

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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On Writ of Certiorari to the Court of Appeals
Appeal from York County
John C. Hayes, III, Circuit Court Judge

S.C. Supreme Court

The State of South Carolina.....Respondent,

v.

Kenneth Darrell Morris, II.....Petitioner.

BRIEF OF PETITIONER

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STATEMENT OF THE ISSUES ON APPEAL

I

The Court of Appeals erred in affirming the trial court's finding that the officers had reasonable suspicion to expand the scope and length of the traffic stop.

II

The Court of Appeals erred in affirming the trial court's finding that search of the trunk was supported by probable cause.

STATEMENT OF THE CASE

A grand jury indicted Petitioner for trafficking ecstasy and possession of marijuana with intent to distribute. A pre-trial motion to suppress drugs found during a traffic stop was denied by the Honorable John C. Hayes, III. Petitioner's jury trial began on April 15, 2009. On April 17, 2009, the jury returned a verdict of guilty on the charges of trafficking ecstasy and on the lesser-included offense of simple possession of marijuana. Petitioner was sentenced to thirty years in prison.

Petitioner filed a timely Notice of Appeal to the Court of Appeals. After hearing oral argument on March 8, 2011, the Court of Appeals affirmed Petitioner's conviction. The Court of Appeals issued a published decision on August 17, 2011 that affirmed the trial court's ruling. Petitioner timely sought rehearing on September 1, 2011. On November 2, 2011 the Court of Appeals issued an amended decision affirming Petitioner's conviction. This Court granted Petitioner's Petition for a Writ of Certiorari on December 19, 2013.

STATEMENT OF THE FACTS

During the afternoon on February 6, 2008, Petitioner and a passenger were driving north on I-77 through South Carolina. They were travelling back to North Carolina from Georgia in a rented Ford 500 with a North Carolina license plate. Though he was not listed as a permitted driver on the rental agreement, Petitioner was driving the car.

Around 2:00 p.m., Petitioner exited the Interstate to stop at gas station. As Petitioner turned into the gas station's parking lot, Officer Vinesett of the York County Highway Interdiction Team activated his blue lights. Vinesett had noticed Petitioner's car while it was still on the Interstate and followed it down the off ramp. Vinesett's initial statement to Petitioner during the traffic stop was that he blue-lighted Petitioner's car at the gas station because it had been following an eighteen-wheel transfer trailer truck too closely on I-77. It

was raining. The time stamp on the video recording of the traffic stop reveals the detention of Petitioner began at 2:06 p.m. (Traffic Stop Video, filed with S.C. Court of Appeals).

While at the vehicle's window speaking with Petitioner, Vinesett saw some loose cigar tobacco scattered around the center console area. (R. p. 11, lines 6-7). He also saw partially-smoked, hollowed out cigars in the same area (R. p. 11, line 5). Later during the detention, he told a fellow officer about the loose tobacco and the cigars when he later called for a K-9 unit. The report that Vinesett prepared several days later says he smelled burnt marijuana when he first made contact with Petitioner's car. (R. p. 30, lines 5-14).

Vinesett did not mention the smell of marijuana to Petitioner or to the passenger. Instead, he asked Petitioner to step out of his vehicle to discuss the traffic violation (R. p. 75, lines 23-24). Because of rainy conditions that afternoon, Vinesett asked Petitioner to get into his patrol car (R. p. 13, lines 3-6). Once inside the unmarked patrol car, they never discussed the stated reason for the traffic stop. After fishing for information from Petitioner about his travel plans, Vinesett left his patrol car to pose similar questions to the passenger.

According to the video recording of the traffic stop, at 2:11 p.m. (a little over five minutes into the detention) Vinesett ended his conversation with the passenger. He returned to his patrol car, and told Petitioner to get out. He placed Petitioner in the custody of another officer at the scene, (R. p. 80, lines 23-24), and called for a K-9 unit over his radio. (R. p. 81, lines 1-2). At this point in the detention, Petitioner was detained outside of the car with the other officer, and the passenger remained inside the car in his seat.

Vinesett supported his request for a drug dog by saying that he had detained two young guys coming up from Atlanta (R. p. 81, lines 3-4). He told the K-9 unit that Petitioner said they made the trip to visit some girls, but the passenger said they went to watch a basketball game. He also mentioned Petitioner's prior record. (He asked Petitioner if he had

been convicted of any drug offenses instead of discussing the reason for the traffic stop). Vinesett also told the K-9 officer he saw “shake”¹ inside their car. (R. p. 81, lines 12-14). Though it should have been his strongest justification for calling out a drug dog to the scene, Vinesett did not mention the smell of burnt marijuana. (R. p. 35-36, lines 24-25. 1-3).

