No. 21-7737

ORIGINAL

FILED
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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

Justin Lee Douglas — PETITIONER
(Your Name)

vs.

United States Supreme Court
OR
State of Wisconsin — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Supreme Court of Wisconsin
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Justin Lee Douglas #322852
(Your Name)

P.O. Box 900
(Address)

Portage, Wisconsin 53901-0900
(City, State, Zip Code)

N/A
(Phone Number)

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QUESTION(S) PRESENTED

1. Did the Supreme Court of Wisconsin error in their ruling on my right to have effective Counsel?

2. Did the Supreme Court of Wisconsin properly rule on my attorney's ineffective assisstance of counsel?

3. Did the Court of Appeals properly rule on my attorney's ineffective assisstance of counsel?

4. Were my trial court attorney's ineffective for failing to pursue a suppression argument and that the defendant had standing but because he was not advised right by his counsel, the defendant didn't take the position that the phone was his due to his counsel telling him that the State's attorney could use this against me when i go to trial but in realality the state's attorney couldn't use this against me at trial and if i would've knew this, i would've took the position that the phone was mine?

5. Did the Appleton Police Department illegally seize Mr. Douglas's cell phone?

6. Did the Appleton Police Department illegally use a "Stalking Horse" to search Mr. Douglas's

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:

RELATED CASES

1. United States V. Jacobsen, 466 U.S. 109, 113. 104 S.Ct. 1652 80 L.Ed.2d 85 (1984). Pg. 8
2. Simmons V. United States, 390 U.S. 377, 394 (1968). Pg. 9
3. State V. Wheat. 2002 WI App. 153, P3-4, 256 Wis.2d 270, 647 N.W.2d 441. Pg. 10
4. State V. Bauer Pg. 12
5. State V. Washington, 2005 WI App. 123, P10. 284 Wis.2d 456, 700 N.W.2d 305. Pg. 12
6. State V. Carroll, 2011 WI App. 155, 322 Wis.2d 299, 778 N.W.2d 1. Pg. 8
7. State V. Carter, 2002 WI App. 55, 250 Wis.2d 851, 641 N.W.2d 517. Pg. 7
8. State V. Doss, 2008 WI 93, 312 Wis.2d 570, 754 N.W.2d Pg. 6
9. State V. McGuire, 10 WI 91, 328 Wis.2d 289, 786 N.W.2d 227 Pg.
10. Strickland V. Washington, 466 U.S. 668, 104 S.Ct. 205

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

[ ] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[⋈] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[⋈] is unpublished.

The opinion of the Wisconsin Supreme court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[⋈] is unpublished.

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts:**

The date on which the highest state court decided my case was 8-10-21. A copy of that decision appears at Appendix B.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. IV

U.S. Const. Amend. XIV

U.S. Const. Amend. VI

STATE OF WISCONSIN,
Plaintiff-Responent,

V. Case No. 20AP84 CR

Justin L. Douglas,
Defendant-Appellant.

" PETITION FOR A WRIT OF CERTIORARI "

Justin L. Douglas #322852
Pro Se Appellant

Justin L. Douglas #322852
Columbia Correctional Institution
P.O. Box 900
Portage, Wisconsin 53901-0900

united states supreme court

STATE OF WISCONSIN,
Plaintiff-Respondent,

V. Case No. 20AP84 CR

Justin L. Douglas #322852,
Defendant-Appellant.

" PETITION FOR A WRIT OF CERTIORARI "

STATEMENT OF THE ISSUES

I. Defendant argued via postconviction motion that his trial court attorneys were ineffective for failing to pursue a suppression argument and that the defendant had standing to contest such. The issue whether the trial court properly denied the motion was presented to the court of appeals, and the court of appeals also ruled that counsels were not ineffective.

II. The United States Supreme Court Has Jurisdiction Under 28 U.S STATEMENT OF REASONS FOR GRANTING REVIEW §1254(1), §1257(a)

Wisconsin Statute 809.62(2)(c) states this Court can review an issue if there is a substantial and compelling reason to do so. Wis. Stat. 809.62.

The issue presented regards whether the defendant's trial counsels were ineffective for failing to pursue a suppression argument and that the defendant had standing to contest such. Considering both lower levels denied the defendant relief, it appears there is some difficulty in determining when counsel is considered ineffective; therefore, there is a substantial and compelling reason to recitfy this issue and also to prevent similar future issues.

