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March 31, 2023

RECEIVED

Mar 31 2023

SC Court of Appeals

The Honorable Jenny Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: State v. Daquan J. Crummey
Appellate Case No. 2020-000537

Dear Ms. Kitchings:

This matter is scheduled for oral argument on Tuesday, April 4, 2023 at 11:20 a.m. in Courtroom I. Pursuant to Rule 208(b)(7), SCACR, I would like to submit the following citation as supplemental authority in this matter. I believe it is pertinent and significant authority as to Issue IV which has recently come to my attention in preparing for the oral argument in this case.

State v. Frasier, 437 S.C. 625, 879 S.E.2d 762 (2022).

I have enclosed a copy of the case with this letter. Please let me know if you require further information. I have copied opposing counsel by electronic mail and attached the case.

Sincerely,

Taylor D. Gilliam
Appellate Defender

TDG/sl
cc: Joshua Edwards, Esquire
Enclosure

RECEIVED
Mar 31 2023
C Court of Appeals

437 S.C. 625

Supreme Court of South Carolina.

The STATE, Respondent,

v.

Michael N. FRASIER, Jr., Petitioner.

Appellate Case No. 2020-001405

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Opinion No. 28117

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Heard March 15, 2022

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Filed September 28, 2022

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Rehearing Denied November 17, 2022

Synopsis

Background: Defendant was convicted in the Circuit Court, Charleston County, Deadra L. Jefferson, J., of trafficking cocaine. Defendant appealed. The Court of Appeals, 431 S.C. 234, 847 S.E.2d 274, affirmed. Defendant petitioned for writ of certiorari, which was granted.

Holdings: The Supreme Court, Hearn, J., held that:

[1] police officer lacked reasonable suspicion to further detain defendant after initial traffic stop, and

[2] defendant did not voluntarily consent to search of his person.

Reversed.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion.

West Headnotes (18)

- [1] **Criminal Law** ⇌ Review De Novo
Criminal Law ⇌ Evidence wrongfully obtained
Appellate review of a motion to suppress based on the Fourth Amendment involves a two-step analysis under which appellate court reviews the

trial court's factual findings for any evidentiary support, but the ultimate legal conclusion is a question of law subject to de novo review. U.S. Const. Amend. 4.

4 Cases that cite this headnote

- [2] **Arrest** ⇌ What Constitutes a Seizure or Detention
A person has been "seized" within the meaning of the Fourth Amendment at the point in time when, in light of all the circumstances surrounding an incident, a reasonable person would have believed that he was not free to leave. U.S. Const. Amend. 4.

- [3] **Automobiles** ⇌ Ordering occupants out of vehicle
Once a police officer pulls over a motor vehicle for a traffic violation, the officer may order the driver to exit the vehicle without violating Fourth Amendment proscriptions on unreasonable searches and seizures. U.S. Const. Amend. 4.

- [4] **Automobiles** ⇌ Inquiry; license, registration, or warrant checks
In carrying out a traffic stop, a police officer may request a driver's license and vehicle registration, run a computer check, and issue a citation. U.S. Const. Amend. 4.

- [5] **Automobiles** ⇌ Detention, and length and character thereof
To prolong or exceed scope of a traffic stop beyond the initial traffic violation, a police officer must have reasonable suspicion that criminal activity may be afoot. U.S. Const. Amend. 4.

- [6] **Automobiles** ⇌ Detention, and length and character thereof

Reasonable suspicion to prolong or exceed scope of a traffic stop beyond the initial traffic violation is not susceptible to a rigid, formulaic approach, but it requires more than a mere hunch or unparticularized suspicion. U.S. Const. Amend. 4.

[7] **Automobiles** ⇌ Detention, and length and character thereof

Reasonable suspicion to prolong or exceed scope of a traffic stop beyond the initial traffic violation requires a police officer to have an objective, specific basis for suspecting the person stopped of criminal activity. U.S. Const. Amend. 4.

