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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2012-CP-46-03398

Donell Maurice Hutchinson,
#339400,

Appellant,

v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Donell Maurice Hutchinson appeals the order of the Honorable Alison Renee Lee dated March 24, 2016 and entered March 31, 2016. Appellant received written notice of entry of this order on April 11, 2016.

April 13, 2016

G. Kirkland Hardymon (#80053)
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **NOTICE OF APPEAL** was served on this date upon the parties in this action by first-class United States mail and electronic mail, postage prepaid, addressed as follows:

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This the 13th day of April, 2016.

G. Kirkland Hardymon

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RAYBURN COOPER & DURHAM, P.A.

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April 13, 2016

South Carolina Court of Appeals
Jenny Abbott Kitchings, Clerk of Court
P.O. Box 11629
Columbia, SC 29211

Re: Donell Maurice Hutchinson, #339400 v. State of South Carolina (Case No. 2012-CP-46-03398) NOTICE OF APPEAL

Dear Clerk:

Enclosed for filing, please find a Notice of Appeal with regard to the above-captioned matter on behalf of Appellant Donell Maurice Hutchinson.

Thank you for your assistance and please feel free to contact me with any questions or concerns.

Very truly yours,

RAYBURN COOPER & DURHAM, P.A.

G. Kirkland Hardymon

GKH:kdg
Enc.

Cc: J. Rutledge Johnson, Assistant Attorney General (w/enc.)
Chris Epting, York Solicitor's Office (w/enc.)
Donell M. Hutchinson (w/enc.)

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF YORK
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2012-CP-46-03398

Donell Maurice Hutchinson, #339400	State of South Carolina
PLAINTIFF(S)	DEFENDANT(S)

Submitted by: _____	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge s/ Alisa Renee Lee **Judge Code** 2118 **Date** 3/24/16

For Clerk of Court Office Use Only

This judgment was entered on the 31st day of March, 20 16 and a copy mailed first class or placed in the appropriate attorney's box on this 31st day of March, 20 16 to attorneys of record or to parties (when appearing pro se) as follows:

Glen Kirkland Hardymon 227 W. Trade St. Ste 1200 Charlotte, NC 28202
ATTORNEY(S) FOR THE PLAINTIFF(S)

James Rutledge Johnson P.O. Box 11549 Columbia, SC 29211
ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____ **Clerk of Court** David Hamilton

STATE OF SOUTH CAROLINA COUNTY OF YORK	IN THE COURT OF COMMON PLEAS SIXTEENTH JUDICIAL CIRCUIT
Donell Maurice Hutchinson, #339400, Applicant, v. State of South Carolina Respondent.	Case No. 2012-CP-46-03398

This matter comes before the Court by way of an application for Post-Conviction Relief ("PCR"). Applicant Donell Hutchinson ("Applicant") filed the application on September 25, 2012. The State of South Carolina ("Respondent") made its Return on January 11, 2013. A hearing was convened November 19, 2014, at the York County Courthouse. Applicant was present at the hearing and was represented by counsel, Glen Kirkland Hardymon, Esquire ("Hardymon"). Respondent was represented by Assistant Attorney General J. Rutledge Johnson, Esquire. After reviewing all of the testimony and evidence presented at the hearing, along with a review of all records provided to the Court, the Court finds that there are no constitutional deprivations or other grounds on which to grant relief and denies and dismisses this application with prejudice.

PROCEDURAL HISTORY

Applicant presently is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. Applicant was indicted at the November 2009 term of the York County Grand Jury for Possession of Cocaine Base and Trafficking in Cocaine. Erik Delaney, Esquire, ("Delaney") represented Applicant on his charges. On February 23, 2010, Applicant proceeded to a jury trial before the Honorable Lee S. Alford. Applicant was found guilty and sentenced to confinement for ten years for Trafficking in Cocaine, 28-100 grams, 2nd offense, and three years, concurrent, for Possession of Crack Cocaine, less than one gram, 1st offense. A notice of appeal was filed on Applicant's behalf. The South Carolina Court of Appeals affirmed the Applicant's conviction and sentence. *See State v. Hutchinson*, 2012 WL 10841791, at *1 (Ct. App. May 2, 2012). The Remittitur was issued on May 21, 2012.

