

No. **19-7513**

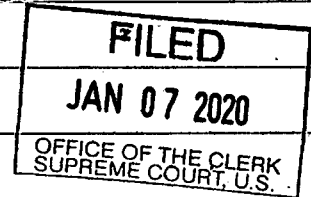
IN THE
SUPREME COURT OF THE UNITED STATES

Omar Smith, #1069073 - PETITIONER

VS.

ORIGINAL

Harold W. Clarke, Director VDOC - RESPONDENT



On Petition for a Writ of Certiorari to
Virginia Supreme Court

PETITION FOR WRIT OF CERTIORARI

PETITIONER

Omar Smith #1069073
Sussex II State Prison
24427 Musselwhite Drive
Waverly, Va 23891

QUESTIONS PRESENTED

1. Did the Virginia Supreme Court err in deciding that counsels failure to adequately advise Petitioner of the necessary elements needed to convict him, was not ineffective assistance of counsel?
2. Did the Virginia Supreme Court err in deciding that counsels failure to exclude the victim during the preliminary hearing, was not ineffective assistance of counsel?
3. Did the Virginia Supreme Court err in deciding that counsels failure to suppress Sydnee Brown's testimony, was not ineffective assistance of counsel?
4. Did the Virginia Supreme Court err in deciding that counsels failure to sever Petitioner's trial from that of his codefendants, was not ineffective assistance of counsel?
5. Did the Virginia Supreme Court err in deciding that counsels failure to adequately investigate Petitioner's phone records, was not ineffective assistance of counsel?

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No. _____

IN THE
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Omar Smith, #1069073 - PETITIONER

VS.

Harold W. Clarke, Director VDOC - RESPONDENT

OPINIONS BELOW

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

The opinion of the Virginia Supreme Court dated July 17, 2019 appears at Appendix A to this petition.

The opinion of the Virginia Supreme Court dated October 10, 2019 appears at Appendix B to this petition.

These orders were not designated for publishing.

JURISDICTION

The date on which the Virginia Supreme Court decided my case was on October 10, 2019.

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

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTIONAL 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 time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, 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 CONSTITUTIONAL AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy trial 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 have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

UNITED STATES CONSTITUTIONAL AMENDMENT XIV.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, 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 states 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 law.

CONSTITUTION OF VIRGINIA, Article I Section 8

That in criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, and to call for evidence in his favor, and he shall enjoy the right to a speedy and public trial, by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty. He shall not be deprived of

life or liberty, except by the law of the land or the judgment of his peers, nor be compelled in any criminal proceeding to give evidence against himself, nor be put twice in jeopardy for the same offense.

STATEMENT OF THE CASE

A.

On October 17, 2016 Petitioner wrote a letter to attorney Craig Evans. In this letter Petitioner requested that counsel file a motion for a Bill of Particulars, so that he may clearly understand the charges against him and the necessary elements needed to convict him.

Counsel responded by letter dated October 24, 2016. In counsel's response he states that the Commonwealth is providing him with an "open file" discovery... and if he files for a Bill of Particulars that door closes. Furthermore, counsel acknowledges that Petitioner's letter sets forth an accurate summary of the law in Virginia...

B.

A preliminary hearing was conducted in the Hanover County General District Court on July 13, 2016. Commonwealth's attorney Shari Skipper called two witnesses to testify, the victim Dat Mong and codefendant Sydnee Brown.

Prior to the testimony of either witness, Commonwealth requested that the victim be allowed to remain in the courtroom during the entire proceeding, pursuant to Va. code 19.2-265.01. Counsel for Petitioner stated that he did not have any objections in this hearing.

Commonwealth's first witness, Dat Mong identified two of four defendants. Petitioner not being one of the men identified by the victim Dat Mong. Mong also testified to having seen Sydnee Brown drive his attackers away in a white Lexus SUV.

Commonwealth's second witness Sydnee Brown stated during her testimony that Petitioner picked the victims attackers up and drove them away.

C.

As previously mentioned a preliminary hearing was held in the Hanover County General District Court on

July 13, 2016. During this hearing Sydnee Brown testified as follows: (i) she was not aware of any conspiracy to commit the alleged offenses; (ii) she does not know who created the craigslist ad; (iii) she does not know who the attackers were that perpetrated these crimes; (iv) she left the scene of the crime at the moment that the two attackers approached and never returned to the scene of the crime; and (v) she testified that Smith (Petitioner) and Neal drove the victims attackers away from the scene of the crime.

