

STATE OF SOUTH CAROLINA

 ORIGINAL

IN THE SUPREME COURT

Certiorari to Richland County

Honorable Clifton Newman, Circuit Court Judge

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SEP 19 2016

Opinion No. 5420 (S.C. Ct. App. Filed June 29, 2016) S.C. SUPREME COURT

10-CP-40-04277

DARRYL FRIERSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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INDEX

INDEX.....i

CERTIFICATE OF COUNSEL.....1

QUESTION PRESENTED2

STATEMENT OF THE CASE.....3

ARGUMENT

The Court of Appeals erred in refusing to find that the guilty plea was rendered involuntary by trial counsel’s failure to advise petitioner that he could challenge the placement of a mobile tracking device on petitioner’s car by the police without an order pursuant to S.C. Code §17-30-140 and move to suppress any evidence gained as a result of the illegal search.5

CONCLUSION14

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on 8/18/2016.

QUESTION PRESENTED

Did the Court of Appeals err in refusing to find that the guilty plea was rendered involuntary by trial counsel's failure to advise petitioner that he could challenge the placement of a mobile tracking device on petitioner's car by the police without an order pursuant to S.C. Code §17-30-140 and move to suppress any evidence gained as a result of the illegal search?

STATEMENT OF THE CASE

In September of 2007, the Richland County Grand Jury indicted Frierson for assault and battery of a high and aggravated nature [ABHAN], armed robbery kidnapping and criminal conspiracy, indictments #2007-GS-40-4362, 4363, 4364, 4429. On December 3, 2008, Frierson appeared before the Honorable J. Michelle Childs and pled guilty as charged. Sentencing was deferred to allow Frierson to testify as a State's witness in the trial of a co-defendant. On August 24, 2009, Frierson appeared before Judge Childs for sentencing. Deon O'Neil represented Frierson at both the guilty plea and the sentencing. Daniel L. Goldberg prosecuted the case on behalf of the State. Judge Childs sentenced Frierson to 10 years for ABHAN, 5 years concurrent for criminal conspiracy, and 30 years for both kidnapping and armed robbery to be served consecutively to the ABHAN and conspiracy charges, resulting in an aggregate sentence of 40 years. A petition for reconsideration was filed and denied without a hearing. A timely notice of intent to appeal was filed but later dismissed by the Court of Appeals on January 8, 2010.

On June 28, 2010, Frierson filed an application for post-conviction relief. The State filed a return on July 20, 2010. An evidentiary hearing was held on February 14, 2010 before the Honorable Clifton B. Newman. Nicole Singletary represented Frierson at the PCR hearing. Rob Corney was present on behalf of the State. In a written order filed March 27, 2012, Judge Newman denied relief and dismissed the application. A timely notice of intent to appeal was filed on April 4, 2012. On January 10, 2013, the petition for writ of certiorari was filed. The State filed a return on May 24, 2013. On February 22, 2014, the South Carolina Court of Appeals granted the petition for writ of certiorari and subsequent briefs were filed. On September 8, 2015, the Court of Appeals heard arguments in the case. On June 29, 2016, the Court of Appeals affirmed the denial of post-

conviction relief. A timely petition for rehearing was filed and denied on August 18, 2016. This petition for writ of certiorari follows.

ARGUMENT

The Court of Appeals erred in refusing to find that the guilty plea was rendered involuntary by trial counsel's failure to advise petitioner that he could challenge the placement of a mobile tracking device on petitioner's car by the police without an order pursuant to S.C. Code §17-30-140 and move to suppress any evidence gained as a result of the illegal search.

During the course of an investigation into the robbery of an armored truck, officers with the Richland County Sheriff's Department, without an order or search warrant, placed a mobile tracking device [GPS] on Petitioner's car. (App. p. 100, lines 12-16; Supp. App. p. 18, lines 19-20). Monitoring the GPS on Petitioner's car, officers located Petitioner and a co-defendant, Domonique Blakney, and arrested both men. Both Petitioner and Domonique Blakney gave incriminating statements. (App. p. 105, lines 11-24). On December 3, 2008, Petitioner pled guilty to assault and battery of a high and aggravated nature [ABHAN], armed robbery kidnapping and criminal conspiracy.

