STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Richland County

Honorable Clifton Newman, Circuit Court Judge

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

10-CP-40-04277

DARRYL FRIERSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Darryl Frierson, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2012-211091

ON WRIT OF CERTIORARI

Appeal From Richland County
J. Michelle Childs, Circuit Court Judge
Clifton Newman, Post-Conviction Relief Judge

Opinion No. 5420
Heard September 8, 2015 – Filed June 29, 2016

AFFIRMED

Appellate Defender Kathrine Haggard Hudgins, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Assistant Attorney General John Walter Whitmire, and Assistant Attorney General James Clayton Mitchell, III, all of Columbia, for Respondent.

MCDONALD, J.: Darryl Frierson (Petitioner) pled guilty to kidnapping, armed robbery, assault and battery of a high and aggravated nature (ABHAN), and criminal conspiracy. He appeals from the denial of his application for post-conviction relief (PCR), arguing the PCR court erred in not finding his guilty plea was involuntary due to counsel's failure to advise him he could move to suppress evidence stemming from the placement of a mobile tracking device on his car. We affirm.

FACTS AND PROCEDURAL HISTORY

On May 10, 2007, Petitioner and his co-conspirators stole approximately 9.8 million dollars from an Express Tellers Services (ETS) armored truck. ETS employees David Jones (Jones) and Petitioner drove the truck from Charleston to Columbia, where two co-conspirators—Jeremy McPhail (McPhail) and Dominic Lyde (Lyde)—attacked Jones while he refueled, pushed him into the truck, and restrained him. The co-conspirators drove the truck away and stopped in a field, where two other co-conspirators—Domonique Blakney (Domonique) and Kelby Blakney (Kelby)—transferred money from the truck into a different car, left Jones and Petitioner in the truck, and fled.

Despite suffering substantial injuries, Jones was able to free himself and walk to a nightclub to call the police. Officers responding to the scene found Petitioner still inside the armored truck. Petitioner self-reported injuries and was transported to the hospital, where a team of investigators came to interview him.

Petitioner provided a fictitious account of the incident that immediately alerted investigators to the possibility of dishonesty. For example, although it was dark outside at the time of the heist and Petitioner alleged he was too injured to escape the abandoned armored car, he provided a very detailed account of the surrounding crime scene. During a follow-up interview at the police station, officers became more suspicious when they saw Petitioner through the two-way mirror freely moving his arm, despite his claims of injury to his arm and shoulder. Petitioner failed a polygraph test and had no duct tape residue or significant injuries such as those suffered by Jones. At this point, the investigative team at the police station determined Petitioner was a suspect, not a victim, and placed a Global Positioning System (GPS) tracking device on Petitioner's car—without a warrant or court order—before he left the police department.

Although the Richland County Sheriff's Department's led the detectives working on the case, dozens of additional law enforcement officers from across the state took part in the investigation. While Petitioner was being interviewed at the station, a separate team of officers was examining the armored truck. They collected a blue latex glove from inside the truck that was identical to a glove found in the trash abandoned on the street outside Petitioner's house. In addition, officers interviewing other ETS employees learned that Paul Whitaker (Whitaker), another co-conspirator,[1] and Petitioner were friends. When police questioned Whitaker, he became upset, started crying, and immediately confessed to his role in the scheme. According to Whitaker's statement, Petitioner had been planning to rob the armored truck for several months. Police searched Whitaker's house, where they discovered a large amount of cash and receipts from Petitioner's recent purchases. Based on Whitaker's confession and the evidence gathered at his home, police obtained a warrant for Petitioner's arrest.

Monitoring the tracking device on Petitioner's car, police located him driving with Domonique and found several thousand dollars in cash in the car. Police arrested Petitioner and interviewed Petitioner and Domonique in separate rooms at the police department. On Domonique's cell phone, officers found pictures of large bags of money. Domonique subsequently gave a statement admitting his role in the robbery and implicating Petitioner as the "mastermind." After police told Petitioner about Domonique's statement, Petitioner waived his rights and confessed to his involvement in the heist.

In September 2007, a grand jury indicted Petitioner for kidnapping, armed robbery, ABHAN, and criminal conspiracy. Domonique, Kelby, McPhail, Lyde, and Whitaker were also indicted for their involvement in the conspiracy.