Before the drug dog arrived, Vinesett asked Petitioner if he still needed to use the restroom (R. p. 82, lines 12-13). Petitioner said that he did. Before he allowed Petitioner to go inside the gas station (under the other officer’s supervision) Vinesett first conducted a consensual search of Petitioner’s person. It produced no contraband (R. p. 34, lines 10-17). Once Petitioner and the other officer left the scene, Vinesett then ordered the passenger to step outside of the car. He complied.

While he did not mention the smell of burnt marijuana to the passenger at this time; later in the stop Vinesett would state that when the passenger exited the car, he “swore [he] could smell some marijuana” (R. p. 87, lines 13-14). However, Vinesett did not react in any way to the odor that he later alleged he detected. Rather he asked for and received consent to search the passenger. (R. p. 83, lines 15-16). After this pat down search failed to reveal evidence of illegal activity, Vinesett still did not mention smelling burnt marijuana. He merely told the passenger that the traffic stop was not over (R. p. 83, lines 22-23).

When Vinesett finished his search of the passenger, eight and one-half minutes had elapsed since the traffic stop and detention began. When the K-9 unit arrived at the gas station, Vinesett and the dog’s handler first tried to get consent to search from the passenger. They threatened that they would get the drug dog out if consent to search was refused. (R. p.

¹ Shake is often used as a slang word for small fragments of marijuana. Urban Dictionary, <http://www.urbandictionary.com/define.php?term=shake> (last visited Nov. 23, 2009). But during the suppression hearing Vinesett readily admitted that he recognized the “shake” he saw in the car’s console area as loose tobacco, not loose marijuana (App. p. __, lines 5-7).

84, lines 10-15). The passenger refused to provide consent, so the dog handler went to get the drug dog from his vehicle (R. p. 37, lines 8-11). The video recording of the traffic stop shows that it was still raining lightly while the drug dog worked.

The dog walked around the car twice, with at least one window rolled down (R. p. 48, lines 15-18). The dog did not alert, and the handler finally gave up and returned the dog to his vehicle (R. p. 37, lines 23-25). Vinesett then asked the passenger for consent to search the car a second time. The passenger again refused to give consent. (R. p. 86, lines 15-18). Vinesett and the dog's handler then engaged in a hushed conversation that Vinesett's lapel microphone failed to capture.

Then, after this conversation and thirteen minutes into the detention Vinesett – for the very first time – claimed that he “swore [he] could smell some marijuana,” (R. p. 87, lines 13-14), when the passenger exited the car. Not once during the entirety of the video-recorded detention did Vinesett say that he smelled burnt marijuana as he first approached the car. However, his testimony under oath during the suppression hearing was that he smelled the odor of marijuana when he first came up to the passenger window. (R. p. 10, lines 16-22).

The passenger denied the allegation and attributed the odor to his Black and Mild cigar (R. p. 87, lines 15-16). Vinesett walked over to the car and searched the center console area of the passenger compartment (R. p. 40-41, lines 22-25, 1-7). He examined the partially-smoked, “hollowed out” cigars he had seen earlier and determined those cigars did not contain any marijuana residue (R. p. 40, lines 5-11). At this point in the detention, the pat down search of the car's occupants had produced no evidence of criminal activity; the drug dog search had produced no evidence of criminal activity, and the passenger compartment of the car had produced no evidence that either Petitioner or the passenger had engaged in any criminal activity whatsoever.

Without any further evidence of criminal activity to rely on, Vinesett then engaged in a full-blown search of the car. He opened the car's trunk and proceeded to rummage through the personal belongings it contained. Inside a closed gift box, Vinesett found a plastic bag containing ecstasy pills (R. p. 16, lines 12-14). He immediately arrested Petitioner and the passenger. Later, an inventory search of the car conducted at the impound lot resulted in the discovery of raw marijuana hidden underneath the spare tire.

From start of the traffic stop, to the warrantless search of the car's trunk and the arrest of Petitioner and the passenger, the detention lasted just over fourteen minutes. The detention ended when Vinesett arrested Petitioner following his decision not to seek a search warrant.

ARGUMENT

I. The Court of Appeals erred in affirming the trial court's finding that the officers had reasonable suspicion to expand the scope and duration of the traffic stop.

