No. 20-5294

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Byron Becton — PETITIONER
(Your Name)

vs.

Shawn Phillips — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Sixth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Byron Becton 219081 T.D.O.C.
(Your Name)

960 State Route 212
(Address)

Tiptonville, TN 38079
(City, State, Zip Code)

(Phone Number)

Questions presented in claim in which a C.O.A. is sought

Did the prosecutor's misconduct deprive the petitioner of a fair trial that violated petitioner's Fifth and Fourteenth Amendment rights against self-incrimination?

Did the ineffective assistance of counsel deprive the petitioner of my rights guaranteed by the Sixth Amendment of the United States Constitution. Regarding the failure to investigate or interview witnesses was contrary to, or unreasonable application of clearly established Supreme Court law?

Whether the evidence is sufficient to rational trier of fact to find me guilty of Aggravated Rap beyond a reasonable doubt as required by Jackson V. Virginia and Rule 13(e) Tenn. R. App. Proc.?

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:

don't know how to do this

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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 _____ to the petition and is

[ ] reported at don't know how to do this; 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[ ] is unpublished.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 _____ to the petition and is

[ ] reported at don't know how to do this; 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[ ] is unpublished.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 don't know how to do this; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the don't know how to do this 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 ~~Feb 27, 2020~~ FEBRUARY 27, 2020.

[X] 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: NONE, 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. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was 4-28-2014. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: NONE, 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 NONE (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

TENNESSEE CONSTITUTONAL

TENN CONST ART 1-9 TENNESSEE FORBIDS SUCH COMMENT ON A DEFENDANT'S RIGHT NOT TO TESTIFY

UNIED STATES CONSTITUTONAL

U.S. CONST AMEND V

U.S. CONST AMEND XIV

STATEMENT OF THE CASE

On August 10, 2010 the Shelby County Grand Jury indicted the Petitioner for six (6) counts of Aggravated Rape.

On September 1, 2011 a Jury found the Petitioner guilty on all six (6) counts.

On September 29, 2011 the Petitioner was sentenced to 65 years incarceration.

On October 27, 2011, the Petitioner filed a timely Motion For New Trial

On November 23, 2011, the Petitioner filed a timely Direct Appeal

On March 11, 2013 the Court of Criminal Appeals affirmed the judgments of the trial court.

On May 30, 2013 the Petitioner filed a timely petition for post-conviction relief.

On April 28, 2014 the court denied petitioner's petition for post-conviction relief

On October 28, 2015 pro se complaint petition under 28 U.S.C. 2254 for writ of habeas corpus filed.

On October 27, 2017 petitioner filed a motion to reopen post-conviction.

On October 8, 2018 petition motion for reopen was dismissed because of lawyer filing the wrong motion

On September 17, 2019 petition filed 2254 petition was dismissed

On October 19, 2019 petition filed a timely petition for a C.O.A. in the United States Court of Appeals for the Sixth Circuit in Cincinnati.

On February 27, 2020 petition motion was denied from the United States of Appeals for the Sixth Circuit for a C.O.A.

DID THE PROSECUTOR'S MISCONDUCT DEPRIVE THE PETITIONER OF A FAIR TRIAL THAT VIOLATED PETITIONER'S FIFTH AND FOURTEENTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION

