

No.

20-7643

Supreme Court, U.S.
FILED

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IN THE
SUPREME COURT OF THE UNITED STATES

NAFIS FAISON,
Petitioner-Appellant

v.

SUPERINTENDENT SMITHFIELD SCI, et al
Respondent-Appellee

On Petition for a Writ of Certiorari to the
United States court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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ORIGINAL

QUESTIONS PRESENTED

1. In applying *Minnesota v. Olson*, 495 U.S. 91 (1990), and *Minnesota v. Carter*, 525 U.S. 83 (1998), to a habeas claim based on the states unreasonable application of the Constitutional standard for [expectation of privacy] of a third party overnight guest, the federal court impermissibly added an element that otherwise does not appear, in violation of 28 U.S.C. §2254 (d)(1), that petitioner's fleeing the residence upon entry of the police eviscerated his standing as an overnight guest.

2. In applying *Illinois v. Gates*, 462 U.S. 213 (1983), to a habeas corpus claim based on the state's unreasonable application of the Constitutional standard for probable cause, in violation of 28 U.S.C. §2254 (d)(1), the federal court impermissibly concluded that police did not have to verify or corroborate averments in probable cause regarding a non-informants information to authorities, and that trial counsel was not deemed ineffective for failing to challenge warrant [probable cause] used to obtain trace and tracking device that lead to the petitioner's whereabouts and confiscation of drugs.

3. In applying *Steagald v. United States*, 451 U.S. 204 (1981), to a habeas corpus claim based on the state's unreasonable application of the Constitutional standard for police entry in a third party residence searching for the subject of an arrest warrant, in violation of 28 U.S.C. §2254 (d)(1), the federal court impermissibly held that police without exigent circumstances can enter third party residence without warrant.

PARTIES TO THE PROCEEDING

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

Petitioner Nafis Faison is a Pennsylvania state prisoner, who was sentenced to 5 to 10 years following a jury trial in Lycoming County, Pennsylvania.

Respondent Jamey Luther is the Superintendent at the prison where Faison was incarcerated at all relevant times.

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PETITION FOR WRIT OF CERTIORARI

Petitioner NAFIS FAISON respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit, denying Petitioner's appeal from the denial of his Petition for Writ of Habeas Corpus by the District Court for the Middle District of Pennsylvania.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A, and is unpublished.

The opinion of the District Court appears at Appendix B, and is unpublished. The state court opinion appears at Appendix "C."

JURISDICTION

The date on which the United States Court of Appeals decided the instant case was August 12, 2020. No petition for rehearing was filed in this case. This petition is filed within 90 days of the latter date.

Prior to the denial by the Court of Appeals, Petitioner filed a timely petition for writ of federal habeas corpus in the United States District Court for the Middle District of Pennsylvania, which was denied. The District Court denied a Certificate of Appealability (hereafter "COA").

~~The jurisdiction of this Court is invoked under 28 U.S.C. §~~
1254(1).

STATUTORY PROVISIONS INVOLVED

Amendment IV

The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment VI

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 defence.

ARGUMENT SUMMARY

" The poorest man may , in his cottage, bid defiance to all the forces of the Crown. It may be frail, its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force does not cross the threshold of the ruined tenement."

William Pitt before the British House of Commons addressing the need for PRIVACY- the protection of LIFE, LIBERTY and HAPPINESS.

Petitioner's rights as secured by the Fourth Amendment were allowed to be abridged, disregarded, due to another right that was lost; his right to have the assistance of counsel for his

This High Court's laws govern this great nation, and are not to be watered down or heightened without first consent from this Court. Within the arguments presented, its clear that the Third Circuit Court of Appeals overlooked or ignored clear precedent, by implementing additional protections to eviscerate basic rights, and on the other hand strip protections that were provided by this court which interfered with the right to be free from illegal searches and seizures.

STATEMENT OF THE CASE

Petitioner was charged with possession with intent to deliver a controlled substance and related drug offenses. At the conclusion of a jury trial, Petitioner was found guilty and the trial court thereafter sentenced him to an aggregated term of five to ten years' incarceration.

