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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2024-000732

THE STATE, APPELLANT,

v.

RICHARD LEROY ANDERSON, RESPONDENT.

RECORD ON APPEAL

DAVID A. ALEXANDER
Deputy Chief Attorney for Capital Appeals

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR RESPONDENT

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Assistant Attorney General

South Carolina Office of the
Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR APPELLANT

INDEX

State of South Carolina
The Circuit Court of the Fifteenth Judicial Circuit

Benjamin H. Culbertson
Resident Circuit Judge

P. O. Box 479 (zip code 29442)
401 Cleland St. (zip code 29440)
Georgetown, South Carolina
Telephone: (843) 545-3030
Facsimile: (843) 545-3282
Email: bculbertsonj@sccourts.org

October 3, 2023

Erin Smith, General Sessions Non-Jury Coordinator
Horry County Clerk of Court
P.O. Box 677
Conway, SC 29528-0677

RE: *State v. Anderson* (Warrants 2023A2620601180 – 1183)

Dear ~~Ms. Smith~~ Erin,:

Please find enclosed for filing with the Clerk of Court the Order Granting Defendant's Motion to Suppress in the above referenced case. Please file this order and provide a clocked copy to the attorneys in this case.

I thank you in advance for your service in this matter and with kindest regards, I remain

Very truly yours,

Benjamin H. Culbertson

BHC/bhc
Enclosure (a/s)

FILED
HORRY COUNTY
2024 MAR 11 A 8:58
RENEE H. ELVIS
CLERK OF COURT
HORRY COUNTY, SC

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF GENERAL SESSIONS

WARRANT(S): 2023A2620601180 - 1183
INDICTMENT(S):

State of South Carolina

Richard Leroy Anderson
DEFENDANT(S)

This form order submitted by: Benjamin H. Culbertson Presiding Judge	Attorney for : ☐ State ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE

☐ **DECISION BY THE COURT AFTER HEARING.** This action came to a hearing before the court. The issues have been heard and a decision rendered. ☐ See below for additional information.

☐ **DECISION BY THE COURT AFTER STATUS CONFERENCE.** This case came for a status conference before the court. The status of this case and pending issues in this case were discussed and a decision rendered. ☐ See below for additional information.

DECISION BY THE COURT AFTER SECOND APPEARANCE. This case came for a Second Appearance before the court. The status of this case and pending issues in this case were discussed and a decision rendered. ☐ See below for additional information.

☑ MOTION: **Defendant's Motion to Suppress**

☑ GRANTED ☐ DENIED ☐ CONTINUED ☐ WITHDRAWN

☐ WITHDRAWN BY MOVING PARTY: _____
Signature of Moving Party

☐ OTHER:

IT IS ORDERED AND ADJUDGED: ☐ See Order of the Court below ☐ See attached order
☑ Formal Order to follow; to be prepared by: ☐ State ☑ Defendant ☐ Other: _____

ORDER INFORMATION

This order ☐ ends ☑ does not end the case.

Additional Information for the Clerk :

Defendant's Motion to Suppress is GRANTED. The detention, questioning and warrantless search of the defendant violated the defendant's 4th Amendment right against unlawful search and seizure. Therefore, the drugs found on the defendant are suppressed and may not be used as evidence against the defendant. However, the charges against the defendant are not dismissed as the Court is not aware if the State possesses other inculpatory evidence against the defendant.

Attorney Melinda Knowles is to prepare a formal order.

Margaret H Culbertson — 2148 — Feb. 22, 2024

Circuit Court Judge | Judge Code | Date

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	WARRANT NOS.: 2023A2620601180 – 1183
STATE OF SOUTH CAROLINA,	)	
	)	
v.	)	ORDER GRANTING
	)	DEFENDANT'S MOTION TO SUPPRESS
RICHARD LEROY ANDERSON,	)	
DEFENDANT.	)	

DATE OF HEARING:	FEBRUARY 15, 2024
PRESIDING JUDGE:	HONORABLE BENJAMIN H. CULBERTSON
ASSISTANT SOLICITOR:	KAITLIN COOK
DEFENDANT'S ATTORNEY:	MELINDA KNOWLES

This matter comes before the Court on a Motion to Suppress filed by the defendant's attorney, Melinda Knowles, on January 12, 2024. In this motion, defense counsel requests that this Court suppress all drug evidence seized in this case as the defendant asserts that this evidence was illegally obtained during an unlawful detention of the defendant. The defendant further asserts that this evidence should be suppressed as fruit of an illegal search and seizure as it was obtained in violation of the Fourth Amendment of the *United States Constitution* and Article I, Section 10, of the *South Carolina Constitution.*

Based upon the arguments of counsel and evidence presented at this motion hearing, I do hereby find the following salient facts:

Findings of Fact

On May 6, 2023, the defendant ("Anderson") was a passenger in a vehicle operated by Anthony Shaunta Kerson ("Kerson"). The vehicle was pulled over by Myrtle Beach Police Officer B. Sonko ("Sonko") for allegedly failing to give a turn signal when required. Upon approaching the vehicle, Sonko requested the driver (Kerson) to provide his driver's license, proof of insurance,

and vehicle registration. Sonko noted in his report that Kerson appeared nervous, was shaking, and provided responses to questions that were not asked.

Kerson provided Sonko with an identification card instead of a valid driver's license, and Sonko returned to his patrol car to request dispatch run Kerson's information. Dispatch soon confirmed that Kerson's driver's license was suspended and Sonko immediately returned to Kerson's vehicle and placed him under arrest for driving under suspension. A search incident to arrest was performed on Kerson with negative results as it revealed nothing illegal in his possession. Kerson was placed in the back of a patrol car to await transport to the jail.

As Kerson awaited transport, Sonko decided to tow Kerson's vehicle. Before Sonko begins his search of the vehicle, Anderson is removed and told to go with other officers to the rear of the vehicle. Anderson immediately complies and is cooperative throughout the entire encounter. At no time did Anderson commit any crimes or exhibit any suspicious behavior.

According to Sonko, an inventory of the vehicle needed to be conducted prior to towing it from the scene. Anderson is never allowed to leave the scene and is told by law enforcement to remain at the scene, despite the purpose of the traffic stop having been fulfilled with the arrest of the driver. After the arrest of Kerson, Anderson is removed from the vehicle and told to wait nearby with other officers. He is assured by law enforcement that they would get him out of there shortly but instead of releasing him, he is subjected to a second detention outside of the vehicle. During this detention, Anderson is questioned and specifically asked if he has anything illegal on him. He admits to being in possession of marijuana. This admission leads to his arrest and a subsequent search of his person reveals a baggie containing marijuana and other drugs. As a result of this search, Anderson is charged with: Possession of Narcotics in Schedule I(b), (c), LSD, & Schedule II – 1st offense, Manufacture/Distribution/ Etc. of Cocaine Base – 1st offense, MDP-

Narcotics in Schedule I(b) &(c), LSD, and Schedule II – 1st offense, and Possession of Less than 1 Gram of Methamphetamine or Cocaine Base – 1st offense.

Conclusions of Law

The Fourth Amendment to the *Constitution of the United States* declares that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, 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." Further, Article I, Section 10, of the *South Carolina Constitution* states that "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable 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, the person or thing to be seized, and the information to be obtained."

The Fourth Amendment protects against unreasonable searches and seizures, including seizures that involve only a brief detention.[1] Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a seizure within the meaning of the Fourth Amendment.[2] Because the usual traffic stop is more analogous to an investigative detention than a formal arrest, this Court must evaluate this traffic stop utilizing the framework set forth in *Terry v. Ohio*, 392 U.S. 1 (1968), and its progeny.[3] Pursuant to *Terry*, the propriety of a traffic stop is examined on two fronts.[4] First, the Court must determine whether the officer's action was justified at its inception, and, secondly, whether the

[1] State v. Pichardo, 367 S.C. 84, 97 (Ct. App.2005), (citing *U.S. v. Mendenhall*, 446 U.S. (1980)).
[2] *Id.*, citing *Whren v. U.S.*, 517 U.S. 806 (1996).
[3] *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984).
[4] *United States v. Digiovanni*, 650 F.3d 498, 506 (4th Cir. 2011).

officer's subsequent actions were reasonably related in scope to the circumstances that justified the stop.[5]

Regarding the first inquiry under *Terry*, no one disputes that the traffic stop in this case was justified at its inception. An officer who observes a violation of the law has probable cause to initiate a traffic stop and such a stop comports with the Fourth Amendment.[6] A lawful traffic stop generally begins when a vehicle is pulled over for investigation of a traffic violation, and the stop normally ends when the officer has no further need to control the scene and informs the driver and passengers, they are free to leave.[7] All of the vehicle's occupants are effectively seized during a traffic stop for the duration of the traffic stop.[8]A lawful seizure at inception can violate the Fourth Amendment if its manner of execution unreasonably infringes upon the interests protected by the Constitution.[9] Based upon the incident report for this case, Officer Sonko observed the driver (Kerson) fail to give a turn signal when it was required by law. [10] Therefore, Officer Sonko was justified in his decision to initiate a traffic stop on this vehicle.

The second inquiry under *Terry*, pertains to the investigative detention and requires that it must be limited in scope to its underlying justification and last no longer than is necessary to effectuate the purpose of the stop, i.e. the seizure must be limited both in scope and duration.[11] For the scope of investigation detention, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time.[12] As to the duration of the detention, police may stop and briefly detain a vehicle for a traffic

[5] *Terry v. Ohio*, 392 U.S. 1 at 20 (1968).
[6] *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977).
[7] *Arizona v. Johnson*, 555 U.S. 323, (2009).
[8] *Brendlin v. California*, 551 U.S. 249, 255 (2007).
[9] *Illinois v. Caballes, 543 U.S. 405 407 (2005)*
[10] S.C. Code Ann §56-5-2150.
[11] *State v. Pichardo*, 367 S.C. 84,99 (Ct. App. 2005), citing *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed. 2d 229 (1983).
[12] *Florida v. Royer*, 460 U.S. at 500.

violation and once the vehicle is stopped, the police may order the driver to exit the vehicle.[13] In carrying out the stop, an officer may request a driver's license and vehicle registration, run a computer check, and issue a citation.[14] Any further detention for questioning is beyond the scope of the stop and therefore illegal unless the officer has a reasonable suspicion of a serious crime.[15]

An investigative detention must be temporary and not last longer than is necessary to effectuate the purpose of the stop and the scope of the detention must be carefully tailored to its underlying justification.[16] The police may lengthen detention of an individual for further questioning beyond that related to the initial stop but only in two circumstances: 1) if the officer has an objectively reasonable and articulable suspicion of criminal activity; or 2) if the initial detention has become a consensual encounter.[17]

In the case at hand, no reasonable, articulable suspicion existed to support the continued detention of Anderson after completion of the traffic stop.[18] The search of Anderson's person was an exploitation of the original stop and by prolonging Anderson's detention beyond its proper scope, the officer rendered the ensuing encounter more coercive than consensual. The circumstances were sufficiently intimidating such that Anderson could have reasonably believed that he was not free to go about his business and disregard the police presence.[19] As a passenger in the vehicle, Anderson can assert a Fourth Amendment claim based upon his unreasonable detention[20] and the absence of "reasonable suspicion" to prolong his detention or search his person.

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[13] *Id.*, citing *Pennsylvania v. Mimms*, 434 U.S. 106 (1977).
[14] *Id.*, citing *U.S. v. Sullivan*, 138 F.3d 126 (4th Cir. 1998).
[15] *State v. Williams*, 351 S.C. 591 (Ct. App 2002).
[16] *State v. Pichardo*, 367 S.C. 84,99 (Ct. App. 2005), citing *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed2d 229 (1983).
[17] *Id.*, at 99.
[18] *State v. Williams*, 351 S.C. 591, 598 (Ct. App. 2002).
[19] *State v. Pichardo*, 367 S.C. 84, (S.C. Ct. App. 2005), 623 S.E. 2d 840.
[20] *Sikes v. State*, 323 S.C. 28, 448 S.E. 2d 560 (S.C. 1994).

Therefore the discovery of the illegal narcotics found on the defendant was the product of an illegal search and seizure.[21]

After carefully evaluating the totality of circumstances in this case, this Court finds and concludes as a matter of law that the detention, questioning, and warrantless search of Anderson violated his Fourth Amendment right against unlawful search and seizure. In reaching this conclusion, I find that Officer Sonko unjustifiably extended the length of Anderson's detention beyond the time reasonably necessary to effectuate the initial purpose of the stop. The initial purpose of the stop was achieved when the driver was arrested as the crime that triggered this traffic stop was the driver's alleged failure to use a turn signal. Anderson, a mere passenger in the vehicle, should have been permitted to leave the scene when the decision to arrest the driver was made as law enforcement had no reasonable articulable suspicion to support his continued detention. Because law enforcement lacked reasonable suspicion to prolong Anderson's detention and search Anderson's person, the discovery of illegal narcotics on Anderson are a product of an illegal seizure and therefore should not be allowed to be used as evidence against this Defendant.

The "fruit of the poisonous tree" doctrine holds that where evidence would not have come to light but for the illegal actions of the police, and such evidence is obtained by the exploitation of that illegality, then such evidence must be excluded.[22]

CONCLUSION

NOW, THEREFORE, based upon the above findings of fact and conclusions of law, it is hereby

ORDERED that the defendant's Motion to Suppress is GRANTED; it is further

[21] *State v. Frasier*, 437 S.C. 625, 879 S.E. 2d 762 (S.C. Sup Ct. 2022).
[22] *State v. Greene*, 330 S.C. 551, 559, 499 S.E.2d 817, 821 (Ct. App. 1997)

ORDERED, that the drug evidence seized from this Defendant is suppressed and inadmissible at the trial of this case.

AND IT IS SO ORDERED.

Benjamin H. Culbertson

Honorable Benjamin H. Culbertson
Presiding Judge
Fifteenth Judicial Circuit

Dated: March 5, 2024

FILED
HORRY COUNTY
2024 MAR 11 A 8:58
RENEE N. ELVIS
CLERK OF COURT
HORRY COUNTY, SC

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF GENERAL SESSIONS

WARRANT(S): 2023A2620601180 - 183
INDICTMENT(S): 2023GS2604885 – 4886
2023GS2603140 – 3146

State of South Carolina

Richard Anderson
DEFENDANT(S)

This form order submitted by: Benjamin H. Culbertson Presiding Judge	Attorney for : ☐ State ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE

☐ **DECISION BY THE COURT AFTER HEARING.** This action came to a hearing before the court. The issues have been heard and a decision rendered. ☐ See below for additional information.

☐ **DECISION BY THE COURT AFTER STATUS CONFERENCE.** This case came for a status conference before the court. The status of this case and pending issues in this case were discussed and a decision rendered. ☐ See below for additional information.

DECISION BY THE COURT AFTER SECOND APPEARANCE. This case came for a Second Appearance before the court. The status of this case and pending issues in this case were discussed and a decision rendered. ☐ See below for additional information.

☑ MOTION: **State's Motion to Reconsider**

☐ GRANTED ☑ DENIED ☐ CONTINUED ☐ WITHDRAWN

☐ WITHDRAWN BY MOVING PARTY: _____
Signature of Moving Party

☐ OTHER:

IT IS ORDERED AND ADJUDGED: ☐ See Order of the Court below ☐ See attached order
☐ Formal Order to follow; to be prepared by: ☐ State ☐ Defendant ☐ Other: _____

ORDER INFORMATION

This order ☐ ends ☑ does not end the case.

Additional Information for the Clerk :

This motion is decided on State's brief without oral arguments.

Benjamin H. Culbertson
Circuit Court Judge

2148
Judge Code

April 11, 2024
Date

STATE OF SOUTH CAROLINA)	IN THE COURT OF GENERAL SESSIONS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	
)	
STATE OF SOUTH CAROLINA)	MOTION TO SUPPRESS &
)	SUPPORTING MEMORANDUM OF LAW
)	
v.)	COPY
)	
RICHARD LEROY ANDERSON,)	
)	**Warrant No(s): 2023A2620601180-1183**
Defendant.)	
)	

MEMORANDUM IN SUPPORT OF MOTION TO SUPPRESS:

This matter is before the Court upon the Motion of the Defendant, Richard Leroy Anderson, hereinafter referred to as "Anderson", by and through his attorney of record, Melinda Knowles, wherein the Defense requests this Court suppress the drug evidence seized in this case as it was illegally obtained during an unlawful detention of Mr. Anderson following a traffic stop of a vehicle in which he was a passenger. The Defense asserts the evidence recovered and seized should be suppressed as fruits of an illegal search and seizure as they were obtained in violation of the Fourth Amendment of the United States Constitution and Article I, Section 10, of the South Carolina Constitution.

FACTUAL BACKGROUND

On May 6, 2023, Anderson was a passenger in a vehicle owned and operated by Anthony Shaunta Kerson, hereinafter referred to as Kerson, which was pulled over by Myrtle Beach Police Officer B. Sonko, hereinafter referred to as Sonko, for allegedly failing to give a turn signal when required. Upon approaching the vehicle, Sonko requested the driver (Kerson) provide his driver's

license, proof of insurance, and vehicle registration. Sonko noted in his report that Kerson appeared nervous, was shaking, and provided responses to questions that were not asked.

Kerson provided Sonko with an identification card instead of a valid driver's license, and Sonko returned to his patrol car to request dispatch run Kerson's information. Dispatch soon confirmed that Kerson's driver's license was suspended and Sonko immediately returned to Kerson's vehicle and placed him under arrest for driving under suspension. A search incident to arrest was performed on Kerson with negative results as it revealed nothing illegal in his possession. Kerson was then placed in the back of a patrol car to await transport to the jail.

As Kerson awaited transport, Sonko decided to tow Kerson's vehicle instead of allowing Kerson to contact someone to come and pick it up or asking him if he wanted Anderson to drive it from the scene. Before Sonko begins his search, Anderson is removed from the vehicle and told to go with other officers to the rear of the vehicle. Anderson immediately complies and appears to be cooperative throughout the entire encounter. At no point did a member of law enforcement report seeing Anderson commit any crimes or exhibit any suspicious behavior that would lead them to believe that he was involved in any criminal activity.

Based upon Sonko's report, the legal justification given for the search of the vehicle was that an inventory search was required prior to towing the vehicle from the scene. However, no inventory sheet was provided to the defense within the discovery documentation produced per the Defense's request in its motion for production of evidence filed on July 20, 2023, which included a specific request for "any and all police reports relating to the investigation and circumstances surrounding the crime with which the Defendant is charged." Without an inventory sheet, we do not know for certain if all items found inside of this vehicle were documented as a proper inventory search would require. If all items inside of the car were not documented, then the true nature (i.e.

the legal justification) for this warrantless search becomes questionable as the purpose of a "true" inventory search is to record the contents of a vehicle or person.

Despite the purpose of this traffic stop being entirely related to the driver and the driver already having been arrested, Anderson was not permitted to leave but instead removed from the vehicle and told by law enforcement that "they would get him out of there shortly." It is during this second detention outside of the car that he is asked if he has anything illegal on him and he admits to being in possession of marijuana. This admission led to his arrest and a subsequent search of his person revealed a baggie containing marijuana and the other drugs charged.

LAW/ANALYSIS

A. U.S. Constitution - 4th Amendment & S.C. Constitution - Article I, § 10

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[1] The Fourth Amendment protects against unreasonable searches and seizures, including seizures that involve only a brief detention. [2]Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a seizure of within the meaning of the Fourth Amendment.[3] Police may stop and briefly detain a vehicle for a traffic violation and once the vehicle is stopped, the police may order the driver to exit the vehicle.[4] In carrying out the stop, an officer may request a driver's license and vehicle registration, run a computer check, and issue a citation.[5]

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[1] *US Const. Amend IV.*
[2] *State v. Pichardo*, 367 S.C. 84, 97 (Ct. App.2005), citing *U.S. Mendenhall,* 446 U.S. (1980).
[3] *Id.*, citing *Whren v. U.S.*, 517 U.S. 806 (1996).
[4] *Id.*, citing *Pennsylvania v. Mimms,* 434 U.S. 106 (1977).
[5] *Id.*, citing *U.S. v. Sullivan,*138 F.3d 126 (4th Cir. 1998).

Any further detention for questioning is beyond the scope of the stop and therefore illegal unless the officer has *a reasonable suspicion of a serious crime*.[6] An investigative detention must be temporary and not last longer than is necessary to effectuate the purpose of the stop and the scope of the detention must be carefully tailored to its underlying justification.[7] The police may lengthen detention of an individual for further questioning beyond that related to the initial stop but only in two circumstances: 1) if the officer has an objectively reasonable and articulable suspicion of criminal activity, or 2) if the initial detention has become a consensual encounter.[8]

The SC Constitution, Article 1, Section 10, addresses the issue of searches, seizures and invasions of privacy and states: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable 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, the person or thing to be seized, and the information to be obtained."[9]

B. Case Law in Support of Suppression

I. State v. Williams

In State v. Williams[10], the Court of Appeals affirmed the trial court's suppression of evidence where there was no reasonable, articulable suspicion to support the continued detention of the passenger of a vehicle after completion of a traffic stop. In Williams, the officer asked the driver to step out of the vehicle while the passenger remained seated.[11] The officer explained the

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[6] *State v. Williams*, 351 S.C. 591, 598 (Ct. App 2002).

[7] *State v. Pichardo*, 367 S.C. 84, 99 (Ct. App. 2005), citing *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed2d 229 (1983).

[8] *Id*. at 99

[9] S.C. Constitution, Article 1, Section 10

[10] *State v. Williams*, 351 S.C. 591, (Ct. App 2002).

[11] *Id*. at 595

ticket to the driver, returned his driver's license and registration, then asked if he could ask a few questions.[12] The officer then asked the driver where they were coming from, where they were headed, the name of the passenger, and the nature of their relationship.[13] The officer said that he became suspicious because the driver and passenger gave inconsistent answers to his questions.[14] The driver ultimately consented to a search of the car, and the officer discovered twenty-five pounds of marijuana. [15]

The detention of Williams lasted between twenty-five and forty minutes.[16] Despite the officer's testimony that the Defendant was free to leave before he answered his questions, the Court found that the Defendant was not free to leave, and that he was seized for purposes of the Fourth Amendment.[17] In deciding whether a Fourth Amendment seizure had occurred, the Court noted that "the detention associated with roadside searches is unlike a mere field interrogation where an officer may question an individual without grounds for suspicion.[18] Roadside consent searches are instead more akin to an investigatory stop that does involve a detention." [19]

The circumstances the Court considered included: it was a roadside traffic stop; the presence of two uniformed officers and a drug dog; the officer asking the driver to exit his car so that the officer could talk to driver and passenger separately; the officer asking a second officer to stand by the driver at the rear of the car while the first officer questioned the passenger; and the seemingly innocuous but immediate transition from the valid traffic stop such that the defendant

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[12] *Id.*

[13] Id.
[14] *Id.* at 596
[15] *Id.*
[16] *Id.* at 602
[17] *Id.* at 601
[18] *Id.*
[19] *Id.*

may not have realized that the initial seizure had ended.[20] In addition, the Court concluded that the consent to search was not valid because it was obtained through the officer's exploitation of the unlawful detention; a minimal amount of time had passed between the seizure and the ensuing consent; there were no intervening or attenuating circumstances; and the detention had no legal basis. The Court further noted..."When an officer asks for consent to search *after* an unconstitutional detention, the consent procured is per se invalid *unless* it is both *voluntary* **and** not an exploitation of the unlawful detention." [21]

II. State v. Pichardo

In State v. Pichardo,[22] the Court again ruled in favor of the defense finding no reasonable suspicion existed to justify the prolonged detention of the defendants and that the search conducted in the case was an exploitation of the original stop. The officer initiated a traffic stop on the vehicle driven by Pichardo, which was owned by Reyes (passenger), for failure to maintain a lane.[23] After the officer requested Pichardo's driver's license and the vehicle documentation, Pichardo immediately explained that he had left his license at home and the only reason he was driving was because Reyes was too sleepy to drive.[24] Pichardo further stated that the two were in the process of driving from Miami to New York.[25] The officer issued a warning ticket, returned the paperwork to the driver, but before returning to his patrol car asked if he could ask them another question.[26] When they both turned to him, he explained the situation that they were experiencing with people running contraband on the interstate and then asked for consent to search their car. [27]According to

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[20] *Id.* at 602
[21] *Id.* at 604
[22] *State v. Pichardo*, 367 S.C. 84 (S.C. Ct. App. 2005), 623 S.E. 2d 840
[23] *Id.* at 91
[24] *Id.*
[25] *Id.*
[26] *Id.* at 93
[27] *Id.*

the officer's testimony, both nodded in the affirmative. [28]A subsequent search yielded a kilo of heroin found inside the car door.[29]

The Court looked to the rulings in other cases citing the following language: "Once the purpose of the stop has been fulfilled, the continued detention of the car and the occupants amounts to a second detention" and "[T]he basis for the stop was essentially completed when the dispatcher notified the officers about the defendants' clean records, three minutes before the officers sought consent to search the vehicle…accordingly, the officers should have ended the detention and allowed the defendants to leave and their failure to release the defendants violated the Fourth Amendment.[30] The court referenced U.S. v. Beck, emphasizing "Once the purposes of the initial stop were completed, there is no doubt that the officer could *not* further detain the vehicle or its occupants unless something that occurred during the traffic stop generated the necessary reasonable suspicion to justify a further detention."[31]

The Court then defined "consensual encounter" stating it as "the voluntary cooperation of a private citizen in response to non-coercive questioning by a law enforcement official."[32] The Court noted "because an individual is free to leave at any time during such an encounter, he is not "seized" within the meaning of the Fourth Amendment." [33]The Court also defined the term "seizure" within the meaning of the Fourth Amendment identifying it as when the officer, by means of physical force or show of authority, has in some way restricted the liberty of a citizen. [34]The test for if an encounter constitutes a seizure within the meaning of the Fourth Amendment is whether

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[28] *Id.* at 93
[29] *Id.*
[30] *Id.* at 98-99
[31] *Id.* at 99, citing *United States v. Beck*, 140 F.3d 1129, 1136 (8th Cir. 1998).
[32] *Id.* at 100
[33] *Id.*
[34] *Id.*, citing *Terry v. Ohio*, 392 U.S. 1, 19-20n. 16, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

under the totality of circumstances surrounding the encounter, a reasonable person in the suspect's position would have felt free to decline the officer's requests or otherwise terminate the encounter.[35] The Court in Pichardo ultimately concluded that by prolonging the initial stop beyond its proper scope, the officer rendered the ensuing encounter more coercive than consensual, and the circumstances were sufficiently intimidating such that Pichardo and Reyes could have reasonably believed that they were not free to disregard the police presence and go about their business.[36]

III. Sikes v. State

In Sikes v. State,[37] the South Carolina Supreme Court addressed the issue of the rights of a passenger in a vehicle, finding that a passenger in a vehicle could assert a Fourth Amendment claim based upon an unreasonable detention. In Sikes, the defendant (a passenger in the vehicle) was removed from the vehicle and placed in the back of a patrol car where he was detained for at least twenty minutes while officers ran a warrant check on him.[38] This warrant check revealed that he had an outstanding warrant, and he was arrested on that warrant.[39] When removing Sikes from the patrol vehicle at the police station, crack was found in the seat where he was seated.[40] Sikes argued that he was improperly seized with no reasonable cause. The Court classified the actions of law enforcement as "a blatant violation of Sikes's Fourth Amendment rights."[41] The Court further that "the officers' *reasonable suspicion* that the car was either stolen or that the driver was

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[35] *Id.* at 100-101, citing *Michigan v. Chesternut*, 486 U.S. 567.
[36] *Id.* at 103
[37] Sikes v. State, 323 S.C. 28, 448 S.E.2d 560 (S.C. 1994).
[38] *Id.* at 562
[39] *Id.*
[40] *Id.* at 562-563

[41] *Id.* at 563

uninsured did not give the officers the right to seize or question the car's passenger."[42] The Court went onto to say "even assuming arguendo that this stop was reasonable, certainly a twenty-minute detention while the officers "went fishing" for evidence of some crime was not brief within the definition announced in *Prouse* or *Knight*." [43]

IV. State v. Frasier

In a recent case, State v. Frasier,[44] the Supreme Court of South Carolina reversed the Court of Appeals ruling, finding that the officer in the case lacked reasonable suspicion to prolong the traffic stop and the discovery of the cocaine found on the defendant was the product of an illegal seizure. The Court also found that Frasier did not consent to the search that was conducted.[45]

Frasier was a passenger in a vehicle that was stopped by law enforcement for an inoperable third brake light.[46] The arresting officer (Hall) noted that the driver appeared to be acting suspiciously and he thought she could potentially be hiding contraband because her zipper was down. He also noted that Frasier appeared nervous and was sweating profusely.[47] Upon approach, he asked them a serious of questions about their travel and then requested the license of the driver.[48] The driver informed him that she did not have her license on her but gave him her personal information and dispatched confirmed that she had no outstanding warrants.[49] Hall then informed dispatch that he was going to issue a warning ticket and try to obtain consent to search the vehicle.[50]

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[42] *Id.*
[43] *Id.*
[44] State v. Frasier, 437 S.C. 625, 879 S.E. 2d 762 (S.C. Sup Ct. 2022)
[45] *Id.* at 639
[46] *Id.* at 629
[47] *Id.*
[48] *Id.* at 630
[49] *Id.*
[50] *Id.*

Hall returned to the vehicle and asked the driver to step out and obtained consent to search the car from her.[51] Other officers arrived and two of them approached the passenger side where Frasier was seated. He was asked to step out of the car and told to remove his hands from his pockets as he did so.[52] He is then asked by one of the officers if he minds if he searches him. Frasier's response was "I do but…" and he subsequently placed his hands on the hood of the car at the direction of the officer. [53]He was found to be in possession of a white powdery substance later identified as crack. [54]He was arrested and charged with trafficking cocaine.[55] He was found guilty at trial and the S.C. Court of Appeals affirmed the trial court's findings, the review of the case by our Supreme Court followed.