On December 3, 2008, Petitioner pled guilty to all charges. At the plea hearing, Petitioner acknowledged he understood that by pleading guilty he was waiving his constitutional rights, including his right to challenge the State's evidence at trial. Petitioner also stated he was satisfied with plea counsel's representation. He testified plea counsel reviewed with him and explained his charges, his potential sentences, and his constitutional rights, allowing him to make an informed and intelligent decision about whether to plead guilty or proceed to trial. The plea

[1] Whitaker's role was to field phone calls from the armored truck at ETS headquarters to delay detection of the robbery and provide the co-conspirators time to flee.

court accepted Petitioner's guilty plea but deferred sentencing until a later proceeding.

On August 24, 2009, the plea court sentenced Petitioner to concurrent sentences of thirty years' imprisonment for kidnapping, thirty years' imprisonment for armed robbery, and ten years' imprisonment for ABHAN, as well as a consecutive sentence of five years' imprisonment for criminal conspiracy.

Petitioner filed a PCR application, alleging ineffective assistance of counsel. At the PCR hearing, Petitioner testified that plea counsel's lack of confidence about the outcome of a trial prompted Petitioner to plead guilty despite his desire to go to trial. Petitioner also stated plea counsel influenced him to plead guilty by telling him his co-defendants would testify against him at trial.

Petitioner further testified he asked plea counsel to research the legality of the placement of the GPS tracking device because damaging evidence stemmed from the use of the device. According to Petitioner, plea counsel did not discover section 17-30-140 of the South Carolina Code (2014), which requires a warrant or court order for the placement of tracking devices. Plea counsel told Petitioner the placement of the tracking device on the outside of the vehicle was legal based on his research. However, Petitioner testified he would not have pled guilty and would have proceeded to trial if plea counsel had advised him of section 17-30-140 and his ability to challenge the search and use of the resulting evidence.

Plea counsel testified he advised Petitioner to plead guilty because he believed Petitioner's chances of succeeding at trial were "very slim" based on his statement confessing to his involvement in the plan and the likelihood his co-conspirators would have testified against him. Plea counsel explained he researched the constitutionality of the tracking device after learning it was installed without a warrant or court order, however, he was unable to find any South Carolina case law addressing the issue. Plea counsel explained that in light of *United States v. Knotts*[2] and the placement of the tracking device on the outside of Petitioner's vehicle, he believed Petitioner's Fourth Amendment rights were not implicated.

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[2] 460 U.S. 276 (1983) (holding police's placement and monitoring of a tracking beeper in a container of chemicals that the defendant later placed in his car was neither a search nor a seizure under the Fourth Amendment because the device only exposed information about the defendant's movements on public roads, for which there was no reasonable expectation of privacy).

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.

The PCR court denied Petitioner's PCR application, finding he failed to prove deficient performance or resulting prejudice. It found plea counsel's testimony was credible while Petitioner's testimony was "wholly incredible." Analyzing the deficiency prong set forth in *Strickland v. Washington*,[3] the PCR court found plea counsel "performed extensive investigation into the GPS monitoring issue" and reasonably relied on Supreme Court case law in determining there was no Fourth Amendment violation "based on the status of the law at the time." It found plea counsel fully advised Petitioner about the ability to challenge the evidence based on his research.

Analyzing the prejudice prong, the PCR court found Petitioner failed to demonstrate he would have proceeded to trial but for counsel's failure to discover the statute and challenge the placement of the tracking device. Moreover, the PCR court found that even if plea counsel had successfully achieved the suppression of the evidence stemming from the tracking device, the outcome of Petitioner's case would not have been different because there was overwhelming evidence of his guilt.

Petitioner sought a writ of certiorari, which this court granted on February 22, 2014.

STANDARD OF REVIEW

[3] 466 U.S. 668, 687 (1984) (setting forth the two-pronged test of deficient performance and prejudice that a PCR applicant must satisfy to establish ineffective assistance of counsel).

In a PCR proceeding, the applicant has the burden of establishing he is entitled to relief. *Terry v. State*, 383 S.C. 361, 370, 680 S.E.2d 277, 282 (2009). An appellate court gives great deference to a PCR court's findings of fact and conclusions of law. *Id.* at 371, 680 S.E.2d at 282. "[An appellate court] will uphold the findings of the PCR court when there is any evidence of probative value to support them, and will reverse the decision of the PCR court when it is controlled by an error of law." *Id.* "[An appellate court] gives great deference to a PCR [court's] findings where matters of credibility are involved." *Simuel v. State*, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010).

