Supreme Court, U.S.
FILED
SEP 15 2003
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No. 03-54

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

In re Timothy D. Johnson

ON PETITION FOR A WRIT OF HABEAS CORPUS TO

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. §2241

TIMOTHY D. JOHNSON D-67730

P.O. BOX 715071 / (5-BA1-22)

REPRESA, CA. 95671

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QUESTION(S) PRESENTED

If the federal court arbitrarily convert a habeas petition pursuant to 28 U.S.C. §2241 into a habeas petition under 28 U.S.C. §2254. Did the federal court abuse its discretion and/or violate the due process clause under the Fourteenth Amendment by converting the habeas petition?

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
JUN 12 2002
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

TIMOTHY DEMETRIUS JOHNSON, Petitioner - Appellant, v. ANTHONY C. NEWLAND Respondent - Appellee.	No. 02-15042 D.C. No. CV-01-01830-LKK Eastern District of California, (Sacramento) ORDER

FILED
JUN 13 2002
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY
DEPUTY CLERK

Before: RYMER and T.G. NELSON, Circuit Judges.

The request for a certificate of appealability is denied. *See* 28 U.S.C. § 2253(c)(2).

If petitioner wishes to file a second or successive 28 U.S.C. § 2254 petition in the district court, petitioner must first move this court for an order authorizing the district court to consider that petition. *See* 28 U.S.C. § 2244(b)(3). If petitioner files an application in this court for the authorization order, petitioner must show that:

A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST

JUN 12 2002

by Bailey Ward
Deputy Clerk

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ARGUEMENT

1.

THE COURT UNCONSTITUTIONALLY RULED, GRANTING THE PROSECUTION'S MOTION TO EXCLUDE ANY EVIDENCE OF THE VICTIM'S HISTORY OF DRUG AND ALCOHOL ABUSE DENYING PETITIONER DUE PROCESS.

On July 8, 1991, the prosecution made a motion to excluse any evidence of the victim's drug and alcohol abuse prior to the date of the incident, March 5, 1991. (RT. 23-24) The motion was opposed by both defence counsels (RT.24). Counsel argued that there had been no access to the victim by defence, that they were completely barred from having any access to the victim.

The prosecution based (his) motion to exclude any evidence of the victim's drug and alcohol abuse on Evidence Code, §352, although the prosecution conceded that the defence had the right to prove the victim was under the influence on the night of the incident. (RT. 24) However, the defence, based on medical records that indicated a doctor had diagnosed the victim as having substantial alcohol and drug abuse, methamphetamine problems argued that the lack of access to the victim deprived the defence of discovering any information regarding the victim's past history regarding the subject of prior drug or methamphetamine problems. (RT.39-40).

Joining in the objection to the motion, Mr Weis, counsel for co-defendant: "First of all, it would be relevant if, in fact, she had a prior history, a long history of drug abuse, that could seriously injer her ability to recall or reclect

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THE JUDGE WAS IN ERROR WHEN HE DENIED THE PETITIONER'S MOTION FOR MISTRIAL UNDER THE MIRANDA RULE. WHICH HIS DENIAL VIOLATED PETITIONER'S DUE PROCESS UNDER THE FOURTEENTH AMENDMENT.

The judge was in error when he denied petitioner's motion for mistrial under the Miranda Rule. Which the petitioner's motion was made in a timely manner at the judges bench.

The judge denied the petitioner's motion stating, "As far as I'm concerned, there was no custodial interrogation. There was no questioning of the kind that comes within the Miranda Rule." (See exh. 1). The judges decision was wrong because the petitioner was in custody and interrogated before he was read his rights, as petitioner's attorney Mr. Gibbert argued:

(Mr. Gibbert): "That at that time, according to the testimony of the witness (Detective Edwards), Mr. Johnson was a suspect in this shooting. He was under arrest, and he was questioned at that point without being advised of his Miranda Rights. The statements that he made to the investigating officer at that time were material and incriminating."

(The Court): Do you want to be heard, Mr. Johnson (Prosecutor).

(Prosecutor): "Your Honor, I believe he was in custody. I believe he was a suspect. There was no interrogation going on; however, he merely introduced himself and asked Mr. Johnson for his name."

