

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lancaster County

Brooks P. Goldsmith, Circuit Court Judge

Opinion No. 2014-UP-343 (S.C. Ct. App. filed September 24, 2014)

12-GS-29-00060, 00061

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S.C. Supreme Court

THE STATE,

RESPONDENT,

V.

DERRICK A. MCILWAIN,

PETITIONER

APPELLATE CASE NO. 2013-000373

A P P E N D I X

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Derrick A. McIlwain, Appellant.

Appellate Case No. 2013-000373

Appeal From Lancaster County
Brooks P. Goldsmith, Circuit Court Judge

Unpublished Opinion No. 2014-UP-343
Submitted August 1, 2014 – Filed September 24, 2014

AFFIRMED

Deputy Chief Appellate Defender Wanda H. Carter, of
Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant
Attorney General Jennifer Ellis Roberts, both of
Columbia; Solicitor Douglas Barfield, of Lancaster, for
Respondent.

PER CURIAM: Derrick A. McIlwain appeals his convictions for possession of
cocaine and possession of marijuana, arguing the trial court erred in (1) denying

his motion to suppress the drugs and (2) denying his motion for a directed verdict. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to the motion to suppress: *State v. Morris*, 395 S.C. 600, 606, 720 S.E.2d 468, 471 (Ct. App. 2011) ("When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling. The appellate court will reverse only when there is clear error." (citations omitted)); *Whren v. United States*, 517 U.S. 806, 810 (1996) ("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."); *State v. Provet*, 405 S.C. 101, 108, 747 S.E.2d 453, 457 (2013) ("A traffic stop supported by reasonable suspicion of a traffic violation remains valid until the purpose of the traffic stop has been completed."); *id.* ("The officer may not extend the duration of a traffic stop in order to question the motorist on unrelated matters unless he possesses reasonable suspicion that warrants an additional seizure of the motorist."); *Morris*, 395 S.C. at 607, 720 S.E.2d at 471 ("Reasonable suspicion requires a particularized and objective basis that would lead one to suspect another of criminal activity." (citations and internal quotations marked omitted)).

2. As to the directed verdict motion: *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006) ("When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight."); *id.* ("When reviewing a denial of a directed verdict, [an appellate court] views the evidence and all reasonable inferences in the light most favorable to the [S]tate."); *id.* at 292-93, 625 S.E.2d at 648 (stating an appellate court must find a case is properly submitted to the jury if any direct evidence or any substantial circumstantial evidence reasonably tends to prove the guilt of the accused); *State v. Hudson*, 277 S.C. 200, 202, 284 S.E.2d 773, 774 (1981) ("Conviction of possession of [a controlled substance] requires proof of possession-either actual or constructive, coupled with knowledge of its presence."); *id.* at 202, 284 S.E.2d at 774-75 ("To prove constructive possession, the State must show a defendant had dominion and control, or the right to exercise dominion and control, over the [controlled substance]. Constructive possession can be established by circumstantial as well as direct evidence, and possession may be shared.").

AFFIRMED.¹

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

WILLIAMS, GEATHERS, and McDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

DERRICK A. MCILWAIN,

APPELLANT

Appellate Case No. 2013-000373

Appeal from Lancaster County

Brooks P. Goldsmith, Circuit Court Judge

Opinion No. 2014-UP-343

PETITION FOR REHEARING

Pursuant to Rules 221 and 240 of the South Carolina Appellate Court Rules, the undersigned counsel would petition for rehearing in this appeal because this Court may have overlooked the fact that appellant's case was practically identical to State v. Pichardo, 367 S.C. 84, 623 S.E.2d 840 (2005), in that the **purpose** of the traffic stop in appellant's case was complete as the ticket was being written and that there was no reasonable suspicion to support appellant's second (or extended) detention in the case as this was an illegal search and seizure in violation of the Fourth Amendment. In support of this motion the undersigned counsel would submit the following information.

1.) Prior to trial, defense counsel moved to suppress drugs and other items (notebook, money, and digital scales) seized per a vehicle search as tainted evidence because of the illegal search and seizure that occurred during the traffic stop in this case. An in camera hearing followed. During the hearing, Officer Bowers testified that he initiated a traffic stop of a vehicle with no brake/tail lights on October 22, 2012, after 6:00 p.m. on 12th Street in Lancaster County. Officer Bowers stated that Sims was the driver, and that Christina Stevens was a front seat passenger, and that appellant sat in the backseat behind the driver. Then, after Sims produced his license and insurance papers and the tag was found to be valid, Officer Bowers stated that he decided to issue a warning ticket for the non-functioning brake/tail lights. Pretrial Hearing Transcript p. 4, l. 21 – p. 18, l. 11.

2.) Thereafter, Officer Barnes added that he walked to his patrol car and commenced writing the ticket when Officer McLemore arrived on the scene. Pretrial Hearing Transcript p. 18, lines 10-19. Officer Bowers explained that he was told by Officer McLemore, who recognized appellant, that appellant had warrants out against him. Minutes later, Officer Bowers ran a check on appellant and found out that there were warrants outstanding against him. Pretrial Hearing Transcript p. 18, l. 20 – p. 20, l. 9.

3.) Shortly after the warrants were discovered, Officer Bowers and McLemore went to the stopped vehicle and asked appellant to exit the vehicle. Appellant was arrested immediately thereafter. Pretrial Hearing Transcript p. 20, l. 20 – p. 22, l. 1. At this point, Officer Bowers saw a notebook in the back seat containing names and money amounts listed, (presumably drug transactions) and after the driver consented to a search, a zipper bag containing marijuana and cocaine were found, and then more marijuana was found in the console. Also, cash money and digital scales were found inside the vehicle as well. Pretrial Hearing Transcript p. 21-p. 41, l. 4.

4.) Defense counsel argued that the detention of appellant was beyond the scope of the traffic stop and that this prolonged detention that was used to check for warrants resulted in an unreasonable seizure and search because the traffic violation for bad brake/tail lights, which was the purpose or initiation behind the stop, had ended when the traffic ticket was being written by Officer Bowers. This meant that any activity beyond the brake/tail light, which had been resolved, rendered appellant's extended, i.e. second detention, and the search that followed unlawful. Pretrial Hearing Transcript p. 64, l. 2-p. 67, l. 2; Tr. 68, l. 22-p. 69, l. 1; Tr. 69, l. 3-p. 71, l. 23; Tr. 73 lines 2-20.

The trial judge ruled that the intervening warrant information that led to the extended detention of appellant did not render the seizure and search illegal and denied appellant's pretrial motion to suppress the drugs and items seized from the vehicle. Pretrial Hearing Transcript p.73, l. 21-p. 74, l.25.

5.) This Court held in State v. McIlwain, Unpublished Opinion No. 2014-UP-343 (S.C. Ct. App. filed September 24, 2014) that appellant's motion to suppress was properly denied in effect because reasonable suspicion existed to justify the extended duration of the traffic stop and cited to State v. Provet, 405 S.C. 101, 747 S.E.2d 453 (2013), and State v. Morris, 395 S.C. 600, 720 S.E.2d 468 (S.C. Ct. App. 2011) in support of its holding on this issue. However, this Court might have overlooked the fact that in this case, the **purpose** of the traffic had been completed and there was insufficient reasonable suspicion in existence to justify an additional seizure of appellant.

6.) This Court's reliance on Morris and Provet in support of its holding that an extended, i.e., second detention of appellant in this case was justified should be reviewed again in light of the fact that the scenario in appellant's case can be soundly distinguished from the facts in the Morris and Provet cases. For example, in Provet, the defendant was seized via a second detention and asked for his permission to search the car after the first detention and physical personal search of

that defendant yielded nothing, because the officer had observed air fresheners in the car and discovered that the defendant had lied about his alleged travel plans. Therefore, when the canine unit arrived and alerted to drugs (cocaine found in backseat in a fast food bag), the Court held that the second detention and seizure were legal due to justifiable reasonable suspicion that existed in the case. In Morris, the officer saw hallowed "Phillies blunts"¹ and loose tobacco and smelled the odor of marijuana in the car being driven by the defendant after initiating the traffic stop; and even though a search of the defendant yielded no contraband, the conversation the officer had with the defendant regarding his travel plans became suspicious and supported justification for the second detention and search that yielded the presence of ecstasy pills. The Morris Court found that there was reasonable suspicion in existence in that case to uphold the second detention and seizure as legal. In the case at bar, there were no facts amounting to reasonable suspicion to justify appellant's second or extended detention as in Provet and Morris as there were no discoveries of blunts, and no smell of marijuana and no suspicious conversation or any activity indicating reasonable suspicion on behalf of the appellant or the occupants to justify conducting a second detention in the case (other than Officer McLemore's arrival and suggestion that there were warrants out on appellant).

7.) To the contrary, however, the facts here support appellant's claim that no reasonable suspicion of criminal activity was afoot in this case to justify a second seizure and search of the car. In the case at bar, Officer Bowers found no reasonable suspicion of criminal activity after obtaining the proper information from the driver and identifications of the occupants, and had already walked to his patrol car to write a warning ticket for the traffic violation before the second detention occurred. Thus, the initial undertaking regarding the traffic stop (non-operating brake/tail lights) was complete in purpose and Officer Bowers had no new suspicion of criminal activity. Hence, the

¹Phillies Blunts are cigars where the tobacco inside may be emptied and replaced with marijuana.

decision to write a warning ticket. At this point, appellant's detention via the traffic stop should have ended since the **purpose** of the traffic stop ended. Officer Bower's testimony at the in camera hearing establishing that the **purpose** of the stop (tail/brake light malfunction) had been fulfilled:

DEFENSE COUNSEL: Now, I think your statement was – and make sure I got this right – you recognized Mr. McIlwain when you had a name to put with the face.

OFFICER BOWERS: Yes.

DEFENSE COUNSEL: When you first saw huh did you go, "Ah, there are pending warrants on him."

OFFICER BOWERS: No. I didn't know there was a warrant.

DEFENSE COUNSEL: So you weren't looking for him.

OFFICER BOWERS: No. Tr. p. 44, 12-11.

DEFENSE COUNSEL: Was there anything in the car in plain view that was illegal?

OFFICER BOWERS: No. Tr. p. 44, lines 21-23.

CO-DEFENDANT'S COUNSEL: Well, in this particular case you said that you were headed back to write the ticket after getting the names of everybody in the car, correct?

OFFICER BOWERS: Yes. Tr. p. 46, l. 17 – p. 47, l. 3.

8.) Clearly, no reasonable suspicion existed in this case (save what was subsequently uncovered (warrants) as a result of the "fishing" expedition), to support appellant's extended or second detention and arrest, and ultimately, the search of the vehicle, which yielded the presence of drugs.

9.) The instant case is almost identical to the factual scenario in State v. Pichardo, *supra*, where the Court held that the officer's second (extended) seizure and the search that followed the

See Footnote # 1 in State v. Morris, *supra*.

issuance of the traffic warning ticket violated the Fourth Amendment because there was no reasonable suspicion to support the second and subsequent seizure and search of Pichardo. In Pichardo, the officer found no drugs after the pat down of Pichardo and went on to write a ticket for the lane traffic violation and returned the paperwork to him; but then turned back around to the vehicle to engage in conversation that led ultimately to the second (i.e. extended) detention, which the Court held was illegal because there was no reasonable suspicion to further detain Pichardo as the traffic stop had already been concluded and the purpose of the stop had been fulfilled. The Court in Pichardo cited to Florida v. Royer, 460 U.S. 491 (1983), in holding that an investigation detention must last no longer than to effectuate the purpose of the stop.

10.) The rule is that although the scope of the stop may be enlarged, the scope and duration of the seizure must be strictly tied to and justified by the circumstances which rendered its initial undertaking proper. State v. Morris, 395 S.C. 600, 720 S.E.2d 468 (2011); Sikes v. State, 323 S.C. 28, 448 S.E. 2d 560 (1994). A lawful traffic stop can become unlawful if it is prolonged beyond the time reasonably required to complete its mission. State v. Adams, 397 S.C. 481, 725 S.E.2d 523 (2012), citing to State v. Morris, *supra*, and Illinois v. Caballes, 543 U.S. 405 (2005). Once the purpose of that stop has been fulfilled, the continued detention of the vehicle and occupants would result in a second detention. State v. Morris, *supra*, citing to State v. Pichardo, 367 S.C. 84, 623 S.E.2d 840 (2005). The encounter can only continue if the police have a reasonable suspicion that other criminal activity would be afoot. State v. Adams, *supra*; State v. Morris, *supra*; State v. Pichardo, *supra*.

11.) In Sikes, which is similar to Pichardo, a vehicle was stopped because the paper tags aroused suspicion of it being stolen, but after receiving the requested identification information from the driver and the passenger; nonetheless, the passenger was taken from the car while police ran a

warrant check on him. The Court reversed in Sikes and held that the officer's further detention of the passenger while going "fishing" for evidence of a crime, i.e., looking for warrants, was unlawful because the scope and duration of the initial seizure must be **tied to and justified by the circumstances which rendered its initiation proper**. In Sikes, the belief that the car was stolen ended upon the receipt of proper identifications. Therefore, there was no reasonable suspicion in existence thereafter to extend the seizure of the passenger by detaining him any further.

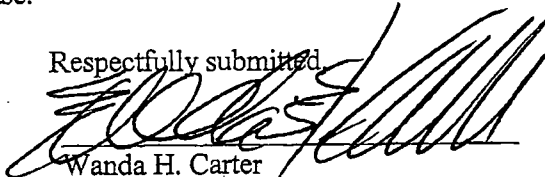
12.) Also, the Sikes Court cited to State v. Johnson, 805 P.2d 761 (Utah 1991), where the Court held that the leap from asking a passenger's name and date of birth to running warrant checks on the passenger was unlawful as such was an attempt to gather information in support of an unparticularized suspicion or hunch. Compare, State v. Williams, 351 S.C. 591, 571 S.E.2d 703 (2003), where the Court held that since the officer had written the traffic ticket and the traffic stop was complete, it was error for the officer to continue to question the defendant until he (officer) believed the answers were inconsistent as a basis to search the vehicle because there was no prior reasonable suspicion that criminal activity had been afoot. Going on a "fishing" expedition to find evidence in support an unparticularized hunch of inchoate criminal activity is unlawful because reasonable suspicion is an objective assessment of the circumstances at trial. See State v. Provet, 405 S.C. 101, 747 S.E. 2d 453 (2013), citing to Whren V. United States, *supra*. Reasonable suspicion is more than an inchoate or unparticularized hunch, but rather it is an objective basis that would lead to a suspicion of criminal activity under the probability of the circumstances. State v. Rogers, 368 S.C. 529, 6219 S.E. 2d 679 (2006) citing to State v. Butler, *supra*. Moreover, once the purpose of the traffic stop has ended, the officer may not extend the duration of the traffic stop without reasonable suspicion that would justify an additional or prolonged seizure. State v. Provet,

405 S.C. 101, 747 S.E. 2nd 453 (2013) citing to Pennsylvania v. Morris, 403 U.S. 106 (1977) and Arizona v. Johnson, 555 U.S. 323 (2009).

13.) This fishing expedition that uncovered the warrants against appellant and led to his illegal second detention violated the Fourth Amendment to the United States Constitution and article 1, §10 of the South Carolina State Constitution because the **purpose** of the initial stop had been completed and there was no reasonable suspicion justifying the second, extended detention which exceeded the **purpose** of the stop, and the drugs obtained from the seizure and search that followed constituted tainted fruit of the poisonous tree. Wong Sun v. United States, 371 U.S. 471 (1963). Thus, the lower court erred in denying appellant's motion to suppress the drugs and other items as evidence in the case.

WHEREFORE, the undersigned counsel would request a petition for rehearing on the issue raised herein, i.e. that the officer's **purpose** in detaining appellant had been complete at the time the ticket was about to have been written and that there was no reasonable suspicion justifying a second detention and subsequent search in the case.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

This 9th day of October, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lancaster County
Brooks P. Goldsmith, Circuit Court Judge

THE STATE,

RESPONDENT,

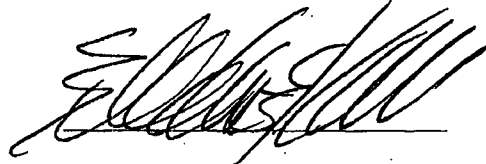
V.

DERRICK A. MCILWAIN,

APPELLANT

CERTIFICATE OF SERVICE

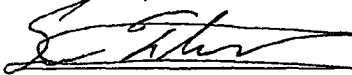
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Jennifer Ellis Roberts, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Derrick A. McIlwain, at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827 this 9th day of October, 2014.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 9th day
of October, 2014.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.

The South Carolina Court of Appeals

The State, Respondent,

v.

Derrick A. McIlwain, Appellant.

Appellate Case No. 2013-000373

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SC OFFICE OF
APPELLATE JUSTICE

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

H. B. Weir J.

John D. Beatty J.

Stephen P. McGrath J.

Columbia, South Carolina

cc: Douglas A. Barfield, Jr., Esquire
Alan McCrory Wilson, Esquire
Wanda H. Carter, Esquire
Jennifer Ellis Roberts, Esquire
The Honorable Brooks P. Goldsmith

FILED

October 23, 2014

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STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM LANCASTER COUNTY

Brooks P. Goldsmith, Circuit Court Judge

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S.C. Supreme Court

THE STATE,

RESPONDENT,

V.

DERRICK A. MCILWAIN,

APPELLANT

APPELLATE CASE NO. 2013-000373

RECORD ON APPEAL

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1 STATE OF SOUTH CAROLINA
2 COURT OF GENERAL SESSIONS
3 COUNTY OF LANCASTER
4 2012-GS-29-00060, 00061
5

6 State of South Carolina

7 vs.

8 Derrick A. McIlwaine
9

10

11 Lancaster, South Carolina

12 February 15, 2013 Pretrial Motions

13 Before the Honorable Brooks P. Goldsmith
14

15 APPEARANCES

16 For the State: Doug Barfield

17 For the Defendant: William Frick
18

19 Reported by: Michael C. Watkins

20 Official Court Reporter
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1 MR. BARFIELD: Your Honor, this is a hearing on the
2 informal suppression of certain evidence seized during a
3 traffic stop. Mr. McIlwaine is represented by Mr. Frick,
4 Mr. Sims is represented by Mr. Grier. If the Court will
5 indulge me, I'll give you 30 seconds synopsis of the facts
6 you're about to hear that might help.

7 THE COURT: If you would.

8 MR. BARFIELD: Two witnesses for the State in this
9 proceeding and in the subsequent proceeding is going to be
10 Tony Bowers and Ryan McLemore, both drug agents with the
11 sheriff's office. Tony Bowers stopped -- saw a car with bad
12 brake lights, watched the car briefly and pulled into a
13 driveway, he let it go at that. Not too long after that saw
14 the car out on the highway again, still bad brake lights,
15 initiated a traffic stop. During the course of the traffic
16 stop he calls and asks for backup Ryan McLemore comes out
17 assists with the traffic stop, he finds Mr. Sims to be the
18 driver of the car, he finds a young lady named Stevens to be
19 the front passenger in the car and he finds Derrick
20 McIlwaine to be the rear passenger of the car. He's going
21 to write a warning -- is going to and does write a warning
22 ticket for the brake lights. During the course of that Ryan
23 McLemore comes up and knows it's Derrick McIlwaine in the
24 back seat, Ryan McLemore believes that Derrick McIlwaine is
25 wanted by the city and maybe by Charlotte. They again

1 during the process of writing the warning ticket to Sims
2 they get on the radio, confirm that McIlwaine is wanted,
3 they're going to arrest him, no question about it. He is
4 taken out of the car, he's arrested for what the city and
5 Charlotte want him for. When they take him out of the car
6 they see what appears to be a little notebook which is open
7 on the seat next to him right there with him which appears
8 to them, or at least to Tony Bowers, to be a ledger of drug
9 sales and they'll tell you some background knowledge of
10 McIlwaine. They ask Sims for consent to search the car,
11 he's the driver, he says yes, they search the back seat,
12 they find drugs, they ask Sims again for consent to search
13 the car, he says yes again, they search the front part of
14 the car and find some drugs. Both Sims and McIlwaine are
15 charged with PWID marijuana, PWID cocaine. The girl empties
16 her pockets, has nothing on her, she's allowed to drive off
17 with the car when the stop is complete. That's a synopsis
18 of the facts you're going to get.

19 The witness, TONY BOWERS, was first duly sworn
20 and testified as follows, on:

21 DIRECT EXAMINATION

22 BY MR. BARFIELD:

23 Q. Tell us your name, please.

24 A. Tony Bowers.

25 Q. Investigator Bowers, who do you work for?

1 A. I work for the Lancaster County Sheriff's Office in the
2 narcotics division.

3 Q. How long have you worked for the sheriff's office?

4 A. I've been with the sheriff's office 12 years.

5 Q. How long in narcotics?

6 A. Since 2007.

7 Q. Who is Ryan McLemore?

8 A. He's supervisor over the drug task force.

9 Q. He's your immediate supervisor I reckon?

10 A. Yes.

11 Q. Did you and he arrest Derrick Antonio McIlwaine and
12 Matthew Craig Sims for the case that we're all here about
13 today?

14 A. Yes.

15 Q. What date did this occur?

16 A. October 22nd of 2011.

17 Q. What time of day or night did it start?

18 A. 6:00 p.m.

19 Q. And do you remember whether on October 22nd of 2011 at
20 6:00 in the evening when this started, was it daylight,
21 completely dark or somewhere in between, or do you know?

22 A. It wasn't completely dark, it should have been -- I
23 believe it was daylight.

24 Q. Daylight?

25 A. Yes.

- 1 Q. Where did it start? Where did the first contact with
2 an automobile start?
- 3 A. I originally saw the vehicle the first time on Memorial
4 Park Road.
- 5 Q. And where did it end?
- 6 A. It ended on 12th Street.
- 7 Q. Is that all in the County of Lancaster?
- 8 A. It is.
- 9 Q. How were you dressed that day?
- 10 A. Blue jeans, T-shirt and SWAT vest.
- 11 Q. Your normal narcotic wear?
- 12 A. Yes.
- 13 Q. And you had your SWAT vest on?
- 14 A. Yes.
- 15 Q. Did you have a sidearm on you?
- 16 A. Yes.
- 17 Q. Did you have a badge somewhere?
- 18 A. Yes.
- 19 Q. Was there any question from your clothing that you were
20 police?
- 21 A. No, sir.
- 22 Q. What were you driving?
- 23 A. A Ford F150.
- 24 Q. Regular unappearing to be a law enforcement and police
25 truck?

1 A. Yes.

2 Q. Is it equipped with blue lights and sirens and radios
3 and all of that stuff?

4 A. Yes.

5 Q. No logos on it or anything?

6 A. No.

7 Q. I'll ask you so I don't have to ask him, but do you
8 remember generally speaking how Ryan McLemore was dressed?

9 A. Little bit of the same way.

10 Q. Do you remember specifically what his -- were y'all
11 separate, in different vehicles?

12 A. Yes.

13 Q. What was he driving?

14 A. Same vehicle, same style vehicle.

15 Q. Unmarked?

16 A. Yes.

17 Q. Did he have indicia of being a policeman on his
18 clothing of some sort?

19 A. Yes.

20 Q. Sidearm?

21 A. Yes.

22 Q. Badge?

23 A. Yes.

24 Q. During this event that you're going to describe, were
25 any other police officers ever on the scene?

- 1 A. No.
- 2 Q. Before this event occurred, did you know by name or
3 sight somebody named Matthew Craig Sims?
- 4 A. Not on sight, but yes, I was familiar with the name.
- 5 Q. None on sight, never had seen or met him before?
- 6 A. Right.
- 7 Q. Before this event began, did you know somebody by the
8 name of Derrick Antonio McIlwaine?
- 9 A. Yes.
- 10 Q. And for purposes of this hearing without a jury here,
11 how did you know Derrick McIlwaine? What did you know about
12 Derrick McIlwaine?
- 13 A. In the past the sheriff's drug task force conducted
14 controlled buys, we had investigated Derrick McIlwaine for
15 illegal drug sales in Lancaster County.
- 16 Q. Do you know whether he prior to this event had been
17 arrested or had any pending charges for drug events?
- 18 A. Yes.
- 19 Q. One or both? Had he been arrested first?
- 20 A. Yes.
- 21 Q. Do you know if he had pending charges?
- 22 A. I don't know if they were pending that day.
- 23 Q. That's fine. Had you ever -- never mind about that.
24 Now, you saw a car.
- 25 A. Yes.

1 Q. Describe generally speaking what kind of car you saw.

2 A. I don't remember the color but it was a Chevy Impala.

3 Q. Where did you see the car first?

4 A. On Memorial Park Road.

5 Q. On the highway?

6 A. Yes.

7 Q. Did anything about the car draw your attention to it?

8 A. Yes. I noticed that as the car slowed down for
9 vehicles in front of it or to make a turn that the brake
10 lights weren't working.

11 Q. Did you just happen to come across this car or were you
12 intentionally trying to find this car to follow it before
13 any of this started?

14 A. Just out riding looking for anything.

15 Q. Okay. Were you looking for Derrick McIlwaine that day?

16 A. No.

17 Q. Were you looking for Matthew Craig Sims that day?

18 A. No.

19 Q. Were you looking for anybody in particular that day?

20 A. No.

21 Q. Did you follow the car for any distance when you
22 initially saw it with bad brake lights?

23 A. Yes. I followed it on Memorial Park Road until it
24 turned left on Memorial Drive, when it turned left it
25 immediately went to a driveway so I didn't pursue, I figured

1 it was home.

2 Q. And when you say -- you might have said specifically,
3 but what was wrong with the brake lights?

4 A. They weren't working.

5 Q. Just didn't have any at all.

6 A. No.

7 Q. What did you do when the car with the no brake lights
8 turned into the driveway?

9 A. I cut block basically, circled around to see if it was
10 going to stay there for a long period of time and leave.

11 Q. Did the car stay there?

12 A. Just for a few minutes.

13 Q. Did you see the car again on the highway?

14 A. I did.

15 Q. Same car?

16 A. Same car.

17 Q. When you saw it the first time, could you tell how many
18 people were in it?

19 A. I could tell there were three people in the car.

20 Q. Could you recognize any of those three people?

21 A. No.

22 Q. Could you tell at that time whether there were men,
23 woman, adults, children, could you tell?

24 A. I don't think so.

25 Q. When was the car when you saw it the second time on the

1 highway?

2 A. It came off Memorial Drive, crossed over Memorial Park
3 Road onto Usher Road.

4 Q. What did you do when the car came back out on the
5 highway?

6 A. I came back out with it and followed it.

7 Q. Did you have occasion to observe the brake lights
8 during any of that process?

9 A. I did. There were several stop signs between where I
10 caught up with the car and where I actually made the stop to
11 make sure the brake lights weren't working, they went
12 through three or four different stop signs with no brake
13 lights.

14 Q. When the car first turned into the driveway, between
15 then and you following it again out on the highway, did you
16 sit there and watch the car or did you go somewhere else and
17 just notice that it came back out?

18 A. I noticed it came back out. I didn't watch the vehicle
19 the whole time from the driveway but I hung around the area
20 to see if it was going to leave.

21 Q. Do you have any idea whether the driveway where the car
22 turned in had any connection to anybody you subsequently
23 learned was inside that car?

24 A. No.

25 Q. Do you know whether anything occurred in the driveway

1 or at a residence at that driveway while the car was there?

2 A. No, I don't.

3 Q. What did you do with this car with no brake lights?

4 A. I initiated a traffic stop on 12th Street.

5 Q. And in your F150 Ford truck, how do you know initiate a
6 traffic stop?

7 A. I turn on the blue lights, I have them in the grill of
8 the truck and also on a fold-down visor.

9 Q. Did you at any time during this stop have to cut on the
10 siren?

11 A. I don't think so, no.

12 Q. Was there anything bad about the stop from the
13 standpoint of the driver of the car obeying what you were
14 trying to get him to do?

15 A. No.

16 Q. Not a slow stop, not a chase, nothing like that?

17 A. No, sir.

18 Q. Where did the stop occur?

19 A. On 12th Street right off Brooklyn Avenue.

20 Q. Roadway wise, how did the stop occur; into a driveway,
21 into a parking lot, just pulled along the edge of the road
22 or what?

23 A. On the shoulder of the road.

24 Q. Where did you stop?

25 A. Right behind the car.

1 Q. Were you the only law enforcement officer out there at
2 that point?

3 A. Yes.

4 Q. What did you do when you stopped the car?

5 A. I notified Lieutenant McLemore that I was going to stop
6 the car before the stop so he would be on the way to where I
7 was at. When I stopped the car I got out and approached the
8 driver's side of the vehicle. Before I got out I noticed
9 the back passenger looked back at me and turned back around.

10 Q. Stop. When you stopped the car before you knew who
11 people were, could you tell how many people were in the car?

12 A. Yes.

13 Q. And how many were in the car?

14 A. There were three people in the car.

15 Q. Where were they sitting?

16 A. When I initiated the stop there was a white male
17 driver, a white female passenger and black male passenger in
18 the rear seat behind the driver.

19 Q. Describe with any specificity that you can what you're
20 talking about with the black male passenger in the back
21 looking at you or doing whatever he was doing.

22 A. I noticed that the rear passenger turned around, looked
23 back and he was fumbling around in the back seat.

24 Q. Did you approach the car?

25 A. I did.

1 Q. Again, which part of the car did you approach?

2 A. I approached the driver's side and made contact with
3 the driver.

4 Q. Before you approached, do you know whether the windows
5 on the car -- is this a two-door or a four-door car?

6 A. Four-door.

7 Q. Do you know whether windows were up or down on the car
8 at the time you stopped it but before you got up to it?

9 A. I'm not sure.

10 Q. Did a window or windows come down during this traffic
11 stop?

12 A. Driver's did, yes.

13 Q. Did any other windows come down that you recall?

14 A. Not that I recall.

15 Q. And again, you're on the driver's side and you told us
16 there's a female passenger and you told us there's a rear
17 passenger. Was the rear passenger on the passenger's side
18 of the car or on the driver's side of the car?

19 A. Driver's side.

20 Q. When you got up to the car what did you say and what
21 did you do?

22 A. I spoke with the driver, identified myself as an
23 investigator working with the Lancaster County Sheriff's
24 Office and the reason I stopped him was his brake lights
25 were defective and were not working.

1 Q. Let me stop you right there. Did you determine who the
2 driver was eventually?

3 A. Yes.

4 Q. And who was the driver?

5 A. Matthew Sims.

6 Q. And is that the fellow in the fuzzy hood back there
7 that just raised his hand?

8 A. Yes, sir.

9 Q. Let's me stop you right there. Was his face familiar
10 to you?

11 A. No.

12 Q. How did you find out who he was?

13 A. I asked for his driver's license and proof of
14 insurance.

15 Q. Did he produce documents for you?

16 A. He did.

17 Q. Were they straight documents as far as you can --

18 A. They were. He gave me a South Carolina driver's
19 license and proof of insurance.

20 Q. Did you at some point have occasion to determine who
21 owned the car?

22 A. By running the tag we determined who owned the car.

23 Q. Was the tag the right tag for that car?

24 A. It was.

25 Q. By name only who owned the car?

1 A. Bobby Mcinvale.

2 Q. Do you have any idea whether Bobby Mcinvale is a man or
3 woman and what connection, if any, Bobby Mcinvale has with
4 anybody that was inside that car?

5 A. I don't.

6 Q. Was there any conversation between you and Sims about
7 the brake lights?

8 A. Yes. I told him the reason I stopped him and Mr. Sims
9 acknowledged that there was an electrical short in the
10 vehicle and he had been having trouble with it.

11 Q. What was your intention with respect to Mr. Sims and
12 his bad brake lights?

13 A. To issue him a written warning.

14 Q. What did you have to -- you're a drug agent but do you
15 carry a traffic book around.

16 A. I do, I keep it in my vehicle.

17 Q. What did you have to do to issue him a written warning?

18 A. After I received his driver's license and his insurance
19 I walked back to my vehicle and that's when Lieutenant
20 McLemore arrived on the scene. Well, first I asked all the
21 occupants of the vehicles their names.

22 Q. Let's get to that. At what point did you find who else
23 was in the car?

24 A. At the same time I asked for a driver's license and
25 talked to him about his brake lights, I asked the passenger

- 1 her name and the back passenger his name.
- 2 Q. Did you get a name for the front passenger?
- 3 A. I did.
- 4 Q. What was her name?
- 5 A. I believe it was Christina Stevens.
- 6 Q. I'm going to jump way ahead. Did Ms. Stevens go to
- 7 jail for anything that night?
- 8 A. No.
- 9 Q. Did she have ID?
- 10 A. I don't remember.
- 11 Q. How about the rear passenger, did you determine who
- 12 that was?
- 13 A. Yes.
- 14 Q. And who was he?
- 15 A. Derrick McIlwaine.
- 16 Q. And is that the fellow in the middle on the front row
- 17 on that side of the courtroom?
- 18 A. It is.
- 19 Q. Did he have ID on him?
- 20 A. I don't remember if he did or not.
- 21 Q. Did you recognize the person you described as Derrick
- 22 McIlwaine?
- 23 A. I did. Once he told me his name I looked at him and I
- 24 recognized him.
- 25 Q. And again prior to this traffic stop, did you know by

1 name and by face who Derrick McIlwaine was?

2 A. Yes.

3 Q. I think I asked you all of this a minute ago about your
4 knowledge of him, is he the same person you referred to in
5 your initial testimony about prior knowledge?

6 A. Yes.

7 Q. What occurred next? You now have talked to driver,
8 you've got bad brake lights, you've identified everybody in
9 the car, what's happening next?

10 A. I walk back to my vehicle to get my warning ticket
11 book, I get on the radio with the sheriff's office and I
12 check warrants on them for all three names.

13 Q. When did Ryan McLemore get there in relation to what
14 you just described to us?

15 A. He walks up as I'm walking from their vehicle back to
16 my vehicle -- as I'm walking from the car to my truck he
17 approached.

18 Q. To get your ticket book?

19 A. Yes.

20 Q. Did you and Ryan McLemore have any conversations about
21 who was in the car?

22 A. Yes.

23 Q. Describe how that conversation occurred. What was said
24 between you and Ryan McLemore?

25 A. Basically he walks up, "What you got?" He knew I

1 stopped the car, he knew why and what was going on. I told
2 him everybody's name that was in the car and he told me he
3 thought Derrick McIlwaine was wanted out of the city.

4 Q. Wanted out of the city means what?

5 A. That they have active charges on him and he was in NCIC
6 as a wanted person.

7 Q. So when you got back to your truck what did you do?

8 A. Well, I ran all three names through the sheriff's
9 office and checked for warrants.

10 Q. Stop right there. Was Matthew Craig Sims wanted by
11 anybody that you could tell from the check?

12 A. No.

13 Q. Was Ms. Stevens, the female, wanted by anybody as far
14 as you could tell from your check?

15 A. No.

16 Q. Was Derrick Antonio McIlwaine wanted by anybody as far
17 as could you tell from your check?

18 A. Yes.

19 Q. What did your check reveal?

20 A. He had outstanding warrants from Charlotte Mecklenburg
21 and also from the City of Lancaster Police Department.

22 Q. After you -- and that was all done by your radio
23 communication?

24 A. Yes.

25 Q. With your dispatch?

1 A. Yes.

2 Q. After you got that information what did you do?

3 A. Once they told me that he was wanted and we confirmed
4 it, Lieutenant McLemore and myself walked back up on the
5 vehicle.

6 Q. When you walked back up to the car, did you have your
7 ticket book with you?

8 A. I left it at the truck. I was writing the warning and
9 waiting on the warrant checks to come back.

10 Q. So where was your ticket book when you went back up to
11 the car?

12 A. I either laid it on the hood of the truck or seat of
13 the truck when I walked back up to the car.

14 Q. Had the warning ticket been written and completed when
15 you walked back up to the car?

16 A. No, it wasn't completed.

17 Q. It was not?

18 A. I don't think it was completed. I was in the process
19 of writing it when we learn he was wanted.

20 Q. What did you and Ryan McLemore do when you got back up
21 to the car?

22 A. Opened the rear passenger door on the driver's side and
23 told Mr. McIlwaine he was wanted and asked him to step out
24 of the vehicle.

25 Q. Again, I'm jumping ahead, but were there any

1 difficulties in taking Derrick McIlwaine into custody? Did
2 he fight, try to run, did y'all have to dry stun him or tase
3 him or anything?

4 A. No, sir.

5 Q. You opened the door, then what?

6 A. He stood up outside of the vehicle and we were right
7 there, had him face the car right there and placed him in
8 handcuffs for the warrant in the City and Charlotte.

9 Q. At that point was Derrick McIlwaine clearly under
10 arrest?

11 A. Yes.

12 Q. Did he get handcuffed?

13 A. Yes.

14 Q. Was he arrested for anything at that point other than
15 being wanted by the city and being wanted by Charlotte?

16 A. No, sir.

17 Q. Was he handcuffed behind his back?

18 A. He was.

19 Q. Was he left standing or was he put in somebody's truck
20 or did y'all subsequently call for a marked patrol unit to
21 come transport him?

22 A. We were all three standing at the rear of the car.

23 Q. Now, anything unusual occur when you were getting
24 Derrick McIlwaine -- did you get him out of the driver's
25 side backdoor?

1 A. Yes.

2 Q. Anything unusual occur or did you observe anything
3 unusual when you did that?

4 A. Yes. When we got Mr. McIlwaine out and secured him and
5 handcuffed him out behind his back the door was still open
6 on the vehicle, I could see a small notebook where he was
7 sitting that had names and monetary amounts written on it.

8 Q. I'll jump ahead again. Have we got the notebook and
9 some other stuff that was seized in this case, not drugs but
10 some items that was seized in this case today?

11 A. Yes.

12 Q. Are they sealed up in an evidence bag?

13 A. Yes.

14 Q. I'll show you this bag, I'm not going to offer this
15 right now, but I'll show you that bag. Is that the notebook
16 that you're referring to that's in that bag?

17 A. It is.

18 Q. Is there other stuff that's not the notebook in that
19 bag?

20 A. Yes.

21 Q. Okay. Now, this is called a composition book, it's a
22 little pocket sized thing it appears to be and it's blue,
23 there are couple of pens it appears stuck in it. Where was
24 the notebook first of all?

25 A. It was laying in the backseat.

1 Q. And in the backseat in relation -- where in relation to
2 where Derrick McIlwaine had been sitting before y'all took
3 him out of the car?

4 A. It would have been on his right between the seat.

5 Q. Okay. Was it in any way hidden down in the seat?

6 A. No.

7 Q. Was it concealed at all?

8 A. It was not.

9 Q. Did you have to move anything or -- other than Derrick
10 McIlwaine himself getting out of the car, did anything get
11 moved around for you to see this?

12 A. No.

13 Q. Did you search for this?

14 A. No.

15 Q. What was its position other than being to the right of
16 where Derrick McIlwaine was sitting, what was the condition
17 on the seat?

