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Oct 13 2022
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Charleston County
Honorable Deadra L. Jefferson, Circuit Court Judge
Appellate Case No. 2020-001405

THE STATE,

Respondent,

vs.

MICHAEL N. FRASIER, JR.,

Petitioner.

STATE'S PETITION FOR REHEARING

On September 28, 2022, this Court issued a published opinion in which it reversed Petitioner Michael N. Frasier, Jr.'s conviction for trafficking in cocaine. State v. Frasier, Op. No. 28117 (S.C. Ct. App. filed Sept. 28, 2022). In doing so, this Court: (1) altered our previously-enunciated standard of review for Fourth Amendment issues; (2) found "law enforcement lacked reasonable suspicion to prolong the traffic stop" in Frasier's case; and (3) determined "Frasier did not consent to the search" of his person. Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, the State respectfully petitions for rehearing because it believes this Court misapprehended and overlooked several critical points in its analysis.

Alteration of the Standard of Review

Initially, the portion of this Court's opinion changing our state's standard of review for appellate evaluation of Fourth Amendment issues fails to articulate the new standard in a manner

that actually aligns with the standard articulated by the United States Supreme Court through its decision in Ornelas v. United States, 517 U.S. 690 (1996). Since the stated purpose of this Court's change was, in fact, to align South Carolina with the federal standard of review, this Court should grant rehearing in order to truly achieve that expressed goal.

More specifically, in the first portion of its opinion in Frasier's case, this Court explained it was using the matter as a vehicle "to refine our standard of review to better align with the federal standard[.]" It then adopted—while renouncing the standard expressed in its just-over-two-decade-old decision in State v. Brockman, 339 S.C. 57, 528 S.E.2d 661 (2000)—a new standard by which appellate courts in South Carolina "review the trial court's factual findings for any evidentiary support" while treating "the ultimate legal question" of whether reasonable suspicion exists as a pure "question of law subject to de novo review." Meanwhile, this Court included none of the language from Ornelas about the basis for why de novo review was warranted or about the critical need for deference to still be extended when conducting such de novo review.

Significantly, in Ornelas itself, the United States Supreme Court explained the second part of a search-and-seizure analysis that entails looking to the ultimate question of whether reasonable suspicion or probable cause existed in a case is—as opposed to being a pure "question of law" like this Court seems to have concluded—"a mixed question of law and fact[.]" Id. at 696. Nonetheless, the United States Supreme Court still found de novo review was necessary. Id. at 699. And, in so doing, the United States Supreme Court did *not* find such review was warranted because appellate judges might themselves be in position to watch recordings of traffic stops and, thus, be capable of drawing their own conclusions about the significance of what occurred in any given case. Id. at 697. Instead, the United States Supreme

Court found such review was needed because "[a] policy of sweeping deference" to trial judges' ultimate determinations concerning the existence of reasonable suspicion or probable cause could lead to a lack of uniformity and hinder the ability for defined sets of rules to be articulated that officers would be capable of understanding and following. Id. Therefore, the Supreme held "as a general matter determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal." Id. at 699. Most critically though, the United States Supreme Court further "hasten[ed] to point out that a reviewing court should take care both to review findings of historical fact only for clear error and *to give due weight to inferences drawn from those facts by* resident judges and *local law enforcement officers*." Id. (emphasis added).

As previously noted, this Court's opinion in Frasier's case as currently drafted includes none of the language from Ornelas instructing the proper de novo review of the ultimate question still necessitates deference being extended to the law enforcement officers involved along with the inferences they drew from the facts. And, that language's absence is significant and problematic because, using what occurred in Ornelas as an example, the United States Supreme Court explained why the need for such deference on appeal is so great:

> [O]ur cases have recognized that a police officer may draw inferences based on his own experience in deciding whether probable cause exists. To a layman the sort of loose panel below the back seat armrest in the automobile involved in this case may suggest only wear and tear, but to Officer Luedke, who had searched roughly 2,000 cars for narcotics, it suggested that drugs may be secreted inside the panels. An appeals court should give due weight to a trial court's finding that the officer was credible and the inference was reasonable.