LAW AND ANALYSIS

Petitioner argues plea counsel was deficient in failing to locate section 17-30-140 and failing to advise Petitioner of his ability to challenge the admissibility of his confession and other critical evidence. Petitioner further argues the PCR court erred in finding he was not prejudiced because the evidence established a reasonable probability that he would have not have pled guilty and would have proceeded to trial but for counsel's deficiency. We disagree.

Clearly, a defendant entering a guilty plea is entitled to the effective assistance of counsel. *Hill v. Lockhart*, 474 U.S. 52, 57 (1985). To establish a claim of ineffective assistance, however, a PCR applicant must prove counsel's performance was deficient and the deficient performance prejudiced him. *Strickland*, 466 U.S. at 687. "A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial." *Kolle v. State*, 386 S.C. 578, 588, 690 S.E.2d 73, 78 (2010) (quoting *Rolen v. State*, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009)).

In the context of a guilty plea, the prejudice prong "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill*, 474 U.S. at 59. Ordinarily, a PCR applicant must show some evidence "that would have affected counsel's advice to [him] to accept the plea bargain offered or that would have caused [him] to decline to accept it." *Stalk v. State*, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). "In many guilty plea cases, the 'prejudice' inquiry will closely resemble the inquiry engaged in by courts reviewing

ineffective-assistance challenges to convictions obtained through a trial." *Hill*, 474 U.S. at 59.

Like the PCR court, in conducting the prejudice analysis, we must consider the evolution of our Fourth Amendment jurisprudence applicable to the use of tracking devices on public roadways. Our supreme court recently considered this history in *State v. Adams*, explaining,

> In *Knotts*, law enforcement, with the owner's consent, concealed a beeper in a container of chloroform that was eventually loaded onto a target vehicle. Law enforcement then monitored the beeper and maintained surveillance on the target vehicle, ultimately arresting Knotts several days after he took possession of the container. The Supreme Court found no Fourth Amendment violation, upholding the warrantless use of the beeper because "[a] person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another."
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> One year later, in *Karo*,[4] the Supreme Court "addressed the question left open by *Knotts*, whether the installation of a beeper in a container amounted to a search or seizure." In *Karo*, law enforcement officers installed a beeper inside a container of chemicals prior to the container being transferred to the buyer. "As in *Knotts*, at the time the beeper was installed the container belonged to a third party, and it did not come into possession of the defendant until later." The Court held that, because the beeper was installed with the consent of the owner of the container, no search or seizure occurred because "[t]he mere transfer to Karo of a can containing an unmonitored beeper infringed no privacy interest."

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[4] *United States v. Karo*, 468 U.S. 705 (1984).

409 S.C. 641, 651–52, 763 S.E.2d 341, 347 (2014) (citations omitted) (footnote omitted).

In 2002, as part of the South Carolina Homeland Security Act,[5] the legislature enacted a statute outlining the requirements for obtaining authorization for the placement of a GPS tracking device. S.C. Code Ann. § 17-30-140 (2014). Pursuant to the statute, "[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." § 17-30-140(A). "Upon application made as provided under subsection (B), the court, upon finding that the certification and statements required by subsection (B) have been made in the application and probable cause exists, must enter an ex parte order authorizing the installation and use of a mobile tracking device." § 17-30-140(C). "The standards established by the United States Supreme Court for the installation and monitoring of mobile tracking devices apply to the installation and use of any device as authorized by this section." § 17-30-140(E).

In 2012, the United States Supreme Court decided *United States v. Jones*, which upheld the reversal of a defendant's conviction on drug trafficking conspiracy charges. 132 S. Ct. 945 (2012). There, the Court found the government's warrantless installation of a GPS tracking device on defendant's vehicle and its use of the device to monitor the vehicle's movements constituted a Fourth Amendment search. *Id.* at 949. Rejecting the government's argument that portions of the tracking of the Jeep Grand Cherokee's movement occurred upon public streets—on which defendant would have no reasonable expectation of privacy under the tracking device analysis of *Knotts*—the Supreme Court held the government's intrusion on an "effect" (the Cherokee) for the purpose of obtaining tracking information constituted a search. *Id.*; *see also* U.S. Const. amend. IV. ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

Thereafter, our supreme court decided *Adams*, *supra*, which considered a motion to suppress drug evidence stemming from the placement of a GPS tracking device on the defendant's car without a warrant or court order. 409 S.C. 641, 763 S.E.2d 341.

