ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CARMICHAEL ARVEL GLENN,

APPELLANT

Appellate Case No. 2011-188248

BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

I. Did the trial court err in finding the cracked condition of the windshield in this case constituted a traffic violation under section 56-5-5310 of the South Carolina Code (1976), so that there was probable cause to initiate the traffic stop?

II. Whether probable cause was present to initiate the traffic stop of the Explorer in which Appellant was a passenger where the stop was based upon a crack in the windshield in front of the driver, yet the officer purportedly saw the crack through the back tinted window of the vehicle?

STATEMENT OF THE CASE

Appellant Carmichael Arvel Glenn was indicted by the Lexington County Grand Jury on December 13, 2010, for trafficking between 10 to 28 grams of crack cocaine. R. 5, ll. 4-8; R. 7, ll. 16-18; R. 13, ll. 16-19. A bench trial was held from March 14 through 15, 2011, before the Honorable R. Knox McMahon. R. 1; R. 6, ln. 4—R. 13, ln. 5. David M. Mauldin represented Appellant, while the State was represented by Colleen E. Dixon. R. 1. The court found Appellant guilty as charged, and sentenced him as a third drug offense to 25 years imprisonment. R. 113, ll. 3-8; R. 121, ln. 15—R. 122, ln. 2.

STATEMENT OF THE FACTS

Appellant was a passenger in the white Ford Explorer (Explorer) of Ms. Damarius Hernandez (Hernandez) in West Columbia on the afternoon of September 28, 2010. R. 65, ln. 6—R. 66, ln. 14. Officer Jody Putney (Putney) saw the Explorer back out of a trailer park, which he believed to be a "known drug house," and drive in front of him on Alexandria Street. From his position behind the Explorer, Putney allegedly observed through the rear tinted window of the Explorer a six-inch crack in the front windshield directly in front of Hernandez; specifically, the crack was "on the driver's side about a quarter of the way from the bottom," which Putney claimed to be concerned might obstruct the view of the driver. R. 17, ln. 23—R. 16, ln. 7; R. 22, ll. 3-23; R. 72, ll. 5—R. 73, ln. 2. Putney stated that he could see the crack in front of Hernandez because (1) he "had prior knowledge of Ms. Hernandez's windshield to be cracked," and (2) "it was almost one in the afternoon, very sunny day. [He] could see the glare coming from the crack through the back window." R. 24, ll. 3-8.

Putney followed the Explorer in his car, radioed for back-up, and eventually stopped it for faulty equipment under Section 56-5-5310 of the South Carolina Code. R. 16, ll. 10-23; R. 25, ll. 9-19. He asked for Hernandez's driver's license and paperwork, and had her exit the Explorer after allegedly noticing signs of nervousness. Specifically, Putney purportedly saw Hernandez shaking, and in his own words, "other than shallow breaths and you could see—what I like to say is her chest beating through her shirt kind of." R. 27, ll. 4-19. Yet, Putney acknowledged that Hernandez was neither stuttering nor evasive in any manner, and after Hernandez exited the Explorer, she simply told Putney that she was cold.

R. 27, 7-16. Putney further testified that Hernandez's shutting off her Explorer was "one of those things we like to call a red flag." R. 27, ll. 22-24.

Based on these "red flags," Hernandez was taken to the back of the Explorer and questioned by Putney whether she had any drugs or weapons on her or in the Explorer. Hernandez denied possession of such contraband, and even told Putney he could search the Explorer. She also handed her purse to Putney, which the officer again categorized as a red flag. R. 17, ll. 11-24; R. 27, ln. 25—R. 28, ln. 4; R. 66, ln. 19—Tr, 68, ln. 2.

