STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable G. Edward Welmaker, Circuit Court Judge
Appellate Case Tracking No. 2013-002307

The State,		Appellant,
	vs.	
Scott Eugene Williams,		Respondent.

INITIAL BRIEF OF RESPONDENT

G. DAVID SEAY, JR., ESQ.
S.C. Bar No. 06964

P.O. Box 8699
Greenville, SC 29604

ATTORNEY FOR RESPONDENT

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STATEMENT OF THE CASE

On or about March 26, 2011, Respondent was arrested for Driving Under the Influence. (Uniform Traffic Citation F062451, R._). Almost two years later the Respondent's case was called to trial on March 14, 2014. A jury was selected by the parties and the Respondent made pre-trial motion for the State to show the constitutionality of the Highway Patrol drivers' license check point in order to determine if the State had a lawful basis for the traffic stop made on the Respondent. The trial court held a hearing pursuant to Respondent's motion. The State neither objected to the motion being heard at that time nor raised the issue that Respondent was entitled to pursue said motion. (Magistrate's Return; R._). The State vigorously argued the checkpoint was properly authorized and implemented and that the Respondent was lawfully stopped by Trooper Robinson for violation of SC Code Section 56-1-140. (Magistrate's Return and State's March 19, 2013 motion to reconsider, paragraph 9; R._). After the State proffered testimony and evidence at the hearing regarding both the checkpoint and the Respondent's U-turn, Judge McCall found that the documents and evidence submitted by the State in support of the checkpoint and the traffic stop did not establish a proper foundation for the location and establishment of the checkpoint, did not provide the court with credible evidence the State had probable cause to stop the Respondent for an unlawful u-turn and there was no evidence of impaired driving at the time the traffic stop was initiated. (Magistrate's Return; R._). Furthermore, Judge McCall found the traffic stop of the Defendant was made without probable cause and that the State presented no admissible evidence concerning the constitutionality of the checkpoint and dismissed the case against Respondent. (Magistrate's Return; R._). At the conclusion of the hearing,

the State did raise or preserve any exceptions or any objections on the record as to whether or not Respondent was entitled to the motion hearing Neither did the State make any objections to Judge McCall's rulings on the record nor move for a new trial on the record at the conclusion of the March 14, 2013 motion hearing. (Magistrate's Return; R._ and March 14, 2013 hearing transcript, pg. 1 and 14; R._).

A hearing was held before Judge McCall on April 10, 2013 to consider the State's March 19, 2013 motion to reconsider. The State did not raise, at trial or in its March 19, 2013 motion to reconsider, that Trooper Robinson's initial contact and seizure of Respondent was not the result of a traffic stop initiated by Trooper Robinson. In fact, the State, at trial and in its March 19, 2013 motion to reconsider, only raised the issue that Respondent's u-turn alone established sufficient probable cause or reasonable suspicion for Trooper Robinson to conduct a traffic stop on Respondent. (March 14, 2013 hearing transcript and State's March 19, 2013 motion to reconsider; R.__________). The trial court denied the State's motion to reconsider. (Order dated April 17, 2013; R._) The State subsequently filed an appeal to the Circuit Court and the appeal was heard before the Honorable G. Edward Welmaker on August 5, 2013. Judge Welmaker affirmed the magistrate's ruling in an Order dated August 9, 2013. Judge Welmaker found no error in the magistrate's review of the testimony and evidence presented by the State and the magistrate's conclusion that the State did not establish a proper foundation for the checkpoint. (Order dated August 9, 2013; R.__) Judge Welmaker also found that the State could not meet its burden of reasonable suspicion for the Defendant's stop because the checkpoint was established without proper foundation and the State was unable to prove the u-turn was illegal, instead only that it appeared to be an evasive maneuver as the

result of the checkpoint. (Order dated August 9, 2013; R.____) The State's subsequent motion to reconsider the denial of the State's appeal was also denied by Judge Welmaker on September 24, 2013. The State filed a Notice of Appeal and Appellant filed its initial brief May 23, 2014. This reply brief of the Respondent follows.

