STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Oconee County
Honorable R. Scott Sprouse, Circuit Court Judge

Appellate Case No. 2016-001756

DAN L. TEMPLE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT

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RESPONDENT'S QUESTION PRESENTED

I. Is there probative evidence in the record to support the PCR court's finding Counsel was not ineffective despite failing to preserve his objection to the admission of drug evidence for appellate review, where Petitioner has failed to show any prejudice resulted from the omission because it is not likely he would have prevailed on appeal when the search warrant was supported by a proper affidavit detailing a substantial factual basis for the magistrate to conclude the confidential informant's information was reliable, and there were sufficient grounds to establish probable cause to support the issuance of the search warrant?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Oconee County Clerk of Court. Petitioner was indicted at the January 2013 term of the Oconee County Grand Jury for distribution of cocaine base, third or subsequent offense (2013-GS-37-0184), and possession of other controlled substance in schedule I to V, second or subsequent offense (2013-GS-37-0185). App. 589-92. E. Delane Rosemond, Esquire, represented Petitioner. App. 1. On March 18-21, 2013, Petitioner proceeded to a trial before the Honorable Alexander S. Macaulay and a jury. App. 1. He was found guilty as indicted for possession of other controlled substance, second or subsequent offense, and of the lesser-included offense of possession of crack cocaine. App. 404. Judge Macaulay sentenced Petitioner to a term of imprisonment for ten years for possession of crack cocaine plus a consecutive term of one year for possession of other controlled substance.[1] App. 418-19.

A timely notice of appeal was filed and perfected on Petitioner's behalf. Carmen Ganjehsani, Esquire, represented Petitioner on appeal. App. 486-87. The South Carolina Court of Appeals affirmed Petitioner's conviction. State v. Temple, Op. No. 2015-UP-061 (S.C. Ct. App. filed February 5, 2015). The Remittitur was issued on February 23, 2015. App. 565.

Petitioner then filed a post-conviction relief ("PCR") application on March 16, 2015. App. 488-97. An evidentiary hearing into the matter was convened on June 6, 2016, at the Oconee County Courthouse before the Honorable R. Scott Sprouse. App. 564. Petitioner was

[1] Petitioner's criminal history is also relevant. Petitioner pleaded guilty to voluntary manslaughter (2002-GS-03-0152) in Allendale County on August 23, 2004, for an incident occurring while he was in prison. Petitioner was sentenced to eleven years imprisonment and, upon his release, he began serving probation for distribution of crack cocaine within proximity of a school (1997-GS-37-0089). After the jury found Petitioner guilty of the charges he is challenging in this action, Judge Macaulay revoked his probation and sentenced Petitioner to five years in prison. This was also to be served consecutively to the sentences for 2013-GS-37-0184 and 2013-GS-37-0185.

present at the hearing and was represented by Hugh W. Welborn, Esquire (Counsel). App. 564. Johanna Valenzuela, Esquire, of the South Carolina Attorney General's Office, represented Respondent. App. 564. Petitioner and Counsel both testified, and Judge Sprouse ultimately denied Petitioner's application by order filed August 15, 2016. App. 564-71. Petitioner filed a *pro se* motion pursuant to Rule 59(e), SCRCP, which was denied by order filed October 7, 2016. App. 573-88. Petitioner then filed a timely notice of appeal on August 25, 2016, and a Petition for Writ of Certiorari on March 23, 2017. By Order dated March 28, 2018, this Court granted the Petition, and Petitioner filed a brief on May 28, 2018, in accordance with the order. This Brief of Respondent follows.

STATEMENT OF THE FACTS

In July of 2012, officers from both the Seneca Police Department and Oconee County Sheriff's Office began a narcotics investigation focused on Petitioner. Supp. App. 2-5. Law enforcement worked with a confidential informant to purchase drugs from Petitioner and conducted surveillance of a room at the Town & Country Motel in Seneca, South Carolina. Supp. App. 2-5. Officers observed and photographed Petitioner approaching the vehicle driven by the confidential informant and then returning to the motel room. App. 124-128.