The Fourth Amendment of the Constitution 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. This constitutional protection extends to the use of automobiles. “[A]n automobile stop implicates the Fourth Amendment prohibition against unreasonable searches and seizures, imposing a standard of ‘reasonableness’ upon the exercise of discretion by [law enforcement officers].” State v. Banda, 371 S.C. 245, 252, 639 S.E.2d 36, 40 (2006). South Carolina courts have provided law enforcement officers with abundant, clear guidance on what constitutes the reasonable exercise of discretion as they perform their duties.

The decision to stop a vehicle is reasonable per se when an officer has probable cause to believe a traffic violation has occurred. State v. Rivera, 384 S.C. 356, 361, 682 S.E.2d 307, 310 (Ct. App. 2009) (citing Whren v. U.S., 517 U.S. 806 (1996)). “In carrying out the stop,

an officer ‘may request a driver’s license and vehicle registration, run a computer check, and issue a citation . . .’” State v. Williams, 351 S.C. 591, 598, 571 S.E.2d 703, 707 (Ct. App. 2002) (quoting U.S. v. Sullivan, 138 F.3d 126, 131 (4th Cir. 1998)).

But, prolonging the stop to engage in further questioning is “‘beyond the scope of the [] stop and . . . illegal unless the officer has a reasonable suspicion of a serious crime.’” Id. (quoting Sullivan, 138 F.3d at 131). Thus, even if an officer suspects that a person who has been lawfully detained for a traffic violation could be engaged in criminal activity, that officer cannot prolong the stop without “‘a particularized and objective basis’ that would lead [the officer] to suspect [the person] of criminal activity.” State v. Lesley, 326 S.C. 641, 644, 486 S.E.2d 276, 277 (Ct. App. 1997) (quoting U.S. v. Cortez, 449 U.S. 411 (1981)).

When an officer conducts a traffic stop after observing a traffic infraction, that officer “may briefly detain the vehicle and its occupants . . .” Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994) (emphasis in original) (citing Delaware v. Prouse, 440 U.S. 648, 653 (1979)). During a typical traffic stop the officer may ask to see the driver’s license and vehicle registration, run a computer check, and issue a traffic citation.² Williams, 351 S.C. at 598, 571 S.E.2d at 707 (quoting Sullivan, 138 F.3d at 131). But the detention “must be temporary and last no longer than necessary to effectuate the purpose of the stop.” Florida v. Royer, 460 U.S. 491, 500 (1983) (plurality opinion). In a typical case, after an officer has achieved the purpose of the initial traffic stop, the detention may only be extended if the officer has an objectively reasonable suspicion of illegal activity or if the encounter becomes consensual. State v. Pichardo, 367 S.C. 84, 99, 623 S.E.2d 840, 847-48 (S.C. Ct. App. 2005).

² The United States Supreme Court has held that law enforcement officers may even utilize drug detection techniques during a lawfully conducted traffic stop. Illinois v. Caballes, 125 U.S. 834 (2005). However, the Court also cautioned “a seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission.” Id. at 837.

In the case presently before this Court, the Court of Appeals found that Vinesett had reasonable suspicion to extend the traffic stop beyond requesting a driver's license and proof of registration and running a computer check. The court pointed to Vinesett's observation of hollow blunts and loose tobacco, Vinesett's claim that he smelled the odor of burnt marijuana and the fact Petitioner was not an authorized driver of a rented car. State v. Morris, 395 S.C. 600, 608, 720 S.E.2d 468, 472 (C.t App. 2011). The Court of Appeals then considered the search itself and found that Vinesett's search of the entire car was supported by probable cause. Morris, 395 S.C at 609, 720 S.E.2d at 472.

The court concluded its opinion by acknowledging "the trial court made no separate rulings to support its finding of probable cause beyond those supporting its pronouncement of reasonable suspicion. The trial court simply stated, 'He had probable cause to search.'" Morris, 395 S.C. at 610, 720 S.E.2d at 473. When it determined that the facts that supported reasonable suspicion to extend the stop (hollowed-out cigars, the odor of marijuana and an unauthorized driver of a rental car) also provided probable cause for the search, the Court of Appeals explicitly "emphasiz[ed] our deferential standard of review." Id., 720 S.E.2d at 472.

The trial court specifically found that in Officer Vinesett's experience blunts are often hollowed to accommodate the smoking of marijuana. Similarly, the loose tobacco in the car indicated the blunts were recently hollowed in the car. Considering these factors in conjunction with the background odor of marijuana, the circumstances are sufficient to warrant a reasonable and prudent person to believe [Petitioner] and [the passenger] possessed marijuana. Accordingly, the officers had probable cause to search anywhere in the vehicle where marijuana could be located. The trial court properly admitted the drug evidence discovered in the trunk.

