STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Dec 22 2020

S.C. SUPREME COURT

Certiorari to Spartanburg County
R. Lawton McIntosh, Circuit Court Judge

SHANNON MILES LANCASTER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-000801

JOHNSON PETITION FOR WRIT OF CERTIORARI

Joanna K. Delany
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Whether the PCR court erred where it found counsel provided effective representation where counsel failed to recognize and advise Petitioner that evidence in the case against him might be suppressed pursuant to the South Carolina Homeland Security Act, since counsel's failure to advise Petitioner of this important potential defense resulted in Petitioner's entry of a plea that was not voluntarily, knowingly, and intelligently made?

STATEMENT

On September 30, 2016, a Spartanburg County Grand Jury indicted Petitioner for trafficking methamphetamine. App. 166 – 167. The State alleged that an undercover officer, James Ruane, called Petitioner on April 15, 2016, and asked him to procure $1,250 worth of methamphetamine. The State contended that Ruane picked Petitioner up from his home in Gaffney and eventually took him to a trailer park in Wellford, whereupon Petitioner went into a mobile home, then "came back out and gave Investigator Ruan[e] just under 28 grams of methamphetamine." App. 12, l. 24 – 13, l. 15.

On March 14, 2017, Petitioner appeared for a plea hearing before the Honorable J. Derham Cole. Petitioner was represented by Ricky Harris. The State was represented by James Hunter. App. 1. In accordance with plea negotiations, Petitioner pleaded guilty to one count of trafficking methamphetamine, second offense, with a negotiated range of twelve to eighteen years. The State agreed to dismiss by nolle prosequi pending charges of: two counts of trafficking in methamphetamine, third offense; one count of distribution of methamphetamine, third offense; one count of possession with intent to distribute methamphetamine, third offense; unlawful carrying of a pistol; and two counts of possession of a controlled substance. Petitioner was sentenced to fifteen years' imprisonment. App. 3, l. 5 – 7, l. 13; App. 11, ll. 2-20; App. 16, ll. 22-25; App. 168.

A motion to reconsider the sentence was denied. App. 19 – 25. After exhausting his remedies on direct appeal, Petitioner filed an application for post-conviction relief (PCR) on September 4, 2018. App. 26 – 42. On April 18, 2019, the State made its return. App. 43 – 55. On September 18, 2018, Petitioner amended his PCR application. App. 57 – 60. A hearing was held

on the matter before the Honorable R. Lawton McIntosh on February 20, 2020. Petitioner was represented by Susannah Ross and the State was represented by Jacob Isenberg. App. 61.

Plea counsel said he had advised Petitioner to plead guilty. "[M]y advice to [Petitioner] consistently was these were very difficult cases to try to defend in court in trial." App. 100, ll. 16-18. "[W]hat are the odds of successfully defending three drug trafficking cases in a row." App. 101, ll. 5-6. Counsel told Petitioner that a defense of entrapment would be a "long shot." App. 102, l. 19 – 103, l. 19. Counsel knew the solicitor was considering "seeking life without parole based on [Petitioner's] prior convictions." App. 94, ll. 15-17.

Counsel admitted that he did not research the law pertaining to the permissible use of recording devices by law enforcement. App. 116, ll. 2-10.

Petitioner testified that he only pleaded guilty because he believed he did not have any defense at trial. App. 84, ll. 7-8. This testimony was in keeping with Petitioner's answers to the plea judge during the plea colloquy. In response to questioning by the plea judge, Petitioner said that based on his discussions with counsel, he did not believe he had a defense to the trafficking methamphetamine charge to which he was pleading guilty. App. 5, l. 22 – 6, l. 1.

Petitioner explained at the PCR hearing that if he had known he could have had a hearing to suppress an audiovisual recording of the alleged drug buy pursuant to the South Carolina Homeland Security Act[1] he would not have pleaded guilty but would have insisted on exercising his right to trial. App. 78, l. 6 – 80, l. 5. Specifically, Petitioner explained that Officer Ruane drove Petitioner "around five hours searching for drugs without any kind of prior warrant." App. 86, ll. 23-25. Officer Ruane's reports were admitted at the PCR hearing and reflected that he

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[1] The preamble to S.C. Code Ann. §§ 17-30-10 – 145 provides: "This act may be cited as the 'South Carolina Homeland Security Act.'" The appellate courts of this state have also, at times, referred to this act as the "Wiretap Act."

made an "audio/video recording" of the incident although, "Due to the length of time of this buy, the transaction was not recorded due to the equipment running out of battery. Investigator Ruane was able to get some of the details of the buy, but not the buy in its entirety." App. 121 – 123. Petitioner explained this recording was an unlawful interception of an oral communication under S.C. Code Ann. § 17-30-70. App. 66, l. 23 – 67, l. 3.

