STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Horry County

Honorable William H. Seals, Circuit Court Judge

TIMOTHY L. FRADY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000466

BRIEF OF PETITIONER

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ISSUE PRESENTED

Was trial counsel ineffective for not moving to suppress pictures found on Petitioner's cell phone based on a warrantless search that violated the Fourth Amendment?

STATEMENT

In December of 2012, the Horry County Grand Jury indicted Petitioner, Timothy L. Frady, for criminal domestic violence, third offense indictment, #2012-GS-26-04266. On May 12, 2014, Petitioner proceeded to jury trial before the Honorable Edward B. Cottingham. Melinda A. Knowles represented Petitioner at trial. J. Scott Hucks prosecuted the case. The jury found Petitioner guilty and Judge Cottingham sentenced Petitioner to five years suspended upon the service of four years followed by three years of probation. A timely notice of intent to appeal was filed and the direct appeal perfected. On November 4, 2015, the South Carolina Court of Appeals affirmed the sentence and conviction. State v. Frady, Op. No. 2015-UP-508 (S.C. Ct.App. filed Nov. 4, 2015).

On December 10, 2015, Petitioner filed an application for post-conviction relief [PCR]. The State filed a return on December 15, 2016. On November 28, 2017, an evidentiary hearing was held before the Honorable William H. Seals, Jr. James K. Falk represented Petitioner at the PCR hearing. Johnny Ellis James represented the State. In a written order filed February 28, 2018, Judge Seals denied relief and dismissed the application. A timely notice of intent to appeal was served on March 12, 2018. On November 15, 2018, counsel filed a petition for writ of certiorari pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 210 (1988), and a motion to be relieved as counsel. The issue presented in the Johnson petition was whether the PCR judge erred in refusing to find counsel ineffective for failing to object to the admission of photos found on Petitioner's cell phone on the ground that the photos were obtained by an illegal warrantless search of Petitioner's phone in violation of the Fourth Amendment.

On January 8, 2019, the South Carolina Supreme Court transferred the case to the South Carolina Court of Appeals pursuant to Rule 243(1) of the South Carolina Appellate Court Rules.

On October 3, 2019, the South Carolina Court of Appeals denied the motion to be relieved and directed the parties to address the question of whether trial counsel was ineffective for not moving to suppress pictures found on Petitioner's cell phone based on a warrantless search that violated the Fourth Amendment. The petition for writ of certiorari was filed on November 4, 2019. The return was filed on March 2, 2020. On June 16, 2020, this Court granted the petition for writ of certiorari and requested further briefing pursuant to Rule 243(j), SCACR. This brief of Petitioner follows.

STANDARD OF REVIEW

The standard of review in PCR cases depends on the specific issue before the Court. The Court defers to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). The Court reviews questions of law de novo, with no deference to trial courts. Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)). Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839–40 (2018).

ARGUMENT

Trial counsel was ineffective for not moving to suppress pictures found on Petitioner's cell phone based on a warrantless search that violated the Fourth Amendment.

A jury found Petitioner guilty of domestic violence against Petitioner's wife. Twenty-one months after the domestic violence incident the wife provided the Solicitor's Office with Petitioner's cell phone and an investigator with the Solicitor's Office searched the phone and found sexual photographs of Petitioner's nineteen-year old step-daughter. (App. pp. 132-137; pp. 56-59). At trial seven of the photos were admitted in evidence over objection. (App. p. 137, lines 1-8). Counsel argued that the photos were irrelevant to the domestic violence charge, were overly prejudicial and not properly authenticated. (App. p. 34, lines 1-6). On direct appeal Petitioner argued that, "The trial judge erred in admitting a cell phone and photographs that Appellant allegedly took of Tammi Frady's adult daughter, Appellant's step-daughter, where Frady gave the phone to the solicitor almost two years after Appellant's arrest, the photographs were not relevant to the CDV charge, and even if they were, they should have been excluded under Rule 403, SCRE, the State offered no evidence that the cell phone belonged to Appellant, and there was no evidence of when the photographs were taken." (App. p. 222). The South Carolina Court of Appeals affirmed finding that the photographs were relevant, that the prejudicial effect of the photographs did not outweigh their probative value and that the photographs had been properly authenticated. (App. p. 250).