Frasier's arguments were two-fold. First, he argued that once Hall had written the warning ticket, the legal justification for the stop had ended and nothing the officer relied on established reasonable suspicion to prolong the encounter. [56]Secondly, he argued that he did not give consent to be searched.[57] Our Supreme Court ultimately agreed finding that the prolonged detention of Frasier was not supported by reasonable suspicion.[58] In its analysis, the Court reiterated the following:

1. A person has been *seized* within the meaning of the Fourth Amendment when in light of all the circumstances surrounding an incident a reasonable person would have believed that he was not free to leave.[59]

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[51] *Id.*
[52] *Id.*
[53] *Id. at 630*
[54] *Id.*
[55] *Id.*
[56] *Id.* at 631
[57] *Id.*
[58] *Id.* at 634
[59] *Id.*

2. To prolong or *exceed the scope of a stop* beyond the initial traffic violation, law enforcement *must* have reasonable suspicion that criminal activity may be afoot.[60]

3. Although *reasonable suspicion* is not susceptible to a rigid, formulaic approach, it *requires more than a mere hunch or unparticularized suspicion.*[61]

4. For an officer to have reasonable suspicion, there *must be an objective, specific basis* for suspecting the person stopped of criminal activity.[62]

The Court determined that Hall had not seen any items that would demonstrate potential criminal activity - such as cash on hand, hollowed out blunt cigars, or the smell of marijuana - before he decided to extend the stop. [63]

The Court noted that "warrantless searches are generally considered per se unreasonable unless they fall within a recognized exception under the Fourth Amendment.[64] It identified one of those exceptions as "consent" but noted that the State bears the burden of proving the voluntariness of the consent to search from the totality of the surrounding circumstances.[65] It emphasized that law enforcement must obtain consent *voluntarily* which is a fact intensive inquiry. [66]The Court stated that Frasier's conduct (i.e. his alleged consent) was at the direction of the officer and not a voluntary decision.[67]

C. Analysis & Application to Our Facts

If this Court follows the precedent established in the above and adheres to the principles set out in the Fourth Amendment of the United States Constitution and Article I, Section 10, of the

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[60] *Id.*
[61] *Id.*at 635
[62] *Id.*
[63] *Id.* at 637
[64] *Id.*at 638
[65] *Id.*
[66] *Id.*
[67] *Id.* at 639

South Carolina Constitution, then the evidence in this case should be suppressed. As a mere passenger in a vehicle subjected to a traffic stop for a minor traffic violation, Anderson should have never been detained. He had done nothing wrong and was not acting in a suspicious manner that would justify his detention.

There should be no question that the purpose of this traffic stop was complete when the driver was arrested, and nothing occurred after that event which would provide the reasonable suspicion needed to justify further detention. Although Anderson never asked if he could leave the the surrounding circumstances coupled with the actions of law enforcement told him that he could not leave. He was removed from the vehicle and told by law enforcement that "they would get him out of there shortly" – a statement that suggests that he was not free to simply walk away instead it suggests that he needed their permission to do so.

This traffic stop was prolonged after the purpose of the stop had been fulfilled and this was done without sufficient legal justification leading to Anderson's unlawful seizure. The discovery of the drug evidence in this case occurred during this period of unlawful detention and was the product of this unlawful seizure. Therefore, the Defense respectfully requests that this Court suppress all drug evidence in this case after issuing a finding that it was illegally obtained in violation of the Fourth Amendment of the United States Constitution and Article One, Section 10, of the South Carolina Constitution. Additionally, the Defense would respectfully request that this Court take immediate action to end Anderson's unlawful detention by dismissing all the above-referenced charges as he has remained incarcerated, unable to afford bond, since his arrest - May 6, 2023.

Respectfully submitted,

Melinda Knowles
Attorney for the Defendant

January 12, 2024

351 S.C. 591
571 S.E.2d 703

The STATE, Appellant,
v.
Donovan WILLIAMS, Respondent.

No. 3550.

Court of Appeals of South Carolina.

Submitted May 6, 2002.

Decided September 9, 2002.

Rehearing Denied November 21, 2002.

[351 S.C. 594]

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan and W. Rutledge Martin, all of Columbia; and Solicitor Ralph E. Hoisington, of N. Charleston, for appellant.

Peter David Brown, of Mount Pleasant, for respondent.

[351 S.C. 595]

SHULER, J.:

The State appeals the trial court's ruling suppressing twenty-five pounds of marijuana found in Donovan Williams' possession as the product of an illegal search. We affirm.

FACTS/PROCEDURAL HISTORY

On Sunday April 4, 1999, Officer Robert Blajszczak of the Moncks Corner Police Department was conducting stationary radar on Highway 52 in Berkeley County. Around 9:00 a.m. he received a "be on the lookout" dispatch involving a "green on tan" Ford Explorer allegedly being operated without the owner's consent. Soon afterward Blajszczak spotted a similar Explorer and followed it.

Because Blajszczak did not know the tag number of the suspect Explorer, he ran a license plate check. The check revealed the vehicle was registered to Dwayne Anthony Barbour and that it was not the vehicle in question. It did, however, disclose that the vehicle's license tag had been suspended for lack of insurance. As a result, Blajszczak stopped the Explorer for a possible insurance violation.

Blajszczak approached and asked the driver, Dwayne Barbour, for his driver's license, registration, and proof of insurance. As part of his standard procedure, Blajszczak ran a driver's license check and discovered that although Barbour's recent driving record was clean, his license previously had been suspended in 1995 for a controlled substance violation. Blajszczak returned and asked Barbour to step outside the vehicle while he issued a citation for the tag violation. Barbour's passenger remained seated in the vehicle.

At the rear of the vehicle, Blajszczak wrote and explained the ticket to Barbour. He then returned Barbour's license and registration and stated: "[B]efore you leave, let me ask you a few questions." Blajszczak proceeded to ask Barbour a series of questions, such as where he was coming from and where he was headed. He also asked Barbour the name of his passenger and what their relationship was.

As Blajszczak was speaking with Barbour, a K-9 officer in a marked patrol unit whom Blajszczak had radioed arrived as backup. Blajszczak directed this officer to stand with Barbour

[351 S.C. 596]

while he questioned Barbour's passenger, Donovan Williams. According to Blajszczak, he became suspicious when Barbour and Williams gave inconsistent answers to his questions. These inconsistencies, combined with Barbour's previous license suspension, led Blajszczak to request consent to search the vehicle.

Barbour consented to the search and Blajszczak discovered an open bottle of cognac behind the driver's seat. In the Explorer's cargo area, he found a black suitcase; Williams acknowledged ownership and consented to a search of its contents. He gave Blajszczak the key, and when Blajszczak had trouble opening the case, Williams opened it for him. Inside, Blajszczak found miscellaneous clothes and a large white block of an unknown substance. Williams admitted it was marijuana. Following verification by the canine at the scene, Blajszczak seized the item and immediately arrested Barbour and Williams. He also cited both men for the open container violation. Subsequent analysis revealed the substance to be twenty-five pounds of marijuana.

On June 30, 1999, a Berkeley County grand jury indicted Williams for trafficking more than ten pounds of marijuana. Williams moved to suppress the drug evidence, arguing it was obtained as the result of an illegal search. The trial court held a suppression hearing on July 18, 2000.

At the hearing, Blajszczak testified his normal procedure when issuing a traffic citation is to return the driver's license, explain the ticket, ask the driver if he has any questions, and then advise him to have a good or a safe day and allow him to leave. Blajszczak, however, admitted he did not follow his normal procedure in this case. In addition, Blajszczak agreed his only basis for questioning Barbour further was Barbour's prior license suspension for a drug violation. According to Blajszczak, that was a "warning sign . . . or a flag."

The trial court granted Williams' motion to suppress, finding the search illegal because Blajszczak lacked reasonable suspicion to question Barbour and Williams beyond the scope of the traffic stop. The court specifically found they were not free to leave under the totality of the circumstances, because "once they get past the ticket . . . anything from that point

[351 S.C. 597]

forward is an investigation and is custodial." The State appeals this ruling.

LAW/ANALYSIS

Standard of Review

In *State v. Brockman*, 339 S.C. 57, 528 S.E.2d 661 (2000), our supreme court articulated the standard of review to apply to a trial court's determination that a search was private such that it did not fall within the parameters of the Fourth Amendment. In so doing, the court specifically rejected the de novo standard set forth in *Ornelas v. United States*, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996) for reviewing determinations of reasonable suspicion and probable cause in the context of warrantless searches and seizures. Instead, the court stated it would "review the trial court's ruling like any other factual finding and reverse if there is clear error," and would therefore "affirm if there is any evidence to support the ruling." *Brockman*, 339 S.C. at 66, 528 S.E.2d at 666.

Subsequently, in *State v. Green*, 341 S.C. 214, 532 S.E.2d 896 (Ct.App.2000), this Court declared that *Brockman* "determined the appellate standard of review in Fourth Amendment search and seizure cases is limited to determining whether any evidence supports the trial court's finding and the appellate court may only reverse where there is clear error." *Green*, 341 S.C. at 219 n. 3, 532 S.E.2d at 898 n. 3. Accordingly, we will apply an "any evidence" standard to the ruling below.

Discussion

The State argues the trial court erred in suppressing the marijuana because Blajszczak "was not required to have reasonable suspicion to question" Barbour and Williams. According to the State, Blajszczak merely engaged the men in a consensual encounter and thus properly obtained consent to search. We disagree.

The Fourth Amendment guarantees "[t]he right of the people to be secure . . . [from] unreasonable searches and seizures." U.S. Const. amend IV; *see State v. Butler*, 343 S.C. 198, 539 S.E.2d 414 (Ct.App.2000). "Temporary detention of individuals during the stop of an automobile by the police,

[351 S.C. 598]

even if only for a brief period and for a limited purpose, constitutes a `seizure' of `persons' within the meaning of [the Fourth Amendment]." *Whren v. United States*, 517 U.S. 806, 809-10, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). Thus, an automobile stop is "subject to the constitutional imperative that it not be `unreasonable' under the circumstances." *Id.* at 810, 116 S.Ct. 1769. Where probable cause exists to believe that a traffic violation has occurred, the decision to stop the automobile is reasonable per se. *Id.*

;Williams concedes Blajszczak had probable cause to stop the Explorer. He contends, however, that once the traffic stop was concluded, Blajszczak needed a reasonable suspicion that some further criminal activity was afoot in order to begin questioning Barbour.

Once a motor vehicle is detained lawfully for a traffic violation, the police may order the driver to exit the vehicle without violating Fourth Amendment proscriptions on unreasonable searches and seizures. *Pennsylvania v. Mimms*, 434 U.S. 106, 111 n. 6, 98 S.Ct. 330, 54 L.Ed.2d 331 (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.'" *United States v. Sullivan*, 138 F.3d 126, 131 (4th Cir.1998) (citation omitted). However, "[a]ny

further *detention* for questioning is beyond the scope of the [] stop and therefore illegal unless the officer has a reasonable suspicion of a serious crime." *Id.* (emphasis added); *see Florida v. Royer*, 460 U.S. 491, 500, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) (plurality opinion) ("[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop."); *Ferris v.* State, 355 Md. 356, 735 A.2d 491, 499 (1999) ("Once the purpose of [the] stop has been fulfilled, the continued detention of the car and the occupants amounts to a second detention.").[1] The question, then, is

[351 S.C. 599]

whether Blajszczak detained, i.e. "seized" Williams anew, thereby triggering the Fourth Amendment and possibly rendering his consent invalid, or simply initiated a consensual encounter invoking no constitutional scrutiny. *See Ferris*, 735 A.2d at 500 (stating the difficult question was whether the trooper's questioning of Ferris after he issued a citation and returned his driver's license and registration "constituted a detention, and hence raise[d] any Fourth Amendment concerns, or was merely a `consensual encounter[. . . implicating no constitutional overview").[2]

It is well settled that "mere police questioning does not constitute a seizure" for Fourth Amendment purposes. *Florida v. Bostick*, 501 U.S. 429, 434, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991); *see State v. Culbreath*, 300 S.C. 232, 237, 387 S.E.2d 255, 257 (1990) ("Not all personal encounters between policemen and citizens involve `seizures' of persons thereby bringing the Fourth Amendment into play.") (citations omitted), *abrogated on other grounds by Horton v. California*, 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990). To the contrary, "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of

[351 S.C. 600]

a citizen may we conclude that a `seizure' has occurred." *Terry v. Ohio*, 392 U.S. 1, 19-20 n. 16, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). "So long as a person remains at liberty to disregard a police officer's request for information, no constitutional interest is implicated." *Sullivan*, 138 F.3d at 132 (citations omitted).

The test for determining if a particular encounter constitutes a seizure is whether "`in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" *Michigan v. Chesternut*, 486 U.S. 567, 573, 108 S.Ct. 1975, 100 L.Ed.2d 565 (1988) (citation omitted); *see Sullivan*, 138 F.3d at 132 ("The test . . . [is] whether, under the totality of the circumstances surrounding the encounter, a reasonable person in the suspect's position `would have felt free to decline the officer's requests or otherwise terminate the encounter.'") (citations omitted). It is necessarily imprecise, "because it is designed to assess the coercive effect of police conduct" taken as a whole. *Chesternut*, 486 U.S. at 573, 108 S.Ct. 1975. Thus, exactly what constitutes a restraint on liberty sufficient to lead a reasonable person to conclude he is not free to leave varies with the setting in which the police conduct occurs. *Id.*

Reasonableness "is measured in objective terms by examining the totality of the circumstances." *Ohio v. Robinette*, 519 U.S. 33, 39, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996). As a result, the nature of the reasonableness inquiry is highly fact-specific. *Id.* Although no single factor dictates whether a seizure has occurred, courts have identified certain probative factors, including the time and place of the encounter, the number of officers present and whether they were uniformed, the length of the detention, whether the officer moved the person to a different location or isolated him from others, whether the officer informed the person he was free to leave, whether the officer indicated to the person that he was suspected of a crime, and whether the officer retained the person's documents or exhibited threatening behavior or physical contact. *See United States v. Beck*, 140 F.3d 1129 (8th Cir.1998); *Ferris*, 735 A.2d at 502 (citations omitted).

In deciding whether Williams was seized for purposes of the Fourth Amendment, it must be noted that "the detention

[351 S.C. 601]

associated with roadside searches is unlike a `mere field interrogation' where an officer may question an individual `without grounds for suspicion.' Roadside consent searches are instead more akin to an investigatory stop that does involve a detention." *State v. Carty*, 170 N.J. 632, 790 A.2d 903, 908 (2002) (citations omitted). As the Maryland Court of Appeals has stated, a traffic stop, or pre-existing seizure, "enhance[s] the coercive nature of the situation and the efficacy of the other factors in pointing toward the restriction" of liberty. *Ferris*, 735 A.2d at 502. Such a situation, therefore, is "markedly different from that of a person passing by or approached by law enforcement officers on the street, in a public place, or inside the terminal of a common carrier." *Id.* (citations omitted).

When asked at the suppression hearing if Barbour was free to leave before answering the additional questions, Blajszczak replied that "[t]here was nothing stopping him from leaving." While that may technically be correct, we believe Blajszczak, by prolonging the initial stop beyond its proper scope, rendered the ensuing encounter more coercive than consensual. As the Ohio Supreme Court explained:

> "The transition between detention and a consensual exchange can be so seamless that the untrained eye may not notice that it has occurred. The undectability of that transition may be used by police officers to coerce citizens into answering questions that they need not answer, or to allow a search of a vehicle that they are not legally obligated to allow."

State v. Robinette, 80 Ohio St.3d 234, 685 N.E.2d 762, 770-71 (1997) (citation omitted); *see Ferris*, 735 A.2d at 503 ("The moment at which a traffic stop concludes is often a difficult legal question, not readily discernible by a layperson. It is not sound to categorically impute to all drivers the constructive knowledge as to the precise moment at which, objectively, an initially lawful traffic stop terminates, *i.e.*, the time at which the driver may depart.").

The facts encompassi[illegible]jszczak's questioning of Barbour and Williams support th[illegible]clusion that the men were in fact seized. Blajszczak admitted he initially asked Barbour to step to the rear of the Explorer so that he could

[351 S.C. 602]

speak with him privately. When asked why, Blajszczak responded that it was because of his law enforcement training. In particular, Blajszczak testified he brought Barbour to the rear of the vehicle so that Williams would not "hear any questions or any answers to any questions" he was asking. He explained that he was taught to follow a line of questioning that might build to a point where he had sufficient reasonable suspicion to ask for consent to search. Hence, at this point the encounter began to assume the tenor of an investigation.

We recognize the Constitution does not require an officer to inform a motorist he is free to leave before obtaining consent. *See Robinette,* 519 U.S. at 35, 117 S.Ct. 417 (rejecting per se rule that would render consent involuntary if an officer failed to advise a motorist he was free to go before requesting consent). However, the Supreme Court in *Robinette* reiterated that such advice was one factor to consider in the overall analysis. *Id.* at 39, 117 S.Ct. 417. Significantly, in this case not only did Blajszczak fail to tell Barbour the traffic stop had concluded and he could go, he specifically stated: *"[B]efore you leave,* let me ask you a few questions." In our view, this statement indicated Barbour was not free to leave, despite Blajszczak's contrary testimony at the suppression hearing.

Furthermore, the following circumstances surrounding the encounter lend additional support to our conclusion: the roadside traffic stop; the presence of two uniformed patrol officers in marked, flashing vehicles, one of them part of a K-9 unit; the fact Blajszczak detained Barbour and Williams between twenty-five and forty minutes, as opposed to a normal stop which Blajszczak testified would last approximately nine to eleven minutes, and otherwise did not follow his usual procedure for a traffic stop; the fact Blajszczak asked Barbour to exit the Explorer so that he could talk to him and Williams separately; that Blajszczak asked the K 9 officer to stand beside Barbour at the rear of the vehicle while he questioned Williams; and the seemingly innocuous but immediate transition from the valid traffic stop such that Barbour and Williams may not have realized the initial seizure had ended.

We believe these circumstances were sufficiently intimidating such that Williams "could reasonably have believed that he

[351 S.C. 603]

was not free to disregard the police presence and go about his business." *Chesternut,* 486 U.S. at 576, 108 S.Ct. 1975; *see People v. In Interest of H.J.,* 931 P.2d 1177, 1181 (Colo.1997) *(en banc)* ("It strains credulity to imagine that any citizen, directly on the heels of having been pulled over to the side of the road by armed and uniformed police officers in marked patrol cars, would ever feel `free to leave' or `at liberty to ignore the police presence and go about his business.'") (citations omitted); *compare Ferris,* 735 A.2d at 502-03 (enumerating several factors that transmuted a valid traffic stop into an unlawful detention, including the trooper's failure to inform Ferris he was free to leave, the trooper's "request" that Ferris step "to the back of his vehicle to answer a couple of questions," the detention seamlessly followed a pre-existing lawful stop, the trooper removed Ferris from his automobile and separated him from his passenger, the presence of two uniformed law enforcement officers, and the fact that the police cruiser emergency flashers remained operative throughout the entire encounter) (footnote omitted), *with Sullivan,* 138 F.3d at 133 (finding brief questioning of defendant after officer returned driver's license and registration was consensual and did not constitute a seizure under the Fourth Amendment; court noted that defendant remained in his own car throughout the questioning and found it significant that there was no indication the officer "employed any physical force or engaged in any outward displays of authority" indicating the defendant was being detained).

Even under the court's analysis in *Sullivan,* however, a routine stop "constitute[s] a Fourth Amendment seizure so that when the purpose justifying the stop is exceeded, the detention becomes illegal unless a reasonable suspicion of some other crime exists." *Sullivan,* 138 F.3d at 131; *see State v. Robinson,* 306 S.C. 399, 402, 412 S.E.2d 411, 413 (1991) ("To justify a brief stop [or] detention, the police officer must have a reasonable suspicion that the person has been involved in criminal activity."). Here, the only indication of a possible further crime, according to Blajszczak's own testimony, was the prior suspension of Barbour's license for a drugrelated offense. This fact, of course, was in no way probative of a present crime, and thus could not serve as the basis for a reasonable suspicion. *See United States v. Jones,* 234 F.3d

[351 S.C. 604]

234 (2000) (stating there was no reason to further detain defendants following a traffic stop because a prior arrest or criminal record alone does not amount to reasonable suspicion).

Having determined Williams was seized without reasonable suspicion, we now review the circumstances of the detention to decide whether his consent to search the suitcase was valid.

It is well settled that "[w]arrantless searches and seizures are reasonable within the meaning of the Fourth Amendment when conducted under the authority of voluntary consent." *Palacio v.* State, 333 S.C. 506, 514, 511 S.E.2d 62, 66 (1999). Undoubtedly, a law enforcement officer may request permission to search at any time. However, when an officer asks for consent to search *after* an unconstitutional detention, the consent procured is per se invalid unless it is "both voluntary *and* not an exploitation of the unlawful [detention]." *State v. Robinson,* 306 S.C. 399, 402, 412 S.E.2d 411, 414 (1991); *see Wong Sun v. United States,* 371 U.S. 471, 487-88, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) ("We need not hold that all evidence is `fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is `whether, granting

establishment of the prima [illegible]ality, the evidence to which instant objection is made has [illegible]come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'") (citation omitted); *Brown v.* State, 188 Ga.App. 184, 372 S.E.2d 514, 516 (1988) ("[I]n order to eliminate any taint from an [illegal] seizure or arrest, there must be proof both that the consent was voluntary and that it was not the product of the illegal detention."). As the Georgia Court of Appeals stated in *Brown:*

> Proof of a voluntary consent alone is not sufficient. The relevant factors include the temporal proximity of [the] illegal seizure and consent, intervening circumstances, and the purpose and flagrancy of the official misconduct.

Brown, 372 S.E.2d at 516.

In the instant case, we need not determine whether Williams' consent was voluntary, because the record clearly reflects it was obtained through Blajszczak's exploitation of

[351 S.C. 605]

the unlawful detention. Blajszczak's testimony before the trial court revealed that a minimal amount of time passed between the seizure and ensuing consent, there were no intervening or attenuating circumstances, and, as we have already decided, Blajszczak's actions in detaining Barbour and Williams had no legal basis. Although the trial court failed to reach the issue of consent, the record unquestionably supports finding Williams' consent invalid. *See id.; Robinson*, 306 S.C. at 402, 412 S.E.2d at 414; *Brown*, 372 S.E.2d at 516 ("[W]e find that there was no significant lapse of time between the unlawful detention and the consent, that no intervening circumstances dissipated the effect of the unlawful detention and that the deputy's conduct had no arguable legal basis. Therefore, we hold that the consent was the product of the illegal detention, and that the taint of the unreasonable stop was not sufficiently attenuated."); *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000) (stating an appellate court may affirm for any reason appearing in the record on appeal).