STATEMENT OF THE CASE

On March 5, 2015, the State filed an Information charging Justin Douglas (Douglas) with 16 counts. (5:1-10). The first count, 1st degree child sexual assult - child under age of 13, contrary to Wis. Stat. § 943.02(1)(e), carried a maximum penalty of 60 years imprisonment; however, because he was charged as a repeater, contrary to Wis. Stat. § 939.62(1)(c), the maximum penalty could be increased by not more than six years. (5:1). The second, third, tenth, and eleventh counts, sexual explotation of a child, contrary to Wis. Stat. 948.05(1)(a) and (b), each carried a maximum penalty of 40 years imprisonment, and a mandatory minimum of five years initial confinement; however, because he was charged as a repeater, contrary to Wis. Stat. § 939.62(1)(c), the maximum penalties could be increased by not more than six years. (5:1-3, 6-7). The fourth and twelfth count, possession of child pornography, contrary to Wis. Stat. § 948.12 (1m) and (3a), carried a maximum penalty of 25 years imprisonment; however, because he was charged as a repeater, contrary to Wis. Stat. § 939.62(1)(c), the maximum penalties could be increased by not more than six years, and there's a mandatory minimum of five years initial confinement on Wis. Stat. § 948.12(1m) and (3a). The fifth through eighth, and thirteenth through sixteenth counts, felony bail jumping, contrary to Wis. Stat. § 946.49(1)(b), each carried a maximum penalty of six years imprisonment; however, because he was charged as a repeater, contrary to Wis. Stat. § 939.62(1)(b), the maximum penalty on each count cound be increased by not more than four years. (5:4-5, 8-10). The ninth count, 1st degree child sexual assult- child under age of 12, contrary to Wis. Stat. § 948.02(1)(b), carried a maximum penalty of 60 years imprisonment, however, because he was charged as a repeater, contrary to Wis. Stat. § 939.62(1)(c), the maximum penalty could be increased by not more than six years. (5:6).

On September 17, 2015, Douglas filed a motion to suppress evidence that led to the charges. (20:1). As a result, the court scheduled a motion hearing. At the hearing, the issue of standing arose - whether Douglas was even claiming the phone with the incriminating evidence was his. (161:2-5). At that time, defense counsel indicated he could not take the position that the phone was owned by Douglas, and the court therefore denied the motion since the defendant did not have

standing to bring the motion. (161:2-5, 50-52).

G. Opinions Below.

On March 12, 2018 and March 14, 2018, Douglas exercised his right to a trial as well as to determine whether he was insane at the time of the offense. (167:1-249; 168.1-154). In doing so, the jury heard extensive testimony from five of the State's witnesses, and two of the defense's witnesses. (167:92-185; 168:28-111). After doing so, it found Douglas guilty on all counts, and that he was not mentally insane at the time of the offense(s). (167:240-243; 168:147). At sentencing, the court imposed a total sentence of 50 years initial confinement followed by 30 years of extended supervision. (125:3).

Subsequently, Douglas filed a postconviction [redacted] motion for a new trial. (131:1-3). In doing so, Douglas argued his previous counsels were ineffective assistance of counsel. (131:1-3). Their performance was deficient for failing to argue the phone belonged to Douglas, and the performance prejudiced the defendant since the evidence would have been suppressed had they done so. (131:1-3). The court, however, determined counsels were not ineffective, and it denied said motion. (171:13).

Douglas then filed a notice of appeal to the Appellate Court - District III. (144:1). The defendant appealed for the same reasons argued in the lower court. Nonetheless, the Court of Appeals also denied the defendant's appeal. (Court of Appeals Opinion and Order Dated April 21, 2021 at 1). In doing so, it found there was no prejudice. Id. at 6. As a result, the defendant petitioned the Wisconsin Supreme Court to Review the Court of Appeals Decision and the Wisconsin Supreme Court denied to review this matter.

Douglas filed his motion for a petition for a review to the Wisconsin Supreme Court pursuant to Wis. Stat. § 808.10 on [redacted] May 18, 2021 and on August 11, 2021 the Wisconsin Supreme Court Denied to Review Douglas' case. As a result, Douglas is now filing a "Petition for A Writ of Certiorari" to the United States Supreme Court for further review.

ARGUMENT

I. The United States Supreme Court review is warranted in this case because there is a substantial and compelling reason to prevent future mistakes so that lower courts know what is considered ineffective assistance of counsel, and when a new trial should be granted.

