STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	FOR PUBLICATION September 30, 2021 9:05 a.m.
v	No. 338030 Oakland Circuit Court
KRISTOPHER ALLEN HUGHES, Defendant-Appellant.	LC No. 2016-260154-FC

ON REMAND

Before: TUKEL, P.J., and BECKERING and SHAPIRO, JJ.

SHAPIRO, J.

This case returns on remand for us to decide whether trial counsel was ineffective for failing to challenge the admission of evidence discovered in a search of defendant's cellular telephone that the Michigan Supreme Court has deemed unconstitutional. We conclude that defendant was denied his constitutional right to effective assistance of counsel. Trial counsel's failure to object to the evidence on Fourth Amendment grounds was objectively unreasonable, and defendant was prejudiced by this error because the evidence would have been barred by the exclusionary rule. Accordingly, we reverse and remand for a new trial.

I. BACKGROUND

Defendant faced two separate criminal prosecutions, "one related to drug trafficking and the other related to armed robbery." *People v Hughes*, 506 Mich 512, 517; 958 NW2d 98 (2020). The facts of the armed robbery are as follows:

> On August 6, 2016, [Ronald] Stites was going for a walk when he met Lisa Weber. The two talked, and Stites invited Weber back to his home. At Stites's residence, Weber offered to stay with Stites all night and to perform sexual acts in exchange for $50. Stites agreed, and Weber followed him into his bedroom, where he opened a safe containing $4,200 in cash and other items and pulled out a $50 bill that he agreed to give her after the night was over. Stites then performed oral sex on Weber. Afterward, Weber went to the store to get something to drink.

> Approximately 15-20 minutes later, she called a drug dealer, who went by the name of "K-1" or "Killer," and asked that he come over and sell drugs to her and Stites. Sometime thereafter, a man arrived at Stites's home, sold Weber and Stites crack cocaine, and then departed. Weber and Stites consumed some of the drugs and continued their sexual activities. Later in the evening, the man who had sold the drugs returned to the home with a gun and stole Stites's safe at gunpoint. Stites testified that Weber assisted in the robbery and departed the home with the robber, while Weber asserted that she did not assist in the robbery and only complied with the robber's demands to avoid being harmed. Weber identified defendant as the perpetrator, while Stites could not identify defendant as the perpetrator. [*Id*. at 518.]

The issue in this appeal concerns a search of data extracted from defendant's cell phone. Detective Matthew Gorman obtained a warrant to search defendant's personal belongings, including any cell phones. The warrant sought information related only to the drug-trafficking charge; it did not authorize a search for evidence related to the armed robbery. *Id*. at 519. While executing the warrant, police officers recovered a cell phone from defendant's person on August 12, 2016. *Id*. at 520. Defendant was arraigned on the robbery charge on August 17, 2016. *Id*.

On August 23, 2016, Detective Edward Wagrowski performed a forensic examination of defendant's cell phone. He utilized a software program, "Cellebrite," to extract digital data. *Id*. That program "separated and sorted the device's data into relevant categories by, for example, placing all of the photographs together in a single location." *Id*. The examination resulted in a 600-page report, which "included more than 2,000 call logs, more than 2,900 text messages, and more than 1,000 photographs." *Id*. Defendant later pleaded guilty to various charges in the drug-trafficking case.

A month after this first data extraction, and at the request of the prosecutor in the armed-robbery case, Detective Wagrowski conducted a second search, this time searching for: "(a) contacts with the phone numbers of Weber and Stites and (b) the name 'Lisa,' variations on the word 'killer' (defendant's nickname), and the name 'Kris/Kristopher' (defendant's actual name)." *Id*. at 521.

> These searches uncovered 19 calls between defendant and Weber on the night of the robbery and 15 text messages between defendant and Weber between August 5, 2016 and August 10, 2016. Weber's texts to defendant leading up to the robbery included communications indicating where Stites's home was located, that the home was unlocked, and that there was a flat screen TV in the home. Defendant sent texts to Weber on the night of the robbery asking her to "[t]ext me or call me" and to "open the doo[r]." None of the text messages with the words "killer" or "Kris" were from Weber's number. . . . [T]he results of these searches served as evidence at defendant's armed-robbery trials. Defense counsel objected to the admission of this evidence, arguing that it was "not relevant" and "stale," but the trial court overruled his objection. [*Id*.]