D.

Attorney Craig Evans submitted an affidavit in response to Petitioner's Habeas Corpus Petition. Counsel stated that, counsel for codefendant Rajit Nash informed him on July 13, 2016 during the preliminary hearing, that his client was going to testify against Petitioner.

Counsel for Petitioner further states that counsel for Trevion Wright informed him that he was trying to convince his client to testify against Petitioner as well.

E.

In the notes provided by attorney Craig Evans,
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counsel states that the Pinger phone number that was created is attached to two different numbers. Counsel stated in a letter to Petitioner dated November 11, 2016 that he was enclosing a copy of Petitioner's phone records. The purported phone records that counsel refers to are not Petitioner's phone records but are log sheets from Pinger Inc. Petitioner's cell phone service provider was in fact Metro PCS not Pinger Inc.

Pinger Inc. is a internet based company that digitally forwards calls. There are no cell phone records from Metro PCS that would imply that any such calls were forwarded to Petitioner's cell phone.

REASON FOR GRANTING WRIT

1. Pursuant to Virginia Practice Criminal Procedure, 13:8. Whenever the indictment is comprehensive enough to identify the offense charged but not specific enough to give the information necessary to enable the accused to prepare his defense, a Bill of Particulars may be furnished.

The sixth amendment of the United States Constitution and Virginia Constitutional Article I, 8 guarantee to the accused the right to demand the

cause and nature of the charges against him or her, and if the indictment does not inform the accused of such he or she may demand that it be furnished by a Bill of Particulars or some other approved method.

As stated by the Supreme Court, a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts. See *Henderson v. Morgan*, 426 U.S. 637, 659.

Here in Petitioner's case, he did not have a clear understanding of the offenses and the necessary elements needed to convict him. Petitioner not only informed his attorney of his unclear understanding of the offenses but he also requested counsel, file for a Bill of Particulars, so that he may clearly understand the elements needed to convict him. Counsel utterly ignored Petitioner's request, violating Petitioner's rights as guaranteed by the United States Constitutional Amendments 5, 6 and 14.

2. In accordance with Virginia Rule of Evidence 2:615, the purpose of this rule is to prevent a later witness from shaping his or her testimony to correspond to earlier evidence in the case and to facilitate exposure of inconsistencies by cross examination. The Supreme Court has summarized

the purpose of the exclusion statute, emphasizing the need to discourage witnesses from shaping their answers to key questions in light of the testimony of other witnesses and expose fabrication and collusion by witnesses and minimize the likelihood that witnesses will alter their testimony so that such testimony is consistent with testimony provided by other witnesses.

Virginia Rule of Evidence 2:615(c), specifically addresses the issue of crime victims. For those victims who are slated to provide testimony the rule integrates the statutory and case law interpretations to assure that the victim may remain in the courtroom unless "the presence of the victim would impair the conduct of a fair trial," an apparent reference to the possibility of a witness so shaping his or her upcoming testimony based on other evidence that the truth of the victim's own testimony could become suspect.

The current statute governing exclusion of witnesses in criminal proceedings is Va. code 19.2-265.1, the routine exclusion of prospective witnesses is inapplicable to "any victim" who is to be called as a witness. A victim is by this provision "exempt from the rule of this section as a matter of law unless, in accordance with the provisions of Va. code 19.2-265.01, his exclusion is otherwise required."

To support a claim of unfairness under Va. Code 19.2-265.01, a defendant must proffer to the trial court facts which, if true would make the victim witness uniquely vulnerable to being manipulated, consciously or not, by the suggestive power of other witnesses testimony. This could be shown by proffer that the victim witness had previously admitted a lack of knowledge on some crucial detail fact on which other witnesses will testify to in detail, or the victim has natural limitations, that would make him susceptible to memory enhancement or manipulation. See *Hernandez-Guerrero v. Commonwealth*, 46 Va. App. 366, 371.

Here in Petitioner's case, the victim did not identify him in any capacity. He further testified that Sydnee Brown drove his attackers away. Commonwealth attorney Shari Skipper knew that the victim would not identify Petitioner in any capacity and hoped that Sydnee Brown's testimony would reshape the victims testimony. Clearly this violates the standards set out in Va. code 19.2-265.01, ultimately violating Petitioner's rights as guaranteed by the United States Constitutional Amendments 5, 6 and 14.

