STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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May 05 2020

S.C. SUPREME COURT

Certiorari to Charleston County

Honorable Michael G. Nettles, Circuit Court Judge

GERALD CORNELL GREEN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001755

JOHNSON PETITION FOR WRIT OF CERTIORARI

Jessica M. Saxon
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ISSUE PRESENTED

Did the PCR court err in finding Petitioner entered a knowing and voluntary guilty plea when, at the time of the plea, Petitioner did not know that there was potentially an unauthorized wire-tap on his personal cellphone, which law enforcement used to intercept telephone calls that directly led to his arrest on the drug trafficking charge?

STATEMENT OF THE CASE

On October 6, 2014, Petitioner was stopped by a Charleston Police Department (CPD) officer for disregarding a stop sign. The officer made contact with Petitioner and asked him to step out of his car. As Petitioner was getting out of his car the officer saw a plastic bag containing an off-white rock-like substance on the driver's seat. The substance tested positive for .58 grams of heroin. App. 8, ll. 7-20.

Four months later, on February 10, 2015, Petitioner was again stopped by CPD for failing to maintain his lane. Upon approaching the vehicle to speak with Petitioner, the officer observed a clear plastic tube, burnt on both ends, on the driver's floorboard. Petitioner admitted to using the tube to smoke crack. A subsequent search of Petitioner incident to arrest produced a clear plastic bag from the defendant's pocket which tested positive for heroin. App. 8, l. 21-App. 9, l. 10.

Seventeen days later while on patrol, CPD officers observed Petitioner sitting in his vehicle behind the Best Western Hotel. Officers approached the vehicle to speak with Petitioner and he gave them consent to search his car. During the search officers found two off-white rock-like substances in the center console which tested positive for crack cocaine. App. 9, ll. 11-19.

On March 28, 2015, a deputy with the Charleston County Sheriff's Office responded to a call that a person was passed out inside of a running car at the Kangaroo gas station. When the deputy approached the car, he saw the Petitioner in the driver's seat, slumped over the center console. The deputy opened the driver's door to remove the keys from the ignition and saw a baggy on the driver's floorboard. The baggy contained .95 grams of cocaine, .69 grams of crack cocaine, and .97 grams of heroin. App. 9, l. 20-App. 10, l. 14.

On November 16, 2015, CPD officers and agents with the city of Charleston Drug Enforcement Administration Task Force intercepted a series of phone calls that Petitioner would be involved in a drug transaction in the area. App. 112. That same day DEA agents and CPD officers observed Petitioner conduct a hand to hand transaction with an unknown individual. Petitioner was approached and detained. A search of his person produced a plastic bag containing 6.93 grams of heroin. After his arrest Petitioner admitted to buying heroin from suppliers in trafficking weight. App. 10, l. 15-App. 11, 1. 4.

Over the course of a year a Charleston County grand jury indicted Petitioner for seven different drug offenses. He was charged with three counts of possession of heroin, third offense, two counts of possession of crack cocaine, third offense, one count of possession of cocaine, third offense and, trafficking in heroin, 4 to 14 grams, third offense. App. 123-143. On July 20, 2016, Petitioner appeared before the Honorable R. Markley Dennis, Jr. to enter a guilty plea. App. 1. The state was represented by Truc Tran. Petitioner was represented by Martha Runey. App. 1.

At the plea hearing the court was advised that the trafficking charge was being reduced to a first offense as part of the plea agreement. The court was also informed that, pursuant to the plea agreement, the state would not serve Petitioner with a life without parole notice, which Petitioner was eligible for. App. 6, ll. 20-25. The court confirmed that Petitioner understood that he was giving up his right to a jury trial, the right to confront witnesses against him, and the right to remain silent. App. 7, l. 24-App. 8, 1.2. Judge Dennis sentenced Petitioner to twenty-five years imprisonment, suspended to the service of twelve years, on the trafficking charge and concurrent terms of five years imprisonment on each possession charge. App. 19. Petitioner did not appeal his plea or sentence.

