20-7833

ORIGINAL

Supreme Court, U.S.
FILED
MAR 30 2021
OFFICE OF THE CLERK

No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

_____

In re DEMARCUS WRIGHT, PETITIONER

VS.

PAUL BLAIR, RESPONDENT.

ON PETITION FOR A WRIT OF HABEAS CORPUS TO THE

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF HABEAS CORPUS

DEMARCUS WRIGHT #1041671
POTOSI CORRECTIONAL CENTER
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573-438-6000

PETITIONER, PRO SE

QUESTIONS PRESENTED

1. Question: Has prejudice been shown where the prosecuting attorney, whether intentional or unintentional, allowed false evidence and inaccurate information to go uncorrected, and instead, elicited the false/perjured testimony of a State's expert witness to be presented in support of such false evidence and inaccurate information? Thus, the jury was not apprised of the fact that the State's expert witness was attesting to a DNA match that was actually inconclusive and not supported by the evidence in her possession.

2. Question: Has prejudice been shown where defense counsel failed to elicit through cross-examination and/or present evidence to the fact that, Petitioner's co-defendant and State's key witness had a bias, motive to lie, or interest to testify on bahalf of the party and office that had control over his pending charges. The prototypical bias standard was set out in Delaware v. Van Arsdall, 475 U.S. 673 (1986).

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner respectfully prays that a writ of habeas corpus issue to review the judgment below.

OPINIONS BELOW

This case is from federal courts:

The Opinion of the United States Court of Appeals for the Eighth Circuit appears at Appendix A to the petition and is unpublished.

The Opinion of the United States District Court appears at Appendix B to the petition and is unpublished.

The Opinion of the United States Court of Appeals for the Eighth Circuit regarding the petition for rehearing appears at Appendix C to the petition and is unpublished.

The Opinion of the United States Court of Appeals for the Eighth Circuit regarding the motion for leave to file a successive 2254 petition appears at Appendix D to the petition and is unpublished.

JURISDICTION

This case is from federal courts:

1. The date on which the United States Court of Appeals for the Eighth Circuit decided my case was April 03, 2009. A copy of the Order denying appeal appears at Appendix A.

2. The date on which the United States District Court denied the petition was September 28, 2007. A copy of the Memorandum and Order appears at Appendix B.

3. A timely-filed petition for rehearing was denied by the United States Court of Appeals for the Eighth Circuit on July 07, 2009. A copy of the Order denying rehearing appears at Appendix C.

4. A request for authorization to file a successive 28 U.S.C. § 2254 petition in the United States District Court was denied by the United States Court of Appeals for the Eighth Circuit on February 04, 2021. A copy of Order appears at Appendix D.

5. No petition for a writ of certiorari was filed in this case..

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that "no state shall ... deprive any person of life, liberty, or property, without due process of law."

The Sixth Amendment to the United States Constitution provides, in relevant part, that no person shall be denied the right to legal counsel in any criminal proceeding, and the effective assistance of legal counsel.

PROCEDURAL HISTORY

1) On April 13, 2000, a jury in the Circuit Court of New Madrid County, Missouri found Mr. Wright guilty of forcible rape, first degree burglary, second degree assault, and armed criminal action (Tr. 442-443; LF 42-45).

2) On May 23, 2000, Mr. Wright was sentenced by the Honorable Fred W. Copeland, in accordance with the jury's recommendation to consecutive terms of life, fifteen years, seven years, and life, respective to the four counts. State v. Demarcus Wright, No. CR199-35FX (34th Jud. Cir. 2000)(Tr. 453-454; LF 50-52).

3) Mr. Wright's convictions and sentences were affirmed on appeal in State v. Wright, No. SD23704. The Appellate Court's mandate issued on October 2, 2001 (PCR LF 12, 20).

4) On March 25, 2002, Mr. Wright filed an amended motion for post-conviction relief. The motion court denied Wright's Rule 29.15 post-conviction motion after an evidentiary hearing, issuing its findings of fact and conclusions of law on August 12, 2002, in Case No. 01CV753507 (PCR LF 2, 19-26).

5) The motion court's denial was affirmed on appeal in Wright v. State, SD25153. The Appellate Court's mandate issued on August 13, 2003.

6) On April 28, 2004, Mr. Wright filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United

States District Court, seeking to challenge his 2000 convictions and sentences. Wright v. Dwyer, No. 4:04-CV-00497-FRB (E.D. Mo. 2004). On September 28, 2007, the court dismissed the petition.

