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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

The Honorable G. Edward Welmaker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ERICK E. HEWINS,

APPELLANT

Appellate Case No. 2013-000224

FINAL REPLY BRIEF OF APPELLANT

Jessica H. Lerer
STROM LAW FIRM, LLC
2110 N. Beltline Boulevard
Columbia SC, 29204
Telephone: (803) 252-4800
jlerer@stromlaw.com

Robert M. Dudek
Chief Appellate Defender

Attorneys for Appellant

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I. OFFICER GARDNER FAILED TO JUSTIFY HIS INITIAL STOP OF APPELLANT BY ARTICULABLE FACTS OF PRESENT CRIMINAL ACTIVITY

As Appellant acknowledged in his initial brief, "[n]ot all personal encounters between policemen and citizens involve 'seizures' of persons thereby bringing the Fourth Amendment into play." *State v. Rodriquez*, 323 S.C. 484, 476 S.E.2d 161 (Ct.App. 1997). "As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy," that would require Constitutional justification. *United States v. Mendenhall*, 446 U.S. 544 at 554, 100 S.Ct. 1870 at 1877 (1980). However, where, "in view of all the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave," that person has been seized within the meaning of the Fourth Amendment." *Id.*

Here, there is no question that Appellant was seized within the meaning of the Fourth Amendment from the time that Officer Gardner's vehicle came to a stop. Officers Gardner and Hall entered the Clarion Inn parking lot and parked their vehicle directly in front of Appellant's vehicle preventing him from driving away. (R. p. 68, lines 5-21). Furthermore, Officer Gardner came to question Appellate in Appellant's doorframe, preventing Appellant from leaving his vehicle and walking away from the encounter. (R. p. 69, lines 15-25).

Additionally, with no more information than Officer Gardner had when he and Officer Hall entered the parking lot, Officer Gardner testified that had Appellant attempted to drive off, Officer Gardner would have pursued him. (R. p. 159, lines 13-15).

Officer Gardner also corroborated Appellant's testimony that the police vehicle was parked directly in front of Appellant's vehicle. (R. p. 155, lines 11-14). Thus no individual in Appellant's position would reasonably have thought they were free to leave the parking lot, and disregard Officer Gardner's questions.

Therefore, Officer Gardner's questioning of Appellant constituted an investigatory detention within the meaning of the Fourth Amendment from the moment his vehicle came to a rest. The question then becomes whether, given the totality of the circumstances, at the time Officer Gardner entered the parking lot, he had reasonable, articulable suspicion that Appellant was presently engaged in criminal activity. [1]

The term "reasonable suspicion" requires a particularized and objective basis that would lead one to suspect another of criminal activity." *State v. Blassingame*, 338 S.C. 240, 248, 525 S.E.2d 535, 539 (Ct.App. 1999). Officers may not base reasonable suspicion on a gut feeling, or a "hunch" of illegal activity. *United States v. Sokolow*, 490 U.S. 1, 8, 109 S.Ct. 1581, 1585 (1989). The query is fact specific and must take into account the totality of the circumstances. *Id.*

In the instant case, Officer Gardner, testified that the night of the incident, he was on routine patrol and had not received any particular calls about criminal activity in the area. (R. p. 157, lines 1-21). He further testified that when he pulled into the Clarion Inn parking lot, he saw Appellant's car parked next to another car and observed the occupants of the vehicles talking to one another. (*Id.*)

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[1] It is important to note that Officer Gardner had been an Officer for approximately four (4) years at the time of the trial of this matter. (Trial transcript, p. 43, ll. 11-17) Therefore, on the night of this encounter, he had been an officer for approximately two (2) years. (R. p. 5, lines 11-17)