Based on the information obtained during the investigation, Investigator Tim Hunnicutt of the Seneca Police Department sought a search warrant on July 24, 2012, seeking authorization to search the motel room for controlled substances, counterfeit money, and other associated items. Supp. App. 2-5. In the affidavit attached to the search warrant, Investigator Hunnicutt included the following information to establish probable cause:

> 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 has been a sworn law enforcement officer for approximately eleven (11) years.
>
> 2. That during this time, the affiant has investigated various types of narcotics 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 [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 [Petitioner] in the area of the 100 block of Bypass 123 in 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 [Petitioner] in the area of the 100 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 [Petitioner] at 318 Bypass 123 in Seneca, SC. [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 [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 [Petitioner] at the Town & Country Motel and gave [Petitioner] the documented funds. [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. 2-5. Later that day, a magistrate judge issued the search warrant. Supp. App. 2-5.

The next morning, officers went to the motel room to execute the search warrant, knocked on the door, and announced their presence. App. 116. They attempted to enter the room, but the door was barricaded shut. App. 116. Officers eventually broke down the door and located Petitioner in the bed with his hands hidden underneath the covers along with Petitioner's girlfriend, Crystal Henry (Henry), hiding behind the door. App. 116-17, 121. The officers ordered Petitioner to show his hands, but he refused. App. 116-17. Petitioner and Henry were then secured and arrested. App. 116-17, 123. As Petitioner was being arrested, Investigator B.J. McClure of the Seneca Police Department observed a pill bottle fall out of Petitioner's bed and onto the floor. App. 117-18. During the subsequent search of the room, the officers discovered a rock-like substance in the pill bottle, a rock-like substance on a bedside nightstand, several pills

in a nightstand drawer, $622 in cash, a cell phone, several computers, two glass crack pipes, and other items associated with the use of crack cocaine. Supp. App. 6.

Petitioner asked to speak with an officer, and Captain Kenneth Washington of the Oconee County Sheriff's Office met with him. App. 174-75. Petitioner waived his rights and advised the officer he wanted to cooperate, stating he had purchased an ounce of crack cocaine in Pendleton, South Carolina, on the previous night, he could buy more from that source, and he could also buy drugs from a source in Georgia. App. 180. Captain Washington relayed that information to Investigator Hunnicutt, and Investigator Hunnicutt spoke with Petitioner as well. App. 191-94. During that conversation, Petitioner again waived his rights, claimed the crack cocaine found in the motel room belonged to him, and admitted he had bought the drugs in Pendleton the night before for $300. App. 193-94.

Subsequently, Petitioner was indicted for possession of crack cocaine with intent to distribute and possession of a controlled substance. App. 589-92. When Petitioner proceeded to trial, Counsel moved to suppress the evidence discovered in the search of Petitioner's motel room, arguing the search violated his Fourth Amendment rights. App. 46. In support of that contention, Counsel asserted the search warrant was invalid because it did not contain any information regarding the reliability of a confidential informant, it did not establish any controlled buys actually occurred at the motel room, and it did not contain any information establishing the controlled buys were properly conducted. App. 46, 50-51. In response, the solicitor argued the warrant was proper because the totality of the circumstances as presented in the affidavit established probable cause for the issuance of the warrant. App. 59. The trial judge found the affidavit contained sufficient information to support the issuance of the warrant and denied Counsel's motion to suppress. App. 59-61.

The officers involved in the operation then testified in front of the jury about the investigation into Petitioner's activities, his apprehension and arrest, and the subsequent search of the motel room, which led to the discovery of crack cocaine and other evidence. App. 115-18, 126-30, 173-77, 180-81, 187-89, 191-96, 231-35. Additionally, Henry testified for the State, indicated Petitioner was a dealer, claimed the crack cocaine discovered on the nightstand belonged to her, asserted the bottle of crack cocaine and Xanax belonged to Petitioner, and stated Petitioner purchased crack cocaine in both Pendleton and Toccoa, Georgia, on the night before the search. App. 138-42,146, 151, 161-64. Following the testimony of the investigating officers and Henry, Agent Meredith Lanford, an analyst with the Anderson/Oconee Regional Forensics Laboratory and an expert forensic drug chemist, testified as to her analysis of the drugs discovered during the search of Petitioner's motel room. App. 246-50. Lanford testified one of the substances discovered during the search was 0.12 grams of crack cocaine, the substance recovered from the pill bottle was 1.10 grams of crack cocaine, and the ten pills located during the search were alprazolam, also known as Xanax. App. 250-52. At the conclusion of Lanford's testimony, the solicitor moved to admit the drugs and Lanford's report into evidence, and the trial judge inquired of Counsel as to whether there were any objections to the admission of that evidence. App. 252. Counsel responded he had no objection and the trial judge then admitted the drugs and the report "[w]ithout objection[.]" App. 252.

