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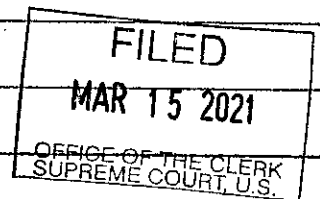
IN THE
SUPREME COURT OF THE UNITED STATES

Kevin Dunbar, Petitioner

ORIGINAL

- VS -

State of Arizona, Respondent



PETITION FOR WRIT OF CERTIORARI
AND APPEAL OF STATE COURT OPINION

Kevin Dunbar vs. State of Arizona

Pima County Superior Court No. CB-20152260-001

Arizona Appeals Court No. 2CA-CB18-0064

Arizona Supreme Court No. CB-20-0171-PB

Kevin Dunbar # 325047

ASPC-Tucson- Winchester Unit

P.O. Box 24401

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Kevin Dunbar

Kevin Dunbar, Pro se Representation

QUESTIONS PRESENTED FOR REVIEW

Was the petitioner's aggravated sentences was in violation of due process and conflicts with the United States Supreme Court holdings in Apprendi v. New Jersey and Blakely v. Washington when the Court not the jury found aggravating circumstances by ponderance of evidence

Was the petitioner's due process and double jeopardy were violated when the court imposed consecutive sentences for kidnapping and attempted first degree murder

Did the courts commit reversible error by denying petitioner's Faretta rights to self-representation when it ruled that the petitioner cannot represent himself no longer in Chambers without giving the petitioner notice

Parties To The Proceedings

Kevin Dunbar #325047, Petitioner

ASPC- Tucson- Winchester Unit.

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I. Was the petitioner's aggravated sentences was in violation of due process and conflicts with the United States Supreme Court holdings in Apprendi v. New Jersey and Blakely v. Washington when the Court not the jury found aggravating Circumstances by preponderance of evidence.	
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II. Was the petitioner's due process and double jeopardy protections were violated when the court imposed consecutive sentences for kidnapping and attempted first degree murder.

III. Did the Court's commit reversible error by denying petitioner his Faretta rights to self-representation when it ruled that the petitioner cannot represent himself no longer in Chambers without giving the petitioner notice.

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Petitioner, Kevin Dunbar, prays that this Honorable Court will issue a writ of certiorari to review the judgement and opinion of the Arizona Court of Appeals, Division Two, entered in the above proceeding on April 29, 2020.

CITATIONS OF OPINIONS AND ORDERS IN CASE

The original judgement of conviction of Petitioner in the Pima County Superior Court and is hereto attached as Appendix A

The original judgement of conviction of Petitioner was appealed to the Arizona Appeals Court, which affirmed conviction and sentences in part in its opinion attached hereto Appendix B

The Petitioner submitted a petition of review of the Arizona's Appeal Court opinion to the Supreme Court of Arizona is attached hereto as Appendix C

The opinion and order of the Arizona Supreme Court is unpublished and attached hereto as Appendix D

JURISDICTIONAL STATEMENT

The judgement of the Arizona Court of Appeals was entered April 29, 2020. The order of the Supreme Court of Arizona was entered December, 2021. The jurisdiction of this court is invoked under USCS Const. Art. III § 2, C12 "Supreme Court has appellate

jurisdiction, both as to law and fact," *Ableman v. Booth*, 62 U.S. 506, 16 L. Ed. 169, 1858 U.S. 676 (1859). "Supreme Court in exercise of its appellate jurisdiction, has power not only to correct errors in judgement under review but to make such disposition of case as justice requires." *Honeyman v. Hanan* 300 U.S. 14, 57 S. Ct. 350, 81 L. Ed. 476, (1937).