By this time, Officer Neal Cameron Nelson (Nelson) arrived, and stood beside the passenger door of the Explorer. At Putney's command, Nelson told Appellant to exit the Explorer; Appellant opened the door and exited, which Nelson claimed to believe took longer than the average person. R. 17, ln. 25—Tr, 18, ln. 21;R. 28, ll. 10-21;R. 68, ll. 8-16; R. 78, ll. 3-12. Putney stood by the door, and Nelson walked back to Hernandez. Putney observed Appellant holding the crotch area of his pants with his right hand when he exited the vehicle. R. 19, ll. 4-9; R. 28, ll. 21-25; R. 68, ll. 17—20. He was immediately asked if he had any weapons on him, was turned to face the car, and had his left hand placed on the car by Putney. When his right hand was placed on the car, a plastic bag containing a white substance was seen in his hand. R. 19, ll. 6—R. 20, ln. 4; R. 29, ll. 1-5; R. 68, ln. 21—R. 69, ln. 11.

Appellant was arrested, and the bag seized. The stop occurred over a period of approximately five minutes. R. 20 ll. 10-14; R. 54, ll. 5-6. The substance was later identified as 15.6 grams of crack cocaine. R. 98, ll. 14-15.

At trial, Counsel for Appellant objected, *inter alia*, to the legality of the initial traffic stop and eventual seizure of the drugs. Specifically, Counsel timely asserted that Putney

lacked probable cause to support the traffic stop of the Explorer, and that he lacked reasonable articulable suspicion to support the investigation from one for a cracked windshield to another for drugs and guns. R. 14, ll. 16-19; R. 32, ll. 19-25; R. 34, ll. 4-15; R. 48, ln. 3—R. 49, ln. 14; R. 65, ln. 23—R.66, ln. 1; R. 67, ll. 13-20; R. 107, ll. 16-23; R. 113, ll. 10-17. The State Argued that Putney had probable cause to stop the vehicle, and that Putney had a reasonable articulable suspicion to question Hernandez whether she had drugs or weapons on her or in the vehicle. R. 37, ll. 14-19; R. 38, ll. 12-20; R. 49, ln. 16—R. 52, ln. 15. The trial court determined probable cause was present for the stop, and that Putney's questioning was proper. R. 41 ln. 19—R. 48, ln. 1; R. 54, ln. 4—R. 56, ln. 4. Accordingly, the trial court refused to suppress the drugs. R. 100, ll. 6-17.

The trial court found Appellant guilty, and sentenced to 25 years imprisonment. R. 113, ll. 3-8; R. 121, ln. 15—R. 122, ln. 2.

Counsel filed Appellant's notice of appeal with the South Carolina Court of Appeals on March 16, 2011. On April 3, 2012, the undersigned appellate counsel filed the brief of Appellant pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967) asserting the following issue:

> Whether probable cause was present to initiate the traffic stop of the Explorer in which Appellant was a passenger where the stop was based upon a crack in the windshield in front of the driver, yet the officer purportedly saw the crack through the back tinted window of the vehicle?

After reviewing the materials presented, the South Carolina Court of Appeals denied appellate counsel's motion to be relieved, and directed briefing on the following issues:

> 1. Did the trial court err in finding the cracked condition of the windshield in this case constituted a traffic violation under section 56-5-5310 of the South

Carolina Code (1976), so that there was probable cause to initiate the traffic stop?

2. Any other issues counsel believes are preserved and are of arguable merit.

This appeal follows.

ARGUMENT

I. The trial court erred in finding the cracked condition of the windshield in this case constituted a traffic violation under section 56-5-5310 of the South Carolina Code (1976), so that there was probable cause to initiate the traffic stop.

Assuming *arguendo* that Putney saw a six-inch crack in Appellant's windshield, the trial court reversibly erred by finding probable cause was present to initiate the traffic stop of the Ford Explorer due to the crack in the windshield. Based upon the clear and unambiguous language of Section 56-5-5310, as well as the language of similar provisions in chapter five of title fifty-six of the South Carolina Code, a six-inch crack in the front windshield of the Ford Explorer would not amount to a violation of 56-5-5310. Thus, even assuming Putney saw a six-inch crack in the windshield of the Explorer, he did not have probable cause to initiate the traffic stop of that vehicle. As a result, the drugs subsequently discovered after the unconstitutional stop should have been suppressed.