STATEMENT OF THE FACTS

On or about March 26, 2011, the South Carolina Highway Patrol was conducting a driver's license check point at the bottom of the hill on SC 183 where Old Cedar Lane Road intersects. (March 14, 2013 hearing transcript, pg. 2;R._). Trooper Robinson participated in the check point for approximately 30 minutes prior to conducting a traffic stop on Respondent and arresting Respondent for Driving Under the Influence. Trooper Robinson did not know what time this check point was put in place on March 26, 2011. (March 14, 2013 hearing transcript, pg. 6-7; R._). Trooper Robinson testified he did not how many vehicles were stopped as a result of this checkpoint. (March 14, 2013 hearing transcript, pg. 7;R._). Trooper Robinson testified he had no role in setting up the check point and had no knowledge about who made the decision to set up this particular check point or the data relied upon in making the decision to set up this particular check point on March 26, 2011. (March 14, 2013 hearing transcript, pg. 5-6; R._). Trooper Robinson observed Respondent make a u-turn prior to arriving at the check point and notified his supervisor of the same. Trooper Robinson, pursuant to his supervisor's instruction, initiated and conducted a traffic stop on the Respondent. (March 14, 2013 hearing transcript, pg. 5; R.__). As of March 14, 2013, Trooper Robinson had never made any measurements of the distance from the check point to the crest of the hill and Trooper Robinson could only guestimate the distance from where Respondent executed his u-turn to the crest of the hill behind Respondent's vehicle. (March 14, 2013 hearing transcript, pg. 12-13; R._). Respondent used the center turn lane dividing the four lanes of travel to execute the u-turn. (March 14, 2013 hearing transcript, pg. 13; R._). Respondent stopped for Trooper Robinson in a parking lot where Trooper Robinson made contact

with Respondent. (March 14, 2013 hearing transcript, pg. 5; R.__) A a result of the traffic stop initiated by Trooper Robinson in response to Respondent making a u-turn, Trooper Robinson placed Respondent under arrest for the charge of Driving Under the Influence. (Uniform Traffic Citation F062451; R._).

ARGUMENT

RESPONDENT'S RESPONSE TO APPELLANT'S FIRST ISSUE ON APPEAL

I. The circuit court erred in affirming the magistrate's determination the State had to demonstrate the constitutionality of the vehicle checkpoint when Respondent never drove through the checkpoint and reasonable suspicion or probable cause existed to justify a stop absent Respondent going through the checkpoint. Further, there was no stop of Respondent in this case because he was parked in a parking lot and the Officer merely approached to speak with him. As a result, no probable cause or reasonable suspicion was necessary to for a stop and the officer had reasonable suspicion for a subsequent detention based on the smell of alcohol.

The circuit court did not err in affirming the magistrate's ruling at trial. The first issue on appeal, raised by the State, is without merit, as the State's argument assumes facts not in evidence and the issues raised were not timely raised or objected to at trial and therefore have not been properly preserved for appellate review. The State, at trial, neither objected to Respondent's right to have the magistrate determine the constitutionality of the vehicle checkpoint nor argued that the State did not have to demonstrate the constitutionality of the vehicle checkpoint. In fact the State, without hesitation, attempted to demonstrate that the checkpoint was lawfully authorized and implemented. "The issue which is not properly preserved cannot be raised for the first time on appeal." State v. Vanderbilt, 287 S.C. 597, 340 S.E.2d 543 (1986). "A contemporaneous objection is required to properly preserve an error for appellate review." State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

At the hearing before the magistrate, the State's justification for Trooper Robinson making the traffic stop on Respondent was that Respondent executed an illegal

U-turn and that the simple act avoiding the checkpoint should constitute reasonable suspicion. In this case there is absolutely no evidence of impaired driving prior to the trooper stopping the Respondent. During his first visit to the witness stand, Trooper Robertson testified " I saw a vehicle make a U-turn on the hill and my supervisor advised me to conduct a stop" on Respondent's vehicle. (March 14, 2013 hearing transcript, pg. 5; R._). His first time on the witness stand, Trooper Robinson articulated no facts which would reasonably suggest probable cause to believe Respondent's U-turn was executed in violation of section 56-5-2140 of the South Carolina Code of Laws. "As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." Whren v. United States, 517 U.S. 806, 810 (1996). Neither did Trooper Robinson testify to any articulable facts that give reasonable suspicion that vehicle's occupant was engaged in criminal activity. Nonetheless, Trooper Robinson, patrol car lights flashing, sirens blaring and bearing the full force and color of lawful authority, pursued Respondent's vehicle and Respondent succumbed to that apparent show of authority and stopped his vehicle.

