25-6359

Docket No.
25-

In the
United States Supreme Court

Travis Tuggle
Petitioner
V
United States of America
Respondent

Originating in
The United States District Court
Central Division of Illinois (23-CV-2040)
on appeal from
The United States Court of Appeals
For the Seventh Circuit (24-1958)

Request for a Writ of Certiorari
Brief of the Petitioner

Pro-Se
Litigant

Travis Tuggle

Travis Tuggle
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Petitioner
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Question Presented

1. Whether the petitioner's Sixth Amendment right to the effective assistance of counsel was infringed upon when counsel failed to argue that, in order for the plain view doctrine, an exception to the warrant requirement of the Fourth Amendment's protection against the Unreasonable Search and Seizure of the Government, to apply, the Government must be occupying a place it was lawfully entitled to be, particularly in light of today's technological advances.

2. Whether, despite the fact that the imposition of sentence may result in the same sentence, was counsel's performance deficient and the petitioner prejudiced when counsel failed to file a Rule 28 (j) during the pendency of the petitioner's direct appeal which would have allowed the petitioner to be resentenced.

Parties to the Proceeding

The petitioner, Travis Tuggle, was the petitioner with respect to a petition filed in the United States District Court, for the Central Division Illinois, Pursuant to Title 28 of the United States Code section 2255. There were no other petitioners regarding that filing.

The United States of America was the Respondent named in the §2255 petition.

Statement of Related Cases

This case finds its origins from the following:

- United States v Tuggle, NO. 24-1458 (7th Cir) denying the petitioner's request for a rehearing or otherwise a hearing En Banc
- United States v Tuggle, NO. 24-1458 (7th Cir) denying the petitioner's request for a Certificate of Appealabilty.
- United States v Tuggle, NO. 23-CV-2040 (USDC, CD of Ill) denying the petitioner's motion pursuant to 28 U.S.C. §2255.
- United States v Tuggle, NO. 21-541 (US Supreme Court) denying petitioner's request for a Writ of Certiorari
- United States v Tuggle, NO. 20-2352 (7th Cir) affirming denial of Motion to Suppress, and
- United States v Tuggle, NO. 16-CR-20070 (USDC, CD of Ill) denying Motion to Suppress.

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Jurisdiction

The Judgement of the Court of Appeals for the Seventh Circuit was entered on October 22, 2024, this court has Jurisdiction pursuant to 28 U.S.C. § 1254 (1)

Constitutional Provisions

The Fourth Amendment to the United States Constitution provides in pertinent part . . .

> ". . . The right of the people to be secure in their persons, houses, effects against unreasonable searches and seizures, shall not be violated . . ."

This of course, in practical effect, requires the Government to obtain a warrant "prior" to such searches and seizures, provided the Government's search falls within one of the warrantless exceptions to this rule.

Statutory Provisions

and Rules

21 U.S.C. § 841 (b)(1)(a)

21 U.S.C. §

28 U.S.C. §

28 U.S.C. §

§ 401 (First Step Act)

FRAP R. 28 (j)

Mattoon Municipal Code § 99.20 (a)

CONCISE STATEMENT OF THE CASE

RULE 14.1(g)

Petitioner, Travis Tuggle, reasonably expected privacy against long-term targeted surveillance of his home, wherein the Governemnt monitored his every movement in and out of his house, around the clock, for eighteen months.

Petitioner did not expect that the Government agents would climb a utility pole and secretly attach video cameras without a warrant and without permission from local authorities. Particularly, as local law in Mattoon, Illinois where Petitioner's home is located, prohibits "willfully climbing... on... any... pole" and attaching any "matter or material to any utility pole." See Mattoon Code §§ 98.037, 99.20.

This long-term surveillance was unlawful and unjustifiable and intruded upon Petitioner's Fourth Amendment right to be free from unreasonable search and seizure.

Petitioner's counsel was ineffective in failing to argue these facts and the illegality of the cameras placements.