Id., 720 S.E.2d at 472.

The Court of Appeals acknowledged this Court's instruction in State v. Tindall that the deferential abuse of discretion standard "does not bar this Court from conducting its own review of the record to determine whether the trial judge's decision is supported by the

evidence." State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (S.C. 2010). In a footnote the opinion noted that Tindall

requires a two-part analysis: (1) whether the record supports the trial court's factual findings and (2) whether those factual findings establish reasonable suspicion or probable cause. See Tindall, 388 S.C. at 523 n.5, 698 S.E.2d at 206 n.5 ("While we acknowledge that we review under the deferential 'any evidence' standard, this Court still must review the record to determine if the trial judge's ultimate determination is supported by the evidence. In short, we must ask first, whether the record supports the trial court's assumed findings . . . and second, whether these facts support a finding that the officer had reasonable suspicion of a serious crime to justify continued detention of Tindall." (citation omitted)).

Morris, 395 S.C. at 611 n.2, 720 S.E.2d at 473 n.2. (citing Tindall, 388 S.C. at 523 n.5, 698 S.E.2d at 206 n.5.

Petitioner contends that the record in this case does not support the trial court's finding that the odor of marijuana was present and further that Vinesett did not have reasonable suspicion to extend the scope and duration of the traffic stop or probable cause to search the car. For the following reasons, both the trial court erred when it did not suppress drugs seized as a result of a warrantless search, and the Court of Appeals erred when it failed to reverse the trial court's ruling.

A. Vinesett's claim that the odor of marijuana was present during the traffic stop lacks credibility.

Although the trial court accepted Vinesett's testimony that he smelled marijuana during the traffic stop as credible, (R: p. 59, lines 12-14), this Court is not bound by the trial court's factual finding on that point if it was clearly erroneous. See State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001) (defining the appropriate standard of review in Fourth Amendment cases); State v. Maybank, 352 S.C. 310, 318, 573 S.E.2d 851, 855 (Ct. App. 2002) ("[T]his Court is bound by the trial court's factual findings unless they lack evidentiary support or are clearly erroneous"). With all due respect, the use of the word "credible" on the

record should not be a death knell to a Fourth Amendment challenge to the presence of either reasonable suspicion or probable cause.

Petitioner respectfully urges this Court to examine all the evidence on the record – including the video recording of the traffic stop. The video (1) accurately captures the traffic stop and (2) does not harmonize with Vinesett’s testimony and written report, both of which aver that he smelled marijuana when he first approached Petitioner’s car. The fact that Vinesett claimed to have smelled burnt marijuana during the stop thus lacks evidentiary support. Petitioner respectfully submits that this Court is not bound by that finding and the trial court abused his discretion when it accepted Vinesett’s testimony.

Vinesett observed a Ford 500, what he knew to be a common rental car, with North Carolina tags on the Interstate. He followed the car off I-77 and waited until it pulled into a gas station to ticket the driver for committing a traffic infraction. Vinesett certainly had a suspicion about drug activity. When he spoke with Petitioner in his patrol car he asked Petitioner whether he had been arrested for drugs in the past rather than discussing the traffic infraction. (R. p. 75, lines 23-24).

The incontrovertible video and audio evidence is that Vinesett never once, not even to his fellow officer over a secure police channel when calling for a K-9 unit, breathed one word about the smell of burnt marijuana. He first mentioned it to the passenger a full thirteen minutes into the detention (R. p. 41, lines 2-3; R. p. 87, lines 13-14). When he finally mentioned the odor, Vinesett said he “swore” he smelled marijuana when the passenger got out of the car, not when Vinesett first approached the car.

Without alleging the odor of marijuana, Vinesett had no other cause to search. Up until that point, the investigation had produced nothing to confirm Vinesett’s suspicion. The pat down of Petitioner and the passenger proved fruitless, the drug dog failed to alert on the

car, and Vinesett knew the cigars in the car's cabin were just cigars. The fact Vinesett did not so much as mention the odor of burnt marijuana until he had nothing else to justify a search is a very strong indication that the smell simply was not present.³

The fact the drug dog failed to alert on the car, with its passenger window rolled down, a mere two minutes after Vinesett claimed he smelled marijuana also severely undermines his credibility. Finally, the fact that Vinesett never found one shred of physical evidence to corroborate the smell suggests that he never detected the odor of burnt marijuana. For all these reasons, the Court of Appeals erred in affirming the trial court's finding that Vinesett claimed to have smelled burnt marijuana during the traffic stop.

