STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Berkeley County
Court of Common Pleas
The Honorable Bentley Price, Post-Conviction Relief Judge
The Honorable Roger M. Young, Sr., Trial Judge

Appellate Case No. 2021-000089

JOSEPH T. ROWLAND, Respondent,

vs.

STATE OF SOUTH CAROLINA, Petitioner.

BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

South Carolina Cases:

Other Cases:

Statutes and Rules:

ISSUES PRESENTED ON APPEAL

I. Did PCR Court err by finding that Counsel's efforts to suppress the evidence seized from the residence were ineffective, where ample evidence supported the issuance of the warrant and there is not a reasonable likelihood that the trial court would have granted Rowland's suppression motion?

   a. Did the PCR Court err in finding Counsel deficient for failing to argue law enforcement's alleged failure to comply with §17-13-150 warranted suppression where compliance was not established and suppression is not a recognized remedy?

   b. Did the PCR Court err in finding Counsel was ineffective for failing to renew his objection to the introduction of the evidence attained through the search warrant where sufficient evidence existed to support the trial court's finding, and a different outcome on appeal is not reasonably probable?

II. Did the PCR Court err in finding Counsel was ineffective for failing to call Father or Brother to testify where their testimony would not have warranted suppression?

III. Did the PCR Court err in finding Brother's testimony meets the standard for after-discovered evidence and that it reasonably would have changed the result of trial where Counsel was aware of the potential testimony prior to trial and it would not have changed the result of trial?

STATEMENT OF THE CASE

In April of 2012, Joseph T. Rowland was indicted by the Charleston County Grand Jury for one count of trafficking in cocaine, one count of possession of marijuana with intent to distribute, one count of possession of a firearm during the commission of a violent crime, and one count of unlawful possession of a stolen pistol.

On May 12, 2014, a jury trial was held in the Charleston County Court of General Sessions before the Honorable Roger M. Young, Sr., circuit court judge. At the close of the State's case Rowland's counsel moved for a directed verdict on all four of the charges. The Court directed a verdict of not guilty on the charge of Possession of a Stolen Firearm S.C. Code Ann. §16-23-30, but denied Rowland's directed verdict motion regarding the remaining three charges. The jury returned a verdict of guilty on the three remaining charges, and the trial judge sentenced Rowland to concurrent terms of imprisonment of twenty years for trafficking in cocaine, five years for possession of marijuana with intent to distribute, and five years for possession of a firearm during the commission of a violent crime.

Rowland filed a timely notice of appeal. The South Carolina Court of Appeals affirmed Rowland's conviction on May 24, 2017. State v. Rowland, Op. No. 2017-UP-225 (S.C. Ct. App. filed May 24, 2017).

Rowland filed his application for post-conviction relief on September 19, 2018. On June 2, 2020, the PCR Court granted post-conviction relief and remanded the matter for a new trial. The State moved for reconsideration pursuant to Rule 59(e), SCRCP, which was summarily denied. The State filed a Petition for Writ of Certiorari, which this Court granted.

STATEMENT OF FACTS

On the afternoon of June 3, 2011, Sergeant Brandon Ratliffe and Investigator Keith Sumner began conducting surveillance of Rowland's home, located on Woodleaf Court in Charleston, South Carolina, after the officers received several complaints about drug activity occurring at that location over the course of the preceding year. (App'x 95-97; 119-122). During their surveillance, the officers observed Rowland exit his residence and get into a vehicle parked outside. (App'x 65). While they watched, a bicyclist rode up, got into the vehicle with Rowland, exited the vehicle after only a minute, and swiftly left the area. (App'x 64-66). Shortly thereafter, the officers observed a blue car pull up and park in front of 31 Woodleaf Court. (App'x 64-66). Immediately after that, Rowland, who had gone back inside his home after meeting with the bicyclist, exited the residence, walked directly over to the passenger side of the blue car, reached in through the car's window, and conducted what appeared to be a hand-to-hand drug transaction with the driver. (App'x 64-66; 120). Rowland then quickly returned to his residence, and the blue car drove away. (App'x 57-8; 120-22).

After the blue car left Rowland's residence, Sergeant Ratliffe and Investigator Sumner asked nearby officers waiting directly outside of Rowland's neighborhood to stop that vehicle based on the drug transaction they had just observed. (App'x 65). In response, the nearby officers quickly stopped the blue car and, during the ensuing stop, located marijuana and cocaine in the driver's possession. (App'x 49; 380). Sergeant Ratliffe and Investigator Sumner then responded to the scene of the stop and spoke with the driver, who confirmed he had just bought the drugs from "Blow," who the officers knew to be Rowland, at Rowland's address. (App'x 49; 371).

