No. 22-6878

ORIGINAL

In The
Supreme Court Of The United States

Roger Keith Lunsford, Petitioner,

Vs.

United States Of America, Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

Roger Keith Lunsford
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<u>Questions Presented</u>

I. Could The State Violate A Defendants Substantive And Procedural Right To Due Process So Egregiously That It Would Bar A Future Federal Prosecution?

II. Does 28 U.S.C. 2255 Require The District Court To Grant A Prompt Hearing Where The Files And Records Do Not Contradict A Defendants Claim For Relief?

Table Of Contents

Index To Appendix

Table Of Cases And Statutes

Cases

Statutes

Statutes

Petition For Writ Of Certiorari

Petitioner Roger Keith Lunsford respectfully prays this Court that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Fourth Circuit, issued on November 21, 2022, affirming his judgment and sentence.

Opinion Below

The opinion of the United States Court of Appeals for the Fourth Circuit which review is sought is United States Vs. Roger Keith Lunsford, No. 22-6079 (4th cir., November 21, 2022). The opinion is unpublished. The opinion of the United States Court of Appeals for the Fourth Circuit is reproduced in the Appendix to this petition as Appendix . The judgment is reproduced as Appendix . The mandate is reproduced as Appendix .

Jurisdiction

The judgment of the United States Court of Appeals for the Fourth Circuit was issued on November 21, 2022. The jurisdiction of this court is invoked pursuant to 28 U.S.C. 1254(1).

Constitutional And Statutory Provisions Involved

On February 17, 2017, Petitioner Roger Keith Lunsford filed a timely motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. 2255. He claimed that State authorities, because they were holding him soley for future federal prosecution, had held him for thirteen and a half months without providing any judicial process in violation of State laws, and the guarantee to Due Process required by the Fifth and Fourteenth Amendment of United States Constitution.

Petitioner by motion also requested the district to allow "discovery" and or an "evidentiary hearing" to further develope the claim.

On April 14, 2020, the district court adopted the Magistrate Judges Report and Recommendation, and denied relief. The court held that a motion under 28 U.S.C. 2255 is not the proper vehicle to assert the kind of Constitutional violations the Petitioner complains, and further because the State authorities had not convicted Petitioner of any State charges related to the bank robberies, [the State dropped all charges], any purported constitutional violations suffered while in State custody could not prejudice him at his subsequent federal trial.

The district court also denied without explanation all discovery, including defence and government trial exhibits. The district did not acknowledge the Petitioners request for an evidentiary hearing. The record is silent.

The Petitioner objected claiming the Magistrate Judges findings were contrary to Supreme Court and Fourth Circuit precedent. And that he was denied the right to substantive and procedural Due Process as required by the Fifth Amendment, and equal protection under the law as required by the Fourteenth Amendment of the United States Constitution.

Essentially an interpretation of 28 U.S.C. 2255 is at issue here. As a matter of law has Petitioner made a cognizable 2255 claim, which leads to the question: Could the State violate a defendants substantive and procedural right to Due Process so egregiously that it would bar a future federal prosecution? Secondly, Does 28 U.S.C. 2255 require the district court to grant a prompt hearing where the files and record do not contradict a defendants claim?

If the court answers these questions in the affirmative the basic inquiry then becomes whether the governments actions in prosecuting the Petitioner violated fundamental conceptions of justice or a communitys sense of fair play and decency.

Statement Of The Case

Procedural History

On May 2, 2013, federal authorities with assistance from State authorities arrest Petitioner. On August 10, 2013, to prevent Petitioner from making bond, federal authorities placed a "hold" on Petitioner. After a thirteen and a half month detention, federal agents coordinated the timing of dismissal of state charges and the arrest of petitioner on federal charges on June 18, 2014. Petitioner was charged with two counts of armed bank robbery (18 u.s.c. 2113(d)), and two counts of brandishing a firearm, (18 u.s.c. 924(c). On August 16, 2014, Petitioner was found guilty on all counts by a federal jury. He was sentenced to five years, ten months (70) for each bank robbery, running concurrently to each other. He was sentenced to seven years for the first 924(c) conviction and twenty five years for the second subsequent conviction, each to run consecutively. A three year supervised release violation sentence was also run consecutively to each sentence, resulting in a forty year, ten month sentence. A de facto life sentence. Petitioners trial attorney represented him on direct appeal and argued the evidence at trial was insufficient to support the jurys finding of guilt on all counts. The Fourth Circuit affirmed Petitioners conviction. U.S.-vs-Lunsford, 629 Fed. Appx. 518 (Nov. 13, 2015).