"The Fourth Amendment to the Constitution of the United States grants citizens the right to be secure against unreasonable search and seizure." Tindall, 388 S.C. at 521, 698 S.E.2d at 205 (citing U.S. Const. amend. IV). Also, the Fourth Amendment is applicable to the States through the Due Process Clause of the Fourteenth Amendment Mapp v. Ohio, 367 U.S. 643, 655, 81 S.Ct. 1684, 1691 (1961). Further, it is well settled that "[t]emporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and limited purpose, constitutes a seizure of persons within the meaning of the Fourth Amendment." State v. Pichardo, 367 S.C. 84, 97, 623 S.E.2d 840, 847 (Ct. App. 2005) (citing Whren v. United States, 517 U.S. 806, 116 S.Ct. 1769 (1996); see also Delaware v. Prouse, 440 U.S. 648, 653, 99 S.Ct. 1391, 1396 (1979) ("[S]topping an automobile and detaining its occupants constitutes a 'seizure' within the meaning of [the

Fourth and Fourteenth Amendments, even though the purpose of the stop is limited and the resulting detention quite brief."). As such, not only is the driver seized within the meaning of the Fourth Amendment when an officer makes a traffic stop, but also "a passenger is seized as well and so may challenge the constitutionality of the stop." United States v. Brendlin, 551 U.S. 249, 252, 127 S.Ct. 2400, 2403 (2007).

Traffic stops are reviewed under the standard set forth in Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968), because a traffic stop is more analogous to an investigative detention than a custodial arrest. See United States v. Digiovanni, 650 F.3d 498, 8506 (4th Cir. 2011). Consequently, Terry outlines a two-prong test for analyzing the constitutionality of a traffic stop: (1) whether the police officer's action was justified at the inception of the traffic stop; and (2) whether the police officer's subsequent actions were reasonably related in scope and duration to the circumstances that justified the stop. Id.

"An automobile stop is thus subject to the constitutional imperative that it not be 'unreasonable' under the circumstances." Whren, 517 U.S. at 809-10, 116 S.Ct. at 1772. Therefore, "as a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." Id. 517 U.S. at 810, 116 S.Ct. at 1772.

In the case at bar, Putney claimed he stopped the Ford Explorer for a traffic violation pursuant to Section 56-5-5310 of the South Carolina Code, due to his belief that a six-inch crack in the windshield in front of the driver might obstruct the view of the driver. R. 17, ln. 23—R. 16, ln. 7; R. 22, ll. 3-23; R. 72, ll. 5—R. 73, ln. 2. However, even assuming *arguendo* that Putney indeed saw such a crack prior to stopping the Explorer,

such a minor crack in the translucent glass would not constitute a violation of the statute cited for the traffic violation. Section 56-5-5310 provides as follows:

> No person shall drive or move on any highway any vehicle unless the *equipment* thereon is in *good working order* and *adjustment as required in this chapter* and the *vehicle is in such safe mechanical condition* as not to endanger the driver or other occupant or any person upon the highway.

S.C. Code Ann. § 56-5-5310 (Westlaw, West current through end of 2011 Sess.) (emphasis added). Title fifty-six also includes a definition of safety glass, as well as specific provisions pertaining to obstructions to the driver's view. Pursuant to Section 56-5-330 of the South Carolina Code, "Safety Glass" is defined as "any product composed of glass, so manufactured, fabricated or treated as substantially *to prevent shattering and flying of the glass when struck or broken* . . . ." S.C. Code Ann. § 56-5-330 (Westlaw, West current through end of reg. 2011 Sess.) (emphasis added). Moreover, Section 56-5-5010 of the South Carolina Code, titled "Safety glass in motor vehicles," merely provides that new vehicles must be equipped with safety glass before they can be sold or registered. S.C. Code Ann. § 56-5-5010 (Westlaw, West current through end of reg. 2011 Sess.).

