STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Oconee County

Honorable R. Scott Sprouse, Circuit Court Judge

DAN L. TEMPLE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-001756

BRIEF OF PETITIONER

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ISSUE PRESENTED

Did the post-conviction relief (PCR) judge err by finding trial counsel was not ineffective when counsel failed to preserve for appellate review the admission of drug evidence seized as the result of an unlawful search where counsel moved pretrial to suppress the drug evidence but failed to contemporaneously object when the drugs were admitted into evidence, and where Petitioner was prejudiced because if counsel had properly preserved the objection, the appellate court would have considered the merits, corrected the trial court's error in admitting the drugs seized pursuant to an unlawful search, and suppressed the drugs?

STATEMENT OF THE CASE

An Oconee County Grand Jury indicted Petitioner on January 23, 2013 for possession with intent to distribute cocaine base, third or subsequent offense, and possession of a controlled substance, second or subsequent offense. App. 589-592. His case was called to trial on March 18, 2013 before the Honorable Alexander S. Macaulay, and a jury. App. 1. Assistant Solicitors Lindsey Simmons and Blair Stoudemire represented the state, and E. Delane Rosemond represented Petitioner. App. 1.

On March 21, 2013, the jury found Petitioner guilty of the lesser included offense of possession of cocaine base and possession of a controlled substance. App. 404, ll. 8-24. Judge Macaulay sentenced Petitioner to ten years' imprisonment for possession of cocaine base, third offense, and one year for possession of a controlled substance, second offense. He ordered the sentences be served consecutively for a total of eleven years' imprisonment. App. 418, ll. 4-25.

The Court of Appeals affirmed Petitioner's convictions and sentence. State v. Temple, Op. No. 2015-UP-061 (S.C. Ct. App. filed February 5, 2015); App. 486-487.

On March 16, 2015, Petitioner filed an application for post-conviction relief (PCR). App. 488-497. The state filed a return to this application dated May 6, 2016. App. 498-505. The matter proceeded to an evidentiary hearing on June 6, 2016 before the Honorable R. Scott Sprouse. App. 506. Assistant Attorney General Johanna C. Valenzuela represented the state, and Hugh W. Welborn represented Petitioner. App. 506. By order filed August 15, 2016, the PCR court denied Petitioner relief. App. 564-571.

On March 23, 2017, Petitioner filed a petition for writ of certiorari with this Court. The state filed a return to this petition on September 6, 2017. By order dated March 28, 2018, this Court

granted the petition and ordered further briefing pursuant to Rule 243(j), SCACR. This brief of petitioner follows.

STANDARD OF REVIEW

The standard of review in post-conviction relief (PCR) cases depends on the specific issue before the Court. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). The Court defers to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Id. (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016)). The Court reviews questions of law de novo, with no deference to trial courts. Id. at 180-181, 810 S.E.2d at 839-840 (citing Sellner, 416 S.C. at 610, 787 S.E.2d at 527).

STATEMENT OF FACTS

On July 24, 2012, Investigator Tim Hunnicutt with the Seneca Police Department obtained a search warrant to search Room 103 of the Town and Country Motel located at 320 Bypass 123, Seneca, South Carolina. App. 187, ll. 2-20. In his affidavit supporting the search warrant, Investigator Hunnicutt averred:

1. That the affiant, Tim Hunnicutt, is an Investigator in the Narcotics Division with the Seneca Police Dept. and has been involved in numerous narcotics investigations and had been a sworn law enforcement officer for approximately eleven (11) years.

2. That during this time, the affiant has investigated various types of narcotic cases and has participated in the investigation, apprehension and arrest of numerous narcotic violators.

3. That on July 17, 2012 an undercover operative working under the direction of the Seneca Police Department was distributed a quantity of crack cocaine from Dan Temple [Petitioner] in the area of the 100 block of Bypass 123 Seneca, SC.

4. That on July 17, 2012 an undercover operative working under the direction of the Seneca Police Department/Oconee Sheriff's Office was distributed a quantity of crack cocaine from Dan Temple [Petitioner] in the area of the 100 block of Bypass 123 Seneca, SC.

