STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

The Honorable C. Victor Pyle, Jr., Circuit Court Judge

Appellate Case No. 2013-000903

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

DANIEL LOPEZ,

APPELLANT.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. **The trial judge properly denied Appellant's motion to suppress the cocaine found in his car where the indicators the officer observed during the normal course of the traffic stop provided him with reasonable suspicion that criminal activity was afoot.**

II. **The trial judge properly allowed Appellant to be tried in his absence where, although Appellant had absconded from the court's jurisdiction the year before while he was out on bond, he was properly notified of trial where the solicitor's office mailed him a notice of trial at the address he provided on his bond form and where this notice and Appellant's signed bond form warned him that if he failed to appear in court the trial would proceed in his absence.**

STATEMENT OF THE CASE

Appellant was indicted in Greenville County in March 2005 for trafficking in cocaine in an amount over 400 grams and possession of a firearm with an obliterated serial number. On October 12-15, 2009, Appellant's case was called for trial before the Honorable C. Victor Pyle, Jr., and a jury. Appellant did not appear for trial and the trial was held in his absence. The jury found Appellant guilty as indicted, and the sentences were sealed. On May 7, 2013, the sealed sentences were read in Appellant's presence by the Honorable Letitia H. Verdin. The sentence imposed by Judge Pyle was twenty-five years for trafficking in cocaine and five years, concurrent, for the firearm charge. A timely notice of appeal was served and filed.

ARGUMENT

I. The trial judge properly denied Appellant's motion to suppress the cocaine found in his car where the indicators the officer observed during the normal course of the traffic stop provided him with reasonable suspicion that criminal activity was afoot.

Relevant Facts

In a pre-trial hearing on Appellant's motion to suppress, Deputy Hines testified regarding the facts leading up to Appellant's arrest. (See R. p. 16-44). Initially, Deputy Hines testified that he had been working for the Greenville County Sheriff's Department for twelve years; that he was assigned to the traffic division as a K-9 officer; and that he had received training on "highway drug investigation" in addition to other types of training. (R. p. 16). He further testified that he and his drug dog, Angie, had been properly certified at the time of Appellant's traffic stop. (R. p. 16-17). At approximately 2:30 pm on January 21, 2005, Deputy Hines was patrolling Interstate 85 in Greenville County. (R. p. 17). He noticed a man later identified as Appellant using a pay phone at the Breakers gas station. (R. p. 17). A white Dodge Intrepid was parked at the pay phone. (R. p. 17). A few minutes later, as Deputy Hines was sitting in his vehicle on the side of the road, the white Dodge Intrepid passed him going northbound on I-85 at a high rate of speed. (R. p. 17). Deputy Hines followed and attempted to overtake the vehicle, and at that point he was able to measure Appellant's speed by radar and he determined that Appellant was going 72 miles per hour in a 60 mile-per-hour zone. (R. p. 17-18). As he approached Appellant's car, Appellant made an abrupt exit off the interstate onto White Horse Road. (R. p. 17-18). Deputy Hines pulled him over just after he had passed the exit which would have allowed him to turn around and proceed southbound on I-85. (R. p. 18-19; p. 28-29).

After informing Appellant that speeding was the reason for the traffic stop, Deputy Hines observed a cell phone sitting in the passenger seat. (R. p. 19). The cell phone appeared to be on. (R. p. 19). Deputy Hines then saw another cell phone sitting in the back of the car. (R. p. 19). Deputy Hines found it odd that Appellant had two cell phones in his vehicle, one of which was on, yet he chose to use a pay phone a few minutes before. (R. p. 19). While asking for and obtaining Appellant's license and other paperwork, Deputy Hines engaged in casual conversation with Appellant about where he was going and coming from. (R. p. 20). Appellant claimed to have been visiting his son in North Carolina and said he was heading home to Georgia. (R. p. 20). However, Deputy Hines observed that, before he was stopped, Appellant was actually traveling toward North Carolina rather than away from it. (R. p. 20). When Deputy Hines reviewed Appellant's license and paperwork, he noticed that Appellant provided a Louisiana driver's license listing a Kenner, Louisiana, address, a car registration listing a Gainesville, Georgia, address, and insurance paperwork listing a Tucker, Georgia, address. (R. p. 20-21). Appellant verbally provided a fourth address in Lawrenceville, Georgia and indicated that was where he was currently living. (R. p. 20-21). Deputy Hines testified that, based upon his training, the fact that Appellant provided four different addresses raised a "red flag." (R. p. 21, lines 8-11). He also noted that three of Appellant's addresses were "in and around the Atlanta metro area" and that Atlanta is a known source for drugs used in drug trafficking. (R. p. 24, lines 14-19). Deputy Hines also testified that the highway on which Appellant was traveling, I-85, is a "main pipeline for drug trafficking." (R. p. 24, lines 1-10).

After Deputy Hines informed Appellant he was only going to issue a warning citation for the speeding violation, Appellant maintained the same level of nervousness,

which Deputy Hines found unusual. (R. p. 25, lines 3-11). He engaged in "nervous chatter" with Deputy Hines and tried to insinuate that he had an affiliation with law enforcement because he worked for Gwinnett County as a "bouncer" and "he told on people." (R. p. 21). Deputy Hines took this as Appellant trying to "befriend" him, and found it suspicious that Appellant was claiming to work for Gwinnett County as a "bouncer" since most law enforcement agencies do not employ persons as "bouncers." (R. p. 21, lines 17-25; p. 23, lines 6-9). Deputy Hines also noticed that Appellant had taped a Gwinnett County Police Department patch to his dashboard near the vehicle identification number. (R. p. 23, lines 4-6). Subsequently, Appellant reiterated his claim that he was going home to Georgia, but then asserted he was stopping to get something to eat first. (R. p. 22). Interestingly, when asked where he was going to get something to eat, he indicated he was heading to the McDonald's off of exit 44, which was odd because Appellant had just been using the pay phone at exit 40, and there was a McDonald's at that exit. (R. p. 23, lines 10-14; p. 27-28).

When Deputy Hines tried to confirm exactly where Appellant was coming from in North Carolina, Appellant began to stutter and was unable to provide the name of the army fort where his son was supposedly stationed. (R. p. 22). At that point Appellant began to "ad lib" a story and mentioned that his baby's mother lived in North Carolina and that the baby was sick. (R. p. 22). When Deputy Hines asked him how old his son was, Appellant changed his story and said the son was his friend's son. (R. p. 22). Then he changed again and stated his friend had a daughter. (R. p. 22). Deputy Hines was confused and tried to make sense of what Appellant was saying, but Appellant then said he had a daughter who was six who lived in California. (R. p. 22). Deputy Hines stated that Appellant's story was "kind of all over the place" and Appellant was "stumbling

upon his words" and avoiding making eye contact with Deputy Hines. (R. p. 22-23). Deputy Hines also stated that Appellant appeared to be fabricating a story, "lie after lie after lie," and that most people he encountered in traffic stops did not fabricate stories. (R. p. 41-42). Hines indicated it would have been obvious to a reasonable person that Appellant was "making stuff up" because he didn't want the officer to know where he was going and coming from. (R. p. 159, lines 11-23).