Yet, based on the clear and unambiguous language of the statutory definition, it is clear that the six-inch crack would not amount to a violation. "The cardinal rule of statutory construction is to ascertain and effectuate legislative intent." State v. Jacobs, 393 S.C. 584, 587, 713 S.E.2d 621, 622 (2011) (quoting Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "Furthermore, in construing a statute, words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991) (citing Bryant v. City of Charleston, 295 S.C. 408, 368 S.E.2d 899 (1988); see also Jacobs,

393 S.C. at 587, 713 S.E.2d at 622. Simply stated, "[]here the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Jacobs, 393 S.C. at 587, 713 S.E.2d at 622 (quoting Hodges, 341 S.C. at 85, 533 S.E.2d at 581). Finally, "[i]t is a well-settled principle of statutory construction that penal statutes should be strictly construed against the state and in favor of the defendant." Blackmon, 304 S.C. at 273, 403 S.E.2d at 662.

As indicated above, for a crack in a driver's windshield to amount to a violation of this section, it must not be in "good working" order *and* require adjustment as required in chapter five of title fifty-six, and render the vehicle in an unsafe "*mechanical* condition" that it endangers the driver, occupants, or others on the highway. However, according to the statutory definition of "safety glass," the purpose of that equipment is to substantially "prevent shattering and flying of the glass when struck or broken." At Appellant's trial, the State never showed that the six-inch crack in the Ford Explorer windshield either rendered the safety glass in poor working order, or rendered the vehicle itself in an "unsafe mechanical condition." Simply stated, no evidence was produced indicating the six-inch crack would or could have rendered the safety glass of the windshield incapable of preventing shattering and flying of the glass when struck or broken." As a result, examination of the clear and unambiguous language of the applicable statutes readily shows that no probable cause existed to stop the Ford Explorer for violation of Section 56-5-5310, and the trial court's ruling to the contrary was erroneous.

Furthermore, the rationale provided by Putney as to why he believed the six-inch crack violated Section 56-5-5310 was likewise without merit. Putney claimed he stopped

the Ford Explorer for a traffic violation pursuant to Section 56-5-5310 of the South Carolina Code, due to his belief that a six-inch crack in the windshield in front of the driver might obstruct the view of the driver. R. 17, ln. 23—R. 16, ln. 7; R. 22, ll. 3-23; R. 72, ll. 5—R. 73, ln. 2. However, the South Carolina General Assembly has provided two specific sections addressing obstructions to a driver's view—neither of which fall under Section 56-5-5310. Importantly, even the language of these more specific statutory provisions indicate the six-inch crack cited by Putney would not suffice to be an obstruction to the driver sufficient enough to warrant a traffic violation.

First, Section 56-5-5000 of the South Carolina Code, titled in part "Windows shall be unobstructed," provides the following pertaining to windshield obstructions:

> No person shall drive any motor vehicle with any sign, poster or other *nontransparent* material upon the front windshield, sidewings or side or rear windows of such vehicle *which obstructs the driver's clear view of the highway* or any intersecting highway.

S.C. Code Ann. § 56-5-5000 (Westlaw, West current through end of reg. 2011 Sess.) (emphasis added). Thus, the specific statutory provision regarding windshield obstructions is specifically concerned with *nontransparent* obstructions blocking a driver's view, not a translucent crack or blemish in or on the safety glass itself.

Additionally, Section 56-5-3820, titled "Operation of vehicle when driver's view or control over driving mechanism interfered with," provides as follows:

> No person shall drive a vehicle when it is so loaded or when there are in the front seat such number of persons, exceeding three, *as to obstruct the view of the driver to the front* or sides of the vehicle *or as to interfere with the driver's control over the driving mechanism of the vehicle.*

S.C. Code Ann. §§ 56-5-3820, -5010 (Westlaw, West current through end of reg. 2011 Sess.) (emphasis added). Therefore, Section 56-5-3820 is also concerned with obstructions, such as objects or people, physically blocking the view of the driver or interfering with his control over the driving mechanism.

