No: 19-7170

ORIGINAL

In The

SUPREME COURT OF THE UNITED STATES

DANTE TAYLOR,
Petitioner - Pro Se

v.

The People of the State of New York
Respondent

On Petition for a Writ of Certiorari To
New York State Court of Appeals

PETITION FOR WRIT OF CERTIORARI

DANTE TAYLOR - DIN# 14-B-3448
Clinton C.F.
P.O. Box 2001
Dannemora, NY 12929

QUESTION PRESENTED FOR REVIEW

Q1. What is the appropriate appellate protocol for appellate counsel to follow when: (i) the Supreme Court has issued a new constitutional ruling affecting Fourth amendment jurisprudence that breaks with the past, (ii) the case is not yet final, and (iii) the new constitutional ruling overturns the factual and legal findings of the appellate division's previous ruling?

Q2. Was Appellate counsel ineffective for failing to initiate the appropriate appellate protocols to have the newly minted Carpenter holdings applied to the facts of my case?

Q3. In denying my application to vacate its prior decision, did the Fourth Department violate the Supreme Court's directive in Griffith v. Kentucky, 479 U.S. 314, 322, 328 (1987), for all of its subordinate court's to apply "a new rule for the conduct of criminal prosecutions . . . retroactively to all cases, state or federal, pending on direct review or not yet final . . . " (id.)?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the Court whose judgment is the subject of this petition is as follows

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TABLE OF AUTHORITIES

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below

OPINIONS BELOW

The opinion of the highest State Court to review the merits appears at Appendix A and is

[X] Reported at People v. Taylor, 34 NY3d 954 (2019)

The opinion of the Appellate Division, Fourth Department appears at Appendix B to the petition and is

[X] Reported at People v. Taylor, 173 A.D.3d 1721 (4th Dept. 2019)

The Opinion of the Wayne County Court of New York appears at Appendix E to the petition and is

[X] is unpublished

JURISDICTION

[X] The date on which the highest state court decided my case was September 19, 2019. A copy of that decision appears at Appendix A.

[X] A timely petition for rehearing was thereafter denied on 09/27/19, and a copy of the order denying rehearing appears at Appendix C.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment of the United States Constitution provides in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized

The Fourteenth Amendment of the United States Constitution provides in relevant part:

> No state shall make or enforce any law that shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws

The Supremacy Clause of Article VI of the United States Constitution provides in relevant part:

> The Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land, and the Judges in every state shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding

The Stored Communication Act, 18 U.S.C. § 2703, provides in relevant part:

> (c) Records concerning electronic communication service or remote computing service -- (1) A governmental entity may require a provider of electronic communication service or remote computing service to disclose a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications) only when the governmental entity --
>
> (A) obtains a warrant issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using State warrant procedures) by a court of competent jurisdiction; *** (d) *** and shall issue only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation. ***

The Stored Communications Act, 18 U.S.C. § 2707(g), provides in relevant part:

> (g) Improper disclosure -- Any willful disclosure of a "record", as that term is defined in section 552a(a) of title 5, United States Code, obtained by an investigative or law enforcement officer, or a governmental entity, pursuant to section 2703 of this title *** that is not a disclosure made in the proper performance of the official functions of the officer or governmental entity making the disclosure, is a violation of this chapter [and is punishable as described under 18 U.S.C. § 2701 et al].

STATEMENT OF THE CASE

On 02/02/18, the Appellate Division, Fourth Department denied my direct appeal, holding, amongst other things, that there was no warrant requirement for the obtaining of Cell Site Location Information (see Coram Nobis' Exhibit A). Thereafter, on 03/05/18, my appellate attorney filed his leave application to the New York State Court of Appeals (see Coram Nobis' Exhibit B).

However, while my appellate counsel's leave application was pending, the United States Supreme Court decided Carpenter v. United States, 138 S.Ct. 2206 (2018). The Supreme Court held that law enforcement officials' acquisition of historical cell site location information (CSLI) revealing the aggregated location information of a defendant constitutes a search under the Fourth Amendment (see Coram Nobis' Exhibit C). This not only eviscerated the fourth Department's legal conclusion that there was no warrant requirement for the four-day period in which the police obtained CSLI data, but created a whole set of additional factual issues attendant to my case which needed clarification in a Court capable of expanding the record to hear them[1].

In my Coram Nobis application, I argued that because my case had not yet become final, had appellate counsel raised this issue by way of an application for renewal and/or reargument before the Fourth Department, the Fourth Department would not only have been required to vacate its holding that there was no Fourth Amendment requirement for a warrant for the obtaining of the CSLI data used by the police in this case, but that they would have been required to re-assess the facts and merits of my appeal. This included the fabricated claim of the state that there was exigent circumstances for the obtaining the CSLI date (see Coram Nobis' Memorandum of Law, at Point 1, infra). This reassessment was crucial to my case because

[1] For instance, the police claimed that there were exigent circumstances at the time that they went to the service provider and asked for access to my record. However, in light of the fact that the police had me under surveillance, a hearing needed to be held to determine whether there really existed exigent circumstances under the framework worked out in Carpenter.

without the CSLI data, any evidence that was collected as a result of the illegal obtaining of the CSLI data must be deemed the fruit of the poisonous tree.