[8] **Automobiles** ⇌ Detention, and length and character thereof

Reasonable suspicion to prolong or exceed scope of a traffic stop beyond the initial traffic violation is not a high bar and is a less demanding standard than probable cause to arrest and requires a showing considerably less than preponderance of the evidence. U.S. Const. Amend. 4.

[9] **Automobiles** ⇌ Detention, and length and character thereof

Inquiry into reasonable suspicion to prolong or exceed scope of a traffic stop beyond the initial traffic violation involves the totality of the circumstances. U.S. Const. Amend. 4.

[10] **Automobiles** ⇌ Detention, and length and character thereof

Inquiry into reasonable suspicion to prolong or exceed scope of a traffic stop beyond the initial traffic violation requires a court to give due weight to common sense judgments reached by officers in light of their experience and training. U.S. Const. Amend. 4.

1 Case that cites this headnote

[11] **Automobiles** ⇌ Detention, and length and character thereof

Police officer lacked reasonable suspicion to further detain defendant after initial traffic stop of vehicle in which defendant was passenger, even though officer had information from two other officers, who were conducting routine drug interdiction outside a bus station, that defendant seemed suspicious, officer had to repeat questions to driver, and officer noticed the driver's sweating, nervous demeanor, and unzipped pants zipper suggesting she was potentially hiding contraband in her pants, where officer did not see any items that would have demonstrated potential criminal activity, such as cash on hand, hollowed out blunt cigars, or smell of marijuana, before deciding to extend stop. U.S. Const. Amend. 4.

[12] **Automobiles** ⇌ Detention, and length and character thereof

When a case involving an allegedly improper prolonged traffic stop boils down to a flip of the coin, the Fourth Amendment requires a court to find in favor of the defendant since the State has the burden to demonstrate reasonable suspicion. U.S. Const. Amend. 4.

[13] **Searches and Seizures** ⇌ Necessity of and preference for warrant, and exceptions in general

Warrantless searches are generally per se unreasonable unless they fall within a recognized exception under the Fourth Amendment. U.S. Const. Amend. 4.

[14] **Searches and Seizures** ⇌ Voluntary nature in general

A police officer may conduct a warrantless search of an individual if that person voluntarily consents. U.S. Const. Amend. 4.

- [15] **Searches and Seizures** ⇄ Consent, and validity thereof

State has burden to demonstrate voluntary consent to a warrantless search. U.S. Const. Amend. 4.

- [16] **Searches and Seizures** ⇄ Voluntary nature in general

A police officer must obtain consent to search voluntarily. U.S. Const. Amend. 4.

- [17] **Searches and Seizures** ⇄ Voluntary nature in general

Whether consent to search was voluntary is a fact-intensive inquiry viewed under the totality of the circumstances. U.S. Const. Amend. 4.

- [18] **Searches and Seizures** ⇄ Particular concrete applications

Defendant did not voluntarily consent to search of his person during traffic stop after police officer told him to take his hands out of his pockets and asked if defendant would mind if officer searched him, where defendant raised his hands in air, defendant stated "I do, but," and defendant placed his hands on hood of vehicle at officer's direction while another officer was standing beside him. U.S. Const. Amend. 4.

****763 ON WRIT OF CERTIORARI TO THE COURT OF APPEALS**

Appeal from Charleston County, Deadra L. Jefferson, Circuit Court Judge

Attorneys and Law Firms

Appellate Defender Kathrine Hudgins, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant Attorney General Mark Reynolds Farthing, both of Columbia,

and Solicitor Scarlett Anne Wilson, of Charleston, all for Respondent.

Opinion

JUSTICE HEARN:

*628 **764 Petitioner Michael Frasier was convicted of trafficking cocaine in excess of 100 grams after police discovered cocaine during a traffic stop for an inoperable brake light. The questions before the Court concern whether police had reasonable suspicion to prolong the traffic encounter and whether Frasier consented to the search. The trial court concluded the officer had reasonable suspicion and Frasier consented, and the court of appeals affirmed. In deciding these two issues, we clarify the scope of this Court's standard of review in the Fourth Amendment context. Ultimately, we reverse the court of appeals *629 because law enforcement lacked reasonable suspicion to prolong the traffic stop and Frasier did not consent to the search.

