

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Arthur H. Smith v. Arnold R. Jago, Supt.

Smith v. Jago, 888 F.2d 399 (6th Cir. 1989) · No. No. 88-3775 · Decided January 4, 1990

SUMMARY

The Sixth Circuit held that a habeas petitioner claiming ineffective assistance of counsel must show prejudice to the entire criminal proceeding, not just to the direct appeal, under Strickland v. Washington, 466 U.S. 668 (1984). The district court erred by focusing only on whether counsel's failure to preserve exculpatory testimony prejudiced the appeal, rather than considering whether the trial outcome would have been different. The court also ruled that state appellate court factual findings are entitled to a presumption of correctness under 28 U.S.C. § 2254(d), and because the omitted testimony would not have changed the jury's verdict, the habeas writ was improperly granted.

CASE DETAILS

|                       |                                                                                                                                                   |
|-----------------------|---------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | United States Court of Appeals for the Sixth Circuit                                                                                              |
| WRITING FOR THE COURT | Albert J. Engel; Danny J. Boggs; Avern Cohn                                                                                                       |
| JURISDICTION          | Federal                                                                                                                                           |
| DECIDED               | January 4, 1990                                                                                                                                   |
| DOCKET                | No. 88-3775                                                                                                                                       |
| DISPOSITION           | reversed                                                                                                                                          |
| PROCEDURAL POSTURE    | Appeal from district court's grant of habeas corpus                                                                                               |
| STANDARD OF REVIEW    | For factual findings, clearly erroneous; for legal conclusions, de novo; state court factual findings presumed correct under 28 U.S.C. § 2254(d). |
| PRECEDENTIAL VALUE    | Published                                                                                                                                         |
| PARTIES               | Arnold R. Jago, Supt. v. Arthur H. Smith                                                                                                          |

TOPICS

- criminal procedure
- appellate procedure
- constitutional law

PRACTICE AREAS

- Criminal Law
- Habeas Corpus

## QUESTIONS PRESENTED

1. Whether the district court applied the proper standard of prejudice under *Strickland v. Washington* when it found that trial counsel's deficient performance prejudiced Smith by affecting the outcome of his direct appeal.
2. Whether the district court erred in failing to give deference to the state appellate court's factual findings under 28 U.S.C. § 2254(d).

## HOLDINGS

1. The proper standard requires the court to consider whether the deficient performance prejudiced the entire criminal proceeding, not merely the appeal. Under *Strickland*, the defendant must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Where the error did not affect the trial itself but only the appeal, the court must assume the appeal would have succeeded and then determine whether the ultimate outcome (a new trial) would have been different.
2. Under 28 U.S.C. § 2254(d), state court factual findings are presumed correct unless one of eight enumerated circumstances exists. The district court failed to address or apply § 2254(d) and thus erred in disregarding the state appellate court's factual findings that Smith was not prejudiced.

## KEY QUOTATIONS

*“Because we believe that, on the record of this case, the district court applied an improper standard of prejudice by looking only to the outcome of Smith's direct appeal and not to the outcome of the entire criminal proceeding, we must, at the very least, vacate and remand the cause for further consideration in light of the proper standard.”* (at 403)

*“Even if we believed that the district court applied the proper standard, we would have to find that the court erred because it failed to give the findings of fact, made by the state appellate court during Smith's post-conviction proceedings, the deference they are due under the statute which governs federal habeas review of state convictions. 28 U.S.C. Sec. 2254(d).”* (at 404)

*“After careful review of the record, we first note that we are satisfied that the state court's findings of fact are ‘fairly supported by the record’ and that none of the other seven circumstances listed in section 2254(d) is applicable in this case.”* (at 406)

*“Accordingly, the judgment of the district court is REVERSED, and the cause is REMANDED for dismissal of Smith's petition for a writ of habeas corpus.”* (at 407)

## FACTUAL BACKGROUND

At approximately 10:00 p.m. on September 6, 1980, a robbery occurred at El Rancho Grande Restaurant in Wooster, Ohio. At least three men dressed in army fatigues and wearing ski masks committed the crime. The men, brandishing an assortment of weapons, ordered the employees and patrons to the floor and took their watches, wallets, jewelry and cash. The approximately thirty victims were then placed in the restrooms, where they remained until after the robbers left. Police officers arrived at the scene and interviewed the witnesses, but were unable to obtain any positive evidence as to the identities of the men who had committed the robbery.