The prosecutor repeated referring to evidence was not submitted to the jury I assert that the prosecutor continuously referred to matters not in evidence. The judge kept allowing these instances even though my attorney objected. The prosecutor referred to note or piece of paper that was never produced. The prosecutor continuously referring to blood stains on the wall that was not tested so they don't know what it was. In the case of Washington V. Hofbauer 228 F3d 689 (C.A.6 (Mich 2000). The court stated misrepresenting fact in evidence can amount to substantial error because doing so may impress a jury in a wrong way and make an impact on the jury's deliberations. Donnelly V. Dechristoford 416 U.S. 637, 646, 94 S. Ct 1868, 40 L. Ed 2d, 431 (1974). For similar reasons asserting facts that were never admitted into evidence may mislead a jury in a prejudicial way, asserting facts that were never admitted into evidence made mislead a jury in a prejudicial way. This constant referring to evidence not proven sure influenced the jury in determining their verdict prosecutor informing the jury to do their duty and giving her interpretations of the charge and instructions and vouching for witnesses. Because a defendant constitutional right not to testify includes protection against visitation of that right through the state's comment on the exercise of that right at trial. A prosecutor is absolutely prohibited from commenting upon a decision made by the defendant not to testify at trial. Coker V. State 911 S.W. 2d 357 (Tenn. Crim. App. 1995) citing Griffin V. California 380 U.S. 609, 85 S.Ct. 1229, 14 L. Ed 2d 106 (1965). Griffin extends that Fifth Amendment right to state trials through the 14th Amendment guarantee of due process. Tennessee forbids such comment on a defendant's right not to testify through Article I-9 of the Tennessee Constitution, by case

decision in Staples V. State, 89 S.W. 231, 14 S.W. 603, and by statute, Tennessee Code Annotated 40-17-103 The Tennessee Supreme Court in Staples said, An argument based upon this failure of the defendant to testify cannot but be most prejudicial to the defendant, and when the attention of the trial judge is called to such argument and he fails to interfere, and fully instructs the jury it is reversible error. Staples at 603 in the case Noura Jackson V. State of Tennessee 444 S.W. 3d 5541 that the Five-Factor test set forth in Judge V. State should be applied only to clams of improper prosecutorial argument that does not rise to the level of a constitutional violation, abrogating State V. Flinn 2013 WL 6237253, and State V. Becton, 2013 WL 967755, the State did not prove that the constitutional error in the prosecutor's remark was harmless beyond a reasonable doubt. The prosecutor's was just asking the jury to in speculate. The trial courts have substantial discretion in determining the propriety of final argument, and counsel is generally given wide latitude. However courts must restrict any improper argument. Sparks V. State, 563 S.W. 2d 564 (Tenn. Crim. App 1978) State V. McCary 119 S.W. 3d 226 (Tenn. Crim. App 2003) perm. App. Denied 2003. A court's decision on the propriety of a prosecutorial conduct is subject to review under an abuse of discretion standard. Sparks, Supra. The prohibition against comment on a defendant's exercise of my Fifth Amendment right not to testify is perhaps the most significant restriction on argument Griffin V. California in assessing the effect of inappropriate argument by the state the test established by the Tennessee Supreme Court is whether the improper conduct could have affected the verdict to the prejudice of the defendant Harrington V. State 215 Tenn. 338, 340, 385 S.W. 2d 758, 759 (1965). In State V. Buck 670 S.W. 2d 600 (Tenn. 1984) the Supreme Court adopted the factors to consider in analyzing whether the misconduct in question warrants reversal as set forth in Judge V. State 539 S.W. 2d 340, 344 (Tenn. Crim. App. 1976).

The Court must consider:

(1) The conduct complained of, viewed in light of the facts and circumstances of the case.

(2) The curative measures undertaken by the court and the prosecutor,

(3) The intent of the prosecutor in making the improper statement

(4) The cumulative effect of the improper conduct and any other errors in the record, and

(5) The relative strength or weakness of the case Buck, at 609

Applying the judge analysis to the current case, reveals that the prosecutor's misconduct prejudiced me and the conviction should be reversed.

The objectionable portion of the prosecutor's comments in closing argument were as follows:

Ms. Mcendree: Now when Ms. Barnes testified and she told you about her injuries she told you a lot about her injuries but no one ever asked her, I never thought to ask her, Mr. White never asked her no one asked her what was there right when you left and what was not there till two later.

Mr. White- Objection, your honor

Ms. Mcendree- and when exactly did your turn black

The Court- Excuse me

Ms. McEndree- No one asked her that

Mr. White- Objection your Honor

The Court- He's got an objection. What's your objection?