The jury found Petitioner guilty on both charges. App. 404.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Id. at 180, 810 S.E.2d at 839. (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). 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." Id., 300 S.C. at 117-18, 386 S.E.2d at 625.

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

ARGUMENT

I. There is probative evidence in the record to support the PCR Court's finding Counsel was not ineffective for failing to preserve his objection to the admission of the drug evidence for appellate review because Petitioner has failed to show any prejudice resulted because it is not likely he would have succeed on appeal. The search warrant was supported by a proper affidavit detailing a substantial factual basis for the magistrate to conclude the confidential informant's information was reliable, and there were sufficient grounds to establish probable cause to support the issuance of the search warrant. Therefore, Petitioner has not proven he was prejudiced by Counsel's deficiency because there is no reasonable probability Petitioner's conviction would have been reversed on appeal.

Petitioner contends the PCR court erred in finding Counsel was not ineffective for failing to preserve his objection to the admission of the drug evidence for appellate review. Brief of Petitioner, p. 12. This Court has previously held an issue that was raised on direct appeal but found to be unpreserved may be raised in the context of a post-conviction relief 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); Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999)). However, to be entitled to relief on such a claim, an applicant must establish the underlying claim is meritorious and would have resulted in a reversal on appeal to a reasonable probability. McHam, 404 S.C. at 475-76, 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 in McHam's PCR claim.") (citing 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."

(emphasis in McHam)). Further, "[i]n determining whether a PCR applicant has established prejudice, the PCR court. . . must view the trial court's ruling through the same lens that would be applied on appeal, which. . . requires giving appropriate deference to the trial court's findings." Milledge v. State, 422 S.C. 366, 380, 811 S.E.2d 796, 804 (2018) (reversing PCR court's finding of ineffectiveness because although trial counsel was deficient in failing to preserve the Fourth Amendment issue for appellate review, there was no prejudice to the applicant as the search was lawful).

Therefore, before a post-conviction relief court can find an applicant has prevailed on a claim of ineffective assistance of trial counsel for failing to preserve a ground for appellate review, the court must determine the underlying claim was meritorious and a reasonable probability that it would have resulted in reversal on appeal. On appeal from a motion to suppress, appellate courts will only reverse the trial court if there is clear error and will affirm if there is any evidence to support the ruling. State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 459-60 (2002). In this case, although the PCR court found Counsel was deficient for failing to preserve the objection, the court found Petitioner was not prejudiced by the deficiency because Petitioner failed to meet his burden of establishing a favorable outcome on appeal, had the objection been made. App. 568. Respondent concedes Counsel was deficient in failing to preserve the suppression issue for appellate review. However, even if the issue had been properly preserved, Petitioner would not have prevailed on appeal. Therefore, the PCR court correctly denied Petitioner's request for relief. App. 570-71.

A. The search warrant affidavit was sufficient on its face to establish probable cause.

In South Carolina, an affiant seeking a search warrant must present a sworn affidavit to a judge attesting to sufficient grounds to establish probable cause to support the issuance of the

warrant. State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348-49 (1999); see S.C. Code Ann. § 17-13-140 ("A warrant issued hereunder shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record establishing the grounds for the warrant."); see also Illinois v. Gates, 462 U.S. 213, 238 (1983) (defining probable cause in this context as "a fair probability that contraband or evidence of a crime will be found"). This Court has further explained probable cause as it relates to the issuance of a search warrant:

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

State v. Williams, 262 S.C. 186, 189, 203 S.E.2d 436, 437-38 (1974) (citing State v. Bennett, 256 S.C. 234, 182 S.E.2d 291 (1971)).

In deciding whether to issue a search warrant, a judge must "make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." Gates, 462 U.S. at 238. In making such a decision, judges "are concerned with probabilities and not certainties." State v. Sullivan, 267 S.C. 610, 617, 230 S.E.2d 621, 624 (1976). Additionally, judges should review the warrant affidavit in a common-sense fashion, giving consideration to the fact that such affidavits are typically prepared by non-lawyers in the haste of criminal investigations. State v. Arnold, 319 S.C. 256, 260, 460 S.E.2d 403, 405 (Ct. App. 1995).