Id. at 700 (citation omitted); cf. State v. Alston, 422 S.C. 270, 291, 811 S.E.2d 747, 758 (2018) (plurality opinion in part) (Few, J., concurring) ("Rejecting what Deputy Gilbert learned in his professional training, the majority states, 'Were we to accept Deputy Gilbert's proposition, then

we would necessarily accept the illogical inference that only males engage in criminal activity.' This criticism is based on a misapplication of our standard of review, and misses the significance of Deputy Gilbert's testimony on this subject. When law enforcement officers are trained to consider a certain fact to be important in the officer's attempts to deal with crime on the streets, it is not appropriate for judges to sit in our easy chairs in our secure offices and simply disagree.").

Like Officer Luedke in Ornelas, the officers involved in Frasier's case had substantial specialized training and real-world law enforcement experience, with Officer Hall himself having conducted *thousands* of traffic stops prior to the one at issue now. (R. p. 27; p. 39; pp. 149-150; p. 169). The vast number of traffic stops Officer Hall has personally conducted put him into an enhanced position to be able to recognize behavior outside the norm that might not have appeared—and might still not appear—to be significant to someone without his substantial experience-based background, including to appellate judges and justices who presumably have not been involved in nearly as many routine and non-routine traffic stops over the courses of their lifetimes. See United States v. Cortez, 449 U.S. 411, 418 (1981) ("[A] trained officer draws inferences and makes deductions—inferences and deductions that might well elude an untrained person. . . . [T]he evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.").

But, as currently drafted and then applied, this Court's newly-enunciated de novo standard of review for the ultimate question would not appear to require deference to be extended to an officer's experience, training, and background or the inferences the officer was equipped to draw by virtue of those things. In fact, strongly suggesting it did not consider such information pertinent to the matter before it, this Court in its opinion included no statements

about the experience and background of the specific officers involved *in Frasier's case*, including about the fact Officer Hall had engaged in thousands of traffic stops during his over-a-decade-long law enforcement career.

Even though de novo review is appropriate pursuant to the Ornelas standard, the Ornelas standard nevertheless *requires* deference to be extended to officers and the inferences they are trained to be able to draw from the factors they observe. Because neither this Court's newly-articulated standard of review nor ensuing analysis applying that standard appears to actually extend such deference, neither is ultimately consistent with this Court's stated goal of aligning our state with the federal standard of review applied in search and seizure cases. Accordingly, rehearing is warranted and should be granted to truly bring our state into the desired proper alignment.

Determination and Analysis Concerning Reasonable Suspicion

Furthermore, the portion of this Court's opinion containing its analysis of the reasonable suspicion issue is respectfully inconsistent with what the reasonable suspicion standard constitutionally requires if the standard articulated by the United States Supreme Court in the seminal case of Terry v. Ohio, 392 U.S. 1 (1968), is the one that—as it must in the context of a Fourth Amendment analysis—is being followed and applied. Therefore, this Court should grant rehearing on this point as well.

Specifically, in analyzing whether reasonable suspicion existed, this Court—without, as previously noted, ever mentioning the details of the highly-experienced officers' background, training, and experience—looked to the factors present and relied upon by the officers, acknowledged virtually all of those factors were "pertinent" or "relevant" to a reasonable suspicion analysis, and then nonetheless stated it disagreed those factors were sufficient to

establish reasonable suspicion in Frasier's case due to the absence of any more overt indicators of criminal activity—like the smell of marijuana—being detected.