During the pendency of Petitioner's prior direct appeal, the Seventh Circuit rendered a decision, Ruth v. United States, 966 F.3d 642 (7th Cir. 2020) which concluded that Ruth's prior drug conviction wa snot a categorical match to federal Controlled Substance Act, and as a result the § 851 enhancement was not applicable.

Petitioner was convicted of a similar drug charge and similar § 851 enhancement which raised his statutory minimum from ten to fifteen years. Petitioner's counsel was ineffective by failing to

file FRAP 28(j) letter and failing to argue that the § 851 enhancement does not apply to petitioner, and that resentencing was appropriate under the circumstances. This was prejudicial to Petitioner and resulted in an increased sentence including longer supervised release. Without the § 851 enhancement, for example, supervised release would be 5 years, instead of 10 years.

Factual Posture

In the interest of judicial economy, this petitioner will provide a brief synopsis of the factual basis precipitating the questions presented for review.

For eighteen months, Federal agents, without a warrant, surveilled the petitioner's home utilizing around the clock hidden video cameras attached to utility poles across the street from the petitioner's home.

These cameras, three in all, allowed the Government to record, every visitor, package delivered, etc. for 24 hours a day . . . for eighteen months.

Subsequent to being denied a Suppression motion, wherein the petitioner alleged, among other things, that his expectation of privacy was "infringed" upon thereby warranting suppression of unlawful evidence collected, the petitioner appealed the District Court's decision to the United States Court of Appeals, for the Seventh Circuit.

The Seventh Circuit reluctantly affirmed the District Court's decision, struggling with the fact that the Government placed unmanned cameras which recorded on a continuous basis for 24 hours a day for eighteen months.

In the end, the court concluded that as long as the government was lawfully on the telephone poles, then the "plain view" doctrine allowed the warrantless invasion of the petitioner's expectation of privacy.

Seizing on this holding, the petitioner discovered that the town of Mattoon, IL., where the petitioner resides, requires a permit to affix anything to the telephone poles, including cameras. Since the Government failed to secure such a permit, they were therefore not "lawfully" on the telephone pole, therefore the plain view doctrine was not applicable here. The petitioner filed a motion pursuant to § 2255. Chief among his arguments is that his counsel was ineffective in failing to argue that the plain view doctrine did not apply as the Government was not lawfully on the pole while it was intruding on the petitioner's right or otherwise expectation of privacy.

The District Court disagreed and denied the petitioner's motion pursuant to 28 U.S.C. § 2255.

The petitioner then sought a Certificate of Appealability from the court of appeals for the Seventh Circuit who declined to issue such a certificate.

The petitioner then petiti9oned the Seventh Circuit for a rehearing or hearing En Banc . . . such a request was also denied

Furthermore, with respect to the petitioner's other question presented, at his original sentencing, the Government pursued an enhancement under 21 U.S.C. § 851 as a result of the petitioner's "prior conviction," for a Controlled Substance offense. The District Court, while imposing the sentence, granted the Government's request and applied the § 851 enhancement.[1]

This had the effect of elevating the petitioner's Statutory mandatory minimum sentence from ten (10) years [21 U.S.C. § 841 (b) (1) (a)] to fifteen (15) years, [see § 401 of the FSA].

During the petitioner's "direct" appeal, the Seventh Circuit Court of Appeals rendered a decision in Ruth.[2] In summary, the Court of Appeals concluded that the Appellant's [Ruth] prior drug conviction was not a categorical match to the Federal Controlled Substance Act and as a result, the § 851 enhancement applied to Ruth did not apply.

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[1] The petitioner was sentenced "post-First Step Act" and as a result, the revised provisions of § 401 of the Act applied.

[2] Ruth v United States.

This petitioner was convicted . . . in the State of Illinois . . . under the same statute as Ruth therefore his § 851 enhancement was also inapplicable.

The Ruth decision was rendered during the petitioner's appeal, however, before the decision of the petitioner's appeal was rendered.