On May 15, 2020, the PCR court issued an order of dismissal. App. 145 – 165. The order of dismissal stated that the "the plea hearing transcript reflects that Applicant freely and voluntarily pled guilty after receiving a complete and thorough plea colloquy by the plea court." App. 156. "Applicant stated that he discussed any potential defenses, discovered there were none, and knew he would have to waive defenses when taking the plea." App. 156. "[I]t appears Applicant freely and voluntarily chose to plea instead of facing a potential trial sentence of twenty-five years to thirty years, and potential life without the possibility of parole sentence on his other pending charges." App. 157. "Thus, this [c]ourt finds that Applicant entered his plea freely, voluntarily, knowingly, and intelligently." App. 157.

The order of dismissal further found counsel was not ineffective for failure to investigate. App. 157. "Applicant failed to show [c]ounsel failed to suppress illegally gathered evidence." App. 158. The PCR court recounted Petitioner's allegation that counsel was ineffective for failing to recognize a defense to evidence of the drug transaction that was recorded by Officer Ruane. "Applicant asserts Investigator James Ruane's recording of their conversations while riding in a car to facilitate Applicant's drug purchases is in violation of S.C. Code Section 17-30-70." App. 158. The order of dismissal continued,

> Section 17-30-15 defines wire and oral communications and Section 17-30-20 defines what acts are prohibited. While 18 U.S.C. Section 2519 requires the reporting of the intercept of oral communications and 18 [U.S.C.] Section 2511 prohibits the

> intercept of oral communications, 18 [U.S.C.] Section 2510(2) defines oral communications as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation."

App. 159.

The order concluded, "No evidence was presented that Applicant had an expectation that his oral communication was not subject to intercept or that the circumstances justified such an expectation. Thus, these communications do not fall under the definition in 2510(2)." App. 159. "[B]ecause the recording of Applicant does not fall under these definitions or the prohibited acts, [c]ounsel was not deficient in failing to investigate into an application by the investigator, to make sure a judge entered an order, to advise the [c]ourt of allegedly illegal actions or investigate a search and seizure issue, because the conduct did not fall under the statute requiring these actions on [c]ounsel's part." App. 159. "[C]ounsel did not act deficiently in neglecting his duty to investigate and present a defense." App. 161. "Furthermore, through his free and voluntary guilty plea, Applicant waived any right to claim illegal searches and seizures." App. 159.

This petition for certiorari follows.

ARGUMENT

The PCR court erred where it found counsel provided effective representation where counsel failed to recognize and advise Petitioner that evidence in the case against him might be suppressed pursuant to the South Carolina Homeland Security Act, since counsel's failure to advise Petitioner of this important potential defense resulted in Petitioner's entry of a plea that was not voluntarily, knowingly, and intelligently made.

Counsel admitted he advised Petitioner that Petitioner had no real defense at trial. However, unbeknownst to counsel, Petitioner did have a potential partial defense at trial—suppression. Petitioner could have sought suppression of Officer Ruane's recording of details of the alleged drug buy as a protected oral communication for which law enforcement needed a court order to intercept. Counsel's failure to advise Petitioner that he could challenge the admissibility of the recording was ineffective assistance of counsel.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 686 (1984). A defendant is entitled to the effective assistance of competent counsel before deciding whether to plead guilty. *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010). The decision to plead guilty must be a voluntary and intelligent choice among the alternative courses of action open to the defendant. *Hill v. Lockhart*, 474 U.S. 52, 56 (1985).

"In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) counsel's deficient performance prejudiced the applicant's case." *McKnight v. State*, 378 S.C. 33, 40, 661 S.E.2d 354, 357 (2008) (citing *Strickland*, 466 U.S. at 687). "[T]he two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective

assistance of counsel." *Hill*, 474 U.S. at 58. Before a guilty plea may be accepted, it is required "that the defendant understand the nature and crucial elements of the charges, the consequences of the plea, and the constitutional rights he is waiving, and that the record reflect a factual basis for the plea." *Rollison v. State*, 346 S.C. 506, 511, 552 S.E.2d 290, 292 (2001).

S.C. Code Ann. §§ 17-30-10 – 145 contain the South Carolina Homeland Security Act (the Act). S.C. Code Ann. § 17-30-10 provides that, "The interception of wire, electronic, or oral communications is hereby authorized only in the manner permitted by this chapter." S.C. Code Ann. § 17-20-15(2) goes on to define "oral communication" as "any oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying the expectation and does not mean any public oral communication uttered at a public meeting or any electronic communication." S.C. Code Ann. § 17-20-15(3) defines "intercept" as "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device."