Additionally, in Deputy Hines' experience, Appellant's level of nervousness was greater than that of most people, and he testified that Appellant, unlike most people, did not become less nervous after he was told he was only getting a warning. (R. p. 25; p. 41, lines 4-20). He stated that Appellant "kept on avoiding eye contact" with him. (R. p. 23, lines 2-3). He further testified that Appellant's conduct during the traffic stop was not consistent with "95 plus" percent of the hundreds of people that the police stop monthly in the vicinity. (R. p. 168, lines 8-21).

As Deputy Hines was finishing writing the warning ticket, he asked routine questions about whether there were any dangerous items in Appellant's vehicle. (R. p. 130, lines 12-20). When he asked Appellant if there were any guns in the car, Appellant looked down, broke eye contact, and said no. (R. p. 130, lines 12-14). When he asked if there was any marijuana or cocaine in the car, Appellant's "face kind of tensed up" but he said no. (R. p. 130, lines 14-16). When he asked Appellant about bomb or terrorist devices, Appellant "eased up," laughed, and said no. (R. p. 130, lines 17-20).

At that point in time, Deputy Hines, based upon his extensive experience and training, suspected drug activity and believed he had sufficient reasonable and articulable suspicion to detain Appellant and his vehicle long enough to allow his drug detection dog to perform a sniff around Appellant's vehicle. (R. p. 23, line 15 – p. 25, line 21; p. 39,

lines 2-6; p. 44, lines 4-22; p. 168-69). After handing Appellant the warning ticket along with his other paperwork and confirming that Appellant had no questions regarding the warning ticket, Deputy Hines asked Appellant if he could search his vehicle. (R. p. 33-34). Appellant shrugged his shoulders and indicated he was ready to go ahead and leave. (R. p. 35). Deputy Hines told Appellant he was free to leave but that he was going to hold the car so that he could perform a drug sniff using his dog. (R. p. 35-36). At that point Appellant agreed that the dog could perform a sniff around the outside of his car. (R. p. 38, lines 38-39). Deputy Hines had already called for backup sometime during the midst of the traffic stop, and Deputy McBee arrived around the time Hines was requesting consent to search. (R. p. 34-38; p. 186-87). Only a few minutes had elapsed since Appellant was first stopped.[1] (See R. p. 17, lines 5-17; p. 122, lines 7-22; see State's Exhibit # 7). Deputy McBee stood with Appellant in the concrete median while Deputy Hines and his dog performed the sniff. (R. p. 187-88).

While Deputy Hines walked the dog around Appellant's car, Appellant watched, "almost entranced" by what was going on with his vehicle to the point that he was almost oblivious to Deputy McBee's presence and the conversation they were having. (R. p. 187-89). The drug dog exhibited an "aggressive alert" to the left rear door seam and to the right rear tire well area. (R. p. 132-33). The alerts caused Deputy Hines to believe that drugs were contained somewhere in the rear part of Appellant's vehicle. (R. p. 133-34). His subsequent search of the car revealed a nine millimeter handgun with an

[1] Although Deputy Hines' video of the traffic stop had been lost or misplaced after he transferred out of the traffic division (see R. p. 144-45), the video from the patrol car of Deputy McBee, the backup officer, was introduced at trial. (See R. p. 192-93; State's Exhibit # 7). Deputy McBee's video reflects that he pulled up to the traffic stop at 2:44 pm. (See State's Exhibit # 7).

obliterated serial number in the center console and a cognac box filled with over 500 grams of cocaine in the trunk.[2] (R. p. 134-138).

Applicable Law

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). In Fourth Amendment search and seizure cases, the appellate court is limited to determining if there is any evidence to support the trial court's findings and can only reverse due to clear error. State v. Flowers, 360 S.C. 1, 5, 598 S.E.2d 725, 727 (Ct. App. 2004); see State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000) ("[W]e will review the trial court's ruling like any other factual finding and reverse if there is clear error. We will affirm if there is any evidence to support the ruling."). The reviewing court may conduct its own review of the record to determine whether the trial judge's ruling is supported by the evidence. State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 460 (2002). However, the appellate court must affirm the trial court if there is any evidence in the record to support the ruling. State v. Pichardo, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005). The appellate court will not reverse merely because it would have reached a different conclusion than the trial judge. State v. Rivera, 384 S.C. 356, 361, 682 S.E.2d 307, 310 (Ct. App. 2009), *overruled in part on other grounds by* State v. Provet, 405 S.C. 101, 108, 747 S.E.2d 453, 457 (2013) (citations omitted).

[2] Appellant was Mirandized and he indicated he wanted to cooperate and help the officers apprehend the person who was supposed to receive the drugs in Greenville County. (R. p. 138-44). Appellant's cooperation that afternoon led to the arrest of his co-defendant, Octavius Nelson. (R. p. 144). Afterwards, Appellant provided a voluntary statement at the police station wherein he admitted he was delivering drugs to Greenville for a dealer out of Dekalb County, Georgia, nicknamed "Candela." (R. p. 231-32). The statement indicated Appellant was supposed to hand the drugs over to a contact person, receive $10,500 in exchange for the drugs, and return to Georgia and turn over the money to "Candela." (R. p. 232; p. 281, lines 14-20).

The Fourth Amendment protects "[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. That guarantee protects against unreasonable searches and seizures, including those involving only a brief detention. Pichardo, 367 S.C. at 97, 623 S.E.2d at 847. "The touchstone of the Fourth Amendment is reasonableness." Florida v. Jimeno, 500 U.S. 248, 250 (1991). Thus, only unreasonable searches and seizures are prohibited. State v. Foster, 269 S.C. 373, 378, 237 S.E.2d 589, 591 (1977); see Maryland v. Buie, 494 U.S. 325, 331 (1990) ("It goes without saying that the Fourth Amendment bars only unreasonable searches and seizures[.]").

For Fourth Amendment purposes, a traffic stop of a vehicle, along with the detention of individuals during the stop, constitutes a seizure. State v. Maybank, 352 S.C. 310, 315, 573 S.E.2d 851, 854 (Ct. App. 2002). The reasonableness of a stop or detention "is measured in objective terms by examining the totality of the circumstances." Ohio v. Robinette, 519 U.S. 33, 39 (1996). The test regarding whether reasonable suspicion exists is an objective assessment of the circumstances, and the officer's subjective motivations are irrelevant. State v. Provet, 405 S.C. 101, 108, 747 S.E.2d 453, 457 (2013) (citations omitted). However, the initiation of a traffic stop is reasonable *per se* when probable cause exists to believe a traffic violation has occurred. State v. Williams, 351 S.C. 591, 598, 571 S.E.2d 703, 707 (Ct. App. 2002).

