

No. 16-1230

IN THE
SUPREME COURT OF THE UNITED STATES

Kenneth P. Jackson — PETITIONER
(Your Name)

VS.

Trevor Wingard, ET AL — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Third Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Kenneth P. Jackson
(Your Name)
SCI - Somerset
1600 Walter Mills Rd.
(Address)

Somerset, Pa. 15510
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

- I. Whether Counsel on direct Appeal rendered ineffective Assistance in failing to argue that Appellant's sentence violates the plea Agreement because sentencing was to be within the standard guidelines range for all counts
- II. Whether Appellant was denied his Sixth Amendment right to counsel at sentencing even though he was told by Judge Manning during ~~sentencing~~ ^{Guilty Plea} Colloquy that he could ask for competent counsel.
- III. Did Judge Manning and Allegheny District Attorneys office commit fraud on the Courts when they falsely claimed that Appellant fired ALL His Appointed counsel, and when they claimed there was not a sentence agreement, Even though the record reflects otherwise.
- IV. Whether the 3rd Circuit erred in their decision when they found that Jackson's Sixth amendment Right to Counsel (effective Assistance of Counsel) was not violated at sentencing.
- V. Was Appellant denied his constitutional Right to a fair trial, when Appellant was denied sentence based on Plea agreement, which was violated by the Commonwealth

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:

A) Trevor Wingard, Superintendent,
SCI-Somerset

B) Stephen A. Zappala Jr.
District Attorney

C) Ronald M. Wabby Jr.
Deputy District Attorney

D) Keaton Carr
Assistant District Attorney

E) Pennsylvania Attorney General
Josh Shapiro
Pa. Office of Attorney General
16th Floor Strawberry Square
Harrisburg, Pa. 17120

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~~Petition for Rehearing, Court of Appeals, Western District of Pennsylvania~~

Appendix G - Appellants Petition for rehearing En Banc, and Guideline Sentence form showing that Plea was for standard sentence; Negotiated guilty Plea, and Trial Transcript 367

TABLE OF AUTHORITIES CITED

CASES

PAGE NUMBER

Coleman v. Thompson 501 US 722, 754 (1991)

Parzen v. Maurer 424 F.3d 303 (3rd cir. ²⁰⁰⁵ ~~2004~~)

~~See also~~

* Robinson v. Ignacio, 360 F.3d 1044 (9th cir 2004)

United States v. Robinson 913 F.2d 712 (9th cir. 1990)

United States v. Taylor 933 F.2d 307, 311 (7th cir. 1991)

U.S. v. CRONIC 466 U.S. 648, 80 L.Ed 2d 657, 104 S. Ct. 2039 (1984)

Bradshaw v. Stumpf - 545 U.S. 175, 183 (2005)

Com v. Krah 440 Pa. Super. 654 A2d 1168 (1994)

U.S. v. Sed 601 F.3d 224 (3rd cir. 2010)

Com v. Zakrzewski 400 Pa. 528 333 A2d 898, 900 (1975)

STATUTES AND RULES

Menefield's Rational Applied

U.S. v. CRONIC - The Right to be represented by Counsel at a critical stage.

Robinson v. Ignacio and United States v. Robinson - The right to have counsel appointed at sentencing, which is a critical stage.

Plea agreements are contractual

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 D 2 to the petition and is

☐ reported at _____; 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 C to the petition and is

☐ reported at _____; 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 E to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the PCRA court appears at Appendix E 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 ~~DEC. 1, 2017~~
NOV. 2, 2017.

☐ 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: Dec-1 2017, and a copy of the order denying rehearing appears at Appendix 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 June 23 2015.
A copy of that decision appears at Appendix B.

☐ 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

U.S. V. Cronio 466 U.S. 648, 80 L.Ed 2d 657, 104 S.Ct. 2039 (1984)

Pg. 2047 The presumption that counsels assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial.

A) 6th Amendment Right violation - Right to Counsel

B) 8th Amendment Right violation - cruel and unusual punishment

The court has uniformly found constitutional error without any showing of prejudice when Counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceedings

Pg. 2048 Thus, only when surrounding circumstances justify a presumption of ineffectiveness can a Sixth Amendment claim be sufficient without inquiry into counsels actual performance at trial.

STATEMENT OF THE CASE

The appellant was charged at CC No. 200201068 with Count of Criminal Homicide, and at CC No. 200202589 with various other charges. Theft, Forgery, etc. .

Appellant Kenneth Jackson on Jan. 23, 2002 went to a Coroners Inquest and was represented by Attorney Jim Eckard.

After the Coroners Inquest Appellant ~~could~~ could not pay Attorney Eckards fee to represent him at trial, so Attorney Eckard withdrew as Appellants Counsel of record.

