No. 19-6924

ORIGINAL

Supreme Court, U.S.
FILED
NOV 04 2019
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2019

WILLIAM D. THOMAS, Petitioner,

VS.

MARK MCCULLICK-Warden, Respondent.

On Petition for Writ of Certiorari to the Sixth Circuit Court of Appeals

---

PETITION FOR WRIT OF CERTIORARI

PROOF OF SERVICE

By: William D. Thomas
In pro per
Brooks Correctional Facility
2500 S. Sheridan Rd.
Muskegon Hieghts, MI 49444

QUESTIONS PRESENTED

I. Whether an identification resulting from a one on one Confrontation during a preliminary hearing tainted by prior police activity is Sufficient to Warrant a Court's reliability inquiry.

II. Whether a States failure to meet the reciprocal requirements of it's alibi statute is a Violation of the Due Process Clause Where a defendant has already Complied With the same mandatory requirements.

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case of the Cover.

Petitioner

Petitioner William D. Thomas is an individual and has no corporate affiliations.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

JURISDICTION

The United States Court of Appeals for the Sixth Circuit denied petitioner's request for a Certificate of Appealability on August 6, 2019.

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

OPINIONS BELOW

The Order of the United States Court of Appeals in the Sixth Circuit appears at Appendix A to the petition and is unpublished.

The Opinion of the United States District Court appears at Appendix B to the petition and is unpublished.

The Opinion of the Michigan Court of Appeals appears at Appendix C to the petition and is unpublished.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. XIV § 1

All persons born or naturalized in the United States, and subject to the jurisdiction therefore, are Citizens of the United States and of 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 the laws.

MCL 768.20 (1)(2)

(1) If a defendant in a felony case proposes to offer in his defense testimony to establish an alibi at the time of the alleged offense, the defendant shall at the time of arraignment on the information or within 15 days after that arraignment but not less than 10 days befor the trial of the case, or at such other time as the court directs, file and serve upon the prosecuting attorney a notice in writing of his intention to claim that defense. The notice shall contain, as particularly as is known to the defendant or the defendant's attorney, the names of witnesses to be called in behalf of the defendant to establish that defense. The defendant's notice shall include specific information as to the place at which ~~time~~ the accused claims to have been at the time of the alleged offense.

(2) Within 10 days after the receipt of the defendants notice but not later than 5 days before trial of the case, or at such other time as the court may direct, the prosecuting attorney shall file notice and serve upon defendant of rebuttal which shall contain, as particularly as is known to the prosecuting attorney, the names of the witnesses whom the prosecuting attorney proposes to call in rebuttal to controvert the defendant's defense at the trial of the case.

MCL 768.21(2)

(2) If the prosecuting attorney fails to file and serve a notice of rebuttal upon the defendant as provided in section 20(2)

the court shall exclude evidence offered by the prosecution in rebuttal to defendant's evidence relevant to a defense specified in section 20... If the notice given by the prosecuting attorney does not state, as particularly as is known to the prosecuting attorney, the names of witnesses to be called in rebuttal of the defense of alibi..., the court shall exclude the testimony of a witness which is offered by the prosecuting attorney for the purpose of rebutting that defense.

STATEMENT OF THE CASE

Petitioner was convicted of first Degree Criminal Sexual Conduct and First Degree Home Invasion - crimes he did not commit - at a Criminal Jury trial in State Court, this Conviction was obtained through the State's use of an identification without assessing its reliability and presentation of alibi rebuttal testimony without notice of it's intention to do so.

First, 2 years before trial and prior to petitioner's preliminary hearing, Captain Daryl Green arranged and met victim Helen Boettcher alone in his office for the purpose of telling her that they had identified her assailant due to a DNA Match while petitioner's photo was displayed on his desk Computer. (Trial Transcript 2/18/14 pg. 70 Appendix D)

Ms. Boettcher, was told that the DNA identified belonged to the Major donor among other unidentified minor donors, although she did ask if the picture of petitioner was the person responsible, she denied being told the name of who the DNA belonged to.