On February 17, 2017, Petitioner filed motion under 28 U.S.C. 2255 with the U.S. District Court For The Middle District Of North Carolina. On April 14, 2020 the motion was denied without conducting an evidentiary hearing or allowing "discovery". On May 13, 2020, Petitioner filed a Motion To Alter Or Amend Judgment Under Fed. R. Civ. P. 59(e) and 52(b). On December 20, 2021, the district court denied the motion holding it was filed one (1) day late, despite the fact Petitioner explained the delay was a result of the Covid-19 pandemic that had hit F.C.I. Butner, N.C. especially hard, killing twenty-five inmates and one (1) staff member. [The district further converted the 59(e) motion into a 60(b) motion without notice.]

On April 20, 2022, Petitioner filed appeal on denial of Fed. R. Civ. P. 59(e) motion to the Fourth Circuit Court of Appeals. He claimed the district court had failed to adjudicate all the claims, failed to require the government to submit a responsive pleading to all the claims, failed to make necessary factual determinations, and had withheld access to trial exhibits that

that support or could support his claims in violation of his Fifth and Sixth Amendment rights guaranteed in the United States Constitution. On July 26, 2022, the Fourth Circuit Court Of Appeals dismissed Petitioners appeal opining he had not made the requisite showing for granting a "Certificate Of Appeal" (COA.). Petitioner requested a rehearing and rehearing en banc. On November 21, 2022, the court denied the petition. On November 29, 2022, the court of appeals issued its Mandate. Ninety days from November 21, 2022, the Petitioner put this pro se motion to the Supreme Court into the prison mailing system pursuant to the principles of Houston-vs-Lack, 748 U.S. 266, 275 (1988).

Statement Of Facts

Late April 2013, F.B.I. Agent Max Wooten received a tip from Petitioner Roger Keith Lunsfords ex-wife that he had committed a bank robbery in Concord, N.C.. F.B.I. Agent Wooten with assistance from State authorities arrested the Petitioner on May 2, 2013 in Gastonia, N.C.. Several hours later he was transported to the Cabarrus County Detention Center in Concord, N.C., and was charged with Felony Robbery with a dangerous weapon, (Case No. 13CR57935). In accordance with N.C.G.S. 15(a)-601, an initial appearance was conducted the next business day in Cabarrus County Superior Court, Concord, N.C.. The Petitioner was found to be indigent and so counsel was appointed to assist him.

Shortly after May 2, 2013 arrest F.B.I. Agent Wooten contacted Forsyth County Sheriff Deputy Gaylord III and named the Petitioner as his suspect in another bank robbery that had occurred two weeks prior to the Concord, N.C. robbery. On May 10, 2013 (Friday), eight days after Petitioners initial arrest, he was charged with Felony Robbery with a dangerous weapon in Forsyth County District Court, Winston-Salem, N.C., (Case No. 13CR54432). In accordance with N.C.G.S. 15(a)-601, the State Clerk of Court for Forsyth County, N.C., scheduled Petitioner an "initial appearance" hearing for May 13, 2013 (Monday).

Concord County Detention Center Deputies had Petitioner forewarned and prepped for transportation to the "initial appearance" in Forsyth County (1 hour drive away) in the early morning hours of May 13, 2013. The hearing was cancelled without explanation, but Concord Deputies later explained to Petitioner that Forsyth County authorities had deemed the hearing unnecessary because federal arrest was imminent. As a result of the States failure to provide an "initial appearance" in violation of State law, no assistance was appointed or otherwise provided to help Petitioner defend or prepare a defence against the charges... for thirteen and a half months. For thirteen and a half months Petitioner was held without any judicial process, the first seventeen days was not allowed a phone call or a visit from family. And because on the day of his arrest police seized $3,300 from his person, and federal authorities had his bank account frozen, the Petitioner was effectively prevented from obtaining any legal assistance. [None of the money seized was ever linked to the robbery, and the bank account was unfrozen after the district court denied Petitioners 2255.] No hearing was ever conducted under 21 U.S.C. 853 to determine whether any of the money was tainted, before or after trial.

The combined efforts of State and Federal authorities caused the Petitioner to lose witnesses and a Lowes Hardware surveillance tape that supported his alibi. And the witnesses that he was later able to obtain after the thirteen and a half month illegal detention, could not recall specific dates because of faded memories.

