

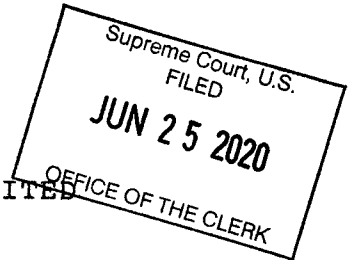
20-5483

IN THE SUPREME COURT OF THE UNITED STATES
JUNE TERM 2020
No. _____

ORIGINAL

DION BLACK
Reg. # A-741-043
London Corr. Institution
P.O. Box 69
London, Ohio 43140 petitioner,
-vs-

NORMAN ROBINSON, Warden
London Corr. Institution
P.O. Box 69
London, Ohio 43140 Respondent.



ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

I. QUESTION PRESENTED

Should the petitioner have been granted a certificate of appealability where the State courts, U.S. District Court and Sixth Circuit Court of Appeals determined that the State court judgment did not violate the double inference rule by relying on evidence not of record in violation of the petitioner's right to confrontation and effective cross-examination of adverse witnesses against him contrary to this Court's holdings in *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 745 (1927) & *Gray v. Mississippi*, 481 U.S. 648, 107 S.Ct. 2045 (1987)

II. PARTIES

The petitioner was convicted in the Montgomery County Court of Common Pleas (Ohio), for possession of heroin which was affirmed by the Montgomery County, Ohio Court of Appeals and summarily affirmed by the U.S. District Court for the Southern District of Ohio at Dayton and the U.S. Court of Appeals for the Sixth Circuit and the respondent herein is the warden of the London Correctional Institution, London, Ohio.

III. JURISDICTION

This Supreme Court of the United States retains jurisdiction to act, pursuant to 28 U.S.C. Section 1254(c) & 28 U.S.C. Section 2101(c)

IV. CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

In re Winship, 397 U.S. 358 (1970); *Jackson v. Virginia*, 443 U.S. 307 (1979); Ohio Revised Code Section 2901.05(A)

V. STATEMENT OF THE CASE

The facts as found by the Ohio courts, the district court and federal court of appeals found the facts as follows:

Dion Black a pro se Ohio prisoner appealed the district court's judgment denying his petition for a writ of habeas corpus under 28 U.S.C. 2254. The appeals court construed petitioner's notice of appeal as an application for a certificate of appealability and a request to proceed in forma pauperis.

A jury convicted petitioner of possession of heroin and cocaine. The trial court sentenced him to a total of eleven years of imprisonment. The Ohio Court of Appeals affirmed. *State v. Black*, No. 27888, 2018 WL 6435759 (Ohio Ct. App. Dec. 7, 2018). Petitioner then moved to reopen his appeal under Ohio Appellate Rule 26(B) claiming ineffective assistance of appellate counsel. The Ohio Court of Appeals denied the request to reopen the appeal of right. *State v. Black*, No. 27888 (Ohio App. Apr. 12, 2019). The Ohio Supreme Court did not accept jurisdiction. *State v. Black*, 126 N.E. 3d 1171 (Ohio 2019). (table).

Petitioner then filed a 2254 petition in the district court, claiming that the evidence was insufficient to convict him and that he received ineffective assistance of appellate counsel. A magistrate judge screened petitioner's petition pursuant to Rule 4 of the Rules Governing 2254 Cases and issued two reports and recommendations urging the district court to dismiss the claims as being without merit. The district Court adopted the magistrate judge's R&R over petitioner's objections and denied the petition. The district court denied petitioner an COA and the Court of Appeals affirmed the denial of an COA.

