ALAN WILSON
ATTORNEY GENERAL

June 5, 2014

VIA HAND DELIVERY
The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: **Corey Jawan Robinson v. State of South Carolina**
Appellate Case No: 2013-001391

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

Joshua L. Thomas
Assistant Attorney General

JLT/nb
Enclosures

cc: Jason P. Boan, Esquire (2 copies)

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Larry B. Hyman, Jr., Circuit Court Judge

Appellate Case No. 2013-001391

Corey Jawan Robinson, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the PCR judge properly find appellate counsel was not ineffective for failing to challenge the admission of drug evidence on appeal where the issue was not preserved for review when Petitioner consented to the admission of the evidence; where Petitioner raised the issue on direct appeal by including it in his *pro se* response to an Anders brief; and where the admission of the drugs did not violate Petitioner's Fourth Amendment rights when reasonable suspicion justified a frisk for officer safety during an investigatory detention.

STATEMENT OF THE CASE

In August 2008, the Georgetown County Grand Jury indicted Petitioner for possession of cocaine base with intent to distribute, possession of marijuana with intent to distribute, and assault while resisting arrest. (App. pp. 389-402). The State tried Petitioner before the Honorable Steven H. John and a jury on March 16, 2009. (App. p. 1). C. Reuben Goude, Esquire ("trial counsel"), initially represented Petitioner at trial. (App. p. 1). After Judge John heard pre-trial motions, Applicant made a motion to relieve trial counsel. (App. p. 39, lines 18-21). After extensive questioning of Petitioner, Judge John granted the motion and allowed Petitioner to proceed *pro se*. (App. p. 47, line 24-p.48, line 1).

The jury found Petitioner guilty as indicted. (App. p. 192, line 17-p. 193, line 1). Judge John sentenced Petitioner to concurrent terms of fifteen (15) years for possession of cocaine base with intent to distribute, ten (10) years for possession of marijuana with intent to distribute, and ten (10) years for assault while resisting arrest. (App. p. 199, lines 11-25).

Wanda H. Carter, Esquire ("appellate counsel"), of the South Carolina Commission on Indigent Defense perfected Petitioner's appeal with the filing of an Anders[1] brief on December 29, 2009. (App. pp. 203-13). Applicant filed a *pro se* response to the Anders brief. (App. pp. 214-34). The South Carolina Court of Appeals dismissed the appeal. State v. Robinson, Op. No. 2011-UP-191 (S.C. Ct. App. filed April 28, 2011). (App. pp. 235).

[1] Anders v. California, 386 U.S. 738 (1967)

Petitioner filed an application for post-conviction relief on July 11, 2011. (App. pp. 236-58). Jason P. Boan, Esquire, ("PCR counsel") represented Petitioner. (App. p. 289) PCR counsel field an amended application on or about March 5, 2013 (App. pp. 283-88). The Honorable Larry B. Hyman, Jr. ("PCR judge"), convened a hearing on the application at the Georgetown County Courthouse on April 26, 2013. (App. p. 289). Petitioner was present and represented by PCR counsel. (App. p. 289). Assistant Attorney General T. Andrew Johnson, Esquire, represented Respondent. (App. p. 289). The PCR judge denied relief in an order dated May 9, 2013, and filed June 4, 2013. (App. pp. 380-85).

ARGUMENT

I. Probative evidence supports the PCR judge's finding appellate counsel was not ineffective for failing to brief the suppression issue.

Petitioner asserts the PCR court erred by finding appellate counsel was not ineffective for failing to argue the drug evidence should have been suppressed as "fruit of the poisonous tree of an illegal arrest." (Pet. for Writ of Cert. p. 4). However, probative evidence supports the PCR judge's finding Petitioner had shown neither error nor prejudice from appellate counsel's performance.

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Id. at 442, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 396 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745 (1983)). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones, 463 U.S. at 753. Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d

1226, 1235 (4th Cir. 1985). Petitioner must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, 302 S.C. at 537, 397 S.E.2d at 526; Strickland, 466 U.S. at 687.