A timely appeal was filed in the Pennsylvania Superior Court in which that court affirmed the conviction. See Commonwealth v. Faison, 151 A.3d 1150 (Pa.Super.), appeal denied, 160 A.3d 756 (Pa.2016). The Pennsylvania Supreme Court denied allowance of appeal on October 25, 2016.

Thereafter, Petitioner filed a timely Post-Conviction Relief Act (PCRA) petition. Counsel was appointed and filed a no-merit letter, pursuant to Commonwealth v. Turner, 544 A.2d 927 (Pa.1988), and Commonwealth v. Finley, 550 A.2d 213 (Pa.Super.1988)(en banc). On May 15, 2017, Petitioner filed a pro se supplemental petition.

On July 13, 2017, the PCRA court denied the petition without an evidentiary hearing. A timely appeal was filed in the Pennsylvania Superior Court. The Superior Court affirmed the order of the PCRA court. See Commonwealth v. Faison, No. 1423 MDA 2017 (Decemeber 3, 2018). An allowance of appeal in the Pennsylvania Supreme Court was not filed.

Petitioner then filed a timely habeas corpus petition in the United States Middle district of Pennsylvania on December 21, 2018. The respondents filed a reply and Magistrate Karoline Mehalchick on October 31, 2019 issued a report and recommendation (R&R) that the petition be denied. Following objections United States District Court Judge Sylvia H. Rambo adopted the R&R.

Petitioner filed a notice of appeal in the district court seeking a Certificate of Appealability (COA) in the Third Circuit Court of Appeals. That court denied his request on August 12, 2020.

This timely certiorari petition follows:

STATEMENT OF PERTINENT FACTS

TRIAL FACTS

The evidence at trial established the following: The lessee was Demetrius Simpson (demetrius) who resided there with his nine year old son. Notes of Testimony (N.T.) 10/30/14, at 19. Demetrius one year old daughter stayed with him about three days per week. Id. Demetrius son had his own room and his daughter stayed in the same bedroom as Demetrius. Upon request, Demetrius allowed Petitioner to spend the night at his apartment. Id. at 21. When at his apartment, Petitioner typically stayed in the dining room and usually slept on the couch. Id. 29-30.

On December 12, 2013, Petitioner was the subject of a police investigation. Police learned that the property was a possible location for Petitioner.¹ Id. 69, 71. Police surveilled the property. Id. 71, 87. Police observed individuals going in and out of the apartment. Id. at 87. They appeared to stay only a few minutes. Id. at 94. According to the testimony of Demetrius, Petitioner had four visitors at the apartment on the day in question, two of who Demetrius knew; one stayed for 20-30 minutes, and another, Joshsea Colley ("Colley"), stayed for only 10-15 minutes.² After observing Colley leave the apartment, Police performed a traffic stop and "Terry frisk" on Colley. This revealed a clear baggy allegedly containing cocaine in Colley's left pocket and one Alprazolam pill in his front pocket of his jeans. Id. at 88, 91.

1. Notably, and will be discussed infra, the police only knew that Petitioner was at this location by unlawfully tracing his phone without probable cause.

2. Simpson left the apartment for a period of about 20 minutes to

Upon believing that Petitioner was in the apartment, police decided to make contact with the occupants of the second floor of the residence. Id. 72, 92³. Notably, police had ample time to retrieve a search warrant. Police knocked and banged loudly on the door of the aptment, and announced their presence. Id. 96-97. "[C]haos erupted as the Petitioner jumped out a second floor window." Id. 73:1,2. A loud crash bang-like crash noise sounded from the front of the house. Id. 93, 98.

Petitioner jumped out of the second floor bedroom window and fled the apartment. Id. 73. The only remaining individuals police found in the second floor apartment where Simpson and his nine year old son. Id. 92-93. Trooper Lance Thomas heard police yell that there was a runner. Id. at 102. The runner was identified as Petitioner. After a foot chase, police apprehended Petitioner. Id. at 104, 132. Police conducted a search of Petitioner incident to arrest and found \$3, 879.00 in his front of his left pocket.