7) On February 7, 2008, Mr. Wright filed a notice of appeal, and on April 3, 2009, the United States Court of Appeals for the Eighth Circuit dismissed the appeal. Wright v. Dwyer, No. 08-1762.

8) A petition for rehearing was timely filed, and the United States Court of Appeals for the Eighth Circuit denied the petition for rehearing on July 7, 2009.

9) A request for authorization to file a successive 28 U.S.C. § 2254 petition in the United States District Court was filed and denied by the United States Court of Appeals for the Eighth Circuit on February 4, 2021.

10) No petition for a writ of certiorari was filed in this case.

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

GROUND ONE

THE PROSECUTING ATTORNEY, H. MORLEY SWINGLE, WHETHER INTENTIONAL OR UNINTENTIONAL, ALLOWED FALSE EVIDENCE AND INFORMATION TO GO UNCORRECTED, AND INSTEAD, ELICITED THE FALSE/PERJURED TESTIMONY OF SHIRLEY DENG, FORENSIC EXPERT TO BE PRESENTED IN SUPPORT OF SUCH FALSE EVIDENCE, AND THUS, PETITIONER, DEMARCUS WRIGHT WAS PREJUDICED AS A RESULT. HAD THE JURY IN THIS CASE BEEN APPRISED OF THE FACT THAT THE STATE'S FORENSIC EXPERT, SHIRLEY DENG WAS ATTESTING TO A DNA MATCH THAT WAS INCONCLUSIVE AND WAS NOT SUPPORTED BY THE EVIDENCE IN HER POSSESSION, THIS EXCULPATORY EVIDENCE COULD HAVE UNDOUBTEDLY AFFECTED THE JUROR'S JUDGMENT, AND THE OUTCOME OF PETITIONER'S TRIAL WOULD HAVE LIKELY BEEN DIFFERENT, AND PETITIONER WAS DENIED HIS RIGHTS TO DUE PROCESS OF LAW, AND TO A FAIR TRIAL, AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§ 10 AND 18(a) OF THE MISSOURI CONSTITUTION.

FACTS IN SUPPORT

In this case, the DNA evidence and the testimony of Dr. Robert W. Allen, Defense's expert on DNA (**Appendix E**) established that Petitioner, Demarcus Wright (Wright) did not accompany Shondale Tipler (Tipler) on July 24, 1999, when Tipler committed the crimes against Erin Schloss and Randy Koehler.

Christopher Davis and Dr. Robert W. Allen:

BY MR. DAVIS (CROSS-EXAMINATION):

Q. Okay, now, she references that Demarcus Wright has the genetic marker 21 in his DNA?

A. Yes.

Q. Do you agree or disagree with those findings as to her?

A. I disagree with the conviction with which she says it's a 21. You got, if you in fact, if we can refer to State's Exhibit of her gel.

(Tr. 374).

Q. So, basically, you disagree with the conclusion that she has Demarcus Wright having the number 21 genetic marker?

A. That's correct.

Q. Now in your opinion, when she says that the Defendant had the 21 allele in his DNA that report is being arbitrary?

A. It's arbitrary. I think she's assuming that it looks a little bigger than the 20, that's an assumption that it's a 21. And, moreover, we're talking here about his blood, that's not really the sample that's in question. The sample that's in question, and the only sample with respect to Mr. Wright that's in question is the number 4 panty stain, and not only the number 4 panty stain, but the number 4 panty stain that contains, that has the female fraction of DNA. So there's even some question as to whether or not his sperm was present in that stain in as much as sperm segregates or differently extracts into the male fraction, that harsher extraction

condition you apply to break open the sperm heads and liberate the male DNA.

(Tr. 377-378).

Q. Now, do you have any opinion, now for Shirley Deng to say that Demarcus Wright has that number 21 allele, do you have any opinion as to her standards and guidelines?

A. The entire test standard process, both of which use exactly this same technology to identify people . . . I don't think that there is, a standard written that said if it sort of looks like it's about the same distance above the top rung in your allelic ladder, you can all it the next logical sequential number in the series. I don't think there's a standard that allows that.

(Tr. 380).

In this case, it is clear that Shirley Deng, who is undoubtedly an agent of the State, was well aware of the falsity of her testimony when she gave it at trial. Even if the prosecution was unaware of the false testimony given by Ms. Deng, this knowledge is imputed to the State. Based on the testimony of Dr. Robert W. Allen (**Appendix E**), it is clear that an agent of the State gave false testimony, and the prosecutor allowed that testimony to go uncorrected after it was given. See Giglio v. United States, 405 U.S. 150, 153 (1972).