FACTS/PROCEDURAL HISTORY

During the morning of August 14, 2013, two plainclothes officers with the North Charleston Police Department sat in an unmarked car outside a bus station conducting a routine drug interdiction as part of the department's narcotics division. On this particular morning, Frasier had traveled from New York to North Charleston on a commercial bus. The two officers were approximately 75 to 100 yards away from the bus station's exit when they observed Frasier leave the station. According to the officers, Frasier immediately stopped after exiting the station and looked left and right before walking about ten yards to a vehicle driven by Cheryl Jones. Frasier entered the vehicle, and the two left the station. Officers characterized Frasier's conduct as clearing the area for threats, including law enforcement, which they deemed suspicious. As the vehicle left the station, the officers discovered that it had an inoperable third brake light. Accordingly, one of the officers called Steven Hall, a patrol officer who previously had worked in the narcotics department, to perform a traffic stop. Although the legal basis for the traffic stop stemmed from the broken brake light, the officers informed Hall that Frasier seemed suspicious. However, the officers never informed Hall of the specific conduct that raised their suspicion, such as Frasier's scanning the parking lot.

Hall subsequently caught up to the vehicle on the North Bridge over the Ashley River after reaching a speed of 87

miles per hour. Jones used her turn signal to get into the left lane and out of the officer's way. Apparently upon realizing that she was being pulled over, she then turned on her flashers and moved into the right lane before pulling off the road. Hall testified that Jones took longer than usual to pull over although the dashcam video indicated it took less than a minute. Hall exited his patrol car and approached Jones's vehicle. He informed Jones that her brake light was out, and while talking with her, Hall noticed the zipper was down on her pants. He testified that, from his experience, this suggested she was potentially hiding contraband in her pants. Hall *630 testified that Frasier "just appeared to be nervous. He was sweating profusely. Did not want to really interact with me a whole lot as far as eye contact, something like that." Hall asked them where they were traveling from, and after repeating the question several times, Jones answered that she picked up Frasier from the bus stop. Hall requested Jones's driver's license, but she did not have it on her; instead, she gave him her personal information, and dispatch indicated that she did not have any outstanding warrants. Hall can be heard on the dashcam video telling dispatch that he is going to issue a warning ticket and try to obtain consent to search the car. Hall subsequently exited his patrol car, walked over to Jones and asked her to step out of her vehicle. Jones complied and consented for Hall to search the vehicle. Another patrol officer arrived on scene during the traffic stop, and both officers walked over to the passenger side door and asked Frasier to step out of the vehicle. Frasier complied, and placed his hands in his pockets. Hall immediately told Frasier to remove his hands from his pockets and asked Frasier if he would mind if he searched him. Frasier raised his hands in the air and said, "I do, but" Frasier subsequently placed his hands on the hood of the car at the direction of Hall. Ultimately, Hall found a white powdery substance **765 later identified as cocaine on Frasier and a larger quantity in Frasier's jacket in the back seat of the vehicle. Frasier was arrested and charged with trafficking in cocaine in excess of 100 grams.

Thereafter, Frasier filed two motions to suppress, one contending Hall lacked reasonable suspicion to prolong the traffic stop and the second asserting he never consented to the search. Following the testimony of the officers, which was consistent with the account relayed above, Frasier argued all the drugs should be suppressed. The solicitor contended the following established reasonable suspicion to prolong the traffic stop in order to obtain consent: 1) Frasier's behavior at the bus stop, specifically traveling on a commercial bus which law enforcement knew was frequented by drug traffickers and

his "scanning" the parking lot upon exiting the bus station; 2) Jones's purportedly "evasive driving" and the delay in pulling over; 3) the zipper down on her pants; 4) "evasively not answering very simple direct questions" such as where they *631 were coming from; 5) the sense of nervousness Frasier displayed; and 6) "his sweating profusely."