5. That on July 23, 2012 an undercover operative working under the direction of the Seneca Police Department was distributed a quantity of crack cocaine from Dan Temple [Petitioner] in the area of the 1000 block of Bypass 123 Seneca, SC.

6. Within the last 72 hours an undercover operative working under the direction of the Seneca Police Department was distributed a quantity of lortabs from Dan Temple [Petitioner] at 318 Bypass 123 in Seneca, SC. Temple [Petitioner] was seen walking to and from the Town & County Motel.

7. Within the last 72 hours an undercover operative working under the direction of the Seneca Police Department was given a counterfeit 100 dollar bill by Dan Temple [Petitioner] at 318 Bypass 123. He asked the undercover operative to take it to a store and exchange it for real US currency. The undercover operative turned the counterfeit money over to agents. Agents gave the undercover operative 100 dollars in documented funds. The undercover operative met with Dan Temple [Petitioner] at the Town &

> Country Motel and gave [T]emple [Petitioner] the documented funds. Temple [Petitioner] was observed by agents exiting and re-entering room 103 at Town & Country Motel.
>
> 8. Based upon the Undercover Operation on the above listed dates, establishing a continuing criminal enterprise, the affiant believes illegal drugs, proceeds from illegal drug transactions, and drug paraphernalia and counterfeit money will be present at this residence.

Supp. App. 5.

The following morning, officers executed the search warrant at Room 103 of the Town and Country Motel. App. 114, l. 22 – 115, l. 19; App. 187, ll. 19-22. Officers rammed their way into the room and found Petitioner lying in bed on the side closest to the door. App. 116, ll. 12-24. After yelling at Petitioner to put his hands up, Officer Mike Teramano jumped on the bed to secure Petitioner. App. 117, ll. 1-6; App. 120, ll. 2-25. When Teramano jumped on the bed, Investigator B.J. McClure observed "either a purplish or a bluish-color prescription bottle fall out of the bed onto the floor closest to the door." App. 117, ll. 5-10. McClure did not see where this pill bottle came from. All he remembered was that the bottle fell from the bed. App. 119, l. 23 – 120, l. 1; App. 121, ll. 3-7. Investigator Hunnicutt also observed the pill bottle on the floor, but he too did not see from which direction the bottle came. App. 227, ll. 7-19. It was later determined that this pill bottle contained 1.10 grams of crack cocaine. App. 189, ll. 24-25; App. 250, ll. 18-22. For whatever reason, law enforcement never analyzed the bottle for fingerprints. App. 228, ll. 18-23.

The officers also found a "rock-like substance" and two "crack pipes" on the nightstand on the opposite side of the bed from where Petitioner was lying. App. 131, ll. 14-21; App. 134, l. 25 – 135, l. 4; App. 189, ll. 2-6; App. 204, ll. 7-10. The rock-like substance was determined to be 0.12 grams of crack cocaine. App. 250, ll. 11-16. Additionally, ten yellow pills of alprazolam, also known as Xanax, were found in the top drawer of the nightstand. App. 207, ll. 7-13; App. 251, ll. 1-16.

The officers found Petitioner's girlfriend, Crystal Henry, behind the door of the motel room. App. 121, ll. 18-25. Henry testified that the two had been dating for a little over a year and a half at the time the officers executed the search warrant. App. 139, ll. 7-13. She and Petitioner lived together in Room 103 of the Town and Country Motel. App. 135, ll. 14-15. On the day law enforcement rammed into their motel room, Henry was getting high. She admitted the crack pipes found in the room belonged to her. App. 140, ll. 10-18. She further admitted that the piece of crack found on the nightstand beside the bed also belonged to her. App. 140, ll. 19-21; App. 142, ll. 16-19; App. 146, ll. 2-4; App. 151, ll. 4-5. However, she denied that any of the other drugs found in the room, including the crack cocaine found in the pill bottle and the Xanax pills, belonged to her. App. 140, l. 19 – 141, l. 12.