The Petitioners defence strategy at his federal trial rose or fell on his alibi, and the State and Federal authorities actions and or inactions critically impaired that defence. But hamstringing the Petitioners alibi defence is not the only advantage the government gained. The government was able to take the written statements of its witnesses at the outset of the case, and use those statements to refresh their witnesses memories before and during trial testimony. Other circumstantial evidence the State obtained during the illegal detention was turned over to federal authorities and used at trial, which included Petitioners personal wrist-watch, his business records and personal writings, his billfold, and a jail visitation tape which generated a photo used at trial, and was used to influence the defence from not calling Petitioners Mother to testify for worry that the tape would reveal that Petitioner had previous bank robbery conviction. Last, the States law enforcement officials went on to play leading roles as federal prosecution witnesses in the federal trial, all to bolster the governments case.

During the thirteen and a half month detention period, the Petitioner repeatedly and vociferously asserted his right to an initial appearance, an attorney, a probable cause hearing, a bond hearing, requested discovery materials, speedy trial, and importantly he made repeated requests for assistance in obtaining the Lowes Hardware surveillance tape and alibi witness statements ... before their memories faded. See (Apendix , prose motions filed in State court)

The Petitioner was locked up, hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defence. The resulting inability to prepare his defence skewed the fairness of the whole process, including the federal trial.

Reasons For Granting The Petition

I. The governments actions in prosecuting the Petitioner violate fundamental conceptions of justice or a communitys sense of fair play and decency.

"Subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights". Elkin-vs-U.S., 364 U.S. 206 (1960).

"State courts as well, equally and concurrently with federal courts, bear the duty and obligation to enforce and protect every right granted and secured by the Constitution of the United States". Irvin-vs-Dowd, 359 U.S. 394, 79 S.Ct. 825 (1959).

Here, the Magistrate Judge held, and the district court adopted and Appellate court adopted, that the Petitioner could not assert in a 28 U.S.C. 2255 motion that the State authorities violated his substantive and procedural right to due process so egregiously that his conviction should be overturned and an Order issue for his release. This is contrary to Supreme Court precedent and denies Petitioner the guarantees of the United States Constitution.

"The Constitution must be obeyed by the judiciary as well as other departments of government, and judges are sworn to support its provisions, (U.S.-vs-Fisher, 6 U.S. 358, 2 LEd 304 (1805), courts are not at liberty to overlook or disregard its commands", (Trustees of Dartmouth College-v-Woodward, 17 U.S. 518 (1819).

Its true that federal courts may not review the merits of a particular decision of the State, but federal courts do have jurisdiction over claims the State violated a defendants Constitutional rights. U.S.-vs-Wilson, 503 U.S. 329, 112 S.Ct. 1351 (1992). Also in accordance with equitable principles, where no remedy is available in the State court to complainant, a federal court should determine all the issues alleged to be in contrevention of the Federal Constitution, both State and Federal. (32 AM Jur. 2d, Fed. Cts 1316-1325) (Video Softwares Dealers Ass'n-vs-Webster, 968 F.2d 684, 20 Media L. Rep. (BNA) 1384 (8th cir. 1992).

The Magistrate Judges decision, adopted by the district court and appellate court, was premised upon a fundmental misreading of both applicable law and facts, which led him to believe the 2255 vehicle could not be used by the Petitioner to make his particular claim. As a result the Magistrate was unable to recognize what issues were before it, what discretion it possessed, or what facts were relevant to the inquiry, let alone apply the law to the true facts.

The Petitioner argued in the district court, Appendix 59(e) motion), and the Appellate court (Appendix Appeal Brief), that the Supreme Court recognized many instances where a defendant can invoke federal law if he can show that a Federal-State working arrangement was used to circumvent the Bill of Rights. Knapp-v-Shweitzer, 357 U.S. 371 (1958) (the federal government may not take advantage of the States autonomy in order to evade the Bill of Rights); Anderson-vs-U.S., 318 U.S. 350 (1942).

The Fourth Circuit even recognizes the "Ruse Exception", where it is alleged the States primary purpose in holding defendant is for a future federal prosecution. U.S.-vs-Rodriguez-Amaya, 521 F.2d 437 (4th 2008).

Claims such as this are rarely clear cut, nevertheless there are many factors recognized by the courts that demonstrate improper collusion between State and Federal authorities, i.e., a working arrangement.

