STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Laurens County

Honorable Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRYAN PRESTON COOPER,

APPELLANT

APPELLATE CASE NO. 2023-000231

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

1. Does the South Carolina Constitution protect a motorist from a warrantless search and seizure during a routine traffic stop when police have no reasonable grounds for suspicion either of ongoing criminal activity unrelated to the traffic stop or that the motorist is armed or dangerous?

STATEMENT OF THE CASE

Appellant Bryan Preston Cooper was indicted for possession of methamphetamine and resisting arrest on by a Laurens County grand jury on October 14, 2022. R. p. *. He was tried before the Honorable Donald B. Hocker, and a jury on February 8-10, 2023. Tr. 1. At trial, appellant was represented by Callie West and Joel Broome. Jake Lampke and Jared Appellant represented the state.

On February 10, 2023, the jury convicted appellant of possession of methamphetamine, while the resisting arrest charge was dismissed by the prosecutor during trial. Tr. 231, l. 23 - 214, l. 5. Judge Hocker sentenced appellant to six years with credit for ten days pretrial confinement on February 10, 2023. Tr. 218, ll. 21-25. This appeal follows.

STATEMENT OF THE FACTS

Appellant was stopped for speeding in the afternoon hours on a rural road in Laurens County. Tr. 54, ll. 10-25; Tr. 63, l. 20 - 64, l. 6. At the time of the stop, deputy Parham was on routine patrol and initiated a traffic stop of appellant's vehicle for speeding and saw the appellant "reaching over into the passenger seat area" after stopping his vehicle. Tr. 55, ll. 15-23. This movement indicated to Parham that the driver was "either they are reaching for a possible weapon, or trying to conceal something." Tr. 56, ll. 3-7. At this moment, Parham's stop was solely related to a traffic offense, with no ongoing criminal activity surrounding the location or the vehicle. Tr. 65, l. 24-66, l. 11. Appellant stopped his vehicle very shortly (approximately five to ten seconds) after the initiation of blue lights by Parham. Tr. 60, l. 25 - 61, l. 2. As Parham exited his vehicle, his body camera video was active but the dash-cam in the vehicle he was driving was broken and not recording.[1] Tr. 129, ll. 14-23; State's Exhibit 1. Parham smelled no suspicious odors prior to ordering appellant from the vehicle and appellant was fully cooperating with the traffic stop when he was ordered from the vehicle by Parham. State's Exhibit 1; Tr. 135, l. 25 - 137, l. 17. At the time of the stop, Parham had been certified for only approximately one month and the stop occurred in an area that was not known for drugs or crimes. Tr. 63, ll. 1-19; Tr. 126, ll. 6-22. While appellant's vehicle had tinted windows, he rolled down all four windows of his vehicle at the instruction of Parham, giving clear views into the vehicle's interior. State's Exhibit 1. During this time, appellant's pet cat is seen in the video, with appellant expressing concern the cat would jump from the vehicle and Parham himself having to move his arms to block the cat from jumping out of the opened windows. State's Exhibit 1. After Parham forcibly opened appellant's door and ordered him to "step out and put

[1] State's Exhibit 1, body camera video, is on file with this Court for review.

your hands behind your back," appellant refused and asked why he is being ordered out of vehicle. State's Exhibit 1 01:05-01:15. Over the next several minutes of the encounter, appellant remained seated and calm, indicating he wanted a "supervisor" and had done "nothing wrong." State's Exhibit 1 01:15-05:22. Appellant is then removed from his vehicle for "investigative detention" since he was "reaching for something" when pulled over. State's Exhibit 1 05:18-05:27. Appellant then admitted he had "pipes" in the vehicle, got out of the vehicle under threat of force (Parham was pointing his taser at appellant and had threatened to use it several times), and was handcuffed and placed in Parham's vehicle. State's Exhibit 1 05:25-09:25. While appellant was detained and locked in his vehicle, Parham searched appellant's vehicle and discovered "pipes" and a pill bottle containing a crystal substance he believed to be drugs.[2] State's Exhibit 1 09:25-13:20; State's Exhibits 2, 5, & 6.

Appellant moved to suppress all evidence seized as a result of the traffic stop for the unlawful search of appellant's vehicle (Parham opening the driver's door) and unreasonable order for appellant to exit the vehicle during a routine traffic stop. Tr. 74, l. 21 - 76, l. 3. Judge Hocker denied the motion to suppress and ruled the evidence could be introduced pursuant to Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977) and McHam v. State, 404 S.C. 465, 746 S.E.2d 41 (2013), *abrogated on other grounds by* Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018) based upon officer safety. Tr. 90, ll. 1-22. During trial, the body camera video showing the stop was admitted subject to the court's ruling on the motion to suppress. Tr. 116, ll. 9-19.

