

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Sumter County

William Jeffrey Young, Circuit Court Judge

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MAR 28 2012

S.C. Supreme Court

THE STATE,

RESPONDENT,

V.

JAMES P. AUSTIN,

PETITIONER.

APPENDIX

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THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

James P. Austin, Appellant.

Appeal From Sumter County
W. Jeffrey Young, Circuit Court Judge

Unpublished Opinion No. 2011-UP-475
Submitted October 1, 2011 – Filed October 26, 2011

AFFIRMED

Appellate Defender Elizabeth A. Franklin-Best, of
Columbia, for Appellant.

Attorney General Alan M. Wilson, Chief Deputy
Attorney General John W. McIntosh, Assistant
Deputy Attorney General Salley W. Elliott, and
Assistant Attorney General Christina J. Catoe, all of
Columbia; and Solicitor Ernest A. Finney, III, of
Sumter, for Respondent.

PER CURIAM: James P. Austin appeals his conviction for possession of cocaine. He argues the circuit court erred in denying (1) his motion to suppress drug evidence because he was illegally seized and (2) his motion to continue the trial due to the unavailability of a material witness. We affirm^[1] pursuant to Rule 220(b)(1), SCACR, and the following authorities:

1. As to whether the circuit court erred in denying Austin's motion to suppress the drug evidence: State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010) ("On appeals from a motion to suppress based on Fourth Amendment grounds, [an appellate court] applies a deferential standard of review and will reverse if there is clear error."); Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968) ("Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may [a court] conclude that a 'seizure' has occurred."); State v. Foster, 269 S.C. 373, 378, 237 S.E.2d 589, 591 (1977) (recognizing "that the police may briefly detain and question a person upon a reasonable suspicion, short of probable cause for arrest, that he is involved in criminal activity").

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

JAMES P. AUSTIN,

APPELLANT

Appeal from Sumter County

William Jeffrey Young, Circuit Court Judge

Opinion No. 2011-UP-475

PETITION FOR REHEARING

Counsel for James P. Austin respectfully asks this Court, pursuant to SCAR, Rule 221(a) to rehear his case and reverse his conviction. Appellant submits this Court has overlooked or misapprehended points necessary to the proper resolution of this case. Specifically, this Court committed an error of law when it found the trial court judge did not err when he denied petitioner's motion to suppress because the drugs were seized in violation of the 4th Amendment, and again by not finding that the trial court judge abused his discretion in denying petitioner's motion for a continuance.

RELEVANT FACTS

ISSUE 1

Prior to the start of trial, defense counsel made a motion to suppress the drugs seized in this case because, he argued, they were taken in violation of the 4th Amendment of the Federal Constitution. Earlier, defense counsel made a motion to continue the case because a material state's witness, Detective Wilson, was not available to testify. The judge refused that motion. The state proceeded to offer its evidence supporting introduction of the drugs into evidence at trial.

The State first called Detective Kim Coker to the stand. Coker had eleven years of law enforcement experience. ROA 26, ll. 17 – 24. At the time of these events, she was a part of the drug unit. ROA 27. She testified that she, and the other officers, had received an anonymous tip that a male subject was outside a convenience store:

“We had received an anonymous tip that a male subject was outside the store, and was – had a telephone call to another subject and was bringing him a quantity of cocaine. We had a description given to us of the male subject that made the phone call. When we arrived at the store that particular subject was standing there talking to another gentleman. We just got out to investigate the situation. When we drew up, Detective Quiroz was in the driver's seat. I was in the rear passenger seat behind the driver's seat.

And Detective Wilson was in the passenger front seat. When we pulled up, I was on the side that was closest the defendant. When we exited the vehicle, I saw the defendant thrown (sic) down an object to the ground. And when I walked up, there was a dollar bill. When I opened up the dollar bill, there was a quantity of cocaine inside that dollar bill.”

ROA 28, ll. 2 – 20.

According to Coker she retrieved the item containing cocaine prior to placing appellant under arrest. ROA 31, ll. 19 – 21. Coker testified that Detective Wilson actually received the anonymous phone call. ROA 35, ll. 11 – 19. After this testimony, defense counsel made an additional motion for a continuance in this case. ROA 35, l. 20 -- 36, l. 13. Coker testified that she

did not speak with anyone on the telephone. ROA 36, ll. 14 -- 16. Coker did not know who called - she did not know that person's name, nor would she recognize the caller if the caller were in the courtroom. ROA 37, ll. 1 -- 23. Coker did not remember whether they were in the car, or at the police offices, when they received this call. Coker testified that these events occurred at night time, at approximately 9:30 pm. ROA 40, l. 21 -- 41, l. 14. She also testified that the car they were driving had dark tinted windows. ROA 40, ll. 13 -- 19.

Coker testified that she and the other officers abruptly pulled in to the convenience store. They wanted to surprise appellant and the person standing with him. Coker testified that it was her intention to approach him about the cocaine. ROA 42, l. 13 -- 43, l. 20. Coker also testified that she did not observe appellant throw down the dollar bill containing the cocaine until after she exited the car. ROA 51, ll. 19 -- 24. Coker also testified that she observed exactly where appellant threw the drugs and that she "kept her eye on it." ROA 52, l. 24 -- 53, l. 3. Coker testified, before the jury, that the only reason the officers went to a convenience store was to investigate the anonymous tip. ROA 75, l. 23 -- 76, l. 2. Coker also testified that the appellant was not the person described by the anonymous tip. ROA 76, ll. 13 -- 25. Coker admitted that, of the three officers present at the scene, she was the only one who observed the appellant growing the dollar bill to the ground. ROA 77, ll. 1-3; ROA 78, ll.2-13.

The State also called Detective Quiroz to the stand. Quiroz has been with the Sumter Police Department for little over 5 years. ROA 55, ll. 19 -- 21. Quiroz testified that he believed that Coker received a telephone call (a claim she disputed). He testified that he believed that the telephone call stated there was an individual at the store trying to sell drugs either to the clerk or somebody else. ROA 56, ll. 15 -- 19. Quiroz also testified he believed that they may have actually received a second call. ROA 56, ll. 20 -- 24. Quiroz testified that once they pulled up to where appellant and

his friend were, they started talking to them. ROA 58, ll. 7 -- 14. Quiroz testified that Coker stated that she had seen appellant throw something into the trash can. ROA 58, ll. 23 -- 24. Significantly, Quiroz did not observe appellant throw anything into the trash can. ROA 58, l. 25 -- 59, l. 2. Quiroz also testified that Coker was digging through the trash can to retrieve what she saw the appellant throw away. ROA 59, ll. 15 -- 24.; ROA 60, 8 -- 13. Quiroz did not observe Coker pick anything up from the ground. ROA 60, ll. 14 -- 16. Quiroz did not recall who actually searched appellant. ROA 61, ll. 2 -- 9. He further testified that had appellant or his friend attempted to leave they would have been stopped. ROA 63, ll. 14 -- 16. He testified:

Q. Right. So they weren't free to leave once you drove up in that parking lot, were they?

A. They were until I spoke to them. I mean once they started to speak to them, at that time they were free to leave. I had not engaged them at that time.

Q. But you were going to engage them, right?

A. Right. Those were my intentions.

Q. And you were not going to let him leave until you engage them, right?

A. I would have spoken to them. I mean, what came after that is --

Q. Right. But you would've said, "Hey," if they would have run you would've chased them, right?

A. Yes, sir.

Q. If they tried to leave you would've stop them from leaving, right?

A: Right. Based on the information we were given as far as . . .

Q: Okay. Thank you, sir. That's all I have.

ROA 66, l. 16 -- 67, l. 9.

At trial, Quiroz was asked the following question:

Q: So your basis for detaining the defendant was?

A: Strictly off information that we received.

Q: And from what Detective Coker said?

A: Right. Right.

ROA 89, ll. 5-9.

At trial, Quiroz also testified that he did not hear Coker claim that she observed appellant drop the drugs until after he exited the vehicle. ROA 90, ll. 11 -- 18.

Defense counsel moved to suppress the drugs on the basis that the search and seizure violated the 4th Amendment. Counsel argued that both officers testified that they saw these two individuals standing in the parking lot and that was the extent of their observations. They did not testify they saw them handing anything out of the window, or conducting a drug transaction. Quiroz, in fact, testified that he would have stopped them if they had attempted to avoid police questioning. The evidence presented at the pre-trial hearing established that appellant was not free to leave. Counsel argued that appellant was improperly seized. In support of this argument counsel relied on State v. Woodruff, 344 S.C. 537, 544 S.E.2d 290 (Ct. App. 2001); Terry v. Ohio, 392 U.S. 1 (1968); State v. Davis, 354 S.C. 348, 580 S.E.2d 778 (2003); and Florida v. J.L., 529 U.S. 266 (2000). Counsel argued that there was no corroboration of the anonymous tip in this case. ROA 67, l. 20 - 74, l. 1.

The judge denied the motion:

THE COURT: Thank you. The motion for as (sic) to the suppression of the evidence, I am not going to suppress the evidence. The police received an anonymous tip which was subsequently corroborated by the defendant's actions when they drove up. Had he not thrown anything down, you would be dead on, Mr. Clark. They would not have been able to search your client. But the testimony is that your client threw something down. They checked it. It had cocaine in it. At that point in time, they had reason to stop. And therefore, anything they found out after that, (sic). And including what they saw there.

There is absolutely no expectation of privacy out in the front of a store. This is not in a hotel room or anything like. (sic). Therefore, the weight that the jury wants to put on it, whether they want to believe Detective Coker or not would be up to you to put reasonable doubt in their minds to that. But the facts of the stop and the evidence that which was obtained from your client will be coming into evidence.

ROA 74, ll. 2 -- 24.

The trial court judge erred in denying appellant's motion to suppress because the anonymous tip, which was uncorroborated by any personal observations, was insufficient to justify the seizure of appellant. The drugs which were found as a result of the police action are fruit of the poisonous tree and should be suppressed. Wong Sun v. United States, 371 U.S. 471 (1963). As the officers testified, the only reason they approached the convenience store was to investigate the anonymous tip that they received. The officers did not identify any additional factor in their decision to approach appellant. The state never even called the one witness who the other officers claimed received the anonymous tip, Detective Wilson. It is clear from the testimony of the officers that appellant was not free to leave at the time the officers approached him. He was therefore seized within the meaning of the 4th Amendment. California v. Hodari, 499 U.S. 621 (1991). The State did not provide any evidence that would justify the seizure of appellant in this case because there stop was not predicated on reasonable suspicion, and because there was no evidence presented regarding the reliability of the anonymous tip. State v. Taylor, 388 S.C.101, 694 S.E. 2nd 62 (2010). Appellant respectfully asks this Court to reverse his convictions.

ISSUE 2

Trial counsel moved for a continuance when the state called appellant's case to trial. Officer Wilson, who was present with Detectives Coker and Quiroz when these events occurred, was not available to testify. On the day that trial was scheduled to start, defense counsel first found out that Wilson was under a medical disability and would not be appearing in court. Defense counsel was

informed by the solicitor that putting Wilson under subpoena would be of no benefit because he is disabled. On the day of trial, Wilson was having surgery. ROA 4-13.

The state argued that Wilson's testimony would merely be cumulative to the testimony of Coker and Quiroz. ROA 6, l. 24 -- 7, l. 4.

Defense counsel made a motion pursuant to Rule 7 of the South Carolina Rules of Criminal Procedure. Counsel argued that it was necessary for appellant's defense for Wilson to appear and testify. The judge asked the state how they would be prejudiced by a continuance. The state responded:

I beg the Court's indulgence for one second. Your Honor, the answer to that question is, I mean, there no (sic) prejudice to us. And were (sic) ready to proceed though. This case is one of I actually am (sic) -- I don't have an older case due to the fact that I was recently hired. It is one of my older cases. I am ready to go to trial.

ROA 12, ll. 6 -- 13 (emphasis added).

The judge did not grant the continuance motion. ROA 13, ll. 20 -- 22.

During its closing argument, the state took advantage of Wilson's absence:

And, Ladies and Gentlemen, Mr. Clark was you to draw some kind of negative inference for the state's case based on the fact that you didn't hear from Mr. Wilson, Detective Wilson. But I submit to you, Ladies and Gentlemen, there is no evidence that Detective Wilson's testimony would have been any different.

ROA 228, ll. 10-16.

The state also argued that it "cannot be required to bring in every single witness in a case."

ROA 99, ll. 10-12.

The state also made the following argument:

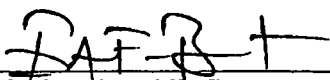
But I submit to you there is no reason for Detective Coker fabricated anything in regards to this case. And there is no motive on her part to lie. No motive on her part to mislead you. There's been nothing shown to call into question the credibility of Detective Coker.

ROA 101, ll. 7-14.

The State's entire closing argument was an exercise in explaining away the inconsistencies of the testimony of the two officers they called to testify. ROA 91 - 115.

The trial court judge abused his discretion by not granting defense counsel's motion for continuance. Counsel made the appropriate motion under Rule 7, and the state conceded that it would not have been prejudiced by the continuance. Counsel had the right to have Wilson testify and be subject to cross-examination. The credibility of Coker was the essential issue in this case. Counsel was unable to mount a vigorous defense without the presence of this material witness. Additionally, the state took unfair advantage of their failure to produce this witness. It is also important to note that the state only called professional witnesses and that it would not have caused them any burden to reschedule the trial when Wilson was available. State v. Smith, 387 S.C. 619, 693 S.E.2d 415 (2009). See also Melendez -- Diaz v. Massachusetts, 129 S.Ct. 2527, 2540 (2009). ("More fundamentally, the Confrontation Clause **imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court.** Its value to the defendant is not replaced by a system in which the prosecution presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiant if he chooses.") Respectfully, appellant asks this Court to grant his petition for rehearing.

Respectfully submitted,


 Elizabeth A. Franklin-Best
 Appellate Defender

This 7th day of November, 2011.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Sumter County
William Jeffrey Young, Circuit Court Judge

THE STATE,

RESPONDENT,

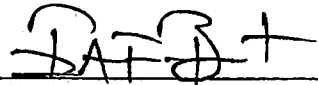
V.

JAMES P. AUSTIN,

APPELLANT

CERTIFICATE OF SERVICE

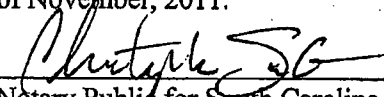
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Christina J. Catoe, Esquire, this 7th day of November, 2011.



Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 7th day
of November, 2011.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: May 16, 2021.

The South Carolina Court of Appeals

The State,

Respondent,

v.

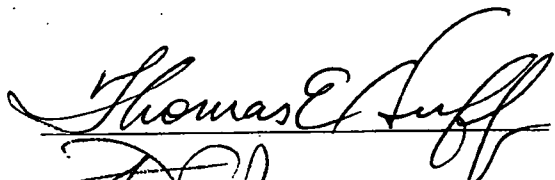
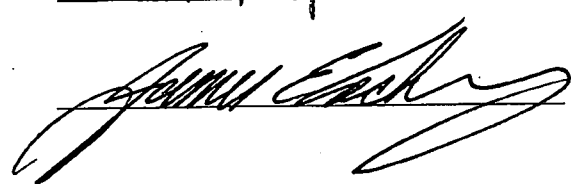
James P. Austin,

Appellant.

The Honorable W. Jeffrey Young
Sumter County
Trial Court Case No. 2009-GS-43-00371

ORDER

After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing. It is, therefore, ordered that the Petition for Rehearing be denied.

 J.
 J.
 J.

Columbia, South Carolina

FILED

30 Jan 2012

STATE OF SOUTH CAROLINA

In The Court of Appeals

RECEIVED

MAR 28 2012

APPEAL FROM SUMTER COUNTY

William Jeffrey Young, Family Court Judge

S.C. Supreme Court

THE STATE,

RESPONDENT,

V.

JAMES P. AUSTIN,

APPELLANT

RECORD ON APPEAL

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State of South Carolina)
)

County of Sumter)
)

State of South Carolina,
 Plaintiffis

vs.

General Sessions
 09-GS-43-371

James P. Austin,
 Defendant

September 24th & 25th, 2009
 Sumter, S.C.

Before The Honorable W. Jeffrey Young, Judge.

A P P E A R A N C E S:

Mr. Martin Spratlin,
 Assistant Solicitor

Mr. John D. Clark,
 Attorney for Defendant

Margaret T. Sullivan,
 Court Reporter.

	<u>WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
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1 (Whereupon, the following takes place outside the
2 presence of the jury.)

3 THE COURT: Mr. Solicitor.

4 MR. SPRATLIN: Your Honor, the State is
5 next going to call Indictment No. 2009-GS-43-371.
6 In that Indictment, the defendant's name is James
7 P. Austin. And he is charged with one count.
8 That being possession of cocaine. He is
9 represented by attorney John Clark, Your Honor.
10 The State is ready to proceed. We have our
11 witnesses on the way. And they can be here within
12 the 10 or 15 minutes.

13 THE COURT: Mr. Clark.

14 MR. CLARK: Good morning, Your Honor.
15 Your Honor, there are a couple of matters I want
16 to bring up to the court. The first thing, Your
17 Honor, I have a Worker's Comp. hearing scheduled
18 at 12:30 before commissioner Huffsteadler. And my
19 client, Mr. Hector Marquez, requires an
20 interpreter. And I am scheduled to meet with the
21 interpreter at 11:30. I can do the hearing at
22 12:30. I would ask the court to allow me to do
23 that.

24 THE COURT: General Sessions takes
25 precedence.

1 MR. CLARK: And I understand that, Your
2 Honor. I would simply ask that -- I do have a
3 motion to continue on another basis.

4 THE COURT: Let me hear that.

5 MR. CLARK: Your Honor this an anonymous
6 tip case where my client was in front of a Young's
7 Market on 521. I am sure you are familiar with
8 that. And officers responded to the tip. Came
9 up seized him, searched him and arrested him. We
10 have a motion, or I intend to make a Motion to
11 Suppress that seizure, intention to search, on the
12 basis that there was no probable cause for it.

13 When I came to court this morning, I was
14 advised by Mr. Spratlin that one of the officers,
15 Mr. Beaufort Wilson, is under medical disability
16 and cannot be here today. He's an absent witness
17 under Rule 7. Your Honor, it our position that we
18 cannot safely go to trial without the testimony of
19 Mr. Wilson, because his testimony goes to the
20 Motion to Suppress.

21 THE COURT: Well wouldn't that be more
22 their concern than yours, if I deny, If I grant
23 your motion? Because they don't have enough
24 evidence, and I suppress it, that's more their
25 risk than yours, isn't it?

1 MR. CLARK: Well I have the burden of
2 bearing the motion, and intend to use his
3 testimony to support my motion. So I have burden
4 of bearing the motion. And his testimony would go
5 to my motion.