The Petitioner pointed to trial testimony of FBI Agent Wooten. Agent Wooten received the tip from Petitioners ex-wife and took her statement. Agent Wooten made out the affidavit supporting probable cause for issue of State arrest warrant. Agent Wooten arrested Petition, although he was assisted by State authorities. Agent Wooten contacted and

and obtained a spare key from Petitioners mother to allow entry into Petitioners home. Agent Wooten led search of Petitioners home, although State authorities assisted. These are all recognized factors supporting an inference of a working arrangement.

Another key factor recognized is where its found the State did nothing to vindicate their interests after arrest, making the case a "Sham Prosecution". Certified State Clerk of Court records evidence that Petitioners initial appearance was scheduled, but deemed unnecessary... for thirteen and a half months. See (Appendix , Certified State Court documents).

Further, the Petitioner provided the lower courts with two affidavits. Each affiant attested to the fact that an officer of the State Court, defence attorney Larry Harris, Concord, N.C., stated to them that because the Petitioner case was going federal, and federal arrest was imminent per the State District Attorneys communication with federal authorities, he did not represent Petitioner. See (Appendix , Affidavit of Carol Lunsford.) This is a recognized factor supporting an inference there was a working arrangement.

Last, Petitioner offered copies of the prose motions he filed in State court formally asserting his rights. The fact the State authorities failed to act or answer the motions supports the inference the States prosecution was a "Ruse", and the States detention of the Petitioner was soley for the future federal prosecution. See (Appendix , Petitioners pro se motions).

As a prophylactic measure the court can use the aforementioned precedent to insure that Petitioners rights protected by the U.S. Constitution are vindicated, and to deter federal authorities from arranging with State authorities to detain defendants until federal authorities are ready to file charges, this court should find there was an impermissable "working arrangement", a "Ruse", or "Sham Prosecution", Vacate Petitioners sentence and conviction and bar/suppress all the evidence obtained by federal authorities from the State.

But, the Petitioner contends there is a more fundamental principle at stake. Although the Petitioner made the aforementioned arguements in the lower courts, See (Appendix , Appeal Brief, and Appendix , 59(e) motion), he contends the States violation of his right to substantive and procedural Due Process was so egregious that as a perse rule it should bar any future prosecutions, because it violates fundamental conceptions of justice and the communitys sense of fair play and decency.

II. When an individuals life hangs in the balance higher standards of reliability and fairness should be observed.

Discovery is warranted where specific allegations before the court shows reason to believe that the Petitioner may, if the facts are fully developed, be able to demonstrate that he is entitled to relief". Bracy, 520 US. at 908-09, (quoting Harris-vs-Nelson, 394 US. 286, 89 S.Ct. 1082 (1969).

In (Machibroda-vs-U.S., 368 US. 487 (1962) (the court held a 2255 petitioner is entitled to evidentiary hearing where alleged facts, if true, would entitle him to relief).

Petitioner has submitted unrebutted affidavits, unrebutted Certified State Court documents, and pointed to trial transcripts of government agents testimony to support there was an improper working arrangement between State and Federal authorities. If he would be allowed to more fully develope the facts he could demonstrate he is entitled to relief.

The Petitioner is sentenced to 490 months imprisonment. A defacto life sentence. He was 48 years old at sentencing. He will likely die in prison.

Sentences of imprisonment of 470 months or longer are "De.Facto Life Imprisonment Sentences". See (U.S. Sent. Comm., Feb. 2015, "Life Sentences in the Federal System", by Glen R. Schmitt, J.D., M.P.P., office of Research and Data), (www.w.ussc.gov).

"When an individuals life hangs in the balance, the Supreme Court has repeatedly insisted in higher standards of reliability and fairness be observed". (Lockett-vs-Ohio, 438 US. 586 (1978).

The lower courts decision was premised upon a fundamental misreading of both applicable law and facts, which led it to believe the 2255 is not the proper vehicle to assert Petitioners claims. As a result the lower courts were unable to recognize what issues were before it, what discretion it possessed, or what facts were relevant to the inquiry, let alone to properly apply the law to the true facts.

Petitioner contends if this court, chooses to not vacate his conviction and sentence, it would be proper for the Court to remand for further development of facts.

Conclusion

For the foregoing reasons, Petitioner Roger Keith Lunsford, respectfully requests that a Writ of Certiorari issue to review the decision of the US. Court of Appeals For The Fourth Circuit.

I swear under penalty of perjury the foregoing is true and correct,

Date: 2-17-23 Signature: Roger Keith Lunsford

Roger Keith Lunsford