

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

David J. Widi, Jr.,
Petitioner,

v.

State of New Hampshire,
Respondent.

On Petition for a Writ of Certiorari to the
New Hampshire Supreme Court

PETITION FOR WRIT OF CERTIORARI

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Question Presented

- I. Whether a claim of actual innocence asserted in error coram nobis proceedings can be time-barred when petitioner was not afforded the opportunity to raise the issue on direct appeal or in habeas proceedings?

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Opinion Below

The opinion of the New Hampshire Supreme Court appears in the Appendix (A1-A7) and is reported at New Hampshire v. Widi, 170 N.H. 163, 166 A.3d 1105 (2017).

Jurisdiction

The New Hampshire Supreme Court issued its decision on June 22, 2017 (A7) and denied a timely petition for rehearing on August 10, 2017 (A8). An extension of time to file the petition for a writ of certiorari was granted to and including January 7, 2018 in Application No. 17A509.

Statement of the Case

David J. Widi, Jr., was indicted by a Rockingham County grand jury for felony-level reckless conduct (A9). The indictment alleged that he placed a loaded .45 caliber gun inside a box at a Hallmark store, and that the gun was a deadly weapon (A9). Mr. Widi submitted through counsel a notice of intent to plead guilty to misdemeanor-level reckless conduct in exchange for a 12-month suspended sentence, one-year probation, and a tour of the New Hampshire State Prison (A10).

The information that was to be substituted for the indictment alleged that Mr. Widi “placed an object in a hat box in Warner’s Hallmark Store, placing customers in danger of serious bodily injury,” and made no reference to a gun or deadly weapon (A12). The

information referenced docket #03-S-1714, which notably is the same docket number reference in the indictment (Compare A9 with A10).

The State subsequently made a “revised plea offer” due to Mr. Widi’s “continued contact with law enforcement (he ha[d] a pending charge of operating Recklessly in Newburyport, Massachusetts).” (A13). The revised offer referenced the same docket number as the original plea agreement and only asked for an additional year of probation (Compare A13 with A10).

On December 15, 2004, Mr. Widi entered his guilty plea and the superior court imposed the 12-month all-suspended sentence with two-years of probation. But the felony indictment, rather than the misdemeanor information, was stamped “Guilty” (A14) and the mittimus in turn recorded the conviction as a “Felony” (A15).

On November 28, 2008, Mr. Widi was arrested for the possession of a firearm by a felon under 18 U.S.C. § 922(g)(1). *See United States v. Widi*, 2:09-cr-00009-GZS (D. Me). Mr. Widi subsequently filed a “motion to correct the record” in the state superior court where he contended that he had pled guilty to misdemeanor-level Reckless Conduct. The superior court summarily denied that motion and Mr. Widi appealed. The State asked that the appeal be dismissed without prejudice to Mr. Widi’s ability to challenge the plea and the NH Supreme Court declined to accept the appeal. *See New Hampshire v. Widi*, 2010-0727 (N.H. Supreme Ct.). This Court declined to issue a writ of certiorari. *See Widi v. New Hampshire*, 568 U.S. 901, 133 S. Ct. 309 (2012).

Meanwhile, Mr. Widi returned to the superior court with a motion to correct, modify or reduce conviction that was also denied and his discretionary appeal was once again denied. *See New Hampshire v. Widi*, 2010-0845 (N.H. Supreme Ct).

On January 6, 2014, Mr. Widi filed a Motion to Vacate, Set Aside, or Correct a Sentence Pursuant to 28 U.S.C. § 2255 challenging his federal conviction on the grounds that he was actually innocent of the predicate. *See United States v. Widi*, 2:09-cr-00009-GZS (D. Me)(ECF#369, #369-1).

On November 10, 2014, Mr. Widi returned to the superior court with a petition for writ of error coram nobis, but he was denied for a third time. Mr. Widi again filed a discretionary appeal to the NH Supreme Court but, third time being a charm, his appeal was accepted and he was appointed counsel for the first time since his sentencing. The NH Supreme Court nevertheless concluded that Mr. Widi's claim of actual innocence was time-barred (A5-A7). Mr. Widi asked for reconsideration, but the NH Supreme Court refused to do so in boilerplate fashion (A8). This timely petition now follows:

Reasons for Granting the Writ

The indictment alleged that: "David J. Widi, Jr. recklessly engaged in conduct which may have placed others in danger of serious bodily injury in David J. Widi, Jr. placed a loaded .45 caliber gun in a box in Warner's Hallmark Store such .45 caliber gun constituting a deadly weapon, as defined in RSA 625:11 V." (A9).

The statute that was used to prosecute Mr. Widi provided that: “Reckless conduct is a class B felony uses a deadly weapon as defined in RSA 625:11, V. All other reckless conduct is a misdemeanor.” NH RSA § 631:3(II)(2003 edition).