18 A. It was laying open. The pens that are in it were
19 actually marking the pages that are open.

20 Q. If we need to we might but I don't know yet. What --
21 could you tell whether there was writing on pages on this
22 open notebook?

23 A. Yes.

24 Q. What did the writing look like?

25 A. It was in black ink, it was just -- there were people's

1 names and monetary amounts.

2 Q. What kind of monetary amounts?

3 A. I think for an example one of the names on it is Kim
4 and right next to the name it has \$20.

5 Q. And again, we might open this or we might not. One or
6 two names or a bunch of names on the open pages you saw?

7 A. There was a few, I'm not sure how much it was, more
8 than one.

9 Q. Did you -- was there anything odd about that notebook
10 to you?

11 A. No. Just that with Mr. McIlwaine and what we knew
12 about him through our active investigations and where the
13 notebook was laying and what it had written on it just
14 seemed kind of suspicious.

15 Q. Which made you suspect it was what?

16 A. It was a ledger of drug transactions, either owed money
17 or money they had been paid.

18 Q. And you don't know that one way or the other to this
19 day I suppose; is that true?

20 A. Right.

21 Q. Now, I'm going to ask you to think back from -- and I'm
22 going to ask you some times if you can give us some times.

23 A. Okay.

24 Q. I want you to start as point A the moment you walked up
25 to Mr. Sims when the traffic stop started, when you walked

1 up to his window and started talking to him, from that point
2 A until the time that Derrick McIlwaine has gotten out of
3 the back seat and you see this little composition book,
4 about how long is that?

5 A. Maybe five to eight minutes.

6 Q. When that occurred -- by the time that had occurred had
7 you completed your business with Mr. Sims concerning the
8 warning for the bad brake lights?

9 A. No.

10 Q. Jump ahead again. Did you ever finish writing him a
11 warning for the bad brake lights?

12 A. I did.

13 Q. Did you give it to him?

14 A. I did.

15 Q. After you got McIlwaine out and after you saw the
16 notebook, what happened next?

17 A. I asked Mr. Sims if there was anything illegal in the
18 vehicle and would he consent to a search.

19 Q. Did he answer the first question was there anything
20 illegal in the vehicle?

21 A. Not to his knowledge.

22 Q. He said there was not?

23 A. No. Right.

24 Q. Did he answer the second question, "Can I search the
25 vehicle?"

1 A. Yes, sir.

2 Q. At any time during this day when you saw this car on
3 the road, was anybody other than Sims driving that car?

4 A. No.

5 Q. Did you do a written consent to search of the car by
6 Sims?

7 A. No.

8 Q. Did you and Ryan McLemore -- well, first of all, did
9 y'all search the car?

10 A. Yes.

11 Q. Did you search one part of it before the other? And
12 that's a really stupid question because you can't search it
13 all at once, but what part did you search before the other?

14 A. I searched the back seat first.

15 Q. Did you do the searching or did Ryan McLemore do the
16 searching?

17 A. I did.

18 Q. Where was McIlwaine when you were searching the back
19 seat of the car?

20 A. He was down with Lieutenant McLemore at the rear of the
21 car.

22 Q. Where were Sims and Stevens when you were searching the
23 back seat of the car?

24 A. Still in the vehicle.

25 Q. Was that okay with you?

- 1 A. Yes.
- 2 Q. Nobody had asked them to get out at that point?
- 3 A. No.
- 4 Q. Had Sims been asked to get out at all up to that point?
- 5 A. No.
- 6 Q. Or Stevens?
- 7 A. No.
- 8 Q. Did you find anything in the back seat of that car?
- 9 A. Yes.
- 10 Q. Describe what you found.
- 11 A. I located a blue zipper bag, inside the zipper bag was
- 12 approximately four grams of cocaine.
- 13 Q. All right. Stop. Has it been analyzed?
- 14 A. Yes.
- 15 Q. And did SLED say it was cocaine?
- 16 A. Yes.
- 17 Q. What else was in that blue zipper bag?
- 18 A. Two bags of marijuana. The approximate weight, one bag
- 19 had 28.9 grams, the second had 7.8 grams of marijuana.
- 20 Q. And you might not know this, but do you know if Ann
- 21 Horton with the sheriff's office has analyzed that yet?
- 22 A. I believe she has.
- 23 Q. Was it marijuana?
- 24 A. Yes.
- 25 Q. Was all of that in that one blue zipper bag?

- 1 A. Yes.
- 2 Q. Did you seize the bag and its contents?
- 3 A. Yes.
- 4 Q. Was there anything else in that blue zippered bag?
- 5 A. No.
- 6 Q. Where was that -- was the blue zippered bag zipped up
- 7 when you seized it?
- 8 A. It was.
- 9 Q. Where was the blue zippered bag in the back seat of
- 10 that car?
- 11 A. It was laying in the back seat on the seat.
- 12 Q. Where in relation to where McIlwaine had been sitting
- 13 and where the blue book was found?
- 14 A. It was -- McIlwaine would have been sitting right
- 15 behind the driver, the blue book was in the middle and the
- 16 zipper bag would have been to the right past the notebook.
- 17 Q. Did you find anything else in the back seat of that
- 18 car?
- 19 A. Yeah, the black zippered bag.
- 20 Q. And is that the black zippered bag that was in this
- 21 sealed evidence?
- 22 A. It is.
- 23 Q. Was there anything in the black zippered bag?
- 24 A. Yes, sir.
- 25 Q. Cash money?

- 1 A. Yes, sir.
- 2 Q. Where was the black zippered bag?
- 3 A. It was in the back seat also.
- 4 Q. Where in relation to the blue zippered bag?
- 5 A. Right next to it.
- 6 Q. Did you seize the black zippered bag with any money in?
- 7 A. Yes.
- 8 Q. Did you find anything else in the back seat of that car
- 9 that you put your hands on and took position of?
- 10 A. No.
- 11 Q. When you found that stuff what did you do?
- 12 A. I asked whose it was, I said, "Whose is this?"
- 13 Q. We might get into another hearing, maybe today or at
- 14 some other time, but did you ultimately ask McIlwaine about
- 15 dope?
- 16 A. Yes. I turned around, looked at him asked him if it
- 17 was his.
- 18 Q. Did you ultimately ask Sims about some dope?
- 19 A. Yes.
- 20 Q. Did you read anybody Miranda out there on the street
- 21 that night?
- 22 A. No.
- 23 Q. That's fine, we'll get into more detail about that
- 24 maybe in another hearing if we need to.
- 25 A. Okay.

1 Q. So you come out of the car, you find stuff in the back
2 seat. Describe your conversation with McIlwaine.

3 A. I showed it, I had it in my hands, I said, "Whose is
4 this," and, "Is this yours?" And Mr. Sims and the front
5 passenger also, "Whose is this?" Derrick McIlwaine --

6 Q. You can say what he said today.

7 A. Derrick McIlwaine says it was his.

8 Q. Did he say that everything you found was his in the
9 back seat? We're just talking about the back seat.

10 A. Correct. I asked McIlwaine if the drugs belonged to
11 him, he said they did but the money was not his.

12 Q. I'll jump ahead again. Later on before all of this was
13 over with that evening, did McIlwaine change his story about
14 the dope being his?

15 A. Yes.

16 Q. And how did he change his story, what did he say?

17 A. Basically he said that he was going to -- he claimed
18 ownership of the drugs since he was already going to jail
19 because he was wanted and since Mr. Sims was now going to
20 jail it wasn't his.

21 Q. Did anybody give any written statements in this case?

22 A. No.

23 Q. Any of the two guys who got arrested or the female that
24 was in the car?

25 A. No.

1 Q. So what happened when McIlwaine after that conversation
2 and he said "The dope is mine but the money is not?"

3 A. He stayed at the rear of the car with Lieutenant
4 McLemore, this is when I asked Mr. Sims to step out of the
5 car.

6 Q. Did Sims get out of the car?

7 A. He did.

8 Q. When Sims got out of the car, was he handcuffed in any
9 way?

10 A. No.

11 Q. At some point did Stevens get out of the car, the
12 female?

13 A. Yes.

14 Q. Same time as Sims or some subsequent time?

15 A. I think it was right after Sims got out of the car she
16 stepped out on the passenger's side.

17 Q. Why did she get out?

18 A. When Mr. Sims got out I asked for consent to search if
19 he had anything illegal on him and he consented, I searched
20 him. Then I asked again for consent to search the rest of
21 the car because if there was anything else in the vehicle
22 and he consented so he stepped out.

23 Q. Let me back up to McIlwaine. When y'all got McIlwaine
24 out of the car the first time, did anybody pat him down,
25 search him for weapons in that context?

1 A. Yes.

2 Q. Did he have any weapons on him?

3 A. No.

4 Q. Was he searched fully at some point, his person after
5 he was arrested?

6 A. Yes.

7 Q. Did he have anything illegal on his person?

8 A. No.

9 Q. And I can't remember, I haven't looked at the report in
10 the last few minutes but did he have any other money on him
11 or anything that y'all seized on his person?

12 A. I don't believe so.

13 Q. Same questions for Sims. When you got Sims out of the
14 car at some point was he patted down?

15 A. Yes.

16 Q. Was that before you start getting into the conversation
17 with him again about consent to search the car?

18 A. Yes.

19 Q. Did he have any weapons on him or anything that caused
20 you to take something out of his pocket?

21 A. No.

22 Q. Was he ultimately searched thoroughly for anything else
23 after he was arrested at some point?

24 A. Yes.

25 Q. Did he have anything illegal on his person?

1 A. I think we seized some money out of his pocket but
2 nothing illegal.

3 Q. No dope in the pockets or down the britches or drawers
4 of either one of these guys?

5 A. No, sir.

6 Q. Let's focus again on Sims just a little bit -- let's
7 talk about the girl first. Was the girl patted down or did
8 she do it herself to your satisfaction at some point for you
9 to know whether she had anything on her she shouldn't have
10 had on her?

11 A. Yes. We asked her to pull her pockets inside out.

12 Q. Did she have anything illegal on her?

13 A. No.

14 Q. Did she ever get arrested for anything?

15 A. No.

16 Q. When this whole event was over with, what's her
17 disposition and what is the car's disposition?

18 A. She drove the car away from the location.

19 Q. Did somebody give her permission to do that outside you
20 and Ryan McLemore? How did that come about? Let me ask
21 this question, do you know what her relationship to either
22 McIlwaine or Sims was, if any?

23 A. I believe she was Sims' girlfriend.

24 Q. She left there with the car?

25 A. Yes, sir.

1 Q. Let's get back to Sims. From the point that you have
2 found what you believe to be drugs in the car, that's again
3 a new point A, you put your hands on something you think is
4 dope in the back seat of that car, at that point from asking
5 Sims whether there's anything else illegal in the car and
6 can you search the car, how long elapsed between you finding
7 dope and you asking Sims the second time for consent to
8 search the car?

9 A. Less than two minutes.

10 Q. And again during any of that period of time was Sims
11 handcuffed?

12 A. No.

13 Q. Was he restrained in any manner physically?

14 A. No.

15 Q. Had he been told he was under arrest?

16 A. No.

17 Q. Let me just ask you this, I probably shouldn't but I'm
18 going to, he had already told you once you could search the
19 car, why did you ask him again?

20 A. Just because I had already found something illegal and
21 I wanted to make sure it was okay.

22 Q. Okay. Where was -- did you search the front part of
23 that car?

24 A. I did.

25 Q. Where was Ms. Stevens when that was going on?

- 1 A. She was outside of the vehicle on the passenger side.
- 2 Q. Just on her own so to speak?
- 3 A. Sitting on the side of the road.
- 4 Q. Y'all weren't worried about her?
- 5 A. No.
- 6 Q. She wasn't being watched closely or restrained -- was
- 7 she ever restrained in any way?
- 8 A. No, sir.
- 9 Q. Where was Sims when you searched the front part of the
- 10 car?
- 11 A. I believe we had him standing beside her on the side of
- 12 the road so Lieutenant McLemore was staying with McIlwaine
- 13 and all occupants of the car while I searched it.
- 14 Q. And again, during any part of the search on the front
- 15 part of the car was Sims physically restrained in any
- 16 manner?
- 17 A. No.
- 18 Q. Did you search the front of the car?
- 19 A. Yes.
- 20 Q. Did you find anything?
- 21 A. Yes.
- 22 Q. What did you find?
- 23 A. I found two more bags of marijuana, a set of digital
- 24 scales and some cash.
- 25 Q. You say in the console --

- 1 A. Yes.
- 2 Q. -- was it an open console or was it a closed console?
- 3 A. It was closed, it was a lid on it.
- 4 Q. Did you open that lid and look in there?
- 5 A. I did.
- 6 Q. Is that where all of that stuff that you just described
- 7 was found?
- 8 A. Yes, sir.
- 9 Q. And the bags of marijuana, how many different bags?
- 10 A. There were two bags.
- 11 Q. And approximate weight based on your investigation, not
- 12 the actual analysis.
- 13 A. 20 grams in one bag, 28 in the other.
- 14 Q. And how much money?
- 15 A. \$320 and a set of digital scales.
- 16 Q. Was this stuff -- other than being in the enclosed
- 17 console, was it in some common container?
- 18 A. No, it was just in the console.
- 19 Q. And when you say a bag of marijuana and a bag of
- 20 marijuana, what kind of bag was it?
- 21 A. Just a plastic bag.
- 22 Q. Like a ziplock?
- 23 A. Sandwich bags?
- 24 Q. When you say money, was the money bundled up or
- 25 fastened or contained in any way?

1 A. No, not that I know of.

2 Q. Just folded and laying loose?

3 A. Yes.

4 Q. And the scales, digital scales, are they as big as a
5 cellphone?

6 A. They are.

7 Q. Is it something about that size and shape?

8 A. Yes.

9 Q. And commonly in your line of work, what are digital
10 scales used for by people who have got dope in the car?

11 A. Used to weigh drugs and make sure the proper amount is
12 being sold.

13 Q. Anything else found in that car?

14 A. No, sir.

15 Q. When you found the stuff in the front seat, did you
16 have any conversation with anybody about it?

17 A. I believe I may have asked whose is this.

18 Q. Did anybody answer when you asked that question?

19 A. Yes. Mr. Sims said that the marijuana in the console
20 belonged to him.

21 Q. What was -- after that occurred what happened with
22 Sims?

23 A. He was placed under arrest and handcuffed behind his
24 back.

25 Q. And getting back to placing people under arrest as to

- 1 McIlwaine and as to Sims, did you tell them both they were
2 under arrest at those appropriate times?
- 3 A. Yes.
- 4 Q. Was Sims handcuffed?
- 5 A. Yes.
- 6 Q. Hands behind his back?
- 7 A. Yes.
- 8 Q. Did he go to jail?
- 9 A. Yes.
- 10 Q. How did McIlwaine and Sims get to the detention center?
- 11 A. We transported them, I carried one and Lieutenant
12 McLemore carried the other.
- 13 Q. Sitting in the front passenger seat of your F150 and
14 the other one sitting in the front seat of the McLemore's
15 truck?
- 16 A. Yes, sir.
- 17 Q. No additional police cars came out at all that night
18 for anything?
- 19 A. No.
- 20 Q. Does your report -- you technically didn't get
21 dispatched, I assume a dispatch time -- is it correct that a
22 dispatch time in this case would be when you called the
23 sheriff's office to say I'm doing a car stop.
- 24 A. Dispatch time would be when I'm notifying the sheriff's
25 office I'm stopping a car.

- 1 Q. And what is the dispatch time on this case?
- 2 A. 6:05 p.m.
- 3 Q. Did you have a -- I can't remember what y'all call it,
4 a depart time?
- 5 A. Yes.
- 6 Q. What's the depart time mean?
- 7 A. 6:30.
- 8 Q. What does that mean?
- 9 A. That means I notified the sheriff's office I had
10 cleared up from the traffic stop and I was on my way.
- 11 Q. So from you calling off this traffic stop until it
12 ending and you leaving the area with the two guys in
13 custody, how long did that all take?
- 14 A. Twenty-five minutes.
- 15 Q. Let me ask you this, generally speaking as to both
16 McIlwaine and Sims -- well, was there any -- specifically as
17 to Sims, you've described this in a fairly matter of factly
18 calm manner, is that the way it happened?
- 19 A. Yes.
- 20 Q. Was there ever any beating up on Sims from a figurative
21 or literal standpoint about searching his car?
- 22 A. No.
- 23 Q. Did you say or do anything in any way to talk him in to
24 letting you search the car?
- 25 A. No.

1 Q. Did you threaten him with anything --

2 A. No.

3 Q. -- to try to get him to consent to search the car?

4 A. No, sir.

5 Q. Did you trick him in any way to get him to consent to
6 let you search the car?

7 A. No.

8 Q. Is there anything you ain't telling us that happened
9 out there that would weigh on the Judge's ability to decide
10 whether Sims was good with y'all searching the car?

11 A. No.

12 MR. GRIER: I kind of missed that.

13 Q. Is there anything else that occurred that could impact
14 the Judge's decision about whether Sims was completely
15 willing for you to search the car?

16 A. No.

17 Q. Nothing happened that you ain't telling us about,
18 that's my question.

19 A. That's right. No.

20 Q. Did you ever ask McIlwaine if you could search the car?

21 A. No.

22 Q. Did McIlwaine ever protest your searching of the car?

23 A. No.

24 Q. Did McIlwaine ever indicate any interest he had in the
25 car other than it was a place for him to park his butt to

1 ride down the road?

2 A. No.

3 Q. Did he ever say it was his car?

4 A. No.

5 MR. BARFIELD: Your Honor, a question for the Court.

6 This thing has been sealed up since they seized it, I think

7 I'm interested in the Court taking a look at it, I don't

8 know if I want to offer it into evidence at this point. How

9 does the Court propose that I do -- how would you like me to

10 do that?

11 THE COURT: Is there a chain of custody issue?

12 MR. BARFIELD: There's not now, it's been sealed up.

13 But something might be later because they may claim that

14 somebody wrote something in it.

15 MR. FRICK: If the argument is it's got names in it and

16 that's indicative of a drug dealer, my concern is how are

17 you going to protect it from that?

18 THE COURT: Just like you would in every case where

19 somebody has possession of something.

20 MR. FRICK: Unless it occurs contemporaneous with the

21 trial, I'm not arguing with what we're doing now but I do

22 think that will become an issue.

23 MR. BARFIELD: Well, Ryan McLemore checked it out of

24 evidence and brought it today and he would be responsible

25 for taking it back without making any alterations and being

1 able to testify at the trial that nobody has written Derrick
2 McIlwaine's name in it saying, "this is my book."

3 MR. FRICK: I guess my concern is what's the relevance
4 for the purpose of this hearing? For the trial I can
5 understand.

6 MR. BARFIELD: This is sort of by way of argument. My
7 argument is this gave Tony Bowers reason to believe this is
8 a record for drugs transactions, if the Court is satisfied
9 not necessarily that that's true but that's what he thought
10 then I don't necessarily need you to look at it, I'm really
11 doing it for the Court's benefit if you feel any need to
12 look at this book.

13 THE COURT: Let me look at the book.

14 MR. BARFIELD: Do you want it open?

15 THE COURT: Yes, sir.

16 MR. BARFIELD: Ryan McLemore brought this here today --

17 THE COURT: It's sealed?

18 MR. BARFIELD: No, it's been sealed.

19 THE COURT: I've got for you.

20 (Break in proceedings.)

21 MR. BARFIELD: That's all of the questions I have,
22 answer anything Mr. Grier and Mr. Frick has.

23 CROSS EXAMINATION

24 BY MR. FRICK:

25 Q. Only reason you pulled the car over is because of

1 taillights.

2 A. That's right.

3 Q. And the first time you saw it you weren't going to
4 execute a stop.

5 A. Well, I was and I thought it. When I was going to try
6 to make the decision they pulled in the driveway and I just
7 backed off and let it go.

8 Q. Was there anything else that you -- anything else that
9 grabbed your attention about this car?

10 A. No.

11 Q. You just saw a car had taillights trying to either
12 figure out whether he knew that or not or --

13 A. Basically.

14 Q. Was it about dusk? It looks like it was about 6:00 in
15 October.

16 A. It was still daylight.

17 Q. You could still see?

18 A. Yes, sir.

19 Q. You could see that it was a white guy, a white girl and
20 black guy in the car? Could you tell even that?

21 A. Originally when I first saw it?

22 Q. Yes, sir.

23 A. No.

24 Q. When you executed the traffic stop then you could see
25 who was in there.

1 A. Yes, sir.

2 Q. Now, I think your statement was -- and make sure I got
3 this right -- you recognized Mr. McIlwaine when you had a
4 name to put with the face.

5 A. Yes.

6 Q. When you first walked up to the car you didn't go,
7 "That's Derrick McIlwaine."

8 A. No.

9 Q. When you saw huh did you go you, "Ah, there are pending
10 warrants on him."

11 A. No. I didn't know there was a warrant.

12 Q. The county didn't have any warrants on him.

13 A. No.

14 Q. The drug task force didn't have any warrants on him.

15 A. No.

16 Q. So you weren't looking for him.

17 A. No.

18 Q. Are you aware of what he was wanted for out of
19 Charlotte or Lancaster?

20 A. I don't remember.

21 Q. Was there anything in the car that was in plain view
22 that was illegal?

23 A. No.

24 Q. Was there anything whatsoever when you looked in the
25 car that caused you to want to search the vehicle or asked

1 to search the vehicle other than Mr. McIlwaine?

2 A. Mr. McIlwaine and the notebook.

3 Q. But you don't see the notebook until he gets out?

4 A. That's right.

5 Q. And the notebook -- I'm not sure I'll really get too
6 excited about it, but he's out of the car in handcuffs,
7 right?

8 A. Yes.

9 Q. And you see the notebook in the back seat, you were
10 able to -- it's opened?

11 A. Yes.

12 Q. And you're able to read it or you pick it up and see
13 what it is.

14 A. I can see it from the outside of the car.

15 Q. As far as any drugs at that time, are they -- they're
16 not out in plain view, or are they?

17 A. No, they're not.

18 MR. FRICK: Thank you, sir. I believe that's all of
19 the questions I have.

20 CROSS EXAMINATION

21 BY MR. GRIER:

22 Q. Some of this you've probably already been asked by
23 Mr. Barfield. But what's the normal time to stop somebody
24 for a taillight, brake light burned out and issue them a
25 warning ticket?

1 A. Anytime the taillights aren't working.

2 Q. Do what?

3 A. Anytime the taillights aren't working.

4 Q. But how long does it take to actually -- that process
5 of stopping them, giving them a warning, or do you give
6 people a ticket for that ever?

7 A. No, I don't.

8 Q. How long is that process typically?

9 A. You mean how long would that normal traffic stop be
10 just to issue the warning and clear up?

11 Q. Yeah.

12 A. Probably about 15 minutes.

13 Q. Fifteen minutes?

14 A. Ten or 15 minutes. We have to wait for information to
15 come back on the driver's license and the tag and actually
16 write the ticket.

17 Q. Well, in this particular case you said that you were
18 headed back to write the ticket after getting the names of
19 everybody in the car, correct?

20 A. Yes.

21 Q. And so you wrote a ticket?

22 A. I did.

23 Q. Have you got a copy of that somewhere?

24 A. I'm sure I do.

25 Q. But you did not write that ticket until later after

1 everything --

2 A. I was in the process of writing it when we learned that
3 Mr. McIlwaine had outstanding warrants.

4 Q. So literally you're writing the ticket.

5 A. Yes.

6 Q. And you've already put it where, do you recall?

7 A. I don't.

8 Q. But you have already started, you've got some
9 information on the ticket.

10 A. Yes.

11 Q. You just have not finished the ticket.

12 A. That's right.

13 Q. Or you just have not given it to Mr. Sims.

14 A. I haven't finished it, I didn't complete it at that
15 point.

16 Q. Well, are you in your vehicle writing it?

17 A. No. I'm standing on the outside of my vehicle writing
18 it.

19 Q. And why didn't you finish the ticket?

20 A. Well, we learned that Mr. McIlwaine had outstanding
21 warrants so I put the ticket down to go arrest him.

22 Q. So you're in the middle of writing a ticket and you
23 said we learned.

24 A. Yes, Lieutenant McLemore and myself.

25 Q. Well, I thought -- we learned or you learned?

1 A. We were standing side by side.

2 Q. Okay.

3 A. We both have sheriff's office radios that came over the
4 radio.

5 Q. But didn't you already say that McLemore said he
6 thought that he had them?

7 A. Yes.

8 Q. So that happened prior to you writing the ticket or
9 starting the ticket?

10 A. I started -- when I started writing the ticket
11 Lieutenant McLemore had already arrived on the scene and
12 told me he thought Derrick McIlwaine had outstanding
13 warrants. I picked up the ticket book and the radio, called
14 to the sheriff's office to request a warrant check on all
15 three occupants in the vehicle and began writing a ticket
16 while waiting on the warrant check to come from the
17 sheriff's office. In the middle of writing a ticket the
18 sheriff's office confirmed that Derrick McIlwaine was wanted
19 and the hit had been confirmed so now he was under arrest
20 and we got him out of the car in handcuffs.

21 Q. So at that point you have no reason to believe that any
22 criminal activity is occurring in the car, just that you
23 have somebody that's wanted for a previous criminal
24 offenses.

25 A. That's true.

1 Q. And so why was it necessary to -- why wouldn't you have
2 just finished writing a ticket and gone ahead and given it
3 to Mr. Sims? I know that's an archaic question but it
4 matters.

5 A. Obviously I had suspicions because of who was in the
6 vehicle on whether there was anything illegal in the car.

7 Q. So you're saying that at that point you became
8 suspicious of what might be in the car?

9 A. Yes. Based on the occupants of the vehicle, Derrick
10 McIlwaine and Matthew Sims being in the car.

11 Q. But now -- both of them?

12 A. Yes, sir.

13 Q. Why both of them?

14 A. Well, we talked about -- earlier about Derrick
15 McIlwaine's history. At the time of the traffic stop the
16 sheriff's office was working an active complaint against
17 Mr. Sims and had conducted surveillance on his residence for
18 illegal drug trade -- suspicion of illegal drug trade.

19 Q. During a routine traffic stop for a -- for brake lights
20 not working you would have finished up writing that ticket
21 and taking it to him and done what? I mean, excuse me,
22 warning, I said ticket, I guess warning is a ticket, yeah.
23 Okay, warning ticket.

24 A. It was a written warning, yeah.

25 Q. Okay. So what happens after you have the warrants on

1 McIlwaine? But now that doesn't really change, you already
2 know who they are.

3 A. Yes. I know them by representation.

4 Q. So warrants coming out doesn't change anything with
5 your analysis about Sims, whatever you knew about Sims,
6 finding out McIlwaine has warrants doesn't change that part
7 of it, right?

8 A. Right.

9 Q. All right. But let's say that nothing -- so nothing as
10 to Sims changes other than, you know, that there are some
11 suspicious about him that the department has investigated in
12 the past.

13 A. That's right.

14 Q. So you don't finish writing the ticket for him, but
15 normally if you were just doing a routine stop for that same
16 purpose where you had no reason to believe there was --
17 whether your client was -- or whether my client was involved
18 in criminal activity at that time, you would have just
19 written the ticket, taken it back to him and what? I think
20 I've had them but I can't really remember, I've had warnings
21 actually but and all I can remember is them coming back and
22 saying, "Here, Mr. Grier, have a nice day," or something of
23 that nature. Is that normally what you would do if there
24 was not some other circumstances going on?

25 A. Possibly. Every traffic stop is different.

1 Q. Do you think you might let me go with a warning under
2 the same circumstances maybe?

3 A. Maybe.

4 Q. Okay. The notebook didn't give you any suspicions or
5 anything as to Matthew Sims.

6 A. At the time I saw the notebook I didn't know who it
7 belonged to.

8 Q. True. Okay, that's fair. It's described as a ledger
9 in the report.

10 A. Yes. I think that's what the ledger is.

11 Q. Is it actually a ledger? It's a notebook.

12 A. It's just a little notepad.

13 Q. You could call it a ledger, right, or composition book
14 is the title of it I think, right?

15 A. Yes.

16 Q. All right. So you actually you go ahead and tell
17 Mr. McIlwaine he's under arrest --

18 A. Right.

19 Q. -- and deal with him, Mr. Sims is still in the car
20 right?

21 A. That's right.

22 Q. And you've got a half written warning ticket waiting on
23 him in your pocket now?

24 A. No, it was back in my vehicle.

25 Q. So McIlwaine is taken out of the car, so that -- he's

1 arrested. The next event -- or arrested on the outstanding
2 warrants. The next event is what in your mind as far as
3 investigation goes, after McIlwaine is taken out of the car?
4 What's the next event of any relevance in this?

5 A. That's when I saw the ledger laying in the seat.

6 Q. And then what's the next matter of significance?

7 A. I was standing at the open backdoor on the driver's
8 side and asked Mr. Sims is there anything illegal in the
9 vehicle and did I have permission to search the car.

10 Q. Okay. Why haven't you -- is there a reason you haven't
11 given Mr. Sims his ticket back -- his ticket?

12 A. No reason.

13 Q. I mean, as far as the brake lights, that investigation
14 and that stop has concluded, is that not true?

15 A. That's not concluded, kind of opened up into a
16 completely different investigation.

17 Q. So you get one consent to search as a result of what
18 you find in the back seat from Sims and that's when -- once
19 that's concluded you ask for permission -- you ask for
20 consent again to search?

21 A. Yes.

22 Q. That's before anything is found pertaining to Sims or
23 implicating Sims or Sims has made any statements implicating
24 himself in this, correct?

25 A. Before he made any statement implicating himself?

1 Q. Well, he never made any statements implicating
2 McIlwaine, true?

3 A. No.

4 Q. Who made statements implicating themselves first?
5 McIlwaine did.

6 A. That's right.

7 Q. And that happened after the first consent by Sims to
8 search?

9 A. That's right.

10 Q. Now, after that's done you ask for consent to search
11 again.

12 A. Yes.

13 Q. Okay. You end up finding 48 grams of weed, two
14 different bags, electronic scales. You said electronic
15 scales are used to make sure the proper amount is being
16 sold?

17 A. That's right. The buyer doesn't want to get shorted
18 and the seller doesn't want to sell too much.

19 Q. Well, isn't it just as likely that the purpose of the
20 scales is to make sure that the amount you're purchasing is
21 correct?

22 A. It could be either way.

23 Q. So Mr. Sims could have just as likely had scales to
24 make sure that what he purchased was the right amount.

25 A. He could have.

1 MR. GRIER: Thank you.

2 REDIRECT EXAMINATION

3 BY MR. BARFIELD:

4 Q. One more thing. The whole thing about Sims, did that
5 ring bells with you or did that ring bells with Ryan
6 McLemore? Who had the light bulbs come on first about Sims?

7 A. I believe it was me.

8 Q. Okay. Let's run through this again real quick. How
9 did the light bulb come on about Sims and y'all's interest
10 in him, how did that happen?

11 A. I didn't know Mr. Sims on sight but when I got his
12 driver's license and saw his name and address it rang a bell
13 that's the place we conducted our surveillance on recently
14 based on complaints.

15 Q. What was his address?

16 A. It's on Harry Lane in Kershaw.

17 Q. Going out off 521 below town?

18 A. Yes.

19 Q. And had you, in fact, been to that area concerning
20 complaints about Mr. Sims yourself?

21 A. Yes.

22 Q. Had you ever seen him during the investigation or
23 surveillance of those complaints?

24 A. No.

25 Q. Didn't know what he looked like?

1 A. No. Just D and T photo.

2 THE COURT: You may step down.

3 MR. BARFIELD: Call Ryan McLemore.

4 The witness, RYAN MCLEMORE, was first duly
5 sworn and testified as follows, on:

6 DIRECT EXAMINATION

7 BY MR. BARFIELD:

8 Q. State your name, please.

9 A. Ryan McLemore.

10 Q. It's Lieutenant McLemore, isn't it?

11 A. Yes, sir.

12 Q. Are you an investigator with the sheriff's office?

13 A. Yes, sir.

14 Q. How long with the sheriff's office?

15 A. A little over 15 years.

16 Q. Currently assigned to the drug unit?

17 A. I am.

18 Q. Head of the drug unit?

19 A. I am.

20 Q. How long had you been head of the drug unit?

21 A. I've been supervisor of the drug unit for about five
22 and a half years, I've been in narcotics for a little over
23 12 years.

24 Q. Tell me about Derrick McIlwaine first. Before this
25 incident back in October did you know who he was by name and

1 sight?

2 A. I did.

3 Q. Had you worked cases involving Derrick McIlwaine
4 yourself?

5 A. I have.

6 Q. Did you know that he had been arrested and charged with
7 drug offenses prior to this traffic stop?

8 A. Yes, I had.

9 Q. Had you ever had occasion to deal -- maybe not one on
10 one but personal with him during investigations, arrests,
11 anything else?

12 A. Sure.

13 Q. Did you know what he looked like?

14 A. I did.

15 Q. Let me ask you this: Before this traffic stop, did you
16 have information, maybe not official, maybe not in black and
17 white, maybe not through the radio initially, but did you
18 have information or knowledge in your head about the status
19 of Derrick McIlwaine with respect to law enforcement with
20 any agency?

21 A. I did.

22 Q. What did you know?

23 A. I knew he had outstanding warrants from the city of
24 Lancaster and that he was entered in NCIC. At some point,
25 I'm not sure whether it would have been a day or two ahead

1 of time or by email, but information was given out that
2 Derrick McIlwaine was, in fact, wanted and that we would
3 need to be on the lookout for him.

4 Q. Now, let me ask you this -- well, at what point did you
5 determine that Derrick McIlwaine was one of the people in
6 the car?

7 A. When I arrived on scene I walked up to the car and I
8 saw him and I knew that was Derrick McIlwaine and I knew he
9 was wanted and I told him, "Hey, this guy is wanted by the
10 city, that's Derrick McIlwaine."

11 Q. You weren't writing the warning, but do you have any
12 view about why that process was not complete once the
13 specific information --

14 A. Yes.

15 Q. Tell me why. Why didn't y'all just finish writing the
16 warning and then deal with Derrick McIlwaine?

17 A. Derrick has a history of running from the police, he
18 has a history of resisting police. We had recently been to
19 his residence and I think actually executed a search warrant
20 looking for him on some other stuff at his girlfriend's
21 residence, so he is known to run and flee police or police
22 presence. So at that time we knew we needed to drop what we
23 were doing and deal with him then.

24 Q. Did you do any of the searching of the car yourself?

25 A. No, I did not.

1 Q. What did you do while Tony Bowers was searching the
2 car?

3 A. I stood by.

4 Q. Both the front seat and the back seat?

5 A. I stood by with Mr. McIlwaine.

6 Q. Did you ever -- was the female Stevens ever restrained
7 physically in any manner out there?

8 A. I don't think so.

9 Q. Was Sims during the car search, back seat and front
10 seat, ever physically restrained?

11 A. No.

12 Q. Was any kind of -- I'll ask you generally the same
13 thing. Did you hear the conversations between Tony Bowers
14 and Sims concerning the first search of the car, the back
15 seat?

16 A. I did.

17 Q. Describe what you heard the exchange between the two of
18 them was.

19 A. I think it was pretty -- just briefly. Investigator
20 Bowers asked Sims for consent -- would he consent or did he
21 mind him searching his vehicle and his answer was, yes, you
22 could search him.

23 Q. Was there any hesitation on his part by Sims?

24 A. No.

25 Q. Prior to being asked the question or during the

1 dialogue, was there any coercion or threatening language
2 used to get him to let Tony Bowers look in the car?

3 A. No, there wasn't.

4 Q. Same question with the front seat part, did you hear
5 that part of it?

6 A. I did briefly. At that time I think those two were out
7 of the vehicle at the back of the car so distance was a
8 little bit different by that time, time stretched on a
9 little bit. I remembered it but word for word I really
10 couldn't as good as the first time I heard it.

11 Q. Did you see what is officially called the composition
12 book when it was -- did you see the composition book at some
13 point?

14 A. I saw something lying in the seat. My focus was on
15 McIlwaine, I did not pay attention to what it was, it's
16 whereabouts or anything like that. I was focused on
17 watching him and what he was doing.

18 Q. Did you see it once Tony Bowers laid hands on it?

19 A. Yes.

20 Q. Did it have any significance to it?

21 A. Yes.

22 Q. In what way?

23 A. It had some names in it with dollar amounts written
24 beside of it. I can remember some of the names that were in
25 it were names and nicknames that we are very familiar with

1 as far as being involved in the drug trade.

2 Q. Now, nothing definitive in that book says this is the
3 drug log of Derrick McIlwaine or anything like that?

4 A. No, sir, it's not.

5 Q. And got a return mailing address sticker or anything
6 like that showing it was his either?

7 A. No, sir.

8 Q. It doesn't say \$20 for a dime bag?

9 A. No.

10 Q. Let me ask you about Sims. Were you familiar with Sims
11 or the fact that Sims had been the subject of attention for
12 the sheriff's office at some point?

13 A. Yes, I was.

14 Q. Did you know what he looked like?

15 A. I did not.

16 Q. Just tell us what you know about Sims or what you knew
17 about Sims before this traffic stop occurred.

18 A. We had taken some complaints, we get in phone-in
19 complaints all of time, we actually have a line that was
20 directed through our drug task force office. In fact, I had
21 spoken with complainants on a couple of occasions who were
22 calling this information in and who is neighbors of
23 Mr. Sims, their complaint being that vehicles come and go
24 from his residence at all times of the night different
25 people and such and such and they are concerned that drug

1 activity may be occurring at his residence and they had some
2 concern for this. So we had, in fact, taken that complaint
3 and we had, in fact, gone to Harriette Lane in Kershaw and
4 done surveillance on his residence.

5 Q. Had you ever seen anything that led to anybody getting
6 arrested out of Mr. Sims' yard or driveway or house or
7 anything like that?

8 A. No, sir.

9 Q. And at what point -- did a light bulb come on at some
10 point during this traffic stop that the Harriette Lane guy
11 is the one that was driving the car?