On appeal, this Court must affirm the circuit court's denial of post-conviction relief when there is probative evidence to support the findings of the circuit court. Wolfe v. State, 326 S.C. 158, 163, 485 S.E.2d 367, 369 (1997) (citing McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989)).

A. Appellate counsel was not deficient because the suppression issue was not preserved for appellate review.

Appellate counsel is not ineffective for failing to brief an issue where the issue "would not have been preserved for appeal[.]" Legge v. State, 349 S.C. 222, 225, 562 S.E.2d 618, 620 (2002). Petitioner failed to renew his objection to Judge John's pre-trial ruling regarding the admissibility of the drug evidence. Therefore, appellate counsel could not have challenged Judge John's ruling on appeal.

In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004). "If a party fails to properly object, the party is procedurally barred from raising the issue on appeal." State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005).

Generally, a motion *in limine* seeks a pre-trial evidentiary ruling to prevent the disclosure of potentially prejudicial evidence to the jury, and a ruling on such a motion is preliminary and subject to change based on developments during trial. State v. Smith, 337 S.C. 27, 32, 522 S.E.2d 598, 600 (1999). A ruling on a motion *in limine* does not

constitute a final ruling on the admissibility of evidence. State v. Simpson, 325 S.C. 37, 42, 479 S.E.2d 57, 60 (1996). Therefore, an objection must be made at the time the evidence is introduced during trial in order to preserve the issue for appellate review. State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993).

In the case at bar, any issue with the admission of the drug evidence was not properly preserved for appellate review. At the outset of trial, trial counsel made a motion *in limine* seeking the suppression of the drugs discovered in the area where Petitioner was apprehended. (App. p. 11, lines 2-9). After hearing testimony of the arresting officer, Judge John issued a preliminary ruling denying the suppression motion. (App. p. 19, line 23-p. 28, line 22). Thereafter, when the solicitor moved to introduce the drugs into evidence during trial, Petitioner did not renew his pre-trial objection and, instead, affirmatively stated the evidence could be admitted without objection. (App. p. 130, lines 16-22; p. 139, lines 7-11). Instead of renewing his objection to the evidence, Petitioner consented to its introduction. See State v. Dicapua, 373 S.C. 452, 455, 646 S.E.2d 150, 152 (Ct. App. 2007) ("Dicapua's sole objection to the videotape came in the form of a motion *in limine* to suppress the videotape because of its lack of audio. Once the State moved to enter the videotape into evidence and publish it to the jury, however, Dicapua's counsel specifically stated he had 'no objection.' We find this amounted to a waiver of any issue Dicapua had with the videotape."). By indicating he had no objection to the drugs when the State moved them into evidence, Petitioner expressly waived his pre-trial objection to the introduction of that evidence. See Burke v. AnMed Health, 393 S.C. 48, 55, 710 S.E.2d 84, 88 (Ct. App. 2011) ("When a party states to the trial court that it has no objection to the introduction of evidence, even though the party previously made a motion to exclude the evidence, the issue raised in the previous motion is not

preserved for appellate review."); see also State v. Carlson, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005) ("A party cannot complain of an error which his own conduct induced."); State v. Burton, 326 S.C. 605, 613, 486 S.E.2d 762, 766 (Ct. App. 1997) ("This testimony was admitted without objection. Because Burton failed to object, he is barred from raising this issue on appeal."). Accordingly, any issue related to the introduction of drugs could not properly be raised or reviewed on appeal. See Dicapua, 373 S.C. at 455-456, 646 S.E.2d at 152.

Because Petitioner did not properly preserve the suppression issue for review, appellate counsel could not have raised it on appeal. Therefore, appellate counsel was not ineffective. Legge, 349 S.C. at 225, 562 S.E.2d at 620. Accordingly, the PCR judge properly denied relief.

B. Petitioner was not prejudiced because he raised the suppression issue in his *pro se* response to the Anders brief.

Furthermore, Applicant has not shown he was prejudiced by appellate counsel's decision to file an Anders brief because the Court of Appeals' dismissal indicates it also reviewed Applicant's *pro se* response. In State v. Lyles, 381 S.C. 442, 673 S.E.2d 811 (2009), this Court outlined the Anders procedure as follows:

> In these cases, the role of the appellate court is to review the brief submitted by counsel, any *pro se* response submitted by the appellant, and the record on appeal to determine whether the appeal contains any issues of arguable merit.