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[5] Act No. 339, 2002 S.C. Acts 3619.

Concluding *Knotts* was not binding precedent[6] authorizing the officers' warrantless placement of the GPS tracking device, the supreme court held, "Because the only binding law in this case was a statute that *forbade* law enforcement officers from installing a GPS device on [the defendant's] car without court authorization, there is no support for the State's invocation of the good-faith reliance exception as an additional sustaining ground to uphold the conviction." *Id.* at 653, 763 S.E.2d at 348. An "intervening acts" argument was likewise rejected because "Adams' traffic violations provide[d] an insufficient attenuation from the taint of the illegal search. The traffic stop was entirely predicated on the information obtained from the GPS device and law enforcement's desire to search Adams and his vehicle for drugs." *Id.* at 648, 763 S.E.2d at 345.

Relying upon *Jones* and *Adams*, Petitioner argues counsel was ineffective in failing to locate section 17-30-140 and advise Petitioner of the possibility of moving to suppress based upon officers' failure to comply with its statutory warrant requirement. 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. *See Strickland*, 466 U.S. at 700 ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim.").

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 ("[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

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[6] The United States Supreme Court decided *United States v. Jones* during the pendency of Adams' appeal.

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. *See Hutto v. State*, 387 S.C. 244, 250, 692 S.E.2d 196, 199 (2010) (stating the exclusion of evidence should be limited to violations of constitutional rights and not to statutory violations); *Rollison v. State*, 346 S.C. 506, 509–10, 552 S.E.2d 290, 292 (2001) (holding counsel's failure to investigate the circumstances surrounding the legality of a weapons frisk and advising applicant to plead guilty did not prejudice him). Because probative evidence supports the PCR court's finding that Petitioner failed to prove prejudice because he did not establish a reasonable probability he would have proceeded to trial instead of pleading guilty but for counsel's errors, we uphold the decision of the PCR court. *See Terry*, 383 S.C. at 371, 680 S.E.2d at 282 ("[An appellate court] will uphold the findings of the PCR court when there is any evidence of probative value to support them, and will reverse the decision of the PCR court when it is controlled by an error of law.").

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.").[7] Although police used the GPS tracking device to locate Petitioner to

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[7] We resolve this matter in reliance upon the "prejudice" prong of the *Strickland* analysis. However, like the PCR court, we recognize the clarification of our Fourth Amendment jurisprudence with respect to the warrantless placement of tracking devices in *United States v. Jones* and *State v. Adams* occurred some years

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. These independent aspects of the investigation, as well as the other evidence unrelated to the GPS tracker that police developed against Petitioner, provide further probative evidence supporting the PCR court's finding that Petitioner failed to establish prejudice. *See Terry*, 383 S.C. at 371, 680 S.E.2d at 282 ("[An appellate court] will uphold the findings of the PCR court when there is any evidence of probative value to support them, and will reverse the decision of the PCR court when it is controlled by an error of law.").

CONCLUSION

We conclude probative evidence supports the PCR court's finding that Petitioner failed to establish ineffective assistance of counsel. Accordingly, the decision of the PCR court is

AFFIRMED.

SHORT and GEATHERS, JJ., concur.

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after Petitioner's guilty plea. Our courts have "never required an attorney to be clairvoyant or anticipate changes in the law which were not in existence at the time of trial." *Gilmore v. State*, 314 S.C. 453, 457, 445 S.E.2d 456 (1994) *overruled on other grounds by Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999); *see also Robinson v. State*, 308 S.C. 74, 77–78, 417 S.E.2d 88, 91–92 (1992) (holding defense counsel was not ineffective in failing to present evidence of battered woman's syndrome in support of wife's self-defense claim where trial took place six years before our supreme court recognized battered woman's syndrome as relevant to a claim of self-defense).

