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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Deadra L. Jefferson, Circuit Court Judge

THE STATE,

APPELLANT,

V.

JOSHUA FELIPE SIMMONS,

RESPONDENT

APPELLATE CASE NO. 2023-001978

INITIAL BRIEF OF RESPONDENT

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COUNTER STATEMENT OF THE ISSUE

Whether the circuit court properly suppressed drug evidence found during a warrantless search of Mr. Simmons' car in violation of the Fourth Amendment where no exceptions applied because law enforcement lacked reasonable suspicion to prolong the traffic stop?

STATEMENT OF THE CASE

In October 2018 a Charleston County grand jury indicted Joshua Simmons for trafficking cocaine. *Indictment. On December 11, 2023, the indictment was amended to possession with intent to distribute cocaine. Tr. 5, l. 4—6, l. 12; *Indictment. During the week of December 11-14, 2023, the Honorable Deadra Jefferson heard pretrial motions in Mr. Simmons case. Tr. 1.

Prosecuting for the state were assistant solicitors Kelly Barber and Daniel Cooper. Tr. 1. On December 11, 2023, Mr. Simmons represented himself pro se with Ted Smith as standby counsel. Later that day, Judge Jefferson appointed John Kozelski to represent Mr. Simmons. Tr. 53, ll. 1-4; 142, l. 24—144, l. 4.

On December 13, 2023, defense counsel moved to suppress statements made by Mr. Simmons to police and moved to suppress drug evidence. Tr. 67, l. 2-25; 75, l. 18; 87, ll. 18-19. Judge Jefferson made a preliminary ruling regarding Mr. Simmons' statements to police finding Mr. Simmons was not free to leave and police were asking questions that were inculpatory. Judge Jefferson stated, "anything after he's handcuffed is out." Tr. 162, l. 13—163, l. 2; 175, ll. 13-19. On December 14, 2023, Judge Jefferson granted defense counsel's motion to suppress all drug evidence. Tr. 176—189.

The state appealed the court's ruling regarding suppression and subsequently submitted a brief in support on July 29, 2024. This brief of respondent follows.

STANDARD OF REVIEW

In *State v. Frasier*, the South Carolina Supreme Court clarified its standard of review for cases involving an appeal from a motion to suppress based on Fourth Amendment grounds. 437 S.C. 625, 879 S.E.2d 762 (2022). In *Frasier* the Court explained due to the “dawn of the technological age, appellate courts are no longer dependent on the trial court” when the appellate court reviews the evidence. *Id.*, at 633–34, 879 S.E.2d at 766. Accordingly, the Court held “appellate review of a motion to suppress based on the Fourth Amendment involves a two-step analysis. *Id.* This dual inquiry means [the appellate court] review[s] 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.” *Id.*

ARGUMENT

The circuit court properly suppressed drug evidence found during a warrantless search of Mr. Simmons' car in violation of the Fourth Amendment where no exceptions applied because law enforcement lacked reasonable suspicion to prolong the traffic stop.

Introductory facts

On July 28, 2018, officers of the Charleston Police Department, Officer Engles, Officer Preston, and Officer Bianchi, pulled Mr. Simmons over for failure to maintain his lane of travel telling Mr. Simmons he touched the yellow line a few times. Tr. 14, l. 19—15, l. 18; 89, l. 8—90, l. 12; Court's exhibit 2, pretrial jump drive.¹ After searching Mr. Simmons' car without a warrant police found drugs. Tr. 93, l. 11—94, l. 3. Defense counsel moved to suppress the drugs found during the search. Tr. 75, ll. 17-20; 87, ll. 18-19; 89-194.

Hearing on defense motion to suppress drug evidence

The state called Officer Sean Engles to testify at the hearing. Tr. 89-111. Officer Engles testified he was one, of three, officers present at the traffic stop. Tr. 89, ll. 21-25. Engles said Mr. Simmons pulled his car over without any delay and was compliant throughout the stop. Tr. 97, ll. 2-18. Engles testified he approached the driver side of Mr. Simmons car, and his partner went to the passenger side of the car. Tr. 90. They explained to Mr. Simmons he had been stopped because he was “touching the yellow line” and they were “concerned about his driving behavior.” Engles testified he asked Mr. Simmons to get out of the car and go to the back of the vehicle. He explained the request stating, Simmons “appeared nervous.” Additionally, he

¹ Court's exhibit 2 is listed in the index of the transcript as “Engles body-cam clips.” However, it is apparent from the discussion of the jump drive throughout the hearing that it contains all the body worn camera recordings from the three officers present, Engles, Preston, and Bianchi. The state designated all three recordings, and they are on file with the Court. For ease of reference undersigned counsel will refer to the recordings by the name of the officer wearing the body worn camera as that is how they are listed on the drive.

testified the traffic stop was on the side of the highway in a dangerous area. Tr. 90, ll. 4-17; 94, l. 22—95, l. 15.

