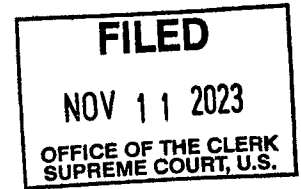


ORIGINAL

Case No. 23-6674

IN THE SUPREME COURT
OF THE UNITED STATES



TERRY HAMBRICK, Petitioner

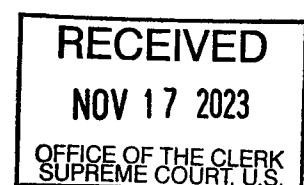
v.

UNITED STATES OF AMERICA, Respondents

ON PETITION FOR A WRIT OF
CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT
CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Question Presented for Review

**WHETHER THE DISTRICT COURT, IN EXPANDING THE CRITERIA REQUIRED
BY PLAIN ERROR REVIEW ON APPEAL, HAS SO FAR DEPARTED FROM THE
ACCEPTED
AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN
EXERCISE OF THIS
COURT'S SUPERVISORY POWER?**

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Parties to the Proceedings

1. Terry Hambrick
2. United States of America

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Terry Hambrick respectfully requests the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

DECISION BELOW

The decision of the United States Court of Appeals for the Eighth Circuit is published at 70 F.3d 1068 (8th Cir. 2023) and is reproduced at Pet. App. 1a.

JURISDICTION

The Eighth Circuit entered judgment on June 14, 2023. See Pet. App. 1a. The Eighth Circuit also denied Hambrick's petition for rehearing on August 22, 2023. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

STATEMENT OF FACTS

In January 2020, law enforcement started using a confidential informant (CS#1) to buy guns and drugs from several people in Des Moines. (TT-I 136-39; TT-II 288-89.)¹ Most of these deals started with Leon Edwards, who would take CS#1 to different gun and methamphetamine sources of supply, including Kieffer Simmons. (TT-I 148-49.)

On February 28, 2020, Edwards and CS#1 met with Simmons at

¹ This brief uses the following abbreviations:

"R. Doc." – district court clerk's record, followed by docket entry and page number, where noted; "T-FPTC" – final pretrial conference transcript, followed by page number; "TT" – trial transcript, followed by volume and page number; "S. Br." – Simmons' opening brief, followed by page number; and "H. Br." – Hambrick's opening brief, followed by page number.

Simmons' house and purchased approximately 72 grams of methamphetamine. (TT-I 156-61; TT-II 284-85, 296, 304, 306-11, 379; R. Doc. 432-1, 433-1, 433-31.) The deal took place in a Dodge Durango in Simmons' driveway. (TT-II 305-06.) During the deal, Simmons and CS#1 also discussed guns Simmons had and Simmons showed the confidential informant a gun. (TT-II 306-07.) Less than two weeks later, law enforcement arrested Simmons after they found methamphetamine and a digital scale in the garage at Simmons' house. (TT-II 232-37; R. Doc. 433-17.) Simmons was also carrying a gun in his waistband. (TT-II 235-36.) Edwards and CS#1 had met with Simmons before.

On January 21, 2020, Edwards facilitated the purchase of a semi-automatic AK-style rifle between Simmons and CS#1. (TT-I 151-53, 196-201; TT-II 294-96.) Simmons drove his white Jeep to the deal and afterwards went to the Jeep to retrieve a loaded gun magazine to give to CS#1. (TT-II 199-201; R. Doc. 432-2, 433-13.) Edwards also introduced CS#1 to Leroy Williams and CS#1 dealt directly with Williams. (TT-I 162-63; TT-II 285, 298, 311.) On April 9, 2020, Hambrick supplied Williams with methamphetamine, who in turn supplied CS#1 with approximately 221.9 grams of that methamphetamine. (TT-II 380; R. Doc. 433-2.) Williams was in contact with Hambrick prior to and during the deal. (TT-II 246-57, 268-73; R. Doc. 432-3.) Williams walked to a white Escalade truck, met with Hambrick, and departed with a clear makeup style case with a black plastic bag containing methamphetamine. (TT-II 246-57, 285, 315-16, 320; R. Doc. 433-49, 433-40, 433-41, 433-42, 433-43, 443-44, 443-45.) The plastic bags that contained the methamphetamine were submitted for testing. (TT-I 166-67; TT-II 322; R. Doc. 433-3.) Fingerprints belonging to Hambrick, Williams, and CS#1 were located on the bag.

