

No. 19-7228

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

JERRY CARTER — PETITIONER
(Your Name)

Supreme Court, U.S.
FILED
DEC 03 2019
OFFICE OF THE CLERK

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

JERRY CARTER
(Your Name)

Jesup, Federal Satellite Low
2600 Highway 301 South

(Address)

Jesup, GA 31599
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

Whether the Eighth Circuit Court of Appeals erred by entering the decision, "We also find no abuse of discretion in the admission, with a limiting instruction, of testimony that officers observed Carter involved in what appeared to be hand-to-hand drug transactions on multiple days shortly before they dated and executed their search warrant, because the uncharged conduct was "inextricably intertwined" with the charged offenses. See United States v. O'Dell, 204 F.3d 829, 833 (8th Cir. 2000)., in conflict with the Fifth Circuit Court of Appeals decision, "Defendant's rights under U.S. Const. Amend. VI's Confrontation Clause were violated when a law enforcement agent testified that he knew defendant had received a large amount of methamphetamine based on what he was told by a confidential informant, and the testimony about his conversation with the confidential informant pointed directly at defendant and his guilt in the crime charged: [2]-The error was not invited or harmless, because the defense simply pointed out an inconsistency between the agent's testimony that he did not observe a drug transaction, and his assertion that he knew defendant had received the drugs and the inadmissible evidence was highly incriminating.

QUESTION(S) PRESENTED (2)

"[W]hether the Eighth Circuit erred in rejecting the Supreme Court's Napue violation test and instead creating a per se rule

that because the report was available to Movant's counsel at trial, Movant's claim that counsel should have requested fails. Likewise, his reliance on the contents of the report in support of his chain-of-custody argument is fatal to his claim that counsel should have objected to its admission.



QUESTION(S) PRESENTED (3)

Whether the Eighth Circuit erred in rejecting the Supreme Court's Strickland test and instead creating a per se rule.

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:

RELATED CASES

Jerry Carter v. Lawrence O'Toole, Case No. 4:17-CV-1356-HEA

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APPENDIX H - JUDGMENT - Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis is DENIED. The appeal is dismissed.

TABLE OF AUTHORITIES CITED

CASES

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STATUES AND RULES

1. U.S. Const. Amend. VI's Confrontation Clause
2. The prosecutor's use of false testimony to obtain a conviction is a violation of due process.
3. When false testimony arises during the course of trial, "the duty to correct false testimony is on the prosecutor and that duty arises when the false evidence appears."
4. A new trial is required if, "the testimony...could in any reasonable likelihood have affected the judgment of the jury."
5. Strickland may be violated by failure to impeach, "especially critical testimony, particularly where counsel cannot articulate a reasoned strategy for not doing so."

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,
[x] 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 _____ 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

[X] For cases from federal courts:

The date on which the United States Court of Appeals decided my case was July 24, 2019.

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: September 26, 2019, and a copy of the order denying rehearing appears at Appendix D.

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).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Napue v. Illinois, the Supreme Court of the United States acknowledged that "it is established that a conviction obtained through the use of false evidence, known to be such by representations of the state, must fall under the Fourteenth Amendment." 360 U.S. at 269 (emphasis added).

STATEMENT OF THE CASE

The district court abused its discretion by allowing law enforcement officers to testify to the jury, "blatantly linking" ~~the Movant to drug selling activity and "eliminate all doubt" as to~~ who the informant was referring to without calling the informant to testify to the jury.

STATEMENT OF THE CASE (2)

The prosecutor used the Examiner in the Laboratory Report's Request for analysis Drug identification to falsely testify live after the defense objected to the chain of custody of the evidence to obtain the conviction of the defendant.

STATEMENT OF THE CASE (3)

Trial counsel prejudiced the Movant by explaining to the Court that the truth about what had been occurring with [Movant] is that "the DEA was purchasing drugs throughout the St. Louis, Metropolitan area...in an effort to locate [its] country of origin."

