STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Beaufort County
The Honorable J. Ernest Kinard, Jr., Circuit Court Judge

The State, Petitioner,

v.

Diamon D. Fripp, Respondent.

Opinion No. 4956(S.C. Ct. App. filed March 21, 2012)
Appellate Case No. 2012-212201

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF QUESTION PRESENTED IN REPLY

Are issues relating to the trial court's denial of Respondent Fripp's pre-trial motions to suppress stones, money and his statement about cocaine preserved for review by this Court when Fripp waived his pre-trial objection to admission of the evidence by either failing to object or affirmatively indicating he had no objection at the time the evidence was introduced during trial and when the issues were not presented by petition for writ of certiorari or return to certiorari; nevertheless, the pre-trial requests to suppress were correctly denied by the trial court and any error was harmless?

ARGUMENT

Issues relating to the trial court's denial of Respondent Fripp's pre-trial motions to suppress rocks, money and his statement about cocaine were not preserved for review by this Court because Fripp waived his pre-trial objection to admission of the evidence by either failing to object or affirmatively indicating he had no objection at the time the evidence was introduced during trial and because the issues were not presented by petition for writ of certiorari or return to certiorari; nevertheless, the pre-trial requests to suppress were correctly denied by the trial court and any error was harmless.

In his Final Brief to the court of appeals, Fripp contended in Argument III that his statement about a bag of cocaine should have been suppressed because it was made after arrest but before Miranda rights were given and the officer's actions were the functional equivalent of interrogation. (A. pp. 156-57). In Argument II, he also contended the trial court erred in refusing to suppress the $600 and stones seized after he was arrested for fleeing to evade arrest when the magistrate's court directed a verdict of not guilty on the charge. He argued that the verdict negated probable cause for the arrest. (A. p. 158). In reversing Fripp's conviction, the court of appeals declined to address these issues, concluding its determination on a third issue was dispositive. Fripp did not submit a petition for rehearing to the court of appeals or ask this Court to consider these issues by way of petition for writ of certiorari or return to the petition for writ of certiorari. Fripp, in Argument II of the Brief of Respondent submitted after this Court granted the State's petition for writ of certiorari contends the trial court erred in denying his motion to suppress the stones, cash and statement. He argues the officer lacked probable cause to arrest and search him and that the statement was made without the benefit of Miranda warnings. He disputes that the

search was conducted pursuant to Terry and claims the officer admitted he searched incident to Fripp's arrest for fleeing to evade arrest. The State submits that the issues respecting the stones, cash, and statement were not preserved for review by this Court because Fripp waived his pre-trial objections to admission of the evidence by failing to object or affirmatively indicating he had no objection at the time the evidence was introduced during trial and because the issues were not presented by petition for writ of certiorari or return to the State's petition for writ of certiorari; nevertheless, the pre-trial requests to suppress were properly denied by the trial court.

Pre-trial Hearing

The record before this Court reflects that during a pretrial Jackson v. Denno hearing, Officer Rodriguez of the Beaufort County Sheriff's Office testified that he responded to nightclub Studio Seven at 2:00 a.m. on January 1, 2009, after receiving a complaint about a man creating a disturbance in the parking lot. It was reported to Officer Rodriguez that the male perpetrator was wearing blue clothing. (Appendix [hereinafter "A"], p. 5). The nightclub and parking lot posed a danger to officers because it was considered a high crime area and because there was only one way to enter or exit the parking lot. (A. pp. 11, 13).

When Rodriguez arrived, Damien Fripp was only one male in the parking lot other than the security guard working at the front door. Fripp was wearing blue clothing. Fripp looked over his shoulder toward Rodriguez's patrol vehicle and started walking away. (A. p. 6). Rodriquez exited his patrol car and the club owner pointed Fripp out to Rodriguez. (A. pp. 6 – 7). Rodriguez followed and called to Fripp asking Fripp to stop and to speak with him. Rodriquez also whistled to get Fripp's attention. (A. pp. 7; 14). Fripp continued walking but at a faster pace using an evasive route. Rodriguez generally followed in Fripp's direction. Fripp ran behind a black pickup

truck where he remained out of sight for about 10 seconds. Rodriguez commented to his dispatcher that he guessed Fripp did not want to speak with him. (A. p. 8).