At this point the prosecutor knowingly and intentally lied to the court and the jury about the detectives reading the petitioner his Miranda Rights. The prosecutor was reading the report at the time they

PETITIONER WAS DENIED A FAIR TRIAL IN VIOLATION OF DUE PROCESS WHEN THE COURT FAILED TO MAKE THE DISTINCTION BETWEEN THE MOTIVE OFFERED BY THE PROSECUTION ON THE PRETEXT THAT IT WAS "DRUGS" AND THE MOTIVE SHOWN BY THE EVIDENCE. THIS ALLOWED THE COURT TO IMPROPERLY ALLOW EVIDENCE OF DRUGS AND OTHER RELATED EVIDENCE AGAINST PETITIONER WHICH INFECTED THE TRIAL WITH FUNDAMENTAL UNFAIRNESS.

Petitioner will show that throughout the trial the prosecution presistently argued for the admission of drug related evidence in every motion made by the defence to exclude such evidence. Evidence relating to drugs was offered and allowed "solely for the purpose to show motive", but it is clear from the record that drugs was not a motive for the attempted murder rather, the motive was "to prevent the victim from disclosing incriminating information". The motive provided by the prosecution involving drugs was offered on the pretext that the crime was drug motivated when infact, the true purpose served by the related drug evidence was to link petitioner's mental state with that of co-defendant which led the jury into believing that both petitioner and co-defendant shared the "specific intent" to kill the victim. Absent the drug related evidence the jury would not have concluded that petitioner shared the "specific intent" with co-defendant and therfore, would not have been convicted of the attempted murder of the victim in the first degree which would have allowed for sua sponte jury instructions on 2nd degree attempted murder, a lesser included offence provided by P.C. §664, and thereby petitioner could not be sentenced to any more than nine years as provided by the statute. Accordingly, petitioner's conviction must be reversed, modified or granted a new trial.

PETITIONER WAS CONVICTED OF ATTEMPTED MURDER. HOWEVER ON PETITIONER'S VERDICT FORM IT DID NOT HAVE THE DEGREE OF THE CRIMES FOR THE JURY TO SELECT FROM. SINCE THE JURY DID NOT HAVE THE OPTION TO SELECT THE DEGREE OF THE CRIME, IT CAUSED AN UNAUTHORIZED SENTENCE, WHICH IS IN EXCESS OF THE COURT JURISDICTION, WHICH DENIED THE PETITIONER HIS RIGHT TO DUE PROCESS.

In petitioner's case. Petitioner was on trial for First Degree Attempted Murder, with a lesser included offense of Assault with the attempt to kill. The jury found the petitioner guilty of Attempted Murder, but did not find him guilty of the special circumstances. Furthermore, the jury felt that the petitioner did not have the intent to commit the crime. (exh. 3). Which intent is required to convict petitioner of Aiding and abetting an Attempted Murder. If the jury had the option to find petitioner guilty of a lesser degree of crime or lesser included offense, they would have done so.

On petitioner's Verdict form the jury did not have the option to find the petitioner guilty of First Degree or Second Degree Attempted Murder, or the lesser included offense, assult with the intent to kill. (See exh. 3). Which denied petitioner his right to Due Process under the Fourteenth Amendment of United States Constitution.

A jury in a criminal case is required to determine the degree of the crime and if it does not, the offense is deemed to be of the lesser degree. People v. McDonald, (1984) 37 Cal. 3d. 351, 379-383.

In In re Birdwell, (1996) 50 Cal. App. 4th 926. The jury convicted the defendant of murder, found there were special circumstance, but did not make any finding on the verdict form with the respect of the degree of the murder. Defendant was entitled to have his sentence reduced to Second degree Murder under Penal Code § 1157.

Penal Code § 1157 states, "Whenever a defendant is convicted of a crime or attempt to commit a crime which is distinguished into degrees, the jury, or the court if a jury trial is waived, must find the degree of the crime or attempted crime of which he is guilty. Upon the failure of the jury or the court to so determine, the degree of the crime or attempted crime of which the defendant is guilty, shall be deem to