But, in Terry itself, no overt indicators of criminal activity existed. Id. at 5-6 Instead, in that case, a plainclothes officer on patrol had his eyes drawn to two men he had never seen before standing on a street corner in downtown Cleveland, Ohio, for reasons the officer self-admittedly was never able to explain. Id. at 5. Despite being unable to explain why he was drawn to them, the officer proceeded to watch them anyway for more than ten minutes. Id. at 5-6. During that time, the two men alternated walking down the street, looking in a store window (which itself existed to allow people to look inside the store), and then returning to one another. Id. at 6. The men did that roughly a dozen times, conferred with a third man, carried out their routine a few more times, left the area, and met up with the third man at another location. Id. Based on those facts alone, the officer—who had followed them when they left the area near the store—approached the three men, physically grabbed Terry, and frisked him for weapons, which led to the officer finding an illegally-concealed gun. Id. at 6-7. At the time he did so, the officer did not know or recognize any of the men, had not received any information about any of them, and had not seen—like was mentioned in this Court's opinion in Frasier's case—any items that would demonstrate potential criminal activity. Id. Nevertheless, the United States Supreme Court found both the physical seizure *and* search were constitutionally proper because Terry and the other men's actions—which, notably, were not themselves illegal in any way—were sufficient to give the officer an objectively reasonable basis to not just believe criminal activity "may" be afoot but *also* to believe the three men might be armed and presently dangerous. Id. at 30. And, in so finding, the United States Supreme Court explained it found the officer's action to be constitutionally reasonable because they were not "the product of a volatile or inventive

imagination" or "undertaken simply as an act of harassment" and, instead, were reasonably tempered based on the minimal circumstances observed. Id. at 28; see United States v. Arvizu, 534 U.S. 266, 274 (2002) ("The officer in Terry observed the petitioner and his companions repeatedly walk back and forth, look into a store window, and confer with one another. Although each of the series of acts was perhaps innocent in itself, we held that, taken together, they warranted further investigation." (citations and internal quotations omitted)).

Like in Terry, the officers in Frasier's case did not observe any overtly illegal activity prior to extending the traffic stop. Nevertheless, the highly-experienced officers, including one who had personally conducted *thousands* of traffic stops, detected and observed a number of suspicious factors before any extension of the stop occurred. Specifically, the collective factors detected and observed prior to the stop being extended included: (1) Frasier was observed leaving a bus station—a known vector for drug trafficking—and scanning the entire parking lot in a manner suggestive of counter-surveillance *despite the fact* the vehicle he was getting into was parked directly in front of him; (2) after the stop was initiated, the driver's pants were unzipped in a manner recognized to be consistent with efforts to conceal drugs; (3) Frasier was more nervous than Officer Hall typically encountered in traffic stops, and the unusual nature of that nervousness was further heightened by the fact Frasier was merely a passenger in a vehicle stopped for an equipment infraction for which he logically had no responsibility; and (4) both the driver and Frasier were repeatedly evasive when an incredibly simple and innocuous question was posed to them multiple times about from where they were coming. Cf. Kansas v. Glover, __ U.S. __, 140 S. Ct. 1183, 1190 (2020) (concluding an officer possessed "more than reasonable suspicion" to initiate a seizure based on his knowledge of just three facts: (1) someone was driving a truck with a specific license plate; (2) the truck's registered owner had a revoked