Thereafter, Sergeant Ratliffe quickly prepared a search warrant affidavit and appeared before a magistrate to obtain a search warrant for Rowland's residence. (App'x 50). The affidavit Sergeant Ratliffe presented to the magistrate specifically identified the premises to be searched

as the home located at 31 Woodleaf Court and contained the following information about the investigation:

> Over the past 6 months, the Charleston Police Department Special Investigations Unit has received numerous complaints of narcotics activity from citizens, in reference to illegal narcotics being sold from 31 Woodleaf Ct. SIU has been conducting a[n] investigation on this residence and [Rowland] for more th[a]n a year for narcotic activity.
>
> In response, within the past 72 hours, the CPD Special Investigations Unit . . . established a fixed surveillance location in which Inv. Ratliffe and Inv. Sumner observed [Rowland], a registered resident at this location, conduct a hand to hand narcotics transaction. At approx 1440hrs. [Rowland] was observed exiting the residence via the front door and walk[ing] up to a vehicle which parked in front of the residence. [Rowland] approached the door of the vehicle and conducted a hand to hand transaction with a person inside the vehicle [with a specified license tag number]. Within 1 minute of making contact with the driver of the vehicle [Rowland] then walked back into the above residence. The vehicle [with the specified license tag number] then immediately left the area. Inv. Ratliffe and Inv. Sumner then corroborate this by having a CPD patrol unit conduct a traffic stop on the above vehicle [with the specified license tag number] and locate an amount of illegal narcotics. The driver of the vehicle then wrote a statement confirming the above mentioned transaction of illegal narcotics.
>
> Your affiant, Investigator C. Ratliffe, is a sworn police officer with the Charleston Police Department and has been for over 7 years with 1 year experience conducting narcotics investigation with the CPD Narcotics Unit. He has attended several narcotics investigation schools and seminars over the course of [his] career taught by the Drug Enforcement Administration, the South Carolina Criminal Justice Academy, and the Multi-jurisdictional Counterdrug Task Force Training. He has executed countless search warrants and has been involved in the arrest of over approximately 500 subjects for illegal drug offenses. Furthermore, he has conducted surveillance on suspected drug dealers, testified in court, managed informants, and interviewed numerous suspects and witnesses for drug related crimes.
>
> Based on Inv. Ratliffe's experience and the current investigation, there is probable cause to believe that illegal narcotics, and/or the proceeds of, are being stored at [an entirely unrelated Charleston address].

(App'x 588). Additionally, Sergeant Ratliffe provided supplemental information to the magistrate by informing him about his knowledge of and history with Rowland and about the

tips he had received regarding Rowland in the past. (App'x 51-52; 62). The magistrate then issued a search warrant authorizing a search of Rowland's home. (App'x 67; 109; 267-274).

Shortly thereafter, officers from the Charleston Police Department executed the search warrant at 31 Woodleaf Court while Rowland and his parents, who also lived in the home, were detained outside. (App'x 54; 67-69; 109; 101-102). During the officers' search of the residence, they located pictures of Rowland with one of his children, letters addressed to Rowland at 31 Woodleaf Court, a notebook containing a ledger, multiple cellular phones, and a box of plastic bags in one of the residence's bedrooms. (App'x 114-116; 162; 1174). Additionally, in that same bedroom, the officers found a digital scale on top of a dresser along with a bag of cocaine and two more digital scales hidden in the dresser's drawers. (App'x 115-116; 162-163). Likewise, the officers located a .45-caliber pistol and a book entitled "Criminal Procedure Guide for Drug Agents" on a bookshelf near the bed and a plastic container containing individually-packaged quantities of marijuana near a television. (App'x 185). Furthermore, the officers found a brown bag behind the bedroom door with two plastic bags of cocaine inside. (App'x 128; 143). One of those plastic bags contained thirty-four grams of cocaine, and the other plastic bag contained twenty-one smaller bags that each contained roughly a gram of cocaine. (App'x 172-173).

