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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Charleston County
Honorable Deadra L. Jefferson, Circuit Court Judge

THE STATE,

PETITIONER,

V.

MICHAEL N. FRASIER,

RESPONDENT

APPELLATE CASE NO. 2020-001405

Return to State's Petition for Rehearing

On October 13, 2022, the State filed a petition for rehearing of this Court's opinion, State v. Frasier, Op. No. 28117 (S.C. Sup.Ct. filed September 28, 2022). On that same day, October 13, 2022, this Court requested a return to the petition for rehearing. This Court correctly found that law enforcement lacked reasonable suspicion to prolong the traffic stop and that Frasier did not consent to the search. The refined standard of review announced by this Court better aligns with the federal standard, adopted in nearly every state. Respectfully, this Court should deny the petition for rehearing.

Standard of Review

This Court correctly clarified the standard of review in Fourth Amendment cases writing, "Accordingly, appellate review of a motion to suppress based on the Fourth Amendment involves a two-step analysis. This dual inquiry means we review the trial court's factual findings for any evidentiary support, but the ultimate legal conclusion—in this case whether reasonable suspicion exists—is a question of law subject to de novo review." State v. Frasier, No. 2020-001405, 2022 WL 4491598, at *2 (S.C. Sept. 28, 2022). The standard of review announced by this Court is consistent with Ornelas v. United States, 517 U.S. 690 (1996), requiring federal courts to employ a more rigorous two-part analysis where courts defer to the trial court's factual findings but review the ultimate legal conclusion de novo. The standard of review adopted by this Court is consistent with that adopted in nearly every state as listed in footnote two of the well-reasoned unanimous opinion.

The State argues, "...[T]his 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." (Petition for rehearing p. 4). The standard of review clarified by this Court does not remove the requirement that appellate courts give due weight to an officer's experience, training, and background. In applying the standard of review and finding that law enforcement lacked reasonable suspicion to prolong the traffic stop this Court specifically noted the due weight to be given to an officer's experience and training writing:

> In other words, for an officer to have reasonable suspicion, "there [must] be an objective, specific basis for suspecting the person stopped of criminal activity." Id. While reasonable suspicion is not a high bar and "is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for making the stop." Illinois v. Wardlow,

> 528 U.S. 119, 123, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000). This inquiry involves the totality of the circumstances, and "[c]ourts must give due weight to common sense judgments reached by officers in light of their experience and training." State v. Moore, 415 S.C. 245, 252-53, 781 S.E.2d 897, 901 (2016).

State v. Frasier, No. 2020-001405, 2022 WL 4491598, at *3 (S.C. Sept. 28, 2022). Respectfully, rehearing is not warranted as to standard of review.

Reasonable Suspicion

After a thorough discussion of the law and the facts of this case, this Court correctly found that law enforcement lacked reasonable suspicion to prolong the traffic stop writing:

> Here, even after accepting the trial court's factual findings as we must do since they are supported by some evidence, we conclude that Hall lacked reasonable suspicion as a matter of law pursuant to de novo review. The two plainclothes officers relayed to Hall that Frasier seemed suspicious, but that was only based on a subjective hunch. While "scanning the parking lot" is a relevant factor, it is far from establishing reasonable suspicion. Accordingly, in order for Hall to prolong the traffic encounter, there had to be more indications of criminal activity once Hall initiated the traffic stop. Although the State contends the following additional facts establish reasonable suspicion—repeating questions, noticing Jones's unzipped zipper, sweating, and being nervous—we disagree.

State v. Frasier, No. 2020-001405, 2022 WL 4491598, at *4 (S.C. Sept. 28, 2022) (n.#4, n. #5 omitted.). This Court noted in footnote four that the trial court believed the reasonable suspicion issue was at best a 50/50 call. This Court also noted that as the State has the burden of proof to demonstrate reasonable suspicion, when a case boils down to a flip of the coin, the Fourth Amendment requires a finding in favor of the defendant. In footnote five this Court wrote:

> Jones told Hall during the traffic stop that her zipper was undone because she has just taken a shower before meeting Frasier at the bus station. Concerning the fact that Frasier sweated, we agree with the trial court's statement that "[e]verybody sweats profusely in August in Charleston. I sweat profusely in Charleston in August. It's hot at 6 in the morning. As soon as you walk out the door, it's 90 to 100 percent humidity." The solicitor responded that he had the almanac showing the temperature and humidity for the day in question and "would be happy to give it to you." The court answered, "No. I live in Charleston. I've lived in Charleston my whole life...."