State Courts

"Supreme Court has appellate jurisdiction to review and correct judgement of state court..." *Mathews v. Zane*, 8 U.S. 382, 2 L. Ed. 654, 1807 U.S. 396 (1807); Supreme Court has appellate jurisdiction over judgements of state courts. *Cohens v. Virginia*, 19 U.S. 264, 5 L. Ed. 257, 1821 U.S. 362 (1821). "United States Supreme Court has jurisdiction to review state criminal convictions raising issue of indigent defendant's Constitutional right... have been violated." *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53, 1985 U.S. 52 (1985).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment of the United States Constitution Provides:

No person shall be... deprived of life, liberty, or property without due process of law; nor shall be compelled in any criminal case to be a witness against himself and Protection Against Double Jeopardy/Punishment.

2. The Sixth Amendment to The United States Constitution

Provides:

In all prosecutions, the accused shall enjoy the right to... by an impartial jury of the State... and to be informed of the nature and cause of the accusation, ... and to have the Assistance of Counsel for his defence.

3. The Fourteen Amendment of the United States Constitution

Provides:

... nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law

STATEMENT OF THE CASE

On March 11, 2015, Detective Buller, Tucson Police Department, filed a complaint against Petitioner without a sworn statement or affidavit with the Justice Court accusing Petitioner of five charges: 1) attempted first-degree murder, A.R.S. §§ 13-1105 & 13-110, 2) A.R.S. § 13-3102, Possession of Deadly Weapon by Prohibited Possessor, 3) A.R.S. § 13-1204(2), Aggravated Assault with deadly weapon, 4) Aggravated Assault, serious physical injury, A.R.S. § 13-1204(1) and 5) Kidnapping, A.R.S. § 13-1304. Subsequently, the Petitioner was arrested pursuant to fugitive warrant of alleged complaint in New York City, June 3, 2015.

On June 11, 2015, a Pima County grand jury returned a five count "Direct" indictment charging attempted first-degree murder, possession of deadly weapon, aggravated assault with deadly weapon, aggravated assault, serious physical injury and Kidnapping. A "Direct" Indictment is symbolic to a sealed Indictment which makes it unconstitutional because it cannot be filed after a complaint have already been lodged. On October 15, 2015, the New York County Court released Dunbar to the transportation officers to be extradited/transfer to the state of Arizona to answer to the charges. On October 27, 2015, petitioner appeared in the pima County Justice Court to answer to the charges.

On July 15, 2016, the Pima County Superior Court, Honorable Carmine Corneilio, grant Petitioner his Six Amendment right to self representation. Upon retirement of said judge, and appointment of new judge, Honorable Richard Fields, who consistently tried to persuade the petitioner to surrender his Sixth Amendment right to represent himself, ruled that the petitioner cannot no longer represent himself. This determination was made in the judge chambers and two weeks after the petitioner confirmed in a hearing that he still want to retain his right to self-representation. See B.T.

The Petitioner came to court prepared to start his trial

representing himself and was shocked when the court told him he no longer representing himself without notice and after the mental doctor found him competent. The Petitioner vow that he did not learned that advisory counsel submitted a motion to the court to waive Petitioner's Sixth Amendment right to represent himself and that the court made such ruling in Chambers two weeks before trial until the filing of the opening brief of his direct appeal by appellate counsel, violating his Faretta right. Petitioner objected to this. See R.T.

Pursuant to Arizona Rules of Criminal Procedure 13.5, the State filed notice of Aggravating Circumstances in November 2015. The state alleged three aggravated factors:

- 1) The defendant was previously convicted of a felony
- 2) Lying in wait
- 3) Physical, emotional harm. See Ex

During trial, the Petitioner took the stand and admitted to having a gun in his car. The State did not conduct a bifurcated trial or introduced the aggravated circumstances to the jury nor did the Petitioner waive his right for the jury to hear the aggravated factors, in violation of Apprendi.

On sentence day, without no previous notice, the state alleged as an aggravated circumstance and the court utilized, the possession and use of a deadly weapon

when it aggravated the Petitioner sentences, standing in violation of the Sixth Amendment and due Process. See Ex. Also, the court ran the sentences of attempted first-degree murder and kidnapping consecutive.