12 A. When I walked up Tony told me, "That's Matthew Sims up
13 there," and he said, "That's our Kershaw guy."

14 MR. BARFIELD: Thank you. Answer anything the other
15 two fellows have.

16 CROSS EXAMINATION

17 BY MR. FRICK:

18 Q. Did you know what charge the city had on Mr. McIlwaine?

19 A. I can't remember if it was a burglary or -- I really
20 cannot remember what the charge was, I really don't.

21 Q. You don't know what it was.

22 A. I cannot remember what it was. I may have known then
23 but right ow I just can't remember what it was.

24 Q. But you had to go look it up, you had to go back to a
25 computer and confirm that he was wanted?

- 1 A. I didn't.
- 2 Q. But someone did?
- 3 A. We have to do that, by our policy we have to do that.
- 4 We can't just take someone into custody just because we
- 5 think they're wanted, we have to --
- 6 Q. Isn't that what you did here?
- 7 A. No, we confirmed it.
- 8 Q. But didn't you hold him in custody until you confirmed
- 9 it?
- 10 A. Absolutely not. Once he was confirmed by NCIC we
- 11 placed him under arrest.
- 12 Q. While y'all are doing that if he would have said, "I
- 13 don't want to hang around, I want to go home," he would have
- 14 been able do that?
- 15 A. Absolutely not.
- 16 Q. That isn't custody?
- 17 A. That's investigative custody, it's not arrest custody.
- 18 Q. Okay. If that makes you feel better.
- 19 A. That's what it was.
- 20 Q. As far as searching the vehicle I think you said you
- 21 didn't search it.
- 22 A. No.
- 23 Q. You saw the notebook after it had been removed from the
- 24 vehicle?
- 25 A. Yes.

1 MR. FRICK: That's all I've got. Thank you, sir.

2 MR. GRIER: Briefly.

3 CROSS EXAMINATION

4 BY MR. FRICK:

5 Q. You had never had any contact with Matthew Sims, didn't
6 know who he was, just had a complaint about him?

7 A. Correct.

8 Q. But at this time there's no complaint about that car or
9 that vehicle they were in or anything?

10 A. That's correct.

11 Q. You don't -- there's no nothing indicative of any
12 criminal activity in that vehicle.

13 A. Right.

14 Q. You and Investigator Bowers -- is his title
15 investigator -- Okay -- had a conversation just about this
16 is going to be the Kershaw guy you had done surveillance on?

17 A. Yes. We had done surveillance on his residence.

18 Q. And that was unproductive?

19 A. Yes, sir.

20 MR. GRIER: Thank you.

21 MR. BARFIELD: Nothing else from this witness.

22 THE COURT: You may step down.

23 MR. BARFIELD: Nothing else from the State on the issue
24 then perhaps argument at whatever time you want to take
25 argument.

1 THE COURT: Argument on the motion to suppress.

2 MR. GRIER: Your Honor, I will start off. I passed up
3 the Sikes case, I think it's almost exactly on point here.
4 In that case you've got a guy who is a passenger in the car
5 and it gets pulled over because it ironically has a paper
6 tag on the back of it and the police officer pulls over that
7 car because -- well, because, you know, usually cars with
8 paper tags are sometimes stolen and involved in other
9 activities. In that case they detained the car, they run a
10 warrant check on the driver and the passenger and then they
11 determine that the passenger in the vehicle has a warrant
12 outstanding for something, I'm not entirely sure what the
13 warrant was. Then they do a search and find crack, I
14 believe, and arrest the passenger for possession of the
15 drugs. And in that case, as I do in this case, I don't
16 think there's any reason why they could not stop the car for
17 a taillight. The question then becomes what they do
18 afterwards, and in Sikes what they're arguing is exactly
19 what I'm arguing here, there was no reason to do the warrant
20 check, that was an unreasonable seizure and search. I point
21 to you at the very bottom of the first page on the Sikes
22 case I've handed up, they cite Terry versus Ohio and they in
23 fact say South Carolina would have gone a little further by
24 holding that an officer may stop a car, briefly detain the
25 occupants if he has a reasonable suspicion that the

1 occupants are involved in criminal activity. Your Honor,
2 you've heard that there was nothing that -- they had
3 suspected folks in this vehicle of possibly doing something
4 but not at this time. The testimony is the sole reason this
5 car is pulled over is because of a taillight they're in the
6 process of writing the ticket for that. There's nothing in
7 plain view, there's nothing whatsoever that draws their
8 attention any further to any ongoing activity in the car.
9 Sikes goes onto say that in the case that they had that the
10 reasonable suspicion was the cars was either stolen or was
11 uninsured. Under Knight neither of these reasons -- and
12 they cited Knight versus State as the 1985 case that cited
13 what I just said -- under Knight neither of these reasons
14 gave the officer the right to seize or question the cars
15 passengers. So when they stopped this car they've got every
16 right to stop it, if they would have seen something in plain
17 view I wouldn't be able to make this argument but they
18 don't, they don't. There's no testimony that there was
19 anything going on or otherwise suspicious about the activity
20 in this car or about this car. Now, in a second I'm sure
21 the solicitor is going to come up and tell you how they have
22 this detention and it lasted about five to eight minutes
23 before they arrested my client, Mr. McIlwaine, and I will
24 concede that that ain't a real long time. But look at that
25 first full paragraph under the heading where it says 536,

1 they go -- under that first line I've just read to you,
2 "Moreover even assuming arguendo that this stop was
3 reasonable." So they go further to say okay, it wasn't
4 reasonable, you shouldn't have been doing the warrant check
5 in the first place, but even if you did that's when we get
6 into the timeframe. So I caution you on that because I know
7 the solicitor is going to say it didn't take them a real
8 long time to run this, the Supreme Court of South Carolina
9 has said it doesn't matter how long it takes, you ain't have
10 any reason to do it. They don't find anything until they
11 pulled my client out of the car for whatever they think,
12 they don't even know what it is when they first see it.
13 It's not a county warrant, Tony Bowers and Ryan McLemore
14 don't walk up and say, "We have got warrants on him." Tony
15 Bowers doesn't know who it was when he gets up to the car,
16 he's got to put a name to the face and he goes, "Yeah, I've
17 dealt with him before." We hear he has got something out of
18 the city, we don't know what it is, but we have got to hold
19 him and they set up here and were holding him intentionally
20 to run this warrant check, or hold him intentionally because
21 he likes to run. Well, the seizure was for a traffic
22 violation that they're going to write a warrant on, they've
23 exceeded the scope of that and they've admitted they've
24 exceeded the scope of that. The Supreme Court says it's
25 unreasonable seizure, Your Honor, I am asking you to do the

1 same, anything they find afterwards is fruit of the
2 poisonous tree and should be excluded.

3 THE COURT: Thank you, Mr. Frick. Mr. Grier?

4 MR. BARFIELD: I will be happy to respond to
5 Mr. Frick's argument as to Mr. McIlwaine.

6 THE COURT: All right, we'll do it that way.

7 MR. BARFIELD: I think Sikes is different. And
8 Sikes -- it looks like to me like -- Sikes is kind of
9 confusing to read, but it looks to me like in the Sikes case
10 before they decide that he's going to jail for anything they
11 get him out of the car and put him in the patrol car and
12 make him sit in the patrol car for 20 minutes while they run
13 all this stuff down including the warrant check which
14 reveals that he, in fact, has an outstanding warrant.
15 McIlwaine was not detained beyond his misfortune in being a
16 passenger in the car that got stopped for police for bad
17 brake lights. Tony Bowers stops Sims, told him he had bad
18 brake lights, doesn't know it's McIlwaine at that point,
19 doesn't even know it's McIlwaine at that point, goes back to
20 his truck to get his warning ticket book -- to get his
21 ticket book and write the warning and concurrently calls in
22 the sheriff's office once he finds out who the -- well, let
23 me back up, he does know who it is, he does know the name, I
24 misstated, he knows who he's got, is going back to write a
25 warning to Sims and concurrently was writing the warning, is

1 on the radio doing the warrant check on all three of these
2 people. McIlwaine is not being detained, he's simply
3 sitting in the back seat of the car that's been pulled over
4 on the side of the road by a law enforcement officer for
5 brake lights. The minute they realize -- they confirm that
6 McIlwaine was wanted, they dropped what they do for reasons
7 they've explained, go back to the car and take him into
8 custody. He's detained only from the standpoint, he's
9 sitting in a car which has bad brake lights and the driver
10 has been stopped for that. They didn't tell him, "don't get
11 out," they didn't tell him, "wait here," they didn't take
12 him out and put him in handcuffs and put him in a police car
13 while they did all of this, they walked away from the car, I
14 don't think that's detention. And I think it's completely
15 different from Sikes which again, I think the case indicates
16 was taken out of the car, put in a police car for 20 minutes
17 while they ran all of this stuff down. And, of course, the
18 other thing is Bowers said from the time I walked up and had
19 the first conversation with Sims until -- I think he said
20 until we realized McIlwaine is wanted and go lay our hands
21 on him that's only five minutes. That's it on McIlwaine.

22 MR. FRICK: Your Honor, if I could maybe clarify one
23 point. Ryan McLemore just testified while they were running
24 the search after they stopped the car if he would have said
25 I want to go home they wouldn't have let him go home, if

1 that ain't detention I don't know what is.

2 THE COURT: All right. I understand. Mr. Grier?

3 MR. GRIER: Judge, the different situation between our
4 clients is the difference between the stop of a driver --
5 and I have a case I would like to hand up, I'm giving it to
6 Mr. Barfield on Rivera, which is a 2009 court of appeals
7 case, I think it adds a little bit different element. And
8 certainly I think that if Mr. Frick's argument prevails,
9 then obviously the detention exceeded the scope of the stop,
10 and if Mr. Frick prevails then on Mr. McIlwaine then
11 Mr. Sims should prevail on the weight of the stop being the
12 detention -- the detention being an illegal detention in
13 itself in the scope in an overall analysis of Sikes. But,
14 Your Honor, on the Rivera case we have got a situation where
15 Mr. Rivera is stopped simply for following too closely, a
16 simple crime, and then he's held beyond the reasonable
17 amount of time according to the court of appeals because
18 they try to separate the two folks in the car and get
19 information which is inconsistent. And the analysis of the
20 Rivera case says where probable cause exists -- over on page
21 310; second paragraph, "Where probable cause exists to
22 believe a traffic violation has occurred the decision to
23 stop the automobile is reasonable per se. Once the vehicle
24 has been unlawfully detained the police officer may order
25 the driver to get out of the vehicle without violating, he

1 also may request a driver's license, vehicle registration,
2 run a vehicle check, issue a citation. However, any further
3 detention for questioning is beyond the scope of the stop
4 and therefore illegal unless the officer had a reasonable
5 suspicion of a serious crime." And so certainly in the
6 incident case when, you know, Investigator Bowers is, in
7 fact, writing a ticket -- a warning ticket to return to
8 Mr. Sims and; you know, the detention would have concluded.
9 Most certainly it would be beyond arguable, I believe, to
10 say that the detention of Mr. Sims had not concluded once
11 that ticket had been delivered to him, certainly within the
12 scope of the normal stop that would have happened and I
13 assume that the State is arguing that they were intervening
14 events that simply stopped Mr. Bowers in the middle of
15 writing the ticket from completing the right -- from
16 completing that ticket. If that ticket had been written and
17 handed there wouldn't be argument, I don't think, from the
18 State to make that there had been a detention beyond what
19 was reasonable under the analysis of the cases including
20 Sikes. But in this case, Your Honor, assuming that, you
21 know, you find that the search of Mr. McIlwaine was
22 reasonable, you've got a different element in this case
23 because Officer Bowers asked for two consents to search,
24 he's gone -- that is an additional detention. You've got
25 the detention -- the reasonable detention for the brake

1 light, you've got another detention that begins from the
2 time that detention should have ended, and you know, the
3 business with the warrant with Mr. McIlwaine starts which I
4 submit would not even apply to Mr. Sims, it should have
5 ended when that ticket could have and should have under
6 the -- for the brake light you've got a second detention.
7 And so under the Woodruff case and I think the Williams case
8 as well as the Sikes case, I'm not sure which one of them,
9 but certainly any consent that happens after a second
10 detention, which is an illegal detention clearly under the
11 line of cases, is not going to be permissible and the
12 results of that search and that consent to search would not
13 be valid under that line of cases as well, and most
14 certainly Rivera adds another dimension to that. And, in
15 fact, I think there was some testimony about the time
16 between the illegal detention and ensuing consent -- well,
17 simply put on page 311 that there were no intervening
18 circumstances. The book is a Red Herring, too, Your Honor,
19 and I don't think that that gives them anything more than
20 they've got a warrant on Mr. McIlwaine as far as the search
21 goes and so I think there's clearly a second detention that
22 was in there. So I would ask you to suppress the evidence,
23 Your Honor.

24 THE COURT: All right. Thank you.

25 MR. BARFIELD: Your Honor, I think clearly the process

1 of the traffic stop had not concluded at the time the
2 officers learned that McIlwaine was wanted, and I think they
3 had at that point probably an obligation under the law to
4 make sure they took him into custody and that was the next
5 thing they needed to do, but also based on their knowledge
6 of Mr. McIlwaine and his history that was the prudent thing
7 for them to do. So I would say they had to get McIlwaine in
8 to custody before they concluded the warning ticket process
9 for Sims. They've taken McIlwaine into custody, they know
10 his history, they also know they've had complaints about
11 Sims. It's a lot weaker on Sims, the history part of it
12 clearly, but they take McIlwaine into custody, they see this
13 thing which tells both of them this might be a record of
14 drug transactions, and I submit certainly there's reasonable
15 suspicion at that point that illegal activity is afoot,
16 there might be illegal substances in the car. From the
17 point that McIlwaine has gotten out of the car and the
18 ledger book is found, Tony Bowers says it couldn't have been
19 more than two minutes and he says to Sims, "Are you okay
20 with me searching the car?" Again, the warning ticket
21 process hadn't been concluded and it had to be concluded at
22 some point, so Sims wasn't being held any longer because of
23 those intervening events than not an unreasonable period of
24 time any way because of those intervening events and
25 arresting McIlwaine out of the back of the car and they knew

1 that he was wanted. That's it.

2 MR. GRIER: Well, just briefly in response, Your Honor.
3 That's a license for law enforcement to simply finish not
4 writing a ticket and holding it until they do anything they
5 want to do. I think that aggregates the intent of -- it has
6 to be a reasonable amount of time. And so I don't think the
7 point when you bring the warning ticket back and hand it to
8 them while that physically is a clear line -- a line that is
9 not so clear and I think the analysis of the Court suggests
10 the Court should take in -- the analysis of the case law
11 suggests should be taken into account is not simply when
12 that ticket is returned to the -- for the not so serious
13 violation and the warning ticket especially, but when it
14 should have been returned. And I think -- I don't think
15 they clearly have to do anything, he's in the middle of the
16 ticket and wouldn't take any -- it's kind of arbitrary.
17 That ticket should have been written if that's a clear line
18 and there's no indication that Mr. Sims is doing anything
19 illegal at that point and I believe that that is the reason
20 it should be suppressed, Your Honor.

21 THE COURT: All right. I'm trying to analyze it one
22 step at a time. The Court finds that the vehicle initially
23 was legally stopped, that the officers did have the right to
24 examine the vehicle's registration and driver's license and
25 therefore could detain everybody in the vehicle while they

1 did that, that the -- as I understand the testimony while
2 the ticket was being written the officers learned that there
3 was an outstanding warrant for the passenger, I think it was
4 reasonable for them to stop the writing of the ticket to go
5 and make the arrest. After making the arrest I find there
6 was an intervening factor or circumstance in that the
7 officers observed the notebook which gave them reasonable
8 suspicion based on their experience that something may have
9 been going on knowing the reasons for the arrest of the
10 backseat passenger, looking at the notebook, seeing the
11 numbers and the side names that they were familiar with,
12 that that gave them reasonable suspicion to continue the
13 detention and to continue the further investigation. So I
14 find that -- I do find this, had there not been that
15 intervening circumstance, that being the notebook, I find
16 that the detention should have ended and there would not
17 have been sufficient reason to continue the detention of the
18 driver. But based on that intervening circumstance that
19 gave the reasonable suspicion to the officers to ask for
20 permission which was given by the defendant to search once
21 they found illegal drugs in the back seat, I think that gave
22 them reasonable suspicion to ask if there might be
23 additional drugs and ask for permission to search the rest
24 of the car. For all of those reasons I find that the
25 motions to suppress for both defendants should be denied.

1 Is there anything further we need to do on this case? We'll
2 take a short lunch break.

3 (End of the hearing.)

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1 I, the undersigned, Michael C. Watkins, Official Court
2 Reporter for the Sixth Judicial Circuit of the State of South
3 Carolina, do hereby certify that the foregoing is a true,
4 accurate and complete transcript of record of the proceedings
5 had and evidence introduced in the trial of the captioned
6 case, relative to appeal, in the Court of General Sessions
7 for Lancaster County, South Carolina, on the 15th day of
8 February, 2013.

9 I do further certify that I am neither of kin, counsel,
10 nor interest to any party hereto.

11

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May 2, 2013

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Michael C. Watkins
Court Reporter

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1 STATE OF SOUTH CAROLINA
2 COURT OF GENERAL SESSIONS
3 COUNTY OF LANCASTER
4 2012-GS-29-00060, 00061
5

6 State of South Carolina
7 vs.
8 Derrick A. McIlwaine
9

10
11 Lancaster, South Carolina
12 February 19-20, 2013
13 Before the Honorable Brooks P. Goldsmith
14

15 APPEARANCES

16 For the State: Doug Barfield
17 For the Defendant: William Frick
18

19 Reported by: Michael C. Watkins
20 Official Court Reporter
21
22
23
24
25

OPENING STATEMENTS

1 say is not fact, it's merely how I want you to think about
2 things and that I ask you to think about things. And, of
3 course, we'll be asking you to think a lot harder and longer
4 and deeper a little later on in the process, but I believe
5 when you -- I think you're going to be in for a few
6 surprises today, this isn't going to be like some kind of
7 crazy TV drama but it will be an interesting case, it's not
8 going to be a particular long one. I think you're lucky in
9 the sense you're not going to be stuck here all week in the
10 trial if being here is being stuck. Some of you might be
11 loving it, I hope you are, we love what we do, but I think
12 when you've heard all of the evidence today and you have
13 taken the law that the Judge will give you and you've
14 applied the law to the facts as you determine what they are
15 you will find that Matt Sims is not guilty of possession
16 with intent to distribute marijuana and not guilty of
17 possession with intent to distribute cocaine. Thank you.

18 THE COURT: Thank you, Mr. Grier. Mr. Frick?

19 MR. FRICK: Thank you, Your Honor, solicitor, ladies
20 and gentlemen of the jury. I bet when you walked in this
21 morning you had a pretty good idea what the word possession
22 meant, you either have something or you don't have it, and
23 you now have found out that that clearly cannot be the case,
24 it cannot be that simple because I'm now the third attorney
25 who is going to stand in front of you and tell them what

OPENING STATEMENTS

1 that simple word means, what it means is you had something
2 or you didn't, that's what I'm telling you. And the State
3 has got to prove to you that Derrick McIlwaine had
4 something. One, they can't do that because he didn't have
5 anything on him, so they're going to have to show it to you
6 another way, and you're going to hear a term called
7 constructive possession. See, you thought it was simple,
8 you either had something or you didn't. No. You can have
9 something and not have something is what the solicitor is
10 going to tell you and here is how we go about doing that and
11 that is the only way that they can say that Mr. McIlwaine
12 was doing anything in this car because otherwise he's just
13 sitting in the back seat of a car and there ain't nothing
14 illegal about that. I will go further and tell you it's not
15 illegal to sit in the back seat of the car that does have
16 drugs in it. What? Yes. We'll deal with that as we go
17 along, but I tell you that and keep that in mind. Mr.
18 McIlwaine, Mr. Sims for that matter, doesn't have to prove
19 to you a thing. It is entirely up to the State for the
20 State to prove to you beyond a reasonable doubt that
21 Mr. McIlwaine or Mr. Sims for that matter, possessed
22 anything. All over here. The defense doesn't have to call
23 a witness, doesn't have to put up any testimony, doesn't
24 have to do a thing. That is a right that we're all afforded
25 and it is what makes our system what it does, it takes folks

OPENING STATEMENTS

1 like y'all who have an understanding of what the word
2 possession means, removes those of us who want to complicate
3 these simple terms unless you decide does the law apply in
4 this situation. And the way that works is you're going to
5 see some testimony, you're going to see a little bit of
6 evidence, there's not going to be any fancy CSI evidence,
7 this is not going to be nearly as exciting as what you've
8 watched on TV, I promise you it can be down right boring
9 sometimes even for me and this is what I do and this is what
10 I enjoy doing. But it's part of the process and it's the
11 way it works and it's what we've got to do. You can believe
12 all, none or part of what you see and hear from the witness
13 stand. Just because somebody gets up there and puts their
14 hand on the Bible doesn't mean you've got to believe them,
15 that's entirely up to you to decide what you want to
16 believe. It's not complicated, it's not going to take real
17 long, I think due to some scheduling we are going to have to
18 go into tomorrow morning, but you're not in one of those
19 places where trials drag on for weeks and weeks. We're
20 pretty quick about the process in South Carolina, and you're
21 going to find this ain't a whole lot to talk about, you
22 either possessed it or you didn't possess it. And the State
23 can show you all the legal definitions and alternate terms
24 of possession and how you do that or not, but it's going to
25 come down to one simple fact, Derrick McIlwaine was just

OPENING STATEMENTS

1 sitting in the back of a car, that's it, that's it. They're
2 not going to be able to prove to you beyond a reasonable
3 doubt a thing. Now, just so we're clear, it's not at the
4 end of the case if you think Derrick McIlwaine might have
5 possessed something, it's not, well, I've been looking at
6 Derrick and probably, possibly. If that's what the State
7 has proven to you then they ain't proven to you a thing.
8 They've got to convince you that there's no other reasonable
9 explanation other than Mr. McIlwaine possessed what they say
10 he possessed and they can't do it and you're going to find
11 him not guilty. Thank you very much for your time and your
12 service.

13 THE COURT: Thank you, Mr. Frick. Solicitor, you may
14 call your first witness.

15 MR. BARFIELD: Call Tony Bowers.

16 The witness, TONY BOWERS, was first duly sworn
17 and testified as follows, on:

18 DIRECT EXAMINATION

19 BY MR. BARFIELD:

20 Q. Tell us your name, please, sir.

21 A. My name is Tony Bowers.

22 Q. Mr. Bowers, where are you employed?

23 A. I work for the Lancaster County Sheriff's Office.

24 Q. What do you currently do for the Lancaster County
25 Sheriff's Office?

TESTIMONY OF TONY BOWERS

1 A. I'm a narcotics investigator currently assigned to the
2 drug task force.

3 Q. How long have you been a police officer?

4 A. I've been a police officer with the sheriff's office
5 since 2001.

6 Q. Were you a police officer with anyone else prior to
7 2001?

8 A. I had two years with the department of corrections as a
9 law enforcement officer prior to coming to the sheriff's
10 office.

11 Q. Who is Ryan McLemore?

12 A. He's my immediate supervisor, a lieutenant.

13 Q. Were you working on, I believe, Saturday, October 22nd
14 of 2011?

15 A. I was.

16 Q. Was Ryan McLemore working that day?

17 A. He was.

18 Q. On that day, were y'all working out of one vehicle or
19 separate vehicles?

20 A. We were in separate vehicles.

21 Q. And on that day what was your assigned vehicle as a law
22 enforcement vehicle?

23 A. I have a 2010 Ford F-150, silver.

24 Q. Pickup truck?

25 A. Pickup truck.

TESTIMONY OF TONY BOWERS

1 Q. Does it have any outward markings on it to tell the
2 public that it's a police vehicle?

3 A. No, it doesn't.

4 Q. Does it have police equipment in and on it?

5 A. It does.

6 Q. Without giving any secrets away, how is it equipped as
7 a police vehicle?

8 A. I have blue lights and a siren, the lights can be seen
9 once they're turned on it can be initiated.

10 Q. Have you got a police radio in it?

11 A. Yes, sir.

12 Q. Is it the same truck you're driving today that you were
13 driving on October 22nd of 2011?

14 A. Yes, sir.

15 Q. What color is it?

16 A. Silver.

17 Q. On that day -- generally speaking, I'm not asking you a
18 T-shirt -- if it was a T-shirt, but how were you dressed on
19 October 22nd of 2011?

20 A. Normal dress code for coming to work is blue jeans and
21 T-shirt, when we're out working traffic stops I'll wear a
22 tactical vest that has sheriff written across the front.

23 Q. Was that the kind of clothing you were wearing that
24 day?

25 A. Yes, sir.

TESTIMONY OF TONY BOWERS

1 Q. Did you have a badge somewhere about your person
2 outwardly?

3 A. Yes.

4 Q. Were you carrying a side arm, a gun?

5 A. Yes, sir.

6 Q. Did you have handcuffs stuck somewhere?

7 A. Yes.

8 Q. Probably my first stupid question of the day, were you
9 doing anything particular while you were out working when
10 this event starting ticking off, or was there an assignment
11 you were on at the time?

12 A. No.

13 Q. On October 22nd of 2011, did you stop a car?

14 A. I did.

15 Q. And the car I'm referring to is what this case is
16 about. About what time of day or night did that happen?

17 A. It was around 6:05 p.m.

18 Q. And in October of 2011 at 6:05, what were the lighting
19 conditions outside?

20 A. It was still daylight.

21 Q. And I'll bounce around a little bit, but where did you
22 stop the car?

23 A. The traffic stop was on 12th Street right off Brooklyn
24 Avenue.

25 Q. Is that in -- is that in the City of Lancaster?

TESTIMONY OF TONY BOWERS

- 1 A. It's not.
- 2 Q. Is it in the County of Lancaster?
- 3 A. It is.
- 4 Q. Prior to the stop -- well, first of all generally
5 describe the car.
- 6 A. It was a Chevy Impala, I don't recall the color.
- 7 Q. Older model or newer model?
- 8 A. It's going to be a nineties model.
- 9 Q. When that day had you first seen that car?
- 10 A. It was before the stop I saw it on Memorial Park Road
11 maybe 15 minutes before I stopped, 15 or 20 minutes.
- 12 Q. When you first saw the car on Memorial Park Road --
13 first of all what -- in addition to the lighting what were
14 the weather conditions that day?
- 15 A. It was clear.
- 16 Q. When you first saw the car on Memorial Park Road could
17 you tell -- could you see people inside the car?
- 18 A. I could.
- 19 Q. Could you tell how many people were inside the car?
- 20 A. There were three people inside the car.
- 21 Q. And before you knew for sure after a stop, describe
22 when you first saw the car the driver of the car.
- 23 A. I just knew there were three people inside the car.
- 24 Q. Didn't know who was male, female, race, sex or anything
25 else?

TESTIMONY OF TONY BOWERS

1 A. I didn't.

2 Q. On Memorial Park Road, did anything draw your attention
3 to the car?

4 A. I noticed when the vehicle slowed down to take a left
5 turn on Memorial Drive off of Memorial Park Road that it
6 didn't have any brake lights.

7 Q. None at all?

8 A. None.

9 Q. Brake lights, not taillights.

10 A. Right. As the vehicle was slowing there were no
11 lights.

12 Q. Where were you to be able to observe this when the car
13 turned from Memorial Park onto Memorial Drive, behind it or
14 passing it or what?

15 A. I was behind it.

16 Q. And before you saw that was there any reason for you to
17 be behind that car?

18 A. No.

19 Q. When you saw the car turn onto Memorial Drive without
20 brake lights, what did you do?

21 A. I approached Memorial Drive, I was considering stopping
22 the vehicle, I saw it turn into a driveway on Memorial Drive
23 and I kept going, I didn't stop.

24 Q. As a drug enforcement agent for the sheriff's office,
25 can you charge people with drug offenses?

TESTIMONY OF TONY BOWERS

- 1 A. I can.
- 2 Q. Can you charge people with driving offenses?
- 3 A. I can.
- 4 Q. When you charge somebody with a driving offense, what
5 is the paperwork, what do you call it?
- 6 A. They get a written ticket.
- 7 Q. Do you have a ticket book with you all of the time?
- 8 A. I do.
- 9 Q. Do you use it?
- 10 A. I do.
- 11 Q. How far on Memorial Drive did the car turn into a
12 driveway?
- 13 A. It wasn't far, I'm not sure.
- 14 Q. Did you turn into the driveway when the car turned into
15 the driveway?
- 16 A. No. I didn't turn onto Memorial Drive, I stayed on
17 Memorial Park Road.
- 18 Q. Why didn't you do something about the car with no brake
19 lights that you had seen on the road?
- 20 A. I assumed they had made it home safely.
- 21 Q. Did you see that same car again?
- 22 A. I did.
- 23 Q. How long after you saw it turn into a drive on Memorial
24 Drive?
- 25 A. Five or ten minutes.

TESTIMONY OF TONY BOWERS

- 1 Q. How did you come to see that car again?
- 2 A. I had circled the block, came back around, saw it
- 3 coming off Memorial Drive.
- 4 Q. Off Memorial Drive onto what road?
- 5 A. Crossing over Memorial Park Road onto Usher Road.
- 6 Q. What did you do when you saw the car -- well, back up.
- 7 Sure it's the same car?
- 8 A. Yes.
- 9 Q. Any doubt about that at all?
- 10 A. No.
- 11 Q. When you saw it the second time could you tell how many
- 12 people were in it?
- 13 A. Yes, there were three people in it.
- 14 Q. Could you tell anything specific about those three
- 15 people?
- 16 A. No.
- 17 Q. What did you do when you saw the car the second time?
- 18 A. When I saw it go onto Usher Road I was on Memorial Park
- 19 Road, I turned behind it to catch up with it.
- 20 Q. Why were you now pursuing this car?
- 21 A. I knew the brake lights weren't working previously.
- 22 Q. Describe the path of the car from when you got up
- 23 behind it to wherever the stop was.
- 24 A. The vehicle traveled down Usher Road, took a left on I
- 25 think it's Bradburn Drive, I noticed -- when it slowed down

TESTIMONY OF TONY BOWERS

1 I noticed the brake lights still weren't working, there's a
2 stop sign at Bradburn, I think it's Springdale Church Road
3 or somewhere in the back in that neighborhood, it stopped at
4 the stop sign, no taillight. That's when I radioed
5 Lieutenant McLemore to let him know I was going to stop the
6 vehicle so he could kind of head in my direction.

7 Q. Explain to the jury why you did that. You're a big
8 boy, why couldn't you make a stop by yourself?

9 A. Well, on the drug task force we always notify our
10 partners or whoever you work with and we always back each
11 other up.

12 Q. What happened next?

13 A. We turned onto Springdale Road, took a left, approached
14 the light at Brooklyn and Springdale, turned right, as we
15 approached 12th Street Lieutenant McLemore notified me that
16 he was close and we turned onto 12th Street, I initiated my
17 blue lights on the car.

18 Q. Now, Springdale onto Brooklyn is a left turn, is that
19 what you said?

20 A. It's a right turn.

21 Q. And 12th Street is a left or right off Brooklyn?

22 A. It's a right.

23 Q. If you stay on Brooklyn and followed it all of the way
24 out, where would you end up?

25 A. Main Street, South Main.

TESTIMONY OF TONY BOWERS

1 Q. At Crenco?

2 A. Yes.

3 Q. Was McLemore on the scene when you actually stopped the
4 car?

5 A. No.

6 Q. Is there anything you do as a law enforcement officer
7 procedure wise to as y'all say initiate a traffic stop?
8 What do you do to initiate a traffic stop?

9 A. I get on the radio and call to the sheriff's office and
10 let them know I'm fixin' to stop the vehicle and I give them
11 a tag number and I turn on my blue lights.

12 Q. Did you get the car stopped?

13 A. Yes, sir.

14 Q. Was there anything unusual about the stop, meaning --
15 I'm going to ask a series of questions that you can probably
16 answer. Did the car speed up?

17 A. No.

18 Q. Did the car try to evade you?

19 A. No.

20 Q. Did the car duck down into some cul de sac or anything?

21 A. No.

22 Q. How did the car stop, meaning where on or along --

23 A. It pulled on the shoulder of the road.

24 Q. 12th Street is a two lane road?

25 A. It's a two lane road, yes, sir.

TESTIMONY OF TONY BOWERS

1 Q. Is it daylight or dark when this is going on?

2 A. It's daylight.

3 Q. Where did you stop your truck?

4 A. Immediately behind the vehicle.

5 Q. Now, where did the blue lights pop out or show up on
6 your truck when you cut them on?

7 A. I have a fold down on the passenger visor and they're
8 also in the grill of my truck, my headlights.

9 Q. When you got the car stopped what did you do?

10 A. I got out of the vehicle and approached the Malibu.

11 Q. Which part of the Malibu did you approach?

12 A. On the driver's side.

13 Q. Do you remember if this was a two-door or a four-door
14 car?

15 A. It was a four-door car.

16 Q. Do you remember as you approached the car whether any
17 windows were up or down?

18 A. I remember the driver's window came down so I could
19 talk to the driver.

20 Q. Did you determine who the driver of the car was?

21 A. Yes.

22 Q. Who was the driver of the car?

23 A. Matthew Sims.

24 Q. Do you see the person that you call Matthew Sims and
25 identified as the driver of the car in this courtroom today?

TESTIMONY OF TONY BOWERS

- 1 A. I do.
- 2 Q. Where is Matthew Sims sitting what is he wearing?
- 3 A. He's wearing a blue shirt sitting next to Mr. Grier.
- 4 Q. At the table facing this way?
- 5 A. Yes.
- 6 Q. Did you talk to Mr. Sims when you approached?
- 7 A. I did. As when I stop all vehicles I identify myself
- 8 as an employee with the Lancaster County Sheriff's Office
- 9 and the reason for the stop is his brake lights weren't
- 10 working properly.
- 11 Q. You said something earlier about the tactical vest when
- 12 you make traffic stops.
- 13 A. Yes.
- 14 Q. Did you have it on?
- 15 A. I did.
- 16 Q. Did you and Mr. Sims talk about his brake lights any?
- 17 A. We did. When I notified him the reason for the stop he
- 18 told me that he knew there was a short in the electrical
- 19 system of the car, he knew they weren't working.
- 20 Q. On a traffic stop other than telling Mr. Sims why you
- 21 stopped him, was there anything else you needed to do with
- 22 him concerning the traffic stop?
- 23 A. Yes. I asked Mr. Sims for his driver's license and
- 24 proof of insurance.
- 25 Q. Did he provide satisfactory documents to you?

TESTIMONY OF TONY BOWERS

- 1 A. He did.
- 2 Q. Was there a front seat passenger in the car?
- 3 A. There was.
- 4 Q. Did you identify that person?
- 5 A. I did.
- 6 Q. Who was that person?
- 7 A. Christina Stevens.
- 8 Q. And I think in my opening I said Stevenson, I
- 9 apologize. But Christina Stevens?
- 10 A. I believe it is.
- 11 Q. Do you see Christina Stevens in the courtroom today?
- 12 A. I do.
- 13 Q. Where is she sitting and what is she wearing?
- 14 A. I'm not sure what kind of shirt she's wearing.
- 15 Q. The young lady that just waived, is that Ms. Stevens?
- 16 A. Yes, sir.
- 17 Q. Any question about that at all?
- 18 A. No, sir.
- 19 Q. What about the guy in the back, was there a subject in
- 20 the back seat?
- 21 A. There was.
- 22 Q. Who was in the back seat?
- 23 A. Derrick McIlwaine.
- 24 Q. Did you interact with Derrick McIlwaine when the stop
- 25 occurred?

TESTIMONY OF TONY BOWERS

1 A. Yes. When I asked the driver for his license and proof
2 of insurance I asked the passengers for their names.

3 Q. Did Derrick McIlwaine produce something to identify
4 himself?

5 A. He did, he told me his name was Derrick McIlwaine.

6 Q. Do you see the person that you identified as Derrick
7 McIlwaine as the rear passenger in the courtroom today?

8 A. I do.

9 Q. Where is he sitting and what is he wearing?

10 A. Next to Mr. Frick and he's wearing an orange shirt.

11 Q. Before the stop other than brake lights, did you
12 observe anything else about or within the car?

13 A. As I initiated the stop between the time the blue
14 lights came on and the vehicle actually stopped I noticed
15 that the back passenger looked back at me and was fumbling
16 around in the back seat.

17 Q. Could you tell what was going on in the back seat other
18 than what you just described?

19 A. No.

20 Q. Was there any fourth person anywhere in that car at any
21 time during your interaction with the car?

22 A. No, sir.

23 Q. What part of the back seat was Derrick McIlwaine
24 sitting in?

25 A. He was sitting directly behind the driver.

TESTIMONY OF TONY BOWERS

1 Q. Did you form any intention with respect to the driver
2 of the car and the bad brake lights?

3 A. Yes. I was going to issue him a written warning for
4 the vehicle equipment.

5 Q. Where was your ticket book when you were interacting
6 with Sims, the driver of the car?

7 A. It was in my truck.

8 Q. What did you do -- what did you need to do to issue a
9 written warning for the bad brake lights?

10 A. Go back to my vehicle, get my book and just write him a
11 ticket.

12 Q. Did you start that process?

13 A. I did.

14 Q. Where were you writing the ticket?

15 A. Standing outside of my vehicle. I don't get back in to
16 write it, I stand beside my vehicle and write the warning
17 ticket.

18 Q. How far behind the Malibu was your truck? In
19 relation -- you're the rear bumper of Malibu, I'm the front
20 bumper of your truck, how far have I got to be --

21 A. It's a little bit closer, that's probably it.

22 Q. At some point did you see Ryan McLemore out there on
23 12th Street?

24 A. Yes. He arrived on scene as I was walking back from
25 the vehicle to my truck.

TESTIMONY OF TONY BOWERS

1 Q. And you were walking back to the Malibu from your
2 truck?

3 A. I was walking from the Malibu to my vehicle.

4 Q. Why were you walking to your truck?

5 A. To get my warning ticket.

6 Q. At that point as a matter of continuity, did you start
7 and finish a warning ticket?

8 A. I started a warning ticket, yes.

9 Q. Did you go back to the Malibu before you completed the
10 warning ticket?

11 A. I did.

12 Q. And when you got back to the Malibu, did you ask
13 McIlwaine to get out of the car?

14 A. We did.

15 Q. Was McLemore with you when that occurred?

16 A. Yes.

17 MR. FRICK: Your Honor, at this time I would just like
18 to renew my motion I made in pretrial, just put that for the
19 record.

20 THE COURT: The Court notes the motion.

21 Q. Which door of the car did McIlwaine get himself out?

22 A. I believe I may have reached around and opened the door
23 from the outside.

24 Q. But from a physical standpoint did he make himself get
25 up and get out?

TESTIMONY OF TONY BOWERS

- 1 A. Yes, sir.
- 2 Q. From which door did he get out of the car?
- 3 A. On the rear passenger door on the driver's side.
- 4 Q. Where was he when he was out of the car?
- 5 A. He stood at the rear of the vehicle of Lieutenant
- 6 McLemore, the rear of the Malibu.
- 7 Q. When he got out of the car did you see anything in the
- 8 car of interest?
- 9 A. Yes. There was a ledger laying on the seat right next
- 10 to where Mr. McIlwaine had been sitting.
- 11 Q. I'm showing you a plastic bag that's got some stuff in
- 12 it. Take a minute to look at the bag and just tell me if
- 13 you know what the stuff is in that bag.
- 14 A. I do.
- 15 Q. Have you got a -- I hesitate to ask, have you got a
- 16 knife in your pocket?
- 17 A. I do not.
- 18 Q. I hate to say this but I do. Will you take my knife
- 19 and open that bag?
- 20 A. I will.
- 21 Q. Take out just the notebook when you get to that point.
- 22 Now, just hold that up above the rail a little bit so people
- 23 can see what I'm talking about. Well, first of all in what
- 24 position or condition was that notebook when you first saw
- 25 it?

