STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Honorable Brooks P. Goldsmith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAKAVIS GREEN,

APPELLANT

APPELLATE CASE NO. 2023-000846

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in refusing to dismiss the traffic related charges because of the standardless sweep allowed by S.C. Code Ann. § 56-5-2120 (1993) which is an unconstitutionally vague statute that provides contradictory guidance to both the public and the police on which is the lawful lane of travel to turn into while making a left-hand turn?

STATEMENT OF THE CASE

Appellant Jakavis Green was charged in Beaufort County as a habitual traffic offender and for driving under suspension. R. *. He was tried before the Honorable Brooks Goldsmith and a jury on July 25, 2022. R. *. Appellant was represented by Taylor Diggs and Juan Tolley, while Samantha Molina appeared on behalf of the state. The jury returned guilty verdicts on both counts, and Judge Goldsmith sealed appellant's sentence.[1] Tr. 101, ll. 13 -21.

At an appearance before the Honorable Carmen Mullen on May 19, 2023, appellant's sealed sentence was presented. R. *. Judge Goldsmith sentenced appellant to four years in prison for being a habitual traffic offender and ninety days for driving under suspension, third offense. Tr. 3, ll. 4 – 24 (May 19, 2023).

This appeal follows.

[1] Appellant was present at the call of the case and during jury selection but did not reappear for the presentation of evidence and was tried in his absence. Tr. 50, l. 5 – 52, l. 5.

STATEMENT OF THE FACTS

On May 13, 2018, Sergeant Justin Greninger of the Beauford County Sheriff's Office initiated a traffic stop of appellant's vehicle for an "improper" left-hand turn based upon the lane which appellant turned his vehicle onto. Tr. 64, ll. 7 – 22. Greninger admitted the sole basis for the stop was this allegedly improper turn. Tr. 69, ll. 11 – 22. Counsel for appellant moved to dismiss due to a violation of the Fourth Amendment prohibition against unreasonable searches and seizure, arguing the statutory basis asserted by Greninger was "nonsensical." Tr. 38, ll. 9 – 17; R. * Defense Motion to Suppress, R. * Defense Reply to State's Response. Judge Goldsmith denied the motion, ruling the statute was not ambiguous and required turning into the most immediate left lane on the new direction of travel. Tr. 44, ll. 6 – 12.

STANDARD OF REVIEW

"Violation of motor vehicle codes provides an officer reasonable suspicion to initiate a traffic stop." State v. Provet, 405 S.C. 101, 108, 747 S.E.2d 453, 457 (2013); *see also* Pennsylvania v. Mimms, 434 U.S. 106 (1977). "The concept of reasonable suspicion, like probable cause, is not 'readily or even usefully, reduced to a neat set of legal rules.'" United States v. Sokolow, 490 U.S. 1, 7 (1989) (quoting Illinois v. Gates, 462 U.S. 213, 232 (1983)). "The test whether reasonable suspicion exists is an objective assessment of the circumstances; the officer's subjective motivations are irrelevant." Provet, 405 S.C. at 108, 747 S.E.2d at 457. The court's review must "consider 'the totality of the circumstances—the whole picture.'" Sokolow, 490 U.S. at 8.

However, a void-for-vagueness statute may not serve as the basis for a lawful Terry stop. "As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357 (1983). "Where the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" Id., 461 U.S. at 358. "In addition, this Court and the United States Supreme Court have recognized that a more stringent test for vagueness applies to criminal statutes because the consequences of imprecision in such cases can be more severe." Planned Parenthood S. Atl. v. State, 438 S.C. 188, 245–46, 882 S.E.2d 770, 801 (2023).

ARGUMENT

The trial court erred in refusing to dismiss the traffic related charges because of the standardless sweep allowed by S.C. Code Ann. § 56-5-2120 (1993) which is an unconstitutionally vague statute that provides contradictory guidance to both the public and the police on which is the lawful lane of travel to turn into while making a left-hand turn.