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[2] States Exhibit 2 shows the pipes in the driver's seat, State's Exhibits 5 and 6 show the bottle containing the methamphetamine; and are on file with this Court for review.

STANDARD OF REVIEW

"[A]ppellate 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, 437 S.C. 625, 633–34, 879 S.E.2d 762, 766 (2022).

ARGUMENT

I. South Carolina's Constitution grants a greater degree of protection from warrantless searches and seizures than the Fourth Amendment and prohibits a "stop and exit" order by police related to a routine traffic encounter.

A. South Carolinian enjoy greater protections from invasions of privacy and searches and seizures than the Fourth Amendment provides.

Under S.C. Const. art. I, §10, South Carolinians are protected "from two distinct actions by the government: first are 'unreasonable searches and seizures[,]' largely mirroring our federal constitution's Fourth Amendment, and second is a protection not found in the United States Constitution, to be secure from 'unreasonable invasions of privacy.'" Planned Parenthood S. Atl. v. State, 438 S.C. 188, 199, 882 S.E.2d 770, 776 (2023).

South Carolina courts have

> [i]nterpreted South Carolina's express right against unreasonable invasions of privacy provision to provide greater—or, a more 'heightened'—protection than that provided by the United States Constitution. State v. Weaver, 374 S.C. 313, 321, 649 S.E.2d 479, 483 (2007) (holding ultimately the search in question met the automobile exception to the warrant requirement and did not violate the more expansive right to privacy); see also State v. Brown, 423 S.C. 519, 533, 815 S.E.2d 761, 769 (2018) (Beatty, C.J., dissenting) (noting the heightened protection afforded by the state constitution and finding it protected petitioner from the warrantless search of his cell phone). 'State courts may afford more expansive rights under state constitutional provisions than the rights which are conferred by the Federal Constitution.' State v. Easler, 327 S.C. 121, 131 n.13, 489 S.E.2d 617, 625 n.13 (1997). 'This relationship is often described as a recognition that the federal Constitution sets the floor for individual rights while the state constitution establishes the ceiling.' State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001). 'South Carolina and the other states with a right to privacy provision imbedded in the search and seizure provision of their constitutions have held such a provision creates a distinct privacy right that applies both within and outside the search and seizure context. Id. at 644, 541 S.E.2d at 841.

State v. German, No. 2018-002090, 2023 WL 3129475, at 9 (S.C. Apr. 5, 2023).

This "heightened" protection stems mainly from the addition of the "unreasonable invasions of privacy shall not be violated" clause which distinguishes the rights afforded South Carolina citizens from the general Fourth Amendment rights enjoyed by all. *Compare* State v. Counts, 413 S.C. 153, 172, 776 S.E.2d 59, 70 (2015) (holding that "law enforcement must have reasonable suspicion of illegal activity at a targeted residence prior to approaching the residence and knocking on the door."), *with* Kentucky v. King, 563 U.S. 452, 469 (2011) (holding "law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do.").

B. This heightened protection extends to demands by law enforcement that South Carolinians leave their vehicles during routine traffics stops.

The United States Supreme Court has upheld the "stop and exit" order for routine traffic stops under Fourth Amendment challenge. See Pennsylvania v. Mimms, 434 U.S. 106 (1977) (per curiam) (holding that when police have lawfully stopped vehicle for traffic violation officer may order driver to exit vehicle). Appellant asserted that this "stop and exit" order, and the opening of appellant's driver side car door, amounted to an impermissible search and seizure under South Carolina's Constitution, and provided the lower court authority from other jurisdictions with similar additional Constitutional safeguards that rejected the blanket holding in Mimms. Tr. 75, l. 1 - 76, l. 3.

While South Carolina courts have referenced the authority of law enforcement to order drivers and passengers to exit the vehicle, the cases typically reference Fourth Amendment decisions. *See* Milledge v. State, 422 S.C. 366, 375, 811 S.E.2d 796, 801 (2018) ("Upon initiating the traffic stop, a police officer may order the driver out of the vehicle in the interest of officer safety.")(citing Pennsylvania v. Mimms, 434 U.S. 106 (1977)); McHam v. State, 404 S.C.

465, 477, 746 S.E.2d 41, 48 (2013), *abrogated on other grounds by* Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018) (noting the "parties agree that an officer may order the driver and any passengers to exit a detained vehicle without violating the Fourth Amendment").