TESTIMONY OF TONY BOWERS

1 A. I could see the notebook laying in the car open where
2 the pens are.

3 Q. Are those pens pens that were on it when you saw it?

4 A. They are, yes, sir.

5 Q. Where was -- particularly in the car where was the
6 notebook?

7 A. It was laying right beside Mr. McIlwaine in the other
8 seat.

9 Q. To his right or left?

10 A. To his right.

11 Q. Could you see anything on it when you first saw it?

12 A. Yes. I could see there was names and monetary amounts
13 on it.

14 Q. Whole names, proper names or first names or nicknames?

15 A. First names and nicknames.

16 Q. Now, on one page or on more than one page?

17 A. At that time I could see it on one page.

18 Q. Just give us an example, read some of that stuff that's
19 on that.

20 A. The first page says Joel, \$435 --

21 MR. FRICK: Your Honor, before we read everything
22 that's on this should we not have it in evidence?

23 THE COURT: Sustained.

24 Q. Is there any -- first let me ask you a few more
25 questions about this. Did you take possession of this item

TESTIMONY OF TONY BOWERS

1 off the back seat of this car?

2 A. Yes.

3 Q. Have you altered it in any form?

4 A. No.

5 Q. Have you written anything in it or on it?

6 A. No.

7 Q. Is it in the same condition now that it was in when you
8 laid your hands on it in the back seat of that car?

9 A. Yes.

10 MR. BARFIELD: Your Honor, at this time I would offer
11 what is described as a little blue composition book with two
12 pens stuck in it as State's Exhibit Number 1.

13 MR. FRICK: Same objection as from pretrial, I think it
14 applies to the notebook.

15 THE COURT: Noted. Mr. Grier?

16 MR. GRIER: Nothing.

17 THE COURT: Admitted.

18 (At this time the notebook was received as
19 State's 1.)

20 MR. BARFIELD: Beg the Court's indulgence just a
21 second.

22 (Break in proceedings.)

23 Q. Same question as I asked a minute ago, just read a
24 couple of the entries off that book.

25 A. It says Shaggy, it has a monetary amount that was

TESTIMONY OF TONY BOWERS

1 scratched out twice and then it has one that's not scratched
2 out, \$350. It says Kevin 55, Fee 20, Kim 65 and Marcus 20.

3 Q. Do you know who those people are?

4 A. I don't.

5 Q. Was that composition book of any interest to you when
6 you first saw it? Well, let me backup and ask you some
7 background questions. Sims and McIlwaine are not charged
8 with selling drugs in this case, correct?

9 A. That's right.

10 Q. Not in reference to them but generally in reference to
11 your job on a day to day basis, do you supervise drug
12 transactions?

13 A. I do.

14 Q. Explain to the jury how that works.

15 A. Sometimes the --

16 Q. Typically how that works.

17 MR. FRICK: Your Honor, is he asking Mr. Bowers to be
18 an expert in drug transactions? I'm curious as to where
19 he's going with this.

20 THE COURT: I don't know.

21 MR. BARFIELD: I'm eliciting some background
22 information based on this officer's training and experience
23 to establish what he knows about his job.

24 MR. FRICK: Sounds like he wants to qualify him as an
25 expert, maybe he needs to do that.

TESTIMONY OF TONY BOWERS

1 THE COURT: He's only asking so far as to what he does
2 at this point; isn't that right?

3 MR. BARFIELD: Yes, sir.

4 THE COURT: Overruled. I'll let him go down that road.

5 A. Sometimes the Lancaster County Sheriff's Office Drug
6 Task Force does some controlled buys, it's called controlled
7 buys. It's just basically we use an informant, we go and
8 buy illegal narcotics under a controlled environment with
9 sheriff's office money to buy illegal drugs.

10 Q. How long have you been doing that as a drug agent of
11 the sheriff's office?

12 A. Since October of 2007.

13 Q. In connection with your work on those transactions,
14 have you ever been involved in the controlled buys of
15 marijuana?

16 A. Yes.

17 Q. Ever been involved in controlled buys of cocaine?

18 A. Yes.

19 Q. Have you been to schools to learn what you do on a day
20 to day basis?

21 A. Yes, I do.

22 Q. Tell me where you have been to schools.

23 A. I've been to several schools that were given by the
24 State Law Enforcement Division, SLED, down at the police
25 academy in Columbia, other classes given by other law

TESTIMONY OF TONY BOWERS

1 enforcement agencies.

2 Q. Okay. When you're supervising a controlled buy, does
3 money change hands?

4 A. It does.

5 Q. Where does the money come from?

6 A. It comes from the sheriff's office drug task force.

7 Q. Who decides how much money is going to be used in a
8 transaction?

9 MR. FRICK: Your Honor, I would object to relevance,
10 we're not in a distribution trial, he just said that. Why
11 are we talking about this?

12 THE COURT: Solicitor?

13 MR. BARFIELD: Your Honor, I think it's relevant to
14 some questions I intend to ask Investigator Bowers about the
15 notebook in a minute.

16 THE COURT: All right. Overruled, go ahead.

17 A. Ultimately we decide how much money we're going to
18 spend, but it's based on information provided by an
19 informant and street values of drugs.

20 Q. Well, let's talk about -- how do you measure marijuana?
21 Not physically how do you measure it but what increments are
22 used to describe measurable marijuana?

23 A. Street values are --

24 Q. Scientific.

25 A. Grams.

TESTIMONY OF TONY BOWERS

- 1 Q. And how many grams make an ounce?
- 2 A. Twenty-eight.
- 3 Q. How do you measure powdered cocaine?
- 4 A. The same.
- 5 Q. How many grams of cocaine make an ounce?
- 6 A. Twenty-eight.
- 7 Q. From your training and experience generally speaking,
- 8 have you ever heard the phrase nickel bag?
- 9 A. Yes.
- 10 Q. What is a nickel bag?
- 11 A. It's \$5 worth of marijuana.
- 12 Q. And typically from your training and experience, how
- 13 much marijuana is represented by a nickel bag transaction?
- 14 A. Not much, it's less than a gram.
- 15 Q. What is a dime bag?
- 16 A. It's going to be about a gram or \$10.
- 17 Q. What is a quarter bag?
- 18 A. It is going to be \$25 and roughly five grams give or
- 19 take.
- 20 Q. All right. From your training and experience what do
- 21 you call -- what's a marijuana cigarette called?
- 22 A. A joint or a blunt, depending on how it's packaged.
- 23 Q. And if it's a joint, is a joint larger or smaller than
- 24 a blunt?
- 25 A. It's going to be smaller.

TESTIMONY OF TONY BOWERS

1 Q. From your training and experience, how much marijuana
2 goes into a joint?

3 A. A nickel bag, less than a gram.

4 Q. Let's talk -- I'm going to ask you some questions about
5 powdered cocaine. From your training and experience, you
6 know, I asked you about nickel bags and dime bags and
7 quarter bags, are there similar lingo for cocaine quantities
8 or transactions?

9 A. There is.

10 Q. What are they called?

11 A. You can get a 20, it's two tents of a gram for 20
12 bucks.

13 Q. What other increments?

14 A. Half gram can run you 20 bucks, whole gram can run you
15 100. You can get an eight ball, it's an eight of an ounce
16 which is three and a half grams for 180 or 220.

17 Q. 180 or \$220?

18 A. Yes, somewhere in that range.

19 Q. Going back to the composition book, was there anything
20 significant about that, that peaked your interest I guess is
21 what I'm asking?

22 A. Well, it's the name and the monetary amounts when I saw
23 it it struck me as maybe illegal drug transactions.

24 Q. When you put your hands on the composition book,
25 State's Exhibit Number 1, where was Sims?

TESTIMONY OF TONY BOWERS

- 1 A. In the driver's seat.
- 2 Q. Where was Ms. Stevens?
- 3 A. In the passenger seat.
- 4 Q. And where was McIlwaine?
- 5 A. Standing in the rear of the vehicle with Lieutenant
- 6 McLemore.
- 7 Q. After you found the ledger what if anything did you do?
- 8 A. I asked Mr. Sims if there was anything illegal in the
- 9 vehicle and could I have permission to search the car.
- 10 Q. There were three people out there, why did you ask Sims
- 11 to search the car?
- 12 A. He was the driver, he was in control of the vehicle.
- 13 Q. What did Sims say?
- 14 A. He said yes.
- 15 Q. When you asked Sims if you could search the car, where
- 16 was Sims?
- 17 A. In the driver's seat.
- 18 Q. Where was Stevens?
- 19 A. Passenger seat.
- 20 Q. Did you search part of the car?
- 21 A. I searched the back seat where Mr. McIlwaine was.
- 22 Q. Did you put your hand on anything else in the back seat
- 23 of that car?
- 24 A. Yes, I did.
- 25 Q. All right. Now, I think you're going to describe some

TESTIMONY OF TONY BOWERS

1 things, I'm going to show you some things in the minute, but
2 generally speaking, what was the condition of the back seat
3 of the car?

4 A. I think there was a jacket laying on the passenger
5 side, that's about it.

6 Q. Empty Mountain Dew cans or anything that you recall?
7 Was it trashy or was it okay?

8 A. I don't remember it being trashy.

9 Q. I'm going to hand you another piece of -- a plastic bag
10 with some stuff in it. Can you identify that item?

11 A. I can, it's a blue zipper bag.

12 Q. Where did you first see that blue zipper bag?

13 A. It was laying in the back seat of the vehicle to the
14 right of where Mr. McIlwaine was sitting.

15 Q. And where was it in relation to the composition book
16 that you recall?

17 A. The composition book was between Mr. McIlwaine and this
18 blue bag.

19 Q. Was any of the stuff under this coat that you referred
20 to?

21 A. I don't think it was, I don't remember.

22 Q. Did you put your hands on that blue bag?

23 A. I did.

24 Q. Again, I'm going to ask you to open it.

25 A. (Witness complies.)

TESTIMONY OF TONY BOWERS

1 Q. How would you describe that blue bag? Have you ever
2 seen that item before? What does it look like?

3 A. It looks like a pencil pouch for school kids.

4 Q. When you laid your hands on the blue bag did it have
5 anything in it?

6 A. It did.

7 Q. Could you see that there was stuff in it?

8 A. Yes.

9 Q. And generally speaking, describe what you saw in it.

10 A. Just what's in it now. There was a plastic bag that
11 had a white powdered substance believed to be cocaine.

12 Q. All right. Stop right there. I'm going to show you
13 this sealed up envelope and I'm not going to hand you the
14 money, can you tell me, have you ever seen that before?

15 A. Yes.

16 Q. First of all where did you first see what's in that
17 bag?

18 A. I took the contents of this bag out of this blue bag.

19 Q. Which pocket of that blue bag were the contents of
20 plastic envelope in?

21 A. It was in the large compartment.

22 Q. How can you tell these people right here that that
23 stuff in that bag is what you took out of there? Is there
24 some way to identify it?

25 A. Well, the reason I took it out is so they could be put

TESTIMONY OF TONY BOWERS

1 in a BEST kit to be sent to SLED for analysis.

2 Q. What I'm telling you is by looking at that how can you
3 tell this jury that that's from this case and it came out of
4 that blue bag?

5 A. It has the case number and the evidence number marked
6 on it.

7 Q. Now, for the jury's purposes, again, I'm not going to
8 ask you to open this, but what all is inside -- exactly what
9 inside this sealed envelope was inside that blue package?

10 A. The white powdered --

11 MR. FRICK: Your Honor, we are publishing stuff to the
12 jury that's not in evidence, we keep doing that, it's not
13 even marked for ID.

14 MR. BARFIELD: I will do that. I can't put it into
15 evidence yet because I'm not there yet. Your Honor, at this
16 time I would offer the blue pouch for identification
17 purposes as State's Exhibit Number 2, just the pouch for
18 identification.

19 THE COURT: All right, for identification.

20 Q. Don't tell me anything about it other than these
21 questions. What part of what was in -- what part of what is
22 in this evidence bag was actually in the blue pouch?

23 A. This plastic bag here that doesn't have anything in it
24 now and the contents of this plastic bag.

25 Q. All right. But not the bag that has got the little

TESTIMONY OF TONY BOWERS

1 sealed strip?

2 A. Right.

3 MR. BARFIELD: Your Honor, I would offer -- I don't
4 want to open it up, but I would offer this package as
5 State's Exhibit Number 3 for identification.

6 THE COURT: Okay, for identification.

7 Q. I'm handing you State's Exhibit Number 2 for
8 identification and I'm going to ask you a couple of
9 questions about it. Was -- other than State's Exhibit
10 Number 3 for identification, was anything else in State's
11 Number 2 for identification?

12 A. Yes, it was.

13 Q. Describe it. Describe it first, then we'll talk about
14 it.

15 A. Two plastic bags and a green leafy substance believed
16 to be marijuana.

17 Q. Are they in there now?

18 A. They are.

19 Q. Is this them?

20 A. It is.

21 Q. Are they the same size or different size?

22 A. They're different sizes.

23 Q. Again, how do you know that this is what you got out of
24 this bag today?

25 A. By the case number and evidence numbers.

TESTIMONY OF TONY BOWERS

1 MR. BARFIELD: Your Honor, I'll offer as State's 4 and
2 5 for identification these two baggies and their contents.

3 THE COURT: For identification.

4 Q. I'm handing you State's Number 2 for identification
5 which has State's 4 and 5 for identification in it. Is
6 there anything else in there that we haven't talked about in
7 that blue zipper bag?

8 A. No.

9 Q. What is that?

10 A. It's in the front pouch, there are empty sandwich bags.

11 Q. Were they in there when you seized it?

12 A. Yeah.

13 Q. How many empty sandwich bags?

14 A. Two.

15 Q. You can stick them back in there. Now, concerning the
16 current contents of State's Exhibit Number 2 for
17 identification, and specifically State's 4 and 5 for
18 identification, did you do any testing for this yourself at
19 any time, but specifically out there on the road that day?

20 A. No.

21 Q. Concerning State's Exhibit Number 3 for identification,
22 the contents of this sealed evidence bag, did you do any
23 testing out there on the road of this substance that day or
24 any time since then yourself?

25 A. No.

TESTIMONY OF TONY BOWERS

1 Q. What did you do with all of these things, State's 2, 3,
2 4 and 5 for identification including and sandwich bags which
3 aren't marked, what did you do with this stuff?

4 A. I turned it into evidence at the sheriff's office.

5 Q. When you say turned it into evidence at the sheriff's
6 office, is there somebody that you turned it in to?

7 A. No, there's an evidence lock box.

8 Q. And how do you put something into a lock box?

9 A. Basically the lock box has several compartments, each
10 individual box has a key. I place my evidence into that
11 box, lock it, take the key and put it into a mail slot on
12 the evidence door for the evidence custodian to retrieve and
13 then go get the evidence.

14 Q. Now, once you put the key into the mail slot, can you
15 get the key back?

16 A. No.

17 Q. Can anybody on the outside open that slot that you put
18 that evidence into?

19 A. No.

20 Q. Who is the evidence custodian at the Lancaster County
21 Sheriff's Office?

22 A. Ann Horton.

23 Q. Was there anything else -- did you take possession of
24 anything else from the back seat of that car?

25 A. Yes. A black zipper pouch that looks a lot like the

TESTIMONY OF TONY BOWERS

1 blue one except it was black.

2 Q. Can you identify the contents of the envelope?

3 A. That looks like the bag, yes.

4 Q. Is it open?

5 A. Yes, sir.

6 Q. When did you first seize and put your hands on that
7 item?

8 A. I found it after the blue bag.

9 Q. Where was it?

10 A. It was in the back seat laying next to the blue bag.

11 Q. Was there anything in it?

12 A. Yes, \$60 in cash.

13 Q. Do you remember the denominations?

14 A. No, sir.

15 Q. Nothing other than \$60 cash?

16 A. No, that's right.

17 MR. BARFIELD: Your Honor, I would offer the black
18 zippered bag for identification -- well, I'll offer it as an
19 exhibit, State's Exhibit Number 6.

20 THE COURT: Any objection?

21 MR. FRICK: Same objection as previously noted, I think
22 it applies to the bag as well.

23 MR. GRIER: No objection.

24 THE COURT: Overruled, I'll admit it.

25 (The black bag was received as State's 6.)

TESTIMONY OF TONY BOWERS

1 Q. What did you do after you searched the back seat of
2 that car?

3 A. I asked Mr. Sims to step out of the vehicle.

4 Q. Did he get out?

5 A. He did.

6 Q. What happened next?

7 A. I asked him if he had anything illegal on his person
8 and if he would consent to a search and he did.

9 Q. Of his person?

10 A. Of his person, yes.

11 Q. And when you say a search, how thorough a search did
12 you do of him?

13 A. Patted him down and checked his pockets.

14 Q. Did he have anything on him that he shouldn't have had
15 on him?

16 A. He did not.

17 Q. What happened next?

18 A. I asked Mr. Sims again if he would consent to search of
19 his vehicle.

20 Q. What did he say?

21 A. He said yes.

22 Q. Where out of the car is Sims when that occurred?

23 A. He is standing outside -- at this point he's standing
24 outside on the driver's door, this is when Ms. Stevens gets
25 out of the vehicle and they both go to the passenger's side

TESTIMONY OF TONY BOWERS

1 and stand with Lieutenant McLemore and Mr. McIlwaine.

2 Q. When did McIlwaine and McLemore move -- they're still
3 on the same back passenger corner of the car, is that what
4 you're saying?

5 A. Yes.

6 Q. What prompted Stevens to get out of the car?

7 A. So I could search the front of the vehicle.

8 Q. Did you ask her to or did she just get out?

9 A. I think it was both, I asked her to when she was
10 getting out of the vehicle.

11 Q. Were you interested to know if she had anything on her?

12 A. Yes.

13 Q. Did you accomplish that objective somehow?

14 A. Yes. We asked her to pull her pockets inside out, she
15 wasn't patted down or anything.

16 Q. Did she have anything on her that she shouldn't have?

17 A. No.

18 Q. What did you do next -- well, let me interrupt you and
19 ask you this question, is McIlwaine arrested for the drugs
20 in the back seat at some point?

21 A. Yes.

22 Q. When Sims got out of the car was he arrested?

23 A. No.

24 Q. When Stevens got out of the car, was she arrested?

25 A. No.

TESTIMONY OF TONY BOWERS

1 Q. Did you search the front of the car?

2 A. I did.

3 Q. Where were McIlwaine, Sims and Stevens when that was
4 going on?

5 A. They were on the rear passenger side of the vehicle
6 standing with Lieutenant McLemore.

7 Q. At any time during the search, were either Sims or
8 Stevens arrested and handcuffed?

9 A. Not during the search, no.

10 Q. Describe the search of the front part of the car.

11 A. We searched the front of the vehicle and in the console
12 between the seats there were located two bags of marijuana,
13 a set of digital scales and \$320 in cash.

14 Q. Describe the console. First of all, is this a bucket
15 seat car or a bench seat front seat?

16 A. I think it had two bucket seats up front with the
17 center console either raised open or flipped open.

18 Q. Was there a lid on the console?

19 A. Yes.

20 Q. Did you search underneath inside the conceal underneath
21 the lid?

22 A. Yes.

23 Q. The stuff you just said you found, is that where it
24 was?

25 A. It was.

TESTIMONY OF TONY BOWERS

1 Q. Now, I'm going to show you this bag. Can you
2 identify -- have you ever seen that before?

3 A. Yes.

4 Q. What is that?

5 A. This would be the two bags of green leafy substance
6 believed to be marijuana that was located in the console.

7 Q. Again, did you do any testing of it out there in the
8 field?

9 A. I did not.

10 Q. Did you ever do any testing of it yourself?

11 A. No.

12 Q. How big of a console area was this underneath that lid?

13 A. It's not very big, maybe four or five inches wide, a
14 foot long.

15 Q. How were those bags -- first of all the bag with the
16 red trim at the top, is that a law enforcement bag, the
17 outer bag?

18 A. The outer bag is, yes.

19 Q. How were the two inner bags in the console now?

20 A. As they are now.

21 Q. Were they in anything else?

22 A. No.

23 MR. BARFIELD: Your Honor, at this time I would offer
24 this sealed bag as State's 7 I think for identification.

25 THE COURT: For identification.

TESTIMONY OF TONY BOWERS

- 1 Q. I'm going to show you another sealed bag and ask you if
2 you can identify what's in it.
- 3 A. I can.
- 4 Q. What is that generally speaking?
- 5 A. That's a set of digital scales.
- 6 Q. Where did you first see that item?
- 7 A. It was in the console.
- 8 Q. Where in relation to the two bags that you believed to
9 be marijuana, State's Number 7 for identification?
- 10 A. They were together in the console.
- 11 Q. Are you familiar with the operation of digital scales?
- 12 A. I am.
- 13 Q. Do you use them in your work?
- 14 A. I do.
- 15 Q. What do you use them for?
- 16 A. Once we make an illegal drugs case I weigh the drugs so
17 I can put the amount in my report.
- 18 Q. Do you use a scale to weigh the stuff we have been
19 talking about this afternoon?
- 20 A. Yes.
- 21 Q. How does that scale work?
- 22 A. You can turn it on, you can tear it out, you can --
- 23 Q. You can what?
- 24 A. Zero it out and you can choose grams or ounces.
- 25 Q. Is it battery operated or solar operated or --

TESTIMONY OF TONY BOWERS

1 A. Battery powered.

2 Q. Do you know if that still has got battery power in it?

3 A. It does.

4 Q. What increments -- if you're doing ounces what
5 increment will it measure?

6 A. It was set on grams but it will measure ounces. It
7 does like one point and take it out in digits.

8 Q. Okay.

9 MR. BARFIELD: Your Honor, I would offer the scales as
10 State's Number 8.

11 MR. FRICK: Same objection as pretrial motion.

12 MR. GRIER: None.

13 THE COURT: Okay. Overruled, I'll admit it.

14 (The digital scale was received as State's 8.)

15 Q. You said you found money in the console too.

16 A. Yes.

17 Q. How much money?

18 A. \$320.

19 Q. American currency?

20 A. Yes.

21 Q. Do you remember how it was in the console?

22 A. It was all together folded in the console.

23 Q. Was it in any kind of container?

24 A. No.

25 Q. Was it rubber-banded or money clipped or anything?

TESTIMONY OF TONY BOWERS

- 1 A. I don't remember it being rubber-banded.
- 2 Q. Where was it in relation to the two bags of suspected
3 marijuana and the scales?
- 4 A. It was all together.
- 5 Q. Okay. What is the significance to you based on your
6 training and experience of digital scales being in that
7 console with the other items that you took out of the
8 console?
- 9 A. Digital scales being present indicates to me that the
10 drugs were being sold. They're used by dealers to make sure
11 the amounts are correct that they're giving to their
12 customers.
- 13 Q. At some point -- you told us McIlwaine got arrested and
14 charged with the drugs, at some point did anybody else get
15 arrested and charged with drugs?
- 16 A. Yes.
- 17 Q. Who?
- 18 A. Matthew Sims.
- 19 Q. How did that happen? How did he know he was arrested?
- 20 A. He was told he was under arrest. After the marijuana
21 was found in the console he was handcuffed behind his back.
- 22 Q. Was he searched after he was handcuffed?
- 23 A. I believe he was patted down again.
- 24 Q. Was anything taken off him at any point off his person?
- 25 A. No.

TESTIMONY OF TONY BOWERS

1 Q. I'm going to ask you that again, was anything taken off
2 Sims person?

3 A. No, it wasn't.

4 Q. Was any other money recovered during this event?

5 A. Yes.

6 Q. What?

7 A. \$71 was taken off Sims out of his pocket.

8 Q. Do you remember which pocket?

9 A. I don't.

10 Q. That's fine. Was it in a billfold or was it lose
11 money?

12 A. It was lose.

13 Q. Did Stevens ever get arrested?

14 A. No.

15 Q. What did Stevens do -- how did this event clear up, end
16 up?

17 A. We verified Stevens had a driver's license and we
18 allowed her to take the vehicle from the scene.

19 Q. That evening did you know whose car it was?

20 A. When I initially stopped the vehicle I ran the license
21 plate.

22 Q. And was that name one of three people that were there
23 with you on the scene?

24 A. No, it wasn't.

25 Q. Did Stevens get charged with anything?

TESTIMONY OF TONY BOWERS

1 A. No.

2 Q. At any time between your seizure of all of these items
3 we have marked as either exhibits or exhibits for
4 identification purposes, did you alter anything, change
5 anything, manipulate anything?

6 A. No.

7 MR. BARFIELD: Thank you. Answer anything Mr. Frick or
8 Mr. Grier may have.

9 CROSS EXAMINATION

10 BY MR. FRICK:

11 Q. You pulled the car over because the taillight is out.

12 A. Brake lights.

13 Q. Brake lights. Didn't notice anything else, weren't
14 pulling it over for any other reason.

15 A. No, sir.

16 Q. We get to the search of the car and you see -- first of
17 all you've got -- Mr. McIlwaine is out of the car, right?

18 A. That's right.

19 Q. You don't see State's Number 1 until he is out of the
20 car.

21 A. That's right.

22 Q. Were you there by yourself when he's out of the car?

23 A. No, Lieutenant McLemore is with him.

24 Q. Were there any other vehicles backing y'all up at that
25 time?

TESTIMONY OF TONY BOWERS

- 1 A. No.
- 2 Q. Did anybody else come to back y'all up at that time?
- 3 A. No.
- 4 Q. So y'all were the only two out there.
- 5 A. That's right.
- 6 Q. Three people in the car, one standing outside of the
- 7 car and you're able to read that notebook while it's laying
- 8 on the car seat.
- 9 A. Yes, sir.
- 10 Q. What did it say?
- 11 A. I could see names and monetary amounts on there.
- 12 Q. What were their names?
- 13 A. I think one says Kim, one says Joel, one says Shaggy.
- 14 Q. Okay. How far away were you? Stop me when I get
- 15 there.
- 16 A. I'm not sure laying on the seat, I was standing
- 17 outside. Closer.
- 18 Q. Tell me.
- 19 A. Right about there.
- 20 Q. Right about there. And you've got a guy standing
- 21 outside of the car and two people sitting in the car, you
- 22 and one other officer and you're focusing on a notebook?
- 23 A. Yes, sir.
- 24 Q. And this is the page it's on?
- 25 A. That's right.

TESTIMONY OF TONY BOWERS

- 1 Q. And I think you said you didn't know who these people
2 were.
- 3 A. Not right offhand, no.
- 4 Q. Did you look at any other pages?
- 5 A. I didn't.
- 6 Q. In anywhere in this notebook does it say Derrick
7 McIlwaine?
- 8 A. Not that I recall.
- 9 Q. What else was in the back seat? And I know you're
10 going to tell me the drugs and I understand that, what else
11 was in the back seat?
- 12 A. There was a jacket laying in the back seat.
- 13 Q. Whose jacket was it?
- 14 A. I'm not sure.
- 15 Q. Did you check the jacket?
- 16 A. I did.
- 17 Q. What was in the jacket?
- 18 A. Nothing.
- 19 Q. Nothing in the jacket. Okay. The blue -- was this the
20 one you said, this State's Number 2, was that one of the
21 things that you said was in the back seat?
- 22 A. It was.
- 23 Q. Where? Whereabouts?
- 24 A. It was laying to the right of Mr. McIlwaine on the
25 other side of the little notepad.

TESTIMONY OF TONY BOWERS

- 1 Q. Something like that?
- 2 A. Basically, the blue side was up.
- 3 Q. Where is the jacket?
- 4 A. It's on the passenger side, it's there.
- 5 Q. The little black baggy, where was it?
- 6 A. It was laying next to the blue bag.
- 7 Q. Next to the blue bag. So he's got his notebook, he's
- 8 got a blue baggy, black baggy and jacket all sitting beside
- 9 him.
- 10 A. Yes, sir.
- 11 Q. That's all that was in the car.
- 12 A. That's it.
- 13 Q. No McDonald's baggies laying in the floor or anything
- 14 like that?
- 15 A. No.
- 16 Q. Did you photograph anything?
- 17 A. No.
- 18 Q. All of these other items here, do we have any other
- 19 forensics, DNA, fingerprints, anything?
- 20 A. No.
- 21 Q. Now, these two larger baggies of marijuana, you found
- 22 them where?
- 23 A. Console.
- 24 Q. You found some cash in the console?
- 25 A. Yes.

TESTIMONY OF TONY BOWERS

- 1 Q. How much?
- 2 A. 320.
- 3 Q. You found cash on Mr. Sims?
- 4 A. Yes.
- 5 Q. What did you find on Mr. McIlwaine?
- 6 A. Nothing.
- 7 Q. Ms. Stevens was not searched?
- 8 A. No. She was not pat-down searched, she was asked to
- 9 pull her pockets out.
- 10 Q. She just pulled her pocket out, that was it.
- 11 A. Basically, yes, sir.
- 12 Q. But no determination whether she had anything else on
- 13 her anywhere?
- 14 A. We were satisfied she had nothing else on her.
- 15 Q. Okay. These two pens, those were on there too?
- 16 A. Yes, sir.
- 17 Q. And this is the ledger of drug transactions you were
- 18 talking about.
- 19 A. Yes, sir.
- 20 Q. This is what peaked your interest to go further in the
- 21 vehicle.
- 22 A. It did.
- 23 Q. If you had not seen this what would have happened?
- 24 A. I don't know because I saw it.
- 25 Q. Well, I mean, anything else spark your interest?

TESTIMONY OF TONY BOWERS

1 A. No.

2 Q. Okay. So conceivably to say you don't see this
3 notebook we're not standing here today.

4 A. Potentially.

5 MR. FRICK: Beg the Court's indulgence one moment.

6 THE COURT: All right, sir.

7 (Break in proceedings.)

8 MR. FRICK: Thank you, sir. That's all of the
9 questions I have.

10 THE COURT: Mr. Grier?

11 CROSS EXAMINATION

12 BY MR. GRIER:

13 Q. Officer Bowers, did my client make a statement that day
14 to you about the ownership of the drugs by him?

15 A. He did.

16 Q. After you searched the vehicle you found two bags,
17 20 grams and 28 grams in the console?

18 A. That's right.

19 Q. My client claimed possession of those, didn't he?

20 A. He did.

21 Q. And you found a set of scales in the console.

22 A. That's right.

23 Q. Is this it?

24 A. It is.

25 Q. I can buy these for 20 bucks, can't I, at Wal-Mart?

TESTIMONY OF TONY BOWERS

1 A. Yes, sir.

2 Q. Cheap. When I want to buy marijuana do I want to know
3 how much I'm buying for personal use as well as selling?

4 A. Possibly, yes.

5 Q. It's just as likely if I'm buying I want to make sure
6 I'm buying the right amount of weed, I'm not getting screwed
7 by the dealer, right?

8 A. I guess potentially, yes.

9 Q. And so I understand that's considered indicia for
10 charging somebody with PWID.

11 A. That's correct.

12 Q. That's something you can use but it doesn't mean any
13 more as evidence of a buyer with 48 grams of marijuana than
14 it does to be a seller, does it?

15 A. The charge of PWID is also based on the weight of the
16 illegal drugs and possession of the scales.

17 Q. Yeah. If it is over 28 grams you can charge with PWID.

18 A. That's right.

19 Q. But if you would have found 28 grams only you wouldn't
20 have had -- and if you would have found this you would have
21 still been able to charge with PWID, wouldn't you?

22 A. That's right.

23 Q. And if you would have found two grams or one gram of
24 marijuana, we're just talking about marijuana, right, no
25 cocaine found in the console, but if you found two grams of

TESTIMONY OF TONY BOWERS

1 marijuana and this scale you could charge somebody with
2 possession with intent to distribute based on the scales.

3 A. You could. But normally if the marijuana is in
4 separate packages that's also indicative of possession with
5 intent to distribute.

6 Q. If they were in separate packages, yes, you probably
7 would charge them.

8 A. That's right.

9 Q. If it wasn't in separate packages you probably wouldn't
10 charge them?

11 A. If it was a gram probably not, it would just be
12 possession.

13 Q. But you could.

14 A. Yes.

15 Q. Mr. Sims said, "This is my marijuana."

16 A. That's right.

17 Q. Is it open?

18 A. No, we didn't open it.

19 MR. GRIER: Your Honor, I would like to open it and ask
20 him about it -- I need to ask him something about the -- I
21 need to have the solicitor's knife, I believe, to do that.

22 THE COURT: Any objection to that, Mr. Frick?

23 MR. FRICK: No. Him opening that? No, sir, I don't
24 believe so.

25 Q. All right. Officer Bowers, I want you to examine these

TESTIMONY OF TONY BOWERS

- 1 two different bags.
- 2 A. Okay.
- 3 Q. Just generally the constitution of the marijuana --
- 4 don't they appear to be different types of marijuana?
- 5 A. It's very possible, there's hundreds if not thousands
- 6 of strands of marijuana.
- 7 Q. Can you distinguish -- if I put those two, the same
- 8 amount, don't you think you could distinguish between those
- 9 two different types of marijuana?
- 10 A. No.
- 11 Q. You don't think you could?
- 12 A. No.
- 13 Q. You don't see any difference in the texture?
- 14 A. No. One appears to be ground up finer than the other,
- 15 that doesn't make it a different strand of marijuana.
- 16 Q. Well, does that bag not look lighter colored than that
- 17 bag to you, the marijuana?
- 18 A. Yeah, sure.
- 19 Q. Excuse me. That marijuana looks lighter in color than
- 20 that?
- 21 A. It does.
- 22 Q. Wouldn't that suggest that it might be different kinds
- 23 to you?
- 24 A. I don't know.
- 25 Q. Mr. Sims was cooperative, wasn't he?

TESTIMONY OF TONY BOWERS

- 1 A. Yes, sir.
- 2 Q. He didn't give you any trouble?
- 3 A. No, sir.
- 4 Q. He gave you consent to search?
- 5 A. That's right.
- 6 Q. Didn't do anything to suggest that he was going to be
- 7 any problem for you.
- 8 A. That's right.
- 9 Q. Now, didn't he tell you -- is the money here, the cash?
- 10 A. I didn't bring it.
- 11 Q. Didn't he tell you that the cash was for -- to pay a
- 12 power bill?
- 13 A. I'm not sure.
- 14 MR. BARFIELD: Your Honor, I apologize, I can't hear.
- 15 THE COURT: I couldn't hear the question.
- 16 Q. I said didn't Mr. Sims tell you that the money was to
- 17 pay a power bill?
- 18 A. It could have been.
- 19 Q. Approximately -- I think you said a joint is about a
- 20 gram typically?
- 21 A. I would said roughly, maybe little less or more.
- 22 Q. So typically 28 grams would be --
- 23 A. An ounce.
- 24 Q. It would always be an ounce, wouldn't it? But
- 25 typically that would be 28 joints, an ounce would be about

TESTIMONY OF TONY BOWERS

1 28 joints, maybe slightly more?

2 A. I guess potentially it could be.

3 Q. And for personal use you would typically smoke joints,
4 the users -- in your training, you have been trained that
5 users have a particular pattern?

6 A. Different users smoke different amount based on the THC
7 content of the marijuana.

8 Q. So a heavy marijuana user would certainly go through an
9 ounce of weed possibly in less than a week, a few days or --
10

11 A. I guess potentially, yes.

12 Q. If I was buying weed and most typically if I was buying
13 for personal use I would buy an ounce, would you say that is
14 the most common?

15 A. No, sir.

16 Q. No?

17 A. Most controlled buys we conduct were on dime bags or
18 quarter bags.

19 Q. Is that right?

20 A. Yes, sir.

21 Q. But if I -- I mean, the most typical units you see are
22 dime, quarter you say?

23 A. Yes.

24 Q. Controlled buys? The next most common unit then
25 becomes an ounce probably?

TESTIMONY OF TONY BOWERS

- 1 A. Quarter ounce, half ounce on up.
- 2 Q. On up to an ounce. Okay. Beyond an ounce we're
- 3 looking at most commonly quarter pounds?
- 4 A. No. It could be two ounces or three ounces, anywhere
- 5 in between.
- 6 Q. So there's really no hard and fast rule about the
- 7 quantity and the way that it's either sold or consumed?
- 8 A. That's right. The only rule I know about is the
- 9 28 grams infers possession with intent to distribute.
- 10 Q. It infers it.
- 11 A. That's right.
- 12 Q. That means you can charge somebody.
- 13 A. That's right.
- 14 Q. But you've got to prove it. All right. Now, you said
- 15 this was set to grams?
- 16 A. When I turned it on just now it was set on grams.
- 17 Q. Is that the condition you found it in?
- 18 A. Yes.
- 19 Q. So when you got it it was set to grams?
- 20 A. Yes, sir.
- 21 Q. When you got it from the console it was set to grams?
- 22 A. It was set so grams now, I assume it was.
- 23 Q. You hadn't changed it or done anything to it that you
- 24 know of?
- 25 A. No.

TESTIMONY OF TONY BOWERS

1 Q. Were these pens found in there like this or was it just
2 set to keep it open? These pens were found in this book
3 like this?

4 A. They were what was holding it open in the back seat,
5 yes, sir.

6 Q. Destiny Christian Church. I think you described this
7 console in that vehicle as being eight inches wide maybe.

8 A. I think I said four or five.

9 Q. So all of this stuff was just in the console?

10 A. Yes.

11 Q. But, I mean, it wasn't like it was organized in any
12 kind of manner or anything, do you remember the order of
13 what was found where?

14 A. I don't.

15 Q. The money was in an envelope?

16 A. No, it was lose in the console.

17 Q. It was lose just laying around?

18 A. Folded in half laying in the console.

19 MR. GRIER: Thank you.

20 THE COURT: Redirect?

21 MR. BARFIELD: Just a couple.

22 REDIRECT EXAMINATION

23 BY MR. BARFIELD:

24 Q. Did you find any -- Mr. Grier asked you if Sims said
25 the money was to pay a power bill. Do you recall whether he

TESTIMONY OF TONY BOWERS

1 said that or not?

2 A. I don't recall if he did or not.

3 Q. Did you find any power bills or any other bills laying
4 around in the car?

5 A. No.

6 Q. If you're going to have more than an ounce and you want
7 to know how much you've got, what do you set it on?

8 A. You can set it on ounces or grams.

9 Q. If you want to take one ounce and divide it up, what
10 can you set it on?

11 A. Grams.

12 MR. BARFIELD: Thank you, that's all.

13 RECROSS EXAMINATION

14 BY MR. FRICK:

15 Q. So you don't know whether Mr. Sims was claiming the
16 money that was in the black bag in the back seat or not.

17 A. I don't know.

18 Q. You don't say it is but you don't dispute that either.
19 You can't say whether or not the money in the back seat in
20 the black bag -- isn't that what it was in, was it in the
21 black bag?