James Willie Walker, Petitioner's former "classmate," testified that on July 24, 2012, the night before officers executed the search warrant at Petitioner's motel room, Crystal Henry asked him to take her to Pendleton to buy crack cocaine. App. 306, l. 8 – 308, l. 2. Walker drove Henry and Petitioner to Pendleton where Henry purchased two grams of crack. App. 308, ll. 3-12.

Petitioner and Henry were both arrested and charged with possession with intent to distribute crack cocaine and possession of a controlled substance. Tr. 139, l. 25 – 140, l. 3; App. 143, l. 25 – 144, l. 3.

Petitioner moved pretrial to suppress the evidence seized from his motel room in violation of the Fourth Amendment to the United States Constitution and Article 1, § 10 of the South Carolina Constitution. Supp. App. 1. Defense counsel argued that the search warrant, which was based solely on the alleged distribution of drugs and counterfeit currency by Petitioner to a confidential informant in the days preceding the search, was not supported by probable cause. More specifically, counsel argued the affidavit in support of the search warrant lacked any information as

to the confidential informant's reliability or whether the controlled buys were properly conducted. App. 46, ll. 7-16; App. 50, l. 7 – 51, l. 2; App. 52, l. 25 – 53, l. 4. Again, the affidavit in support of the search warrant alleged:

1. That the affiant, Tim Hunnicutt, is an Investigator in the Narcotics Division with the Seneca Police Dept. and has been involved in numerous narcotics investigations and had been a sworn law enforcement officer for approximately eleven (11) years.

2. That during this time, the affiant has investigated various types of narcotic cases and has participated in the investigation, apprehension and arrest of numerous narcotic violators.

3. That on July 17, 2012 an undercover operative working under the direction of the Seneca Police Department was distributed a quantity of crack cocaine from Dan Temple [Petitioner] in the area of the 100 block of Bypass 123 Seneca, SC.

4. That on July 17, 2012 an undercover operative working under the direction of the Seneca Police Department/Oconee Sheriff's Office was distributed a quantity of crack cocaine from Dan Temple [Petitioner] in the area of the 100 block of Bypass 123 Seneca, SC.

5. That on July 23, 2012 an undercover operative working under the direction of the Seneca Police Department was distributed a quantity of crack cocaine from Dan Temple [Petitioner] in the area of the 1000 block of Bypass 123 Seneca, SC.

6. Within the last 72 hours an undercover operative working under the direction of the Seneca Police Department was distributed a quantity of lortabs from Dan Temple [Petitioner] at 318 Bypass 123 in Seneca, SC. Temple [Petitioner] was seen walking to and from the Town & Country Motel.

7. Within the last 72 hours an undercover operative working under the direction of the Seneca Police Department was given a counterfeit 100 dollar bill by Dan Temple [Petitioner] at 318 Bypass 123. He asked the undercover operative to take it to a store and exchange it for real US currency. The undercover operative turned the counterfeit money over to agents. Agents gave the undercover operative 100 dollars in documented funds. The undercover operative met with Dan Temple [Petitioner] at the Town & Country Motel and gave [T]emple [Petitioner] the documented funds. Temple [Petitioner] was observed by agents exiting and re-entering room 103 at Town & Country Motel.

8. Based upon the Undercover Operation on the above listed dates, establishing a continuing criminal enterprise, the affiant believes illegal drugs, proceeds from illegal drug transactions, and drug paraphernalia and counterfeit money will be present at this residence.

Supp. App. 5.

Citing State v. Johnson, 302 S.C. 243, 395 S.E.2d 167 (1990), defense counsel argued, "Certainly, if you are basing a search warrant on what your confidential informant did or told you or saw, then you have to have some information that goes to that confidential informant's reliability. App. 50, ll. 13-17. Because the affidavit in support of the search warrant contained no information about the informant's reliability, counsel asserted the affidavit failed to establish probable cause.