In his PCR application, Applicant alleges that he is being held unlawfully in custody for the following reasons: "(a) 6th Amendment, right to an effective counsel/during trial by jury;" and "(b) 4th Amendment, search and seizure claim." Concerning his first claim, Applicant argues that his trial counsel provided ineffective assistance of counsel because he: (1) failed to make a motion to challenge an underlying controlled buy; and (2) failed to obtain certain audio. The controlled buy and audio both were used to obtain the search warrant executed against Applicant. Concerning his closely-interrelated second claim, Applicant alleges that: (1) the affidavit used to obtain the search warrant did not have any statement regarding the reliability of the confidential informant ("CI") who provided the information necessary for obtaining the search warrant; and (2) the investigating officer improperly conducted the controlled buy.[1]

SUMMARY OF TESTIMONY PRESENTED AT EVIDENTIARY HEARING

At the evidentiary hearing, the Court had before it Applicant's trial transcript, the records from the York County Clerk of Court regarding the convictions, and Applicant's records from the South Carolina Department of Corrections.

Applicant presented testimony from Assistant Solicitor Chris Epting ("Epting") who prosecuted the case on behalf of Respondent. During the PCR hearing, Epting testified that he made a redacted recording, excluding the CI's voice, of the underlying transaction between Applicant and the CI. After making the redactions, Epting transcribed the recording. This transcript was admitted as Applicant's Exhibit 1 during the PCR hearing. Applicant also played the recording during the PCR hearing, and it was admitted as Applicant's Exhibit 2.

Upon cross examination, Epting explained that the event forming the basis for the search warrant was a "controlled buy" of crack cocaine, and that the investigating officers followed the procedure required for conducting controlled buys.[2] Epting explained that the CI informed the

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[1] During the PCR hearing, Applicant focused specifically on his trial counsel's failure to make a motion to suppress evidence obtained through the search warrant. The Court, thus, will interpret Applicant's 6th and 4th Amendment claims as being a claim of ineffective assistance of counsel.

[2] The investigating officers executed the controlled buy in the following manner:

> The CI was searched with no contraband being located. The CI's vehicle was searched with no contraband being located. The CI was given identifiable government funds. The CI was fitted with electronic surveillance equipment. The CI went to [Applicant's residence] and met with [Applicant]. The CI purchased a quantity of crack from [Applicant]. Officers monitored the transaction via electronic listening device. The CI left [Applicant's residence] and met with officers at a predetermined location. Officers

police that he purchased the drugs from Applicant at Applicant's apartment.[3] Lastly, Epting testified that when the police conducted the search warrant at Applicant's apartment, he was found flushing drugs down the toilet. The controlled buy was used only to obtain the search warrant; it was not the basis for Applicant's possession and trafficking of cocaine charges.

Applicant then testified at the PCR hearing. Applicant testified that it was important for Delaney to obtain the underlying audio because the audio would have shown that it was not Applicant's voice in the recording, and thus, proven that Applicant did not sell contraband to the CI. Although, according to Applicant, Delaney constantly informed him that he would obtain a copy of the audio, he never did.

Lastly, Delaney, Applicant's trial counsel, testified that the solicitor's office does not turn over recordings used to obtain search warrants. Delaney also testified that he filed a motion to suppress the evidence that was obtained by the search warrant. The trial judge, however, denied the motion. The audio was used only to obtain the search warrant—it was not used at trial.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony provided at the PCR hearing. This Court, further, has had the opportunity to observe the witnesses presented at the hearing, pass upon their credibility, and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. § 17-27-80 (1976).

I. Ineffective Assistance of Counsel

Applicant argues Delaney provided ineffective assistance of counsel for not making a motion to suppress evidence that was obtained through the search warrant.

In a PCR action, the applicant bears the burden of proving the allegations in his application. *Hyman v. State*, 397 S.C. 35, 42, 723 S.E.2d 375, 378 (2012). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be

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> recovered the crack the CI purchased from [Applicant]. The CI was searched again with no contraband being located. The CI's vehicle was searched again with no contraband being located.

[3] Applicant's mom leased the apartment but Applicant would sometimes stay there. Trial Transcript of Record at 194:11–23; 206:13–21. Applicant also listed the apartment as his address on his driver's license. Trial Transcript of Record at 207:19–24.

relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). Claims of ineffective assistance of counsel are evaluated under a two-prong test. *See Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). First, the applicant must prove that counsel's performance was deficient. *Holden v. State*, 393 S.C. 565, 572, 713 S.E.2d 611, 615 (2011). Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). To receive relief, a PCR applicant must overcome this presumption. *Cherry v. State*, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Suber*, 371 S.C. at 558, 640 S.E.2d at 886.

