

19-8025

Case No. _____

ORIGINAL
FILED

In the Supreme Court of the United States

Kwasi McKinney, prose

Petitioner

^{vs.}
State of Arkansas "et al."
~~State of Arkansas "et al."~~

Respondent

U.S.
110
JAN 12 2007
U.S. DEPT. OF JUSTICE

On Petition for A Writ of Certiorari to
The Columbia County Circuit Court of Arkansas

Petition for Writ of Certiorari

Kwasi McKinney #137005

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Kwasi McKinney

Question Presented

The Circuit Court abused its discretion for denying McKinney pre-trial Motions to suppress statement and search warrant for untimely. The Arkansas Court of Appeals reversed and remanded the circuit court order denying McKinney suppression motions. The Court of Appeals also held that the circuit court abuse its discretion in denying McKinney request for a hearing on his motion to suppress statement which is mandatory and that was not harmless error. The Court of Appeals ruled that the trial court found that the statement should have been allowed, then the playing of it prior to the hearing would be consider harmless error. The case thus presents the following questions:

Did the Appeal Court err in affirming the circuit Court ruling that McKinney statement was harmless error?

Illegally obtained evidence can never be called harmless.

List of parties

All parties do not appear in the caption of this case on the cover page. A list of all parties to the proceeding in the court whose judgement is the subject of this petition is as follows:

David W. Talley, Jr Columbia County Arkansas Circuit Court Judge

Larry D Vaught Arkansas Court of Appeals Judge

State of Arkansas Attorney General

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A. Cases

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Brady V. Maryland 373 U.S. 83 (1963)

Jackson V. Denno 378 U.S. 368, 84 S.Ct 1774, 12 L.Ed 2d 908

Smith V. State 256 Ark. 67 505 S.W. 2d 504

Bell V. State 324 Ark 258, 920 S.W. 2d 501

Franks V. Delaware 438 U.S. 154 (1978)

United States V. Strops, 387 F.3d 766, 77 (8th Cir 2004)

Katz V. United States 389 U.S. 347 88 S.Ct 507 14 L.Ed 2d 576

B. Rules and Statutes

Ark. R. Crim. P. Rule 16.2 (b)(1)

Ark. R. Crim. P. Rule 4.7 (b)(1) + (b)(3)

Ark. R. Crim. P. Rule 10.1

A.C.A. 16-89-107 (b)(1)

C. Constitutional Authorities

United States Constitution 4th Amendment

United States Constitution 5th Amendment

United States Constitution 6th Amendment

United States Constitution 14th Amendment

Opinion Below

The Opinion of the Arkansas Court of Appeals appears at Appendix A to this petition and reported at case number CR-18-546. The denial of the Columbia County Arkansas Circuit Court appears at Appendix B State vs. McKinney April 25, 2019. The Court of Appeals reversed and remanded appears in Appendix C is reported at 2018 Ark. App. 10. The order denying petition for review appears in Appendix D to this petition, State v. McKinney October 17, 2019.

Jurisdiction

The date on which the Arkansas Court of Appeals decided my case was August 28, 2019. A copy of that decision appears at Appendix A. A timely petition for review was there after denied October 17, 2019.

The jurisdiction of this Court is invoked pursuant to Ark. Sup. Ct. R. 1-2(a), the Arkansas Supreme Court has jurisdiction over this case.

Statutory and Constitutional Provisions involved

United States Constitution 4th Amendment

~~Prohibiting~~ Prohibiting unreasonable searches and seizures and the issuance of warrants without probable cause.

United States Constitution 5th Amendment

Providing that a person cannot be (1) required to answer for a capital or otherwise infamous offense unless a grand jury issues an indictment or presentment, (2) subject to double jeopardy, (3) compelled to engage in self-incrimination on a criminal matter, (4) deprived of life, liberty, or property without due process of law, or (5) deprived of private property for public use without just compensation.

United States Constitution 6th Amendment

guaranteeing in criminal cases the right to a speedy and public trial by jury, the right to be informed of the nature of the accusation, the right to confront witnesses, the right to counsel, and the right to compulsory process for obtaining favorable witnesses.

United States Constitution 14th Amendment

prohibiting states from denying due process and equal protection and from abridging the privileges and immunities of U.S. citizenship.

