STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Honorable J. Derham Cole, Circuit Court Judge

Opinion No. 2022-UP-380

ADONIS WILLIAMS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001688

Second Petition for Rehearing

On October 12, 2022, this Court heard Petitioner's belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974) and affirmed. Additionally, this Court denied certiorari on Petitioner's PCR issues two through ten. A timely petition for rehearing was filed on October 27, 2022. On November 16, 2022, this Court granted the petition for rehearing and filed a substituted opinion. The substituted opinion did not change the Court's initial ruling that affirmed the belated direct appeal issue and denied certiorari on Petitioner's PCR issues two through ten. Pursuant to Rule 221(a), SCACR, counsel for Petitioner, Adonis K. Williams,

respectfully requests a second rehearing on both the belated direct appeal issue and the denial of the post-conviction relief [PCR] issues.

As to the belated direct appeal issue, counsel first respectfully submits this Court may have misapprehended the Fourth Amendment abandonment analysis. Additionally, counsel respectfully submits that this Court may have misapprehended the prejudice argument addressed in the reply brief as a result of the Fourth amendment violation, the sole issue raised on belated direct appeal. Counsel also respectfully submits that in denying certiorari on the nine PCR issues, without addressing any of the issues raised, this Court may have overlooked the fact that Petitioner alleged that the cumulative effect of nine separate instances of ineffective assistance of counsel established prejudice requiring a new trial. Counsel respectfully seeks rehearing.

Belated Direct Appeal

On September 6, 2018, the PCR judge, the Honorable J. Derham Cole, in a 48- page written order, granted a belated appeal pursuant to White v. State but denied relief on the other allegations and dismissed the application. A timely notice of intent to appeal was served on September 19, 2018. On March 11. 2019, Petitioner filed the brief pursuant to White v. State and a separately filed petition for writ of certiorari addressing the PCR issues. The issue presented in the first brief pursuant to White v. State was "Did the trial judge err in admitting text messages obtained from a cell-phone without a warrant when the phone was not abandoned?" Petitioner argued that the warrantless search of the cell phone revealing the text messages violated the Fourth Amendment and required suppression of the test messages.

On January 8, 2020, this Court granted Petitioner's motion to withdraw the original White v. State brief and accept as filed the amended White v. State brief. Petitioner moved to amend the brief due to a factual error. While pre-trial the State argued that law enforcement had a

search warrant for a house, testimony from the officers later revealed that the search was done by consent. The original brief asserted that the search was done pursuant to a search warrant. Counsel filed the amended brief to correct the error and apply the correct analysis for a consent search rather that a search done pursuant to a warrant. The issue presented in the amended White v. State brief, however, was the same Fourth Amendment issue presented in the original brief, "Did the trial judge err in admitting text messages obtained from a cell-phone without a warrant when the phone was not abandoned?"

In the amended White v. State brief Petitioner specifically argued:

> The judge overruled the objections and the investigator testified before the jury as to the content of the text messages found on the phone stating, "The police is looking for you. They came back one of a kind." (App. p. 497, lines 7-8). The investigator then testified about another text message stating, "'Are you gonna let me get that weed, my N-I-G-G-A?' There's a question mark. And, 'I'm about to go into hiding.' Then, 'Black power.'" (App. p. 497, lines 19-22). Photographs of the text messages were also admitted in evidence as State's Exhibits #66, #67. (App. p. 496, line 8). The trial judge erred in finding that the phone was abandoned and admitting the text messages obtained without a warrant.

(Amended brief pursuant to White v. State p. 7).

On January 26, 2022, the State filed a brief of respondent pursuant to White v. State. The State's statement of issue on appeal was, "Even if the trial court improperly admitted text messages from Appellant's phone, any error was entirely harmless in light of the cumulative nature of the evidence and the overwhelming evidence of guilt such that the text messages could not have reasonably impacted the jury's verdict." In response to the State's harmless error argument, Petitioner filed a reply brief. The argument in the reply brief was, "The admission of the contents of text messages obtained by a warrantless search of Appellant's phone in violation of the Fourth Amendment is not harmless."

Standard of Review

In State v. Frasier, No. 2020-001405, 2022 WL 4491598, at *2 (S.C. Sept. 28, 2022), the South Carolina Supreme Court wrote, "Accordingly, appellate review of a motion to suppress based on the Fourth Amendment involves a two-step analysis. This dual inquiry means we review the trial court's factual findings for any evidentiary support, but the ultimate legal conclusion—in this case whether reasonable suspicion exists—is a question of law subject to de novo review."