It is well settled that "great deference [is provided] to a magistrate's determination of probable cause." *State v. Dupree*, 354 S.C. 676, 683, 583 S.E.2d 437, 441 (Ct. App. 2003). Courts acknowledge that affidavits used for obtaining search warrants "are not meticulously drawn by lawyers, but are normally drafted by non-lawyers in the haste of a criminal investigation." *State v. Arnold*, 319 S.C. 256, 260, 460 S.E.2d 403, 405 (Ct. App. 1995). Affidavits, thus, are "viewed in a common sense and realistic fashion." *State v. Sullivan*, 276 S.C. 610, 617, 230 S.E.2d 621, 624 (1976). In determining whether to issue a search warrant, a magistrate must only decide whether "under the totality of the circumstances set forth in the affidavit, 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 the particular place to be searched." *Dupree*, 354 S.C. at 685, 583 S.E.2d at 442.

"An informant's controlled buy of drugs can constitute probable cause sufficient for a magistrate to issue a warrant." *Id.* at 687, 583 S.E.2d at 443. A "'controlled purchase of narcotics . . . [occurs when] there is 'physical proximity and active participation in the informant's intrigue' by the police, so that it is not 'independent police work' which corroborates, but rather 'the police corroboration is a co-ordinant and intrinsic part of the informer's operation[.]'" *Id.* at 689, 583 S.E.2d at 444 (quoting Wayne R. Lafave, *Search and Seizure: A Treatise on the Fourth Amendment*).

In this case, the investigating officer, Officer Michelle Jean Del Castillo ("Del Castillo"), and other officers, conducted the controlled buy in the following manner:

> The CI was searched with no contraband being located. The CI's vehicle was searched with no contraband being located. The CI was given identifiable government funds. The CI was fitted with electronic surveillance equipment. The CI went to [Applicant's residence] and met with [Applicant]. The CI purchased a quantity of crack from [Applicant]. Officers monitored the transaction via electronic listening device. The CI left [Applicant's residence] and met with officers at a predetermined location. Officers recovered the crack the CI purchased from [Applicant]. The CI was searched again with no contraband being located. The CI's vehicle was searched again with no contraband being located.

Search Warrant, Attachment #1, Search Warrant Affidavit.

Applicant argues that since Del Castillo did not visually watch the CI purchase drugs from Applicant, the controlled buy procedure was ineffective under *United States v. Clyburn*, 24 F.3d 613 (4th Cir. 1994), and thus, did not provide sufficient probable cause for the magistrate to issue the underlying search warrant. Accordingly, Applicant contends that Delaney was ineffective as trial counsel for not seeking to suppress the evidence that was obtained through use of the search warrant. The Court disagrees.

In *Clyburn*, the defendant was convicted of various drug charges after selling drugs to confidential informants in controlled buys. *See Clyburn*, 24 F.3d at 615. These controlled buys were used as a basis for the search warrant ultimately leading to the discovery of drugs at the defendant's residence. *See id.* In a footnote, the *Clyburn* court noted that the district court had explained that a controlled purchase involved the following procedure:

> [L]aw enforcement officers search the informant to make sure that [he] does not have any illegal narcotics before the purchase; officers provide the informant with marked bills with which to purchase the drugs; officers place a body wire on the informant and monitor all conversations during the purchase; the informant is placed under visual surveillance during the purchase; and the informant turns over the contraband to the officers immediately after the purchase.

Clyburn, 24 F.3d at 615 n. 1.

Before trial, Delaney made a motion to suppress the evidence that was obtained through the search warrant based upon the CI's reliability. Delaney argued that "as far as the affidavit in this case, it did not contain any testimony or any statements as to the prior, you know, level of

credibility that the CI has, as far as the reliability of the CI and not as the Drug Enforcement Unit." Trial Transcript of Record at 49:24 to 50:1–3. The trial judge, however, denied Delaney's motion. *See* id. at 50:22–23. The trial judge explained that:

> [D]eference is given to the magistrate [as to] what information the magistrate had at that time in his determination or her determination as whether there was probable cause, deference is given to what information he had at that time; although, obviously, court looks at the search warrant, but the magistrate made the determination at that time there was probable cause to issue the search warrant. The Court finds that based on what's in the testimony today and what's in the search warrant, that there was probable cause for the warrant, the search warrant to be issued. I, therefore, deny your motion to suppress any evidence seized in regards to the search warrant.

