

20-7658

NO.:

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

Johnny Rice - Petitioner;

V.

State of Indiana - Respondent;

FILED

MAR 08 2021

OFFICE OF THE CLERK
SUPREME COURT, U.S.

PETITION FOR WRIT OF CERTIORARI
to the UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

Attorney for Petitioner:

Johnny Rice

DOC # 249455

Wabash Valley Correctional Facility

P.O. Box 1111

CARLISLE, IN 47838

Petitioner/Pro se

QUESTIONS PRESENTED

1. Was trial counsel ineffective when he failed to suppress the affidavit due to the insufficiency of Count 1 and 2, Rape, and when counsel failed to seek a Franks hearing pursuant to Franks v. Delaware, 438 U.S. 154, 155-56 (1978), due to the affiant's reckless disregard for the truth opposing M.S. Consent statement that's on the face of the affidavit,

2. Was trial counsel ineffective for not deliberating the insufficiency of Count 1 and 2, Rape, and when counsel failed to Motion to Strike the insufficiency of Count 1 and 2, Rape.

3. Was Rice wrongfully charged with Count 1 and 2, Rape.

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:

Johnny Rice, Pro se, Petitioner

DOC # 249455

Wabash Valley Correctional Facility

P.O. Box 1111

Carlisle, IN 47838

Solicitor General of the United States

Respondent

Department of Justice

950 Pennsylvania Ave. N.W., Room 5614

Washington, D.C. 20580-0001

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully prays that this Honorable Court issue a writ of certiorari to review the judgment below.

OPINIONS BELOW

☒ For cases from Federal courts:

The opinion of the United States court of appeals appears at Appendix None to the petition and is-

☐ reported at None; 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☐ is unpublished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 A to the petition and is-

☒ reported at Rice v. Warden, 2020 U.S.

Dist Lexis 219622; 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☐ is unpublished.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 A~~ to the petition and is -

☐ reported at None; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

The opinion of the state trial court appears at Appendix B to the petition and is -

☐ reported at None; 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 None.

A copy of that decision appears at Appendix None.

☒ 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: , 20 , 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 , 20 , on 20 , in Application No. , and a copy of the order granting said extension appears at Appendix .

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 None.

A copy of that decision appears at Appendix NA.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied on the following date: None, and a copy of the order denying rehearing appears at Appendix NA.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including 20, on 20, in Application No. , and a copy of the order granting said extension appears at Appendix .

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (a).

CONSTITUTIONAL PROVISIONS AND STATUTES

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STATEMENT OF THE CASE

On September 16, 2014, Johnny Rice was arrested and charged with: Count 1 and 2, Rape of M.S.. Following a jury trial, on May 19, 2015, Rice was convicted of Count 1 and 2, Rape.

On June 4, 2015, Rice was sentence to thirty six (36) years for Count 1 and 2, Rape.

The Indiana Court of Appeals affirmed the judgments and sentences on direct appeal on March 15, 2016. *Rice v. State*, 49A02-1506-CR-614 Ind. Ct. App. (2015).

Rice petitioned for post-conviction relief in Marion County on May 31, 2017. The county court denied post-conviction relief on August 3, 2018. Rehearing was also denied on July 23, 2019.

The Indiana Supreme Court refused to grant transfer on October 3, 2019. Rice filed a timely Petition for Writ of Habeas in the U.S. District Court on Oct. 29, 2019. The petition was denied on Nov.

23, 2020.

Rice petitioned for a Certificate of Appealability in the United State District Court on December 11, 2020. The U.S. District Court denied the Certificate of Appealability on January of 2021.

Rice also petitioned for a Certificate of Appealability in the Circuit Court of Appeals on January 21, 2021. The Circuit Court of Appeals denied the Certificate of Appealability on March 3, 2021. This timely petition ensued.

STATEMENT OF THE FACTS

On September 11, 2014, officer with the Indianapolis Metropolitan Police Department (hereinafter "IMPD"), was dispatched to 4445 N. Mission Drive on a person assaulted run. (Tr. 23) (Probable Cause Affidavit pg. 16).

Upon arrival, officers spoke with M.S. (hereinafter "M.S."), who relayed that her live-in boyfriend, Rice had assaulted her.

That same day, IMPD Detective, Michelle Floyd, spoke to Rice who signed a rights waiver and agreed to speak with her regarding the allegations made by M.S. (Tr. 259-260).

According to Rice, on September 10, 2014, after he dropped M.S. off at work, he returned to his apartment where he met a young lady named Tiffany. (Tr. 264).