The Court found any prejudice caused by counsel's statement was minimal, rejecting the Strickland test.

REASONS FOR GRANTING THE PETITION

The government failed to meet the following requirements of the court's ruling for the 404(b) evidence to be admissible, needed by the government:

They witnessed the entire transactions

To inform the court whether or not the confidential informant was going to testify.

The government did not call the confidential informant to testify.

Detective Anthony Mocca testified, "I didn't see a hand-to-hand transaction with Jerry Carter."

You didn't see one?"

"No."

"She vanished from your ability to see her while that was going on?"

"That's correct."

So, you can't say, from your own knowledge, whether Ashley did a hand-to-hand transaction with Jerry Carter, or not?"

"I didn't see a hand-to-hand transaction between Ashley and Jerry Carter, no. She told me she bought it from him."

The Petitioner filed in the 2255 motion denied seeking relief on an ineffective assistance of counsel claims, "Trial counsel abandoned the order of the court ruling during the pretrial, if the confidential informant does not testify the issues of proof are different than if the confidential informant does testify. Trial counsel failed to object to the issues of proof based on the confidential informant did not testify."

Detective Anthony Mocca and the prosecution "blatantly linked" the defendant to the drug deals and "eliminated all doubt" as to who the informant was referring to. *Gray v. Maryland*, 523 U.S. 185, 193-194, 118 S.Ct. 1151, 140 L.Ed.2d 294 (1998).

Trial counsel was ineffective assistance of appellant counsel and filed there was absolutely nothing worthy of appealing and that he wanted to withdraw.

Trial counsel filed a brief under *Anders v. California*, 386 U.S. (1967), conceding with the government the controlled buys were inextricably intertwined with the charged offense.

Trial counsel omitted the DEA Six Report from the pretrial by telling the court, referencing the 404(b) evidence, "It actually is a part of the search warrant itself."

During the preliminary hearing, trial counsel decided to have a written motion to suppress under *Franks v. Delaware* with the government, where he conceded with the government against the Defendant, "the truth about what had been occurring with "[Movant]" is that "the DEA was purchasing drugs throughout the St. Louis, Metropolitan area...in an effort to locate [its] country of origin.

The United States Court of Appeals for the Eighth Circuit ruled: and Carter's ineffective-assistance of counsel claims are best left to 28 U.S.C. 2255 proceedings where the record can be sufficiently developed.

Trial counsel's abandonment of his role as advocate by consenting with the government that the 404(b) evidence was a

part of the search warrant prejudiced the Movant by leading to the government, allowing law enforcement officers to "blatantly link" the Movant to drug selling activity and "eliminate all doubt" as to who the informant was referring to without calling the informant to testify to the jury.

Trial counsel first went outside the wide range of professionally competent assistance by writing in the Movant's motion to suppress under *Franks v. Delaware* the Movant sold drugs to "The Program, The National Drug Threat Assessment."

This caused a breakdown in the adversary process which renders the justice of his sentence unreliable.

Trial counsel next conceded with government that the drug sales were actually a part of the search warrant against the Movant and told the court during the pretrial hearing, "It actually is a part of the search warrant, itself."

Trial counsel knew the Movant was totally against him, conceding with the government. Trial counsel informed the court, "Obviously, we oppose, as we often do, any of the 404(b) evidence on uncharged crimes. Jurors have significant trouble in my mind, saying he did that, we can't use that as evidence of guilt here. More to the point, these are the very issues Mr. Carter is distraught about, that were part of the *Franks* hearing. These are the DEA, I don't want to go far into it, but these are the very issues that he believed shouldn't have been included in the *Franks* hearing." Pretrial hearing transcript, DCD 155, page 30-31. Trial counsel was referring to the statement he incorporated in the Movant's motion to suppress under *Franks v. Delaware*: "the

truth about what had been occurring with "[Movant]" is that "the DEA was purchasing drugs throughout the St. Louis, Metropolitan area...in an effort to locate [its] country of origin."