In the application for post-conviction relief Petitioner alleged that plea counsel was ineffective in failing to advise Petitioner that he could challenge the placement of the GPS without an order, as required by S.C. Code §17-30-140, and move to suppress any evidence gained as a result of the violation of the statute as well as the Fourth Amendment violation. (App. pp. 43-45).

During the PCR hearing Petitioner testified that counsel told him the GPS device was legal because it was placed on the outside of the car. (App. p. 76, lines 20 – p. 77, lines 1-8). Plea counsel admitted advising Petitioner, based on United States v. Knotts, 460 U.S. 276, 281, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983), that the placement of the tracking device was legal. (App. p. 101, lines 4-20). Counsel's advice was erroneous. The Knotts case did not authorize the

S.Ct. 1081, 75 L.Ed.2d 55 (1983), that the placement of the tracking device was legal. (App. p. 101, lines 4-20). Counsel's advice was erroneous. The Knotts case did not authorize the placement of a GPS tracking device on the outside of a vehicle without an order or warrant. In State v. Adams, 409 S.C. 641, 651, 763 S.E.2d 341, 347 (2014), the South Carolina Supreme Court wrote, "The State contends that two United States Supreme Court cases—United States v. Knotts, 460 U.S. 276, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983) and United States v. Karo, 468 U.S. 705, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984)—constitute binding precedent that specifically authorized officers to install a tracking device on Adams' car without a warrant. We disagree."

Counsel admitted that he was unaware of S.C. Code §17-30-140. (App. p. 101, lines 21 – p. 102, lines 1-3). Petitioner testified that, at the time of the plea, he was unaware of the existence of any South Carolina statute regarding tracking devices. (App. p. 78, lines 5-8). Counsel testified that S.C. Code §17-30-140 could have been used to support a motion to suppress based on the State's failure to comply with the statute. (App. p. 104, lines 13-24). Petitioner testified that if he had known about the statute, he would not have pled guilty and instead would have proceeded to trial. (App. p. 77, lines 19-25; p. 90, lines 9-23). Plea counsel was ineffective in failing to distinguish Knotts and in failing to advise Petitioner in regard to S.C. Code §17-30-140.

In the order of dismissal the PCR judge wrote, "Counsel said he did not investigate the legality of the GPS tracking device based on S.C. Code §17-30-140, nor was he aware of the statute at the time of Applicant's plea. Counsel stated, had Applicant proceeded to trial, his main strategy would have been to suppress any evidence gathered against Applicant as a result of the GPS device, but he did not believe there were any valid grounds to support the extremely incriminating and damaging statements given by co-defendants against Applicant. Counsel finished by stating he believed there was 'very slim' chance of Applicant winning at trial based

on the State's evidence against him." (App. pp. 145-146). The record reflects that plea counsel actually testified, "I think the most damning thing for Mr. Frierson was his own statement. And I think the mobile tracking device, if we won that argument at a hearing, then we could have got his own, Mr. Frierson's, statement suppressed, and then at least we'd have a fighting chance at trial. We could just say that the other co-defendants are just blaming him because he's the obvious fall guy. That would have been my advice to him. You know, of course it would have been Mr. Frierson's decision whether he wanted to take it." (App. p. 123, lines 12-20). Counsel, however, never advised Petitioner Frierson about challenging the mobile tracking device based on S.C. Code §17-30-140. Counsel provided erroneous advice about the constitutionality of the placement of the GPS. Petitioner testified that if he had known about the statute, he would have proceeded to trial. (App. p. 77, lines 19-25; p. 90, lines 9-23). The PCR judge erred in refusing to find counsel ineffective for not advising Petitioner about the ability to move to suppress critical evidence because it was obtained in violation of S.C. Code §17-30-140 and the Fourth Amendment.