6 THE COURT: Did you put him under
7 subpoena?

8 MR. CLARK: No, sir. I have been told by
9 Mr. Spratlin that putting him under subpoena would
10 be of no benefit because he is disabled. Cannot
11 be here. He was in a bad car wreck on duty, and
12 Mr. Spratlin advised me that he is medically
13 unable to be here. So I could issue a subpoena
14 right now. They are having surgery on him right
15 now, and I don't think he can be here. That would
16 be my motion for a continuance.

17 I am not moving to continue the case based
18 on the worker's comp. hearing. I am just simply
19 asking the court allow me to attend the hearing.
20 If the court doesn't grant the Motion for a
21 Continuance, which I am asking for, I can come
22 back after the Worker's Comp. hearing and try this
23 case.

24 THE COURT: Mr. Spratlin.

25 MR. SPRATLIN: Your Honor, the State is

1 ready to go forward. What Mr. Clark said about
2 Mr. Wilson, Beaufort Wilson, is true. He was
3 involved in a car accident on the job, and unable
4 to testify. There were three officers that
5 responded, not to go too deeply in to that. Three
6 officers that responded to an anonymous call. And
7 when they responded, Your Honor, the Officer
8 Coker, who is in the courtroom and ready to
9 proceed, did see the Defendant throw an item to
10 the ground. A folded up dollar bill which she
11 then went and looked at and determined it was
12 cocaine and then placed the defendant under
13 arrest. At that point after witnessing him throw
14 cocaine, suspected cocaine, at that point to the
15 ground.

16 And a search incident to the arrest did
17 find the drug paraphernalia on the defendant; that
18 being a straw. Your Honor, Detective Wilson and
19 Detective Quiroz were also with Detective Coker at
20 the scene. And were all responding to the call.
21 They are the Sumter City drug unit.

22 THE COURT: Your contention is that the
23 other officer's just got additional information
24 that is already being testified to by other
25 officers.

1 MR. SPRATLIN: That is correct, Your
2 Honor.

3 THE COURT: Cumulative is the word I am
4 thinking.

5 MR. SPRATLIN: Any evidence that Detective
6 Coker and Detective Quiroz would be more capable
7 of providing. If Mr. Clark feels that Detective
8 Beaufort Wilson is going to provide some kind of
9 exculpatory information or anything of that
10 nature, there is nothing proffered to the court
11 about that. And no reason for the Court to draw
12 that inference.

13 MR. CLARK: I will be happy to respond to
14 that, Your Honor. First of all, the Defendant
15 has the right to call every person that was there.
16 And Mr. Wilson was there. He made, we believe he
17 may have seen something differently than the other
18 officers. And we have the right---

19 THE COURT: Well this is just to determine
20 whether there was probable cause.

21 MR. CLARK: Yes, sir.

22 THE COURT: This is not going to be the
23 finding.

24 MR. CLARK: But it also going to
25 possession as well. And circumstances surrounding

1 the discovery or the recovery I should say, the
2 seizure and detention of my client. So It goes to
3 not only the Motion to Suppress that I intend to
4 make, but also the actual facts involved in the
5 case as far as what happened when they got there.

6 THE COURT: What would this officer, what
7 do you expect that he is going to say that is
8 going to be materially different from what the
9 other officer would say?

10 MR. CLARK: Well, Your Honor, I expect
11 him, well, I am simply saying that I have the
12 right to put him under oath and question him about
13 what happened. And I have the absolute right to
14 do that. He was there. And I have the right to
15 question him, to attempt to impeach the other
16 witness, or to attempt to impeach the other
17 officers recount or account of what happened. And
18 without him available, I am not able to---

19 THE COURT: Well I mean, he may never be
20 available.

21 MR. CLARK: Well, Your Honor, we don't
22 know that.

23 THE COURT: He may never be able to
24 testify.

25 MR. CLARK: We, I don't know that for a

1 fact. I was just advised that he was disabled.
2 But, you know, if the court grants a continuance,
3 then further inquiry can be made of that. I think
4 inquiry can be made of that right now if the court
5 would give us a minute to see if he is available
6 at the next term. He may be. I was just -- I was
7 just given this case.

8 THE COURT: How old is this case?

9 MR. CLARK: This case is from February,
10 Your Honor. I just took the case on Friday.

11 THE COURT: I know, but you took it on.

12 MR. CLARK: No question. And I am not
13 using that as a basis, Your Honor. I explained
14 that to my client.

15 THE COURT: He had another attorney who
16 has had ample time---

17 MR. CLARK: Yes, sir,---

18 THE COURT: ---to work with him.

19 MR. CLARK: Yes, sir. But that still
20 doesn't change the injury and the unavailability
21 of a witness. And Rule 7, and I intend to, and I
22 had my staff bring over a written motion right
23 now. But Rule 7 of the criminal rules says no
24 Motion for a Continuance of trial shall be granted
25 on account of the absence of a witness without the

1 oath of the party, his counsel or agent. And I am
2 stating what my position is as an officer of the
3 Court. The testimony of the witness is material
4 to support the defense of the party moving. The
5 motion is not intended for a delay. But made
6 solely because he cannot go to trial safely
7 without such testimony.

8 THE COURT: And that would be if you were,
9 go ahead.

10 MR. CLARK: And so, Your Honor, it's my
11 position that this is a closed factual case. This
12 is a case where officers approached my client.
13 Alleged that he threw something to the ground.
14 He denies that. And it is a close factual
15 determination that this jury has to make. And it
16 would be my position that I cannot go to trial
17 safely without calling the people who were there.
18 I have the right to call them.

19 THE COURT: You don't have the burden of
20 proof though. When you go to trial. The initial
21 hearing is just going to be a probable cause
22 hearing.

23 MR. CLARK: Well I understand that, Your
24 Honor, but I intend to use his testimony in the
25 defense of this case. While I don't have the

1 right to burden of proof, I do have every
2 available means to defend my client. And while I
3 don't have the burden of proof, we deem it
4 necessary that this witness appear and testify in
5 this case. If he was going to be called as a
6 State's witness we would have the right to cross
7 examine him. And if he is not, I would have the
8 right to call him in my defense. And because he
9 is disabled, what I believe temporarily, I cannot
10 go to trial safely without calling him.

11 And, Your Honor, the State has shown no
12 prejudice that it will suffer if this court
13 continued this case until November 2nd, I believe
14 is the next term.

15 THE COURT: If this is a 2009 case?

16 MR. CLARK: Yes, sir.

17 THE COURT: What is the prejudice to the
18 State?

19 MR. SPRATLIN: Your Honor, the prejudice
20 to the State would be that right now we have all
21 our witnesses necessary for trial.

22 THE COURT: Well you do that every -- you
23 are always prepared. Tell me why it would be a
24 great -- justice would be thwarted by not trying
25 this case in November.

1 MR. SPRATLIN: Your Honor, I would just
2 state that Detective Coker has had to take time
3 off from other investigative duties.

4 THE COURT: She is still being paid today
5 in this trial.

6 MR. SPRATLIN: I beg the Court's
7 indulgence for one second. Your Honor, the answer
8 to that question is, I mean, there no prejudice to
9 us. And were are ready to proceed though. This
10 case is one of I actually am -- I don't have an
11 older case due to the fact that I was recently
12 hired. It is one of my older cases. I am ready
13 to go to trial.

14 THE COURT: Oh, you're ready.

15 MR. SPRATLIN: Yes.

16 THE COURT: Let me see the attorneys up
17 here.

18 (Whereupon, the attorneys approach the
19 bench and confer with judge.)

20 MR. SPRATLIN: Are we going to do the
21 pretrial motions at 2:00 o'clock as well?

22 THE COURT: That's correct. I think we
23 ought to bring the jury back at three, and strike
24 the jury then. I will hear your motion, and I'm
25 going to accommodate you for your Worker's Comp.

1 hearing. We'll go ahead and do the case.

2 MR. CLARK: My client is on the way here.

3 THE COURT: He doesn't have to be here for
4 striking of the jury panel.

5 THE COURT: Any particular voir dire you
6 would want to present?

7 MR. SPRATLIN: No particular voir dire
8 from the state.

9 THE COURT: Wait a minute for Mr. Clark's
10 client to get here.

11 THE COURT: Mr. Solicitor.

12 MR. SPRATLIN: Thank you, Your Honor. The
13 State next calls the State of South Carolina
14 versus James P. Austin. Indictment
15 2009-GS-43-0371. In that Indictment, Your Honor,
16 the defendant is charged with one count of
17 possession of cocaine. He is represented by
18 attorney John Clark, Your Honor. The State is
19 ready to proceed with trial.

20 THE COURT: Are you ready to proceed, Mr.
21 Clark?

22 MR. CLARK: Subject to my motion.

23 THE COURT: Yes, sir. Ladies and
24 gentlemen, we are about to select the jury in the
25 case of the State versus James P. Austin. The

1 indictment charges Mr. Austin with possession of
2 cocaine. The indictment states that James P.
3 Austin did in Sumter County on or about February
4 6th 2009, knowingly and intentionally possess a
5 quantity of cocaine, a controlled substance under
6 the acts of 445 of the General Assembly of the
7 State of South Carolina. Such possession not
8 having been authorized by law.

9 Now, Ladies and gentlemen, the indictment
10 is in no way an inference that the defendant is
11 guilty of the charges contained in it. It is
12 merely the paper that brings this case in to
13 court. Now there are a number of questions that I
14 need to ask you concerning this and other things.
15 Are they under oath at this time?

16 THE CLERK: Yes, sir.

17 THE COURT: Thank you. As I told you the
18 other day, it is so important that you answer
19 these questions honestly, because these attorneys
20 want a jury that is unbiased and will listen to
21 the facts and rule only on the facts of this case.
22 Now the first question I have, is anyone related
23 by blood, marriage, knows professionally or
24 socially, the Defendant, James P. Austin? If so,
25 please stand at this time.

1 (Whereupon, no response.)

2 THE COURT: No one is standing. Thank
3 you. Now this is a list of potential witnesses in
4 this case. Detective Kim Coker of the Sumter City
5 Police Department. Detective Darian Quiroz of the
6 Sumter City Police Department. James Allsbrook of
7 the Sumter City Police Department. And Angil
8 Landrum of the South Carolina Law Enforcement
9 Division.

10 Does any member of the jury panel know or
11 have any relationship with any of the witnesses I
12 have just named? If so, please stand at the time.

13 (Whereupon, No response.)

14 THE COURT: No one is standing. Now the
15 attorneys who will be trying this case are
16 Mr. Martin Spratlin for the State. And Mr. John
17 Clark for the Defense. Is there any member of the
18 jury panel who has ever been represented by either
19 of these attorneys, or their law firms? If so
20 please stand. Yes, sir. Please state your number
21 and name.

22 THE JUROR: I'm Greg Williams, No. 141. I
23 have been represented by Mr. Clark.

24 THE COURT: You have been represented by
25 Mr. Clark? Do you think the fact that you have

1 been represented by Mr. Clark on a different
2 matter would make it so that you couldn't be fair
3 and impartial in this case today, sir?

4 THE DEFENDANT: No, sir.

5 THE COURT: Thank you, sir. You may be
6 seated. Has any member of the jury panel formed
7 or expressed an opinion about any issue or matter
8 involved in this case? If so, please stand.

9 (Whereupon, No Response.)

10 THE COURT: Thank you. No one is
11 standing. Is any member of the jury panel aware
12 of any bias or prejudice that they may have
13 toward either the state or defense in this case?
14 If so, please stand.

15 (Whereupon, no response.)

16 THE COURT: No one is standing. Thank
17 you. Is there any member of the jury panel that
18 was a member of the Grand Jury who issued the
19 indictment in this case? If so, please stand.

20 (Whereupon, no response.)

21 THE COURT: No one standing. Thank you.
22 Is there any member of the jury panel who is a
23 member of or a contributor to any group which has
24 its primary concern with promotion of law
25 enforcement or victim's rights? These groups

1 would include, Mother's Against Drunk Driving,
2 Students Against Drunk Driving, Citizens Against
3 Violent Crime or any other crime such as that. Is
4 there anyone who falls in to that category? If
5 so, please stand.

6 (Whereupon, no response.)

7 THE COURT: Thank you. Does any member of
8 the jury panel know of any reason whatsoever why
9 he or she should not serve as a juror in this
10 case, with particular emphasis being placed upon
11 your ability to be fair to both the state and the
12 defendant? Yes, ma'am.

13 THE JUROR: I would like to come forward
14 please.

15 THE COURT: Yes, ma'am.

16 THE JUROR: There has been a death in my
17 family. The deceased is 5 years old. He passed
18 away at 9:00 o'clock yesterday morning. And I
19 don't think I can be conscious today.

20 THE COURT: Any objection to it? We have
21 got another juror as well. Your juror number and
22 name.

23 THE JUROR: 48, Florence Disher. And may
24 I leave now?

25 THE COURT: Yes, ma'am. I am going to

1 excuse you for the balance of today.

2 Mr. Cox, you have something you have to
3 attend tomorrow morning?

4 THE JUROR: All day. The Tuomey
5 foundation is having a meeting tomorrow.

6 THE COURT: I am going to excuse you for
7 the balance of the week. Thank you all. That is
8 Juror No. 40 that is excused as well.

9 Does the state have any additional
10 questions they would like for me to ask?

11 MR. SPRATLIN: No, Your Honor.

12 THE COURT: Does the defense have any
13 additional questions?

14 MR. CLARK: No, sir, Your Honor.

15 THE COURT: Ladies and Gentlemen, as you
16 have seen -- Yes, ma'am.

17 THE JUROR: Juror 23. Irene Brunson. Mr.
18 Clark is my cousin's husband.

19 THE COURT: Would the fact that Mr. Clark
20 is your cousin's husband make it so that you
21 couldn't be fair and impartial to the state or
22 defense in this case?

23 THE JUROR: No, it wouldn't.

24 THE COURT: Thank you. Everybody get her
25 name? Yes, sir.

1 THE JUROR: George Shaw No. 155.

2 THE COURT: Yes, sir, Mr. Shaw?

3 THE JUROR: My cousin was also represented
4 by Mr. Clark.

5 THE COURT: The fact that your cousin was
6 represented by Mr. Clark would that make it so you
7 couldn't be fair and impartial to the state and
8 the defense in this case?

9 THE JUROR: No, sir.

10 MR. JACKSON: Your Honor, what number was
11 that?

12 THE COURT: What was your number?

13 THE JUROR: 155.

14 THE COURT: 155.

15 MR. JACKSON: Thank you.

16 THE COURT: Now, Ladies and gentlemen, as
17 you all have seen probably about 10 times this
18 week, the clerk will print a name, a list of
19 names. The attorneys will -- the clerk will call
20 your name. When he does that, would you please
21 stand? The state will then request to strike or
22 to seat you. And then the defense will have the
23 opportunity to do the same thing. Again they can
24 strike you for any reason. But they cannot strike
25 you for reasons of your race or your gender.

1 Anything further from the state before we strike?

2 MR. SPRATLIN: No, Your Honor.

3 MR. CLARK: No, sir, You Honor.

4 THE COURT: Let me see the attorneys for
5 just one second.

6 (Whereupon, the attorneys approach the
7 bench and confer with judge.)

8 THE CLERK: When your name is called,
9 bring your personal belongings and make your way
10 up to the jury box to your left. No. 21 Michael
11 Brooks (m-w) defense struck. No. 38 Mathew Cooney
12 (m-w) accepted. No. 125 Christa Singleton (f-b)
13 accepted. No. 47 Mae Deals (f-b) accepted.
14 No. 64 John Holiday (m-b) accepted. No. 75 David
15 Knox (m-b) accepted. No 49 James Dura (m-w)
16 accepted. No. 23 Irene Brunson (f-b) state
17 struck. No. 69 Lydia Johnson (f-w) accepted.
18 No. 7 Barbara Barwick (f-w) defense struck. No.
19 110 Janie Robinson (f-b) accepted. No. 15 Kristen
20 Bradley (f-b) state struck. No. 147 Ebony Wilson
21 (f-b) accepted. No. 26 Stephanie Burns (f-w)
22 defense struck. No. 108 Youlinda Richardson (f-b)
23 accepted. No. 84 Michael Machado (m-w) accepted.
24 No. 16 Christian Brarens (m-w) accepted. No. 51
25 Joan Fedderson (f-w) accepted.

1 (Whereupon, jury roll call.)

2 THE COURT: Any objection from the state
3 or the defense to this jury or the manner in which
4 it was selected?

5 MR. SPRATLIN: None from the State.

6 MR. CLARK: No, Your Honor.

7 THE COURT: Ladies and Gentlemen, you all
8 have been selected as the jurors in the State
9 versus James P. Austin. I am going to excuse you
10 now to the jury room while we take up some other
11 matters. I will bring you back in here shortly.
12 Thank you.

13 (Whereupon, the following takes place
14 outside the presence of the jury.

15 MR. CLARK: Motion, Your Honor?

16 THE COURT: Don't you have other business?

17 MR. CLARK: Yes, sir, Your Honor. Yes,
18 sir.

19 THE COURT: Why don't you come back at
20 2:00 o'clock. And let me bring the jury back then
21 and let them know then we will swear them then.

22 MR. SPRATLIN: Your Honor, are we going to
23 let the jury come back at a later time then when
24 we come back?

25 THE COURT: Yeah, I am going to have jury

1 come back at three. We are going to come back at
2 two. You may bring the jury back in.

3 (Whereupon, the following takes place
4 within the presence of the jury.)

5 THE COURT: Ladies and Gentlemen, we have
6 some other issues to take up. So what I am going
7 to do is, I am going to release you for lunch.
8 But I am going to ask that you return at
9 3:00 o'clock. And, Ms. Johnson, if you will be
10 the foreperson of this jury. And we will swear
11 you at 3:00 o'clock. And then begin the testimony
12 in this case. I have already asked you not to
13 discuss this case amongst yourself or anybody
14 else. And please don't look up anything on the
15 media or on the internet or anything like that.
16 Or find out any other information other than what
17 you are going to hear from the witness stand. At
18 this time, you are dismissed until 3 p.m. today.
19 Thank you.

20 (Whereupon, at 11:45 a.m. the jury is
21 dismissed.)

22 THE COURT: Good luck in your case.

23 (Whereupon, the trial commences at 2
24 o'clock p.m. outside the presence of the jury.)

25 THE COURT: Are we ready to proceed?

1 MR. SPRATLIN: Your Honor, The State is
2 ready to proceed. I believe Mr. Clark has some
3 motions that he wants to take up.

4 MR. CLARK: Your Honor, I do have at least
5 one motion. But before I make that motion my
6 client was not here, is now here.

7 THE COURT: Yes, sir.

8 MR. CLARK: He was not here when I moved
9 for a continuance.

10 THE COURT: You made a vehement, hard
11 motion back to back.

12 MR. CLARK: Your Honor, would the court
13 allow him to put him something on the record? I
14 know you have ruled on it already.

15 THE COURT: No, I will allow you to put
16 something on the record for him. I am not going
17 to allow him. You are his attorney.

18 MR. CLARK: Yes, sir. I beg the court's
19 indulgence.

20 THE COURT: Yes, sir.

21 MR. CLARK: That he just retained me on
22 Friday. He doesn't feel like he has had time to
23 talk with me about the case. Or even his
24 witnesses that he would like to call that he
25 didn't feel like his prior attorney was doing what

1 he should. And he wanted this matter continued.