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

DARRYL FRIERSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-211091

Appeal from Richland County

Honorable Clifton Newman, Circuit Court Judge

Opinion No. 5420

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for Darryl Frierson petitions the Court for rehearing. First, counsel respectfully submits that this Court overlooked the fact that plea counsel was deficient in failing to properly advise Petitioner of valid challenges to the unlawful placement of the GPS. Second, counsel respectfully submits that in finding that Petitioner failed to prove prejudice this Court misapprehended United States v. Knotts, 460 U.S. 276, 281, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983) and overlooked the fact that neither Knotts 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. There is a reasonable probability that if counsel had challenged the unlawful placement of the GPS, based on both the Fourth Amendment and S.C. Code §17-3-140, critical State's evidence would have been suppressed and Petitioner would have proceeded to trial rather than pleading guilty. Third, counsel respectfully submits that in finding no prejudice based on a credibility determination in regard to Petitioner's testimony that if he had been advised of the statutory requirement of South Carolina Code §17-30-140, he would not have pled guilty, this Court overlooked plea counsel's testimony that if he had known about S.C. Code §17-30-140, he would have used law enforcement's violation of the statute as a basis for a motion to suppress. Fourth, counsel respectfully submits that in finding no prejudice due to overwhelming evidence of guilt, apart from the evidence seized as a result of the unlawful search, this Court misapprehends the State's remaining evidence against Petitioner.

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 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).

First, without specifically finding deficient performance, this Court 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). Plea counsel was deficient in 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. This Court should find plea counsel deficient.

Second, in finding that Petitioner failed to demonstrate prejudice this Court 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).

Counsel respectfully submits that this Court 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. Respectfully counsel submits that this Court overlooked the fact that Knotts did not authorize the placement of a GPS tracking device on the outside of a vehicle without an order or warrant. Respectfully, this Court overlooked the fact that 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, the 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. Counsel respectfully submits this Court erred in finding that Petitioner failed to establish a reasonable probability that he would have prevailed at the suppression hearing.

Third, in finding no prejudice this Court additionally 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). This Court acknowledged plea counsel's testimony 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.

Fourth, counsel respectfully submits that this Court misapprehended The State's remaining evidence after suppression of Petitioner's statement based on the unlawful search. This Court 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).

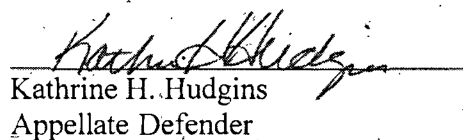
Plea counsel testified that Petitioner's statement was the most damaging piece of evidence and if the statement had been suppressed, Petitioner would have had a "fighting chance" at trial. (App. p. 123, lines 12-20). In regard to the statements by co-defendants, plea counsel testified, "We could just 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.

Petitioner respectfully petitions for rehearing based on the four points discussed above. Petitioner asks this Court to reverse the finding of the PCR judge, grant Petitioner post-conviction relief and remand for a new trial.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

This 14th day of July, 2016.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Honorable Clifton Newman, Circuit Court Judge

DARRYL FRIERSON,

PETITIONER,

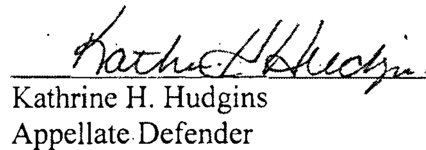
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

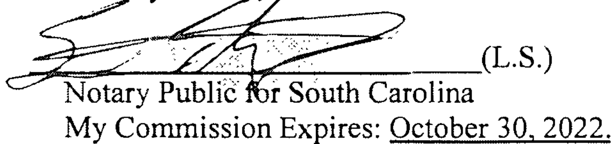
The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon J. Clayton Mitchell, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Darryl Frierson, #336466, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 14th day of July, 2016.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this
14th day of July, 2016.



(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.

apv

The South Carolina Court of Appeals

Darryl Frierson, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2012-211091

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Paul E. Short, Jr., J.

John D. Geathers, J.

Stephanie P. McDonald, J.

Columbia, South Carolina

cc:
Kathrine Haggard Hudgins, Esquire
John Walter Whitmire, Esquire
James Clayton Mitchell, III, Esquire
Alan McCrory Wilson, Esquire

FILED

August 18, 2016 LZ

Darryl Frierson, 00336466
The Honorable Clifton Newman