Police searched the apartment and found after the protective sweep/ without a search warrant drugs. In the dining room/living room area, police found a black backpack sitting on the couch. Inside the black backpack, police discovered a grocery bag with 179.16 grams of cocaine, another package with 319.86 grams of cocaine and scale containing cocaine residue. Id. 145, 147, 179.

pick up his son, while Petitioner watched Simpson's one year old daughter. Id. 31.
3. After being in handcuffs, Colley allegedly admitted that the Petitioner had been in the apartment. Id. at 90. Trooper Kenneth Fishel observed Petitioner on the balcony of what appeared to be the third floor.

police also found a tan jacket hanging on the dining room table which contained 13.65 grams of cocaine in the front right pocket of the jacket. Id. 159.

Testimony showed that Petitioner had been staying in the dining room area and typically when he stayed at the apartment, overnight guest, he slept on the couch where the backpack was found. Police found the backpack on the same couch where an I-phone was charging. The telephone number of the I-phone was the same number listed as a contact for "Nore New" on Demetrius phone. Demetrius identified Petitioner as "Nore." Demetrius allowed others to stay at his apartment on other occasions, and those people would usually sleep on the couch. However, there was no testimony that anyone other than Petitioner was staying the night of December 12, 2013.

HABEAS FACTS

On December 12, 2013, Petitioner was residing in the residence of a close friend Demetrius Simpson (Simpson) at his apartment in Williamsport, Pennsylvania. At the same time, he was a fugitive with an arrest warrant for drugs.

The Williamsport Police Department unbeknownst to Petitioner had a trace and tracking device on his telephone. The trace and tracking device was able to be obtained and Petitioner traced to Simpson's apartment simply because Steven Williams had told his parole agent on a visit one day that petitioner's phone number was 570-692-0882. Based upon that information, his parole agent contacted Trooper Lombardo who then armed with this information from parole agent Tracy Gross, went to a magistrate and obtained permission to place a trace and tracking device on Petitioner's phone.

On the night in question, December 12, 2013, Police surveilled Simpson's apartment. Joshsea Colley (Colley) had went to Simpson's apartment, and stayed for about 15 minutes and exited. Police then stopped Colley's car and performed a "Terry frisk" and discovered a baggy containing cocaine, and one pill. N.T. 88; 91.

Knowing that Petitioner was in Simpson's apartment, and also knowing that Petitioner was not the lessee, police proceeded to the door of the apartment, knocked on the door. Id. 72, 92.

96-97. Petitioner upon entry of police jumped through the window, and was captured outside the apartment. Id. 73. Police then went back into third party's apartment after the protective sweep, and without a search warrant, searching for clothes for Simpson's son, discovered drugs.⁴

Significant to this certiorari petition, is the drugs were found after the protective sweep, while police were searching for clothes for Simpson's son while Mr. Simpson was in the house.

4. Police testified that Petitioner was seen standing in the doorway of the third floor prior to them approaching the residence.

1. In applying *Minnesota v. Olson*, 495 U.S. 91 (1990), and *Minnesota v. Carter*, 525 U.S. 83 (1998), to a habeas corpus claim based on the states unreasonable application of the Constitutional standard for [expectation of privacy] of a third party overnight guest, the federal court impermissibly added an element that otherwise does not appear, in violation of 28 U.S.C. §2254 (d)(1), that petitioner's fleeing the residence upon the entry of the police eviscerated his standing as an overnight guest.

.....