381 S.C. at 444, 673 S.E.2d at 813 (citing State v. Williams, 305 S.C. 116, 406 S.E.2d 357 (1991)). Petitioner's *pro se* response to the Anders brief directly raised the issue of whether Judge John properly denied the suppression motion. (App. p. 222-23). The Court of Appeals opinion indicates it reviewed the issues raised in the *pro se* response.

(App. p. 235). Therefore, Petitioner cannot now argue appellate counsel's decision not to raise this issue prejudiced him. Accordingly, the PCR judge properly denied relief.

C. Petitioner was not prejudiced because the seizure of the drugs did not violate the Fourth Amendment.

Furthermore, Petitioner cannot show he would have been successful on appeal if appellate counsel had briefed the suppression issue. 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). Thus, only unreasonable searches and seizures are prohibited. State v. Foster, 269 S.C. 373, 378, 237 S.E.2d 589, 591 (1977); see also Maryland v. Buie, 494 U.S. 325, 331 (1990) ("It goes without saying that the Fourth Amendment bars only unreasonable searches and seizures[.]").

"A police officer may stop and briefly detain and question a person for investigative purposes, without treading upon his Fourth Amendment rights, when the officer has a reasonable suspicion supported by articulable facts, short of probable cause for arrest, that the person is involved in criminal activity." State v. Blassingame, 338 S.C. 240, 248, 525 S.E.2d 535, 539 (Ct. App. 1999) (citing Terry v. Ohio, 392 U.S. 1 (1968); State v. Robinson, 306 S.C. 399, 412 S.E.2d 411 (1991); Foster, 269 S.C. 373, 237 S.E.2d 589; State v. Fowler, 322 S.C. 263, 471 S.E.2d 706 (Ct. App. 1996)). The reasonableness of an investigatory stop is determined by looking at the totality of the circumstances. State v. Taylor, 401 S.C. 104, 108, 736 S.E.2d 663, 665 (2013). "Among the circumstances to be considered in connection with [the] issue [of the propriety of a stop and frisk] are the 'characteristics of the area' where the stop occurs, the time of the

stop, whether late at night or not, as well as any suspicious conduct of the person accosted such as an obvious attempt to avoid officers or any nervous conduct on the discovery of their presence." United States v. Bull, 565 F.2d 869, 870-871 (4th Cir. 1977). "Reasonable suspicion 'is not readily, or even usefully, reduced to a neat set of legal rules, but, rather, entails common sense, nontechnical conceptions that deal with factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act.'" State v. Provet, 391 S.C. 494, 500, 706 S.E.2d 513, 516 (Ct. App. 2011) (quoting United States v. Foreman, 369 F.3d 776, 781 (4th Cir. 2004)). It is "more than a general hunch but less than what is required for probable cause." State v. Willard, 374 S.C. 129, 134, 647 S.E.2d 252, 255 (Ct. App. 2007); see also State v. Rogers, 368 S.C. 529, 534, 629 S.E.2d 679, 682 (Ct. App. 2006) ("Reasonable suspicion is something more than an inchoate and unparticularized suspicion or hunch."). All of the circumstances of the stop must be considered as a whole to determine whether the officer's actions were reasonable in light of all of the information available to the officer at the time. See United States v. Arvizu, 534 U.S. 266, 273 (2002) ("[W]e have said repeatedly that [reviewing courts] must look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing. The process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'" (citations omitted)); see also United States v. Mason, 628 F.3d 123, 129 (4th Cir. 2010) ("[J]ust as one corner of a picture might not reveal the picture's subject or nature, each component that contributes to reasonable suspicion might not alone give rise to reasonable suspicion.").