Engles said during their conversation at the back of Mr. Simmons' car he continued to notice "nervous behavior," and asked Simmons about it. While Engles' partner, Officer Preston, continued to speak with Simmons Engles walked back to the car and began looking inside the open windows. He described this as a "plain view search." He noticed two open containers of alcohol hanging in a "transparent handbag." Tr. 90, l. 14—91, l. 21. At that point he placed Mr. Simmons under arrest. Tr. 91, l. 22—92, l. 3. Engles testified after Simmons was arrested, they conducted an "inventory search" to "document any possessions of value" that were inside the car and that is when he found "three and a half grams of white powder." Tr. 92, l. 6—93, l. 13. Also discovered during the search were a digital scale and additional white powder in a sunglass case. Tr. 94, ll. 1-4

On cross-examination Engles testified when he and Officer Preston first approached Mr. Simmons' car, they were looking through the car with their flashlights for two reasons. First for their own safety. Second to see if there was anything visible that would show some additional criminal activity. Tr. 98, ll. 2-13. Engles admitted when he opened the door to get Mr. Simmons out of his car he did not see open containers of alcohol. Tr. 99, ll. 7-16. He testified Simmons did not have any difficulty getting out of the car, he had no trouble with balance, he was not slurring his speech, and he was compliant to their commands and questions. Engles said there was no odor of alcohol or odor of marijuana. Tr. 99, l. 17—100, l. 24. Engles testified he did not believe Mr. Simmons was too inebriated to drive. Tr. 102, ll. 1-3. When asked if he considered giving Simmons a field sobriety test, Engles admitted that he did not and he was not trained to administer field sobriety tests. Tr. 101, ll. 11-22.

Engles claimed the open containers of alcohol he found were not under the seat but “draped off of like a shifter . . . hanging at leg level.” Tr. 102, ll. 9-19. Engles admitted Mr. Simmons never consented to a search of his car. He contended the basis for the search was “twofold.” First, Simmons was under arrest for the open container and the car had to be towed so it needed to be inventoried. Second, he had probable cause to search the car because the open containers in the car led him to believe there could be other contraband. Tr. 103, ll. 15-25.

Judge Jefferson asked Officer Engles some clarifying questions. Tr. 104—107. The court first asked why they removed Mr. Simmons from his car. Engles first response was Simmons’ hands were shaking and he exhibited other nervous indicators. When pressed again by the court why they removed Mr. Simmons from his car Engles responded, “twofold[,] [o]ne being safety reasons, the other to have an opportunity to take a look at Mr. Simmons face to face, gauge any other nervousness or any other nervous indicators we might see by having him outside the car . . . to see if there was anything else going on.” Tr. 104, l. 8—105, l. 5. When asked why Mr. Simmons was arrested instead of ticketed for the open containers Engles responded, “he hadn’t been honest and he was deceptive with us, not letting us know that that was there.” Tr. 106, ll. 1-15. When asked why he went back to the car after Simmons was removed, Engles answered he wanted to see if something was overlooked in the initial approach and that he felt it was necessary because Simmons was not being forthright. Tr. 106, l. 16—107, l. 9.

After Engles’ testimony, defense counsel moved to suppress the drugs arguing the warrantless search violated Mr. Simmons’ Fourth Amendment rights. Tr. 112—136. Defense counsel argued the stop was pretextual where other than Simmons allegedly hitting the yellow line there was no indication he was driving under the influence. Tr. 113, ll. 1-13. Counsel asserted the officers did not have reasonable suspicion to prolong the stop past its initial purpose.

Tr. 113, ll. 14-19; 121, ll. 7-116. Counsel averred the stop was prolonged at the point where it was clear Mr. Simmons was not a danger on the road and the officers continued to detain him. Tr. 115, l. 1—116, l. 8. He contended the officers evaluated the situation saw that Simmons was safe to drive and should have written him a ticket for the traffic violation and been done. He asserted the officers went far beyond the scope of the stop by returning to search Mr. Simmons' car. Counsel argued officer safety was no longer a legitimate concern when Engles went back to the car the second time. Tr. 126, l. 22—127, l. 25. Defense counsel contended a warrantless search occurred when Officer Engles went back to the car, and it was not conducted for officer safety reasons. Instead, the officers were trying to find a reason to get in the car and it was all pretext. Tr. 117, l. 19—118, l. 10; 125 ll. 8-12.