Preliminarily, the district court in denying relief opined the following:

"She correctly noted that as an overnight guest, petitioner enjoyed a 'legititmate expectation of privacy for as long as [he was] in the [apartment].' *United States v. Pettitway*, 429 F.App'x 132, 135 (3d Cir.2011)(citing *Minnesota v. Olson*, 495 U.S. 91, 98-99 (1990). That expectation, however, 'fails when the overnight guest departs the home' *Id.* As Magistrate Judge Mehalchick correctly noted, petitioner left the apartment and was arrested before police re-entered it. Accordingly, because petitioner was not present when the re-entry occurred, he would have lacked standing to challenge the re-entry and subsequent search. See *United States v. Harris*, 884 F.Supp.2d 383, 390 n.5 (W.D.Pa. 2012)."

The above ruling by the United States District Court for the Middle District of Pennsylvania is wrong. A review of the cases

relied upon by that court are misplaced and does not espouse that Petitioner's rights secured by the Fourth Amendment were lost when he left the residence.

In essence, the district court believes that your rights are forfeited if you flee from police. In other words, if police accost a citizen without probable cause, and that citizen flees, then, no matter if probable cause didn't exist for the initial encounter, your fleeing gives police complete free rein. There is absolutely no precedent, at least from this Court, supporting that proposition.

Assuming arguendo, the police enter a private dwelling, the police have no warrants, the home owner flees the residence, the police can then search the residence because the homeowner fled when they entered. That's the argument and belief that was used to deny Petitioner's habeas corpus petition.

The relevant habeas facts illustrate that, authorities did not have a warrant to enter Demetrius Simpson's apartment, notwithstanding, believing Petitioner to be in there for at least an hour, and having the premises secure. Simpson testified at trial, that Petitioner occasionally stayed at his apartment overnight, and stayed in the living room area. On the night in question, Simpson testified that Petitioner stayed overnight on the couch.

Authorities discovered the drugs in a book bag that was found on the couch. These drugs were attributed to Petitioner because of his connection to the premises searched. The district court's reliance on Minnesota V. Olson, 495 U.S. 91, 98-99 (1990), for its position that fleeing disembowels Petitioner's standing as an overnight guest, is misplaced.

This Court in Minnesota V. Olson, supra, established Olson's status as an overnight guest is alone sufficient to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable Id. at 90. In Minnesota V. Carter, 525 U.S. 83 (1998), this Court held, "Rather, to claim Fourth Amendment protection, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable. Id. at 85.

The district court added an element that has no place in the assessment of whether or not a citizen has a standing or not, in a third party's residence as an overnight guest. The question for this Court is, does that right diminish if a defendant flees an area where he has an expectation of privacy?

It merits mention that the police had no warrants. They essentially invaded a third party's residence, conducted a search without a warrant. The warrant that was eventually obtained, was obtained after the drugs were discovered. Searches and seizures inside a home without a warrant are presumptively unreasonable under the Fourth Amendment. See Payton V. New York, 445 U.S. 573

(1980).

Petitioner seeks this Court's indulgence in establishing clearly established law, that fleeing a residence upon police entry without a warrant does not invalidate a third party's standing. In actuality, because Minnesota v. Olson, supra, and Minnesota V. Carter, supra, stand for the proposition that an overnight guest enjoys a standing in a third party's residence, the United States District Court for the Middle District of Pennsylvania, was legally in error for making its own precedent while ignoring clearly established law by this Court.

2. In applying Illinois v. Gates, 462 U.S. 213 (1983), to a habeas corpus claim based on the state's unreasonable application of the Constitutional standard for probable cause, in violation of 28 U.S.C. §2254 (d)(1), the federal court impermissibly concluded that police did not have to verify or corroborate averments in probable cause regarding a non-informant's information to authorities, and that trial counsel was not deemed ineffective for failing to challenge warrant [probable cause] used to obtain trace and tracking device that lead to the Petitioner's whereabouts and confiscation of drugs.

.....

The District Court for the Middle District of Pennsylvania adjudicated this claim unreasonably, ignoring clear dictates from this Court on probable cause to issue search warrants. In this matter, it was probable cause to issue trace and tracking device on Petitioner's phone which enabled police to pinpoint his location to a second floor apartment on West Fourth Street, in Williamsport, Pennsylvania.