Distinguishing this case from State v. Dupree, 354 S.C. 676, 583 S.E.2d 437 (2003), counsel also argued that not only did the affidavit contain no information about the confidential informant's reliability, it also contained no information about whether the controlled buys were properly conducted. App. 52, l. 18 – 53, l. 10. Consequently, counsel asserted that the affidavit failed to provide the magistrate with a substantial basis for finding probable cause to search Petitioner's motel room. App. 53, l. 11 – 55, l. 6.

The trial judge ultimately denied Petitioner's motion to suppress. The judge ruled, "[C]onsidering as a whole or totality of the events, it does seem that the basis for the [s]earch [w]arrant on July the 24th, 2012, referring to various incidences on July the 17th and July the 23rd and within 72 hours is sufficient to support the [s]earch [w]arrant. So the [m]otion to [s]uppress the contraband is denied." App. 60, l. 20 – 61, l. 3.

Despite extensively arguing pretrial that the drug evidence seized as a result of the unlawful search warrant should be suppressed, defense counsel failed to contemporaneously object when the drugs were later admitted into evidence during trial. When asked whether he had any objection after the state sought to admit the drugs, counsel stated, "No objection, Your Honor." The court

then admitted the drugs, which were marked as State's Exhibit No. 32, "[w]ithout objection." App. 252, ll. 4-12.

The jury ultimately found Petitioner guilty of the lesser included offense of possession of cocaine base and possession of a controlled substance. App. 404, ll. 8-24. On appeal, Petitioner, who was represented by Carmen Ganjehsani then of the Office of Appellate Defense, argued:

> The trial court erred in denying Appellant's motion to suppress the drug evidence seized during the execution of the search warrant where the affidavit for the search warrant was based on information from a confidential informant that he had received drugs from Appellant and where such affidavit contained no information about the reliability of this informant.

App. 429.

The Court of Appeals affirmed holding the issue was not preserved for appellate review. State v. Temple, Op. No. 2015-UP-061 (S.C. Ct. App. filed February 5, 2015); App. 486-487. Quoting State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001), the court stated, "In most cases, [m]aking a motion in limine to exclude evidence at the beginning of trial does not preserve an issue for review because a motion in limine is not a final determination." App. 486-487. The court also cited to State v. Dicapua, 373 S.C. 452, 455, 646 S.E.2d 150, 152 (Ct. App. 2007), which held "that when a party affirmatively states it has no objection to evidence being admitted at trial, it has waived any previous objections made in a pretrial motion." App. 487.

Petitioner ultimately filed an application for post-conviction relief arguing in part that trial counsel was ineffective for failing to properly object to the admission of drug evidence and preserve the motion to suppress for appellate review. App. 488-497. At the evidentiary hearing, trial counsel testified that he moved pretrial to suppress the drug evidence arguing it was seized in violation of the Fourth Amendment. App. 547, ll. 2-5. He said he believed the argument was "meritorious." App. 557, ll. 20-23. He also acknowledged the importance of the motion stating that if the trial

judge had ruled in his favor the drug evidence would have been suppressed and Petitioner would not have faced a trial. App. 552, ll. 22-25.

Yet, counsel admitted he failed to preserve the motion to suppress because he did not make a contemporaneous objection when the drugs were admitted into evidence. App. 555, ll. 1-6. He acknowledged the law in South Carolina is that "a motion in limine to exclude evidence at the beginning of a trial does not preserve an issue for review because a motion in limine is not a final determination." App. 553, ll. 6-11. Without giving any reason as to why, counsel stated that he mistakenly believed the trial court's pretrial ruling denying the motion to suppress was a final ruling and that he did not need to renew his objection in order to preserve the issue for appellate review. App. 547, ll. 15-19.

The PCR judge ultimately denied Petitioner relief. App. 564-571. While the judge acknowledged that the failure to contemporaneously object to the admission of evidence, and therefore preserve an issue for appellate review, "has been held by the appellate courts to be ineffective assistance of counsel," the judge found Petitioner failed to prove any prejudice as a result of trial counsel's failure to preserve the motion to suppress. App. 568. More specifically, the judge found Petitioner "has not met his burden of establishing the magistrate's finding of probable cause and issuance of the search warrant would have resulted in the case being reversed had trial counsel objected during the trial in addition to making the argument in pretrial." App. 568 (citing State v. Bellamy, 323 S.C. 199, 205, 473 S.E.2d 838, 842 (Ct. App. 1996)).