But instead of seeking renewal and/or reargument in the Fourth Department, on June 25, 2019, my appellate counsel filed a 1-page supplemental leave application with New York's Court of Appeals asking that Court to consider the clarifications and new rulings contained in Carpenter v. United States, supra (see Coram Nobis' Exhibit D).

On 06/26/18, the district attorney submitted an Opposition to my appellate attorney's application, arguing, amongst other things, that because the question of whether Carpenter applied to my case was a mixed question of law and fact, the Court of Appeals -- as a Court of Law -- could not resolve the newly minted Carpenter decision as it applied to the facts of my case (see Coram Nobis' Exhibit E, page 3).

On June 29th, 2019, Appellate Counsel filed a follow up supplemental leave application with the Court of Appeals (see Coram Nobis' Exhibit P). In his supplemental application, he attempted to rebut the district attorney's claim, and he further specified each of the reasons why the CSLI data was indeed a search under Carpenter, supra. Something that he should have done in a motion to reargue to the Appellate Division, or better yet, in a motion for renewal in the County Court.

On August 6, 2018, the Court of Appeals denied leave (see Coram Nobis' Exhibit F). I then filed a pro se application for reconsideration (see Coram Nobis' Exhibit G). On January 3, 2019, the Court of Appeals denied reconsideration (see Coram Nobis' Exhibit H). Utilizing these facts, on 03/28/19, I filed an omnibus type motion to the Appellate Division, Fourth Department, arguing that:

A. Appellate counsel was ineffective for failing to file an application for renewal and/or reargument in the Fourth Department based on the retroactive effect of Carpenter v. United States, supra

B. Because my case had not yet become final, the Supreme Court's Fourth Amendment clarifications in Carpenter v. United States was controlling, requiring the Fourth Department to recall and/or vacate its February 2, 2018 Order denying my appeal, in order to conform its decision to the newly minted principles laid out in the holdings In Carpenter v. United States. supra. A mode of relief available to this writer under either CPLR § 2221(d) or CPLR § 2221(e), and

C. Under the principles laid out in Griffith v. Kentucky, 479 U.S. 314, 322, 328 (1987), Equal Protection and the Supremacy Clause required that the Fourth Department recall its previous fourth amendment adjudication, and replace it with a decision that applied the facts of my case with the holdings in Carpenter.

On 06/17/19, the Appellate Division, Fourth Department denied my application, holding that I was not deprived of the effective assistance of appellate counsel, and expressly holding that my application for reargument was untimely (see Initial Leave Application's Exhibit A). It made no ruling concerning my application for Renewal (i.e. CPLR § 2221[e]), nor did it provide any guidance as to the appellate protocols an appellate attorney is supposed to follow when dealing with newly minted constitutional clarifications by the Supreme Court issued after case was heard in the Fourth Department, but before it was declared final.

On 06/28/19, I filed an application for leave to appeal. On __/__/__, the Honorable Jenny Rivera granted me until August 30, 2019 to file this application. On __/__/__, the Court of Appeals denied leave.

REASONS FOR GRANTING THE PETITION

Issue 1: There is a need to resolve the constitutional ramifications of an appellate attorney who fails to follow the appropriate appellate protocols to address newly minted constitutional holdings to a case which has not yet become final

In finding that appellate counsel was not ineffective, the Appellate Division overlooked and/or misapprehended the fact that because the Court of Appeals was a Court of Law, appellate counsel was in error for filing his application for consideration of the implications of Carpenter in the Court of Appeals. Rather, appellate procedures in New York State required that he request

that the Court of Appeals leave application be held in abeyance so that he could return to the appellate court, under CPL § 450.50(1), to have Carpenter's constitutional clarifications applied to the facts of my case.

If this had occurred, the Appellate court would have been bound to find that a Fourth Amendment violation occurred in my case, and thereafter, utilize the exclusionary rule to suppress all of the evidence found in my home.[2] This, of course, would have resulted in reversal, or at the very least, remittal to the County Court for further proceedings.

My appellate counsel's actions of placing my constitutional arguments in a venue that was not designed for that purpose, was not consistent with a reasonable competent appellate attorney (see People v. Borrell, 12 NY3d 365, 368 [2009]), and provides the perfect test case to set the policy as to the constitutional duty of an appellate attorney who, while his leave application is pending, and the case is not yet final, fails to seek reconsideration of a New Constitutional ruling issued by this Court that affects the validity of his client's conviction.

Issue 2: **There is a need to clarify the due process and supremacy clause ramifications of an appellate court's failure to to apply newly minted constitutional issues to all cases which have not yet become final in direct violation of this Court's rulings in Griffith v. Kentucky,**

In my Coram Nobis application, I asked the appellate court, under the principles outlined under Griffith v. Kentucky, and CPLR § 2221(e) to reopen my case and apply the principles of Carpenter to the facts of my case. The Appellate Division did not address either of these claims. I am asking that certiorari be granted to determine whether the Fourth Department's failure to consider that portion of my application for renewal (i.e. CPLR § 2221), was the type of inequity the Supreme Court warned of in Griffith v. Kentucky, 479 U.S. 314, 322, 328 (1987), when it commanded that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a clear break with the past" (id.).