State v. Frasier, No. 2020-001405, 2022 WL 4491598, at *4 (S.C. Sept. 28, 2022). This Court also correctly noted that there must be an *objective* basis for concluding that criminal activity may be afoot.

The State argues that this Court failed to give due weight to the officers training background and experience. (Petition for rehearing p. 9). There is nothing in the opinion to suggest that the Court did not give due weight to officer's training, background and experience. This Court, as a matter of law and giving due weight to the experience of the officer, found the factors relied upon by the officer - repeating questions, unzipped zipper, sweating, and nervousness - did not provide an objective basis for concluding that criminal activity may be afoot. The experience of an officer is not a substitute for reasonable suspicion.

In Robinson v. State, 407 S.C. 169, 182, 754 S.E.2d 862, 868–69 (2014)(n. #8 omitted) this Court wrote:

> Reasonable suspicion is something more than an "inchoate and unparticularized suspicion" or hunch. Terry v. Ohio, 392 U.S. 1, 27, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Instead, looking at the totality of the circumstances, reasonable suspicion requires there be an objective, specific basis for suspecting the person stopped of criminal activity. United States v. Cortez, 449 U.S. 411, 417–18, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981). The police officer may make reasonable inferences regarding the criminality of a situation in light of his experience, but he must be able to point to articulable facts that, in conjunction with his inferences, "reasonably warrant" the intrusion. Terry, 392 U.S. at 21, 27, 88 S.Ct. 1868.

In the present case the evidence shows that the officer, at best, had merely an unparticularized suspicion or hunch, not reasonable suspicion to justify the prolonged detention. Officer Hall was unable to articulate why he believed the behavior of Ms. Jones or Mr. Frasier was suspicious and he was unable to logically demonstrate, given the surrounding circumstances, how their behavior was indicative of more sinister activity than may appear at first glance. Instead, Officer Hall testified, "Just with the totality of everything, with what I was relayed from

the detectives and almost evasiveness – well, not evasiveness, but the length they pulled over, her zipper being undone, just not being very direct with their answers with me, my interest was piqued highly that something was amiss or – I don't know." (R. p. 45, lines 2-7). When asked what information he received from the narcotics officers, Officer Hall testified, "I was told that they had – they were watching the bus station and observed the subject exit the bus station, enter a car. They didn't give me – run through all the particulars. They just believed that something was funny about it and asked if I would conduct a traffic stop on the vehicle." (R. p. 55, lines 1-6). This Court correctly found that Officer Hall did not have reasonable suspicion to prolong the traffic stop.

The State also argues, "In addition to that, [the assertion that this Court did not give due weight to officer experience] 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." (Petition for rehearing p. 9) (citations omitted). The State then argues, "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." (Petition for rehearing p. 9) (citation omitted).

First, as discussed above, this Court, as a matter of law and giving due weight to the experience of the officer, found the officer failed to provide an objective basis for concluding

criminal activity may be afoot. Second, this Court did not conflate the requirements for reasonable suspicion with the requirements for probable cause, as suggested by the State. This Court did not require the State to prove the presence of overt evidence of criminal activity. The State takes this Court's reference to the smell of marijuana out of context. This Court did not require the smell of marijuana. Instead, this Court wrote:

> Hall did not see any items that would demonstrate potential criminal activity—such as cash on hand, hollowed out blunt cigars, or the smell of marijuana—before deciding to extend the stop. See Moore, 415 S.C. at 249, 781 S.E.2d at 899 (officers found a "wad" of $600 in cash); Morris, 411 S.C. at 581, 769 S.E.2d at 859 (police saw hollowed out cigars and smelled marijuana). It is equally apparent that this was a drug stop masquerading as a traffic encounter. Indeed, the goal of the stop was to "try to obtain consent," as Hall can be heard telling dispatch on the dashcam video. While we do not suggest that pretexual stops are illegal, in order to prolong the stop, there must be an *objective* basis for concluding that criminal activity may be afoot.