Frasier contended once Hall wrote the warning ticket, the legal justification for the stop ended, and nothing the officer relied on established reasonable suspicion to prolong the encounter. The trial court stated that this issue "is at best a 50/50 call." Ultimately, the court denied Frasier's motion to suppress, concluding the facts above supported a finding of reasonable suspicion, with the exception of Jones's alleged "evasive driving" and taking too long to pull over. The court found Jones's driving reasonable, and thus, it did not take that fact into consideration.

As to Frasier's second argument—that he did not give Hall consent to search him—defense counsel noted that Frasier responded, "I do, but ..." in response to Hall asking whether he minded being searched. The solicitor contended that, "it was the officer's belief, as he testified earlier, that his words and actions together was [sic] consent." The trial court concluded the dashcam video unambiguously showed that Frasier consented to the search by virtue of his words and conduct, and it denied the second motion to suppress as well.

Ultimately, the jury found Frasier guilty, and the trial court sentenced him to the mandatory minimum sentence of twenty-five years imprisonment. Frasier appealed to the court of appeals which affirmed, citing our deferential standard of review and concluding evidence supported the trial court's decision. Frasier subsequently filed a petition for a writ of certiorari, which the Court granted in part.¹

¹ This Court denied Frasier's argument concerning the admission of statements Frasier made following a *Miranda* warning when officers had asked similar questions before *Miranda* was given.

ISSUES

- I. Did the court of appeals err in affirming the trial court's decision that Officer Hall had reasonable suspicion to prolong the traffic stop in order to subsequently ask for consent to search?

*632 II. Did the court of appeals err in affirming the trial court's determination that Frasier gave Officer Hall consent to search him?

STANDARD OF REVIEW

Before reaching the merits, we take this opportunity to clarify our standard of review when reviewing an appeal from a motion to suppress based on Fourth Amendment grounds. Historically, we have repeatedly noted that appellate courts review an appeal from a motion to suppress based on a violation of the Fourth Amendment under the deferential “any evidence” standard. *See, e.g., State v. Morris*, 411 S.C. 571, 578, 769 S.E.2d 854, 858 (2015). Pursuant to this standard, our appellate courts “will not reverse a trial court's finding of fact simply because it would have decided the case differently.” *State v. Spears*, 429 S.C. 422, 433, 839 S.E.2d 450, 455 (2020) (quoting *State v. Pichardo*, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005)).

**766 [1] In *State v. Brockman*, 339 S.C. 57, 528 S.E.2d 661 (2000), this Court declined to follow the United States Supreme Court's decision in *Ornelas v. United States*, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (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. *Brockman* concluded that *Ornelas* was an advisory opinion, and thus, the Court declined to implement de novo review. *Id.* at 64-65, 528 S.E.2d at 664-65. 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 *633 nearly every state.² 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 *634 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.