A lawful traffic stop begins at the point an officer stops a vehicle to investigate a traffic violation and "ordinarily continues, and remains reasonable, for the duration of the stop." Arizona v. Johnson, 555 U.S. 323, 333 (2009). Once a lawful traffic stop is initiated, an officer may order the driver and any passengers out of the vehicle pending completion of the stop and "may request a driver's license and vehicle registration, run a

computer check, and issue a citation." Pichardo, 367 S.C. at 98, 623 S.E.2d at 847 (citing United States v. Sullivan, 138 F.3d 126 (4th Cir. 1998)); see Maryland v. Wilson, 519 U.S. 408, 415 (1997) ("[A]n officer making a traffic stop may order passengers to get out of the car pending completion of the stop."). "Normally, the stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave." Johnson, 555 U.S. at 333.

During the course of the stop, an officer can inquire into matters unrelated to the initial justification for the stop without converting the stop into something other than a lawful seizure so long as the unrelated questioning does not *measurably* extend the duration of the stop. Id.; see also Muehler v. Mena, 544 U.S. 93, 100-101 (2005) (instructing additional questioning during a detention unrelated to the original purpose of the detention does not constitute an additional seizure or independent Fourth Amendment violation). "Notwithstanding that an officer may not lawfully extend the duration of a traffic stop in order to engage in off-topic questioning, this rule does not limit the scope of the officer's questions to the motorist during the traffic stop." State v. Provet, 405 S.C. at 108-109, 747 S.E.2d at 457.

Even if a traffic stop is initially lawful, the detention "can become unlawful if it is prolonged beyond the time reasonably required to complete [its] mission." Illinois v. Caballes, 543 U.S. 405, 407 (2005); see Pichardo, 367 S.C. at 98, 623 S.E.2d at 848 ("Once the purpose of that stop has been fulfilled, the continued detention of the car and the occupants amounts to a second detention."). However, a further detention extending the scope of a traffic stop beyond its original purpose is not automatically unconstitutional. Pichardo, 367 S.C. at 99, 623 S.E.2d at 848. "The officer's

observations while conducting the traffic stop may create reasonable suspicion to justify further search or seizure." Provet, 405 S.C. at 109, 747 S.E.2d at 457 (citation omitted).

Reasonable suspicion consists of "'a particularized and objective basis' that would lead one to suspect another 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, 417 (1981)). Reasonable suspicion "is not readily, or even usefully, reduced to a neat set of legal rules, but, rather, entails common sense, nontechnical conceptions that deal with factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act." U.S. v. Foreman, 369 F.3d 776, 781 (4th Cir. 2004) (citation omitted). "In this highly fact-specific inquiry, reasonable suspicion 'is a fluid concept which takes its substantive content from the particular context in which the standard is being assessed.'" State v. Wallace, 392 S.C. 47, 51-52, 707 S.E.2d 451, 453 (Ct. App. 2011) (quoting Foreman, 369 F.3d at 781). The reasonable suspicion standard "is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence[.]" Illinois v. Wardlow, 528 U.S. 119, 123 (2000). "Reasonable suspicion is more than a general hunch but less than what is required for probable cause." State v. Willard, 374 S.C. 129, 134, 647 S.E.2d 252, 255 (Ct. App. 2007); see State v. Rogers, 368 S.C. 529, 534, 629 S.E.2d 679, 682 (Ct. App. 2006) ("Reasonable suspicion is something more than an inchoate and unparticularized suspicion or hunch.").

In determining the existence of reasonable suspicion, the totality of the circumstances must be considered. Pichardo, 367 S.C. at 104, 623 S.E.2d at 85. In reviewing the totality of the circumstances, the individual factors of the traffic stop must not be considered piecemeal or in isolation. See U.S. v. Branch, 537 F.3d 328, 337 (4th

Cir. 2008). Instead, all of the circumstances of the stop must be considered as a whole to determine whether the officer's actions were reasonable in light of all of the information available to him at the time. See U.S. v. Mason, 628 F.3d 123, 129 (4th Cir. 2010) ("[J]ust as one corner of a picture might not reveal the picture's subject or nature, each component that contributes to reasonable suspicion might not alone give rise to reasonable suspicion."). "In applying the concept of reasonable suspicion to the various facts of a case, '[i]t is the entire mosaic that counts, not single tiles.'" Wallace, 392 S.C. at 52, 707 S.E.2d at 453 (quoting U.S. v. Whitehead, 849 F.2d 849, 858 (4th Cir. 1988)); see also U.S. v. Arvizu, 534 U.S. 266, 273-78 (2002) (rejecting the lower court's "evaluation and rejection of seven of the listed [reasonable suspicion] factors in isolation from each other" because it failed to take into account the totality of the circumstances, and holding that although "each of these factors alone is susceptible of innocent explanation, and some factors are more probative than others," taken together they sufficed to form a particularized and objective basis for the stop, "making the stop reasonable within the meaning of the Fourth Amendment."). Thus, courts must look at the cumulative information available to an officer and "may not find a stop unjustified based merely on a piecemeal refutation of each individual fact and inference." State v. Taylor, 401 S.C. 104, 112, 736 S.E.2d 663, 667 (2013) (citations omitted).

Discussion of Recent Cases

In State v. Provet, an officer stopped the defendant on I-85 in Greenville County for following another vehicle too closely and driving with a burned-out tag light. 405 S.C. 101, 105, 747 S.E.2d 453, 455 (2013). As the defendant produced his license and registration, the officer - who had fourteen years of experience with the South Carolina Highway Patrol and four years of experience in the Aggressive Criminal Enforcement

("ACE") unit - noticed that the defendant's hands were shaking excessively and that his breathing was accelerated. Id. at 105-106, 747 S.E.2d at 455-56. After discovering that the vehicle was registered to a third party, the officer asked the defendant to step to the rear of the car and he performed a pat-down search which did not yield any weapons. Id. at 106, 747 S.E.2d at 455-56. As the officer prepared a warning citation for the traffic violations, he asked the defendant where he was coming from, and the defendant stated he had been visiting a girlfriend at a nearby Holiday Inn; however, the officer had just observed the defendant pass the exit at which the only Holiday Inn in Greenville was located. Id. at 106, 747 S.E.2d at 456. The defendant was unable to tell the officer the exit number of the Holiday Inn he had just left and denied having gone anywhere else after leaving the Holiday Inn. Id. In response to further questions, the defendant explained that the car he was driving belonged to a different girlfriend than the one he had just visited; that he had recently graduated from technical college and was unemployed; and that he had been in Greenville for two days but did not have any luggage. Id. At that point the officer called for a canine drug detection unit and also called dispatch to check on the status of the defendant's license and the vehicle's registration. Id.