The statute used by Greninger to stop appellant is unconstitutionally vague. S.C. Code Ann. § 56-5-2120 (1993) provides:

> The driver of a vehicle intending to turn left shall approach the turn in the extreme left-hand lane lawfully available to traffic moving in the direction of travel of such vehicle. *Whenever practicable the left turn shall be made to the left of the center of the intersection so as to leave* the intersection or other location in the extreme left-hand lane lawfully *available* to traffic moving in the same direction as the vehicle on the roadway being entered. (emphasis added).

In the present case, Greninger testified that about appellant's alleged illegal left turn:

> Q. And what was the basis for your traffic stop?
>
> A. Along Arrow Road, there was a vehicle making a left-hand turn onto Palmetto Bay Road. And during that time, the vehicle turned directly into lane 2 instead of turning into lane 1.

Tr. 64, ll. 18 – 22.

There was no other alleged traffic violation involved:

> Q. On this night, May 13th, you conducted the traffic stop around 11:30 p.m.
>
> A. I believe so.
>
> Q. Okay. It was nighttime, right?
>
> A. Yes, it was dark.
>
> Q. And there weren't that many cars on the road?

A. There were some vehicles on the road, yes.

Q. Okay. But you didn't notice Mr. Green's car speeding?

A. No.

Q. Was it swerving?

A. No.

Tr. 69, ll. 11 – 22.

Under Greninger's interpretation of the statute, a driver completing a left-hand turn must turn into the farthest left-hand lane on the new roadway allowing the right lane to be available for other traffic heading in the same direction. This was the argument presented by the state in response to the motion to dismiss.[2] Appellant would concede Greninger's interpretation as argued by the state below was potentially a valid interpretation of the statutory language since the statute is vague and uncertain as to which lane was proper. Under the statute's wording, it is equally reasonable to assume the statute mandates the driver must leave the left-hand lane on the "roadway being entered" free for other drivers, necessitating a turn into the right-hand lane (as appellant did in this case). Tr. 64, ll. 18 – 22. Much like it is impossible for a person to be in two places at the same time, it is impossible for a driver to be both in compliance and in violation of the law by performing the same act at the same time.

Appellant's counsel filed a detailed written motion concerning the validity of the traffic stop before trial. R. * Defense Motion to Suppress, R. * Defense Reply to State's Response. Counsel for appellant argued that "statement [in the statute] is just nonsensical" and was not clear

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[2]Appellant would note from the description provided by Greninger in his testimony ("the vehicle turned directly into lane 2 instead of turning into lane 1") we are left to speculate as to whether or not the left lane or the right lane was "lane 1" though the state argued below that one can "infer" that the "driver intending to make a left turn must turn into" the far-left lane. R. * State's Response to Motion to Suppress page 6; Tr. 64, ll. 18 – 22.

"what lane of traffic a driver turning left should turn into." Tr. 38, ll. 18 – 21. Counsel for appellant also argued that the added language "whenever practical" further undermined the meaning of the statute. Tr. 38, l. 22 – 39, l. 4.

> It's our position that this -- Mr. Green did not transgress -- his driving, nor his vehicle violated any traffic infractions that night, and we, therefore, believe that the State would be unable to establish that, you know, his driving or anything in regard to the vehicle itself broke any traffic laws, which would make there be no probable cause for the traffic stop.

Tr. 39. Ll. 5 – 12.

Appellant has found no case from South Carolina addressing this problem. However, in addressing a virtually identical statute, the Supreme Court of Georgia found it constitutionally vague.

> Although a criminal statute must be read according to the natural and obvious import of its language, *see Foster v. State*, 273 Ga. 555(1), 544 S.E.2d 153 (2001), our analysis above establishes that the language in OCGA § 40–6–120(a)(2) can be read as setting forth two directly contradictory ways for executing a left-hand turn onto a multi-lane roadway. Because of the language in the statute, both methods are equally plausible. The law is well established that a statute violates due process if it is so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application.

McNair v. State, 678 S.E.2d 69, 71 (Ga. 2009). The Court in McNair found virtually identical statutory language confusing, allowing a driver, the public, and the police, little true guidance as to which lane to turn into, while clearly defining from which lane to begin the turn.