On June 1, 2017, Petitioner filed an application for post-conviction relief. App. 22-29. The state filed its return dated October 20, 2017. App. 31-37. An evidentiary hearing was convened before the Honorable Michael G. Nettles on July 24, 2019. App. 38. Petitioner was represented by James Falk. The state was represented by Benjamin Limbaugh. App. 38. Petitioner and plea counsel Runey testified at the hearing. App. 39. At the start of the hearing PCR Counsel Falk clarified that Petitioner was proceeding on the allegation that his guilty plea was involuntary and unknowing because there were reasons to believe that the DEA had conducted an illegal search of, or placed an illegal tracking device on, Petitioner's cellphone that he did not know about at the time he entered the plea. Petitioner stated that if he had known that his cellphone was being illegally tapped or searched, he would not have entered a plea. App. 45, ll. 14-21.

At the PCR hearing Petitioner testified that plea counsel spoke with him about a negotiated plea deal for eighteen years. Petitioner stated he did not want to take that plea and would prefer to go to trial. After that conversation Petitioner did not hear from plea counsel until the day of the plea when he was brought to court. There, Petitioner was told the state would reduce the trafficking charge from a third offense to a first offense and allow a straight up plea without recommendations. App. 49-50.

Petitioner stated that at the time of his arrest he was approached by law enforcement officers who claimed he matched the description of a robbery suspect. He was detained and searched for a gold chain that had allegedly been stolen. App. 53, ll. 7-14. Petitioner testified he overheard a conversation between the officers that led him to believe they were looking for drugs, not a gold chain. During the third search of his person that officers checked his underwear and located suspected heroin. App. 54, ll. 5-18.

Petitioner testified that he was not aware that the Charleston Resident Office of the DEA was conducting surveillance on him. He further stated that he was unaware of any tracking or telephone call intercept device that may have been placed on his cellphone. App. 55, ll. 15-23. Petitioner stated that the original arrest report, which was heavily redacted, specifically referenced that his cellphone was being monitored. App. 56, ll. 3-11; App. 57, ll. 17-23. Petitioner did not know if there was a search warrant authorizing the interception of the cellphone calls but did not think that there was one. App. 58, ll. 2-5.

Petitioner testified that if had known there was a warrantless tracking or intercept device[1] on his cellphone, he would not have pled guilty but would have gone to trial on the trafficking charge. App. 59, ll. 2-12. On cross-examination Petitioner admitted that he had been suspicious that his cellphone was being monitored illegally and stated he specifically asked plea counsel to investigate that possibility. App. 61, ll. 10-22; App. 65, ll. 10-15.

Plea counsel Runey testified that she was never provided with a search warrant regarding the intercepted phone calls but that she did note a conversation she had about the cellphone calls with a detective in the city police department. App. 68, ll. 19-25. She further stated that she discussed the evidence with Petitioner and told him that if he went to trial the intercepted cellphone calls would be an issue and she would move for suppression of the drugs found as a result of those intercepted cellphone calls. App. 69, ll. 5-9; App. 71, ll. 3-8.

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1 At the start of the evidentiary hearing PCR Counsel Falk informed the court that he had spent the last year attempting to get records from the US Department of Justice and the DEA regarding the investigation and potentially illegal surveillance of Petitioner. The documentation that PCR Counsel Falk was provided was highly redacted and he stated that he informed Petitioner it could take another year to fight the redactions for more clarification as to what was being kept secret. At the time of the PCR hearing it was not clear whether an illegal wiretap or surveillance device had been used on Petitioner's cellphone. App. 44-45.

The PCR court found that the record clearly reflected that Petitioner understood his rights and that he waived them during the plea hearing. Further, the court noted that the burden was on Petitioner to prove that there had been warrantless monitoring of his phone and that merely asserting there might have been warrantless monitoring was not enough to show prejudice. App. 76, ll. 3-22. The PCR court dismissed Petitioner's application finding that he had presented nothing of evidentiary value in support of his allegation that his plea was involuntary. App. 121.