When the officer approached the car to check the vehicle identification number, he noticed that the car contained several air fresheners, several fast food bags, a cell phone, some receipts, and a bag on the rear seat. Id. The canine unit arrived prior to the officer's receipt of the dispatcher's return call regarding the status of the license and registration; however, when dispatch reported no problems with either the license or registration, the officer returned the license and registration papers to the defendant and issued him a warning citation. Id. After doing so, the officer requested permission to

search the defendant's vehicle, and the defendant consented. Id. As another officer prepared the drug detection dog to perform a search, the defendant fled the scene on foot but was apprehended. Id. The dog alerted to a fast food bag in the car, and the subsequent search of the bag yielded a substance that field tested positive for cocaine. Id.

At trial, the defendant moved to suppress the cocaine found in the fast food bag, arguing that the cocaine was obtained as a result of an illegal detention and search. Id. The trial court found that the second detention of the defendant, which began when the officer requested permission to search the vehicle, was justified by the officer's reasonable suspicion that the defendant was involved in criminal activity and also found that the defendant voluntarily consented to the search. Id. at 106-107, 747 S.E.2d at 456. The Court of Appeals affirmed. See State v. Provet, 391 S.C. 494, 706 S.E.2d 513 (Ct. App. 2011). Regarding the initial detention, the Court found the stop was proper as the officer's questioning was tangentially related to the traffic stop. Id. at 499, 706 S.E.2d at 516. The Court further found the questioning did not unreasonably extend the traffic stop because the officer had not completed the initial purpose of the stop and the stop was only eleven minutes long. Id. at 499-500, 706 S.E.2d at 516.

Regarding the extension of the traffic stop after the warning was issued, the Court determined the officer possessed reasonable suspicion to extend the stop based on the presence of the following factors: (1) Provet's nervous behavior; (2) the fact third-party vehicle registration is common in drug trafficking; (3) Provet's inconsistent or deceptive responses to several questions; (4) the presence of numerous fast food bags, a cell phone, and some receipts; and (5) the presence of numerous air fresheners. Id. at 504-505, 706 S.E.2d at 518-519. Based on the factors present coupled with the officer's considerable experience, the Court of Appeals concluded the trial court did not err in finding an

extension of the stop was justified under the circumstances. Id. at 506, 706 S.E.2d at 519-520.

The South Carolina Supreme Court also upheld the denial of the defendant's motion to suppress. Provet at 109-13, 747 S.E.2d at 457-59. The Supreme Court held that the officer's off-topic questioning did not **measurably** extend the duration of the stop, where the time from initial seizure up until the point the officer requested consent to search the defendant's vehicle was only approximately ten minutes.[3] Id. at 109, 747 S.E.2d at 457-58. Importantly, the Supreme Court also took the opportunity to clarify that, to the extent that State v. Rivera, 384 S.C. 356, 682 S.E.2d 307 (Ct.App. 2009), suggested that police questioning must bear some relationship to the purpose of the stop in order to withstand Fourth Amendment scrutiny, it was incorrect. Id. at 110, 747 S.E.2d at 458. The Provet court also stated that "[t]o the extent Rivera suggests that shifting the conversation to another topic marks the end of the lawful seizure even though the citation has not been issued, regardless whether such off-topic conversation measurably extends the duration of the initial seizure, it is also incorrect." Id. Further, "[t]o the extent other South Carolina cases contain similar language, we note that language has likewise been superseded." Id. at 111, 747 S.E.2d at 458.

The Supreme Court also concluded that the officer had reasonable suspicion to detain the defendant in order to request his permission to search the vehicle. Id. at 111-12, 747 S.E.2d at 459. The following factors were relevant to the reasonable suspicion determination: (1) the officer's testimony that the defendant exhibited extreme nervousness, as evidenced by shaking hands and accelerated breathing, which was

[3] The Court also noted that "the proper inquiry is not whether an officer 'unreasonably' extended the duration of the traffic stop with his off-topic questions but whether he 'measurably' extended it. This is a temporal inquiry, not a reasonableness inquiry." Provet at 111, 747 S.E.2d at 458 (citation omitted).

excessive in comparison to people he pulled over who were not involved in criminal activity other than a traffic violation; (2) the vehicle's registration to a third party; (3) the defendant's apparent deception regarding where he was coming from; (4) the defendant's claim that he was unemployed yet was able to afford to stay in a hotel and buy large quantities of gasoline for his large vehicle; (5) the presence of numerous air fresheners in the vehicle, which indicated to the officer that the defendant was seeking to mask odors; (6) the presence of numerous fast food bags, receipts, and the cell phone, which the officer testified were all consistent with the tight schedule maintained by drug traffickers; and (7) the fact that the defendant claimed to have no luggage but the officer observed a bag on the rear seat that could have been a luggage bag. Id. at 111-12, 747 S.E.2d at 459. The Supreme Court held that the officer had reasonable suspicion supported by articulable facts that criminal activity was afoot, justifying a second seizure, and that because the record contained evidence supporting the trial court's finding of reasonable suspicion, the Court was required to affirm due to the deferential standard of review. Id. at 112, 747 S.E.2d at 459.

In State v. Wallace, Wallace was stopped on Interstate 85 for committing a traffic violation. Wallace, 392 S.C. at 50, 707 S.E.2d at 452. The officer took twelve minutes to complete the traffic stop and issued Wallace a citation. Id. However, based on his observations during the stop, the officer continued to question Wallace after issuing the ticket and requested consent to search the vehicle. Id. Wallace refused consent, and the officer walked a drug-sniffing dog around the vehicle. Id. The dog alerted on Wallace's car, and a substantial quantity of cocaine was discovered inside. Id. During trial, Wallace moved to suppress the drugs found in his vehicle, and the trial judge denied the motion. Id.