In the order of dismissal the PCR judge made a credibility finding writing, "Based on the testimony presented at the [sic] and a thorough review of the plea transcript, this Court finds Applicant failed to carry his burden in proving counsel was ineffective in this regard [Failure to challenge the GPS]. Further, this Court finds counsel's testimony to be credible while finding Applicant's testimony to be wholly incredible." (App. p. 146). Counsel's testimony at the PCR hearing, however, did not contradict Petitioner's testimony. Counsel testified:

It – I was not aware of that statute [§17-30-140] at the time we had this discussion. Upon me being aware of the statute – I guess mainly because Mr. Frierson's PCR application – I've since looked at the statute. It, it appears on its face to be applicable to his situation, and it would have availed to him a opportunity to have a pretrial hearing to determine whether or not the state had followed the prescriptions of that statute and if not – my understanding of, my reading of the

statute is that he would have had an opportunity to try to get all evidence derived from the illegal tracking device suppressed at trial.

(App. p. 104, lines 13-24). Counsel then testified to a summary of the evidence that he would have moved to suppress had he been aware of the statute. (App. p. 105, line 1 – p. 106, lines 1-8).

Addressing the prejudice prong the PCR judge wrote, “Applicant has failed to convince this Court that, had counsel taken some further action regarding this GPS device or done some further investigation into S.C. Code §17-30-140, Applicant would have proceeded to trial to face such serious charges rather than enter a plea.” The PCR judge’s finding is not supported by the record. If Petitioner had been properly advised about the statutory and constitutional violations, there is nothing in this record to support that he would not have taken advantage of that opportunity to try and suppress critical evidence. There is a reasonable probability that if the placement of the GPS had been properly challenged, critical State’s evidence would have been suppressed and Petitioner would have proceeded with a trial. This is especially true in light of the fact that, although the sentences for ABHAN, armed robbery and kidnapping were run concurrently, Petitioner received the maximum sentence on each of those charges and a five year consecutive sentence for criminal conspiracy.

The PCR judge erred in refusing to find that the guilty plea was rendered involuntary by counsel’s failure to properly advise Petitioner about challenging the illegal placement of the GPS. In United States v. Jones, — U.S. —, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012), the Supreme Court held that “the Government’s [warrantless] installation of a GPS device on a target’s vehicle, and its use of that device to monitor the vehicle’s movements, constitutes a ‘search.’ ” 132 S.Ct. at 949. In State v. Adams, 409 S.C. 641, 652, 763 S.E.2d 341, 347-48 (2014) (footnote omitted) the South Carolina Supreme Court wrote:

Prior to Jones, no South Carolina appellate decision addressed the constitutionality of the warrantless installation and monitoring of a GPS device. There is, however, a state statute that squarely addresses law enforcement's use of electronic tracking devices. In 2002, as a part of the South Carolina Homeland Security Act, the legislature enacted a statute that provides that “[t]he Attorney General or any solicitor may make application to a judge of competent jurisdiction for an order authorizing or approving the installation and use of a mobile tracking device by the South Carolina Law Enforcement Division or any law enforcement entity of a political subdivision of this State.” S.C.Code Ann. § 17-30-140(A). This statutory requirement “provide[s] law enforcement ... with the proper means and tools to enable them to protect and defend South Carolina and her citizens while preserving individual constitutional rights and liberties.” Act No. 339, 2002 S.C. Acts 3625.

While Jones and Adams were both decided after Petitioner’s 2008 guilty plea, S.C. Code §17-30-140 was in effect at the time of the guilty plea. Additionally, there was no pre- Jones binding precedent authorizing the placement of a GPS tracking device without a warrant. See Adams. Plea counsel should have distinguished the placement of the GPS on Petitioner’s car without an order or warrant from the placement of beepers in containers, with the consent of the owners of the containers discussed in Knotts and United States v. Karo, 468 U.S. 705, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984).

Without specifically finding deficient performance, the Court of Appeals found that Petitioner failed to show prejudice writing, “However, even if plea counsel was deficient in failing to advise Petitioner of section 17-30-140 in conjunction with their discussions of moving to suppress and attempting to challenge the legality of the GPS monitoring at trial, we find probative evidence supports the PCR court's finding that Petitioner failed to prove the prejudice necessary to support the granting of post-conviction relief.” Frierson v. State, No. 2012-211091, 2016 WL 3573148, at *5 (S.C. Ct. App. June 29, 2016) (citation omitted). The Court of Appeals erred in refusing to find plea counsel deficient for failing to advise Petitioner that the

placement of the GPS was in violation of the statute and the Fourth Amendment. Plea counsel did not need to be clairvoyant or anticipate changes in the law when there was no binding precedent authorizing the placement of a GPS without an order or warrant and there was a statute that specifically **forbade** law enforcement officers from installing a GPS without court authorization. Plea counsel was deficient.