Petitioner contends the officer violated his constitutional rights by conducting the frisk search because there was no reasonable suspicion to stop and question him. (Pet. for Writ of Cert. p. 6). Specifically, Petitioner argues an "anonymous tip" is not sufficient to warrant an investigative detention. (Pet. for Writ of Cert. p. 6-7). Unfortunately, Petitioner has entirely misconstrued the record in this regard. The call to police was not from an anonymous source. (App. p. 90, lines 10-14).[2] Rather, it came from Karen Fordham. (App. p. 59, lines 23-24). Ms. Fordham testified she told the police she witnessed Petitioner pass some drugs to another person. (App. p. 59, lines 11-14). In no way was this an anonymous tip to police. Instead, it was a report of criminal activity from an eyewitness. Under those circumstances, the officer was well within the bounds of the Fourth Amendment when he briefly stopped Petitioner to investigate the report.

Furthermore, the officer testified Petitioner was acting nervous when approached and had his hands in his pockets. (App. p. 15, lines 22-p. 16, line 7). The officer also stopped Petitioner in an area known for drug activity. (App. p. 18, line 22). Furthermore, the officer testified the large sum of money Petitioner showed him was consistent with evidence Petitioner engaged in drug sales. (App. p. 18, lines 16-19). These factors, viewed in light of the officer's experience and the witness' description, is sufficient to create reasonable suspicion to believe Petitioner had engaged in the drug transaction described by the witness. See State v. Smith, 329 S.C. 550, 557, 495 S.E.2d 798, 802 (Ct. App. 1998) (finding the officer was justified in conducting a frisk search after the suspect behaved in an "edgy" manner); State v. Abrams, 322 S.C. 286, 288, 471 S.E.2d

[2] "A lot of times people remain anonymous. Obviously she didn't because she gave her name on the 911 tape, but that information was not given to me."

716, 717 (Ct. App. 1996) (frisking justified when suspect questioned in "area known for drugs"); Arvizu, 534 U.S. at 273 (allowing officers to make inferences and deductions based on their training and experience). Therefore, the officer was justified in asking Petitioner to submit to a pat down to ensure the officer's safety. See Illinois v. Wardlow, 528 U.S. 119, 124 (2000) (recognizing a person's presence in a high crime area is one relevant contextual consideration in a Terry analysis); see also State v. Banda, 371 S.C. 245, 253, 639 S.E.2d 36, 40 (2006) (frisks for officer safety justified because of the "indisputable nexus between drugs and guns").

The record is clear Petitioner was not under arrest when the officer sought to place him in investigatory detention. State v. Corley, 383 S.C. 232, 243, 679 S.E.2d 187, 193 (Ct. App. 2009) aff'd as modified, 392 S.C. 125, 708 S.E.2d 217 (2011) ("[T]he law is clear that the police may, in an investigative detention, briefly detain and question a person upon a reasonable suspicion, short of probable cause for arrest, that the person is involved in criminal activity."). Furthermore, Petitioner appeared to consent to the justified frisk until the moment he decided to assault the officer and flee. (App. p. 24, line 12-p. 25, line 23). Once Petitioner made the decision to punch the officer, his commission of a crime justified his arrest on that ground alone.

In light of the circumstances, Judge John properly denied Petitioner's motion to suppress. Therefore, even if the issue was preserved and not raised in the *pro se* response to the Anders brief, Petitioner would not have been successful on this issue on appeal. Accordingly, Petitioner has not shown he was prejudiced by appellate counsel's decision to not brief this issue.

Because the record contains significant probative evidence appellate counsel did not fail to raise a viable issue and Petitioner was not prejudiced by appellate counsel's

decision, the PCR judge did not err in denying the application for post-conviction relief. Wolfe, 326 S.C. at 163, 485 S.E.2d at 369.

CONCLUSION

For the foregoing reasons, the State respectfully requests this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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By: _____
ATTORNEYS FOR RESPONDENT

June 5, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Georgetown County

The Honorable Larry B. Hyman, Jr., Circuit Court Judge

Corey Jawan Robinson,

Petitioner,

v.

State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Jason P. Boan, Esquire
P.O. Drawer 15849
Surfside Beach, SC 29587

This 5th day of June, 2014

NORMA BIGBEE
LEGAL ASSISTANT