioned by either party about the manufactured tape though he was in sole possession of this tape and possibly the previous recording.

Mr. Young was severly prejudiced by his attorney moving to exclude this recording, the proper procedure would have been to allow to tape to go in and impeach it and Brown before the jury. This would have shredded the government's case against Mr. Young and would have exposed the fraud going on in the District Court against Mr. Young. See e.g. United States V. Thompson, 130 F.3d 676 (5th Cir. (1997))("Once Tape recordings are admitted, defendant can seek to impeach them by such means as showing that the voice on tape is not his, the tape does not record the entire event, that tapes have been altered, or that tapes are untrustworthy or contradictory.").

It is Mr. Young's contention that the altered tapes would have shredded the government's case against him when the jury found out that the government was tampering with evidence in order to win this case against Mr. Young. The strategic choice here would have been to let the tape come in and then impeach it and the government's star witness before the jury.

The judge and the AUSA were so adamant about covering this fraud up that the judge refused to appoint Mr. Young counsel at his first evidentiary hearing and then proceeded to run roughshod over

Mr. Young's rights in that Mr. Young is not an educated man and knows nothing about the legal process. Mr. Young's lawyer knew that Mr. Young was not the one to sell the firearm that day, it was actually Preston young, Mr. Young's Brother. A fundamental miscarriage of justice has occurred in this case and needs to be set right and this Court is Mr. Young's last resort at justice.

YOUNG WAS NOT SENTENCED AS AN ARMED CAREER CRIMINAL

Mr. Young was not sentenced under the ACCA according to the District Court's own opinion. See Case: 5:18-cv-00125-JMH Doc. #6 Filed: 07/12/18 "Thus, to the extent that Young claims that the trial court erred in determining that Young was a "career offender" for purposes of the ACCA, he was sentenced under the Guidelines, not under the ACCA." Young raised this issue before the Sixth Circuit Court of appeals arguing that Young could not be sentenced over the ten year mandatory minimum under Sec. 922(g) because he was not sentenced as a Armed Career Criminal..The District Court further stated: "Young was sentenced in 2012 under a post-Booker advisory Guidelines regime. Indeed, although he was found to be a "Career offender" for the purposes of the ACCA, at sentencing, the trial court was clear that Young's 188-month sentence was based on the trial court's consideration of the recommended guideline range of 188-235 months and the relevant factors under 18 USC Sec. 3553(a). United States V. Young No. 5:11-cr-328-JG-1 (2011) at R. 112: P. 7,9,11. In Edwards V. United States, 140 L.Ed. 2d 703 (1998) "That the Statutory Maximum set by statute "trumps" the guidelines. Therefore Mr Young could not have been sentenced above the 10 year maximum set by statute unless he was enhance under the ACCA statute. Mr. Young moves for a Grant and Remand on this issue alone.

Mr. Young respectfully moves to be allowed to proceed on the original record before the Courts, In that Young is an indigent Inmate with limited resources and is unable to pay for copies and such other expenses included in the reproduction of these materials. For all of the above stated reasons,

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Dazle Young

Date: 8-26-19