Statement of the Case

On March 21, 2016, the State filed a felony information alleging that McKinney committed the offense of delivery of controlled substance ~~(two counts)~~, Maintaining a Drug Premises, Endangering the Welfare of a Minor in the first Degree, Simultaneous Possession of drugs and firearms, possession of a controlled substance with intent to deliver, and possession of a firearm by certain persons. On August 30, 2016, the State filed an amended felony information alleging the same previous criminal offenses but now including enhancements for proximity to certain facilities and habitual offender status. All parties appeared in court on October 6, 2016 and announced ready for trial with a date set for November 29, 2016. McKinney filed a series of motions (Motion to Suppress Statement, Motion to suppress search, and Motion for Scientific Testing) ~~(not read)~~. On November 8, 2016 McKinney requested a hearing on the pending motions and was subsequently denied for timeliness on November 14, 2016. ~~(not read)~~. The case proceeded to a jury trial on November 29, 2016, in Columbia County Circuit Court on the above listed charges.

Following the conclusion of all testimony, the jury returned with a verdict of guilty of delivery of a controlled substance, possession of a controlled substance, possession of controlled substance with intent to deliver, simultaneous possession of drugs and firearms, maintaining a drug premises within 1000 feet of a church, and possession of firearm by certain person. McKinney was also sentenced under the proximity enhancement and as a habitual offender. McKinney was sentenced to an aggregate term of one hundred and fifty-four (154) years in Arkansas Department of Corrections (sentences running consecutively). On December 8, 2016, the trial court entered a sentencing order to this effect

against McKinney. ~~(McKinney)~~ McKinney filed his Notice of appeal on January 5, 2017 and an appeal followed. ~~(McKinney)~~ On January 10, 2018, the Arkansas Court of Appeals issued an opinion affirming in part and reversing and remanding in part. ~~(McKinney)~~

The Appeal Court's opinion required the trial court to hold a hearing on the motion to suppress statement and rule on the motion to suppress search warrant. ~~Id~~ The trial court held the remanding hearing on April 16, 2018. On April 25, 2018 the trial court issued orders denying McKinney suppression motions. ~~(McKinney)~~ McKinney filed his notice of Appeal on May 1, 2018. The Court of Appeals affirmed the trial court rulings on August 28, 2019. McKinney petition for review was denied October 17, 2019.

Abstract from Suppression Hearing

Mr. Phillips: Your Honor, at this time I'm going to ask that I be allowed to play the audio statement.

McKinney: Your Honor, can I object to that.

Mr. Rolfe: Your Honor, Obviously Mr. McKinney is wanting to take control of this hearing.

McKinney: Because I don't know what's going on. I'm being misled through the whole thing.

The Court: Wait

McKinney: He's fixing to play a statement --

The Court: Mr. McKinney, stop talking and listen to me. Once again, we have to decide if you're going to be represented by an attorney or if you're going to represent yourself. You cannot make objections, because you have an attorney.

McKinney: I asked him to object.

The Court: Listen you hired him, you're relying on his education and experience. If it's in his determination that an objection is not proper, is not merited, then

thats his call.

McKinney: So man.

The Court: So is--

McKinney: Is this the same statement that was played in front of the jury?

The Court: I have no idea

McKinney: Because he just said, "full statement" and the Jury didn't hear a full statement, so if he playing a different statement, that will be illegal evidence.

The Court: You're not in a position that you can make any objections and I'm advising you not to make anymore statements.

McKinney: But my Lawyer, He's sitting here not saying nothing.

Closing Argument made by Mr. Rolf: Your Honor, I would ask the court to just please take notice again that while the entire statement was played before you today, at trial it was an edited version of that statement that was giving to the Jury. He believes that that is something

that the court should take into account here.

Mr. Phillips: Your Honor, Just briefly, I feel like I need to respond to that.

Closing Argument made by Mr. Phillips: Your Honor, In this case, the state does not deny that we played an edit video at trial. What was present today was the full statement. The state in this case, believes that what was played were the incriminating statements and what was not played were self-serving statements ~~from~~ from defendant. Therefore, we chose not to play those for that reason.

Reason for Granting the writ

1. ^{McKinney} ~~Appellant~~ Motion to Suppress Statement Should have been granted.

(A) Illegally Obtained Evidence

trial court erred and abused its discretion in allowing McKinney statement to be played before the jury without a proper mandatory admissibility hearing. *id.* The determination of fact concerning the admissibility of a confession shall be made by the court when the issue is raised by the defendant; the trial court shall hear the evidence concerning the admissibility and the voluntariness of the confession out of the presence of the jury, and it shall be the court's duty before admitting the confession into evidence to determine by a preponderance of the evidence that the confession has been made voluntarily. A.G.A. 16-89-107(b)(1)

Jackson v. Denno 378 U.S. 368, 84 S.Ct 1774, 12 L.Ed 2d 908 involves an examination of the procedure whereby a statement is submitted to the jury as evidence without a prior determination by the trial judge based upon facts hearing that the statement was voluntarily given fails to meet the minimum requirement of due process guaranteed by the fourteenth Amendment of the United States Constitution.