The marijuana found in Williams' suitcase was discovered through an illegal detention accompanied by a lack of valid consent. The trial court, therefore, did not err in suppressing the evidence. *See Robinson*, 306 S.C. at 402, 412 S.E.2d at 414 (suppressing drug evidence as the fruit of an unlawful stop because no attenuating circumstances removed the taint of the illegality from the consent to search); *State v. Greene*, 330 S.C. 551, 559, 499 S.E.2d 817, 821 (Ct.App.1997) ("The fruit of the poisonous tree doctrine holds that where evidence would not have come to light but for the illegal actions of the police, and the evidence has been obtained by the exploitation of that illegality, the evidence must be excluded."); *People v. Brownlee*, 186 Ill.2d 501, 239 Ill.Dec. 25, 713 N.E.2d 556 (1999) (suppressing marijuana as fruit of an illegal detention, where officers legitimately stopped vehicle for investigation of a traffic violation but after returning driver's license and insurance card and stating no citation would be issued officers paused for a couple of minutes and then asked for and obtained consent to search the vehicle, because during this time the driver and his passengers were detained without reasonable suspicion of any criminal activity).

AFFIRMED.

HEARN, C.J., and CONNOR, J., concur.

Notes:

1. Other federal and state courts have reached a similar conclusion. *See, e.g., United States v. Jones*, 234 F.3d 234, 241 (5th Cir.2000) ("The basis for the stop was essentially completed when the dispatcher notified the officers about the defendants' clean records, three minutes before the officers sought consent to search the vehicle. Accordingly, the officers should have ended the detention and allowed the defendants to leave. And the failure to release the defendants violated the Fourth Amendment."); *United States v. Beck*, 140 F.3d 1129, 1136 (8th Cir.1998) ("Because the purposes of [the officer's] initial traffic stop of Beck had been completed . . . [the officer] could not subsequently detain Beck unless events that transpired during the traffic stop gave rise to reasonable suspicion to justify [the officer's] renewed detention of Beck."); *United States v. Mesa*, 62 F.3d 159, 162 (6th Cir.1995) ("Once the purposes of the initial traffic stop were completed, there is no doubt that the officer could not further detain the vehicle or its occupants unless something that occurred during the traffic stop generated the necessary reasonable suspicion to justify a further detention."); *People v. Redinger*, 906 P.2d 81, 85-86 (Colo.1995) *(en banc)* ("When, as here, the purpose for which the investigatory stop was instituted has been accomplished and no other reasonable suspicion exists to support further investigation, there is no justification for continued detention and interrogation of citizens."); *Davis v. State*, 947 S.W.2d 240, 243 (Tex.Crim.App.1997) *(en banc)* ("[O]nce the reason for the stop has been satisfied, the stop may not be used as a 'fishing expedition for unrelated criminal activity.'") (citations omitted).

2. "A consensual encounter has been defined as simply the voluntary cooperation of a private citizen in response to non-coercive questioning by a law enforcement official. Because an individual is free to leave at any time during such an encounter, he is not 'seized' within the meaning of the [Fourth] Amendment." *Ferris*, 735 A.2d at 500 n. 4 (citations omitted).

No. 4036
Court of Appeals of South Carolina

State v. Pichardo

367 S.C. 84 (S.C. Ct. App. 2005) · 623 S.E.2d 840
Decided Oct 31, 2005

No. 4036.

Heard October 12, 2005.

Decided October 31, 2005. Rehearing Denied January 19, 2006.

Appeal from the Circuit Court, Colleton County,
85 Perry M. Buckner, III, J. *85

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia; and Solicitor Randolph Murdaugh, III, of Hampton, for Appellant.

Acting Chief Attorney Joseph L. Savitz, III, of Columbia, for Respondent Victor Pichardo.

James G. Longtin, of Walterboro, for Respondent
92 Lorenzo Victoria Reyes. *92

91 *91

ANDERSON, J.:

Victor Pichardo and Lorenzo Victoria Reyes were indicted for trafficking in heroin. Prior to trial, Pichardo and Reyes made separate and identical motions to suppress drug evidence discovered in the search of Reyes' automobile. The circuit judge granted the motions. The State appeals the order suppressing the drug evidence. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

On September 18, 2002, Pichardo and Reyes were traveling north on I-95 in a vehicle owned by Reyes. Pichardo was driving the vehicle and Reyes was in the front passenger seat. Colleton County Sheriff's Deputy Christopher Stevers stopped the vehicle "[f]or failure to maintain a lane." Pichardo told Stevers that Reyes owned the vehicle and that he was driving because Reyes was sleepy.

Deputy Stevers called Deputy William G. Polk for backup. Stevers asked Polk if he could speak Spanish to assist the interrogation.

Deputy Stevers requested Pichardo's license. Pichardo stated he left his license at home. Pichardo informed Stevers that he and Reyes were traveling from Miami to New York City. Stevers advised Pichardo that he was going to give him "a warning ticket for no license." Stevers asked Pichardo to exit the vehicle and stand behind the trunk so he could give him the warning ticket.

Deputy Stevers then approached Reyes and asked for his license and the vehicle registration, which Reyes handed to Stevers. Deputy Stevers "noticed a lot of nervousness about Mr. Reyes while he was sitting in the front seat of the car." Stevers asked Reyes to exit the vehicle and stand behind the trunk with Pichardo. Stevers instructed Reyes that he would have to drive since Pichardo did not have his driver's license with him.

Reyes related to Stevers that he and Pichardo had been in Miami and were driving to New York, where they live. Reyes walked to the rear of the car to exchange positions with Pichardo as driver.

At that time, Deputy Stevers: (1) told the men to have a good day and be careful; (2) shook
93 Pichardo's *93 hand; (3) returned their paperwork; and (4) turned away from the men. Stevers then turned back around and "asked [Pichardo and Reyes] if [he] could ask them a question and they both turned to [him]." Stevers "explained to them the situation that we have on I-95, especially since 9-11, with persons running illegal contraband up and down the highway and weapons and so forth . . . and then asked both of them for consent to search the vehicle." Stevers declared Pichardo and Reyes "both nodded in the affirmative." Pichardo claimed he "told [Stevers], I got no problem with that but this is not my car."

After Deputy Polk arrived, he initiated a pat-down of Pichardo and Reyes for safety purposes. Deputy Polk asked Pichardo and Reyes if they had a "pistola." Polk stated: "That's what I normally do when I have Spanish persons."

During the search of the vehicle, Stevers discovered "a kilo" of heroin hidden inside the right rear passenger door.

At the suppression hearing, Pichardo testified that Reyes "don't speak English at all." Pichardo professed that, when he and Reyes are together, Pichardo "talk[s] most of the time for him because he don't understand [English]." Pichardo, who speaks English, said Reyes does not use English except for an occasional request for a cigarette or "a couple of words" like "yes or no but understanding any conversation at all is difficult." Pichardo was not asked to translate anything for Reyes when the stop occurred. According to Pichardo, when Reyes joined him at the rear of the vehicle, Reyes asked Pichardo "what the officer was asking." Pichardo told Reyes that Deputy Stevers "was trying to argue permission to search the car." Pichardo informed Reyes he told the deputy that he did not object to the search but that the car belonged to Reyes. Pichardo claimed Stevers did not ask Reyes for consent to search. Pichardo declared Stevers "went straight to the car."

Sharon Folk, an interpreter and expert in Spanish language and Spanish culture and a professor at the University of South Carolina, Salkehatchie campus, opined that Reyes spoke little or no English, did not "understand" English and had a
94 very limited education. *94

Reyes testified, through an interpreter, that he speaks "very little" English. He explained he could not understand any of the questions Stevers asked him. He stated that, on the day he was stopped on the interstate, no one asked him for permission to search his vehicle. Reyes declared he "didn't know that they were going to look in the car." When asked if he gave the police permission to search his car, Reyes replied: "No, because I didn't understand what they were saying." Reyes is originally from the Dominican Republic and has maintained a permanent residence in the United States for only three years.

Reyes presented affidavits from several inmates that were in the Colleton County jail with him. These affidavits attested to Reyes' reliance on Spanish for communication.

Deputy Stevers testified regarding his conversation with Reyes. When Stevers asked Reyes for the vehicle registration, Reyes handed it to him. While sitting in the vehicle, Reyes related that he and Pichardo had been visiting family in Miami and were driving to New York City. Stevers stated that, when he asked if he could search the vehicle, Reyes "nodded in the affirmative and said yes or something to that effect." Stevers opined that Reyes "understood what [he] was asking for."

At the hearing, the Solicitor stipulated Deputy Stevers did not tell Pichardo and Reyes they were free to leave. The Solicitor declared: "Your Honor, now that I've reviewed my report here, I had another case that Stevers was involved in, and I

believe your recollection is correct here that he told him to have a good day. He did not say you're free to go." Stevers testified: "I told [Pichardo] to have a good day, they were free to go."

A stipulation is an agreement, admission or concession made in judicial proceedings by the parties thereto or their attorneys. *Porter v. South Carolina Pub. Serv. Comm'n*, 333 S.C. 12, 507 S.E.2d 328 (1998); *Kirkland v. Allcraft Steel Co.*, 329 S.C. 389, 496 S.E.2d 624 (1998); *South Carolina Dep't of Transp. v. Richardson*, 335 S.C. 278, 516 S.E.2d 3 (Ct.App. 1999). Stipulations are binding upon those who make them. *Id.; see also Webster v. Holly Hill Lumber Co.*, 268 S.C. 416, 95 234 S.E.2d 232 (1977) (stating a stipulation is *95 an agreement, an understanding, that is to be construed like a contract, to effect the intent of the parties); *State v. Anderson*, 318 S.C. 395, 399-400, 458 S.E.2d 56, 58 (Ct.App. 1995) ("Generally, a stipulation is an agreement between the parties to which there must be mutual assent."); *Black's Law Dictionary* 1415 (6th ed. 1990) (defining a stipulation as a "[v]oluntary agreement between opposing counsel concerning disposition of some relevant point so as to obviate need for proof or to narrow range of litigable issues."). The court must accept stipulations as binding upon the parties.

After hearing oral arguments and reviewing briefs and video evidence, the circuit judge found "the stop was legal and the defendant[s] properly detained." The judge concluded the search was "an exploitation of the original stop." He ruled "there was no reasonable suspicion to further detain or question [Pichardo and Reyes] after Pichardo was given the warning ticket." The judge determined: "I find that [voluntary consent] has not been shown here even by a preponderance of the evidence. As such, I cannot infer voluntary consent and must find that no such voluntary consent was given and that the search is invalid." Finally, the judge held the search was improper because it was "not based upon probable cause or suspicion and was still with the scope of the traffic stop and exploitive of that stop . . .; and that no voluntary consent by Reyes, the foreign speaking owner of the vehicle was ever obtained." The judge suppressed all evidence obtained in the search of Reyes' automobile.

STANDARD OF REVIEW

The appellate standard of review in Fourth Amendment search and seizure cases is limited to determining whether any evidence supports the trial court's finding. *State v. Brockman*, 339 S.C. 57, 528 S.E.2d 661 (2000); *State v. Jones*, 364 S.C. 51, 610 S.E.2d 846 (Ct.App. 2005); *State v. Green*, 341 S.C. 214, 532 S.E.2d 896 (Ct.App. 2000). The appellate court may only reverse where there is clear error. *Id.; see also State v. Wilson*, 345 S.C. 1, 545 S.E.2d 827 (2001) (holding in a criminal case the appellate court is bound by the trial court's preliminary factual findings in determining the admissibility of certain evidence 96 unless the findings are clearly *96 erroneous, and its review extends only to determining whether the trial judge abused his discretion).

The "clear error" standard means that an appellate court will not reverse a trial court's finding of fact simply because it would have decided the case differently. *Easley v. Cromartie*, 532 U.S. 234, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001). Rather, the appellate court must ask whether, on the entire evidence, it is left with the definite and firm conviction that a mistake has been committed. *Id.*

An appellate court must affirm the trial court's ruling if there is *any* evidence to support the ruling. *Brockman*, 339 S.C. at 66, 528 S.E.2d at 666. Accordingly, we will apply an "any evidence" standard to the circuit judge's ruling. *See State v. Williams*, 351 S.C. 591, 571 S.E.2d 703 (Ct.App. 2002).

LAW/ANALYSIS

I. Right to Appeal

Initially, we determine whether the State has the right to appeal the judge's order suppressing the drug evidence.

In South Carolina, the State's right to appeal is defined by our judicial decisions, not statutory law. *State v. McKnight*, 353 S.C. 238, 577 S.E.2d 456 (2003). Thus, the State's right to appeal in a criminal case is a judicially created right. *State v. Belviso*, 360 S.C. 112, 600 S.E.2d 68 (Ct.App. 2004).

Our Supreme Court has recognized limited situations where the State may appeal. *State v. Holliday*, 255 S.C. 142, 177 S.E.2d 541 (1970). A pre-trial order granting the suppression of evidence which significantly impairs the prosecution of a criminal case is directly appealable. *State v. Mabe*, 306 S.C. 355, 412 S.E.2d 386 (1991); *State v. McKnight*, 287 S.C. 167, 337 S.E.2d 208 (1985); *State v. Henry*, 313 S.C. 106, 432 S.E.2d 489 (Ct.App. 1993); *see also* S.C. Code Ann. § 14-3-330(2)(a) (1977) ("The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal . . . [a]n order affecting a substantial right made in an action when such order . . . in effect determines the action and
97 prevents a judgment from which an *97 appeal might be taken or discontinues the action."). The State has the right to immediately appeal a trial court's suppression of evidence which significantly impairs the prosecution of the case. *Belviso*, 360 S.C. at 115, 600 S.E.2d at 70.

There is *no* direct statement emanating from the State in regard to an allegation that the order will significantly impair the prosecution of its case. However, factually and legally, if this court affirms the order of the circuit judge, the prosecution of the case against Pichardo and Reyes is eviscerated and annihilated.

II. Search of Reyes' Vehicle

The State argues the trial court erred in suppressing the evidence obtained from a search of Reyes' vehicle. The State claims the court's findings that the search exploited the traffic stop and there was no voluntary consent by Reyes are not supported by the record. We disagree.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend IV; *see State v. Woodruff*, 344 S.C. 537, 544 S.E.2d 290 (Ct.App. 2001). Thus, the Fourth Amendment protects against unreasonable searches and seizures, including seizures that involve only a brief detention. *United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980).

Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a seizure of persons within the meaning of the Fourth Amendment. *Whren v. United States*, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996); *State v. Maybank*, 352 S.C. 310, 573 S.E.2d 851 (Ct.App. 2002). Thus, an automobile stop is "subject to the constitutional imperative that it not be `unreasonable' under the circumstances." *Whren*, 517 U.S. at 810, 116 S.Ct. 1769. Where probable cause exists to believe that a traffic violation has occurred, the decision to stop the automobile is reasonable per se. *Id.* The police may also stop and briefly detain a vehicle if they
98 have a reasonable suspicion that the occupants *98 are involved in criminal activity. *State v. Butler*, 343 S.C. 198, 539 S.E.2d 414 (Ct.App. 2000).

The testimony of Deputy Stevers was that he stopped the vehicle because Pichardo failed to maintain his lane. This evidence was not challenged. The vehicle was legally stopped and Pichardo and Reyes detained. However, Pichardo and Reyes contend that, once the traffic stop was concluded, Deputy Stevers needed a reasonable suspicion that some further criminal activity was afoot in order to begin questioning Pichardo and Reyes.

Once a motor vehicle is detained lawfully for a traffic violation, the police may order the driver to exit the vehicle without violating Fourth Amendment proscriptions on unreasonable searches and seizures. *Pennsylvania v. Mimms*,

434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977); *State v. Williams*, 351 S.C. 591, 571 S.E.2d 703 (Ct.App. 2002). In carrying out the stop, an officer may request a driver's license and vehicle registration, run a computer check, and issue a citation. *United States v. Sullivan*, 138 F.3d 126 (4th Cir. 1998). However, any further detention for questioning is beyond the scope of the stop and therefore illegal unless the officer has a reasonable suspicion of a serious crime. *Id.*

An investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop and the scope of the detention must be carefully tailored to its underlying justification. *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). The officer's purpose in an ordinary traffic stop is to enforce the laws of the roadway, and ordinarily to investigate the manner of driving with the intent to issue a citation or warning. *Ferris v. State*, 355 Md. 356, 735 A.2d 491 (1999). Once the purpose of that stop has been fulfilled, the continued detention of the car and the occupants amounts to a second detention. *Id.; see also United States v. Jones*, 234 F.3d 234, 241 (5th Cir. 2000) ("The basis for the stop was essentially completed when the dispatcher notified the officers about the defendants' clean records, three minutes before the officers sought consent to search the vehicle. Accordingly, the officers should have ended the detention and allowed the defendants to leave. And the failure to release the defendants violated
99 the *99 Fourth Amendment."); *United States v. Mesa*, 62 F.3d 159, 162 (6th Cir. 1995) ("Once the purposes of the initial traffic stop were completed, there is no doubt that the officer could not further detain the vehicle or its occupants unless something that occurred during the traffic stop generated the necessary reasonable suspicion to justify a further detention."); *United States v. Beck*, 140 F.3d 1129, 1136 (8th Cir. 1998) ("Because the purposes of [the officer's] initial traffic stop of Beck had been completed . . . [the officer] could not subsequently detain Beck unless events that transpired during the traffic stop gave rise to reasonable suspicion to justify [the officer's] renewed detention of Beck."); *People v. Redinger*, 906 P.2d 81, 85-86 (Colo. 1995) ("When, as here, the purpose for which the investigatory stop was instituted has been accomplished and no other reasonable suspicion exists to support further investigation, there is no justification for continued detention and interrogation of citizens."); *Davis v. State*, 947 S.W.2d 240, 243 (Tex.Crim.App. 1997) ("[O]nce the reason for the stop has been satisfied, the stop may not be used as a `fishing expedition for unrelated criminal activity.'") (citations omitted).

Once the underlying basis for the initial traffic stop has concluded, it does not automatically follow that any further detention for questioning is unconstitutional. Fourth Amendment jurisprudence clarified:

> Lengthening the detention for further questioning beyond that related to the initial stop is permissible in two circumstances. First, the officer may detain the driver for questioning unrelated to the initial stop if he has an objectively reasonable and articulable suspicion illegal activity has occurred or is occurring. Second, further questioning unrelated to the initial stop is permissible if the initial detention has become a consensual encounter.

United States v. Hunnicutt, 135 F.3d 1345, 1349 (10th Cir. 1998) (citations omitted). Thus, a law enforcement officer's continued questioning of a vehicle's driver and passenger outside the scope of a valid traffic stop passes muster under the Fourth Amendment either when the officer has a reasonable articulable suspicion of other illegal activity or when the valid traffic stop has become
100 a consensual encounter. *100

The question in this case is whether Deputy Stevers detained, i.e. "seized" Pichardo and Reyes anew, thereby triggering the Fourth Amendment

or simply initiated a consensual encounter invoking no constitutional scrutiny. *See State v. Williams*, 351 S.C. 591, 571 S.E.2d 703 (Ct.App. 2002); *see also Ferris*, 735 A.2d at 500 (stating the difficult question was whether the trooper's questioning of Ferris after he issued a citation and returned his driver's license and registration "constituted a detention, and hence raise[d] any Fourth Amendment concerns, or was merely a `consensual encounter' . . . implicating no constitutional overview").

A consensual encounter has been defined as simply the voluntary cooperation of a private citizen in response to non-coercive questioning by a law enforcement official. *Ferris*, 735 A.2d at 500 n. 4; *Williams*, 351 S.C. at 599 n. 2, 571 S.E.2d at 708 n. 2. Because an individual is free to leave at any time during such an encounter, he is not "seized" within the meaning of the Fourth Amendment. *Id.*

Mere police questioning does not constitute a seizure for Fourth Amendment purposes. *Florida v. Bostick*, 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991); *see State v. Culbreath*, 300 S.C. 232, 237, 387 S.E.2d 255, 257 (1990) ("Not all personal encounters between policemen and citizens involve `seizures' of persons thereby bringing the Fourth Amendment into play.") (citations omitted), *abrogated on other grounds by Horton v. California*, 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990). To the contrary, " [o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a `seizure' has occurred." *Terry v. Ohio*, 392 U.S. 1, 19-20 n. 16, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). As long as a person remains at liberty to disregard a police officer's request for information, no constitutional interest is implicated. *United States v. Sullivan*, 138 F.3d 126 (4th Cir. 1998); *Williams*, 351 S.C. at 600, 571 S.E.2d at 708.

The test for determining if a particular encounter constitutes a seizure within the meaning of the Fourth Amendment is whether in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. *Michigan v. Chesternut*, 486
101 U.S. 567, 101 108 S.Ct. 1975, 100 L.Ed.2d 565 (1988); *United States v. Analla*, 975 F.2d 119 (4th Cir. 1992); *see also Sullivan*, 138 F.3d at 132 ("The test . . . [is] whether, under the totality of the circumstances surrounding the encounter, a reasonable person in the suspect's position `would have felt free to decline the officer's requests or otherwise terminate the encounter.'") (citations omitted). So long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification. *United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). The test is necessarily imprecise, because it is designed to assess the coercive effect of police conduct taken as a whole. *Chesternut*, 486 U.S. at 573, 108 S.Ct. 1975; *Williams*, 351 S.C. at 600, 571 S.E.2d at 708. Thus, exactly what constitutes a restraint on liberty sufficient to lead a reasonable person to conclude he is not free to leave varies with the setting in which the police conduct occurs. *Id.*

Reasonableness is measured in objective terms by examining the totality of the circumstances. *Ohio v. Robinette*, 519 U.S. 33, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996); *Williams*, 351 S.C. at 600, 571 S.E.2d at 708. As a result, the nature of the reasonableness inquiry is highly fact-specific. *Id.* Although no single factor dictates whether a seizure has occurred, courts have identified certain probative factors, including the time and place of the encounter, the existence and nature of any prior seizure, whether there was a clear and expressed endpoint to any such prior detention, the number of officers present and whether they were uniformed, the length of the detention, whether the

officer moved the person to a different location or isolated him from others, whether the officer informed the person he was free to leave, whether the officer indicated to the person that he was suspected of a crime, and whether the officer retained the person's documents or exhibited threatening behavior or physical contact. *See United States v. Beck*, 140 F.3d 1129 (8th Cir. 1998); *Ferris v. State*, 355 Md. 356, 735 A.2d 491 (1999).

In determining whether Pichardo and Reyes were seized for purposes of the Fourth Amendment, it
102 must be *102 noted that the detention associated with roadside searches is unlike a mere field interrogation where an officer may question an individual without grounds for suspicion. *See Williams*, 351 S.C. at 600-01, 571 S.E.2d at 708. Roadside consent searches are instead more akin to an investigatory stop that does involve a detention. *Id.* A traffic stop, or pre-existing seizure, enhances the coercive nature of the situation and the efficacy of the other factors in pointing toward the restriction of liberty. *Ferris*, 735 A.2d at 502. Such a situation, therefore, is "markedly different from that of a person passing by or approached by law enforcement officers on the street, in a public place, or inside the terminal of a common carrier." *Id.* (citations omitted).

In the instant case, Stevers returned the "paperwork," gave Pichardo his warning ticket, and told him to "have a nice day." The fact that the officer returned the driver's documentation is not always sufficient to demonstrate that an encounter has become consensual. *Daniel v. State*, 277 Ga. 840, 597 S.E.2d 116 (2004). Thus, the return of documents does not conclusively establish that a traffic stop has de-escalated into a consensual encounter. *Id.*

The Solicitor stipulated that Pichardo was never instructed that he and Reyes could leave. It is well established that the Constitution does not require an officer to inform a motorist he is free to leave before obtaining consent. *See Robinette*, 519 U.S. at 35, 117 S.Ct. 417 (rejecting per se rule that would render consent involuntary if an officer failed to advise a motorist he was free to go before requesting consent). However, the Supreme Court in *Robinette* reiterated that such advice was one factor to consider in the overall analysis. *Id.* at 39, 117 S.Ct. 417. Significantly, in this case the State is bound by the stipulation that Stevers failed to tell Pichardo and Reyes they were free to leave.

The circumstances surrounding the encounter lend support to the circuit judge's conclusion. The two men were isolated while questioned. Stevers requested the two men separately step to the rear of Reyes' vehicle. Two uniformed police officers were present. Pichardo and Reyes were physically searched. There was an immediate transition from the valid traffic stop to the search such that they
103 may not have realized *103 the initial seizure was over. At this point, the "encounter began to assume the tenor of an investigation." *See Williams*, 351 S.C. at 602, 571 S.E.2d at 709. Pichardo and Reyes were detained beyond the traffic stop. The facts encompassing Stevers' questioning of Pichardo and Reyes support the conclusion that the men were in fact seized.

These circumstances were sufficiently intimidating such that Pichardo and Reyes "could reasonably have believed that [they were] not free to disregard the police presence and go about [their] business." *See Michigan v. Chesternut*, 486 U.S. 567, 576, 108 S.Ct. 1975, 100 L.Ed.2d 565 (1988); *see also People v. In Interest of H.J.*, 931 P.2d 1177, 1181 (Colo. 1997) ("It strains credulity to imagine that any citizen, directly on the heels of having been pulled over to the side of the road by armed and uniformed police officers in marked patrol cars, would ever feel `free to leave' or `at liberty to ignore the police presence and go about his business.'") (citations omitted); *Ferris*, 735 A.2d at 502-03 (enumerating several factors that transmuted a valid traffic stop into an unlawful detention, including the trooper's failure to inform Ferris he was free to leave, the trooper's "request" that Ferris step "to the back of his vehicle to

answer a couple of questions," the detention seamlessly followed a pre-existing lawful stop, the trooper removed Ferris from his automobile and separated him from his passenger, the presence of two uniformed law enforcement officers, and the fact that the police cruiser emergency flashers remained operative throughout the entire encounter) (footnote omitted).

Deputy Stevers, by prolonging the initial stop beyond its proper scope, rendered the ensuing encounter more coercive than consensual. As the Ohio Supreme Court explained:

> "The transition between detention and a consensual exchange can be so seamless that the untrained eye may not notice that it has occurred. The undetectability of that transition may be used by police officers to coerce citizens into answering questions that they need not answer, or to allow a search of a vehicle that they are not legally obligated to allow."