In the case at bar, Putney specifically indicated his concern regarding the six-inch crack was that it might obstruct the driver's view. Yet, neither statutory provision regarding obstructions to a driver's view would be satisfied by a six-inch crack. First, the crack was in the windshield, and no evidence whatsoever indicated the crack was nontransparent. In other words, the minor crack in the glass was not a nontransparent physical obstruction to the driver's view of the highway, such as a CD dangling from the rear-view mirror, or a large box on the seat or dashboard, or even a person. Rather, it was in the glass itself, so it was translucent, and it was a crack, so it was thin. Therefore, a minor six-inch crack in the windshield would not constitute probable cause for a traffic violation under either Sections 56-5-5000 or 56-5-3820—the statutory sections addressing obstructions to a driver's view—much less under Section 56-5-5310, the statutory section which Putney actually cited. Accordingly, under the totality of the circumstances presented, Putney did not have probable cause to believe that a traffic violation occurred based on a six-inch crack in the windshield of the Ford Explorer, and the trial court reversibly erred by failing to suppress the evidence gleaned from the unconstitutional stop as fruits of the poisonous tree. Whren, 517 U.S. at 810, 116 S.Ct. at 1772.

Appellant was also prejudiced by the trial court's failure to suppress evidence of drugs found as a result of the unlawful stop and search. "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the

conviction." Chapman v. California, 386 U.S. 18, 23, 87 S.Ct. 824, 827 (1967). Appellant was tried and convicted for trafficking crack cocaine in an amount between 10-27 grams. The State's case was undeniably built around Appellant's possession of 15.6 grams of crack cocaine. Had the trial court properly suppressed such evidence and testimony regarding the crack, the State's case against Appellant for drug possession would have collapsed. Accordingly, Appellant was prejudiced as the constitutional error was not harmless beyond a reasonable doubt. See, e.g., Id. 386 U.S. at 24, 87 S.Ct. at 828 (holding "that before a federal constitutional error can be held harmless, the court must be able to declare that it was harmless beyond a reasonable doubt.").

II. Probable cause was not present to initiate the traffic stop of the Explorer in which Appellant was a passenger where the stop was based upon a crack in the windshield in front of the driver, yet where the officer purportedly saw the crack through the back tinted window of the vehicle.

Even assuming, without conceding, that a six-inch crack in the windshield of the Ford Explorer in which Appellant was a passenger constituted a traffic violation, the trial court reversibly erred by finding by finding probable cause was present to initiate the traffic stop because Putney's explanation of how he purportedly saw such a crack was factually implausible. As a result, the trial court's probable cause ruling was governed by clear error. Although the appellate courts apply a deferential standard of review on appeals from a motion to suppress based on Fourth Amendment grounds, they will reverse if there is clear error. Moreover, the deference given to the trial court "does not bar this Court from conducting its own review of the record to determine whether the trial judge's decision is supported by the evidence." Tindall, 388 S.C. at 521, 698 S.E.2d at 205; see also, Ornelas v. United States, 517 U.S. 690, 698-99, 116 S.Ct. 1657, 1662-63 (1996) (holding that, because independent review is necessary for the courts to maintain control of and clarify these legal principles, "determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal.").

"The Fourth Amendment to the Constitution of the United States grants citizens the right to be secure against unreasonable search and seizure." Tindall, 388 S.C. at 521, 698 S.E.2d at 205 (citing U.S. Const. amend. IV). Also, the Fourth Amendment is applicable to the States through the Due Process Clause of the Fourteenth Amendment Mapp, 367 U.S. at 655, 81 S.Ct. at 1691. Further, it is well settled that "[t]emporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and limited purpose, constitutes a seizure of persons within the meaning of the Fourth

Amendment." Pichardo, 367 S.C. at 97, 623 S.E.2d at 847 (citing Whren, 517 U.S. 806, 116 S.Ct. 1769 (1996); see also Prouse, 440 U.S. at 653, 99 S.Ct. at 1396 ("[S]topping an automobile and detaining its occupants constitutes a 'seizure' within the meaning of [the Fourth and Fourteenth Amendments, even though the purpose of the stop is limited and the resulting detention quite brief."). As such, not only is the driver seized within the meaning of the Fourth Amendment when an officer makes a traffic stop, but also "a passenger is seized as well and so may challenge the constitutionality of the stop." Brendlin, 551 U.S. at 252, 127 S.Ct. 2403.

Traffic stops are reviewed under the standard set forth in Terry, because a traffic stop is more analogous to an investigative detention than a custodial arrest. See Digiovanni, 650 F.3d at 506. Consequently, Terry outlines a two-prong test for analyzing the constitutionality of a traffic stop: (1) whether the police officer's action was justified at the inception of the traffic stop; and (2) whether the police officer's subsequent actions were reasonably related in scope and duration to the circumstances that justified the stop. Id.