Fripp emerged from behind the truck and walked toward Rodriguez. (A p. 8). Rodriguez could not see Fripp's hands. Rodriguez drew his weapon and asked Fripp to show his hands. Rodriguez testified that that he did not know whether Fripp had a gun and responded in this manner as a matter of officer safety. (A. p. 9). Fripp did not show his hands but responded, "You got nothing on me. I don't got any drugs." (A. pp. 9; 15). Rodriguez continued to ask Fripp to show his hands and Fripp eventually complied after repeated requests. (A. p. 9). Rodriguez asked Fripp to get on the ground. Fripp refused but eventually squatted and placed his left hand on the ground several times. (A. 9). After some struggle, Rodriguez was able to place handcuffs on Fripp. (A. p. 9). Once Fripp was detained, Rodriguez conducted a search and found almost $600 is crumpled bills and a bag of stones in Fripp's pocket. (A. p. 10). The items were placed on the trunk of the patrol car. Fripp attempted to scoop the items up with his mouth. (A. p. 10). Another officer had arrived and Fripp was placed in the second patrol car. Another officer was directed by Rodriguez to search the area. The second officer found a bag of white powdery substance that tested positive for cocaine. (A. pp. 11- 12). A field tested revealed that the stones were not cocaine. (A. p. 11). Rodriguez testified that Fripp could see what transpired and was yelling obscenities at officers the entire time. (A. p. 12)

Fripp asked what he was being arrested for and Rodriguez said for fleeing to evade arrest and also said "you're being charged with this." (A. pp. 12; 14). Fripp responded that he didn't "know anything about that cocaine." (A. p. 12). Rodriguez testified that he had not said anything to Fripp about cocaine at that point. (A. p. 12).

Fripp moved *in limine* to exclude his statement about the cocaine on the ground it was involuntary because the officer intended to elicit a response by showing the bag of cocaine. (A. pp. 12 – 13). The motion was denied. (A. p. 13).

Fripp also moved *in limine* to exclude any reference to his fleeing or suspicious behavior that related to the offense of fleeing to evade arrest and detention because a summary court judge [after the case had gone to the jury and the jury had not agreed on a verdict] had supposedly granted a directed verdict, and collateral estoppel barred testimony which could support the summary court charge. (A. pp. 17- 19). Fripp generally contended there was no probable cause for the arrest. Fripp asserted that the presentation of evidence about his detention was fine but that nothing relating to the charge for which the summary court judge had granted a directed verdict should be admitted. (A. pp. 19 – 20; 22; 24). The judge declined to exclude testimony about the facts and circumstances that the officer observed. (A. pp. 18 - 22). The trial court found that Fripp was detained and then drugs were found. (A. p. 20).

Also, Fripp moved to prevent the officer from making a statement about drug money - apparently on the basis that the stones were not drugs, and it would be prejudicial "to insinuate that he was taking them for drug money." He also moved to suppress the stones as being irrelevant. (A. p. 23). The trial court denied the motions. The trial court commented that the officer had the right to detain Fripp for a brief period of time when Fripp started walking away. (A. p. 18 – 23).

Additional Trial Testimony

Officer Rodriguez testified similarly at trial with the exception that he explained that the call from dispatch also reported that the perpetrator was wearing blue "sweats" and was acting very belligerently at the front door of the club and refusing to leave. Officer Rodriguez was alone

when he arrived at the nightclub and that usually two to three patrol cars respond to calls at that nightclub because of the nature of the parking lot and the fights and shootings that routinely occur there. (A. p. 35; 54). Rodriguez testified that Fripp looked over his shoulder toward the patrol car and that Fripp turned and looked at Rodriquez in response to the requests for Fripp to stop to speak with the officer and upon the officer's identification to Fripp as "Sheriff's Office." (A. pp. 36; 38-39; 58 - 59). Rodriguez also testified that when Fripp emerged from behind the black truck, Fripp walked toward him. Rodriguez drew his weapon for officer safety reasons because Fripp's hands were hidden and Fripp refused to comply with repeated requests to show his hands and request to get onto the ground but continued to approach the officer in a walking-squat position. Rodriguez testified that Fripp responded saying, "I have no drugs." (A. pp. 42 - 43; 60 - 61). Although Fripp objected to this statement about drugs, he did not do so until after the answer was received and based only upon the leading nature of the question. He did not move to strike the testimony. (A. p. 43).

The club owner had joined Officer Rodriguez and Fripp at this point and yelled to Fripp to comply with the officer's requests. (A. p. 43). Other patrol officers responded to the scene as Fripp was being placed in handcuffs. No questions were asked but Fripp was screaming, yelling, and cursing. (A. pp. 43 - 44). Before being placed in the patrol car, Fripp was searched pursuant to procedure. (A. p. 45; 70). Rodriguez testified that Fripp was under arrest for evading arrest or detention. (A. p. 45; 63). Rodriguez testified without objection that Fripp had almost $600 in crumpled bills in his pocket as well as a bag of black stones. (A. p. 45).