(TT-II 395-401; R. Doc. 433-4, 433-5.) After the deal, agents continued surveillance of Hambrick and confirmed Hambrick was the driver of the white Escalade. (TT-II 257-62, 273-74; R. Doc. 433-46, 433-47.)

In November 2020, Hambrick and Simmons were charged with conspiracy to distribute and distribution of methamphetamine, along with five co-defendants, including Leon Edwards and Leroy Williams. (R. Doc. 2-1.) In November 2021, Hambrick and Simmons proceeded to trial. In its motions in limine, as relevant to this appeal, the government requested to exclude the testimony and written statement of codefendant Edwards and admit intrinsic evidence about Hambrick. (R. Doc. 356.)

Simmons sought to call Edwards² as a defense witness. Simmons also presented a purported written statement of Edwards denying that

² In June 2021, Edwards pleaded guilty to conspiracy to distribute methamphetamine and possession of a firearm in furtherance of a drug

Simmons sold the confidential informant methamphetamine on February 28, 2020. (R. Doc. 161-2, 397.) At the final pretrial conference, Edwards, through his counsel, indicated he intended to invoke his Fifth Amendment right against self-incrimination and stated he did not wish to testify. (T-FPTC 5.) The district court (the Honorable Rebecca Goodgame Ebinger) declined to create a right to judicial immunity. (T-FPTC 11, 14.) The district court also declined to compel the government to offer Edwards immunity. (T-FPTC 15-16.)

In addition, the district court allowed evidence from two cooperating witnesses that Hambrick sold drugs as intrinsic evidence to the crimes charged. (R. Doc. 394 at 6; see *also* R. Doc. 356 at 7-8.) At trial, K.T. testified that he purchased methamphetamine

from Hambrick. (TT-II 413, 415-16, 418-19.) K.T. testified that he met with Hambrick at the Walgreens near where the April 9, 2020 controlled purchase took place. (TT-II 416-17.) K.T. also met with Hambrick in the same vehicle Hambrick drove during the April 9, 2020 controlled purchase. trafficking crime. (R. Doc. 228.) As part of his written plea agreement, he admitted to distributing methamphetamine on three occasions. (R. Doc. 228 ¶ 9.) He did not admit to his involvement in the February 28, 2020 methamphetamine transaction involving Simmons. (*See id.*) (TT-II 419.) K.T. also discussed Facebook messages about methamphetamine and drug debt between K.T. and Hambrick. (TT-II 419-27; R. Doc. 432-4, 432-5; *see also* R. Doc. 433-48.) D.S. testified about purchasing PCP from Hambrick. (TT-II 442.) D.S. also testified that he met with Hambrick at the Walgreens near where the April 9, 2020 controlled purchase took place. (TT-II 442-43; *see also* R. Doc. 433-50, 433-51.) D.S. also met with Hambrick in the same vehicle Hambrick drove during the April 9, 2020 controlled purchase. (TT-II 443-44.) D.S. also knew Hambrick to have a Yukon, something Williams told CS#1 about Hambrick during the April 9, 2022 controlled purchase. (TT-II 105, 444; R. Doc. 433-37, 433-38.)

Following a three-day trial, both Simmons and Hambrick were convicted. (R. Doc. 416.) Simmons did not file any post-trial motions. Hambrick filed a motion for a new trial arguing a new trial was warranted because the district court erred in allowing the testimony of the cooperating witnesses and due to alleged newly discovered evidence. (R. Doc. 436.) The district court denied Hambrick's motion. (R. Doc. 485.)