After a brief conversation, Rice exchanged numbers with Tiffany, returned to his apartment and later called Tiffany around noon. During the call, Rice and Tiffany made plans to get together that afternoon at his apartment. (Tr. 264-266).

However, Rice fell asleep and did not wake up until around 6:15 P.M., and was running late to pick M.S. up from work. (Tr. 266-267).

Then after Rice and M.S. arrived home, Rice asked M.S. for oral sex. (Tr. 267-269). The two, then, engaged in consensual oral sex. (Tr. 267-269).

Later that evening as Rice and M.S. were relaxing at home, Tiffany knock on the door, due to her (Tiffany) and Rice making plans earlier that day. (Tr. 264). Rice, not knowing what to do in a moment of possibly getting caught, invited Tiffany into their apartment. (Tr. 270).

Rice introduced Tiffany to M.S., she came in and they all went to Rice's bedroom.

Once there, Rice was drinking alcohol and M.S. and Tiffany were drinking and smoking marijuana. (Tr. 272).

At some point, Tiffany asked M.S., "What's wrong with you, bitch?" and M.S. responded, "Who you talking to, bitch?" (Tr. 272). Tiffany responded, "I'm talking to you, bitch," and swung and punched M.S. in the face. (Tr. 273).

The two ladies then began fighting (Tr. 273-274). Rice then tried to separate them to calm them down. (Tr. 273-274). Rice separated them several times, only to have them charge one another and begin to fight again (Tr. 275-276).

At some point, Rice noticed that someone was bleeding but could not tell at the time, whether it was one or the other, or both of them. (Tr. 274). Shortly thereafter, both women left the apartment and Rice awaited M. S. phone call but she never called (Tr. 277-278).

The following morning, Rice called M. S. sister and several hospitals in an attempt to locate M. S. (Tr. 278-279).

Later that day, Rice was visited at his apartment by IMPD Detective, Michelle Floyd (hereinafter "Detective Floyd"), he agreed to voluntarily waive his right to remain silent and assisted the police. Rice fully cooperated with police and provided information in hopes of furthering the investigation. (Tr. 328). (Probable Cause Affidavit pg. 20).

SUMMARY OF THE ARGUMENT

I. Trial counsel was ineffective when he did not argue - Insufficient Charging Information (Count 1 and 2, Rape) and when counsel did not suppress the affidavit when the sworn testimony of consent outweighs the totality of the hearsay alleged in the affidavit.

Counsel failed to acknowledge that the consent of M.S. upon the affidavit and at trial is contrary to the charges of Count 1 and 2, Rape.

Counsel also failed to act, by suppressing the affidavit, when the testimony of M.S. on the affidavit and at trial give clear and convincing statements of:

1. Consent;
2. M.S. never telling the defendant no,
3. No resistance,
4. A Rape never happening.

Counsel should have suppressed the affidavit.

Counsel should have sought an evidentiary hearing, but did not.

Counsel should have Motioned to Strike, but failed to do any of the above.

The crux of Rice argument is that if trial counsel would have acted, by pursuing any of the above listed:

1. Suppressing the affidavit
2. Seeking an evidentiary hearing, or
3. Motioning to Strike,

the defendant (Rice) would have never been charged, tried and convicted of Rape, or sentenced to thirty six (36) years, or had his fourth (4th), Sixth (6th) and fourteenth (14th) Amendment Rights violated, and would have resulted in Count 1 and 2, Rape being dismissed.

REASONS FOR GRANTING THE WRIT

I. Trial counsel was ineffective, when he did not argue - Insufficient Charging Information (Count 1 and 2, Rape) and when counsel did not suppress the affidavit, when the sworn testimony of consent outweigh the totality of the hearsay alleged in the affidavit.

Ineffective Assistance of Trial Counsel - Standard of Review

Petitioner's claims entitle him to post-conviction relief for ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); U.S. Constitution, Amendments VI and XIV. The standard of review for an ineffective assistance of counsel claim declares that a petitioner must prove both that (1) counsel's performance was deficient, and (2) that petitioner suffered prejudice from counsel's deficient performance.

Strickland, 466 U.S., at 688. To prevail, Rice must show a "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different."
Strickland, 466 U.S. at 687.