"An automobile stop is thus subject to the constitutional imperative that it not be 'unreasonable' under the circumstances." Whren, 517 U.S. at 809-10, 116 S.Ct. at 1772. Therefore, "as a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." Id. 517 U.S. at 810, 116 S.Ct. at 1772. The United States Supreme Court has framed the probable cause standard as follows:

> The quantum of information which constitutes probable cause—evidence which would "warrant a man of reasonable caution to believe" that a felony has been committed—must be measured by the facts of the particular

> case. The history of the use, and not infrequent abuse, of the power to arrest cautions that a relaxation of the fundamental requirements of probable cause would "leave law-abiding citizens at the mercy of the officers' whim or caprice."

Wong Sun v. United States, 371 U.S. 471, 479, 83 S.Ct. 407, 413 (1963) (quoting Carroll v. United States, 267 U.S. 132, 162, 45 S.Ct. 280, 288 (1925), and Brinegar v. United States, 338 U.S. 160, 176, 69 S.Ct. 1302, 1311 (1949) (internal citations omitted).

In the case at bar, the facts presented by Putney supporting both his belief and the trial court's ruling that the Explorer was in violation of Section 56-5-5310 of the South Carolina Code are without merit. As discussed in Section I, *supra*, Putney claimed the stop was initiated pursuant to Section 56-5-5310 of the South Carolina Code due to a crack he purportedly saw in the windshield of the Explorer. Specifically regarding his view of the crack, Putney indicated he saw it from his patrol car, through the back tinted window of the Explorer, and ostensibly even through the driver where he witnessed the glint of the crack one quarter of the way up from the bottom of the windshield, and in front of the driver such that it obstructed her view through it. Yet, Putney's in-car video did not reveal the crack from the perspective of the car dashboard into the rear of the Sport Utility Vehicle's tinted rear window. As the trial court stated when making its ruling on the matter, "we don't see the view that the officer has. . . . [I]t's not in the record, but his testimony is that, I could see the rear window, the front windshield, and also see the crack of about 6 inches in length on the driver's side of the vehicle at that time." R. 45, ll. 1-6.

Simply stated, Putney's own depiction of how he purportedly saw the crack in the windshield of the Explorer from his car is implausible; yet, the trial court nonetheless found his testimony credible. Based on this testimony, the trial court erroneously deemed probable

cause was present of a traffic violation. Accordingly, this ruling represents a clear error, and is not supported by the evidence. Tindall, 388 S.C. at 521, 698 S.E.2d at 205.

If anything, the plausible reason for Putney's belief that a crack was present on the Explorer was the answer Putney himself supplied: he indicated he saw a crack in the windshield of Hernandez's Explorer on an earlier, unspecified occasion. Thus, Putney's actions in pulling over the Explorer were not objectively guided or supported by either probable cause that the Explorer was in violation of the traffic code at the time of the stop, or a reasonable articulable suspicion of criminal activity. Rather, at most, it was likely based upon a hunch that the crack was not repaired from the unspecified prior occasion that Putney purportedly saw Hernandez's Explorer. Under these circumstances, the seizure of the Explorer violated Appellant's Fourth Amendment rights, and the evidence therefrom should have been suppressed. See, e.g. United States v. Foster, 634 F.3d 243, 249 (4th Cir 2011).

Moreover, Putney did not articulate sufficient reasonable suspicion to support the stop of the Explorer independent of the cracked windshield. Although an investigatory stop of a vehicle is permissible under the Fourth Amendment, it must at least be supported by reasonable suspicion. Ornelas, 517 U.S. at 693, 116 S.Ct. at 1660. "The principal components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause." Id. 517 U.S. at 696, 116 S.Ct. at 1661-62. Because independent review is necessary for the courts to maintain control of and clarify these legal principles, "determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal." Id. 517 U.S. at 698-99, 116 S.Ct. at 1662-63.

