

In The Supreme Court of Florida

Robert mackay
Petitioner

PROVIDED TO COLUMBIA CORRECTIONAL INSTITUTION
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CASE no: SC14-2055

Vs

State of Florida
Respondent

Petitioners Jurisdictional Brief

On Review From the District Court of Appeal, 2d District

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Statement of the CASE And Facts

This case originated in the Sixth Judicial Circuit, Pinellas county, FLA. The state initiated charges dating back thirteen years by Grand Jury indictment. Charging Petitioner with one count of 194.011(a) between the years of October 16-1974 - May 27, 1975.

Trial was held on March 5-1987, Petitioner was convicted And sentenced to a Capital Offense on April 2, 1987.

Petitioner is being illegally detained.

The lower tribunal failed to rule on the merits of the Previously filed Postconviction relief motion.

Petitioner is raising new grounds for relief.

Petitioner filed the Great Writ habeas Corpus and manifest injustice in the lower Tribunal on 8-26-2013

on September 27-2013 the lower Tribunal denied the Great Writ habeas Corpus and manifest injustice.

Petitioner filed for a rehearing on October 5-2013 on October 29-2013 the lower Tribunal denied motion for rehearing,

Petitioner filed an Appeal to the 2d DCA on 6-11-2014. The 2d DCA denied the Great Writ habeas Corpus and manifest injustice.

The 2d DCA wrote the first Opinion on 8-29-2014. The 2d DCA then withdrew the first Opinion, and Attached a new opinion on 10-10-2014.

See Appendix: 2d DCA First and Second Opinions.

And stated no further motions for rehearing will be entertained.

Petitioner filed notice to invoke discretionary jurisdiction to the Supreme Court on October 22-2014

Summary of the Argument

2d DCA denied Petitioners Great Writ habeas Corpus And manifest injustice

Jurisdictional Statement

The Supreme Court has Jurisdiction to hear this case under Article I Section 21 - Article I Section 9 - Article V Section 3(b)(3) Fla. Const, Fla Statute ~~§ 9.120~~ Fla. R APP P 9.120 - 9.141 (b)(2)(D) - 9.030 (a)(2)(A) - And Article XIV US Constitution

Petition for extraordinary relief Pursuant to a manifest injustice And a denial of due Process in a criminal Procedure.

The Supreme Court has repeatedly held Procedural bars such as the law of the case doctrine must give way

"Where reliance on the prior decision would result in a manifest injustice"

Preston v state, 444 So2d 939-942 [1] (Fla 1984) citing
State v Sigler, 967 So2d 835-840 [1] (Fla 2007)
Henry v state, 649 So2d 1361-1364 [2] (Fla 1994)

Argument

2d DCA First Opinion ~ August 29-2014

2d DCA denied Petitioners Great writ habeas corpus and manifest injustice. In violation of Article I Section 9 Fla. Const And Article XIV U.S. const.

2d DCA stated, mr. mackay is correct that the information alleged that he was over the age of eighteen and that this element was not a finding that the jury was required to make on the Verdict Form.

" But mr. mackay does not allege that he was under the age of eighteen at the time of this event,

It appears that he was over the age of twenty at the time of this event"

It is obvious the 2d DCA is reading the above accusation from some type of manuscript. The court does not reveal what agency provided this information to the court or why the 2d DCA intentionally failed to attach a copy of the file or record to the courts first Opinion filed August 29-2014

US v Bryan 70 S. Ct. 124 339 U.S. 323 U.S. District of Columbia 1950

with the 2d DCA stating

" But mr. mackay does not allege that he was under the age of eighteen at the time of this event,

It appears that he was over the age of twenty at the time of this event"

with this accusation from the ad DCA the court is now in conflict with Petitioners Standard of Review.

Baker v State, 604 SO 2d 1239 - see 1240 - F12-F13-F4 at 1363
(FIA 3d DCA 1992)

now that the ad DCA brought in Petitioners Age during the date of offense first, Petitioner is now allowed to refute the ad DCA's accusation about Petitioners Age.