Rodriguez also testified that Fripp responded to discovery of the bag of white powder by stating he knew nothing about that cocaine. When confronted with the fact that no one said

anything about cocaine, Fripp stated that he did not know anything about the white powdery substance. (A. 49). Two other law enforcement officers testified after Rodriguez. The bag of cocaine and the stones were introduced as evidence specifically without objection from Fripp when a forensic drug chemist testified later. (A. p. 101 - 02).

Cash and Stones

First, the State submits that Fripp's Argument II is not properly before this Court because Fripp failed to pursue petition for writ of certiorari or raise it in the return to the State's petition for writ of certiorari.1 This Court's order granted the State's petition to review the court of appeals' decision in this case. In order for an issue to be considered by this Court on review of a decision of the court of appeals by writ of certiorari, the issue must have been raised in a petition for rehearing before the court of appeals. Rule 242(d)(2), SCACR; State v. Johnson, 334 S.C. 78 n. 1, 512 S.E.2d 795 (1999) (stating this Court will decline to consider an issue the court of appeals did not address and that was not raised in petition for rehearing); Bonaparte v. Bonaparte, 317 S.C. 256, 452 S.E.2d 836 (1995), overruled on other grounds (same). The petition for writ of certiorari may be granted or denied on any question presented. Rule 242 (i), SCACR. If granted, this Court will issue an order specifying the issue or issues upon which certiorari review is granted and the parties shall thereafter submit briefs addressing the issue or issues as directed by this Court. Rule 242 (i), SCACR.

Fripp did not ask the court of appeals to rule on the issues he now presents, and the arguments were not revisited by Fripp in a petition for certiorari or return to the State's petition. The issues are not subsidiary questions comprised within the issue of the jury charge ruled upon by

1 The State notes that this argument was advanced to this Court in a Motion to Stike submitted by the State. The motion was previously denied by Order dated October 8, 2014. The State revisits the issue as a means of seeking guidance for proper procedure when issues are not ruled upon by the court of appeals.

the court of appeals and upon which rehearing and certiorari review was sought by the State. See Rule 242 (d)(2), SCACR ("Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court. A question presented will be deemed to include every subsidiary question fairly comprised therein."). This Court's order granting certiorari did not specify Fripp's second and third arguments respecting motions to suppress as issues to be addressed by the parties. Therefore, the arguments are not proper for inclusion in the Brief of Respondent because the issues were not properly preserved for consideration by this Court, are not issues upon which this Court ordered certiorari review, and are not a subsidiary to the issue presented by petition for writ of certiorari. To the extent Fripp might argue the appellate court may affirm on any ground appearing in the record, the State submits that the rule allows the appellate court to affirm the **trial court** on any ground appearing in the record, not reverse the trial court's ruling. Law v. S.C. Dept. of Corrections, 368 S.C. 424, 629 S.E.2d 642 (2006); Rule 220(c), SCACR. "[D]ifferent preservation rules apply to an appellant – the losing party in the lower court. An appellate court may not . . . reverse for any reason appearing in the record." I'On, L.L.C. v. town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000). The arguments should not be considered by this Court.

Second, the arguments respecting the trial court's failure to suppress are not properly before this Court because Officer Rodriguez testified at trial to making a search incident to arrest and finding cash and stones on Fripp. There was no objection made by Fripp when Rodriguez testified at trial to finding the wad of crumpled cash. (A. p. 45). The stones were later introduced as evidence at trial through the chemist with Fripp specifically stating he had no objection. (A. p. 102). Fripp has not and cannot identify where he raised a contemporaneous trial objection and the

matter should not be considered by this Court for failure to properly preserve the matter for appeal. State v. Simpson, 325 S.C. 37, 42, 479 S.E.2d 57, 60 (2003) (stating that the failure to object when the evidence is offered constitutes a waiver of the right to raise the issue on appeal); see also State v. Hoffman, 312 S.C. 386, 393, 440 S.E. 2d 869, 873 (1994) (objection to testimony was broadly made and well after initial, allegedly prejudicial testimony).

Third, defense counsel's verbal account of the summary court trial as the basis for his argument that probable cause is lacking, without presenting the trial judge with any summary court order or summary court record, leaves the appellate court with nothing to review. State v. Winestock, 271 S.C. 473, 248 S.E.2d 307 (1978) (appellant has the burden of presenting a sufficient record for appellate review); S.C. Dep't of Transp. v. Thompson, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct.App. 2003) (statements of fact appearing in argument of counsel are not evidence). Reviewing counsel's account, the summary court supposedly found a want of probable cause for arrest and supposedly granted a directed verdict after apparently finding direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused and submitting the case to the finder of fact. The account may raise questions about the summary court's view of the arrest, testimony which might have been reconsidered as ground for possible suppression of other evidence, the possible effect of the summary court jury's inability to agree on a verdict, the summary court's view of the charged offense in light of the evidence adduced at trial, and whether the purported directed verdict after the jury's consideration of the evidence was a weighing of the evidence. The account is difficult to understand and fails to properly preserve any matter for this Court's consideration.