Trial counsel created the evidence, "The Program, The National Drug Threat Assessment," and included it in the Movant's motion to suppress, accusing the Movant of selling drugs to the DEA. This lightened the government's burden of proof and helped advance the government's admission of 404(b) evidence needed to prove possession with intent to distribute, along with trial counsel conceding the 404(b) evidence was actually a part of the search warrant against the Movant's defense and objections to the 404(b) evidence.

REASONS FOR GRANTING THE PETITION (2)

ISSUE (III)

The District Court refused to take into account the Government's team, with the assistance of trial counsel, introduced false testimony to the jury that Detective Lawrence O'Toole conveyed the Government's drug evidence to a night drop box. The false testimony was to cover up that Detective Lawrence O'Toole broke the chain of custody and turned the evidence in 18 hours after he claimed to have discovered it in the Appellant's residence.

Allyson D. Seger, signed as the Examiner in the Laboratory Report's Request for Analysis Drug Identification that Lawrence O'Toole conveyed the drug evidence to Bridgette Stewart. Next,

Allyson D. Seger testified at trial that it appeared as if Lawrence O'Toole conveyed the drug evidence to a night drop box when the clerks were unavailable, therefore the time the drug evidence was conveyed can not be known. The government was allowed to change its evidence at trial by the district court and trial counsel. The Government's changing the evidence in the middle of trial caused undue surprise. The Government further violated the Appellant's Fifth Amendment Constitutional Due Process Right.

Lawrence O'Toole and Allyson D. Seger falsely testified to the jury that he conveyed the drug evidence to a night drop box between May 29th at 11:00pm and May 30th 2013 at 6a.m. The prosecutor's use of false testimony to obtain a conviction is a violation of due process. See Napue, 360 U.S. at 269. When false testimony arises during the course of trial, "the duty to correct false testimony is on the prosecutor, and that duty arises when the false evidence appears." See United States v. Foster, 874 F.2d 491, 495 (8th Cir. 1988)(Emphasis added) applying the Napue rule.

In Napue v. Illinois, the Supreme Court of the United States acknowledged that "it is established that a conviction obtained through the use of false evidence, known to be such by representations of the state, must fall under the Fourteenth Amendment." 360 U.S. at 269 (emphasis added). "The same result obtains when the state, although not soliciting false evidence, allows it to go uncorrected when it appears." Id. (emphasis added). "This principle holds true even when the false testimony goes only to the credibility of the witnesses." Id.

Since Napue, the Supreme Court has reaffirmed that a new trial is required if "the testimony...could in any reasonable likelihood have affected the judgment of the jury." See Giglio v. United States, 405 U.S. 150, 154, 92 S.Ct. 763. 31 L.Ed.2d 104 (1972)(quoting Napue 360 U.S. at 271)(alteration original) (emphasis added).

Lawrence O'Toole conveying the evidence to a night drop box was not reasonable.

The District Court abused its discretion by not holding an evidentiary hearing concerning counsel's failure to conduct an adequate pre-trial investigation of Lawrence O'Toole conveying the evidence to Bridgette Stewart.

The District Court refuses to take notice that the Appellant made several plausible showings that the chain of custody report showing Lawrence O'Toole conveying the evidence to Bridgette Stewart existed. Evidence may be "favorable" in the required since not only when it tends to substantively to negate guilt but also when it tends to impeach the credibility of a key witness for the prosecution. Giglio v. United States, 405 U.S. 150, 154, 31 L.Ed.2d 104, 92 S.Ct. 763 (1972).