Defense counsel preliminarily moved for the evidence discovered in Rowland's case to be suppressed, and the trial judge conducted an in limine hearing on that motion. (App'x 71). At the conclusion of the in limine hearing, defense counsel asked the trial judge to suppress the evidence discovered during the search of Rowland's home. (App'x 71-5). In seeking that relief, defense counsel noted the search warrant affidavit contained at least one error, asserted there was nothing inherently suspicious about riding a bicycle, and contended the "only real substance" to the officers' surveillance was their observation of what appeared to be a hand-to-hand drug

transaction between Rowland and another individual. (App'x 71-75). In rebuttal, the solicitor asserted the search warrant affidavit correctly identified the address of Rowland's residence numerous times and only incorrectly listed an unrelated address a single time due to a scrivener's error. (App'x 71-75). The solicitor further argued the information contained in the affidavit, including the information about the observed hand-to-hand drug transaction, established a probable cause basis supporting the issuance of the search warrant. (App'x 71-75). The trial judge then denied the in limine suppression motion, explaining:

> Based on the totality of the circumstances, it's clear that the reference to the [entirely unrelated Charleston address] was a scrivener's error. The correct address, 31 Woodleaf [Court], is referenced several times in here, and that was obviously just a scrivener's error.
>
> The totality of the circumstances is that they had a reason to be observing [Rowland], the defendant's house. They witnessed – or they – based on tips that he had been drug dealing, et cetera, that's what got them to observe that house. They then witnessed at least one transaction, possibly two, on drugs. One was the bicycle, but, more importantly, the one was the one with the car.
>
> They then stopped that person in driving the car who said yes, I bought drugs just a short time before from the defendant. That gets the search warrant and gives them information that is sufficient to rise to the level of probable cause to issue the warrant, so the search warrant is valid.

(App'x 74-75).

At the PCR hearing Rowland testified that Counsel failed to adequately object to the execution of a search warrant by not raising that Officer Ratliff failed to comply with the law by not leaving an affidavit at his home after executing a warrant. (App'x 1529). Additionally, Rowland argued that Counsel failed to adequately cross-examine Ratliff on a previous statement concerning who was at the home when the warrant was executed. (App'x 1530-1). Rowland also claimed that newly discovered evidence in the form of an affidavit that the drugs found belonged to his brother warranted reversal. (App'x 1535). Rowland's brother, John Rowland (Brother),

testified that the affidavit was correct and that the drugs at the scene found in the bag and upstairs were his. (App'x 1540). Rowland's father, Leroy Rowland (Father), testified that he was present during the execution of the search warrant and did not recall seeing the warrant. (App'x 1553). Rowland's mother, Janis Rowland (Mother), testified that she thought officers left a copy of the search warrant after its execution. (App'x 1556).

Counsel testified that he had a conversation with Brother about the possibility of him claiming responsibility of the drugs. (App'x 1561). Counsel stated that he informed Brother that any conversation related to this would be a conflict and advised him to retain an attorney because claiming responsibility had consequences. (App'x 1561). Counsel stated he told Brother that he would be happy to put Brother on the stand if he was telling the truth and had time to speak with an attorney. (App'x 1562). Counsel testified he never heard back from Brother concerning this matter. (App'x 1563). Counsel stated Rowland did not inform him that Brother owned the drugs. (App'x 1581).

Counsel testified that he did not see much value in challenging Officer Ratliff's inconsistent statements because in his experience challenging an officer's truthfulness without malfeasance can backfire. (App'x 1566). Counsel testified that he exercised this approach whether it was a hearing or trial, regardless of whether the jury was present. (App'x 1567). Counsel also testified that it was not clear whether or not the warrant was left due to conflicting testimony. (App'x 1568). Ultimately Counsel summarized his strategy by stating "as a matter of trial strategy I didn't feel it was appropriate to drag red herring through that really wasn't a fresh red herring so to speak." (App'x 1574).

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts give great deference to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Smalls, 422 S.C. at 179, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

I. The PCR Court erred by finding that Counsel's efforts to suppress the evidence seized from the residence were ineffective, because ample evidence supported the issuance of the warrant and there is not a reasonable likelihood that the trial court would have granted Rowland's suppression motion.

The PCR Court improperly found Counsel was deficient for failing to present all arguments in support of the trial court suppressing the evidence seized as a result of searching Rowland's residence. Here Counsel challenged the acquired evidence in a pre-trial hearing by arguing the warrant contained an error and that the alleged drug transactions observed did not rise to a level sufficient to properly issue a warrant. (App'x 70-1). Accordingly, Counsel attempted to challenge the admission of evidence obtained through the pertinent search warrant and did not deviate from prevailing professional norms.

Pursuant to the first prong of the Strickland analysis, Petitioner must prove counsel's performance was deficient. Strickland v. Washington, 466 U.S. 688, 686 (1984); Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." Strickland, 466 U.S. at 688. See also Rule 71.1(e), SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence"). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant." Id. at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (citing Strickland, 466 U.S. at 690). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually

"countless" ways. Strickland, 466 U.S. at 688-89. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the result cannot be relied upon as being just. Id. 466 U.S. at 686. Even if there is reason to think counsel's conduct was far from exemplary relief may still be denied so long as counsel did not take an approach that no competent lawyer would have taken. Dunn v. Reeves, 594 U.S. 731 (2021).