State v. Robinette, 80 Ohio St.3d 234, 685 N.E.2d 762, 770-71 (1997); *see Ferris*, 735 A.2d at 503
104 ("The moment at which a *104 traffic stop concludes is often a difficult legal question, not readily discernible by a layperson. It is not sound to categorically impute to all drivers the constructive knowledge as to the precise moment at which, objectively, an initially lawful traffic stop terminates, i.e., the time at which the driver may depart."). A traffic stop must have a distinct ending point which is ascertainable to both the officers charged with enforcing the law and the citizens whom they encounter. *Daniel v. State*, 277 Ga. 840, 597 S.E.2d 116 (2004).

A routine stop constitutes a Fourth Amendment seizure so that when the purpose justifying the stop is exceeded, the detention becomes illegal unless a reasonable suspicion of some other crime exists. *United States v. Sullivan*, 138 F.3d 126 (4th Cir. 1998); *see State v. Robinson*, 306 S.C. 399, 402, 412 S.E.2d 411, 413 (1991) ("To justify a brief stop [or] detention, the police officer must have a reasonable suspicion that the person has been involved in criminal activity."). The term "reasonable suspicion" requires a particularized and objective basis that would lead one to suspect another of criminal activity. *United States v. Cortez*, 449 U.S. 411, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981); *State v. Woodruff*, 344 S.C. 537, 544 S.E.2d 290 (Ct.App. 2001). In determining whether reasonable suspicion exists, the whole picture must be considered. *United States v. Sokolow*, 490 U.S. 1, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989). The burden is on the State to articulate facts sufficient to support reasonable suspicion. *State v. Butler*, 343 S.C. 198, 539 S.E.2d 414 (Ct.App. 2000).

Here, the only evidence at the suppression hearing of reasonable suspicion was Deputy Stevers' testimony that Reyes was nervous. In light of Reyes' inability to speak English, nervousness alone is not sufficient to support reasonable suspicion of "some other crime." *Sullivan*, 138 F.3d at 131. There was no reasonable suspicion of "some other crime" to further detain or question Pichardo and Reyes after Pichardo was given the warning ticket. Such a search at this point was an exploitation of the original stop rather than a separate and valid search based upon a reasonable suspicion. When Deputy Stevers asked for consent, he detained anew, triggering the Fourth Amendment. Pichardo and Reyes were
105 unconstitutionally detained. *105

Warrantless searches and seizures are reasonable within the meaning of the Fourth Amendment when conducted under the authority of voluntary consent. *Palacio v. State*, 333 S.C. 506, 511 S.E.2d 62 (1999). Undoubtedly, a law enforcement officer may request permission to search at any time. However, when an officer asks for consent to search *after* an unconstitutional detention, the consent procured is per se invalid unless it is both voluntary and not an exploitation of the unlawful detention. *State v. Robinson*, 306 S.C. 399, 412 S.E.2d 411 (1991); *State v. Williams*, 351 S.C. 591, 571 S.E.2d 703 (Ct.App. 2002); *see Wong*

Sun v. United States, 371 U.S. 471, 487-88, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) ("We need not hold that all evidence is `fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is `whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'") (citation omitted); *Brown v. State*, 188 Ga.App. 184, 372 S.E.2d 514, 516 (1988) ("[I]n order to eliminate any taint from an [illegal] seizure or arrest, there must be proof both that the consent was voluntary and that it was not the product of the illegal detention.").

Proof of a voluntary consent alone is not sufficient. *Williams*, 351 S.C. at 604, 571 S.E.2d at 710; *Brown*, 372 S.E.2d at 516. The relevant factors include the temporal proximity of the illegal seizure and consent, intervening circumstances, and the purpose and flagrancy of the official misconduct. *Id.*

The State bears the burden of establishing the voluntariness of the consent. *State v. Harris*, 277 S.C. 274, 286 S.E.2d 137 (1982); *State v. Mattison*, 352 S.C. 577, 575 S.E.2d 852 (Ct.App. 2003). Whether a consent to search was voluntary is a question of fact to be determined from the totality of the circumstances. *State v. McKnight*, 352 S.C. 635, 576 S.E.2d 168 (2003); *Mattison*, 352 S.C. at 584, 575 S.E.2d at 855. The issue of voluntary consent, when contested by contradicting testimony, is an issue of credibility to be determined by the circuit judge. *Mattison*, 106 352 S.C. at 584-85, *106 575 S.E.2d at 856. A trial judge's conclusions on issues of fact regarding voluntariness will not be disturbed on appeal unless so manifestly erroneous as to be an abuse of discretion. *Id.* There is ample evidence in the record to support the circuit judge's finding that the State failed to meet this burden and there was no voluntary consent to search.

A plethora of evidence in the record buttresses the circuit judge's determination that Pichardo and Reyes were unlawfully detained and that Reyes' purported consent to search was not voluntary. Deputy Stevers initially testified that Reyes gave his consent to the search. However, Stevers thereafter stated he needed to view the video to be certain Reyes responded to Stevers' request to search with a "yes along with a nod." Pichardo and Reyes declared no consent was given or understood by Reyes. Pichardo professed he explained to Reyes what the officer had asked to do. There was expert testimony that Reyes speaks little or no English, did not "understand" English and had a very limited education. Reyes submitted affidavits to the court from several inmates attesting to Reyes' reliance on Spanish for communication. The Stevers video has no audio and was inconclusive in the video rendering of the confrontation. The Polk video had audio but did not include any exchange between Reyes and Stevers in which the consent is alleged. The Stevers video clearly shows Stevers standing on the passenger's side of the vehicle talking across Reyes to Pichardo, who speaks English. The incident report and testimony indicate that Deputy Stevers asked Deputy Polk if he could speak Spanish to assist the interrogation.

The standard of review by the appellate entity is to determine if "any evidence" exists in the record to support the findings of fact and conclusions of law of the circuit judge. We affirm the circuit judge in his ruling that Reyes did not give voluntary consent and there was no valid consent to search the vehicle.

Moreover, the record reveals that Reyes' consent was obtained through Deputy Stevers's exploitation of the unlawful detention. Stevers's testimony before the trial court revealed that a minimal amount of time passed between the seizure and ensuing consent, there were no 107 intervening or attenuating *107 circumstances, and Stevers's actions in detaining Pichardo and Reyes had no legal basis. *See Williams*, 351 S.C. at 605,

571 S.E.2d at 711. The record unquestionably supports the circuit judge's finding that Reyes' consent was not valid. *See Robinson*, 306 S.C. at 402, 412 S.E.2d at 414; *see also Brown*, 372 S.E.2d at 516 ("[W]e find that there was no significant lapse of time between the unlawful detention and the consent, that no intervening circumstances dissipated the effect of the unlawful detention and that the deputy's conduct had no arguable legal basis. Therefore, we hold that the consent was the product of the illegal detention, and that the taint of the unreasonable stop was not sufficiently attenuated."); *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000) (stating an appellate court may affirm for any reason appearing in the record on appeal).

CONCLUSION

The heroin found in Reyes' vehicle was discovered through an illegal detention accompanied by a lack of valid consent. Evidence obtained as a result of an unlawful search constitutes a violation of the Fourth Amendment and is inadmissible at trial. *State v. Nelson*, 336 S.C. 186, 519 S.E.2d 786 (1999); *State v. Flowers*, 360 S.C. 1, 598 S.E.2d 725 (Ct.App. 2004). The trial court, therefore, did not err in suppressing the evidence. *See State v. Copeland*, 321 S.C. 318, 323, 468 S.E.2d 620, 624 (1996) ("The `fruit of the poisonous tree' doctrine provides that evidence must be excluded if it would not have come to light but for the illegal actions of the police, and the evidence has been obtained by the exploitation of the illegality."); *Robinson*, 306 S.C. at 402, 412 S.E.2d at 414 (suppressing drug evidence as the fruit of an unlawful stop because no attenuating circumstances removed the taint of the illegality from the consent to search); *State v. Greene*, 330 S.C. 551, 559, 499 S.E.2d 817, 821 (Ct.App. 1997) ("The fruit of the poisonous tree doctrine holds that where evidence would not have come to light but for the illegal actions of the police, and the evidence has been obtained by the exploitation of that illegality, the evidence must be excluded."); *People v. Brownlee*, 186 Ill.2d 501, 239 Ill.Dec. 25, 713 N.E.2d 556 (1999) (suppressing marijuana as fruit of an illegal detention, where officers legitimately stopped vehicle for investigation of a traffic violation but after returning driver's license
108 and insurance *108 card and stating no citation would be issued officers paused for a couple of minutes and then asked for and obtained consent to search the vehicle, because during this time the driver and his passengers were detained without reasonable suspicion of any criminal activity).

Accordingly, the circuit judge's order suppressing the drug evidence is

AFFIRMED.

HUFF and WILLIAMS, JJ., concur.

Page 560

448 S.E.2d 560
Delaney Thomas SIKES, Petitioner,
v.
STATE of South Carolina, Respondent.
No. 24140.
Supreme Court of South Carolina.
Submitted April 20, 1994.
Decided Sept. 6, 1994.
Rehearing Denied Oct. 5, 1994.

Page 561

Lisa T. Gregory, Asst. Appellant Defender, Office of Appellate Defense, Columbia, for petitioner.

Atty. Gen. T. Travis Medlock, Chief Deputy Atty. Gen. James Patrick Hudson, Asst. Atty. Gen. Delbert H. Singleton, Jr., and Deputy Atty. Gen. J. Emory Smith, Jr., Columbia, for respondent.

TOAL, Justice:

We granted certiorari to review the dismissal of Delaney Thomas Sikes' (Sikes) application for post conviction relief (PCR). Sikes contends that the PCR judge erred in finding that he received effective assistance of counsel. We agree and reverse.

Page 562

FACTS

Police arrested Sikes on an outstanding warrant during a routine traffic stop. When removing Sikes from the patrol car at the police station, an officer found a bag of crack cocaine in the back seat. Sikes was convicted of possession with intent to distribute and subsequently filed a PCR application alleging that his attorney was ineffective in failing to challenge the admissibility of the cocaine at trial on the ground that his seizure at the traffic stop was unlawful.

The record indicates that police, while in a high crime area, stopped the vehicle in which Sikes was a passenger because it had paper tags which, according to the officers indicated that the car may have been stolen or lacked insurance. After stopping the car, police requested identification from the driver and the passengers, Sikes, and his common-law wife, Jacqueline Hardin. Sometime after obtaining Sikes' identification, police searched him for weapons and placed him in the patrol car where he was detained for at least twenty minutes. At the PCR hearing, counsel testified that he did not challenge police detention of Sikes because "it didn't appear to [him] that they (the police) were doing anything out of the ordinary." The PCR judge dismissed the application after a hearing, finding that counsel was not ineffective because his decision not to challenge the seizure was a strategic choice designed to minimize the impact of testimony regarding the outstanding warrant for Sikes' forgery charges. We granted certiorari.

LAW/ANALYSIS

Sikes contends that the PCR judge erred in ruling that he received effective assistance of counsel when his counsel did not move to suppress evidence that was obtained in violation of the Fourth Amendment of the United States Constitution. We agree.

To establish a claim of ineffective assistance of counsel, petitioner must show counsel's representation fell below an objective standard of reasonableness and that defendant was prejudiced by such deficient performance. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Gallman v. State, 307 S.C. 273, 414 S.E.2d 780 (1992). When the defendant claims that counsel's failure to articulate a Fourth Amendment claim was ineffective assistance, defendant must show that such claim is meritorious and that the verdict would have been different absent the evidence that should have been excluded. Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986).

When an officer stops a vehicle for a traffic violation, he may briefly detain the vehicle and its

occupants while he examines the vehicle registration and the driver's license. Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979) (emphasis added). Although Sikes does not challenge the officers' initial stop of the automobile, Sikes claims that the officers improperly seized him to run a warrant check with no reasonable cause. An individual is "seized" when an officer restrains his freedom, even if the detention is brief and falls short of arrest. The scope and duration of seizure must be strictly tied to and justified by the circumstances which rendered its initiation proper. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). In South Carolina, we have gone a little further by holding that an officer may stop a car and briefly detain the occupants if he has a reasonable suspicion that the occupants are involved in criminal activity. Knight v. State, 284 S.C. 138, 325 S.E.2d 535 (1985) (emphasis added).

Petitioner was merely a passenger in a car with paper dealer tags that had the misfortune of being in a "high crime area." [1] The arresting officers readily admitted the only reason they stopped the car was because vehicles with paper tags are often stolen or lack insurance. While the car was stopped, the officers asked for the identification of both the driver and the Petitioner. They then removed the Petitioner from the car and placed him in the back of the patrol car for twenty minutes while they conducted their investigation. At the end of twenty minutes, after diligently searching for evidence of criminal activity, the officers discovered that:

Page 563

the car was not stolen, the driver had insurance, and that there was an outstanding forgery warrant for Petitioner. The Petitioner was arrested and transported to jail. A search of the back seat of the patrol car revealed a bag containing several pieces of crack cocaine. The record contains evidence that Petitioner was searched twice prior to his placement into the police car.

Here the officers' "reasonable suspicion" was that the car was either stolen or that the driver was uninsured. Under Knight, supra, neither of these reasons gave the officers the right to seize or question the car's passenger. Moreover, even assuming arguendo that this stop was reasonable, certainly a twenty minute detention while the officers "went fishing" for evidence of some crime was not brief within the definition announced in Prouse, supra, or in Knight, supra. See also State v. Damm, 246 Kan. 220, 787 P.2d 1185 (1990) (seizure of occupants of the vehicle while routine records checks were made of the occupants was unreasonable); State v. Johnson, 805 P.2d 761 (Utah 1991) (the leap from asking for the passenger's name and date of birth to running a warrants check on her severed the rational inference from specific and articulable facts and degenerated into an attempt to support an as yet unparticularized suspicion or hunch).

The detention and arrest of the Petitioner was unlawful; therefore, the evidence of the Petitioner's possession of crack cocaine would have been inadmissible as fruit of the poisonous tree. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); State v. Plath, 277 S.C. 126, 284 S.E.2d 221 (1981). Trial counsel testified at the post conviction relief hearing that he did not challenge the stop because "it didn't appear to me they were asking him to do anything out of the ordinary." The post conviction relief court found that trial counsel's decision was a matter of proper trial strategy; however, this can not be correct in the face of such a blatant violation of Petitioner's Fourth Amendment rights.

Having found in this record that Sikes's Fourth Amendment claim is meritorious, we must determine if he has satisfied the performance and prejudice prongs of Strickland. At the PCR hearing, Sikes' trial counsel testified that he did not question Sikes' seizure because it didn't appear to him that "they [the officers] were asking him to do anything out of the ordinary." Because counsel's failure to motion to suppress evidence was based on the fact that he thought the officers' action were justified, we find counsel's decision

fell below an objective standard of reasonableness. Additionally, because the unlawfully-obtained evidence was the only evidence of Sikes' possession of cocaine, we find that counsel's performance prejudiced Sikes such that it rendered the proceeding fundamentally unfair. See Lockhard v. Fretwell, --- U.S. ----, ----, 113 S.Ct. 838, 844, 122 L.Ed.2d 180 (1993).

In our view, the PCR judge's finding that Sikes received effective assistance of counsel is not supported by the record. See Gallman v. State, 307 S.C. 273, 414 S.E.2d 780 (1992). "A PCR judge's findings will not be upheld if such findings are not supported by probative evidence." Id. at 277, 414 S.E.2d at 782. Based on our holding, we need not address Sikes' remaining exception. Accordingly, the PCR judge is REVERSED.

CHANDLER and FINNEY, JJ., concur.

MOORE, J., dissenting in separate opinion.

HARWELL, C.J., not participating.

MOORE, Justice, dissenting:

I respectfully dissent. At the PCR hearing, Sikes did not claim the initial stop of the car was unlawful. Further, Sikes did not raise the issue regarding the length of the subsequent warrants check. Therefore, these issues are not properly before the Court. Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983) (issues not raised or ruled upon below are not preserved for review).

Sikes claims the officers improperly seized him without probable cause only when they requested identification. The PCR judge ruled the officers' request for identification was not a fourth amendment seizure. I agree. A request for identification by police does not, by itself, constitute a fourth amendment

seizure. I.N.S. v. Delgado, 466 U.S. 210, 215, 104 S.Ct. 1758, 1762, 80 L.Ed.2d 247 (1984); see State v. Foster, 269 S.C. 373, 237 S.E.2d 589 (1977). The PCR judge's finding that Sikes received effective assistance of counsel is supported by the record. Therefore, I would affirm the PCR judge's order.

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1 The lesson here is that if you live in or near a "high crime area" do not purchase a new car.

(4)

437 S.C. 625
879 S.E.2d 762

The STATE, Respondent,
v.
Michael N. FRASIER, Jr., Petitioner.

Appellate Case No. 2020-001405
Opinion No. 28117

Supreme Court of South Carolina.

Heard March 15, 2022
Filed September 28, 2022
Rehearing Denied November 17, 2022

Appellate Defender Kathrine Hudgins, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant Attorney General Mark Reynolds Farthing, both of Columbia, and Solicitor Scarlett Anne Wilson, of Charleston, all for Respondent.

JUSTICE HEARN :

[437 S.C. 628]

[879 S.E.2d 764]

Petitioner Michael Frasier was convicted of trafficking cocaine in excess of 100 grams after police discovered cocaine during a traffic stop for an inoperable brake light. The questions before the Court concern whether police had reasonable suspicion to prolong the traffic encounter and whether Frasier consented to the search. The trial court concluded the officer had reasonable suspicion and Frasier consented, and the court of appeals affirmed. In deciding these two issues, we clarify the scope of this Court's standard of review in the Fourth Amendment context. Ultimately, we reverse the court of appeals

[437 S.C. 629]

because law enforcement lacked reasonable suspicion to prolong the traffic stop and Frasier did not consent to the search.

FACTS/PROCEDURAL HISTORY

During the morning of August 14, 2013, two plainclothes officers with the North Charleston Police Department sat in an unmarked car outside a bus station conducting a routine drug interdiction as part of the department's narcotics division. On this particular morning, Frasier had traveled from New York to North Charleston on a commercial bus. The two officers were approximately 75 to 100 yards away from the bus station's exit when they observed Frasier leave the station. According to the officers, Frasier immediately stopped after exiting the station and looked left and right before walking about ten yards to a vehicle driven by Cheryl Jones. Frasier entered the vehicle, and the two left the station. Officers characterized Frasier's conduct as clearing the area for threats, including law enforcement, which they deemed suspicious. As the vehicle left the station, the officers discovered that it had an inoperable third brake light. Accordingly, one of the officers called Steven Hall, a patrol officer who previously had worked in the narcotics department, to perform a traffic stop. Although the legal basis for the traffic stop stemmed from the broken brake light, the officers informed Hall that Frasier seemed suspicious. However, the officers never informed Hall of the specific conduct that raised their suspicion, such as Frasier's scanning the parking lot.

Hall subsequently caught up to the vehicle on the North Bridge over the Ashley River after reaching a speed of 87 miles per hour. Jones used her turn signal to get into the left lane and out of the officer's way. Apparently upon realizing that she was being pulled over, she then turned on her flashers and moved into the right lane before pulling off the road. Hall testified that Jones took longer than usual to pull over although the dashcam video indicated it took less than a minute. Hall exited his patrol car and approached Jones's vehicle. He informed Jones that her brake light was out, and while talking with her, Hall noticed the zipper was down on her pants. He testified that, from his experience, this suggested she was potentially hiding contraband in her pants. Hall

[437 S.C. 630]

testified that Frasier "just appeared to be nervous. He was sweating profusely. Did not want to really interact with me a whole lot as far as eye contact, something like that." Hall asked them where they were traveling from, and after repeating the question several times, Jones answered that she picked up Frasier from the bus stop. Hall requested Jones's driver's license, but she did not have it on her; instead, she gave him her personal information, and dispatch indicated that she did not have any outstanding warrants. Hall can be heard on the dashcam video telling dispatch that he is going to issue a warning ticket and try to obtain consent to search the car. Hall subsequently exited his patrol car, walked over to Jones and asked her to step out of her vehicle. Jones complied and consented for Hall to search the vehicle. Another patrol officer arrived on scene during the traffic stop, and both officers walked over to the passenger side door and asked Frasier to step out of the vehicle. Frasier complied, and placed his hands in his pockets. Hall immediately told Frasier to remove his hands from his pockets and asked Frasier if he would mind if he searched him. Frasier raised his hands in the air and said, "I do, but ...." Frasier subsequently placed his hands on the hood of the car at the direction of Hall. Ultimately, Hall found a white powdery substance

[879 S.E.2d 765]

later identified as cocaine on Frasier and a larger quantity in Frasier's jacket in the back seat of the vehicle. Frasier was arrested and charged with trafficking in cocaine in excess of 100 grams.

Thereafter, Frasier filed two motions to suppress, one contending Hall lacked reasonable suspicion to prolong the traffic stop and the second asserting he never consented to the search. Following the testimony of the officers, which was consistent with the account relayed above, Frasier argued all the drugs should be suppressed. The solicitor contended the following established reasonable suspicion to prolong the traffic stop in order to obtain consent: 1) Frasier's behavior at the bus stop, specifically traveling on a commercial bus which law enforcement knew was frequented by drug traffickers and his "scanning" the parking lot upon exiting the bus station; 2) Jones's purportedly "evasive driving" and the delay in pulling over; 3) the zipper down on her pants; 4) "evasively not answering very simple direct questions" such as where they

[437 S.C. 631]

were coming from; 5) the sense of nervousness Frasier displayed; and 6) "his sweating profusely."

Frasier contended once Hall wrote the warning ticket, the legal justification for the stop ended, and nothing the officer relied on established reasonable suspicion to prolong the encounter. The trial court stated that this issue "is at best a 50/50 call." Ultimately, the court denied Frasier's motion to suppress, concluding the facts above supported a finding of reasonable suspicion, with the exception of Jones's alleged "evasive driving" and taking too long to pull over. The court found Jones's driving reasonable, and thus, it did not take that fact into consideration.

As to Frasier's second argument—that he did not give Hall consent to search him—defense counsel noted that Frasier responded, "I do, but ..." in response to Hall asking whether he minded being searched. The solicitor contended that, "it was the officer's belief, as he testified earlier, that his words and actions together was [sic] consent." The trial court concluded the dashcam video unambiguously showed that Frasier consented to the search by virtue of his words and conduct, and it denied the second motion to suppress as well.

Ultimately, the jury found Frasier guilty, and the trial court sentenced him to the mandatory minimum sentence of twenty-five years imprisonment. Frasier appealed to the court of appeals which affirmed, citing our deferential standard of review and concluding evidence supported the trial court's decision. Frasier subsequently filed a petition for a writ of certiorari, which the Court granted in part.[1]

ISSUES

> I. Did the court of appeals err in affirming the trial court's decision that Officer Hall had reasonable suspicion to prolong the traffic stop in order to subsequently ask for consent to search?

[437 S.C. 632]

> II. Did the court of appeals err in affirming the trial court's determination that Frasier gave Officer Hall consent to search him?

STANDARD OF REVIEW

Before reaching the merits, we take this opportunity to clarify our standard of review when reviewing an appeal from a motion to suppress based on Fourth Amendment grounds. Historically, we have repeatedly noted that appellate courts review an appeal from a motion to suppress based on a violation of the Fourth Amendment under the deferential "any evidence" standard. *See, e.g.* , *State v. Morris* , 411 S.C. 571, 578, 769 S.E.2d 854, 858 (2015). Pursuant to this standard, our appellate courts "will not reverse a trial court's finding of fact simply because it would have decided the case differently." *State v. Spears* , 429 S.C. 422, 433, 839 S.E.2d 450, 455 (2020) (quoting *State v. Pichardo* , 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005)).

[879 S.E.2d 766]

In *State v. Brockman* , 339 S.C. 57, 528 S.E.2d 661 (2000), this Court declined to follow the United States Supreme Court's decision in *Ornelas v. United States* , 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996) requiring federal courts to employ a more rigorous two-part analysis where courts defer to the trial court's factual findings but review the ultimate legal conclusion de novo. *Brockman* concluded that *Ornelas* was an advisory opinion, and thus, the Court declined to implement de novo review. *Id.* at 64-65, 528 S.E.2d at 664-65. At the time this Court issued *Brockman* , appellate courts routinely reviewed cold records and depended on trial courts to review credibility and weigh conflicting evidence in reaching its decision. However, with the dawn of the technological age, appellate courts are no longer dependent on the trial court in our review of evidence. The most obvious example is the advent of body and dashcam footage, whereby this Court reviews the same video as the trial court. Accordingly, while the need for deference remains, particularly in determining issues of credibility, it is no longer necessary for us to defer to the trial court's overall ruling in every case. Instead, we take this opportunity to refine our standard of review to better align with the federal standard, which has been adopted in

[437 S.C. 633]

nearly every state.[2] Accordingly, appellate review of a motion to suppress based on the Fourth Amendment involves a two-step analysis. This dual inquiry means we review the trial

[437 S.C. 634]

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.

DISCUSSION

I. Reasonable Suspicion to Prolong the Traffic Stop

Frasier contends Hall did not have reasonable suspicion to prolong the traffic stop beyond the purpose of issuing the warning for an inoperable third brake light. He asserts law enforcement had, at best, an "unparticularized

[879 S.E.2d 767]

suspicion or hunch, not reasonable suspicion to justify the prolonged detention." Conversely, the State argues evidence supports the trial court's determination that Hall had reasonable suspicion

of potential criminal activity, and therefore, the extension of the initial traffic stop was constitutionally permissible. Applying the facts as found by the trial court, we disagree these findings rise to the level of reasonable suspicion.

"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, 98 S.Ct. 330, 54 L.Ed.2d 331 (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)).

In order to prolong or exceed the scope of a stop beyond the initial traffic violation, law enforcement must have reasonable suspicion that criminal activity may be afoot. *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

[437 S.C. 635]

the stop—the stop may be prolonged, and the scope of the detention enlarged as circumstances require."). Although 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. In other words, for an officer to have reasonable suspicion, "there [must] be an objective, specific basis for suspecting the person stopped of criminal activity." *Id.* While 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, 123, 120 S.Ct. 673, 145 L.Ed.2d 570 (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).