2 THE COURT: Well I am going to
3 respectfully deny that. He had an attorney.
4 For whatever reason he decided to let that
5 attorney go. He knew at the time that he changed
6 lawyers that that would not change the scheduling
7 of this case. If he is not happy with you, he can
8 go ahead by himself. That is the best option
9 available.

10 MR. CLARK: Your Honor, and I just want to
11 put on the -- he just adds that he thinks it is a
12 due process violation.

13 THE COURT: It's what?

14 MR. CLARK: He thinks its a due process
15 violation.

16 THE COURT: I happen to disagree with him
17 and we will move forward.

18 MR. CLARK: And, Your Honor, if I can put
19 one final thing on the record.

20 THE COURT: Yes, sir.

21 MR. CLARK: When I took this case on
22 Friday I discussed it with Mr. Austin; that me
23 coming in at that point, would not necessarily be
24 a basis for a continuance.

25 THE COURT: Yes, sir.

1 MR. CLARK: And I just wanted to put that
2 on the record that I did advise him of that.

3 THE COURT: I don't doubt that you told
4 him that.

5 MR. CLARK: Yes, sir.

6 THE COURT: The case will go forward at
7 this time.

8 MR. CLARK: Your honor, at this point, we
9 would make a Motion to Suppress the evidence
10 seized in this case on the basis that the search
11 and seizure and detention was unlawful and not
12 based on probable cause.

13 THE COURT: Is the State ready to go
14 forward on that issue?

15 MR. SPRATLIN: Yes, Your Honor, the State
16 is ready to go forward on that issue. We would
17 first call Detective Kim Coker to the stand.

18 Detective Kim Coker, being
19 first duly sworn, testified as follows:

20 THE CLERK: State your full name and spell
21 your last name for the record.

22 A Kim Coker. C-O-K-E-R.

23 Direct Examination by Mr. Spratlin:

24 Q Detective, where are you currently
25 employed?

Detective Coker-direct by Spratlin

1 A Sumter City Police Department.

2 Q What is your job title there?

3 A I'm sorry?

4 Q What is your job title there?

5 A Detective of the drug unit.

6 MR. CLARK: I hate to interrupt, but
7 could -- I would move to sequester the other
8 officer during this hearing.

9 THE COURT: Okay. If you will step out.
10 Both witnesses. Quiroz and James Allsbrook.

11 Q Detective Coker, how long have you been
12 employed with the Sumter Police Department?

13 A Going on four years.

14 Q And where were you employed before that?

15 A In Summerton. And before that, Hannahan.
16 I was in Charleston.

17 Q How much law enforcement experience do you
18 have in total?

19 A 11 years.

20 Q 11 years. How much of that has been
21 focused on narcotics and other illegal substances?

22 A Nine.

23 Q Nine of the 11 years?

24 A Yes, sir.

25 Q And I think you mentioned earlier about

1 what division or section of Sumter Police
2 Department are you assigned?

3 A The drug unit.

4 Q And what are some of your duties of being
5 a Detective on the drug unit?

6 A We do controlled purchases. We get
7 information from various sources. We do all types
8 of investigations involving drug activity. Drug
9 trafficking. Purchasing, possession, anything
10 related to drugs, money. If it is intertwined
11 with drugs or gang related or anything.

12 Q So pretty much anything drug related, it
13 is your field of expertise.

14 A Yes, sir.

15 Q Were you on duty back on February 6th;
16 2009?

17 A Yes, I believe that's the case.

18 Q And what were you doing? What was your
19 assignment on that date, if you would?

20 A I was part of the drug unit.

21 Q And did you have a chance to come in
22 contact with the defendant, Mr. James Austin, on
23 that date?

24 A Yes, I did.

25 Q Okay. Would you please, where did you

1 come in contact with Mr. Austin?

2 A We had received an anonymous tip that a
3 male subject was outside a store, and was -- had a
4 telephone call to another subject and was bringing
5 him a quantity of cocaine. We had a description
6 given to us of the male subject that made the
7 phone call. When we arrived at the store that
8 particular subject was standing there talking to
9 another gentleman. We just got out to investigate
10 the situation. When we drove up, Detective
11 Quiroz was in the driver's seat. I was in the
12 rear passenger seat behind the driver's seat.

13 And Detective Wilson was in the passenger
14 front seat. When we pulled up, I was on the side
15 that was closest the defendant. When we exited
16 the vehicle, I saw the Defendant thrown down an
17 object to the ground. And when I walked up, there
18 was a dollar bill. When I opened up the dollar
19 bill, there was a quantity of cocaine inside that
20 dollar bill.

21 Q Okay. Hold on a second. Let me go back.
22 Now you said you received an anonymous call?

23 A Yes, sir.

24 Q And was that caller able to give you any
25 kind of identifying information about the person

1 at the time?

2 A Yes, sir. She said that the person said
3 that the male subject was standing outside of the
4 store and made a phone call to another subject.
5 And they had overheard him asking for a quantity
6 of, and they were going to meet him outside the
7 front of the store.

8 Q And is that why you and the other
9 detective proceeded to that store?

10 A Yes.

11 Q What kind of vehicle were you all
12 traveling in?

13 A A blue Tahoe.

14 Q Was it marked in any way?

15 A It had blue lights on the inside of it,
16 but I don't think they were initiated when we
17 pulled up.

18 Q Now you said that when you pulled up, you
19 saw, how many people did you see at the store when
20 you first pulled up?

21 A There was only two subjects outside.

22 Q Okay. Two subjects outside. Could you
23 identify who both of those subjects were?

24 A Well the one I knew from the individual
25 that called stated about the location where he was

1 standing. The other one, you know, I didn't know.

2 Q And which one of those suspects were
3 people standing outside the store with the
4 defendant?

5 A He was standing on the right hand side of
6 the other subject that we had the description of.

7 Q Okay. Now you said when you pulled up you
8 observed the Defendant and what exactly did you
9 observe him doing?

10 A He threw down a small little object from
11 his arm -- I mean from his hand.

12 Q Okay. And now how far away would you say
13 you were from the defendant when this happened?

14 A From you to me.

15 Q Okay. And how long, how clearly were you
16 able to see the defendant?

17 A Very clearly.

18 Q Was there anything in the way, blocking
19 your view of the defendant?

20 A No, sir.

21 Q Okay. How far away was the other guy
22 that was standing next to the defendant when this
23 happened?

24 A There was a trash can kind of separating
25 them probably from here to there.

1 Q Was there any chance you could have
2 confused who threw down the item?

3 A No, sir.

4 Q Okay. Now when you pulled up what, and
5 got out, I assume did you exit the vehicle after
6 witnessing that?

7 A Yes, sir. I was already coming out of the
8 vehicle.

9 Q Did you identify yourself as police at
10 that time?

11 A When we pulled up, and when he threw it a
12 down, yes, we identified ourself as police. But
13 not as we were pulling up.

14 Q Okay. What did you do after witnessing
15 the defendant throw down those items?

16 A I went and retrieved the items. And I saw
17 that it was cocaine and placed the defendant under
18 arrest.

19 Q Okay. And now you say retrieved the items
20 before placing the defendant under arrest?

21 A Yes.

22 Q Did the defendant try to run at any time?

23 A No.

24 Q And just going back one more time. Are
25 you certain that the man you saw throw down that

1 item was the Defendant?

2 A Yes, sir.

3 Q How certain are you that it was the
4 defendant?

5 A Very certain. 100 percent certain.

6 Q Now when you got -- when you found the
7 item that the Defendant threw down, would you
8 please just for the court describe exactly what
9 that item was?

10 A It was a dollar bill folded up. Inside
11 the dollar bill was a loose quantity of cocaine.

12 Q Okay.

13 A Powder cocaine.

14 Q So the powder was actually folded up
15 inside the dollar bill?

16 A Yes, sir.

17 Q Is that, in your experience as a law
18 enforcement officer, with 9 years experience in
19 narcotics or other controlled substances, is that
20 a way to transport cocaine?

21 A Yes.

22 Q Now how could you tell that it was in fact
23 or appeared to you to be cocaine? what was
24 particular about the substance and by the dollar
25 bill that made you believe it was cocaine?

1 A It was a white powder substance that in my
2 9 years after seeing cocaine over and over and
3 over this was marijuana and crack. I mean, I have
4 been working with drugs for 9 years.

5 Q Okay.

6 A It is always suspected as cocaine until it
7 is analyzed by sled.

8 Q And what did do you do with that dollar
9 bill and the suspected cocaine once you picked it
10 up off the ground?

11 A Once I retrieved it off the ground, we put
12 it in a bag and we place it in to evidence. And
13 then we put it in a Best Kit and give it into the
14 evidence. The evidence custodian takes it to sled
15 to have it analyzed.

16 Q Okay. Now you said you were putting the
17 defendant under arrest after observing what was
18 thrown down. Is that correct?

19 A Yes, sir.

20 Q What happened when you were placing the
21 defendant under arrest?

22 A We placed him under arrest and place the
23 handcuffs on him. And then we searched his
24 person. And while we were searching his person,
25 we looked in his right front pants pocket and

1 found a straw, a cut straw. And the straw
2 contained white powder residue.

3 Q Okay. Why were you searching him at that
4 point and time?

5 A Any time you transport someone, you always
6 search them before you transport them.

7 Q When someone is under arrest, do you have
8 a right to search them?

9 A Yes.

10 Q Is that considered what is commonly called
11 a search incident to arrest?

12 A Yes, sir.

13 Q Now the cut straw, in your experience as a
14 law enforcement officer, what is that indicative
15 of?

16 A Some individuals snort the cocaine through
17 a cut straw. It is a common way of using powdered
18 cocaine.

19 Q Now all the events you described to me
20 today, in what county did they occur?

21 A Sumter.

22 Q Okay. And did they all occur within the
23 city limits of Sumter as well?

24 A Yes, sir.

25 Q And did all these events occur on or about

1 February 6th 2009?

2 A Yes, sir.

3 MR. SPRATLIN: Please, Detective Coker, if
4 you would answer any questions that Mr. Clark may
5 have at this time.

6 THE COURT: Mr. Clark.

7 MR. CLARK: Your Honor, may I use the
8 easel?

9 THE COURT: You may.

10 Cross Examination by Mr. Clark:

11 Q Detective Coker, just a couple of
12 questions for you. As far as the anonymous tip is
13 concerned, to who was that call made?

14 A Detective Wilson.

15 Q It was made to Detective Wilson?

16 A Yes, sir.

17 Q And so you never actually spoke to that
18 person?

19 A No, sir.

20 MR. CLARK: Your Honor, I know you have
21 ruled, but I would renew my Motion for a
22 Continuance on that basis as well. And if the
23 Court would permit me, I would also submit that
24 that is potentially Brady evidence that we are not
25 permitted to query Mr. Wilson about. And not

Detective Coker-cross by Clark

1 just---

2 THE COURT: I understand where you are
3 coming from.

4 MR. CLARK: Yes, sir.

5 THE COURT: What it appears what may have
6 created the probable cause was when they drove up
7 and he threw something down and she saw it. She
8 saw that, and have any reason to be here. And
9 once he threw it down and sees cocaine in it, then
10 its wide open. It's almost like plain view.

11 MR. CLARK: I just wanted to renew my
12 motion on that.

13 THE COURT: Yes, sir.

14 Q Now, Detective Coker, you never spoke to
15 anyone on the phone?

16 A No, sir.

17 Q And do you know what number they called?

18 A Do I know what number they called from?

19 Q No, that they called to. What number did
20 they call? Was it 911 or what, do you know?

21 A Either dispatch did with Detective Wilson
22 or they called Detective Wilson. I am not sure.

23 Q Okay. So you don't know. Do you know,
24 you don't know whether that phone called was
25 recorded or not, do you?

Detective Coker-cross by Clark

1 A I don't know. If it went through dispatch

2 I am sure it was. If not I am not sure.

3 Q Okay. And you don't know who that person
4 was, do you, that called?

5 A Yes, sir.

6 Q You do know who that person was?

7 A I don't know that person, but I know what
8 type of situation it was, yes, sir.

9 Q So you know who was on the phone?

10 A No, sir, I don't know the person. Like I
11 can't identify that person. I couldn't if they
12 were in the courtroom today. I would have no idea
13 who it was.

14 Q Do you know that person's name?

15 A No, sir, I don't.

16 Q Do you know if Detective Wilson knows that
17 person's name?

18 A I don't know.

19 Q And you say that they may have even called
20 it on a cell phone, right?

21 A I don't know.

22 Q We don't know.

23 A No.

24 Q Now when did you get the anonymous call?

25 A When?

Detective Coker-cross by Clark

1 Q Yes, in relation to the time you went to
2 the store? If you know.

3 A I can't remember if we were just riding
4 around that day, or if we were up in the office.

5 Q Okay.

6 A I can't remember.

7 Q And your report says that you arrived at
8 21:30. And I believe that is 9:30. And you don't
9 know when in relation to that time you got the
10 call?

11 A From what time? To the phone call until
12 then?

13 Q Yes, ma'am.

14 A It was pretty much immediately. I mean,
15 as soon as we got the phone call we drove over
16 there.

17 Q Okay.

18 A We didn't waste a whole lot of time.

19 Q And is this the Young's Supermarket or
20 Food Store right on highway 521 north? Is that
21 the store that we are talking about now?

22 A It's on the back side of Wal-Mart.

23 Q Right.

24 A You're talking about?

25 Q Right.

Detective Coker-cross by Clark

1 A Yes, sir.

2 Q And I think it is Mason Road beside it?

3 Known as Mason Road?

4 A That's not my area. I believe it is.

5 Q Okay. But you know this is the Camden

6 Highway?

7 A Yes, sir.

8 Q And that is 521 north. Would you agree

9 with that?

10 A Yes, sir.

11 Q And you weren't driving, were you?

12 A No, sir.

13 Q And this is a rectangular square. Did

14 that somewhat represent the parking lot that the

15 store is on?

16 A Yes, sir.

17 Q And then, this is the store right here?

18 Is that right? Approximate.

19 A I think there is woods behind there.

20 Q Yeah.

21 A Where there are houses and all.

22 Q Yeah, the woods would be back here,

23 wouldn't it? I mean, is this the parking lot?

24 isn't the store right there?

25 A Oh, I thought the square was the store.

Detective Coker-cross by Clark

1 Q No, that's why I put the store right
2 there. See that. Is there a door on the front of
3 the store right here, ma'am?

4 A Uh-huh. (Affirmative.) Yes, sir.

5 Q You see what I am getting at?

6 A Uh-huh. (Affirmative.)

7 Q And then I believe there is a gas pump
8 over here?

9 A I don't really remember where the gas pump
10 was.

11 Q Well who is driving the car?

12 A Detective Quiroz.

13 Q And what kind of car was it?

14 A A blue Tahoe.

15 Q Tinted windows in it?

16 A Yes.

17 Q Dark tinted windows?

18 A They were tinted.

19 Q Tinted.

20 A I don't know if it was dark or not.

21 Q And it was at night, wasn't it?

22 A Yes, sir.

23 Q And it was dark outside, wasn't it?

24 A Not so much that the stores were lit.

25 It's got lights all over the place.

Detective Coker-cross by Clark

1 Q But as far as the, other than the -- I
2 mean it was nighttime is what I was getting at. I
3 am not asking you about the lights. I am asking
4 you about being nighttime. Was it nighttime?

5 A It was 9:00 o'clock or so. I can't
6 remember if it was -- I mean I can probably refer
7 back to my notes, I am not sure of the time.

8 Q Okay. May I show her the report, Your
9 Honor?

10 THE COURT: You certainly may.

11 Q Okay.

12 A It was 21:30. So it would be 9:30.

13 Q You agree that's night, right?

14 A Yes, sir, it's nighttime.

15 Q And is it correct that Mr. Austin was
16 standing near the entrance to the door?

17 A To the left side of it.

18 Q Would you say approximately in this area?

19 A Yes, sir.

20 Q Now can you show me where you all entered
21 the parking lot?

22 A Uh-huh. (Affirmative.)

23 Q May this witness step down, Your Honor?

24 THE COURT: Yes.

25 Q I want you to show me where the police car

Detective Coker-cross by Clark

1 entered the parking lot.

2 A We came in, when we came in, we came in an
3 angle. Right there. We stopped directly in
4 front of him.

5 Q So y'all came in at an angle, right?

6 A What's that?

7 Q You came in at an angle?

8 A Yes, sir.

9 Q And you all didn't pull into a parking
10 space or anything, did you?

11 A No, sir. We stopped directly in front of
12 the defendants.

13 Q And y'all pulled in abruptly, didn't you?

14 A Yes, sir.

15 Q But you wanted to surprise him, right?

16 A Yes, sir.

17 Q And---

18 A We had already driven by one time and saw
19 that they were out there.

20 Q Okay. And what were -- and when you
21 pulled in, you all were going to approach him
22 about this cocaine deal?

23 A Yes, sir.

24 Q And that was your intention to approach
25 him about the cocaine?

Detective Coker-cross by Clark

1 A To approach the other subject, yes.

2 Q And him, right?

3 A Yes, sir.

4 Q And you pulled in rather quickly, right?

5 A We pulled in to the parking lot.

6 Q Right. But you pulled across at an angle?

7 A Yes, sir.

8 Q And you stopped pretty much, not in a

9 parking space, right?

10 A Right.

11 Q And you pulled up rather close to him,

12 didn't you?

13 A There was probably, I don't know however

14 how many feet. From about here to the solicitor.

15 Q Okay. About 12 feet or so?

16 A Whatever that is. I guess so.

17 Q And your intention of going was to

18 surprise him, right?

19 A No, sir. We just wanted to ask him about

20 what was going on.

21 Q And who was in charge of this

22 investigation?

23 A Lieutenant Bradshaw.

24 Q Lieutenant Bradshaw.

25 A Uh-huh. (Affirmative.)

Detective Coker-cross by Clark

1 Q I mean on the scene. Who was in charge of
2 it on the scene?

3 A Detective Quiroz is our -- the officer
4 that was in there the longest.

5 Q But he was in charge of the three of you
6 all?

7 A Well Lieutenant Bradshaw was there as
8 well.

9 Q Okay. But was he on the scene when you
10 first pulled up?

11 A Yes.

12 Q So how many people pulled up?

13 A Just three. All three of us who was
14 riding in the vehicle.

15 Q Quiroz, Wilson and Bradshaw?

16 A Yes.

17 Q And you are Carter, right? You are---

18 A Coker.

19 Q Coker. So the four of you all.

20 A No, sir. Lieutenant Bradshaw didn't come
21 in until later.

22 Q Right. Okay. So what I am asking you out
23 of Coker, Quiroz, and Wilson, who was making the
24 decisions?

25 A We all pretty much worked together, but

Detective Coker-cross by Clark

1 Quiroz is the---

2 Q He's a senior officer?

3 A He's a senior officer, yes, sir.

4 Q And when you all pulled up in the
5 parking -- you all pulled up in an angle across
6 the parking lot, and jumped out quickly, right?