3. In accordance with *Defending Criminal Cases In Virginia* 8:301, The Supreme Courts mandate that in certain circumstances an accused is entitled to be represented by

counsel when confronted by eyewitnesses is not the only method by which the Court has attempted to control the use of eyewitness testimony. It also has held that the defendants due process right to a fair trial may be violated by a "suggestive" pretrial identification procedure.

Once it has been established that an unconstitutionally "suggestive" identification has occurred, that identification must be suppressed, and the ability of the witness thereafter to make an identification will be treated as a "fruit-of-the-poisonous-tree" problem.

The factors to be considered in evaluating the likelihood of misidentification include, (i) the opportunity of the witness to view the criminal act at the time of the crime; (ii) the witness' degree of attention; (iii) the accuracy of the witness' prior description of the suspect; (iv) the level of certainty demonstrated by the witness at the confrontation; and (v) the length of time between the crime and the confrontation. See *Neil v. Biggers*, 409 U.S. 188, 199.

In accordance with the Virginia Law Of Evidence Rule 2:402, irrelevant evidence is inadmissible. Evidence which has no tendency to prove guilt but only serves to prejudice an accused, should be excluded on the ground

of lack of relevancy. For evidence to be admissible it must relate and be confined to the matters in issue and tend to prove an offense or be pertinent thereto. Evidence of collateral facts or those incapable of affording any reasonable presumption or inference on matters in issue, because too remote or irrelevant, cannot be accepted in evidence. See *Smith v. Commonwealth*, 223 Va 721.

Here in Petitioner's case, the testimony in which was given by Sydnee Brown pertaining to Petitioner was irrelevant and therefore inadmissible. She did not know of any plans to commit the alleged offenses. She did not see who the attackers were that committed the alleged offenses. She left the scene of the crime when she saw the attackers approach and never returned to the scene. She ultimately did not witness Petitioner commit any of the alleged offenses. This violated Petitioner's rights as guaranteed by the United States Constitutional Amendments 5, 6 and 14.

4. In accordance with Va. code 19.2-262.1, allows a joinder of trials where the persons charged are in fact charged with related acts or occurrences that occurred contemporaneously. It does not allow a joinder of trials where the parties would be prejudiced.

To show entitlement to severance, the defendant must establish that actual prejudice would result from a joint trial and not merely that a separate trial would offer a better chance of acquittal. See *United States v. Goldman*, 750 F.2d 1221.

Here in Petitioner's case, the evidence being presented against Petitioner's codefendants was inadmissible against Petitioner, and this evidence would have spilled over into the jury's perception and assessment of Petitioner. It is obvious, due to the lack of evidence against Petitioner that the court would have granted severance; (i) the alleged victim testified that Petitioner was not one of his attackers; (ii) Sydnee Brown's testimony was irrelevant and therefore inadmissible against Petitioner. Counsel's failure to file for severance violated Petitioner's rights as guaranteed by the United States Constitutional Amendments 6 and 14.

5. In deciding whether trial counsel exercised reasonable professional judgement with regard to the investigation and presentation of mitigating evidence, a reviewing court must focus on whether the investigation resulting in counsel's decision not to introduce certain mitigation evidence was itself

reasonable. See *Wiggins v. Smith*, 539 U.S. 510, 523.

When making this assessment, "a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." See *Wiggins v. Smith*, 539 U.S. at 527.

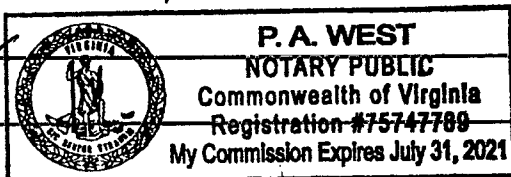
Here in Petitioner's case, counsel was aware (i) that the phone number created by Pinger Inc. was attached to two different phone numbers; (ii) Pinger Inc. is not a cell phone service provider; (iii) Petitioner's cell phone service provider was Metro PCS; (iv) the phone records provided by Metro PCS did not match any of the call logs obtained from Pinger Inc. Knowing this information, it was counsel's duty to investigate further. Counsel's failure to do so violated Petitioner's rights as guaranteed him by the United States Constitutional Amendments 6 and 14.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Omar Smith



6 Jan 2020

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