Petitioner filed a direct appeal with the Arizona Appeals court, Division Two. The Arizona Appeals court held that the implementation of aggravated sentences was warranted because once the Petitioner admitted on the stand at trial that he possessed and/or used a deadly weapon, the court is allowed to find other aggravated factors. Also, consecutive sentencing applies because once the Petitioner completed his thought after kidnapping the victim, the offense was completed. The attempted first-degree murder becomes a separate offense. See *State v. Dunbar*, 465 P.3d 527, 2020. Petitioner filed a Petition for Review to the Arizona Supreme Court, the State highest court, which denied review. See Ex.

COURSE OF PROCEEDINGS IN THE CASE BEFORE THIS COURT

On February 5, 2018, during sentencing, counsel for the petitioner objected to all of the above.

On November 28, 2018, Petitioner filed opening brief on his direct appeal.

ARGUMENTS PRESENTED

I. Was the petitioner's aggravated sentences was in violation of due process and conflicts with the United States Supreme Court holdings in *Apprendi v. New Jersey* and *Blakely v. Washington* when the Court, not the jury found aggravating circumstances by preponderance of evidence.

On February 5, 2018, sentencing day, the State submitted their sentence memorandum. Without giving the petitioner previous notice, the State decided to use the use or possession of a deadly weapon as an aggravated factor. See R.T. 2/5/18 p. 3 Ln 12-13. The state alluded to using the petitioner testimony of self-defense at trial to establish the use or possession of a deadly weapon. NOTE: Before trial, the State have not provided notice of its intentions to use the use or possession of a deadly weapon as an aggravated factor. p. 4 Ln 20-22.

The State argued that the jury did find an aggravating factor because possession of a deadly weapon inherent in its verdict. p. 5 Ln 5-8. The court said based on the jury's finding of the one aggravating factors, the finds a number of additional aggravated factors by a preponderance of the evidence. p. 14 Ln 7-12.

The court then sentenced the petitioner to an aggravated sentence on the offense of attempted first degree murder of a term of 18.5 years and the offense of Kidnapping to a term of 18.5 years in violation of Apprendi v. New Jersey, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S.Ct. 2348 (2000) and Blakely v. Washington, 542 U.S. 296, 159 L. Ed. 2d 403, 124 S.Ct. 2531 (2004)

The Sixth Amendment to the United States Constitution provides that the state have to prove every element of a crime to a jury unless defendant waives his right to a jury trial. Apprendi v. New Jersey, supra and Blakely v. Washington the United States Supreme Court holds that aggravated factors are an element of a offense with the state bearing the burden of proving "all" aggravating circumstances beyond a reasonable doubt, in a separate jury determination unless the defendant waive his right to a jury.

In the instant case, the state did not introduce no aggravated circumstances to a jury via bifurcate trial nor did the state asked any witnesses questions pertaining to the aggravating factors. Also the state never alleged their intentions to use the use or possession of a deadly weapon as an aggravated circumstance.

Further, Apprendi and Blakely make it clear that aggravated circumstances shall be found ^{beyond a} ~~by a preponderance~~ reasonable doubt, not by preponderance of evidence as

as the trial court did in this case.

By the trial court finding additional aggravated factors by a preponderance evidence, the court has become part of the litigation. In *Wilson v. Knowles*, 638 P.3d 1213 (CA9 2011) held that any judicial fact finding violates Apprendi and leaves the court to speculate as to how a jury might have evaluated the evidence. Clearly, the trial court finding of aggravating circumstances by preponderance of evidence and the state failure to present any aggravating factors to the jury stands in violation of Apprendi and Blakely, and the petitioner due process protection Fourteenth Amendment.

FIFTH AMENDMENT

The fifth amendment prohibits a defendant in a criminal case to be subjected to double jeopardy or double punishment.