7 A Uh-huh. (Affirmative.)

8 Q And when you all jumped out, those
9 individuals weren't free to leave, were they?

10 A Well, simultaneously as I'm exiting the
11 vehicle and once he kind of notices that its the
12 Police Department---

13 Q Uh-huh. (Affirmative.)

14 A ---is when I see him throw down the dollar
15 bill. So as we are approaching, and I picked up
16 the dollar bill, no, sir.

17 Q Yeah, but that's not the question that I
18 asked you. Because nothing was thrown down prior
19 to you all pulling up and stopping, was it? Isn't
20 that true?

21 A Not that I saw.

22 Q Right. And at the time you all pulled up
23 and stopped, those people that were standing
24 there, if they had tried to leave, you would have
25 stopped them, wouldn't you?

Detective Coker-cross by Clark

1 A After I saw him throw down, yes, sir. But
2 if he had just walked off, no, I mean, there was
3 nothing I could have done, if he had just walked
4 off if I didn't see him throw it down.

5 Q So you all drove across the parking lot of
6 at an angle. Stopped with your vehicle pointing
7 at them.

8 A No, sir.

9 Q Well your vehicle wasn't pointed in their
10 direction?

11 A No, sir.

12 Q Where were they standing? They weren't in
13 front of the vehicle?

14 A No, sir. They were on the side.

15 Q Can you come show me that, please?

16 A Uh-huh. (Affirmative.)

17 (Whereupon, the witness steps down from
18 the witness stand.)

19 A Yeah, like I stated earlier,---

20 Q Well just show me, and then I will ask
21 you.

22 A I stated earlier that when we came in, and
23 we drove the car was right here.

24 Q What car?

25 A Okay.

Detective Coker-cross by Clark

1 Q The car you were in.

2 A Yes, sir. Detective Quiroz was here.

3 Wilson was here. I was here. So when we come in
4 and park like this. So the parking places yes,
5 sir, are this way.

6 Q Can you show me, can you draw me in there
7 where the parking places are?

8 A I believe they are on to the side like
9 this. They are on the side of the store right
10 here.

11 Q Well then---

12 A And then there are maybe some like over
13 here. But there is nothing right in here in front.
14 I don't know that area.

15 Q It's a parking area, though, isn't it?

16 A I don't think you could park in front of
17 the store.

18 Q So it's your testimony, I want to ask you
19 this. It's your testimony that these aren't
20 parking spaces along in here.

21 A I can't testify to something. I am not
22 real sure. I think there are some on the end of
23 it.

24 Q Right.

25 A And there are definitely some over here.

Detective Coker-cross by Clark

1 Q on this side, right?

2 A Yes, sir. And there are some definitely
3 some over here.

4 Q So it's your testimony under oath that you
5 don't know that these are parking spaces. Is that
6 what your testimony is, ma'am?

7 A Right where he was standing right there
8 was by the door.

9 Q Yeah, but that was a parking space, wasn't
10 it?

11 A I really don't know. I don't know.

12 Q May I approach the witness, Your Honor?

13 THE COURT: You may.

14 MR. SPRATLIN: Your Honor, may I see what
15 he is talking about?

16 THE COURT: Sure. Sure.

17 Q Detective Coker, I am going to ask you to
18 look at this photograph.

19 A Sure.

20 Q And you see where it is marked Camden
21 Highway?

22 A Uh-huh. (Affirmative.)

23 Q And you see where it's marked Mason Road?

24 A Is that the store right there?

25 Q Yes.

Detective Coker-cross by Clark

1 A Yes, sir.

2 Q And you see where the cars are parked
3 directly in front of the door?

4 A I believe the door is right here where
5 that little light thing is right there.

6 Q Okay.

7 A So that wouldn't be the door. So there
8 are parking spaces here and here.

9 THE COURT: Mr. Clark, where are you
10 going with this? This is just a suppression
11 hearing.

12 Q I'm almost done.

13 A I don't think that right there is a
14 parking space.

15 THE COURT: You made your point.

16 Q Okay. Were these people free to leave
17 when you pulled up?

18 A Yes, sir. If he would have walked away.
19 I mean, as we were getting out of the vehicle, if
20 he would have took off, there would have been no
21 reason. I mean....

22 Q You wouldn't have pursued him?

23 A I mean, I...

24 Q But your vehicle, the vehicle that you
25 were in, was parked in between. He was standing

Detective Coker-cross by Clark

1 by the wall of the store and your vehicle, right?

2 A Yes, sir.

3 Q Can you show me where he was standing?

4 A Pretty much where you've got it drawn.

5 Q Okay. And so your vehicle was between,
6 had him between the wall of the store and your
7 vehicle, right?

8 A No, sir. It wasn't like that close. It
9 was, I guess the wall of the vehicle, I mean the
10 wall of the store is right here. And he was
11 standing about where this table was. And then
12 there was a trash can in between them.

13 Q Okay. Well what did you say when you
14 jumped out of the car? What do you say when you
15 got out of the car?

16 A I am sorry?

17 Q What did you say when you got out of the
18 car?

19 A As we were approaching---

20 Q What did you say?

21 A We told him what we were there for.

22 Q And what was that?

23 A We told him we were there because we got
24 some information that somebody had made a phone
25 call to another male subject. They were both

Detective Coker-cross by Clark

1 standing in front of the store doing a cocaine
2 deal.

3 Q Okay. So it's your testimony that when
4 you all pulled up, they were free to leave?

5 A Did I tell them that?

6 Q No, I am not asking you that. I am asking
7 when you pulled up, were they free to leave?

8 A If he would have walked off. Now if he
9 would have run off, then we would have probably
10 pursued him over something, if I would have seen
11 him throw it down. But it was simultaneously as
12 I'm getting out of the truck, you know, he threw
13 it down.

14 Q Okay.

15 A So, you know, we would -- now if he would
16 have pulled up, if he would have walked off when
17 we were coming in---

18 Q Uh-huh. (Affirmative.)

19 A ---but I saw him throw it down when we got
20 out of the car.

21 Q Now that didn't happen until you after you
22 got out of the car, right? You said as soon as
23 you got out of the car?

24 A Right. Right.

25 Q And just one, I don't think you answered

Detective Coker-cross by Clark

1 this question. What exactly did you say?

2 A I had told him why we were there.

3 Q And what---

4 A That we received information. And that,
5 you know, that somebody had called somebody else
6 for some cocaine. They were supposed to meet them
7 up there. And that's what we were there for.

8 Q And you said all that before he threw it
9 down?

10 A Sir?

11 Q You said all that before he threw it?

12 Well when---

13 A When he threw it down, you asked me after.

14 Q No, I am asking you, tell me what he said,
15 what you said before anything was thrown down.

16 A I didn't say anything.

17 Q What did Detective Quiroz say?

18 A I don't know what. I can only testify to
19 what I said.

20 Q Okay. What did Detective Wilson say?

21 A I can only testify to what I said.

22 Q Okay. All right. Now when this object
23 was thrown, did you know what it was being thrown?

24 A It looked like something small like a
25 dollar bill folded up. But I mean I wasn't like

Detective Coker-cross by Clark

1 positively sure until I got right up on it. I saw
2 exactly where he threw it, and I kept my eye on
3 it.

4 Q Was there anything else on the ground?

5 A I don't remember any bottles or anything
6 like that laying on the ground.

7 Q Well wasn't it in front of a trash can?

8 A It was front of them. The trash can was
9 in the back of them.

10 Q And who searched Mr. Austin?

11 A I believe I did.

12 Q Can you be certain of that?

13 A Yes, sir. Because I am the one who put
14 everything in evidence.

15 Q Okay. So you put everything in evidence?

16 A Yes, sir.

17 THE COURT: Thank you, ma'am. That's all
18 I have. Any redirect?

19 MR. SPRATLIN: Just real briefly, Your
20 Honor.

21 Redirect Examination by Mr. Spratlin:

22 Q Detective Coker, when you all first pulled
23 up, and Mr. Clark has drawn, pulled the vehicle in
24 front of the defendant. Just to clarify, I think
25 he said the defendant was actually facing the side

Detective Coker-redirect by Spratlin

1 of the vehicle, is that correct?

2 A Yes, sir.

3 Q Was the defendant -- was there sufficient
4 room between your vehicle and the Defendant such
5 that he could walk away if he wanted to?

6 A Yes.

7 Q Was he in any way blocked in?

8 A No, sir.

9 Q Was his freedom in any way restrained by
10 your pulling that vehicle in front of him?

11 A No, sir.

12 MR. SPRATLIN: Thank you. That's all I
13 have.

14 MR. CLARK: Your Honor, I would just like
15 to make this a Court's Exhibit for the hearing.

16 THE COURT: Any objections?

17 MR. SPRATLIN: None, Your Honor.

18 THE COURT: For purposes of this
19 suppression then it will be Defense Exhibit No. 1.

20 (Map marked Defendant's Exhibit marked No.
21 1.)

22 MR. CLARK: I don't have any further
23 questions for this witness.

24 MR. SPRATLIN: Your Honor, the State would
25 next call Darian Quiroz.

Detective Coker-redirect by Spratlin

1 Detective Darian Quiroz, being
2 first duly sworn, testified as follows:

3 THE CLERK: State your name and spell your
4 last for the record.

5 A Darian Quiroz. Q-U-I-R-O-Z.

6 DIRECT EXAMINATION BY SPRATLIN:

7 Q Detective Quiroz, where are you currently
8 employed?

9 A Sumter City Police Department.

10 Q And what is your job title there?

11 A I'm a Detective with the organized crime
12 and vice control.

13 Q How long have you been with the Sumter
14 Police Department?

15 A A little over 9 years.

16 Q Were you employed in law enforcement prior
17 to your work at Sumter Police Department?

18 A No, sir.

19 Q How long have you been a detective with
20 the Sumter Police Department?

21 A A little over 5 years.

22 Q And have you spent that entire time in the
23 drug unit?

24 A Five years of it, I have.

25 Q Were you on duty back on

Detective Quiroz-direct by Spratlin

1 February 6th 2009?

2 A Yes, sir.

3 Q What were you doing on that day?

4 A I believe we were doing street suppression
5 type work.

6 Q What do you mean by that?

7 A Pretty much riding through troubled
8 neighborhoods that are known for high crime or
9 drug activity and suppressing them.

10 Q At some point on that day, did you have a
11 chance to go to the Young's Store located at
12 Highway 521?

13 A Yes, sir.

14 Q What was the purpose of going there?

15 A I believe we received a phone call. I
16 believe it was by phone. Detective Coker might
17 have received a call stating that there was an
18 individual at the store trying to sell drugs
19 either to the clerk or somebody. He made mention
20 about drugs and said he would be back. That was a
21 call we received. Then I believe we might have
22 received another call stating that the person was
23 there and that they were standing in front of the
24 store.

25 Q And you are not exactly certain which

Detective Quiroz-direct by Spratlin

1 one -- who all was with you on this date in the
2 car?

3 A I normally drive, but I wasn't driving.
4 Detective Coker I believe, might have been in my
5 vehicle. I know Detective Wilson was.

6 Q Do you remember where Detective Coker was
7 sitting?

8 A I think Detective Wilson usually sits up
9 front in the front passenger side. And so she was
10 probably -- she was behind me somewhere. I am not
11 sure where she was.

12 Q And now you said you weren't certain which
13 one of the three of you received a phone call?

14 A Right. I know I didn't receive a phone
15 call.

16 Q Now when you arrived at the Young's Food
17 Market, what did you find?

18 A While we were pulling up, I observed two
19 black males standing in front of the store next
20 to, I can't remember if it was an ice machine or
21 some type of -- but it was a trash -- an ice
22 machine or something and then the trash can. And
23 then double doors that led to the store. And they
24 were standing right in front of the trash can next
25 to it.

Detective Quiroz-direct by Spratlin

1 Q They were standing right in front of the
2 trash can?

3 A Right.

4 Q Now when you got out of the car, or what
5 happened after you pulled up and saw the two
6 people standing there?

7 A Once we pulled up, we pretty much got out
8 and spoke with them. I believe I spoke to, I
9 don't recall his name, but it was the second
10 individual that was there with the Defendant. I
11 spoke to him. And I believe it was Detective
12 Wilson was standing next to the defendant. And
13 that's pretty much -- we got there and kind of
14 started talking to them.

15 Q Okay. Did anyone on your team observe
16 anything to your knowledge when you all pulled up?

17 MR. CLARK: Your Honor, I object to, he
18 can't testify about what somebody observed. Then
19 it would be hearsay.

20 THE COURT: Well they are all part of the
21 team. She has already testified. This is a
22 Probable Cause Hearing and Suppression.

23 A Detective Coker stated that she had seen
24 the defendant throw something into the trash can.

25 Q Did you actually observe the defendant

Detective Quiroz-direct by Spratlin

1 throw anything into the trash can?

2 A No, sir.

3 Q Okay. What were you focused on as you all
4 were pulling up into the parking lot?

5 A Like I said, I was the one driving so
6 making sure I didn't hit anybody that was walking
7 across. Pretty much just pulling up to scene as
8 quick and as safe as possible. And they are
9 getting out with guys knowing. Because a lot of
10 times people will try to run. But just getting
11 out as quick as possible when confronting them.

12 Q To the best of your knowledge, what
13 happened after you all began talking with the two
14 individuals when you all pulled up?

15 A We were speaking to them, and I believe we
16 were just asking general conversations, what were
17 they doing there, you know, standing in front of
18 the store those type of things. Detective Coker
19 was digging through the trash to retrieve what she
20 saw. At that point she retrieved some money, I
21 believe. I am not sure how much it was, but it
22 was crumbled up. And at the time she looked at it
23 and saw that what she believed to be cocaine
24 powder.

25 Q How much attention were you paying to what

Detective Quiroz-direct by Spratlin

1 Detective Coker was doing at this point and time?

2 A Like I say, I was kind of watching the guy
3 that I had control over, which was the guy that
4 was on the scene.

5 Q Okay.

6 A And was kind of overall observing her, but
7 still paying attention to what my guy was doing.

8 Q Are you certain that Detective Coker was
9 actually digging inside the trash can?

10 A Or on top of the trash. When I say
11 digging, but was going through the top of the
12 trash can. She didn't actually dive into it or
13 anything.

14 Q Did you observe Detective Coker pull up or
15 pick up anything from the ground?

16 A Not they I can recall.

17 Q And at some point was the defendant placed
18 under arrest?

19 A Right. Before that dollar or whatever it
20 was, the currency that had the cocaine powder in
21 it, he was placed under arrest for that.

22 Q Okay. And who was, who was searching him
23 after he was placed under arrest?

24 A I am not quite sure. I believe Detective
25 Wilson was watching him and probably detained him

Detective Quiroz-direct by Spratlin

1 at that time.

2 Q Okay. But you can't be certain who was
3 actually searching him.

4 A No, sir.

5 Q Okay. Can you be certain that Detective
6 Coker was not searching him?

7 A Right. Well I can't be certain of that
8 either. Like I said, Detective Wilson was the one
9 that was watching over him.

10 Q When you got -- when law enforcement finds
11 evidence on someone, who customarily enters that
12 evidence?

13 A Usually the person that retrieves the
14 evidence is the one that enters the evidence.

15 Q So if a report or the evidence log showed
16 that Detective Coker retrieved those items, that
17 would be consistent with Detective Coker finding
18 those items?

19 A Right. Right.

20 Q When you first pulled up your vehicle in
21 front of those young gentlemen standing in front
22 of the Young's Food Market, how much room or space
23 did you leave between your vehicle and those two
24 people?

25 A Just estimation probably be about 10 feet.

Detective Quiroz-direct by Spratlin

1 Q Was there any -- were they at that point
2 able to walk away from the scene?

3 A Once we pulled up?

4 Q Yes.

5 A Like I said, by pulling up, we weren't
6 conforming them. So they could have walked away.

7 MR. SPRATLIN: That's all the questions I
8 have at this time.

9 Cross Examination by Mr. Clark:

10 Q Detective Quiroz, you said earlier that
11 some people run when you would drive up, right?

12 A Yes, sir.

13 Q And you didn't want them to run.

14 A Right.

15 Q Isn't that what you said?

16 A Right.

17 Q And that's why you pulled up on them
18 quickly, right?

19 A Right.

20 Q And let me show you what is marked as
21 Defendant's Exhibit No. 1. Did you drive your
22 vehicle at an angle across that parking lot?

23 A Right. It would have been an angle.

24 Q Does this red mark across the parking lot
25 fairly represent how you drove across that parking

Detective Quiroz-cross by Clark

1 lot?

2 A I mean, it's not -- I mean, given the fact
3 that it's a drawing and not an accurate depiction
4 of the actual. I mean it is somewhat similar to
5 that.

6 Q Okay.

7 A I will say that.

8 Q And that would be this mark leaving from
9 Mason Road going across the parking lot, right?

10 A Right.

11 Q And if they had run, you would have
12 stopped them, wouldn't you?

13 A If they would have ran?

14 Q Yes, sir. If they had tried to leave you
15 would have stopped them too, wouldn't you?

16 A Sure.

17 Q Okay.

18 A If I would have confronted them.

19 Q And you were driving the vehicle, right?

20 A Yes, sir.

21 Q And your vehicle -- you parked your
22 vehicle kind of between, let me see how I want to
23 say this. They were between your vehicle and the
24 store when you stopped, right?

25 A No, sir, not exactly.

Detective Quiroz-cross by Clark

1 Q Where were they?

2 A Do you mind if I show you?

3 Q If it is all right with the court, it is
4 all right with me.

5 (Whereupon, witness steps down from the
6 witness stand.)

7 A Where they were standing, and say these
8 were the double doors there.

9 Q Can you write door right there?

10 A Sure.

11 Q All right.

12 A That was a door.

13 Q Okay.

14 A I believe there was some type of machine
15 here. Trash can right here.

16 Q Can you put an M by that machine, and T by
17 the trash?

18 A And where they were standing was kind of
19 right there. My vehicle was more this angle here.

20 Q Okay.

21 A So we had -- we were -- I was pretty
22 much headlights on---

23 Q Right.

24 A ---at an angle. But they were standing
25 more towards the building, and not in the middle

Detective Quiroz-cross by Clark

1 of the parking spot.

2 Q So where you put these two dots is where
3 they were standing.

4 A Correct.

5 Q And your vehicle was facing them, right?

6 A Right. Right. At an angle.

7 Q And if you had kept going, which I know
8 you wouldn't. But if you had kept going, you
9 would have run slam over them, right? I mean---

10 A If I was driving recklessly, yes, sir, I
11 mean, I guess I could have.

12 Q Right. But I mean, they were directly in
13 your path, right?

14 A Right.

15 Q And you were actually parked across these
16 parking spaces right here, weren't you?

17 A Right.

18 Q I understand. But you were at an angle on
19 the parking spaces, right?

20 A Right.

21 Q And are these the parking spaces right
22 here? Isn't that where the parking spaces were
23 right across the front of the store?