In *Moore* , a police officer pulled over a vehicle on I-85 for speeding. *Id.* at 248, 781 S.E.2d at 899.[3] The officer testified he smelled alcohol, and the occupant admitted to having a couple drinks. During the stop, Moore passed two of three field sobriety tests. The vehicle was registered out of state to a third party, and the officer found $600 on Moore during a consensual pat down. *Id.* at 249, 781 S.E.2d at 899. The officer subsequently asked Moore if he could search the vehicle, but Moore declined. *Id.* The officer decided not to charge Moore with driving while impaired, but he did request a canine unit, which subsequently alerted to the presence of drugs. The State relied on the following facts to support the presence of reasonable suspicion:

[437 S.C. 636]

> (1) Moore initially turned on his left turn signal but then pulled his vehicle over to the right; (2) the time Moore took to pull over was longer than average, indicating the possibility of flight; (3) Deputy Owens noticed an odor of alcohol emanating from the vehicle, which led him to believe that Moore had been drinking in order to calm his nerves; (4) Moore smoked several cigarettes,

[879 S.E.2d 768]

> which was also an indicator that he might be trying to calm his nerves; (5) Moore continued to talk on the phone during the traffic stop, which

> was an indicator of criminal activity as phones provide a means of communication between drug traffickers; (6) Moore's hands were shaking when he handed Deputy Owens his driver's license and rental agreement; (7) Moore's pulse appeared to be rapid; (8) Moore's breathing was heavy; (9) Moore tried to pick up his cell phone when he was asked to exit his vehicle, also indicating the possibility of flight; (10) Moore was carrying a large sum of money in his pocket despite being unemployed; (11) Moore was driving a rental car, which was rented by a third party; and (12) Moore was leaving a suburb of Atlanta, which is a known drug trafficking hub.

Id. at 249-50, 781 S.E.2d at 899-900. Notably, while the Court determined at least some evidence supported the trial court's decision to deny the motion to suppress, it acknowledged that nervousness is typically present in any encounter with police. The Court cautioned law enforcement that although "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." *Id.* at 254-55, 781 S.E.2d at 902.

Here, even after accepting the trial court's factual findings as we must do since they are supported by some evidence, we conclude that Hall lacked reasonable suspicion as a matter of law pursuant to de novo review.[4] The two plainclothes officers relayed to Hall that Frasier seemed suspicious,

[437 S.C. 637]

but that was only based on a subjective hunch. While "scanning the parking lot" is a relevant factor, it is far from establishing reasonable suspicion. Accordingly, in order for Hall to prolong the traffic encounter, there had to be more indications of criminal activity once Hall initiated the traffic stop. Although the State contends the following additional facts establish reasonable suspicion—repeating questions, noticing Jones's unzipped zipper, sweating, and being nervous—we disagree.[5] Hall did not see any items that would demonstrate potential criminal activity—such as cash on hand, hollowed out blunt cigars, or the smell of marijuana—before deciding to extend the stop. *See Moore* , 415 S.C. at 249, 781 S.E.2d at 899 (officers found a "wad" of $600 in cash); *Morris* , 411 S.C. at 581, 769 S.E.2d at 859 (police saw hollowed out cigars and smelled marijuana). It is equally apparent that this was a drug stop masquerading as a traffic encounter. Indeed, the goal of the stop was to "try to obtain consent," as Hall can be heard telling dispatch on the dashcam video. While we do not suggest that pretexual stops are illegal, in order to prolong the stop, there must be an *objective* basis for concluding that criminal activity may be afoot. Simply put, "[i]n law, the ends do not justify the means." *State v. Adams* , 409 S.C. 641, 654, 763 S.E.2d 341, 348 (2014). Because the State failed to meet its burden of demonstrating reasonable suspicion, we reverse.

II. Frasier's Consent

Frasier contends the court of appeals erred in affirming the trial court's conclusion that he gave Hall consent to search

[437 S.C. 638]

him. The State asserts there is evidence in the record to support the trial court's decision. We agree with Frasier.

[879 S.E.2d 769]

Warrantless searches are generally considered per se unreasonable unless they fall within a recognized exception under the Fourth Amendment. Police may search an individual if that person consents, but the burden is on the State to demonstrate consent. *State v. Harris* , 277 S.C. 274, 276, 286 S.E.2d 137, 138 (1982) ("However, the State bears the burden of proving

the voluntariness of a consent to search from the totality of the surrounding circumstances."). Law enforcement must obtain consent voluntarily, which is a fact-intensive inquiry viewed under the totality of the circumstances. *Schneckloth v. Bustamonte* , 412 U.S. 218, 248, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). Police do not need to tell an individual that he can refuse to consent, but it is a factor in the overall analysis. *Id.* ; *State v. Forrester* , 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001) ("Therefore, like the federal standard, our state standard does not require a law enforcement officer conducting a search to inform the defendant of his right to refuse consent.").

During the pretrial testimony, Hall noted that he asked Frasier "if he minded if I checked him out or searched him, and he said, 'I do, but,' and just kind of put his hands up on top of the car." The State also described the encounter as, "[R]egarding his actions, Frasier shrugged his shoulders, placed his hands on top of Jones's vehicle, positioned himself in a manner such that the officer could search him, and exposed both his body and his pockets to the officer." Because we are able to view the same video as the trial court, we can make an independent finding and are not constrained to defer to the trial court's conclusion that Frasier consented through his words and conduct. The video clearly indicates that Frasier stepped out of the vehicle at the direction of one of the officers, with a second officer standing beside him. Once Frasier began to place his hands in his pockets, Hall understandably told Frasier to remove them. In response, Frasier raised his hands over his head and began to turn. Hall testified it was Frasier's conduct that indicated he consented to a search, but it is clear from the video that Frasier only placed his hands on the vehicle at the direction of the officer.

[437 S.C. 639]

Indeed, after asking whether Frasier had any weapons on him, Hall asked Frasier to "put his hands up on the car for me." Accordingly, because Frasier's conduct was at the direction of the officer, it was not a voluntary decision to allow Hall to search him. Thus, the State failed to prove that Frasier voluntarily consented, and we therefore reverse on this ground as well.

CONCLUSION

We hold law enforcement lacked reasonable suspicion to prolong the traffic stop, and thus, the discovery of cocaine was the product of an illegal seizure. We also conclude that Frasier did not voluntarily consent. Accordingly, we reverse the court of appeals.

REVERSED.

BEATTY, C.J., KITTREDGE, FEW and JAMES, JJ., concur.

Notes:

[1] This Court denied Frasier's argument concerning the admission of statements Frasier made following a *Miranda* warning when officers had asked similar questions before *Miranda* was given.

[2] *See James v. State* , 197 So.3d 532, 535 (Ala. Crim. App. 2015) ; *State v. Miller* , 207 P.3d 541, 543 (Alaska 2009) ; *State v. Fornof* , 218 Ariz. 74, 179 P.3d 954, 956 ((Ariz. Ct. App. 2008) ; *MacKintrush v. State* , 479 S.W.3d 14, 17 (Ark. 2016) ; *People v. Letner and Tobin* , 50 Cal.4th 99, 112 Cal.Rptr.3d 746, 235 P.3d 62, 99-100 (2010) ; *People v. McKnight* , 446 P.3d 397, 402 (Colo. 2019) ; *State v. Lewis* , 333 Conn. 543, 217 A.3d 576, 586-87 (2019) ; *Lopez-Vazquez v. State* , 956 A.2d 1280, 1284-85 (Del. 2008) ; *Huffman v. State* , 937 So.2d 202, 205-06 (Fla. Dist. Ct. App. 2006) ; *State v. Cartee* , 355 Ga.App. 326, 844 S.E.2d 202, 203 (2020) ; *State v. Spillner* , 116 Hawai'i 351, 173 P.3d 498, 504 (2007) (reviewing a trial court's ruling on a motion to suppress evidence de novo); *State v. Perez* , 164 Idaho 626, 434 P.3d 801, 803 (2018) ; *People v. Timmsen* , 401 Ill.Dec. 610, 50 N.E.3d 1092, 1097 (Ill. 2016) ; *Marshall v. State* , 117 N.E.3d 1254, 1258 (Ind. 2019) ; *State v. Brown* , 930 N.W.2d 840, 844 (Iowa 2019) ; *State v. Hanke* , 307 Kan. 823, 415 P.3d 966, 969 (2018) ; *Commonwealth*

v. Conner , 636 S.W.3d 464, 471 (Ky. 2021) ; *State v. Boeh* , 324 So.3d 653, 659-60 (La. Ct. App. 2021) ; *State v. Sasso* , 143 A.3d 124, 129 (Me. 2016) ; *State v. Holt* , 206 Md.App. 539, 51 A.3d 1, 7 (2012) ; *Commonwealth v. Henley* , 488 Mass. 95, 171 N.E.3d 1085, 1097 (2021) ; *People v. Pagano* , 507 Mich. 26, 967 N.W.2d 590, 592 (2021) ; *State v. Bergerson* , 671 N.W.2d 197, 201 (Minn. Ct. App. 2003) ; *Eaddy v. State* , 63 So.3d 1209, 1212 (Miss. 2011) ; *State v. Peery* , 303 S.W.3d 150, 153 (Mo. Ct. App. 2010) ; *State v. Neiss* , 396 Mont. 1, 443 P.3d 435, 443 (2019) ; *State v. Shiffermiller* , 302 Neb. 245, 922 N.W.2d 763, 772 (2019) ; *State v. Beckman* , 129 Nev. 481, 305 P.3d 912, 916 (2013) ; *State v. Francisco Perez* , 173 N.H. 251, 239 A.3d 975, 981 (2020) ; *State v. Nyema* , 249 N.J. 509, 267 A.3d. 449, 459 (2022) ; *State v. Ochoa* , 146 N.M. 32, 206 P.3d 143, 147 (N.M. Ct. App. 2008) ("The constitutionality of a search or seizure is a mixed question of law and fact and demands de novo review."); *People v. Blandford* , 37 N.Y.3d 1062, 155 N.Y.S.3d 1, 176 N.E.3d 1043, 1044 (2021) ; *State v. Watson* , 250 N.C.App. 455, 792 S.E.2d 873, 874 (2016) ; *State v. Marsolek* , 964 N.W.2d 730, 735 (N.D. 2021) ; *State v. Hawkins* , 158 Ohio St.3d 94, 140 N.E.3d 577, 580-81 (2019) ; *Fuentes v. State* , 517 P.3d 971, ----, 2021 WL 3027309 (Okla. Crim. App. 2021) ; *State v. Maciel-Figueroa* , 361 Or. 163, 389 P.3d 1121, 1123 (2017) ; *Commonwealth v. Smith* , 164 A.3d 1255, 1257 (Pa. Super. Ct. 2017) ; *State v. Taveras* , 39 A.3d 638, 645-46 (R.I. 2012) ; *State v. Moore* , 415 S.C. 245, 251, 781 S.E.2d 897, 900 (2016) ; *State v. Aaberg* , 718 N.W.2d 598, 600 (S.D. 2006) ; *State v. Smith* , 484 S.W.3d 393, 399 (Tenn. 2016) ; *Herrera v. State* , 546 S.W.3d 922, 926 (Tex. App. 2018) ; *Salt Lake City v. Street* , 251 P.3d 862, 865 (Utah Ct. App. 2011) ; *State v. Rutter* , 189 Vt. 574, 15 A.3d 132, 135 (2011) ; *McArthur v. Commonwealth* , 72 Va.App. 352, 845 S.E.2d 249, 252 (2020) ; *State v. Gatewood* , 163 Wash.2d 534, 182 P.3d 426, 427-28 (2008) ; *State v. Bookheimer* , 221 W.Va. 720, 656 S.E.2d 471, 476 (2007) ; *State v. Reed* , 384 Wis.2d 469, 920 N.W.2d 56, 65-66 (2018) ; *Jennings v. State* , 375 P.3d 788, 790 (Wyo. 2016).

[3] The officer in *Moore* testified the driver took longer than usual to pull over and was evasive because he initially used his left turn signal before finally pulling onto the right shoulder. *Id.* at 250, 781 S.E.2d at 899. Officer Hall testified Jones was evasive as she took longer than usual to pull off the side of the road and initially switched to the left lane before exiting the highway on the right shoulder. However, the trial court expressly rejected this factor in its totality of the circumstances approach. Nevertheless, the State continues to argue that this fact is relevant. We disagree, as the video in question clearly shows Jones did not attempt to evade police.

[4] We note the trial court believed the issue was at best 50/50 but ruled in favor of the State. When a case boils down to a flip of the coin, the Fourth Amendment requires that we find in favor of the defendant since the State has the burden to demonstrate reasonable suspicion.

[5] Jones told Hall during the traffic stop that her zipper was undone because she had just taken a shower before meeting Frasier at the bus station. Concerning the fact that Frasier sweated, we agree with the trial court's statement that "[e]verybody sweats profusely in August in Charleston. I sweat profusely in Charleston in August. It's hot at 6 in the morning. As soon as you walk out the door, it's 90 to 100 percent humidity." The solicitor responded that he had the almanac showing the temperature and humidity for the day in question and "would be happy to give it to you." The court answered, "No. I live in Charleston. I've lived in Charleston my whole life...." Further, although Hall testified that the driver door opening during the stop was unusual, he never articulated a reason as to how that fact was potentially indicative of illegal behavior.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	INDICTMENTS: 2023GS2604885-886,
	)	2023GS2603140, -3146
	)	WARRANTS: 2023A2620601180-183
STATE OF SOUTH CAROLINA	)	
	)	
	)	**MEMORANDUM IN SUPPORT OF**
VS.	)	**MOTION TO RECONSIDER**
	)	
RICHARD ANDERSON,	)	
	)	

MEMORANDUM IN SUPPORT OF MOTION TO RECONSIDER

This matter comes before the Court upon the motion of the State wherein the State requests this Court reconsider its previous ruling on the defense's motion to suppress the drug evidence seized in the case as it was legally obtained during a lawful detention of the defendant, Richard Anderson, hereinafter referred to as "Defendant", following a traffic stop in which he was a passenger. The State asserts the evidence recovered and seized should be admitted as it was obtained lawfully in accordance with the Fourth Amendment of the United States Constitution, Article I, Section 10, of the South Carolina Constitution, and well-established South Carolina case law precedent.

FACTUAL BACKGROUND

On May 6, 2023, Officer Sonko with the Myrtle Beach Police Department conducted a traffic stop on a vehicle operated by Anthony Kerson, hereinafter referred to as "Co-defendant," for failing to properly use a turn signal not less than the last one hundred feet traveled by the vehicle before turning.[1,2] The grounds for the traffic stop was not challenged. Co-defendant pulled

[1] SC Code §56-5-2150.
[2] Sonko, Brandon. May 6, 2023. *DRUGS* [Video]. Evidence.com.

the vehicle over and stopped it in the road.[3] Defendant was sitting in the front passenger's seat of the vehicle.[4] Officer Sonko requested Co-defendant's license, registration, and proof of insurance. Co-defendant produced an identification card and started smoking a cigarette.[5] Co-defendant told Officer Sonko the vehicle belonged to a friend, and he could not find the registration in the glove compartment.[6] Officer Sonko went back to his vehicle and ran Co-defendant's information.[7] Dispatch confirmed Co-defendant's driver's license was suspended.[8] While Officer Sonko was running Co-defendant's information, Officer McCluskey approached the passenger side of Officer Sonko's vehicle, and Officer Sonko relayed this information to Officer McCluskey.[9,10] Officer Sonko also told Officer McCluskey Co-defendant was very shaky, and he could smell a faint odor of marijuana.[11,12,13] Officer Sonko got out of his vehicle and arrested Co-defendant for driving under suspension.[14] The entire encounter, from the moment Officer Sonko initiated the traffic stop to the moment Co-defendant was arrested, took approximately five minutes, and Officer Sonko smelled the odor of marijuana coming from the vehicle during his initial interaction with Co-defendant.[15]

While Officer Sonko was running the Co-defendant's information and ultimately arrested Co-defendant, Officer McCluskey engaged in conversation with Defendant.[16] Defendant was still

[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] McCluskey, Shon. May 6, 2023. *DRUGS* [Video]. Evidence.com.
[11] Sonko, Brandon. May 6, 2023. *DRUGS* [Video]. Evidence.com.
[12] Mot. Tr., at 16, 18
[13] McCluskey, Shon. May 6, 2023. *DRUGS* [Video]. Evidence.com.
[14] Sonko, Brandon. May 6, 2023. *DRUGS* [Video]. Evidence.com.
[15] *Id.*
[16] McCluskey, Shon. May 6, 2023. *DRUGS* [Video]. Evidence.com.

seated in the front passenger's seat of the vehicle.[17] Defendant lit up a cigarette and started smoking it.[18] Officer McCluskey asked if Defendant knew Co-defendant, and Defendant gave a non-verbal answer, "uh-uh", indicating he did not know him.[19] Defendant told Officer McCluskey he just got a ride from him and was going to be dropped off at the store and get some gas money.[20] After approximately six minutes after the traffic stop was initiated, Officer McCluskey informed Defendant that Co-defendant was going to be arrested for driving under suspension and asked Defendant to step out of the vehicle.[21] Approximately one minute later, Officer McCluskey asked Defendant if he had anything illegal on him to which he replied yes.[22] Defendant reached in his front hoodie pocket and pulled out marijuana in a baggie.[23] Defendant said he only had weed on him.[24] Around the same time, Officer Sonko found drugs and a scale in the driver's side door of the vehicle.[25] Also found in the vehicle between the center console and the front passenger's seat, one clear bag containing a purple powder that field tested positive for fentanyl.[26] Officer McCluskey told Officer Sonko about the marijuana on Defendant's person, and Defendant was subsequently arrested for possession of marijuana.[27] Search incident to arrest, officers found a clear bag inside the front hoodie pocket on Defendant's person.[28] Inside the clear bag was several bags, about eighteen, with different types of narcotics: one bag with a purple powder, fourteen bags of a white powdery substance, two bags with a clear rock like substance, and one bag with

[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*

an off-white rock like substance. The one bag with purple powder field tested positive for fentanyl with an approximate packaged weight of 0.67 grams. The fourteen bags with white powdery substance field tested positive for cocaine with an approximate packaged weight of 3.44 grams. The two bags with clear rock like substance field tested positive for methamphetamine with an approximate packaged weight of 8.88 grams. The one bag with off-white rock like substance field tested positive for cocaine base with an approximate packaged weight of 0.45 grams. The green leafy substance was identified as marijuana based off officer training and experience with an approximate packaged weight of 5.15 grams. Officer McCluskey read Defendant his *Miranda* rights, and Defendant said he just met Co-defendant a couple minutes ago.[29] Defendant was charged with possession of fentanyl 1st offense, possession with intent to distribute methamphetamine 1st offense, possession with intent to distribute cocaine 1st offense, possession of cocaine base 1st offense, and possession of 28 grams or less of marijuana 1st offense. The entire encounter, from the moment Officer Sonko initiated the traffic stop to the moment Defendant was arrested, took approximately twelve minutes.

SUPPRESSION HEARING

A suppression hearing refers to an *in camera* evidentiary hearing in which testimony is taken and evidence presented, conducted to determine whether Fourth Amendment violations have occurred.[30,31] Testimony is taken and presented through law enforcement officers involved in the case. The State calls the officers, and the defense has a chance to cross-examine the given

[29] *Id.*

[30] *State v. Patton*, 322 S.C. 408, 472 S.E.2d 245 (1996)

[31] *State v. Banda*, 371 S.C. 245, 630 S.E.2d 36 (2006) (where an in camera suppression hearing was held in which the trial court heard testimony from Banda and Detectives White and Lawson. The court denied Banda's motion to suppress the drugs. The trial court found the police had probable cause to stop the car for the stolen tags; they had the authority to request Banda to get out of the car; and that Banda was properly frisked for weapons given the officers' reasonable suspicion of her involvement in the delivery of drugs).

testimony. Rules of evidence normally applicable in criminal jury trials do not operate with full force at hearings before the judge to determine the admissibility of evidence.[32]

On February 22, 2024, the suppression hearing was brought before the Court on defense's motion to suppress. The law enforcement officers involved in the case were available for testimony and were present in the courtroom. Over the State's objection, the Court decided against hearing from the officers[33] even though the burden is upon the State to justify a warrantless search.[34] During the suppression hearing, the State mentioned a statement made by Officer Sonko on his body worn camera video regarding him smelling the faint odor of marijuana.[35] Defense counsel stated that statement was not in the video.[36] The State had provided all available videos to defense counsel prior to the hearing and put on the record the name of the video, the length of the video, and the approximate time in the video where the statement could be heard.[37] The State again stated the law enforcement officer who made the statement was available for testimony and was present in the courtroom, but the Court decided against hearing from him.[38] The Court stood the matter down to allow defense counsel to review the video.[39] Once the matter was brought back on the record, defense counsel provided the video to the Court for review, at which point, the Court was able to hear the officer say he could smell the faint odor of marijuana.[40] Once Officer Sonko's statement was heard in open court, the State again brought it to the Court's attention.[41] Once the

[32] *U.S. v. Matlock*, 415 U.S. 164, 94 S.Ct. 988 (1974)
[33] Mot. Tr., at 14.
[34] *State v. Key*, 431 S.C. 336, 848 S.E.2d 315 (2020).
[35] Mot. Tr., at 16.
[36] Mot. Tr., at 20-21.
[37] Mot. Tr., at 22.
[38] Mot. Tr., at 21.
[39] Mot. Tr., at 22.
[40] Mot. Tr., at 23-24.
[41] Mot. Tr., at 23-24.

Court reviewed the video, the matter was taken under advisement, without hearing further from the State.

Ultimately, the Court produced a Form 4 stating the motion to suppress was granted; however, there were no findings of fact or findings of law made on the record. The Form 4 further stated the detention, questioning, and warrantless search of the Defendant violated the Defendant's Fourth Amendment right against unlawful search and seizure; therefore, the drugs found on the Defendant's person were suppressed and may not be used as evidence against the Defendant. The Court directed the defense attorney to prepare the formal order. Defense counsel's order omitted any mention of the odor of marijuana coming from the vehicle. The Court produced an Order Granting Defendant's Motion to Suppress again with no mention of the odor of marijuana coming from the vehicle. The State filed a motion to reconsider in response for two reasons: 1) procedural error in not allowing the State to present officers' testimony, and 2) legal error because the odor of marijuana coming from the vehicle created reasonable suspicion of criminal activity and probable cause to search the vehicle.

LAW/ANALYSIS

I. LAW ENFORCEMENT OFFICERS HAVE AUTHORITY TO ORDER EVERYONE OUT OF A VEHICLE

The Supreme Court of the United States has held that once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable seizures.[42] The touchstone of analysis under the Fourth Amendment is always the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security;

[42] *Pennsylvania v. Mimms*, 434 U.S. 106 (1977).

reasonableness depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.[43]The police have already lawfully decided that the driver shall be briefly detained; the only question is whether he shall spend that period sitting in the driver's seat of his car or standing alongside it.[44] Not only is the insistence of the police on the latter choice not a serious intrusion upon the sanctity of the person, but it hardly rises to the level of a petty indignity.[45] What is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer's safety.[46]

In *Pennsylvania v. Mimms*, the Supreme Court held that where police officers on routine patrol observed defendant driving an automobile with an expired license plate and lawfully stopped vehicle for purpose of issuing a traffic summons, order of one of officers that defendant get out of automobile was reasonable and thus permissible under Fourth Amendment, notwithstanding that officers had no reason to suspect foul play from defendant at time of the stop since there had been nothing unusual or suspicious about his behavior.[47]

In *Maryland v. Wilson*, the Supreme Court of the United States extended this holding to allow police officers to order passengers to get out of the vehicle. Danger to an officer from a traffic stop is likely to be greater when there are passengers in addition to the driver in the stopped car.[48]While there is not the same basis for ordering the passengers out of the car as there is for ordering the driver out, the additional intrusion on the passenger is minimal.[49]An officer making a traffic stop may order passengers to get out of the car pending completion of the stop.[50]

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[43] *Id.* at 109.
[44] *Id.* at 111.
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Maryland v. Wilson*, 419 U.S. 408, 414 (1997).
[49] *Id.* at 414-415.
[50] *Id.*

In our case, Officer Sonko conducted a lawful traffic stop for failure to use a turn signal. At the start of the traffic stop, he was the only officer on the scene with two occupants in the vehicle. In accordance with the holdings of the Supreme Court, the officers had proper authority to order both of the occupants out of the vehicle as a matter of officer safety. In *Mimms*, the officer had no suspicion of foul play, and the Supreme Court held the officer had proper authority to order the driver out of the vehicle. Here, Officer Sonko did have suspicion of foul play because the driver was driving under suspension, and Officer Sonko smelled the odor of marijuana coming from the vehicle; therefore, the basis for ordering everyone of the vehicle was even more justified.

II. INITIAL TRAFFIC STOP WAS NOT CONCLUDED

This case is easily distinguishable from the cases cited by the defense in support of his motion to suppress because the initial traffic stop in this case was clearly not concluded, and there was no unlawful prolongation.

First, in *State v. Williams*, the driver and passenger were clearly detained beyond the scope of the traffic stop.[51] There, the officer had written and explained the ticket to the driver and returned his license and registration before he began questioning the driver.[52]The driver and passenger had been detained between twenty-five and forty minutes as opposed to the officer's normal stop time of nine to eleven minutes, and the officer there did not otherwise follow his normal procedure for a traffic stop.[53]

Second, in *State v. Pichardo*, the officer (1) told the Defendants to have a good day and be careful; (2) shook Pichardo's hand; (3) returned their paperwork; and (4) turned away from the men.[54] The basis for the stop was essentially completed when the dispatcher notified the officers

[51] *State v. Jones*, 364 S.C. 51 (2005) citing *State v. Williams*, 351 S.C. 591, 571 S.E.2d 703 (Ct.App. 2002).
[52] *Id.*
[53] *Id.*
[54] *State v. Pichardo*, 367 S.C. 84, 623 S.E.2d 840 (Ct.App. 2005).

about the Defendants' clean records, three minutes before the officers sought consent to search the vehicle...accordingly, the officers should have ended the detention and allowed the Defendants to leave and their failure to release the Defendants violated the Fourth Amendment.[55]

Third, in *Sikes v. State*, police, while in a high crime area, stopped the vehicle in which Sikes was a passenger because it had paper tags which, according to the officers indicated that the car may have been stolen or lacked insurance.[56]Sometime after obtaining Sikes' identification, police searched him for weapons and placed him in the patrol car where he was detained for at least twenty minutes.[57]

The case at hand is easily distinguishable from those cases because it was a lawful traffic stop (uncontested at the suppression hearing),[58]and Officer Sonko did not write up a ticket and then prolong the stop in order to receive consent to search the vehicle. He smelled the odor of marijuana when he began his interaction with Co-defendant and Defendant. The odor of marijuana created reasonable suspicion of criminal activity and probable cause to search the vehicle.[59] As Officer Sonko is running Co-defendant's information and relaying to another officer that he smelled the faint odor of marijuana coming from the vehicle[60], the dispatcher notified him that Co-defendant did not have a clean record, and his driver's license was suspended. Driving under suspension is an arrestable offense, and the traffic stop did result in Co-defendant's arrest. Once it was determined that Co-defendant was driving under suspension, Defendant was lawfully ordered out of the vehicle. After the Co-defendant was arrested, officers had further need to control the scene. Officers had to tow the vehicle for multiple reasons. The vehicle was parked in the road,

[55] *Id.*
[56] *Sikes v. State*, 323 S.C. 28, 448 S.E.2d 560 (1994).
[57] *Id.*
[58] Mot. Tr., at 2.
[59] *State v. Morris*, 395 S.C. 600, 720 S.E.2d 468 (Ct.App. 2011).
[60] Mot. Tr., at 16, 18.

the registered owner of the vehicle was not present nor could the identity of the registered owner be determined, and Defendant and Co-defendant both told officers they did not know each other, so a legitimate relationship between them could not be established. Not only did officers have authority to order Defendant out of the vehicle pursuant to *Mimms*, they cannot perform an inventory search of a vehicle with occupants still inside the vehicle. Ordering Defendant to exit the vehicle in order for officers to conduct an inventory search prior to towing the vehicle did not create a second detention or an unlawful prolongation of the initial traffic stop. It took officers approximately five minutes to initiate the traffic stop and then to arrest Co-defendant, and Defendant waited inside the vehicle while officers determined the status of Co-defendant's driver's license. The total detainment time of Defendant lasted less than fifteen minutes, and Officer Sonko would have testified that he followed his normal procedure for a traffic stop. Therefore, the traffic stop was not concluded, and there was no unlawful prolongation.

