

21-6945 **ORIGINAL**

IN THE
SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED

JAN 13 2022

OFFICE OF THE CLERK

JOHNNIE W. BYRD III

— PETITIONER
(Your Name)

STATE OF OHIO VS.

— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

COURT OF APPEALS OF OHIO, NINTH APPELLATE DISTRICT, SUMMIT COUNTY

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Mr. Johnnie W. Byrd III, A671-753

(Your Name)

BELMONT CORRECTIONAL INSTITUTION, P.O. Box 540

(Address)

St. Clairsville, Ohio 43950

(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

Johnnie Byrd's case raises an issue of national importance in the wake of our Criminal Justice Systems efforts to regain the publics confidence in its ability to be fair and just:

Can the citizens of the United States have confidence in the fairness of our criminal justice system and its reforms if our system tolerates the total disregard for Byrd's due process right to not be convicted of the crimes alleged except upon proof of every fact necessary to constitute the crime with which he is charged?

Did the United States Court of Appeals, Sixth Circuit undermine the peoples confidence in our federal judicial system to protects it citizens federal due process protections by not issuing a certificate of appealability (C.O.A.) for review of the merits in this matter. When Byrd clearly demonstrated to the Magistrate and District Court how the respondent's failed to produce any evidence that he knew his employees at the store he managed (Byrd House) was stealing Food Stamps and/or WIC program benefits. And that the respondent's clear violation of Ohio Law forbidding the use of the value of the stolen benefits to cause the jury to infer the essential knowingly element of the crime?

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:

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STATUTES AND RULES

OTHER

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

reported at Byrd v. Gray, 2021 U.S. App. LEXIS 26257; 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 B to the petition and is

reported at Byrd v. Gray, 2021 U.S. Dist. LEXIS 36448; 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 C to the petition and is

reported at State v. Byrd, 2016 WL 7231138; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

reported at _____; 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 August 31, 2021.

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: November 1, 2021, and a copy of the order denying rehearing appears at Appendix N/A.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

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 December 14, 2016. A copy of that decision appears at Appendix C.

A timely petition for rehearing was thereafter denied on the following date: _____, 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 _____ (date) on _____ (date) in Application No. A.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment 14 - All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they resided. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, 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 laws.

STATEMENT OF THE CASE

A. Summary of Facts

In 2009 Heather Fry formed BYRD HOUSE INC., for the purpose of running a convenience store in Akron. Ms. Fry also completed the paperwork that was required for the store to sell tobacco, alcohol, and accept EBT (Electronic Benefit Transfer) cards. Mr. Byrd was named as the statutory agent, and he established a checking account on behalf of the corporation.

Ms. Fry testified Byrd was solely responsible for the operation of the business.

Between the dates of October 2009 and March 2012 Byrd operated the convenience store. Law enforcement began to investigate the business as it was suspected of selling items not authorized for purchase with EBT cards.

The Summit County Grand Jury subsequently indicted Mr. Byrd and BYRD HOUSE INC. for Engaging in a Pattern of Corrupt Activity, Telecommunication Fraud, Illegal Use of Food Stamps, and Theft. They suspected he was using the revenue of the company to pay the mortgages of properties that his mother owned. Therefor he was also indicted for Money Laundering. In addition Heather Fry, and Carl Bennet (Employee) was indicted as well.

At trial the state called two witnesses that alleged to have made unlawful transactions with their EBT cards during 2011. Both of these individuals alleged to have been successful in their efforts, however both women testified that they knew (Byrd) and that he was not present at the time they entered the store, nor did he conduct the transactions in question. At a later time, law enforcement sent in confidential informants to attempt to make unlawful transactions of small quantities of cigarettes or alcohol, and small amounts of cash. However, there was no testimony offered by the state that Byrd conducted any of these transactions, nor was present when they occurred. BYRD HOUSE employee Carl Bennet who plead guilty to conducting illegal sales

in a separate trial, also did not testify that Byrd knew of his thefts from the store.

Because the state's case lacked a witness, such as an employee of the store that could testify Mr. Byrd knew of illegal transactions taking place in the store, and no other witnesses or law enforcement agents that could testify their confidential informants completed at least one of the illegal transactions with Byrd himself the state relied heavily on the value of illegal sales to persuade the jury that he knew of the illegal sales.

The jury ultimately convicted Byrd of all counts.