Statements made by Petitioner during the five hours in which he and Ruane drove around allegedly attempting to buy drugs were intercepted within the meaning of § 17-20-15(3) when Ruane acquired them through a recording device. As will be discussed further *infra*, these statements were protected oral communications as defined in § 17-30-15(2), because Petitioner reasonably believed his conversation in the car was private.

Ruane's interception of the oral communications was unlawful. S.C. Code Ann. § 17-30-70 provides that the SLED Chief must apply for a court order to intercept oral communications, and the statute provides that the interception must be done by or under the direct supervision of SLED if part of the investigation of a methamphetamine trafficking case. § 17-30-70 states:

> (A) **An application for an order authorizing or approving the interception of wire, oral, or electronic communications must**

> **be initiated by the Chief of SLED**. After reviewing the application, the Attorney General or his designated Assistant Attorney General may authorize the submission of the application to a judge of competent jurisdiction for, and the judge may grant in conformity with this chapter, an order authorizing or approving the interception of wire, oral, or electronic communications by:
>
> (1) the South Carolina Law Enforcement Division for the investigation of the offense as to which the application is made when the interception may provide or has provided evidence of the commission of the offenses of murder (Section 16-3-10); assault and battery with intent to kill (Section 16-3-620); kidnapping (Section 16-3-910); voluntary manslaughter (Section 16-3-50); armed robbery (Section 16-11-330(A)); attempted armed robbery (Section 16-11-330(B)); **drug trafficking as defined in Section**s 44-53-370(e) and **44-53-375(C)**; arson in the first degree (Section 16-11-110(A)); arson in the second degree (Section 16-11-110(B)); accessory before the fact to commit any of the above offenses (Section 16-1-40); or attempt to commit any of the above offenses (Section 16-1-80). This interception may also be authorized when it may provide or has provided evidence of any conspiracy or solicitation to commit any violation of the offenses specified in this subsection;
>
> (2) the South Carolina Law Enforcement Division for the investigation of the offense as to which the application is made when the interception may provide or has provided evidence of the commission of any offense related to terrorism or the commission of a terrorist act, any offense related to bombs, destructive devices, bacteriological and biological weapons, and weapons of mass destruction as provided for in Article 7, Chapter 23, Title 16 or evidence of any conspiracy or solicitation to commit any crime specifically enumerated in this subsection; or
>
> (3) an individual operating under a contract with the South Carolina Law Enforcement Division for the investigation of an offense listed in subsection (1) or (2). Any interception conducted under this chapter by persons authorized by this subsection must conduct the interception under the direct supervision of an agent or officer of the South Carolina Law Enforcement Division.
>
> (B) Any person authorized to intercept wire, oral, or electronic communications pursuant to this section must have completed training provided by SLED pursuant to Section 17-30-145.

(emphasis added).

Petitioner was charged with violating S.C. Code Ann. § 44-53-375(C), which puts the intercept in this case within the ambit of § 17-30-70(A)(1). App. 167; App. 168. However, there was no evidence that Ruane followed the correct protocol to record Petitioner's oral communications (i.e., obtain a court order for the interception pursuant to an application by the Chief of SLED) before he intercepted Petitioner's protected statements.

"Our Wiretap Act parallels the Federal Act passed by Congress in 1968 . . ."[2] *State v. Whitner*, 399 S.C. 547, 553, 732 S.E.2d 861, 864 (2012). As the PCR court's order of dismissal recognized here, the federal equivalent to our state's definitional provision of the Act, 18 U.S.C. § 2510(2), defines the term "oral communication" almost identically to S.C. Code Ann. § 17-20-15(2). Per 18 U.S.C. § 2510(2), "'oral communication'" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication." Therefore, federal cases interpreting the definition of "oral communication" under the Federal Act are useful in interpreting the definition of "oral communication" under the State Act.

In *United States v. McKinnon*, 985 F.2d 525, 527 (11th Cir. 1993), the Eleventh Circuit found that interpreting the term "oral communication" necessitated a consideration of "whether the person uttering the words has a reasonable or justifiable expectation of privacy." Observing that legislative history required the term be considered in light of the constitutional standards expressed in *Katz v. United States*, 389 U.S. 347 (1967), the Eleventh Circuit held the test is whether a reasonable or justifiable expectation of privacy exists. "This test has two prongs. First, whether McKinnon's conduct exhibited a subjective expectation of privacy; second, whether

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[2] *See* 18 U.S.C. §§ 2510 – 2523.