B. Vinesett's suspicion dissipated throughout the extended duration of the traffic stop and when he finally searched, he had nothing but the alleged smell of marijuana.

The Court of Appeals, using the facts as found by the trial court, affirmed the denial of the suppression motion. The court noted that the following facts provided Vinesett with a reasonable suspicion that Petitioner and the passenger were using drugs: Vinesett testified he smelled marijuana; Petitioner was not an authorized driver on a rental agreement, and the observed hollow blunts and loose tobacco, which in Vinesett's experience indicated drug use. Morris, 395 S.C. at 608, 720 S.E.2d at 472. Were this Court to discount the odor of marijuana the only suspicion that Vinesett had left is the hollowed-out cigars and the fact Petitioner should not have been driving a vehicle rented by the passenger. The latter (driving a rental without authorization) is simply not evidence of drug activity. The former (hollowed-out cigars) arguably could be considered reasonable suspicion of drug activity.

³ As a point of stark contrast to Vinesett's reaction to the odor he alleged to detect, compare another officer's reaction to the smell of marijuana. "When [the officer] returned to his patrol car with Ross's license and registration, he immediately told [his partner] that he had smelled marijuana in Ross's car and intended to investigate further, with her assistance. His subsequent conversation with Ross confirmed his suspicion that there was contraband in the car." United States v. Ross, 300 Fed. App'x. 386, 390 (6th Cir. 2008) (unreported decision).

Based on the reasonable suspicion Vinesett articulated, the Court of Appeals held that he “properly gained reasonable suspicion [Petitioner] and [the passenger] were using drugs, and he was permitted to take reasonable steps to confirm or dispel this suspicion.” Id. at 608-09, 720 S.E.2d at 472 (emphasis provided). The court further noted that Vinesett actually did just this “by asking [Petitioner] and [the passenger] a series of questions, receiving consent to search their persons, and calling in a drug dog.” Id. at 609, 720 S.E.2d at 472.

Petitioner respectfully submits that the Court of Appeals overlooked the fact that these three actions dispelled any reasonable suspicion of criminal behavior. Petitioner and [the passenger] answered all of the officer’s questions to the point where even the trial judge discounted Vinesett’s claim that their stories were inconsistent. Id. at 606, 720 S.E.2d at 470. Though Petitioner was permitted to drive the car under the rental agreement, nothing was inherently suspicious about the rental agreement. Vinesett’s search of pat down search of Petitioner and the passenger lead to no contraband, (R. p. 34, lines 10-17), and the drug dog did not alert on any part of the car. (R. p. 37, lines 23-25). Further, the Court of Appeals appears to have neglected the fact that Vinesett and a fellow officer also extended the duration and scope of the stop to conduct a cursory search of the passenger compartment of the car and, again, found no contraband (R. p. 40-41, lines 22-25).

The critical Fourth Amendment question is: to what point is Vinesett permitted to continue a detention, already extended in both scope and duration, in order to confirm or dispell a reasonable suspicion? Petitioner respectfully submits that Vinesett’s suspicions should have dissipated as the detention progressed because his investigation continuously revealed less and less evidence of any suspicion related to the use of drugs. At the point where the cursory inspection of the cabin of the car confirmed the hollowed-out cigars had not been used to smoke marijuana, Petitioner contends that any reasonable suspicion held by

Vinesett should have been fully expelled. Possession of marijuana is a necessary prerequisite to smoking marijuana, and once Vinesett realized the partially-smoked, hollowed-out cigars contained no marijuana, his reasonable suspicion should have been dispelled.⁴ Without any more reasonable suspicion of drug activity, Vinesett should have either allowed Petitioner and the passenger to leave (with the passenger driving) or should have returned to the reason for the traffic stop. However, Vinesett searched the car instead.

At the conclusion of the suppression hearing, the trial court ruled that the “detention was not excessively long” (R. p. 58, line 23). For some reason, the trial court’s analysis focused on the moment Vinesett got the passenger out of the car (before the drug dog arrived) so he could conduct a pat down search of his person. When issuing this ruling, the trial court stated that:

I find the stop and detention, while it was about – I have got about thirteen minutes, based on the times I was jotting down, but I believe it was only about five minutes before they – from 14:07 to 14:12. I believe about 14:12 was when they got the passenger out and indicated he smelled marijuana, or at least I have got a statement about that within five minutes, but I think the detention was not excessively long. I don’t know that is any bright-line test for what is or is not a reasonable time

(R. p. 58, lines 1-25). Simply restated, the trial court’s logic appears to be as follows:

Vinesett got the passenger out of the car about five minutes into the detention. Then, about five minutes later, Vinesett said he smelled burnt marijuana back when the passenger exited the car.⁵ Thus, the length of the detention was not excessive.