Counsel did not file a FRAP Rule 28 (j) as a result of the Ruth holding. In his motion pursuant to 28 U.S.C. § 2255, the petitioner argued inter alia, that as a result of Ruth, his sentencing was now unlawful warranting a "re-sentencing," sans the § 851 enhancement.

The District Court disagreed reasoning that the application of the unlawful § 851 was irrelevant as the petitioner's sentence exceeded 15 years anyway.

Procedural Posture

On February 21, 2023, this petitioner filed a timely motion pursuant to 28 U.S.C § 2255 with the United States District Court, for the Central District of Illinois [Docket No. 23-CV-2040].

Subsequent to the filing of pleadings of both parties, the District Court on January 22, 2024, entered an order denying the petitioner's motion under § 2255.

In March of 2024, the petitioner filed a timely request for a Certificate of Appealability with the Seventh Circuit Court of Appeals who denied same on August 22, 2024 [No. 24-1458].

On October 3, 2024, the petitioner again filed with the appeals court for the Seventh Circuit a request for a rehearing or hearing En Banc which was denied on October 22, 2024.'

This petitioner now requests, through this timely writ, that this court grant certiorari.

Reason for Granting this

Writ of Certiorari

This question presented is of exceptional importance requiring the United States Supreme Court to consider the scope of the plain view doctrine, an exception to the warrant requirement, in light of today's technology.

Whether the petitioner's Sixth Amendment right to the effective assistance of counsel was infringed upon when counsel failed to argue that, in order for the plain view doctrine, an exception to the warrant requirement of the Fourth Amendment's protection against the unreasonable search and seizure of the Government must be occupying a place it was lawfully entitled to be, particularly in light of today's technological advances.

The facts surrounding this matter are rather simple and straightforward . . . perhaps resolving the issue is more complex.

Law enforcement suspected that the petitioner was involved in some form of drug sale activity.

Rather than conventional investigative techniques, such as a "controlled purchase," the Government elected to survey the petitioner. They did so by placing three surveillance cameras on utility poles owned by the town of Mattoon, Illinois, which pointed directly at the petitioner's front door and front curtilage of the house.

With the three cameras in place, the Government was able to obtain around the clock surveillance (24 hour footage) for a period of eighteen months, until they believed they had obtained enough evidence, through this eighteen month surveillance, to arrest the petitioner.

Unfortunately for this petitioner, when he contested the "lawfulness" of the "constant" surveillance of his property, although the Court of Appeals "struggled" to agree with the Government that the warrantless search fell within the plain view exception of the exclusionary rule, it did so because it found that the Government, was in a place it was entitled to be as it, in plain view, collected such evidence. The Court of Appeals stated . . .

> " . . . In short, the Government's use of technology in a public place, while occupying a place it was lawfully entitled to be, to observe plainly visible happenings did not run afoul of the Fourth Amendment."[3]

The Fourth Amendment to the United States Constitution governs all searches and seizures conducted by the Government agents, Wolf v Colorado 338 US 25 (1949). The Fourth Amendment contains two separate and essential clauses . . .

- The prohibition against unreasonable searches and seizures and,
- A requirement that probable cause support each warrant issued.[4]

A lawful search or seizure neither precludes prosecution nor invalidates a subsequent conviction . . . however . . . the remedy for the Fourth Amendment violation is the suppression of unlawfully seized or collected evidence, Weeks v United States 232 US 389 (1914)

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[3] No. 20-2325 United States v Tuggle 4 F. 4th 505 (7th Cir 2021)

[4] U.S. Const. Amend. IV

At the very core of that guarantee is the person's absolute right to be free, in his own home, from unreasonable Government intrusion, Caniglia v Strom 141 5.CT.1596 (2021).[5]

However, as with every Rule, there are exceptions, and in this case, there is, among others, an exception to the Warrantless Search rule and that is the plain view exception . . . but this exception also has its limitations, and in order for the Government must lawfully be occupying a place or space that they are entitled to be.