McKinnon's subjective expectation of privacy is one that society is willing to recognize as reasonable." *McKinnon*, 985 F.2d at 527. The recording at issue in *McKinnon* was made while McKinnon was in the backseat of a police car with his codefendant, out of hearing range of police officers. The government argued in part that "the back seat of a police car is equivalent to a jail, and no reasonable expectation of privacy exists in a jail cell." *Id*. The Eleventh Circuit agreed, concluding that McKinnon did not have a reasonable or justifiable expectation of privacy for conversations he held while seated in the back seat of a police car. *Id*. at 528. Importantly, Petitioner, unlike McKinnon, was in the car of an undercover police officer, not a marked police car—therefore Petitioner did have a reasonable and subjective expectation of privacy because he did not believe his statements were being recorded.

In *Matter of John Doe Trader No. One*, 894 F.2d 240, 243-45 (7th Cir. 1990), the Seventh Circuit found statements made by a trader on the "noisy and frantic" floor of a mercantile exchange were not "oral communications" under 18 U.S.C. § 2510(2) as the trader had no reasonable expectation of privacy, since he exposed the statements to the public when he spoke loudly enough to be recorded by an agent who was standing "only a few feet" away. Here, unlike in *Matter of John Doe Trader No. One*, Petitioner was not in a noisy and frantic environment, but in a quiet car where he reasonably believed he was speaking privately.

S.C. Code Ann. § 17-30-110 provides, in relevant part, that "any aggrieved person may move to suppress the contents of any intercepted wire, oral, or electronic communication, or evidence derived therefrom, on the grounds that the: (1) communication was unlawfully intercepted. . ." The "Act is violated when a person intercepts oral communications that are not otherwise exempt from or subject to an exception contained in section 17-30-30. Evidence intercepted in violation of the Wiretap Act must be suppressed." *State v. Whitner*, 399 S.C. at

553, 732 S.E.2d at 864. "However, when a party to a communication gives consent for the communication to be intercepted, such recording does not violate the law."[3] *Id*. "Our Wiretap Act parallels the Federal Act passed by Congress in 1968, which similarly permits lawful interception where one party to the communication consents."[4] *Id*.

Here, the State could arguably claim that Ruane, who was a party to his conversations with Petitioner in the car, gave consent to record the oral communications. But, Petitioner could have maintained that, regardless, Ruane was required to apply for a court order to lawfully intercept the oral communications pursuant to § 17-30-70—and Petitioner might have prevailed in suppressing the recording.

To establish prejudice when challenging a guilty plea, a PCR applicant must prove "there is a reasonable probability that, but for, counsel's errors, the defendant would not have pled guilty, but would have gone to trial." *Harden v. State*, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004). "The crux of the inquiry is whether counsel's ineffective performance affected the outcome of the plea process, not whether the defendant would have been successful had he gone to trial." *Frierson v. State*, 423 S.C. 257, 262, 815 S.E.2d 433, 436 (2018).[5] Here, Petitioner's

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3 *See* S.C. Code Ann. § 17-30-30(B): "It is lawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where the person is a party to the communication or one of the parties to the communication has given prior consent to the interception;" and S.C. Code Ann. § 17-30-30(C): "It is lawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception."

4 *See* 18 U.S.C. § 2511(2)(a)(iii)(c) – (d) (allowing interception of oral communications where one of the parties to the communication is the interceptor or consents to interception).

5 *See also Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *Stalk v. State*, 383 S.C. 559, 562, 681 S.E.2d 592, 594 (2009) (where alleged error of counsel is failure to advise defendant of a potential affirmative defense, the resolution of the prejudice inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial).

testimony supplied prejudice. Petitioner testified that had he known he could move to suppress the recording made by Ruane, he would not have pleaded guilty but would have insisted upon exercising his right to trial.

As seen, South Carolina's Homeland Security Act provided a legitimate way in which to challenge a critical piece of evidence against Petitioner, and counsel was unaware of this avenue of challenge. Petitioner has therefore established both deficiency and prejudice and this Court should grant certiorari. *Strickland v. Washington*, 466 U.S. at 686.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests that a writ of certiorari be granted to allow full briefing on this issue.

s/ Joanna K. Delany
Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of December, 2020.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Shannon Miles Lancaster 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 R. Lawton McIntosh, which was held on February 20, 2020, 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 Shannon Miles Lancaster.

Respectfully Submitted,

s/ *Joanna K. Delany*
Joanna K. Delany
Appellate Defender
ATTORNEY FOR PETITIONER

This 22nd day of December, 2020.

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Dec 22 2020

S.C. SUPREME COURT

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/ *Joanna K. Delany*
Joanna K. Delany
Appellate Defender

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This 22nd day of December, 2020.