In this case, it is obvious that had the jury been apprised of the fact that the forensic expert was attesting to

a DNA match that was not supported by the evidence in her possession (**Appendix F**), this exculpatory evidence would have undoubtedly affected the judgment of the jurors in their deliberations. See U.S. v. Bagley, 473 U.S. 667, 678 (1985). Here, based on the foregoing facts, there can be little doubt that Wright's conviction was obtained through the use of perjured testimony, known by the prosecutor to be false when it was elicited. The following colloquy occurred between defense counsel, Christopher Davis and Shirley Deng, forensic expert for the State:

BY MR. DAVIS (CROSS-EXAMINATION):

Q. Now, for the mixture, your crime lab cannot do any statistics for the mixture of DNA?

A. Yeah, we don't do that.

Q. You were able for the non-mixture to assign results as far as Shondale Tipler goes, the stain on the panties is item 4M, that, chances are one in 2 point 3 million?

A. Yes.

Q. But you cannot do any statistics mixture of what you say Demarcus Wright's DNA cannot be included?

A. Yeah, our lab cannot do any statistics for the mixture.

(Tr. 353).

Q. Okay. Now, as far as Demarcus's blood sample, this right here, items 12, this is just from his blood that was taken?

A. Yes.

Q. And, these four, these items right here, the vaginal swab, the shorts, and the panties, these were provided to you from the crime scene?

A. Yes.

Q. Okay, in the vaginal swab, Demarcus Wright's DNA wasn't present at all?

A. I can say, I cannot call that his DNA in it.

Q. Okay, and now in the shorts, the, Demarcus Wright's DNA was not present?

A. The same way.

(Tr. 354).

Q. How do you know that there was a number 21 genetic marker present?

A. It didn't on the protocol and the company provided, and they labeled that, and, there were a 21 marker on the vWA.

Q. Okay, what if you arrived at that conclusion, what test did you do to arrive at the conclusion that he had that number 21 genetic marker?

A. His DNA, on the DNA analysis.

Q. Okay, did you compare that to a known allelic ladder?

A. Allelic ladder even at 20, but the company provided and they said they find, that, it was 11 and 21, evenly, also 11 not on the ladder. They said 11 and 21, 12 ladder were found, so it's not common, so that's the reason they didn't put it in the ladder.

Q. Well, the vWA system, what is the top one in your ladder?

A. We are running silver stain.

Q. Okay you compare the known next to an allelic ladder, right?

A. Yes.

Q. And the top rung in your allelic ladder is 20 isn't it?

A. Yes.

Q. Do you have any ladders that have 21?

A. For this manual they don't have 21.

Q. There are ladders that contain 21 that are available commercially, aren't there?

A. But it's not for that manual. If you use silver stain detection and you use this kit, you follow exactly what the manuals say.

Q. So the top rung in your ladder is 20?

A. Yes.

Q. And you compare that next to the known sample of Demarcus Wright's DNA?

A. Yes.

(Tr. 356-357).

Q. And, his DNA went outside your allelic ladder?

A. Yes.

Q. And because it went outside your allelic ladder, you found that, you concluded that he had the number 21?

A. Uh, you can see the size, and the distance, and, also depends on the manual, they said he had, there are 21, and, for this DNA marker.

Q. Well, let me ask you this way. If it's outside of your allelic ladder, does that always automatically mean it's a number 21?

A. No, it's outside that position we call it 21.

Q. Okay. Can you explain that to me?

A. For the ladder? And, you have all the ladder, the way you run the DNA, each ladder, the STR, and it's for the DNA place pair and so you have a certain distance, you can see the distance, if, it, of course, it's hard to say that, and, so you have and one ladder and then then each of that, and, each ladders have a certain distance. You know, when you count that, you continue from 12 to 20 for the vWA, and, he's 21 is just up and the same distance from like 19 to 25. So, we have 19, 20, and 21, so,

Q. Okay, but, again knowing the top rung in your allelic ladder is 20; is that right?

A. Yes.

(Tr. 358).