In finding that Petitioner failed to demonstrate prejudice the Court of Appeals wrote:

At the time of Petitioner's guilty plea in 2008, the constitutionality of the placement of a GPS tracking device on a vehicle was an unsettled question of law; the United States Supreme Court had not decided Jones, and our supreme court had not decided Adams. Instead, Knotts provided authority suggesting the placement of a GPS tracking device on the outside of a vehicle might not have been a constitutional violation, and other South Carolina courts considering the question before Jones found no constitutional violation under such circumstances. See United States v. Narrl, 789 F.Supp.2d 645, 652 (D.S.C. 2011) (“Knotts is clear that the use of a tracking device to track a person's movements on public roads is not a violation of that person's Fourth Amendment rights.”). As no clear authority concluded that the placement of a tracking device on a vehicle without a court order was a Fourth Amendment violation at the time of Petitioner's plea, we find Petitioner failed to establish a reasonable probability that he would have prevailed at a suppression hearing despite the violation of the statute.

Frierson v. State, No. 2012-211091, 2016 WL 3573148, at *5 (S.C. Ct. App. June 29, 2016).

The Court of Appeals misapprehended the Knotts case in finding that Knotts provided authority suggesting the placement of a GPS tracking device on the outside of a vehicle might not have been a constitutional violation. Knotts did not authorize the placement of a GPS tracking device on the outside of a vehicle without an order or warrant. Neither United States v. Knotts, 460 U.S. 276, 281, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983) nor United States v. Karo, 468 U.S. 705, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984) constituted binding precedent at the time of the 2008, guilty plea authorizing officers to install a GPS tracking device without a warrant. See Adams. Importantly, Knotts and Karo were not overturned by Jones. While there was no clear

authority that concluded that the placement of a GPS on a vehicle without a court order constituted a Fourth Amendment violation, there was also no clear authority authorizing the placement of a GPS without an order or warrant. This Court's reliance on Narrl is misplaced as that case was decided **after** the 2008, plea and plea counsel could not have relied on the case in support of his erroneous advice.

The placement of the GPS on Petitioner's car was in violation of both S.C. Code §17-30-140 and the Fourth Amendment. Plea counsel was ineffective in failing to properly advise Petitioner that he could challenge the unlawful placement and move to suppress critical State's evidence. Petitioner was prejudiced by counsel's deficient performance. The Court of Appeals erred in finding that Petitioner failed to establish a reasonable probability that he would have prevailed at the suppression hearing.

Additionally, in finding no prejudice the Court of Appeals wrote:

Although Petitioner asserted he would have proceeded to trial had plea counsel advised him of the statute, the PCR court found Petitioner's testimony "wholly incredible." See Simuel, 390 S.C. at 270, 701 S.E.2d at 739 ("[An appellate court] gives great deference to a PCR [court's] findings where matters of credibility are involved."); Stalk, 383 S.C. at 563, 681 S.E.2d at 595 ("[The] prejudice prong ordinarily requires more than simply a defendant's assertion that but for counsel's deficient performance he would not have pled but would have gone to trial."); Hill, 474 U.S. at 59, 106 S.Ct. 366 ("[I]n order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."). At the time of Petitioner's guilty plea in 2008, the constitutionality of the placement of a GPS tracking device on a vehicle was an unsettled question of law; the United States Supreme Court had not decided Jones, and our supreme court had not decided Adams.

Frierson v. State, No. 2012-211091, 2016 WL 3573148, at *5 (S.C. Ct. App. June 29, 2016).