24 A There are some parking spaces in front of
25 the store.

Detective Quiroz-cross by Clark

1 Q Can you write parking space right there?

2 So, thank you. And so how far, and these two

3 dots, I put suspects on here. Is that where they
4 were standing?

5 A Right.

6 Q These two little dots right there? And I
7 am just going to say, let's say police car. Well
8 actually a truck, right? And an arrow pointing to
9 that, that's where you say your truck was.

10 A Well at least angled downward.

11 Q And these two dots were the suspects.

12 A Right.

13 Q And you say that if they had tried to
14 leave you would have stopped them, right?

15 A Right. I was in front of them.

16 Q Right. So they weren't free to leave once
17 you drove up in that parking lot, were they?

18 A They were until I spoke to them. I mean
19 once I started to speaking to them, at that time
20 they were free to leave. I had not engaged them
21 at that time.

22 Q But you were going to engage them, right?

23 A Right. Those were my intentions.

24 Q And you were not going to let them leave
25 until you engaged them, right?

Detective Quiroz-cross by Clark

1 A I would have spoken to them. I mean, what
2 came after that is---

3 Q Right. But you would have said, "Hey," if
4 they would have run you would chased them, right?

5 A Yes, sir.

6 Q If they tried to leave you would have
7 stopped them from leaving, right?

8 A Right. Based off the information we were
9 given as far as...

10 Q Okay. Thank you, sir. That's all I have.

11 MR. SPRATLIN: No further questions, Your
12 Honor.

13 THE COURT: Thank you, you may step down.
14 Is there anything further from the state?

15 MR. SPRATLIN: No, Your Honor. The State
16 at this time as far as the issue of the
17 suppression of evidence would rest.

18 THE COURT: Mr. Clark, would you like to
19 make an argument at this point.

20 MR. CLARK: Yes, Your Honor. Your Honor,
21 I would move to suppress the evidence seized in
22 this case on the basis that the search was an
23 unlawful search, seizure and detention. It was
24 unlawful and violated the 4th Amendment. It was
25 not supported by probable cause. Your Honor, the

1 law in this state is very clear. That when there
2 is an anonymous tip by itself is not enough to
3 conduct a detention, a seizure and a search that
4 the officers must corroborate the anonymous tip.

5 In this case both officers testified that
6 they saw these two individuals standing in the
7 parking lot and that is it. They didn't say they
8 saw them handing anything out of a window or
9 making a transaction or anything. Detective
10 Quiroz testified that he would have stopped them
11 if they had tried to run away or if they had tried
12 to walk away. So the evidence establishes that
13 they were not free to leave. And without a --
14 without corroboration, driving up the way he did,
15 and he said his intention -- he said they would
16 not have been able to leave without talking to
17 him. And so I would submit that that was a
18 seizure. And any subsequent evidence found as a
19 result thereof has to be suppressed.

20 In support of our position, Your Honor, we
21 would submit the case of State vs. Woodruff, State
22 vs. Ronald Woodruff. Which is a 2001 Court of
23 Appeals case. The case clearly sets out that
24 whenever a person is not free to walk away, they
25 have been seized. And that would be on page 8 of

1 the opinion. They cited Terry. They say "A
2 person has been seized within the meaning of the
3 4th Amendment whenever a police officer accosts
4 the individual and restrains his freedom to walk
5 away." Citing Terry vs. Ohio. And then it says
6 quoting Terry, "An individual is seized when
7 officers restrain his freedom even if the
8 detention is brief and falls short of an arrest;
9 that is, only when the officer by means of
10 physical force or a show of authority has in some
11 way restrained the liberty of a citizen may we
12 conclude that a seizure occurred." I submit to
13 you that not only did Detective Quiroz testify
14 that they weren't free to leave, the way he drove
15 his vehicle up and basically cornered this man,
16 was a show of authority that amounts to a seizure
17 under the law.

18 Your Honor, I would also rely on the case
19 of State of South Carolina, if I could approach
20 the bench.

21 THE COURT: Yes, sir.

22 MR. CLARK: ---vs. Naquentez Debeckio
23 Davis. For the proposition that when there is an
24 anonymous tip---

25 THE COURT: Well that was in a hotel room,

1 though, wasn't it?

2 MR. CLARK: Well---

3 THE COURT: They had to go in to
4 somebody's room.

5 MR. CLARK: But I believe this case stands
6 for the proposition that an anonymous tip is not
7 enough to search someone.

8 THE COURT: Oh, that's correct.

9 MR. CLARK: But that it had to be
10 corroborated. And that there is absolutely no
11 corroboration under the facts of this case. And,
12 Your Honor, and also, Your Honor, the case of,
13 this is a case from the United States Supreme
14 Court. Florida vs. J. L. And this case discusses
15 the fact that an anonymous tip must be reliable.
16 Not just in its tendency to identify a person, but
17 it has to be reliable and it also discusses
18 cooperation. And in this case there cannot be any
19 evidence in this record about reliable informant,
20 because neither of the officers spoke with the
21 informant. Therefore, Your Honor, I would move at
22 this time to suppress any evidence that was seized
23 in this matter.

24 THE COURT: Mr. Spratlin.

25 MR. SPRATLIN: Thank you, Your Honor.

1 Your Honor, Mr. Clark is right, that an anonymous
2 tip without any kind of conformation is not enough
3 grounds to allow a detention of an individual.

4 What Mr. Clark is arguing what we have here.

5 However, I would submit to the court that there
6 was in fact no detention prior to Detective Coker
7 seeing the defendant throw the item to the ground.
8 Prior to seeing the defendant, when the police
9 arrived at the scene and got out of their vehicle,
10 throw the item to the ground, there was no
11 detention, Your Honor.

12 Detective Quiroz' testimony was not that
13 they were not free to leave, no. He said they
14 were not free to run away. They were not free to
15 run from the police. Which, Your Honor, there is
16 case law out there that one of the factors to be
17 considered in determining whether a Terry stop
18 would be allowed. Why? Running from the police
19 officers can in and of itself be reasonably
20 suspicious. He testified that they were free to
21 walk away. Both Detective Coker testified to
22 that. And Detective Quiroz testified that having
23 walked away there is nothing they could have done.

24 Your Honor, these individuals, there was
25 no detention prior. The testimony was that and

1 using Mr. Clark's own diagram, the car drove up.
2 The defendant's were standing in front of the
3 door. And both officers testified at least 10
4 feet of space. 10 feet between the defendant and
5 the automobile. 10 feet to allow the defendant
6 and the other suspect who did match the
7 description that was given by the confidential
8 informant to leave the scene. 10 feet. They were
9 not blocked in from Detective Coker's testimony.
10 They were not restrained from being able to leave.
11 They were free to walk away.

12 Your Honor, there is no detention in this
13 case when the officers first arrived. The only
14 detention occurred was after this man threw down
15 the dollar bill. Detective Coker, her testimony
16 was, saw it, saw cocaine in it. Placed that man
17 under arrest. That's when the detention happened,
18 Your Honor. After the defendant threw down the
19 dollar bill. Not before. And the State would ask
20 that the evidence that was seized as a result of
21 the throw down, the cocaine itself, as well as the
22 straw that was found in the defendant's pocket, be
23 allowed in to evidence.

24 THE COURT: Thank you.

25 MR. CLARK: May I briefly respond, Your

1 Honor?

2 THE COURT: Briefly.

3 MR. CLARK: Your Honor, I think where Mr.
4 Spratlin and I disagree or where we differ; is
5 that, the seizure occurred with a show of force
6 when the vehicle drove up. And that is quoted in
7 State vs. Woodruff, page 8. Where they, that is
8 only when the officer by means of physical force
9 or show of authority has in some way restrained
10 the liberty of a citizen.

11 THE COURT: I mean, in Woodruff, and the
12 facts weren't that when the police drove up, that
13 they throw something down either, was it?

14 MR. CLARK: No, sir, that wasn't the
15 facts.

16 THE COURT: And that's a different
17 situation entirely than what we have here.

18 MR. CLARK: That is true, Your Honor. But
19 my case would be that that doesn't change the
20 principles of law; that a show of force is a
21 detention. And detective Quiroz testified he was
22 driving the car. That he drove across the parking
23 lot quickly. He didn't want them to run. And he
24 pointed his vehicle directly at them across the
25 parking lot, Your Honor. Thank you, that's all I

1 have.

2 THE COURT: Thank you. The motion for as
3 to the suppression of the evidence, I am not going
4 to suppress the evidence. The police received an
5 anonymous tip which was subsequently corroborated
6 by the defendant's actions when they drove up.
7 Had he not thrown anything down, you would be dead
8 on, Mr. Clark. They would not have been able to
9 search your client. But the testimony is that
10 your client threw something down. They checked it.
11 It had cocaine in it. At that point and time,
12 they had reason to stop. And therefore, anything
13 they found out after that. And including what
14 they saw there.

15 There is absolutely no expectation of
16 privacy out in the front of a store. This is not
17 in a hotel room or anything like. Therefore, the
18 weight that the jury wants to put on it, whether
19 they want to believe Detective Coker or not would
20 be up to you to put reasonable doubt in their
21 minds to that. But the facts of the stop and the
22 evidence that which was obtained from your client
23 will be coming in to evidence. Do you want a few
24 more minutes before we bring the jury?

25 MR. CLARK: No, sir, I have one more

Detective Coker-direct by Spratlin

1 A So that it's known to be a police or some
2 kind of emergency vehicle.

3 Q Okay. At some point when you were on the
4 road with Detective Wilson and Quiroz, did you
5 have a chance to go to the Young's Store located
6 at 521? At Highway 521?

7 A Yes, sir.

8 Q Why did you -- why did you, Detective
9 Quiroz and Detective Wilson go to his Young's
10 Store?

11 A We received information that an individual
12 was talking on their cell phone in the store. And
13 that someone overheard them asking another subject
14 to bring a quantity of cocaine to them and meet
15 them at the store. And that individual called law
16 enforcement, and we went to, and they gave us the
17 description of the individual waiting on the other
18 person to show up. And we went to investigate it.

19 Q So you were essentially---

20 MR. CLARK: Object to the leading
21 question, Your Honor.

22 THE COURT: Don't lead.

23 Q Now is that the only reason why you went
24 to the Young's Market?

25 A Yes, sir, to investigate the gentleman who

Detective Coker-direct by Spratlin

1 was standing out in front of the store who made
2 the phone call.

3 Q Was it the gentleman standing out in front
4 of the store who made the phone call? Or do we
5 know who made the phone call?

6 A Yes, sir. The caller stated what the
7 subject looked like that was standing out in front
8 of the store. So we knew what the subject looked
9 like that was standing out in front of the store.
10 So we approached that subject and said that they
11 were waiting on another person.

12 Q Okay.

13 A And when we drove up, there were two
14 people standing there. And one of them was
15 described as the subject.

16 Q And was that the defendant in this case?

17 A The defendant is actually the one who was
18 bringing it to them.

19 Q Well so the defendant was not the
20 gentleman described on the phone call, correct?

21 A I am sorry?

22 Q The defendant was not the gentleman -- the
23 description given on the phone call was not that
24 of the defendant, correct?

25 A Right. Right.

Detective Coker-cross by Clark

1 Isn't it true that out of the three officers out
2 there, you are the only one that claims you saw
3 this, right?

4 A Yes, sir.

5 Q And isn't it true out of the other two
6 that were there, you were the farthest away, isn't
7 that?

8 A No, sir, I was the closest to them. When
9 we pulled up---

10 MR. CLARK: Well, Your Honor, that is not
11 responsive to my question. She already answered
12 it.

13 THE COURT: He can cover that on redirect.

14 MR. CLARK: All right.

15 THE COURT: Ask the question, answer the
16 question, ma'am.

17 Q You weren't driving, were you?

18 A No, sir.

19 Q And you were in the back seat, weren't
20 you?

21 A I was the closest to the defendant.

22 ME. CLARK: Your Honor, that is not
23 responsive to my question. Were you in the back
24 seat or not?

25 A Yes, sir, I was in the back seat..

Detective Coker-cross by Clark

1 A No, sir.

2 Q But the fact of the matter is, you are the
3 only one that claimed you saw him do that, right?

4 A Yes, sir.

5 Q Well, Ms. Coker, wasn't it at nighttime?

6 A Yes, sir.

7 Q And weren't your windows tinted?

8 A Yes, sir.

9 Q And weren't you sitting in the back?

10 A Yes, sir.

11 Q And these officers in the front never saw
12 this, did they?

13 A No, sir.

14 Q And now isn't it true that since this case
15 has been filed, you have changed your testimony
16 about this case, haven't you?

17 A No, sir.

18 Q Didn't you testify a few minutes ago that
19 you found a straw in this man's pocket?

20 A Yes, sir.

21 Q Well why does your report say that the
22 officers found it? Different than what you
23 testified here? Why is that different?

24 A Because in my reports, we always put
25 officers located such and such. That's common.

James Allsbrook-direct by Spratlin

1 supervisor, and that's it.

2 Q And from the time that it left the
3 evidence room, has it been in your custody and
4 control?

5 A Always.

6 MR. SPRATLIN: Your Honor, at this time I
7 would tender State's Exhibit No. 1 for
8 identification as State's Exhibit No. 1.

9 THE COURT: Mr. Clark, any objection?

10 THE COURT: Just a few questions, Your
11 Honor.

12 THE COURT: You may ask.

13 Cross Examination by Mr. Clark:

14 Q Detective Allsbrook. Mr. Allsbrook.

15 A I am not a police officer.

16 Q Sir, I was, happened to be looking at this
17 evidence, is there a defect on that bag?

18 A I see that there is a minor hole in it.

19 Q A hole big enough to slide things in and
20 out, right?

21 A You could pour something into it if you
22 wanted to.

23 Q Okay.

24 A Or out of it.

25 Q And so that bag right there is not really

James Allsbrook-cross by Clark

1 tamper proof, is it?

2 A I didn't say the bag was tamper proof. I
3 said the evidence tape was.

4 Q Well I mean, the purpose of having tamper
5 proof evidence tape is so that you can't get the
6 items in and out without knowing, right?

7 A The only way that you are going to do what
8 you are asking for, sir, is to completely enclose
9 an item with tape.

10 Q I understand. But can't you get what's in
11 there out of that little hole? It does raise that
12 question.

13 A I can get the straw out of it if I really
14 wanted to.

15 Q And couldn't you fold that dollar up and
16 get it in and out too?

17 A Not the way it is right now, I couldn't.
18 I am not going to tamper with it.

19 Q I understand. But there is clearly a hole
20 in there, right?

21 A I do see a small hole.

22 Q And that compromises that bag to some
23 extent, you would admit, right?

24 A It compromises the integrity of the bag
25 itself.

James Allsbrook-cross by Clark

1 Q Yes, sir.

2 A It is.

3 Q And so therefore if the bag is
4 compromised, then no way to absolutely be sure
5 that anything came out or went in or vice versa.
6 Isn't that true? A way to be absolutely be sure.

7 A I know what I received. I know what I had
8 in front of me.

9 Q Do you know when the hole got put in the
10 bag?

11 A No, sir, I don't remember.

12 Q And you don't know anything else about
13 whether Mr. Austin possessed any cocaine or not,
14 do you?

15 A I have no personal knowledge.

16 Q You are not a sworn officer, right?

17 A I have no personal knowledge of that
18 person.

19 Q And as evidence custodian -- well that's
20 all I have on that issue, Your Honor.

21 THE COURT: Thank you.

22 Direct Examination continues by
23 Mr. Spratlin:

24 Q Mr. Allsbrook, you mentioned on Mr.
25 Clarks's interview, that, that is what you

James Allsbrook-cross by Clark

1 received. How do you know that's what you
2 received?

3 A On Chain of Custody it lists a Item 1
4 being a Best Kit containing cocaine, and a plastic
5 bag would also be with the Best Kit number.

6 Q Uh-huh. (Affirmative.)

7 A Item 2 being a clear straw containing
8 cocaine residue. Item 3, dollar bill with cocaine
9 residue. I have got three items.

10 Q Now do you check and make sure that when
11 you receive the item that it is actually what is
12 listed on that report?

13 A Yes, sir.

14 Q Okay. And that report again says straw
15 cocaine residue.

16 A It does.

17 Q And so that's what you received in to
18 evidence?

19 A I received three items. I verify I have
20 three items.

21 Q And that was on February 6th 2009?

22 A Correct.

23 MR. SPRATLIN: Your Honor, again, I would
24 submit this to be entered into evidence as State's
25 Exhibit, No. 1.

James Allsbrook-direct by Spratlin

1 THE COURT: Do you object?

2 MR. CLARK: Yes, Your Honor, I object
3 because the bag has a hole in it. And it is
4 tamper proof.

5 THE COURT: Overrule your objection. The
6 evidence is, or the exhibit is allowed into
7 evidence.

8 Q Okay. Now, Mr. Allsbrook,---

9 THE COURT: That will be State's Exhibit
10 No. 2?

11 MR. SPRATLIN: No. 1, Your Honor.

12 (State's Exhibit No. 1 into evidence.)

13 Q Mr. Allsbrook, let me ask you about that
14 slight hole. The jury is going to get to see it
15 in a second. Would there be any way in your
16 opinion, to shove that straw through the hole
17 without making the hole bigger?

18 MR. CLARK: Objection to his opinion.

19 THE COURT: He is the evidence custodian,
20 I am going to let him answer that one.

21 A Without making it bigger?

22 Q Yes.

23 A I don't believe so.

24 Q And is the -- so you could, you could just
25 tear open the bag and get the stuff out, correct?

James Allsbrook-direct by Spratlin

1 A I could tear the bag open, yes.

2 Q And there will be obviously evidence of
3 that.

4 A Yes, sir.

5 Q So given the fact that the hole is not
6 big enough to stick the straw through.

7 A Without further damaging the bag.

8 Q Without further damaging the bag. It does
9 not appear to you in your opinion as the evidence
10 custodian that that straw has been removed from
11 the bag or placed in the bag.

12 A It does not.

13 MR. SPRATLIN: Your Honor, at this time, I
14 would ask to permission to publish Exhibit No. 1
15 to the jury.

16 THE COURT: You may.

17 Q Your Honor, If I may continue while they
18 are publishing the exhibit.

19 THE COURT: You may.

20 Q Mr. Allsbrook, let me show you what has
21 been marked State's Exhibit No. 2 for
22 identification purposes. What is that item I just
23 handed you?

24 A The item contained within the heat sealed
25 pouch is what is termed a Best Kit container.

James Allsbrook-direct by Spratlin

1 Q Now who placed that item in the
2 heat-sealed pouch, if you would? To the best of
3 your knowledge?

4 A Angil Landrum from Sled.

5 Q Okay. So that's the way Sled sends drugs
6 back?

7 A Repackage it.

8 Q And what is in that heat sealed bag?

9 A It is the Best Kit containing the drug
10 evidence that I submitted to Sled.

11 Q If you would, look at the Best Evidence
12 Kit bag that you described in there. Does that
13 appear to be the same bag that you submitted to
14 Sled in this case?