Instead, the District Court abused its discretion by ruling erroneously, "Because the report made by Lab Technician Bridgette Stewart was available to Movant's counsel at trial. Movant's claim that counsel should have requested it fails. Likewise, his reliance on the contents of the report in support of his chain of custody argument is fatal to his claim that counsel should have objected to its admission. Moreover, the government notes that

trial counsel did request all testing records and did use them to vigorously cross-examine the government's witnesses on the chain of custody. The Court agrees"

Clearly, the court is in error. Nowhere in the record does the record prove trial counsel used Bridgette Stewart's report to cross-examine the government's witnesses on the chain of custody. The District Court is in error. The District Court further erred by ruling the issue was not determinative without holding an evidentiary hearing on the issue.

Generally, an abuse of discretion is evident, "when the reviewing court is firmly convinced that a mistake has been made. A district court abuses it's discretion when it relies on clearly erroneous findings of fact, or when it improperly applies the law or uses [an] erroneous legal standard." See Romstadt v. Allstate Ins. Co., 59 F.3d 608, 615 (6th Cir. 1995)(quotation and citations omitted).

The fact the District Court agreed with the Government, "Lab Technician Bridgette Stewart's chain of custody report was available to the Appellant's trial counsel," trial counsel violated, "(the threshold of reasonable professional competence required by Strickland may be violated, for example, by failure to impeach" especially critical "testimony, particularly where counsel cannot articulate a reasoned strategy for not doing so.)" See Id. at 953 (citing Steinkuehler v. Meschner, 176 F.3d 441, 445 (8th Cir. 1999)).

Trial Counsel's reason that he did not know how to go about obtaining evidence he did not believe existed is not reasonable trial strategy.

The District Court is in error agreeing with the Government's argument that trial counsel used Bridgette Stewart's report at trial because it is wrong or either a lie.

Furthermore, the Fifth Amendment Due Process Right requires evidence to go through a chain of custody.

In this case, the Government lied about the chain of custody of the evidence which shows the chain of custody contained bad faith and ill will.

The Appellant objected to the chain of custody of the evidence he was found guilty of possessing on the record. The government then put on live testimony from Allyson D. Seger that was false.

Without Allyson D. Seger and Lawrence O'Toole's false testimony that Lawrence O'Toole conveyed the evidence to a night drop box, the government would not have been able to obtain a conviction because the evidence would have been inadmissible.

If the jury would have found out Lawrence O'Toole had broke the chain of custody of the evidence, lied about the chain of custody of the evidence and Allyson D. Seger helped in the injustice by vouching for Lawrence O'Toole, the jury would have found the Appellant not guilty, or the case would have been dismissed.

REASONS FOR GRANTING THE PETITION (3)

ISSUE (II)

Trial counsel was ineffective by portraying the Appellant as a drug dealer. Trial counsel wrote in the written arguments

written to decide the Appellant's suppression hearing that the Government explain the truth about what had been occurring with the Appellant. According to the Appellant's trial counsel, the DEA had purchased drugs from the Appellant. See Motion for hearing pursuant to Franks v. Delaware, page 7 of 8.

Trial counsel abandoned Appellant's Sixth Amendment Effective Assistance of Counsel by accusing the Appellant of selling drugs to the DEA program called the National Drug Threat Assessment. Trial counsel further abandoned Appellant's Sixth Amendment Constitutional Effective Assistance of Counsel by conceding during the ruling rather, or not the 404(b) uncharged crime evidence was relevant under 404(b), the 404(b) evidence was part of the search warrant against the Appellant. Trial counsel was ineffective for not trying to refute the prosecution's theory that the Appellant sold drugs to the DEA and that the sales were part of a search warrant application. In Showers v. Beard, the Third Circuit Court of Appeals considered a petitioner's claim that her counsel had been ineffective in failing to present expert evidence to try to refute the prosecution's theory that she administered liquid morphine to her husband to kill him and to support her theory that the victim committed suicide. See Showers, 635 F.3d at 631. Trial counsel should have refuted the Government's 404(b) evidence by making the jury aware that the DEA Six Report provided by the officer's of the state reported an unidentified individual participating in the controlled buys on May 22, 2018 at 5400 Enright. Trial counsel should have informed the jury that the DEA Six Report made for prosecution purposes

related to May 22, 2013 against the Movant reported an unidentified individual at the address 5400 Enright instead of the Movant at the Movant's address of 5622 Delmar as the government testified to the jury. Trial counsel should have also pointed out the special area of reliability based on the officer's official status had been tainted.