22 A. Yes.

23 Q. The money in the black bag in the back seat was to go
24 pay his power bill.

25 A. No, I don't know whose it was.

TESTIMONY OF TONY BOWERS

1 MR. FRICK: Okay. Thank you.

2 THE COURT: Thank you, sir, you may step down.

3 MR. BARFIELD: Nothing else from this witness. I call
4 Ann Horton.

5 MR. FRICK: Could we have a break, Your Honor? I kind
6 of need a break.

7 THE COURT: Let's take a short break, ladies and
8 gentlemen, I ask you to retire to the jury room, be with you
9 shortly.

10 (A recess was taken.)

11 MR. BARFIELD: Call Ryan McLemore.

12 The witness, RYAN MCLEMORE, was first duly
13 sworn and testified as follows, on:

14 DIRECT EXAMINATION

15 BY MR. BARFIELD:

16 Q. State your name, please.

17 A. Ryan McLemore.

18 Q. And you're a lieutenant with the sheriff's office?

19 A. I am.

20 Q. How long have you been employed by the sheriff's
21 office?

22 A. I've been with the sheriff's office a little over 15
23 years.

24 Q. What do you currently do with the sheriff's office?

25 A. I supervise the narcotics unit.

TESTIMONY OF RYAN MCLEMORE

1 Q. How long have you been on the narcotics unit?

2 A. A brief period from 1999 to 2000, and then 2000 to
3 present.

4 Q. Are you -- how long have you been the supervisor of the
5 narcotics unit?

6 A. About five and a half years.

7 Q. Were you involved as a backup officer to Tony Bowers on
8 the car stop that occurred on 12th Street involving
9 defendants McIlwaine and Sims and passenger Stevens on 10/22
10 of '11?

11 A. Yes, I was.

12 Q. What were you driving back then?

13 A. Back then I had a 2010 black Ford F150 pickup truck
14 four-wheel drive.

15 Q. Was it marked so that the public would know it was a
16 police vehicle?

17 A. No, it was not.

18 Q. Did it have police equipment in it like Officer Bowers
19 says his vehicle had?

20 A. Yes, it did.

21 Q. Did you at any time while it was moving see this car on
22 the highway that Tony Bowers had stopped?

23 A. While it was moving, no.

24 Q. Did you become aware that he had a traffic stop that he
25 was initiating?

TESTIMONY OF RYAN MCLEMORE

1 A. I did.

2 Q. Were you and he talking directly on the radio or were
3 you just listening to his communication with the sheriff's
4 office dispatch system?

5 A. Had he told me directly on a private channel radio that
6 he was following a vehicle and that he was going to stop it.

7 Q. And how long did it take you to get to his location?

8 A. I'm guessing maybe five minutes or so.

9 Q. Did you -- what did you do when you first -- where was
10 Tony Bowers when you first got there?

11 A. He was up next to the vehicle speaking with the
12 occupants and looked like he was -- the time I pulled up he
13 was about to leave the car like he was fixin' to walk back
14 to his vehicle.

15 Q. Did you and he talk?

16 A. We did.

17 Q. What did you do as he started to write his warning
18 ticket?

19 A. I stood by with the vehicle, occupants of the vehicle.

20 Q. Was anybody out while you were standing by initially?

21 A. Not initially.

22 Q. Were you present when Derrick McIlwaine got out of the
23 car?

24 A. I was.

25 Q. What was your responsibility from the point Derrick

TESTIMONY OF RYAN MCLEMORE

1 McIlwaine got out of the car?

2 A. He was my responsibility, I was watching him at that
3 time.

4 Q. Were you present when Tony Bowers had conversations
5 with Sims about searching the car?

6 A. I was.

7 Q. How did that transpire?

8 A. I heard Investigators Bowers ask Mr. Sims for
9 permission to search the vehicle and it was granted by
10 Mr. Sims.

11 Q. Any hesitancy at all on Mr. Sims' part to say Bowers
12 could search?

13 A. No, sir.

14 Q. Did you participate in the search of the back part of
15 the car yourself?

16 A. No, sir. I stood by with Mr. McIlwaine at the rear of
17 the vehicle.

18 Q. Did you at any time before Tony Bowers took possession
19 of the stuff see any of this stuff?

20 A. I saw the notebook and stuff lying in the back seat
21 just briefly as I was speaking with Mr. McIlwaine.

22 Q. Okay. Were you present when -- well, did you see Tony
23 Bowers come out of that car with this stuff?

24 A. I did.

25 Q. What happened after Tony Bowers came out of the car

TESTIMONY OF RYAN MCLEMORE

1 with these items which have been marked either as exhibits
2 or for identification purposes?

3 A. An arrest was made.

4 Q. Of McIlwaine?

5 A. Of McIlwaine.

6 Q. Did you hear any further conversation between Tony
7 Bowers and Matthew Sims?

8 A. I did hear some conversation. I was dealing with
9 Mr. McIlwaine at that time, I did not hear the exact words
10 or could tell you exactly what was said in that conversation
11 although I know there was some conversation.

12 Q. Where was Sims when that conversation was going on?

13 A. I'm thinking he was out of the car by then.

14 Q. Where was Ms. Stevens when that conversation was going
15 on?

16 A. I think she still may have been in the car. Like I
17 said, I was with Mr. McIlwaine at the rear of the car.

18 Q. When you say rear, which side of the rear of the car?

19 A. It was kind of towards the driver's side, the rear
20 bumper trunk area.

21 Q. Did Ms. Stevens get out of the car?

22 A. She did.

23 Q. Do you know what prompted her to get out of the car?

24 You didn't ask her.

25 A. No.

TESTIMONY OF RYAN MCLEMORE

1 Q. Was there anything -- was she of any concern to you as
2 a drug enforcement officer during this stop?

3 A. She wasn't.

4 Q. Did anything occur to make you conclude that?

5 A. I think she was questioned or checked by someone, I'm
6 not real sure.

7 Q. When McIlwaine is out of the car and now Sims is out of
8 the car and now Stevens is out of the car, what is your
9 responsibility during the conclusion of this traffic stop?

10 A. I still continued to stand by with Mr. McIlwaine.

11 Q. And where were Sims and Stevens at this point?

12 A. They were back at the rear of the vehicle with me and I
13 was kind of watching while the other officer was searching
14 the vehicle.

15 Q. Close enough to be in a huddle sort of or spread out?

16 A. Yeah..

17 Q. Did you participate in the search of the front part of
18 the car by Tony Bowers?

19 A. I didn't.

20 Q. Did you see anything in the front of the car before he
21 came out with the stuff?

22 A. I didn't.

23 Q. Did you at any time have responsibility for securing
24 any of these items of evidence that are either exhibits or
25 marked for identification purposes?

TESTIMONY OF RYAN MCLEMORE

1 A. No, sir, I didn't.

2 Q. Did you do any field testing or any kind of scientific
3 testing on any of that stuff?

4 A. I did not.

5 MR. BARFIELD: Thank you, sir. Answer anything
6 Mr. Frick and Mr. Grier have.

7 CROSS EXAMINATION

8 BY MR. FRICK:

9 Q. You didn't conduct any search of the car?

10 A. Of the car itself?

11 Q. Yes, sir.

12 A. No.

13 Q. Anybody?

14 A. I may have helped pat some down, as far as actually
15 searching, no.

16 Q. But as far as just this little pat down search, did you
17 do that?

18 A. Yes.

19 Q. Who did you pat?

20 A. I patted Mr. McIlwaine because I ended up transporting
21 him and anybody I transport I need to know if they've been
22 searched or not.

23 Q. Did you find anything on him?

24 A. No.

25 MR. FRICK: Thank you, no questions.

TESTIMONY OF RYAN MCLEMORE

1 CROSS EXAMINATION

2 BY MR. GRIER:

3 Q. Did you hear my client make a statement claiming
4 marijuana?

5 A. When the conversation at that point was up toward the
6 front of the car and I was at the rear I did hear a
7 conversation, what exactly occurred in that conversation I
8 could not testify to.

9 Q. So you don't know.

10 A. I knew there was a conversation, but no, sir, I can't
11 say what he exactly said.

12 Q. Fair enough.

13 MR. GRIER: Thank you.

14 MR. BARFIELD: That's all.

15 THE COURT: Thank you, sir, you may step down.

16 MR. BARFIELD: The State calls Ann Horton.

17 The witness, ANN HORTON, was first duly sworn
18 and testified as follows, on:

19 DIRECT EXAMINATION

20 BY MR. BARFIELD:

21 Q. Tell us your name, please, ma'am.

22 A. My name is Ann Horton.

23 Q. Ms. Horton, by whom are you employed?

24 A. Lancaster County Sheriff's Office.

25 Q. What is your job at the Lancaster County Sheriff's

TESTIMONY OF ANN HORTON

1 Office?

2 A. I'm the evidence custodian.

3 Q. And what does that mean? Tell these people what that
4 means that you are the evidence custodian at the sheriff's
5 office.

6 A. Any evidence that's brought in by an officer would
7 be -- would go through me. We keep a chain of custody of
8 any type evidence that comes in, and if they come in through
9 the night when I'm not there it goes into a locker, I
10 believe you heard them discuss that before, and I have the
11 keys to those lockers and I'm the one that it goes through
12 after that. I keep all of that.

13 Q. Okay. Tony Bowers described -- I can't remember how he
14 described the slot, he takes a key, opens something up,
15 sticks something in, shuts it back, locks it and puts a key
16 to the mail slot.

17 A. Yes.

18 Q. What do you call the hole in the wall that he sticks
19 something into? What do you call that?

20 A. We call it a drop box, but it is a metal door with a
21 box on the other side that the key goes in so that no one
22 can put their arm in it or anything, it's secured there.

23 Q. When you go inside what do you call it, the evidence
24 room? What do you call it out there right now, the place
25 that you worked from?

TESTIMONY OF ANN HORTON

1 A. The evidence room.

2 Q. When you go inside what are you looking at on the other
3 side of the wall from where somebody has dropped something
4 in?

5 A. Okay. I actually -- I have a key that I go in that
6 evidence room and then it's an acrylic box that drops down
7 low enough so that you can't get your hand in it, I open it
8 and retrieve the key from it.

9 Q. Is that system secure?

10 A. Yes, it is.

11 Q. Can anybody get anything out of it without you and a
12 key?

13 A. No. And there's also a locked door.

14 Q. As evidence custodian for the sheriff's office or as
15 part of your job for the sheriff's office, do you have any
16 training concerning examining and analysis for substances
17 believed to be marijuana?

18 A. I do. Through the South Carolina Law Enforcement
19 Division I have a certification.

20 Q. All right. When did you get certified?

21 A. In September of 2009.

22 Q. And what did you have to do -- is the South Carolina
23 Law Enforcement Division SLED?

24 A. Yes.

25 Q. What did you have to do to get certified by SLED to

TESTIMONY OF ANN HORTON

1 analyze substances suspected to be marijuana?

2 A. Initially you go through a two day class of learning
3 how to measure and learning what marijuana is and what we're
4 looking for. There are two types of analysis, we do
5 chemical and we do a visual analysis on the microscope, you
6 have to learn to do both of those. And then we take a
7 written test and a test of analyzing 100 samples which you
8 must receive 100 percent on that.

9 Q. This is kind of a trick question maybe, but of the 100
10 samples, are some of them not marijuana when you're taking
11 your training?

12 A. Sure they are, yeah, some are not.

13 Q. How did you do in your course?

14 A. You have to make 100 percent to be certified, I am
15 certified.

16 Q. Did you make 100 percent and get certified?

17 A. Yes, sir.

18 Q. Initial certification in '09?

19 A. Then we have to recertify which I did that last August.

20 Q. So are you current with your certification of a
21 marijuana analyst right now?

22 A. Yes, sir, I am.

23 Q. You've got a little less than three years to -- have a
24 little less than three until you've got to get certified
25 again; is that right?

TESTIMONY OF ANN HORTON

1 A. I just got recertified in August, that's correct.

2 Q. I'm going to show you some stuff. And some of it the
3 original packing was off, but let me just ask you this
4 generally. You've been in the courtroom while we've been
5 bantering around with all of this stuff, did you bring all
6 of this stuff here today?

7 A. Yes, sir, I did.

8 Q. Now, it was in different envelopes and bags and some of
9 it was sealed up; is that correct?

10 A. That's correct.

11 Q. Where did you get your hands on this stuff today to
12 bring it here?

13 A. From our evidence locker where Investigator Bowers left
14 it, I unlocked it and received it.

15 Q. Now, did you have a need to examine it in the course of
16 bringing it here today, not analysis of anything but just to
17 look at it to make sure everything is there?

18 A. Yes. Everything is given a number, the case number and
19 then each individual item is given a number, it's stored
20 that way so when I'm called to come to court I can print out
21 exactly the amount of evidence I have, their individual
22 evidence numbers and bring them to court.

23 Q. Is everything in this case accounted for?

24 A. Yes, sir, it is.

25 Q. All right. This blue zippered pouch that's labeled

TESTIMONY OF ANN HORTON

1 State's Exhibit Number 2 for identification, is that one of
2 the things you brought here today?

3 A. Yes.

4 Q. Inside it are State's Exhibit Numbers -- let me back
5 up. Inside this sealed pouch is the -- the sealed pouch is
6 labeled State's Exhibit Number 3, can you identify that?

7 A. Yes, sir, I can.

8 Q. Is that one of the things you brought here today?

9 A. I did.

10 Q. These two baggies are marked as State's Exhibits 4 and
11 5 for identification. Can you identify them?

12 A. Yes, I can.

13 Q. Are those items that you brought here today?

14 A. Yes, they are.

15 Q. State's Exhibit Number 7 for identification purposes
16 has been manipulated and opened, and can you identify the
17 stuff in that envelope?

18 A. Yes, I did.

19 Q. Is that associated with this case?

20 A. Yes, it is.

21 Q. Did you bring them here today?

22 A. Yes, I did.

23 Q. Before we started busting stuff open when you brought
24 them here today was everything still sealed up?

25 A. Yes, it was.

TESTIMONY OF ANN HORTON

1 Q. Was it sealed up when you got it, some of it? Was
2 everything sealed up when you got it?

3 A. All of it was sealed up.

4 Q. In the course of your work, did you have to open some
5 of it up?

6 A. Yes, I did.

7 Q. With regard to State's Exhibit Number 3 for
8 identification, did it ever take a road trip from the
9 Lancaster County Sheriff's Office?

10 A. It did.

11 Q. Where did it go?

12 A. When I received it I do not do any analysis on anything
13 but marijuana, it goes to the South Carolina Law Enforcement
14 Division to be chemically analyzed.

15 Q. How did this State's Exhibit Number 3, the stuff in
16 this envelope, get to SLED?

17 A. I took it.

18 Q. How do you know that -- how do they know that? Have
19 you got records of that?

20 A. Yes, we do. And SLED also signs it in and signs for it
21 and they do a chain of custody there.

22 Q. Was this sealed when you got it from the drop box at
23 the sheriff's office after the case first got made?

24 A. Yes, it was, it was in a BEST kit.

25 Q. Did you put it in anything else yourself or did you

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1 leave it like that?

2 A. I have to leave it like that.

3 Q. Did it remain sealed while it was in your care and
4 control?

5 A. It did.

6 Q. Was it sealed when you got it to SLED?

7 A. Yes, it was.

8 MR. BARFIELD: Your Honor, at this time I think I'm
9 correct that State's 2 is still for identification only, the
10 blue zippered pouch, I would offer it as State's Exhibit
11 Number 2 if I have not already done that.

12 MR. FRICK: Same objection as previously noted by
13 pretrial motions.

14 THE COURT: Objection noted. Court admits the exhibit.

15 (The blue pouch was received as State's 2.)

16 Q. All right. Tell the jury just a little bit about --
17 you said a minute ago you were training to be a marijuana --
18 back up.

19 MR. BARFIELD: Your Honor, at this time I would offer
20 Ms. Horton as an expert in marijuana analysis.

21 MR. FRICK: No objection.

22 MR. GRIER: No objection.

23 THE COURT: The motion is granted, she is so qualified.
24 Ladies and gentlemen, just briefly, this witness has been
25 qualified as an expert witness. Expert witnesses are

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1 typically qualified by a Court to offer an opinion about
2 matters within their area of expertise. Normally witnesses
3 are not permitted to just offer their opinion about things,
4 they're required to testify about what they know, what
5 they've seen, what they've smelled or what they've heard
6 except for the expert witness. Go ahead, Solicitor.

7 Q. You testified a minute ago that in your training there
8 are two basic tests, a visual and chemical. When you
9 analyze something that's suspected to be marijuana which one
10 do you do first?

11 A. I do the microscopic test first.

12 Q. All right. Now, when you -- in this case we have got
13 four bags of suspected marijuana, do you maintain the
14 evidence in the form that it comes to you and take some out
15 of each one or what do you do?

16 A. I would take one of the bags and the very first thing I
17 do is weight, I weigh usually in grams for amounts in the
18 size.

19 Q. What do you use to weigh it on?

20 A. I use an electronic scale.

21 Q. Bigger and better than that?

22 A. Yes, much better. I have to calibrate those scales, I
23 actually have weights that everyday that I do marijuana
24 analysis I recheck that scale to make sure that it's showing
25 the proper weights. After I weigh it --

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1 Q. You weigh it before you do any testing?

2 A. I weigh it before I do any testing. Then I do a
3 microscopic analysis, which in that analysis there are three
4 things that I'm looking for. I'm looking for simple hairs,
5 unicellular hairs and multicellular hairs, I have to see all
6 three of those. Sometimes you may see two or you may see
7 one, but you must see all three of those for it to be said
8 that it is marijuana by the microscope.

9 Q. When you say hairs what are you talking about?

10 A. Okay. A simple hair looks just like the hair from your
11 head. A multicellular hair looks like, in laymen's term, it
12 will look like a little bear claw, it's thick and it just
13 goes over like this and you can see it on there. And then a
14 granular type hair is the other hair, it actually looks like
15 a waterfall and it's glistening like brown sugar, that is
16 what actually the THC is, or the tetrahydrocannabinol, and
17 it flows just like a fountain on there and you must see all
18 of those.

19 Q. Can you see any of that just holding it up and looking
20 at it with your naked eyes?

21 A. Usually not. Every once in a while you will get some
22 buds that you can really see some shiny things on it but you
23 can never test by the naked eye.

24 Q. If you don't get all three kinds of hairs do you call
25 it marijuana?

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1 A. No, it cannot be.

2 Q. If you don't get all three kinds of hairs do you do a
3 chemical test if you conclude microscopically that you can't
4 say it's marijuana?

5 A. It's no use to. If it can't be seen it's no use to say
6 that it is.

7 Q. As to State's Exhibit 7 for identification and State's
8 Exhibits 4 and 5 for identification, did you ever --

9 MR. BARFIELD: Your Honor, I'm going to move to, with
10 the Court's permission, remark 7 which we eventually opened
11 up, I don't know how the Court wants to do it but I would
12 like for them to be marked individually. The overall
13 package is 7 for identification, if we could use 7 for one
14 and 7A for perhaps. I need to ask her about them
15 individually.

16 THE COURT: Okay. We can do the package 7, contents 7A
17 and B.

18 Q. Let me start all over. Did you -- again, generically
19 speaking, did you do the microscopic test as to each
20 individual bag and the package that it came to you in?

21 A. I weigh each bag through the --

22 Q. Now, as to State's for identification 4, 5 and 7A and
23 7B, did you do the microscopic test on those?

24 A. Yes, I did.

25 Q. What was the result of the microscopic tests on those?

TESTIMONY OF ANN HORTON

- 1 A. It was positive for all three.
- 2 Q. As to State's 4, 5, 7A and B for identification, did
3 you do the chemical test on those?
- 4 A. Yes, I did.
- 5 Q. Explain to the jury what's involved in the chemical
6 test.
- 7 A. In the chemical test we actually just take a very small
8 sample of each individual package, they are tested
9 individually by putting a reagent on it and then actually
10 using hydrochloric acid, and then we use chloroform. What
11 I'm looking for is for when the hydrochloric acid starts to
12 work you can just see it sort of move in there and it will
13 begin to change colors. Usually it will be a purple color,
14 a blue color or a dark pink in color that is very close in
15 those colors. Then you use the chloroform in it to actually
16 drop in and it will form a circle in the middle of your
17 solution that looks just like a contact that you would put
18 in the eye. When all of that takes place and you get your
19 color formation and your eye formation then you can say that
20 it is.
- 21 Q. Is there a color that you're looking for to be able to
22 say something is marijuana?
- 23 A. Yes. I am looking for that bluish purple color and
24 it's a very distinct color.
- 25 Q. What if you don't get that color; can you say it's

TESTIMONY OF ANN HORTON

1 marijuana?

2 A. No, you cannot. You must have all three hairs and both
3 of these tests, the microscopic and chemical must both be
4 positive.

5 Q. Did you analyze chemically 4, 5, 7A and 7B to determine
6 if it's marijuana?

7 A. I did.

8 Q. And what were the results you got as to each of them?
9 Were they the same for all of them?

10 A. They were all positive.

11 Q. Any question about that at all?

12 A. No, sir.

13 Q. Now, did you prepare a written report concerning your
14 testing for this suspected marijuana?

15 A. Yes, I did.

16 Q. Can you identify what that is?

17 A. This is the report that I did when I did the
18 analyzation of the marijuana.

19 Q. Did it speak to both the microscopic and chemical test?

20 A. It does.

21 Q. Does it deal with 4, 5, 7A and 7B?

22 A. Yes, there were four items tested.

23 Q. Now, if you can from your report, do you assign
24 evidence numbers to stuff that comes into your lab that have
25 got nothing to do with these yellow stickers that come on

TESTIMONY OF ANN HORTON

1 there?

2 A. Yes, I do.

3 Q. Describe the evidence numbers that you assign to those
4 four numbers that you tested.

5 A. Okay. I give it the year first and then the month and
6 then the number piece of evidence that I have for that
7 month. These two items, the first one would be 2011, that
8 would be the year, ten would be the month and then the
9 130ith item that we had in and one of them would be 131 and
10 131-2.

11 Q. Under 130 you have got subitems?

12 A. One and two, that's correct.

13 Q. Which one is 130 subitem one and 130 subitem two?

14 A. That will be done by the weight and also on here I
15 put -- this is item number two and this is the weight for
16 it, and then on this one this would be item number one and
17 the weight for it.

18 Q. Now, you said that's all marijuana. How much did 130
19 subitem one weigh, which is 7B; is that correct?

20 A. Yes. That would be 18.38 grams.

21 Q. Now, your abbreviation on your report for grams is
22 what?

23 A. GR.

24 Q. How much did 130 subitem two, which is 7A for
25 identification, how much did that weigh?

TESTIMONY OF ANN HORTON

1 A. 26.84 grams.

2 Q. All right. Let's look at the other two items. Did you
3 give them a general item number?

4 A. Yes, I did.

5 Q. Did you break them down by subitems also?

6 A. Yes. They would have been 131 item one and 131 item
7 two.

8 Q. Did you weigh 131 subitem one?

9 A. Yes, I did.

10 Q. And is that four or five between these two here?

11 A. I'm sorry?

12 Q. Is that State's 4 or State's 5 as I have them laid up
13 here, which one is 131 subitem one?

14 A. This would be one.

15 Q. How much did subitem one weigh?

16 A. 26.83.

17 Q. And the next would be subitem 2?

18 A. Yes.

19 Q. And how much did it weigh?

20 A. 6.5 grams.

21 MR. BARFIELD: Your Honor, at this time I would offer
22 4, 5, 7A and 7B and the envelope 7 all for identifications
23 now as State's Exhibits.

24 MR. FRICK: Same objection as previously noted.

25 MR. GRIER: No objection.

TESTIMONY OF ANN HORTON

1 THE COURT: Admitted for identification over objection.

2 (The marijuana was received as State's 4, 5, 7A
3 and 7B.)

4 Q. When you get through with the weighing and the testing,
5 what do you do with this stuff?

6 A. I try to put them in the bags they came in and put them
7 right back where they came from. The items that came from
8 the blue container are wrapped and go back in the blue
9 container. If I have to open the item and I cannot get it
10 back in the baggy that it's in or whatever, I will put it in
11 the envelope, put the baggy in that envelope with it and
12 mark that I have removed it and I have repackaged it.

13 Q. After you have repackaged it, are you done with it
14 other than hauling it back and forth when we ask you to?

15 A. Yes, sir. I do this and then I actually restore it.

16 Q. Restore it meaning what?

17 A. Put it back in the evidence room and its place.

18 MR. BARFIELD: Your Honor, at this time I would offer
19 her report as the next State's exhibit which I believe is 9.

20 THE COURT: Admitted over objection.

21 (The report was received as State's 9.)

22 MR. BARFIELD: Thank you, ma'am, answer anything
23 Mr. Frick or Mr. Grier has.

24 CROSS EXAMINATION

25 BY MR. FRICK:

TESTIMONY OF ANN HORTON

1 Q. Ms. Horton, at least in this case you don't go out to
2 the scene, right?

3 A. I do not.

4 Q. You're not out of the car when they're collecting this
5 stuff, you just receive what is brought into you.

6 A. That's correct.

7 Q. Catalog it, if it's supposed to go to SLED you make
8 sure it gets it SLED.

9 A. That's correct.

10 Q. Do you request any additional testing or would it have
11 to be the officers say I want them to check this for
12 whatever when they send it to SLED?

13 A. The officer or the investigator would let me know what
14 he wants something tested for, but in a case of any type of
15 drugs they're going to test and do a chemical analysis to
16 tell us everything that's in there.

17 Q. In this case, though, the stuff that's sent to SLED is
18 the cocaine.

19 A. That's correct.

20 Q. Was anything else sent to SLED for any kind of other
21 analysis other than the chemical analysis on the cocaine?

22 A. No, it was not.

23 MR. FRICK: Thank you ma'am, that's all of the
24 questions I have.

25

CROSS EXAMINATION

TESTIMONY OF ANN HORTON

1 BY MR. GRIER:

2 Q. Ms. Horton, there's nothing in your report that
3 distinguishes between -- you don't measure potency of
4 marijuana.

5 A. No. It's measured that it is marijuana or it is not
6 marijuana.

7 Q. So it's just an up or down thing.

8 A. That's correct.

9 Q. You don't classify it as Acapulco Gold or whatever some
10 of the other names of marijuana would be or anything of that
11 nature.

12 A. No.

13 Q. But you do look at a lot of marijuana, I assume.

14 A. I do.

15 Q. And, you know, you see differences in the texture and
16 consistency and the nature of it.

17 A. I do.

18 Q. How about -- this is I guess Exhibit 7A and 7B, you
19 examined all of this, right?

20 A. I did.

21 Q. Do you notice any differences in the constitution of
22 these two different kinds of marijuana? Are there any
23 differences between them that you can observe as an expert?

24 A. No. We're just taught to do the analysis, the two must
25 match and that's it.

TESTIMONY OF ANN HORTON

1 Q. And those don't look like bigger individual buds
2 than -- is this a different texture and ground up? I'm just
3 asking you to observe and look at it.

4 A. If you're just asking me to observe I would say that
5 one is ground more than the other and one is -- but other
6 than that I don't know anything about it.

7 Q. Do they not have a different color if you look at them?

8 A. They may just --

9 Q. And one looks a little more brown and one more green,
10 is that fair?

11 A. I guess that's fair, but that's not how I was trained
12 to do that.

13 Q. I understand. But you've looked at a lot of marijuana
14 and I wanted to distinguish between possibly the source of
15 two different bags of marijuana, you seem like a person
16 that's the expert, you've been qualified to look at it,
17 right? Certainly in looking at these they could have easily
18 come -- those two different bags of marijuana could have
19 come from different sources of marijuana. Okay. Thank you.

20 MR. GRIER: That's all.

21 MR. BARFIELD: No redirect.

22 THE COURT: Thank you, ma'am, you may step down.

23 MR. BARFIELD: Your Honor, that's all from the State
24 this afternoon.

25 THE COURT: Looks like that's it for today, ladies and

TESTIMONY OF ANN HORTON

1 gentlemen. There's some out-of-town witnesses that
2 apparently are going to be here tomorrow morning at 9:30 so
3 we'll recess the proceedings. Between then and now let me
4 ask you to do a few things for me and that is don't talk to
5 anyone about the case, don't let anyone talk to you about
6 the case, don't even talk about it in the jury room. But in
7 the morning when you come in and get together see if you can
8 select a foreperson to represent the jury, select someone to
9 be a foreperson, if you can't that's fine, I can appoint
10 somebody but I thought perhaps if y'all got to know each
11 other a little bit today you might can appoint someone. Is
12 anybody going to have a problem being here at 9:30 in the
13 morning? Don't talk to anybody about the case, don't let
14 anyone talk to you about the case. See you at 9:30 in the
15 morning, ladies and gentlemen.

16 (The jury left the courtroom.)

17 THE COURT: Anything else we need to do this evening?

18 MR. BARFIELD: No, sir.

19 THE COURT: This case is recessed until 9:30 in the
20 morning.

21 (Court adjourned for the evening and resumed at
22 9:30 a.m. on February 20, 2013.)

23 THE COURT: It's my understanding all jurors are
24 present. State ready?

25 MR. BARFIELD: Yes, sir.

TESTIMONY OF ANN HORTON

1 THE COURT: Defense ready?

2 MR. GRIER: Yes, sir, Your Honor.

3 MR. FRICK: Yes, sir.

4 (The jury returned to the courtroom.)

5 THE COURT: Good morning, ladies and gentlemen, welcome
6 back. The bailiff handed me a note indicating he believes
7 the jury has selected Mr. Trent Alford, number three, juror
8 number three to serve as foreperson of the jury. Is that --
9 I'm assuming you're Mr. Alford?

10 THE JUROR: Yes, sir.

11 THE COURT: A wise decision the jury has made, thank
12 you for serving. I believe we are ready to resume with
13 evidence in the case. Solicitor?

14 MR. BARFIELD: State calls Doris Yarbrough.

15 The witness, DORIS YARBROUGH, was first duly
16 sworn and testified as followed, on:

17 DIRECT EXAMINATION

18 BY MR. BARFIELD:

19 Q. Tell us your name, please, ma'am.

20 A. My name is Doris Yarbrough, Y-a-r-b-r-o-u-g-h.

21 Q. By whom are you employed?

22 A. I'm employed with the South Carolina Law Enforcement
23 Agency also known as SLED.

24 Q. What department of SLED are you employed in?

25 A. I'm a forensic technician in the evidence control

TESTIMONY OF ANN HORTON

1 log-in department.

2 Q. How long have you been employed by SLED?

3 A. Four years, eight months.

4 Q. Have you been in that department the whole time?

5 A. Yes, sir.

6 Q. Explain -- I want us to talk about procedure for a
7 little bit. Summarize what your job -- not the technician
8 part but the log-in part is in the evidence control room at
9 SLED.

10 A. We accept evidence from throughout the State of South
11 Carolina by law enforcement agencies that need a forensic
12 analysis. They submit their items for submission along with
13 their paperwork, we look it over, talk with them about the
14 analysis they're looking for and it's logged in. We take it
15 on a said to contain basis.

16 Q. Take it on a what?

17 A. Said to contain basis.

18 Q. Meaning you write down on it what they say it contains?

19 A. Well, they write down and we take it based on what they
20 said it is.

21 Q. All right. Now, when something -- is it common in some
22 cases to have a whole bunch of items on a particular
23 incident from a local law enforcement agency?

24 A. It is.

25 Q. When the first thing comes in to SLED on a particular

TESTIMONY OF DORIS YARBROUGH

1 incident from a local law enforcement agency, is there some
2 number assigned by SLED to SLED's work on that case?

3 A. It's called the log-in. It's bar-coded labeled with
4 the number that assigns that case number -- SLED's case
5 number to that case.

6 Q. And typically what is -- how is a SLED case number, a
7 lab number configured?

8 A. It starts with the L for lab, the year that it is
9 submitted and it is in sequence numbers as they're logged
10 in.

11 Q. If multiple items come in under one case from a local
12 law enforcement agency are they given separate item numbers
13 within the lab number that SLED assigns?

14 A. Correct.

15 Q. All right. Now, when you log in something from a local
16 agency, what is your responsibility?

17 A. To look over the items that are submitted because we do
18 have a limit on certain types of items for the first
19 submission depending on the case type, look at their
20 analysis request and hopefully make sure they have all of
21 the paperwork correct.

22 Q. Do you actually look at what they're bringing to you to
23 see if there's any issue or problem with it?

24 A. We don't always see the evidence because sometimes it
25 is already prepackaged.

TESTIMONY OF DORIS YARBROUGH

1 Q. If it's packaged, do you look at the packaging I guess?

2 A. We do.

3 Q. Why do you look at the packaging?

4 A. To make sure it's sealed.

5 Q. What would be a problem with something coming in to

6 SLED that isn't sealed?

7 A. I don't know where it has been or what has happened to
8 it before it got to me.

9 Q. When you get something, when you log something in --
10 let's talk about drug evidence generically, not specifically
11 to this case, but when it is something that's drug evidence
12 the packaging is commonly called what?

13 A. A BEST kit.

14 Q. What is a BEST kit all about?

15 A. A BEST kit is typically a manila type envelope that has
16 a bar code labeled on it, a numbered label, and inside it
17 contains a plastic tamper evident pouch that evidence goes
18 into and is sealed by the submitting or the seizing officer.

19 Q. When you log in suspected drug evidence in a BEST kit
20 when you get through logging it in where do you put it?

21 A. We have a -- for drug evidence it's our secure
22 storage -- drug evidence intake storage in our evidence
23 room.

24 Q. Is that a locked facility?

25 A. It is.

TESTIMONY OF DORIS YARBROUGH

1 Q. Can anybody walk in and out and pick stuff up?

2 A. No, sir.

3 Q. Is there some record maintained of the handling and
4 movement of every piece of evidence that comes into the drug
5 lab?

6 A. We have an electronic chain of custody, everything that
7 I have logged in is logged in under my name and then it is
8 transferred to the area that it is going to be stored, and
9 then the next person that comes along and retrieves it, they
10 have to scan it to them and then they transfer it to the
11 next place that it is going to.

12 Q. And you said something about bar codes, does SLED use
13 bar codes kind of like a grocery store uses bar codes?

14 A. Correct.

15 Q. Does a bar code identify a case or item or both?

16 A. Both.

17 Q. Is there some written record -- well, I guess
18 electronic record first that can be produced as a written
19 record that shows the handling and movement of a particular
20 piece of evidence that SLED gets from log in to return to
21 the agency?

22 A. Correct.

23 Q. What do y'all call that document?

24 A. The chain of custody.

25 Q. I'm going to hand you a couple of things. First of all

TESTIMONY OF DORIS YARBROUGH

1 I'm going to hand you this two page document and ask you to
2 examine it for a minute and tell me if you can identify it.

3 A. This is our electronic chain of custody.

4 Q. For the case that I sent you a subpoena to be here for
5 today?

6 A. Correct.

7 MR. BARFIELD: Your Honor, at this time I would offer
8 the chain of custody as a State's exhibit.

9 THE COURT: In evidence without objection.

10 (The chain of custody document was received as
11 State's 9.)

12 Q. I'm now handing you what's been introduced into
13 evidence as State's Exhibit 9, which you identified as the
14 chain of custody in this case. First of all, what is the
15 lab number in this case?

16 A. The lab number is L11-12597.

17 Q. How many items of evidence, items not subitems, but how
18 many items of evidence were logged in to SLED on this case?

19 A. It's considered one item.

20 Q. And it was described as -- under the said to contain
21 policy, it was described as what when it was logged in?

22 A. Drug evidence.

23 Q. Who brought it to SLED?

24 A. Ann Horton of the Lancaster County Sheriff's Office.

25 Q. Who did she bring it to, who logged it in?

TESTIMONY OF DORIS YARBROUGH

- 1 A. Me.
- 2 Q. What did you do with it after she logged it in after
3 you logged it in and --
- 4 A. After it's logged in it's scanned to the drug evidence
5 intake storage.
- 6 Q. And where did it go from you?
- 7 A. It was -- one of our other forensic technicians scanned
8 it to herself and transferred it to the forensic scientist
9 that requested it for analysis.
- 10 Q. And the name of the other forensic technician between
11 you and the chemist?
- 12 A. Amy Stevens.
- 13 Q. She does the same job as you do?
- 14 A. Correct.
- 15 Q. And the name of the forensic scientist who actually
16 worked on this evidence, what's his name?
- 17 A. Willie C. Smith, III.
- 18 Q. Now, after he got done with it just tell the jury --
19 they'll see on the document, but tell the jury what happened
20 to it after Willie Smith got through with it.
- 21 A. When he's through analyzing it he'll send an email down
22 and said, "I would like to return evidence when it's
23 convenient," and we'll tell him he can bring it back.
24 There's four full-time technicians and one part-time so one
25 of us will agree to accept it. Then we scan it to

TESTIMONY OF DORIS YARBROUGH

1 ourselves, then we place it into an area that is still a
2 secure area called drugs for return shelf, it stays there
3 until the agency that submitted it comes back -- usually
4 when they come in and submit more evidence they also take
5 back anything that's ready to be returned to their agency.

6 Q. And this particular piece of evidence after Willie
7 Smith got through with it, who did it go to and who did it
8 go to and who did it go to?

9 A. It went to Patricia Crooks, then it went to drug to
10 return shelf, then she returned it to Ann Horton of the
11 Lancaster County Sheriff's Office.

12 Q. Now, I'm going to show you this stuff. Can you take a
13 minute, look at that and tell me if you can identify what
14 that is?

15 A. I can identify it by the yellow bar coded label that is
16 on it. This inside pouch plastic would have been in that
17 manila type envelope, I would have looked at this bar code
18 label, that should have matched the manila envelope and that
19 same number should be written on that paperwork as well to
20 make sure.

21 Q. Is what you have in your hand what you logged in from
22 Ann Horton absent some of the outside packaging?

23 A. Correct, but it has this label on it.

24 Q. And what was the condition of the packaging when you
25 logged that evidence in at SLED? And let me ask you this,

TESTIMONY OF DORIS YARBROUGH

1 what date did you log this in at SLED?

2 A. November 4th of 2011.

3 Q. And what was the condition of packaging when you logged
4 it?

5 A. One thing I check for is to make sure the seal on the
6 plastic inside bag has been sealed and that it has been
7 signed by the seizing officer and that the paperwork is
8 included.

9 Q. Was everything sealed?

10 A. It was.

11 Q. Was there anything that you noticed that was abnormal
12 about the packaging or the security of that evidence when
13 you logged it?

14 A. No, sir.

15 Q. Did you manipulate the seal or the packaging in any way
16 before you passed it on to the next location that this was
17 stored?

18 A. No, sir.

19 Q. Is there any indication that Amy Stevens who was
20 between you and Willie Smith opened anything up and did
21 anything with it?