Nevertheless, the summary court proceeding, even if properly established, is not dispositive of probable cause for arrest or result in issue preclusion. There was no showing that probable cause to arrest was directly litigated or that the summary court judge suppressed the evidence about which Fripp now complains based upon a lack of probable cause. State v. Hewins, 409 S.C. 93, 760 S. E. 2d 814 (2014).

Additionally, "probable cause for a warrantless arrest generally exists 'where the facts and circumstances within the arresting officer's knowledge are sufficient for a reasonable person to believe that a crime has been or is being committed by the person to be arrested.'" State v. Moultrie, 316 S.C. 547, 552, 451 S.E.2d 34, 37 (Ct.App. 1994). "When determining the constitutional validity of an arrest, a court must consider 'whether, at the moment the arrest was made, the officers had probable cause to make it – whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [appellant] had committed . . . an offense." State v. Goodwin, 351 S.C. 105, 110, 67 S.E.2d 912, 914 (Ct. App. 2002) (citing State v. Robinson, 335 S.C. 620, 634, 518 S.E.2d 269, 276 (Ct. App. 1999)). The determination is based upon the totality of the circumstances surrounding information available to the officer. Id.

The facts and circumstances supported probable cause to arrest, if not for the original charge, then certainly for other offenses. See State v. Tyndall, 336 S.C. 8, 518 S.E.2d 278 (Ct. App. 1999)(stating officers had probable cause to arrest the defendant for committing the misdemeanor offense of trespass after notice and defendant was not entitled to dismissal of resisting arrest charge when officers responded to a call for assistance and the defendant refused to leave when officers asked him to); State v. Roper, 274 S.C. 14, 260 S.E.2d 705 (1979)(stating that

even if the disorderly conduct statute was unconstitutional, arrest of the defendant was based upon probable cause to believe the defendant violated the statue and the arrest was lawful and search incident to arrest was proper); State v. Mims, 263 S.C. 45, 208 S.E.2d 288 (1974) ("there is no question the defendant was threatening to commit or committing a breach of the peace and that further conduct was continuing at the time the officer arrived).

The fact that an arresting officer might have improperly based a search on one ground does not prevent the State from otherwise justifying the search by showing another valid ground to support the search conducted. State v. Moultrie, 316 S.C. at 551, 451 S.E.2d at 37 (citing Florida v. Royer, 460 U.S. 491 (1983)). The officer's subjective reason for arresting a defendant need not be the criminal offense for which the arrest was made as long as the facts, viewed objectively, justify the action. State v. Freiburger, 366 S.C. 125, 133, 620 S.E.2d 737, 741(2005) ("[T]he fact that [the defendant] was not ultimately arrested for hitchhiking is not dispositive. As recently stated by the United States Supreme Court, an officer's 'subjective reason for making an arrest need not be the criminal offense as to which the known facts provide probable cause. [T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.'"). "[T]he legality of the arrest is to be determined under the facts and circumstances which existed at the time and place of arrest and not upon the results of the subsequent trial." State v. Retford, 276 S.C. 657, 660, 281 S.E.2d 471, 472 (1981); see also Eaves v. Broad River Electric Cooperative, Inc., 277 S.C. 475, 478, 289, S.E.2d 414, 415 (1982) (stating that, in an action for malicious prosecution, probable cause "does not turn

on plaintiff's guilt or innocence but upon whether the facts within the prosecutor's knowledge would lead a reasonable person to believe the plaintiff was guilty of the crime charged.").

Alternatively, the State submits that the stones and cash were seized as a result of a proper investigatory stop and frisk.