During the PCR hearing Petitioner argued that trial counsel was ineffective in failing to move to suppress the photographs on the ground that the photographs were the result of an illegal warrantless search pursuant to Riley v. California, 573 U.S. 373, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014). (App. p. 267, lines 3-22). Trial counsel testified that to her knowledge the investigator with the Solicitor's Office did not obtain a warrant before searching Petitioner's

phone. (App. p. 275, lines 5-6). When asked if she considered moving to suppress the photos as the result of a warrantless search, trial counsel admitted that she did not consider doing that. (App. p. 275, lines 7-11). Counsel agreed that the Riley case was argued on April 29, 2014, before Petitioner's May 12, 2014, trial date but was not decided until June 25, 2014. (App. p. 276, lines 9-18). Trial counsel testified that she focused more on moving to suppress the photos on the grounds of relevance, prejudice and lack of authentication. (App. p. 276, line 22 – p. 277, lines 9-11). When asked how arguing the additional ground for suppression based on the warrantless search would have taken away from her other arguments trial counsel testified, "I mean, looking back, I probably should have. But again, you know, hindsight is always 20/20." (App. p. 277, lines 14-15). Trial counsel admitted that she did not make a conscious decision not to argue for suppression based on the warrantless search. (App. p. 277, lines 22-25). Trial counsel agreed that the sexual photos of the step-daughter were prejudicial and inflammatory. (App. p. 273, lines 3-12).

In the order of dismissal the PCR judge wrote:

> In an opinion issued June 25, 2014, a little over a month after Applicant's trial, the United States Supreme Court held that, in conducting a search incident to arrest, law enforcement must generally obtain a warrant before searching information stored or accessible on a cell phone. Riley v. California, -- U.S.--, 134 S.Ct. 2473 (2014). However, an attorney is not required to be clairvoyant, and cannot be expected in the course of regular competence to anticipate or discover changes in the law not yet come to pass at the time of trial. Thomas v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765-66 (1993)(citations omitted).
>
> At the evidentiary hearing, Counsel explained she focused on what she felt were her strongest arguments against admissibility of the photographs – authenticity and Rule 403. Counsel noted that Riley did not come down until after Applicant's trial, but conceded she should have argued on Fourth Amendment grounds.
>
> The Court finds no deficiency on the part of Counsel, nor prejudice therefrom. Riley was an open question at the time of trial, and counsel could not be held to have expected its outcome at the United States Supreme Court. Furthermore,

> Counsel articulated a valid trial strategy of focusing on what she felt were her most compelling arguments against the admissibility of the photographs. Accordingly, Applicant's request for relief by way of this allegation is DENIED.

(App. pp. 292-293). The PCR judge erred.

First, counsel did not articulate a valid trial strategy for failing to move to suppress the photographs based on the warrantless search. Trial counsel admitted that she did not make a strategic decision to challenge the admission of the photographs based on the warrantless search and that she did not consider making such an argument. The fact that she argued for suppression on other grounds does not constitute a strategic reason to not argue an additional ground, especially when trial counsel admitted that she did not consider arguing the additional constitutional ground.

Second, while Riley was decided a month after Petitioner's trial, the case was argued before the United States Supreme Court on April 29, 2014, before Petitioner's May 12, 2014, trial date. Failure to challenge the admission of the photos on the additional constitutional ground that had just been argued before the Supreme Court is unreasonable under prevailing professional norms. Counsel did not need to be clairvoyant to know that the Riley case was argued prior to Petitioner's trial and involved an issue upon which counsel could have based the motion to suppress. The present case is distinguished from Robinson v. State, 308 S.C. 74, 417 S.E.2d 88 (1992), where the Court found that counsel was not ineffective in failing to explain to the jury the battered woman's syndrome when the Court did not recognize battered woman's syndrome as relevant to a claim of self-defense until six years after petitioner's trial.