Mr. White- She's trying to put facts not into evidence in front of the jury

The Court- All I got to say is the jury heard the testimony from the witness, they have heard the statements of the attorneys and they will be the final arbiters of what was said from that witness stand

Ms. Mcendree- No one asked her that. And the law tells you not to speculate not to guess. The law tells you that you can't consider that the fact that he decided not to testify, but that's his right. But the law tells

you not to speculate and not to guess. And that means don't speculate and don't guess what he might have said had he got on the stand.

Mr. White- Objection, your honor.

The Court- I don't know if that's quite correct, general

Mr. White- Well, I want to put that on the record, what she's did is

The Court- Make it, Make it

Mr. White- That is prosecutorial misconduct. She is not allowed to argue that and she knows that as long as she's been around here. She is she is attacking his right not to testify. There is case law on this, your Honor. This is reversible error

The Court- I know about case law and the elements that go in to tie (sic) that, but it was an unfortunate statement. That's all I'm going to say.

Mr. White- Well and it was done intentionally

The Court- Yeah, but-

Mr. White- This is prosecutorial misconduct. I will be writing the board

The Court- Okay

Mr. White- I would like a jury instruction. This is serious, your Honor, he's looking at a lot

The Court- Well, I'll just tell the jurors to just disregard her statement.

Mr. White- It's more than that. That improper argument.

Ms. Mcendree- Judge Mr. White talked about the defendant giving several page and was asking them to speculate.

Mr. White- No, I didn't ask them to speculate

Ms. Mcendree- And without I was re-

The Court (indiscernible) before you finish it.

Ms. Mcendree- I was responding to his argument.

Mr. White- I did not say that.

Ms. Mcendree- And I didn't get to finish what I was saying with it. I apologize for the interference.

The Court- All right. You stated your reasons why you made it. For the record, and then there, if there's an adverse verdict, your know.

Mr. White- Well she can't go there anymore about his right not to testify.

The Court- She's not going to go there. Are you?

Ms. Mcendree- No

The Court then instructed the jury

The Court- All right ladies and gentleman of the jury, you will disregard the last words of the district attorney.

Consider the first factor, when one looks at the prosecutor's comment on defendant's decision not to testify she poison the jury's mind and circumstances of the case. A case in which the lack of credibility of the victim was the lynchpin of the defense, comment on the lack of account from defendant is highly significant and prejudicial.

The second consideration the curative measures taken by the court and prosecutor, argues in favor of a mistrial the court's instruction to the jury to just disregard the attorney generals last words was and inadequate attempt to offset such an egregious assault on my Fifth Amendment right not to testify.

The third factor under consideration is the intent of the prosecutor. The prosecutor argued that she was responding to defense counsel's statements. Thus it was not a slip of the tongue but an intentional argument, for which she saw fit to apologize. It should also be noted that defense counsel made a motion in limine prior to trial in order to prevent the prosecutor from arguing that the presumption of innocence does not mean actual innocence. The court granted the motion.

The fourth factor, the cumulative effect of the improper conduct and any others errors in the record, would appear to be minimal in the sense that there was only the one incident, albeit egregious sand highly prejudicial.

The fifth factor, the relative strength or weakness of the case is highly significant in this case. The state's evidence relied on the credibility of the victim, who lie's many of the time on the stand. There was no medical evidence supporting aggravated rape. The DNA evidence was inconclusive to exculpatory. And

the inconsistency in the various version of the victim's account of the events of December 16, 2009 rendered her credibility highly suspect.

The prosecutor's attack on defendant's decision not to testify, viewed under the facts and circumstances of this case was prejudicial to the extent that it could have affected the verdict to the prejudice of the defendant Harrington, at 340.

Therefore, Defendant's conviction should be reversed.