Trial Transcript of Record at 50:25 to 51:1–12. Applicant contends that Delaney, in his motion to suppress, should have specifically challenged the manner in which Del Castillo conducted the controlled buy and was ineffective as trial counsel for failing to do so. Applicant, through his PCR counsel, argued that the controlled buy in his case was improperly conducted because the investigating officers did not visually see Applicant sell drugs to the CI.

Even if Delaney was deficient in not specifically contesting the controlled buy procedure, Applicant cannot satisfy the second prong of the ineffective assistance of counsel analysis. Applicant cannot show that "but for" Delaney's failure to challenge the controlled buy, the trial result would have been different. Applicant improperly relies on *Clyburn* as establishing a strict procedure that *must* be followed exactly when conducting controlled buys. In *Clyburn*, the defendant did not challenge the controlled buy procedure that was used as a basis for the State obtaining the search warrant against him. The defendant, instead, argued a separate and distinct issue— "that the magistrate's consideration of sworn oral testimony supplementing the written warrant affidavit violated both state and federal law." *Clyburn*, 24 F.3d at 615. The controlled buy procedure, thus, was not at issue in *Clyburn*. As explained by a North Carolina federal district court, the "*Clyburn* court was more concerned with whether an officer's unrecorded oral testimony may support a magistrate's judge's probable cause determination than with codifying specific procedures for controlled buys, which it addresses in a footnote simply as a reference to the district court's description of those procedures." *United States v. Cubias-Rivas*, 2009 WL 4127555 at *4 (E.D.N.C. Western Div. Nov. 25, 2009).

In *State v. Dupree*, 354 S.C. 676, 689, 583 S.E.2d 437, 444 (Ct. App. 2003), the Court of Appeals held that a properly conducted controlled buy "alone can provide facts sufficient to establish probable cause for a search warrant." The controlled buy procedure mentioned in *Clyburn* did not establish a procedure that law enforcement *must* follow *exactly* to properly execute controlled buys. In *Dupree*:

> [The officer] searched the informant prior to the controlled buy at the mobile home. At this time, the informant had no drugs on his person. The officer observed the informant enter and exit the mobile home. When the informant returned, [the officer] searched him again. At this time, the informant was in possession of crack cocaine and reported obtaining the crack cocaine in the mobile home for which the warrant was obtained. This amounts to sufficient police corroboration of an informant's information based on the controlled buy.

Id. at 690, 583 S.E.2d at 445. As indicated above, the officer did not provide the informant marked bills with which to purchase the contraband or place a body wire on the informant as would be required if *Clyburn* established a controlled buy procedure that must be followed as Applicant contends. The *Dupree* court upheld this procedure as a properly executed controlled buy providing probable cause for the magistrate to issue the search warrant. Accordingly, *Dupree* establishes that the controlled buy procedure mentioned in *Clyburn* is not the required standard to support a search warrant.

Furthermore, in *United States v. Casanova*, the United States Fourth Circuit Court of Appeals was presented with the same arguments Applicant presents here. *Casanova*, 168 F.3d 483 at *2 (4th Cir. Jan. 5, 1999) (unpublished table decision). In *Casanova*, the defendant argued that the two controlled buys used as a basis for the magistrate's finding of probable cause to issue the search warrant were improperly conducted. *See id.* Similar to Applicant in this case, the defendant in *Casanova* "attempt[ed] to distinguish *Clyburn* factually by noting that the informant in that case wore a body wire and was under visual surveillance during the entire buy." *Id.* The Fourth Circuit quoted one of its earlier cases and explained that "'[b]ecause of the Fourth Amendment's strong preference for searches conducted pursuant to warrants, reviewing courts must resist the temptation to invalidate warrants by interpreting affidavits in a hypertechnical, rather than a commonsense, manner.'" *Id.* (quoting *United States v. Blackwood*, 913 F.2d 139, 142 (4th Cir. 1990) (internal quotations omitted)). The *Casanova* court found that the defendant's "argument invited the court to employ a hypertechnical analysis by assigning a

lengthy and specific definition to the concept of a 'controlled buy.'" *Id.* The *Casanova* court explained that:

> For each controlled buy referenced in the affidavits, police in this case provided the informant with cash, made certain that their informant was not carrying contraband when he/she entered the apartment building, and waited a short period of time. Both times, when the informant returned, she/he was in possession of crack cocaine and reported obtaining the cocaine in the apartment for which the warrant was obtained. This amounts to sufficient police corroboration of an informant's information based on the controlled buy. The magistrate judge had ample probable cause to issue the warrant[.]

