No. 20-7202

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
FEB - 8 2021
OFFICE OF THE CLERK

Deon Anthony Romelle Bailey — PETITIONER
(Your Name)

vs.

United States of America "et al" — 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

Deon Anthony Romelle Bailey
(Your Name)

Hazelton U.S.P. P.O. Box 2000
(Address)

Bruceton Mills, WV 26525
(City, State, Zip Code)

(Phone Number)

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Questions Presented

Did the Eighth Circuit decision improperly deny Petitioners Rule 11 C 1 violation by failing to remand to give Petitioner the opportunity to plead anew?

Does Rule 11 C 1 unequivocally place an affirmative duty on the District Judge to personally inform the defendant of the range of available legal penalties according to 841 b 1 C second offender?

Did defense counsel's failure to provide professional guidance to Petitioner regarding his statutory maximum sentence exposure prior to a plea violate his Sixth Amendent Right to effective Counsel?

Can a guilty plea be voluntary if a defendant doesn't posses the Knowledge or understanding of the law in relation to the facts, and was unaware that drug quantity were elements of the offense?

List of Parties

All parties appear in the caption of the case on the cover page

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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

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[X] reported at Eighth Circuit Court of Appeals; 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[ ] is unpublished.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 C to the petition and is

[X] reported at United States district court; 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[ ] is unpublished.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[ ] is unpublished.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 August 18, 2020.

[ ] No petition for rehearing was timely filed in my case.

[x] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: September 30, 2020, and a copy of the order denying rehearing appears at Appendix B.

[ ] 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

Due Process Clause Amendment V

The Right to have effective assistance of counsel Amendment VI

Due Process Clause Amendment XIV

18 USC § 4241

STATEMENT OF THE CASE

Proceedings Below

On July 16, 2015, the Grand Jury, sitting in the Northern District of Iowa, indicted Deon Bailey, in Count 1 with Distribution of Cocaine Base within 1,000 feet of Orange Park in Dubuque, Iowa, on March 12, 2015, in violation of 21 USC §§ 841(a)(1), 841(b)(1)(c), and 860 and in Count 11 with the same offense on March 18, 2015. Docket No. 2

The Indictment did not charge, or hint by statutory citation, any enhancement for being an Second Offender under the 851 Notice for a felony drug offense. The indictment charged Bailey with a substance containing a detectable amount of cocaine base. On or about November 12, 2016 Petitioner entered a plea of guilty to the indictment. In his Petition to enter a plea, he acknowledged that the penalty for the violation under 841(b)(1)(C) is zero to 20 years maximum. During the plea colloquy at the change of plea hearing, the Court, with neither objection, nor comment from the government, informed the Petitioner that the maximum penalty he could face was 30 years. The government made no mention of the possibility of any enhanced penalty based on Second Offender under the 851 Notice. Probation found the Petitioner was subject to a imprisonment range of zero and not more than 20 years imprisonment under 841(b)(1)(C), based upon the defendants status as an Career Offender under

4B1.1 and not under the 851 Notice. Probation based that conclusion on two convictions that occurred between 2007 and 2008. During the plea colloquy Petitioner made repeated attempts to find out base offense for a detectable amount of cocaine base. The elements of the offense were not clear in the charging Indictment. The Factual Basis for the plea was 1.06 grams of cocaine base. The drug quantity was less than 5 grams which corresponds to offense level 12. The Petitioner respectfully points out as follows: A violation of 841 b 1 C "after a prior conviction for a drug offense has become final" increases the maximum sentence from 20 years to 30 years. see Title 21 U.S.C. 841(b) 1 C and Title 21 U.S.C. pertaining to recidivist offenders. Petitioner had a 6th Amendment right to Counsel. The failure of cousel to provide professional guidance to a defendant regarding his statutory maximum sentence exposure prior to a plea may constitute deficient assistance. Petitioners right to be apprised of the Courts sentencing options... requires only that the Court inform the defendant of the applicable mandatory minimum and maximum sentence; The consequences of a guilty plea include "any maximum possible penalty, including imprisonment." Fed. R. Crim. P 11 (b) (1)(H). Here the plea agreement and the district court incorrectly advised Bailey that the maximum penalty was 20 years, when in fact it was 30 years according to law. the guilty plea cannot have been Knowing and voluntary, however, if a defendant does not receive reasonably effective assistance of counsel in connection with the decision to plead guilty, because the plea does not represent an informed choice. Counsel must be familiar with the facts and the law in order to advise the defendant of the options available. The plea was not in any way conditional and the Petitioner was not informed of any possibility that he could receive a maximum sentence of 30 years by virtue of his prior felony drug offense under 802 (44). After the plea was accepted by the Court, Probation determined that the Petitioner was an Career Offender and not an Second Offender by reason of the two prior convictions. On June 21st 2016 Petitioner was sentenced to 295 months in Federal Prison for 1.06 grams of cocaine base. 840 grams of cocaine base not charged in the Indictment was due to perpondence of the evidence without informing Petitioner that drug quantity were elements of the offense.