The magistrate and circuit court did not err in requiring the State to establish the validity of the checkpoint in this case in order to establish probable cause or reasonable suspicion for Trooper Robinson to stop the Respondent. Trooper Robinson was unable to provide any credible evidence or empirical data to justify the authorization and implementation of this particular checkpoint. "Prouse , Groome, and Sitz all require some empirical data that supports the second prong of Brown, that the seizure serves the public interest. However, none of these cases state how much evidence is considered

enough. The United States Supreme Court, as well as our own supreme court, has stressed that no evidence is not enough." State v. Vickery, 732 SE. 2nd 218, 225 (2012).

It is undisputed that Respondent did not go through the South Carolina Highway Patrol's unlawful checkpoint on March 26, 2011 and executed a U-turn. The facts in United States v. Scheetz, 293 F.3d 175 (4th Cir. 2002), however, do not actually support the State's argument on appeal. The Fourth Circuit did not rule that Sheetz' avoidance of an illegal checkpoint alone would have given officers reasonable suspicion to stop him. In making its ruling the Fourth Circuit did not consider whether Sheetz' avoidance of the unlawful checkpoint was a fact upon which reasonable suspicion to stop Sheetz could be established. Instead the Fourth Circuit found the only consideration was whether the actual stop as a result of Sheetz' illegal U-turn was valid. Id. At 184. The Respondent's avoidance of the unlawful checkpoint alone is not sufficient to establish reasonable suspicion that criminal activity is afoot. It is patently unjust to allow law enforcement to set up unlawful check points and then use an individual's avoidance of law enforcement's unlawful show of authority to justify reasonable suspicion to stop the individual. Respondent had the right to challenge the validity of the checkpoint when the State attempted to hobble together the innocent facts that Respondent avoided an unlawful checkpoint and lawfully executed a U-turn to create reasonable suspicion for Trooper Robinson's initial detainment of the Respondent or to establish probable cause for the traffic stop. "At least four times in 2011, we admonished against the Government's misuse of innocent facts as indicia of suspicious activity." United States v. Black, 4th Cir. Ct. App. Opinion No. 11-5084, pg. 11 (2013) (internal citations omitted).

Upon Respondent's argument at trial that Trooper Robinson's testimony failed to articulate facts sufficient to establish probable cause for the traffic stop made on Respondent for executing a U-turn, the magistrate allowed the State to recall Trooper Robinson to the stand to elaborate on his previous testimony regarding Respondent's execution of the U-turn. Upon retaking the witness stand, Trooper Robinson admitted he was "guesstimating" the distance of Respondent's car from the crest of hill at the time Respondent executed the U-turn. Trooper Robinson had never taken measurements of the area or offer any other other indicia of reliability to support the reasonableness of his "guesstimation" of the distance. (March 14, 2013 hearing transcript, pg. 10-13; R._). The magistrate took judicial notice "that it is not possible to see the crest of a hill from the bottom of a hill. An apparent horizon is created where the slope of the hill begins to diminish as it approaches the crest." (Magistrate's Return; R._). "The reasonableness of an officer's visual estimate that a vehicle is traveling in slight excess of the legal speed limit may be supported by radar, pacing methods, or other indicia of reliability that establish, in the totality of the circumstances, the reasonableness of the officer's visual speed estimate." United States v. Sowards, 4th Cir. Ct. App. Opinion No. 10-4133, pg. 17 (2012). Therefore the magistrate found that there was "no credible evidence that the turn was made within 500 feet of the crest of the hill. Nor was there any evidence of impaired driving. Finding that the stop of the defendant was without probable cause." (Magistrate's Return; R._). "Probable cause exists if, given the totality of the circumstances, the officer "had reasonably trustworthy information . . . sufficient to warrant a prudent [person] in believing that the petitioner had committed or was committing an offense." Beck v. Ohio, 379 U.S. 89, 91 (1964). "An appellate court will

not reverse a trial court's finding of fact simply because it would have decided the case differently." State v. Pichardo, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct.App.2005). "In criminal cases, the appellate court sits to review errors of law only. We are bound by the trial court's factual findings unless they are clearly erroneous. This same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases." State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001)