In reviewing the correct way to interpret Georgia's version of the statute, the Georgia Supreme Court noted "[t]he first interpretation is that a driver who wants to make a left turn onto a roadway with multiple lanes must make the turn in a manner that leaves the intersection or other extreme left-hand lane location lawfully available, i.e., open or clear, to traffic moving in the same

direction on the roadway the driver has just entered." McNair, 678 S.E.2d at 70. This would require a driver the leave the extreme left-hand lane "free" for vehicles traveling in the same "new" direction, dictating a turn into the right-hand lane. This was the manner appellant turned in the instant case.

The Georgia Supreme Court did not stop at this single, logical interpretation. It noted "the second interpretation of OCGA § 40–6–120(a)(2) is that a driver who wants to make a left turn onto a roadway with multiple lanes must make the turn so that, when the driver departs from or 'leaves' the intersection or other location, the turning vehicle is itself located in the lane farthest to the left that is lawfully available to traffic moving in that same direction." McNair, 678 S.E.2d at 71. This "logical interpretation" was asserted by the state below and adopted by the trial court in the instant case. Tr. 44, ll. 6 – 15.

A comparison of Georgia statute examined in McNair and South Carolina's version show them to be almost identical in language. Ga. Code Ann. § 40–6–120(a)(2) (2009) provided the following:

> The driver of a vehicle intending to turn left shall approach the turn in the extreme left-hand lane lawfully available to traffic moving in the direction of travel of such vehicle. Whenever *practicable,* the left turn shall be made to the left of the center of the intersection *and so as to* leave the intersection or other location in the extreme left-hand lane lawfully available to traffic moving in the same direction as *such* vehicle on the roadway being entered (differences noted in italics).

In comparison, S.C. Code 56-5-2120(b) (1993) contains the following language:

> The driver of a vehicle intending to turn left shall approach the turn in the extreme left-hand lane lawfully available to traffic moving in the direction of travel of such vehicle. Whenever *practicable* the left turn shall be made to the left of the center of the intersection *so as to* leave the intersection or other location in the extreme left-hand lane lawfully available to traffic moving in the same direction as *the*

> vehicle on the roadway being entered (differences noted with italics).

As to which lane of the "new road" a driver turns into was most important to leave free for vehicles moving in the same "new" direction, the Supreme Court of Georgia acknowledged contradictory rules of the road. For example, Georgia statutes require vehicles to be "driven 'in the right-hand lane then available for traffic' when they are 'proceeding at less than the normal speed of traffic,' a category that would include most vehicles that have just executed a left turn." McNair, 678 S.E.2d at 71. South Carolina provides similar guidance to drivers, requiring "any vehicle proceeding at less than the normal speed of traffic at the time and place and under the conditions then existing shall be driven in the right-hand lane then available for traffic or as close as practicable to the right-hand curb or edge of the roadway, except when overtaking and passing another vehicle proceeding in the same direction or when preparing for a left turn at an intersection or into a private road or driveway." S.C. Code § 56-5-1810(4)(b) (1976 as amended). A driver completing a left-hand turn will often be driving at less than the normal speed for the roadway as they complete the turn. Such a driver would be required by S.C. Code § 56-5-1810(4)(b) to be in the right-hand lane.

In response to McNair, the Georgia legislature revised the law concerning left-hand turns. Under current Georgia law, the driver of a vehicle intending to turn at an intersection shall do so as follows:

> (2) Left turn. (A) As used in this paragraph, the term "extreme left-hand lane" means the lane furthest to the left that is lawfully available to traffic moving in the same direction as the turning vehicle. In the event of multiple lanes, the second extreme left-hand lane shall be the lane to the right of the extreme left-hand lane that is lawfully available to traffic moving in the same direction as the turning vehicle. The third extreme left-hand lane shall be the lane to the right of the second extreme left-hand lane and so forth.