The Court of Appeals erroneously discounted Petitioner’s argument that the trial court’s analysis amounted to clear error. As a threshold matter, the trial court’s time

⁴ Further, the lack of marijuana inside a partially-smoked cigar should also have dispelled the odor of marijuana that Vinesett “swore” he smelled when the passenger exited the vehicle.

⁵ For reasons unknown, the trial court never credited Vinesett’s claim that he smelled burnt marijuana from the moment he approached the car.

calculations are inaccurate. The time stamp on the on-board camera that captured the stop reveals that Vinesett got the passenger out of the rented car a little over eight minutes after the traffic stop began. Five minutes into the stop, Vinesett was speaking with the passenger, but he was doing so to compare his story to the one Petitioner had just provided. Then, from the inception of the stop, it took Vinesett a full thirteen minutes to allege that he smelled burnt marijuana. In the intervening time, the search of Petitioner and the passenger occurred, the drug dog failed to alert on the car, and the inspection of the cigars in the passenger compartment did not corroborate the presence of the odor of marijuana. Only after all the time it took to conduct the above investigation transpired did Vinesett allege he smelled burnt marijuana and search the car's trunk.

While he was supposed to be addressing a traffic infraction, Vinesett searched both Petitioner and the passenger, called a drug dog to the scene, and conducted an inspection of the car's passenger compartment. Each extension of the detention provided no evidence that either Petitioner or the passenger had engaged in criminal activity, but the duration of the detention still continued to escalate.

If this Court is not inclined to be persuaded by Petitioner's argument that Vinesett's alleged detection of the smell of marijuana lacks credibility and should thus be completely discounted, the fact still remains that every additional step Vinesett took to confirm or dispel his reasonable suspicion also should have dispelled the alleged presence of the odor of marijuana. No marijuana was found in the cabin of the car, nor on the persons of its occupants, and the drug dog failed to detect such an odor with the car's window rolled down. Vinesett simply did not find any evidence to support his suspicions regarding drug usage.

After careful review of the videotape of the traffic stop, Petitioner requests that this Court determine the record does not support the trial court's determination that Vinesett had

an objectively reasonable and articulable suspicion that illegal activity had occurred or was occurring so as to justify extending the scope and length of the detention in this case. Simply put, the extended traffic stop yielded no evidence of criminal activity until Vinesett chose to search the car without probable cause or a warrant. To hold otherwise would permit officers to engage in fishing expeditions for criminal activity in violation of the Fourth Amendment.

II. The Court of Appeals erred in affirming the trial court's finding that search of the car was supported by probable cause.

Though the Fourth Amendment will certainly permit an officer to expand the scope and duration of a traffic detention provided his or her reasonable suspicion of criminal activity is particularized and objective, a warrantless search of a vehicle will only withstand constitutional scrutiny if it is supported by probable cause. Ornelas v. U.S., 517 U.S. 690, 693 (1996) (“An investigatory stop is permissible . . . if supported by reasonable suspicion, and a warrantless search of a car is valid if based on probable cause.”) (internal citations omitted); accord State v. Weaver, 374 S.C. 313, 320, 649 S.E.2d 479, 482 (2007) (“Pursuant to the automobile exception, if there is probable cause to search a vehicle, a warrant is not necessary [if] the search is based on facts that would justify the issuance of a warrant . . .”).

An officer has the probable cause needed to conduct a warrantless search when the “circumstances known to [the] officer are such as to warrant a person of reasonable caution [to believe] that a search would reveal incriminating evidence.” State v. Moultrie, 316 S.C. 547, 552 fn. 3, 451 S.E.2d 34, 37 (Ct. App. 1994) (quoting U.S. v. Thornton, 733 F.2d 121, 127 (D.C. Cir. 1984). As the United States Supreme Court has explained, “the question is whether the totality of the circumstances is sufficient to warrant a reasonable person to believe that contraband or evidence of a crime will be found in a particular place.” Ornelas, 517 U.S. at 696 (emphasis supplied).