The State, in this appeal, now wishes to change the facts that the State itself proffered and endorsed at trial. The State, at trial and in its March 19, 2013 motion to reconsider, never raised the issue nor argued to the magistrate that Respondent stopped his vehicle for any reason other than complying with and succumbing to Trooper Robinson's authority. The State now attempts for the first time to argue that Respondent was not arrested pursuant to a traffic stop initiated by South Carolina Highway Patrol. The issue is without merit due to the State's own acknowledgement at trial and in its motion for reconsideration that Respondent was detained pursuant to a traffic stop and therefore the issue is not preserved for appeal. "An issue not properly preserved cannot be raised for the first time on appeal." State v. Hoffman, 312 S.C. 386, 440 S.E.2d 869 (1994). "Because the State failed to argue that petitioner was not entitled to equitable relief until its brief to the Court of Appeals, the issue was not preserved for appellate review." Johnson v. Lloyd, 757 S.E. 2nd 705 (S.C. 2014).

The magistrate gave great consideration to the testimony and facts presented by the State at Respondent's March 14, 2013 motion hearing. After hearing all the evidence the State wished to present, as well as oral arguments from both the State and Respondent, the magistrate made reasonable findings of fact and conclusions of law in

this case. The circuit court having reviewed the record of appeal, including transcripts of the hearing, found that the magistrate's findings of fact and conclusions of law were not made in error. "In criminal cases, the appellate court sits to review errors of law only. We are bound by the trial court's factual findings unless they are clearly erroneous. This same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases." State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001) (citations omitted). "In Fourth Amendment search and seizure cases, our review is limited to determining whether any evidence supports the trial court's finding." State v. Banda, 371 S.C. 245, 251, 639 S.E.2d 36, 39 (2006). "an appellate court will not reverse a trial court's finding of fact simply because it would have decided the case differently." State v. Pichardo, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct.App.2005).

RESPONDENT'S RESPONSE TO APPELLANT'S SECOND ISSUE ON APPEAL

II. The magistrate court incorrectly considered Respondent's pre-trial motions for dismissal and impermissibly dismissed the case based on what amounted to a pre-trial probable cause hearing in contravention of State v. Ramsey, 381 S.C. 375, 673 S.E. 2d 428 (2009).

The magistrate did not err in considering Respondent's pre-trial motions to dismiss and dismissing the case. As noted by the magistrate, the State had been notified well in advance of the March 14, 2013 trial date of Respondent's intention to bring pre-trial motions for suppression of evidence or dismissal of the case. The State had ample time and notice of Respondent's pre-trial motion to prepare and present any objections it may have had to Respondent's requests for relief. The magistrate, in fact, reminded the State at the April 10, 2013 motion to reconsider hearing, "But, Mr. Seay had made this motion, very clearly at least a year before this case came to trial. Sitting in my chambers with a representative from the Solicitor's Office present." (April 10, 2013 hearing transcript, pg. 8; R._). The State's response was, "And I have no dispute about the notice aspect of it." (April 10, 2013 hearing transcript, pg. 8; R._).

On the day of trial, however, the State never raised any objection to Respondent's right to have his motions heard or Respondent's right to seek the requested relief from the magistrate at any time during the hearing. The State made no objections and took no exception to the magistrate's ruling at the conclusion of the hearing. In fact, at the conclusion of the March 14, 2013 hearing, after the magistrate found in favor of Respondent and the case against Respondent was dismissed, the State's only reply was

"Very well your honor, thank you." (March 14, 2013 hearing transcript, pg. 14; R._) On March 14, 2013, the State never argued under State v. Ramsey, 381 S.C. 375, 673 S.E. 2d 428 (2009) that the magistrate lacked the authority to hold Respondent's hearing or grant Respondent the relief requested. The State did not ask for a new trial on March 14, 2013. "An issue not properly preserved cannot be raised for the first time on appeal." State v. Hoffman, 312 S.C. 386, 440 S.E.2d 869 (1994). "Because the State failed to argue that petitioner was not entitled to equitable relief until its brief to the Court of Appeals, the issue was not preserved for appellate review." Johnson v. Lloyd, 757 S.E. 2nd 705 (S.C. 2014).