REASONS FOR GRANTING THE PETITION

The Petitioner Asserts that Counsel was Constitutionally Ineffective for failing to realize that the Court did not inform, or give notice to Petitioner of "the maximum possible penalty provided by law." The Court should have explained charges instead of relying on counsel to do so. Rule 11 C 1 unequivocally places an affirmative duty on the district judge to personally inform the defendant, inter, alia, the range of legal penalties. This was a violation of this Courts decision in Mc Carthy vs. United States {1991 U.S. App. LEXIS 15} States, 394 U.S. 459, 467, 22 L Ed. 2d 418, 89 S Ct. 1166 (1969), also see Harvey vs. United {927 F. 2d 1065} States, 850 F. 2d 388, 395 (8th Cir 1988). The Judge had a duty and explicit requirement personally, in open Court, or record, to determine defendant Knows and understands nature of charges. The Petitioner respectfully points out that the Court should be guided by the overriding principle that as a matter of fundamental fairness, a defendant entering a plea is entitled to notice of the charge and penalties to which he is exposed. Young 927 F.2d at 1063 and also see Matthews vs. United States, 114 F. 3d 112, 114 (8th Cir 1997). The District Court Judge denied petitioner 2255 on procedural grounds.

The Eighth Circuit Court of Appeals Decision was based on the District Courts procedural default ruling. Petitioner asserts, at least, that jurists of reason would find it debatable that petitioner states a valid claim. The standard of review should be de novo due to not being given notice of the statutory maximum penalty. see Change of Plea Hearing held on the 12th day of November, 2015 pg. 53:22, 55:17, 58:19, 75:25, 76:2, 77:23, 77:24 and 79:13. Page 55 lines 13-16 clearly explains petitioner was unaware of the max penalty being 30 years on each count due to 841 (b)(1)(C) Second Offender. Also see page 76 lines 2-3 which prove petitioners confusion of the maximum penalty. Page 79 line 13 proves the court was under the impression that Bailey understood the nature of the charges. At no time at all during the plea was petitioner aware of 30 year maximum penalty. Pursuant to Rule 10 (c) of the Rules of the Supreme Court, Petitioner seeks grant of this Petition for Writ of Certiorari because the Decision conflicts with that relevant decision of this Court. Pursuant to Rule 10 (a) of the Supreme Court, Petitioner also seeks grant of this Petition for Writ of Certiorari because the Decision conflicts with multiple Courts decisions with regard to Rule 11 c 1 requirements.

As noted, the Court is presented here with a situation in which a defendant entered a plea of guilty to a charge with a maximum penalty of 20 years. Rule 11 C 1 requires that the court inform a defendant of "the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law." see United States vs Young, 927 F.2d 1060, 1063 (8th Cir 1990). Petitioner asserts he was not given specific notice of the nature of the charges according to 841 b 1 C prior drug felony. Here the plea could not be voluntary in the sense that it constituted an intelligent admission that he committed the offense unless the defendant received "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process." Smith vs O'Grady, 312 US 329, 85 L.Ed 859, 61 S.Ct. 572. The Indictment did not charge Petitioner with 841 b 1 500 grams or more of cocaine base. In addition to Petitioner not being advised of the maximum penalty of 841 b 1 C second offender, the record does not make Petitioner aware that drug quantity are elements of the offense. The Indictment did not give notice of any drug quantity. see Henderson vs. Morgan, 426 U.S. 645, 59 L.Ed 2d 108, 96 S.Ct. 2253 (1976)