15 A It is.

16 Q Okay. How do you know that is the same
17 bag?

18 A There are several ways of looking at that.
19 Each individual Best Kit is serialled and
20 controlled.

21 Q Uh-huh. (Affirmative.)

22 A Each one has it's own number. This one
23 being B-199622. The officer fills out several
24 forms associated with that individual number. And
25 they are all submitted to me when they present the

James Allsbrook-direct by Spratlin

1 evidence to me. I make a note of those. Clarify
2 them and get everything accurate. I have to fill
3 out a form with that same number. And when I
4 submit the evidence to Sled, I get a receipt which
5 also notes that same number. So when the Chain of
6 Custody from the officer to me, to Sled.

7 Q Thank you. And how certain are you that
8 that Best Evidence bag is the same bag that you
9 submitted to Sled in this case?

10 A I am positive it is.

11 Q Does it appear that that bag has in any
12 way been tampered with?

13 A Except for having been opened by someone
14 at Sled, no, sir.

15 Q And just again I think, I think we have
16 already covered a lot of how you get evidence with
17 the Exhibit No. 1. How did Best Evidence Kit come
18 in to your possession?

19 A When officer Coker placed it in to the
20 Evidence Locker and secured it. I have a key that
21 opens the locker. I retrieved it. Verified the
22 Chain of Custody and associated forms for
23 accuracy. Take it my office. Note the item in
24 the computer. Sign and receipt it showing that I
25 am now in the care and custody of the evidence.

James Allsbrook-direct by Spratlin

1 And secured it until I took it to sled. And then
2 when I retrieved it from Sled placed it back in to
3 our secured storage location and brought it here
4 to court today.

5 Q Has that Best Evidence Kit been in your --
6 was that Best Kit in your possession from the date
7 it was seized on Feb -- or the date it was
8 submitted to you February 6th, 2009, until it went
9 to Sled?

10 A It was.

11 Q And was that Best Evidence Kit in your
12 possession from the day it was retrieved from Sled
13 until it came to court here today?

14 A It was.

15 MR. SPRATLIN: Your Honor, at this time I
16 would tender into evidence State's Exhibit No. 2
17 for identification as State's Exhibit No. 2.

18 THE COURT: Mr. Clark.

19 MR. CLARK: Same objection.

20 THE COURT: I am satisfied that the Chain
21 of Custody has been met. It can come in as
22 State's Exhibit No. 2.

23 (Best Kit marked State's Exhibit No. 2
24 into evidence.)

25 MR. SPRATLIN: Permission to publish this

James Allsbrook-direct by Spratlin

1 to the jury.

2 THE COURT: You may.

3 MR. SPRATLIN: Mr. Allsbrook, I believe
4 that's all the questions I have for you at this
5 time. Please answer any questions Mr. Clark may
6 have.

7 THE COURT: Mr. Clark.

8 MR. CLARK: Thank you, Your Honor.

9 Cross Examination by Mr. Clark:

10 Q Mr. Allsbrook, is it your testimony that
11 this straw cannot fit through that hole?

12 A Without further damaging the ziploc bag;
13 no, sir.

14 Q Do you know how this got damaged?

15 A I have no recollection of that damage.

16 Q And you actually take the evidence to
17 sled?

18 A Yes, sir, I did.

19 Q And you ask sled to perform whatever test
20 is requested by you?

21 A Yes, sir.

22 Q By the officer?

23 A Yes, sir.

24 Q And sled can do DNA testing, can't they?

25 A If requested, yes, sir.

James Allsbrook-direct by Spratlin

1 Q Again, what if you anything did you
2 personally observe the defendant throw down that
3 day?

4 A I didn't.

5 Q So your basis for detaining the defendant
6 was?

7 A Strictly off information that we received.

8 Q And from what Detective Coker said?

9 A Right. Right.

10 Q Now when someone is placed under arrest,
11 and one officer has already seized some evidence,
12 who typically searches the defendant?

13 A Usually on, whatever is on the chain is
14 the person that recovered the evidence.

15 Q So if Detective Coker appears on the
16 chain, It would be Detective Coker who recovered
17 the evidence?

18 A Right.

19 Q Now what if any reports did you prepare
20 from this incident?

21 A I didn't report. I didn't prepare any.

22 Q And why did you not prepare any reports?

23 A Usually the report is done by the person
24 that witnesses the events that have happened.

25 Q And so who would have prepared a report in

James Allsbrook-direct by Spratlin

1 Q And what date did they occur?

2 A February 6th.

3 Q Of what year?

4 A 2009.

5 MR. SPRATLIN: Thank you, Detective

6 Quiroz. That's all the questions I have at this
7 time.

8 THE COURT: Mr. Clark.

9 MR. CLARK: Thank you, Your Honor.

10 Cross Examination by Mr. Clark:

11 Q Detective Quiroz, just a couple of
12 questions to follow up what Mr. Spratlin asked
13 you. Where did you hear Detective Coker say that
14 she saw something?

15 A Not until after I got out of the vehicle.
16 Pretty much took watch of her guy. Then she said
17 I seen the defendant throw something down. And
18 then she went to that location.

19 Q What location was that?

20 A Around the trash can area where the
21 defendant was sitting.

22 Q And you saw her digging in the trash can,
23 didn't you?

24 A I saw her look through the top of it.

25 Q Right. And That was before she found it,

1 THE COURT: Thank you.

2 MR. CLARK: And renews my previous motion,
3 Your Honor.

4 THE COURT: Thank you. Ladies and
5 Gentlemen, that is all the testimony that you are
6 going to hear in this case. Now in a few minutes,
7 the attorneys are going to give a summation, or
8 closing arguments as to what they believe they
9 have shown in this case. And make their proof to
10 you. After that, I will then charge you with the
11 law, and we will then send you into the jury room
12 to deliberate.

13 I anticipate that may be a little bit
14 after 12. Mr. Herring, and, Mr. Prince, if you
15 can make arrangements to order some pizza or
16 something like that, so the jurors can have some
17 lunch while they are deliberating. It would be
18 rude to have you deliberate and not feed you
19 lunch. So, all right. Is the State ready?

20 MR. SPRATLIN: Yes, Your Honor. The State
21 is ready, your Honor.

22 THE COURT: Thank you. You may proceed.

23 MR. SPRATLIN: Thank you. Ladies and
24 gentlemen, I know it's been a long week, and I
25 thank you for bearing with us. I don't know

1 whether this is good news or bad news for you all,
2 but this is the last trial for you all. But this
3 is the last time you will hear me talk. This is
4 the only time I am going to get to talk to you.
5 In a minute Mr. Clark is going to get to talk to
6 you and he's going to address you as well. And
7 then the case is going to be in your hands.

8 And that's what makes this system great;
9 is that, 12 people came in to the court. Not
10 knowing anything about the case. Heard all the
11 evidence that was presented. And now it's in
12 those 12 people's hands to decide what do with the
13 case. And decide whether or not the state has met
14 it's burden of proving the defendant guilty of
15 possession of cocaine beyond a reasonable doubt.
16 And then I am going to talk more about reasonable
17 doubt, the state's burden of proof, and a few
18 other issues with the law.

19 The burden of proof in a criminal case is
20 on the State. I have to present evidence
21 sufficient to show that defendant is guilty beyond
22 a reasonable doubt. The burden is never on the
23 Defendant to present any evidence, or do anything
24 to prove his innocence. Rather, the State has the
25 burden of proving guilt. And as the judge is

1 going to tell you in a minute, he will refer to it
2 as, I believe, a robe of righteousness or a shroud
3 saying that the defendant comes in to this
4 courtroom presumed innocent. And it is only when
5 I present enough evidence to show that he
6 possessed cocaine that he then becomes guilty.

7 Now reasonable doubt. What is reasonable
8 doubt? Some of you have heard me try to explain
9 reasonable doubt before. I don't know if I did a
10 good job on it before or not. But reasonable
11 doubt is that doubt that you can assign a reason
12 to. If you heard the testimony, and you doubt
13 whether or not that man possessed cocaine on
14 February 6th, 2009, and you have a reason for that
15 doubt, well then that's reasonable doubt. I
16 submit to you Ladies and Gentlemen, there is no
17 reasonable doubt in this case. And in a couple of
18 minutes, I am going to talk to you about some
19 stuff, and Mr. Clark is probably going to address
20 with you.

21 It is kind of, going first in a closing
22 argument, kind of puts me in a position of having
23 to see the future a little bit. And tell what
24 topic Mr. Clark is going to bring up and try to
25 address this. That's one of the advantages of

1 going last that Mr. Clark is going to have. But
2 my job right now is try to address some of what
3 Mr. Clark is going to talk about. And point out
4 why it either is not appropriate in this case, or
5 it does not in any way take away from the evidence
6 the State has presented to show that the defendant
7 is guilty beyond a reasonable doubt.

8 But before I go in to that, I want to go
9 in to specifics of what exactly is possession of
10 cocaine. Because we have all heard, all day that,
11 I think I have asked several times. I think
12 Mr. Clark asked several times, the defendant
13 possessed cocaine. Had possession of cocaine.
14 Did he possess it? Was it in his possession?
15 All that, those questions were asked. Well half
16 our job was done for us. The parties have
17 stipulated. The judge told you earlier that this
18 is cocaine. Half the job is done. Now how do we
19 know the defendant possessed it?

20 Well, a person can possess drugs or
21 anything, any item in two separate ways; actual
22 possession or constructive possession. This pen
23 is in my hand. I am actually in possession of
24 this pen. That pen is on the table. I don't have
25 it in my hands, but I have dominion and control

1 over it. That's still possession. That's
2 constructive possession. I am not actually in
3 possession of it, but I have dominion and control
4 over it. It's my pen. If someone came and took
5 it, I would be able to file a police report and
6 charge them with that. It's my pen. It's still
7 my pen. Just because it is not on me doesn't take
8 away from it being my pen.

9 In this case, Ladies and gentlemen, this
10 case is more about actual possession. Because we
11 can put the drugs in the defendant's hands. And
12 how can we put the drugs into the defendant's
13 hands? By Detective Coker's testimony. And I am
14 going to go over Detective Coker's testimony a lot
15 more in depth in a couple of minutes. But I just
16 wanted to go ahead and discuss briefly with you
17 the different ways that one can possess,
18 constructive and actual possession. This is an
19 actual possession case, Ladies and gentlemen.
20 The drugs were in his hand.

21 The constructive possession stuff, as far
22 as it is sitting on the table, I still possess it.
23 But that's not what we have here. We don't have a
24 situation where it was in the defendant's general
25 vicinity and he controlled it. No, we have it in

1 his hand. We actually can put it in his hand.
2 Now it was found in this general vicinity. It was
3 found folded up in this dollar bill in his
4 vicinity. But we can actually put this dollar
5 bill with this cocaine in it, in his hand. That's
6 actual possession. This isn't a case where the
7 defendant was merely standing around and this was
8 laying on the ground. No, we can put it in his
9 hand. We can put it on the ground too. But we
10 can put it on the ground by him throwing it on the
11 ground.

12 Now as I said, I was going to talk to you
13 a little bit about what I believe Mr. Clark is
14 going to address. As defense attorney, his job is
15 to protect his client's rights and make sure they
16 are defended at trial as vehemently as they can.
17 Mr. Clark has done an excellent job. He has
18 presented, he has brought up and several points
19 and several issues in this case. But there are
20 two kinds of issues, Ladies and Gentlemen. They
21 are issues that are material and there are issues
22 that immaterial.

23 Material issues apply to whether or not
24 the defendant is guilty or innocent. The
25 immaterial issues apply to things such as, what

1 angle the car pulled up into. Where the gas pumps
2 were. Those are immaterial issues. Now sure,
3 there were some inconsistencies between every
4 piece of testimony if you broke it down, bit by
5 bit by bit. Sure, Detective Coker said some
6 things and Detective Quiroz said some things were
7 a little bit different. But think about what was
8 material in the case. Think about what actually
9 mattered as to whether or not this man possessed
10 cocaine. And I submit to you their testimony was
11 consistent on that basis. The inconsistencies
12 were immaterial things that don't matter. And
13 that is what Mr. Clark is going to try to drill
14 home to you. He's going to try to confuse you.
15 He's going to try to make you think about all the
16 little things that didn't matter; such as, whether
17 they were 10 feet away from the car. Whether they
18 were 12 feet away from the car.

19 Detective Coker said she was close enough
20 observe them. Detective Quiroz said they were
21 close enough to observe them. And they weren't
22 far off on how far away they were from the car. I
23 believe Detective Quiroz said 10 or 15 feet.
24 Detective Coker said, I think, 10 or 12 feet.
25 It's not that great a difference in the yards.

1 Ladies and Gentlemen, I submit to you
2 there are no material issues in this case as far
3 as the inconsistency of their testimony goes.
4 Another thing I believe that Mr. Clark is going to
5 bring up and try to address with you today is
6 Beufort Wilson. Detective Beufort Wilson is the
7 third person in that car. Now we have heard from
8 two-thirds of the occupants in that car. You
9 heard that we couldn't hear from Detective Wilson.

10 And, Ladies and Gentlemen, Mr. Clark wants
11 you to draw some kind of negative inference for
12 the State's case based on the fact that you didn't
13 hear from Mr. Wilson, Detective Wilson. But I
14 submit to you, Ladies and Gentlemen, there is no
15 evidence that Detective Wilson's testimony would
16 have been any different. In fact, I believe
17 Mr. Clark on cross examination of Detective Coker,
18 brought out several things about Mr. Wilson and
19 what he observed that day.

20 Mr. Clark in his cross examination of
21 Detective Coker asked her, did Beufort Wilson see
22 the drugs get thrown down and she said, no. That
23 was Mr. Clark's own question. Now, yes, we did
24 hear from Detective Beufort Wilson today. And
25 she's absolutely 100 percent right. Or

1 Yesterday. But, Ladies and Gentlemen, the State
2 does have the burden of proving or presenting
3 every single witness at a crime scene. The State
4 did not have to bring in Detective Wilson. The
5 State did not have to bring in the other guys
6 standing there with them. The State does not have
7 to bring in the clerk who was in the store maybe
8 watching them. The State does not have to bring
9 in the guy pumping gas at the gas pump. The
10 State cannot be required to bring in every single
11 witness in a case.

12 Rather, Ladies and gentlemen, what we
13 have, and our burden is to bring in forth
14 sufficient evidence to convince you beyond a
15 reasonable doubt that the defendant is guilty.
16 And I submit to you we have done that with the
17 testimony of Detective Coker and Detective Quiroz.
18 And of course the stipulated testimony of Ms.
19 Angil Landrum, which you are going to have her
20 drug report back there with you showing that this
21 is in fact cocaine.

22 And, now, Ladies and gentlemen, I told you
23 at the beginning of this trial and when the Judge
24 said you aren't going to be able to take notes,
25 and you weren't going to have a legal pad there to

1 take notes and write it down, well, and I told you
2 that your job would be to pay attention as best
3 you could. Because the evidence you were going to
4 hear was very important. And I wanted you to have
5 as good recollection of the evidence as you could.

6 Unfortunately, Ladies and gentlemen, the
7 most important witness you heard from, you heard
8 from last night. A day ago. But I am asking you
9 to try your best to remember exactly what
10 Detective Coker's testimony was. Because, and
11 think about the way Detective Coker delivered that
12 testimony. Does she appear to be trying to hide
13 anything from you? Because credibility is an
14 issue for you the jury to decide. Now I will go
15 ahead and tell you, if you don't believe what
16 Detective Coker said on that witness stand, then
17 you go back there and you find him not guilty.
18 And you come back out and that's it. But I submit
19 to you there is no reason, no reason, has been
20 given for Detective Coker to fabricate anything
21 against this defendant. In fact, the evidence
22 shows before February 6th, 2009, she didn't even
23 know the defendant. She didn't know his name when
24 they pulled up. I believe Mr. Clark even asked
25 her that. And she didn't know that. She didn't

1 his name when they pulled up. And they weren't
2 even really looking for him when they pulled up.
3 They were looking for someone who matched the
4 description of the other guy. Why would she
5 fabricate seeing this man thrown down cocaine?
6 Why?

7 If you find a reason for that, then yes,
8 go back there and find him not guilty and come
9 back out. But I submit to you there is no reason
10 for Detective Coker to have fabricated anything in
11 regards to this case. And there is no motive on
12 her part to lie. No motive on her part to mislead
13 you. There's been nothing shown to call in to
14 question the credibility of Detective Coker. And
15 you heard her testimony. You heard it for
16 yourself. Did she seem like she was lying to you?
17 Did she seem like she was lying? When Mr. Clark
18 kept asking her 15 times the same question, was
19 she dancing around? No. She was trying to figure
20 out what he was actually asking so she could give
21 him the information that he wanted. If she was
22 trying to cover something up, would she have done
23 that? I submit to you she wouldn't have.
24 Therefore, I submit to you she wouldn't have.
25 Therefore, I submit to you that the testimony of

1 Detective Coker should be believed.

2 And again Mr. Clark is going to talk about
3 the inconsistencies. I submit to you that the
4 only inconsistencies between Detective Coker's
5 testimony and Detective Quiroz' testimony were
6 minute details. And this is a phenomenon that in
7 a minute you all are going to get to experience.
8 Because you are going to go back in to that
9 witness room, and you are going to talk about the
10 evidence you've heard, and each and every single
11 one of you is going to remember things just a
12 little bit different. It's a natural. Everyone
13 remembers things from their own perspective.
14 Those little inconsistencies that Mr. Clark, I
15 imagine is going to talk about, because that's
16 what he has, minute inconsistencies. That's what
17 he has to argue. Those minute inconsistencies can
18 be explained away from the fact that Detective
19 Coker observed what she observed. She actually
20 prepared a police report, because she was the
21 investigating officer on the case. She was the
22 Detective that seized the drugs. She told how
23 it's her job when she seizes the drugs to prepare
24 the report, and to prepare a more detailed
25 detective's report which for legal reasons did not

1 come in to evidence. And that she also prepared a
2 Chain of Custody form which did come in to
3 evidence.

4 Now Mr. Clark asked Detective Coker a lot
5 about her report. She stated what the officers
6 observed. Officers seized. Officers did this.
7 Officers did that. However you heard on her
8 redirect when I got to question her again; that
9 she actually prepared the reports. She prepared
10 the summary, the little old short report that she
11 told you that Mr. Clark was referencing that she
12 submits when she submitted the drugs. And then
13 later on that night she prepared another report,
14 the detective's report. Again, neither one of
15 those reports for legal reasons comes in to
16 evidence. But she -- you heard her testify that
17 she prepared another report, a more detailed
18 report. In that report, she even reads portions
19 of it the stand; that she said Detective Coker
20 observed. Detective Coker did this, Detective
21 Coker did that. And Detective Coker completed a
22 Chain of Custody form when she got back to the
23 police station as well which is in evidence,
24 saying that she is the one who sees. And it says,
25 from James Austin, not from the ground. But

1 that's because, Ladies and gentlemen, that's the
2 defendant's name. And she saw him throw it to the
3 ground. So she can say she actually seized it
4 from him, because it was on his person.