State v. Frasier, No. 2020-001405, 2022 WL 4491598, at *4 (S.C. Sept. 28, 2022). In distinguishing the facts of Moore and Morris this Court did not conflate the requirements for reasonable suspicion with the requirements for probable cause. Respectfully, rehearing is not warranted as to this Court's finding that the officer lacked reasonable suspicion to prolong the traffic stop.

State's failure to prove Consent

This Court correctly found that the State failed to prove that Frasier voluntarily consented to the search of his person, writing, "Accordingly, because Frasier's conduct was at the direction of the officer, it was not a voluntary decision to allow Hall to search him. Thus, the State failed to prove that Frasier voluntarily consented, and we therefore reverse on this ground as well." State v. Frasier, No. 2020-001405, 2022 WL 4491598, at *5 (S.C. Sept. 28, 2022). This Court made the finding after properly viewing the video of the encounter writing:

> Because we are able to view the same video as the trial court, we can make an independent finding and are not constrained to defer to the trial court's conclusion that Frasier consented through his words and conduct. The video clearly indicates that Frasier stepped out of the vehicle at the direction of one of the officers, with a second officer standing beside him. Once Frasier began to place his hands in his pockets, Hall understandably told Frasier to remove them. In response, Frasier raised his hands over his head and began to turn. Hall testified it was Frasier's conduct that indicated he consented to a search, but it is clear from the video that Frasier only placed his hands on the vehicle at the direction of the officer. Indeed, after asking whether Frasier had any weapons on him, Hall asked Frasier to "put his hands up on the car for me."

State v. Frasier, No. 2020-001405, 2022 WL 4491598, at *5 (S.C. Sept. 28, 2022).

The State argues, "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.')." (Petition for rehearing pp. 12-13). The State notes, "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." (Petition for rehearing p. 14).

The clarified standard of review announced in this case supports this Court's authority to find that the State failed to prove consent. This Court wrote:

> At the time this Court issued Brockman, appellate courts routinely reviewed cold records and depended on trial courts to review credibility and weigh conflicting evidence in reaching its decision. However, with the dawn of the technological age, appellate courts are no longer dependent on the trial court in our review of evidence. The most obvious example is the advent of body and dashcam footage, whereby this Court reviews the same video as the trial court. Accordingly, while the need for deference remains, particularly in determining issues of credibility, it is no longer necessary for us to defer to the trial court's overall ruling in every case. Instead, we take this opportunity to refine our standard of review to better align with the federal standard, which has been adopted in nearly every state. Accordingly, appellate review of a motion to suppress based on the Fourth Amendment involves a two-step analysis. This dual inquiry means we review the

> trial court's factual findings for any evidentiary support, but the ultimate legal conclusion—in this case whether reasonable suspicion exists—is a question of law subject to de novo review.

State v. Frasier, No. 2020-001405, 2022 WL 4491598, at *2 (S.C. Sept. 28, 2022). This Court was able to view the video and determine that Frasier's conduct was at the direction of the officer. The trial court's finding as to consent lacked evidentiary support.

Alternatively, not only was Frasier's conduct at the direction of the officer, any purported consent given by Frasier was the product of the illegal prolonged traffic stop, rendering the purported consent invalid. See Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

Conclusion

This Court properly refined the standard of review of a motion to suppress on Fourth Amendment grounds to better align with the federal standard adopted in nearly every state. This Court properly noted the due weight to be given to an officer's experience and training. This Court properly analyzed the reasonable suspicion issue finding that the officer lacked reasonable suspicion to prolong the traffic stop. This Court properly analyzed the consent issue, finding the State failed to prove that Frasier consented to the search. For these reasons, Respondent respectfully requests that this Court deny the State's petition for rehearing and uphold the decision to reverse the conviction.

Respectfully Submitted,

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This 26th day of October, 2022.