Petitioner's Asserts the Indictment did not specify drug amount. The factual basis for the plea was 1.06 grams of cocaine base. The indictment was not specific in regard to less than 5 grams of cocaine base. therefore petitioner was unaware of the offense level. An indictment must be specific in its charges and necessary allegations cannot be left to inference. Moreover, "an indictment must do more than simply repeat the language of the criminal statute." At the same time, an "indictment should be read in its entirety, construed according to common sense, and interpreted to include facts which are necessarily implied." Beyond the essential element requirement, an indictment must fairly inform a defendant of the charge. An indictment drafted in the generic wording of a statute may be, but is not necessarily, sufficient to achieve this end. However, where guilt depends so crucially upon a specific identification of fact, cases have uniformly held that an indictment must do more than simply repeat the language of the criminal statute." Hamling vs. United States, 418 U.S. 87, 118, 94 S. Ct. 1038, 8 L. Ed. 2d 590 (1974) Where the Rule 11 error results in a complete miscarriage of justice or a situation that is inconsistent with the rudimentary demands of fair proceedure, a defendant may collaterally attack a conviction with a claimed Rule 11 error. Ineffective assistance of counsel claims are governed by the two pronged test in Strickland vs. United States, 466 U.S. 668, 104 S. Ct. 2052, 80 L Ed. 2d 674 (1984) for a claim to be cognizable, (1) counsel's performance must rise to a level of constitutional deficency, and (2) the defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. see Eastin vs. Hobbs 688 F. 3d 911, 915 (8th Cir 2012) quoting Strickland 466 U.S. at 695, that the defendant was prejudiced by the dificiency. It is a violation of the due process for trial counsel to stipulate to prior convictions being used to enhance his sentence. Petitioner asserts counsel should have informed him that the prior drug felony of Conspiracy to Deliver Cocaine Base raised the statutory max to 30 years according to 841 b 1 C prior drug felony. The prior drug was used as a Career Offender Enhancement. This raises a genuine factual issue of whether Petitioner received actual notice of the precise nature of the charge against him. An erroneous stipulation is presumed prejudicial. see. Cox vs Hutto, 589 F. 2d 394, 296 (8th Cir. 1979) In the present case, defense counsel's representation fell below the prevailing norm by virtue of his failure to recognize defendant's status as a second drug felony offender. see Mask vs. Mc Ginnis, 28 F. Supp. 2d 122 (S.D.N.Y. 1998) also Pitts vs. United States, 763 F.2d 197 (CA 6 1985) Although Petitioner was informed of the 20 year maximum sentence that his plea subjected him to; nothing on the record established defense counsel, prosecutor, or the court (either separately or cumulatively) provided Bailey with sufficient information about the maximum sentence according to 841 b 1 C statue due to 1 prior drug felony. see. Jamison vs. Klem, 544, F. 3d 266 (CA3 2008) and Teague vs Scott, 60 F. 3d 1167 (CA 5 1995) Due to the Maximum sentence information being misrepresented Baileys sentencing exposure in a plea agreement was breached. Defense Counsel had a duty to advice his client fully on whether a particular plea to a charge is desirable. US vs Gordon, 156 F. 3d 376 (CA 2 1998) The petitioner asserts that his plea was not voluntary because his attorney did not advise him about the 30 year maximum penalty. A decision to enter into a plea agreement cannot be Knowing and voluntary when the plea agreement itself is the result of advise outside the range of competence demanded of attorneys in criminal cases "De Roo vs United States, 223 F. 3d 919, 923-24 (8th Cir 2000) quoting Hill vs Lockhart, 474 US. 52, 56, 106 S. Ct. 366 88 L Ed. 2d 203 (1985).

But a criminal defendant's "right to be apprised of the courts sentencing options... requires only that the court inform the defendant of the applicable mandatory minimum and maximum sentences." see Thomas vs United States, 27 F.3d 321, 326 (8th Cir 1994) As held in Thomas "the failure of defense counsel to provide professional guidance to a defendant regarding his statutory maximum sentense exposure prior to a plea may constitute deficent assistance." Id It is undisputed that the factual basis for the plea is 1.06 grams of cocaine base which corresponds to less than 5 grams for offense level 12, for a total of 36 months. At the same time the law does not allow the aggregation of second uncharged drug type (840 grams of cocaine base) when determining the statutory penalty range. Petitioners sentence was enhanced by 20 levels due to the uncharged drug type. Petitioner also asserts that his counsel was ineffective at sentencing for failing to argue agaisnt statutory penalty range, relying on Glover vs United States 531 U.S. 198, 121 S. Ct. 696, 148 L. Ed. 2d 604 (2001). and also see Alaniz vs United States, 351 F. 3d 365 (8th Cir 2003) The district court applied the statutory penalty range applicable to an offense comitted by a person with one drug felony involving a detectable amount. The dispute lies in the fact that Petitioners statutory maximum sentence was 30 years due to 21 USC 841 b 1 C prior drug felony. The prior drug felony was used as a Career Offender Enhancement when Petitioner had a 5^{th} and 6^{th} Amendment right to be informed of the nature of the charges. Moreover, those cases concluded that counsel's failure to object to a courts legal error constitues deficient performance. Glover, 531 U.S. at 203 (stating that a counsel's "failure to object to a courts legal error constitues deficient performance when the error of law affects the calculation of a sentence." Alaniz, 351 F. 3d at 368 (concluding that counsel "performed deficiently" by failing to object to a courts determination that had "simply no legal basis") In spite of counsel's failure to recognize the statutory max of 841 b 1 C's prior drug felony. The Petitioner respectfully asserts the Courts have a duty and explicit requirement personally, in open court, or record, to determine the defendant Knows and understands nature of charges. The Petitioner having showed by 8^{th} Circuit case law that counsel performed deficiently, the Court must turn to the question whether Petitioner was prejudiced by his attorneys deficient performance. Petitioner points out as noted in Cox vs Hutto, 589 F. 2d 394, 296 (8^{th} Cir 1979) petitioner never received actual notice of the max penalty according to 841 b 1 C second offender. Petitioner asserts had counsel objected at sentencing or on direct appeal that the district court cannot accept a plea in violation of Fed R. Crim P 11 the result of the proceedings would have been different. Petitioner asserts he would have went to trial Knowing he was facing 30 years maximum, as well as decline the plea.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Deon Bailey

Date: 2-8-2021