In finding the Pennsylvania Superior Court decision not contrary to or an unreasonable application of Illinois v. Gates, 462 U.S. 213 (1983), the district court stated the following: "The Pennsylvania Superior Court, in examining the affidavit in support of probable cause, noted that the parolee who supplied the number 'specifically identified and known to law enforcement, and could be held accountable for false information provided,' and also that the affidavit provided the name of the parole agent, the date and time of the interview between the parole

agent and the parolee, and stated that the parolee informed the agent that [petitioner] was in the area and using the street name of 'Mike' which was similar to name "Mickey" [petitioner] had used during controlled buys that had been conducted." district Court Memorandum at 7 adopting report and recommendation at 24; see also appendix "B."

For the sake of this argument, Petitioner has attached a copy of the affidavit at Appendix "D," the affidavit of probable cause that he believes infringed on his Fourth Amendment right to be free from unreasonable searches and seizures.

In Illinois v. Gates, this Court stated that sufficient information must be presented to the magistrate to allow that official to determine probable cause for issuance of search warrant; his actions cannot be mere ratification of the bare conclusion of others. The Pennsylvania Superior Court basically ignored this explicit requirement.

The affidavit for probable cause attached for this Court's review, is not sufficient for a trace and tracking device to have been placed on Petitioner's phone, as it is "bare-back" with hardly enough sufficient information for a detached magistrate to issue probable cause. Everything this Court held to solidify a sufficient showing was completely ignored.

For starter's, no where in affidavit does it state the reliability of the parolee who provided the information Steven

Williams knowledge that the phone number to be that of Petitioner; no where in the affidavit does it state that the police corroborated the information given to them by Steven Williams. See Gates, at 238, 241-42; Appendix "D."

Most importantly, the information provided to the affiant was transferred from the parole agent to affiant. No where does the affidavit state that the affiant personally had a conversation with parolee, Steven Williams. Therefore, the affidavit relied on uncorroborated double hearsay. *Id.*

Contrary to the Third Circuit Court of Appeals review, the Fourth Circuit Court of Appeals analysis interpreting Illinois v. Gates, *supra*, is in line with this Court's holding. "Because '[i]t is well settled that probable cause may be founded upon hearsay and information received from informants,' a judicial officer's assessment of probable cause based upon the totality of the circumstances must include a review of 'veracity and basis of knowledge of persons applying hearsay information.'" United States v. Perez, 393 F.3d 457, 461-62 (4th Cir.2004) (alteration in original) (citations omitted) (internal quotations omitted) (quoting Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); United States v. Dequasie, 373 F.3d 509, 518 (4th Cir.2004)). "Certainly, an informant's reliability may also be bolstered by '[t]he degree to which [the] informant's story is corroborated.'" *id.* at 462.

In the case at bar, the Middle District of Pennsylvania, ruled as if the prophylactic measures incorporated in Gates, is for show. In light of what has already been stated, Steven Williams never positively identified Petitioner, or stated how he knew that was Petitioner's phone number. Contrary to the state court's findings, there's no statement asserted within the affidavit that police knew Mr. Williams, other than that he was on parole.

The Middle District of Pennsylvania adjudication of this claim, upholding the Pennsylvania Superior Court's decision, was simply unreasonable. For example, according to the district court, because police knew Steven Williams, and he could be held liable for giving false information, that somehow relieves the police from adhering to this Court's clearly established dictates. That argument does not cut muster.

If left uncorrected, according to the Middle District of Pennsylvania/Third Circuit Court of Appeals, the occupants of a third party have little protection. Assuming arguendo there interpretation is correct. Steven Williams provides false information, he's held accountable. What about the citizens rights that were infringed, whose house was impermissibly search?

This is why this Court enacted verification, corroboration, to eleviate the heartace that would be caused by an unreliable source. Affidavit of probable cause must contain enough

information for a magistrate to make a detached determination that probable cause exist. The Fourth Amendment is not to be taken lightly.