On appeal, the Court of Appeals affirmed the trial judge's ruling. Id. The Court determined the following factors observed by the officer during the traffic stop established a reasonable articulable suspicion to extend the duration of the stop: (1) Wallace's abnormal braking after the officer initiated the stop; (2) Wallace's fumbling of his paperwork for an unusually long period of time; (3) the fact the passenger stared straight ahead and did not acknowledge the officer; (4) Wallace and the passenger's inconsistent responses about their trip; (5) Wallace's increasing nervousness throughout the stop; (6) the fact an unknown car pulled up behind Wallace's vehicle for several minutes during the stop; (7) Wallace's cell phone ringing during the stop; (8) the fact drug dealers frequently use decoy cars and communicate via cell phones; (9) the fact the passenger would not look at the officer while they were talking; (10) the fact the passenger was sweating and visibly nervous on a mild day; (11) the fact Wallace changed his story after the officer spoke with his passenger; (12) the fact the car was owned by a third-party, which is common in drug cases; (13) Interstate 85's status as a known drug corridor; and (14) Atlanta's status as a known drug hub. Id. at 55, 707 S.E.2d at 455. While noting none of the factors taken in isolation established a reasonable articulable suspicion of criminal activity, this Court held the presence of all of the factors established a reasonable suspicion when examined in totality as required. Id.

Similarly, in State v. Jones, Jones was stopped for speeding on I-85 in Spartanburg County. 364 S.C. 51, 53, 610 S.E.2d 846, 847 (Ct. App. 2005). While in the process of issuing a traffic ticket, the officer, as a part of his routine procedure, asked Jones where he had been coming from. Id. Jones indicated he and the other two occupants of the vehicle had been in Greenville visiting his cousin and stated that they had stayed in a hotel. Id. However, Jones was unable to provide the name or location of

the hotel. Id. Jones then changed his story and told the officer he stayed with his cousin, but was unable to provide his cousin's name or the location of his cousin's residence. Id. at 53-54, 610 S.E.2d at 847. Jones appeared "very nervous" and was sweating profusely despite the fact that it was a cool day. Id. at 54-55, 610 S.E.2d at 847-48.

Although Jones had provided his driver's license, he did not produce the vehicle's registration; therefore, the officer requested the passenger's assistance in locating the registration. Id. As the passenger fumbled through some paperwork looking for the registration, the officer asked him where they were coming from. Id. The passenger responded that they had been in Spartanburg for the last two days but could not remember specifically where they had been. Id. Then the backseat passenger stated that they had been in Atlanta that morning, not Spartanburg. Id. At that point, the officer asked Jones if there were any weapons in the vehicle or any other items he needed to know about; Jones responded that there were not. Id. The officer then asked for permission to search the vehicle and Jones consented. Id. at 54, 610 S.E.2d at 847-48. Immediately thereafter, approximately seven minutes into the stop, the officer made a call requesting backup. Id. It took three to four minutes for the backup officer to arrive, and during this time, the initial officer continued to fill out paperwork related to the speeding ticket. Id. at 54, 610 S.E.2d at 848. About the time the backup officer arrived, the front seat passenger jumped out of the vehicle with a white towel in his hand. Id. The officers gave chase and observed the passenger throwing objects in the bushes as he ran. Id. at 55, 610 S.E.2d at 848. These objects were subsequently retrieved and were determined to contain more than 230 grams of crack cocaine. Id.

Jones moved to suppress the crack cocaine, arguing it was found as a result of an unconstitutionally prolonged detention. Id. He further argued that the questioning of

Jones and the passengers was a deliberate ruse so the officer could eventually search the car. Id. The trial judge denied the motion, finding that the traffic stop lasted a reasonable amount of time; that any prolonging was due to the fact that Jones did not immediately produce the car's registration; and that there was no constitutional violation with regard to the officer's casual conversation with Jones and the passengers regarding where they had been coming from. Id. Finally, the trial judge determined that whether or not Jones gave valid consent to search was irrelevant where no search was carried out pursuant to the consent because the passenger jumped out and fled with the drugs after being detained no more than eleven minutes. Id. at 55-56, 610 S.E.2d at 848.

On appeal, Jones relied on this Court's decision in State v. Williams, 351 S.C. 591, 571 S.E.2d 703 (Ct. App. 2002), arguing that Williams mandated reversal of the trial judge. Jones at 56, 610 S.E.2d at 848. This Court disagreed and held that the Williams case was "easily distinguishable" because in Williams, the driver and passenger were clearly detained beyond the scope of the traffic stop where the officer did not begin to question them until after he had completed the ticket and returned the driver's license and registration. Id. at 57, 610 S.E.2d at 849. In other words, only **after** completing the purpose of the traffic stop did the officer begin to ask questions that led to his becoming suspicious. See Williams, 351 S.C. at 595-96, 571 S.E.2d at 705-706; cf. State v. Tindall, 388 S.C. 518, 522, 698 S.E.2d 203, 205 (2010) (pointing out that, although at this point, the purpose of the traffic stop was accomplished except for the issuance of the warning ticket, rather than issue the ticket, the officer continued to question the defendant for an additional six to seven minutes). The Jones court found no Fourth Amendment violation where the officer did not question Jones and his passenger after returning Jones's license and registration; the questions the officer asked during the traffic stop did not exceed the

scope of the traffic stop such as would convert the stop into an illegal detention, particularly where the detention was not for an unreasonably long time; and the purpose of the traffic stop had not yet been completed at the time Patterson ran with the drugs. Id. at 58, 610 S.E.2d at 850. In conclusion, this Court stated: "[i]n the case at hand, there is evidence to support the trial judge's findings and we cannot say his findings are clearly erroneous. We therefore find no abuse of discretion." Id. at 59, 610 S.E.2d at 850.

Appellant's Case

In Appellant's case, as in Provet, Wallace, and Jones, there is evidence supporting the trial judge's findings, and consequently, the denial of Appellant's motion to suppress was not an abuse of discretion.[4] Here, Deputy Hines' questioning of Appellant occurred before the completion of the purpose of the traffic stop and did not measurably extend the traffic stop. In fact, at the time permission to search was requested, only a few minutes had elapsed since the commencement of the traffic stop.[5] Furthermore, at the time Deputy Hines requested permission to search Appellant's car, he had acquired reasonable suspicion justifying a further detention because he had observed numerous indicators of

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[4] Appellant concedes that the initial detention for the speeding violation was proper. (See Brief of Appellant, p. 11).