5 Again, I am not doubting for a minute that
6 Mr. Clark is going to get up here, and he's going
7 to have some inconsistencies in Detective Coker's
8 and Detective Quiroz' story to point out. But I
9 ask you again, are those material inconsistencies,
10 or are they, as I submit to you, immaterial
11 inconsistencies? But I believe when you look at
12 the evidence, you will find that those are in fact
13 immaterial. They don't really apply to this
14 Defendant's guilt or not.

15 Now another issue in the case as Detective
16 Quiroz stated that Detective Coker was searching
17 through a trash can. That's not an inconsistency.
18 Detective Coker testified that she did in fact
19 look in the trash can. I believe Mr. Clark during
20 direct examination was trying to insinuate to
21 Detective Quiroz that she found the drugs in the
22 trash can. We heard from Detective Coker that she
23 found the drugs on the ground. And I submit to
24 you there is no reason for her to lie. No reason
25 for her to fabricate that.

1 She watched them, her testimony was, she
2 watched them from the time that it left the
3 defendant's hand when she pulled up, to the
4 ground. And then went and got it. And there was
5 no other debris laying around as she testified to.
6 Detective Quiroz' testimony, he didn't even
7 remember any debris on the ground, but he wasn't
8 even focused on that. His focus was on a
9 different task. Because Detective Coker told you
10 on the stand, they all have different assignments.
11 They all have different assignments when they
12 pull up. Somebody watches the suspect. Somebody
13 drives. Somebody helps with the suspect.

14 Now Mr. Clark wants you to believe that
15 all three officers were in the same vantage point
16 to be able to observe this Defendant when they
17 throw down these drugs. And only Detective Coker
18 saw him do it. Something must be fishy with that.
19 But I submit to you there is a valid and a good
20 and a reasonable reason why that's the case. That
21 being Detective Coker, that was her job. That was
22 her assignment. That was what she was supposed to
23 be doing. Detective Quiroz was driving.
24 Detective Wilson was a passenger. The one who the
25 testimony shows was the furthest away from the

1 defendant.

2 Now the tinted windows, Ladies and
3 gentlemen, Detective Quiroz testified that he
4 didn't have any problem seeing out of them.
5 Detective Quiroz testified that no one has ever
6 said they had any problem seeing out of them. And
7 if any one of us have tinted windows, we know that
8 the tint keeps you from being able to see in the
9 car, a whole lot more than it does if you could
10 see out of the car.

11 And, Ladies and gentlemen, I want to
12 emphasize to you that Detective Coker testified
13 that she saw the item leave the Defendant's hand.
14 She saw this dollar bill leave the defendant's
15 hand. Kept her eyes on it. Went and picked it
16 up. Found cocaine. Put him under arrest. And
17 found this drug paraphernalia, this cut straw,
18 with white powder residue on it in the defendant's
19 pocket.

20 Now Mr. Clark brought up this small little
21 hole. You will get to have this back in the jury
22 room. You are going to be able to look at it
23 yourself. And I submit to you that it is nothing
24 more than a ziploc bag. And Mr. Clark wants you
25 to draw some kind of negative inference from the

1 fact that there is a slight little hole in it.
2 Well I mean, there is a hole in there, I can't
3 deny that. And Mr. Allsbrook couldn't deny that
4 there was a hole in it. But there is no evidence
5 where the hole the came from.

6 And Ladies and gentlemen, the hole, and
7 Detective Alls - I mean Mr. Allsbrook testified,
8 and you are going to get to see for yourself, is
9 not big enough that you can shove this straw
10 through without severely damaging this straw. And
11 I submit to you when you look at this straw, does
12 it look like it has been bent, folded and twisted
13 so it can fit through a little hole like that? It
14 hasn't been. Is there any way you can fit this
15 dollar bill through that little hole without
16 making that hole bigger? I submit to you there is
17 not.

18 Again, little minute details that do not
19 really apply to whether or not this defendant is
20 guilty or innocent, is what Mr. Clark has to
21 argue. And that's what he is going to argue. Now
22 Mr. Clark wants you to also believe and he is
23 probably going to get up and say this case does
24 rest on Detective Coker's testimony. I am not
25 going to stand up and tell you it doesn't. If you

1 do not believe Detective Coker, then like I
2 already told you several times, go back there and
3 find him not guilty and just come back. Because
4 Detective Coker's testimony is what it was. And
5 it's the crux of our case. It is. But it's not
6 all we have.

7 We have a straw with white powder residue
8 in the defendant's pocket. Which in Detective
9 Coker's 9 years in narcotic's training, and 11
10 years of law enforcement, she knows that this is a
11 common way to do cocaine. And now yes, it wasn't
12 fingerprinted. And yes, It wasn't sent off to
13 sled for DNA testing. He's absolutely right. And
14 Mr. Clark is going to tell you that we cannot even
15 be 100 percent certain that this is in fact
16 cocaine. He's absolutely right on that. This was
17 never sent to the laboratory for testing. This
18 isn't CSI, Ladies and gentlemen of the jury. And
19 I know a lot of us, I myself love the show. You
20 sit at home. You watch it. You see all these
21 police in New York or Las Vegas or I think there
22 is one in Miami, where they sit around, and will
23 take, they will get a little bitty piece of a
24 particle and duplicate it. Clone it, blow it up
25 huge so they can test it. That's not real life.

1 Mr. Allsbrook told you, he doesn't send drug
2 paraphernalia to sled to be tested because, why?
3 It was found in his pocket. Detective Coker said
4 she didn't request that the fingerprints on the
5 dollar bill or the straw because why? The straw
6 was found in the defendant's pocket. There is no
7 question whether or not he possessed it. As far
8 as the dollar bill, Ladies and Gentlemen,
9 Detective Coker told you she didn't think you
10 could get a fingerprint off of a dollar bill. Mr.
11 Clark I believe on cross examination started
12 asking her well maybe you would have found the
13 other guy's fingerprints. Maybe she would have.

14 But we do know one person's hand that this
15 has been in. His. And we know that, and we know
16 that when this dollar bill was in his hand that it
17 had cocaine in it. And we know from his actions
18 when he realized that the people pulling in to the
19 Young's Food Market were police; that he knew that
20 dollar bill had cocaine. Why else would he throw
21 it to the ground? And intent is an element of
22 every crime. As the judge is going to tell you,
23 we have to prove that he intentionally possessed
24 this drug. But intent unfortunately we haven't
25 developed enough technology to be able to take cat

1 scan of that man's brain and pinpoint where
2 criminal intent is. We can't do that
3 unfortunately.

4 So what you have to do and as the judge
5 will tell you, you can infer from the incident,
6 his conduct, and all the factors surrounding this
7 case whether or not he intentionally possessed the
8 cocaine. Whether he had the required of criminal
9 intent. You heard from Detective Quiroz that the
10 purpose of that vehicle was, it was pretty obvious
11 that it was a police car once you got close
12 enough. But if you saw it driving down the road,
13 and you wouldn't say, oh here comes the cops.
14 Rather when it gets closer to you that's when you
15 say oh, that's the police. And, Ladies and
16 gentlemen, that's exactly what happened here. The
17 vehicle pulled in to the Young's, not in a high
18 rate of speed, as Detective Quiroz testified to.
19 He was concerned about safety. He was pulling in
20 to a parking lot of a gas station at 9:30 at
21 night. He wasn't going to come in there going 70
22 miles an hour and come screeching to a stop.
23 That's not the why he testified that he does this.
24 He will drive in at a normal rate of speed, at a
25 rate of speed that he feels is safe.

1 And, Ladies and gentlemen, when this
2 defendant realized that it was the cops, that was
3 it was Sumter City Police Unit. Sumter City Drug
4 Unit. And that's when this dollar bill with this
5 cocaine went to the ground. That's when it left
6 his hand. That, Ladies and Gentlemen shows that
7 intentionally possessed it. Because why else
8 would he throw it to the ground when he realized
9 it was the cops? Unless he knew it was drugs.
10 Why else would he have this straw in his pocket
11 unless he knew he had some drugs to use this straw
12 for.

13 And now Mr. Clark is going to tell you
14 that merely being present where drugs are found,
15 and the judge is also going to tell you that, that
16 merely being present where drugs are found are not
17 enough. I am in the presence of drugs right now.
18 We all are. And am I guilty of possession of
19 cocaine? No. But merely being present where
20 drugs are found is not enough. However that's not
21 what we have here. We don't have the defendant
22 and his buddy standing in front of the Young's
23 talking and there are drugs on the ground.

24 We don't have that case here. That's not
25 the case we have. We have the Defendant and his,

1 whatever, buddy, I am assume they are friends if
2 they are sitting there talking. I am not exactly
3 certain. And let me go ahead and get this out of
4 the way too while I'm talking about the other
5 person being there. All the evidence shows that
6 that person was smaller in Stature than that man.
7 There is no way either of those officers,
8 especially Detective Coker, could have confused
9 who she saw throw down those drugs. There is no
10 question.

11 Now going back to those two guys standing
12 there, we don't have a case where they were
13 standing there and the drugs were just on the
14 ground. Rather the Defendant and his buddy are
15 standing there. He's holding these drugs. He's
16 got the drug paraphernalia the way they actually
17 use drugs, sitting in his pocket. And then the
18 cops pull up, and that's when the drugs wind up on
19 the ground. And how do we know that's when the
20 drugs wound up on the ground? Detective Coker saw
21 him throw it.

22 Now I will go ahead and tell you, we are
23 not talking about a whole lot of drugs here. As
24 you can tell by this package, they aren't a whole
25 lot of drugs. Now I submit to you, there are

1 probably more in the dollar bill possibly. And
2 one of the reasons the dollar bill is folded this
3 way, as you can tell is, I mean, it's folded up in
4 here just to keep anything from rolling out, then
5 rolling around free in the bag. But there aren't
6 a whole lot of drugs here. But that doesn't
7 matter, Ladies and gentlemen. That's not the
8 issue. The issue is not the quantity. The issue
9 is the quality. The issue is, is this cocaine?
10 And, yes, it is. And we know that because the
11 South Carolina Law Enforcement Division tested it.
12 And let me talk a little bit about this form you
13 are going to have back here. Because I know you
14 are going to read through it. And I want to make
15 sure that everything is, basically there aren't
16 any questions about the form. It does state
17 identifying information. It has what it actually
18 is, a drug analysis. It has several pieces of
19 information, sled lab number, the date it was
20 tested, the incident date, Sumter City Police
21 Department case number, the evidence custodian,
22 James Allsbrook. Or, no, the Defendant, I am
23 sorry, James Austin. The evidence custodian is
24 actually around somewhere else on here. Items of
25 evidence seized. Ziploc bag containing powder

1 substance. Results cocaine found .12 grams.
2 Chemical analysis, Angil Landrum. Angil Landrum.
3 That was the woman who was sitting there
4 yesterday, last time.

5 The second page is basically a summary of
6 her qualifications as well as the test that she
7 did. I submit to you this page is not as
8 important as this page, and the end result being
9 that cocaine was in fact found. And the defense
10 freely admits that this is cocaine by stipulation.
11 Excuse me.

12 Ladies and Gentlemen, the evidence is what
13 the evidence is. And I am almost at the end of my
14 closing. And now it is almost time for you to do
15 what you have to do in this case. You have
16 already done a commendable job. I have been
17 watching you all. You paid attention. You paid
18 attention to Detective Coker's testimony,
19 Detective Quiroz's testimony, Mr. Allsbrook's
20 testimony. And I appreciate that. And your job
21 is almost done. So the last thing you are going
22 to have to do is go back there and decide whether
23 or not I have presented enough evidence that you
24 can be certain beyond a reasonable. Now it's not
25 beyond all doubt. As the judge will tell you,

1 it's not beyond all doubt. It's beyond a
2 reasonable doubt. That's a doubt you can assign a
3 reason to, that this man possessed cocaine.

4 I submit to you, Ladies and gentlemen,
5 given the testimony that you've heard, there is no
6 doubt that you can assign a reason to, to believe
7 that this man didn't possess cocaine. Rather the
8 evidence overwhelmingly shows you that he did it.
9 And that's why I ask you to go back there, you
10 take the jury form that the -- I mean the verdict
11 form that the judge is going to give you, and you
12 check the little box that says guilty. Because
13 that's what the evidence shows he did. He
14 possessed cocaine. He is guilty. And now it's
15 your job to pass judgment upon him as 12 citizens
16 of Sumter County. Thank you.

17 THE COURT: Mr. Clark, for the defense.

18 MR. CLARK: Thank you, Your Honor. Please
19 the Court, counsel, Ladies and gentlemen of the
20 jury, I stand before you today at this time and
21 submit to you very succinctly and directly, the
22 State of South Carolina has not met its burden of
23 proof beyond a reasonable doubt.

24 Mr. Spratlin took the better part of 30
25 minutes. And I think one thing he said that

1 THE COURT: But he knew that.

2 MR. CLARK: I'm not making excuses, Your
3 Honor. I'm just saying for the slightest slip-up,
4 he's on parole until 2042. 2046. Now I doubt,
5 Your Honor, I honestly doubt, there is a question
6 of whether he's even going to live that long, you
7 know. So, Your Honor, I'd ask you to consider a
8 90-day sentence for him. He did serve a couple of
9 days in jail. We would ask for credit for that.
10 And he does -- he's a salesman. He has his own
11 little small business. He sells perfumes and
12 those kinds of things. And that's all we have,
13 Your Honor.

14 THE COURT: Officer, did he give you any
15 trouble when you arrested him?

16 DETECTIVE COKER: No.

17 THE COURT: James P. Austin on the charge
18 of possession of cocaine, second offense, I am
19 taking into consideration your prior history. You
20 just had another drug offense two years ago. The
21 other one was a while back. I find, I am going to
22 sentence you to the State Department of
23 Corrections for a period of 5 years, suspended
24 upon one year. That's the sentence of the Court.

25 MR. CLARK: Thank you, Your Honor.

WITNESSES

SPD

Quiroz

ARREST WARRANT NUMBER

M000341

D/A: 02/07/09

ACTION OF GRAND JURY

True Bill

[Signature]
Foreperson of Grand Jury

Date: *2 Apr 2009*

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2009-GS-43- 371

The State of South Carolina

County of SUMTER

COURT OF GENERAL SESSIONS

APRIL TERM 2009

THE STATE

vs.

JAMES P. AUSTIN

Indictment for

POSSESSION OF COCAINE

C. KELLY JACKSON, SOLICITOR

CERTIFIED TRUE COPY
OF ORIGINAL FILED

STATE OF SOUTH CAROLINA *James C. Campbell* INDICTMENT FOR

COUNTY OF SUMTER

CLERK OF COURT
SUMTER COUNTY
SOUTH CAROLINA

POSSESSION OF COCAINE

At a Court of General Sessions, convened on April 2, 2009, the Grand Jurors of SUMTER County present upon their oath:

That JAMES P. AUSTIN did in Sumter County on or about February 6, 2009, knowingly and intentionally possess a quantity of cocaine, a controlled substance under the provisions of Act No. 445, Acts of 1971, General Assembly of South Carolina, as amended (Section 44-53-370(d)(3) et. seq., 1976 Code of Laws of South Carolina, as amended), such possession not having been authorized by law.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

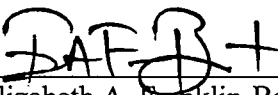
P. Kelly Jackson

SOLICITOR

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability, with the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

September 29th, 2010


Elizabeth A. Franklin-Best
Appellate Defender

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ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Sumter County

William Jeffrey Young, Family Court Judge

THE STATE,

RESPONDENT,

V.

JAMES P. AUSTIN,

APPELLANT

FINAL BRIEF OF APPELLANT

ELIZABETH A. FRANKLIN-BEST
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STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court judge err by not granting appellant's motion to suppress the drugs when appellant was seized in violation of the 4th amendment?

- II. Did the trial court judge err in not granting appellant a continuance when a material witness was unavailable to appear in court on the day the state called the case to trial, and the state admitted that it would suffer no prejudice from a continuance?

STATEMENT OF THE CASE

James P. Austin was indicted by the Sumter County grand jury of possession of crack cocaine. On September 24-25th, he stood trial before the Honorable W. Jeffrey Young and a jury. He was represented by John D. Clark, Esquire. He was convicted, and sentenced to 5 years, suspended on the service of 1 year.

This appeal timely follows.

ARGUMENTS

I. The trial court judge erred by not granting appellant's motion to suppress the drugs because appellant was seized in violation of the 4th amendment.

Prior to the start of trial, defense counsel made a motion to suppress the drugs seized in this case because, he argued, they were taken in violation of the 4th amendment. Earlier, defense counsel made a motion to continue the case because a material state's witness, Detective Wilson, was not available to testify. The judge refused that motion. See *infra*, Argument 2, and the state proceeded to offer its evidence supporting introduction of the drugs into evidence at trial.

The State first called Detective Kim Coker to the stand. Coker had eleven years of law enforcement experience. ROA 26, ll. 17 -- 24. At the time of these events, she was a part of the drug unit. ROA 27. She testified that she, and the other officers, had received an anonymous tip that a male subject was outside a convenience store:

“We had received an anonymous tip that a male subject was outside the store, and was -- had a telephone call to another subject and was bringing him a quantity of cocaine. We had a description given to us of the male subject that made the phone call. When we arrived at the store that particular subject was standing there talking to another gentleman. We just got out to investigate the situation. When we drew up, Detective Quiroz was in the driver's seat. I was in the rear passenger seat behind the driver's seat.

And Detective Wilson was in the passenger front seat. When we pulled up, I was on the side that was closest the defendant. When we exited the vehicle, I saw the defendant thrown (sic) down an object to the ground. And when I walked up, there was a dollar bill. When I opened up the dollar bill, there was a quantity of cocaine inside that dollar bill.”

ROA 28, ll. 2 -- 20.

According to Coker she retrieved the item containing cocaine prior to placing appellant under arrest. ROA 31, ll. 19 -- 21. Coker testified that Detective Wilson actually

received the anonymous phone call. ROA 35, ll. 11 -- 19. After this testimony, defense counsel made an additional motion for a continuance in this case. ROA 35, l. 20 -- 36, l. 13. Coker testified that she did not speak with anyone on the telephone. ROA 36, ll. 14 -- 16. Coker did not know who called -- she did not know that person's name, nor would she recognize the caller if the caller were in the courtroom. ROA 37, ll. 1 -- 23. Coker did not remember whether they were in the car, or at the police offices, when they received this call. Coker testified that these events occurred at night time, at approximately 9:30 pm. ROA 40, l. 21 -- 41, l. 14. She also testified that the car they were driving had dark tinted windows. ROA 40, ll. 13 -- 19.