ARGUMENT

The PCR court erred in finding Petitioner entered a knowing and voluntary guilty plea when, at the time of the plea, Petitioner did not know that there was potentially an unauthorized wire-tap on his personal cellphone, which law enforcement used to intercept telephone calls that directly led to his arrest on the drug trafficking charge.

Petitioner's guilty plea was not knowing and voluntary because he did not know that his cellphone was being illegally monitored. Further, a fair reading of the record reveals that Petitioner did not know he was waiving the right to challenge the evidence against him if he entered a plea.

Both state and federal laws require that law enforcement or the prosecuting attorney apply to a judge for an order allowing the interception of electronic communications. See S.C. Code Ann. § 17-30-10 et seq.; 18 U.S.C.A. § 2510 et seq. Notably, both state and federal law prohibit the use of illegally intercepted communications, and any evidence derived from the intercepted communication, from being used in any trial. S.C. Code Ann. § 17-30-65; 18 U.S.C.A. § 2515. While electronic communications can be intercepted without an order in emergency situations, those situations are narrowly defined by statute. S.C. Code Ann. § 17-30-95; 18 U.S.C.A § 2518.

In Petitioner's case the discovery and related documents entered at the PCR hearing clearly indicate that Petitioner was being surveilled by the DEA as a result of intercepted cellphone calls which indicated Petitioner would be involved in a drug transaction. The report provided to the PCR court included the details of the intercepted cellphone calls made to Petitioner on November 16, 2015, regarding a new supply of heroin. The information gained

from the intercepted cellphone calls was used to set up surveillance of the drug transaction that resulted in Petitioner's arrest for trafficking heroin.

As plea counsel testified, no search warrant or order was ever provided to explain the intercepted cellphone calls. Without an order or search warrant authorizing the wiretap, the interception of those cellphone calls was illegal. Thus, the details from the cellphone calls and the evidence resulting from the interception of the calls, particularly the trafficking weight heroin recovered from Petitioner, would not be usable at trial.

The state, and subsequently the PCR court, relied on the fact that Petitioner waived his rights during the plea colloquy and therefore his claim was barred. A review of the record shows that Petitioner waived his right to a jury trial, his right to confront witnesses against him, and his right to remain silent. At no point did the plea judge ask Petitioner if he understood that he was waiving his right to challenge the evidence or the legality of the intercepted cellphone calls.

Importantly, plea counsel never stated that she reviewed with Petitioner that he would be waiving his right to challenge the legality of the intercepted cellphone calls if he entered a guilty plea. Based on the plea colloquy and plea counsel's testimony it is not implausible to surmise that Petitioner believed he would be able to challenge the likely illegal interception of the cellphone calls that led to his arrest on the trafficking charge.

It is well established that counsel has a duty to undertake reasonable investigations or to make a decision that renders a particular investigation unnecessary. Strickland v. Washington, 466 U.S. 668, 691 (1984). Therefore, "[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008); See also Ard v. Catoe,

372 S.C. 318, 642 S.E.2d 590 (2007) (holding counsel's decisions regarding the investigation of, and failure to challenge, the gunshot residue evidence was unreasonable and clearly deficient).

In the present case, plea counsel was deficient for failing to investigate the legality of the intercepted cellphone calls. Plea counsel testified that she never received a search warrant and only noted a conversation with law enforcement about a search warrant. Plea counsel testified she discussed the possibility of a suppression motion with Petitioner however, there is nothing in the record to indicate that she ever performed any of the necessary investigation to determine whether a suppression motion was proper. This failure to investigate then can support the contention that Petitioner's plea was involuntary.