In cases where an affiant relies upon information supplied by a confidential informant, the informant's veracity, reliability, and basis of knowledge are highly relevant in determining the value of the informant's information and making the determination of whether or not probable cause exists. Gates, 462 U.S. at 238. However, those considerations are *not* "entirely separate and independent requirements to be rigidly exacted in every case." Id. at 230. Instead, they "should be understood simply as closely intertwined issues that may usefully illuminate the common sense, practical question whether there is 'probable cause' to believe that contraband or evidence is located in a particular place." Id. Furthermore, "deficiency in one of the elements 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*." Bellamy, 336 S.C. at 144, 519 S.E.2d at 349 (emphasis added).

When analyzing a decision to issue a search warrant, the reviewing court should decide whether the issuing judge had a substantial basis for concluding probable cause existed. State v. Dupree, 354 S.C. 676, 683, 583 S.E.2d 437, 441 (Ct. App. 2003). The reviewing court should base such determination on the totality of the circumstances, applying the same standard as the issuing judge. State v. Keith, 356 S.C. 219, 223, 588 S.E.2d 145, 147 (Ct. App. 2003). Additionally, "[s]earches based on warrants will be given judicial deference to the extent that an otherwise marginal search may be justified if it meets a realistic standard of probable cause." State v. Rutledge, 373 S.C. 312, 316, 644 S.E.2d 789, 791 (Ct. App. 2007). "Suppression is appropriate in only a few situations, including when an affidavit is 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" State v. Weston, 329 S.C. 287, 293, 494 S.E.2d 801, 804 (1997) (quoting United States v. Leon, 468 U.S. 897, 923 (1984)).

In Petitioner's case, the trial judge correctly found the search warrant was properly issued because the information contained in Investigator Hunnicutt's affidavit, viewed in its entirety and in a common-sense fashion, was sufficient to establish probable cause to believe, at a minimum, evidence of counterfeit currency would be found in Petitioner's motel room at the time of the search. See State v. Thomas, 275 S.C. 274, 276, 269 S.E.2d 768, 769 (1980) (holding courts should consider a "common-sense reading of the entire affidavit" in determining whether probable cause exists). Petitioner contends the trial judge erred in denying his motion to suppress the evidence found pursuant to the search warrant because the warrant affidavit failed to contain sufficient information to establish the reliability of the confidential informant or whether the controlled buys were properly conducted, and, therefore Counsel rendered ineffective assistance because Petitioner likely would have prevailed on this issue on appeal. Brief of Petitioner, pp. 17-19. However, even assuming the affidavit is deficient as it relates to the allegations of the distribution of crack cocaine, the allegation regarding counterfeit currency alone is enough to support a finding of probable cause and render the search warrant valid.

Petitioner contends the affidavit "contained absolutely no information about the reliability or veracity of this informant." Brief of Petitioner, p. 17. Petitioner argues his case is akin to State v. Philpot, wherein the Court of Appeals found the search warrant should not have been issued when the magistrate had only the officer's affidavit and the statement of the confidential informant in front of him. 317 S.C. 458, 461, 454 S.E.2d 905, 907 (Ct. App. 1995). In Philpot, however, the affidavit of the officer included only 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 drug activity.

Id. at 460, 454 S.E.2d at 906. The Court of Appeals found these to be "merely conclusory statements" which made "absolutely no showing of the confidential informant's reliability." Id. at 461, 454 S.E.2d at 907.

On the other hand, the affidavit in Petitioner's case did contain sufficient detail to establish the reliability of the confidential informant. Although Petitioner tries to distinguish his case from State v. Bellamy, relied upon by the State at trial, the affidavit at issue here is similar to the affidavit approved in that case. In Bellamy, the affidavit read:

> 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.

336 S.C. 140, 142, 519 S.E.2d 347, 358 (1999). This Court found the magistrate had probable cause to issue the warrant because, "[a]lthough the affidavit [was] weak on the element of the reliability of the informant, this deficiency [was] compensated for by the strong showing of specificity, first-hand observation, and partial corroboration." Id. at 145, 519 S.E.2d at 349.