The solicitor asked the court to deny the defense's motion to suppress. Tr. 136—140. They argued the stop was proper and Simmons was asked to remove from the car for safety reasons as they were on the side of a busy highway. Tr. 137, ll. 1-18. They further argued the stop was not prolonged because the officers are trying to obtain personal information from Mr. Simmons, and he did not supply the documents requested. The solicitor contended Officer Engles return to the car was not a search but only looking in and getting a "plain view image" of the contents of the car when he found the open containers. Tr. 138, ll. 7-24. They contended the search occurred as a result of the tow of the car in accordance with police policy. Tr. 138, l. 25—139, l. 10.

At the conclusion of argument, the judge stated she was "troubled" and would rule the following day. Tr. 153, 10-12; 159, ll. 7-8; 162, ll. 13-15; 167, ll. 5-25. Regarding the statements made by Mr. Simmons to police on the body worn camera videos she ruled anything after he was placed in handcuffs was not admissible. Tr. 162, ll. 13-25; 175, ll. 18-19.

The following day the judge granted defense counsel's motion to suppress the drug evidence. Tr. 176—190. The judge stated, "I think the defense concedes there was an appropriate traffic infraction . . . failure to maintain a lane, although nobody really articulated that . . . there was no indication that he crossed the yellow line, which really is technically the definition of failure to maintain a lane." Tr. 176, ll. 9-18. The judge found a search of Mr. Simmons' car took place after he was removed from the car stating,

[O]nce they removed Mr. Simmons from the vehicle his windows were down, and so the officers were really quite honest that they were looking for items in the car. And what is, I think, most telling is that when they stopped Mr. Simmons and the light was shined into the vehicle, there is nothing that is apparent in the car that would give rise or give the impression that there was some evidence of criminal activity being afoot in that vehicle or with Mr. Simmons. It was not until he was removed from the car and basically a search took place that items were found . . .

Tr. 178, l. 15-25. The judge found officers prolonged the stop without reasonable suspicion. Tr. 181, ll. 3-18. The judge focused, not on the length of time of the stop, but the purpose of the stop. Tr. 192, l. 20—193, l. 5. She ruled the state did not meet its burden of proving the officers had reasonable suspicion to prolong the stop under the totality of the circumstances. Tr. 182, l. 2—183, l. 4; 186, l. 19—187, l. 24; 188, l. 9—189, l. 12. The judge ruled nervousness alone was not enough for reasonable suspicion. Tr. 187, l. 22—188, l. 8.

Discussion

The court correctly found the state did not establish by the burden of proof there was an objective specific basis for suspecting Mr. Simmons, after being stopped, of criminal activity. Tr. 188, ll. 9-12. The court properly found that because there was no justification for the officers prolonging the stop there was no need for additional inquiry the search was in violation of the Fourth Amendment.

Initially, the court ruled defense counsel conceded the traffic stop was proper however no such concession was made during the hearing. Officer Engles claimed they stopped Mr. Simmons because he was failing to maintain a lane however his testimony at the hearing and the verbal observation on the body worn camera video was that Mr. Simmons “touched the yellow line” not that he crossed the line or was swerving between lanes. Officer Preston body worn camera video at :58—1:05. This is significant because failure to maintain a lane was the reason given for the improper stop. Regardless of the impropriety of the traffic stop it is what occurred during the stop that was the focus of the court’s ruling suppressing the drugs found during the warrantless search of Mr. Simmons’ car.

In the state’s brief counsel argues the court erred suppressing the drug evidence where multiple exceptions to the Fourth Amendment warrant requirement applied including: plain view, search incident to arrest, inventory search. However, all these arguments fail because the officers did not have reasonable suspicion to prolong the traffic stop beyond its cited purpose, which was ticket or warning for failing to maintain a proper lane.

“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 (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)).

Mr. Simmons was pulled over and informed by officers he had touched the yellow line while driving. Officer Preston body worn camera video at :58—1:05. He was asked for documents of identification and removed from his car. Officer Preston body worn camera video at 1:06; 2:06—2:30. Mr. Simmons complied, although he initially could not find his license, he gave his correct name and an identification card to the officers. Mr. Simmons got out of his car at the officers' request. He politely responded to the questions the officers asked. Officer Preston body worn camera video at 2:06—3:20. At this point the officers should have checked his information and issued him a ticket for the alleged driving infraction and for not having the proper documents.

Instead, Mr. Simmons was held at the back of his car by Officer Preston while Officer Engles went and searched his car based on nothing more than a hunch. Officer Engles body worn camera video at 7:19—8:37. In its ruling the court stated, “[t]he rub really becomes how did they find the open container such that they were able to do the inventory search of the vehicle when the drugs were found.” Tr. 183, ll. 14-17. During this search Engles did not open the door to the car but his hand and flashlight entered the open window of the car on both sides. Officer Engles body worn camera video at 7:24; 8:33. Engles return to the car prolonged the stop beyond the initial traffic violation without reasonable suspicion.