If the ad DCA Attached a copy of the record to the courts accusation in the first Opinion

In lieu of Petitioners documented response, Petitioner would have answered the courts accusation with a different argument, in the same line of reasoning.

Rule 3.850(f)(4) A copy of that Portion of the files or records in the case that conclusively shows that the defendant is not entitled to relief

Rule 3.850(d) in those instances when the denial is not Predicated on the legal insufficiency of the motion on its face A copy of that Portion of the files or records shall be Attached to the order.

FIA R. APP. P. 9.141(b)(2)(D) on appeal from denial of relief unless the record shows conclusively the appellant is entitled to no relief the order shall be reversed and the cause remanded for an evidentiary hearing,

The ad DCA then states, 'as explained in Glover v State, 836 So2d 236 (Fla 2003). The omission of this element even from jury instructions is not fundamental error when the element is not in dispute.

See Appendix: circuit courts Great Writ habeas Corpus and manifest injustice; jury instructions Page 4 #4 states;

The jury was instructed it had to find the defendant eighteen years of age in order to find defendant guilty of a Capital offense.

Petitioner never made an issue of the jury instructions, since the age element was never missing from the instructions.

The ad DCA now goes even further stating, 'Petitioner has alleged no claim to manifest injustice.

Petitioners sole claim to manifest injustice is based on

Baker v State, 604 So2d 1239 - see 1940- FNA- FN3- Ad at 1363, (Fla 3d DCA 1992)

Petitioners case is virtually the same as Bakers.

The jury failed to make a finding Petitioner was eighteen years of age or over.

Verdict form contained no provision for a finding of Petitioners age,

see Appendix: Verdict form

The ad DCA should have granted relief under fundamental error on the jury instructions.

And granted relief as manifest injustice under Baker,

2d DCA Second Opinion October 10-2014

#1) in a motion for rehearing filed in this court Mr. Mackay claims under oath that his date of birth is November 27, 1958.

#2) And that the State was mistaken in believing that his date of birth is November 27, 1953 when it Prosecuted him in 1987,

Because he did not make this Allegation in his Petition to the Postconviction court - we deny rehearing.

The 2d DCA "falsified Paragraph #2", (Above) and then denied the Rehearing on the falsified Paragraph

Petitioner never wrote the "falsified Paragraph #2" in his motion for Rehearing.

see Appendix: Petitioners - motion for Rehearing filed 9-13-2014

In the 2d DCA first Opinion filed August 29-2014 the court is the first to bring in Petitioners age during the date of Offense. Quoting,

"It appears that he was over the age of twenty at the time of this event"

now in the courts Second Opinion the 2d DCA goes even further and states Petitioner wrote

And the State was mistaken in believing that his date

of birth is November 27, 1953 when it prosecuted him in 1987.

Regardless, that this statement is not written in Petitioners Motion for Rehearing 9-13-2014

consider this --

during the trial the State Attorney's failed to produce any evidence concerning Petitioners D.O.B.

Please View: Trial Transcripts Volume One and Two

Adams v. State, 834 So.2d 308 [5] (Fla 1st DCA 2002)

The Police department investigation report did not have Petitioners D.O.B.

County Jail booking did not have Petitioners D.O.B.

Grand Jury indictment does not have Petitioners D.O.B.

see Appendix: Grand Jury Indictment.

during the trial there was no testimony from either side concerning Petitioners date of birth See: Trial Transcripts, Volume one and Two

Petitioners mother testified during the trial, never testified about her son's D.O.B. See: Trial Transcripts, Volume one

There are no official circuit court trial records with Petitioners D.O.B.