The Fourth Amendment protects "[t]he right of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." U.S. Const. amend. IV. A seizure occurs within the purview of the Fourth Amendment when, in light of the surrounding circumstances, a reasonable person would believe he or she is not free to leave. Robinson v. State, 407 S.C. 169, 181, 754 S.E.2d 862, 868 (2014); see also Michigan v. Chestnut, 486 U.S. 567 (1988).). "However, a seizure does not occur by a police officer's mere pursuit of a fleeing suspect, absent physical force." Cone v. Nettles, 308 S.C. 109, 417 S.E.2d 523 (1992) (citing California v. Hodarie D., 499 U.S. 621 (1991)). "The Fourth Amendment by its terms prohibits [only] 'unreasonable' searches and seizures. Reasonableness . . . depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.'" McHam v. State, 40 4S.C. 465, 480, 746 S.E. 2d 41, 49 (2013) (citing Pennsylvania v. Mimms, 434 U.S. 106 (1977)). The United States Supreme Court opines that reasonableness is measured in objective terms based upon the totality of the circumstances and is necessarily fact specific. Ohio v. Robinette, 519 U.S. 33 (1996).

It is permissible for law enforcement officers to briefly detain an individual for purposes of investigation if the officer has reasonable, articulable suspicion that criminal activity is afoot; that is, that the individual has committed or is about to commit a crime. Terry v. Ohio, 392 U.S. 1 (1968); see also U.S. v. Moore, 817 F.2d 1105 (4th Cir. 1987); State v. Taylor, 401 S.C. 104, 736

S.E.2d 663 (2013); State v. Woodruff, 344 S.C. 537, 544 S.E.2d 290 (Ct. App. 2001); State v. Smith, 329 S.C. 550, 495 S.E.2d 798 (Ct. App. 1998); State v. Abrams, 322 S.C. 286, 471 S.E.2d 716 (Ct. App. 1996); State v. Robinson, 306 S.C. 399, 412 S.E.2d 411 (1991); State v. Culbreath, 300 S.C. 232, 387 S.E.2d 255 (1990); State v. McLaughlin, 307 S.C. 19, 413 S.E.2d 819 (1987); State v. Ferrell , 274 S.C. 401, 266 S.E.2d 869 (1980); State v. Foster, 269 S.C. 373, 237 S.E.2d 589 (1977); State v. Peters, 271 S.C. 498, 248 S.E.2d 475 (1978). Reasonable suspicion will support a limited stop for purposes of questioning. Florida v. Royer, 460 U.S. 491 (1983).

Whether an investigatory detention is justified is dependent upon whether the information possessed by the officer at the time of the search or seizure would cause a man of reasonable caution to believe the action was appropriate. Quigley v. Commonwealth, 414 S.E.2d 851 (Va.App.1992). Whether reasonable suspicion exists is dependent upon the totality of the circumstances. U.S. v. Sokolow, 490 U.S. 1 (1989); State v. Khingratsaiphon, 352 S.C. 62, 572 S.E.2d 456 (2002); State v. Blassingame, 338 S.C. 240, 525 S.E.2d 535 (Ct. App. 1999). "Courts must look at the cumulative information available to the officer . . . and not find a stop unjustified based merely on a 'piecemeal refutation of each individual fact and inference.'" State v. Taylor, 401 S.C. at 108, 736 S.E.2d at 665. An investigatory stop may also be lengthened and the scope enlarged as indicated by the circumstances and where suspicions are confirmed or further aroused, including for a different reason than for which the stop was initiated. State v. Culbreath, 300 S.C. at 235, 387 S.E.2d at 257; Robinson v. State, 407 S.C. at 182, 754 S.E.2d at 86 (citing U.S. v. Hensley, 469 U.S. 221 (1985)); State v. Blassingame, 338 S.C. 240, 525 S.E.2d 535 (Ct. App. 1999). It requires more than an "inchoate and unparticularized suspicion and hunch." Robinson v. State, 407 S.C. at 182, 754 S.E.2d at 869.

The suspect's conduct such as flight is a sufficiently suspicious response to provide reasonable suspicion of criminal activity to allow additional inquiry. U.S. v. Lane, 909 F.2d 895 (6th Cir. 1990); see also State v. Grimes, 195 Ga. 773, 395 S.E.2d 42 (1990); Green v. State, 127 Ga. App. 713, 194 S.E.2d 678 (1972). Also, while an individual located in a high crime area is not in itself sufficient to support reasonable suspicion, it is a factor which may be considered. Illinois v. Wardlaw, 528 U.S. 119 (2000); U.S. v. Moore, 817 F.2d at 1105; State v. Taylor, 401 S.C. at 110, 736 S.E.2d at 665; but see Sikes v. State, 323 S.C. 28, 448 S.E.2d 560 (1994). Other considerations include the characteristics of the area, the time of the stop, the officer's experience and observation, as well as other behavior of the detainee. U.S. v. Sokolow, 490 U.S. at 1; U.S. v. Hensley, 469 U.S. 1 (1985); U.S. v. Brignoni-Ponce, 422 U.S. 873 (1975); U.S. v. Bull, 490 F.2d 869 (4th Cir. 1977). Complete restriction may be accomplished in a Terry stop. U.S. v. Moore, 817 F.2d 1105.