However, the same day of the meeting, Captain Green later Called Ms. Boettcher and told her they had arrested her assailant based on the DNA match. (Trial Transcript 2/18/14 pg. 78 Appendix D)

On April 19, 2012 a preliminary hearing was held - Fourteen days after the meeting in Captain Green's office and being informed of her assailant's arrest - Ms. Boettcher was asked for the very first time to identify her assailant at a one on One Confrontation With petitioner dressed in jail clothes and seated at the defense table, this resulted in her identifying petitioner by name. (Preliminary

Hearing Transcript 4/19/12 pg. 25-26 Appendix E)

Additionally, Ms. Boettcher detailed features of her assailant that she had never told police before seeing petitioner at the preliminary hearing, such as: a distinctive brow, which she admitted was a result of seeing petitioner in the Court room. (Preliminary Hearing Transcript pg. 37 Appendix E)

Also Ms. Boettcher detailed her home at the time of the attack as dark and shadowy and that her assailant wore a mask. (Preliminary Hearing Transcript 4/19/12 pg. 14 Appendix E)

However, Ms. Boettcher admitted that she learned petitioner's name from the subpoena and the news paper and news where she also saw his picture. (Preliminary Hearing Transcript pg. 26 Appendix E)

Ms. Boettcher never mentioned the where Captain Green told her of petitioner's DNA Match, that she saw his picture on the Captain's desk computer, or of the phone call informing her of petitioner's arrest based on the DNA match despite being asked if the police showed her photos or spoke to her concerning the identity of her assailant. (Preliminary Hearing Transcript 4/19/12 pg. 26 and 36 Appendix E)

After hearing Ms. Boettcher's testimony during the preliminary hearing the presiding judge accepted the identification, but found that there was a question as to whether or not Ms. Boettcher could actually see her assailant. (Preliminary Hearing Transcript 4/19/12 pg 24 Appendix E)

Petitioner motioned to suppress the victim's identification as the result of suggestive identification procedure based the suggestive circumstances of the one on one confrontation during the preliminary hearing where petitioner was first identified. The trial court denied this motion for lack of evidence of circumstances of suggestive police conduct. (Motion to Suppress Transcript 1/30/14 pg 47-50 Appendix G)

However because both the police and ~~and~~ Ms. Boettcher did not divulge that the meeting took place or the phone call between them, petitioner was unaware of the suggestive events that occurred as a result of Captain Green's actions at the time of the motion hearing and could not address them.

However, petitioner immediately motioned for reconsideration of the issue two years later when the prosecutor finally informed petitioner's counsel of these suggestive events.

During the motion hearing the State conceded that the police had already identified who they believed committed the crime due to a DNA match before the meeting with Ms. Boettcher, that they informed Ms. Boettcher of this belief, that they provided her with the details of the evidence in support of this belief, and that Ms. Boettcher's meeting with police had no investigative or identification purpose. (Motion Hearing Transcript 2/10/14 pg. 19 Appendix F)

Despite this and a conflicting police statement that this event never occurred the trial court denied relief and refused to hold an evidentiary hearing. (Motion Hearing Transcript 2/10/14 pg. 37 Appendix F) ~~at sol~~

Next and also prior to the trial, the State forced petitioner to divulge the details of his alibi defense and the names of his alibi witnesses while withholding it's intention to rebut this defense and the names of it's rebuttal witnesses.

During trial petitioner raised a preimptory objection that the prosecution had never responded to his notice of alibi defense with the notice of rebuttal required by MCL 768.20(2) and was therefore prohibited from presenting alibi rebuttal testimony under MCL 768.21(2). (Trial Transcript 2/18/14 pg 98-99 Appendix D)

Further although the prosecutor said that she had provided petitioner's counsel with it's witnesses' statements, petitioners counsel notified the trial court that he had not been given any specific statement from the objected to witness Jeffery Pergl from the prosecutor. (Trial Transcript 2/18/14 pg. 108 Appendix D)

Then over petitioner's objection and despite the prosecution's pledge to the court and defendant that it would not and could not do so, the State presented alibi rebuttal testimony during it's case in chief through witness Pergl contrary to MCL 768.20(2), a state law amended to ensure reciprocal discovery in it's alibi statute.