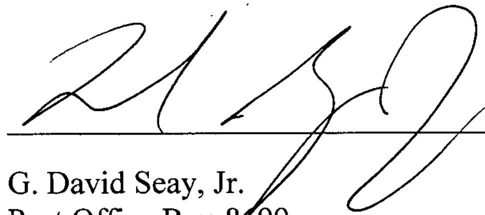
While Respondent's counsel may have awkwardly expressed the relief sought by Respondent, for all intents and purposes, it is clear from the record that Respondent sought the magistrate's review of law enforcement's initial seizure of Respondent under the Fourth Amendment to the United States Constitution. The magistrate's conclusion that "the stop of this defendant was without probable cause", as a practical matter, prohibited the State from submitting any evidence, at trial, that was obtained subsequent to the initial unlawful seizure of Respondent by Trooper Robinson. "Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of [the Fourth Amendment]." Whren v. United States, 517 U.S. 806, 809-10, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). As has long been recognized by the courts, "[A] conviction in the federal courts, the foundation of which is evidence obtained in disregard of liberties deemed fundamental by the Constitution, cannot stand." Mapp v. Ohio, 367 U.S. 643, 648 (1961) *Citing Boyd v. United States,* 116 U. S. 616, 116 U. S.

630 (1886), _Weeks v. United States,_ 232 U. S. 383 (1914). The magistrate's tacit suppression of the State's evidence against Respondent for the offense of Driving Under the Influence precluded the State from being able to present any evidence of impairment at trial. Therefore the magistrate simply expressed what was a foregone conclusion: that the case against Respondent had to be dismissed for lack of admissible evidence. As mentioned above, the State made no contemporaneous objections or exceptions to the magistrate's authority to dismiss the case.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the decision of the circuit court affirming the dismissal by the magistrate should be affirmed; and this Court find that Appellant is not entitled to new trial.

Respectfully submitted by,



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ATTORNEY FOR RESPONDENT

September 24, 2014

September 24, 2014

William M. Blitch, Jr., Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549

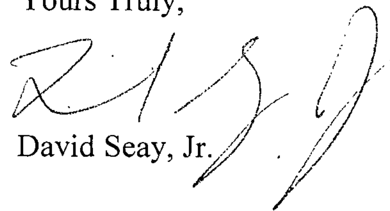
Re: State v. Scott E. Williams
Civil Action No. 2013-CP-23-02731
Appellate Case No. 2013-002307

Dear Mr. Blitch:

I am enclosing one (1) copy of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Thank you for your kind assistance. If you have any questions, I may be reached at (864) 235-6790.

Yours Truly,



David Seay, Jr.

GDS/etr

cc: Alan Wilson, Attorney General
William M. Blitch, Jr., Assistant Attorney General
W. Walter Wilkins, III, Solicitor, Thirteenth Judicial Circuit

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September 24, 2014

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

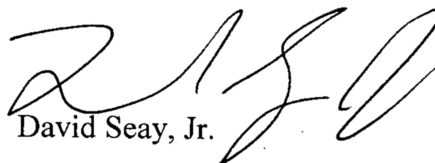
Re: State v. Scott E. Williams
Civil Action No. 2013-CP-23-02731
Appellate Case No. 2013-002307

Dear Ms. Kitchings:

Please find Respondent's Initial Brief and Designation of Matter along with Proof of Service for filing in your office.

Thank you for your kind assistance. If you have any questions, I may be reached at (864) 235-6790.

Yours Truly,



David Seay, Jr.

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cc: Alan Wilson, Attorney General
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W. Walter Wilkins, III, Solicitor, Thirteenth Judicial Circuit

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