driver's license; and (3) the vehicle linked to the registered owner based on the observed license plate's information matched the observed vehicle); United States v. Riley, 684 F.3d 758, 764 (8th Cir. 2012) (explaining "difficulty in answering basic questions about [the individual's] itinerary" can support a finding of reasonable suspicion); United States v. Tinnie, 629 F.3d 749, 752 (7th Cir. 2011) (recognizing evasiveness or silence in response to simple questions can support a finding of reasonable suspicion); United States v. Garcia, 339 F.3d 116, 119 (2d Cir. 2003) (recognizing conduct consistent with drug trafficking, such as engaging in what appears to be "counter-surveillance," can support a finding of reasonable suspicion); State v. Alston, 422 S.C. 270, 290, 811 S.E.2d 747, 757 (2018) (plurality opinion) (Few, J., concurring) (characterizing as suspicious Alston's inability to be consistent on "a subject anybody ought to be able to speak consistently about—the number and ages of his children"); State v. Moore, 415 S.C. 245, 254, 781 S.E.2d 897, 902 (2016) ("Moore exhibited excessive nervousness *in the judgment of the officer*, which lends support to a finding of reasonable suspicion to prolong the traffic stop." (emphasis added)). Collectively, those factors—when evaluated through the proper lens giving credence to the value of the officers' training and experience towards accurately recognizing the significance of suspicious factors—were sufficient to give the officers a reasonable and objective basis to believe criminal activity *may* be afoot before the stop was extended. See Arvizu, 534 U.S. at 273 (explaining "due weight to the factual inferences drawn by the law enforcement officer" must be given when conducting appellate review of a search and seizure issue and criticizing—and ultimately reversing—the Ninth Circuit Court of Appeals for rejecting certain factors considered by the officer due to its independent belief the factors were insignificant or meaningless in its own reasoned judgment); Illinois v. Wardlow, 528 U.S. 119, 125-126 (2000) (recognizing factors that are "susceptible of an innocent explanation" can

establish reasonable suspicion and probable cause); United States v. Whitfield, 634 F.3d 741, 744 (3d Cir. 2010) ("It is not necessary that the suspect actually have done or is doing anything illegal; reasonable suspicion may be based on acts capable of innocent explanation." (citation and internal quotations omitted)).

Meanwhile, in reaching a conclusion to the contrary, this Court appears to have failed to extend any deference whatsoever to the officers' training, background, and experience or the inferences they drew as required pursuant to the proper standard of review. In addition to that, this Court further appears to have applied a standard requiring the presence of overt evidence of criminal activity in order for the reasonable suspicion standard's very low bar to be met even though the presence of something like the smell of marijuana—one of the absent factors this Court expressly pointed to as justification for its finding of no reasonable suspicion—has long ago been recognized by this Court to be *alone* sufficient to satisfy the *probable cause* standard's higher-but-still-not-high bar. See State v. Lane, 271 S.C. 68, 72, 245 S.E.2d 114, 116 (1978) ("From the record it is evident that the odor emanating from the packages *alone* was a sufficient basis to establish probable cause as to their contents when it is considered that an officer of the law, familiar with the odor of marijuana, believed the odor being emitted was that of marijuana." (emphasis added)); see also Kaley v. United States, 571 U.S. 320, 338 (2014) (recognizing even the probable cause standard "is not a high bar"); United States v. Ramos, 826 F. App'x 131, 133 (3d Cir. 2020) ("Reasonable suspicion is a *very* low bar." (emphasis added)). Accordingly, this Court should grant rehearing, reevaluate the question of whether reasonable suspicion existed through the purposefully-deferential standard of review discussed in Ornelas, and apply a standard of reasonable suspicion that does not incorrectly conflate its minimal requirements with the requirements of the higher probable cause standard. See Glover, 140 S. Ct. at 1190 (rejecting

an interpretation of what is required to satisfy the reasonable suspicion standard because the rejected interpretation "would considerably narrow the daylight between the showing required for probable cause and the 'less stringent' showing required for reasonable suspicion"); Arvizu, 534 U.S. at 274 (explaining "the likelihood of criminal activity need not rise to the level required for probable cause" in order for the reasonable suspicion standard to be satisfied).

Determination and Analysis Regarding Consent

Finally, the portion of this Court's opinion containing its analysis of the consent issue is—as currently drafted—inconsistent with the constitutional limits of this Court's authority. Therefore, this Court should respectfully give the matter another look and grant rehearing.