[5] Deputy Hines testified that, as he was turning around at the county line on I-85 and Highway 153, Exit 40, he observed Appellant on the pay phone at the gas station "at approximately 2:30" pm. (R. p. 17, lines 5-13). He testified that he pulled back on the interstate, parked on the side of the road, and began to review some materials while sitting in his vehicle. (R. p. 17, lines 14-16). At that point, he observed Appellant's vehicle pass him at a high rate of speed. (R. p. 17, lines 16-17). He then tried to measure the speed by radar, but was unable to do so because Appellant passed by too quickly. (R. p. 17, lines 18-20). Deputy Hines then attempted to overtake Appellant's vehicle but Appellant made an abrupt lane change and took Exit 44. (R. p. 17, lines 20-25). During this time Deputy Hines managed to clock Appellant's speed at 72 miles per hour. (R. p. 18, lines 11-13). After turning north onto White Horse Road and stopping at a red light, Appellant pulled over for the traffic stop. (R. p. 18, line 21 – p. 19, line 2). At some point during the traffic stop, Deputy Hines called for backup, and Deputy McBee responded. (R. p. 34-38; p. 167; p. 186-87). The video from Deputy McBee's video reflects that he pulled up to the traffic stop at 2:44 pm. (See State's Exhibit # 7). Under the above facts, it is reasonable to assume that several minutes passed from the time Deputy Hines saw Appellant at the pay phone (about 2:30 pm) until the time of the traffic stop. Considering that Deputy McBee arrived at 2:44 pm, and that his arrival occurred around the time Deputy Hines issued the warning citation and then requested Appellant's consent to search (see R. p. 34-38; p. 167; p. 186-87), the traffic stop could have lasted no longer than about nine minutes at the point in time Deputy Hines requested consent to search.

criminal activity during the course of the traffic stop before he issued the warning citation. Specifically, Deputy Hines' decision to extend the stop was supported by the following factors: (1) Deputy Hines' twelve years of experience working for the sheriff's department and his training in highway drug investigation; (2) Appellant used a pay phone at a gas station and had two cell phones, one of which was on, in the car with him; (3) Appellant abruptly changed lanes and exited off the interstate when the officer was approaching him; (4) Appellant stuttered when responding to questions and avoided direct eye contact; (5) Appellant's responses regarding his travel itinerary, purpose, et cetera, were inconsistent and appeared to be deceptive; (5) Appellant's level of nervousness was greater than that of most people, even after he was told he was only getting a warning citation, and Appellant's nervous conduct during the traffic stop was not consistent with "95 plus" percent of people stopped; (6) Appellant tried to insinuate he had an affiliation with law enforcement in Georgia in order to try to befriend the officer and had posted a law enforcement sticker on his car near the vehicle identification number; (7) Appellant tensed up when the officer asked about guns and drugs being in the car but relaxed when asked about bombs or terrorist devices; (8) Appellant provided a total of four different addresses which raised a "red flag" to Deputy Hines; (9) three of Appellant's addresses were located near Atlanta, which was a known source for drugs; (10) the highway on which Appellant was traveling, I-85, was a "main pipeline" for drug trafficking.

Taking into account Deputy Hines' extensive experience and training, his observation of the above indicators, considered together under the totality of the circumstances, provided him with reasonable suspicion that Appellant was involved in drug activity, and this reasonable suspicion was sufficient to justify the very brief

additional detention required to run the drug dog around Appellant's car.[6] Cf. Provet at 111-13, 747 S.E.2d at 459; Wallace at 55, 707 S.E.2d at 455; Jones at 53-58, 610 S.E.2d at 847-50; see also U.S. v. Mubdi, 691 F.3d 334, 344 (4th Cir. 2012); U.S. v. Vaughan, 700 F.3d 705, 712 (4th Cir. 2012) (acknowledging reasonableness of officer's suspicions arising from the presence of four cell phones in a vehicle containing two persons); cf. State v. Tindall, 388 S.C. 518, 523, 698 S.E.2d 203, 206 (2010) (finding that the following four factors were insufficient to establish reasonable suspicion: (1) Tindall was driving to Durham to meet his brother; (2) Tindall was driving a rental car rented the previous day by another individual which was to be returned to Atlanta on the day of the stop; (3) Tindall did a "felony stretch" on exiting the vehicle; and (4) Tindall seemed nervous).

Although some of the factors observed by Deputy Hines might appear to be consistent with innocent travel to a person lacking the officer's experience and training, all of the factors **taken together** established a reasonable articulable suspicion Appellant was involved in criminal activity. See Robinson v. State, 407 S.C. 169, 185, 754 S.E.2d 862, 870 (2014) (referencing the Provet opinion and pointing out that "[*d*]*espite the fact that the Court agreed with the defendant that the existence of several factors were indicative of innocent travel,* the Court noted, "we must affirm when *any evidence* in the record supports" the trial court's finding.") (emphasis in original), citing Provet at 112, 747 S.E.2d at 459; U.S. v. Arvizu, 534 U.S. 266, 277-78 (2002) ("A determination that reasonable suspicion exists, however, need not rule out the possibility of innocent conduct. Undoubtedly, each of these factors alone is susceptible of innocent explanation,

[6] The additional detention from the point in time the purpose of the traffic stop was completed to the time the drug dog alerted was probably less than two minutes. (See State's Exhibit # 7; see also R. p. 33-38; p. 130-31).

and some factors are more probative than others. Taken together, we believe they sufficed to form a particularized and objective basis for Stoddard's stopping the vehicle, making the stop reasonable within the meaning of the Fourth Amendment.") (citation omitted); Illinois v. Wardlow, 528 U.S. 119, 130 n4 (2000) (noting that in Terry v. Ohio, "reasonable suspicion was supported by a concatenation of acts, each innocent when viewed in isolation, that when considered collectively amounted to extremely suspicious behavior"); U.S. v. Sokolow, 490 U.S. 1, 10 (1989) (reiterating that in making a determination regarding probable cause, the relevant inquiry is not whether particular conduct is innocent or guilty but the degree of suspicion that attaches to particular types of *noncriminal acts*; that principle applies equally well to the reasonable suspicion inquiry) (citations omitted); see State v. Taylor, 401 S.C. at 113, 736 S.E.2d at 667 (reiterating the "well-settled principle that courts must give due weight to common sense judgments reached by officers in light of their experience and training"); State v. Burgess, 394 S.C. 407, 414, 714 S.E.2d 917, 920 (Ct. App. 2011) (failing to afford the proper weight to an officer's inferences stemming from his experience would be to fail to consider the totality of the circumstances) (citation omitted); Taylor at 108, 736 S.E.2d at 665 (instructing that courts must consider the cumulative information available to the officer and pointing out that each individual factor might not alone give rise to reasonable suspicion) (citations omitted); see also Mason, 628 F.3d at 129 ("[J]ust as one corner of a picture might not reveal the picture's subject or nature, each component that contributes to reasonable suspicion might not alone give rise to reasonable suspicion."). Moreover, contrary to Appellant's contentions, there is no evidence Deputy Hines intentionally delayed any part of his normal routine in traffic stops in order to drag out the traffic stop

for the purpose of acquiring reasonable suspicion.[7] Accordingly, Appellant's detention for the brief period of time it took to run the drug dog around the car was not unlawful.[8] Therefore, the trial judge did not err in denying Appellant's motion to suppress the cocaine.[9]

II. The trial judge properly allowed Appellant to be tried in his absence where, although Appellant had absconded from the court's jurisdiction the year before while he was out on bond, he was properly notified of trial where the solicitor's office mailed him a notice of trial at the address he provided on his bond form and where this notice and Appellant's signed bond form warned him that if he failed to appear in court the trial would proceed in his absence.