A. The search of car was not supported by probable cause.

Petitioner contended at trial and on appeal that no probable cause existed that would allow Vinesett to search the trunk of the car. As noted previously, the Court of Appeals' opinion acknowledged that "the trial court made no separate rulings to support its finding of probable cause beyond those supporting its pronouncement of reasonable suspicion. The trial court simply stated, 'He had probable cause to search.'" Morris, 395 S.C. at 610, 720 S.E.2d at 473. When it determined that the facts that supported reasonable suspicion to extend the stop (hollowed-out cigars, the odor of marijuana and an unauthorized driver of a rental) also provided probable cause for the search, the Court of Appeals explicitly "emphasiz[ed] our deferential standard of review." Id., 720 S.E.2d at 472.

The trial court specifically found that in Officer Vinesett's experience blunts are often hollowed to accommodate the smoking of marijuana. Similarly, the loose tobacco in the car indicated the blunts were recently hollowed in the car. Considering these factors in conjunction with the background odor of marijuana, the circumstances are sufficient to warrant a reasonable and prudent person to believe [Petitioner] and [the passenger] possessed marijuana. Accordingly, the officers had probable cause to search anywhere in the vehicle where marijuana could be located. The trial court properly admitted the drug evidence discovered in the trunk.

Id., 720 S.E.2d at 472.

Petitioner respectfully submits that the Court of Appeals erred in finding that these facts gave rise to probable cause. Even if those findings of fact made by the lower court did amount to reasonable suspicion, each and every one of suspicions had been dispelled before Officer Vinesett opened the trunk of Petitioner's car. At the time he opened the trunk, Vinesett lacked even a reasonable suspicion that the Petitioner was engaged in the use of marijuana. Therefore, Petitioner contends that Vinesett could not have had probable cause sufficient to justify the full-blown search of the packages inside the trunk of the car.

The Record on Appeal is clear on the fact that Vinesett never found any physical evidence of marijuana consumption inside the passenger compartment of the vehicle (R. p. 41, lines 2-10). Furthermore, the investigation that preceded this inspection uncovered no physical evidence to suggest the crimes of marijuana possession or consumption had been committed by either occupant of the vehicle. The search of Petitioner's person produced no incriminating evidence, the search of the passenger yielded no incriminating evidence, and the drug dog did not alert on the vehicle. More importantly Vinesett himself testified at the suppression hearing that he knew the passenger compartment of the vehicle contained no evidence of marijuana consumption before he made the decision to initiate a warrantless search of the trunk (R. p. 42, lines 2-6).

South Carolina law requires officers to use the totality of the circumstances test when determining whether probable cause exists. State v. Adams, 291 S.C. 132, 134, 352 S.E.2d 483, 485 (S.C. 1987). This test requires that an officer make "a justifiable determination, based upon the totality of the circumstances and in view of all the evidence available to law enforcement officials at the time of the search, that there exists a practical, nontechnical probability that a crime . . . has been committed and incriminating evidence is involved." State v. Bultron, 318 S.C. 323, 332, 457 S.E.2d 616, 621 (Ct. App. 2003).

Based on this standard as articulated, Vinesett conducted his search without probable cause. He did so because, at the time he made the conscious decision to open the trunk, his fourteen-minute detention of Petitioner produced no evidence of marijuana possession or consumption. This is evidenced by the facts that Vinesett: (1) found no contraband on the person of Petitioner or his passenger, (2) uncovered no contraband inside the passenger compartment of the car, and (3) the drug dog failed to alert on any part of the vehicle. Thus Vinesett neither had a "practical, nontechnical probability" that Petitioner had possessed or

consumed marijuana nor any “incriminating evidence” against Petitioner. All he had was his uncorroborated and unproven allegation that he smelled burnt marijuana with nothing in the way of hard evidence to back it up. This does not rise to the level of probable cause that will allow an officer to conduct a warrantless search.

B. In the alternative, even if this Court finds Vinesett had probable cause to search the passenger compartment of the car, he still lacked probable cause to search the trunk of the car for evidence of marijuana possession or consumption.

Petitioner’s primary probable cause argument is that Vinesett lacked probable cause to search the car at all for the reasons stated above. However, in the alternative, if this Court is persuaded that Vinesett smelled marijuana and had the right to conduct a warrantless search as a result, then Petitioner argues that Vinesett still lacked the right to search the trunk of Petitioner’s car. The Court of Appeals considered this argument and disagreed with Petitioner’s contention that, even if Vinesett had probable cause to search the cabin of the vehicle, he did not have probable cause to search the trunk. Petitioner respectfully contends this was in error and the Court of Appeals misapprehended United States v. Ross, 456 U.S. 798 (1982).

The Ross Court held the “scope of a warrantless search of an automobile thus is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found.” Id. at 824. To give this seemingly abstract statement real-life application, the Court explained as follows.

Probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, [and] probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase. Probable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab.

Id. at 824. Post-Ross, several jurisdictions have had occasion to consider cases that involve the alleged odor of burnt marijuana emanating from a vehicle's passenger compartment and determined an uncorroborated odor of marijuana alone does not give an officer probable cause to conduct a search of the trunk or make an arrest.⁶

In the present case, Vinesett ignored the totality of the circumstances known to him when he searched the car, and he certainly was unable to corroborate his alleged detection of burnt marijuana. Neither the search of Petitioner nor the search of the passenger revealed any corroborating evidence of marijuana use; the drug dog failed to alert on any part of the car, and Vinesett examined the "hollowed out" cigars and concluded they contained no marijuana residue before he made the decision to search the car's trunk.⁷ Thus, to find Vinesett's search supported by probable cause only because he claimed to smell burnt marijuana would be to ignore the greater weight of the evidence and the totality of the circumstances known to him during the traffic stop.

But because not one of the many investigative techniques he employed revealed any physical evidence of contraband, Vinesett was left without sufficient facts "to warrant a

⁶ See, e.g. State v. Farris, 109 Ohio St.3d 519, 849 N.E.2d 985 (Ohio 2006) (light odor of marijuana alone does not provide an officer with probable cause to search the trunk); State v. Schmadeka, 136 Idaho 595, 38 P.3d 633 (Idaho Ct. App. 2001) (odor of marijuana alone is not necessarily sufficient to justify a search of the trunk of a vehicle); State v. Grande, 164 Wash.2d 135, 187 P.3d 248 (Wash. 2008) ("The court's multifactor analysis does not support the State's argument here that marijuana odor itself is a basis for probable cause to arrest a passenger."); Com. v. Garden, 451 Mass. 43, 883 N.E.2d 905 (Mass. 2008) ("The search of the Honda's trunk in this case exceeded the permissible scope of the search because [the officer] could not reasonably have believed that the source of the smell of burnt marijuana would be found in the trunk."); State v. Morse, 331 Mont. 300, 132 P.3d 528 (Mont. 2006) ("Morse correctly points out that the odor of marijuana alone does not constitute probable cause.").

⁷ Furthermore, the record contains no evidence that Petitioner or the passenger appeared to be under the influence of marijuana. Neither does it contain any evidence that either of the other officers at the scene also smelled burnt marijuana.

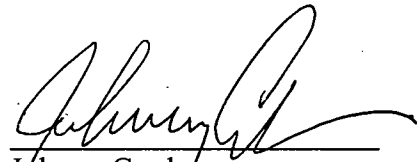
reasonable person to believe that contraband or evidence of a crime will be found in a particular place.” Ornelas, 517 U.S. at 696. In the end, he acted without probable cause when he searched the car’s trunk, so the trial court should have suppressed the fruit of the search.

Accordingly, Petitioner requests that this Court review this case, grant oral argument if deemed appropriate, and ultimately issue a decision that holds, based on the totality of the circumstances known to him, Vineseett did not have probable cause to search any part of the car driven by Petitioner.

CONCLUSION

For the above reasons, Petitioner respectfully requests this Court to issue a decision that reverses the Court of Appeals and suppresses the evidence obtained during the warrantless search of the car Petitioner was driving.

Respectfully Submitted,



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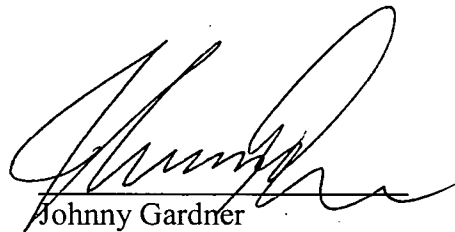
Attorney for Petitioner

March 24, 2014

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability, this Brief of the Petitioner complies with Rule 211(b), SCACR, and the August 13, 2007 order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

Dated: March 24, 2014



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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM YORK COUNTY

John C. Haynes, III, Circuit Court Judge

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MAR 31 2014

S.C. Supreme Court

State of South Carolina, Respondent,

v.

Kenneth Darrell Morris, II. Appellant.

PROOF OF SERVICE

I, Victoria Hucks Bailey, hereby certify that I have served the within Brief of Petitioner, Appendix and Record On Appeal upon Mark R. Farthing, Esq., by depositing three copies of the same in the United States Mail, with sufficient first class postage attached, addressed to:.

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I further certify that all parties required by the South Carolina Rules of Appellate Procedure have been served.

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March 28, 2014