The tainted statement was used to corroborate other state evidence. The statement was insufficient to support a finding of guilty because the statement was tainted and other evidence did not show guilt. The state relied on unconstitutional evidence and therefore would have reached a different conclusion

if the evidence had been excluded. The trial court error was prejudicial and cannot be called harmless.

(B) Failure to Produce Full Statement (Brady Violation)

Statement made by McKinney that was submitted to the jury was edited and altered. On remand for suppression hearing on motion to suppress statement, Prosecutor Ryan Phillips admitted the statement played at trial was not the full version. (Exhibit 1 TR.69) Prior to the suppression hearing on statement prosecutor Ryan Phillips produced a different statement from the statement that was played at trial and asserting that it was the full copy of McKinney statement. (Exhibit 2 TR.26)

McKinney Made a statement to Agent Chambers and Agent Ilmer after first requesting an attorney but that statement was edit out when played for Jury. Right to have Counsel present at interrogation is indispensable to protection of the fifth Amendment privilege. There can be no questioning if defendant indicates in any manner and at any stage of interrogation process that he wishes to consult with attorney before speaking. U.S.C.A. Annen. 5

Officer Chambers coerced McKinney into making a statement under the influence of leniency, stating if McKinney make a statement he would go to the prosecutor on his behalf (Exhibit 3,4 TR.31-32) That statement was also edit out when played for Jury, but was ~~was~~ played on remand at the suppression hearing on motion to suppress statement. (Exhibit 3,4 TR.31-32) citing *Freeman V. State* 258 Ark 617 527 S.W.

2d 909 "A confession made under the influence of hope of mitigation of punishment extorted by those in authority is inadmissible as voluntary confession." In *Giglio v. U.S.*, 405 U.S. 150, 31 L.Ed 2d 104 92 S.Ct 763 (1972) The Supreme Court reversed and remanded petitioner case for new trial after evidence was newly disclose a promise of ~~leniency~~ leniency made to key witness in return for a witness testimony.

Since ~~case~~ the state case depended on McKinney statement his credibility was important. Evidence of agreement between the state and McKinney is relevant to his credibility and the Jury is entitled to know of it.

It is Prosecutor Misconduct to any form of deceit to hide the truth which in fact was presented in the statement transcript that McKinney informed Officer Chambers and Officer Ilmer the Gun and Crown Royal Bag belong to Jaylon McKamie but that very statement was subsequently edit out when played for jury, but was played on remand. (Exhibit 5 TR. 33)

The statement that was played on remand:

Jonathan Chambers: What happen?

Kwasi McKinney: I don't know what happened. All I know, that gun belong to my homeboy --

Jonathan Chambers: Who's your homeboy

Kwasi McKinney: Jaylon McKamie. If you found some drugs, it belonged to him too.

Jonathan Chambers: which guy was that
Kwasi McKinney: The tall one

Trial Counsel asked Officer Chambers, when he asked McKinney who the drugs and gun belong to, the State objected (Exhibit 6-10) (TR. 312-316) and the trial judge granted the States objection (Exhibit 6-10) (TR. 312-316) stating my recollection is there was nothing in McKinney statement that was introduced as state's Exhibit six, that had reference about a crown royal bag or gun (Exhibit 6-10) (TR. 312-316)

The state edited, altered and intentionally deleted exculpatory points within McKinney custodial recording statement. The withholding of exculpatory evidence and mitigating evidence in favor of the Accused, violated Brady v Maryland, also the 6th Amendment and 14th Amendment right to fair and impartial trial.

(C) Edit Statement

The basis of Arkansas Rule of Criminal Procedure Rule 4.7

(b)(1)+(3) are meritorious in regards to the motion to suppress statement of the following guidelines:

Ark.R.Crim.P Rule 4.7(b)(1): In determining the admissibility of any custodial statement, the court may consider, together with all other relevant evidence and consistent with existing law, whether an electronic recording is substantially accurate and not intentionally altered.

Ark.R.Crim.P. Rule 4.7(b)(3) "Nothing in this rule preclude the

admission of a statement that is used only for impeachment, and not as substantial evidence."

The factual-finder give merit to McKinney for failing to suppress statement, instead allowed an intentionally edited and altered custodial recording to be played to the jury.

(D) Failure to Produce Material Witness

McKinney made a statement to Special Agent Louis Ilmer and Agent Chambers at the Columbia County Sheriff's office. McKinney submits that he did not legally waive his rights to remain silent. The burden is on the state to prove by a preponderance of evidence that a custodial statement was given voluntarily and was knowingly and intelligently made.