"Defendant's first two trials on the armed-robbery charge resulted in mistrials due to hung juries." *Id*. At the third trial resulting in defendant's conviction, the prosecutor acknowledged that the jury may have concerns regarding Weber's credibility as a "disputed accomplice" to the crime, but

"argued during both opening and closing statements that the text messages and phone calls discovered on defendant's cell phone bolstered her testimony and established a link between defendant and the armed robbery." *Id*. at 522.

On appeal, defendant argued that the cell phone records should have been excluded from his armed-robbery trial because "the warrant supporting a search of the data only authorized a search for evidence of drug trafficking and not armed robbery," and that trial counsel was ineffective for failing to raise an argument under the Fourth Amendment for suppression of the cell-phone data. *Id*. at 522. We rejected those arguments and affirmed defendant's conviction. *People v Hughes*, unpublished per curiam opinion of the Court of Appeals, issued September 25, 2018 (Docket No. 338030).

In a unanimous opinion, the Supreme Court reversed our decision. It held that the search of defendant's cell phone for evidence specifically related to the robbery violated defendant's Fourth Amendment rights because the warrant only authorized a search of the phone for evidence related to the drug offenses. *Id*. at 552-553. The Court's decision rested on the Fourth Amendment's particularity requirement as well as a 2014 decision from the United States Supreme Court:

> We conclude-- in light of the particularity requirement embodied in the Fourth Amendment and given meaning in the United States Supreme Court's decision in *Riley v California*, 573 US 373; 134 S Ct 2473; 189 L Ed2d 430 (2014) (addressing the 'sensitive' nature of cell-phone data)-- that a search of digital cell-phone data pursuant to a warrant must be reasonably directed at obtaining evidence relevant to the criminal activity alleged in *that* warrant. [*Id*. at 516-517.]

The Court declined to reach the question whether trial counsel was ineffective for failing to raise a Fourth Amendment challenge and instead remanded to this Court to decide the issue. *Id*. at 551-552.

We now consider defendant's ineffective-assistance-of-counsel claim in light of the Supreme Court's opinion and after consideration of the parties' supplemental briefing.

II. ANALYSIS

We review de novo "the constitutional question whether an attorney's ineffective assistance deprived a defendant of his or her Sixth Amendment right to counsel." *People v Fyda*, 288 Mich App 446, 449-450; 793 NW2d 712 (2010). Where the trial court has not conducted an evidentiary hearing, this Court's review "is limited to mistakes apparent on the record." *Id*. at 450.

"To establish a claim of ineffective assistance of counsel a defendant must show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense." *Id*. at 450. Trial counsel's performance is deficient where it falls below an objective standard of professional reasonableness. *Id*. "When reviewing defense counsel's performance, the reviewing court must first objectively 'determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.' " *People v Jackson (On Reconsideration)*, 313 Mich App 409, 431; 884 NW2d 297 (2015), quoting *Strickland v Washington*, 466 US 668, 690; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Prejudice is established if, but for counsel's deficient performance, it is reasonably probable that the result of the proceeding would have been different. *Fyda*, 288 Mich App at 450. Defendant bears the burden of establishing both prongs. *People v Crews*, 299 Mich App 381, 400; 829 NW2d 898 (2013).

A. DEFICIENT PERFORMANCE

We begin with the fact that trial counsel had three opportunities to move for suppression of defendant's cell-phone data on the ground that it violated the Fourth Amendment and failed to do so. At each of defendant's three trials for armed robbery, the prosecutor introduced evidence of phone logs obtained pursuant to the search warrant for the drug-trafficking case. No objection was made before or during the first two trials. Before the third trial, the prosecutor informed trial counsel that he intended to introduce "additional documents from the forensic report" of defendant's phone.[1] Trial counsel now objected, arguing that the additional documents were not relevant because "a lot of that file is in reference to the drug case," and because the phone records were "stale." The trial court denied the objection and later when the records were introduced, trial counsel again unsuccessfully argued that the data was not relevant to the armed-robbery case.