In March 2022, Simmons was sentenced to a term of imprisonment

of 151 months, followed by a five-year term of supervised release. (R. Doc. 500.) In May 2022, Hambrick was sentenced to a term of imprisonment of 360 months, followed by a five-year term of supervised release. (R. Doc. 517.)

Hambrick filed a timely notice of appeal (R. Doc. 496, 519.). On appeal, Hambrick made the following arguments:

I. Whether the jury's verdict was based on ample evidence that Hambrick conspired and distributed methamphetamine to a middleman, including identification of Hambrick and his vehicle, Hambrick's fingerprints on the drug packaging, and phone records showing the middleman called Hambrick?

II. Whether intrinsic evidence from cooperating witnesses about Hambrick dealing drugs to them in the same car and near the same locations as the charged crimes was properly admitted?

On June 14, 2023, the Eighth Circuit issued an order affirming the judgment issued by the district court. U.S. v Simmons, 70 F.4d 1086 (8th cir. 2023). In doing so, the Eighth Circuit found, first of all, that the evidence was sufficient to sustain the conviction.

Second, the Eighth Circuit found that it did "not need to resolve the purpose for which K.T.'s and D.S.'s testimony was offered because Hambrick's challenge does not survive the third prong of plain error review. An error affects a substantial right if there is "a reasonable probability that, but for the error, the outcome of the proceeding would have been different." *Molina-Martinez v. United States*, 578 U.S. 189, 194 (2016) (citation omitted). The testimony of the agent and the CI, Williams's phone records, the fingerprints on the bag of methamphetamine, and the supporting exhibits all support the jury verdict without the testimony of K.T. and D.S." See pg. 13 of 6/14/2023 memorandum opinion.

Its against this backdrop, that the Eighth Circuit affirmed. *Id.*

Hambrick filed a timely petition for rehearing, which was denied August 22, 2023.

This timely writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

A.

THE EIGHTH CIRCUIT COURT OF APPEALS ERRED, AS A MATTER OF CLEARLY ESTABLISHED LAW WARRANTING THIS COURT'S ATTENTION, PURSUANT TO SUPREME COURT RULE 10(A) WHEN IT FOUND THAT THE OUTCOME OF THE JUDICIAL PROCEEDINGS WOULD NOT HAVE BEEN DIFFERENT UNDER THE PLAIN ERROR STANDARD OF REVIEW

Hambrick asserts that, in the face of his claim that the testimony of witnesses K.T. and D.S. was impermissible prior bad act evidence under Fed. R. Evid. 404(b)(1), the Eighth Circuit Court of Appeals impermissibly expanded the criteria required by plain error review on appeal, therefore departing from the accepted and usual course of the judicial proceedings, necessitating a call for an exercise of this court's supervisory power pursuant to Supreme Court Rule 10(a).

Keeping these facts in mind, in *United States v. Olano*, 507 U.S. 725, 732 (1993) this Court noted the limitations on "plain error" review by the courts of appeals under Rule 52(b). "The first limitation on appellate authority under Rule 52(b) is that there indeed be an `error.'" *Ibid.* Second, "the error [must] be `plain.'" *Id.*, at 734. Thus, "[a]t a minimum, a court of appeals cannot correct an error pursuant to Rule 52(b) unless the error is clear under current law." *Ibid.* Third, the plain error must "'affect[] substantial rights,'" *ibid.*, *i.e.*, "in most cases it means that the error must have been prejudicial," *ibid.* Finally, if these three prerequisites are met, the decision to correct forfeited error

remains within the sound discretion of the court of appeals. A court of appeals, however, should not exercise that discretion unless the error ""seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."" *Id.*, at 732.