Further, reasonable force may be utilized to accomplish an investigatory detention and frisk or "pat-down" for weapons. See Graham v. Connor, 490 U.S. 386, 396 (1989); Heyward v. Christmas, 357 S.C. 202, 208, 593 S.E.2d 141, 144 (2004); LaFave, Search and Seizure, (2nd Ed. 1987) §9.2(d); pp. 366-368). Officers may handcuff a suspect when reasonably necessary during an investigatory stop under Terry. Id.; United States v. Elston, 479 F.3d 314, 319 (4th Cri. 2007); United States v. Acosta-Colon, 157 F.3d 9, 18 (1st Cir. 1998); United States v. Tilmon, 19 F.3d 1221, 1228 (7th Cir. 1994); State v. Carrouthers, 683 S.E.2d 781, 784 (N.C. Ct. App. 2009).

The individual detained may be frisked for weapons if the officer reasonably fears the individual is armed and dangerous. Terry v. Ohio, 392 U.S. 1 (1968); Adams v. Williams, 407 U.S. 143 (1972). Reasonable force is permissible for the officer's protection and will not transform

the investigatory stop into an arrest. U.S. v Manbeck, 744 F.2d 360 (4th Cir. 1984); U.S. v. Flippin, 924 F.2d 163 (9th Cir. 1991). The purpose of the permissible limited frisk for weapons is to allow the officer to investigate without fear of harm at the hands of the detainee. Adams v. Williams, 407 U.S. at 143. While the usual self-protective measure taken is a limited frisk, the officer may take whatever measures are reasonable under the circumstances. State v. Grimes, 395 S.E.2d at 42; State v. Jackson, 260 S.C. 30, 194 S.E.2d 181 (1973). The self-protective measure such as the frisk may be limited to that necessary to discover weapons which could harm the officer or others close at hand. Terry v. Ohio, supra. A seizure becomes an arrest which must be supported by probable cause only when law enforcement action exceeds reasonableness and when the conduct is more intrusive than necessary. U.S. v. Manbeck, 744 F.2d 360; U.S. v. Doffin, 791 F.2d 118 (8th Cir. 1986). The officer need not be certain that the person is armed; rather, the question is whether a reasonably prudent individual in the same circumstances would be warranted in believing that safety of the officer or others is at issue. State v. Smith, 329 S.C. 550, 556, 495 S.E.2d at 801, citing Terry v. Ohio, 392 U.S. at 27.

On appeal from a motion to suppress based upon Fourth Amendment grounds, our appellate courts apply a deferential standard of review assessing whether there is evidence to support the trial judge's decision and reversing only if there is clear error. State v. Taylor, 401 S.C. 104, 736 S.E.2d 663 (2013); Robinson v. State, 407 S.C. 169, 754 S.E.2d 862 (2014).

The State submits that, based upon the totality of the circumstances presented in this case, Officer Rodriguez had reasonable suspicion to conduct an investigatory stop and frisk which yielded the cash and stones. The record reflects that Officer Rodriguez promptly responded to the nightclub during early morning hours. The nightclub was known to officers as a high crime area

due to the propensity toward fights and shootings. It was also known to pose a specific danger to officers due to the configuration of the parking lot. Officer Rodriguez responded to the call alone, although it was rare to do so. Usually two to three patrol cars responded when a call was received for the reasons outlined above. Rodriguez responded to the nightclub owner's ongoing request for assistance with a disturbance involving a very belligerent man in the parking lot wearing blue clothing who refused to leave the premises.

Upon arrival at the nightclub, Rodriguez immediately saw a man in the parking lot matching the description given. The individual was the only male in the parking lot other than the security guard who worked at the nightclub. The owner identified Fripp as the problematic man to the officer, and the officer investigated. Fripp looked toward the patrol car and, later, toward the officer and turned his back and walked away. Fripp continued to quickly walk away from the officer in response to the officer's requests to stop. During the brief investigation Fripp went where he wanted to go, freely articulated his view of the law, thoughts about the status of the police investigation, and odd concern for drugs. Fripp clearly ignored the officer's attempts to investigate and reacted in a suspicious, evasive manner by moving away when he saw the patrol car arrive. Fripp walked away faster taking a circuitous path when the officer called out to him, revealing efforts to evade the officer and hinder the officer's efforts to investigate. Fripp then inexplicably disappeared from view behind a black truck. Fripp emerged ten (10) seconds later and, instead of continuing in an evasive path, headed directly toward the officer. Fripp's hands were hidden and Fripp ignored the officer's repeated requests to show his hands and, later, to get onto the ground. Concerned for his safety and in an effort to continue his investigation, the officer detained Fripp and engaged in a pat down.