This is therefore the gravamen of the petitioner's issue . . . was law enforcement (or their cameras) occupying a place they were lawfully entitled to be, when they, without warrant, encroached on the petitioner's expectation of privacy, and turned to the "plain view doctrine," to justify such a breach of the petitioner's expectation.

Mattoon municipal code, § 99.20 (a) states in pertinent part . . .

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[5] See also Florida v Jardines 267 US 132 (2019)

" . . . No person shall point or affix any sign,
advertisement or other matter material onto any street,
curb, sidewalk, utility pole, tree, post or other fixture in
any street or onto any sidewalk or onto any city property."

The law therefore prohibits placing anything on city owned utility poles, among other things, of course, this is not to say that if requested, the town of Mattoon would authorize such use . . . however whatever the town, "would have" done is of no moment, the DEA, with impunity and with complete abandon of the code, unlawfully placed cameras on the utility poles.

The Supreme Court, in Horton v California 496 US 128 (1990) outlined a three part analysis designed to determine whether, using the plain view exception, a warrantless search permissible . . .

(1) The officer was lawfully in place which the object or the evidence could viewed,

(2) The officer had a lawful right of access to the seized item, and

(3) The incriminating character of the item was immediately apparent.

The Government fails on all three prongs of this analysis

This petitioner would caution this court to not be swayed by the fact that technology governs the facts of this case, for the analysis here is no different of the factual analysis of Jardines, supra.

In Jardines, law enforcement could not smell the marijuana, with or without a K-9 unit. So the officer brought the dog onto the curtilage of the defendant: Jardine's home whereby the K-9 alerted.

This court held that even if the smell of marijuana was in plain view, officers were unlawfully on the defendant's property and as a result the evidence seized was subject to suppression.

Here, the officers from the street could not observe the petitioner's home, rather they needed elevation (utility pole) to have an unobstructed view. Even though the view from the utility pole was in plain view, the cameras, as in Jardines curtilage, were not lawfully on the utility pole.

It is also noteworthy that the Government at some point alleged that nearly all the evidence observed through the cameras was critical in the prosecution of this petitioner.

Nevertheless, the critical determination here is not what the Government ultimately observed, but rather the means used to observe it.

This instant matter is tantamount to the FBI obtaining a Title III intercept authorizing to intercept communications between Person A and Person B, while listening to these "authorized" target interceptee, Person A elects to contact Person C, subsequent to the "Copra" authorization, Person C speaks of illicit matters . . . unfortunately for law enforcement, permission or authorization was not sought to listen to Person C, just as permission was not sought to be on the utility pole, and as a result, the conversation between Person A and C must be suppressed . . . just as the observations recorded by the camera must be suppressed.

Here, the Government could not pass the test provided by the Supreme Court in Horton, supra.

This petitioner contends that without a lawful presence or existence on the utility pole any evidence seized by the Government must be suppressed,

The crux of this matter therefore hinges on the "lawful presence" law enforcement on the utility pole.

Prior to any claims of ineffective assistance of counsel regarding whether counsel was ineffective in failing to present to the court that the Government was not lawfully entitled to be on the pole while collecting evidence, the Seventh Circuit Court of Appeals wrote . . .

> " . . . The Government's continued intrusion by way of video surveillance for 18 months is disturbing, however, assuming the Government was lawfully present on the utility pole, the expectation of privacy was not infringed upon."

The Seventh Circuit agreed in its opinion of this petitioner's "direct" appeal that assuming a lawful presence, the expectation of privacy was not infringed upon. But the Government was not present lawfully therefore the petitioner's expectation of privacy "was' infringed upon . . . counsel was therefore ineffective in failing to investigate and make the court aware that the Government was not lawfully on the utility pole and as a result, the evidence should be suppressed.

Even the district court, in its opinion, although missing the point, stated in denying the petitioner's § 2255 motion that . . .

> ". . . The Seventh Circuit's opinion [Direct Review] in his [Tuggle's] case did repeatedly note that the use of the pole cameras was permitted because they [the Government] were located where they were entitled to be."