III. EVEN IF TRAFFIC STOP WAS COMPLETED, THERE WAS REASONABLE SUSPICION TO PROLONG THE TRAFFIC STOP

Furthermore, even if the Court deemed the basis for the traffic stop had concluded and there was a second detention, the traffic stop was lawfully prolonged because there was reasonable suspicion of criminal activity due to the odor of marijuana and Co-defendant and Defendant's behavior.

Temporary detention of an individual in the course of a routine traffic stop constitutes a Fourth Amendment seizure, but where probable cause exists to believe that a traffic violation has occurred, such a seizure is reasonable per se.[61] In carrying out a traffic stop, a police officer may request a driver's license and vehicle registration, run a computer check, and issue a citation.[62] To

[61] *State v. Tindall*, 388 S.C. at 521, 698 S.E.2d at 205 (2010).
[62] *State v. Frasier*, 437 S.C. 625, 634, 879 S.E.2d 762, 767 (2022).

prolong or exceed scope of a traffic stop beyond the initial traffic violation, a police officer must have reasonable suspicion that criminal activity may be afoot.[63]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.[64] Reasonable suspicion to prolong or exceed scope of a traffic stop beyond the initial traffic violation is not susceptible to a rigid, formulaic approach, but it requires more than a mere hunch or unparticularized suspicion.[65]Reasonable suspicion to prolong or exceed scope of a traffic stop beyond the initial traffic violation requires a police officer to have an objective, specific basis for suspecting the person stopped of criminal activity.[66]Reasonable suspicion to prolong or exceed scope of a traffic stop beyond the initial traffic violation is not a high bar and is a less demanding standard than probable cause to arrest and requires a showing considerably less than preponderance of the evidence.[67]Inquiry into reasonable suspicion to prolong or exceed scope of a traffic stop beyond the initial traffic violation involves the totality of the circumstances.[68]Inquiry into reasonable suspicion to prolong or exceed scope of a traffic stop beyond the initial traffic violation requires a court to give due weight to commonsense judgments reached by officers in light of their experience and training.[69]The State has the burden to demonstrate reasonable suspicion.[70]

During the suppression hearing, the State was unable to call upon the police officers to testify.[71] The commonsense judgments made by Officer Sonko in light of his experience and

[63] *Id.*
[64] *Id.* (citing *State v. Robinson*, 407 S.C. at 182, 754 S.E.2d at 868-69).
[65] *Id.* at 634-635, 879 S.E.2d at
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] Mot. Tr., at 14, 21.

training were not heard by the court. The officer could not testify to his normal procedure in conducting traffic stops, behavior of Defendant and Co-defendant during the stop, what he saw and smelled during the traffic stop, how long the traffic stop took, etc. When the State did put on the record that Officer Sonko smelled the odor of marijuana, the matter was stood down to allow the defense to watch the video that was provided as part of discovery.[72] The appropriate findings of law could not be made because the necessary findings of fact were not made.

In *State v. Frasier*, the Supreme Court held that police officer lacked reasonable suspicion to further detain defendant after initial traffic stop.[73] Two plainclothes officers relayed to Officer Hall that Frasier seemed suspicious, but that was only based on a subjective hunch – Frasier had scanned the parking lot and seemed nervous.[74]The Supreme Court listed things that Officer Hall did not see that would demonstrate potential criminal activity – such as cash on hand, hollowed out blunt cigars, or the smell of marijuana.[75]

In *State v. Morris*, Morris and a passenger, Brandon Nichols, were traveling northbound on I-77 in York County in a rented Ford 500.[76] While riding in an unmarked police cruiser, Officer L.T. Vinesett, Jr., and Constable W.E. Scott noticed the Ford following a truck too closely.[77]The vehicle exited the interstate and proceeded to a gas station and rest area, where Officer Vinesett initiated a traffic stop.[78]

Officer Vinesett approached the passenger side of the vehicle, where Nichols was sitting.[79]Officer Vinesett asked for Morris's license and registration, and after a rental agreement

[72] Mot. Tr., at 22.
[73] *State v. Frasier*, 437 S.C. 625, 634, 879 S.E.2d 762, 767 (2022).
[74] *Id.*
[75] *Id.*
[76] *State v. Morris*, 395 S.C. 600, 720 S.E.2d 468 (Ct.App. 2011).
[77] *Id.*
[78] *Id* at 604.
[79] *Id.*

was produced, Officer Vinesett noticed the car was rented to Nichols and Morris was not an authorized driver.[80]Speaking through the passenger window, Officer Vinesett instructed Morris to exit the car, and as Morris opened the driver's side door, Officer Vinesett noticed hollowed Phillies Blunts in the center console and blunt tobacco in the center console and on the floorboard.[81]

To avoid the rain, Officer Vinesett had Morris sit in the front passenger seat of the police cruiser while he inquired about Morris's travel plans.[82]Morris told him Nichols rented the vehicle the previous day in Greensboro, North Carolina, and they were on their way back from visiting some women in Atlanta, Georgia.[83]Officer Vinesett also asked Morris whether Morris had a drug record.[84]Morris disclosed he had been arrested for a marijuana offense when he was a minor.[85]

Officer Vinesett returned to the Ford, and outside the presence of Morris, Nichols stated the pair was returning from a basketball game in Atlanta.[86]Officer Vinesett consequently radioed for a nearby canine unit to bring a drug dog to the scene.[87]He explained that he pulled over two men who offered conflicting stories of their plans, one of whom had a previous drug conviction, and that he had seen loose blunt tobacco in the car, suggesting they had been rolling marijuana in the blunts.[88]

While waiting for the drug dog, Morris consented to a search of his person, and the search yielded no contraband.[89]Morris then went to the restroom under Constable Scott's supervision.[90]

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[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.* at 470.
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.*

Officer Vinesett asked Nichols to exit the car and requested consent to search Nichols's person.[91] Nichols consented, and again, the search yielded no contraband.[92]

Moments later, Officer Gibson arrived with a drug dog.[93] While Morris was still in the restroom, Officer Vinesett and Officer Gibson asked Nichols for permission to search the car, saying the officers would use the drug dog if consent was not given.[94] Nichols refused to give consent, so Officer Gibson walked the dog around the car twice.[95] The dog did not alert on either lap around the car and was returned to the police cruiser.[96] Officer Vinesett again asked Nichols for consent to search the car, and Nichols again refused.[97] Roughly thirteen minutes after the stop had been initiated, Nichols stated he "was ready to go."[98]

Shortly thereafter, the officers held a conversation away from Morris and Nichols.[99] Officer Vinesett returned to the Ford, leaned through the still open window of the car, and looked around for a few moments.[100] He then returned to Nichols, who was still seated in the police cruiser, and stated that he could have "swor[n he] could smell some marijuana."[101] Nichols responded that Officer Vinesett was confusing the smell of the Black & Mild he recently smoked with marijuana and he neither had marijuana, nor was he a marijuana smoker.[102]

At that time, Officer Vinesett and Officer Gibson returned to the car and searched the passenger compartment.[103] The emptied blunts contained no marijuana or marijuana residue, and

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[91] *Id.*
[92] *Id.*
[93] *Id.* at 605.
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.*

the officers found no other evidence of contraband in the passenger compartment.[104] However, Officer Vinesett searched the trunk and eventually found a plastic bag containing ecstasy pills inside a gift box.[105] The men were arrested slightly over fourteen minutes after the initiation of the stop.[106] The car was impounded, and a subsequent inventory search of the car yielded nearly a half pound of marijuana hidden under the spare tire.[107]

At trial, Morris moved to suppress the drug evidence, arguing the officers illegally extended the scope and length of the traffic stop and probable cause did not support the search of the trunk.[108] During the suppression hearing, Officer Vinesett testified that, although he failed to mention it to Constable Scott at the scene or Officer Gibson when he requested the dog, he smelled the odor of burnt marijuana when he first approached the car.[109] The trial court denied the motion.[110] It specifically discounted what Officer Vinesett classified as Morris's and Nichols's "inconsistent stories."[111] However, it found Officer Vinesett's testimony regarding the smell of marijuana credible, and it held the length and scope of the stop was reasonable in light of the circumstances.[112] Additionally, the trial court found that even though the dog did not alert on the car, the marijuana smell, loose tobacco, and hollowed blunts, in light of the officer's knowledge and experience, amounted to probable cause to search the entire car, including the trunk.[113]

In regards to the scope and length of the stop, the trial court found Officer Vinesett's testimony credible when he testified that he smelled marijuana, and the Court of Appeals was

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[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.* at 606.
[112] *Id.*
[113] *Id.*

bound by the fact findings of the trial court.[114]Officer Vinesett testified he smelled marijuana as he approached the car, and after requesting Morris's license and registration, he learned Morris was not an authorized driver.[115]Upon stopping the Ford, moreover, Officer Vinesett had the authority to order Morris out of the car, and when he did so, he observed the hollow blunts and loose tobacco, which in his experience indicated drug use.[116]Thus, Officer Vinesett properly gained reasonable suspicion Morris and Nichols were using drugs, and he was permitted to take reasonable steps to confirm or dispel this suspicion.[117]Ultimately, the Court of Appeals held that the police officer had reasonable suspicion of drug activity to extend duration and scope of traffic stop and had probable cause to search trunk of vehicle.[118]

In *State v. Moore*, Deputy Dale Owens of the Spartanburg County Sheriff's Office was patrolling the I-85 corridor along with his supervisor, Corporal Ken Hancock.[119]At around 1:10 am., Deputy Owens observed Moore driving northbound on the interstate and visually estimated that he was travelling in excess of the posted speed limit.[120] Deputy Owens pulled onto the interstate, "paced" Moore's vehicle, and determined that Moore was driving ten miles over the speed limit.[121] Deputy Owens initiated a traffic stop.[122] Moore turned on his left turn signal and

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[114] *Id.*

[115] *Id.* Cf. *State v. Butler*, 353 S.C. 383, 390, 577 S.E.2d 498, 501 (Ct.App. 2003) (finding that an officer's detection of the odor of alcohol during a traffic stop justified the extension of the stop based on the reasonable suspicion that open containers were located in the vehicle); see also *State v. Odom*, 376 S.C. 330, 335, 656 S.E.2d 748, 751 (Ct.App. 2007) (indicating that the sight of Swisher Sweet cigars, the strong odor of marijuana, the defendant's admission he smoked marijuana earlier in the day, and the presence of a gun holster in the back seat amounted to reasonable suspicion of the existence of drugs).

[116] *Id.*

[117] *Id. See State v. Corley*, 383 S.C. 232, 241, 679 S.E.2d 187, 192 (Ct.App. 2009) (providing that during a traffic stop, "the police may briefly detain and question a person upon a reasonable suspicion, short of probable cause for arrest, that the person is involved in criminal activity"; "[t]he scope and duration of [this investigative] detention must be strictly tied to and justified by the circumstances that rendered its initiation proper"; and normally, this permits an officer to attempt to obtain information confirming or dispelling the officer's suspicion).

[118] *Id.*

[119] *State v. Moore*, 415 S.C. 245, 248, 781 S.E.2d 897, 899 (2016).

[120] *Id.*

[121] *Id.*

[122] *Id.*

appeared to move to the left; however, he then turned on his right turn signal and slowly pulled over.[123]

Deputy Owens approached the passenger side of Moore's vehicle, observed Moore talking on the phone, and requested that Moore end the call.[124] Deputy Owens immediately smelled an odor of alcohol coming from the vehicle, and Moore readily admitted to having a couple of drinks.[125] Deputy Owens then asked Moore for his driver's license and registration.[126] Moore produced his driver's license and a rental agreement for the vehicle.[127] The vehicle had been rented by a third party in Morganton, North Carolina, the previous afternoon.[128]

At the direction of Deputy Owens, Moore exited the vehicle; however, Moore left the door of the vehicle open and had to return to shut it.[129] Moore then lit a cigarette and consented to a pat down, which yielded a "wad" of approximately $600 in cash in Moore's pocket.[130] Moore stated he was unemployed.[131] Moore further informed the officers he was driving from Lawrenceville, Georgia, which is a suburb of Atlanta, on his way to visit his grandmother in Marion, North Carolina.[132]

Deputy Owens then administered a series of three field sobriety tests.[133] Moore passed two of the three tests.[134] Based on these results, Deputy Owens did not arrest Moore for driving while

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[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] *Id.*

impaired and opted to give him a warning instead.[135] However, Deputy Owens asked Moore for consent to search the vehicle.[136] Moore declined to consent to a search.[137]

At that point, approximately fifteen to sixteen minutes into the traffic stop, Corporal Hancock requested that Deputy Jason Carraway, a drug-detection canine handler, respond to the scene.[138] When Moore learned that a canine unit was en route, he smoked another cigarette.[139] Deputy Carraway arrived approximately sixteen minutes later.[140] The canine alerted to the presence of drugs in Moore's rental vehicle.[141]

Deputy Owens and Corporal Hancock then began a search of the vehicle, which resulted in the seizure of two containers filled with a large quantity of crack cocaine, a loaded semiautomatic handgun, and $4,000.[142] Moore was arrested and charged with trafficking in cocaine base in excess of 400 grams and possession of a firearm during the commission of a violent crime.[143] Prior to trial, Moore moved to suppress the evidence seized from his vehicle, arguing the officers did not have reasonable suspicion to continue to detain him after the decision was made not to arrest him for driving while impaired.[144]

During the suppression hearing, Deputy Owens testified in detail about his observations during the traffic stop and identified a number of indicators of reasonable suspicion, summarized as follows: (1) Moore initially turned on his left turn signal but then pulled his vehicle over to the right; (2) the time Moore took to pull over was longer than average, indicating the

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[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *Id.*

possibility of flight; (3) Deputy Owens noticed an odor of alcohol emanating from the vehicle, which led him to believe that Moore had been drinking in order to calm his nerves; (4) Moore smoked several cigarettes, which was also an indicator that he might be trying to calm his nerves; (5) Moore continued to talk on the phone during the traffic stop, which was an indicator of criminal activity as phones provide a means of communication between drug traffickers; (6) Moore's hands were shaking when he handed Deputy Owens his driver's license and rental agreement; (7) Moore's pulse appeared to be rapid; (8) Moore's breathing was heavy; (9) Moore tried to pick up his cell phone when he was asked to exit his vehicle, also indicating the possibility of flight; (10) Moore was carrying a large sum of money in his pocket despite being unemployed; (11) Moore was driving a rental car, which was rented by a third party; and (12) Moore was leaving a suburb of Atlanta, which is a known drug trafficking hub.[145]The trial court denied Moore's motion to suppress, stating: I am required to consider the totality of the circumstances, and give due weight to the common sense judgments reached by officers in light of experience and training.[146]The Supreme Court held that deputy had reasonable suspicion to further detain defendant after initial traffic stop.

CASE ANALYSIS FOR REASONABLE SUSPICION

In *Morris*, the Court held Officer Vinesett properly gained reasonable suspicion Morris and Nichols were using drugs, and he was permitted to take reasonable steps to confirm or dispel this suspicion. The trial court also held there was probable cause to search the entire car due to the odor of marijuana. If the Court held Officer Vinesett properly gained reasonable suspicion, then Officer Sonko certainly did, which would also mean he had probable cause to search the entire car and order all occupants to exit.

[145] *Id.* at 250, 900.
[146] *Id.*

Morris did not have a suspended license, but he was not an authorized driver. The car he was driving was rented to Nichols who was present in the car. Officer Vinesett utilized a drug dog that did not alert, and he only saw loose blunt tobacco in the car. It was even discovered through the search that the emptied blunts did not have marijuana. Officer Vinesett leaned through the open window of the car, looked around for a few moments, and then said he smelled marijuana. Officer Vinesett also never mentioned the odor of marijuana to anyone on scene. Officer Sonko smelled the odor of marijuana when he first interacted with Co-defendant and Defendant and immediately relayed that information to another officer on scene.[147] Officer Sonko smelled the odor of marijuana by merely walking up to the car and talking to Co-defendant asking for license, insurance, and registration, all of which lasted less than two minutes. Co-defendant also immediately lit up a cigarette after getting pulled over which Officer Sonko told Officer McCluskey he believed was a sign of trying to cover up the odor of marijuana.[148]He told Officer McCluskey that Co-defendant appeared shaky and provided answers to questions that were not asked of him all of which indicated to Officer Sonko nervous behavior due to criminal activity afoot.[149]Co-defendant was driving the car with a suspended license, and he said the car belonged to a friend who was not present.[150]When Co-defendant was arrested for driving under suspension, he was searched incident to arrest and did not have anything illegal on his person.[151] This would lead a reasonable person to believe that the marijuana was either in the car or on Defendant's person. Officer Sonko had reasonable suspicion of criminal activity due to the odor of marijuana, Co-defendant's decision to drive despite being suspended, and Co-defendant and Defendant's

[147] Sonko, Brandon. May 6, 2023. *DRUGS* [Video]. Evidence.com.
[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] *Id.*

behavior. A lawful probable cause search of the vehicle was conducted and a scale was found in the driver's side door as well as a bag of purple powder between the center console and front passenger's seat where Defendant had been seated.

Police officers have reasonable suspicion to support frisk of vehicle occupants for weapons, where they have reasonable suspicion to suspect that drugs are present in the vehicle.[152]Officer Sonko smelled the odor of marijuana, so he had reasonable suspicion to suspect that drugs were present in the vehicle. Given the frequent nexus between drugs and guns, where an officer has reasonable suspicion that drugs are present in a vehicle lawfully stopped, there is an appropriate level of suspicion of criminal activity and apprehension of danger to justify a frisk of both the driver and the passenger in the absence of other factors alleviating the officer's safety concerns.[153]Before conducting a frisk, officers asked Defendant if he had anything on him (although they could have performed a frisk for weapons). For officer safety, officers can ask questions before performing a frisk.[154] When asked if Defendant had anything illegal on him, he admitted to having marijuana and pulled it out of his front hoodie pocket. At that point, he was under arrest for the possession of marijuana, and a lawful search incident to arrest revealed the eighteen bags of drugs in his front hoodie pocket.

In *Moore*, Deputy Owens testified in detail about his observations during the traffic stop. The trial court denied Moore's motion to suppress after hearing Deputy Owens's testimony and considering the totality of the circumstances. Deputy Owens smelled the odor of alcohol and

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[152] *State v. Banda*, 371 S.C. 245, 639 S.E.2d 36 (2006) (Officers conducting stop of automobile that had stolen Georgia license tags had reasonable suspicion to support frisk of passengers for weapons, based on frequent nexus between drugs and guns; officers had reasonable suspicion to suspect that drugs were present in the vehicle, in that police observed the car leave the residence of a known drug dealer, car displayed stolen Georgia license tags, and confidential informant had informed police that the drug dealer's drug shipments came from Georgia).

[153] *Id.*

[154] *Unites States v. Buzzard*, 1 F.4th 198 (Officer's question, during traffic stop, asking whether there was anything illegal in the car related to officer safety and, thus, related to the traffic stop's mission; officer's question, during traffic stop, asking whether there was anything illegal in the car did not unlawfully extend the traffic stop).

observed numerous indicators of nervous behavior. Moore's nervous behavior was very similar in nature to Defendant's nervous behavior. Both smoked cigarettes upon talking to police officers and shaky hands. Moore was driving a rental car, and Co-defendant was driving under suspension in a car that did not belong to him. Even though that case only had the odor of alcohol and took over thirty minutes, the Supreme Court held that Deputy Owens had reasonable suspicion to further detain defendant after initial traffic stop.

CONCLUSION

The actions taken by the police officers in this case were proper and lawful. A lawful traffic stop was conducted for a traffic infraction. The initial traffic stop was not concluded because the officers had further need to control the scene in order to arrest Co-defendant for driving under suspicion and to tow the car. Even if the initial traffic stop was concluded, there was reasonable suspicion to prolong the stop: odor of marijuana, Co-defendant driving someone else's car while having a suspended driver's license, both Co-defendant and Defendant smoking cigarettes upon interacting with law enforcement, Co-defendant's shaky hands, Co-defendant answering questions that were not asked of him, and both Co-defendant and Defendant admitting to not knowing one another. The odor of marijuana in a vehicle creates probable cause to search a vehicle, and a search cannot be done while occupants are inside the vehicle. When asked if Defendant had anything illegal on him, he admitted to having marijuana and gave it to officers. Officers conducted a search incident to arrest and found eighteen bags of drugs in his front hoodie pocket.

The drug evidence seized in the case was legally obtained during a lawful detention of Defendant. The detention, questioning, and warrantless search of Defendant did not violate his Fourth Amendment right against unlawful search and seizure. Officer Sonko justifiably extended the length of Defendant's detention because he had reasonable suspicion supported by articulable

facts, and Defendant should not have been permitted to leave the scene. The evidence recovered and seized should be admitted as it was obtained lawfully in accordance with the Fourth Amendment of the United States Constitution, Article I, Section 10, of the South Carolina Constitution, and well-established South Carolina case law precedent. Defendant's motion to suppress should be denied, and the drug evidence seized from Defendant should be admitted and admissible at the trial of this case.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
	)	
	)	**REPLY TO MOTION TO RECONSIDER**
STATE OF SOUTH CAROLINA,	)	
	)	
v.	)	
	)	
RICHARD LEROY ANDERSON,	)	
	)	Warrant No(s): 2023A2620601180-1183
DEFENDANT.	)	

REPLY TO MOTION TO RECONSIDER:

This reply is written in response to the State's Motion to Reconsider & Supporting Memorandum filed with the Court on March 20, 2024, and delivered by U.S. postal mail to the defense on March 25, 2024. The Defense asserts that the ruling by the Court granting suppression of the drug evidence seized in this case was not only proper but fully supported by relevant and current case law. The Defense reasserts its original position that the drug evidence seized in this case was illegally obtained during a period of unlawful detention of Mr. Anderson following a traffic stop of a vehicle in which he was a passenger.

The Defense believes that the Court's ruling in this matter should remain in place as the Court correctly found that the evidence recovered and seized should be suppressed as fruits of an illegal search and seizure as the evidence was obtained in violation of the Fourth Amendment of the United States Constitution and Article I, Section 10, of the South Carolina Constitution.

FACTUAL BACKGROUND

On May 6, 2023, Anderson was a passenger in a vehicle operated by Anthony Shaunta Kerson, hereinafter referred to as Kerson, which was pulled over by Myrtle Beach Police Officer B. Sonko, hereinafter referred to as Sonko, for allegedly failing to give a turn signal when required. Upon approaching the vehicle, Sonko requested Kerson provide his driver's license, proof of insurance, and vehicle registration. Kerson provided Sonko with an identification card instead of a valid driver's license, and Sonko returned to his patrol car to request dispatch run Kerson's information. As Sonko ran Kerson's information, Officer McCluskey arrived to assist and is told by Sonko that the ***driver*** appeared nervous, was shaking, and he observed a faint odor of marijuana which appeared to be covered up by cigar smoke. Nothing more is mentioned about this odor among law enforcement present and neither occupant is questioned in more detail about this odor.

Dispatch soon confirmed that Kerson's driver's license was suspended and Sonko immediately returned to Kerson's vehicle and placed him under arrest for driving under suspension. A search incident to arrest was performed on Kerson with negative results as it revealed nothing illegal in his possession. Kerson is placed in the back of a patrol car to await transport to the jail. During this time, Officer McCluskey engaged Anderson in small talk as Anderson is allowed to remain seated in the vehicle while Officer Sonko completes the arrest of the driver.

As Kerson is seated in a patrol car awaiting transport to jail, Sonko decides to tow Kerson's vehicle, so Anderson is removed from it and told to go with other officers to the rear of the vehicle for Sonko to begin an inventory search of the car and its contents. It is important to note that at the time that Anderson is removed from the car, he is assured by Officer McCluskey that "they would get him out of there shortly." This statement is evidence that Anderson was not suspected of committing

a crime nor was he observed to be exhibiting suspicious behavior that would lead officers to believe that he was involved in criminal activity to justify prolonging his detention. Despite the purpose of the traffic stop having been fulfilled with the arrest of the driver, Anderson was not permitted to leave but instead further detained, questioned, and ultimately admitted to being in possession of marijuana. A search incident to his arrest for possession of marijuana the other drugs charged were discovered.

THE SUPPRESSION HEARING

The sequence of events in this case was well documented by the body worn cameras of law enforcement. This footage shows the events surrounding the traffic stop in real time and is more reliable than in person testimony given that the event in question occurred some 9 months earlier. The presiding judge reviewed the pertinent parts of the traffic stop footage and heard arguments from both the state and the defense on legality of the detention and issue of suppression. The Court then decided to take the matter under advisement. The Court later issued a Form 4 detailing its decision to grant suppression of the evidence seized from the Defendant's person (a copy is attached and marked as Exhibit A). The Court found that "the detention, questioning, and warrantless search of the Defendant violated his Fourth Amendment rights against unlawful search and seizure. The Court's order concluded with an instruction that defense counsel be tasked with the preparation of a formal written order.