The officer articulated reasonable suspicion to concern himself with the safety of the suspect and his own safety and continued to address the club owner's concern with a belligerent man who had refused to leave. State v. Blassingame, 338 S.C. 240, 525 S.E.2d 535 (1999) (stating that a reasonably prudent man in these circumstances would be warranted in the belief that his safety was in danger and the frisk was proper); State v. Taylor, 401 S.C. 104, 736 S.E.2d 663 (2013)(stating that under the totality of the circumstances, officers had reasonable suspicion to conduct an investigatory stop and pat down); see also Commonwealth v. Scarborough, 89 A.3d 679(PA 2014) (finding that the combination of officer's lawful stop of the defendant in a high crime area and defendant's reaching into his pocket and keeping his hand there after he was asked to remove it gave officer reasonable suspicion the defendant was armed and dangerous); U.S. v. Simmons, 560 F.3d 98 (2d Cir 2009) (In determining whether a Terry stop was supported by reasonable suspicion, an anonymous 911 call reporting an ongoing emergency is entitled to a high degree of reliability and flight in response to an order to stop is relevant to the reasonableness of the stop); U.S. v. Harris, 313 F.3d 1228 (10th Cir. 2002)(stating officer had reasonable articulable suspicion to stop the defendant for investigation when officer had a tip from a known source, the defendant matched the description given, the defendant was the only person present in the vicinity, the officer smelled marijuana, and the officer was justified in frisking the defendant when the defendant was nervous and evasive and refused to take his hands out of his pockets). Meanwhile, the police and their dog found a quantity of contraband freshly buried near where the defendant had been behind the black truck.

The State did not re-litigate or rely upon the purported summary court fleeing to evade arrest issue in the court of general trial jurisdiction. Facts and circumstances supported both

probable cause and reasonable suspicion to temporarily seize to investigate and frisk.

Moreover, error, if any, in refusing to suppress the cash and stones is harmless because the record before this court contains sufficient evidence of Appellant's guilt beyond a reasonable doubt. See State v. Lynch, 375 S.C. 628, 654 S.E.2d 292 (Ct. App. 2007)(stating that any error in failing to suppress evidence for possible Miranda violations is harmless if the record before the appellate court contains sufficient evidence to prove Appellant's guilt beyond a reasonable doubt). Even without admission of the stones and cash, evidence of the separate issue of the cocaine found abandoned behind the truck has not been challenged and the conviction for which was not impacted by the cash and rocks.

As an additional sustaining ground, the State submits that, even if the cash and stones were unlawfully seized, the items would have been admissible under the inevitable discovery doctrine as search incident to arrest as a result of Fripp' s investigatory detention during which the cocaine abandoned by Fripp was located and for which he was arrested. State v. Jenkins, 398 S.C. 215, 727 S.E.2d 761 (Ct. App. 2012). Therefore, this Court should not apply the exclusionary rule, and the trial court's ruling should be affirmed.

Statement about Cocaine

To the extent Fripp is also challenging his statement about the bag of cocaine; the State submits the issue is without merit. *In limine* Fripp thought the court might consider the defendant's mention of cocaine not voluntary, claiming it was elicited by showing him the substance. The court did not agree and found the statement admissible. (ROA. p. 12, line 14-p. 13, line 14). On appeal Fripp says that his statement about cocaine was improperly admitted into

evidence on the ground it was the product of the functional equivalent of interrogation, and there had been no Miranda warnings.

Fripp does not show where he raised a contemporaneous objection to the testimony at trial, and the matter should not be considered further. A brief must reference the Record on Appeal to support the facts alleged and "where relevant objections and rulings occurred in the transcript." Rule 207(b) (4), SCACR. *In limine* motion hearings are for the purpose of preventing prejudicial matter coming before the jury, but they are not final rulings on the admissibility of evidence. State v. Floyd, 295 S.C. 518, 369 S.E.2d 842 (1988) (Chandler, J., observing peril of treating an *in limine* ruling as final); State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001) (motion in limine to exclude evidence at the beginning of trial does not preserve an issue for review because a motion in limine is not a final determination).