> (B) The driver of a vehicle intending to turn left shall approach the turn in the extreme left-hand lane lawfully available to traffic moving in the direction of travel of the turning vehicle. Whenever practicable, the left turn shall be made to the left of the center of the intersection and so as to exit the intersection or other location in the extreme left-hand lane lawfully available to traffic moving in the same direction as the turning vehicle on the roadway being entered.

Ga. Code Ann. § 40-6-120 (West). South Carolina's left-turn statute has remained unchanged and unconstitutionally vague.

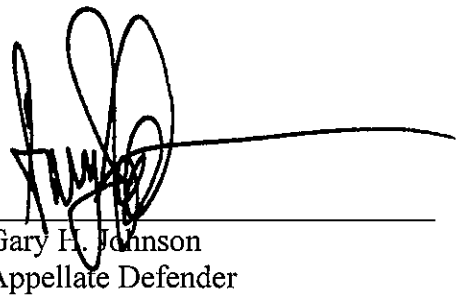
As written, S.C. Code § 56-5-2120(b) (1993) is void for vagueness. As held by the Georgia Supreme Court in McNair, either lane can be read as the proper lane to turn into upon completing a left-hand turn. This creates unfettered discretion on the part of law enforcement to pick and choose which drivers will be pulled over for an alleged violation, since every left turn by every motorist both violates and is in compliance with the ambiguous language used in the statute. This unfettered discretion of the police to stop every driver on a violation of a statute that provides no clear direction for compliance in effect cast a very large net "not to give the courts the power to pick and choose but to increase the arsenal of the police." Papachristou v. City of Jacksonville, 405 U.S. 156, 165 (1972).

Appellant argued the statute was unconstitutionally vague and nonsensical before the trial judge. Tr. 38, l. 1 – 39, l. 12; R. * Defense Motion to Suppress, R. * Defense Reply to State's Response. "As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Lawson, 461 U.S. at 357. Here, the South Carolina legislature has failed "to provide such minimal guidelines" and this vague statute permitted "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." Id., 461 U.S. at 358.

The trial court committed an error of law in finding S.C. Code § 56-5-2120(b) (1993) unambiguous. The traffic stop of appellant, based solely upon an alleged violation of this void-for-vagueness statute, was a violation of appellant's Fourth Amendment rights prohibiting unreasonable searches and seizures. The traffic stop was illegal, and all evidence seized as a result of the stop should have been suppressed as fruits of the poisonous tree. *See* United States v. Calandra, 414 U.S. 338, 348 (1974) ("The exclusionary rule 'is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.'"); Elkins v. United States, 364 U.S. 206, 217 (1960)("The remedy of exclusion 'compel[s] respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.'"). Since the charges against appellant were limited to his status as a licensed driver based on information garnered from an illegal stop, proper application of the law mandated dismissal of the traffic charges by the trial court.

CONCLUSION

Based upon the foregoing arguments, appellant's conviction should be reversed based upon the improper initial traffic stop of appellant's vehicle and the case remanded to the Court of General sessions for proper disposition.



Gary H. Johnson
Appellate Defender

ATTORNEY FOR APPELLANT

This 27th day of December, 2023.

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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True-billed indictment(s):
(2) Transcript July 25, 2022 pages 1 – 10; 36 – 81; 93 – 98; 101 – 107;
(3) Transcript May 19, 2023 pages 1 – 5;
(4) Defense Motion to Suppress;
(5) State's Response to Motion to Suppress;
(6) Defense Reply to State's Response.

I certify that this designation contains no matter which is irrelevant to this appeal.

Gary H. Johnson
Appellate Defender

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ATTORNEY FOR APPELLANT

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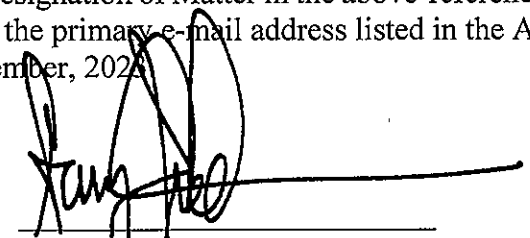
CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Initial Brief of Appellant and Designation of Matter in the above-referenced case has been served upon Mark Farthing, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 27th day of December, 2023.



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