Never once did Officer Gardner testify that he observed any indication of ongoing criminal activity. In fact, he acknowledged that the occupants of the vehicles were making no attempt to exit their vehicles, nor did they appear to have any luggage. (R. p. 132, lines 2-7). Officer Gardner further acknowledged that there was nothing illegal about being in a hotel parking lot. (R. p. 157, lines 17-21). Finally, when Officer Gardner stood at Appellant's window questioning him, he observed no indicia of criminal activity. Indeed, Officer Gardner confirmed that at the time he entered the parking lot, the only indicators he had to support reasonable suspicion of criminal activity were the purported high crime area,[2] that the Appellant was backed into a space, [3] and that it was nighttime. (R. p. 150, lines 3-11). These facts fail to create reasonable suspicion of criminal activity sufficient to support Officer Gardner's initial investigatory detention. Thus this seizure was improper and infected the entirety of the encounter, and the trial court should have suppressed the evidence seized as a result of this encounter.

II. OFFICER GARDNER FAILED TO JUSTIFY HIS *TERRY* FRISK OF APPELLANT BY ARTICULABLE FACTS TO SUPPORT REASONABLE SUSPICION THAT APPELLANT WAS ARMED AND DANGEROUS

By virtue of the fact that Respondent argues Officer Gardner performed a *Terry* frisk in this case, the Respondent concedes that, at some point, a seizure within the meaning of the Fourth Amendment occurred. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968). Appellant maintains that the Respondent has presented insufficient grounds to support its initial investigatory detention of Appellant. However, Respondent also maintains that, given the totality of the circumstances of the frisk, Respondent failed to

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[2] Please see Appellant's initial brief regarding statistical data of decreasing crime in that area in the year leading up to Appellant's arrest.

[3] This is a ticketable, but not custodial offense. Furthermore, Officer Gardner asked Appellant not a single question about why he backed his vehicle into a space.

articulate a reasonable basis to believe that Appellant was armed and dangerous at the time of this incident, sufficient to support a *Terry* frisk. *Terry* (see Footnote 18: "This demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence.")

To determine whether the Officer acted reasonably in performing a weapon's pat down of Appellant the Court must consider, "not [Officer Gardner's] inchoate and unparticularized suspicion... but... the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Terry* at 26, 88 S.Ct. 1868 at 1882. This search is a limited search, justified solely for the protection of the police officer and others nearby, and must therefore be confined in scope to "an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of a police officer." *Terry* at 28, 88 S.Ct. at 1884. Furthermore, this right to search for weapons must be incident to a legal investigatory stop, precipitated by articulable suspicion of criminal activity. *Id.* at 30-31, 88 S.Ct. at 1884-1885.

Here, the initial detention of Appellant is not reasonable, thus no legal *Terry* frisk can follow. Additionally, Officer Gardner testified directly to the fact that his search of Appellant was not limited to a search for weapons. Indeed, he testified that during this encounter, the Appellant touched his pants pocket and that this can indicate that "an individual either has weapons or that they have contraband or drugs inside their pocket." (R. p. 13, lines 9-20). Officer Gardner testified that the following provided reasonable suspicion that the suspect was armed: (1) that when Officer Gardner questioned Appellant he appeared nervous; (2) that Appellant touched his pocket during the encounter.

As a preliminary matter, Appellant has a stutter, which can be exacerbated by nervousness. Furthermore, it is important for the purpose of investigatory stop and frisks, not to "overplay a suspect's nervous behavior in situations where citizens would normally expect to be upset[.]" *United States v. Glover*, 662 F.3d 694 (4th Cir. 2011), citing *State v. Massenberg*, 654 F.3d 480, 490 (4th Cir. 2011). Here, Officer Gardner was not aware of any ongoing crime in the area, had not observed Appellant engaged in any behavior other than sitting in his vehicle in a parking lot, and observed only nervous behavior from Appellant once Officer Gardner approached him. [4]

Officer Gardner's justifications for a *Terry* frisk are further undermined by the extensive delay between when he pulled Appellant from his vehicle and when he actually conducted the *Terry* frisk. As Officer Cothran testified, when he arrived on the scene approximately 12 minutes after Officer Gardner initiated the investigatory detention, Appellant had already been removed from his vehicle, but had not yet been frisked. (R. pp. 57-62). Furthermore, Officer Cothran testified that only after he and Officer Gardner briefly conferred about the stop, and Officer Cothran checked out Appellant's story with the hotel front desk, did he watch Officer Gardner administer a pat down of Appellant. (R. pp. 158-203).