The statements in the affidavit in Petitioner's case indicate the informant was given a counterfeit $100 bill, which was turned over to the agents surveilling Petitioner, and the informant then met with Petitioner to give him documented funds supplied by the Seneca Police Department, while officers observed the motel. Accordingly, the statements in the affidavit regarding the counterfeit currency were witnessed firsthand by the informant and partially corroborated by the officers' observations of the counterfeit bill itself and Petitioner's

movements linking him to the motel room at the time of the exchange with the informant. "A determination regarding [the informant's] credibility need not be based solely on whether [the officer] stated, either in the affidavit or by oral testimony, that [the informant] was a reliable informant." State v. Bellamy, 323 S.C. 199, 206 (Ct. App. 1996), aff'd, 336 S.C. 140, 519 S.E.2d 347 (1999). Thus, contrary to Petitioner's assertion, the confidential informant's reliability was established by the observations of the officers and the verification of the counterfeit money, regardless of whether Investigator Hunnicutt used specific language affirming the informant's reliability.

The affidavit here is more similar to the one at issue in State v. Robinson, in which this Court found there was "information from which the Circuit Court could conclude the informant was reliable." 415 S.C. 600, 605, 785 S.E.2d 355, 358 (2016). That affidavit alleged in pertinent part:

> A confidential and reliable informant working for the Horry County Police Department purchased a quantity of off white powder substance represented as being cocaine and field-testing positive for cocaine attributes from the occupants of the house identified as [the Home]. That the informant has been able to make recent continuous purchases of illegal drugs from this residence leads to the affiant's belief that there is the possibility there may be more illegal drugs located at this residence.

Id. at 605, 785 S.E.2d at 357. This information turned out to be false, and this Court reversed as a violation of Franks.[2] However, this Court first found the "contents of the affidavit were sufficient to provide the Circuit Court a substantial basis to believe that the: (1) Horry County Police Department; (2) had a confidential informant; (3) who bought a substance that tested positive for cocaine; (4) from the Home; and (5) the informant had made other recent purchases of illegal drugs from the Home." Id. at 605, 785 S.E.2d at 357-58. This Court therefore held "the

[2] Franks v. Delaware, 438 U.S. 154 (1978).

Court of Appeals erred in finding the affidavit, on its face, lacked sufficient information to establish the reliability of the confidential informant." Id. at 605-06, 785 S.E.2d at 358.

The language used in the Robinson affidavit is substantially similar to the language regarding the drug transactions in Petitioner's case and is sufficient to establish: (1) the Seneca Police Department, (2) had a confidential informant, (3) who bought crack cocaine and another controlled substance, (4) from Petitioner, (5) and the informant had made other recent purchases of illegal drugs from Petitioner in the immediate vicinity of the hotel room from which Petitioner was observed leaving from and returning on multiple occasions. Petitioner argues the affidavit is insufficient based on State v. Dupree, where in the affidavit specifically alleged "[t]he informant was searched before and after the purchase and was observed by narcotics agents while making the purchase entering and exiting the location." 354 S.C. 676, 681, 583 S.E.2d 437, 439-40 (Ct. App. 2003). The Court of Appeals upheld the affidavit and search warrant, finding a controlled buy alone may establish probable cause for a warrant if the controlled buy was properly conducted. Id. at 689, 583 S.E.2d at 444.

Petitioner contends the affidavit in his case is fatally deficient under Dupree because it lacks any information regarding how the controlled buy was conducted. Essentially, Petitioner would impose a blanket rule that an affidavit based on a controlled buy with an informant must allege that the buy was properly conducted. That rule is clearly contrary to this Court's holding in Robinson, in which the challenged affidavit contained no information whatsoever concerning the how the controlled buy was conducted. 415 S.C. at 605, 785 S.E.2d at 357. Even Dupree contemplates that a search warrant may be issued even when no information as to the informant's reliability is available to the issuing judge. 354 S.C. at 690, 583 S.E.2d 437, 583 S.C. at 444 ("Where the affidavit is based in part on information provided by an informant of

unknown reliability, police corroboration of details provided in the tip may establish probable cause.").