On appeal to the Ohio Court of Appeals, Ninth Appellate District the court relied upon the same rationale to affirm his convictions.

Likewise, the state respondents surmised Byrd guilt in similar fashion in its answer/return writ, (Doc. 5 page 10), "Its impossible to believe this was occurring without Byrd's knowledge."

Byrd's defense throughout has been he did not know of the illegal sales because (1) the EBT terminal was not designed to alert him that illegal sales were taking place, (2) he had no comparison of his EBT sales to other surrounding stores to make him aware his was disproportionate, (3) the state's reliance on the value of the illegal sales to prove the "knowingly" element of the theft is forbidden by Ohio Law because the property's value is a special finding used to determine only the degree of the crime. State v. Smith, 121 Ohio St.3d 409, (2009), 2009-Ohio-787, ¶ 13., Ohio Revised Code §2913.02(B)(2). Therefor, his convictions are in violation of his federal due process right to not be convicted of these crimes except upon every fact necessary to constitute the charges.

B. State Convictions

On March 8, 2013 a Summit County Grand Jury issued an indictment against Byrd for one count of Engaging in a Pattern of Corrupt Activity (R.C. 2923.(A)(B)(1), including a Criminal Forfeiture Specification, one count of Grand Theft (R.C. 2913.02(A), one count of Telecommunications Fraud (R.C. 2913.05(A), one count of Illegal Use of Food Stamps or WIC Program Benefits (R.C. 2913.46(B)(C)(1), and one count of Money Laundering (R.C. 1315.55(A))B)(4). Byrd was found guilty of all counts. At sentencing the trial court merged the telecommunications fraud and the illegal use of food stamps or WIC program benefits charges with the count of grand theft as allied offenses of similar import and ordered Byrd to serve an aggregated sentence of nine years imprisonment. The sentencing entry was journalized on June 24, 2013.

C. Direct Appeal

Represented by different counsel, Byrd filed a timely appeal of his convictions and sentences in the Ninth District Court of Appeals, Summit County. In his brief Byrd asserted two assignment of errors:

1. The trial court erred when it overruled a timely defense motion for acquittal pursuant to Criminal Rule 29, as there was not sufficient evidence presented by the State of Ohio to establish a *prima facie* case of the criminal charge.
2. The verdict of the trial court was against the manifest weight of the evidence since the State of Ohio failed to prove each and every element of the crimes charged beyond a reasonable doubt.

The State filed a responsive brief. On December 14, 2016 the Court of Appeals found that his convictions were supported by sufficient evidence and were not against the manifest weight of the evidence and affirmed the judgment

of the trial court.

Supreme Court of Ohio

Mr. Byrd pro se, also timely appealed to the Ohio Supreme Court. In his Memorandum in Support of Jurisdiction, he set forth the following propositions of law:

- I. The trial court erred when it overruled a timely defense motion for acquittal pursuant to Criminal Rule 29 for insufficient evidence.
- II. The verdict of the trial court was against the manifest weight of the evidence since the State of Ohio failed to prove each and every element of the crimes charged beyond a reasonable doubt.

In addressing the court of appeal's conclusion that although there was no direct evidence the appellant knew illegal EBT activity was occurring within the store Byrd knowledge of the illegal activity can be inferred from the magnitude of the activity.

Byrd argued:

"the decision is in error because the magnitude of the activity is not an element of the charge, nor can serve to establish the knowingly element unless the state produces evidence he somehow knew or became aware the EBT sales were characteristic of a store the size of Walmart or in an amount that is incapable of being generated by a store the size of his. And having that information he failed to make an inquiry or acted with a conscious purpose to avoid learning the facts. Without that evidence to establish that fact to support an inference there is an evidentiary gap in the state's case, and the court's reasoning that cannot survive the standard set forth in *Jackson v. Virginia*.

The State filed a waiver of memorandum response.

On May 17, 2017, the Ohio Supreme Court declined jurisdiction to review the appeal.

D. Federal Habeas Corpus

On January 26, 2018 Byrd filed his habeas corpus petition and raised the following grounds for relief:

Ground One: I am being held in violation of the U.S. Constitution for the reasons my convictions are not sustained by sufficient evidence as required by the due process clause of the fourteenth amendment.

Supporting Facts: Both the state and the court of appeals have acknowledged that there is no direct evidence that the petitioner committed these alleged crimes. The court of appeals identified the correct legal standard but its decision was contrary to and/or an unreasonable application of the standard.