Coker testified that she and the other officers abruptly pulled in to the convenience store. They wanted to surprise appellant and the person standing with him. Coker testified that it was her intention to approach him about the cocaine. ROA 42, l. 13 -- 43, l. 20. Coker also testified that she did not observe appellant throw down the dollar bill containing the cocaine until after she exited the car. ROA 51, ll. 19 -- 24. Coker also testified that she observed exactly where appellant threw the drugs and that she "kept her eye on it." ROA 52, l. 24 -- 53, l. 3. Coker testified, before the jury, that the only reason the officers went to a convenience store was to investigate the anonymous tip. ROA 75, l. 23 -- 76, l. 2. Coker also testified that the appellant was not the person described by the anonymous tip. ROA 76, ll. 13 -- 25. Coker admitted that, of the three officers present at the scene, she was the only one who observed the appellant growing the dollar bill to the ground. ROA 77, ll. 1-3; ROA 78, ll.2-13.

The State also called Detective Quiroz to the stand. Quiroz has been with the Sumter Police Department for little over 5 years. ROA 55, ll. 19 -- 21. Quiroz testified that he

believed that Coker received a telephone call (a claim she disputed). He testified that he believed that the telephone call stated there was an individual at the store trying to sell drugs either to the clerk or somebody else. ROA 56, ll. 15 -- 19. Quiroz also testified he believed that they may have actually received a second call. ROA 56, ll. 20 -- 24. Quiroz testified that once they pulled up to where appellant and his friend were, they started talking to them. ROA 58, ll. 7 -- 14. Quiroz testified that Coker stated that she had seen appellant throw something into the trash can. ROA 58, ll. 23 -- 24. Significantly, Quiroz did not observe appellant throw anything into the trash can. ROA 58, l. 25 -- 59, l. 2. Quiroz also testified that Coker was digging through the trash can to retrieve what she saw the appellant throw away. ROA 59, ll. 15 -- 24.; ROA 60, 8 -- 13. Quiroz did not observe Coker pick anything up from the ground. ROA 60, ll. 14 -- 16. Quiroz did not recall who actually searched appellant. ROA 61, ll. 2 -- 9. Quiroz testified that had appellant or his friend attempted to leave they would have been stopped. ROA 63, ll. 14 -- 16. He testified:

Q. Right. So they weren't free to leave once you drove up in that parking lot, were they?

A. They were until I spoke to them. I mean once they started to speak to them, at that time they were free to leave. I had not engaged them at that time.

Q. But you were going to engage them, right?

A. Right. Those were my intentions.

Q. And you were not going to let him leave until you engage them, right?

A. I would have spoken to them. I mean, what came after that is --

Q. Right. But you would've said, "Hey," if they would have run you would've chased them, right?

A. Yes, sir.

Q. If they tried to leave you would've stop them from leaving, right?

A: Right. Based on the information we were given as far as . . .

Q: Okay. Thank you, sir. That's all I have.

ROA 66, l. 16 -- 67, l. 9.

At trial, Quiroz was asked the following question:

Q: So your basis for detaining the defendant was?

A: Strictly off information that we received.

Q: And from what Detective Coker said?

A: Right. Right.

ROA 89, ll. 5-9.

At trial, Quiroz also testified that he did not hear Coker claim that she observed appellant drop the drugs until after he exited the vehicle. ROA 90, ll. 11 -- 18.

Defense counsel moved to suppress the drugs on the basis that the search and seizure violated the 4th amendment. Counsel argued that the seizure was not supported by probable cause. Counsel argued that both officers testified that they saw these two individuals standing in the parking lot and that was the extent of their observations. They did not testify they saw them handing anything out of the window, or conducting a drug transaction. Quiroz, in fact, testified that he would have stopped them if they had attempted to avoid police questioning. The evidence presented at the pre-trial hearing established that appellant was not free to leave. Counsel argued that appellant was improperly seized. In support of this argument counsel relied on State v. Woodruff, 344 S.C. 537, 544 S.E.2d 290 (Ct. App. 2001); Terry v. Ohio, 392 U.S. 1 (1968); State v. Davis, 354 S.C. 348, 580 S.E.2d 778

(2003); and Florida v. J.L., 529 U.S. 266 (2000). Counsel argued that there was no corroboration of the anonymous tip in this case. ROA 67, l. 20 – 74, l. 1.

The judge denied the motion:

THE COURT: Thank you. The motion for as (sic) to the suppression of the evidence, I am not going to suppress the evidence. The police received an anonymous tip which was subsequently corroborated by the defendant's actions when they drove up. Had he not thrown anything down, you would be dead on, Mr. Clark. They would not have been able to search your client. But the testimony is that your client threw something down. They checked it. It had cocaine in it. At that point in time, they had reason to stop. And therefore, anything they found out after that. (sic). And including what they saw there.

There is absolutely no expectation of privacy out in the front of a store. This is not in a hotel room or anything like. (sic). Therefore, the weight that the jury wants to put on it, whether they want to believe Detective Coker or not would be up to you to put reasonable doubt in their minds to that. But the facts of the stop and the evidence that which was obtained from your client will be coming into evidence.

ROA 74, ll. 2 -- 24.

The trial court judge erred in denying appellant's motion to suppress because the anonymous tip, which was uncorroborated by any personal observations, was insufficient to justify the seizure of appellant. The drugs which were found as a result of the police action are fruit of the poisonous tree and should be suppressed. Wong Sun v. United States, 371 U.S. 471 (1963). As the officers testified, the only reason they approached the convenience store was to investigate the anonymous tip that they received. The officers did not identify any additional factor in their decision to approach appellant. The state never even called the one witness who the other officers claimed received the anonymous tip, Detective Wilson. It is clear from the testimony of the officers that appellant was not free to leave at the time the officers approached him. He was therefore seized within the meaning of the 4th

Amendment. California v. Hodari, 499 U.S. 621 (1991). The State did not provide any evidence that would justify the seizure of appellant in this case because there stop was not predicated on reasonable suspicion, and because there was no evidence presented regarding the reliability of the anonymous tip. State v. Taylor, 388 S.C.101, 694 S.E. 2nd 62 (2010). Appellant respectfully asks this Court to reverse his convictions.

II. The trial court judge erred in not granting appellant a continuance when a material witness was unavailable to appear in court on the day the state called the case to trial, and the State admitted that it would suffer no prejudice from a continuance.

Trial counsel moved for a continuance when the state called appellant's case to trial. Officer Wilson, who was present with Detective Coker and Quiroz when these events occurred was not available to testify. On the day that trial was scheduled to start, defense counsel first found out that Wilson was under a medical disability and would not be appearing in court. Defense counsel was informed by the solicitor that putting Wilson under subpoena would be of no benefit because he is disabled. On the day of trial, Wilson was having surgery. ROA 4-13.

The state argued that Wilson's testimony would merely be cumulative to the testimony of Coker and Quiroz. ROA 6, l. 24 -- 7, l. 4.

Defense counsel made a motion pursuant to Rule 7 of the South Carolina Rules of Criminal Procedure. Counsel argued that it was necessary for appellant's defense for Wilson to appear and testify. The judge asked the state how they would be prejudiced by a continuance. The state responded:

I beg the Court's indulgence for one second. Your Honor, the answer to that question is, I mean, there no (sic) prejudice to us. And were (sic) ready to proceed though. This case is one of I actually am (sic) – I don't have an older case due to the fact that I was recently hired. It is one of my older cases. I am ready to go to trial.

ROA 12, ll. 6 – 13 (emphasis added).

The judge did not grant the continuance motion. ROA 13, ll. 20 -- 22.

During its closing argument, the state took advantage of Wilson's absence:

And, Ladies and Gentlemen, Mr. Clark was you to draw some kind of negative inference for the state's case based on the fact that you didn't hear from Mr. Wilson, Detective Wilson. But I submit to you, Ladies and Gentlemen, there is no evidence that Detective Wilson's testimony would have been any different.

ROA 228, ll. 10-16.

The state also argued that it "cannot be required to bring in every single witness in a case." ROA 99, ll. 10-12.

The state also made the following argument:

But I submit to you there is no reason for Detective Coker fabricated anything in regards to this case. And there is no motive on her part to lie. No motive on her part to mislead you. There's been nothing shown to call into question the credibility of Detective Coker.

ROA 101, ll. 7-14.

The State's entire closing argument was an exercise in explaining away the inconsistencies of the testimony of the two officers they called to testify. ROA 91 - 115.

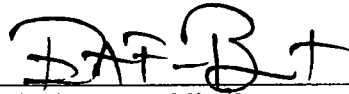
The trial court judge abused his discretion by not granting defense counsel's motion for continuance. Counsel made the appropriate motion under Rule 7, and the state conceded that it would not have been prejudiced by the continuance. Counsel had the right to have Wilson testify and be subject to cross-examination. The credibility of Coker was the essential issue in this case. Counsel was unable to mount a vigorous defense without the presence of this material witness. Additionally, the state took unfair advantage of their failure to produce this witness. It is also important to note that the state only called professional witnesses and that it would not have caused them any burden to reschedule the trial when Wilson was available. State v. Smith, 387 S.C. 619, 693 S.E.2d 415 (2009). See also Melendez -- Diaz v. Massachusetts, 129 S.Ct. 2527, 2540 (2009). ("More

fundamentally, the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court. Its value to the defendant is not replaced by a system in which the prosecution presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiant if he chooses.”) Respectfully, appellant asks this Court to reverse his conviction and remand his case for trial.

CONCLUSION

With respect to issue 1, respectfully appellant asked this court to reverse his conviction. With respect to issue 2, respectfully appellant asks this court to reverse his conviction and remand his case for trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'EAF-BT', written over a horizontal line.

Elizabeth A. Franklin-Best
Appellate Defender

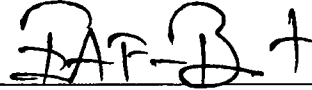
ATTORNEY FOR APPELLANT.

This 14th day of October, 2010.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

October 14th, 2010

A handwritten signature in black ink, appearing to read 'EAF-BT', is written over a horizontal line.

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Sumter County

William Jeffrey Young, Family Court Judge

THE STATE,

RESPONDENT,

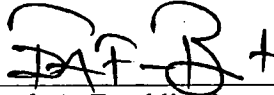
V.

JAMES P. AUSTIN,

APPELLANT

CERTIFICATE OF SERVICE

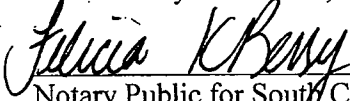
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Christina J. Catoe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 14th day of October, 2010.



Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 14th day of October, 2010.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: June 21, 2020

STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM SUMTER COUNTY

William Jeffrey Young, Family Court Judge

THE STATE,

RESPONDENT,

V

JAMES P. AUSTIN,

APPELLANT

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. The suppression issue raised on appeal is not preserved for review; but, in any event, the officer had probable cause to arrest Appellant where she observed Appellant abandon the drugs by throwing them on the ground at a public gas station.**
- II. The trial court did not abuse its discretion by denying Appellant's motion for continuance where Appellant did not comply with the absent witness rule.**

STATEMENT OF THE CASE

Appellant was indicted in Sumter County in April 2009 for possession of cocaine. (R. p. 117-18). He was tried on September 24-25, 2009 before the Honorable William Jeffrey Young and a jury. (See R. p. 1). He was convicted, and Judge Young sentenced Appellant to five years, suspended upon service of one year. (R. p. 116, lines 17-24). A timely Notice of Appeal was served and filed.

ARGUMENT

- I. The suppression issue raised on appeal is not preserved for review; but, in any event, the officer had probable cause to arrest Appellant where she observed Appellant abandon the drugs by throwing them on the ground at a public gas station.**

Appellant first argues that the drugs should have been suppressed because he was seized in violation of the Fourth Amendment. However, although Appellant did make a pre-trial motion to suppress, he did not contemporaneously object on Fourth Amendment grounds when the drugs were introduced into evidence much later in the trial. (See R. p. 25-74; p. 79-87).¹ See State v. Simpson, 325 S.C. 37, 42, 479 S.E.2d 57, 60 (1996) (motion *in limine* made at the beginning of trial to suppress evidence does not preserve issue for review; contemporaneous objection is required); State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 839-40 (2001) (contemporaneous objection requirement is excused only where the court rules on the admissibility of the contested evidence immediately before its introduction); see also State v. Dicapua, 373 S.C. 452, 455-56, 646 S.E.2d 150, 152 (Ct. App. 2007). Accordingly, the Fourth Amendment issue is not preserved for appellate review.

However, assuming the issue had been preserved for review, the trial court properly denied Appellant's suppression motion. (See R. p. 74, lines 2-23). The suppression hearing testimony illustrated that Appellant was not seized until Officer Coker acquired probable cause to arrest after observing Appellant throw a dollar bill containing cocaine onto the ground. (See R. p. 28-34). Appellant asserts that the anonymous tip which led the officers to the gas station was "uncorroborated" and insufficient to justify a seizure of Appellant. (See Final Brief of Appellant, p. 9).

¹ Instead, he objected because the evidence bag had a small hole in it. (See R. p. 83-88).

However, the anonymous tip ultimately had nothing to do with Appellant's seizure. It is true that the tip led the officers to that location; however, as the trial judge pointed out, the gas station was a public place and Appellant had no expectation of privacy there. (See R. p. 28, lines 2-9; p. 74, lines 4-17). See State v. Dupree, 319 S.C. 454, 460, 462 S.E.2d 279, 283 (1995). The officers had every right to be there, regardless of the reason.

Further, notwithstanding the officers' subjective intentions with respect to their investigation of the tip, at the time Appellant threw the drugs, he had not been seized. (See R. p. 46-54; p. 61-62). See Whren v. United States, 517 U.S. 806, 813-14 (1996) (actual motivation and subjective intentions of officers play no role in Fourth Amendment analysis); Fernandez v. State, 306 S.C. 264, 266, 411 S.E.2d 426, 428 (1991) ("evidence abandoned by the defendant before he was seized by the police cannot be the basis for a violation of the Fourth Amendment's prohibition against unreasonable search and seizure"). When Appellant threw the drugs, officers had only just arrived at the gas station, and they had not exhibited a show of force or authority – in fact, they had not even spoken to Appellant. (R. p. 28, lines 7-17; p. 52-54; see p. 71-72). State v. Foster, 269 S.C. 373, 380, 237 S.E.2d 589, 591-92 (1977). They were in an unmarked undercover vehicle and they did not block in Appellant or restrict his freedom in any way. (R. p. 40, lines 11-18; p. 43, lines 15-16; p. 54, lines 3-11). Appellant was seized and arrested *only* after Officer Coker saw him throw cocaine on the ground. (R. p. 28-34; p. 45, line 8 – p. 46, line 4; p. 51, lines 6-13). Accordingly, where there was no unlawful detention of Appellant, the trial court properly denied the motion to suppress.

II. The trial court did not abuse its discretion by denying Appellant's motion for continuance where Appellant did not comply with the absent witness rule.

Appellant argues that the trial judge should have continued the case due to the absence of Detective Wilson, one of three arresting officers. However, the trial judge did not abuse his discretion by denying a continuance where Appellant failed to comply with the relevant rule regarding continuances. Rule 7(a), SCRCrimP, "Authority to Grant [Continuances]," states that a motion for a continuance made to the presiding judge of a term of court may be granted *only* if there is a "written request by counsel." Further, Rule 7(b), SCRCrimP, "Continuance Because of Absence of Witness," states:

No motion for continuance of trial shall be granted on account of the absence of a witness without the oath of the party, his counsel, or agent to the following effect: the testimony of the witness is material to the support of the action or defense of the party moving; the motion is not intended for delay, but is made solely because he cannot go safely to trial without such testimony; and has made due diligence to procure the testimony of the witness or of such other circumstances as will satisfy the court that his motion is not intended for delay.

Subsection (2) of Rule 7(b) additionally requires that the party must set forth under oath what "fact or facts he believes the witness if present would testify to and the grounds for such belief."

In this case, although Appellant's counsel stated that he intended to file a written motion pursuant to Rule 7, he apparently never filed such motion.² (See R. p. 9, lines 21-23). Further, it is clear from the record that Appellant did not interview Detective Wilson or attempt to ascertain the details of his testimony. (See R. p. 7-11). Therefore, Appellant was unable to attest under oath, as required the rule, the facts that he believed

² The Sumter County Clerk of Court has no record of a continuance motion being filed on September 24-25, 2009, the dates of Appellant's trial.

Detective Wilson would testify to; that Detective Wilson's testimony was material to the defense; or that he used due diligence to procure his testimony. See Rule 7(b), SCRCrimP.

It is clear that Appellant's counsel, whom Appellant had just hired the Friday before trial, had no idea what Detective Wilson would have said and therefore had no idea if he would have even decided to call him as a defense witness. (See R. p. 9, lines 8-9). Appellant cites no authority for his assertion that he "had the right" to have Detective Wilson testify at trial. (See Final Brief of Appellant, p. 12). To the contrary, Appellant could not require the State to call Detective Wilson in its case-in-chief – as the judge pointed out, the State bore the risk of going to trial without this witness. (See R. p. 4, lines 21-25). See State v. Richardson, 253 S.C. 468, 473-74, 171 S.E.2d 717, 719 (1969) ("the State is not required to place upon the stand every witness who has knowledge of material facts connected with the crime charged"). Accordingly, where Appellant failed to properly comply with Rule 7, SCRCrimP, the trial court did not abuse its discretion in denying Appellant's motion for continuance. See State v. Fuller, 267 S.C. 44, 45-46, 225 S.E.2d 866, 867 (1976); State v. Gosnell, 262 S.C. 345, 204 S.E.2d 391 (1974); see also State v. Lytchfield, 230 S.C. 405, 410-11, 95 S.E.2d 857, 860 (1957) (pointing out that a reversal of the denial of a continuance motion is "about as rare as the proverbial hens' teeth").³

³ These three cases were decided under the precursor to the current Rule 7, Circuit Court Rule 27.

CONCLUSION

Based upon the foregoing, Respondent requests that this Court affirm Appellant's conviction and sentence.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

October 15, 2010

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Sumter County
The Honorable William Jeffrey Young, Circuit Court Judge

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

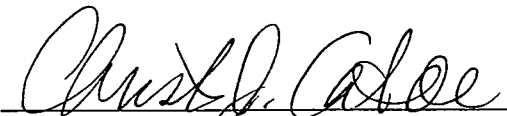
v.

JAMES P. AUSTIN,

APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the **Final Brief of Respondent** complies with Rule 211(b), SCACR, and also complies with the South Carolina Supreme Court's August 13, 2007 **Order on Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings**.


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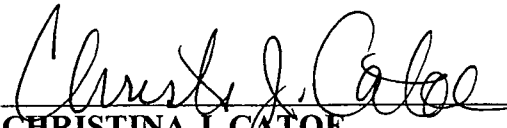
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AFFIDAVIT OF SERVICE

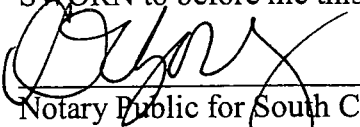
The undersigned attorney hereby certifies that the **Final Brief of Respondent** in the above-referenced case has been served upon **ELIZABETH A. FRANKLIN-BEST**, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589, this **15th day of October, 2010.**



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SWORN to before me this 15th day of October, 2010.



Notary Public for South Carolina.
My Commission Expires: 10/28/2014