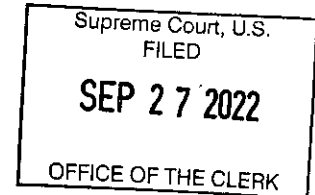


22-5774
No. _____

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES



DAJUAN L. BANKS – PETITIONER, Pro se

VS.

STATE OF OHIO – RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

OHIO COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT

PETITION FOR A WRIT OF CERTIORARI

Dajuan L. Banks #560-248
Grafton Correctional Institution
2500 South Avon-Belden Road
Grafton, Ohio, 44044

QUESTIONS PRESENTED

- 1) ARE THE RIGHTS PROTECTED UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION OFFENDED WHERE AN AFFIDAVIT IN SUPPORT OF THE ISSUANCE OF A SEARCH WARRANT, AND THE SEARCH WARRANT ITSELF, HAVE NEVER BEEN ENTERED ON THE RECORD?¹
- 2) CAN EVIDENCE THAT A JUDGE'S SIGNATURE WAS FORGED ON A LEGAL DOCUMENT, A SEARCH WARRANT, BE DEFEATED BY THE DOCTRINE OF RES JUDICATA?²

¹ The United States Court of Appeals, for the Sixth Circuit, recognized in *United States v. Adkins* that: “***[An Ohio] court of record speaks only through its journal entries.’). See also *Schenley v. Kauth*, 160 Ohio St. 109, 111, 113 N.E.2d 625, 626 [*568] (1953) (‘A court of record speaks only through its journal and not by oral pronouncement or mere written minute or memorandum.’) ‘Were the rule otherwise it would provide a wide field for controversy as to what the court actually decided.’ *Indus. Comm’n of Ohio v. Musselli*, 102 Ohio St. 10, 15, 130 N.E. 32, 18 Ohio L. Rep. 457 (1921).” *Id.* at 729 F.3d 559, 567-68 (2013). See, also, *Smith v. Smith*, 103 Ohio St. 391,396 (1921) (“Section 11604, General Code, provides that all judgments and orders must be entered on the journal of the court and specify clearly the relief granted or order made in the action. All parties to the proceeding are entitled to invoke the benefit and protection of that provision.”)

² “When a warrant is signed by someone who lacks the legal authority necessary to issue search warrants, the warrant is void ab initio.” *United States v. Scott*, 260 F.3d 512, 515 (6th Cir. 2001).

LIST OF PARTIES

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

RELATED CASES

Grau v. United States, (1932) 287 U.S.124, 128.

Shadwick v. Tampa, 407 U.S. 345, 350 (1972).

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STATUTES AND RULES

Fourth Amendment

Fourteenth Amendment

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

[X] For cases from **state courts**:

The opinion of the highest state court to review the merits appear at Appendix A to the petition and is

reported at 2022-Ohio-1463.

The opinion of the State of Ohio, Court of Common Pleas, Lake County appears at Appendix B to the petition and is

reported at 2021 Ohio Misc. LEXIS 2142.

JURISDICTION

[X] For cases from **state courts**:

The date on which the highest state court decided my case was August 2, 2022.
A copy of that decision appears at Appendix C.

Reporter at 2022 Ohio LEXIS 1523.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FOURTH AMENDMENT

FOURTEENTH AMENDMENT

STATEMENT OF THE CASE

In mid-October of 2007, Mr. Banks was accused of murdering his ex-girlfriend's fiancée, Mr. Sam Nicholson, Jr., in her home. The state presented evidence at the change of plea and sentencing hearing that Mr. Banks admitted to the brutal murder of Mr. Nicholson with the aid of a gun and a knife. Shortly before Mr. Nicholson was to leave for work, Mr. Banks slashed the tires on Mr. Nicholson's car, and then returned to the home approximately thirty minutes later. He entered the house and held Mr. Nicholson at gunpoint in his bedroom while questioning him about his love for his ex-girlfriend, Ms. Jackie Duncan. Mr. Banks then hit Mr. Nicholson in the back of the head with the gun several times, ordered him to lie on the floor face down, and slit his throat. Ms. Duncan discovered Mr. Nicholson, lying face-up in a pool of blood, with his arms extended and throat cut when she returned from work later that morning.