Deficient Performance

In the District Court, "Order Denying Petitioner Rice's Writ," the court exclaims that, "the Indiana Court of Appeals applied the correct standard to Mr. Rice ineffective assistance of counsel claims, and that Rice's ineffective assistance of counsel claims are nothing more than an attempt to relitigate his trial. (See Order Denying Petition pg. A2). When in fact, Rice is only pointing to facts within his trial that points to the ineffectiveness of his trial counsel.

The District court, also, claim that the Indiana Court of Appeals concluded that the charging information was supported by probable cause and that Mr. Rice had failed

to show that the accusations of forced oral sex were false ("Because M.S.'s additional statements, supported a Finding of probable cause that she was force by Rice to engage in oral sex through force and without her consent.) (See Order Denying Petition pg. A2).

On the probable cause affidavit the District Court agreeance with the Court of Appeals statement that, "M.S. was forced to engage" is undercut by her (M.S.) testimony to the detective. ~~that~~ M.S. stated on the probable cause affidavit that:

1. Rice asked for oral sex, and
2. she (M.S.) willingly gave Rice oral sex. (See Probable Cause Affidavit pg. 16, 17).

Also at trial (Rice's trial), the notion that M.S. was forced to "engage" is also undercut. The following discussion was held between defense counsel and M.S. at trial:

Q: Now he picked you up from work around 7:00?

A: 6:30

Q: 6:30 on the evening of the 10th, right?

A: Yes.

Q: and everything was fine in the car?

A: Yes.

Q: No problems?

A: No.

Q: and you came straight home?

A: Yes

Q: and things were relatively fine when you got home?

A: Yes

Q: And at some point he (Rice) asked you for oral sex?

A: Yes.

Q: and you gave him the oral sex?

A: Yes

Q: At that time he didn't threaten you?

A: No. That was consensual.

(Tr. 68-70) ATTACHMENT A

Clear evidence that show the accusations of forced oral sex are false (insufficient) and that Rice ineffective assistance of counsel claims stands on facts that show deficient performance and that Rice was prejudiced as a result. (Tr. 68-70) (Attachment A).

Trial counsel performance was deficient, when counsel failed to Motion to Strike the charging information (Count 1 and 2, Rape).

The primary deficiency was that counsel failed to acknowledge the consent of M.S. and that M.S. consent does not agree with the state charges of Count 1 and 2, Rape.

In the case at hand, the problem with the affidavit is not that it was based on the lack of personal knowledge, rather the affidavit does not establish that a Rape had occurred.

As a general rule, the sufficiency of the information is tested by the court by taking facts alleged in the information as true. The purpose of the information is to allege facts sufficient to support a conviction and to sufficiently charge a crime, so that a defendant may prepare a defense. (*Gilliland v. State*, 979 N.E.2d 1049, 1060 (Ind. Ct. App. 2012)).

In the defendant's (Rice) case, there was no sufficient factual information on the affidavit from which a neutral and detached hearing body could have reasonably concluded that probable cause existed to charge Rice with Count 1 and 2, Rape.

The affidavit gives no supporting details of a Rape or any witness alleging a Rape. There was no specific information as to what would be expected to confront at trial.

Det. Floyd never fully investigated the alleged victim's testimony before submitting the affidavit. The record shows that M.S. testimony was the essence of the State's case and the primary evidence in which the state use to charge Rice with Count 1 and 2, Rape. M.S. also informed Det. Floyd twice or more that the oral sex was done willingly. (Probable Cause Affidavit pg. 16, 17). M.S. provided specific detailed description of the event as to establishing consensual oral sex with her (M.S.) and Rice.

(Everroad v. State, 590 N.E. 2d 567)

Rice claim Det. Floyd sole basis for her probable cause for the Rape charges was of opinion or a hunch. Rice also claim that Det. Floyd affidavit of probable cause contained deliberate and reckless omissions of facts, and facts that tend to mislead. Rice also claim, he was denied a prompt appearance before a neutral and detached hearing body

after the affidavit was filed, due to a defective affidavit. (Franks v. Delaware, 438 U.S. 154).

Rice argue that trial counsel violated his Fourteenth Amendment Right to have effective assistance through the Sixth Amendment.

(See U.S. Constitution Article 1 and 13), (Strickland v. Washington, 466 U.S. at 668).

In regard of the multiple charges faced by Rice, Rice trial counsel was ineffective for not making a timely objection or motion to strike or quash the affidavit to dismiss Count 1 and 2, Rape, knowing that the consent of M.S. upon the affidavit and at trial opposing Count 1 and 2, Rape is a violation of Rice's Fourth, Sixth and Fourteenth Amendment Rights. (Probable Cause Affidavit pg. 16, 17), (Tr. 69-70).