22 A. I wouldn't know that.

23 Q. Okay. All right.

24 MR. BARFIELD: Thank you, ma'am, answer anything that
25 Mr. Frick or Mr. Grier has.

TESTIMONY OF DORIS YARBROUGH

1 CROSS EXAMINATION

2 BY MR. FRICK:

3 Q. Just briefly, Ms. Yarborough. You said local law
4 enforcement does an analysis request?

5 A. Yes, sir.

6 Q. That's just some kind of form that --

7 A. It's a log-in request, forensic services log-in
8 request.

9 Q. When something comes up to SLED you don't look at it
10 and go, "Okay, it needs to be analyzed for this, this and
11 this," the sheriff's department has got to tell you, "this
12 is what we're looking for."

13 A. Correct.

14 Q. And in this case what did they ask for?

15 A. It was a drug analysis.

16 Q. Just a drug analysis.

17 A. Yes, sir.

18 Q. SLED conducts many types of analysis, correct?

19 A. Correct.

20 Q. We've got fingerprints and DNA and all other kinds of
21 neat stuff, correct?

22 A. Right.

23 Q. Didn't ask for any of that, did they?

24 A. No, sir.

25 MR. FRICK: Thank you.

TESTIMONY OF DORIS YARBROUGH

1 MR. GRIER: No questions. How are you doing,
2 Ms. Yarbrough?

3 THE COURT: Any objection to the witness being excused
4 from her subpoena?

5 MR. BARFIELD: Certainly would move that she be
6 excused.

7 MR. GRIER: No objection.

8 MR. FRICK: No objection.

9 THE COURT: You are excused from your subpoena.

10 MR. BARFIELD: Call Willie Smith.

11 The witness, WILLIE C. SMITH, III, was first
12 duly sworn and testified as follows, on:

13 DIRECT EXAMINATION

14 BY MR. BARFIELD:

15 Q. Tell the jury name, please, sir.

16 A. My name is Willie Smith, III, S-m-i-t-h.

17 Q. Mr. Smith, by whom are you employed?

18 A. I'm employed with the South Carolina Law Enforcement
19 Division also known as SLED.

20 Q. You have technically two titles at SLED?

21 A. Yes, sir. I'm a chemical analyst, criminalist, also
22 considered a special agent, too.

23 Q. How long have you been employed by SLED?

24 A. Twelve years, eight months.

25 Q. What department of SLED are you currently working in?

TESTIMONY OF WILLIE SMITH

1 A. I'm working in the drug analysis department.

2 Q. How long have you been in the drug analysis department?

3 A. For 12 years and eight months.

4 Q. The whole time?

5 A. That is correct.

6 Q. Are you a chemical analyst in the area of drug
7 analysis?

8 A. I have been certified as a chemical analyst in the
9 field of drug analysis.

10 Q. How did you get certified to be a chemical analyst in
11 the field of drug analysis? What did you have to do to be
12 able to say that's what you are?

13 A. First I earned degrees in Biology and Chemistry from
14 the University of South Carolina, took additional graduate
15 coursework for the purpose of drug analysis, attended the
16 criminal justice academy to become a law enforcement officer
17 and I went through a year of training in order to become a
18 certified analyst in the field of drug analysis.

19 Q. Have you analyzed substances suspected to be drugs,
20 licit and illicit I guess, over the course of your career
21 with SLED?

22 A. Yes, I have.

23 Q. Have you been called upon to testify in the courts of
24 this state as a chemical analyst in the field of drug
25 analysis on prior occasions?

TESTIMONY OF WILLIE SMITH

1 A. Yes. I've been called 63 times to court to testify in
2 the field of drug analysis.

3 Q. Have you ever been offered as an expert in drug
4 analysis and denied qualification as an expert?

5 A. No. I have been qualified all 63 times.

6 MR. BARFIELD: Your Honor, at this time I would offer
7 Mr. Smith as an expert in chemical analysis in the field of
8 drug analysis.

9 MR. FRICK: No objection.

10 MR. GRIER: No objection.

11 THE COURT: So qualified.

12 Q. Before I get to this in my hand let's -- in the field
13 of drug analysis, how many different substances are you
14 called upon to try to identify? Can you put a number on?

15 A. I cannot put a number on it. Any drug that's out there
16 I'm able to identify it on a molecular level.

17 Q. Are you called upon from time to time to analyze
18 substances that are suspected to be cocaine?

19 A. Yes, I have.

20 Q. Now, some people -- we talk about crack cocaine or
21 cocaine base and we talk about powdered cocaine, is there
22 any distinction chemically?

23 A. Yes. One is in a salt form and the other is in a base
24 form. You usually take cocaine hydrochloride and you turn
25 it into the base form.

TESTIMONY OF WILLIE SMITH

1 Q. All right. So you turn powder into crack?

2 A. You turn the powder into the harder rock form.

3 Q. Now, we're talking about in this case powdered cocaine;
4 is that correct?

5 A. That is correct.

6 Q. When you get something into your hands that is thought
7 to be powdered cocaine, summarize for the jury what you have
8 to do to analyze it to determine whether it is.

9 A. Well, the first thing I do is I do a presumptive test
10 which is basically a color test observing the color of the
11 substance change, it shows it's either a salt or a base.

12 Q. Do you introduce some kind of chemical to the
13 substance?

14 A. Yes, I do. And the next part of test is a molecular
15 test and I test it on a molecular level.

16 Q. And without boggling my mind, how do you test it on a
17 molecular level?

18 A. Well, in this case I use a gas chromatography and mass
19 spectroscopy, which is a \$150,000 instrument that's able to
20 test substances on a molecular level.

21 Q. And when you're testing something on a molecular level,
22 are you visually seeing something or are you getting some
23 sort of computer generated profile of a substance? What is
24 it that you see that tells you what something is?

25 A. It is a computer generated report. The first thing I

TESTIMONY OF WILLIE SMITH

1 do is I test a known substance from a certified standard
2 from a company of what the substance is supposed to be, then
3 I run my unknown sample, then I compare it to the known
4 sample.

5 Q. At some point in the analysis process do you have an
6 interest in determining how much of the substance has been
7 submitted to you?

8 A. For every single case that I get in for analysis the
9 first thing I do in that case is take the weight of the
10 substance.

11 Q. And how do you weigh it?

12 A. I have a balance and it's a certified balance and it
13 has documentation to it, and that's the balance that I use
14 to weigh it.

15 Q. Now, I'm going to hand you State's Exhibit Number 3 for
16 identification purposes and let you examine it, and then I
17 will ask you some questions about it.

18 A. Okay.

19 Q. Have you seen that item, State's Exhibit Number 3 for
20 identification, have you seen that item before?

21 A. Yes. Basically this item is a heat-sealed bag that
22 contained a BEST kit, Best Evidence Sample Testing kit that
23 we send out to agencies across the state to submit evidence
24 to SLED and it has a tamper indicative label that's on the
25 top. The first thing I do is I examine this label to make

TESTIMONY OF WILLIE SMITH

1 sure that it is sealed and this label was sealed before I
2 did any analysis.

3 Q. Is there any indication that that package that you
4 received had been tampered with in any way once it entered
5 SLED?

6 A. If this evidence was tampered with in any way
7 whatsoever I would return it to the agency.

8 Q. Would you test it?

9 A. No, I would not test it.

10 Q. Now, does that item, State's Exhibit Number 3 for
11 identification, is it identified by a SLED lab number?

12 A. Yes, it's identified in two different ways. It's
13 identified by the BEST number which is B218353, it's also
14 assigned a SLED lab number which is L1112597.

15 Q. Did you work with that evidence when it got -- well,
16 first of all what date did you get your hands on it and from
17 whom if you can tell?

18 A. I received this evidence on November 4, 2011 from Amy
19 Stevens in the log-in department.

20 Q. And did you complete your work on that evidence all on
21 the same day or is this a multi-day process for you?

22 A. Well, when we get the evidence we have a secure vault
23 and I've got a secure area that's inside the vault where I
24 can store my evidence. I store my evidence in the
25 November 8, 2011 from where I can tell when I did my

TESTIMONY OF WILLIE SMITH

1 analysis on it from my paperwork and my report and I
2 completed my analysis on November 8th of 2011 and identified
3 what the substance was.

4 Q. Okay. Now, when you got it out to do the analysis,
5 what's the first thing you did with that evidence that you
6 got there in your hands?

7 A. The first thing I do is I examine the label at the top
8 of the BEST bag again, I make sure that is sealed. If it is
9 sealed then I can do the next thing, I write the lab number
10 on it and I write my initials and the words sealed and
11 intact which was November 8th of 2011.

12 Q. Was this sealed and intact when you started your
13 analysis?

14 A. It was sealed and intact. If it had not been sealed
15 and intact I would not have returned it to the agency. The
16 next thing I do is I write down exactly what I received from
17 this evidence. It was a plastic bag that contained
18 compressed powdered substance and I took the weight of the
19 substance and the weight of the substance was four grams.
20 The next thing I did was a chemical test on this item and it
21 tested positive for cocaine in the salt form which is a
22 presumptive test.

23 Q. Can you stop there and say that it is cocaine or do you
24 have to do something else?

25 A. I have to test it on a molecular level to identify

TESTIMONY OF WILLIE SMITH

1 exactly what it is. I took some of this sample and I put it
2 on GCMS, Gas Chromatography Mass Spectroscopy, I tested it
3 and I identified it on a molecular level.

4 Q. What's that substance that you weighed out at four
5 grams?

6 A. The substance was found to be cocaine and it had a
7 weight of four grams.

8 Q. Any question or doubt about that at all?

9 A. No question about it.

10 Q. Did you prepare a written report evidencing your
11 findings concerning your analysis of that substance?

12 A. Yes. For every case that we do testing on either
13 negative or positive we always provide the report to all of
14 the agencies.

15 Q. Can you identify what that document is?

16 A. This is a report of the results that I found in this
17 case which corresponds to SLED lab number L1112597 and it
18 says it is compressed powdered substance, cocaine found 4.0
19 grams.

20 Q. Thank you, sir.

21 MR. BARFIELD: Your Honor, at this time I would offer
22 the report as State's Exhibit 10 (sic).

23 MR. FRICK: No objection.

24 MR. GRIER: No objection.

25 THE COURT: Without objection.

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1 (The report was received as State's 11.)

2 MR. BARFIELD: Thank you, Mr. Smith. Answer anything
3 Mr. Frick or Mr. Grier has.

4 CROSS EXAMINATION

5 BY MR. FRICK:

6 Q. Mr. Smith, you weigh it before you test it?

7 A. That is correct.

8 Q. When you test it, are you looking to see whether there
9 are any other substances mixed in with this?

10 A. Yes. Just say for this substance right here, which was
11 described as a white powdered compressed powdered substance,
12 if it looked like there was a black substance or red
13 substance I would separate the items and I would test each
14 of the items. In this case it was just consistent white
15 powdered substance.

16 Q. Okay. But it's all white powdered substance and your
17 test is to see whether it's got cocaine in it or not. But
18 it has got adjuncts in it, are you testing adjuncts in it to
19 see if there's additives in this?

20 A. The only thing that we're required to do is report out
21 the controlled substance that is in the item.

22 Q. So it has got a total of four grams of white stuff with
23 some cocaine stuff in it, right?

24 A. The substance that I found was cocaine.

25 Q. Okay. But you can't tell me whether that's pure

TESTIMONY OF WILLIE SMITH

1 cocaine or not.

2 A. I can tell you that it is cocaine.

3 Q. It contained cocaine.

4 A. That is correct.

5 Q. But as far as whether that's four grams of just pure
6 Columbian cocaine or four grams of cocaine with something
7 else in it, your analysis does not do that, correct?

8 A. We are just required to report what it is.

9 MR. FRICK: Thank you, sir.

10 MR. GRIER: Briefly.

11 CROSS EXAMINATION

12 Q. Mr. Smith, do you know what tests were performed by
13 SLED, what all of the tests that were performed by SLED or
14 all of requests for testing that you did?

15 A. The only thing in this case that was requested was for
16 drug analysis.

17 Q. Okay. And have you got the evidence? Okay. Were
18 you -- there was no request that it be checked for DNA to
19 see if there was any DNA material or anything on the plastic
20 or any fingerprints or anything of that nature by SLED?

21 A. The only plastic in this case was for drug analysis.

22 Q. Okay. So the answer is no?

23 A. No.

24 MR. GRIER: Thank you.

25 MR. BARFIELD: No redirect.

TESTIMONY OF WILLIE SMITH

1 THE COURT: You may step down.

2 MR. BARFIELD: That's the case for the State of South
3 Carolina?

4 THE COURT: May this witness be excused?

5 MR. BARFIELD: Yes, sir.

6 MR. FRICK: No objection.

7 MR. GRIER: Yes, sir.

8 THE COURT: You are excused from your subpoena. The
9 state rests.

10 MR. FRICK: I think we have a motion that we need to
11 take up outside the jurors' presence.

12 THE COURT: Ladies and gentlemen, this is one of those
13 occasions when I told you I would need to talk to the jury
14 (sic) outside of your presence, I would ask you to step in
15 the jury room, we hope to have you back out here shortly.

16 (The jury left the courtroom.)

17 THE COURT: And Mr. Frick?

18 MR. FRICK: Thank you, Your Honor. At this time
19 defense would make a motion for a directed verdict. Taking
20 the evidence in the light most favorable to the State I
21 don't believe there's enough for the jury to -- I think it
22 can be decided as a matter of law and does not need to be
23 sent to the jury to decide as a matter of fact. In regards
24 to my client, Mr. McIlwaine, they have obviously -- do not
25 have actual possession on him as the testimony has been,

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1 there was nothing discovered on his person when he was taken
2 out of the vehicle so the State has to be proceeding on a
3 constructive possession case. And I certainly understand
4 that they've got the notebook they allege contains
5 information and they've got these items that I think it was
6 the cocaine that was in close proximity to my client. They
7 have not proven that he had any actual knowledge that the
8 stuff was in the car and all they've got based on what has
9 been presented is speculation and circumstantial evidence
10 but not sufficient circumstantial evidence to reach the
11 burden at this point. I'm going to hand you up State versus
12 Andre Jackson which is kind of a similar case, I believe it
13 was a traffic stop on 85, the guy was doing 55 or 54 in a 60
14 and it deals with constructive possession and talks about
15 that the State must prove knowledge. And, of course, we all
16 know that knowledge generally is going to be proven by
17 circumstantial evidence, but I feel that all the State has
18 provided in regard to Mr. McIlwaine in this case is he's
19 sitting in the back of the car with stuff around him. The
20 statement as to knowledge of anything is actually elicited
21 from Mr. Sims. So, Your Honor, the evidence that we've got
22 on Mr. McIlwaine at this point is merely circumstantial and
23 not substantial circumstantial and I ask you to direct a
24 verdict.

25 THE COURT: Solicitor?

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1 MR. BARFIELD: Your Honor, I've read the -- I've looked
2 at the case, the Jackson case. First of all certainly I
3 concede that no drugs were taken off Mr. McIlwaine. I think
4 the case Mr. Frick handed up is different, I might be wrong
5 and somebody will correct me if I'm wrong, I just got the
6 case a minute ago, I believe in the Brown case -- in the
7 Jackson case the person charged in that case I think was a
8 front seat passenger, drugs were found in the back. This
9 case is different, McIlwaine is sitting in the back seat,
10 it's a four-door car, nobody else was in the back,
11 immediately beside him is this notebook, immediately beside
12 the notebook is the blue bag with the drugs in it,
13 immediately beside the blue bag is a black bag with the
14 money in it. It is circumstantial, but I think within that
15 confined space certainly there's circumstantial evidence at
16 least that McIlwaine had knowledge that the stuff was
17 sitting there in the seat beside him. There was no
18 indication from the testimony of Tony Bowers that it was
19 covered up by the coat which was also in the back seat, and
20 there's also testimony by Tony Bowers that as he started to
21 initiate the traffic top the rear passenger, who we now know
22 to be McIlwaine, was turning around, squirming around,
23 moving around in the seat which suggests that he knew there
24 was something there and he was trying to do something with
25 it and he was unsuccessful in getting it out of the car. I

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1 believe there's enough evidence to go to the jury and you
2 have to look at the evidence in the light most favorable to
3 the State in a motion for directed verdict motion and I
4 think we're there.

5 MR. GRIER: Judge, before you rule can I jump in?
6 Because I think I need to ride piggy back on this.

7 THE COURT: All right, sir.

8 MR. GRIER: Your Honor, I join Mr. Frick in regard to
9 my client with regard to the drugs that were in the back
10 seat. I think everything that Mr. Frick said also pertains
11 to Mr. Sims about the -- about Mr. Frick's motion, all of
12 that applies to my client with regard to the drugs in the
13 back seat. And so I am asking that you find that he had --
14 of course, he admitted knowledge of the drugs in the console
15 but I think those are distinguishable and I think that the
16 jury -- that if you rule in favor of Mr. Frick then I think
17 you've got to rule in favor of my client with regards to the
18 drugs in the back seat and make the jury aware that that's
19 no longer an issue in terms of Mr. Sims, that the drugs were
20 in the back seat. Also I would ask that you direct a
21 verdict for the possession with intent to distribute. I
22 think the only evidence that has been presented are -- with
23 regard to my client were the drugs that he admitted were
24 his. I would ask that you direct a verdict totally in favor
25 of my client with regard to the possession with intent to

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1 distribute cocaine based on what Mr. Frick has just argued
2 and all of the drugs in the back seat, that would take care
3 of that because that's where the cocaine was found. I would
4 ask that you direct a verdict and send only the possession
5 of marijuana to the jury. Because, of course, my client
6 admitted it. The State admitted that the scales were just
7 as likely used for personal consumption of the marijuana and
8 that my client may have accounted for the money by telling
9 Officer Bowers that that money may have been used for the
10 payment of a bill or was intended to be used for the payment
11 of bill, that's the evidence out there. I understand the
12 inferential issues that I have got to deal with and consider
13 any obstacles in the motions, nevertheless I make that
14 motion.

15 THE COURT: Solicitor?

16 MR. BARFIELD: And as to Mr. Grier's motion about the
17 back seat dope, I think Sims is wearing a different hat than
18 McIlwaine is in this case. Sims is the driver of and in
19 control of the car and I think certainly you analyze his
20 ability to possess, to exercise dominion and control over
21 stuff in the back seat differently than you do McIlwaine.
22 Of course, McIlwaine is sitting right beside it, Sims is in
23 control of the car. I hate to use the word presumptive but
24 I think we all have some responsibility to know what's in
25 our automobiles or the automobiles that we're in charge of

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1 and driving. And again, what was in the back seat it was
2 not under the back seat, it was not stuffed down between the
3 seat in the back rest, it was sitting in the back seat. If
4 you're driving a car down the road I think you
5 circumstantially have knowledge of whatever is in your car
6 that's not hidden or concealed by somebody else. There was
7 no evidence that anything was hidden or concealed in this
8 case. I think Sims being in control of the car, the driver
9 of the car did have dominion and control over whatever might
10 have been in the back seat of that car. As to his motion
11 with possession with intent to distribute, I guess he's
12 specifically talking about the marijuana, I think clearly
13 the statute talks about possession of more than an ounce
14 creates a prima facie case, and we'll talk about how you're
15 going to charge that later. But clearly the stuff in the
16 front seat weighed 45.22 grams which is over an ounce and a
17 half and I think that's sufficient to go to the jury on
18 possession with intent to distribute coupled with the
19 presence of money with the dope, the fact that there were
20 two bags of dope and the fact that there was a set of
21 digital scales found with the money and the dope. Thank
22 you.

23 THE COURT: All right. Help me figure this out,
24 Solicitor. In the front -- I guess it was in the front seat
25 console there were 45 grams; is that right?

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1 car and people were sitting where they actually were and the
2 only dope found was within the locked console, not locked
3 but closed console with the scales and with the money.
4 coupled with the vehicle that Sims told them on the scene
5 that's mine, I doubt anybody else would have gone to jail.
6 I think these officers would say that's probably a fair
7 assessment of their activities had that occurred that way.

8 THE COURT: All right. Well, let me ask -- I
9 understand the position on everybody on everything that's
10 been arguing so far. Let me ask Mr. Grier if he has any
11 additional arguments or motions concerning his part not
12 already made?

13 MR. GRIER: Well, I just want to protect myself on the
14 record as far as the prior motion to suppress and my Miranda
15 motion, and -- I don't think I was required to renew that
16 during the presentation of the evidence, I understand why
17 Mr. Frick may want to do it. But I just want to make sure
18 those motions are protected, Your Honor, for the record.
19 And as far as the directed verdict motions, that's all that
20 I'm asking the Court to consider. I do need to have some
21 conversation with the Court about charges before I decide
22 whether I'm going to present any evidence or not.

23 THE COURT: All right. I'm denying both motions to
24 dismiss as to Sims, I find that he was the driver and
25 therefore in control of the car and for that purpose the

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1 jury might be able to infer that he would know what was
2 in -- laying on the back seat of his car over which he had
3 control. As to McIlwaine I find that there is sufficient
4 evidence certainly because of the drugs in the back seat. I
5 also find that the drugs in the console can be considered
6 because of the drugs found next to him in the back seat as
7 well as the notebook. So that is the ruling of the Court
8 and the jury can consider all drugs against all parties.
9 Now, anything else?

10 MR. GRIER: I need some guidance on the likelihood of
11 charges, Your Honor, to make the decision to present any
12 evidence or not. I think when you have PWI with intent to
13 distribute case there's always the lesser-included offense
14 of possession in the charge. I don't think we have got an
15 issue with that although Mr. Barfield wishes that wasn't the
16 law.

17 MR. BARFIELD: I don't think I have any legal footing
18 to argue against your charge on the lesser-included of
19 possession.

20 THE COURT: I'm inclined to do that.

21 MR. GRIER: Here is the other issue, Judge, and quite
22 frankly I have never confronted it before, but I think that
23 the evidence that's been presented in this case is going to
24 put -- the jury is going to be in a position of being asked
25 perhaps and the evidence would suggest that they could find

TESTIMONY OF CHRISTINA STEVENS

1 has presented all of its evidence that the State intends to
2 prove at least I think, so now I will hear from the
3 defendants if either of them decide to present any evidence
4 although they're not required to do so. Mr. Frick?

5 MR. FRICK: Defense rests, Your Honor.

6 THE COURT: And that brings us to Mr. Grier.

7 MR. GRIER: Thank you, Your Honor. We call Christina
8 Stevens.

9 The witness, CHRISTINA STEVENS, was first duly
10 sworn and testified as follows, on:

11 DIRECT EXAMINATION

12 BY MR. GRIER:

13 Q. Please state your name for the jury.

14 A. Elizabeth Stevens.

15 Q. Ms. Stevens -- how old are you, Ms. Stevens?

16 A. I'm 23.

17 Q. Ms. Stevens, back in 2011, October of 2011, do you
18 recall the incident where these officers stopped the vehicle
19 in which you were a passenger?

20 A. I do.

21 Q. And on that occasion how long had you been in the car
22 at the time that it was stopped?

23 A. No longer than about 30 minutes.

24 Q. Did you -- what knowledge did you have about any drugs
25 in the car?

TESTIMONY OF CHRISTINA STEVENS

- 1 A. None at that time.
- 2 Q. When did you learn that there were drugs in the car?
- 3 A. After they searched it.
- 4 Q. And what is your relationship with Matt Sims?
- 5 A. Matt's my fiance.
- 6 Q. How long have you been together?
- 7 A. Four years.
- 8 Q. And have you got children?
- 9 A. Yes, sir, we've got six.
- 10 Q. You have six children?
- 11 A. Yes, sir.
- 12 Q. Biological, together?
- 13 A. He has custody of his two boys and I have four of my
- 14 own, we have three together and I have one with an
- 15 ex-husband, so we have six in all that lives in the house
- 16 with us.
- 17 Q. And how many children did you have at the time of this
- 18 incident?
- 19 A. Five.
- 20 Q. Lived together with Mr. Sims at the time this happened?
- 21 A. Yes, sir.
- 22 Q. You had been together a couple of years prior to this?
- 23 A. Yes, sir.
- 24 Q. And did you know about his daily habits and quirks and
- 25 learned that from living with him?

- 1 A. Uh-huh.
- 2 Q. Did you know anything about his drug use?
- 3 A. Yes, sir.
- 4 Q. What did you know about his drug use?
- 5 A. He did it all of the time, it was just something --
- 6 every since he stopped -- since he got pulled over and he
- 7 got stopped he's been losing his hair.
- 8 Q. Been what?
- 9 A. Been loosing his hair. It's just something he has
- 10 always done since he was young.
- 11 Q. What did he use?
- 12 A. Marijuana.
- 13 Q. And how often did he use it?
- 14 A. Every day.
- 15 Q. Did you know anything about any plans he had for
- 16 acquiring marijuana that day?
- 17 A. He had said something about it earlier but I didn't
- 18 know he had it on him at the time he picked me up.
- 19 Q. Do you know anything about whether or not he was a drug
- 20 dealer?
- 21 A. No, sir. He's not a drug dealer, he just uses.
- 22 Q. Do you have any knowledge of him ever having drugs with
- 23 the intent to sell them?
- 24 A. No, sir.
- 25 Q. But on this particular day he was going to get some

TESTIMONY OF CHRISTINA STEVENS

1 marijuana, is that what you're saying?

2 A. Uh-huh.

3 Q. Now, there's been some testimony about some money in
4 the vehicle that day.

5 A. Uh-huh.

6 Q. Do you know anything about the origin of that money?

7 A. Yes, sir.

8 Q. What do you know about the origin of that money?

9 A. The \$320 was for my \$315 power bill, I put the money in
10 there that morning before I was dropped off at my aunt's
11 house. The power bill is at home on the refrigerator so I
12 remembered to pay it but I left the money in the car so I
13 wouldn't take it with me to my aunt's house.

14 Q. Where did that money come from?

15 A. From when he cashed his check that day.

16 Q. Well, what check did he cash?

17 A. I believe it was either unemployment or he drew it out
18 of the ATM or I can't remember if he was working at the time
19 or not. If he wasn't working it was unemployment.

20 Q. Where had he worked?

21 A. Wal-Mart Distribution.

22 Q. You say you're not sure whether he was working or not,
23 why wouldn't you be sure?

24 A. I know he had got laid off some time that year because
25 of him having a son in February of 2011.

TESTIMONY OF CHRISTINA STEVENS

1 Q. Because of what?

2 A. Because we had a son in February of 2011 and he came
3 down with the tusses cough.

4 Q. Your son did?

5 A. Uh-huh. He was in the hospital for about four months
6 and he got fired from his job because he took a week too
7 long for FMLA.

8 Q. What is FMLA?

9 A. It's Family Leave of Absence?

10 Q. So he exercised that?

11 A. Uh-huh.

12 Q. And that had some affect on his job?

13 A. He took a week too long. The dates got mixed up and
14 they held it against him.

15 Q. But you're not quite sure when that happened, it could
16 have been before this, could have happened after, but it
17 happened about this time?

18 A. Yes.

19 Q. And as result of him getting laid off he was getting
20 unemployment?

21 A. Uh-huh.

22 MR. GRIER: Thank you. That's all of the questions I
23 have.

24 MR. FRICK: No questions, Your Honor.

25 CROSS EXAMINATION

TESTIMONY OF CHRISTINA STEVENS

1 BY MR. BARFIELD:

2 Q. So it's your belief now that Matt -- you call him Matt?

3 A. Uh-huh.

4 Q. That Matt was not working but was laid off when the car
5 got stopped on October 22nd of 2011?

6 A. I'm still not sure if he was laid off or getting
7 unemployment.

8 Q. And y'all lived together?

9 A. Uh-huh.

10 Q. You remember this day this car got stopped?

11 A. I don't remember the exact day but I do remember.

12 Q. But you remember the event?

13 A. Yeah.

14 Q. You remember stuff before the event and you remember
15 stuff after the event I guess; is that correct?

16 A. I remember what happened.

17 Q. But you don't remember whether your fiance was employed
18 or not when it happened.

19 A. I don't.

20 Q. Tell us about the car. Whose car is it -- well, let me
21 stop you there. Do y'all still have that car?

22 A. No.

23 Q. Whose car was it? What kind of car was it first of
24 all? What kind of car was it?

25 A. It was a 2000 Chevy Malibu.

TESTIMONY OF CHRISTINA STEVENS

- 1 Q. Was it titled -- do you know whose name was on the
2 title when the car got stopped?
- 3 A. Uh-huh.
- 4 Q. Whose name was on the title?
- 5 A. Bobby Mcinvale.
- 6 Q. Is Bobby Mcinvale a man or woman?
- 7 A. A woman.
- 8 Q. Who is Bobby Mcinvale?
- 9 A. She's his mother.
- 10 Q. Meaning Matt's mom?
- 11 A. Uh-huh.
- 12 Q. You've got to say yes or no because they've got to be
13 able to understand and sometimes an uh-huh or nuh-uh they
14 don't understand so make sure to say yes or no. Car titled
15 in his momma's name, whose car was it?
- 16 A. It was my car.
- 17 Q. How did it get to be your car?
- 18 A. She gave it to me because our vehicle was torn up, we
19 have got so many kids that have to go to the doctor and she
20 gave me the car.
- 21 Q. This happened about supertime on October 22nd of 2011,
22 is that your recollection?
- 23 A. Still little bit of daylight.
- 24 Q. Where had you been that day?
- 25 A. I was at my aunt's house.

TESTIMONY OF CHRISTINA STEVENS

- 1 Q. What's your aunt's name?
- 2 A. Patricia Morgan.
- 3 Q. How long did you stay at your aunt's house that day?
- 4 A. While?
- 5 Q. All afternoon or --
- 6 A. From about 9:00 that morning until he picked me up that
- 7 afternoon.
- 8 Q. How did you get to your aunt's house?
- 9 A. I was dropped off by Matthew.
- 10 Q. Was anybody with Matthew when he dropped you off at
- 11 your aunt's house at 9:00 or so in the morning?
- 12 A. No, sir.
- 13 Q. Do you know -- did you stay at your aunt's house all
- 14 day until you got picked up?
- 15 A. Yes, sir.
- 16 Q. Do you know where Matt was or what he was doing all day
- 17 long Saturday?
- 18 A. No, sir.
- 19 Q. He wasn't working or anything as far as you know?
- 20 A. As far as I know he wasn't.
- 21 Q. Don't have any idea where he was, who he was with or
- 22 what he was doing, is that accurate?
- 23 A. Uh-huh.
- 24 Q. How did you get away from your aunt's house?
- 25 A. Matthew picked me up.

- 1 Q. How soon before Tony Bowers stopped your car did
2 Matthew pick you up?
- 3 A. I wasn't even in the car 30 minutes.
- 4 Q. Between -- well, when you got in the car was Matthew by
5 himself?
- 6 A. No.
- 7 Q. Who else was in the car?
- 8 A. He had Mr. McIlwaine with him.
- 9 Q. The fellow in the butterscotch colored shirt that just
10 waived at you? When you got in your car at your aunt's
11 house that day had you ever seen Derrick McIlwaine before?
- 12 A. No.
- 13 Q. Never laid eyes on him?
- 14 A. No.
- 15 Q. Didn't know who he was? You've got to say yes or no.
- 16 A. No.
- 17 Q. Was he in the back seat or the front seat when you went
18 out of the house to get in the car?
- 19 A. I don't remember.
- 20 Q. What part of the car did you get in to?
- 21 A. I was in the passenger side, he could have been in the
22 passenger side and got in the back before I came out, I
23 don't know.
- 24 Q. Would it have looked weird to you if they had driven up
25 with McIlwaine in the back and Matt in the front?

TESTIMONY OF CHRISTINA STEVENS

1 A. If I had seen him pull up? Yes. It would have looked
2 like that but I don't know.

3 Q. And you don't remember switching or anything like that.

4 A. No.

5 Q. But you got in the front passenger seat.

6 A. Uh-huh.

7 Q. And Matt is still driving?

8 A. Uh-huh.

9 Q. And Derrick McIlwaine is sitting behind Matt in the
10 back; is that right?

11 A. Yes, sir.

12 Q. Nobody else in the back seat?

13 A. No, sir.

14 Q. This ain't a real big car, is it?

15 A. No.

16 Q. Four door car?

17 A. Yes, sir.

18 Q. Did Matt offer you any explanation about where he had
19 been or what he had been doing, number one?

20 A. No, sir.

21 Q. Did Matt offer you any explanation about who this
22 stranger was in the back seat of your car?

23 A. Yes.

24 Q. What did he say?

25 A. He said it was an old friend from high school.

TESTIMONY OF CHRISTINA STEVENS

1 MR. FRICK: Objection, hearsay.

2 THE COURT: Sustained.

3 MR. BARFIELD: She's quoting Matt Sims. Okay.

4 Q. Was any of the stuff -- was any of the stuff that was
5 taken by law enforcement in the search of that car your
6 stuff?

7 A. No, sir.

8 Q. You said Matt smoked dope every day.

9 A. All of the time.

10 Q. All of the time every day.

11 A. Uh-huh.

12 Q. Is it your testimony now that -- and that he did it to
13 calm his nerves?

14 A. I guess.

15 Q. Well, you said something about his hair falling out.

16 Is his hair falling out now because he stopped smoking dope?

17 A. Since he stopped it started falling out.

18 Q. Did he produce his own dope?

19 A. No.

20 Q. Do you know where he got his dope?

21 A. No.

22 Q. Do you know if somebody gave him his dope or if he had
23 to buy his dope?

24 A. I don't know.

25 Q. You told the jury a little bit ago that 320 bucks was

TESTIMONY OF CHRISTINA STEVENS

1 your money for the power bill.

2 A. Yes, sir.

3 Q. Where did you get the 320 bucks? Were you working?

4 A. It was ours. No. He gave me that money out of the ATM
5 or either from the check, I don't remember, but he always
6 gave me the power bill first as soon as he got his check
7 first because that was the first thing we pay is -- because
8 we have six kids, we cannot get our power cut off.

9 Q. So you describe the money as y'all's money.

10 A. Yes.

11 Q. Had he a bank account?

12 A. Yes.

13 Q. And you're not remembering whether it was a Wal-Mart
14 check or an unemployment check but you're saying the source
15 of the money was some check he got.

16 A. Yes.

17 Q. And when did you get your hands on that 320 bucks?

18 A. That morning before he dropped me off.

19 Q. He gave it to you?

20 A. Yes.

21 Q. And what did you do with it when he gave it to you?

22 A. I counted it, I folded it and I put it in the middle
23 console, that was the only thing in there. That way when I
24 got home I could take my power bill off the refrigerator and
25 go pay it.

TESTIMONY OF CHRISTINA STEVENS

1 Q. So you put it in the console that's got a lid on it
2 between the two seats of the car?

3 A. Yes, sir.

4 Q. There wasn't anything else in there then?

5 A. No, sir.

6 Q. These bags right here weren't in there that morning
7 when you put in there?

8 A. No, sir.

9 Q. These scales weren't in there when you put it in there
10 that morning.

11 A. No, sir.

12 Q. Have you ever seen that before?

13 A. No, sir.

14 Q. You've never seen State's Exhibit Number 8, which is
15 listed as a Weight Max, it has been identified as a digital
16 scale. You ain't never seen that before.

17 A. No, sir.

18 Q. In your car, your house or anywhere else.

19 A. I don't deal in stuff like that.

20 Q. And there weren't any drugs in that console when you
21 put that money in there at 9:00 or so that morning.

22 A. No, sir.

23 MR. BARFIELD: Thank you, that's all.

24 THE COURT: Mr. Grier, any redirect?

25 MR. GRIER: Nothing on redirect.

TESTIMONY OF CHRISTINA STEVENS

1 MR. FRICK: No questions.

2 THE COURT: Thank you, ma'am, you may step down.

3 MR. GRIER: That's all.

4 THE COURT: Defendant Sims rests. Anything in reply?

5 MR. BARFIELD: No, sir.

6 MR. FRICK: No, Your Honor.

7 THE COURT: Anything before we make argument to the
8 jury?

9 MR. BARFIELD: Nothing from the State.

10 MR. FRICK: I suppose I need to renew my motion that we
11 made previously at the close of the State's case.

12 MR. BARFIELD: Well, let me think a minute.

13 MR. GRIER: Judge, can we have a recess? Are you going
14 right in to closing argument, is that what you propose
15 doing?

16 THE COURT: Unless we have additional testimony.

17 MR. GRIER: I think we need a few minutes to simulate
18 our arguments. I know you could say we should have already
19 been doing that, which we have, but they are kind of
20 convoluted and we need to clarify them to save the jury some
21 time and unnecessary and confusing presentations.

22 THE COURT: I tell you what, we'll take a ten minute
23 recess to do all of that, I will let the jury retire to the
24 jury room and let me know whether they want to go to lunch
25 now or let lunch be brought in. So y'all discuss that if

TESTIMONY OF CHRISTINA STEVENS

1 you would and let the bailiff know.

2 (The jury left the courtroom.)

3 MR. FRICK: Your Honor, at this time in regards to
4 Defendant McIlwaine I would renew my motion for a directed
5 verdict. Of course, you've just heard testimony from
6 Ms. Stevens that the vehicle was theirs, I think that does
7 change it in the light of circumstances of previous
8 testimony and I would ask you to reconsider my motion for a
9 directed verdict based on what I previously stated and I'm
10 not going to go through all of that.

11 THE COURT: I understand the motion, I understand the
12 grounds for the motion and deny the motion.

13 MR. GRIER: Judge, I would just renew mine. I'm not
14 going to go back through it, but I don't have anything new
15 to contribute other than you have other testimony that my
16 client is a marijuana user or was a marijuana user as
17 opposed to a seller and I would ask you to consider that.

18 THE COURT: We also have evidence now that your client
19 was in control of the car most of the day, don't we, from
20 that testimony?

21 MR. BARFIELD: At least at 9:00 and at least 30 minutes
22 before 6:05.

23 THE COURT: I understand the motion and grounds for it
24 and deny the motion.

25 (A lunch break was taken.)

TESTIMONY OF CHRISTINA STEVENS

1 THE COURT: Are y'all ready for the jury?

2 MR. BARFIELD: State is ready.

3 MR. GRIER: Ready.

4 MR. FRICK: Yes, sir.

5 THE COURT: Let's bring them in.

6 (The jury returned to the courtroom.)

7 THE COURT: Welcome back, ladies and gentlemen. I
8 believe all parties have rested; is that correct?

9 MR. GRIER: Yes, sir.

10 THE COURT: There's no reply testimony from the State,
11 therefore, ladies and gentlemen, you have heard and seen and
12 received all of the evidence that you will receive, and in a
13 little while you will be required to go to the jury room for
14 deliberations and make a decision based on what has happened
15 so far and what happens after I tell you about the law and
16 the attorneys make their closing arguments to you. They
17 will do that first, I will then tell you about the law. We
18 will begin with the Solicitor.