Our courts have "expressed 'concern about the inclination of the Government toward using whatever facts are present, no matter how innocent, as indicia of suspicious activity.'" Digiovanni, 650 F.3d at 512 (quoting Foster, 634 F.3d at 248). Thus, an officer's articulated factors "collectively must serve to eliminate a substantial portion of innocent travelers before the requirement of reasonable suspicion will be satisfied." Id. 650 F.3d at 511 (internal quotation marks omitted). In the present case, Putney indicated the Explorer left a trailer park apartment known to sell drugs, and that Hernandez was a known drug user. However, "[a] prior criminal record is not, standing alone, sufficient to create reasonable suspicion." United States v. Powell, 666 F.3d 180, 188 (2011); Foster, 634 F.3d at 246-47 (quoting United States v. Sprinkle, 106 F.3d 613, 617 (4th Cir. 1997). "The rationale underlying this rule is clear":

> If the law were otherwise, any person with any sort of criminal record—or even worse, a person with arrests but no convictions—could be subjected to [an] investigative stop by a law enforcement officer at any time without the need for any other justification at all. To find reasonable suspicion in this case could violate a basic precept that law-enforcement officers not disturb a free person's liberty solely because of a criminal record. Under the Fourth Amendment our society does not allow police officers to "round up the usual suspects."

Powell, 666 F.3d at 188 (quoting United States v. Laughrin, 438 F.3d 1245, 1247 (10th Cir. 2006). Thus, Hernandez's prior criminal record is not sufficient to create a reasonable articulable suspicion.

Further, the observation that the Explorer left an area in the middle of the day that is believed to sell drugs is likewise insufficient to support a reasonable articulable suspicion. See, e.g., United States v. Gooding, 695 F.2d 78, 83 (4th Cir. 1982) (rejecting notion that a drug courier profile alone, which included defendant's arrival from a source city for drugs,

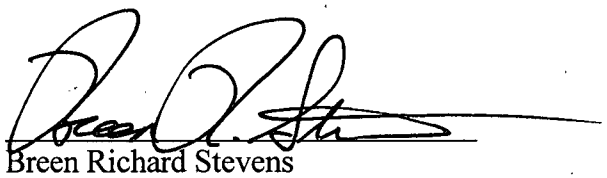
could create reasonable articulable suspicion). Thus, the articulated factors cited by Putney which he observed prior to stopping the Explorer simply do not amount to either probable cause or reasonable articulable suspicion of an offense independent of the cracked windshield; at most, they rise to the level of an inchoate "hunch," rather than the required minimum standard of reasonable articulable suspicion. See, e.g. Sprinkle, 106 F.3d at 617. Accordingly, the stop of the Explorer violated Appellant's constitutional rights against unreasonable seizure, and the fruits from the subsequent search should have been suppressed.

Additionally, Appellant was prejudiced by the trial court's failure to suppress the evidence of drugs found as a result of the unlawful stop and search. "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." Chapman, 386 U.S. at 23, 87 S.Ct. at 827. As previously indicated, Appellant was tried and convicted for trafficking crack cocaine in an amount between 10-27 grams, and the State's case was undeniably built around Appellant's possession of 15.6 grams of crack cocaine. Had the trial court properly suppressed such evidence and testimony regarding the crack, the State's case against Appellant for drug possession would have collapsed. Accordingly, Appellant was prejudiced as the constitutional error was not harmless beyond a reasonable doubt. See, e.g., Id. 386 U.S. at 24, 87 S.Ct. at 828 (holding "that before a federal constitutional error can be held harmless, the court must be able to declare that it was harmless beyond a reasonable doubt.").

CONCLUSION

For the foregoing reasons, Carmichael Glenn respectfully requests reversal of his conviction, and remand for a new trial.

Respectfully submitted,



Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of November, 2012.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CARMICHAEL ARVEL GLENN,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and on Carmichael Arvel Glenn at Lieber Correctional Institution, PO Box 205 Ridgeville, SC 29472, this 13th day of November, 2012.

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 13th day of November, 2012.

Marion Hylton (L.S.)
Notary Public for South Carolina

My Commission Expires October 30, 2022