A grand jury indicted Mr. Banks on six counts: three counts of aggravated murder with two death penalty specifications and a firearm specification on each; two counts of aggravated burglary with firearm specifications, and one count of kidnapping with a firearm specification. Multiple motions were filed during the discovery phase of the case, including a motion for a bill of particulars, as well as a second motion for a "meaningful" bill of particulars and supplemental witness list. The state filed a brief in opposition to the second motion for a "meaningful" bill of particulars and several months later filed an amended bill of particulars and witness supplement to Mr. Banks' prior request for a bill of particulars. The amended bill of particulars added the mens rea of "knowingly" for the underlying offense of burglary to the aggravated burglary charge on counts four and five, and "purposely" to count six, kidnapping.

The state then filed a motion to amend the indictment pursuant to State v. Colon, 118 Ohio St.3d 26, 2008 Ohio 1624, 885 N.E.2d 917 ("*Colon I*"), which the Supreme Court of Ohio decided while Mr. Banks' case was pending, arguing that an amendment should be allowed because neither the name or identity, nor the severity of the crimes were changed by the amendments; and that this case is distinguishable from *Colon I*.

Several days later, the court denied Mr. Banks' second motion for a "meaningful" bill of particulars and supplement, finding that the state provided an adequate bill of particulars, open file discovery, including all police reports, witness' statements and an exhibit/evidence list; as well as numerous supplemental filings.

In early July of 2008, the court held a hearing on the state's motion to amend the indictment. The court issued an opinion and journal entry on July 22, 2008, finding that Mr. Banks failed to make an objection to the form of the indictment pursuant to Crim.R. 12(C)(2) and that Crim.R. 7(D) permits the amendment of an indictment provided it still meets constitutional requirements. The court further found that Mr. Banks did not and could not show surprise or prejudice, and that this case was fundamentally distinguishable from *Colon I*, where the error permeated the entire trial.

Specifically, the court found that the line of cases declaring that the omission of an element of an underlying offense in an indictment may be remedied by identifying the underlying offense in a bill of particulars is still good law, as long as the name or identity of the crime charged does not change. In fact, the state had filed an amended bill of particulars two months prior in response to Mr. Banks' first motion for a bill of particulars. Thus, the court granted the state's motion to amend the indictment because neither the name nor identity of the crimes changed,

Mr. Banks had timely notice, was not misled or prejudiced by the omission of such elements, and showed a readiness at the hearing to proceed to trial on the originally scheduled date, despite the amended indictment.

Before the case proceeded to trial, Mr. Banks reached a plea agreement with the state and, on October 30, 2008, filed a motion to withdraw his not guilty plea and enter a new plea.

Specifically, Mr. Banks pled guilty to aggravated murder with a life term of imprisonment without parole, aggravated burglary, and kidnapping, all with firearm specifications. In exchange, the state agreed to nolle prosequi the death penalty specifications as to the count of aggravated murder, as well as the remaining counts and specifications of the indictment. After holding a hearing, the court accepted his plea, and sentenced him to life imprisonment without parole for aggravated murder, and ten years each for aggravated burglary and kidnapping, as well as a consecutive, merged three-year term for the firearm specification, for a total term of imprisonment of 23 years in addition to the life term of imprisonment without parole.

- **Course of Proceedings – Relevant sections only.**

On November 2, 2021, Mr. Banks moved the Court to withdraw his guilty plea based upon newly discovered evidence, received via public record request in 2021, by submitting *said* irrefutable evidence which reveal that: (1) someone had forged the signature of Judge Timothy E. McMongle; (2) that said search warrant – nor the affidavit in support of said search warrant – had not been entered on the record; and (3) the executing police officers, from Lake County, had knowingly failed to abide by the clear prerequisite commands in the warrant to first acquire the necessary assistance of a

public official who possessed territorial jurisdiction in Cuyahoga County before executing the warrant.

On November 19, 2021, the Lake County Prosecutor, by and through Lake County Asst. Pros. Eric J. Foisel, filed: "STATE'S RESPONSE TO DEFENDANT'S MOTION TO WITHDRAW GUILTY PLEA BASED ON NEWLY DISCOVERED EVIDENCE". Therein, Atty. Foisel simply argued:(1) that "Defendant's Motion is Barred by Res Judicata"; and (2) Defendant Fails to Demonstrate a Manifest Injustice".