Thus, despite a prolonged period of time to consider that the police had searched defendant's phone for evidence of a different crime than what the search warrant was issued for, trial counsel never raised a Fourth Amendment challenge. This was not a strategic decision, to which we generally defer. Trial counsel realized at the third trial that there was *something* improper about the prosecutor using the data obtained from a search warrant in the drug case, but he could not articulate the appropriate objection, i.e., that the search of defendant's phone for evidence of armed robbery exceeded the scope of the search warrant. Instead, he argued that the cell-phone data was not relevant to the armed-robbery case, even though it plainly was, and that it was stale, even though it plainly was not.[2] It is safe to say that a motion to suppress based on Fourth Amendment protections is one of the most common pretrial motions brought by criminal defendants. Counsel's failure to raise any argument regarding the scope of the search warrant over the course of three trials shows a professional error. See *Hinton v Alabama*, 571 US 263, 274; 134 S Ct 1081; 188 L Ed 2d 1 (2014) ("An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*."); *Bullock v Carver*, 297 F3d 1036, 1050 (CA 10, 2002) ("In many cases, a lawyer's unawareness of relevant law will . . . result in a finding that counsel performed in an objectively deficient manner.").

The prosecutor argues that trial counsel's failure to raise a Fourth Amendment challenge was reasonable because counsel was not required to anticipate future developments in the law.

---

[1] At the third trial, the prosecutor introduced for the first time search results for variations of the word "killer" and "Kris/Kristopher" from defendant's cell-phone data.

[2] Trial counsel was apparently arguing that it had been too long since the initial search to introduce new records from the forensic report, but staleness refers to whether the information supporting the affidavit is recent enough so that "probable cause is sufficiently fresh to presume that the sought items remain on the premises." *People v Gillam*, 93 Mich App 548, 553; 286 NW2d 890 (1979).

However, although *Hughes* decided an issue of first impression, it was based on "two *fundamental* sources of relevant law: (a) the Fourth Amendment's 'particularity' requirement, which limits an officer's discretion when conducting a search pursuant to a warrant and (b) *Riley*'s recognition of the extensive privacy interests in cellular data." *Hughes*, 506 Mich at 538 (emphasis added). Per the Fourth Amendment's "particularity requirement," the scope of a warrant must be confined to a specific crime. See *id*. at 540 ("[T]he state exceeds the scope of a warrant where a search is not reasonably directed at uncovering evidence related to the criminal activity identified in the warrant, but rather is designed to uncover evidence of criminal activity *not* identified in the warrant."). For example, "a warrant authorizing police to search a home for evidence of a stolen television set would not permit officers to search desk drawers for evidence of drug possession." *Id*. at 539. And in *Riley*, the United States Supreme Court made clear that "general Fourth Amendment principles[, including the particularity requirement,] apply with equal force to the digital contents of a cell phone." *Id*. at 527. Accordingly, in what it characterized as a "simple and straightforward" holding, *Hughes* concluded that "a warrant to search a suspect's digital cell-phone data for evidence of one crime does not enable a search of that same data for evidence of another crime without obtaining a second warrant." *Id*. at 553.[3]

Thus, while there was no authority directly addressing the Fourth Amendment question at issue in this case, there were well-established broader principles to draw from and caselaw to analogize—as defendant's appointed appellate counsel did in a timely submitted brief to this Court and as attorneys generally do on a regular basis. Because there was existing precedent that would have strongly supported a motion to suppress, trial counsel's failure to raise the Fourth Amendment challenge cannot be excused for not foreseeing a change in the law.[4] See *United States v Morris*, 917 F3d 818, 824 (CA 4, 2019) ("Even where the law is unsettled, . . . counsel must raise a material objection or argument if there is relevant authority strongly suggesting that it is warranted.") (quotation marks and citation omitted); *United States v Palacios*, 982 F3d 920, 924 (CA 4, 2020) ("[W]hile counsel need not predict every new development in the law, they are obliged to make arguments that are sufficiently foreshadowed in existing case law.") (quotation marks and citation omitted).

To be clear, we do not hold that trial counsel was required to make an argument precisely mirroring the analysis set forth in *Hughes*. But, based on the existing authority discussed in *Hughes*, it is objectively reasonably to have expected trial counsel to raise a Fourth Amendment argument and at the very least preserve this issue for appeal. Further, our conclusion that trial counsel rendered deficient performance is based in part on the particular circumstances of this case. Trial counsel represented defendant in both the drug-trafficking and armed-robbery cases; counsel knew that defendant's phone was confiscated and submitted to forensics pursuant to the

[3] Relying primarily on *Riley*, the Court also rejected the prosecutor's argument that the warrant to seize and search defendant's phone extinguished defendant's reasonable expectation of privacy. *Hughes*, 506 Mich at 528-537.