So the alternative argument is that if counsel did not render ineffective assistance and otherwise had demonstrated that the officers were not entitled to be where they were when the evidence was gathered . . . then the use of the cameras would not be permitted.

The District Court and the Court of Appeals both agree with the petitioner, the evidence gathered by the surveillance cameras was permitted because counsel rendered ineffective assistance by not demonstrating that the Government was not entitled to be on the utility poles.

Whether, despite the fact the imposition of sentence may be the dame, was counsel's performance deficient, and the petitioner was prejudiced when counsel failed to file a Rule 28 (j) during the pendency of the petitioner's appeal which would have caused the petitioner to be resentenced.

At this petitioner's original sentencing, Post-First Step Act, the Government filed an information under 21 U.S.C. § 851. The result of this filing caused the petitioner's mandatory minimum sentence to be elevated from ten (21 U.S.C. § 841 (b) (1) (a)] to 15 years. Perhaps, just as important the petitioner's term of supervised release was also elevated from five to ten years. In any event, whole on direct appeal, and before his appeal decision was rendered the Seventh Circuit Court of Appeals decided the matter of United States v Ruth.[6]

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[6] 996 F.3d 642 (7th Cir 2020)

In Ruth, the Seventh Circuit Court was asked to decide whether a prior conviction for a state of Illinois Controlled Substance Offense was a categorical match to its federal counterpart and if not, could the petitioner be subject to an § 851 enhancement.

The appeals court opined that it was not a categorical match and therefore the § 851 enhancement could not stand.

This petitioner's prior controlled substance offense for the state of Illinois mirrored that of Ruth. Counsel, however, failed to file a Rule 28 (j)[7] of FRAP, allowing the petitioner to derive the benefit of the holding while he was on direct appeal. Counsel's failure to file the motion resulted in ineffective assistance of counsel that prejudiced the petitioner by increasing his sentence.

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[7] Please see Griffith v Kentucky 479 US 314 (1987) whereby this court held that if a case is announced whether or not retroactively applicable, if the appellant is on direct appeal, it is applicable to the appellant

As an initial matter, this petitioner, whether or not his sentence would be the same, with or without the § 851 enhancement, should not have a part of his sentencing package an enhancement . . . particularly a statutory enhancement . . . that is not applicable to him.

Furthermore, Supervised Release is part of the defendant's sentence. The application, or the wrongful application of the § 851 enhancement caused the petitioner's Supervised Release term to be elevated from five (5) years to ten (10) years.

This petitioner therefore has been imposed an unlawful sentence.

Lastly, had counsel requested a remand, this petitioner could have demonstrated to the court any post-sentencing conduct/ rehabilitation which could have resulted in a lesser sentence.

In Peppers v United States 562 US 476 (2011) this court held that on remand from the Court of Appeals, district court may consider evidence of the petitioner's post-sentencing conduct as well as rehabilitation.

Due to council's' ineffective performance this petitioner was foreclosed from demonstrating to the district court that he had been . . . and continues . . . to vigorously program as well as maintain a discipline free record while in prison.

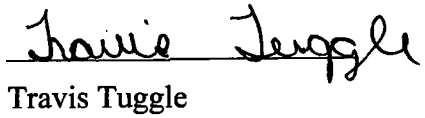
Moreover, this court recently opined in Concepcion v Untied States __ US __ (2022) that in any resentencing . . . which the district court would have to conduct due to the inapplicability of the § 851 statute, that the petitioner could introduce post-sentencing conduct, "as well as" all intervening changes of law since the petitioner's original sentencing.

Therefore, by rendering ineffective assistance of counsel, the petitioner was prejudiced in that now, the petitioner's imposed sentence remains unlawful.

Conclusion

Wherefore, for all of the aforementioned reasons, this petitioner respectfully requests that this court grant him a writ of certiorari and resolve the issues stated herein.

Respectfully,



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