Relevant Facts

On October 12, 2009, the State called for trial the case against Appellant and the case against Appellant's co-defendant, Octavius Nelson. (R. p. 1; p. 6). During pre-trial motions, Appellant's counsel moved to sever the trial of Appellant from that of his co-defendant. (R. p. 6, lines 15-16). Appellant's counsel noted that Appellant was not present and that there had been an active bench warrant for him since 2008. (R. p. 6, lines 16-19). Counsel argued that the judge should "wait until he's found to try him so that he, obviously, could be present." (R. p. 6, lines 15-22). The judge then proceeded with a hearing regarding Appellant's notice for trial. (R. p. 6-7).

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[7] In that vein, the State submits that officers are not required to force a suspect to explain or clarify obviously deceptive responses particularly where doing so would put potentially dangerous criminals even more on edge and subject the officer to a wholly unnecessary risk of violence.

[8] Of course, at the point the drug dog alerted to the rear area of the car, the officer acquired probable cause to search the entire vehicle. See U.S. v. Branch, 537 F.3d 328, 340 (4th Cir. 2008) (noting that "it is well settled that a 'positive alert' from a drug detection dog, in and of itself, provides probable cause to search a vehicle") (citations omitted); see also Illinois v. Caballes, 543 U.S. 405 (2005).

[9] Since there is ample evidence in the record supporting that Deputy Hines possessed reasonable suspicion of criminal activity at the time he requested permission to search, Appellant's subsequent consent regarding the canine sniff (and the resulting brief additional detention) was not the product of any unlawful detention and was perfectly valid. See Provet at 114-15, 747 S.E.2d at 460 (where the officer had reasonable suspicion for an additional seizure and the defendant's consent was voluntary, there was no Fourth Amendment violation); State v. Willard, 374 S.C. at 135-36, 647 S.E.2d at 256 (same); see also U.S. v. Boone, 245 F.3d 352, 362 (4th Cir. 2001) ("If individual voluntarily consents to a search while justifiably detained on reasonable suspicion, the products of the search are admissible.") (citing Florida v. Royer, 460 U.S. 491, 502 (1983)).

The State called Sonia Bass, an investigator for the solicitor's office, to testify. (R. p. 7). Ms. Bass stated that she mailed, via the U.S. Postal Service, "bond cards" to Appellant regarding the trial date. (R. p. 7, lines 15-18; p. 8, lines 24-25). She testified that she sent one "bond card" to Appellant at a Lilburn, Georgia address and one to a Lawrenceville, Georgia address, which was the same address Appellant gave on his bond sheet. (R. p. 7, lines 21-25). Ms. Bass noted that an additional Lawrenceville, Georgia address was also used. (R. p. 7-8). Appellant's bond form and the three bond cards were admitted as Court's Exhibit # 1, and the solicitor pointed out that the bond form contained a provision informing Appellant that the trial would proceed in his absence should he fail to attend court. (R. p. 8, lines 3-16; see Court's Exhibit # 1). The bond cards also contain provisions stating that "[f]ailure to appear may result in trial being conducted in the defendant's absence and/or a bench warrant being issued for the defendant's arrest." (See Court's Exhibit #1). On cross-examination, Appellant's counsel established that Ms. Bass mailed out bond cards rather than attempting to have a subpoena sent to Appellant via Georgia law enforcement agencies. (R. p. 8-9).

At the conclusion of Ms. Bass's testimony, the judge asked if Appellant's counsel had "anything else." (R. p. 9, lines 7-10). Appellant's counsel argued "[j]ust that it was not a subpoena." (R. p. 9, line 11). He further stated that "[t]here's no proof that [Appellant] received it from any of those addresses" and pointed out that a bond card is not a subpoena and not an "official court document." (R. p. 9, lines 12-14). "[O]n that basis," counsel moved "that there be a continuance until he's contacted." (R. p. 9, lines 16-17).

After reviewing Court's Exhibit # 1, including the bond form and the bond cards that were sent to Appellant, the trial judge denied Appellant's continuance motion, stating

that notice of trial was sent to the address provided in Appellant's bond form and that the bond form contained language that Appellant would be tried in his absence if he failed to appear. (R. p. 10, lines 5-16).

Discussion

Although the Sixth Amendment guarantees a defendant's right to be present at trial, it is well established that this right may be waived. State v. Fairey, 374 S.C. 92, 99, 646 S.E.2d 445, 448 (Ct. App. 2007); City of Aiken v. Koontz, 368 S.C. 542, 547, 629 S.E.2d 686, 688 (Ct. App. 2006). Rule 16, SCRCrimP, provides that a defendant may waive his right to be present, and may be tried in his absence, upon the court's finding that the defendant received notice of his right to be present and that he was warned the trial would proceed in his absence if he failed to appear. State v. Fairey, at 99-100, 646 S.E.2d at 448. Notice of the term of court in which a defendant will be tried is sufficient notice to enable the defendant to make an effective waiver of his right to be present at his trial. Ellis v. State, 267 S.C. 257, 261, 227 S.E.2d 304, 306 (1976); Fairey, 374 S.C. at 100, 646 S.E.2d at 448. Also, a bond form that provides notice that a defendant can be tried in absentia may serve as the requisite warning that he may be tried in his absence should he fail to appear. Fairey, 374 S.C. at 101, 646 S.E.2d at 449.

In this case, Appellant was properly tried in his absence because a notice of trial was sent to the address Appellant provided on his bond form (and to two other addresses on file with the solicitor's office) and this notice, and his signed bond form, warned him that trial would proceed in his absence should he fail to attend. See id. at 97-102, 646 S.E.2d at 447-50 (where a trial notice was mailed to the last official address the *pro se* defendant provided to the solicitor and to the address listed in the defendant's signed bond form, and where the defendant's signed bond form indicated he understood that a

trial would proceed in his absence should he fail to appear, the defendant was properly tried in his absence); cf. State v. Roberson, 382 S.C. 185, 187-88, 675 S.E.2d 732, 733 (2009). Appellant's argument - made for the first time on appeal - that the single sentence in his bond form "failed to properly notify Appellant that he would be tried in his absence" is not preserved and is without merit in any event.[10] See State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."); Fairey, 374 S.C. at 101-102, 646 S.E.2d at 449-50 (defendant's signed bond sheet, which informed him that he had a right and obligation to be present at trial and that if he should fail to attend court the trial would proceed in his absence, was sufficient to serve as a warning that he would be tried in his absence).