Second, counsel's deficient performance must have prejudiced the petitioner so that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. Id. at 695. Realistically, this is found "only in the rarest case" because "[t]he likelihood of a different result must be substantial, not just conceivable." Harrington v. Richter, 562 U.S. 86, 111-12 (2011) (quoting Strickland, 466 U.S. at 697). In examining whether an applicant has proven prejudice, courts should consider the specific impact Counsel's error had on the outcome. Smalls v. State, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018). To prove counsel was ineffective when a guilty plea is challenged, an applicant "must show that counsel's performance was deficient and that, but for counsel's errors, there is a reasonable probability a guilty plea would not have been entered." Custodio v. State, 373 S.C. 4, 12, 644 S.E.2d 36, 40 (2007). Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." Richter, 562 U.S. at 112 (emphasis added).

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV.

"The touchstone of the Fourth Amendment is reasonableness." Florida v. Jimeno, 500 U.S. 248, 250 (1991). Accordingly, only unreasonable searches and seizures are prohibited. State v. Foster, 269 S.C. 373, 378, 237 S.E.2d 589, 591 (1977); see Maryland v. Buie, 494 U.S. 325, 331 (1990) ("It goes without saying that the Fourth Amendment bars only unreasonable searches and seizures[.]").

Generally, in order for a search to be reasonable under the Fourth Amendment, a law enforcement officer must obtain a search warrant prior to conducting the search. Robinson v. State, 407 S.C. 169, 185, 754 S.E.2d 862, 870 (2014). In South Carolina, an officer seeking to obtain a search warrant must present a sworn affidavit to a judge presenting grounds sufficient to establish probable cause in order to justify the issuance of the warrant. State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348-349 (1999); see S.C. Code Ann. § 17-13-140 ("A warrant issued hereunder shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record establishing the grounds for the warrant."); see also Illinois v. Gates, 462 U.S. 213, 238 (1983) (identifying probable cause as "a fair probability that contraband or evidence of a crime will be found"). In State v. Williams, 262 S.C. 186, 189, 203 S.E.2d 436, 437-438 (1974), the South Carolina Supreme Court explained probable cause as it relates to the issuance of a search warrant:

> In order to justify the issuance of a search warrant, probable cause must be shown, but the term 'probable cause' does not import absolute certainty. In determining whether there is sufficient evidence to sustain a finding of probable cause, each case stands on its own facts. The evidence need not be sufficient to support a conviction, or a verdict of guilty, or to establish guilt beyond a reasonable doubt; nor need the proof be positive, it being enough if it is such as to induce in the mind of the issuing officer an honest belief that the facts set forth exist, or as would lead a man of prudence to believe that the offense has been committed.

(citing State v. Bennett, 256 S.C. 234, 182 S.E.2d 291 (1971)).

In deciding whether to issue a search warrant, the issuing judge must "make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." Gates, 462 U.S. at 238. In making the probable cause determination, "[issuing judges] are concerned with probabilities and not certainties." State v. Sullivan, 267 S.C. 610, 617, 230 S.E.2d 621, 624 (1976). Furthermore, the issuing judge must view the warrant affidavit in a common-sense and realistic fashion and give consideration to the fact such affidavits are typically prepared by non-lawyers in the haste of criminal investigations. State v. Arnold, 319 S.C. 256, 260, 460 S.E.2d 403, 405 (Ct. App. 1995); see United States v. Ventresca, 380 U.S. 102, 108 (1965) ("Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place [when evaluating the sufficiency of search warrant affidavits].").

In State v. Kinloch, 410 S.C. 612, 613-14, 767 S.E.2d 153, 153-154 (2014), the South Carolina Supreme Court considered whether the information contained in a search warrant affidavit was sufficient to establish a probable cause basis for the search of a residence. In Kinloch, the officer who sought the search warrant included the following details in the search warrant affidavit: (1) officers conducted surveillance of a particular residence after receiving numerous tips about drug transactions taking place at that location; (2) during their surveillance, officers saw a man in a red shirt leave the residence and engage in hand-to-hand transactions with other individuals while a man in a black jacket stood nearby; (3) officers observed the man in the red shirt count money after the transactions; (4) later on, officers saw the man in the black jacket approach another individual and exchange a plastic bag for money; and (5) after that,

officers approached the person who made the exchange with the man in the black jacket and recovered a plastic bag containing heroin when it was dropped to the ground. Id. at 614-15, 767 S.E.2d at 154. Based on those facts, the magistrate issued a search warrant for the targeted residence, drugs and other incriminating evidence were discovered during the ensuing search, and Kinloch subsequently successfully moved to suppress that evidence during trial. Id. Our Supreme Court concluded the search warrant affidavit provided the magistrate with a substantial basis for reaching his probable cause determination based on the information contained within it regarding the numerous tips received by the officers and the officers' subsequent observation of "seemingly drug-related behavior." Id. at 618, 767 S.E.2d at 156.

