STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

Honorable Alison Renee Lee, Circuit Court Judge

DONELL HUTCHINSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-000808

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR court err in finding that, although trial counsel's performance was deficient for failing to obtain the audio recording of the purported controlled buy that the State relied on for probable cause to secure a search warrant of Petitioner's residence, Petitioner was unable to prove prejudice when the audio recording did not support the State's contention that Petitioner sold drugs to the confidential informant?

STATEMENT

Indictment, Trial, and Direct Appeal

Petitioner was indicted by the York County Grand Jury on November 12, 2009 for trafficking in cocaine and possession of cocaine base. App. 330 - 332. On February 22-23, 2010, Petitioner proceeded to trial before the Honorable Lee S. Alford and jury. App. 1 - 272. Erik Delaney and John Cummings represented Petitioner. Assistant Solicitors Christopher Epting and Jessica Holland represented the State.

After five hours of deliberation, the jury found Petitioner guilty as charged. App. 249, l. 22 - 259, l. 23. Judge Alford sentenced Petitioner to a total sentence of ten years of imprisonment. App. 270, l. 17 - 271, l. 18. Petitioner filed a timely notice of appeal and was represented on appeal by Elizabeth Franklin-Best. The South Carolina Court of Appeals affirmed Petitioner's convictions in an unpublished opinion. *State v. Hutchinson*, 2012 WL 10841791, at *1 (Ct. App. May 2, 2012).

Post-Conviction Relief Action

Petitioner filed an application for post-conviction relief (PCR) on September 25, 2012. App. 273 - 280. The State filed a Return on January 11, 2013. App. 281 - 285. An evidentiary hearing was held before the Honorable Allison R. Lee on November 19, 2014. App. 286 - 317. Glen Hardymon represented Petitioner. Assistant Attorney General J. Rutledge Johnson represented the State. Judge Lee denied Petitioner's application in a written order of dismissal filed on March 31, 2016. App. 318 - 328.

This petition follows.

ARGUMENT

The PCR court erred in finding that, although trial counsel's performance was deficient for failing to obtain the audio recording of the purported controlled buy that the State relied on for probable cause to secure a search warrant of Petitioner's residence, Petitioner was unable to prove prejudice when the audio recording did not support the State's contention that Petitioner sold drugs to the confidential informant.

Relevant Facts

In July of 2009, a confidential informant approached Rock Hill Police Department Officer Michell Del Catillo Reiten offering to buy drugs from Petitioner. App. 44, ll. 15-24. Reiten accepted the informant's offer. On July 24, 2009, the informant was given money to buy drugs from Petitioner. App. 45, ll. 4-24. The informant and his vehicle were searched for contraband at the police station.

Police also fitted the informant with an audio recording device. App. 42, ll. 2-22. The police did not visually track the informant. In fact, the police did not see the informant until he returned from the alleged controlled buy with thirty grams of cocaine he claimed to have bought from Petitioner. App. 164, ll. 5-19.

Based on this information, law enforcement sought a search warrant for Petitioner's mother's apartment, where Appellant lived and where the informant claimed the drug purchase occurred. Officer Rayford Ervin appeared in front of a magistrate judge to secure the warrant. Officer Ervin had no first-hand knowledge of the controlled buy operation and was totally reliant on the information provided to him by Officer Reiten. App. 40, l. 3- 4.

Officer Ervin gave no supplemental testimony. His affidavit simply stated that "'the affiant has received information from a confidential informant that crack was being sold from'" Petitioner's residence. *Id.* Despite not being provided with information about the informant's

reliability, other than that he had been under "audio surveillance," the magistrate found that probable cause existed to search Petitioner's apartment. App. 47, l. 1 - 49, l. 14.

The police raided Petitioner's apartment on July 31, 2013. *Id.* Several people were at the residence, including Petitioner. Two hundred twenty five dollars, but no drugs were found on Petitioner's person. App. 105, ll. 2-7. At trial, police would claim that Petitioner was in the bathroom attempting to bags of cocaine down the toilet when they raided his apartment. App. 96, l. 4 - 100, l. 6.

By contrast, Petitioner testified that he was not in the bathroom when the police entered the apartment, but was standing outside the apartment's hall closet - adjacent to the bathroom - where he kept his clothes. App. 195, l. 8 - 204, l. 17. He also stated that the two hundred twenty five dollars were from his car and airplane mobile detailing business. App. 191, l. 19 - 194, l. 6.

The police did not take any photographs of the apartment or of where they claimed to have found the cocaine. Law enforcement searched the entire house, but found no scales, no baggies, and no packaging materials. App. 99, l. 2- 100, l. 25.