2

See James v. State, 197 So.3d 532, 535 (Ala. Crim. App. 2015); *State v. Miller*, 207 P.3d 541, 543 (Alaska 2009); *State v. Fornof*, 218 Ariz. 74, 179 P.3d 954, 956 ((Ariz. Ct. App. 2008); *MacKintrush v. State*, 479 S.W.3d 14, 17 (Ark. 2016); *People v. Letner and Tobin*, 50 Cal.4th 99, 112 Cal.Rptr.3d 746, 235 P.3d 62, 99-100 (2010); *People v. McKnight*, 446 P.3d 397, 402 (Colo. 2019); *State v. Lewis*, 333 Conn. 543, 217 A.3d 576, 586-87 (2019); *Lopez-Vazquez v. State*, 956 A.2d 1280, 1284-85 (Del. 2008); *Huffman v. State*, 937 So.2d 202, 205-06 (Fla. Dist. Ct. App. 2006); *State v. Cartee*, 355 Ga.App. 326, 844 S.E.2d 202, 203 (2020); *State v. Spillner*, 116 Hawaii'i 351, 173 P.3d 498, 504 (2007) (reviewing a trial court's ruling on a motion to suppress evidence de novo); *State v. Perez*, 164 Idaho 626, 434 P.3d 801, 803 (2018); *People v. Timmsen*, 401 Ill.Dec. 610, 50 N.E.3d 1092, 1097 (Ill. 2016); *Marshall v. State*, 117 N.E.3d 1254, 1258 (Ind. 2019); *State v. Brown*, 930 N.W.2d 840, 844 (Iowa 2019); *State v. Hanke*, 307 Kan. 823, 415 P.3d 966, 969 (2018); *Commonwealth v. Conner*, 636 S.W.3d 464, 471 (Ky. 2021); *State v. Boeh*, 324 So.3d 653, 659-60 (La. Ct. App. 2021); *State v. Sasso*, 143 A.3d 124, 129 (Me. 2016); *State v. Holt*, 206 Md.App. 539, 51 A.3d 1, 7 (2012); *Commonwealth v. Henley*, 488 Mass. 95, 171 N.E.3d 1085, 1097 (2021); *People v. Pagano*, 507 Mich. 26, 967 N.W.2d 590, 592 (2021); *State v. Bergerson*, 671 N.W.2d 197, 201 (Minn. Ct. App. 2003); *Eaddy v. State*, 63 So.3d 1209, 1212 (Miss. 2011); *State v. Peery*, 303 S.W.3d 150, 153 (Mo. Ct. App. 2010); *State v. Neiss*, 396 Mont. 1, 443 P.3d 435, 443 (2019); *State v. Shiffermiller*, 302 Neb. 245, 922 N.W.2d 763, 772 (2019); *State v. Beckman*, 129 Nev. 481, 305 P.3d 912, 916 (2013); *State v. Francisco Perez*, 173 N.H. 251, 239 A.3d 975, 981 (2020); *State v. Nyema*, 249 N.J. 509, 267 A.3d 449, 459 (2022); *State v. Ochoa*, 146 N.M. 32, 206 P.3d 143, 147 (N.M. Ct. App. 2008) (“The constitutionality of a search or seizure is a mixed question of law and fact and demands de novo review.”); *People v. Blandford*, 37 N.Y.3d 1062, 155 N.Y.S.3d 1, 176 N.E.3d 1043, 1044 (2021); *State v. Watson*, 250 N.C.App. 455, 792 S.E.2d 873, 874 (2016); *State*

v. *Marsolek*, 964 N.W.2d 730, 735 (N.D. 2021); *State v. Hawkins*, 158 Ohio St.3d 94, 140 N.E.3d 577, 580-81 (2019); *Fuentes v. State*, 517 P.3d 971, —, 2021 WL 3027309 (Okla. Crim. App. 2021); *State v. Maciel-Figueroa*, 361 Or. 163, 389 P.3d 1121, 1123 (2017); *Commonwealth v. Smith*, 164 A.3d 1255, 1257 (Pa. Super. Ct. 2017); *State v. Taveras*, 39 A.3d 638, 645-46 (R.I. 2012); *State v. Moore*, 415 S.C. 245, 251, 781 S.E.2d 897, 900 (2016); *State v. Aaberg*, 718 N.W.2d 598, 600 (S.D. 2006); *State v. Smith*, 484 S.W.3d 393, 399 (Tenn. 2016); *Herrera v. State*, 546 S.W.3d 922, 926 (Tex. App. 2018); *Salt Lake City v. Street*, 251 P.3d 862, 865 (Utah Ct. App. 2011); *State v. Rutter*, 189 Vt. 574, 15 A.3d 132, 135 (2011); *McArthur v. Commonwealth*, 72 Va.App. 352, 845 S.E.2d 249, 252 (2020); *State v. Gatewood*, 163 Wash.2d 534, 182 P.3d 426, 427-28 (2008); *State v. Bookheimer*, 221 W.Va. 720, 656 S.E.2d 471, 476 (2007); *State v. Reed*, 384 Wis.2d 469, 920 N.W.2d 56, 65-66 (2018); *Jennings v. State*, 375 P.3d 788, 790 (Wyo. 2016).