Specifically, in the last portion of its decision in Frasier's case, this Court found the State failed to prove Frasier voluntarily consented to the search of his person and, based on that finding, reversed the decisions of the trial judge and the Court of Appeals on that ground, too. In doing so, this Court emphasized "[b]ecause [it was] able to view the same video as the trial court, [it could] make an *independent finding* and [was] *not constrained* to defer to the trial court's conclusion that Frasier consented through his words and conduct." (emphasis added).

Importantly though, pursuant to the authority conferred to this Court by our citizenry through the South Carolina Constitution, this Court—by the very mandate from which its appellate authority is derived—is constitutionally limited to reviewing for errors of law only in criminal cases on appeal. See S.C. Const. art. V, § 5 ("The Court shall have appellate jurisdiction only in cases of equity, and in such appeals they shall review the findings of fact as well as the law, except in cases where the facts are settled by a jury and the verdict not set aside. The Supreme Court shall constitute a court for the correction of errors at law under such regulations as the General Assembly may prescribe."); Sandel v. State, 128 S.C. 178, __, 122

S.E. 571, 571 (1922) ("There was good reason to draw a distinction between law and equity cases, as was done in section 4; the provision intending that in equity cases only should the Supreme Court have full appellate jurisdiction—that is, the power to review findings of fact as well as of law in the court below—but that in law cases *only findings of law*. It is constituted a court for the correction of errors of law in law cases[.]" (emphasis added)). Thus, even when video recordings exist in a particular criminal case, this Court *is* constitutionally constrained from making independent factual findings on appeal in such a matter despite this Court's statements to the contrary in Frasier's case.[1] S.C. Const. art. V, § 5; cf. United States v. Lattimore, 87 F.3d 647, 651 (4th Cir. 1996) ("*[A]lthough the temptation to substitute its judgment is particularly seductive when the encounter was recorded*, a reviewing court may not reverse the decision of the district court that consent was given voluntarily unless it can be said that the view of the evidence taken by the district court is implausible in light of the entire record." (emphasis added and citation omitted)).

Meanwhile, this Court itself has recognized in the past the question of consent is—unlike the question of whether reasonable suspicion exists—a pure question of fact. See State v. Bailey, 276 S.C. 32, 36, 274 S.E.2d 913, 915 (1981) (recognizing the issue of whether consent for a search was validly given constitutes "a question of fact for the trial judge"). And, this Court is not alone in that recognition as it is consistent with the longstanding views of state and federal courts—including the United States Supreme Court—all throughout our nation. See, e.g., Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973) ("[T]he question whether a consent to a

[1] Perhaps one day the citizens of South Carolina will amend the state constitution to confer upon this Court broad fact-finding authority in criminal appeals due to the dawn of the post-Brockman technological age, but such an alteration has not yet occurred. Cf. State v. Forrester, 343 S.C. 637, 647, 541 S.E.2d 837, 842 (2001) ("[T]he drafters of our state constitution's right to privacy provision were principally concerned with the emergence of new electronic technologies that increased the government's ability to conduct searches.").

search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances."); United States v. Soriano, 976 F.3d 450, 455 (5th Cir. 2020) ("Voluntariness of consent is a factual inquiry. Factual findings are clearly erroneous if the court is left with the definite and firm conviction that a mistake has been committed. If a factual finding is plausible in light of the record as a whole, it is not clearly erroneous. . . . In addition to deferring to the district court's factual findings, this court must review the evidence in the light most favorable to the prevailing party, here, the Government." (citations and internal quotations omitted)); United States v. Winston, 444 F.3d 115, 121 (1st Cir. 2006) ("The existence of consent and the voluntariness thereof are questions of fact to be determined from all the circumstances surrounding the search." (citation and internal quotations omitted)); People v. Michael, 290 P.2d 852, 854 (Cal. 1955) ("Whether in a particular case an apparent consent was in fact voluntarily given or was in submission to an express or implied assertion of authority, is a question of fact to be determined in the light of all the circumstances."); Freeman v. State, 548 S.E.2d 616, 619 (Ga. Ct. App. 2001) (explaining whether consent existed is a question of fact); State v. Daino, 475 P.3d 354, 359 (Kan. 2020) ("The existence, voluntariness, and scope of a consent to search is a question of fact to be determined from the totality of the circumstance."); Meekins v. State, 340 S.W.3d 454, 458 (Tex. Crim. App. 2011) ("The validity of a consent to search is a question of fact to be determined from all the circumstances.").