Counsel also failed to acknowledge, that for the state to properly charge and sustain a charge of Rape (Count 1 and 2), the state must have enough information contained in the affidavit to prove that the act was against M.S. Will. On the face of the affidavit and during trial (Rice trial) M.S. stated plainly that she willingly

gave Rice oral sex (Probable Cause Affidavit pg. 16, 17) and that she (M.S.) never said "no." (Tr. 69-70).

Also, for the state to properly charge and sustain a charge of Rape, the state has to prove within the information on the affidavit that M.S. was in fear and showed resistance.

In this case, M.S. repeatedly testified on the affidavit and during Rice trial that without provocation she (M.S.) gave consent. Further testifying that after consenting, Rice began to abuse her and demand more oral sex. (Probable Cause Affidavit pg. 16-18).

Further testifying that during the course of being abused, that she (M.S.) was in fear, so she continued to provide the defendant with oral sex.

Further testifying that during the course of abuse and force that the defendant then stopped the abuse, drove her (M.S.) to the liquor store, and to Rice's mother's house while being left alone the whole time, came back to the apartment they shared and Rice resumed the abuse and forced oral sex.

While physical resistance by a victim is not required where it is prevented by threats and fear of injury, neither if a weapon is involved. (Tillman v. State, 274 Ind. 39, 408 N.E. 2d 1250; Dean v. State, 272 Ind. 446, 398 N.E. 2d 1270, 1980 Ind.).

But a victim must resist to a degree which would indicate that the act is against her will. (Carroll v. State, 263 Ind. 86, 324.

The notion that M.S. was in fear or showed a act of resistance with no way to escape is simply not supported by the facts in the probable cause affidavit (Probable Cause Affidavit pg. 16, 17) or her testimony at trial. (Tr. 69-71).

At trial, the following exchanged on this issue was had between M.S. and defense counsel:

Q: at some point he asked you for oral sex?

A: Yes.

Q: and you gave him the oral sex?

A: Yes.

Q: at that time he didn't threaten you?

A: no. That was consensual.

Q: okay. and like you said you didn't say no?

A: no.

Q: and you said that that happened for about an hour?

A: right.

Q: and during that oral sex it's your testimony that he hit you?

A: Yes.

Q: and he did that a number of times while you were performing the oral sex?

A: Yes.

Q: and after that he left the apartment?

A: (no response)

Q: after that first incident?

A: Yes.

Q: he went to the liquor store?

A: Yes.

Q: the two of you went?

A: Yes.

Q: he drove?

A: Yes.

Q: he went inside?

A: Yes.

Q: you stayed in the car?

A: Yes.

Q: by yourself?

A: Yes.

Q: You could have gotten out of the car?

A: Yes.

Q: could of left?

A: I could of. Yes.

Q: you also went to his mother's house?

A: Yes.

Q: he went up to the door?

A: Yes.

Q: you stayed in the car?

A: Yes.

Q: could of left?

A: Yes.

Q: could have walked away, right?

A: Yes.

Q: and when you came back home it's your testimony that you performed oral sex on Johnny?

A: Yeah.

Q: and at some point during that he injured you?

A: Yes.

(Tc. 69-21) Att. 20-21

Here, we have clear evidence proving consent and facts that there was no evidence of:

1. Threat or imminent threat, or

2. Force or deadly force, or

3. Compelling, or

4. resistance of any kind, or

5. M.S. ever telling Rice "No" when Rice ask M.S. for oral sex, or

6. M.S. not consenting.

To charge and convict the defendant (Rice) of Count 1 and 2, Rape, the State must prove each of the following elements beyond a reasonable doubt:

1. The defendant, Johnny Rice,

2. knowingly

3. perform or submit to other sexual conduct, that is: an act involving the sex organ of Johnny Rice and the mouth of M.S.

4. when M.S. was compelled by force, or imminent threat of force, and/or that:

1. when M.S. was compelled by deadly force or the imminent threat of deadly force,

2. and/or said act resulted in serious bodily injury to M.S., to-wit, fracture(s) to the orbital and/or nasal bone(s).

If the state fails to prove each of these elements beyond a reasonable doubt, you must find the defendant not guilty of rape, a Class

three(3) felony or rape, a class one(1) felony, as required in Count 1 and 2.

Facts and elements that have to be proven beyond a reasonable doubt in order to sufficiently charge Rice with Count 1 and 2, Rape. (See Ind. Code 35-42-4-1(f)(1)(3)).