On appeal in the Michigan Court of Appeals, the Court denied appeal stating that: 1. There was no evidence of police conduct in the suggestive circumstances surrounding the identification, (Opinion at pg 2 Appendix C) and 2. Although the prosecution did not file the notice required by MCL 768.20(2) the trial court was not required to suppress the rebuttal testimony of Pergl because petitioner should have known the substance of his

~~based~~ testimony based on witness statements provided by the prosecutor; Further although exclusion of testimony of the witness is mandated by the alibi statute where the prosecutor fails to provide notice of rebuttal, MCL 768.21(2), the Court said that it would be absurd for the prosecution to be "prohibited from calling any witnesses that would contradict" petitioners alibi. (Opinion at pg-5 Appendix C)

On habeas review, the United States District Court for the Eastern District of Michigan followed the same formula as the Michigan Court of Appeals in it's decision denying the writ: 1. there was no clearly established improper police conduct, therefore petitioner did not clear "the first requirement of Perry." However, the court never questioned if there was a suggestive identification procedure involved. (opinion at pg-5-6 Appendix B) and 2. Under Wardius "there is no due process violation when the prosecution fails to provide notice but the criminal defendant is none the less aware of the rebuttal witnesses." (Opinion at pg 12-13 Appendix B)

Upon requesting a Certificate of Appealability (COA) from the Sixth Circuit United States Court of Appeals, petitioner was denied, here the court reasoned that because petitioner did not show an unduly suggestive identification procedure was used reasonable jurist would not debate the district court's rejection of his identification claim. (Order at pg.3 Appendix A) Next, the Court of appeals reasoned that because petitioner was aware of Dengl's proposed testimony and that it may undermine his alibi due process was not violated; accordingly reasonable jurist would not find the district court's decision debatable. (Order at pg. 4-5 Appendix A)

REASONS FOR GRANTING THE WRIT

I. An identification resulting from a one on one Confrontation during a preliminary hearing tainted by prior Police activity is Sufficient to Warrant a Court's reliability inquiry.

Petitioner Submits that he has demonstrated all the elements of a suggestive identification procedure tainted by suggestive police activity in Violation of the Due Process Clause of the Fourteenth Amendment. However, because this Court has not made a specific ruling prohibiting preliminary hearing identifications tainted by suggestive Police activity, an unreliable identification that was the product of this very procedure has been allowed to marr ~~the~~ petitioner's trial and this Constitutional Violation has gone unabated.

To Start, petitioner's Claim has always been that the Victim's pretrial identification of him was an unreliable product of a suggestive pretrial identification procedure during the preliminary hearing which was tainted by Police and the trial Court's denial of petitioner's Motion to Suppress this identification Without testing it's identification's reliability was a Violation of the Due Process Clause of the Fourteenth Amendment.

First, due process concerns arise only when law enforcement officers use an identification procedure that is both suggestive and unnecessary. Perry V. New Hampshire 565 U.S. 228, 242 (2012)

The Sixth Circuit Court of Appeals denied petitioner's request for a Certificate of Appealability because it said that he has not shown "that the pre-trial identification procedure was unnecessarily suggestive." (Opinion at pg. 3 Appendix A)

However, While one usually thinks of impermissibly suggestive identification procedures in terms of extra judicial proceedings such as Corporeal and photographic showups, it is well recognized that in-court identification procedures such as the kind that occurred in petitioner's case can be suggestive themselves. See, eg., United States v. Domina, 784 F2d 1361, 1368 (9th Cir 1968) ("There can be little doubt that the initial in-court identification is suggestive."), Cert denied, 479 U.S. 1038 (1987). Thus in United States v. Williams, 436 F2d 1166, 1168 (9th Cir 1970), Cert denied 402 U.S. 912 (1971); the Court described the kind of inherent suggestiveness associated with in court identifications;

> When asked to point to the robber, an identification witness - particularly if he has some familiarity with Courtroom procedure - is quite likely to look immediately at the counsel table, where the defendant is conspicuously seated [redacted] in relative isolation. Thus the usual physical setting of a trial may itself provide a suggestive setting for an eyewitness identification.