A. **Facts from the trial court level.**

The defendant was charged with two counts of sexual assult to a child; four counts of child sexual [redacted] exploitation; two counts of possession of child pornography; and eight counts of felony bail jumping. (2:1-9). As for the charging document, it indicates that Douglas left his phone by C.B.'s residence, that C.B. provided the phone to the police, and that the police searched the phone and found content in the phone that resulted in the charging of Douglas. (2:10-11).

Subsequently, a motion to suppress evidence obtained from the phone was filed - due to an improper seizure, and a motion hearing was held. At the hearing, the State introduced an exhibit of an arrest warrant which indicated C.B. believed Douglas had assulted her daughter. (161:45; 69:3-4). The police testified C.B. wanted Douglas' phone out of her residence. (161:10-11, 30). Thus, the police picked up the phone on January 28, 2015. (161:10-12). The officer that picked up the phone indicated he contacted the officer whom was investigating the sexual assult, and the phone was then secured into an evidence locker. (161:13). At that point, the police indicated they did not believe there was any incriminating information on said phone - pertaining to this case. (161:33). However, on January 30, 2015, Douglas's probation agent was advised by the police that they possessed a phone that was likely Douglas's, that the agent may be interested. (161:31-33). Upon questioning by the agent, Douglas indicated the phone was not his. (161:21). At that point, at the direction of the agent, the police searched the phone, and it obtained information that ultimately led to the charges. (161:33-36).

At the hearing, the issue of standing arose - whether Douglas was even claiming it was his phone, since if he was not, there would be no standing. (161:2-5). Here, defense counsel indicated he could not take a position that the phone was his to have standing. (161:2-5).

As a result, the court denied the motion; in doing so, it indicated the defendant was not claiming it was his phone and thus he did not have standing to bring the issue. (161:50-52).

Subsequently, a postconviction motion hearing was held. At that hearing, Douglas's previous attorney's testified that they were provided a tape of a jail recording that, on January 28, 2015, at 12:56 p.m., Douglas had made a phone call to a third party to pick up his belongings from C.B.'s residence. (167:162); 170:8, 32). Further, counsel whom represented Douglas at the motion hearing indicated Douglas did not take a position whether he wished to claim standing, and that counsel did not inform Douglas that even if he invoked standing for purposes of the motion hearing, it could not be used against him at trial. (170:13-15). As for subsequent counsel, he indicated he did not feel it would have been a good idea to relitigate the issue and he did not recall asking Douglas if he wished to do so. (170:13-15).

After hearing this, the court ruled against the defendant. (171:13). In doing so, it appeared to indicate subsequent counsel's performance was not deficient since it was reasonable to not relitigate the issue. (171:13). Further, the court indicated, both counsels' performance was not prejudicial since the search was instigated by the probation officer based upon her investigation of the alleged sexual assult incident, and a search is not rendered unlawful merely because law enforcement provided some information that led to the search. (171:13).

B. Standard of Review.

This court should review ineffective assistance of counsel as a mixed question of fact and law. State v. Doss, 2008 WI 93, P23, 312 Wis.2d 570, 754 N.W.2d 150. It should not set aside the lower court's findings of fact unless they are clearly erroneous, but it should independently review whether an attorney's performance was constitutionally deficient. Id.

C. [redacted] Applicable law regarding ineffective assistance of counsel.

The United States Constitution and the Wisconsin State Constitution provide that an individual facing criminal charges shall have the right to be represented by counsel. U.S. Const, amend. VI; Wis. Const, art. 1, Sec. 7. The right to counsel is the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed. 674 (1984). If effective assistance of counsel is not provided at trial, the defendant shall be awarded a new trial. State v. Carter, 2002 WI App. 55, P2, 250 Wis.2d 851, 641 N.W.2d 517. As for the ineffective standard, the court has stated:

To prove an ineffective assistance of counsel claim, a defendant must first demonstrate that counsel's Case 2015CF000132 Document 252 Filed 10-11-2019 Page 3 of 3 performance was deficient, meaning that it "fell below an objective standard of reasonableness." Strickland v. Washington, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L.Ed. 2d67 (1984). Courts are "highly deferential" in scrutinizing counsel's performance, and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. The defendant must also show that the deficient performance prejudiced the defense. Id. at 692. This requires a "reasonable probability that, but for counsel's professional errors the result of the proceeding would have beenn different." Id. at 694.

State v. McGuire, 10 WI 91, P65, 328 Wis.2d 289, 786 N.W.2d 227.