Rowland alleges Counsel was ineffective for failing to address additional deficiencies in Officer Ratliffe's probable cause application. However, Counsel was not deficient in his suppression argument because he argued the State failed to establish a fair probability of drug activity. Additionally, Counsel was not deficient for failing to address the reliability of the statements in the search warrant because the officers corroborated statements from neighbors by investigating Rowland and observing multiple apparent drug transactions. Numerous tips are relevant in a totality of the circumstances evaluation for the purposes of finding probable cause to issue a search warrant. Counsel testified that he did not see much value in challenging Officer Ratliff's inconsistent statements because in his experience challenging an officer's truthfulness without malfeasance can backfire. (App'x 1566). Counsel appropriately challenged the evidence obtained from the search warrant while implementing a valid trial strategy. Accordingly, Counsel's challenge was not an approach no competent lawyer would have taken and did not rise to the level of ineffective assistance.

Additionally, Rowland cannot prove prejudice because the State presented sufficient evidence in support of issuing the search warrant. Like the officers in Kinloch, here officers received numerous tips in regard to drug activity taking place at 31 Woodleaf Court. See id. (finding the receipt of numerous tips regarding drug activity to be relevant under the totality of the circumstances towards establishing a probable cause basis for a search). Additionally, the information in the search warrant affidavit established the officers – much like the officers in Kinloch – corroborated those tips by conducting surveillance and observing Rowland engaged in what appeared to be drug transactions to the trained and skilled officers. See id. (finding a substantial basis for probable cause existed where the officers observed "*seemingly* drug-related behavior" (emphasis added)); State v. Adams, 291 S.C. 132, 134, 352 S.E.2d 483, 485 (1987) ("[T]he evidence of a contemporaneous drug deal cited in the warrant's supporting affidavit was a sufficient basis for the determination of probable cause under the totality of the circumstances."); see also United States v. Cortez, 449 U.S. 411, 418 (1981) ("[A] trained officer draws inferences and makes deductions – inferences and deductions that might well elude an untrained person."). Furthermore, the information in the search warrant affidavit established the officers stopped the driver of a vehicle who had just engaged in a hand-to-hand transaction with Rowland, discovered marijuana and cocaine during that stop, and were informed by the driver he had just purchased the drugs from Rowland at 31 Woodleaf Court. Cf. State v. Keith, 356 S.C. 219, 224, 588 S.E.2d at 147 ("We find the portion of the affidavit related to the investigative surveillance, stop, and seizure of illegal drugs from Keith's car standing alone sets forth sufficient information to support a probable cause finding in this case."); State v. Jenkins, 790 So. 2d 626, 627 (La. 2001) (holding a search warrant authorizing a search of a residence was properly issued and supported by probable cause where the investigating officers included

information in the search warrant affidavit establishing they observed what appeared to be a hand-to-hand transaction take place on the porch of the targeted residence, they stopped a person involved in the transaction after that person left the residence, and they seized a plastic bag containing vegetable matter from that person).

Officers received multiple tips concerning suspected drug activity, corroborated them through surveillance, and directly observed conduct consistent with drug transactions which served as a valid basis for the warrant obtained. Cf. Kinloch, 410 S.C. at 618, 767 S.E.2d at 156 ("We find based on these facts that the Court of Appeals erred in affirming the circuit court's suppression ruling as the magistrate had a substantial basis for reaching his probable cause determination."); cf. United States v. Rose, 321 F. App'x 324, 326-327 (4th Cir. 2009) (finding probable cause for the issuance of a search warrant existed where officers conducted surveillance at the targeted residence, observed traffic consistent with drug activity there, stopped an individual who left the residence shortly after arriving, and were advised by the individual he had just purchased crack cocaine from the residence). As a result, the magistrate properly issued the warrant for Rowland's residence, and the trial judge correctly denied Rowland's motion to suppress the evidence discovered during the search. See Gates, 462 U.S. at 238 ("The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.").