Additionally, Investigator Hunnicutt's affidavit established a substantial basis for the magistrate to believe: (1) the Seneca Police Department, (2) had a confidential informant, (3) who received a counterfeit bill, (4) from Petitioner, (5) who was observed leaving and returning to the motel room. Unlike in Robinson, there has been no suggestion in this case that the facts on which the affidavit is based are untrue or Investigator Hunnicutt was deliberately misrepresenting his investigation. Therefore, there is no basis to distinguish the affidavit in this case from the affidavit in Robinson. Accordingly, there was probable cause to believe, at a minimum, evidence of counterfeit bills would be found in the motel room. See Gates, 462 U.S. at 233 ("[A] deficiency in [veracity or basis of knowledge] 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."). That allegation alone is sufficient to support a finding of probable cause and render the search warrant valid, even if the allegations regarding the crack cocaine buys are not.[3]

Accordingly, the magistrate judge committed no error in issuing the search warrant because the affidavit contained sufficient information to assess the reliability of the informant and provided a substantial basis to conclude the informant was reliable. The issuing judge's probable cause determination should be afforded great deference on appeal. Rutledge, 373 S.C. at 316, 644 S.E.2d at 791. Further, "[t]he PCR court does not act as finder of fact and substitute its judgment for that of the trial court." Milledge, 422 S.C. at 380, 811 S.E.2d at 804. Therefore,

[3] However, the fact that the informant's allegation regarding the counterfeit currency was reliable bolsters the credibility of the remaining allegations.

the PCR court correctly found Petitioner was not prejudiced by the trial court's denial of his motion to suppress and would not have prevailed on appeal.

B. The good-faith exception to the exclusionary rule is applicable in this case as the affidavit was not so lacking in indicia of probable cause that it was entirely unreasonable for Investigator Hunnicutt to rely on the warrant after it was issued.

Additionally, even if the trial judge erred in determining the search warrant affidavit was sufficient to establish probable cause, the affidavit was not so lacking in indicia of probable cause that it was entirely unreasonable for Investigator Hunnicutt to rely on the warrant after it was issued. See Leon, 468 U.S. at 922 (holding when an officer acting in objective good faith obtains a search warrant from a judge or magistrate and then acts within its scope, a reviewing court should not order the suppression of the evidence based on a lack of probable cause); Weston, 329 S.C. at 293, 494 S.E.2d at 804 (stating Leon does not require suppression except "in only a few situations, including when an affidavit is 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'"). "[S]uppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule. . . . It is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment. In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient. . . . Penalizing the officer for the [issuing judge]'s error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." Leon, 468 U.S. at 918-19.

Investigator Hunnicutt acted in good faith in obtaining the search warrant and acted in objectively reasonable reliance on the issuing judge's probable cause determination in conducting the search. Petitioner does not argue Investigator Hunnicutt made deliberately false statements in the affidavit or that the magistrate "wholly abandoned his judicial role" such that he was no longer a neutral and detached adjudicator. See Leon, 468 U.S. at 923. Investigator Hunnicutt complied with the statutory requirements in obtaining the search warrant and included information in the affidavit establishing, at a minimum, a confidential informant working under the direction of law enforcement officers had received a counterfeit bill, exchanged it for documented funds, and returned the funds to Petitioner. "'[O]nce the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law.' Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." Id. at 921 (citation omitted and brackets in original). "[S]uppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause." Id. at 926.

Therefore, because the search warrant was properly supported by an affidavit establishing the reliability of the informant, and because the officer reasonably relied on the magistrate judge's determination of probable cause in issuing the warrant, Petitioner would not have prevailed on appeal even if the objection had been preserved. As a result, Petitioner has suffered no prejudice, and the decision of the PCR court should be upheld.

CONCLUSION

For all the foregoing reasons, the decision of the PCR court denying Petitioner relief should be affirmed.

Respectfully submitted,

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7/25, 2018

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Oconee County

The Honorable R. Scott Sprouse, Circuit Court Judge

Appellate Case No. 2016-001756

Dan L. Temple, ...Petitioner,

v.

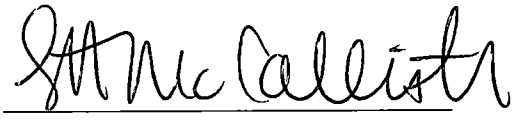
State of South Carolina, ...Respondent.

CERTIFICATE OF SERVICE

I, Lindsey A. McCallister, certify that I have today served the within Brief of Respondent upon Petitioner by depositing a copy of the same in inter-agency mail and addressed to:

Lara M. Caudy, Esquire
SC Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia SC 29211-1589

I further certify that all parties required by Rule to be served have been served. This 25th day of July, 2018.



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