[4] In arguing that trial counsel did not commit professional error by not raising a Fourth Amendment challenge, the prosecutor notes our prior erroneous decision in this case. But there is a significant difference between not raising an issue and wrongly deciding one, and trial counsel could not have been relying on that decision because it had not yet been rendered.

search warrant for the drug case; and at all three trials for armed robbery the prosecution introduced data obtained from the forensic report. Nonetheless, it was not until the third trial that trial counsel began to realize that the prosecutor's use of the cell-phone data was out of bounds, but he was unable to articulate an argument that the police had exceeded the scope of the search warrant issued in the drug case. Under these circumstances, we conclude that trial counsel rendered deficient performance by not raising a Fourth Amendment challenge.

B. PREJUDICE

The next question is whether defendant was prejudiced by trial counsel's failure to move for suppression on the appropriate ground. Considering that the prosecutor heavily relied on the cell-phone data and that the first two trials resulted in a hung jury, there is no dispute that if this evidence would have been excluded from defendant's trial then a reasonable probability of a different outcome exists. Accordingly, the prejudice prong in this case turns on whether the illegally obtained evidence would have been suppressed under the exclusionary rule.

The United States and Michigan Constitutions guarantee the right to be free from unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. "[S]earches or seizures conducted without a warrant are presumptively unreasonable and, therefore, unconstitutional." *People v Barbarich*, 291 Mich App 468, 472; 807 NW2d 56 (2011). Generally, evidence obtained in violation of the Fourth Amendment is inadmissible at trial. *People v Moorman*, 331 Mich App 481, 485; 952 NW3d 59 (2020). Known as the exclusionary rule, this judicially-created doctrine serves to deter violations of the Fourth Amendment. *Utah v Strieff*, ___ US ___, ___; 136 S Ct 2056, 2061; 195 L Ed 2d 400 (2016). See also *United States v Calandra*, 414 US 338, 348; 94 S Ct 613; 38 L Ed 2d 561 (1974) ("[T]he [exclusionary] rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect . . . .").

There are a few established exceptions to the exclusionary rule, but none is applicable here. Among the various exceptions is the good-faith exception, which "renders evidence seized pursuant to an invalid search warrant admissible as substantive evidence in criminal proceedings where the police acted in reasonable reliance on a presumptively valid search warrant that was later declared invalid." *People v Hellstrom*, 264 Mich App 187, 193; 690 NW2d 293 (2004), citing *United States v Leon*, 468 US 897, 905; 104 S Ct 3405; 82 L Ed 2d 677 (1984). In those cases, it is the magistrate rather than the officer who made an error and therefore excluding the evidence does not further the deterrence rationale behind the exclusionary rule:

> It is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment. In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient. . . . Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations. [*Leon*, 468 US at 921.]

The Michigan Supreme Court adopted the good-faith exception in *People v Goldston*, 470 Mich 523; 682 NW2d 479 (2004).

The prosecutor argues that this exception applies in this case because Detective Wagrowski was acting in objective good-faith on the warrant. However, the search of the cell-phone data for evidence of armed robbery was not authorized by the warrant and therefore the officer was not relying on the magistrate's finding of probable cause. Instead, the search was conducted at the request of the prosecutor, who erroneously determined that a second search warrant was not necessary. But unlike a magistrate, the prosecutor is not a neutral and detached decision maker but rather is part of the "law enforcement team." See *id*. at 917. See also *Coolidge v New Hampshire*, 403 US 443, 450; 91 S Ct 2022; 29 L Ed 2d 564 (1971) (holding that law enforcement officials are per se disqualified from issuing search warrants because "prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigations . . . ."). Because the unlawful search was not attributable to an error made by a neutral and detached magistrate, the rationale underlying the good-faith exception does not apply in this case.

The prosecutor also relies on *Davis v United States*, 564 US 229, 241; 131 S Ct 2419; 180 L Ed 2d 285 (2011), which held that an officer's illegal search will not require exclusion of the evidence so long as the officer was relying on "binding appellate precedent specifically authoriz[ing the] particular police practice" that is later overruled. In these cases, exclusion is not warranted because it is objectively reasonable for an officer to rely on binding caselaw authorizing the police practice:

> [W]hen binding appellate precedent specifically *authorizes* a particular police practice, well-trained officers will and should use that tool to fulfill their crime-detection and public-safety responsibilities. An officer who conducts a search in reliance on binding appellate precedent does no more than act as a reasonable officer would and should act under the circumstances. [*Id*. at 241, citing *Leon*, 468 US at 920 (quotation marks and brackets omitted).]