On remand for suppression hearing on motion to suppress statement Agent Ilmer did not show and testify as a witness to McKinney in-custody statement. The state evidence shows that Agent Ilmer was present when McKinney made the statement, and his name was signed as a witness at the end of the statement. (Exhibit 11)

The state did not meet its burden of proof by failure to call Agent Ilmer that was present at the time of the interrogation or giving an adequate explanation for his absence. *Smith v. State* 256 Ark. 67, 51 W. 2d 504, ~~256 Ark. 67, 51 W. 2d 504~~ *Bell v. State* 324 Ark. 258, 920 S.W. 2d 501

2. McKinney motion to suppress search warrant should have been granted.

(A) Franks v. Delaware issue that existed with respect to the affidavit for the search warrant

Under Franks, if an officer submits false information or omits critical information from a search warrant application and obtain a warrant, the resultant search may be unreasonable under the 4th Amendment and all evidence obtained due to the unreasonable search will be suppressed. United States v. Strapp, 387 F.3d 766, 77 (9th Cir 2004)

McKinney submits that the affidavit for the search warrant contained false statements that was necessary to finding of probable cause for search. The statement made in the affidavit for the warrant is obviously false with the respect to the amount of control substance that was allegedly purchased from McKinney.

In the affidavit Agent Chambers stated under oath the drug transaction supposedly engaged on November 10, 2015 involved the purchase of 1.8 grams of methamphetamine. However, crime lab results showed 1.3 grams and Drug Chemist Jenifer Shirley testified at trial that it was 1.3 grams (Exhibit 12, 13, 16). That apparently leaves a half gram (.5) missing. The affiant's statement in the affidavit for the warrant regarding the amount of control substance involving in this alleged transaction is false.

Agent Chambers stated under oath in the affidavit for warrant that the drug transaction supposedly engaged on November 24, 2015 involve the purchase of 6.1 grams of methamphetamine. However, crime lab results showed 4.6 grams and Drug Chemist Jennifer Shirley testified to the results at trial. (Exhibit 13, 15) Once again where is the

missing methamphetamine? The statement in the affidavit for the warrant again is false.

Aside the Frank issue presented here, this raises serious questions about the evidence in this case, (methamphetamine) and how, when, where, and why some of it came up missing. All these facts demonstrated a violation of *Franks v. Delaware*.

(B) Unauthorized wire-tape interception / Illegal search and seizure

McKinney right to be free from unreasonable searches and seizures was violated by an unauthorized wire-tape ~~search~~ made by Detective Chambers and Detective ^{Bradshaw} ~~Chambers~~ on November 10 and 24, 2015. Each application for an order authorizing or approving the interception of wire, oral, electronic communication shall be made in writing upon with or affirmation to a judge of competent jurisdiction and shall ~~and~~ state the applicant's authority to make such application. *Arkansas Rules of Criminal Procedure 10.1* Relying upon *Katz v. United States* 389 U.S. 347 88 S.Ct. 507 14 L.Ed 2d 536, without prior judicial authorization no part of the contents such communication and no evidence derived therefore may be received in any trial.

There's no record in this case shows that Detective Chambers and Detective Ilmer had an order from a Judge authorizing or approving the interception of wire-tape communication.

The unlawfully interception of wire-tape was an illegal search of the property of McKinney under the Fourth Amendment of the United States Constitution and therefore should be suppressed as well any and all evidence gain as a result of search warrant.

Conclusion

Appeal Court Erred affirming McKinney suppression motions. Illegal obtained evidence can never be called harmless. Aside the fact the statement was illegally obtained, on remand a totally different statement was played and not the same statement that was played at trial. McKinney objected to the statement but the circuit court over ruled his objection.

McKinney entire case arose from a illegal wire-tape made by Detective Chambers and Detective ^{Bradshaw} ~~Chambers~~. Therefore, McKinney motion to suppress statement and motion to suppress search warrant should have been grant.

Wherefore, The petition for a writ of certiorari should be granted.

Respectfully Submitted

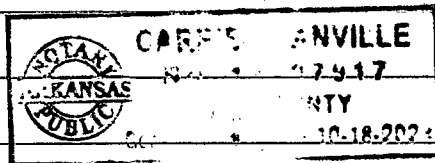
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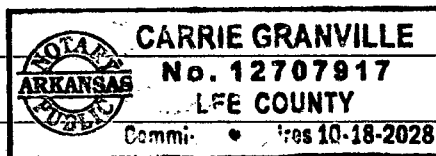
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12-3-19



State of Arkansas

County of Lee



Subscribed and Sworn to Before Me, a Notary Public, on this 06
day of Dec, 20 19

My Commission Expires: 10-18-2028

Carrie Granville
Notary Public