ARGUMENT

The post-conviction relief (PCR) judge erred by finding trial counsel was not ineffective when counsel failed to preserve for appellate review the admission of drug evidence seized as the result of an unlawful search where counsel moved pretrial to suppress the drug evidence but failed to contemporaneously object when the drugs were admitted into evidence, and where Petitioner was prejudiced because if counsel had properly preserved the objection, the appellate court would have considered the merits, corrected the trial court's error in admitting the drugs seized pursuant to an unlawful search, and suppressed the drugs.

Trial counsel was ineffective for failing to contemporaneously object to the admission of the drug evidence that was seized in violation of Petitioner's Fourth Amendment rights. Counsel's failure to properly renew his objection prevented the appellate court from considering the motion to suppress on direct appeal. Petitioner was prejudiced by counsel's deficient performance because if counsel would have preserved the objection, there is a reasonable probability the appellate court would have suppressed the drug evidence. The affidavit in support of the search warrant failed to provide the magistrate with a substantial basis for finding probable cause to search Petitioner's motel room. Specifically, it contained no information about the confidential informant's reliability or whether the alleged controlled buys were properly conducted. App. 52, l. 18 – 53, l. 10.

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper

measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

"This Court has previously held that an issue that was raised on direct appeal but found to be unpreserved may be raised in the context of a PCR claim alleging ineffective assistance of counsel." McHam v. State, 404 S.C. 465, 475, 746 S.E.2d 41, 47 (2013) (citing McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003) and Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999)). In McHam, this Court found McHam's trial counsel's failure to renew his Fourth Amendment objection constituted deficient performance that satisfied the first prong of the Strickland analysis. Id. at 474, 746 S.E.2d at 46.

Here, the record establishes that trial counsel did not contemporaneously object when the drug evidence was admitted into evidence during Petitioner's trial. App. 252, ll. 4-12. Consequently, he failed to preserve the motion to suppress for appellate review. See State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001) ("[M]aking a motion *in limine* to exclude evidence at the beginning of trial does not preserve an issue for review because a motion *in limine* is not a final determination. The moving party must make a contemporaneous objection when the evidence is introduced.") Because counsel failed to contemporaneously object, the

Court of Appeals found the Fourth Amendment claim, which was raised by Petitioner on direct appeal, was not preserved and refused to consider the merits. State v. Temple, Op. No. 2015-UP-061 (S.C. Ct. App. filed February 5, 2015); App. 486-487. Counsel's failure to renew the Fourth Amendment objection constituted deficient performance. See McHam, 404 S.C. at 475, 746 S.E.2d at 47.

"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." McHam, 404 S.C. at 475, 746 S.E.2d at 47; See Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994) ("When the defendant claims that counsel's failure to articulate a Fourth Amendment claim was ineffective assistance, [the] defendant must show that such claim is meritorious and that the verdict would have been different absent the evidence that should have been excluded.").

The trial judge erred by denying Petitioner's motion to suppress the drug evidence seized from his motel room during the execution of the search warrant because the affidavit in support of the warrant failed to provide the magistrate with a substantial basis for finding probable cause. More specifically, the affidavit, which was based solely on the alleged distribution of drugs and counterfeit currency by Petitioner to a confidential informant in the days preceding the search, contained no information about the reliability of the confidential informant or whether the controlled buys were properly conducted.

"The Fourth Amendment to the United States Constitution guarantees the right of the people to be free from unreasonable searches and seizures and provides that no warrants shall be issued except upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized." McHam, 404 S.C. at 476, 746

S.E.2d at 47 (citing U.S. Const. amend. IV). The affidavit in support of the search warrant "must contain sufficient underlying facts and information upon which the magistrate may make a determination of probable cause." State v. Dupree, 354 S.C. 676, 684, 583 S.E.2d 437, 441 (Ct. App. 2003) (citing State v. Philpot, 317 S.C. 458, 454 S.E.2d 905 (Ct. App. 1995)).

