

ORIGINAL  
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COURT OF APPEALS

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

ASHLEY EUGENE MOORE,

APPELLANT

APPELLATE CASE NO. 2011-191327

Appeal from Spartanburg County  
Roger L. Couch, Circuit Court Judge

Opinion No. 5160

**APPELLANT'S RETURN TO  
PETITION FOR REHEARING *EN BANC***

On July 17, 2013, this Court issued its Opinion reversing the Trial Court's denial of Appellant Ashley Eugene Moore's motion to suppress evidence discovered during a traffic stop and reversing his convictions for trafficking and possession. The State thereafter filed a Petition for Rehearing *En Banc* pursuant to Rules 219 and 221(a), SCACR, arguing this Court misapplied the standard of review in Fourth Amendment cases and misapprehended the totality of the circumstances test applied in Fourth Amendment cases. Appellant Moore responds as follows:

This Court correctly applied the established law of Fourth Amendment cases to the facts of this case to reverse Moore's convictions where the State did not present sufficient evidence to establish that the officer conducting the traffic stop had reasonable and articulable suspicion that

criminal activity was afoot. Accordingly, this Court did not misapprehend or overlook any points requiring a rehearing. Furthermore, this case does not involve a question of exceptional importance requiring a rehearing *en banc*.

First, the State contends that this Court's majority opinion misapplied or misapprehended the standard of review.

On appeals from a denial of a motion to suppress based on Fourth Amendment grounds, the appellate courts of this State apply a deferential standard of review and will reverse if there is clear error. State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010). This deference, however, does not bar appellate courts from conducting their own review of the record to determine whether the trial judge's decision is supported by the evidence. Id. The appellate courts will affirm if there is any evidence to support the trial court's ruling. State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 460 (2002).

The State first incorrectly argues that the Trial Court focused on Moore's explanation that he was driving to his grandmother's house at 1:00 a.m. in finding that reasonable suspicion existed. This is not a complete and accurate statement of the Trial Court's finding for his ruling. Instead, the Trial Court in denying the motion to suppress stated:

In particular, the problem I have with the or the facts that are revealed by the rental agreement indicate the rental in North Carolina on the evening, afternoon before the stop was made at one o'clock in the morning. I have my doubts that the car was driven from Morganton [North Carolina] to Lawrenceville [Georgia] and back to Marion [North Carolina] to visit a grandmother. That's a long way to go around to visit your grandmother. Morganton and Marion is a much shorter trip.

So, it appears that he may have been less than truthful about the purpose of this trip.

R.p. 89, ll. 8-17.

As the majority properly held, there was no evidence in the record to support this finding by the Trial Court. Officer Owens never testified that Moore told him that Moore had actually driven

the rental car from North Carolina to Georgia and then was driving back to North Carolina. While the rental agreement may have indicated that the car was rented by a third-party in North Carolina that afternoon, there is no evidence in the record that Moore was the individual who actually drove the car from North Carolina to Georgia. R.p. 85, ll. 7-21. Moore only said that he was driving from Lawrenceville, Georgia to North Carolina. R.p. 32, ll. 1-8; 34, ll. 3-4, 15-18. There is nothing unusual about a person driving from Georgia to North Carolina in one evening. The Trial Court's finding that Officer Owens had reasonable suspicion because Moore made a trip from North Carolina, to Georgia, and back to North Carolina in one day is completely unsupported by the evidence.

The State also argues that the second fact relied upon by the Trial Court in his ruling denying the motion to suppress - that Moore had a large sum of wadded money in his pocket - was also supported by the evidence. Again, this finding was not supported by the evidence. During a patdown conducted by Officer Owens on Moore, Owens testified that he "felt what I perceived as a large sum of wadded money in his pocket." R.p. 28, ll. 9-10. Then Deputy Hancock pulled out the wad of money from Moore's pocket, but then immediately put it back in Moore's pocket. R.p. 28, ll. 11-13. Neither officer actually saw what type of bills were included in the wad of money, nor did either officer count how much money it was at that time. The officers simply did not know if Moore was carrying a large amount of cash with him or was simply carrying a number of one dollar bills.

Therefore, when the officers did not know at the time how much cash Moore was actually carrying, the Trial Court's finding that "for someone unemployed, to be carrying such a large amount of cash in their pocket also would obviously give a [sic] officer reasonable suspicions" is also unsupported by the actual evidence. R.p. 89, ll. 17-22.