19 MR. BARFIELD: State waives opening.

20 THE COURT: State waives opening.

21 MR. FRICK: We will not require them to open so I guess
22 that leaves to me. Thank you, Your Honor. I live down in
23 Fairfield down the road a little bit out in the country a
24 little bit. Of course, it's hard to say that anything is
25 urban in Fairfield County with 22,000 whole people, but I am

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1 out in the woods and I have somewhat of a menagerie of
2 animals in my yard. I have got two dogs, two chickens,
3 three now that my neighborhood's rooster has decided he
4 likes my hens better than his now so I now have three
5 chickens, and two cats. Now, like most of the other rural
6 counties around here now we have convenience centers where
7 you can take your trash to, you don't have the green boxes
8 like you have on the side of the road, some of you know what
9 a green box is, some of you don't. But you collect up your
10 garbage, typically it's one day a week, you take it out and
11 dump it at the convenience center. Well, the trash can was
12 over flowing yesterday and I got home kind of late, put the
13 bag out in the back yard where amazingly my menagerie likes
14 to congregate. How dogs and chickens and cats all get along
15 I don't have the first clue but they do in my back yard.
16 This morning I look out, I've got trash strown all over my
17 back yard, I have no idea who did it, somebody did it. It
18 could have been a dog, a chicken, a cat, it could have been
19 any number of the other animals that venture through my yard
20 living where I live, being a fox, raccoon, a possum or any
21 number of the herd of deer that wonder through my yard
22 thinking that anything and everything in my yard is part of
23 their own personal buffet. Simple fact of the matter is
24 they're all present in my yard, I can't prove that any of
25 them did anything, although on separate occasions I might

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1 have had issues with either one of these animals. My point
2 is just being there ain't enough to make you guilty of
3 anything. I can't blame my dog for tearing up my trash, I
4 can't blame the cat, the chickens or the deer because they
5 were just there, I can't prove anything. Being present
6 where something occurred is not enough. In this case
7 Derrick McIlwaine is sitting in the back of a car, it pulled
8 over, brake light is out, he's the passenger in the car. We
9 find something in the car that peaks our interest so we look
10 through the car and we find the drugs that you've seen and
11 heard talk about this whole process. What, what has the
12 State shown you other than he is there? Well, we don't find
13 the drugs on him so it's not actual possession. What you're
14 going to hear in a little while, there's two types of
15 possession, actual -- I told you yesterday you thought it
16 was real simple, possession is actually having something or
17 not but not quite that. But actual possession really is
18 that it's either on you or it's not. Constructive
19 possession is, well, hold on, I have a notebook, let's see,
20 constructive possession is when a person has dominion or
21 control or the right to exercise dominion and control over
22 either the object or the premises upon the object is
23 located, and you know it has got to be true because it's in
24 one of these little notebooks. Just like this little
25 notebook that the State says is indicative of Mr. McIlwaine

1 this long cigarette boat big bails of marijuana are getting
2 thrown out and big bails of cocaine, we're not talking about
3 that here. But we don't have to be talking about that here
4 for it to be possession with intent to distribute. You can
5 see how much marijuana that was, it doesn't look like much
6 but you can see what can happen with that marijuana and what
7 kind of money is involved with that marijuana if you break
8 it down right, and it's clearly more than 28 grams, that's
9 the marijuana. Let's talk about the cocaine for a minute.
10 Again, same 28 grams same one ounce. Tony Bowers told you a
11 20 is \$20 for about a fifth of a gram, two-tenths of a gram.
12 50 is \$50 for half a gram, he told you what an eight ball
13 is, it's an eighth of an ounce, about three grams, about
14 \$200 for that. How much cocaine was found in this car?
15 Four grams, that's 20 of the smaller sales if you wanted to
16 break it up and sell it, and it's a heck of a lot more than
17 one gram, it's four grams, it's not one gram. What else
18 have we got in this case that tells us of the intent to
19 distribute this drug -- these drugs? The scales. Couple of
20 things about the scales, couple of things about the
21 marijuana, too, in the console. Ms. Stevens told you she
22 put money in the console about 9:00 when Sims dropped her
23 off at her aunt's house and there wasn't any marijuana in
24 the console then. What does that tell us? That the
25 marijuana got put in there some time during the day Saturday

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1 before 5:30 or so when Sims picked Stevens back up, and
2 that's why I tell you I don't have to connect the dots
3 because they're out there riding around doing what they were
4 doing with this dope that day and that's when it got
5 introduced into that car. Stevens told you Sims smokes dope
6 she didn't say everyday, she said all of the time. What
7 that means -- I don't know what it means to you, but I
8 suggest to you that that means a lot every day, not just
9 smokes a joint after supper, smokes dope all of time is what
10 she said. She seemed to know all about his marijuana habit
11 or whatever you want to call it but she had never seen that
12 right there which is the digital scales. What does that
13 tell you? Maybe it's not Sims. They live together, they
14 live together, maybe McIlwaine's scales were in the console
15 with their dope. And this isn't Jenny Craig either, they
16 can tell you all day long that the scales are for the
17 consumer, well this isn't Jenny Craig, they're not weighing
18 out food portions to make sure they're eating the right
19 amount and not too much, not too little, they're weighing
20 out dope to make sure they're buying or selling the right
21 amount, that's what that's all about and that's evidence of
22 intent to distribute this drug -- these drugs. We've got
23 these sandwich bags. Well, what are the sandwich bags for?
24 Well, we know what they're for because we've got four bags
25 of dope in sandwich bags and we've got two empty bags, what

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1 are they for? Well, they're for maybe breaking some of that
2 out and distributing it, and that's evidence of intent to
3 distribute. We've got the composition book. Again, I don't
4 need to talk to you more about that, maybe it means
5 something to you, maybe it doesn't. But it is the reason
6 Tony Bowers said I need to check this thing out a little bit
7 and that's the reason he asked Sims for consent to search
8 the car and that's the reason he found what he found in the
9 back seat and that's the reason which led him asking Sims
10 again to check the car and he looked in the front seat and
11 found what he found in the console. And then we've got
12 money. Again, I've talked a little bit about the money. It
13 doesn't matter where the money is going, everybody has got
14 to have money, everyone has got bills, the source of the
15 money is what is more important. You've heard from us a lot
16 more than you want to hear from us, I'm going to sit down,
17 the Judge is going to talk and then it's going to be up to
18 y'all. You've got -- this whole thing is about intent. The
19 charge itself is intent, possession with intent. Now,
20 unless somebody tells you what his intent is you can't know
21 without just looking at all of the surrounding circumstances
22 and that's what I'm asking you to do in this case, look at
23 what was found, look at how much was found, look at where it
24 was found, look at the circumstances of the day. Ms.
25 Stevens never met McIlwaine before in her life. She tells

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1 you Sims smokes all of the time, she tells you Sims doesn't
2 create his own dope, he's got to get it somewhere, and low
3 and behold he dumps her out at her aunt's early in the
4 morning, he picks her up late afternoon low and behold there
5 is McIlwaine and a car full of dope. You know what happened
6 that day. This is not two guys getting together with a six
7 pack that each of them drink a beer, this is two guys with
8 two different kinds of dope and a bunch of both of them, and
9 I submit to you they're both responsible for all of it and
10 they both possessed it with intent to distribute and I ask
11 you to find them both guilty of both charges. Thank you
12 very much.

13 THE COURT: Thank you, Solicitor Barfield. Do y'all
14 need a break or stand up? If you don't I won't do it, if
15 anybody wants to stand up and stretch let me know. Ladies
16 and gentlemen, I remind you that the fact that the
17 defendants in this case were arrested, charged, and indicted
18 is not evidence and cannot be considered by you as evidence
19 in this case. These documents are simply the documents that
20 bring the case into the Court that each of the defendants
21 have pled not guilty to each of these indictments and that
22 puts the burden upon the State to prove to you guilt beyond
23 a reasonable doubt. I tell you that a person charged with
24 committing a criminal offense in South Carolina is never
25 required to prove himself innocent. It is an important rule

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1 of law no matter what the seriousness of the crime may be
2 that the defendant will always be presumed to be innocent of
3 a crime for which an indictment was issued unless guilt has
4 been proven by evidence that satisfies you, the jury, of
5 that guilt beyond a reasonable doubt. The presumption of
6 innocence does not end when you begin your deliberations,
7 but it accompanies the defendant throughout the trial until
8 you reach a verdict of guilt based on evidence that
9 satisfies you of that guilt beyond a reasonable doubt. The
10 presumption of innocence is like a robe of righteousness
11 placed about the shoulders of a defendant which remains with
12 the defendant until it has been stripped from the defendant
13 by evidence that satisfies you of the defendant's guilt
14 beyond a reasonable doubt. The presumption of innocence is
15 not a mere legal theory, it's not just a legal phrase, it is
16 a substantial right to which every defendant is entitled
17 unless you, the jury, are satisfied from the evidence of the
18 defendant's guilt beyond a reasonable doubt. A reasonable
19 doubt is the kind of doubt that would cause a reasonable
20 person to hesitate to act. Some of you may have served on
21 juries in civil cases where you were told it was only
22 necessary to prove that a fact was more likely true than not
23 true such as a greater weight or the preponderance of the
24 evidence, but in criminal cases the State's proof must be
25 more powerful than that, in criminal cases it must be beyond

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1 a reasonable doubt. Proof beyond a reasonable doubt is
2 proof that leaves you firmly convinced of a defendant's
3 guilt. Of course, there are very few things in this world
4 that we know of with absolute certainty, and in criminal
5 cases the law does not require proof that overcomes every
6 possible doubt. If based on your consideration of the
7 evidence you are convinced that the defendant is guilty of
8 the crime charged you must find the defendant guilty. On
9 the other hand, if you think there's a real possibility that
10 the defendant is not guilty you must give the defendant the
11 benefit of the doubt and find the defendant not guilty.
12 During the trial you and I have had different obligations
13 and responsibilities. It has been my obligation to preside
14 over the trial of the case, but also I now have the duty to
15 charge you or tell you about the law that applies in this
16 case. As the presiding judge I'm the sole judge of the law
17 of the case and it is your duty as jurors, ladies and
18 gentlemen, to accept and apply the law as I now state it to
19 you. If you already have any idea that the law is different
20 than I tell you or that the law should be different than I
21 tell you it is, you must put that out of your mind because
22 under your oath you're obligated to accept the law as I tell
23 you it is. In every case that comes before a court the jury
24 becomes the sole and exclusive judges of the facts of the
25 case. As I told you earlier a trial judge such as myself

1 cannot comment on anything about the facts of the case. You
2 are the sole judges of the facts of the case, and if I have
3 done anything to cause you to believe that I have an opinion
4 about the facts of the case put that out of your mind. The
5 law does not permit me to have an opinion about the facts of
6 the case, this is a matter solely for you. As jurors it is
7 your duty to determine the affect, the value, the weight and
8 the truth of the evidence presented during the trial.

9 Generally speaking there are two types of evidence presented
10 during a trial, direct evidence and circumstantial evidence.
11 Direct evidence, of course, is testimony of a person who
12 claims to have actual knowledge of the facts such as an eye
13 witness, it is evidence which immediately establishes the
14 main fact to be proved. Circumstantial evidence is proof of
15 a chain of facts and circumstances indicating the existence
16 of a fact. It is evidence which immediately establishes
17 collateral facts from which the main fact may be inferred.
18 Circumstantial evidence is based on inference and not on
19 personal knowledge or observations. The law makes no
20 distinction between the weight or value to be given to
21 direct or circumstantial evidence, nor is a greater degree
22 of certainty required of circumstantial evidence than of
23 direct evidence. You should weigh all of the evidence in
24 this case and after weighing all of the evidence if you're
25 not convinced of the guilt of the defendant beyond a

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1 reasonable doubt you must find the defendant not guilty. In
2 doing this, ladies and gentlemen, you must determine the
3 credibility of the witnesses who have testified, and this
4 simply means the believability. It becomes your duty as
5 jurors to analyze and evaluate the evidence and determine
6 which evidence convinces you of its truth. You may believe
7 one witness over several witnesses or several witnesses over
8 one witness, you may believe part of the testimony of a
9 witness and reject the remaining testimony of the very same
10 witness. You may believe the testimony of a witness in its
11 entirety or reject the testimony of a witness in its
12 entirety, and, of course, you may decide whether the witness
13 has exhibited to you any interest or any bias. I instruct
14 and emphasize to you that the fact that these defendants did
15 not testify, that neither of these defendants did not -- did
16 testify is not a fact to be considered in your
17 deliberations, it must not be considered in any manner
18 whatsoever. Under your oath you are to draw no conclusion
19 whatsoever from the fact that neither defendant in this case
20 testified. It should not be discussed in the jury room.
21 Each defendant is not required to prove his innocence, the
22 burden remains on the State to prove guilty beyond a
23 reasonable doubt. I tell you that pursuant to the South
24 Carolina Code of Laws 44-53-370 it is unlawful for any
25 person to manufacture, distribute, dispense, deliver,

1 purchase, aide, abet, attempt or conspire to manufacture,
2 distribute, dispense deliver or purchase, or with the intent
3 to manufacture, distribute, dispense, deliver or purchase
4 any controlled substance. And I tell you under the law of
5 this state marijuana is a controlled substance and cocaine
6 is a controlled substance. Each defendant has been charged
7 with possession with intent to distribute on the one hand
8 marijuana, the second cocaine. The State must prove beyond
9 a reasonable doubt that a defendant possessed such a drug
10 with the intent to distribute it. To prove possession the
11 State must prove beyond a reasonable doubt that a defendant
12 had both the power and the intent to control the disposition
13 or the use of the drug. Possession may be either actual or
14 constructive. Actual possession of course means that the
15 drug was in the actual physical custody of the defendant.
16 Constructive possession means that the defendant had
17 dominion and control or the right to exercise dominion and
18 control of either the drug itself or over the property on
19 which the drug was found. I tell you that mere presence at
20 a scene where drugs are found is not enough to prove
21 possession. A defendant's knowledge of possession may be
22 inferred when a substance is found on the property under the
23 defendant's control, however this inference is simply an
24 evidentiary fact to be taken into consideration by you along
25 with the other evidence in this case and to be given the

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1 weight you decide it should have. I also tell you that two
2 or more persons may have a joint possession of a drug. The
3 State must also prove beyond a reasonable doubt that a
4 defendant intended to distribute the drugs. Distribute
5 means to deliver other than by administering or dispensing
6 the drug. Intent may be shown by acts or conduct of a
7 defendant in other circumstances from which you may
8 naturally and reasonably infer intent. In determining
9 whether a defendant had the intent to distribute the drug
10 you may consider the circumstances surrounding the
11 defendant's alleged possession. You may consider the amount
12 of the substance alleged to have been possessed, the manner
13 in which it was allegedly possessed, the place where it was
14 allegedly possessed and other factors which you consider to
15 be important. You must find that the defendant did not have
16 the intent to have the drug solely for his own use. I also
17 tell you that possession of more than 28 grams or one ounce
18 of marijuana or possession of more than one gram of cocaine
19 creates an inference that the defendant possessed the drug
20 with the intent to distribute it. This inference does not
21 relieve the State from proving beyond a reasonable doubt
22 that the defendant had the intent to distribute, it is
23 simply an evidentiary fact to be taken into consideration by
24 you along with the other evidence in the case, and to be
25 given the weight that you decide it should have. If you

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1 find that a defendant has -- excuse me, that the State has
2 failed to prove beyond a reasonable doubt that the defendant
3 is guilty of possession with intent to distribute either
4 drug you may consider whether the State has proved beyond a
5 reasonable doubt that the defendant is guilty of simple
6 possession of the drug. Simple possession does not require
7 an intent to distribute. The indictments in this case
8 allege different offenses. Each indictment charges a
9 separate and distinct offense. You must decide each
10 indictment separately on the evidence and the law applicable
11 to it uninfluenced by your decision as to any other
12 indictment. A defendant may be convicted or acquitted on
13 all or any of the offenses charged. You will be asked to
14 write a separate verdict of guilty or not guilty on each of
15 the charges, I said that but I'm getting ready to explain to
16 you in more detail the verdict form that you will be given
17 to record your verdict on. For there to be a verdict the
18 verdict must be unanimous, meaning all 12 of you must agree
19 before there could be any verdict. On the verdict form you
20 will be asked or required to address the various charges.
21 Each defendant once again is charged with possession with
22 intent to distribute, on the one hand cocaine and then
23 separately charged with possession with intent to distribute
24 marijuana. As to each of those charges if you find that the
25 defendant -- the State has not proven beyond a reasonable

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1 doubt that the defendant is guilty of possession with intent
2 to distribute the drug you may then consider whether the
3 State has proved beyond a reasonable doubt that the
4 defendant is guilty of possession of the drug which is
5 called a lesser-included offense. As to each of these
6 charges the possession with intent to distribute cocaine and
7 possession with intent to distribute marijuana the
8 defendants cannot be guilty of both intent to distribute and
9 possession. In other words -- I'll say it again, the
10 verdict form will tell you actually what I just said and
11 you're looking at it from across the hall of the way here,
12 Mr. Foreman. But the first question on this verdict form as
13 to each defendant, it will be the same as to each defendant,
14 is whether you find guilty or not guilty possession with
15 intent to distribute cocaine. If you find the defendant
16 guilty of possession with intent to distribute cocaine you
17 do not consider the lesser-included charge which is
18 addressed directly beneath that of possession of cocaine.
19 On the other hand if you find that the State has failed to
20 prove intent -- possession with intent to distribute you do
21 then consider the lesser-included of just simple possession,
22 once again, it's guilty or not guilty. And then you move to
23 the third line on here which deals with marijuana, and you
24 do the same thing, possession with intent to distribute
25 marijuana, and if he's found not guilty -- if you find that

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1 the State has failed to prove beyond a reasonable doubt that
2 the defendant is guilty of possession with intent to
3 distribute marijuana, you then consider whether the State
4 has proven by the preponderance of the evidence that the
5 defendant is guilty of simple possession of marijuana. The
6 defendant cannot be guilty of possession with intent to
7 distribute and simple possession of the same drug. It could
8 be separately found -- can be found that way as to different
9 drugs. I hope I'm making myself clear but I will be here in
10 case you have any questions about that. I'm going to ask
11 you to step back in the jury room for a few moments, I will
12 talk to the lawyers and see if they have any objections to
13 anything I have been telling you, when I'm ready for you to
14 begin your deliberations I will send the evidence to the
15 jury room along with the verdict forms. I forgot to tell
16 you this, once the jury reaches a verdict on each charge I'm
17 going to ask you as foreperson of the jury if you would,
18 Mr. Albert, to circle guilty or not guilty, and then sign
19 the verdict form on the bottom, knock on the door and let
20 the bailiff know that y'all have reached a verdict, we'll
21 then receive you back in the jury room. When all of that
22 comes to the jury room for you to begin your deliberations,
23 at that time we will ask our alternate juror if he will step
24 back into the courtroom. So if you will, ladies and
25 gentlemen, please retire to the jury room, wait on

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1 instructions before you begin your deliberations.

2 (The jury left the courtroom.)

3 THE COURT: Anything from the State?

4 MR. BARFIELD: Nothing.

5 THE COURT: Defendant?

6 MR. FRICK: Yes, sir. When you were talking at the
7 last point about finding not guilty on PWID marijuana that
8 they could consider the lesser-included, you said
9 preponderance of the evidence. You said probably 15 times
10 reasonable doubt but at that one point you did say
11 preponderance of the evidence.

12 THE COURT: Did I really?

13 MR. FRICK: You did. I have to bring it to the Court's
14 attention, however if you wish to address it but that was
15 stated.

16 THE COURT: Mr. Grier, anything?

17 MR. GRIER: No, Your Honor. I believe that you do need
18 to instruct them that there's an error if that was, in fact,
19 said but I didn't catch it either.

20 THE COURT: I didn't catch it.

21 (The jury returned to the courtroom.)

22 THE COURT: Ladies and gentlemen, it has been brought
23 to my attention that I misspoke when I said something to you
24 earlier when talking to you about the verdict forms, I
25 unintentionally apparently said that the State as to one of

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1 THE JUROR: Yes, sir.

2 THE COURT: And sign the verdict form.

3 THE JUROR: Yes, sir.

4 THE COURT: Would you please pass it forward? And
5 Mr. Clerk, would you please publish the verdict?

6 THE CLERK: Yes, sir. We the jury as to indictment
7 number 2012-GS-29-60, possession with intent to distribute
8 cocaine -- I'm sorry, State vs. Derrick Antonio McIlwaine --
9 find that the defendant Derrick Antonio McIlwaine, not
10 guilty. If you find that the State has not proven that the
11 defendant is guilty of possession with intent to distribute
12 cocaine you may then determine that the State has proven
13 that the defendant is guilty of possession of cocaine. As
14 to the charge of possession of cocaine we, the jury,
15 unanimously find the defendant, Derrick Antonio McIlwaine
16 guilty. We the jury as to indictment number 2012-GS-29-61,
17 possession with intent to distribute marijuana unanimously
18 find the defendant, Derrick Antonio McIlwaine, not guilty.
19 If you find that the State has not proven that the defendant
20 is guilty of possession with intent to distribute marijuana
21 you may then determine whether the State has proven that the
22 defendant is guilty of possession of marijuana. As to the
23 charge of possession of marijuana we, the jury, unanimously
24 find the defendant, Derrick Antonio McIlwaine, guilty. And
25 that is signed Trenton Alford, dated 2/20/2013. We the jury

JURY VERDICT

1 as to indictment number 2012-GS-29-76 possession with intent
2 to distribute cocaine unanimously find the defendant,
3 Matthew Craig Sims, not guilty. As to the charge of
4 possession of cocaine we, the jury, unanimously find the
5 defendant, Matthew Craig Sims, not guilty. We the jury as
6 to the indictment number 2012-GS-29-77, possession with
7 intent to distribute marijuana, unanimously find the
8 defendant, Matthew Craig Sims, not guilty. And as the
9 charge to possession of marijuana we, the jury, unanimously
10 find the defendant, Matthew Craig Sims, guilty. Sign
11 Trenton Alford, foreperson, dated 2/20/2013. Ladies and
12 gentlemen of the jury, if this be your verdict so say you
13 all by the raising of your right hands. Let the record
14 reflect all jurors raised their right hands.

15 THE COURT: Thank you, Mr. Hammond. Anything from the
16 State before the jury is discharged?

17 MR. BARFIELD: No, sir.

18 THE COURT: Defendant?

19 MR. FRICK: Request they be polled.

20 THE COURT: Mr. Grier?

21 MR. GRIER: No.

22 THE COURT: No? Mr. Clerk?

23 THE CLERK: Polling on Mr. McIlwaine only.

24 Mr. Foreman, Trenton Alford, is this your verdict and is
25 this still your verdict?

1 STATE OF SOUTH CAROLINA
2 COURT OF GENERAL SESSIONS
3 COUNTY OF LANCASTER
4 2012-GS-29-00060, 00061
5

6 State of South Carolina

7 vs.

8 Derrick A. McIlwaine
9
10

11 Lancaster, South Carolina
12 February 21, 2013 Sentencing Hearing
13 Before the Honorable Brooks P. Goldsmith
14

15 APPEARANCES

16 For the State: Doug Barfield

17 For the Defendant: William Frick
18

19 Reported by: Michael C. Watkins

20 Official Court Reporter
21
22
23
24
25

1 MR. BARFIELD: Your Honor, this is Derrick Antonio
2 McIlwaine, again represented by Mr. Frick, sentencing
3 proceeding for the trial that resulted in guilty verdicts
4 yesterday. I'm handing you the indictment which is 2012-60
5 whereupon Mr. McIlwaine was found guilty of possession of
6 cocaine, and 2012-61, of which he was found guilty of simple
7 possession of marijuana, I'm also handing you sentence
8 sheets. I'm also handing you -- I'm going to tell you about
9 his record but I'm handing you sort of a summary of his drug
10 convictions which I prepared and gave Mr. Frick a copy of.
11 It is the State's position, number one, that both of these
12 would be third or subsequent offenses and for the marijuana
13 statute it would be second or subsequent which carries up to
14 one year, and for the cocaine conviction it's certainly the
15 State's position that it's a third conviction which carries
16 up to 10 years. I will tell you now and I have told
17 Mr. Frick that I am asking for consecutive sentences and
18 everyday he can get under both of them. And I will -- well
19 I guess I will go ahead and tell you about his record. Of
20 course, you heard the facts the of case. First thing I will
21 say is Mr. McIlwaine I think is very fortunate based on the
22 facts that although the jury found him guilty of possession
23 of cocaine despite having what was tested to be four grams
24 they did not find him guilty of possession with intent to
25 distribute cocaine, from my reading of the statute had he

1 been convicted of that he would be been subject to ten to 30
2 years at 85 percent. What he's looking at now is ten years
3 on the cocaine and one year on the marijuana which are not
4 85 percent offenses. Your Honor, his record -- he is 27
5 years old, he was born on 11/2 of '85, his record started as
6 soon as he could start amassing an adult record. His first
7 conviction was 3/7 of '03 -- an arrest 3/7/03 for disorderly
8 conduct. In April of '03 he got arrested and subsequently
9 convicted of several charges which included I'm guessing
10 possession of a pistol by a person under 21 which the
11 statute was back then, carrying a pistol and three counts of
12 auto breaking, he got a five year suspended -- five year
13 sentence on those suspended to four years of probation, and,
14 of course, he remained on probation for some period of time.
15 Apparently while on probation he got arrested on 9/29 of '03
16 for simple assault and battery, my guess is again while on
17 probation. On 5/9 of '04 he got arrested and convicted on
18 both of these for simple assault and battery. 2005 again
19 I'm guessing while he's still on probation got arrested for
20 possession of marijuana first, open container and he had
21 another pistol charge at that time under the five year
22 statute, and for that he got an active three year sentence
23 and that court date was the same date as he pled to all of
24 these drug charges I'm going to tell you about in a minute.
25 It appears also that when he got that active three year

1 sentence he got his probation on the prior convictions for
2 auto breaking and the firearms charges revoked I think, and
3 it looks like he got five years revoked and went to SCDC on
4 that. And then, Your Honor, we get into the drug
5 convictions and the summary I gave you has everything on it
6 concerning those convictions other than the sentences. The
7 convictions that I gave you on my summary were all guilty
8 pleas on 6/6/2006 and you can see what the charges are.
9 There are five different arrests dates so those are not all
10 multiple charges out of a single incident. 4/26 of '05
11 resulted in a conviction for PWID crack. 7/9 of '05
12 resulted in a conviction for PWID marijuana. 9/7 of '05
13 resulted in a conviction for distribution of crack. 10/3/05
14 resulted in a conviction for distribution of marijuana, and
15 then he had two charges out of a 12/12/05 arrest and the
16 clerk didn't have the -- could not lay her hands on the
17 actual court documents, but from the computer system it
18 appears that it was probably either distribution or PWID of
19 marijuana based on the CDR code and code section, the result
20 of all of that is on the marijuana charges he got three
21 years and on the crack charges he got ten years suspended to
22 five years followed by five years of probation and he is
23 still on probation as I understand it. So based upon all of
24 that it's the State's contention, number one, that these are
25 third or subsequent offenses on the cocaine. I just see

1 absolutely no reason that he should not get the maximum
2 sentence based on his continued violation of the law
3 starting when he was 17 years old continuing while he was on
4 probation for other offenses, and continuing further into
5 2011 when he again was caught with drugs and got convicted
6 yesterday of those offenses. So I would ask you to give him
7 ten and one consecutive. Ryan McLemore is here, might at
8 some point want to talk -- I'm sure he wants to talk, if he
9 doesn't I want him to right now.

10 THE COURT: We'll hear from him now.

11 SPEAKER: Your Honor, I guess I'll just kind of --
12 solicitor has already told you about Mr. McIlwaine's record.
13 We at the sheriff's office are at the point where we ask
14 that the maximum that could be given to Mr. McIlwaine. I
15 think he's proven and shown that probation doesn't work for
16 him, or leniency sure hasn't helped with him in the past.
17 We have dealt with him over and over and we have purchased
18 drugs from him, he has just been a repeat offender with the
19 sheriff's office and Lancaster County.

20 THE COURT: Thank you, Mr. McLemore.

21 MR. FRICK: And Judge, I think probation is prepared to
22 go forward, we would ask to resolve all matters.

23 THE COURT: All right. Let's hear from probation then.

24 MR. FRICK: Your Honor, there are post-trial motions
25 that I meant to make yesterday afternoon post-trial

1 obviously, but with all of the excitement I forgot to do it.
2 I do want to put those on the record at some point, I don't
3 know if you want to proceed with sentencing and we do that.

4 THE COURT: Well, you might as well go ahead and do it
5 now.

6 MR. FRICK: And I apologize for -- I meant to do that
7 before we started up the sentencing here. Your Honor, I
8 would move for a new trial for Mr. McIlwaine based on my
9 pretrial motion for suppression of evidence as fruit of the
10 poisonous tree pursuant to the Sikes case. I understand how
11 the Court ruled on that but I believe the Court was in error
12 on that and I think that the Sikes case is exactly on point
13 and almost exactly the same case, and in that case they
14 determined that there was no probable cause to run a warrant
15 search on the passenger in the car which is exactly the same
16 situation Mr. McIlwaine was in. Based on that I would renew
17 my motion to set -- to suppress the evidence that was found
18 and ask for a new trial.

19 THE COURT: I understand the motion and grounds for the
20 motion but I find no reason to change the Court's position
21 on that and will therefore deny your motion.

22 MR. FRICK: And my final motion is one I always make.
23 A judge another term ago told me what I was asking for and I
24 forgot the exact language that he told me, but I ask Your
25 Honor to set the verdict aside based on the 13th Juror

1 Doctrine. I do believe case law supports the ability of the
2 judge to do that in criminal cases as well as they have in
3 the civil cases. I think Your Honor heard the evidence and
4 I think you can conclude there was not a reasonable basis
5 for the jury to reach the verdict they did and I ask that
6 the Court set aside the verdict.

7 THE COURT: All right. I understand the motion but I
8 believe there was sufficient evidence and I will deny that
9 motion, or request.

10 MR. FRICK: Thank you, Your Honor.

11 THE COURT: Anything else then before we proceed with
12 the probation matter?

13 MR. FRICK: No. Thank you for letting me take care of
14 that.

15 AGENT BOYD: Well basically, Mr. McIlwaine is behind --
16 he's just behind on accounts, his money are behind, multiple
17 arrests while on supervision and this right here will
18 constitute a violation so we would just like to get it all
19 wrapped up.

20 THE COURT: And he is facing then?

21 MR. FRICK: Five, I believe.

22 AGENT BOYD: Five years, yes, sir.

23 THE COURT: Now, Mr. Frick?

24 MR. FRICK: Thank you, Your Honor. Your Honor, in
25 regard to the sentencing, I understand why the solicitor is

1 asking for it to be a third offense, he's going to say while
2 all of these were pled on the same date they do have
3 different incident dates, and I do believe and have advised
4 my client that the Court is probably going to follow that,
5 but I do ask you to look at the statute. The statute in
6 regard to prior sentencing which I believe is 44-53-470,
7 it's the one that got enacted with the Omnibus Crime Law.
8 It I guess kind of moved simple possession of marijuana out
9 as a prior, I don't think that's a situation we have here.
10 It talks about convictions from the previous five years I
11 believe as being able to be stuff for enhancement. What I
12 am most specifically looking at is at the very bottom, the
13 last sentence on that one where it says for the purposes of
14 this statute prior convictions -- the date of prior
15 convictions or whatever are from such and such. That
16 particular provision says nothing about incident dates, it
17 specifically says convictions. This is one of those
18 situations where Mr. McIlwaine, of course, had had a
19 probation revocation, is doing a stretch in the department
20 of corrections, is offered a deal to wrap of all of these
21 charges at one time concurrent with what he's already doing,
22 not going to cost him anymore so I don't know that he delved
23 into a lot of the issues behind the cases and did what I --
24 just about everybody I've ever seen in that situation do
25 which is have all of this stuff run concurrent and wrapped

1 in to get it resolved. So I'm asking the Court to look at
2 that statute and I believe it deals completely with
3 conviction date, not incident date. And, of course,
4 criminal statutes are supposed to be construed strictly
5 against the State so I think these could probably and should
6 be -- this conviction should be a second offense because of
7 the convictions date and all of these things occurring at
8 one time. Now, I certainly cannot argue that they all occur
9 out of the same string of incidents, as you see the incident
10 dates are clearly too far apart for me to be able to argue
11 that, but as I said, I don't see where the statute calls it
12 to be for the incident date, just simply conviction date
13 and, of course, all of these occurred at one time and these
14 are his prior drug convictions, so I ask the Court to
15 consider treating these as a second offense under that
16 statute. Your Honor, of course Mr. McIlwaine has not gotten
17 a conviction since June 6th of 2006, an ominous day to plead
18 guilty to anything but he has not been back in front of the
19 Court entering a plea until -- since that date. I
20 understand he got arrested on these charges and there are
21 other charges that he got arrested on but those are all
22 pending charges at this time other than what we had the
23 trial on. Your Honor, he's a young man who made a fair
24 number of mistakes as a much younger man. He is getting to
25 the age where that is probably not the life-style he wants

1 to lead anymore, he wants to get out and be a productive
2 person and I think he can be. He is an intelligent man. I
3 have had good conversations with him, he understands well
4 what he was facing at the trial, what he's facing today. We
5 have discussed a myriad of things and he has just got a good
6 head on his shoulders. He has got good family support, Your
7 Honor. I know he has got biological family out here and mom
8 is out here, she's foster mom but I think she's probably
9 mom. Of course, biological mother is always mom but foster
10 mother I think is probably the closest to him. His brother
11 is out here and his sister may be out here, I think she was
12 here yesterday and some of them may wish to speak. I ask
13 you to hear from whomever from his family wishes to speak.
14 Your Honor, we're just asking for leniency. As the jury
15 spoke, they believed this is a possession, I ask -- we
16 certainly -- the loser in these cases always comes up and
17 wants to question the jury but we all have to accept what
18 the jury said and the citizens of Lancaster came forward and
19 said this was not a PWID, that this was simply a possession.
20 I certainly understand that based on priors it's graduated
21 offenses and he is facing more because of that, but Your
22 Honor, the only prior drug record he's got are these things
23 that he pled to on that one day as far as drug stuff. I
24 understand he was on probation for something previously. He
25 and I didn't talk about probation, I don't know that either

1 one of us are really asking for that right now, but we are
2 asking for something to allow him to put this behind him and
3 come back out. If anyone wants to make sure and say your
4 name real quick.

5 SPEAKER: My name is Marvin McIlwaine, that's my baby
6 brother. And like I told you before when I came up in front
7 of you for his bond hearing, I told you if you give him a
8 chance and let me watch over him I promise I'll keep him out
9 of trouble and I will give you my word. All I need to do is
10 get him out of the residence where he's at now and he will
11 stay out of trouble. We've got family that will keep him
12 out of trouble if you can find it in your heart to let him
13 come home to us.

14 THE COURT: Thank you, sir. Yes, ma'am?

15 SPEAKER: I'm his mama. I love you.

16 SPEAKER: Your Honor, I'm Brenda Bonds, I'm Derrick's
17 foster mother. Derrick is a fine young man just doing bad
18 things because I just didn't give him a chance. And I like
19 his brother said maybe I didn't do anything, but if you give
20 him another chance then I will do more than what I did.
21 Thank you, sir.

22 THE COURT: Thank you, ma'am.

23 SPEAKER: Your Honor, I'm Shaquita Lipscomb, I'm
24 Derrick's sister. Like my mom said, Derrick will give you
25 the shirt off his back, if that's all he had he would do

1 that. He's a smart, smart man and I feel I have no problem
2 with helping my brother along with my mother. Like my
3 brother said, he needs to get out of certain situations, he
4 needs to get out of certain areas to keep his head clear.
5 He needs to make sure he's around positive people and I
6 believe if he had that in his mind there is no other choice
7 that we would not help him as a family. I just ask that you
8 please find it in your heart to please give him another
9 chance. Like I say, he is a good man, he's just in bad
10 situation with bad people. But I mean, if the tables can be
11 turned I'm pretty sure they can be. I just hope you find it
12 in his heart, just please forgive him and allow him another
13 second chance.

14 THE COURT: Thank you, ma'am.

15 MR. FRICK: And Your Honor, I have discussed with Mr.
16 McIlwaine -- of course, my procedure in these cases is to
17 automatically file an appeal, he and another attorney in
18 Columbia will sort out whether it goes forward or not. But
19 I have advised him whatever he says he may be guarded to
20 affect himself in future appellate issues, but he wants to
21 speak at this time.

22 THE DEFENDANT: Before I start I would first like to
23 apologize for my actions yesterday after trial, I let my
24 emotion get the best of me. And like my family done say,
25 all I ask is for a second chance. I put myself in a

1 position where I just hung around the wrong person doing the
2 wrong things trying to fit in, getting high. But all over
3 together I was trying my best to do the positive things and
4 get my life back on track. I was taking care of my kids,
5 probation fell behind because of me taking care of other
6 matters in federal court and I ended up beating them charges
7 but still I had to come home but I was behind by then, and
8 up until then all of my fines and fees is paid in advance.
9 I was never behind, I was in advance, on the right track,
10 taking care of any kids, going to school, completing my
11 programs and all. But it's like even though I'm going
12 forward I've still got a past that still follows me that
13 haunts me and a reputation that is like stereotyping me but
14 it was like I've tried my best to get away from it, Your
15 Honor, but the only way I can get away from it I think is to
16 get out of Lancaster. It's like with me being on probation
17 and all of this stuff it's like holding me back. And my
18 family, we all reside here, I was raised here, I was adopted
19 here and I felt like I had nowhere else to go. But I would
20 just ask you, Your Honor, to have leniency on me, Your
21 Honor, even though I know I did wrong. And yes, I have got
22 to be punished for it but I'm not asking to be punished to
23 the max or something to keep me away from my family. I have
24 been away from my family if you look at my record since I
25 have been a juvenile, after the age of 20 I only spent two

1 years from the age 20 on the streets, from 20 to 25 I was
2 locked up doing five years. Like my lawyer say the only
3 reason the other charges were up on there is because I was
4 doing the five years and I felt like coming home with my
5 family without no pending charges and they put the good plea
6 out just to put it on my record and ran it concurrent why I
7 had other time added to it so that's why I took these
8 charges. If I wouldn't have took pleas to them I doubt if
9 they would have been here today, Your Honor, so I'm just
10 asking you to show leniency on me to get back to my loved
11 ones and family and take care of my four kids.