Pre-Trial Motion to Suppress Evidence Seized on the Grounds that there was no Probable Cause to Issue the Search Warrant.

At a pre-trial hearing on the defense's motion to suppress the evidence seized during the execution of the search warrant, Ervin would admit that there was nothing in the affidavit that stated why police thought the informant was reliable. App. 41, l. 9 - 42, l. 22. Further, Ervin conceded that he did not know who the informant was and that he had not listened to the audio recording of the controlled buy referenced in the affidavit, nor had it been turned over to the defense. *Id.*

Despite not having been present during the magistrate's determination of probable cause, Officer Reiten also testified at the pre-trial hearing. She claimed that the confidential informant

had been in reliable on six other occasions and that he identified Petitioner in a photo line-up. App. 44, l. 8 - 45, l. 24. None of this information had been presented to the magistrate.

On cross-examination, Officer Reiten also admitted that Officer Ervin's affidavit contained no information as to the confidential informant's reliability. App. 47, ll. 2-22. Reiten also conceded that police did not visually surveil Petitioner's residence or even follow the informant after he left the police station. App. 47, l. 15 - 49, l. 7.

The only surveillance they maintained was the audio transmitted by the recording equipment. *Id.* Rieten stressed that the "audio surveillance" allowed law enforcement to exercise a large degree of control over the informant and that the audio corroborated the informant's claim of having purchased drugs from Petitioner. *Id.*.

The trial court denied the defense's motion to suppress. App. 50, l. 10 - 51, l. 12. The trial court reasoned, somewhat circuitously that:

> Officer Del Castillo did say that she took Officer Ervin by the house and told him they made the buy there from Donnell Hutchinson. So he was aware of that at the time he went to the magistrate and got the affidavit, so he was aware of that.
>
> Well, the motion to suppress, I will deny your motion to suppress. I think there was probable cause for the -- and, of course, I can go through all the cases, but **basically deference is given to the magistrate 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 that 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 . . . .

App. 50, l. 10 - 51, l. 12 (*emphasis added*). The case then proceeded to trial. During deliberations, the jury asked to rehear testimony regarding the search warrant as well as Petitioner's testimony. App. 251, ll. 1-21.

Three and a half hours into deliberations, the jury reported to the trial court that they were deadlocked. The trial court then provided an *Allen*[1] charge. App. 252, l. 22 - 255, l. 17. An hour and fifteen minutes after the *Allen* charge, the jury returned a verdict of guilty on all counts. App. 256, l. 3 - 259, l. 24

PCR Evidentiary Hearing

At the PCR hearing, Petitioner entered into the record a recording and a transcript of the "audio surveillance" police conducted on the confidential informant during the alleged controlled buy. App. 290, l. 7 - 291, l. 25; App. 333 - 335; *see also* Applicant's Exhibit #2[2]. Petitioner argued that the search warrant was issued without probable cause.

The magistrate had no way to independently assess the reliability of the informant because Officer's Ervin's affidavit did not provide any information on the informant's reliability beyond stating that the informant performed a controlled buy while under "audio surveillance" . App. 291, ll. 10-25. Moreover, Petitioner argued that the audio surveillance recording did not support Ervin's affidavit's claim that a controlled buy had occurred. *Id.* Petitioner averred that trial counsel was ineffective for failing to obtain the audio recording prior to trial. *Id.*

PCR Hearing Testimony of Assistant Solicitor Epting

Assistant Solicitor Epting identified both the audio recording and the transcript of the audio recording. Epting explained, when questioned by the Assistant Attorney General, that:

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[1] *Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154 (1896).

[2] Applicant's Exhibit #2 is the audio recording from the confidential informant and is on file with this Court.

> It's standard procedure on cases like this to -- and I believe this was established in the transcript to get an informant, wire them up in some way, search them to insure that they have no crack cocaine on their person initially. Give them a vehicle that has also been secured and searched. Send them out with surveillance sufficient enough to insure that they are not making other stops but also bare enough to where other people are not seeing them following them and thereby possibly blowing the deal.

App. 295, ll. 17-25.

Epting further claimed that the "audio surveillance" and the informant's past records demonstrated the informant's reliability, despite the magistrate not being informed of the nature of the audio recording or having been informed of the informant's past reliability. App. 295, l. 11 - 297, l. 19. On re-direct examination, Epting reluctantly conceded that was no officer watching the informant as he approached and entered the apartment. App. 298, ll. 14-25. Epting also stressed that the "audio surveillance" recorded the informant asking "[w]here's Donell?" App. 300, ll. 3-20.

PCR Hearing Testimony of Petitioner

Petitioner testified that he repeatedly asked trial counsel to obtain a copy of the "audio surveillance" tapes, but that counsel never did so. App. 301, l. 11 - 302, l. 20.