After that Attorney Robert Forman was appointed to represent Appellant at trial, but had to withdraw as counsel because of a Conflict of Interest, in his prior representation of several Prosecution Witnesses'.

Because of that, Attorney Sheets was then Court Appointed to represent Appellant by the Public Defenders office, But the Public Defenders office was removed from Appellants case by the A.C.L.U. because Appellant was a Plaintiff in a Federal Consent Decree against the Allegheny County Public Defenders Office.

So Judge Manning Court Appointed Attorney Pat Thomassey to represent Appellant at trial.

On April 19, 2004 Attorney Thomassey informed Appellant that the D.A.s office had a plea offer of 15-30 years for 3rd Degree Murder, with other charges run concurrent.

Appellant turned down the Plea deal, and Jury Selection began.

on 5 occasions during Jury Selection, Attorney Pat Thomassey tried to withdraw as Appointed Counsel, and on 2 of those occasions Attorney Thomassey stated on the record that he did not have Appellants "best interest at heart or in his heart and could not Ethically represent Appellant. (Trial Transcript 42, 43)

After stating this, Judge Manning continued to allow Attorney Thomassey to represent Appellant.

On April 22 2004 Attorney Thomassey informed Appellant that another Plea deal had been offered by the Prosecution.

He informed Appellant that the Plea deal was for a Sentence within the Pennsylvania Sentencing Guidelines which with Appellants record would be around 72-84 months as a minimum.

Appellant accepted the plea deal.

It must be noted that before Judge Manning had Appellant brought up for Guilty Plea Colloquy, that Judge Manning, A.D.A. ED Borkowski, and Attorney Pat Thomassey entered into a Pre-Guilty Plea Colloquy Conversation outside of Appellants Presence.

In which A.D.A. ED Borkowski stated on the record that there was no Agreement to sentencing.

This Ambiguity was Placed on the record without (Trial Transcript- 367)

Appellants knowledge, and was never corrected by Judge Manning or Appellants Counsel Attorney Pat Thomassey. (Trial Transcript 367)

After the Ambiguity was placed on the record, Judge Manning then had Appellant brought up from the Bullpen and then everyone in the Courtroom was sworn in to testify. (Trial Transcript 367)

At this time the Guilty Plea Colloquy began.

In which Judge Manning stated: And sentencing any sentencing would be within the sentencing Guidelines as promulgated by the sentencing Commission of the Commonwealth of Pennsylvania; is that right? (Trial Transcript 372)

Both Mr. Thomassey and A.D.A Mr. Borkowski agreed, and Appellant stated that he understood (Trial Transcript 372)

Judge Manning at this time stated on the record:

* The Court: Admittedly, you have the right to Consult with competent Counsel, but it must be your choice. (Trial Transcript 379)

on May 5 2004 Appellant contacted Judge Manning by mail wishing to enforce his Constitutional Right to effective assistance of Counsel, as stated by the Court.

On July 19 2004 at sentencing Appellant was ambushed by Judge Manning with the removal of Attorney Pat Thomassey as Counsel, but forced into Pro-se (self) representation.

Appellant once again requested and expressed his 6th amendment right to counsel, Judge Manning did not grant Appellant Counsel, but instead proceeded with sentencing.

The Court then imposed the following sentence, at CC 200201068, Appellant received a sentence of 240 to 480 months, a CC 200202589, Appellant received a sentence of 2½ - 5 years of incarceration at each remaining count, all imposed consecutive to each other.

At the time of Sentencing, Appellant objected to the sentence being outside the guidelines. Appellant repeatedly requested appointment of Counsel to file Post-sentence motions, and the Court stated that it "will appoint counsel to represent Appellant."

John Elash, Esquire, was appointed to represent Appellant and on July 29, 2004 filed a motion to reconsider sentence. This Motion was denied by operation of Law on December 2, 2004.

On Dec. 28, 2004, Appellant filed a notice of Appeal to the Superior Court, docketed at 31 WDA 2005.

On October 19, 2005, Judge Manning issued his Opinion.

On March 8, 2006, Attorney Elash filed a brief arguing one issue: Did the lower Court abuse its discretion in denying the motion to withdraw the guilty plea.

On June 23, 2006 the Superior Court issued a one page opinion adopting Judge Mannings opinion and affirmed the Judgement of Sentence.

On July 24, 2006, Appellant filed Petition for allowance of Appeal to the Supreme Court of Pennsylvania, docketed at 385 WAL 2006. On Jan. 3 2007, the Supreme Court denied Allocatur. On May 29, 2007 Appellant filed a Pro-se petition under the Post Conviction Relief Act (PCRA). The office of Conflict Counsel was appointed to represent ~~Appellant~~ Appellant.