3. In applying Steagald v. United States, 451 U.S. 204 (1981), to a habeas corpus claim based on the state's unreasonable application of the Constitutional standard for police entry in a third party residence searching for the subject of an arrest warrant, in violation of 28 U.S.C. §2254 (d)(1), the federal court impermissibly held that police without exigent circumstances can enter third party residence without search warrant.

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This Court in Steagald v. United States, 451 U.S. 204 (1981), explicitly held that the law enforcement officers could not, consistent with the Fourth Amendment, search for the subject of the arrest warrant in the defendant's home without first obtaining a search warrant, absent consent or exigent circumstances.

In the district court, the district judge adopted the Magistrate's report and recommendation (R&R) which stated: -

" the Superior Court stated that police do not violate the privacy rights of the subject of an arrest warrant when they enter the home of a third party without a search warrant in order to execute the arrest warrant of an individual whom they have a reasonable belief is inside or is living there." R&R at 26.

Considering the circumstances of the encounter between police and Petitioner, there was ample time for police to obtain a search warrant before entering the residence.

Interestingly, the Third Circuit Court of Appeals denied Petitioner's request for Certificate of Appealability relying on a circuit case in United States v. Agnew, 407 F.3d 193, 196-97 (3rd Cir.2005). In Agnew, the Third Circuit ruled that "even if Agnew, although not a resident of at 2740 Ludwig Street, did have a privacy interest, the entry did not violate his privacy rights. This Court held in Steagald, that the Fourth Amendment does not permit police to enter a third person's home to serve an arrest warrant on a suspect. But Steagald, protected the interests of the third-party owner of the residence, not the suspect himself. See *id.* at 212 (stating the issue to be "whether an arrest warrant-as opposed to a search warrant- is adequate to protect the fourth Amendment interests of persons not named in the warrant, when their homes are searched without their consent and in the absence of exigent circumstances")."

However, in 2016, the Third Circuit Court of Appeals decided U.S. v. Vasquez-Algarin, 821 F.3d 467 (3rd Cir.2016) ruled the opposite of its Agnew ruling. The Vasquez-Algarin, court relying on Steagald explicitly stated that law enforcement officers need both an arrest warrant and a search warrant to apprehend a suspect at what they know to be a third party's home. If the suspect resides at the address in question, however, officers need only an arrest warrant and a "reason to believe" that the individual is present at the time of the entry. *Id.* 473-74.

In U.S. v. Vasquez-Algarin, the authorities acted in the same manner as the police in the matter at bar. The only exception, was that in Vazquez-Algarin, the subject of the arrest warrant was not present. Instantly, Petitioner fled when police entered the third party's residence. In Vasquez-Algarin, there was no ambiguity about the application of Steagald. The question for the Vazquez-Algarin, court was, "how certain must officers be that a suspect resides at an is present at a particular address before forcing entry into a private dwelling? Distinguishing between Steagald and Payton v. New York, 445 U.S. 573 (1980).

Here, there is absolutely no precedent that allows police to enter a third party residence without some assurances. In fact, aside from the excerpt relied on by the Third Circuit in Agnew. The Steagald court elaborated on the essence of its ruling,

" However, the agents sought to do more than use the warrant to arret Lyons in a public place or in his home; instead, they relied on the moment as legal authority to enter the home of a third person based on their belief that Ricky Lyons might be a guest there. Regardless of how reasonable this belief might have been, it was never subjected to the detached scrutiny of a judicial officer. Thus, while the warrant in this case may have protected Lyons from an unreasonable seizure, it did absolutely nothing to protect petitioner's privacy interest in being free from an unreasonable invasion and search of his home. Instead, petitioner's only protection from an illegal entry and search

was the agent's personal determination of probable cause. In the absence of exigent circumstances, we have consistently held that such judicially untested determinations are not reliable enough to justify an entry into a person's home to arrest him without a warrant, or search of a home for objects in the absence of a search warrant" *Id.* at 451 U.S. 213.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Nafis Faison