In Hill v. Lockhart, 585 U.S. 52 (1985) the United States Supreme Court addressed the analysis to be used in addressing such ineffective assistance claims. The Court explained,

> "Where the alleged error is failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than to go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial."

Hill at 59.

In Kolle v. State, 386 S.C. 578, 690 S.E.2d 73 (2010), this Court held that counsel was deficient in failing to procure pertinent discovery materials, specifically the call/dispatch logs and the search warrant. After failing to obtain a favor ruling suppressing the drugs, counsel advised Kolle to plead guilty. In determining prejudice, this Court explained that with the pertinent discovery materials counsel for Kolle had a stronger challenge to the validity of the search warrant which could have impacted the outcome of the suppression hearing. This Court noted that "Kolle entered his guilty plea without the benefit of all exculpatory

information…Because Kolle was unaware of this information, his claim of ineffective assistance of counsel clearly impinged upon the voluntariness and knowledge with which he entered his plea." Id. at n. 5.

Petitioner is similarly situated to Kolle because Petitioner was unaware of pertinent information – specifically he did not know whether his cellphone was being illegally monitored. This key piece of information was necessary for Petitioner to be able to make an informed decision about whether he should enter a plea or go to trial. Without this necessary information, his plea cannot be deemed voluntary and knowing.

Under the analysis in Hill, *supra*, Petitioner can show that he was prejudiced by plea counsel's failure to investigate. If the cellphone was being monitored illegally then the trafficking weight heroin found on Petitioner would have been suppressed and plea counsel would not have recommended Petitioner plead guilty. Counsel's advice was based on incomplete evidence and thus rendered Petitioner's plea involuntary.

Plea counsel's representation fell below an objective standard of reasonableness. Petitioner was not aware of the full consequences of his plea as he did not understand that he was waiving his right to challenge the evidence against him and therefore his plea was not voluntary and knowing. See Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000). But for counsel's failure to investigate the legality of the wiretap, Petitioner would not have pled guilty and would have insisted on going to trial. Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009); Hill v. Lockhart, 585 U.S. 52 (1985).

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner's writ of certiorari to allow full briefing on this issue.

s/Jessica M. Saxon
Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of May, 2020.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Gerald Cornell Green states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.

2. She has reviewed the record of petitioner's post-conviction relief hearing before Judge Michael G. Nettles, which was held on July 24, 2019, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Gerald Cornell Green.

Respectfully Submitted,

s/Jessica M. Saxon
Jessica M. Saxon
Appellate Defender
ATTORNEY FOR PETITIONER

This 5th day of May, 2020.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

s/Jessica M. Saxon
Jessica M. Saxon
Appellate Defender

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This 5th day of May, 2020.

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CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Johnson Petition for Writ of Certiorari and Appendix has been served upon Benjamin Limbaugh, Esquire by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS); and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Gerald Cornell Green, #187172, at MacDougall Correctional Institution, 1516 Old Gilliard Road, Ridgeville, SC 29472, this 5th day of May, 2020.

s/Jessica M. Saxon
Jessica M. Saxon
Appellate Defender
ATTORNEY FOR PETITIONER

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Wanda H. Carter, Deputy Chief Appellate Defender

May 5, 2020

Mr. Gerald Cornell Green, #187172
MacDougall Correctional Institution
1516 Old Gilliard Road
Ridgeville, SC 29472

Re: Your appeal

Dear Mr. Green:

Enclosed please find a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in your case, which I have filed with the South Carolina Supreme Court. The Court will write to you in the future eliciting any **written memorandum** you may want to submit for the Court's consideration of your appeal. That memorandum should be sent to the Supreme Court, and **not to me**. Please understand that the State does **not file a return** when a Johnson petition is filed. The petition to be relieved is a standard part of the Johnson procedure, it does not mean that I do not wish to represent you.

Please contact me if you have any questions.

Sincerely,

s/Jessica M. Saxon
Jessica M. Saxon
Appellate Defender

JMS/mba

Enclosure