DISCUSSION

I. Reasonable Suspicion to Prolong the Traffic Stop

Frasier contends Hall did not have reasonable suspicion to prolong the traffic stop beyond the purpose of issuing the warning for an inoperable third brake light. He asserts law enforcement had, at best, an “unparticularized **767 suspicion or hunch, not reasonable suspicion to justify the prolonged detention.” Conversely, the State argues evidence supports the trial court’s determination that Hall had reasonable suspicion of potential criminal activity, and therefore, the extension of the initial traffic stop was constitutionally permissible. Applying the facts as found by the trial court, we disagree these findings rise to the level of reasonable suspicion.

[2] [3] [4] “A person has been seized within the meaning of the Fourth Amendment at the point in time when, in light of all the circumstances surrounding an incident, a reasonable person would have believed that he was not free to leave.” *Robinson v. State*, 407 S.C. 169, 181, 754 S.E.2d 862, 868 (2014). Once police pull over a motor vehicle for a traffic violation, “the police may order the driver to exit the vehicle without violating Fourth Amendment proscriptions on unreasonable searches and seizures.” *State v. Pichardo*, 367 S.C. 84, 98, 623 S.E.2d 840, 847 (Ct. App. 2005) (citing

Pennsylvania v. Mimms, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977)). “In carrying out the stop, an officer may request a driver’s license and vehicle registration, run a computer check, and issue a citation.” *Id.* (citing *United States v. Sullivan*, 138 F.3d 126 (4th Cir. 1998)).

[5] [6] [7] [8] [9] [10] In order to prolong or exceed the scope of a stop beyond the initial traffic violation, law enforcement must have reasonable suspicion that criminal activity may be afoot. *Robinson*, 407 S.C. at 182, 754 S.E.2d at 868-69 (“If, during the stop of the vehicle, the officer’s suspicions are confirmed or further aroused—even if for a different reason than he initiated *635 the stop—the stop may be prolonged, and the scope of the detention enlarged as circumstances require.”). Although reasonable suspicion is not susceptible to a rigid, formulaic approach, it requires more than a mere hunch or unparticularized suspicion. *Id.* at 182, 754 S.E.2d at 868. 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).

In *Moore*, a police officer pulled over a vehicle on I-85 for speeding. *Id.* at 248, 781 S.E.2d at 899.³ The officer testified he smelled alcohol, and the occupant admitted to having a couple drinks. During the stop, Moore passed two of three field sobriety tests. The vehicle was registered out of state to a third party, and the officer found \$600 on Moore during a consensual pat down. *Id.* at 249, 781 S.E.2d at 899. The officer subsequently asked Moore if he could search the vehicle, but Moore declined. *Id.* The officer decided not to charge Moore with driving while impaired, but he did request a canine unit, which subsequently alerted to the presence of drugs. The State relied on the following facts to support the presence of reasonable suspicion:

*636 (1) Moore initially turned on his left turn signal but then pulled his

vehicle over to the right; (2) the time Moore took to pull over was longer than average, indicating the possibility of flight; (3) Deputy Owens noticed an odor of alcohol emanating from the vehicle, which led him to believe that Moore had been drinking in order to calm his nerves; (4) Moore smoked several cigarettes, **768 which was also an indicator that he might be trying to calm his nerves; (5) Moore continued to talk on the phone during the traffic stop, which was an indicator of criminal activity as phones provide a means of communication between drug traffickers; (6) Moore's hands were shaking when he handed Deputy Owens his driver's license and rental agreement; (7) Moore's pulse appeared to be rapid; (8) Moore's breathing was heavy; (9) Moore tried to pick up his cell phone when he was asked to exit his vehicle, also indicating the possibility of flight; (10) Moore was carrying a large sum of money in his pocket despite being unemployed; (11) Moore was driving a rental car, which was rented by a third party; and (12) Moore was leaving a suburb of Atlanta, which is a known drug trafficking hub.