On Aug. 5, 2007, Lauren A. Melfa, Esquire, filed an amended petition for relief.

The Petition raised the following claims:

- 1) Appellant Counsel was ineffective for failing to challenge the discretionary aspects of the sentence as the Court failed to place adequate reasons

on the record for imposing a sentence beyond the aggravated range of the Guidelines.

2) ~~Appellant~~ Appellate Counsel was ineffective for failing to raise an issue that the sentencing Court Abused its discretion by imposing each sentence consecutive to each other.

3) Trial Court was ineffective throughout voir dire, trial, Plea, and Sentencing, and

4) Appellant was constructively denied True Advocate Counsel under United States v. Cronin, 466 U.S. 648 (1984). On Dec. 8, 2008 the Commonwealth filed an answer,

On Dec. 1, 2011 Judge Manning issued an order scheduling a hearing on the Petition.

The order stated the hearing would address only the claims raised in paragraph 42 and 44 of the amended petition. Those claims related to the discretionary aspects of sentencing and whether Appellant was denied counsel.

On Dec 1, 2011 a PCRA hearing was held and Richard Narvin, Esquire, represented Appellant.

Attorney Narvin failed to subpoena Mr. Elash (Direct Appeal Counsel) for the PCRA Hearing.

Attorney Thomassey testified that he did nothing at Sentencing because Judge Manning had relieved him of his ~~duties~~ responsibilities prior to imposition of sentence.

On Feb. 27, 2012 Appellant was re-sentenced to the same sentence and Judge Manning only ~~cor~~ corrected a clerical error.

Attorney Narvin filed a Motion for reconsideration of sentence on March 7, 2012, which was denied on October 23, 2012.

On Nov. 15 2012 Attorney Narvin filed a Notice of Appeal, to the Superior Court for only CC No. 200202589. Docketed at 1785 WDA 2012

On Jan. 27, 2014 Judge Manning issued his opinion. On May 22 2014, Attorney Narvin filed a brief concerning only CC No. 200202589 (the Non-Homicide charges).

The appeal challenged the re-sentencing order of Feb. 27, 2012 and raised 4 claims summarized as follows:

- 1) The PCRA court erred in re-imposing a sentence which is illegal, and it violates the terms of the Plea Agreement
 - 2) The PCRA court erred in re-imposing a sentence which is an abuse of discretion and/or manifestly excessive.
 - 3) The PCRA court erred in finding that trial counsel was effective throughout all proceedings.
 - 4) The PCRA court erred when it upheld its refusal to appoint counsel during sentencing.
- On Jan. 9, 2015 the Superior Court affirmed the denial of post-conviction relief.

On Feb. 6, 2015 Appellant filed for a petition for Allowance of Appeal with the Supreme Court of Pennsylvania, docketed at 47 Wal 2015. The Commonwealth would not file an answer. On June 23, 2015, the Supreme Court of Pennsylvania denied allocatur

On July 6 2015, Appellant filed a timely Petition for Writ of Habeas Corpus in the Western District of Pennsylvania. The Commonwealth of Pennsylvania filed an answer on Oct. 15, 2015, on Dec. 15, 2015, Magistrate Judge Robert Mitchell entered judgement in favor of respondent and against Appellant. A Notice of Appeal was filed by ~~the~~ Appellant of Feb. 1, 2016. Appellant filed a (brief) Argument to support Notice of Appeal, which was construed by the Court as a request for a Certificate of Appealability. On August 11, 2016, ~~the Court~~ the third Circuit Court of Appeals granted Appellant a Certificate of Appealability. On May 24, 2017, the Appellant filed a brief and Appendix. Shortly thereafter Appellant filed a Motion to file a supplemental appendix. After 2 extensions were granted, the Appellee filed a brief on August 3, 2017. Appellant then filed a motion for an extension of time to file a reply brief which was not addressed until the eve of the decision affirming the denial of Appellant Petition for writ of Habeas Corpus on Nov. 2, 2017.

Appellant then filed a timely Petition for Rehearing.

The Petition for Rehearing was denied on ~~Dec 1, 2017~~ Dec 1, 2017.

Appellant then filed a timely Petition for Appeal to the Supreme Court of the United States.

This Petition was filed on 1-4-2018.