Ground Two: The verdict of the trial court was against the manifest weight of the evidence.

Supporting Facts: The evidence produced at trial supports his defense over the state's case.

The magistrate judge recommended denying the first claim on the merits and denying the second claim because Byrd acknowledged that it was not cognizable on federal review. Byrd v. Gray, No. 5:18-CV-210, 2020 WL 8673975 (N.D. Ohio Nov. 30, 2020)(report and recommendation). The district court adopted those recommendations over Byrd's objections, denied the petition, and declined to issue a COA. Byrd v. Gray, No. 5:18cv210, 2021 WL 76175 (N.D. Ohio Feb. 26, 2021)(order).

Byrd sought a COA on his insufficient evidence claim from the United States Court of Appeals for the Sixth Circuit.(No. 21-3318). The sixth circuit court of appeals denied his request for COA on August 31, 2021). Byrd filed a petition for rehearing No. 21-3318, which the court denied on November 1, 2021.

REASONS FOR GRANTING THE PETITION

In this matter, Mr. Byrd suffered a substantial denial of his constitutional right to not be convicted of these crimes except upon proof beyond a reasonable doubt of every fact necessary to constitute the crimes with which he was charged as guaranteed by the due process clause of the fourteenth amendment. In Re Winship, 397 U.S. 358, 25 L.Ed. 2d 368, 90 S.Ct. 1068 (1970); Jackson v. Virginia, 443 U.S. 307, 319 (1979).

Byrd asserted his argument and the record supports it. His convictions for illegal use of food stamps or WIC program, grand theft, money laundering, telecommunications fraud, and engaging in a pattern of corrupt activity with a criminal forfeiture specification were not obtained by sufficient evidence. More specifically the state failed to present to the jury sufficient evidence of the essential "knowingly" element of these crimes.

For example the state never produced any direct or circumstantial evidence as the store's manager Byrd: 1. permitted customers to purchase unauthorized items. 2. that he knowingly allowed his employee(s) to permit customers to purchase unauthorized items, or 3. that he was aware that the EBT sales were disproportionate to size of the store in order to alert him to the fraud his employees were committing. Byrd's defense has always been that he had no knowledge illegal sales were occurring because the EBT terminals was not designed to alert him to illegal transactions. The state never offered evidence to dispute this fact. In addition, the state's witnesses testified that they knew Byrd and that he did not make the illegal sales and was not present when they occurred.

The state's theory, as adopted by the magistrate, the district court, and

the sixth circuit court of appeals in denying C.O.A., is that because of the amount of the EBT sales, Byrd must have known about the illegal sales and this was sufficient for the jury to convict. However, Byrd argued a reasonable jurist could disagree because in Ohio, the stolen property's value is a special finding used to determine only the degree of the crime not the elements. State v. Smith, 121 Ohio St.3d 409 (2009). e.g. Ohio Revised Code §2913.02 (B)(2). There is no disputing the fact in this matter the amount means the value, and that Ohio Law is settled on this issue. Yet all of the courts below this Supreme Court has disregarded the law because it falls in Byrd favor in this particular case, and by doing so has indicated the citizens of the united states the protections of the fourteenth amendment is subject to their discretion.

For instance, Byrd demonstrated this fact by citing State v. NRAG, LLC, 12th Dist. Fayette No. CA2008-12-043, 2009-Ohio-4137 ¶ 23. An Ohio case that demonstrates that in Ohio a" trial court erred in denying a defendant's motion for acquittal as the state failed to present sufficient evidence to prove, pursuant to R.C. 2901.23 (A)(4) and 2913.46 (C)(1), that a defendant's high managerial personnel knowingly allowed an employee to permit customers to purchase items using a food stamp electronic benefit transfer card. While the owner signed the application to participate in the food stamp program, in which he stated he accepted responsibility on behalf of defendant for violation of the food stamp program regulations, this did not prove, for the purpose of obtaining a criminal conviction against defendant that he "knowingly" allowed his store clerks conduct". Yet Byrd in his case is not afforded the same due process protection by the state of Ohio as required by the fourteenth amendment of the federal u.s. constitution which conflicts with federal precedent, and undermines the citizens confidence in our judicial

system's willingness to be fair.

A case such as this again asks an important question of our judicial system. Can the citizen of our country count on our court's to administer justice equally to all of its citizens?

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Johnnie W. Byrd III

Date: 1-5-22