In State v. Philpot, 317 S.C. 458, 454 S.E.2d 905 (Ct. App. 1995 the Court of Appeals held the search warrant affidavit was insufficient to establish probable cause for a search of the defendant's residence. In Philpot, an officer with the Pickens County Sheriff's Department signed an affidavit in support of a search warrant for the defendant's residence to search for marijuana and marijuana paraphernalia. Id. at 460, 454 S.E.2d at 906. The affidavit contained the following statement:

> Within the past 72 hours, a confidential informant has seen a quantity of marijuana in the residence to be searched. Also in the past, agents with the Special Operations Div. of the Pickens County Sheriff's Office have received information the [sic] one of the persons who lives at the residence, Jim Philpot, is involved in illicit activity.

Id.

Based on this affidavit, the magistrate issued the search warrant. Officers executed the search warrant and seized evidence of marijuana manufacturing and possession. Id.

Philpot moved to suppress the evidence seized during the search because the name of the confidential informant had not been disclosed and the affidavit for the search warrant was devoid of any information as to the informant's reliability. The trial court denied the motion. During cross-examination, the defense counsel asked the officer presenting the affidavit whether he told the magistrate why this informant was dependable and reliable. The officer replied that he had presented the magistrate with a statement from the informant. Defense counsel moved for a production of the statement. After reviewing the statement, the trial court ruled there was nothing in

it which would assist the defense and denied the motion to produce. Id. at 460, 454 S.E.2d at 906-907.

On appeal, Philpot asserted that the evidence seized during the execution of the search warrant should have been suppressed because the warrant was not supported by probable cause. More specifically, Philpot attacked the failure of the affidavit to address the veracity of the confidential informant. The Court of Appeals agreed. Id. at 460, 454 S.E.2d at 907.

The appellate court first set forth the law regarding the issuance of search warrants by magistrates. It explained:

> The task of a magistrate when determining whether to issue a warrant is to make a practical, common sense decision as to whether, under the totality of the circumstances set forth in the affidavit, there is a fair probability that evidence of a crime will be found in a particular place. State v. Adolphe, 314 S.C. 89, 441 S.E.2d 832 (Ct. App. 1994). This decision includes consideration of the veracity of the person supplying the information and the basis of his or her knowledge. Id. The affidavit must contain sufficient underlying facts and information upon which the magistrate may make a determination of probable cause. Mere conclusory statements which give the magistrate no basis to make a judgment regarding probable cause are insufficient. State v. Smith, 301 S.C. 371, 392 S.E.2d 182 (1990). If the affidavit alone is insufficient to establish probable cause, it may be supplemented by sworn oral testimony before the magistrate. State v. Johnson, 302 S.C. 243, 395 S.E.2d 167 (1990). An appellate court reviewing the decision to issue the warrant should decide whether the magistrate had a substantial basis for concluding probable cause existed. Adolphe, 314 S.C. 89, 441 S.E.2d 832.

Id. at 461, 454 S.E.2d at 907.

The Court of Appeals concluded "the search warrant should not have been issued." Id. The record indicated that the magistrate only had the officer's affidavit and the written statement of the confidential informant before him. Id. The court found that the affidavit and written statement contained "absolutely no showing of the confidential informant's reliability." Id. Consequently, the court held there was no substantial basis for the magistrate to conclude that probable cause for the

search existed and, therefore, the evidence obtained as a result of the search warrant was inadmissible. Id.

The facts of this case are akin to the facts in Philpot. Here, the Investigator Hunnicutt's affidavit was based solely upon information received from an undisclosed confidential informant. The affidavit contained absolutely no information about the reliability or veracity of this informant. Supp. App. 5. Investigator Hunnicutt testified that he took the search warrant to Judge Derrick's home in Seneca to have the warrant signed. He never stated that he provided Judge Derrick with any additional information about the informant other than what was contained in the affidavit. App. 203, ll. 4-24.