REASONS FOR GRANTING THE PETITION

Because Appellant knowingly and intelligently accepted a plea agreement to a standard sentence based on the sentencing guidelines as agreed to by all parties

Appellant is entitled to habeas Corpus relief because his appellate Counsel was ineffective for failing to argue on Direct Appeal that ~~Appellate~~ Appellant was sentenced in violation of the Plea Agreement, which was suppose to be within the sentencing guidelines on all Counts,

Appellant was deprived of his sixth amendment right to counsel at sentencing, (eventhough Judge Manning stated during Guilty Plea Colloquy that Appellant could consult with competent Counsel but it must be Appellants choice, because it was ~~is~~ Appellants constitutional Right), but the Court refused to appoint new Counsel to appellant, and forced Appellant to proceed pro se when Appellant ~~for~~ requested ~~to~~ New Counsel be appointed

Because Judge Manning and Attorney Pat Thomassey allowed A.D.A. ED Borkowski to commit fraud on the Court when they did not correct the statement made by A.D.A. ED Borkowski that there was no agreement to sentencing, while Appellant was not present in Courtroom,

the Case, Bradshaw v. Stumpf, 545
U.S. 175, 183 (2005).

A Plea Agreement has to be knowingly,
intelligently and voluntarily entered.

So what are the Facts

1) Plaintiff accepted Plea Agreement by
the Commonwealth, for a sentence within
the Pennsylvania Sentencing Guidelines.

This was voluntarily, knowingly and intelligently
accepted by Plaintiff, and agreed too by the
Commonwealth, Prosecutor, and Plaintiffs Attorney
Pat Thomassey. (Trial Transcript 371-72)

2) So anything added too, or subtracted from
the 4 corners of the above Plea Agreement, (contract),
No longer makes the Plea Agreement, (contract),
knowingly, intelligently, or voluntarily acceptable
unless all parties involved agree to a new Plea
deal in writing.

3) So unless the Commonwealth can produce in
writing, a New Plea Agreement that over-rides

Plaintiff has now shown that the sentence of $32\frac{1}{2}$ -65 years, imposed by the Commonwealth was not knowingly, intelligently, or voluntarily agreed to by the Plaintiff, and does not reflect the contract that was entered into by all Parties at Trial Transcript 371-72.

Com. v. Kroh 440 Pa. Super. 654 A2d 1168

(1994) states:

Although a Plea Agreement occurs in a criminal context, it remains contractual in nature and is to be analyzed under contract law standards. Furthermore disputes over any particular term of a Plea Agreement must be resolved by objective standards. A determination of exactly what promises constitute the plea bargain must be based upon the totality of the surrounding circumstances and involves a case-by-case adjudication. Any ambiguities in the terms of the Plea Agreement will be construed against the Government, Nevertheless.

The agreement itself controls where its language sets out the terms of the bargain w/ specificity.

So, under Commonwealth Law, and Federal Law (U.S. v. Sed, 601 F.3d 224 (3rd Cir. 2010),

Plea Agreements are contractual in nature and should be interpreted according to general contractual principles.

Plaintiff believes this is enough to satisfy the Honorable Judges seated on this case, and Shows that a sentence of 32½-65 years was not knowingly, Intelligently, or voluntarily accepted by Plaintiff, based on the above "Brief to Support Notice of Appeal", and ^{Argument.} the Trial Transcript 371-72.

Wherefore on the basis of the foregoing, the Plaintiff respectfully requests that this Petition be granted, and that Plaintiff be remanded back to Commonwealth Common Pleas Court of Allegheny County, to be resentenced to a sentence that reflects upon A Sentence within the Guidelines as agreed by all Parties.

Respectfully Submitted
Hennet

the original Plea Agreement, (Trial Transcript 371-72)
Then the original Plea Agreement must be Honored.
Which is a sentence within the Sentencing
Guidelines.

In Com. v. Kroh 440 PA. Super. 654 A2d 1168
(1994) states:

The terms of a Plea Agreement must be stated
in open Court. PA. R. Crim. P. 319(b)(2)

"We know, based on Trial Transcript 371-72, that
the Commonwealth, District Attorney, and Attorney
Pat Thomassey, all agreed in open Court to a
Plea Agreement in which Plaintiff would be
sentenced within the Sentencing Guidelines."

In Com. v. Kroh, it states also:

Therefore in PA. it ~~is~~ is well settled that where
a plea bargain has been entered into and is
violated by the Prosecution, the def. is entitled
at least to the benefit of the bargain.

Com. v. ZAKrzewski 400

PA. 528 333 A2d 898, 900 (1975)

Because Appellant was Ambushed by the State Court (Judge Manning) and made to represent himself denying Appellant the chance to present Mitigating factors such as Appellant only had a 3rd grade education at the time of sentencing, Appellant received Social Security Disability for Mental Illness at the time of Homicide, and that victim, (Appellants Uncle), had raped Appellant from the time Appellant was 8 years old until Appellant was 13 years old.
All very important Mitigating facts.

CONCLUSION

Appellant wishes to request this Court to vacate the Judgement of sentence and remand the case for re-sentencing before a different Judge.

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: 1-4-18