D. *<u>Defense counsels' performance were deficient.</u>

Defense counsels' performance were deficient. However, before addressing why counsels were deficient for not taking the position that Douglas had standing, Douglas will address seizure and how it applies in this case.

In Douglas's case, the problem is the seizure of the phone when the police took the phone from C.B. up until the time the agent sought to view the phone. At that point in time, the police were informed it was Douglas's phone, and they seized the phone without any valid reason: they were not doing so on behalf of the agent and they did not

counsel could have taken the position the phone was owned by Douglas. No one would have disputed such since the evidence all lead to that fact. (161:10-13).

Second, taking said position would not have negatively impacted Douglas. First, here, the State was seeking from defense counsel what position Douglas was taking regarding whether the phone was his because it felt Douglas had to take the position the phone was his to get standing to have a hearing on the suppression issue. (161:4-5). Had counsel responded in the affirmative, it could not have been used against the defendant at trial. As indicated in Simmons v. United States, even court testimony in support of a motion to suppress evidence may not be used against a defendant at trial. Simmons v. United States, 390 US. 377, 394 (1968). Second, even if it could be used for impeachment purposes, it would not have mattered since Douglas did not testify. Notably, he had good reason not to testify considering the fact the jurors would learn he had 11 prior convictions, and the State's witness would have no reason to lie when she testified that the phone was his. (167:17, 96-97).

Considering the above, counsel's decision was unreasonable. The outcome of the motion hearing essentially determined Douglas's fate. [redacted] Had he won, the State would have almost certainly dropped the charges. On the other hand, since he lost, the State was left with a virtually guaranteed conviction. (167:92-181). Ultimately, Douglas needed his counsel's help at this motion hearing.

As for subsequent counsel, whom represented the defendant at trial, he indicated he did not raise the issue of relitigating with Douglas, and he did not relitigate the motion since the issue was already decided. (170:34-35). In response, counsel could have always asked the court to relitigate the issue due to the mistake of previous counsel. At worst, the court would have denied him the ability to reopen the issue. However, by not doing so, and for the reason that the issue was already decided, is not a reasonably strategic reason.

Considering the above, counsels' performance were deficient.

E. Defense counsel's performance prejudiced the defendant

Defense counsels' performance prejudiced the defendant. Had counsels took the position that Douglas had standing, the defendant should have had the evidence suppressed, and the charges likely would have been dropped. Thus, clearly, there is a reasonable probability the outcome would have been different.

In the trial court's decision denying the motion, the Court cited to State v. Wheat. In doing so, it indicated both counsels' performance were not prejudicial since the search was instigated by the probation officer based upon her investigation of the alleged sexual assult incident, and a search is not rendered unlawful merely because law enforcement provided some information that led to the search. (171:12-13).

As a preliminary matter, as Douglas indicated in his motion, Douglas was not disputing the search. He was disputing the seizure of the phone up until the time the agent wished to view the contents of the phone. Since there was an unlawful seizure, the evidence should be suppressed and the analysis should end there. However, even if we address Wheat, it is not supportive to the Court's position.

In State v. Wheat, a police officer searched the defendant and found numerous empty baggies, a cell phone, and a calculator on said person. State v. Wheat, 2002 WI App. 153, P3-4, 256 Wis.2d 270, 647 N.W.2d 441. Subsequently, the officer informed the defendant's agent of said news. Id. at P2, 6. Approximately a week later, the defendant met with agent as part of his condition of his probation; at that time the officer's phone call was discussed and the agent indicated the defendant would need to submit to a drug test. Id. at P2, 6. However, before being tested, the defendant fled. Id. at P18. Based upon the defendant's flight, his history of drug use and possession of drug paraphernalia, and the officer's phone call, the agent decided to search the defendant's residence. Id. at P6-7. At that time, a number of drugs were found. Id. at P9.

Wheat, in turn, made two arguments: 1) the agent acted as a stalking for the police, and 2) the search was illegal because some of

the evidence that formed the basis for the search, the officer's illegal search of his person, contaminated the later search of his residence. Id. at P13, 24. As for the second argument, the Court determined the search was acceptable for two reasons. First, it indicated a probation search can be lawful when a probation agent relies "in part" on information derived from a violation of the Fourth Amendment. This appears to be an important point since the agent used the possible improper information in reaching her decision, but she also had other reasons for her decision: his pervious history of drug use and possession of drug paraphernalia as well as the fact that he fled when he was asked to get tested. In Douglas's case, the only information the agent relied on was the unlawful information provided by the police.