Under South Carolina law, Parham conducted a search and seizure of appellant's property upon opening the door to Appellant's vehicle, independent of the initial traffic stop. McHam, 404 S.C. at 480, 746 S.E.2d at 49 (holding the "opening of the door of an occupied vehicle is an intrusion, however slight, that generally constitutes a search for purposes of the Fourth Amendment."). Parham contemporaneously conducts a seizure of appellant's person the moment Parham opens the door to appellant's vehicle with his order to "step out and put your hands behind your back." State's Exhibit 1 01:04-01:11. In determining if this search and seizure was a violation of S.C. Const. Article I, section 10, cases from other jurisdictions that have similar state Constitutional protections are instructive.

In State v. Sprague, 175 Vt. 123, 824 A.2d 539 (2003), the Vermont Supreme Court ruled that it had "consistently, albeit implicitly, adhered to the rule—well after it was rejected in Mimms—that the test to determine whether an exit order was justified under Article 11 is whether the objective facts and circumstances would support a reasonable suspicion that the safety of the officer, or of others, was at risk or that a crime has been committed." Id. at 129, 824 A.2d at 545; *see also* State v. Tetreault, 206 Vt. 366, 375, 181 A.3d 505, 512 (2017) ("an exit order is justified only when 'the objective facts and circumstances would support a reasonable suspicion that the safety of the officer, or of others, was at risk or that a crime has been committed.'"). In State v. Kim, 68 Haw. 286, 290, 711 P.2d 1291, 1294 (1985), the Supreme Court of Hawaii also rejected the reasoning in Mimms under the Hawaiian Constitution, holding that "a police officer must have at least a reasonable basis of specific articulable facts to believe

a crime has been committed to order a driver out of a car after a traffic stop." Id. at 290, 711 P.2d at 1294. While the Vermont Constitution closely mirrors the language of the Fourth Amendment, Hawaii's tracks South Carolina's by adding a right to privacy. See Haw. Const. art. I, § 7 ("The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized or the communications sought to be intercepted."). In Com. v. Gonsalves, 429 Mass. 658, 662–63, 711 N.E.2d 108, 111–12 (1999), the Supreme Judicial Court of Massachusetts held, under the state's Constitution, that "a police officer, in a routine traffic stop, must have a reasonable belief that the officer's safety, or the safety of others, is in danger before ordering a driver out of a motor vehicle." Id. at 662–63, 711 N.E.2d at 112.

This Court should hold a citizen of South Carolina, during a routine traffic stop, is free from an immediate search of their vehicle through the opening of doors by law enforcement and, absent a reasonable belief that safety either of the officer or public is in danger or criminal activity unrelated to a traffic stop has occurred, are protected from being seized and searched by orders to exit the vehicle. This right extends directly from Article I, section 10, of the South Carolinian Constitution and is supported by existing precedent. *See* State v. German, No. 2018-002090, 2023 WL 3129475, at 11 (S.C. Apr. 5, 2023) ("A mandatory and forced blood draw is patently distinct from other modes of DUI investigation and, consequently, violates the South Carolina Constitution when administered without a warrant."); Planned Parenthood S. Atl. v. State, 438 S.C. 188, 210, 882 S.E.2d 770, 782 (2023) ("Nevertheless, we are persuaded by the logic replete in the opinions we have surveyed that few decisions in life are more private than the

decision whether to terminate a pregnancy."); State v. Counts, 413 S.C. 153, 172, 776 S.E.2d 59, 70 (2015) (holding that "law enforcement must have reasonable suspicion of illegal activity at a targeted residence prior to approaching the residence and knocking on the door.")

i. Unfettered discretion in connection with traffic stops invites an abuse of that discretion which erodes trust and faith that law enforcement are not actively abusing Constitutionally protected rights.

There are sound policy reasons this court should abandon the unfettered discretion granted to law enforcement by the Supreme Court in Pennsylvania v. Mimms, 434 U.S. 106 (1977). Not every routine traffic stop should allow, at the sole discretion of the officer, the freedom to randomly select one citizen for a stop and exit order while allowing another to remain seated in their vehicle while the stop concludes. "Citizens do not expect that police officers handling a routine traffic violation will engage, in the absence of justification, in stalling tactics, obfuscation, strained conversation, or unjustified exit orders, to prolong the seizure in the hope that, sooner or later, the stop might yield up some evidence of an arrestable crime. That a small percentage of routine traffic stops may result in the detection of more serious crime is no reason to subject the vast majority of citizens to orders to get out of their vehicles." Gonsalves, 429 Mass. at 663, 711 N.E.2d at 112. The Gonsalves court discussed at length the negative of impact unfettered stop and exit discretion, especially on minority communities (particularly Justice Ireland's concurring opinion). South Carolina has already rejected this unfettered discretion in "knock and talk" situations. Counts, 413 S.C. at 172, 776 S.E.2d at 69 ("[W]e believe there must be some threshold evidentiary basis for law enforcement to approach a private residence. Otherwise, we foresee the potential for abuse if law enforcement targets a neighborhood and

indiscriminately knocks on doors with the hope of discovering contraband without a search warrant.").