To prolong or exceed the scope of a stop beyond the initial traffic violation, law enforcement must have reasonable suspicion that criminal activity is occurring. *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 the stop—the stop may be prolonged, and the scope of the detention enlarged as circumstances require.”). While 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. For an officer to have reasonable suspicion, “there [must] be an objective, specific basis for suspecting the person stopped of criminal activity.” *Id.* Although 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 (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).

The court cited *State v. Frasier* during its ruling in this case. 437 S.C. 625, 879 S.E.2d 762 (2022). In *Frasier* the South Carolina Supreme Court held the police officer lacked reasonable suspicion to further detain the defendant after the initial traffic stop and the defendant did not voluntarily consent to the search of his person. *Id.* In that case, two plainclothes officers were observing a bus station as part of the department’s narcotics division. *Id.* at 629, 879 S.E.2d at 764. They saw a man, Frasier, leaving the station and look both ways before walking to a car driven by a woman. *Id.* When the car left the station, the officers noted that one of the break lights was not working and called a patrol officer to conduct a traffic stop of the car. *Id.*

The officer that stopped the car testified when he initiated the stop the driver took longer than usual to pull over and when he arrived at the car her pant zipper was down. *Id.* The officer testified the zipper being down suggested she was potentially hiding contraband in her pants. *Id.* He also testified Frasier was nervous and was sweating profusely. *Id.* at 630, 879 S.E.2d at 764. Frasier was removed from the car and searched. *Id.* Frasier filed motion to suppress contending the officer lacked reasonable suspicion to prolong the stop and that he did not consent to a search

of his person. *Id.* at 630, 879 S.E.2d 765. The motion to suppress was denied but reversed by the Court. *Id.* at 631, 879 S.E.2d 765.

In *State v. Moore*, the Court came to the opposite conclusion finding the officer had reasonable suspicion to further detain the defendant after the initial traffic stop. 415 S.C. 245, 781 S.E.2d 897 (2016). In that case, the Court found the totality of factors supported the trial court's finding that the officer had reasonable suspicion to prolong the stop where in addition to Moore's nervousness, Moore had a large sum of money in his pocket and Moore had an unusual itinerary. *Id.* at 253-255, 781 S.E.2d at 901-902.

Here, the officers did not have reasonable suspicion to prolong the traffic stop of Mr. Simmons in July 2018. They wanted to search Mr. Simmons vehicle, which was apparent from early in the stop. Officer Preston body worn camera video at 3:50-4:11. Officer Engles did not articulate any reasonable suspicion during the pretrial hearing in December 2023. Officer Engles repeatedly said one thing, that Mr. Simmons was behaving nervously during their interaction. Nervous behavior alone does not meet even the very low burden required. Additionally, most, if not all, individuals would be nervous if pulled over late in the evening, removed from their car, and questioned by three officers. *See Frasier* at 636, 879 S.E.2d at 768 ([Acknowledging] "nervousness is typically present in any encounter with police" and cautioning that while "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.").

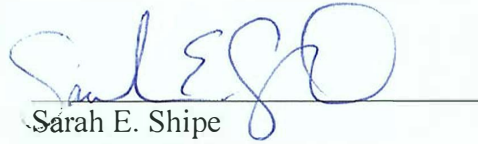
Here, as in *Frasier*, the officers search of Mr. Simmons' car was based only on a hunch that something else was going on. Officers admittedly saw nothing suspicious in their initial

look into the car. There was no testimony given or anything visible in the body worn camera videos that demonstrated criminal activity. It seems apparent here as in *Frasier* this was a drug stop masked as a traffic encounter. Early on it the stop an officer asked to go into his glove compartment and center console even after Mr. Simmons clearly told them the rental documents were not there. The court noted the intentions of the officers during its ruling stating, “the officers were really quite honest that they were looking for items in the car.” Tr. 178, ll. 15-17. The court relied on Engles’ testimony and the video of the encounter to determine the officers were more interested in why Simmons was being dishonest than any driving behavior they allegedly witnessed.

This court should affirm the court’s suppression of the drugs found during a warrantless search of Mr. Simmons’ car.

CONCLUSION

Based on the foregoing, Mr. Simmons requests this Court affirm the circuit court's suppression of drugs found pursuant to a warrantless search.



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Appellate Defender

ATTORNEY FOR RESPONDENT

This 10th day of January, 2025.