However, the State, via the prosecution, failed to submit a single document, in the trial court, discrediting that Bank's had received newly discovered irrefutable documented evidence that proved: (1) someone had forged the signature of Judge Timothy E. McMongle; (2) that said search warrant – nor the affidavit in support of said search warrant – had not been entered on the record; and (3) the executing police officers, from Lake County, had **knowingly** failed to abide by the clear prerequisite commands in the warrant to first acquire the necessary assistance of a public official who possessed territorial jurisdiction in Cuyahoga County before executing the warrant.

On November 19, 2021, the trial court denied Bank's Crim. R. 32.1 motion, by pronouncing the following; pertinent section only:

"Upon review of Defendant's Motions and the State's response, the Court grants the Motion to Amend Pending Motion to Withdraw Guilty Plea Based on Newly Discovered Evidence. As to the merits, the Court finds the Defendant's *pro se* Amended Motion to Withdraw Guilty Plea Based on Newly Discovered Evidence is Denied."

Id. Appendix B.

As a result, on December 6, 2021, Banks filed a "Motion for Findings of Fact and Conclusion of Law".

On December 7, 2021, the trial court issued the following Judgment Entry:

"It is the order of this court that Defendant's pro se Motion for Findings of fact and conclusions of Law is hereby denied."

Id. Appendix B

On December 14, 2021, Bank's fled his Notice of Appeal.

On May 2, 2022, The Court of Appeals of Ohio, Eleventh Appellate District, Lake County affirmed the trial court's decision.

"Defendant-appellant, Dajuan L. Banks, appeals the denial of his Motion to Withdraw Guilty Plea Based on Newly Discovered Evidence by the Lake County Court of Common Pleas. For the following reasons, we affirm the decision of the court below.

"On November 13, 2008, Banks pled guilty to Aggravated Murder, Aggravated Burglary, and Kidnapping. On November 17, Banks was sentenced to life without parole for Aggravated Murder and to consecutive ten-year prison terms for Aggravated Burglary and Kidnapping. Banks' pleas were affirmed on direct appeal in State v. Banks, 11th Dist. Lake No. 2008-L-177, 2009-Ohio-6856. The denial of a previous Motion to Withdraw Guilty Plea was affirmed in State v. Banks, 11th Dist. Lake No. 2015-L-128, 2016-Ohio-4925. The denial of a motion for postconviction relief was affirmed in State v. Banks, 11th Dist. Lake No. 2018-L-028, 2018-Ohio-5330.

"On November 2, 2021, Banks filed a Motion to Withdraw Guilty Plea Based on Newly Discovered Evidence. Banks argued that his guilty pleas were not entered into intelligently inasmuch as the State used unlawfully gathered and inadmissible evidence to induce him to enter the pleas. He claimed that he was only made aware of the existence of such evidence after receiving a tip from a third party sometime during January of 2021. The evidence in question concerned the search warrant authorizing the

search of his residence. Specifically, Banks had learned that: '(1) someone had forged the signature of Judge Timothy E. McMonagle [on the warrant] - signing T.S. McMonagle; (2) that *said* search warrant *was not entered on the record* (journalized); and (3) the executing officers from Lake County had **knowingly failed** to abide by the prerequisite commands in the warrant in order to obtain territorial jurisdiction — i.e., * * * the Lake County Police Officers executed the search warrant of the residence in Cuyahoga County without notifying and obtaining the assistance from police officers from Cuyahoga County.' Motion to Withdraw Guilty Plea (edited for clarity). 'On November 19, 2021, the trial court denied Banks' Motion. 'On December 14, 2021, Banks filed a Notice of Appeal. On appeal, he raises the following assignment of error: 'The trial court abused its discretion when it denied Mr. Banks' Motion to Withdraw his Guilty Plea Based on Newly Discovered Evidence, proving that a manifest injustice had occurred in violation of the Fourth, Fifth, and Fourteenth Amendment[s] to the United States Constitution.' 'Criminal Rule 32.1 provides that 'to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea.' 'A defendant who seeks to withdraw a plea of guilty after the imposition of sentence has the burden of establishing the existence of manifest injustice.' State v. Smith, 49 Ohio St.2d 261, 361 N.E.2d 1324 (1977), paragraph one of the syllabus. 'This term has been variously defined, but it is clear that under such standard, a postsentence withdrawal motion is allowable only in extraordinary cases.' Id. at 264; State v. Straley, 159 Ohio St.3d 82, 2019-Ohio-5206, 147 N.E.3d 623, ¶ 14 ('[a] 'manifest injustice' is a 'clear or openly unjust act') (citation omitted).