The court acknowledged that the use of a deadly weapon is inherent in the verdict/offense, which makes the use of a deadly weapon in this case an element of the offenses. Arizona Revised Statute §13-701(D)(2) provides that the use or possession of a weapon cannot be used to aggravate a sentence if it is an essential part of the offense. The Arizona Appeals court acknowledged this in previous rulings. The court also may not aggravate a sentence based on use of a deadly

weapon if it is an essential element of the offense... "see State v. Pierre, 2017 Ariz. App. Unpub. November 2, 2017; see also State v. Coulter, 236 Ariz. 270 (2014), and State v. Joyner, 215 Ariz. 919, 158 P.3d 263 (Ariz. App. 2007).

Here, the state alleged that the petitioner used a deadly weapon (gun) to kidnapped R. W. and discharged said weapon causing injury, attempted first-degree murder and aggravated assault with deadly weapon. Which makes the deadly weapon an essential element of the offense.

When the trial court utilized the use of a deadly weapon to aggravate the petitioner sentence, it stands in violation of the petitioner fifth amendment protection to double jeopardy and punishment, his due process protection binding on the states by the fourteenth amendment.

NOTICE

Due Process requires a defendant in a criminal case to have notice. "One who has acquired rights by administration or judicial proceedings cannot be deprived of them without notice and opportunity to be heard."

Garfield v. United States, 211 U.S. 249, 29 S. Ct. 62, 53 L. Ed. 2d 1149, (1967) "Privilege against self-incrimination protects accused from being compelled to incriminate himself in 'any' manner, and does not distinguish degree

of information." *Miranda v. Arizona*, ... *United States v. Patene*, 542 U.S. 630, 124 S. Ct. 2620, 159 L. Ed. 2d 667 (2004). Arizona Revised Statute (A.R.S.) § 13-701(D)(26) provides that the state have to alleged the aggravated factors and Arizona Rules of Criminal Procedure 13, provides that the state have to give the petitioner notice of the aggravating circumstances it plan to use at trial.

In this case, the state failed to alleged the use of a deadly weapon as an aggravated circumstance before trial. It wasn't until sentence day that the state alleged the use of deadly weapon as a circumstance.

Petitioner avow that if he knew before he took the stand to testified that the state planned to use the use of a deadly weapon as an aggravated circumstance he may not have taken the stand or invoked his fifth Amendment right when asked about the weapon.

The trial court erred and violated the petitioner's due process protection when it utilize the use of a deadly weapon to aggravate his sentence. The petitioner seek to be re-sentence without aggravated circumstances attach.

The Arizona Court of Appeals erred in affirming the imposition of the aggravated circumstances to aggravate the petitioner sentence standing in violation of *Apprendi*, *Blakely*, the fifth,

sixth and fourteen admendments to the United States Constitution. The Arizona Supreme stands in the same violations when it denied review of the Appeals court opinion. Petitioner request this court to enter a ruling to remand this case back to the Pima County Superior court for resentence due to violation of Appradi.

Petitioner was deprived of his sixth and Fourteenth amendments right when the Arizona Appeals Court made an Erroneous determination of facts and law when it ruled that the offenses attempted First-degree murder and Kidnapping are eligible for an statutory aggravating factor under A. A. S § 13-701(D)(2), and that the court can also find by preponderance of the evidence on other aggravating factors to expose the petitioner to a maximum sentence, ignoring the Blakely and Apprendi law. Any fact that "the law makes essential to the punishment" is the functional equivalent of an element of a greater offense, and is to be treated accordingly.

II. Was the petitioner's due process and double jeopardy protection were violated when the court imposed consecutive sentences for Kidnapping and attempted First-degree murder.

The Arizona Appeals court Division two erroneously

determined that the petitioner are eligible for consecutive sentences for count one, attempted first-degree murder and count five Kidnapping because: 1) "If we subtract the evidence necessary to convict Dunbar for the attempted first-degree murder - intentionally or knowingly shooting B.W. - the remaining evidence supports the kidnapping charge in this case. The kidnapping charge required proof that Dunbar restricted B.W. movements without consent and without authority by confining B.W. with the intent to inflict physical injury. Therefore, once Dunbar formed the intent to inflict physical injury, refused to move his car out of B.W. path, and confined B.W. the crime of Kidnapping was complete. State v. Viramontes, 163 Ariz. 334, 339 (1990)." 2) "Dunbar could have committed the attempted murder without kidnapping B.W. by, for example, parking next to her and shooting her without any restraint." 3) "Dunbar's act of kidnapping caused B.W. to suffer an additional risk of emotional harm not inherent to the attempted murder." See State v. Dunbar Supra. Appx

Dunbar dispel these erroneous assertions.