See also *People v Mungo (On Second Remand)*, 295 Mich App 537, 556; 813 NW2d 796 (2012) (holding that exclusion of the illegally obtained evidence was not required "[b]ecause the search was constitutional under existing law at the time of the search . . .").

The prosecutor does not identify binding precedent that specifically authorized the warrantless search in this case. In fact, the prosecutor does not identify any preexisting caselaw suggesting that the officer's actions in this case were lawful at the time the search was conducted. As discussed, *Hughes* reached the contrary conclusion on the basis of "fundamental" Fourth Amendment law, *Hughes*, 506 Mich at 538, and there was no need to abrogate or overrule any caselaw. In any event, *Davis* did not address the question here, which is whether the exclusionary rule applies in the *absence* of binding appellate precedent addressing the police practice at issue. Accordingly, the prosecutor's reliance on *Davis* is misplaced.

Although this case does not implicate any of the recognized exceptions to the exclusionary rule, the prosecutor nonetheless maintains that the evidence should not be barred because suppression will not further the deterrent purpose of the exclusionary rule. The prosecutor is correct that "[w]here suppression would fail to yield any appreciable deterrence, exclusion of the evidence is unwarranted." *People v Hammerlund*, ___ Mich App ___, ___; ___ NW2d ___ (2021)

(Docket No. 355120); slip op at 5. However, we disagree that application of the exclusionary rule in this case would serve no deterrent function.

The prosecutor argues that there is no police misconduct worthy of deterrence because at the time of the search no court had held that a second search warrant is necessary under the circumstances of this case and thus Detective Wagrowski did not knowingly violate the law. Were we to agree with this argument, however, we would effectively be holding that when the law is unsettled, an officer or the prosecutor is free to make an independent conclusion concerning the legality of a search or seizure, and even if a court subsequently disagrees with that conclusion, the illegally obtained evidence will not be suppressed. Under this approach, an officer would have an incentive *not* to seek a warrant when caselaw is unclear because the request might be denied. On the other hand, if the officer simply decides in "good faith" what the law is, then his or her determination will control at the time a motion to suppress is brought. And "[i]f police have little incentive to obtain a warrant, they will not do so. The law must provide that incentive; otherwise, the warrant requirement of the Fourth Amendment will become a dead letter." *United States v Ogbuh*, 982 F2d 1000, 1004 (CA 6, 1993). Further, there will undoubtedly be more cases where the officer or the prosecutor, who "simply cannot be asked to maintain . . . neutrality with regard to their own investigations," *Coolidge*, 403 US at 450, erroneously conclude that a search warrant is not necessary. Thus, allowing the admission of illegally obtained evidence in these types of cases is not consistent with Fourth Amendment jurisprudence as it invites, rather than deters, future unlawful searches and seizures. See *Davis*, 564 US at 236-237 ("The [exclusionary] rule's sole purpose, we have repeatedly held, is to deter future Fourth Amendment violations.").

The question in this case is *who* is authorized to decide whether a warrant is necessary in the absence of binding appellate precedent specifically authorizing the search. The good-faith exception as it actually exists encourages officers to seek approval from magistrates, who have the "responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment." *Leon*, 468 US at 921. Allowing admission of the illegally obtained evidence in this case would upend this framework, however, because officers would have no incentive to seek a warrant. Suppressing the evidence, on the other hand, will encourage officers to seek review of the legality of a search by a neutral magistrate *before* the search is conducted and will therefore deter future Fourth Amendment violations in cases where the law is unsettled.

For these reasons, we decline create a new exception to the exclusionary rule,[5] and instead hold that the evidence obtained in violation of the Fourth Amendment in this case must be suppressed.

III. CONCLUSION

Defendant was denied his constitutional right to effective assistance of counsel. Trial counsel's failure to move for suppression of the cell-phone data on Fourth Amendment grounds

[5] The prosecutor does not identify any caselaw applying the good-faith exception when there was an absence of binding judicial precedent addressing the police practice that was later held to be unconstitutional.

was objectively unreasonable. Defendant was prejudiced by this professional error because the motion would have resulted in suppression of the cell-phone data, and there is a reasonable probability that the result at trial would have been different absent this evidence. We reverse defendant's conviction and remand for a new trial at which the fruits of the unconstitutional search may not be admitted. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Jane M. Beckering

Tukel, P.J., did not participate.