The general purpose of a *Terry* frisk is to briefly pat down a suspected criminal when there is reason to believe the suspect is armed and poses a threat to officer safety. *Terry, supra.* Not only did Officer Gardner fail to support his frisk with reasonable suspicion that Appellant was armed, but the general timing of the encounter is fatal to the

[4] To the extent that Officer Hall provided any testimony regarding Appellant's actions, her testimony cannot be the basis for Officer Gardner's reasonable suspicion because she did not convey this information to Officer Gardner. (R. p.53, lines 15-25, R. p. 54, lines 1-9).

credibility of the limited frisk for weapons. The record of this case indicates that a young Officer observed Appellant parked in his vehicle, and, based upon a hunch, detained the Appellant. Officer Gardner failed to articulate any suspected ongoing criminal activity at the Clarion, nor could he provide more than a recitation of disparate crimes when asked what he suspected of Appellant. Once the detention began, the Officer observed nothing more than nervous behavior from Appellant, consistent with police-citizen encounters. Officer Gardner than attempted to use Appellant's nervous behavior as his sole basis to justify a *Terry* frisk. However, whatever the search was in this matter, it was not the limited search authorized under *Terry*. Therefore, the Court should have suppressed all evidence that resulted from this search.

III. RESPONDENT'S ARGUMENT THAT APPELLANT VOLUNTARILY CONSENTED TO A SEARCH IS NOT PROPERLY PRESERVED FOR THIS COURT, AND, EVEN IF PROPERLY PRESERVED, THERE IS NO EVIDENCE IN THIS MATTER TO INDICATE THAT APPELLANT COULD HAVE, OR WOULD HAVE, PROVIDED VOLUNTARY CONSENT TO A SEARCH OF HIS PERSON

The trial court did not make any ruling as to consent in this matter. Furthermore, the solicitor withdrew her jury charge regarding consent. Therefore, consent is not an issue properly before this Court, and should be disregarded. However, were the issue of consent properly before this Court, no Court could find that Appellant consented to the search, or that any consent gained was voluntary, and not coerced by the circumstances.

A warrantless search is reasonable within the meaning of the Fourth Amendment when voluntary consent is given for the search. *State v. Provet*, 405 S.C. 101, 747 S.E.2d 453 (S.C. 2013), citing *Palacio v. State*, 333 S.C. 506, 514, 511 S.E.2d 62, 66 (S.C. 1999). The existence of voluntary consent is determined from the totality of the circumstances. *Provet* at 114, 747 S.E.2d at 460. A law enforcement officer may request

permission to search at any time. *State v. Pichardo*, 367 S.C. 84, 623 S.E.2d 840 (Ct.App. 2009). "However, when an officer asks for consent to search after an unconstitutional detention, the consent procured is *per se* invalid unless it is both voluntary and not an exploitation of the unlawful detention. *Id.* at 105, 623 S.E.2d at 851. Finally, in determining if a consent is voluntary, whether an individual is told of their right to refuse consent is highly relevant to the factual inquiry. *Mendenhall supra.*

United States v. Mendenhall dealt, in part, with the issue of whether the Defendant voluntarily consented to a search of her person. 446 U.S. 544, 100 S.Ct. 1870 (1980). In *Mendenhall*, the Respondent was arriving from a Los Angeles flight and was approached by DEA agents because she allegedly met a "drug courier profile." *Id.* at 550, 100 S.Ct. at 1875. After she was approached, she consented to accompany the agents for questioning, and then consented to a search of her person, after being told on two occasions that she had the right to refuse. The Court determined first that the Respondent's consent was procured not as a result of an illegal seizure.