Critically, because consent is a question of fact, this Court's review of a trial judge's decision on consent—including the trial judge's in Frasier's case—is constitutionally circumscribed to error-of-law-only review by our state's constitution. S.C. Const. art. V, § 5; see State v. Lewis, 434 S.C. 158, 166, 863 S.E.2d 1, 5 (2021) ("In criminal cases, the appellate court

sits to review errors of law only."). Therefore, in reviewing such an issue on appeal, this Court cannot constitutionally reverse a trial judge's consent determination simply because—based on its own independent view of the facts—it would have decided the case differently if it had been in the trial judge's position. See State v. Spears, 429 S.C. 422, 433, 839 S.E.2d 450, 455 (2020) ("The clear error standard means that an appellate court will not reverse a trial court's finding of fact simply because it would have decided the case differently." (citations and internal quotations omitted)). Instead, it must review such a factual finding under the clear error standard with appropriate deference extended to the trial judge's findings. See Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573-574 (1985) ("In applying the clearly erroneous standard to the [factual] findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo. If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts."); see also United States v. Weidul, 325 F.3d 50, 53 (1st Cir. 2003) ("Our rule has been that voluntariness of consent is a factual matter that is subjected to the clear error standard of review, and we adhere to that rule. Under this standard, a district court's choice between two plausible competing interpretations of the facts cannot be clearly erroneous. Instead, the only real question for appellate review is whether the evidence presented at the suppression hearing fairly supports the district court's finding." (citations, internal quotations, and brackets omitted)).

As currently articulated, this Court's consent analysis in Frasier's case appears to be based on its own independent factual findings as to the meaning of Frasier's words and conduct during this traffic stop. Such appellate fact finding is inconsistent with the constitutional limits of this Court's authority. Accordingly, this Court should and must reconsider its consent analysis to ensure it is consistent with the applicable standard for reviewing questions of fact on appeal in South Carolina along with the limits that have been put into place by our citizenry through the state constitution. See State v. Beaty, 423 S.C. 26, 41, 813 S.E.2d 502, 510 (2018) (recognizing its authority is limited by the South Carolina Constitution and explaining "when we decide an appeal from a criminal conviction—as we do here—our power is limited to correcting errors of law"); cf. Soriano, 976 F.3d at 455 (affirming the district court judge's finding of voluntary consent based on the applicable standard of review for questions of fact even though "the factors [for and against voluntariness] were essentially even on both sides"). Otherwise, this Court will be committing its own constitutional violation at the same time it is finding one.

Conclusion

For all those reasons coupled with the reasons articulated in the State's brief and during oral argument before this Court, the State respectfully asks this Court to reconsider the matter pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, vacate its prior opinion, and issue a new opinion affirming Frasier's conviction—along with the earlier decisions of the trial judge and the Court of Appeals—upon finding Frasier's constitutional rights were not violated under the specific facts and circumstances of his case. In the alternative, the State respectfully asks this Court to reconsider the matter and, at a minimum, revise its decision to: (1) affirm that deference still remains due to law enforcement officers during judicial evaluation of the constitutional reasonableness of a search or seizure in South Carolina as the United States

Supreme Court unambiguously explained was warranted in the Ornelas decision upon which this Court's newly-adopted search and seizure standard of review is based; and (2) ensure its appellate review of the trial judge's consent determination complies with the limits of this Court's constitutional authority and does not simply constitute a substitute fact finding this Court is not constitutionally empowered to make.

Respectfully submitted,

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October 13, 2022