Id. Thus, the *Casanova* court upheld the officer's execution of the controlled buys although the officer did not provide the informants with any wires or did not visually watch them enter and leave the apartment. In Applicant's case, the officers did provide the CI with a wire. Accordingly, Applicant's controlled buy was more "controlled" than the controlled buys upheld by the Fourth Circuit in *Casanova*. Therefore, in light of the above, even if Delaney was deficient in not specifically contesting the controlled buy procedure used in Applicant's case[4], there is not a "reasonable probability" that "but for" Delaney's failure to make a motion to suppress, Applicant's trial result would have been different—the magistrate possessed probable cause to issue the search warrant.

Applicant also contends that Delaney was ineffective as trial counsel for not obtaining the audio of the transaction between Applicant and the CI. This audio, according to Applicant, would have shown that Applicant did not, in fact, engage in a drug sale transaction with the CI. Even if Delaney was deficient as trial counsel in not obtaining this audio, Applicant would not be able to satisfy the second prong of the ineffective assistance of counsel analysis. Applicant cannot show that if Delaney obtained the audio, Applicant's trial result would have been different. As expressed above, the magistrate had probable cause to issue the search warrant. When the officers executed the search warrant at Applicant's residence, the officers testified at trial that they saw Applicant attempting to flush drugs down the toilet. *See* Trial Transcript of Record at 133:13–23; 109:10–23. The officers grabbed the drugs out of the toilet and retrieved them. *Id.* The audio, thus, would have done nothing to show that Applicant did not, in fact,

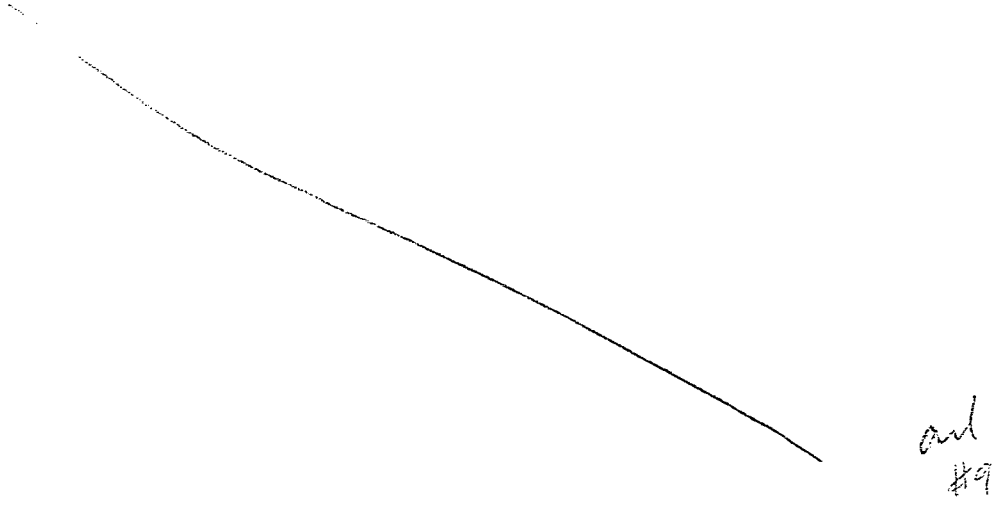
[4] In Delaney's pre-trial motion to suppress, he only contested the CI's reliability. He did specifically challenge the controlled buy procedure itself. *See* Trial Transcript of Record at 49:24 to 51:14.

possess the subject contraband at the time the search warrant was executed. The discovered contraband formed the basis for both his possession and trafficking of cocaine charges as the drugs were in his possession or control, or he had dominion over the drugs. *See* Trial Transcript of Record at 230:20–25 to 231:1:19. Accordingly, the trial result would not have been different if Delaney obtained the subject audio. Delaney, therefore, did not provide ineffective assistance of counsel.

CONCLUSION

Based on all of the foregoing, this Court finds that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for PCR is denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a Notice of Appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on an applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.



ORDER

IT IS THEREFORE ORDERED:

1. That the Application for PCR shall be denied and dismissed with prejudice; and
2. The Applicant shall remain remanded to the custody of Respondent.

AND IT IS SO ORDERED.

ALISON RENEE LEE
Presiding Judge

March 24, 2016
Columbia, South Carolina

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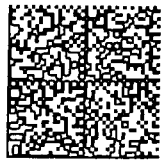

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