The Court then affirmed Respondent's consent based on the totality of the circumstances. *Id.* The Court noted the Respondent's age and education level, and also found it highly relevant that the Respondent was informed twice that she was free to decline consent, and that on both occasions, the Respondent still unequivocally indicated her consent to search. *Id.* at 559, 100 S.Ct. 1870 at 1879-1880. In light of these factors, the Court affirmed the lower court's determination that Respondent's consent was freely and voluntarily given. *Id.*

The facts of the instant case diverge markedly from the facts in *Mendenhall.* First, no court engaged in a conversation about Appellant's age or level of education, or any

other factors indicative of Appellant's ability to provide consent. However, Appellant's own testimony is that he did not provide consent for Officer Gardner to go into his pocket. (R.pp. 75-76, line 23). Furthermore, Officer Gardner produced no video or corroborating evidence of the encounter to support his rendition of the events. Finally, had Officer Gardner asked Appellant to consent to an in-the-pockets search at the point in time that he felt a lump on the outside of Appellant's pocket, any "consent" should be deemed coercive, and, pursuant to the circumstances of the "consent", was not voluntary. In addition, that "consent" would be limited to removal of the lump only, based upon Officer Gardner's own testimony that all he felt during his over-the-clothes pat down was the lump.

The Court should disregard Respondent's position that Appellant consented to a search because this argument was not properly preserved for review. However, even if the Court considers whether Appellant consented in this matter, the Court must find that consent was the product of an illegal detention, and that no voluntary consent existed sufficient to justify a warrantless search of Appellant absent probable cause.

IV. THE TRIAL COURT ERRED BY ADMITTING EVIDENCE WHERE THE ORIGINAL EVIDENCE CUSTODIAN WAS NEVER IDENTFIEID AND THERE WAS NO INDICATION ABOUT THE CONDITION OF THE EVIDENCE AT THE TIME IT WAS LOGGED IN

Appellant strongly encourages this Court to review its initial argument regarding the evidentiary issue presented. It is undisputed that at the initial trial of this matter, the evidence custodian who initially logged the evidence into the property and evidence division never appeared to testify, nor were they identified by sworn affidavit. While at trial the state attempted to identify Mr. Israel Flounders as this initial evidence custodian, the State presented no proof of identification, nor did the state present a single witness

who could positively identify Mr. Flounders as the initial custodian. Thus, the identity of the initial evidence custodian, along with the condition of the evidence when logged in, remains unknown, and the Court erred in admitting this evidence at the trial.

CONCLUSION

For the reasons provided herein, as well as those reasons enunciated in Appellant's initial brief, the trial court erred by failing to suppress evidence seized in violation of Appellant's Fourth Amendment rights, and by admitting evidence where the initial evidence custodian was never properly identified, nor was the condition of the evidence identified at the time the evidence was logged in. The trial court should therefore be reversed, and this case remanded for further decision.

This 1st day of July, 2014

By: [signature]
Jessica H. Lerer
STROM LAW FIRM, LLC
2110 N. Beltline Boulevard
Columbia SC, 29204
Telephone: (803) 252-4800
jlerer@stromlaw.com

Robert M. Dudek
Chief Appellate Defender

Attorneys for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Reply Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

July 1, 2014

Robert M. Dudek
Chief Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

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CERTIFICATE OF SERVICE

I certify that I have served Appellant's Final Reply Brief upon counsel for the Respondent, the State, to the State's attorney of record Mary S. Williams at South Carolina Office of Attorney General, Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia SC, 29201.

This 1st day of July, 2014.

By: _____

Jessica H. Lerer
STROM LAW FIRM, LLC
2110 N. Beltline Boulevard
Columbia SC, 29204
Telephone: (803) 252-4800
jlerer@stromlaw.com
Attorney for Appellant

SUBSCRIBED AND SWORN TO before me
this 1st day of July, 2014.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022