This Court has explained that “use” requires active employment and “includes ‘brandishing, displaying, bartering, striking with, and, most obviously, firing or attempting to fire the weapon, ... but does not include mere possession of a firearm.” Bousley v. United States, 523 U.S. 614, 617 (1998)(quoting Bailey v. United States, 516 U.S. 137, 143, 148 (1995)). Indeed, this Court has made it clear that placement of a firearm does not constitute “use.” See Bailey, 516 U.S. at 149 (“Perhaps the nonactive nature of this asserted ‘use’ is clearer if a synonym is used: storage ... Storage of a firearm, without its more active employment, is not reasonably distinguishable from possession.”). And, this Court has already determined in nearly identical circumstances that Mr. Widi’s claim is one of actual innocence. See Bousley, 523 U.S. at 623-24.

The NH Supreme Court did not dispute that Mr. Widi was actually innocent of felony-level reckless conduct, instead it denied his appeal on the ground there was “no sound reason for his delay in seeking earlier relief.” (A7). The NH Supreme Court held in particular that:

The defendant contends that he did not discover that his conviction had been recorded as a felony until 2008. He argues that, therefore, he could not have sought earlier relief for this alleged error and his constitutional claims arising therefrom. He asserts that, since that discovery in 2008, he has timely and diligently pursued post-conviction relief. Specifically, he asserts that: (1) before 2008, he did not know that he had been convicted of felony reckless conduct; (2) he filed a motion to correct the record in 2010 that

was pending until 2012; and (3) he filed the present petition for a writ of coram nobis in November 2014.

We are not persuaded. Even if we were to accept the fact that the defendant did not learn until 2008 that his 2004 conviction had been recorded as a felony, he has not explained his delay in seeking relief between 2008 and 2014 — when he filed this petition. (A5-A6).

The NH Supreme Court’s holding was based on United States v. Morgan, 346 U.S. 502, 512 (1954), where this Court granted error coram nobis relief to a criminal defendant because “no other remedy [was] available and sound reasons exist[ed] for failure to seek appropriate earlier relief.” But the passage of time was not a dispositive factor in that case. *See Morgan*, 346 U.S. at 514 (Minton, J. dissent)(“Approximately fourteen months after the New York conviction, more than twelve years after being sentenced on the federal conviction, and more than eight years after the federal sentence was completed, respondent filed this ‘Application for a Writ of Error Coram Nobis’...”).

The relevant inquiry should have been directed towards determining why Mr. Widi had not availed himself of earlier remedies and the answer to that question is that he did not know the conviction had been classified as a felony until after he had completed the terms of his sentence, therefore neither avenues of direct appeal or habeas relief were available to him.

After discovering that the conviction had been recorded as a felony, Mr. Widi did seek relief in the form of a motion to correct the record as he believed the conviction had been misclassified because of a clerical error. Because he believed the issue to be nothing more than a scrivener’s error he had no reason to raise any other claim at this time. Nor

could he have raised any other type of claim as New Hampshire law only allowed a trial court to exercise jurisdiction “where there is a clerical error or the sentence is illegal and void.” New Hampshire v. Fletcher, 158 N.H. 207, 210 (2009). Indeed, the NH Supreme Court did not even “acknowledge the viability of the extraordinary common law writ of coram nobis” until recently in New Hampshire v. Santamaria, 169 N.H. 722, 727 (2017). And, notably, Mr. Widi was appearing without counsel all the way until his third appearance before the NH Supreme Court. That he as a pro se litigant did not stumble upon the seldom used writ of error coram nobis until 2014 should not have disposed of his actual innocence claim.

Although this Court has had little occasion to discuss the writ of error coram nobis, it has taken the view that the writ of error coram nobis “is of the same general character as one under 28 U.S.C. § 2255.” Morgan, 346 U.S. at 505 n.4. This Court has explained “in the context of §2255, that actual innocence may overcome a prisoner’s failure to raise a constitutional objection” in an earlier phase of the proceedings. McQuiggin v. Perkins, 569 U.S. 383, 393 (2013)(quoting Bousley, 523 U.S. at 622). And, that the actual innocence “exception applies to state procedural rules, including filing deadlines.” McQuiggin, 569 U.S. at 393 (quoting Coleman v. Thompson, 501 U.S. 722, 750 (1991)). The same result should hold true in these error coram nobis proceedings and this Court should take the opportunity to develop this and create the uniformity of this area of law.

It is understandable that this Court can only grant certiorari in the rare case, but undisputed showings of actual innocence are hen’s-teeth rare. And Mr. Widi has been

condemned not once, but twice, because of an offense that he never committed. He is still currently serving a sentence for being a felon in possession of a firearm and the federal courts will not rectify that wrong until he sheds the predicate conviction. See United States v. Widi, 2:09-cr-00009-GZS (D. Me)(ECF#378:11-14). Neither the people of New Hampshire or the United States have a legitimate interest in the conviction of an innocent man and a system of justice where the innocent are procedurally blocked from court is a system simply not worth having—a principle this nation’s founding fathers understood all too well.

Conclusion

Based on the foregoing, this Court should summarily vacate and remand or issue a writ of certiorari.

Dated: December 21, 2017.

Respectfully submitted,



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