After defense counsel had prepared a proposed formal order, a copy of the same was emailed to Assistant Solicitor Cook for her review on February 26, 2024, at 11:08 am. In this email (copy attached and marked as Exhibit B/Emails with Cook dated 2/26/2024), defense counsel states the following: "Attached is a proposed order from the suppression hearing…please review and let me know of any changes that you would like me to make…" Assistant Solicitor Cook replied shortly thereafter on that same day at 11:28 am acknowledging receipt of the proposed order but never

requesting any changes be made to it (copy of email attached and marked as Exhibit B). A second email was then sent to Assistant Solicitor Cook later that afternoon at 5:16 pm again asking for any desired changes to the proposed order and defense counsel never received a response from Assistant Solicitor Cook about this follow up email (copy of second email attached and marked as Exhibit C). The following day, February 27, 2024, after receiving no requests for changes, and sending more than one request for those changes, defense counsel emailed the proposed order to the presiding judge the at 12:06 pm, and included Assistant Solicitor Cook in this email (copy of email to Judge Culbertson on 2/27/24 attached and marked as Exhibit D).

If there were omissions in this order that Assistant Solicitor Cook desired to be corrected then she had ample time to request changes, however, she chose not to do so and ignored repeated requests from defense counsel for her input regarding the language of this order. Therefore, the Defense believes that she should be prohibited from addressing issues now about how this order was written. The Defense asserts that no procedural error was made by the presiding judge's decision in not allowing testimony of the officers as this testimony would have been cumulative, unnecessary, and a waste of valuable court time. Further, it is the position of the defense that no legal error was made by the presiding judge regarding the issue of the odor of marijuana as this issue was fully addressed during the hearing and ultimately taken into consideration by the presiding judge based upon his review of the traffic stop footage. It appears based upon the Court's ruling in this matter that the judge did not believe that this odor of marijuana (described by Sonko as *faint and covered up by cigar smoke*) was the reason for the search of the vehicle. The video evidence appears to have been dispositive on this issue and resolved any concerns or questions that the judge may have had on the matter. This footage demonstrated the true and accurate reason for the search of the vehicle was an

inventory of it prior to towing it. This reason alone was the justification for Anderson's removal, and the state's own evidence fully supports this assertion.

LAW/ANALYSIS

First, the Defense reasserts the same case law cited in its written motion to suppress to support the judge's decision granting suppression in this case (a copy of the relevant law portion of the motion is attached for reference and marked as Exhibit E). Secondly, the Defense does not, nor has it ever, disputed the fact Sonko lawfully subjected this vehicle to a traffic stop. The detention of the driver was well within the limitations set by the Fourth Amendment; however, the continued detention of the passenger after the arrest of the driver was unlawful and a violation of the passenger's rights under the Fourth Amendment. The reason that this continued detention was unlawful is because the purpose of the traffic stop was fulfilled and there was no sufficient legal basis to continue holding the passenger after that arrest.

The Defense also agrees with the State's assertion that an officer making a traffic stop may order passengers to get out of the vehicle. However, the Defense reemphasizes that this action by law enforcement is **only lawful** *pending completion of a traffic stop.* However, when the purpose of the traffic stop is fulfilled, the legal justification for the detainment of the driver and his passengers is over absent reasonable suspicion of their involvement in a serious crime.

The facts of our case are similar to those in *State v. Williams* and *State v. Piccardo*, with the most crucial commonality being that the purpose of the traffic stop was fulfilled when law enforcement began questioning the occupants of the vehicle and they had no sufficient legal basis to justify further detainment/questioning. As a result, the evidence obtained during this period of unlawful detention was deemed inadmissible. The Court in *Sikes v. State*, again found in favor of the defendant after determining that he had been subjected to unlawful detention and that law

enforcement violated his rights under the Fourth Amendment. In the most recent case of *State v. Frasier,* the Court ruled in favor of the defendant and found that law enforcement lacked reasonable suspicion to further detain the defendant who was a passenger in a vehicle after the traffic stop had concluded.

The State cites the case of *State v. Morris* to support its motion, however, the facts in that case are easily distinguishable from those present in our case. First, in *Morris* the odor of marijuana was definitively determined to exist by law enforcement. This odor was never described as a *faint* odor but instead an odor that the officer *swore* to be marijuana. Secondly, other factors were present in *Morris* that supported probable cause to search the vehicle and detain the occupants for questioning, and those additional factors did not exist in our case.

CONCLUSION

The decision of the Court should remain in place because it was the right ruling in this matter. The Court followed established precedent and adhered to the principles established in the Fourth Amendment of the US Constititon and Article I, Section 10, of the SC Constitution. As a mere passenger in a vehicle subjected to a traffic stop for a minor traffic violation, Anderson should have never been detained. He had given officers no reason to believe that he had committed a crime or was involved in any criminal activity. Therefore, his detainment, the questioning by law enforcement, and the search performed during this period of unlawful detention, violated his rights under both our federal and state constitutions. As a result, the drugs recovered from his person should be suppressed as they were illegally obtained.

Respectfully Submitted,

Melinda A. Knowles, Esq.
Attorney for Defendant

State v. Anderson

From: Culbertson, Benjamin H. <bculbertsonj@sccourts.org>
sent from gmail.com
Sent: Thu, Feb 22, 2024 at 4:22 pm
To: knowleslaw1@gmail.com, Cook, Kaitlin
Cc: Culbertson, Benjamin H. Law Clerk (Kelli Smith), Smith, Erin

State v. Anderson.pdf (662.9 KB)

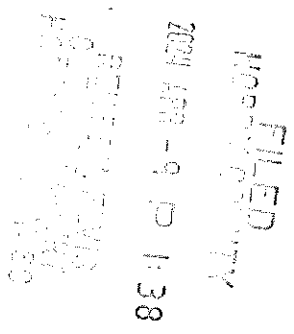


Exhibit A
Form 4

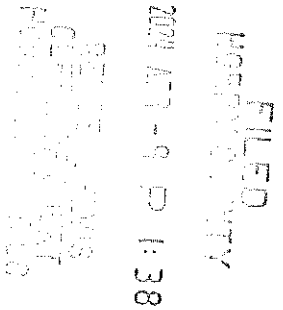
Please find attached a copy of the Form 4 order granting the defendant's motion to suppress in the above referenced case. As you can see, I granted suppression of the drugs found on the defendant but denied the motion to dismiss as I don't know if the State possesses other inculpatory evidence of these crimes against the defendant.

I ask that Ms. Knowles prepare an order of my ruling and email it to me in Word format so that I can edit it if needed. Be sure to submit a copy of the proposed order to Ms. Cook for review prior to submitting it to me for review and signature.

Sincerely,

Benjamin H. Culbertson

Circuit Court Judge
P.O. Box 479 (zip code 29442)
Georgetown, South Carolina
Phone: (843) 545-3030
Fax: (843) 545-3282
Email: bculbertsonj@sccourts.org



COPY

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF GENERAL SESSIONS

WARRANT(S): **2023A2620601180 - 1183**
INDICTMENT(S):

State of South Carolina

Richard Leroy Anderson
DEFENDANT(S)

This form order submitted by: **Benjamin H. Culbertson Presiding Judge**	Attorney for : ☐ State ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE

☐ **DECISION BY THE COURT AFTER HEARING.** This action came to a hearing before the court. The issues have been heard and a decision rendered. ☐ See below for additional information.

☐ **DECISION BY THE COURT AFTER STATUS CONFERENCE.** This case came for a status conference before the court. The status of this case and pending issues in this case were discussed and a decision rendered. ☐ See below for additional information.

DECISION BY THE COURT AFTER SECOND APPEARANCE. This case came for a Second Appearance before the court. The status of this case and pending issues in this case were discussed and a decision rendered. ☐ See below for additional information.

☑ MOTION: **Defendant's Motion to Suppress**

☑ GRANTED ☐ DENIED ☐ CONTINUED ☐ WITHDRAWN

☐ WITHDRAWN BY MOVING PARTY: _____
Signature of Moving Party

☐ OTHER:

IT IS ORDERED AND ADJUDGED: ☐ See Order of the Court below ☐ See attached order
☑ Formal Order to follow; to be prepared by: ☐ State ☑ Defendant ☐ Other: _____

ORDER INFORMATION

This order ☐ ends ☑ does not end the case.

Additional Information for the Clerk :

Defendant's Motion to Suppress is GRANTED. The detention, questioning and warrantless search of the defendant violated the defendant's 4th Amendment right against unlawful search and seizure. Therefore, the drugs found on the defendant are suppressed and may not be used as evidence against the defendant. However, the charges against the defendant are not dismissed as the Court is not aware if the State possesses other inculpatory evidence against the defendant.

Attorney Melinda Knowles is to prepare a formal order.

Benjamin H Culbertson — 2148 — Feb. 22, 2024

Circuit Court Judge | Judge Code | Date

Exhibit D
Email +
Judge
Culbertson
2/27/24
12:06 pm

Richard L. Anderson - Proposed Order - Suppression

From: melinda@melindaknowleslaw.com <melinda@melindaknowleslaw.com>
Sent: Tue, Feb 27, 2024 at 12:06 pm
To: Culbertson, Benjamin H., Culbertson, Benjamin H. Law Clerk (Kelli Smith)
Cc: Cook, Kaitlin

Final Order for Suppression of Evidence.docx (37.9 KB) Adobe - proposed order and docs.pdf (2.9 MB)
– Download all

Dear Judge Culbertson:

Attached you will find an adobe file that includes copies of the proposed order, email correspondence on the matter between myself and Ms. Cook, and a copy of your form 4. Additionally, per your request, I have also included the proposed order in word format for you to make any corrections that you deem necessary.

As you will see in the email correspondence provided, Ms. Cook was sent a copy of this proposed order yesterday with a request that she notify me of any changes that she desired. She acknowledged receipt of the order, and I have not received any requests from her for any changes/additions to be made. Therefore, I can only assume that she approves of the language I have included.

Additionally, when I sent the order to her I asked her about her intentions for this defendant moving forward given the Court's ruling in this matter. Her response to me was that it was her intention to not dismiss these charges and she cited the language in the form 4 regarding your decision to not dismiss to support her position.

Because my client has now been in jail for 298 days (as of today) and he is unable to afford to post bond to get released, I am now trying to plan my next step to try and secure his release. With that said, I need the State to clarify the additional inculpatory evidence in its possession (i.e. the inculpatory evidence not presented at the hearing) so that I can decide what needs to be done next on behalf of my client. I am unaware of any additional inculpatory evidence in the possession of the State that was not presented at the hearing, so I would respectfully request that Ms. Cook respond to this email identifying this additional inculpatory evidence.

Sincerely,

Melinda Knowles
Melinda Knowles, Esquire
1400 Church Street, Ste 300D
Conway, SC 29526
p. 843.488.0778 | f. 1.855.710.7519

Exhibit C
Followup Email
to Cook
2/26/24
5:16pm

RE: Proposed Order - Richard Leroy Anderson

From: melinda@melindaknowleslaw.com <melinda@melindaknowleslaw.com>
Sent: Mon, Feb 26, 2024 at 5:16 pm
To: Cook, Kaitlin

Are there any changes to this proposed order that you would like? If not, I am going to forward this over to him.

Sincerely,

Melinda Knowles, Esquire
1400 Church Street, Ste 300D
Conway, SC 29526
p. 843.488.0778 | f. 1.855.710.7519

-----Original Message-----
From: "Cook, Kaitlin" <Cook.Kaitlin@horrycountysc.gov>
Sent: Monday, February 26, 2024 12:28pm
To: "melinda@melindaknowleslaw.com" <melinda@melindaknowleslaw.com>
Subject: RE: Proposed Order - Richard Leroy Anderson

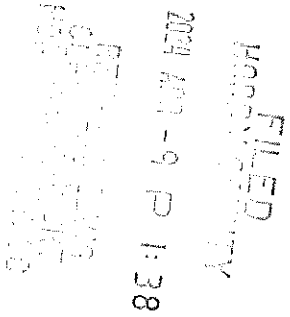


Exhibit B Emails w/ Cook: 2/26/24 11:08 am 11:28 am

I attached a copy of the clocked and filed notice of motion and motion to reconsider.

Kaitlin L. Cook | Assistant Solicitor
Horry County Government | 15th Judicial Circuit Solicitor
1301 Second Avenue, Conway, SC 29526
Tel: (843) 915-8653 | Email: cook.kaitlin@horrycountysc.gov

From: Cook, Kaitlin
Sent: Monday, February 26, 2024 11:28 AM
To: melinda@melindaknowleslaw.com
Subject: RE: Proposed Order - Richard Leroy Anderson

Good Morning,

I am confirming receipt of the proposed order. I filed a motion to reconsider on Friday. Judge Culbertson's Form 4 allowed the charges to stay in place, so they will not be dismissed.

Kaitlin L. Cook | Assistant Solicitor
Horry County Government | 15th Judicial Circuit Solicitor
1301 Second Avenue, Conway, SC 29526
Tel: (843) 915-8653 | Email: cook.kaitlin@horrycountysc.gov

From: melinda@melindaknowleslaw.com <melinda@melindaknowleslaw.com>
Sent: Monday, February 26, 2024 11:08 AM
To: Cook, Kaitlin <Cook.Kaitlin@horrycountysc.gov>
Subject: Proposed Order - Richard Leroy Anderson

Hi Kaitlin:

Attached is a proposed order from the suppression hearing. Please review and let me know of any changes that you would like me to make. After I receive your approval, I will send it over to Judge Culbertson.

Additionally, I wanted to ask about your future plans for this defendant? He has been in jail for 9 months now, so I know he will have questions for me about what to expect in the near future. He is ready to get released and move on with his life.Will I need to file a motion for bond modification based upon this change in circumstance or is it your intention to dismiss upon receipt of the signed order?

Sincerely,

Melinda
Melinda Knowles, Esquire
1400 Church Street, Ste 300D
Conway, SC 29526

p. 843.488.0778 | f. 1.855.710.7519

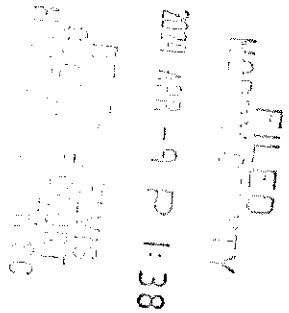


Exhibit E
Case Law
Supporting
Suppression

Any further detention for questioning is beyond the scope of the stop and therefore illegal unless the officer has *a reasonable suspicion of a serious crime.*[6] An investigative detention must be temporary and not last longer than is necessary to effectuate the purpose of the stop and the scope of the detention must be carefully tailored to its underlying justification.[7] The police may lengthen detention of an individual for further questioning beyond that related to the initial stop but only in two circumstances: 1) if the officer has an objectively reasonable and articulable suspicion of criminal activity, or 2) if the initial detention has become a consensual encounter.[8]

The SC Constitution, Article 1, Section 10, addresses the issue of searches, seizures and invasions of privacy and states: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable 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, the person or thing to be seized, and the information to be obtained."[9]

B. Case Law in Support of Suppression

I. State v. Williams

In State v. Williams[10], the Court of Appeals affirmed the trial court's suppression of evidence where there was no reasonable, articulable suspicion to support the continued detention of the passenger of a vehicle after completion of a traffic stop. In Williams, the officer asked the driver to step out of the vehicle while the passenger remained seated.[11] The officer explained the

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[6] *State v. Williams*, 351 S.C. 591, 598 (Ct. App 2002).

[7] *State v. Pichardo*, 367 S.C. 84, 99 (Ct. App. 2005), citing *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed2d 229 (1983).

[8] *Id.* at 99

[9] S.C. Constitution, Article 1, Section 10

[10] *State v. Williams*, 351 S.C. 591, (Ct. App 2002).

[11] *Id.* at 595

ticket to the driver, returned his driver's license and registration, then asked if he could ask a few questions.[12] The officer then asked the driver where they were coming from, where they were headed, the name of the passenger, and the nature of their relationship.[13] The officer said that he became suspicious because the driver and passenger gave inconsistent answers to his questions.[14] The driver ultimately consented to a search of the car, and the officer discovered twenty-five pounds of marijuana. [15]

The detention of Williams lasted between twenty-five and forty minutes.[16] Despite the officer's testimony that the Defendant was free to leave before he answered his questions, the Court found that the Defendant was not free to leave, and that he was seized for purposes of the Fourth Amendment.[17] In deciding whether a Fourth Amendment seizure had occurred, the Court noted that "the detention associated with roadside searches is unlike a mere field interrogation where an officer may question an individual without grounds for suspicion.[18] Roadside consent searches are instead more akin to an investigatory stop that does involve a detention." [19]

The circumstances the Court considered included: it was a roadside traffic stop; the presence of two uniformed officers and a drug dog; the officer asking the driver to exit his car so that the officer could talk to driver and passenger separately; the officer asking a second officer to stand by the driver at the rear of the car while the first officer questioned the passenger; and the seemingly innocuous but immediate transition from the valid traffic stop such that the defendant

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[12] *Id.*

[13] *Id.*
[14] *Id.* at 596
[15] *Id.*
[16] *Id.* at 602
[17] *Id.* at 601
[18] *Id.*
[19] *Id.*

may not have realized that the initial seizure had ended.[20] In addition, the Court concluded that the consent to search was not valid because it was obtained through the officer's exploitation of the unlawful detention; a minimal amount of time had passed between the seizure and the ensuing consent; there were no intervening or attenuating circumstances; and the detention had no legal basis. The Court further noted..."When an officer asks for consent to search *after* an unconstitutional detention, the consent procured is per se invalid *unless* it is both *voluntary* **and** not an exploitation of the unlawful detention." [21]

II. State v. Pichardo

In State v. Pichardo,[22] the Court again ruled in favor of the defense finding no reasonable suspicion existed to justify the prolonged detention of the defendants and that the search conducted in the case was an exploitation of the original stop. The officer initiated a traffic stop on the vehicle driven by Pichardo, which was owned by Reyes (passenger), for failure to maintain a lane.[23] After the officer requested Pichardo's driver's license and the vehicle documentation, Pichardo immediately explained that he had left his license at home and the only reason he was driving was because Reyes was too sleepy to drive.[24] Pichardo further stated that the two were in the process of driving from Miami to New York.[25] The officer issued a warning ticket, returned the paperwork to the driver, but before returning to his patrol car asked if he could ask them another question.[26] When they both turned to him, he explained the situation that they were experiencing with people running contraband on the interstate and then asked for consent to search their car. [27]According to

[20] *Id.* at 602
[21] *Id.* at 604
[22] *State v. Pichardo*, 367 S.C. 84 (S.C. Ct. App. 2005), 623 S.E. 2d 840
[23] *Id.* at 91
[24] *Id.*
[25] *Id.*
[26] *Id.* at 93
[27] *Id.*

the officer's testimony, both nodded in the affirmative. [28]A subsequent search yielded a kilo of heroin found inside the car door.[29]

The Court looked to the rulings in other cases citing the following language: "Once the purpose of the stop has been fulfilled, the continued detention of the car and the occupants amounts to a second detention" and "[T]he basis for the stop was essentially completed when the dispatcher notified the officers about the defendants' clean records, three minutes before the officers sought consent to search the vehicle...accordingly, the officers should have ended the detention and allowed the defendants to leave and their failure to release the defendants violated the Fourth Amendment.[30] The court referenced U.S. v. Beck, emphasizing "Once the purposes of the initial stop were completed, there is no doubt that the officer could *not* further detain the vehicle or its occupants unless something that occurred during the traffic stop generated the necessary reasonable suspicion to justify a further detention."[31]

The Court then defined "consensual encounter" stating it as "the voluntary cooperation of a private citizen in response to non-coercive questioning by a law enforcement official."[32] The Court noted "because an individual is free to leave at any time during such an encounter, he is not "seized" within the meaning of the Fourth Amendment." [33]The Court also defined the term "seizure" within the meaning of the Fourth Amendment identifying it as when the officer, by means of physical force or show of authority, has in some way restricted the liberty of a citizen. [34]The test for if an encounter constitutes a seizure within the meaning of the Fourth Amendment is whether

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[28] *Id.* at 93
[29] *Id.*
[30] *Id.* at 98-99
[31] *Id.* at 99, citing *United States v. Beck*, 140 F.3d 1129, 1136 (8th Cir. 1998).
[32] *Id.* at 100
[33] *Id.*
[34] *Id.*, citing *Terry v. Ohio*, 392 U.S. 1, 19-20n. 16, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

under the totality of circumstances surrounding the encounter, a reasonable person in the suspect's position would have felt free to decline the officer's requests or otherwise terminate the encounter.[35] The Court in Pichardo ultimately concluded that by prolonging the initial stop beyond its proper scope, the officer rendered the ensuing encounter more coercive than consensual, and the circumstances were sufficiently intimidating such that Pichardo and Reyes could have reasonably believed that they were not free to disregard the police presence and go about their business.[36]

III. Sikes v. State

In Sikes v. State,[37] the South Carolina Supreme Court addressed the issue of the rights of a passenger in a vehicle, finding that a passenger in a vehicle could assert a Fourth Amendment claim based upon an unreasonable detention. In Sikes, the defendant (a passenger in the vehicle) was removed from the vehicle and placed in the back of a patrol car where he was detained for at least twenty minutes while officers ran a warrant check on him.[38] This warrant check revealed that he had an outstanding warrant, and he was arrested on that warrant.[39] When removing Sikes from the patrol vehicle at the police station, crack was found in the seat where he was seated.[40] Sikes argued that he was improperly seized with no reasonable cause. The Court classified the actions of law enforcement as "a blatant violation of Sikes's Fourth Amendment rights."[41] The Court further that "the officers' *reasonable suspicion* that the car was either stolen or that the driver was

[35] *Id.* at 100-101, citing *Michigan v. Chesternut*, 486 U.S. 567.
[36] *Id.* at 103
[37] Sikes v. State, 323 S.C. 28, 448 S.E.2d 560 (S.C. 1994).
[38] *Id.* at 562
[39] *Id.*
[40] *Id.* at 562-563
[41] *Id.* at 563

uninsured did not give the officers the right to seize or question the car's passenger."[42] The Court went onto to say "even assuming arguendo that this stop was reasonable, certainly a twenty-minute detention while the officers "went fishing" for evidence of some crime was not brief within the definition announced in *Prouse* or *Knight*." [43]

IV. State v. Frasier

In a recent case, State v. Frasier,[44] the Supreme Court of South Carolina reversed the Court of Appeals ruling, finding that the officer in the case lacked reasonable suspicion to prolong the traffic stop and the discovery of the cocaine found on the defendant was the product of an illegal seizure. The Court also found that Frasier did not consent to the search that was conducted.[45]

Frasier was a passenger in a vehicle that was stopped by law enforcement for an inoperable third brake light.[46] The arresting officer (Hall) noted that the driver appeared to be acting suspiciously and he thought she could potentially be hiding contraband because her zipper was down. He also noted that Frasier appeared nervous and was sweating profusely.[47] Upon approach, he asked them a serious of questions about their travel and then requested the license of the driver.[48] The driver informed him that she did not have her license on her but gave him her personal information and dispatched confirmed that she had no outstanding warrants.[49] Hall then informed dispatch that he was going to issue a warning ticket and try to obtain consent to search the vehicle.[50]

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[42] *Id.*
[43] *Id.*
[44] State v. Frasier, 437 S.C. 625, 879 S.E. 2d 762 (S.C. Sup Ct. 2022)
[45] *Id.* at 639
[46] *Id.* at 629
[47] *Id.*
[48] *Id.* at 630
[49] *Id.*
[50] *Id.*

Hall returned to the vehicle and asked the driver to step out and obtained consent to search the car from her.[51] Other officers arrived and two of them approached the passenger side where Frasier was seated. He was asked to step out of the car and told to remove his hands from his pockets as he did so.[52] He is then asked by one of the officers if he minds if he searches him. Frasier's response was "I do but…" and he subsequently placed his hands on the hood of the car at the direction of the officer. [53]He was found to be in possession of a white powdery substance later identified as crack. [54]He was arrested and charged with trafficking cocaine.[55] He was found guilty at trial and the S.C. Court of Appeals affirmed the trial court's findings, the review of the case by our Supreme Court followed.

Frasier's arguments were two-fold. First, he argued that once Hall had written the warning ticket, the legal justification for the stop had ended and nothing the officer relied on established reasonable suspicion to prolong the encounter. [56]Secondly, he argued that he did not give consent to be searched.[57] Our Supreme Court ultimately agreed finding that the prolonged detention of Frasier was not supported by reasonable suspicion.[58] In its analysis, the Court reiterated the following:

1. A person has been *seized* within the meaning of the Fourth Amendment when in light of all the circumstances surrounding an incident a reasonable person would have believed that he was not free to leave.[59]

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[51] *Id.*
[52] *Id.*
[53] *Id. at 630*
[54] *Id.*
[55] *Id.*
[56] *Id.* at 631
[57] *Id.*
[58] *Id.* at 634
[59] *Id.*

2. To prolong or *exceed the scope of a stop* beyond the initial traffic violation, law enforcement *must* have reasonable suspicion that criminal activity may be afoot.[60]

3. Although *reasonable suspicion* is not susceptible to a rigid, formulaic approach, it *requires more than a mere hunch or unparticularized suspicion.*[61]

4. For an officer to have reasonable suspicion, there *must be an objective, specific basis* for suspecting the person stopped of criminal activity.[62]

The Court determined that Hall had not seen any items that would demonstrate potential criminal activity - such as cash on hand, hollowed out blunt cigars, or the smell of marijuana - before he decided to extend the stop. [63]

The Court noted that "warrantless searches are generally considered per se unreasonable unless they fall within a recognized exception under the Fourth Amendment.[64] It identified one of those exceptions as "consent" but noted that the State bears the burden of proving the voluntariness of the consent to search from the totality of the surrounding circumstances.[65] It emphasized that law enforcement must obtain consent *voluntarily* which is a fact intensive inquiry. [66] The Court stated that Frasier's conduct (i.e. his alleged consent) was at the direction of the officer and not a voluntary decision.[67]

C. Analysis & Application to Our Facts

If this Court follows the precedent established in the above and adheres to the principles set out in the Fourth Amendment of the United States Constitution and Article I, Section 10, of the

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[60] *Id.*
[61] *Id.*at 635
[62] *Id.*
[63] *Id.* at 637
[64] *Id.*at 638
[65] *Id.*
[66] *Id.*
[67] *Id.* at 639

South Carolina Constitution, then the evidence in this case should be suppressed. As a mere passenger in a vehicle subjected to a traffic stop for a minor traffic violation, Anderson should have never been detained. He had done nothing wrong and was not acting in a suspicious manner that would justify his detention.