Accordingly, the PCR court's findings should be reversed.

a. The PCR Court erred in finding Counsel was deficient for failing to argue law enforcement's alleged failure to comply with §17-13-150 warranted suppression because compliance was not established and suppression is not a recognized remedy.

Rowland contends that counsel was deficient for failing to raise the officer's failure to comply with §17-13-150 during the suppression, which requires that a copy of the warrant along with the affidavit be furnished. First, Rowland failed to establish the affidavit was not left at the residence. Rowland's mother, Janis Rowland (Mother), testified that she thought officers left a copy of the search warrant after its execution. (App'x 1556). Although Officer Ratliff testified at the preliminary hearing that he did not leave a copy of the affidavit at the residence, he testified that Rowland would be given a copy of the affidavit at the conclusion of the search. (App'x 62, ln. 1-5). Additionally, Officer Habbestad testified at trial that the search warrant return is given to the person in the residence. (App'x 94, ln. 13-14). Along with this testimony, Officer Habbestad also signed the search warrant return stating that the search warrant was left at the place searched. Even if the search warrant affidavit was not left at the residence and counsel failed to argue this at the suppression hearing, the error was, at most, ministerial and would not merit suppression of the evidence found through the execution of the search warrant.

The failure to leave a copy of the warrant does not amount to a Fourth Amendment violation. United States v. Simons, 206 F.3d 392, 403 (4th Cir. 2000) ("we conclude that the failure of the team executing the warrant to leave either a copy of the warrant or a receipt for the items taken did not render the search unreasonable under the Fourth Amendment."). In Simons, the Fourth Circuit Court of Appeals remanded for the district court to consider whether the violation of Federal rules was deliberate. Id. Several jurisdictions have held such a failure ministerial. State v. Heflin, 611 So. 2d 441 (Ala. Crim. App. 1992) (failure to give copy of search warrant and inventory to defendant at time of search or to leave copy of search warrant

and inventory at the premises searched did not require suppression); Frisby v. United States, 79 F.3d 29, 32 (6th Cir. 1996) ("although the procedural steps enumerated [Federal Rule of Criminal Procedure 41(f)(1)(C)] are important and should not be disregarded, they are ministerial and '[a]bsent a showing of prejudice, irregularities in these procedures do not void an otherwise valid search"); State v. Chatriand, 792 P.2d 1107, 1108–09 (Mont. 1990) ("as a general rule, statutes which require peace officers to exhibit or deliver a copy of the search warrant at the place to be searched are viewed as ministerial only, and failure to comply with such statutes does not void an otherwise valid search").

Yet here the issue presents one that has been held merely a ministerial error in other jurisdictions. Rowland failed to establish that such conduct, if shown, renders counsel's representation ineffective, because Strickland does not require Counsel to be clairvoyant or anticipate changes in law. Pantovich v. State, 427 S.C. 555, 563, 832 S.E.2d 596, 600 (2019) ("we do not require attorneys to be clairvoyant in anticipating changes to the law"). Accordingly, the PCR court's finding should be reversed.

b. The PCR Court erred in finding Counsel was ineffective for failing to renew his objection to the introduction of the evidence attained through the search warrant because sufficient evidence existed to support the trial court's finding, and a different outcome on appeal is not reasonably probable.

The PCR court found that counsel was deficient for failing to preserve for appellate review the introduction of the evidence obtained from the search warrant. However, Rowland has failed to establish the reasonable probability of a different outcome had Counsel preserved the issue. The State presented ample evidence to support the issuance of the search warrant including prior tips, suspicious activity outside the home, and drugs obtained from the blue car after what appeared to be a drug transaction.

To be entitled to relief on claim of ineffective assistance for failure to preserve, Rowland must establish the underlying claim is meritorious and would have been reasonably probable to result in a reversal. McHam v. State, 404 S.C. 465, 475, 746 S.E.2d 41, 47 (2013) ("Since the Fourth Amendment issue was not considered on direct appeal because it was unpreserved, an examination of the merits of the issue is appropriate in analyzing the prejudice prong in McHam's PCR claim.").

Counsel sought to suppress the introduction of the evidence obtained through the search of the residence, however, Counsel did not renew his objection when the State sought to introduce that evidence at the trial. Numerous exhibits were introduced throughout the trial and Counsel did not make contemporaneous objections to preserve the issue for appellate review. Rowland argues that since Counsel did not have a reasonable explanation for his failure to renew his objections his performance was deficient. Yet, Rowland has failed to establish that an appellate court would find that the trial court erred in finding that there was sufficient probable cause to warrant the magistrate court issuing the search warrant.