First, Dunbar were charged with one count of Kidnapping the indictment see Exh The indictment alleged Dunbar kidnapped B.W. with the intent to inflict death, to inflict physical injury, to inflict a

sexual act, or to commit furtherance of a crime or felony. The indictment do not say to "wit" which makes the offense and indictment insufficient. The indictment do not clearly let the defendant know what charges to defend. During pre-trial and on collateral attack on his convictions and sentences, the petitioner challenged the offense of Kidnapping, Count Five, and the indictment as being duplicitous, multiplicitous and insufficient.

At trial, with no clarity to Count Five on the indictment, the State asserted the argument that Dunbar Kidnapped R.W. with intent to inflict death and to inflict physical injury. This subjected the petitioner to an unanimous verdict, subject him to double jeopardy and punishment.

Pursuant to A.R.S. § 13-1304(A), Arizona's Kidnapping requires that a defendant knowingly restrain another person with the intent to commit a further act. Kidnapping requires restraint with intent to accomplish one of the enumerated goals in A.R.S. § 13-1305. The difference between kidnapping and false imprisonment is the mens rea (the intent). Which makes one of the enumerated goals in A.R.S. § 13-1305 an element of kidnapping. Here, the state alleged Dunbar Kidnapped R.W. with the intent to inflict death and to inflict physical injury, which makes both of them an element of kidnapping.

If we eliminate and separate the factual evidence in this instance, then we will not have one of the enumerated goals in A.R.S. § 13-1305 to establish Kidnapping. It will merely be the offense of false imprisonment because kidnapping cannot stand alone. "Intent" simply means that a defendant's objective is to cause that result or to engage that conduct.

The alleged facts in this case are Dunbar Kidnapped B.W. with the intent to inflict death or injury. One scheme, one objective, one offense. As it stands, the evidence demonstrates that the petitioner allegedly kidnapped B.W. to inflict death. So if we eliminate the actual evidence of kidnapping from the first degree attempted murder, then the attempted murder may have not been possible.

Brown v. Ohio, 432 U.S. 161 97 S. Ct. 2221 53 L. Ed. 2d 187 (1977). United States Supreme Court held that "The Double Jeopardy Clause is not a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units." By the state prosecutor separating the attempting first-degree murder and kidnapping, it subjected the petitioner to double jeopardy and double punishment.

Further, the facts will establish that the alleged kidnapping happened first. So the Arizona Appeals court assertion that the petitioner completed the thought of

physical injury and or formed the thought of physical is not in line with the facts and law.

Elements Of A Crime

An individual commits a crime if he/she acts in a way that fulfills every elements of the offense. In general, every crime involves three elements: First, the act or conduct ("actus reus"), second, the individual's mental state at the time of the act ("mens rea"), and thirdly, the causation between the act and the effect. These elements do not exist in forming a complete thought of physical injury. The Arizona Appeals court opinion stands in violation of the petitioner's double jeopardy and due process clauses to the United States Constitution, Fifth and Fourteen amendments.

In this instance, the kidnapping happened first (actus reus), then the intent to inflict death and injury happened second, then the actual attempted murder and the aggravated assault (causation). Together, they was dependent on one another, constitute the necessary three elements to constitute one offense which warrants concurrent sentences.

The Arizona Supreme Court incorrectly applied the Blockburger v. United States test see Blockburger v. U.S. 299, 301 (1937). "Separate conduct or transaction occur if distinct and

separate acts take place at different times." According to Honorable Eppich, Arizona Appeals court, Division two, "Dunbar could have committed the attempted first-degree murder without kidnapping B.W. by, for example, parking next to her and shooting her without restraint." simply, that do not substruct from the factual evidence. That merely just a hypocrisy not factual evidence. so this evidence cannot be substructed from the factual evidence and demonstrate a mis-carriage of law.