There should be no question that the purpose of this traffic stop was complete when the driver was arrested, and nothing occurred after that event which would provide the reasonable suspicion needed to justify further detention. Although Anderson never asked if he could leave the the surrounding circumstances coupled with the actions of law enforcement told him that he could not leave. He was removed from the vehicle and told by law enforcement that "they would get him out of there shortly" – a statement that suggests that he was not free to simply walk away instead it suggests that he needed their permission to do so.

This traffic stop was prolonged after the purpose of the stop had been fulfilled and this was done without sufficient legal justification leading to Anderson's unlawful seizure. The discovery of the drug evidence in this case occurred during this period of unlawful detention and was the product of this unlawful seizure. Therefore, the Defense respectfully requests that this Court suppress all drug evidence in this case after issuing a finding that it was illegally obtained in violation of the Fourth Amendment of the United States Constitution and Article One, Section 10, of the South Carolina Constitution. Additionally, the Defense would respectfully request that this Court take immediate action to end Anderson's unlawful detention by dismissing all the above-referenced charges as he has remained incarcerated, unable to afford bond, since his arrest - May 6, 2023.

Respectfully submitted,

Melinda Knowles
Attorney for the Defendant

January 12, 2024

State of South Carolina) **TRANSCRIPT OF RECORD**

COUNTY OF HORRY) CASE NO. 2023A2620601180 & 1181, 1182 & 1183

Motion Proceedings

February 15, 2024

BEFORE: The Honorable Benjamin H. Culbertson

State of South Carolina,

vs.

Richard Anderson,

Defendant.

APPEARANCES:

Kaitlin L. Cook,Esquire, Assistant Solicitor
For the State.

Melinda Knowles, Esquire
For the Defendant.

Julie A. Kevish
Official Court Reporter

P-R-O-C-E-E-D-I-N-G-S

THE COURT: What do we got?

MS. COOK: Your Honor, if you want to go straight down the list the first one will be Richard Anderson. Terry, we're going to start with Richard Anderson.

MS. KNOWLES: Your Honor, may I approach?

THE COURT: Alright. This is State of South Carolina versus Richard Leroy Anderson. The matter is before the Court regarding warrants 2023A2620601180, 1181, 1182 and 1183. This is defendant's Motion to Suppress. Ms. Knowles, let me hear from you.

MS. KNOWLES: Thank you, Your Honor. We filed this motion on January 12, 2024. We're asking the Court to suppress the drug evidence seized in this case because we believe it was illegally obtained during a period of unlawful detention of my client, Mr. Anderson. On May 6, 2023 my client was a passenger in a vehicle owned and operated by a man by the name of Anthony Kerson. Mr. Kerson was an acquaintance of Mr. Anderson. He did not know him well, but he knew him enough to ask for a ride. He needed to get to the store, and so Mr. Kerson told him that he would take him. They had traveled only a short distance before they saw blue lights and Officer Sonko of Myrtle Beach Police Department initiated a traffic stop on the vehicle for Mr. Kerson's alleged failure to use a turn signal when required. Officer Sonko approaches the driver's side of

the vehicle and asks Mr. Kerson to supply his driver's license, proof of insurance and vehicle registration. He's unable to provide a valid driver's license so his information is ran through dispatch and it's confirmed at that point in time that he's driving on a suspended driver's license. Officer Sonko removes Mr. Kerson from the vehicle and places him under arrest for driving under suspension. A search incident to arrest was performed at that time on Mr. Kerson and nothing illegal was found to be in his possession. He's placed in the back of the patrol car to await transport to the jail, meanwhile, my client, Mr. Anderson, is still seated in the car engaging in small talk with one of the officers that came to assist Officer Sonko. He's told to step out at that point and go with other officers to the rear of the vehicle. He is assured by one of them that they would get him out of there quickly -- or get him out of there shortly, but he's not really given any reason as to why he's being detained. It's my argument that at that point that my client should have been released, allowed to leave. He had committed no crime, he was not suspected of committing any crimes, he didn't exhibit any strange or suspicious behavior that would lead law enforcement to believe that he was involved in criminal activity. He had been compliant and completely cooperative and the purpose of the traffic stop had been completed at that point in time, the driver had already been arrested. Unfortunately, what should

have happened didn't happen, instead, my client subjected to a second detention, this time outside of the vehicle. Officer Sonko decides he's going to tow Mr. Kerson's car instead of allowing my client or anyone else to come to the scene and drive it away. He then performs an inventory search of the vehicle prior to having it towed. Interestingly, though, no inventory sheet has been produced to identify all of the contents of this vehicle. If this were a true inventory search this sheet would exist and it would detail all of the car's contents. Not having it concerns me and to me it gives me a red flag causing to question the true nature of this warrant to search. When I look at the criminal history of my client and Mr. Kerson I see that my client has no prior criminal history involving drugs, but Mr. Kerson has a ton of criminal convictions. Most recently in 2023 he was arrested and charged with PWID, fentanyl third or subsequent, PWID cocaine third or subsequent, a possession of schedule one to five second or subsequent, so his history along with the lack of the proper inventory sheet for a warrant to search of a vehicle makes me really question the real reason for the stop, but moving on and back to Mr. Anderson. Having done nothing wrong he's forced to undergo the second period of detention where he is questioned and asked seemingly out of nowhere if he has anything illegal on his person, and he tells law enforcement at that time, I do, I have a little marijuana on me. He reaches into his pocket

and he shows it to law enforcement. He's then arrested and searched incident to that arrest, the other drugs charged were discovered. Mr. Anderson immediately confesses to law enforcement, when the stop occurred Mr. Kerson had tossed him this bag that contained all of these drugs seemingly because he knew he had a record that he didn't want another conviction for a drug offense, and so Mr. Anderson took what was handed and put it in his pockets.

Your Honor, the law at issue in this case is the Fourth Amendment, and Article 1, United States Constitution, Article 1, Section 10 of our state constitution, both of those address our rights against unreasonable searches and seizures. Our protection under the Fourth Amendment covers our rights against all unreasonable searches and seizures, including seizures involving only brief detention. Our Courts have said that the temporary detention of individuals during a traffic stop even though brief and for a limited purpose is a seizure for Fourth Amendment purposes. They've said that in carrying out a stop an officer --

THE COURT: Hold for a second. The Defendant's going to have to be able to hear us.

THE SOLICITOR: He can hear, we just can't hear them.

THE COURT: Okay. Alright, go ahead.

MS. KNOWLES: Our Courts have said that in carrying out a stop an officer may request driver's license, vehicle

registration, run computer check, and issue a citation, but any further detention for questioning is beyond the scope of the stop and therefore illegal unless the officer has a reasonable suspicion of a serious crime. There is no question in this case that my client was subjected to questioning that went beyond the scope of the stop. The stop was for the driver's alleged failure to use a turn signal, and I argue that because of this fact his detention was illegal because the officer did not have any reasonable suspicion to serious crime based upon the facts in this case. Our Courts have further noted that investigative detention must be temporary, not last longer than necessary to effectuate the purpose of the stop, and the scope of the detention must be carefully tailored to its underlying justification. Our Courts have determined that the police may lengthen the detention of a person for further questioning beyond that related to the initial stop, but only in two circumstances. The first, if the officer has an objectively reasonable and articulable suspicion of criminal activity, which did not exist in our case, or if the initial detention becomes consensual, which certainly didn't exist in our case.

In drafting this motion my research revealed a multitude of cases that support my argument for suppression. The first of those is State v. Williams. In Williams the officer asked the driver to step out of the vehicle while the passenger remains seated. The officer then explained the

ticket to the driver, returned his information, his driver's license, and then asked if he could ask a few more questions. He then asked the driver where they were coming from, where they were going, the name of the passenger, and the nature of their relationship. The officer said that he became suspicious because the driver and the passenger gave inconsistent answers. The driver ultimately consented to a search of his vehicle and 25 pounds of marijuana was discovered. The Court found that Mr. Williams had been seized for purposes of the Fourth Amendment and in making that decision the Court looked at all of the circumstances in existence, the fact that this was a roadside traffic stop, there were two uniformed officers present, the driver and the passenger had been separated and questioned separately, and the seemingly innocent transition that was immediate from the valid traffic stop to a period of unlawful detention and an illegal seizure. The Court concluded that the search in that matter was not valid because it was obtained through the officer's exploitation of unlawful detention. I would argue that, although our case does not involve consent, it does involve an unlawful detention and an incriminating statement made during that unlawful detention, so for the same reason as the consent in Williams was deemed invalid, the incriminating admission in our case should also be excluded. In State v Pichardo the Court ruled in favor of the defense finding no reasonable suspicion existed to justify the

prolonged detention of the defendants and that the search conducted in the case was an exploitation of the original stop. The officer in Pichardo had initiated the traffic stop on the vehicle driven by Mr. Pichardo but owned by Mr. Reyes, the passenger, for failure to maintain his lane. The officer requested Mr. Pichardo's driver's license and vehicle documentation. Mr. Pichardo immediately explained that he had left his license at home and the only reason he was driving was because Mr. Reyes was too sleepy to drive. The officer ultimately issued a warning ticket, returned paperwork, but before he returned to his car he asked if he could ask them another question. When they both turned to him he explained the situation that they had been experiencing in the area of people running contraband on the interstate and then he asked for consent to search the car. According to the officer's testimony both nodded in the affirmative and a subsequent search a kilo of heroin found inside the car door. The Court in its reasoning reiterated this important finding. Once the purpose of a stop has been fulfilled the continued detention of the car and its occupants amounts to a second detention. The Court further defined the term of "seizure" within the meaning of the Fourth Amendment identifying as when the officer by means of physical force or show of authority has in some way restricted the liberty of a citizen. The test for determining if an encounter constitutes the seizure within the

meaning of the Fourth Amendment is whether under the totality of the circumstances surrounding the encounter a reasonable person in a suspect's position would have felt free to decline the officer's request or otherwise terminate the encounter. Ultimately, the Court in Pichardo concluded that by prolonging the initial stop beyond its proper scope the officer rendered the ensuing encounter more coercive than consensual and the circumstances were sufficiently intimidating such that Pichardo nor Reyes could have reasonably believed that they were free to disregard the police presence and go about their business. I would argue that Mr. Anderson in our case felt the same way. Given the circumstances that were in existence at the time of this stop he was surrounded by no less than four officers and his means of transportation had been removed, the vehicle was being towed, the driver had already been arrested. In State v Sikes the South Carolina Supreme Court addressed the issue of the rights of a passenger, finding that a passenger in a vehicle could assert a Fourth Amendment claim based upon an unreasonable detention. The defendant, a passenger in the vehicle, was removed from the vehicle and placed in the back of a patrol car where he was detained for at least 20 minutes while officers ran a warrant check. The warrant check revealed that he did have an active warrant, he was then arrested. When removing Mr. Sikes from the patrol car at the police station crack was found in the seat where he was seated. He argued

that he had been improperly seized with no reasonable cause and the Court found that the actions of law enforcement in that case were a blatant violation of his Fourth Amendment rights. The Court further found that the officer's reasonable suspicion that the car was either stolen or that the driver was driving uninsured did not give law enforcement the right to seize or question the car's passenger.

Lastly, in State v. Frasier which is a very recent case, there is a case from 2022, our Supreme Court reversed the Court of Appeals finding that the officer in that case lacked reasonable suspicion to prolong the traffic stop and the discovery of the cocaine found on the defendant was the product of an illegal search and seizure. The Court also found that Frasier had not consented to the search that was conducted. Frasier was a passenger in a vehicle that was stopped by law enforcement for an inoperable brake light. The arresting officer noted that he appeared to be acting suspiciously, thought he could potentially be hiding contraband. He also noted that he appeared to be nervous and sweating profusely. Upon approach he asked a series of questions and asked the driver as series of questions and then requested the license of the driver. The driver informed him that she did not have her license but gave personal information so that he could run her information. Dispatch confirmed that she had no outstanding warrants. The officer then informed dispatch that he was going

to issue a warning ticket and try to obtain consent to search the car. The officer returned and asked the driver to step out and obtained consent to search from her. Other officers arrived and two of them approached the passenger side where Mr. Frasier was seated. He was then asked to step out. He was then asked by one of the officers if he minded if they searched him, and his response was: I do, but, and he subsequently placed his hands on the hood of the car at the direction of the officer. He was found to be in possession of a substance identified as crack. He was arrested and charged with trafficking cocaine. He was found guilty at trial and the South Carolina Court of Appeals affirmed the Trial Court's findings. The review of the case by our Supreme Court followed. In that case Mr. Frasier's arguments were two-fold. First he argued that the officer -- that once the officer had written a warning ticket the legal justification for the stop had ended and nothing the officer relied on established reasonable suspicion to prolong the encounter, which is exactly my argument in this case, and that once the driver had been arrested the justification for the stop had ended and the officer had no facts to establish reasonable suspicion to prolong the stop any further. Secondly, Mr. Frasier argued that he did not give consent to be searched and our Supreme Court ultimately agreed finding that his prolonged detention was not supported by reasonable suspicion. It reiterated in

its analysis that a person has been seized within the meaning of the Fourth Amendment when in light of all the circumstances surrounding an incident a reasonable person would have believed that he was not free to leave. To prolong or exceed the scope of a stop beyond the initial traffic violation law enforcement must have reasonable suspicion that criminal activity may be afoot. Also, the Court noted that although reasonable suspicion is not susceptible to rigid formulaic approach, it requires more than a mere hunch or unparticularized suspicion. For an officer to have reasonable suspicion there must be an objective specific basis for suspecting the person stopped of criminal activity. The Court in that case determined that the officer had not seen anything that would demonstrate potential criminal activity. The Court noted that warrantless searches are generally considered per se unreasonable unless they fall within a recognized exception.

Your Honor, if this Court follows precedent and follows and adheres to the principle set out in the Fourth Amendment of the United States Constitution in Article 1, Section 10 of our state constitution, then the evidence in this case should be suppressed. As a mere passenger in a vehicle subjected to a traffic stop for a minor traffic violation my client should have never been detained. He had done nothing wrong and was not acting suspiciously or in any manner that would justify his continued detention. There should be no

question that the purpose of the stop was complete when the driver was arrested and nothing occurred after that that would provide the reasonable suspicion needed to justify further detention of my client, Mr. Anderson. Although he never asked to leave, the surrounding circumstances in existence coupled with the actions of law enforcement told him that he could not leave. He was removed from the car and told by law enforcement that they would get him out of there shortly, a statement that suggests that he was not free to simply just walk away, instead, it suggests that he needed their permission to do so. This traffic stop was prolonged after the purpose of the stop had been fulfilled and it was done without sufficient legal justification leading to my client's unlawful seizure. The discovery of the drug evidence in this case occurred during this period of unlawful detention and it was the product of an unlawful seizure. Therefore, defense respectfully requests that this Court suppress all drug evidence seized after issuing a finding that it was illegally obtained in violation of the Fourth Amendment of the United States Constitution in Article 1, Section 10 of our state constitution. Additionally, defense would respectfully request that this Court take immediate action to end my client's unlawful detention by dismissing all of the above-referenced charges as he remained incarcerated unable to afford bond since his arrest on May 6, 2023 totaling 287 days in jail. Your Honor, accountability is a concept that

applies to both sides of this courtroom. Law enforcement must abide by the law as they seek to enforce it, and when they don't we have to hold them accountable, and in this case that means a dismissal of the charges.

THE COURT: State's position?

MS. COOK: Thank you, Your Honor. First and foremost, the State believes that this is premature. This is a pre-trial motion that would be dispositive based off of your ruling. The State believes this should be done in front of the trial court judge before a trial.

THE COURT: Well, I mean, why did the officers detain the defendant?

MS. COOK: Your Honor, I could go into that, but that would get into the argument. I can certainly argue it, and I'm ready for it today, but I do believe it's premature and it should be done in front of the trial court judge.

THE COURT: Well, when is it going to be to trial, he has been in jail since May?

MS. COOK: I don't have a drug report, Your Honor, I can't put a drug case on the trial roster.

THE COURT: Let's go ahead and hear the motion then.

MS. COOK: Yes, Your Honor. I do have the officers here if you want them to testify.

THE COURT: No, just tell me, why did they detain a passenger when they stopped car for an illegal turn signal?

MS. COOK: Yes, Your Honor.

THE COURT: They got him, and then they detained the passenger. What authorized them to detain him and to search him or question, or whatever they did?

MS. COOK: Yes, Your Honor. First, in Brendlin versus California, we have a passenger of a vehicle that was pulled over by the police for a traffic stop and that passenger was seized under the Fourth Amendment from the moment it was stopped on the roadside. So that establishes standing to challenge the constitutionality of the stop, which is how we're able to bring this point, so that's the foundation. Secondly, in Tindall we have a temporary detention of an individual in the course of a routine traffic stop constitutes a Fourth Amendment seizure of where probable cause exists to believe that a traffic violation has occurred such a seizure is reasonable, per se, so we do have --

THE COURT: Wait a minute. You're saying when they pull a person over for a moving traffic violation, that authorizes them to detain the passenger in the car that was not driving?

MS. COOK: That's not what I'm saying, Your Honor. What I'm saying is when a vehicle pulled over by the police for a traffic violation, when the officers believe there is probable cause a traffic violation has occurred, everybody in that car has been seized under the Fourth Amendment, but it is

per se reasonable, so there is a seizure --

THE COURT: Well, yeah, and she's not arguing the stop --

MS. COOK: I was just laying the foundation, Your Honor.

THE COURT: -- she's arguing the fact that once they arrested the driver of the car then her client should have been at liberty to go.

MS. COOK: Yes, I understand what she's arguing, Your Honor, that was the foundation.

THE COURT: Okay.

MS. COOK: So when the co-defendant, Kerson, I'll refer to him as Kerson, and I'll refer to the Defendant as Anderson --

THE COURT: Alright.

MS. COOK: -- when he is arrested, or actually, rather, when he is pulled over for a failure to use a turn signal, he pulls over and stops the car on the side of the road. He is not the registered owner of that vehicle. The registered owner of that vehicle is not present. He and Anderson say they don't know each other. It's confirmed that he is driving under suspension, and actually, Officer Sonko smelled the odor of marijuana. So actually, we don't even have to get into a reasonable suspicion analysis here, Your Honor, we actually have a probable cause to search the vehicle, and at

that point you can detain all passengers in a vehicle. So we have the driver, Kerson, was arrested for driving under suspension. Not only do we have the probable cause due to the odor of marijuana, which is in the vehicle body camera footage that was provided to the defense, we have that he was driving under suspension. If you want to get into a reasonable suspicion argument, driving under suspension already shows a little bit of criminality is afoot, coupled with his nervous behavior.

THE COURT: Of the driver.

MS. COOK: Of the driver --

THE COURT: Right.

MS. COOK: -- but then he also says that he and the defendant, Anderson, do not know each other. They both start smoking cigarettes and they are pulling long pulls on those, but anyway. So there is nervous behavior, driving under suspension, registered vehicle owner is not there, car is on the side of the road. When he is arrested there is nobody that can then take that vehicle, so it has to be towed, so technically because of that the traffic stop has not stopped, it has continued. There is no second detention. It's still a part of that first initial traffic encounter. Driver is found to be driving under suspension, the car has to be taken care of, it's on the side of the road, so it has to be towed. Before you can tow a car there has to be an inventory search.

THE COURT: Was Mr. Anderson at liberty to walk down the road and say, I'm out of here, I'm gone? If not, then what authorized them to keep him there at the site?

MS. COOK: So when they smelled the odor of marijuana, Your Honor, that's probable cause, and as soon as they searched the driver for driving under suspension, there's no marijuana on his person, so it's either in the car or it's on Anderson. They pull Anderson out of the car before --

THE COURT: I mean, if they smelled the marijuana, I'm assuming it was smoked. I'm assuming that it might not have been any marijuana because they're saying --

MS. COOK: And there was marijuana on Anderson's person.

THE COURT: Well, because they said, have you got anything, and he said, yeah, I got some marijuana. The question is is, what authorized them -- as I understand you're saying they were authorized to detain Anderson and to question him because they smelled marijuana.

MS. COOK: Right, and before they search a car they have to ask everybody to get out of the car, so, yes, he was not free to leave at that point as they are trying to figure out -- you know, if they're trying to search the car and, you know, there was an odor of marijuana. So they had -- they were able to detain him. This is not prolonging it, and this not a second detention, this is still part of that initial traffic

encounter, Your Honor.

MS. KNOWLES: Your Honor, may I speak to that?

THE COURT: Well, I mean, did they detain him for any other reason than because they smelled marijuana?

MS. COOK: So they get him out of the car because they smelled the odor of marijuana, and it's a consensual encounter, like, as they take him out of the car it's still okay. They are still dealing with the traffic stop, they are searching the car.

THE COURT: Not with Anderson they're not. The traffic -- they pulled the car over because the driver makes an illegal turn or fails to use the turn signal, or whatever.

MS. COOK: Right.

THE COURT: Alright. We've dealt with that. Why do they keep questioning Anderson? I understand you said they smelled marijuana. Was there anything else besides the odor of marijuana for them to question, detain, hold Anderson?

MS. COOK: They take them out of the car so they can search the vehicle. They have probable cause to search the car due to the odor of marijuana.

THE COURT: Okay.

MS. COOK: At that point everybody has to stay where they are. The odor of marijuana creates probable cause to search the vehicle. At that point Kerson does not have marijuana on his person when they searched him incident to

arrest for the driving under suspension. They take him out of the car, but it is important to note, Your Honor, that this entire encounter lasted ten minutes. In State v. Provitt, we actually have that ten minutes is not unreasonable, and the Supreme Court of State of South Carolina said you can have a ten-minute long traffic stop and that's alright. So he gets out of the vehicle so they can search the vehicle. They are having pleasant talk with him at this point, they're talking about age, just kind of talking about normal things. They take him out of the car. They ask him if he has anything illegal on him, which they are able to ask, and they are able to ask people out of the car, even if there isn't probable cause for odor of marijuana. So they ask him out, they ask him if he has anything illegal on him, and he says, yes, I have marijuana. At that point they arrest him for simple possession of marijuana, it is still illegal in the State of South Carolina, and then search incident to arrest he has 18 baggies of drugs on his person.

THE COURT: Anything in reply?

MS. KNOWLES: What I will say, Your Honor, is this is the first I've heard about the odor of marijuana.

MS. COOK: It was in a video that was provided.

MS. KNOWLES: I've watched the videos.

THE COURT: Wait a minute, wait a minute, wait a minute, only one person can talk at a time.

MS. COOK: Yes, Your Honor.

THE COURT: Where is it disclosed that they smelled the odor of alcohol?

MS. COOK: It's in Officer Sonko's body camera footage, which was provided to the defense.

THE COURT: Alright. Is it in the body footage?

MS. KNOWLES: I have not seen that, and it's not --

THE COURT: You have not seen what?

MS. KNOWLES: What I saw did not include any discussion about the odor of marijuana.

THE COURT: Okay, well, I need to see. They said it's in the Body Cam, you say it's not in the Body Cam, I don't know unless I would look at the Body Cam to see because either --

MS. KNOWLES: I have my laptop, I'll pull it up.

THE COURT: We're going to need to do that.

MS. COOK: And I could just have the officer testify --

THE COURT: No, I want to see the Body -- if you said --

MS. COOK: Yes, Your Honor.

THE COURT: -- that they were provided notice that the reason Mr. Anderson was detained was because they smelled the odor of alcohol, that that's on the Body Cam and that was given to his attorney, then let me see the Body Cam and let me

see if it's on there.

MS. COOK: Yes, Your Honor, for clarification so Ms. Knowles can pull it up, it's on video called "drugs," in all caps, it's the one that takes 57 minutes, 17 seconds, and it's around the time of five minutes, I believe.

THE COURT: We'll stand this down to get that up so I can take a look at it and we'll come back and revisit this.

MS. COOK: Yes, Your Honor.

MS. KNOWLES: Thank you, Your Honor.

THE COURT: Thank you.

(Recess taken)

THE COURT: Back on the record regarding State of South Carolina versus Richard Leroy Anderson. This is the Defendant's Motion to Suppress.

MS. COOK: Thank you, Terry. Richard Anderson.

THE COURT: Richard Anderson.

MS. COOK: We're back on the record now.

THE COURT: We're back on the record on Mr. Anderson's Motion to Suppress. Alright, did we look at the video?

MS. KNOWLES: We did -- I did, Your Honor. I have it right here for you, as well as a copy of the incident report which does not make any mention of marijuana.

THE COURT: Well, I understand that, but she said it was on the video. Just let me see the video and see what it

says.

MS. COOK: Yes, Your Honor.

MS. KNOWLES: In order to get the full context of what my argument is you need to probably run it until marker, like, eleven, right at eleven, Your Honor.

MS. COOK: Your Honor, we were watching the video just for what I represented to the Court, which was that the officer said he could smell the odor of marijuana.

MS. KNOWLES: But you have to see what happens after that to understand that that was not the reason for the detention because it was a faint odor.

THE COURT: Alright, just play it, just play it, let me listen to it.

MS. KNOWLES: Can you hit play?

THE COURT: Yeah.

(Video playing.)

MS. COOK: Your Honor, this can be fast forwarded. This is just the initial traffic stop.

THE COURT: I'm going to let her present her motion however she wants. Can you turn the volume up?

MS. KNOWLES: This is as loud as it goes.

THE COURT: Let me get it here so I can hear it.

(Video playing)

MS. COOK: Your Honor, that's what I represented to

the Court.

(Video Playing)

THE COURT: That's the 1130 mark.

MS. KNOWLES: That was the --

THE COURT: How far do you want me to go? That's good?

MS. KNOWLES: Yes.

THE COURT: I'll take this under advisement. I'll let you all know my decision.

MS. KNOWLES: Thank you, Your Honor.

THE COURT: Alright.

MS. KNOWLES: Your Honor, can I submit a copy of this investigation report?

THE COURT: No. I've got a handle of what's going on.

MS. KNOWLES: Alright. Thank you.

CERTIFICATE

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

I, Julie A. Kevish, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the Court of General Sessions for Horry County, South Carolina, on the 15th of February, 2024.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

February 15, 2024

Julie Kevish

JULIE A. KEVISH
OFFICIAL COURT REPORTER