DID THE INEFFECTIVE ASSISTANCE OF COUNSEL DPREIVE THE PETITIONER OF MY RIGHT GUARANTEED BY THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION. REGARDING THE FAILURE TO INVESTIGATE OR INTERVIEW WITNESSES WAS CONTRARY TO, OR UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED SUPREME COURT LAW

I would show that I was deprived of my rights guaranteed me by the United States Constitution and the Tennessee Constitution by the ineffective assistance of counsel (and such failure was governed by the standards set forth in Strickland V. Washington 466 U.S. 668 104 S. Ct. 2052. 80 Led. 2d 674 (1984). As the Tennessee Supreme Court has held in Finch V. State 226 S.W. 3d 307 315-16 (Tenn. 2007). In order to prevail on my claim of ineffective assistance of counsel, I must establish both that my lawyer's performance was deficient and that he deficient performance prejudiced my defense Strickland. Strickland at 116. I was unfamiliar with the Rules of the Court and the legal process and put my faith in my court appointed counsel to protect my right to a fair trial. The United States Supreme Court said it best in the case of Kimmelman V. Morrison 477 us. 365. 378. 106 S. Cit 2574, 2584 al Led. 2d 305 (1986). Layman will ordinarily be unable to recognize the counsel's errors and to evaluate counsel's performance of Powell V. Alabama 287 U.S. 45. 69. 53 Sct 55 77 Led 158 (1932). Consequently, a criminal defendant will rarely know that I have not been represented competently until after the trial or appeals, usually when I consult another lawyer about my case. Indeed my an accused will not often realize that I have a meritorious ineffectiveness claim until I begin collateral review proceedings particularly see also Powell V. Alabama at 64. Even the

intelligence and educated layman has small and sometimes no skill in the science of law. When I was charged with a crime, I was incapable generally determining for myself whether the indictment is good or bad. I was unfamiliar with the rules of evidence. Left without the aid of counsel, I might be put on trial without a proper charge and convicted upon in competent evidence or, evidence irrelevant to the issue or otherwise inadmissible, I require the guiding hand of my counsel at every step in my proceedings against me.

I will show this Honorable Court the locations and the errors. Trial Counsel failed to file any Pretrial Motions my counsel did not file any Pretrial Motions in the case of US V. Motos 905 F. 2d 30 (2nd Cir. 1990) which is on point with the instant case. Because the Trial Counsel's willingness to accept the Prosecutor's version of facts and failed to file any motions. Because he relied on the prosecutor's version and did not do his own investigation or interview witnesses. My counsel's representation is in serious question or inadequacy. Trial counsel failed to file a Motion to Dismiss the Indictment. The indictment was multiplications with two different theories and six counts of Aggravated. The Sixth Circuit Court of Appeals in the case of U.S. V. Swafford 512 F. 3d 833, 844 plainly states multiplicity is charging a single offense count in an indictment. United States V. Lemons 941 F 2d 304, 317 (5th Cir 1991) multiplicity may result in a defendant being punished twice for the same crime, United States v. Brandon 17 F3d 409 (1st Cir. 1994) or may unfairly suggest that more than one crime has been committed. United States v. Dixon 921 F. 2d 194 (8th Cir. 1990). To determine if multiplicity exists, a court must first look to whether Congress intended to punish each statutory violation separately. Pandelli v. United States 635 F 2d 533 (6th Cir. 1980) quoting Jeffers v. United States 432 U.S. 137. 155. 97 S. Ct. 2207 53 L Ed. 2d 168 (1977). Where this inquiry does not resolve the issue the general test for compliance with the double jeopardy clause looks to whether each provision requires proof of a