This Court's majority properly held that the two primary factors relied upon by the Trial Court in determining that the officers had reasonable suspicion of illegal activity to lengthen the traffic stop detention of Moore were not supported by any evidence. Accordingly, this Court's majority did not misapply the standard of review and correctly reversed the Trial Court's ruling.

The State also argues that this Court misapplied or misapprehended the totality of the circumstances test used in Fourth Amendment cases. Although it may be correct that in reviewing the totality of the circumstances, individual factors of the traffic stop must not be considered piecemeal or in isolation, courts can still discuss the individual factors "one by one as [they] put them into the mix" in evaluating "the combined strength of these factors." United States v. Sprinkle, 106 F.3d 613, 617 (4th Cir. 1997). If the individual factors "gain little, if any, strength when put together," reasonable, articulable suspicion of criminal activity will not exist. Id. at 618-19.

Here, the State's reliance on factors all consistent with innocent behavior, and most of which are signs of nervousness during a traffic stop, do not when combined rise to the level of reasonable suspicion consisting of a particularized and objective basis that would lead one to suspect another of criminal activity. The indicators relied upon by the State as giving rise to a reasonable suspicion consist of the following<sup>1</sup>: (1) Moore turned on his left turn signal when he was initially pulled over; (2) Moore took a long time to pullover (although the record does not indicate exactly how long it took Moore to pullover [R.p. 15, ll. 17-23]); (3) Moore never turned his signal off – a sign of nervousness; (4) Moore admitted he had been drinking, although Officer Owens concluded that Moore was not impaired [R.p. 38, l. 25 – 43, l. 11]; (5) Moore began smoking a cigarette; (6) Moore

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<sup>1</sup> While the State also includes the factor that Moore had a large amount of cash in his pocket, as set forth above, there is no evidentiary support that the officers knew this before they conducted the illegal search.

continued to talk on his cell phone after he was pulled over; (7) Moore was nervous with hands shaking, accelerated breathing, and an elevated pulse; (8) Moore tried to pick up his cell phone once he got out of the car; (9) Moore drove a car rented by someone else; (10) Moore was driving on I-85; (11); Moore was traveling from the Atlanta area; (12) Moore said he was traveling to North Carolina to visit his grandmother even though it was 1:00 a.m.; (13) Moore raised his hands in the felony position even though the officers did not ask him to do so; and (14) Moore remained nervous after receiving a warning citation.

These factors combined simply show that Moore was someone traveling late at night from the Atlanta area to North Carolina on a heavily traveled interstate who was pulled over for speeding and possibly for drinking while driving and who was understandably very nervous. The factors provided by the State gain little, if any, strength when put together. Together, they did not give the officers in this case the necessary reasonable, articulable suspicion of criminal activity, and to the extent the Trial Court's ruling relied on any of these remaining factors,<sup>2</sup> there is no evidence to support a finding of reasonable suspicion. "The Government cannot rely upon post hoc rationalizations to validate those seizures that happen to turn up contraband." United States v. Foster, 634 F.3d 243, 249 (4th Cir. 2011). This Court's majority therefore correctly reversed the Trial Court's denial of Moore's motion to suppress the contraband found during the illegal search.

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<sup>2</sup> While the Trial Court made a cursory reference to these remaining factors, his ruling was primarily based on Moore's alleged driving from North Carolina to Georgia and then back to North Carolina in one day and the large amount of cash Moore was carrying, which as set forth in this Return, were findings not supported by any evidence.

CONCLUSION

This Court's majority did not misapply or misapprehend the standard of review or the totality of circumstances tests used in Fourth Amendment cases and correctly reversed the Trial Court's denial of the motion to suppress. Accordingly, Appellant Ashley Eugene Moore respectfully requests this Court to deny the State's Petition for Rehearing *En Banc*.

Respectfully submitted,



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Carmen V. Ganjehsani  
Appellate Defender

This 8th day of August, 2013.

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CERTIFICATE OF SERVICE  
\_\_\_\_\_

The undersigned attorney hereby certifies that a true copy of the Return to Petition for Rehearing in the above-entitled case has been served upon Julie Kate Keeney, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and to Mr. Ashley Eugene Moore # 345798, Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 8th day of August, 2013.



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Carmen V. Ganjehsani  
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 8th day  
of August, 2013.

Karee Funder (L.S.)  
Notary Public for South Carolina  
My Commission Expires: July 3, 2023.