The information included in the search warrant affidavit established that the officers had received numerous tips in regard to drug activity taking place at 31 Woodleaf Court. Additionally, the information in the search warrant affidavit established the officers corroborated those tips by conducting surveillance and observing Rowland engaged in what appeared to be drug transactions. Cf. Jenkins, 790 So. 2d 626, 627 (La. 2001) (holding a search warrant authorizing a search of a residence was properly issued and supported by probable cause where the investigating officers included information in the search warrant affidavit establishing they observed what appeared to be a hand-to-hand transaction take place on the porch of the targeted residence, they stopped a person involved in the transaction after that person left the residence, and they seized a plastic bag containing vegetable matter from that person).

Other than the disputed issue of whether or not the search warrant and affidavit was left at the residence, which would not merit suppression of the evidence, Rowland has failed to allege any other meritorious reason for reversing the trial court's ruling on appeal. Therefore, this Court should reverse the PCR court's ruling.

II. The PCR Court erred in finding Counsel was ineffective for failing to call Father or Brother to testify because their testimony would not have warranted suppression.

The PCR Court improperly found Counsel was deficient for failing to call Father and Brother to testify because Counsel implemented a valid trial strategy. Rowland failed to establish that calling these witnesses would have resulted in the trial court granting the suppression motion or that the witnesses were willing to testify.

"The selection of witnesses and evidence are matters of trial strategy, virtually unchallengeable in an ineffective assistance claim." Vaca v. State, 314 S.W.3d 331, 335 (Miss. 2010). Counsel's "determination of which witnesses to call is a matter of trial strategy, and such strategic and tactical decisions do not amount to deficient performance [under Strickland] unless they are so unreasonable that no competent attorney would have made them under similar circumstances." Butler v. State, 872 S.E.2d 722, 731 (Ga. 2022).

At the suppression hearing Charleston City Police Officer Brandon Ratliffe testified that Rowland was present when Ratliffe was at the residence to execute the search warrant. (App'x 66). Officer Ratliffe testified CPD attempted to have Rowland stopped prior to getting to the residence; that he refused to stop, and Rowland then drove straight into the driveway where he was then detained. (App'x 67). Father testified at the evidentiary hearing that when the CPD executed the search warrant, he and his wife were at the residence along with their son, Brother. (App'x 1553). Rowland was not at the residence when CPD arrived at the residence. (App'x 1553). He testified that it was more than an hour later that a CPD patrol car arrived at the residence with Rowland in their custody. (App'x 1552). Rowland has failed to show that presenting this evidence would have likely resulted in a different outcome.

Father's testimony does not contradict the testimony of Officer Ratliffe. Officer Ratliffe testified that Rowland was at the residence when he went to execute the search warrant, but that

Rowland left the residence before they could do so. (App'x 66-75). Ratliffe then testified that the officers executed the search warrant while Rowland was away. (App'x 66-75). Father's testimony simply confirms the testimony of Officer Ratliffe that Rowland arrived after the execution of the search warrant and fails to contradict the testimony that Rowland was at the residence while CPD was conducting surveillance prior to executing the search warrant. (App'x 1553-4).

Counsel testified that he spoke to Father about testifying that the gun was his, but, Counsel did not want to highlight the fact that the gun was found very near the premises where Rowland had control. (App'x 1564). This was a valid trial strategy, given Rowland was facing the charge of possession of a weapon during the commission of a violent crime. Because the weapon was found near or in an area where Rowland exhibited control, Counsel's strategy to not bring attention to the weapon was valid. Consequently, Rowland has failed to establish that failing to offer the testimony of Father was deficient or would have likely resulted in a different outcome at trial. Counsel's decision not to call Father to testify falls within the range of reasonable professional norms.

The PCR Court also found that counsel was deficient for failing to call Brother to testify during the suppression hearing. However, Rowland has failed to establish counsel was deficient because Counsel stated he would have called Brother to testify if he was telling the truth and Rowland never indicated the drugs belonged to Brother.

Counsel testified that he had a conversation with Brother about the potentially claiming responsibility for the drugs. (App'x 1561). During the officers' search of the residence, they located pictures of Rowland with one of his children on the dresser where drugs were found. (App'x 126). Counsel stated that he informed Brother that any conversation related to this would

be a conflict and advised him to retain an attorney if that was the case. (App'x 1561). Counsel stated he told Brother that he would be happy to put Brother on the stand if Brother was telling the truth and had time to speak with an attorney. (App'x 1562). Counsel testified he never heard back from Brother concerning this matter. (App'x 1563). Counsel further stated Rowland never indicated that Brother owned the drugs. (App'x 1581).