Where did the 2d DCA receive its information from that the court could give Petitioner A D.O.B. of 1953.

when the Police department - State Attorney's - Grand Jury - the indictment - county Jail booking - and the trial - all failed to acquire Petitioner's D.O.B.,

Petitioner requests the Supreme Court to issue instructions to the 2d DCA to provide proof of the courts accusations in the courts first and second Opinions,

To provide the file or record the court used to give Petitioner A D.O.B. of 1953 in the courts second Opinion October 10-2014

To provide the file or record the 2d DCA used in the courts first Opinion August 29-2014 to accuse Petitioner of

"It appears that he was over the age of twenty at the time of this event"

The 2d DCA has positioned itself into the burden to prove the courts accusations against the Petitioner

Conclusion

if its either unkind of or unethical or even illegal for the 2d DCA to intentionally use a "falsified Paragraph #2", to deny Petitioner's motion for Rehearing, including

the 2d DCA deliberate failure to attach the file or record to support the courts accusations to the courts first and second Opinions

Then Petitioner's Affidavit is moot

Petitioner requests the Supreme Court to grant relief under manifest injustice,

or Quash the 2d OCA Second Opinion of October 10, 2014 including Petitioners Affidavit

And give instructions to the 2d OCA to write another Opinion And order Another rehearing

Petitioner requests the Supreme Court to grant any other relief the court deems just and proper to Petitioner

Certificate of Service

I certify that a true and correct copy of the foregoing motion has been placed in the hands of Prison Officials for mailing to the Attorney General - Coacourse Center #4, 3507 E. Frontage Rd - Suite 200 - Tampa FLA. - 33607-7013 on this 6 day of JANUARY 2015

/s/ Robert Mackay

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Supreme Court of Florida

Robert mackay
Petitioner

Vs

State of Florida
Respondent

CASE no: SC14-2055

Lower Tribunals case no: 2D13-5347

CRC 86-001021 CFAND

Appendix

/s/ Robert Mackay 235741

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1/6/2015

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Circuit Courts, Great Writ Habeas Corpus
And manifest injustice, filed 8-26-2013
jury instructions, page 4 #4

Circuit Courts Order denying defendants writ
of Habeas Corpus And manifest injustice
filed 9-24-2013

Verdict form

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

ROBERT G. MACKAY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 2D13-5347

Opinion filed October 10, 2014.

Appeal pursuant to Fla. R. App. P.
9.141(b)(2) from the Circuit Court for
Pinellas County; Michael F. Andrews,
Judge.

Robert G. MacKay, pro se.

ALTENBERND, Judge.

Robert G. Mackay appeals the summary denial of his petition for writ of habeas corpus, which the postconviction court treated as a motion filed pursuant to Florida Rule of Criminal Procedure 3.850. We write briefly to explain that the petition would be meritless even if treated as a properly filed petition for habeas corpus.

For an event that occurred sometime between late 1974 and mid-1975, Mr. Mackay was convicted of capital sexual battery in 1987. He filed this petition in the court of conviction in 2013. He claims he is entitled to release because the jury's verdict did not find that he was over the age of eighteen even though that element was alleged in the information.

He is correct that the information alleged that he was over the age of eighteen and that this element was not a finding that the jury was required to make on the verdict form. But Mr. Mackay does not allege that he was under the age of eighteen at the time of this event. It appears that he was over the age of twenty at the time of this event. As explained in Glover v. State, 863 So. 2d 236 (Fla. 2003), the omission of this element, even from the jury instructions, is not fundamental error when the element is not in dispute. Mr. Mackay has alleged no claim of manifest injustice in his petition.

In a motion for rehearing filed in this court, Mr. Mackay claims under oath that his date of birth is November 27, 1958, and that the State was mistaken in believing that his date of birth was November 27, 1953, when it prosecuted him in 1987. If his claim is true, he would have been sixteen at the time of the offense alleged in the information. Because he did not make this allegation in his petition to the postconviction court, we deny rehearing. If Mr. Mackay files another postconviction proceeding attaching a certified copy of his birth certificate demonstrating that he was born in 1958, the postconviction court should not treat that filing as a matter resolved by this appeal.

Affirmed.

SILBERMAN and VILLANTI, JJ., Concur.