PCR Hearing Testimony of Trial Counsel

Trial counsel recalled that he moved to suppress the evidence found during the execution of the search warrant on the grounds that the police failed to present the magistrate with any information about the reliability of the confidential informant. App. 303, ll. 15-23. Counsel admitted that he did not adequately preserve his pretrial motion because he failed to renew it when the State entered the drugs obtained during the search into evidence. App. 304, ll. 1-11.

Counsel recollected that the police never saw Petitioner sell the informant drugs and that the only why the police could know "what was going on" was by listening to the audio

recording. *Id.* at ll. 12-18. After reviewing the transcript of the "audio surveillance", trial counsel conceded that "**I don't see anything here that relates to -at least the conversations that I am reading that is transcribed, I don't see a drug sale.**" App. 305, ll. 1-20; App. 333 - 335.

Counsel could not specifically recall whether he ever tried to obtain a copy of the "audio surveillance", but believed that the Solicitor's office would have tried to avoid giving him a copy and that he would have had to seek a court order. *Id.* "The best I can remember that would have been my response to [Petitioner], I cannot get [the audio] for you Donell." *Id.*

In brief closing arguments, Petitioner stressed that trial counsel could have obtained a copy or a transcript of the audio surveillance, but that counsel had candidly admitted that he did not attempt to obtain any copy of it. App. 307, l. 3 - 310, l. 19. Petitioner argued that had, trial counsel secured a copy of the "audio surveillance" the evidence seized during the search warrant would have most likely been suppressed because the "audio surveillance" did not "contain any evidence that the confidential informant purchased drugs from Mr. Hutchison." App. 308, ll. 8-19.

Order of Dismissal

In denying Petitioner relief, the PCR court concluded that trial counsel was not ineffective for failing to obtain the audio recording of the alleged controlled buy. App. 326. The PCR court determined that trial counsel rendered deficient performance in failing to secure a copy of the audio, but that "Applicant cannot show that if [defense counsel] obtained the audio. Applicant's trial result would have been different." *Id.* In reaching this conclusion, the PCR court held that the magistrate had probable cause to issue the search warrant as the techniques used in the controlled buy were sufficiently reliable. *Id.*

Discussion

To establish ineffective assistance of counsel, the Petitioner must satisfy the two-prong test set forth in *Strickland*, 466 U.S. 668. "First, a defendant must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Cherry v. State,* 300 S.C. 115, 386 S.E.2d 624 (1989) (internal citations omitted). "The second prong of the *Strickland* test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

The defendant is required to overcome the presumption that counsel was effective in order to receive relief." *Id.* at 118, 386 S.E.2d at 625 (internal citations omitted). Therefore, where ineffective assistance of counsel is alleged as a ground for PCR relief, the applicant must prove that "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." *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting *Strickland*, 466 U.S. at 692).

The United States Supreme Court has held that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691; *See Wiggins v. Smith*, 539 U.S. 510, 527 (2003) (noting "[i]n assessing the reasonableness of an attorney's investigation, . . . a court must not only consider the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further").

This Court has also held that trial counsel has a duty "to discover all reasonably available mitigation evidence and reasonable available evidence tending to rebut any aggravating evidence

introduced by the State." *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008); *See Lounds v. State*, 380 S.C. 454, 460, 670 S.E.2d 646, 649 (2008) (finding "while the scope of a reasonable investigation depends on a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case") (internal quotations omitted); *see also Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007) (finding "[w]ithout a doubt, [a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation") (internal quotation omitted).

Deficient Performance

In this case, the PCR court correctly ruled that trial counsel was ineffective for failing to obtain the "audio surveillance" of the alleged controlled buy. App. 326. Counsel was clearly aware of the audio's existence and frankly admitted that his failure to obtain a copy of it was an error. App. 304, l. 12 - 306, l. 1.

Prejudice

Contrary to the PCR court's determination, Petitioner was prejudiced by defense counsel's deficient performance. Had counsel obtained the audio recording, there was a fair probability that the trial court would have suppressed the evidence seized during the execution of the search warrant as the audio recording - contrary to law enforcement's averments when seeking the search warrant - did not corroborate the informant's claim of having purchased drugs from Petitioner. App. 326 - 327. *See Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (finding trial counsel's deficient performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result") (quoting *Strickland*, 466 U.S. at 692).

The affidavit in support of issuing the search warrant was sworn out by Ervin. Ervin had no direct knowledge of the controlled buy and was completely dependent on information supplied to him by Officer Rieten. App. 40, l. 12 - 42, l. 22. **At trial, Ervin admitted that his affidavit contained no statements as to the reliability of the confidential informant.** *Id.* His affidavit simply stated that the informant was searched prior to the controlled buy and that the audio of the controlled buy had been recorded by the State.