fact which the other does not, United States v. Davis 306 F 3d 398 417 (6th Cir. 2002) citing Blockberger v. United States 284 U.S. 299, 304, 52 S. Ct. 180 76 Led 306 (1932) see United States v. Medina 992 F2d 573, 588 (6th Cir. 1993). But in examining whether the elements overlap the Blockberger Analysis does require us to go further and look to the legal theory of the case or the elements of the specific criminal clause of action for which the defendant was convicted without examining the facts in detail. Pandelli 635 F2d at 538. In the instant case by the defense attorney not attempting to get the indictment dismissed this allowed the prosecution to place before the jury six counts of one (1) count and gave the prosecution (2) theories in which to prosecute me this also caused me to be sent to trial on double jeopardy law. When all the charges are actually one instead of (6) counts for the exact same thing. I told my attorney that I had a charted witness that would testify on my behalf. My attorney did not investigate or attempt to interview this witness. My attorney never visited the crime scene if he had he would have saw there was not a alley there because she said I came up behind her and put something in her back in the ally on Henderson Street. If he would have gone to the crime scene he would have seen there is no Henderson Street. If he would have visited the area he would have been able to establish that the victim's story was in fact false. And also m y attorney could have been able to obtain a sample of the presumed blood on the wall and had it tested instead of totally depending on the state's word. He should have investigated my case his self and came up on a trial strategy, it would have been reasonably conducted lest the strategic choice erected upon a rotten foundation.

WHETHER THE EVIDENCE IS SUFFICIENT TO RATIONAL TRIER OF FACT TO FIND DEFENDANT GUILTY OF AGGRAVATED RAPE BEYOND A REASONABLE DOUBT AS REQUIRED BY JACKSON V. VIRGINIA AND RULE 13(e) TENN. R. APP. PROC.

When reviewing a defendant's claim that the evidence is not sufficient to support the verdict, the reviewing court must determine whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (Jackson v. Virginia 443 U.S. 307 (1979) Rule 13(e) Tennessee Rules Appellate Procedure). In making that determination, the reviewing court must afford the State the strongest legitimate view of the evidence and make all reasonable inference which can be drawn from that evidence. State v. Harris 839 S.W. 2d 54 (Tenn. 1992), State v. Hanson 279 S.W. 3d 265 (Tenn. 2009). A jury verdict approved by the trial judge accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State, State v. Williams, 657 S.W. 2d 405, 410 (Tenn 1983). A conviction removes the presumption of innocence and places on the defendant the burden of proving the evidence to be insufficient to sustain the verdict. All questions of credibility, weight and value of evidence and issues of fact are matters for the jury, and the reviewing court will not re-weigh or re-evaluate the evidence. State v. Lewter, 313 S.W. 3d 745 (Tenn. 2010) Reh. Denied 2010, State v. Winters 137 S.W. 3d 641 (Tenn. Crim. App. 2003). Defendant respectfully contends that the evidence presented at his trial was not sufficient for a rational trier of fact to find me guilty of Aggravated Rape beyond a reasonable doubt. Just a testimony from a victim should have not been enough for a conviction. The State is required to prove beyond a reasonable doubt that I

sexually penetrated the victim by force or coercion while armed with a weapon or with an article fashioned in a manner to lead the victim to reasonably believe it to be a weapon, or that I caused the victim bodily injury. There is no physical evidence no any DNA evidence to support Aggravated Rape. No weapon was found and the police were parked across the street. The victim's account of the incident was not credible. It was inconsistent and illogical. Who would go down a dark alley when a stranger is following them and there is not an alley over there. I pray and ask that the court give me a new trial.

REASONS FOR GRANTING THE PETITION

THE PROSECUTOR POISON THE SURY WHEN SHE ATTACK MY RIGHT NOT TO TESTIFY AND THE EVIDENNCE WAS INCONCLUSIVE TO EXCULPATORY THE DNE DIDNOT MATCH MY AND THEY COULD NOT PROVE A RAPE HAPPEN. THE VICTIM ACCOUNT OF THE INCIDENT WAS NOT ACCURATE. HER STATEMENT WAS INCONSISTENT AND ILLOGICAL. MY LAWYER DID NOT DO NO INVESTIGATE OR INTERVIEW WITNESSES BEFORE I WENT TO TRIAL HE JUST WENT WHIT THE PROSECUTOR CASE. AND I'M NOT A LAWYER I'm JUST DOING MY BEST ON THIS PETITION AND I HOPE YOU TAKE THIS PETITION THIS TIME AND GO OVER IT.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Byron Beeton 219081

Date: 7-27-2020