The entire investigation of Petitioner and the search warrant ultimately issued stemmed from this informant and the alleged controlled buys conducted by law enforcement. Because there was no information as to the informant's reliability or whether the controlled buys were properly conducted, there was no substantial basis from which the magistrate could find probable cause. Accordingly, the evidence obtained from Petitioner's motel room during the execution of the search warrant should have been suppressed.

During the pretrial hearing, the state relied upon State v. Dupree, 354 S.C. 676, 583 S.E.2d 437 (Ct. App. 2003) in support of its argument that the magistrate had a substantial basis for concluding probable cause existed to issue the search warrant. App. 51, ll. 4-17.

In Dupree, the affidavit supporting the search warranted provided:

> Within the past (72) hours, a confidential and first time informant of the Richland County Sheriff's Department has purchased crack cocaine from the described location. The informant was searched before and after the purchase and was observed by narcotics agents while making the purchase entering and exiting the location.

Dupree, 354 S.C. at 681, 583 S.E.2d at 439-440.

The magistrate issued the search warrant and, during the execution of the warrant, officers found crack cocaine. Id. at 681, 583 S.E.2d at 440. The defense moved to suppress the crack cocaine seized pursuant to the search warrant arguing the warrant was not supported by probable cause and lacked any indicia of reliability as to the informant's veracity or reliability. Id. The trial court denied Dupree's motion to suppress. Id. at 682, 583 S.E.2d at 440.

In affirming the trial court's denial of the motion to suppress, the Court of Appeals observed that "[a]n 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 (internal citations omitted). The court also acknowledged, "If the controlled buy was properly conducted, it alone can provide facts sufficient to establish probable cause for a search warrant." Id. at 689, 583 S.E.2d at 444 (internal citations omitted).

Based upon the totality of the circumstances, the Court of Appeals concluded the affidavit in Dupree provided the magistrate with a substantial basis for finding probable cause to search the mobile home. Id. at 690, 583 S.E.2d at 444 (citing State v. Weston, 329 S.C. 287, 494 S.E.2d 801 (1997)). The court found the information provided by the confidential informant was corroborated by an independent police investigation. Id. at 690, 583 S.E.2d at 445. The affidavit indicated that an officer searched the informant prior to the controlled buy and determined he had no drugs on his person. Id. The officer observed the informant enter and exit the mobile home. Id. The informant was searched again after the buy. Id. The court found these facts constituted "sufficient police corroboration of the informant's information" based upon the controlled buy and the controlled buy was evidence of the credibility and trustworthiness of the informant. Id. at 690-691, 583 S.E.2d at 445. The Court of Appeals therefore upheld the trial court's denial of Dupree's motion to suppress the crack cocaine and reiterated that "if a controlled buy is properly conducted, the *controlled buy*

alone can provide facts sufficient to establish probable cause for a search warrant." Id. at 691, 583 S.E.2d at 445 (emphasis in original).

Here, unlike Dupree, there was no evidence the controlled buys in Petitioner's case were properly conducted thereby establishing probable cause for the search warrant. There was no indication in the affidavit that the confidential informant was searched prior to and after allegedly meeting with Petitioner. There was no indication in the affidavit that law enforcement observed the informant meet with Petitioner or even observed the informant leaving to meet with Petitioner. From the limited information provided in the affidavit, there is no way of knowing whether the confidential informant in fact obtained any drugs from Petitioner. The informant could have already been in possession of the drugs when he claimed to law enforcement that he received drugs from Petitioner. The affidavit Investigator Hunnicutt used to seek the search warrant of Petitioner's motel room therefore lacked any indication of the confidential informant's reliability or whether the alleged controlled buys were properly conducted. Consequently, the affidavit failed to provide the magistrate with a substantial basis for issuing the search warrant for Petitioner motel room.