The thrust of Appellant's argument on appeal appears to be that the State was required to ensure that Appellant was verbally notified in person of his court date and also verbally informed that his trial could proceed in his absence. (See Brief of Appellant, p. 17-18). This has never been the law in South Carolina. See Fairey at 99, 646 S.E.2d at 448; Koontz at 547, 629 S.E.2d at 688. In fact, our Supreme Court has recognized the doctrine of "waiver by conduct" in the context of a trial in absentia without counsel. See State v. Roberson, 382 S.C. at 187-88, 675 S.E.2d at 733. Furthermore, Appellant's contention that the State should have sent a subpoena as opposed to a bond card in order to properly notify Appellant is wholly without merit, as evidenced by the fact that Appellant cited no authority, either below or on appeal, for such a proposition. (See R. p. 8-9; see Brief of Appellant, p. 17-18).

[10] Appellant's contention that the addresses used by the solicitor were probably "no longer accurate" since nearly five years had passed (Brief of Appellant, p. 18) is also unpreserved since this assertion was not made below. (See R. p. 8-9). Regardless, it was **Appellant's** duty to inform the court of any address change, since Appellant's signed bond form required him to "notify the court promptly if he changes his address from the one contained in this order." (See Court's Exhibit # 1, Order Specifying Methods and Conditions of Release). Note that Appellant's counsel never suggested to the trial judge that Appellant's address had changed. (See R. p. 8-9).

In reality, what Appellant invites this Court to do is overlook the fact that he violated his bond in 2008 by absconding from the authority of the court for approximately six years until he was finally apprehended in 2013.[11] (See R. p. 6, lines 15-22; see Sentencing Transcript dated 5/7/13). However, Appellant's willful avoidance of his case, and his flagrant disregard for the instructions of the South Carolina court as set forth in his bond form, cannot excuse his failure to appear, and this Court should decline Appellant's invitation. See Roberson at 187-88, 675 S.E.2d at 733. "No defendant has the unilateral right to set the time or circumstances under which he will be tried," since "[t]he public interest demands that criminal prosecutions be prosecuted with dispatch." Ellis v. State, 267 S.C. at 261, 227 S.E.2d at 306. Appellant's deliberate absence from the South Carolina justice system, despite his clear knowledge that he stood accused in a criminal case in South Carolina, indicated "nothing less than an intention to obstruct the orderly processes of justice." Id. Based on the foregoing, the trial judge did not abuse his discretion in denying Appellant's continuance motion and properly proceeded with the trial in Appellant's absence. See State v. Williams, 321 S.C. 455, 459, 469 S.E.2d 49, 51 (1996) ("The trial court's refusal of a motion for continuance in a criminal case will not be disturbed absent a clear abuse of discretion.").

In any event, a court's decision to try a defendant in his absence is subject to a harmless error analysis. State v. Williams, 292 S.C. 231, 232, 355 S.E.2d 861, 862 (1987). In that vein, "[a]lthough the right to be present is a substantial one, **no presumption of prejudice arises from a defendant's exclusion**." State v. Whaley 290 S.C. 463, 465, 351 S.E.2d 340, 341 (1986) (emphasis added). Here, the jurors were instructed that the fact that Appellant did not participate in his trial was not to be

[11] It appears Appellant also had no communications with his lawyer since the time he violated his bond. (See R. p. 6, lines 16-21).

considered as evidence against him or held against him in any way whatsoever (R. p. 475, line 22 – p. 476, line 8), and the jurors are presumed to have followed the instructions given by the trial judge. See, e.g., State v. Grovenstein, 335 S.C. at 353, 517 S.E.2d at 219 (jurors are presumed to follow instructions given to them by the judge).

On appeal, Appellant contends he was prejudiced by being tried in his absence because had he been present, "he would have appeared and *worked out* a plea deal with the state in exchange for his testimony against his co-defendant, Nelson." (Brief of Appellant, p. 18) (emphasis added). Initially, this argument is not preserved for appellate review because it was not raised at any time below. (See R. p. 6-9; see Sentencing Transcript dated 5/7/13, p. 3-4). See State v. Patterson, 324 S.C. at 19, 482 S.E.2d at 767 ("Appellant is limited to the grounds raised at trial."). In any event, this argument is without merit. First, the State submits that the direct appeal cases pertaining to trials in absentia do not contemplate prejudice other than that which occurs during the course of a trial, i.e., prejudice that would have affected the jury's verdict. See State v. Whaley, 290 S.C. at 465, 351 S.E.2d at 341; State v. Williams, 292 S.C. at 232, 355 S.E.2d at 862. Regardless, the record does not remotely tend to show any inclination on the part of Appellant - or the State, for that matter - to enter into a plea bargain in this case, especially where Appellant violated his bond and had been on the run since 2008.[12] Neither Appellant nor his counsel made any claim regarding a plea offer or plea bargain at any point during trial and made no such claim specifically in the context of prejudice resulting from a trial in absence. (R. p. 6-9; Sentencing Hearing Transcript dated 5/7/13,

[12] See Rule 14(b), SCRCrimP ("A defendant may waive his right to a jury trial only with *the approval of the solicitor* and the trial judge.") (emphasis added); see also Reed v. Becka, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct. App. 1999) (a defendant has no constitutional right to plea bargain and a trial judge is not required to accept a plea) (citations omitted). Obviously, Appellant's claim that he would have "worked out" a plea deal admits that there was no such plea offer on the table at the time of trial. (Brief of Appellant, p. 18).

p. 3-4). Therefore, Appellant's argument regarding a plea bargain is wholly speculative and without merit.

Finally, the State presented overwhelming evidence of Appellant's guilt and his presence at trial could not possibly have altered the outcome. See, e.g., State v. McLeod, 362 S.C. 73, 82, 606 S.E.2d 215, 220 (Ct. App. 2004) ("[A]n insubstantial error not affecting the result of the trial is harmless where guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached."); State v. Sims, 387 S.C. 557, 566-67, 694 S.E.2d 9, 14-15 (2010) (trial error is harmless where there is overwhelming evidence of the defendant's guilt). Appellant was caught red-handed with more than 500 grams of cocaine and a gun with an obliterated serial number and he thereafter confessed and cooperated with police to help apprehend his co-defendant, the person who was supposed to receive the drugs. (See R. p. 131-38; p. 141-44; p. 229-32; p. 280-81). Accordingly, even if the trial judge somehow erred by trying Appellant in his absence, any error was harmless beyond a reasonable doubt.

CONCLUSION

For the reasons discussed above, Respondent requests that this Court affirm Appellant's convictions and sentences.

Respectfully submitted,

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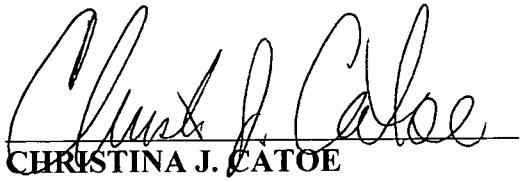

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