It is well recognized that "in-court identification testimony in the absence of a pretrial identification must satisfy the Manson reliability standard, either by meeting the Biggers requirements or in other ways." Kennaugh v. Miller, 289 F3d 36, 47 (2d Cir 2002) (collecting cases). As the Sixth Circuit itself explained in United States v. Hill, 967 F2d 226, 232 (6th Cir 1992), Cert denied, 506 U.S. 964 (1992):

> The Biggers analysis applies to . . . incourt identifications for the same reasons that the analysis applies to impermissibly suggestive pretrial identifications. The due process concerns are identical in both cases and any attempt to draw a line based on the time the allegedly suggestive identification technique takes place seems arbitrary. All the concerns that underlie the Biggers analysis including the degree of suggestiveness, the chance of mistake, and the threat to due process are no less applicable when the identification takes place for the first time at trial.

In this case, two years before trial, Helen Boettcher was asked for the very first time to identify her assailant at petitioners preliminary hearing while petitioner was isolated at the defense table, dressed in a jail uniform, after she had been told by police that petitioner was her assailant.

In Moore v. Illinois, 434 U.S. 220 (1977) a case involving an identification obtained during a preliminary hearing, under circumstances similar to those in petitioner's case, this Court recognized the preliminary hearing as a one on one identification procedure and held it "difficult to imagine a more suggestive manner in which to present a suspect to a witness for their first critical confrontation."

The circumstances in petitioner's case and those of Moore best reflect the type of suggestive identification procedures involving suggestive intervening police activity that this Court has historically sought to prevent through Perry and it's progeny.

Although this Court has already recognized that circumstances during a first time preliminary hearing can be just as suggestive and susceptible to police taint as any of the traditional identification procedures the question of whether such a preliminary hearing qualifies as a pretrial identification procedure has yet to be settled.

Having demonstrated that petitioner's preliminary hearing was undoubtedly suggestive and an identification procedure, petitioner now turns to the question of suggestive police activity.

Fourteen days before Ms. Boettcher was asked to identify her assailant at the suggestive one on one identification procedure during petitioners preliminary hearing, she was summoned to the police station. The sole purpose of this was for a meeting in police Captain Daryl Green's office to tell Ms. Boettcher that police had identified her assailant, that it was due to a DNA match from a doo rag that Ms. Boettcher thought she saw her assailant wearing during the attack and that she new police were testing for DNA, all while petitioner's picture was on display on the Police captain's desk Computer. (Trial Transcripts 2/18/14 pg 70-71-72 Appendix D)

Also, that same day after the meeting, the same Captain called Ms. Boettcher and informed her that they had arrested her assailant because of the DNA match. (Trial Transcripts 2/18/14 pg. 78 Appendix D)

Thus, Fourteen days later, when Ms. Boettcher was subpoenaed to the preliminary hearing she knew that the man police had arrested would be there and the DNA information she had been given by police told her that this man was her assailant.

Therefore, telling Ms. Boettcher of the DNA Match and arrest of petitioner amounts to impermissible law enforcement activity tainting the identification. See Foster v. California, 394 U.S. at 443 (1969) (Holding an identification procedure impermissibly suggestive when police use tactics that "in effect ... says to the witness this is the man.")

Petitioner has demonstrated the threshhold requirements of Perry to warrant a reliability inquiry but for the Courts failure to see an unreliable identification because it resulted from an suggestive identification procedure infected with police taint because these events were clothed in a preliminary hearing.

Thus the Writ should issue and defendant urges the Court to rule that preliminary hearings infect with police taint warrant a Court's inquiry into the reliability of the resulting identification.

CONCLUSION

Petitioner requests that this Honorable Court Grant Certiorari.

Date November 4, 2019

Respectfully Submitted
By: William D. Thomas
Brooks Correctional Fac.
2500 S. Sheridian Rd.
Muskegon Hieghts, MI 49444