One of the most cherished principles of our criminal justice system, "implicit in any concept of ordered liberty," is that the State may not use false evidence to obtain a criminal conviction. Napue v. Illinois, 360 U.S. 264, 269 (1959). Deliberate deception of a court and jury is "inconsistent with the rudimentary demands of justice." Mooney v. Holohan, 294 U.S. 103, 112 (1935). Therefore, "a conviction obtained through the use of false evidence, known to be such by representatives of the state, must fall under the

Fourteenth Amendment." Napue, 360 U.S. at 269. Where it can be shown that the government knowingly permitted the introduction of false testimony, reversal is "virtually automatic." United States v. Stofsky, 527 F.2d 237, 243 (2nd Cir. 1975). The government also violates a criminal defendant's right to due process of law, guaranteed by the Fourteenth Amendment when it allows false evidence to go uncorrected when it is presented. Giglio, 405 U.S. at 155.

The prosecuting attorney, H. Morley Swingle, whether intentional or unintentional, allowed false evidence and information to go uncorrected, and instead, elicited the false/perjured testimony of Shirley Deng, State's forensic expert to be presented in support of such false evidence.

GROUND TWO

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO ELICIT THROUGH CROSS-EXAMINATION AND/OR PRESENT EVIDENCE TO THE FACT THAT SHONDALE TIPLER WAS PETITIONER, DEMARCUS WRIGHT'S CODEFENDANT AND STATE'S KEY WITNESS, AND TIPLER HAD A BIAS, MOTIVE OR INTEREST TO TESTIFY ON BEHALF OF THE PARTY AND OFFICE THAT HAD CONTROL OVER HIS PENDING CHARGES, AND PETITIONER WAS DENIED HIS RIGHTS TO DUE PROCESS OF LAW, TO A FAIR TRIAL, AND TO EFFECTIVE ASSISTANCE OF COUNSEL, AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§ 10 AND 18(a) OF THE MISSOURI CONSTITUTION.

FACTS IN SUPPORT

In this case, trial counsel failed to elicit through cross-examination and/or present evidence to the fact that Shondale Tipler (Tipler) was Petitioner, Demarcus Wright's (Wright) codefendant and State's key witness, and Tipler had a bias, motive or interest to testify on behalf of the party and office that had control over his pending charges.

At trial, Tipler testified that Petitioner, Wright was his accomplice in the crimes he committed on July 24, 1999. When Tipler's strong motives for testifying favorably for the State are considered; whether or not Tipler had "made a deal" with the State gives rise to a disturbing unease and undermines the

reliability of the verdict. When showing bias, it is not necessary to prove the existence of a deal or the State's willingness or unwillingness to deal. What is relevant is the witness' knowledge of these facts, his perception of expectancy of favorable treatment if he furthers the State's case, or his bias to fear harsh treatment if his testimony is unfriendly or fails to benefit the State. Here, this is especially true where the witness has pending felony charges and would be subject to enhanced sentencing. In exchange for plea of guilty and testimony at trial, the prosecutor, H. Morley Swingle dropped all charges against Shondale Tipler except for forcible rape, on which he agreed to recommend a sentence of twenty years (Tr. 244-245).

The bulk of the State's case rested on Tipler's credibility, which should have been subject to scrutiny, because (1) it was established from the State's expert witness, Shirley Deng that the DNA sample from the victim's panties was inconclusive when compared to Petitioner, Wright's DNA profile; (2) the fact that Tipler's sentencing hearing was strategically continued until after Tipler's favorable testimony; (3) the fact that H. Morley Swingle, prosecuting attorney was in a strategic position to have control over Tipler's pending charges; and (4) the cumulative effect of these combined factors clearly furnished Tipler a motive to lie and an interest to testify on behalf of the party and office that had control over Tipler's pending charges. Moreover, Tipler made

an affidavit recanting his trial testimony, indicating that Petitioner, Wright was not his accomplice in the crimes he committed on July 24, 1999 (**Appendix G**).

The legal and logical issues in the case at bar are identical to those in State v. Joiner. In Joiner, the court reversed and remanded for a new trial. The court determined it was possible that the State's witness believed the disposition of the two charges against him could be influenced by his testimony against defendant. The court determined, therefore, that the jury could have found that the witness's perception of the prosecutor's control over the charges pending against him furnished the witness a motive to lie. 823 S.W.2d 50 (Mo.App. E.D. 1991).

In State v. Lindh, 161 Wis.2d 324 (Wis. 1991), a decision by the Supreme Court of Wisconsin analyzed the prototypical bias standard set out in Delaware v. Van Arsdall, 475 U.S. 673 (1986). The Lindh court noted that although the [Supreme Court] did not specifically define "'prototypical form of bias,' the context of the case makes it clear that the Court was referring to a situation in which a witness might have or realistically perceive an interest in testifying so as to favor the prosecution." Lindh, 161 Wis.2d at 354.