In this case, the failure of the Appellate Division to reopen my appeal based on the new constitutional rulings handed out in Carpenter violated the controlling principles of the Supremacy Clause which does not allow the federal retroactivity doctrine to be supplanted by the selective application of statutes like CPLR § 2221. My research (which is limited by my novice status) has revealed that the only mechanism in either the Criminal or Civil Procedure law which specifically allows a State appellate or county court to reopen its prior decision based on "retroactive law" is CPLR § 2221(e), which holds that in order to be granted relief, a defendant "shall . . . demonstrate that there has been a change in the law that would change the prior determination" (see id.). Carpenter was certainly the type of "retroactive change in the law" contemplated by this State.

Because the writ of Coram Nobis is "[a] common-law writ [that] continues to be available to alleviate a constitutional wrong when a defendant has no other procedural recourse" (People v. Syville, 15 NY3d 391, 400 [2010][citation and inner quotation marks omitted), and whatever "freedom state courts may enjoy to limit the retroactive operation of their own interpretation of state law . . . cannot extend to their interpretations of federal law" (Harper v. Virginia Department of Taxation, 509 U.S. 86, 113 S.Ct. 2510, 2519 (1993)(citations omitted), I am asking this Court to grant certiorari to determine if the Appellate Division's failure to reopen my appeal to apply the constitutional rulings in Carpenter to the facts of my case, was a violation of my right to due process and/or otherwise a violation of the Supremacy clause (see Griffith v. Kentucky, 479 U.S. at 322, 323][forbidding selective application of new rules issued by the Supreme Court on cases which have not yet been declared final (Griffith v. Kentucky, 479 U.S. 314, 322).

Issue 3: There is a Nationwide need to determine whether the time Limits of Statute like CPL § 470.50 Violate the Supremacy Clause

[2] It must be noted that the evidence found in my home was tenuous at best, and as I always stated, was purchased from an third party who had direct connections to the home of the decedents.

The New York Legislature has provided that an Appellate Court, in the interest of justice and for good cause shown, may, "upon motion of a party adversely affected by its determination, or upon its own motion, order reargument or reconsideration of the appeal" (CPL § 450.50[1]). While CPL § 450.50(2) provides for time limits which can be set by the individual departments, it also has built into the fabric of its legislative intent a fail safe that ensures that an appellate court's discretion to address even untimely motions for reconsideration can be excused when the defendant has shown that there is good cause for the delay in bringing the claim, or that the interest of justice demands review.

Here, there is no question that my appellate attorney, while well intentioned, filed his application for consideration of the Fourth Amendment principles in Carpenter in the wrong venue. Something even the district attorney conceded (see Coram Nobis' Exhibit E). This, in itself, was sufficient good cause to invoke the good cause exception articulated under CPL § 450.50(1).

Also to consider is the fact that no parties to this proceeding were prejudice as the district attorney had already been put on notice as to the constitutional arguments relative to the CSLI data long before Carpenter was decided. In fact, in each of my appellate counsel's submissions to the Court of Appeals, he informed the district attorney and the court that the Supreme Court was soon to issue a ruling on the very issue which was the main findings in both the County and Appellate Court's ruling that the acquisition of my CSLI data was not a Fourth Amendment intrusion (see Coram Nobis' Exhibit A). So there was no prejudice or failure to give notice to the prosecutor.

Moreover, the Appellate Division's holding that my request to apply Carpenter was untimely failed to take into account the fact that "the lengthy passage of time, in itself, [is not to be considered a] bar [to] review of a defendant's claims" (People v. D'Alessandro, 13 NY3d 216, 221 [2009]). This holds true because the writ of Coram Nobis is not a creature of statute, subject to the limits set by the legislature, but rather "[a] common-law writ [that] continues to be

available to alleviate a constitutional wrong when a defendant has no other procedural recourse" (People v. Syville, 15 NY3d 391, 400 [2010] [citation and inner quotation marks omitted).

When viewed through these principles, it was a violation of procedural due process, and my right to full and fair adjudication of my Fourth Amendment claims when the appellate division denied, as untimely, my application for reargument of its prior order (see Griffith v. Kentucky, 479 U.S. 314, 322, 328 [1987]["a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a clear break with the past"]). And as application of Carpenter to the facts of my case would have resulted in the suppression all of the evidence seized in this case, the failure of this Court to invoke the legislative allotment under CPL § 450.50(1) was a constitutional violation of the highest level.

Based on the foregoing, and on my original applications, I am asking this Court to grant this application not only on its own merits, but for the guidance its resolution will provide for the Court across this nation in resolving future cases where appellate counsel has failed to follow the appropriate protocol to raise his appellate claims in the appellate courts.

Statement Pursuant to 28 U.S.C. § 1746, I Declare, under the Penalty of Perjury under the laws of the United States of America, that the foregoing is True and Correct.

Signed this 12 ***day of December, 2019***

Respectfully submitted

Dante Taylor

Sworn to before me this
__ day of December, 2019

No Notary Available