If the jury would have been made aware of the involvement of an unidentified individual instead of the Appellant, the outcome of the trial would have been different.

The DEA Six Report of May 22, 2013 is at least wrong, if not a lie. The government had an obligation to inform the court about the unidentified individual reported at 5400 Enright during the pretrial hearing when ruling on the relevancy of the 404(b) uncharged crime evidence, but instead violated the Appellant's Due Process Rights.

The prosecution's use of false testimony to obtain a conviction is a violation of Due Process. See Napue, 360 U.S. at 269.

CONCLUSION

The District Court abused its discretion in this case, and the Court of Appeals for the Eighth Circuit turned a blind eye to the abuse, instead of directing the lower court to correct its errors.

The district court allowed the admission of 404(b) uncharged crime evidence that should not have been permitted, because the record proves the evidence did not actually occur.

The government witnesses testified they performed two different days of controlled buys at the address 5622 Delmar, using an informant named Ashley Chase, where they were able to purchase quantities of heroin from the Movant.

The records made to prove the actual occurrence of one of the controlled buys show that officers did not perform controlled buys at the address 5622 Delmar on May 21 and May 22, 2013.

The government's evidence is wrong or a lie used to obtain a conviction against the Movant.

The Movant was assigned a lawyer who conceded to the government's theory that the Movant is a drug dealer, took away the Movant's right to be innocent until proven guilty.

Trial counsel's conceding to the government's false evidence used to convict the Movant, forced the court to look at the false evidence in a probative aspect against the defendant, despite the objections made, or at least caused the court to turn a blind eye to the false evidence that is either wrong or a lie.

The government abandoned the duty to correct the false

evidence showing the DEA Six Report contained the address 5400 Enright with an unknown individual, because without the false evidence, it would have been apparent that the officers that testified at the trial were lying.

In order to deceive the courts, the government team manufactured a DEA Six Report and used it against the Movant, knowing full well the manufactured DEA Six Report has nothing to do with the Movant.

The district court allowed this manufactured evidence based on trial counsel's willingness to concede with the government's theory and file that the Movant sold drugs to a DEA Drug Program called The National Drug Threat Assessment.

This is a clear case of a defendant with an attorney acting as a second prosecutor and abandoning his Sixth Amendment obligation to adversary testing of the government's evidence.

Trial counsel also abandoned his role of adversarially testing the government's ~~address~~^{evidence} when he abandoned the chain of custody report of the drug evidence showing Lawrence O'Toole conveyed his evidence to Bridgette Stewart.

Trial counsel abandoned the chain of custody report so that the government could hide the fact that the government put a false evidence testimony live to the jury that Lawrence O'Toole conveyed the evidence to a night drop box. Therefore, the time the evidence was conveyed can not be known.

The chain of custody report not only proves that the government lied about the conveying of the evidence live after the objection to it was made, but it also could prove the government hid the exact time Lawrence O'Toole conveyed the evidence to Bridgette Stewart.

If trial counsel would have impeached the government's witnesses, instead of conceding to the evidence, the Movant would have been acquitted, or the case would have simply been over.

In the disinterest of justice, the Eighth Circuit made matters worse by ruling as if there is nothing wrong with violating the Sixth Amendment confrontation clause, by permitting officers to testify the Movant sold drugs to the confidential informant based on what he was told by informant, and testimony about such conversation pointed directly at defendant and his guilt in crime charged.

The Petitioner prays the Supreme Court grants relief to the Movant and orders a new trial and new trial counsel.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,


Amy Cate

Date: December 27, 2019