In cases where there exists a prototypical form of bias, the possibility of bias, motive and interest of the witness is particularly distinct and immediate. The witness has an ongoing, dual relationship with the prosecutory actors. On the

one hand, the witness as such is being of some service to the prosecution by giving his testimony. On the other hand, his status with respect to the same prosecution is "vulnerable." Criminal process of some sort against the witness, even if only at its initial stages, is a reality. Usually, it is being carried out by the prosecuting attorneys who are depending on his service as a witness. At the very least, it is being carried out in the same jurisdiction as the one in which the witness is offering his testimony. Under such circumstances, there usually is a reasonable inference that the witness is or considers himself to be in a position of being effectively more or less "vulnerable" to factors that could influence his testimony. The witness's acts, relationship or situation with respect to the state might be likely to produce at least a strong suspicion of bias, motive or intent in the eyes of a jury. A jury might reasonably have found the evidence "furnished the witness a motive for favoring the prosecution in his testimony." Lindh, 161 Wis.2d at 356-57, quoting Van Arsdall, 475 U.S. at 679.

There was also a prototypical form of bias evident in State v. Lenarchick, 74 Wis.2d 425 (1976), where charges were pending against the witness. Prior to trial, one charge was dropped and two charges against the witness were being held open. Addressing the problem as one of constitutional dimension, the court said that:

"When a witness has been criminally charged by the state, he is subject to the coercive power of the state and can also be the object of its leniency. The witness is aware of that fact, and it may well influence his testimony."

Id. at 447-48.

Under such circumstances, this court held, "[a] defendant, as an ingredient of meaningful cross-examination, must have the right to explore the subjective motives for the witness' testimony." Id. at 448.

In this case, there is clearly an issue of prototypical bias, in that, the State's sole eye-witness, at the time of trial, had pending felony charges and awaiting sentencing. The same prosecutor who called this witness will ultimately have discretion in the disposition of his case. It is possible and even likely that Tipler believed the disposition of the pending felony charges against him may be influenced by his testimony. Thus, the jury could find the witness' perception of the prosecutor's control over the pending charges likely furnished Tipler a motive to lie.

Trial counsel, Christopher Davis was ineffective for failing to elicit through cross-examination and/or present evidence to the fact that Shondale Tipler was Petitioner, Wright's codefendant and State's key witness, and Tipler had a bias, motive or interest to testify on behalf of the party and office that had control over his pending charges.

REASONS FOR GRANTING THE PETITION

(1) The writ should issue because the U.S. Court of Appeals for the Eighth Circuit's denial of the petition for rehearing violated Petitioner's rights to equal protection of the law, and the court's ruling is contrary to U.S. Supreme Court precedence in Napue v. Illinois, 360 U.S. 264 (1959); Mooney v. Holohan, 294 U.S. 103 (1935); United States v. Stofsky, 527 F.2d 237 (2nd Cir. 1975); and Giglio v. United States, 405 U.S. 150 (1972), in that, the legal and logical issues in Petitioner's case are identical.

(2) The writ should issue because the U.S. Court of Appeals for the Eighth Circuit's denial of motion for leave to file a successive 2254 petition violated petitioner's rights to equal protection of the law, and the court's ruling is contrary to U.S. Supreme Court precedence and the prototypical bias standard set out in Delaware v. Van Arsdall, 475 U.S. 673 (1986).

COMPLIANCE WITH RULES 20.1 AND 20.4

In compliance with Rules 20.1 and 20.4 Petitioner states as follows:

1. The writ will be in aid of the Court's appellate jurisdiction, by establishing its precedence that will furnish a basis for determining an identical or similar case that may subsequently arise, or present a similar question of law.

2. Exceptional circumstances warrant the exercise of the Court's discretionary powers, in that, a constitutional violation has resulted. Thus, a manifest injustice or miscarriage of justice would result in the absence of habeas relief.

3. Adequate relief cannot be obtained in any other form or from any other court, as Petitioner has presented these issues before the Circuit Court of New Madrid County; Missouri Court of Appeals for the Southern District; United States District Court; United States Court of Appeals for the Eighth Circuit, all of which have denied relief.

CONCLUSION

WHEREFORE, based on the arguments presented herein, Petitioner respectfully moves this Honorable Court to issue a writ of habeas corpus, and reverse Petitioner's convictions and sentences, and the case be remanded for a new and fair trial, and Petitioner be allowed such other and further relief as the Court may deem just and proper.

Respectfully submitted,

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DATE: March 25, 2021