However, assuming arguendo the assignment of error is properly before this Court, the State submits the issue is without merit. Miranda warnings are designed to protect several constitutional rights of an accused, most importantly, the privilege against self-incrimination. State v. Howard, 296 S.C. 481, 374 S.C.2d 284 (1988). In order to assure that an accused's right to remain silent is not compromised during custodial interrogation, the United States Supreme Court ruled that "[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney, either retained or appointed." Miranda v. Arizona, 384 U.S. 436, 444 (1966). "A statement, whether exculpatory or inculpatory, obtained as a result of custodial interrogation is inadmissible unless the person was advised of and voluntarily waived his rights under Miranda . . . ." State v. Kennedy, 325 S.C. 295, 302, 479 S.E.2d 838, 842 (Ct. App.

1996) aff'd as modified, 333 S.C. 426, 510 S.E.2d 714 (1998).

The special procedural safeguards outlined in Miranda are not required if a suspect is simply taken into custody, but only if a suspect in custody is subjected to interrogation. State v. Kennedy, 325 S.C. 295, 303, 479 S.E.2d 838, 842 (Ct. App. 1996) aff'd as modified, 333 S.C. 426, 510 S.E.2d 714 (1998). The interrogation requirement of Miranda is met by express questioning or its functional equivalent, and includes words or actions the police should know are reasonably likely to elicit incriminating responses from a criminal suspect. Rhode Island v. Innis, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980); State v. Franklin, 299 S.C. 133, 382 S.E.2d 911 (1989); State v. Kennedy, 333 S.C. 426, 510 S.E.2d 714 (1998). Volunteered statements not made in response to custodial interrogation do not require Miranda warnings. Arizona v. Mauro, 481 U.S. 520, 107 S. Ct. 1931, 95 L. Ed. 2d 458 (1987); State v. Howard, 296 S.C. 481, 488, 374 S.E.2d 284, 288 (1988).

When courts make an objective determination of whether police statements would be perceived as interrogation by a reasonable person in the same circumstances, courts have distinguished between statements that merely rephrase a defendant's remarks or constitute rhetorical questions, see Commonwealth v. Foley, 445 Mass. 1001, 1002–1003, 833 N.E.2d 130 (2005), cert. denied, 548 U.S. 927, 126 S.Ct. 2980, 165 L.Ed.2d 990 (2006), and those that are aimed at eliciting information likely to be incriminating. See Commonwealth v. Larkin, 429 Mass. 426, 432, 708 N.E.2d 674 (1999). Commonwealth v. Martin, 467 Mass. 291, 309 (2014). Compare Commonwealth v. Mitchell, 47 Mass.App.Ct. 178, 180–181, 711 N.E.2d 924 (1999) (statement commenting on poor timing of defendant's arrest merely an "observation"), with Commonwealth v. Chadwick, 40 Mass.App.Ct. 425, 428, 664 N.E.2d 874 (1996) (officer's

statement disputing defendant's denial of rape charges was functional equivalent of custodial interrogation). Martin, 467 Mass. 291 at 309.

The *in limine* hearing demonstrated that showing Fripp the substance was responsive to Fripp's asking to be apprised of the charges. (A. pp. 11-12; 15 – 16; 47 - 49). The officer's response was not of such nature that the officer should have known that it would elicit a response that a prosecutor would want to use at trial. The trial court's ruling is supported by the record, and there was no error. State v. Franklin, 299 S.C. 133, 382 S.E.2d 911 (1989); Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980).

CONCLUSION

Based upon the arguments presented herein and in its Brief of Petitioner, the State submits that the decision of the Court of Appeals must be reversed and the rulings of the trial court affirmed.

Respectfully submitted,

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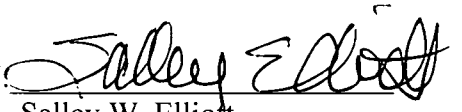
BY: 
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October 27, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Beaufort County
The Honorable J. Ernest Kinard, Jr., Circuit Court Judge

The State, Petitioner,

v.

Diamon D. Fripp, Respondent.

Opinion No. 4956(S.C. Ct. App. filed March 21, 2012)

PROOF OF SERVICE

I, ANGELA BENNETT, certify that I have served the within Reply Brief of Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Jared Sullivan Newman, Esquire
Jared S. Newman, P.A.
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Port Royal, SC 28835

I further certify that all parties required by Rule to be served have been served.
This 27th day of October, 2014.

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OCT 27 2014
S.C. Supreme Court

October 27, 2014

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Re: State v. Diamon D. Fripp
Appellate Case No: 2012-212201

Dear Mr. Newman:

I am enclosing two (2) copies of the Reply Brief of Petitioner in the above-referenced case.

If you have any questions concerning this matter, please contact me.

Sincerely,

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Senior Assistant Deputy Attorney General
S.C. Bar No: 1871

SWE/ab

cc: Honorable Daniel E. Shearouse (original and fourteen enclosed)
Honorable Jenny Kitchings
Victim Services (enclosure)