The state also relied on State v. Bellamy, 336 S.C. 140, 519 S.E.2d 347 (1999) during the pretrial hearing. App. 51, ll. 4-17. This case, like Dupree, is also distinguishable from the facts in Petitioner's case.

In Bellamy, the police chief of Atlantic Beach requested the assistance of the State Law Enforcement Division (SLED) concerning a break-in at the Atlantic Beach Police Department in which weapons were stolen from the department. Bellamy, 336 S.C. at 141, 519 S.E.2d at 347. "The police chief informed SLED that an individual named Luther Stanley, who was already in jail on unrelated charges, had information about the missing weapons." Id. A field officer with SLED interviewed Stanley, and Stanley stated he had seen the weapons in a particular apartment in

Atlantic Beach. Id. Stanley, who had lived at the apartment for days at a time, gave the officer the names of the people who would normally be in the apartment, including the defendant's name. Id. The officer submitted the following affidavit in support of the search warrant:

> At 1420 hours, July 08, 1993, Luthor Spencer Stanley, after being advised of his rights, stated that [during] the early morning hours of July 08, 1993, Stanley observed Lamont Gause fire two shots from a 25 mm pistol while standing outside of the above described premises. [A]ccording to Stanley, he then observed Gause immediately take the 25 mm pistol inside the premises and left it. Stanley further stated that on July 06, 1993, he observed Lamont Gause take a 38 cal pistol and a 22 cal Derringer into the above described premises. These three weapons are the same [description] as weapons stolen from the Atlantic Beach Police department located in Atlantic Beach, S.C. on or about June 23, 1993. [Stanley] further stated that cocaine is usually kept in above residence, inside the refrigerator or the microwave oven.

Id. at 142, 519 S.E.2d at 348 (alterations in original).

The magistrate issued the search warrant and when officers executed the warrant, they found drugs in the apartment and arrested the defendant. Id. Bellamy argued the officer's affidavit lacked sufficient probable cause for issuance of the search warrant. Id. This Court disagreed. Id. The Court found (1) the informant, whose identity was disclosed, was a witness to the events described in the affidavit; (2) the informant described the events "with great specificity;" and (3) "the affidavit was confirmed to the extent the weapons described by the informant matched those weapons stolen" from the police department days earlier. Id. at 144-145, 519 S.E.2d at 349. Accordingly, in upholding the sufficiency of the affidavit, this Court noted, "Although the affidavit is weak on the element of the reliability of the informant, this deficiency is compensated for by the strong showing of specificity, first-hand observation, and partial corroboration." Id. at 145, 519 S.E.2d at 349.

Unlike the affidavit presented in Bellamy, the affidavit in Petitioner's case contains no specificity of the confidential informant's encounters with Petitioner and is not corroborated in the very least by law enforcement. The affidavit was insufficient and failed to establish probable

cause because there is no information supporting the confidential informant's reliability or corroboration by law enforcement concerning whether the controlled buys were properly conducted. Therefore, the drug evidence obtained pursuant to the search warrant should have been suppressed.

Based on the foregoing, it is clear that if Petitioner's trial counsel would have properly renewed his objection to the drug evidence when it was admitted, the appellate court would have considered the objection and held the trial judge erred by denying Petitioner's motion to suppress. Consequently, Petitioner has established that he was prejudiced by counsel's deficient performance. Respectfully, this Court should hold the PCR judge erred, reverse Petitioner's convictions, and suppress the drug evidence unlawfully seized from Petitioner's motel room.

CONCLUSION

Petitioner respectfully requests this Court hold the post-conviction relief judge erred, reverse Petitioner's convictions and sentence, and suppress the drug evidence unlawfully seized in violation of the Fourth Amendment.

Respectfully submitted,

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of May, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Oconee County

Honorable R. Scott Sprouse, Circuit Court Judge

DAN L. TEMPLE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon Lindsey McCallister, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner has been served upon Dan L. Temple at 110 W.S. 4th Street, Seneca, SC 29678, this 25th day of May, 2018.

Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 25th day of May, 2018.

Mary M (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.