

20-7623
No. 21

SUPREME COURT OF THE UNITED STATES

MICHAEL DRAKE,

Petitioner,

vs.

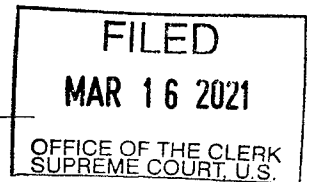
COMMONWEALTH OF PENNSYLVANIA

Respondent.

On Petition for a Writ of Certiorari to
the Superior Court of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

ORIGINAL



MICHAEL DRAKE, LK-2454

SCI Benner Township

301 Institution Drive

Bellefonte, PA 16823

Question Presented

Did the Pennsylvania Superior Court ignore the Sixth and Fourteenth Amendments when it found no issue with trial counsel's failure to protect his client from false prior bad acts information and no steps were ever taken to cure the issue by the trial court?

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PETITION FOR WRIT OF CERTIORARI

Michael Drake, an inmate currently incarcerated at State Correctional Institution Benner Township at Bellefonte, Pennsylvania, respectfully petitions this court for a writ of certiorari to review the judgment of the Pennsylvania Superior Court.

OPINIONS BELOW

The decision by the Pennsylvania Superior Court denying the Petitioner's appeal dated July 16, 2020 is attached at Appendix ("App.") at 1-11. The trial court opinion dated August 14, 2019 is attached at App. at 12-43. The Pennsylvania Supreme Court denied the Petitioner's petition for allowance of appeal on December 1, 2020. That order is attached at App. at 44.

JURISDICTION

Petitioner's petition for allowance of appeal to the Pennsylvania Supreme Court was denied on December 1, 2020. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257, having timely filed this petition for a writ of certiorari within ninety days of the Pennsylvania Supreme Court's judgment.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI, of the United States Constitution provides:

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

Amendment XIV, section 1, of the United States Constitution provides in part:

No State shall ... deprive any person of life, liberty, or property, without due process of law[.]

STATEMENT OF THE CASE

On November 28, 2010, police officers were called to a residence in Philadelphia. At approximately 5:38 a.m., officers found the Complainant covered in blood and she told officers she had been raped. Officers inspected the house and found blood upstairs, downstairs, and broken windows and a broken glass cabinet. She was transported to the Hospital. The Petitioner was arrested on July 19, 2011.

After numerous continuances, a trial was held, in absentia, on August 5, 2013. The Complainant was brought in to testify on a warrant after failing to appear for trial previously. She testified that she was on multiple prescription drugs for depression as well as high on marijuana laced with crack cocaine and under the influence of alcohol. She was also under supervision by the courts on a prostitution case. The Complainant stated that, on the night in question, she stopped by a bar on the way to her friend's house. She met the Petitioner at a bar on her way to meet a friend and they left together. It was extremely late at night, but she stated she was either going to babysit her grandchildren at her

boyfriend's or her boyfriend's children although her story was not consistent.

In either instance, the Petitioner and Complainant stopped at a store to get sundries before stopping at the Petitioner's house which was a block away from her friend's home. The trip took no more than ten minutes. She asked to use the Petitioner's bathroom because her friend would be home in five to ten minutes. She used the bathroom and when she attempted to leave she was punched in the face and raped. She asked to go upstairs to the bathroom again to look at her face and she did so. After she returned, she said he kissed her while she was bleeding from the mouth. When cross examined, she claimed he did not kiss her after she came down the stairs and she never said he kissed her. She said he was completely naked at this point. She punched through a glass cabinet to get a weapon because she feared for her safety. The Petitioner inexplicably gained a pair of jeans and fled the house after she obtained the broken glass. She went on to break out the front windows after he fled and obtained help from the neighbor. A tampon was removed from her at the hospital. During the course of her testimony, the complainant had many inflammatory outbursts. She also introduced false prior bad acts testimony that was unresponsive to the question asked by defense counsel. The exchange read as follows:

[Trial Counsel]: Ma'am, you said that you didn't know him, right?

[The Complainant]: I know he is the person that raped me. I did not know him. I know him from pointing him out in pictures to police officers and believing that he has a previous past of it, from what the officer is saying."

The Court: Ms. ...-

[The Complainant]: Can it just be over with?

The Court: Ms. ..., you need to answer the question, which is, Did you know

him?

[The Complainant]: No, I did not know him.

Appendix B at APP 7. Trial counsel never objected, moved for a curative instruction or asked for a mistrial. The trial court also did nothing.

Ultimately, the Petitioner was found guilty of aggravated assault, rape by forcible compulsion, sexual assault, and indecent assault by forcible compulsion. Subsequently, the Petitioner was apprehended. On February 7, 2014, Petitioner was sentenced to an aggregate sentence of twenty-to-forty years incarceration. Petitioner did not file any post-sentence motions.

On March 10, 2014, Petitioner filed a notice of appeal. On June 18, 2015, the Pennsylvania Superior Court affirmed the judgment of sentence. On April 18, 2016, Petitioner filed a timely pro se Post-Conviction Relief Act (PCRA) petition. On May 25, 2017, an amended PCRA petition was filed which claimed, among other things, ineffective assistance of trial counsel for failing to move for a mistrial or ask for a curative instruction due to inflammatory information and false prior bad acts testimony from the complainant. The petition was supplemented on October 27, 2018, Trial counsel dragged out the PCRA proceedings for months by refusing to cooperate in the process. The Commonwealth moved to dismiss the case, in part, because Petitioner could not obtain a witness statement from trial counsel due to his stonewalling that went on for nearly a year. On April 12, 2019, an evidentiary hearing was finally held and the trial court denied the PCRA petition.