Abandonment

Counsel respectfully suggests that this Court may have misapprehended the Fourth Amendment abandonment issue by overlooking Petitioner's relationship to the home where the phone was seized. Prior to trial Petitioner moved to suppress text messages obtained from a cell phone. (App. pp. 84-91). When the trial judge denied the motion to suppress he stated:

> Well, you know, obviously any time there's a – a defendant's involved in a case, he has a right to make whatever objections or motions he wants to make with respect to any of the evidence or anything else where he thinks his rights are being violated, but, you know, this is not his residence. If he leaves something at somebody else's place and in the course of a lawful search by the police, the police come up with this, I believe it constitutes abandoned property and he doesn't -- and once they take it, they have the right to do with it as they deem appropriate. So I will deny your motion.

(App. p. 89, lines 9-19). The trial judge erred. Leaving something at somebody else's place is not sufficient for a finding of abandonment. Without a sufficient finding of abandonment, the police do not have the right to do with seized property as they deem appropriate, especially as it relates to the contents of a cell phone. See Riley v. California, 573 U.S.373, 134 S.Ct. 2473, 189 L.Ed. 2d 430 (2014).

On March 22, 2009, Linda Wofford reported a burglary, armed robbery, kidnapping. On March 25, 2009, officers obtained consent to search Dawn Shea's house. Officer Ellis testified

that he was told by the fugitive team that Ms. Shea was Petitioner's girlfriend. (App. p. 438, lines 1-2). Petitioner fled the home when members of the fugitive team approached the home. (App. pp. 449-452). When asked about the relationship between Petitioner and Ms. Shea, Sergeant Don Robinson testified that, "This was a rekindled girlfriend situation. They had recently rekindled their affair before this happened." (App. p. 489, lines 22-23). During the pre-trial suppression hearing the prosecutor told the judge that Petitioner would sometimes stay with Ms. Shea. (App. p. 85, lines 23-25).

In affirming the trial judge's refusal to suppress the contents of the cell phone this Court wrote:

> We hold Petitioner "relinquished his reasonable expectation of privacy" by leaving his phone in a place where he did not live and making no efforts to recover his phone. See State v. Brown, 423 S.C. 519, 522, 815 S.E.2d 761, 763 (2018) ("Under a standard abandonment analysis, 'the question is whether the defendant has, in discarding the property, relinquished his reasonable expectation of privacy.' " (quoting State v. Dupree, 319 S.C. 454, 457, 462 S.E.2d 279, 281 (1995))).

Williams v. State, No. 2018-001688, 2022 WL 17164515, at *1 (S.C. Ct. App. Nov. 16, 2022). Respectfully, relinquishment of the reasonable expectation of privacy in the contents of a cell phone requires more than leaving the phone in a place where one does not live.

In State v. Moore, 429 S.C. 465, 839 S.E.2d 882 (2020), the trial judge denied a motion to suppress evidence seized from the warrantless examination of a flip phone's SIM card, finding the phone had been abandoned. The phone was found in the car of a man who had been shot. The Court in Moore, wrote, "Yet we acknowledge a close question is presented on the issue of abandonment. We elect to resolve this appeal on other grounds." State v. Moore, 429 S.C. 465, 473, 839 S.E.2d 882, 886 (2020) (n. #4 omitted). The cell phone in the present case was not found at the crime scene. Instead, the cell phone was found in a home where Petitioner

sometimes stayed with his girlfriend. The search in the present case was not limited to a SIM card of a flip phone. Instead, highly prejudicial text messages from the cell phone were published to the jury. The cell phone in the present case was not abandoned.

The dissent in Moore discusses abandonment writing:

> In my view, the State failed to establish the abandonment exception to the Fourth Amendment warrant requirement. See State v. Dupree, 319 S.C. 454, 457, 462 S.E.2d 279, 281 (1995) (recognizing the doctrine of abandonment as an exception to the Fourth Amendment warrant requirement).
>
> When determining whether a defendant abandoned property for Fourth Amendment purposes, "the question is whether the defendant has, in discarding the property, relinquished his reasonable expectation of privacy so that its seizure and search is reasonable within the limits of the Fourth Amendment." Id. at 457, 462 S.E.2d at 281 (quoting City of St. Paul v. Vaughn, 306 Minn. 337, 237 N.W.2d 365, 370–71 (1975)). "[A]bandonment is a question of intent and exists only if property has been voluntarily discarded under circumstances indicating no future expectation of privacy with regard to it." 68 Am. Jur. 2d *Searches and Seizures* § 23, at 135 (2010). In the context of abandonment, intent is "inferred from words, acts, and other objective facts." 79 C.J.S. *Searches* § 43, at 70 (2017).

429 S.C. at 488–89, 839 S.E.2d at 894.

The State failed to establish the abandonment exception to the Fourth Amendment in the present case. While it may have been a close call in Moore, it is not a close call in the present case. Petitioner did not discard his phone under circumstances indicating no future expectation of privacy by leaving at his girlfriend's house where he sometimes stayed. Counsel respectfully seeks rehearing on the abandonment issue.