Nor does it follow that such a decision will endanger officer safety or create an unreasonable risk of harm to officers connected to routine traffic stops. The original purpose and premise for a Terry stop would remain. During a routine traffic stop, an officer who

> observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and *where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety*, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

Terry v. Ohio, 392 U.S. 1, 30 (1968) (emphasis added).

ii. Outside of a general ability to order someone out of a vehicle, this encounter does not present a valid Terry stop. This record shows a reasonable police officer would not have felt threatened by Appellant or reasonably believed he was engaged in criminal activity unrelated to speeding.

A reasonable officer would not have believed at the time of the stop that appellant was either engaged in criminal activity or armed and presently dangerous. The court ruled, based upon McHam and Mimms that officer safety allowed Parham to open the door and order appellant from the vehicle. Tr. 90, ll. 1-14. As the trial court gave too much deference to the Fourth Amendment cases, rather than the heightened standard governing South Carolina's Constitution, this Court should reach the "ultimate legal conclusion" as to the reasonableness of Parham's actions under the South Carolina Constitution *de novo*. State v. Frasier, 437 S.C. 625, 633-34, 879 S.E.2d 762, 766 (2022).

Parham's concern on approaching the appellant's vehicle was seeing "the driver reaching over into the passenger seat area" and "I saw half his body position over into the passenger seat." Tr. 55, l. 19 - 56, l. 2. This portion of the encounter was not captured on video but was given weight by the trial judge and thus has evidentiary support in the record. This movement of a driver, standing alone, from the driver's seat towards the passenger's seat, does not justify a further search and seizure by law enforcement. The stop was during daylight hours, there was no pursuit required, appellant did not attempt to flee, a long chase did not proceed the encounter, the area was not known for crime of any kind, there was no suspicion that the vehicle or driver was involved in any criminal activity unrelated to the stop. The "movement" described by Parham was easily explained by the presence of appellant's cat in the vehicle, who appellant indicated was sliding off the seat related to the stop. State's Exhibit 1 00:20-01:00. The cat was actively moving about the vehicle in full view of Parham as appellant rolled down all four vehicle windows in compliance with requests and appellant kept his hands visible, close to the steering wheel, while also warning Parham that the cat would jump out of the vehicle. State's Exhibit 1 00:20-00:30. Parham himself is seen making movements with his own hands and arms to keep the cat from jumping out of the vehicle windows. State's Exhibit 1, 00:40-00:59. Under these circumstances, a reasonable police office would not believe his safety was at risk or that appellant had committed some crime unrelated to speeding to justify a Terry stop and frisk, as these "initial stages of the encounter serve[d] to dispel his reasonable fear for his own or others' safety" Terry, 392 U.S. at 30, 88 S. Ct. at 1884–85. At the time, Parham was on the road as a certified law enforcement officer for only a single month. While his inexperience may have played a role in his subjective view of the situation, appellant's constitutional rights are not subject to the subjective beliefs of an inexperienced police officer.

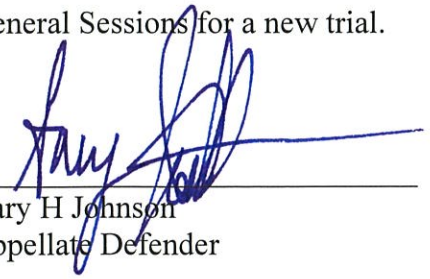
> "[W]hile reasonable suspicion is not a high bar and 'is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for making the stop.' This inquiry involves 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. Frasier, 437 S.C. 625, 635, 879 S.E.2d 762, 767 (2022). In this matter, whether reasonable suspicion existed justifying Parham's decision to order appellant from his vehicle is question of law subject to de novo review. Id. at 633–34, 879 S.E.2d at 766.

Considering appellant's right to privacy and protection from unreasonable searches and seizures under S.C. Const. art. I, §10, Parham's opening of the vehicle door and order removing appellant from the vehicle were both unlawful, and any evidence obtained related to these actions must be suppressed. This includes the bottle containing methamphetamine for which appellant was convicted.

CONCLUSION

By reasons of the foregoing arguments, appellant's conviction should be reversed, and the case remanded to the Laurens County Court of General Sessions for a new trial.



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This 3rd day of July, 2023.