On May 6, 2019, a notice of appeal was filed. Petitioner claimed that the trial court erred when it failed to find trial counsel was ineffective among other claims. On July 16, 2020, the Superior Court issued its opinion which affirmed the lower court. A petition for

an allowance of appeal was filed on August 14, 2020. The Pennsylvania Supreme Court denied allocatur on December 1, 2020. This petition followed.

REASONS FOR GRANTING THE WRIT

The Pennsylvania Superior Court is creating a bleak future where trial counsel can abdicate their duty to defend their client and complainants can say whatever falsehood they wish to unbalance a trial. Petitioners will have no recourse from this injustice unless this Court puts a stop to it.

It is settled that a criminal defendant is entitled to the effective assistance of counsel. See Strickland v. Washington, 466 U.S. 668 (1984). Petitioner was denied his right to due process under the Fourteenth Amendment and his Sixth Amendment right to counsel when his trial/direct appeal counsel failed to object, move for a mistrial, or ask for curative instructions when false prior bad acts statements and other inflammatory information was injected into the trial by the Complainant. Here, the Petitioner was charged with rape. The only witnesses to the majority of the events were the Complainant and the Petitioner. The defense theory of the case was a sex for drugs prostitution case where the Complainant became enraged after the drugs ran out. The case rested solely on the Complainant's credibility. During the course of a rape trial, the Complainant stated that the police told her the Petitioner had a history of rape. The Petitioner had no history of rape or any sexual offenses. The only other potential witness to the matter was not called by trial counsel even though her story contradicted the Complainant's. See Appendix A at APP 8-11. With so much resting on credibility, the false prior bad acts information unbalanced the case and deprived the Petitioner of a fair trial. This could have been prevented had counsel been effective.

A sample of the non-responsive statements made at trial are as follows: “The same way he raped me, he could rape somebody's kid.” “Let it happen to someone else's family member and then they can explain what I went through.” “What is the excuse for a man being less than a man being a animal? There is no excuse for a man being an animal.” Additionally, the complainant was non-responsive to a question on cross-examination and went on a tirade—too long to reproduce—about her substance abuse history, police interview, and the Appellant, which even prompted the prosecution to object. Other than the objection by the prosecution, to their own witness, there was no objection or attempt to put a stop to the injection of prior bad acts information and prejudicial remarks. If one goes over the notes of testimony, these outbursts occur whenever trial counsel came close to impeaching the Complainant. Instead of pressing on with impeaching the complainant, trial counsel was deterred and did not attempt to mitigate the damage caused by the outbursts.

This Court has previously held that prior bad acts evidence is inadmissible in a criminal prosecution as part of the government's case against the defendant. See Michelson v. U.S., 335 U.S. 469, 475 (1948). Although, here, the prosecution did not elicit the prior bad acts statement. Instead, the Complainant—an individual with a vested interest in seeing the Petitioner found guilty like the prosecution—did not answer the questions presented to her and introduced false prior bad acts information. If this Court objects to the prosecution's use of such information, it should also do so for individuals with a vested interest in seeing the Petitioner convicted. To do otherwise would be to open a back-channel for the entry of this destabilizing information with little recourse for defendants. The Superior Court of Pennsylvania, unfortunately, found no issue with this state of affairs. See Appendix A at APP 6-7. This is perplexing as they previously addressed a case exactly on

point and found issue with the situation. See Commonwealth v. Durant, 407 A.2d 1311, 1311-12 (Pa. Super. 1979) (holding a mistrial should have been granted where the mother of a child—who was alleged to have been sexually assaulted by the defendant—brought up the fact that the defendant recently had been released from prison.) Here, they seemed to ignore their prior holding and found that it was a valid strategy not object or ask for a mistrial so as not to bring attention to the statement, which makes no sense for multiple reasons.

First, trial counsel could have confronted this head on and essentially had the judge impeach the witness for him through a curative instruction telling the jury that what she stated was false and the Petitioner had no history of sex crimes. Trial counsel also could have asked for a mistrial. Instead, trial counsel did nothing and let a jury in a rape case believe his client was a serial rapist. This was not some passing event as the Complainant kept saying highly prejudicial comments that had no relevance to the case. The whole case rested on the complainant's credibility and she was allowed to unbalance the scales. The Superior Court even agreed that the strongest defense rested on showing the complainant's lack of credibility. See Appendix A at APP 10. A curative instruction would have cast trial counsel's client in a good light and undermined the Complainants credibility by showing she was lying. It makes no strategic sense to ignore that the jury just heard your client is a serial rapist when it is not true. Finally, the Superior Court said it was trial counsel's strategy not to bring attention to the statement. Trial Counsel never said that when he was asked about his strategy—even when prompted with the "right" answer by the Commonwealth. It is not in the record.

What absolutely sets this case apart from other cases is that the prior bad acts

information was entirely made up and no one did anything to correct the issue. It was also highly prejudicial because the fictitious prior bad act was the exact same charge that the Petitioner was facing. This Court previously noted that, “[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury [...] all practicing lawyers know to be unmitigated fiction.” Krulewitch v. U.S., 336 U.S. 440, 453 (1949). We have now reached the point where Pennsylvania courts are even disposing of the fiction that curative instructions can put the genie back in the bottle. With this holding, the Pennsylvania Superior Court is signaling that it just does not care if prior bad acts information is inserted into a trial—even false prior bad acts. This effectively strips a Petitioner of their presumption of innocence and mutilates due process. A complainant can now claim a Petitioner is a rapist, murderer, or whatever crime they dream up and there will be no relief due. The jury need not be instructed about those statements and trial counsel is absolved of all duty to prevent this injustice. This is abhorrent to any notion of a fair trial and it should not be allowed to stand.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court issue a writ of certiorari to review the judgment of the Pennsylvania Superior Court.

Date: March 15, 2021

Respectfully Submitted,



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