While the PCR judge, for unexplained reasons, found Petitioner's testimony "wholly incredible," as discussed above, plea counsel testified that, had he been aware of the statute, he would have advised Petitioner to challenge the placement of the GPS. (App. p. 123, lines 12-20;

App. p. 104, lines 13-24). The Court of Appeals acknowledged plea counsel's testimony in writing:

Plea counsel admitted he was unaware of section 17-30-140 at the time of Petitioner's plea, did not find it in his research, and did not discuss it with Petitioner. He further testified, however, that he believed the statute was applicable to Petitioner's case and could have been used in an attempt to suppress some of the incriminating evidence. Plea counsel asserted that if he had been aware of section 17-30-140, he would have filed a motion to suppress Petitioner's confession and his co-defendants' confessions, arguing they were the fruit of the poisonous tree stemming from the warrantless use of the tracking device. Plea counsel contended Petitioner's confession was the most damaging evidence against him, and he believed Petitioner would have had a "fighting chance" at trial if a motion to suppress the confession had succeeded.

Frierson v. State, No. 2012-211091, 2016 WL 3573148, at *3 (S.C. Ct. App. June 29, 2016).

There is no evidence of probative value to support the PCR judge's finding that Petitioner failed to establish that if he had been properly advised, he would have challenged the placement of the GPS and moved to suppress critical State's evidence.

Finally, the Court of Appeals misapprehended the State's remaining evidence after suppression of Petitioner's statement based on the unlawful search. The Court of Appeals wrote:

Moreover, we find probative evidence supports the PCR court's finding that even if counsel had been successful in suppressing the evidence found as a result of the GPS tracking device, due to the overwhelming evidence of Petitioner's guilt, the outcome of Petitioner's case would have been no different had he chosen to proceed to trial. See Hutto, 387 S.C. at 249, 692 S.E.2d at 198 ("No prejudice occurs, despite deficient performance, when there is overwhelming evidence of guilt."). Although police used the GPS tracking device to locate Petitioner to execute the arrest warrant, police obtained the arrest warrant through other aspects of the investigation independent of the tracking device. Police considered Petitioner a suspect because of his suspicious behavior and lack of injuries after the robbery, they located a glove outside Petitioner's house matching a glove from the armored truck, and Whitaker broke down and told police that Petitioner had been planning the heist for several months. Even if counsel had been successful in having Petitioner's own confession suppressed, Petitioner would likely have lacked standing to challenge the pictures of money from Domonique's phone, and the co-defendants' statements would have been admissible against him.

Frierson v. State, No. 2012-211091, 2016 WL 3573148, at *6 (S.C. Ct. App. June 29, 2016)(fn 7 omitted).

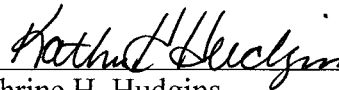
Plea counsel testified that Petitioner's statement was the most damaging piece of evidence and if the statement had been suppressed, Petitioner would have had a "fighting chance" at trial. (App. p. 123, lines 12-20). In regard to the statements by co-defendants, plea counsel testified, "We could just say that the other co-defendants are just blaming him because he's the obvious fall guy." (App. p. 123, lines 16-18). The remaining State's evidence was not overwhelming. Petitioner established prejudice from counsel's deficient performance.

Plea counsel was deficient in failing to challenge the placement of the GPS without a warrant or court order. The guilty plea was rendered involuntary by counsel's deficient performance. There is a reasonable probability that but for counsel's error, Petitioner would not have pled guilty and instead would have gone to trial moving to suppress based on the statutory and constitutional violations.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow for further briefing on the issue.

Respectfully Submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of September, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

SEP 19 2016

Certiorari to Richland County
Honorable Clifton Newman, Circuit Court Judge

S.C. SUPREME COURT

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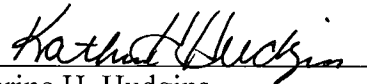
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STATE OF SOUTH CAROLINA,

RESPONDENT

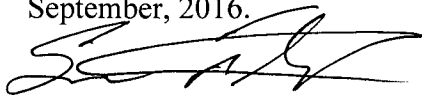
CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on J. Clayton Mitchell, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Darryl Frierson, #336466, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 19th day of September, 2016.



Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 19th day of
September, 2016.

 (L.S)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.