Additionally, as noted by PCR counsel, (App. p. 281, lines 9-23), the companion case in Riley was United States v. Wurie, 728 F.3d 1 (1st Cir. 2013), and was decided by the First Circuit Court of Appeals prior to Petitioner's trial in 2014. In Wurie the First Circuit Court of

Appeals held that a search-incident-to-arrest exception did not authorize the warrantless search of data on a cell phone seized from an arrestee's person. In United States v. Wurie, 728 F.3d 1, 14 (1st Cir. 2013), aff'd sub nom. Riley v. California, 573 U.S. 373, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014), the First circuit wrote:

> Since the time of its framing, "the central concern underlying the Fourth Amendment" has been ensuring that law enforcement officials do not have "unbridled discretion to rummage at will among a person's private effects." Gant, 556 U.S. at 345, 129 S.Ct. 1710; *see also* Chimel, 395 U.S. at 767–68, 89 S.Ct. 2034. Today, many Americans store their most personal "papers" and "effects," U.S. Const. amend. IV, in electronic format on a cell phone, carried on the person. Allowing the police to search that data without a warrant any time they conduct a lawful arrest would, in our view, create "a serious and recurring threat to the privacy of countless individuals." *Gant,* 556 U.S. at 345, 129 S.Ct. 1710; *cf.* United States v. Jones, —— U.S. ——, 132 S.Ct. 945, 950, 181 L.Ed.2d 911 (2012) ("At bottom, we must 'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.' " (quoting Kyllo v. United States, 533 U.S. 27, 34, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001))).

While the First Circuit opinion is merely persuasive, it was valid law at the time of Petitioner's trial. Trial counsel did not need to be clairvoyant in order to use the arguments made in Riley and the Wurie holding in support of a motion to suppress based on the warrantless search of Petitioner's cell phone. This is especially true given South Carolina's State constitutional privacy right providing a higher level of protection than the Fourth Amendment of the Federal Constitution, as argued by PCR counsel. (App. p. 282, lines 4-10). See also State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001); State v. Counts, 413 S.C. 153, 776 S.E.2d 59 (2015).

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117,

386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Trial counsel was ineffective for not moving to suppress photos found on Petitioner's cell phone on the ground that the photos were obtained by an illegal warrantless search of Petitioner's phone in violation of the Fourth Amendment. Petitioner was prejudiced by the deficient performance. While the Court of Appeals addressed probative value and prejudicial effect on direct appeal it was not in the context of a constitutional violation. If trial counsel had moved to suppress the photos based on the illegal search of the phone, the judge would have abused his discretion in not granting the motion. There is a reasonable probability that the jury's verdict was based on the prejudicial inflammatory photos seized in violation of Petitioner's Fourth Amendment rights. The jury was initially hung and did not reach a verdict until after receiving an Allen[1] charge. (App. p. 196, lines 6-10). But for counsel's deficient performance, there is a reasonable probability that the outcome of the trial would have been different.

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[1] Allen v. United States, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896).

CONCLUSION

Based on the above argument, this Court should find that trial counsel was ineffective, Petitioner was prejudiced by the deficient performance and remand the case for a new trial.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of July, 2020.

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SC Court of Appeals

Appeal from Horry County

Honorable William H. Seals, Circuit Court Judge

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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 Brief of Petitioner in the above-referenced case has been served upon Chelsey F. Marto, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and Timothy L. Frady, at 6355 Doyle Lane, Conway, SC 29526, this 16th day of July, 2020.

Kathrine H. Hudgins
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ATTORNEY FOR PETITIONER