The essential facts relied upon by both the State and federal court to deny relief and an COA is as follows:

"Black's first claim is that the evidence was insufficient for the jury to convict him because its verdicts were impermissibly based on the stacking of inferences, i.e. basing one inference "solely and entirely upon another inference". State v. Doubas, No. 100777, 2015WL 4676110, at *6 (Ohio Ct. App. July 30, 2015). In viewing the sufficiency of the evidence claim under the AEDPA, the court gives the state court's judgment a double layer of deference. Brown v. Konteh, 567 F. 3d 191, 205 (6th Cir., 2009). In making this determination, the court does not re-weigh the evidence, re-evaluate the credibility of witnesses, or substitute [its] judgment for that of the jury. Second, even if the court concludes that a rational trier of fact could not have found the petitioner guilty beyond a reasonable doubt, it must defer to the state court's sufficiency determination as long as [it is not unreasonable. Jackson v. Virginia, 443 U.S. 307 (1979)(citing 28 U.S.C. 2254(d)(2)).

Postal inspectors obtained a search warrant to open a suspicious package that had been mailed to a fictitious address. the package held a candle containg almost nine ounces of heroin. "a postal inspector made a controlled delivery of the heroin to the address on the package. [Black] answered the door and accepted the package even though it was not addressed to him. When agents closed in on the house, to execute the search warrant, Black fled, flinging his cell phone and the package containing the heroin over a fence into a neighboring yard. Police recovered the package and a small amount of crack cocaine from Black's pocket and there were firearms and drug-paraphernalia inside of the house. State v. Black, 2018WL 6435759, at *1-2."

Both the district and court of appeals concluded that the petitioner knowingly possessed the heroin and determined that reasonable jurists could not debate their conclusions and denied petitioner a COA and dismissed the habeas corpus applicarion with prejudice.

REASONS FOR GRANTING THE WRIT

In the first instance and in his objections to the magistrate judge's report & recommendations, the petitioner objected that the State court's findings of fact were clearly erroneous because the testifying postal inspector testified at the State court trial that after a two-year span since the crime occurred, she could not identfy who she delived the suspect package to.

Accordingly, and pursuant to Federal Civil Rule 12(c), both the Magistrate judge and district court judge was required to accept the petitioner's initial allegations as true and draw all inferences therefrom. See: Peterson v. Teodosio, (1973), 34 Ohio St. 2d 161, (quoting: 2A Moore's Federal Practice 2341 Section 12.15; 5 Federal Practice & Procedure, Wright & Miller Section 1368).

Accordingly, if the magistrate judge and district court accepted the petitioner's initial allegations as true and drew all reasonable inferences therefrom as required by Federal Civil Rule 12(c), then reasonable jurists could conclude that where the State and federal courts concluded that the postal inspector positively identified the petitioner as the person who actually received the drugs from her such courts were not basing their conclusion upon record evidence but the judge's own personal recollection.

If true then such judge's deprived the petitioner his fundamental right to to confront his accusers and to the effective cross-examination of such judges in violation of this Court's holding in Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437 (1927).

In addition after accepting petitioner's initial allegations as true that the postal inspector did not testify that it was him that accepted the suspect package it remains that the jury's verdict did rest upon them making and stacking an inference on an inference.

If so, then both the State and federal courts attempted to 'cure' this constitutional infirmity by committing the second constitutional violation of basing their ultimate decision not upon record evidence, but rather upon the court's own personal opinion in violation of Tumey v. Ohio, supra.

However, this Supreme Court of the United States has made it clear that a court may not cure one constitutional error by committing a second constitutional error. Cf. Gray v. Mississippi, 481 U.S. 648, 107 S.Ct. 2045 (1987).

Conclusion

Wherefore, after accepting petitioner's initial allegations as true and drawing all reasonable inferences therefrom, reasonable jurists could conclude that petitioner's conviction rests in violation of the double inference rule and that both the State and federal court decisions do not rest upon credible State court evidence, but rather on the several judge's own personal opinions, constitutional structural defect error has occurred in this case.

For all of the foregoing reasons, reasonable jurists could debate whether the courts below are correct in their resolution of this case and because constitutional 'structural defect' error may have occurred in this case, the case deserves encouragement to proceed further.

As a result, this Supreme Court should grant the writ of certiorari to the United States Court of Appeals for the Sixth Circuit with instructions to grant the petitioner a Certificate of Appealability.

It Is So Prayed For

Respectfully submitted,



Dion Black-Petitioner