Counsel's decision was within the prevailing professional norms based on his experience and lack of evidentiary support. Counsel informed Brother that he would be happy to call him as a witness if his version of events were truthful, but the proposed testimony was not grounded in evidentiary support or consistent with what Rowland told Counsel. Here, Counsel's decision to refrain from calling Brother constituted a valid strategy. See Strickland, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."). Therefore, Rowland has failed to establish any deficiency on the part of counsel or any resulting prejudice. Accordingly, the PCR court's finding should be reversed.

III. The PCR Court erred in finding Brother's testimony meets the standard for after-discovered evidence and that it reasonably would have changed the result of trial because Counsel was aware of the potential testimony prior to trial and would not have changed the result of trial.

The PCR court found that Brother's testimony that he owned the cocaine found in the residence meets the requirements for after-discovered evidence and would reasonably result in the jury acquitting Rowland of the cocaine charge if the testimony were presented at trial. However, Counsel was aware of the potential testimony before the trial and Brother's testimony would not have reasonably caused in a different result.

The Uniform Post-Conviction Relief Act states a person may institute a post-conviction relief action if "there exists evidence or material facts not previously presented and heard, that requires vacation of the conviction or sentences in the interest of justice." S.C. Code Ann. §17-27-20(A)(4). If an Applicant contends there is evidence of material fact not previously presented, the post-conviction relief application must be filed within one year after the date of actual discovery of the facts by the applicant or after the date the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. §17-27-45(C). An applicant requesting a new trial based on after-discovered evidence after a conviction must show that the evidence:

1. Is such as would probably change the result if a new trial was had;
2. Has been discovered since the trial;
3. Could not by the exercise of due diligence have been discovered before the trial;
4. Is material to the issue of guilt or innocence; and,
5. Is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983) (citing State v. Caskey, 273 S.C. 325, 256 S.E.2d 737 (1979)).

This testimony does not satisfy the standard for after-discovered evidence. Brother testified at the evidentiary hearing that he was present at his brother's trial and was available to testify. (App'x 1549). He testified he would have stated that the cocaine in the Gucci bag along

with the other cocaine located in the residence was his. (App'x 1549). He testified that he had not revealed this information earlier because there was a pending investigation with the South Carolina Department of Social Services, and he feared that had he come forward before his brother's trial that he would have lost his children. (App'x 1544).

Rowland has failed to establish that Brother's testimony meets the requirements for after-discovered evidence and it was not reasonably likely the jury would have acquitted Rowland of the cocaine trafficking charge. First, the evidence was not only discoverable prior to trial but its admission was contemplated. Counsel testified that Brother asked him about claiming responsibility of the cocaine. (App'x 1565). Counsel informed Brother that he should get a lawyer and to call him if he were willing to testify as to ownership of the cocaine, counsel never received a phone call from him. (App'x 1565-1566). Yet, Counsel testified he never heard back from Brother concerning this matter. (App'x 1563). Therefore, Rowland has failed to establish that the evidence has been discovered since trial and could not have been discovered prior to trial.

Further, the testimony is not such that it would change the result if a new trial were had. See State v. Spann, 334 S.C. 618, 619–20, 513 S.E.2d 98, 99 (1999) (requiring after-discovered evidence to be "such that it would probably change the result if a new trial were granted."). Brother admitting that the cocaine was his does not change the fact that the evidence presented at trial proved that Rowland had constructive possession of the drugs and that the officers surveilling the residence saw Rowland selling drugs on multiple occasions in front of the residence. During the officers' search of the residence, they located pictures of Rowland with one of his children on the dresser where drugs were found. (App'x 126). Therefore, the testimony does not show Rowland's guilt or innocence or would likely change the result if a new

trial were had. Rowland has failed to meet the requirements set forth for granting post-conviction relief based on after-discovered evidence. Accordingly, the PCR court's finding should be reversed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the lower court be reversed.

Respectfully submitted,

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Jun 16 2025
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Berkeley County
Court of Common Pleas
The Honorable Bentley Price, Post-Conviction Relief Judge
The Honorable Roger M. Young, Sr., Trial Judge

Appellate Case No. 2021-000089

JOSEPH T. ROWLAND, Respondent,

vs.

STATE OF SOUTH CAROLINA, Petitioner.

PROOF OF SERVICE

I, Grace Sommer, certify that I have served the within Brief of Petitioner on Kathrine Hudgins Esquire, counsel of record for the Respondent, by electronic mail to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served.

This 16th day of June, 2025.

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