Second, and potentially more damning, is the second reason of support the Court provided for its conclusion in permitting the search to stand in that case. There, the court indicated the [redacted] application of the exclsionary rule to probation searches would have little deterent effect upon an officer who is unaware that the subject of the search is on [redacted] probation since the officer will be searching for evidence that could be used at trial and with the understanding any [redacted] unlawful search will be deemed inadmissible at such. Id. at P28. However, in Douglas"s case, the police were aware the defendant was on probation at the time of the seizure of the phone, and investigator Matthew Kuether testified the police had no interest in the phone, but that he told the agent he would hold it "in case" she ever wanted it, and at some point later, the agent decided to view it. (161:30-33, 40-41). Thus, unlike in Wheat, the police here were aware the defendant was on probation and they were not holding the phone for their own investigation but rather held it "in case" the agent wanted to later see it. The importance of this difference is the importance [redacted] of not inadvertently creating a rule that the police can now start breaching our Fourth Amendment rights when they know one is on probation with the understanding that it will now be deemed admissible at trial.

Considering the above, it is clear Douglas was prejudiced by counsels' performance.

F. <u>The appellate court should not have denied the</u>

defendant's argument.

In denying the defendant's argument, the appellate court indicated, even if it assumed the trial court attorney's performance was deficient, it did not believe the prejudice prong was established. For instance, it first notes that the police did not seize the cell phone from Douglas, but rather secured the phone of [redacted] undetermined ownership that had been voluntarily provided by a third party. Court of Appeals Opinion and Order Dated April 21, 2021 at 6.

In response, the police indicated they took control of the phone believing it was owned by Douglas since they were told it was owned by Douglas. (161:10-11, 30). [redacted] Furthermore, the police were clearly collecting the phone for evidence: the police put on gloves, and then took the phone from C.B. and put it in a brown bag. (173:96-97). After that, the police took it straight to the police department and secured it in the evidence locker. (173:101). Days later, the police contacted Douglas's probation agent to inform her that they believed they had Douglas's phone, and that the agent may be interested since Douglas probation rules forbid owning a phone [redacted] (167:31-32). The police also indicated they would hold the phone "in case""it would be important to anything she was doing". (167:32-33). Considering such, it is not believable that the police retrieved the phone and held it because they were interested in trying to find the rightful owner. All evidence led to the fact that the phone was seized with the understanding it was owned by Douglas.

Next, the court indicated that Douglass denials of ownership essentially resulted in abandonment of any claims of ownership. Court of Appeals Opinion and Order Dated April 21, 2021 at 6. In support, it cited to [redacted] State v. Bauer that: Warrantless seizure of property whose owner has abandoned it or requested another to destroy or get rid of it does not violate the [F]ourth [A]mendment." Id.

In response, the police would not have been in possession of the phone if not for the unlawful seizure. As a result, the phone should have been suppressed as fruits of the poisonous tree doctrine. State v. Washington, 2005 WI App. 123, P10, 284 Wis.2d 456, 700 N.W.2d 305.

Finally, the court indicated, even if it assumed the phone belonged to Douglas and that it was seized unlawfully, the evidence and the videos were nonetheless admissible at trial as the result of a valid probation search. It also noted the Wheat case stated that a reasonable probation search "is lawful even if the probation officer relies, in part, on information from law enforcement officials in violation of the Fourth Amendment." Court of Appeals Opinion [redacted] and Order Dated April 21, 2021 at 7.

In response, however, as Douglas provided earlier in this petition, the seizure was unlawful and the analysis should stop there due to the fruit of the poisonous tree doctrine. Nonetheless, also for the reasons provided earlier, even if this court reviews Wheat, it will only support the position that the evidence should have been suppressed. First, unlike in Wheat, the police here relied exclusively on information confirming the trial court's decision inadvertently creates a rule that the police can now start breaching our Fourth Amendment rights when they know one is on probation with the understanding that it will now be deemed admissible at trial. This could not have been what the Wheat court intended when it wrote its opinion and made its [redacted] ruling.

Considering the above, it is clear Douglas was prejudiced by counsels' performance.

Conclusion

For the foregoing reasons, the defendant respectfully requests that this Honorable Court Grants this Petition for a writ of certiorari.

Dated this 5th day of November, 2021.

Signed:

Justin Lee Douglas (Corrected On 2-9-

Justin L. Douglas #322852
Columbia Correctional Institution
P.O. Box 900
Portage, Wisconsin 53901-0900