The affiant has failed to meet the requirements contained in I.C. 35-33-5-2(b)(1)(2) and the requirement or elements contained in the Rape statute I.C. 35-42-4-1(f)(1)(3) because of M.S. testimony of consent. (Tr. 68-70), Affiant's merit.

Trial Counsel is therefore ineffective, representation falling below an objective standard of reasonableness, when counsel failed to move for a judgement of acquittal based upon the insufficiency of the evidence and information of the element of crime or affidavit. (Wesley v. State, 753 N.E 2d. 686).

Trial Counsel should have suppressed the affidavit, but failed to do so. Counsel should have also sought a Franks hearing pursuant to Franks v. Delaware, 438 U.S. 154, 155-156 (1978), but failed to do so.

Because counsel failed, Rice was wrongfully charged, held and convicted of Rape, also Rice Fourth, Sixth and Fourteenth Amendment Rights were violated, when counsel allowed Rice to be charge and convicted of Rape (Count 1 and 2), when counsel had first hand knowledge of M.S. consent statement on the face of the affidavit and refused to Motion to Strike and suppress the affidavit. (P.C.R. 38). Knowing that the information that the Detective relied upon was not reliable, and insufficient, and opposite of M.S. consent statement, (Crowe v. State, 251 Ind. 562), lacking probable cause to sufficiently charge Count 1 and 2, Rape.

The conclusion to be drawn is that there is clear evidence that:

1. M.S. consented,
2. M.S. never told Rice "No",
3. M.S. did not show resistance of any kind,
4. M.S. was not held against her will,
5. M.S. was not in fear,
6. M.S. was not forced,
7. M.S. was not threatened,

8. The state/affiant relied upon unreliable information;
9. The state/affiant failed to satisfy the elements contained in the Rape statute 35-42-4-1(F)(1)(B),
10. Counsel could have suppressed the affidavit dismissing Count 1 and 2, Rape,
11. Counsel could have Motioned to Strike the affidavit,
12. Counsel could have sought a Franks hearing pursuant to *Franks v. Delaware*, 438 U.S. 154, 155-156 (1978), (Probable Cause Affidavit pg. 16, 12), (Tr. 68-71). Facts that had to be proven in order for the state/affiant to sufficiently charge Rice with Count 1 and 2 Rape. (See Rape I.C. 35-42-4-1(F)(1)(B)). Also, facts that had to be within the information of the affidavit in order to satisfy the elements contained in the Rape statute 35-42-4-1(F)(1)(B). (See I.C. 35-33-5-2(b)(1)(2)).

Prejudice Incurred

The prejudice incurred from trial/counsel, when counsel failed to suppress the affidavit and/or challenge the state/affiant charge of Count 1 and 2, Rape, due to M.S.

sworn statement of consent. If counsel would have suppressed the affidavit, challenging Count 1 and 2, Rape, because of M.S. testimony of consent, Count 1 and 2, Rape would have gotten dismissed, due to the insufficient charging information, lacking reliable information to properly charge Count 1 and 2, Rape. It has been declared within the Supreme Court that when counsel fails to suppress evidence in an affidavit and challenge the veracity of a sworn statement used by police to procure a search warrant when the sworn testimony of consent out-weights the totality of hearsay alleged in the information used to issue and execute a warrant affidavit it may render the trial unfair, qualifying the defendant to invoke his Fourth, Sixth and Fourteenth Amendment Rights.

Also, if counsel would have sought a evidentiary hearing because of the defective affidavit, also because of M.S. testimony of consent, that would have proved that the affidavit lacked reliable information to properly charge the defendant with Count 1 and 2, Rape.

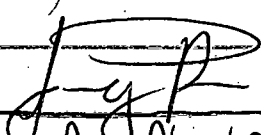
Counsel then, could have Motioned to Strike Count 1 and 2, Rape having both counts dismissed (Franks v. Delaware, 438 U.S. 154, 155-156 (1978)).

Facts and clear evidence that, but for counsel's unprofessional errors, there is a reasonable probability that the results of the proceedings would have been different. (Strickland v. Washington, 466 U.S. at 682).

CONCLUSION

Appellant, Johnny Rice, respectfully requests that this Court reverse the judgment of the United States District Court denying the Writ; grant the Appellant a Writ of Certiorari; and for any and all other just relief this Court deems necessary.

Respectfully submitted this 8 day of March, 2021.


Johnny Rice, Plaintiff-Appellant, pro se