Physical evidence found by the police at the scene included bullet fragments fired by one of the men involved and a spent shell casing. Two weeks later, on September 20, 1980, City of Upper Arlington police involved in an investigation of a 'man-with-a-gun' report were called to the Scioto Trails, a local restaurant. In the parking lot of that establishment they found and impounded an automobile, later determined to be registered in the name of Gary Burress, one of Petitioner Smith's codefendants. Inside the car, the police found, among other things, an AR-15 automatic rifle, a wallet containing Smith's driver's license, a watch later identified as belonging to Smith, a watch later identified as being the property of one of the El Rancho Grande robbery victims, and miscellaneous clothing. That same night, Ronald Bondurant, Smith's other codefendant, was stopped not far from the Scioto Trails by a police officer. The officer found in Bondurant's possession a .45 caliber automatic weapon, a gas mask, and a flashlight. Examination of Bondurant's papers disclosed a receipt issued to him for the purchase of an AR-15 rifle and ammunition. It was later learned that the receipt was for the weapon found in Burress' car, which tests indicated had fired the bullet found at the El Rancho Grande. Another police officer picked up Smith in Upper Arlington that same night. Smith allegedly explained his presence there by telling the officer that three men had kidnapped him in Columbus, had taken him to Upper Arlington, and had dumped him in the street after taking his watch and wallet. Smith, who was held briefly on an outstanding warrant for a Grand Theft which occurred in 1975, was later released. Smith and his two codefendants were subsequently arrested and charged with aggravated robbery. Ohio Rev.Code Ann. Sec. 2911.01. All three were incarcerated at the Wayne County Jail. Shortly before Smith and his codefendants were tried before a jury, Smith's trial counsel learned of the existence of a prosecution witness, named Gerry Wayt, who claimed that Smith's two codefendants had told him that they and two other men, neither of whom was Smith, had committed the El Rancho Grande robbery. Wayt, who has a lengthy criminal record, had been confined with Smith's codefendants while they were awaiting trial. After the trial began on April 6, 1981, but before any testimony was heard, Smith's trial counsel learned that the prosecution had subsequently decided not to call Wayt. Smith's trial counsel then orally renewed a previously denied motion to sever Smith's trial from that of his codefendants. Claiming that he intended to use the subsequently discovered statement of Wayt, Smith's trial counsel argued that because Smith's defense would inculcate his codefendants, severance was required. The trial court denied the motion. Smith's trial counsel later attempted to have Wayt's testimony introduced under an exception to the hearsay rule. At an in-chambers conference, Smith's trial counsel explained his strategy to the trial judge. By calling Smith's codefendants to the stand and inducing each to invoke his Fifth Amendment privilege against self-incrimination, Smith's trial counsel would have them declared 'unavailable.' This, it was claimed, would allow Smith's counsel to move to admit Wayt's testimony under the admission against interest exception to the hearsay rule. Ohio R.Evid. 804(B)(3). Fearing a mistrial, the trial court instructed Smith's trial counsel not to call his codefendants to the stand, and Smith's trial counsel complied with the trial court's instructions. No effort was made to preserve the proffered testimony for review on appeal. In addition to the facts set out above, the evidence at trial revealed that on October 6, 1980, many or all of the witnesses who were at the El Rancho Grande on the night of the robbery participated in a photographic lineup, but were unable to make a positive identification of any of the men involved. At trial, one witness was able, however, to identify Smith with 'reasonable certainty' as one of those involved in the El Rancho Grande robbery. Two other witnesses thought Smith was involved or that he looked familiar. A significant number of the other witnesses, however, were unable to make any identification at all. Confronted with this evidence, Smith presented an alibi defense. Smith and his witnesses testified that on the day of the robbery, he was helping members of his fiance's family move into a new home. In support of this claim, Smith introduced into evidence a receipt identifying himself as the individual who rented a U-Haul truck on the day of the robbery. The receipt indicated that the truck was rented by Smith at 2:00 p.m. and returned at

6:00 p.m. The U-Haul employee who was working at the rental location at issue on the date in question testified that while he could not identify Smith at trial, he would have required Smith, in accordance with company procedure, to show his driver's license as identification. Smith and his codefendants were each convicted of one count of aggravated robbery, and Smith was sentenced to a term of seven to twenty-five years imprisonment.

### PROCEDURAL HISTORY

Smith was convicted of aggravated robbery in Ohio state court. Direct appeal affirmed; post-conviction relief denied. He then filed a federal habeas petition under 28 U.S.C. § 2254, alleging ineffective assistance of counsel. The district court granted the writ, finding prejudice on direct appeal. Respondent Jago appealed.

### DISPOSITION

reversed

### REMAND INSTRUCTIONS

Dismissal of Smith's petition for a writ of habeas corpus.

### CASES CITED

- Strickland v. Washington, 466 U.S. 668 (1984)
- Maupin v. Smith, 785 F.2d 135 (6th Cir. 1986)
- Evitts v. Lucey, 469 U.S. 387 (1985)
- Bowen v. Foltz, 763 F.2d 191 (6th Cir. 1985)
- Bell v. Lockhart, 795 F.2d 655 (8th Cir. 1986)
- Gray v. Greer, 800 F.2d 644 (7th Cir. 1985)
- Schwander v. Blackburn, 750 F.2d 494 (5th Cir. 1985)
- Meeks v. Bergen, 749 F.2d 322 (6th Cir. 1984)
- Beasley v. United States, 491 F.2d 687 (6th Cir. 1974)
- Wainwright v. Sykes, 433 U.S. 72 (1977)
- Jackson v. Virginia, 443 U.S. 307 (1979)
- Sumner v. Mata, 449 U.S. 539 (1981)
- Nichols v. Perini, 818 F.2d 554 (6th Cir. 1987)
- Adams v. Jago, 703 F.2d 978 (6th Cir. 1983)
- Cain v. Smith, 686 F.2d 374 (6th Cir. 1982)
- Fowler v. Jago, 683 F.2d 983 (6th Cir. 1982)