Applying that standard of review to those facts of this case, and the Eighth Circuit found that it did “not need to resolve the purpose for which K.T.’s and D.S.’s testimony was offered because Hambrick’s challenge does not survive the third prong of plain error review. An error affects a substantial right if there is “a reasonable probability that, but for the error, the outcome of the proceeding would have been different.” *Molina-Martinez v. United States*, 578 U.S. 189, 194 (2016) (citation omitted). The testimony of the agent and the CI, Williams’s phone records, the fingerprints on the bag of methamphetamine, and the supporting exhibits all support the jury verdict without the testimony of K.T. and D.S.” See pg. 13 of 6/14/2023 memorandum opinion.

In other words, the Eighth Circuit found that the evidence presented against Hambrick was essentially overwhelming – so there’s no reasonable probability that the outcome of the proceedings would be different absent the impermissible testimony of K.T. and D.S, under the third prong of the plain error test.

With all due respect, however, a candid and scrutinizing review of the trial record reveals that, absent use of the erroneous testimony, the remaining evidence of Hambrick’s purported connection to his counts of conviction was extremely weak.

This is so, for example, because the Government’s witnesses, members of an investigative task force and a cooperating individual, offered no testimony of an agreement between Hambrick and any second party to distribute methamphetamine. (See generally Tr. Vol I & Vol II). Separate and distinct from an insufficiency of the

evidence argument, it must be noted that the government's witness, Wauters, identified his sources of controlled substances, Leon Edwards and Leroy Williams, but never identified Hambrick. Wauters testified that he did not know Hambrick, nor was Hambrick's name mentioned at any point during Wauters' conversation on April 9, 2020 with Williams. (Tr. Vol II p112 ln 9-18). Wauters only "knowledge" relating to Hambrick was hearsay about the color and make of the vehicle driven by the person Williams asserted was his supplier, and even that information was inconsistent. "He told me he was driving a white - -or an Escalade truck and a black Yukon - - or a white Yukon." (Tr. Vol II p105 ln7-9).

The Government did not call Williams as a witness to his alleged interaction with Hambrick on April 9, 2020. The only testimony suggesting that Hambrick *may* have been present at the surveilled location was through Special Agent Jenkins. In speaking about his surveillance of Williams on April 9, 2020, Special Agent Jenkins stated, "I could see him for a short period until he was out of my line of sight, so I saw him walking east through the parking lot away out of my sight." (Tr. Vol II p36 ln2-4) Special Agent Jenkins did not observe Williams meet with anyone other than Wauters and observed no transaction other than that between Wauters and Williams.

At best, excluding the impermissible testimony of K.T. and D.S., the evidence adduced at trial, established that Hambrick was present at a location where Williams sold a controlled substance to Wauters. And "[m]ere presence at the location of the crime alone, even when coupled with knowledge of that crime, is not sufficient to establish guilt on a conspiracy charge." *Id.* Instead, the defendant must have knowingly contributed her efforts to the conspiracy's objectives. See *United States v. Duckworth*,

945 F.2d 1052, 1053 (8th Cir. 1991); *United States v. Bonadonna*, 775 F.2d 949, 957 (8th Cir. 1985).

Said differently, absent the erroneous testimony presented at trial, there's a reasonable probability that the jury would not have arrived at the conclusion that Hambrick conspired with one or more persons to distribute or possess with intent to distribute any controlled substances.

Indeed, it cannot be emphasized enough that the government presented no testimonial or even circumstantial evidence during trial that Hambrick conspired to distribute drugs to another person involved in the alleged instant case crime.

As such, the record plainly reflects that the Eighth Circuit overlooked the above-referenced material facts concerning whether there is a reasonable probability that, absent the erroneously admitted testimony, the outcome of the trial would have been different; and has so far departed from the accepted and usual course of the judicial proceedings, necessitating a call for an exercise of this court's supervisory power pursuant to Supreme Court Rule 10(a).

CONCLUSION

Based on the foregoing, Hambrick respectfully request that this court grant him a writ of certiorari.

Respectfully submitted,

Terry Hambrick

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