A search warrant may only be issued upon a finding of probable cause by a neutral and detached judge. *U.S. v. Leon,* 468 U.S. 897, 914, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). The magistrate should determine probable cause based on all of the information available to the magistrate at the time the warrant was issued. *State v. Dupree,* 354 S.C. 676, 684, 583 S.E.2d 437, 441 (Ct. App. 2003).

Magistrates must make a practical, common-sense decision of whether, given the totality of the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying the information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *State v. King,* 349 S.C. 142, 150, 561 S.E.2d 640, 644 (Ct. App. 2002). As the United States Supreme Court held in *Illinois v. Gates*:

> An affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause, and [a] wholly conclusory statement... [fails] to meet this requirement. ***An officer's statement that "affiants have received reliable information from a credible person and believe" that heroin is stored in a home, is likewise inadequate. This is a mere conclusory statement that gives the magistrate virtually no basis at all for making a judgment regarding probable cause.*** Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others.

462 U.S. 213, 238, 103 S.Ct. 2317, 2333-2334 (1983) (internal citations omitted) (*emphasis added*).

In determining whether the information relied upon by law enforcement is reliable, no one factor is necessary or sufficient to establish probable cause. *Dupree*, 354 S.C. at 685, 583 S.E.2d at 442 (2003). Probable cause arises from the totality of the circumstances, and "[a] deficiency in one [factor] may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." *State v. Gentile*, 373 S.C. 506, 515-516, 646 S.E.2d 171, 175-176 (Ct. App. 2008).

In reviewing an application for a search warrant, a magistrate must make an independent determination of probable cause and not serve as a "rubber stamp for the police." *Leon,* 468 U.S. at 914, 104 S.Ct. 3405. Evidence obtained in violation of the Fourth Amendment is inadmissible in both state and federal court. *See State v. Forrester,* 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001). In terms of a circuit court's review of a magistrate's finding of probable cause, "[t]he duty of the reviewing court is to ensure the issuing magistrate had a substantial basis upon which to conclude that probable cause existed." *State v. Baccus,* 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006).

Here, the magistrate had to rely on Ervin's affidavit that the audio tape corroborated the confidential informant's assertion that a controlled buy occurred. The search warrant affidavit is otherwise devoid of information from which a neutral and detached magistrate could make an independent assessment of the existence of probable cause. *See State v. Johnson*, 302 S.C. 243, 395 S.E.2d 167 (1990) (holding that an affidavit that does not provide sufficient information concerning the informant's reliability will not support a finding of probable cause.); *see also State v. Adolphe*, 314 S.C. 894, 41 S.E.2d 832 (Ct. App. 1994) (holding that magistrate failed to

act as a neutral and detached interposition between the police and the citizen where the affidavit did not contain any information regarding the reliability of the informant nor was there any corroboration.).

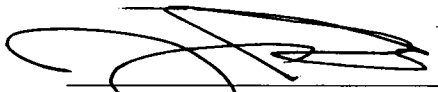
In actuality, the audio recording does not evidence a drug deal, most of the conversation between the informant and someone identified as Donell consists of the informant asking him for a job. App. 333 - 335. Had trial counsel obtained the audio recording, he would have known that the recording could not bolster the informant's reliability and was not evidence of a drug sale.

Accordingly, a central pillar of the State's probable cause argument would not have held up under scrutiny before the circuit court. Had the defense attorney obtained a copy of the audio recording prior to trial, the trial court would have likely overruled the magistrate's finding of probable cause because there was no other evidence presented to the magistrate as to the informant's reliability. This would have led to the suppression of the drugs found during the search of Petitioner's apartment.

Therefore, "there is a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." App. 1041 – 1042; *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted); *See Strickland*, 466 U.S. 668.

CONCLUSION

Based on the foregoing reasons, Petitioner Donell Hutchinson's petition for writ of certiorari should be granted to allow full briefing on the issue.



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of November, 2016.

STATE OF SOUTH CAROLINA

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Certiorari to York County

Honorable Alison Renee Lee, Circuit Court Judge

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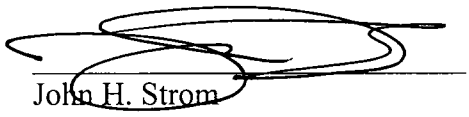
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Justin Hunter, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Donell Hutchinson, #339400, at Chester County Prison, 123 Dawson Drive, Chester, SC 29706, this 18th day of November, 2016.



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 18th day of November, 2016.

(L.S)
Notary Public for South Carolina
My Commission Expires: 5/12/2025