Further, the Arizona Appeals court assertion that the offense of attempted first-degree murder cause emotional harm then kidnapping caused additional emotional harm is just speculation on how the jury thought and it's intent. There were no testimony during trial from any witness about emotional harm.

Also, additional harm do not mean two plus two but goes toward the weight of the severity of the harm. As in this case, the ultimate crime is the attempted first-degree murder which attaches the most severe harm in this case, whether being physical or emotional. In all, this was one transaction, one victim, the same day and one objective.

The Arizona Supreme Court denying petitioner review and the Arizona Appeals court Affirming the trial court

consecutive sentences of the petitioner deprived the petitioner substantive due process right and double jeopardy protection by applying the unlawful standard to determine the consecutive sentences and respectfully request this court enter a ruling to correct this fundamental and substantive error.

III. Did the courts committed reversible error by denying petitioner's *Faretta* rights to self representation when it ruled that the petitioner cannot represent himself no longer in Chambers without giving the petitioner notice.

Faretta v. California, 422 U.S. 806, 818 (1975) holds that a pro-se litigant shall have absolute control of their case. They do not have to share that power with advisory counsel. And the Sixth amendment gives a criminal defendant the right to counsel and the right to waive counsel. Right to self representation is part of due process of the law binding on the states by the Fourteen amendment.

On November 28, 2017, day of trial, the trial court told the petitioner he's no longer representing his self after he came prepared to start trial. See R.T. 11/28/17 Appx and Ex A, (Affidavit). Defendant objected but the court proceeded anyway.

When appellate counsel, Robb P. Holmes, Pima County Legal Defenders Office, submitted the opening brief, is when the petitioner learned that advisory counsel, Anne Elsberry, Pima County Legal Defender Office, submitted a motion two weeks before trial to surrender the petitioner's right to self representation. Clearly, a violation of the petitioner's Faretta's and due process protection. Petitioner, appearing pro-se shall have absolute control. Advisory Counsel filing motion on pro-se petitioner behalf, stands in violation of the petitioner sixth amendment protection. See attached affidavit.

Due process gives a defendant in a criminal case the right to notice and to be heard at a meaningful time. The Petitioner have a right to be informed of all court proceedings. The court should have provided the petitioner of its in chambers ruling. Nothing in the records indicate petitioner had notice of the trial court order.

For the above reasons, Dunbar have not been advised or been served notice of the court ruling nor have the petitioner changed his mind about representing his self at trial. This violates the petitioner Sixth, and Fourteenth amendment protection and his Faretta rights.

CONCLUSION

Petitioner, Kevin Dunbar, has been deprived of basic fundamental rights guaranteed by the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and seek relief in this Court to restore those rights. Based on the argument and authorities presented herein, Petitioner's Conviction and Sentences was sustained in violation of due process. Petitioner had an illegal sentence imposed on him and was denied the right to represent himself. Petitioner prays this court will issue a writ of certiorari and reverse the judgement and sentences affirmed by the Arizona's Supreme Court and Appeals court.

RESPECTFULLY SUBMITTED this 15th day of March, 2021,

Kevin Dunbar

Kevin Dunbar

Pro-se Representation

CONCLUSION

Petitioner, Kevin Dunbar, has been deprived of basic fundamental rights guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and seek relief in this court to restore those rights. Based on the arguments and authorities presented herein, Petitioner's convictions and sentences was sustained in violation of due process. Petitioner had an illegal sentence imposed on him and was denied the right to represent himself. Petitioner prays this court will issue a writ of Certiorari, and reverse the judgement and sentences affirmed by the Arizona's Supreme and Appeals Courts.

BESPECTFULLY RE-SUBMITTED this 22nd day of April, 2021.

Kevin Dunbar

Kevin Dunbar

Pro-se Representation