"A motion made pursuant to Crim.R. 32.1 is addressed to the sound discretion of the trial court, and the good faith, credibility and weight of the movant's assertions in support of the motion are matters to be resolved by that court." Smith at paragraph two of the syllabus.

"We find neither an abuse of discretion nor the existence of a manifest injustice. Banks has failed to establish that this evidence was unavailable to him at the time he entered his plea: the State provided Banks with open file discovery including a "full and complete copy of the Police Report" in the prosecutor's possession. Banks has failed to establish that the evidence seized from his residence induced him to plead guilty: Banks confessed to his crimes in a recorded interview. Banks has failed to establish that his convictions constitute an injustice: the alleged improprieties in the execution of the warrant do not exonerate him of the crimes. Banks has failed to establish that there were improprieties in the execution of the warrant: the allegedly forged 'S.' on the warrant as well as the supporting affidavit has the appearance of an 'E.' consistent with the issuing judge's name; no authority is cited for the proposition that a warrant must be

journalized on the issuing court's docket to be valid; and no evidence was submitted that the signature on the warrant was a forgery.

"The sole assignment of error is without merit.

"For the foregoing reasons, the denial of Banks' Motion to Withdraw Guilty Plea Based on Newly Discovered Evidence by the Lake County Court of Common Pleas is affirmed. Costs to be taxed against the appellant.

"THOMAS R. WRIGHT, P.J.,

"CYNTHIA WESTCOTT RICE, J.,

"concur."

On August 2, 2022, The Supreme Court of Ohio issued an opinion without a published decision. Id. Appendix C.

REASON S FOR GRANTING THE PETITION

A STATE COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT; AND ALSO, HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

If allowed to stand a Citizen of the United States, **in the State of Ohio**, could be subjected to a residential search, arrest based upon the items gathered during the search, prosecuted, convicted and imprisoned with absolutely no post-conviction recourse: in spite of a showing that: (1) the affidavit in support of the issuance of a search warrant, and the residential search warrant itself, have *never been* entered on the record; and (2) the search warrant contained the forged signature of the judge.¹

¹ "The Fourth Amendment provides: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.'

"As declared by the Supreme Court in *Grau v. United States*, 287 U.S. 124, 128, 53 S.Ct. 38, 40, 77 L.Ed. 212, the guaranties of the Fourth Amendment are to be liberally construed 'to prevent impairment of the protection extended.' See also *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357, 51 S.Ct. 153, 75 L.Ed. 374; *Gouled v. United States*, 255 U.S. 298, 304, 41 S.Ct. 261, 65 L.Ed. 647; *Boyd v. United States*, 116 U.S. 616, 635, 6 S.Ct. 524, 29 L.Ed. 746. In the *Gouled* case, *supra*, 255 U.S. at page 304, 41 S.Ct. at page 263, 65 L.Ed. 647, the Supreme Court said: 'It has been repeatedly decided that these amendments (the Fourth and the Fifth) should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice

"The broad construction of the act by the Court of Appeals unduly narrows the guaranties of the Fourth Amendment, in consonance with which the statute was passed. Those guaranties are to be liberally construed to prevent impairment of the protection extended. *Boyd v. United States*, 116 U.S. 616, 635; *Gouled v. United States*, 255 U.S. 298, 304; *Go-Bart Co. v. United States*, 282 U.S. 344, 357." *Grau v. United States*, (1932) 287 U.S.124, 128.

"This Court long has insisted that inferences of probable cause be drawn by 'a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' *Johnson v. United States*, supra, at 14; *Giordenello v. United States*, supra, at 486. In *Coolidge v. New Hampshire*, supra, the Court last Term voided a search warrant issued by the state attorney general 'who was actively in charge of the investigation and later was to be chief prosecutor at the trial.' *Id.*, at 450. If, on the other hand, detachment and capacity do conjoin, the magistrate has satisfied the Fourth Amendment's purpose." *Shadwick v. Tampa*, 407 U.S. 345, 350 (1972).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: September 26, 2022.

of courts or by well-intentioned, but mistakenly overzealous, executive officers.' *Catalanotte v. United States*, 208 F.2d 264,267 (6th Cir. 1953).