Id. at 249-50, 781 S.E.2d at 899-900. Notably, while the Court determined at least some evidence supported the trial court's decision to deny the motion to suppress, it acknowledged that nervousness is typically present in any encounter with police. The Court cautioned law enforcement that although "nervous behavior is a pertinent factor in determining reasonable suspicion, we, like many appellate courts, have become weary with the many creative ways law enforcement attempts to parlay the single element of nervousness into a myriad of factors supporting reasonable suspicion." *Id.* at 254-55, 781 S.E.2d at 902.

³ The officer in *Moore* testified the driver took longer than usual to pull over and was evasive because he initially used his left turn signal before finally pulling onto the right shoulder. *Id.* at 250, 781

S.E.2d at 899. Officer Hall testified Jones was evasive as she took longer than usual to pull off the side of the road and initially switched to the left lane before exiting the highway on the right shoulder. However, the trial court expressly rejected this factor in its totality of the circumstances approach. Nevertheless, the State continues to argue that this fact is relevant. We disagree, as the video in question clearly shows Jones did not attempt to evade police.

[11] [12] 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.⁴ The two plainclothes officers relayed to Hall that Frasier seemed suspicious, *637 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.⁵ 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 pretextual stops are illegal, in order to prolong the stop, there must be an *objective* basis for concluding that criminal activity may be afoot. Simply put, "[i]n law, the ends do not justify the means." *State v. Adams*, 409 S.C. 641, 654, 763 S.E.2d 341, 348 (2014). Because the State failed to meet its burden of demonstrating reasonable suspicion, we reverse.

⁴ We note the trial court believed the issue was at best 50/50 but ruled in favor of the State. When a case boils down to a flip of the coin, the Fourth Amendment requires that we find in favor of the defendant since the State has the burden to demonstrate reasonable suspicion.

5 Jones told Hall during the traffic stop that her zipper was undone because she had 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..." Further, although Hall testified that the driver door opening during the stop was unusual, he never articulated a reason as to how that fact was potentially indicative of illegal behavior.

II. Frasier's Consent

Frasier contends the court of appeals erred in affirming the trial court's conclusion that he gave Hall consent to search *638 him. The State asserts there is evidence in the record to support the trial court's decision. We agree with Frasier.

**769 [13] [14] [15] [16] [17] Warrantless searches are generally considered per se unreasonable unless they fall within a recognized exception under the Fourth Amendment. Police may search an individual if that person consents, but the burden is on the State to demonstrate consent. *State v. Harris*, 277 S.C. 274, 276, 286 S.E.2d 137, 138 (1982) ("However, the State bears the burden of proving the voluntariness of a consent to search from the totality of the surrounding circumstances."). Law enforcement must obtain consent voluntarily, which is a fact-intensive inquiry viewed under the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 248, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). Police do not need to tell an individual that he can refuse to consent, but it is a factor in the overall analysis. *Id.*; *State v. Forrester*, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001) ("Therefore, like the federal standard, our state standard does not require a law enforcement officer conducting a search to inform the defendant of his right to refuse consent.").

[18] During the pretrial testimony, Hall noted that he asked Frasier "if he minded if I checked him out or searched him, and he said, 'I do, but,' and just kind of put his hands up on top of the car." The State also described the encounter as, "[R]egarding his actions, Frasier shrugged his shoulders, placed his hands on top of Jones's vehicle, positioned himself in a manner such that the officer could search him, and exposed both his body and his pockets to the officer." 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.

*639 Indeed, after asking whether Frasier had any weapons on him, Hall asked Frasier to "put his hands up on the car for me." 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.

CONCLUSION

We hold law enforcement lacked reasonable suspicion to prolong the traffic stop, and thus, the discovery of cocaine was the product of an illegal seizure. We also conclude that Frasier did not voluntarily consent. Accordingly, we reverse the court of appeals.

REVERSED.

BEATTY, C.J., KITTREDGE, FEW and JAMES, JJ., concur.

All Citations

437 S.C. 625, 879 S.E.2d 762