In affirming the convictions in this belated direct appeal this Court also wrote, "Petitioner's remaining arguments regarding the text messages are not properly before this court because Petitioner did not raise them in his initial brief. See State v. Wakefield, 323 S.C. 189, 191, 473 S.E.2d 831, 832 (Ct. App. 1996) (stating an issue in the "reply brief should not be

considered on appeal because all issues must be argued in the initial briefs")." Williams v. State, No. 2018-001688, 2022 WL 17164515, at *1 (S.C. Ct. App. Oct. 12, 2022).

In the initial brief Petitioner noted trial counsel's additional objections to the text messages based on hearsay, Rule 403 and the fact that the State was unable to prove who sent or received the text messages. (App. p. 494, lines 14-15; p. 495, lines 12-18). (White v. State brief p. 7). Petitioner did not raise these issues on appeal. The only issue raised on direct appeal in both the initial White v. State brief and the reply brief was the Fourth Amendment violation.

In the reply brief Petitioner noted trial counsel's additional objections to the admission of the text messages as hearsay, a violation of the confrontation clause and Rule 403, SCRE. (Reply brief p. 3). The reference to these objections in the reply brief was not to raise them as separate issues but to support the argument that the Fourth Amendment violation was not harmless, as argued by the State. After the judge erroneously ruled that the phone had been abandoned, trial counsel failed to move to redact the highly prejudicial parts of the text messages and to limit the messages to the State's purpose in showing flight. This is one of the additional allegations of ineffective assistance of counsel Petitioner asks this Court to rehear, as discussed below. Counsel respectfully seeks rehearing and asks this Court to find that the trial judge erred in refusing to suppress text messages obtained by the warrantless seizure of a phone that was not abandoned. Counsel additionally seeks rehearing to find that the error in admitting the text messages in violation of the Fourth Amendment was not harmless.

Ineffective Assistance of Counsel

In addition to the belated direct appeal issue, Petitioner raised nine allegations of ineffective assistance of counsel in the petition for writ of certiorari, addressed in the opinion as Petitioner's Questions Two through Ten. In one count Petitioner alleged, "Due to the cumulative

effect of counsel's error the Applicant suffered prejudice such that, but for the combination of these errors, the result of the proceeding would have been different." (App. p. 765.). This Court denied the other issues raised in the petition for writ of certiorari simply writing, "We deny certiorari on Petitioner's Questions Two through Ten." Williams v. State, No. 2018-001688, 2022 WL 17164515, at *1 (S.C. Ct. App. Oct. 12, 2022). Counsel respectfully submits that this Court may have overlooked the fact that each of the allegations of ineffective assistance of counsel raised independently merit analysis by this Court. Additionally, counsel respectfully submits that summary dismissal is not warranted when there is an allegation of cumulative error.

The second amended application for post-conviction relief contains nine allegations of ineffective assistance of trial counsel. (App. pp. 764-765). The transcript of the PCR evidentiary hearing is 129 pages long. The order of dismissal is 48 pages long. Petitioner respectfully seeks rehearing and an analysis by this Court of the individual allegations raised of ineffective assistance of counsel as well as a cumulative error analysis.

Counsel respectfully requests rehearing based on the arguments raised above and as outlined in further detail in the briefs previously submitted to this Court. Counsel respectfully requests that on rehearing this Court reverse the convictions based on the belated direct appeal issue. Additionally, counsel respectfully requests that this Court address the PCR issues, including cumulative error, and reverse the convictions.

Kathrine H. Hudgins
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This 28th day of November, 2022.

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SC Court of Appeals

STATE OF SOUTH CAROLINA

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Appeal from Richland County

Honorable J. Derham Cole, Circuit Court Judge

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STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001688

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Second Petition for Rehearing in the above-referenced case has been served upon William M. Blitch, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Adonis K. Williams, #274626, at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827, this 28th day of November, 2022.

Kathrine H. Hudgins
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ATTORNEY FOR PETITIONER

From: Stock, Chris
To: SC - BLITCH WILLIAM; SC - COLLINS CAROLINE
Cc: Hudgins, Kathrine
Subject: Williams, Adonis - Second Petition for Rehearing - 2018-001688
Date: Monday, November 28, 2022 2:31:00 PM
Attachments: Williams, Adonis - Second Petition for Rehearing - 2018-001688.pdf
Williams, Adonis - Second Petition for Rehearing - 2018-001688 - AG Cover Letter.pdf

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Mr. Blitch,

Please find attached for service the Second Petition for Rehearing for Adonis Williams' appeal which will be filed today with the Court of Appeals.

Thank you.

Chris

Chris Stock
Administrative Assistant
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