12 THE COURT: All right. Thank you, Mr. McIlwaine.
13 Anything else, Mr. Frick?

14 MR. FRICK: No, Your Honor, thank you.

15 MR. BARFIELD: If I could -- if you're entertaining
16 calling this a second I would like to be heard on that.

17 THE COURT: I want you to tell me what you think about
18 that.

19 MR. BARFIELD: The statute says convicted of,
20 conviction to me runs with the charge. I think as an
21 example yesterday he got convicted twice, he got convicted
22 of two different charges, they happened to occur on the same
23 date. On 6/6 of '06 he got convicted six times for six
24 different charges over five different dates. I don't
25 think -- I think technically a conviction speaks to an

1 individual charge and I think his convictions on 6/6 of '06
2 represented multiple charges on five different incident
3 dates and I think that clearly is contemplated by the
4 statute, otherwise you would have to -- if the Court took a
5 contrary position and this is what I would end up having to
6 do to try to preserve my ability to enhance drug
7 convictions, I would have to plead him on one and hold some
8 until the next term or try him on one even if he wanted to
9 plead and just -- that's nonsensical in our judicial system.
10 I think convictions mean for an incident or for a charge
11 arising out of an incident, and I think clearly this is a
12 third and subsequent and technically would be a seventh.
13 That's my argument about that and do have two other points
14 unrelated.

15 THE COURT: Go ahead then with that.

16 MR. BARFIELD: And, Your Honor, I don't mean to be
17 beating a dead horse, but one of the persons you heard speak
18 on behalf of Mr. McIlwaine is his brother, Marvin, and in
19 the interest of full disclosure Marvin McIlwaine not too
20 long ago was released from prison on drug convictions
21 himself, prosecuted in this court. Second thing is --

22 MR. FRICK: I'm not sure what that has got to do with
23 anything regarding Mr. Derrick McIlwaine, Your Honor, so I
24 would ask you to disregard that.

25 MR. BARFIELD: Marvin McIlwaine stood in front of you

1 three minutes and said, "I will look out for him."

2 THE COURT: I heard him, I know why you said it.

3 MR. BARFIELD: Yes, sir. And then the third thing --
4 I'm not trying to beat a dead horse, this is a poster case
5 with what the citizenry thinks is wrong with the system. He
6 gets on probation, he doesn't make probation, he goes to
7 prison, he gets out, he gets arrested again, gets convicted
8 again. The only way he ain't going to be involved in
9 criminal activity in Lancaster County is if he is in prison
10 and that's why I'm asking what I'm asking for.

11 THE COURT: Let me look at the statute we're talking
12 about here. 44-53-470. And you're saying, Mr. Frick, that
13 Section B will take priority for the language in section A3;
14 is that right? Is that what we're looking at?

15 MR. FRICK: Well, I think it defines where the -- if
16 that's the last line -- I don't have it in front of me, but
17 is that the last line that's in the statute that talks about
18 determining I guess the five years period of time? That's
19 the way I understood that line, it tells you when the clock
20 on the five years starts to run. What I'm saying is that
21 essentially is the definition part of the statute, and in
22 that it doesn't say anything but -- I think conviction date
23 is maybe what it said but I know it says conviction, it
24 doesn't say incident date. That's my argument, that it's
25 all one conviction date so it should be considered as one.

1 THE COURT: I'm prepared to rule. Mr. McIlwaine, I
2 find that you have willfully violated the terms of your
3 probation as a result of the conviction in this case and I'm
4 going to revoke your probation in its entirety, terminate
5 your probation, convert any monies owed to a civil judgment.
6 On the charge of possession of marijuana I'm going to
7 sentence you to the department of corrections for a period
8 of one year, that will be concurrent with your probation
9 violation and you'll get credit for any time served. On the
10 charge of possession of cocaine I am going to treat it as a
11 third or subsequent offense, on that charge I sentence you
12 to the department of corrections for a period of eight
13 years, it will be concurrent sentences, credit for time
14 served. I'll recommend the addiction treatment unit. Court
15 will be in recess for five minutes.

16 (End of the hearing.)

17

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1 I, the undersigned, Michael C. Watkins, Official Court
2 Reporter for the Sixth Judicial Circuit of the State of South
3 Carolina, do hereby certify that the foregoing is a true,
4 accurate and complete transcript of record of the proceedings
5 had and evidence introduced in the trial of the captioned
6 case, relative to appeal, in the Court of General Sessions
7 for Lancaster County, South Carolina, on the 21st day of
8 February, 2013.

9 I do further certify that I am neither of kin, counsel,
10 nor interest to any party hereto.

11

12

May 2, 2013

13

14


Michael C. Watkins
Court Reporter

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PAGE 02

WITNESSES

Bowers - LCSO #11-35088

FAMILY COURT

ARREST WARRANT NUMBER/DOA

M741962 (DOA-10-23-11)

TRUE BILL
ACTION OF GRAND JURY

Ron Mosely
Foreperson of Grand Jury

Date: **JAN 5 2012**

VERDICT

Foreperson of Petit Jury

Date:

03/21/2013 21:24
256

DOCKET NO. 2012-GS-29-60

The State of South Carolina

County of Lancaster

COURT OF GENERAL SESSIONS

JANUARY TERM 2012

THE STATE

vs.

Derrick Antonio McIlwain 55-61

1st. Grand Juror 76-17

Indictment for

**Possession With Intent to Distribute
Cocaine**

SC Code: § 44-53-370(a)(1), (b)(1)

CDR Code: 0183

Class: Felony, D

FILED
JAN 17 2012
CLERK
COURT

JAN 5 P 12:35

COURT OF COURTS
LANCASTER, SC

STATE OF SOUTH CAROLINA)
)
COUNTY OF LANCASTER)

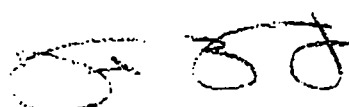
INDICTMENT

At a Court of General Sessions, convened on January 5, 2012, the Grand Jurors of Lancaster County present upon their oath:

POSSESSION WITH INTENT TO DISTRIBUTE COCAINE

That Derrick Antonio McIlwain did in Lancaster County on or about October 22, 2011, possess with intent to distribute, dispense, deliver or purchase cocaine, a controlled substance, in violation of Section 44-53-370(a)(1), (b)(1), of the *Code of Laws of South Carolina*.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



Douglas A. Barfield, Jr., SOLICITOR

PAGE 05

WITNESSES

Bowers - LCSO #11-35088

FAMILY COURT

ARREST WARRANT NUMBER/DOA

M741961 (DOA-10-23-11)

ACTION OF GRAND JURY

[Signature]
Foreperson of Grand Jury

Date:

JAN 5 2012

VERDICT

8032856497

21:24

Foreperson of Petit Jury

Date:

03/21/2013
258

DOCKET NO. 2012-GS-29-61

The State of South Carolina

County of Lancaster

COURT OF GENERAL SESSIONS

JANUARY TERM 2012

THE STATE

VS.

Derrick Antonio McIlwain SB-101

Matthew Sims

7b-17

Indictment for

**Possession With Intent to Distribute
Marijuana**

SC Code: § 44-53-370(a)(1), (b)(2)

CDR Code: 0186

Class: Felony, F

FILED
CLERK OF COURT
LANCASTER, SC

JAN 5 2012 12:35

CLERK OF COURT
LANCASTER, SC

STATE OF SOUTH CAROLINA)
COUNTY OF LANCASTER)

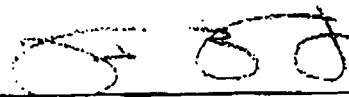
INDICTMENT

At a Court of General Sessions, convened on January 5, 2012, the Grand Jurors of Lancaster County present upon their oath:

POSSESSION WITH INTENT TO DISTRIBUTE MARIJUANA

That Derrick Antonio McIlwain did in Lancaster County on or about October 22, 2011, possess with intent to distribute, dispense, or deliver marijuana, a controlled substance in violation of Section 44-53-370(a)(1), (b)(2), *Code of Laws of South Carolina, (1976), as amended.*

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

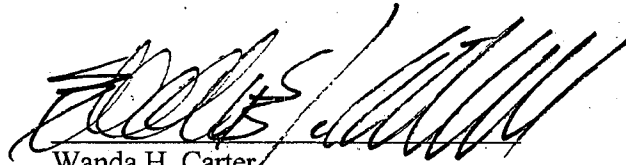


Douglas A. Barfield, Jr., SOLICITOR

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability, with the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

February 18th, 2014



Wanda H. Carter
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lancaster County

Brooks P. Goldsmith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DERRICK A. MCILWAIN,

APPELLANT

APPELLATE CASE NO. 2013-000373

FINAL BRIEF OF APPELLANT

WANDA H. CARTER
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ATTORNEY FOR APPELLANT

RECEIVED

NOV 24 2014

S.C. Supreme Court

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¹ Sikes v. State, 323 S.C. 28, 448 S.E. 2d 560 (1994)

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STATEMENT OF ISSUES ON APPEAL

I. The trial judge erred in denying appellant's motion to suppress the drugs seized per an unlawful search of a vehicle in which appellant was a passenger because the illegal search occurred after appellant had been detained beyond the scope and purpose of the traffic stop, which led police on a Sikes² "fishing" expedition where warrants were found, when there was no reasonable suspicion of criminal activity in existence prior to or soon after the traffic stop.

II. The trial judge erred in denying appellant's motions for directed verdicts of acquittal on the drug charges emanating from the traffic stop in the case because appellant was merely present in the vehicle at that time and neither in actual nor constructive possession of the drugs seized by police after the traffic stop.

² Sikes v. State, 323 S.C. 28, 448 S.E. 2d 560 (1994)

STATEMENT OF THE CASE

Appellant Derrick A. McIlwaine was indicted for possession with intent to distribute crack cocaine and possession with intent to distribute marijuana, but convicted of possession of cocaine and possession of marijuana per jury trial held during the February 2013 term of the Lancaster County General Sessions Court before Judge Brooks P. Goldsmith. Appellant was sentenced to imprisonment for an aggregate period of eight years. William Frick represented appellant at trial.

Appellant appealed his convictions and sentences. This brief follows.

QUESTION I

The trial judge erred in denying appellant's motion to suppress the drugs seized per an unlawful vehicle search of a vehicle in which appellant was a passenger as the illegal search occurred after appellant had been detained beyond the scope and purpose of the traffic stop, which led to a Sikes³ "fishing" expedition where warrants were found, when there was no reasonable suspicion of criminal activity in existence prior to or soon after the traffic stop.

The state presented five witnesses at trial: two police officers, the evidence custodian, a SLED forensic technician, and a SLED chemist. The vehicle that police stopped for a traffic violation in the case contained three occupants, crack cocaine, and marijuana. Neither appellant, who was a back seat passenger, nor Matthew Sims, who was the car driver, testified at trial. Christina Stevens, who was the front passenger in the vehicle, was the only defense witness presented at trial. Note that appellant and Sims were jointly tried in this case.

Prior to trial, defense counsel moved to suppress drugs and other items (notebook, money, and digital scales) seized per a vehicle search as tainted evidence because of the illegal search and seizure that occurred during the traffic stop in this case. An in camera hearing followed. During the hearing, Officer Bowers testified that he initiated a traffic stop of a vehicle with no brake/tail lights on October 22, 2012, after 6:00 p.m. on 12th Street in Lancaster County. Officer Bowers stated that Sims was the driver, and that Christina Stevens was a front seat passenger, and that appellant sat in the backseat behind the driver. Then, after Sims produced his license and insurance papers and the tag was found to be valid, Officer Bowers stated that he decided to issue a warning ticket for the non-functioning brake/tail lights. R. 4, l. 21 – R. 18, l. 11.

³ Sikes v. State, 323 S.C. 28, 448 S.E. 2d 560 (1994)

Thereafter, Officer Barnes added that he walked to his patrol car and commenced writing the ticket when Officer McLemore arrived on the scene. Pretrial Hearing Transcript p. 18, lines 10-19. Officer Bowers explained that he was told by Officer Lemore, who recognized appellant, that appellant had warrants out against him. Minutes later, Officer Bowers ran a check on appellant and found out that there were warrants outstanding against him. R. 18, l. 20 – R. 20, l. 9.

Shortly after the warrants were discovered, Officer Bowers and McLemore went to the stopped vehicle and asked appellant to exit the vehicle. Appellant was arrested immediately thereafter. R. 20, l. 20 – R. 22, l. 1. At this point, Officer Bowers saw a notebook in the back seat containing names and money amounts listed, (presumably drug transactions) and after the driver consented to a search, a zipper bag containing marijuana and cocaine were found, and then more marijuana was found in the console. Also, cash money and digital scales were found inside the vehicle as well. R. 21-R. 41; l. 4.

Defense counsel argued that the detention of appellant was beyond the scope of the traffic stop and that this prolonged detention that was used to check for warrants resulted in an unreasonable seizure and search because the traffic violation for bad brake/tail lights, which was the purpose or initiation behind the stop, had ended when the traffic ticket was being written by Officer Bowers. This meant that any activity beyond the brake/tail light, which had been resolved, rendered appellant's extended, i.e. second detention, and the search that followed unlawful. R. 64, l. 2-R. 67, l. 2; R. 68, l. 22-R. 69, l. 1; R. 69, l. 3-R. 71, l. 23; R. 73 lines 2-20.

The trial judge ruled that the intervening warrant information that led to the extended detention of appellant did not render the seizure and search illegal and denied appellant's pretrial motion to suppress the drugs and items seized from the vehicle. R. 73, l. 21-R. 74, l. 25.

The temporary detention of an individual by police during an automobile stop, even if it is only for a brief period and a limited purpose, i.e. an investigative purpose, would constitute a seizure of that person within the meaning of the Fourth Amendment; and as a result, an automobile stop is subject to the constitutional imperative that it not be unreasonable under the circumstances. McHam v. State, 404 S.C. 465, 746 S.E. 2d 41 (2013), citing to Whren v. United States, 517 U.S. 806 (1996). State v. Butler, 353 S.C. 383, 577 S.E. 2d 498 (2003), citing to Delaware v. Prouse, 440 U.S. 648 (1979). The detainment of an individual after a traffic stop may occur if supported by reasonable suspicion. State v. Butler, *supra*. In determining whether reasonable suspicion exists, the totality of the circumstances must be considered to assess the validity of an officer's suspicions. State v. Corley, 383 S.C. 232, 679 S.E.2d 187 (Ct. App 2009), *aff'd as modified*, State v. Corley, 392 S.C. 125, 708 S.E.2d 217 (S.C. 2011).

Also, note that although the scope of the stop may be enlarged, the scope and duration of the seizure must be strictly tied to and justified by the circumstances which rendered its initial undertaking proper. State v. Morris, 395 S.C. 600, 720 S.E.2d 468 (2011); Sikes v. State, 323 S.C. 28, 448 S.E. 2d 560 (1994). A lawful traffic stop can become unlawful if it is prolonged beyond the time reasonably required to complete its mission. State v. Adams, 397 S.C.481, 725 S.E.2d 523 (2012), citing to State v. Morris, *supra*, and Illinois v. Caballes, 543 U.S. 405 (2005). Once the purpose of that stop has been fulfilled, the continued detention of the vehicle and occupants would result in a second detention. State v. Morris, *supra*, citing to State v. Pichardo, 367 S.C. 84, 623 S.E.2d 840 (2005). The encounter can only continue if the police have a reasonable suspicion that other criminal activity would be afoot. State v. Adams, *supra*; State v. Morris, *supra*; State v. Pichardo, *supra*.

In Sikes, a vehicle was stopped because the paper tags aroused suspicion of it being stolen, but after receiving the requested identification information from the driver and the passenger; nonetheless, the passenger was taken from the car while police ran a warrant check on him. The Court reversed in Sikes and held that the officer's further detention of the passenger while going "fishing" for evidence of a crime, i.e., looking for warrants, was unlawful because the scope and duration of the initial seizure must be **tied to and justified by the circumstances which rendered its initiation proper**. In Sikes, the belief that the car was stolen ended upon the receipt of proper identifications. Therefore, there was no reasonable suspicion in existence thereafter to extend the seizure of the passenger by detaining him any further. Also, the Sikes Court cited to State v. Johnson, 805 P.2d 761 (Utah 1991), where the Court held that the leap from asking a passenger's name and date of birth to running warrant checks on the passenger was unlawful as such was an attempt to gather information in support of an unparticularized suspicion or hunch. Compare, State v. Williams, 351 S.C. 591, 571 S.E.2d 703 (2003), where the Court held that since the officer had written the traffic ticket and the traffic stop was complete, it was error for the officer to continue to question the defendant until he (officer) believed the answers were inconsistent as a basis to search the vehicle because there was no prior reasonable suspicion that criminal activity had been afoot.

Going on a "fishing" expedition to find evidence in support an unparticularized hunch of inchoate criminal activity is unlawful because reasonable suspicion is an objective assessment of the circumstances at trial. See State v. Provet, 405 S.C. 101, 747 S.E. 2d 453 (2013), citing to Whren V. United States, *supra*. Reasonable suspicion is more than an inchoate or unparticularized hunch, but rather it is an objective basis that would lead to a suspicion of criminal activity under the probability of the circumstances. State v. Rogers, 368 S.C. 529, 6219 S.E. 2d 679 (2006) citing to State v. Butler, *supra*. Moreover, once the purpose of the traffic stop has ended, the officer may not

extend the duration of the traffic stop without reasonable suspicion that would justify an additional or prolonged seizure. State v. Provet, 405 S.C. 101, 747 S.E. 2nd 453 (2013) citing to Pennsylvania v. Morris, 403 U.S. 106 (1977) and Arizona v. Johnson, 555 U.S. 323 (2009).

In the case at bar, Officer Bowers found no reasonable suspicion of criminal activity after obtaining the proper information from the driver identifications of the occupants and had already walked to his patrol car to write a warning ticket for the traffic violation. Thus, the initial undertaking regarding the traffic stop (non-operating brake/tail lights) was complete in purpose and Officer Bowers had no new suspicion of criminal activity. Hence, the decision to write a warning ticket. At this point, appellant's detention via the traffic stop should have ended. The following is Officer Bower's testimony at the in camera hearing establishing that the purpose of the stop (tail/brake light malfunction) had been fulfilled:

DEFENSE COUNSEL: Now, I think your statement was – and make sure I got this right – you recognized Mr. McIlwaine when you had a name to put with the face.

OFFICER BOWERS: Yes.

DEFENSE COUNSEL: When you first saw huh did you go, “Ah, there are pending warrants on him”.

OFFICER BOWERS: No. I didn't know there was a warrant.

DEFENSE COUNSEL: So you weren't looking for him.

OFFICER BOWERS: No.

R. 44, lines 2-11.

DEFENSE COUNSEL: Was there anything in the car in plain view that was illegal?

OFFICER BOWERS: No.

R. 44, lines 21-23.

CO-DEFENDANT'S COUNSEL: Well, in this particular case you said that you were headed back to write the ticket after getting the names of everybody in the car, correct?

OFFICER BOWERS: Yes.

CO-DEFENDANT'S COUNSEL: But you did not write that ticket until later after everything –

OFFICER BOWERS: I was in the process of writing it when [he learned from Officer Lemore] that Mr. McIlwaine had outstanding warrants. R. 46, l. 17 – R. 47, l. 3.

In other words, Officer Bowers' purpose for the traffic stop was complete, but then Officer McLemore arrived suggesting that there were warrants out on appellant. At this juncture, the "fishing" expedition commenced. Clearly, no reasonable suspicion existed in this case (save what was subsequently uncovered (warrants) as a result of the "fishing" expedition), to support appellant's extended or second detention and arrest, and ultimately, the search of the vehicle. The search of the vehicle that followed yielded the presence of drugs.

This fishing expedition that uncovered the warrants against appellant and led to his illegal second detention violated the Fourth Amendment to the United States Constitution and article 1, §10 of the South Carolina State Constitution because the extended detention exceeded the scope of the stop and the drugs obtained from the seizure and search that followed rendered them tainted fruit of the poisonous tree. Wong Sun v. United States, 371 U.S. 471 (1963). Thus, the lower court erred in denying appellant's motion to suppress the drugs and other items as evidence in the case.

QUESTION II

The trial judge erred in denying appellant's motions for directed verdicts of acquittal on the drug charges emanating from the traffic stop in this case because appellant was merely present in the vehicle at that time and neither in actual nor constructive possession of the drugs seized by police after the traffic stop.

At the close of the state's case, appellant's counsel moved for directed verdicts on the charges because there was insufficient evidence presented to establish that appellant had actual or constructive possession of the drugs found in the vehicle searched. R. 182, l. 18 – R. 183, l. 24. The trial judge denied appellant's directed verdict motions. R. 188, l. 23 – R. 189, l. 9.

Actual possession occurs when the drugs are found in the actual physical custody of a defendant and constructive possession arises a defendant has dominion and control or the right to exercise dominion and control over the drugs. State v. Heath, 370 S.C. 326, 635 S.E.2d 181 (2006). In Heath, supra, the Court held that there was insufficient evidence that the defendant, who lived with his mother at the time of the arrest, was in constructive possession of crack found in a car washing mitt in a recycling bin outside at the back of a house owned by the defendant's mother.

Here, there was no evidence presented establishing that appellant had any possessory control either actually or constructively in the cocaine and marijuana found in neither the back seat nor in the console of this vehicle. The state's evidence proved that appellant was merely a passenger in the back seat of Sims' vehicle. The vehicle belonged to Sims. Also, Sims, who was the driver, was arrested on drug charges, which was understandable because the drugs obviously belonged to him. Note that Sims actually admitted to police that the drugs belonged to him. R. 37, lines 19-20; R. 126, l. 13 – R. 130, l.1. In addition, Sims claimed that the money found was

for the power bill. R. 130, lines 16-18. R. 134, lines 15 -20. Finally, third passenger Christina Stevens testified that Sims (driver) smoked marijuana every day and that the drugs in the vehicle belonged to him (Sims). R. 190, l. 9 – R. 194, l. 21.

Hence, appellant's presence as a passenger in the vehicle at issue was not tantamount to any possessory interest in the drugs found therein. Mere presence at the crime scene does not translate into one having dominion and control or the right to exercise dominion and control over any drugs via constructive possession. State v. James, 386 S.C. 689 S.E.2d 643 (2012).

Compare following vehicle cases where the defendants were found not to have been in actual or constructive possession of the drugs found pursuant to police searches. In State v. Pradubsri, 403 S.C. 270, 743 S.E.2d 98 (2013), where a traffic stop of the defendant's vehicle resulted in a search where crack cocaine was found only on his girlfriend (actual possession) who was a passenger in the vehicle, the Court held that there was insufficient evidence that the defendant was in constructive possession of the drugs found on his girlfriend without his girlfriends' testimony to that effect. Also, in State v Jackson, 395 S.C. 250, 717 S.E.2d 609 (2011), the Court held that the State's evidence was insufficient to establish that the defendant had actual or constructive possession of the marijuana found under the center console of the vehicle where the drugs were not visible and where the defendant was merely a passenger in the vehicle who had only met the driver once at his (defendant's) grandchild's party and rode to Greenville, South Carolina, to promote a music gig. Compare, State v. Brown, 267 SC 311, 227 S.E. 2d 674 (1976), where the defendant was merely a passenger in the vehicle, who had neither ownership rights to the vehicle nor a relationship with the driver of the vehicle, and could not have seen or known of the opaque bag of marijuana found under the rear floorboard of the vehicle, and thus had no dominion and control over the marijuana. Compare also, State v. Hernandez 382 S.C. 620, 677 S.E.2d 603 (2009), where

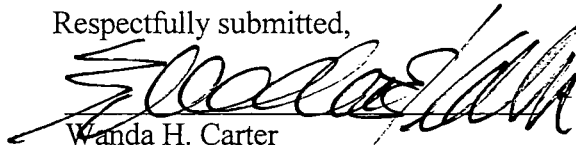
the Court held that the defendants who occupied a rental moving truck following a trailer were only present and had no knowledge that drugs were in the trailer they followed, and that as a result, the state's evidence of trafficking was insufficient and "merely speculation."

Here, the state failed to prove that appellant was in actual or constructive possession of the drugs found in Sims' vehicle; and since possession was a material element of the crime charged, the conclusion is the same as reached in Heath, i.e., that the state "failed to establish an essential element of the crime charged." In reviewing a denial of a motion for a directed verdict motion, an appellate court must review the evidence in the light most favorable to the state, and a case can only be submitted to the jury if there is any direct or circumstantial evidence in existence that reasonably tends to prove the guilt of the accused or from which his guilt maybe fairly or logically deduced. State v. Jackson, supra. In the case at bar, the state's case was lacking in competent evidence of drug possession against appellant, which in turn meant that the trial judge erred in failing to grant appellant's motions for directed verdicts in the case. The state failed to prove every element of the offense charged as required via the Fourteenth Amendment due process clause and article 1, §3 of the South Carolina State Constitution. See Jackson v. Virginia, 443 U.S. 307 (1979). The trial judge erred in denying appellant's motions for directed verdicts of acquittal on the drug offenses charged against him.

CONCLUSION

Based on the foregoing argument, appellant requests that the Court reverse appellant's convictions and enter directed verdicts of acquittals on the charges, or in the alternate, reverse and remand for a new trial on the Fourth Amendment violation.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', written over a horizontal line.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of February, 2014.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lancaster County

Brooks P. Goldsmith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DERRICK A. MCILWAIN,

APPELLANT

APPELLATE CASE NO. 2013-000373

CERTIFICATE OF SERVICE

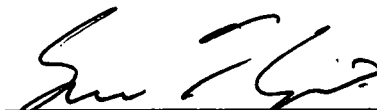
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 26th day of February, 2014.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 26th day of February, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.

Brief of Respondent

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STATEMENT OF ISSUES ON APPEAL

I.

The trial court correctly denied Appellant's pretrial motion to suppress evidence found in the vehicle in which he was the back seat passenger when officers stopped the car for a traffic violation, discovered prior to completion of the purpose of the traffic stop that Appellant had outstanding warrants, saw a suspicious notebook in plain view while arresting Appellant, and got consent from the driver to search the vehicle.

II.

The trial court properly denied Appellant's motion for directed verdict because the State presented substantial circumstantial evidence to establish guilt.

STATEMENT OF THE CASE

A Lancaster County Grand Jury indicted Appellant for possession with intent to distribute (PWID) cocaine and PWID marijuana. (R. pp.256-59) On February 15, 2013, the Honorable Brooks P. Goldsmith held a pretrial hearing during which he denied Appellant's motion to suppress certain evidence found during a traffic stop. (R. pp.1-76.) On February 19, 2013, Appellant and his co-defendant, Matthew Sims, proceeded to trial before a jury and Judge Goldsmith. William Frick, Esquire, represented Appellant, and Mark Grier, Esquire, represented Sims. Solicitor Douglas A. Barfield represented the State. The jury found Appellant not guilty on both PWID charges but found him guilty of two lesser-included offenses of possession. (R. p.236.) Judge Goldsmith sentenced him to eight years' imprisonment for the possession of cocaine charge, one year's imprisonment for the possession of marijuana charge, and five years' imprisonment for a probation violation, to be served concurrently. (R. p.254.)

On February 21, 2013, Appellant filed a Notice of Appeal.

STATEMENT OF FACTS

At approximately 6:00 p.m. on October 22, 2011, Lancaster County Sheriff's Office narcotics investigator Tony Bowers noticed a vehicle that had no brake lights. (R. p.5, line 15-R. p.9, line 10; p. 84, line 13-R. p.86, line 11.) He decided not to stop the vehicle because he saw it pull into a driveway and assumed it had made it safely to its destination. (R. p.9, line 21-R. p.10, line1; R. p.86, line 19-R. p.87, line 20.) However, he saw the same car again five to ten minutes later and decided to pursue the car because of the non-working brake lights. (R. p.10, lines 11-14; R. p.87, line 21-R. p.88, line 21.) Investigator Bowers radioed Lieutenant Ryan McLemore to let him know he was going to stop the vehicle. (R. p.89, lines 1-11.) As he was pursuing the car, he noticed the back passenger, Appellant, look back at him and fumble around in the back seat. (R. p.13, lines 16-23; R. p.94, lines 11-19.)

Bowers stopped the car, took the license and proof of insurance from the driver, and asked the passengers for their names. (R. p.14, line 2-R. p.17, line 15; R. p.92, line 23-R. p.94, line 5.) He decided to issue a written warning for the vehicle equipment and as he was walking from the stopped car back to his vehicle to write the ticket, Lt. McLemore arrived. (R. p.18, lines 10-22; R. p.95, lines 1-25.) Bowers told McLemore the names of the occupants of the car, and McLemore told Bowers he thought Appellant was wanted out of the city, meaning there were active charges on him. (R. p.19, lines 1-6.) At that point, Bowers ran all three names to check for warrants and found out Appellant had outstanding warrants from Charlotte Mecklenburg and also the City of Lancaster Police Department.¹ (R. p.19, lines 7-21.)

¹ While the record does not indicate what these outstanding warrants were for, Investigator Bowers testified during the suppression hearing regarding his knowledge of

Bowers and McLemore walked up to the stopped car, told Appellant he was wanted, and asked him to get out of the car. (R. p.20, lines 6-24.) Bowers arrested Appellant on his outstanding warrants and handcuffed him. (R. p.21, lines 6-18.) Bowers noticed a small notebook where Appellant had been sitting that had names and monetary amounts written on it. (R. p.22, lines 2-7.) Bowers stated during the suppression hearing that he suspected the notebook was a ledger of drug transactions. (R. p.24, lines 9-20.) The driver, Sims, gave Bowers consent to search the car. (R. p.25, line 24-R. p.26, line 1; R. p.31, lines 18-22.) Bowers searched the back seat first and found a blue zipper bag containing cocaine and marijuana. (R. p.27, lines 8-24.) He also found a black zipper bag containing \$60 cash. (R. p.28, line 17-R. p.29, line 7; R. p.112, lines 1-16.) After gaining consent from Sims to search the rest of the car, Bowers then found two more bags of marijuana, a set of digital scales, and some cash in the front console. (R. p.34, line 1-R. p.37, line 14.)

At the pretrial suppression hearing, Bowers testified regarding the traffic stop, the arrest, and the search. (R. pp. 4-54.) Appellant argued that based on Sikes v. State, 323 S.C. 28, 448 S.E.2d 560 (1994), there was no reason to do the warrant check and, therefore, there was an unreasonable seizure and search. (R. p.64, lines 17-20.) The State distinguished Sikes from the case at hand, pointing out that Sikes was made to sit in a patrol car for twenty minutes while the police ran warrant checks whereas Appellant was not detained when Investigator Bowers ran a warrant check on him. (R. p.67, line 7-R. p.68, line 21.) The trial court gave the following very thorough ruling:

All right. I'm trying to analyze it one step at a time.
The Court finds that the vehicle initially was legally

Appellant's having been investigated for illegal drug sales in Lancaster County and having been arrested for drugs. (R. p.8, lines 11-22.)

stopped, that the officers did have the right to examine the vehicle's registration and driver's license and therefore could detain everybody in the vehicle while they did that, that the - - as I understand the testimony while the ticket was being written the officers learned that there was an outstanding warrant for the passenger, I think it was reasonable for them to stop the writing of the ticket to go and make the arrest. After making the arrest I find there was an intervening factor or circumstance in that the officers observed the notebook which gave them reasonable suspicion based on their experience that something may have been going on knowing the reasons for the arrest of the backseat passenger, looking at the notebook, seeing the numbers and the side names that they were familiar with, that that gave them reasonable suspicion to continue the detention and to continue the further investigation. So I find that - - I do find this, had there not been that intervening circumstance, that being the notebook, I find that the detention should have ended and there would not have been sufficient reason to continue the detention of the driver. But based on that intervening circumstance that gave the reasonable suspicion to the officers to ask for permission which was given by the defendant to search once they found illegal drugs in the back seat, I think that gave them reasonable suspicion to ask if there might be additional drugs and ask for permission to search the rest of the car. For all of those reasons I find that the motions to suppress for both defendants should be denied.

(R. p.73, line 21-R. p.74, line 25.)

At trial of Appellant and his co-defendant, Matthew Sims, the State presented testimony from Investigator Bowers regarding the traffic stop and the search. (R. p.81, line 15.) He testified that on the way to his vehicle to write a warning ticket for Sims for his bad brake lights, Lt. McLemore had arrived on the scene. (R. p.95, lines 1-25.) He stated that he started the warning ticket but went back to the stopped vehicle to ask Appellant to get out of the car before completing the writing of the ticket. (R. p.96, lines 6-14.) When asked about the condition of the back seat, Bowers testified there was a jacket lying on the passenger side, the opposite side of the back seat from where

Appellant was sitting. (R. p.106, lines 4-5.) He explained he had noticed a ledger on the seat next to where Appellant had been sitting that contained names and monetary amounts. (R. p.97, line 7-R. p.98, line 15.) He testified the names and monetary amounts made him think of illegal drug transactions. (R. p.104, lines 19-23.) Bowers testified regarding the blue zipper bag containing drugs, which was found in the back seat to the right of where Appellant had been sitting. (R. p.106, line 2-R. p.107, line 11; R. p.109, lines 15-16.) He also recounted how Appellant was looking back at him and fumbling around in the back seat while Bowers was following the car in his attempt to stop it. (R. p.94, lines 11-19.)

After the State rested, Appellant moved for a directed verdict, arguing the State had not proved actual possession and that the only evidence shown was merely circumstantial but not substantial. (R. p.183, lines 6-24.) The State argued circumstantial evidence showed the drugs were in the back seat beside Appellant, showing he had knowledge the items were there. (R. p.184, lines 8-17.) Further, the State pointed out that Bowers did not testify the drugs were covered by the coat that was also in the back seat and noted Bowers' testimony that he observed Appellant fumbling around in the back seat, indicating he may have been trying to do something with the drugs. (R. p.184, lines 18-25.) The trial court denied Appellant's motion, finding "there is sufficient evidence certainly because of the drugs in the back seat. I also find that the drugs in the console can be considered because of the drugs found next to him in the back seat as well as the notebook." (R. p.189, lines 3-7.)

Ultimately, the jury found Appellant not guilty of either PWID charge but found him guilty of the lesser-included possession charges. (R. p.236.) Judge Goldsmith sentenced him to eight years' imprisonment for the possession of cocaine charge, one

year's imprisonment for the possession of marijuana charge, and five years' imprisonment for a probation violation, to be served concurrently. (R. p.254.)

ARGUMENTS

I.

The trial court correctly denied Appellant's pretrial motion to suppress evidence found in the vehicle in which he was the back seat passenger when officers stopped the car for a traffic violation, discovered prior to completion of the purpose of the traffic stop that Appellant had outstanding warrants, saw a suspicious notebook in plain view while arresting Appellant, and got consent from the driver to search the vehicle.

Appellant argues the trial court erred in denying his motion to suppress because he was detained beyond the scope and purpose of the traffic stop. He also asserts there was no reasonable suspicion of criminal activity and that a "fishing" expedition occurred where warrants were found. To the contrary, Appellant was not detained beyond the scope of the traffic stop because Investigator Bowers discovered Appellant had outstanding warrants before Bowers had completed writing the warning ticket. Additionally, Bowers based his reasonable suspicion on seeing in plain view a notebook containing names and monetary amounts that appeared to be a drug ledger. Therefore, the trial court correctly denied the motion to suppress.

In criminal cases, the appellate court sits to review errors of law only. State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). 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) (emphasis added); State v. Bowman, 366 S.C. 485, 501, 623 S.E.2d 378, 386 (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). 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) (emphasis added).

"Where probable cause exists to believe that a traffic violation has occurred, the decision to stop the automobile is reasonable per se." State v. Williams, 351 S.C. 591, 598, 571 S.E.2d 703, 707 (Ct. App. 2002) (citing Whren v. United States, 517 U.S. 806, 809-10 (1996)). "During a lawful traffic stop, an officer may request a driver's license and vehicle registration, run a computer check, and issue a citation." State v. Adams, 397 S.C. 481, 725 S.E.2d 523 (Ct. App. 2012) (citation and internal quotation marks omitted).

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. However, "[t]he purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'" United States v. Mendenhall, 446 U.S. 544, 553-54 (1980) (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976)). "[A]n officer can couple knowledge of prior criminal involvement with more concrete factors in reaching a reasonable suspicion of current criminal activity." U.S. v. Sprinkle, 106 F.3d 613 (4th Cir. 1997).

The Fourth Amendment's exclusionary rule prohibits unreasonable searches and seizures. U.S. Const. amend. IV; see also S.C. Const. art. I, § 10. Any evidence seized as the result of an unreasonable search and seizure must be excluded from trial. State v.

Weaver, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007). “Generally, a warrantless search is per se unreasonable and thus violative of the Fourth Amendment’s prohibition against unreasonable searches and seizures.” State v. Bultron, 318 S.C. 323, 331, 457 S.E.2d 616, 621 (Ct. App. 1995). However, a warrantless search may be constitutional if it falls within a recognized exception. Id. at 331-32, 457 S.E.2d at 621. South Carolina courts have recognized several exceptions to the warrant requirement, including: (1) search incident to a lawful arrest; (2) “hot pursuit”; (3) stop and frisk; (4) the automobile exception; (5) the “plain view” doctrine; and (6) consent. State v. Bailey, 276 S.C. 32, 36, 274 S.E.2d 913, 915 (1981). Under the plain view exception, “a law enforcement officer who is lawfully in a position to view [an] object” may seize it. State v. Abdullah, 357 S.C. 344, 352, 592 S.E.2d 344, 349 (Ct. App. 2004). The plain view doctrine applies when ““(1) the initial intrusion which afforded the authorities the plain view was lawful; (2) the discovery of the evidence was inadvertent; and (3) the incriminating [nature of the] evidence was immediately apparent to the seizing authorities.”” Id. at 352-53, 592 S.E.2d at 349 (quoting State v. Culbreath, 300 S.C. 232, 237, 387 S.E.2d 255, 257 (1990)). The United States Supreme Court has eliminated the requirement that the discovery be inadvertent, as long as the seizure meets the other two requirements. Id. at 353 n.5, 592 S.E.2d at 349 n.5 (citing Horton v. California, 496 U.S. 128, 130 (1990)).

Here, one only need look to the trial court’s thorough ruling to see that its decision to deny the motion to suppress was correct and must be affirmed. First, the Court found the vehicle initially was legally stopped because the officer had the legal right to stop a car for having non-working brake lights. At that point, the trial court determined the officer had the right to examine the vehicle’s registration and driver’s license and detain everybody in the vehicle while he did that. See State v. Woodruff, 344

S.C. 537, 549-50, 544 S.E.2d 290, 297 (2001) ("When an officer stops a vehicle for a traffic violation, he may *briefly* detain the vehicle and its occupants while he examines the vehicle registration and the driver's license." (citing Delaware v. Prouse, 440 U.S. 648 (1979))). Further, the trial court found that because Bowers testified that he learned there was an outstanding warrant for Appellant while the ticket was being written, it was reasonable for him to stop the writing of the ticket to go make the arrest. The trial court then stated, "After making the arrest I find there was an intervening factor or circumstance in that the officers observed the notebook which gave them reasonable suspicion based on their experience that something may have been going on knowing the reasons for the arrest of the backseat passenger, looking at the notebook, seeing the numbers and the side names that they were familiar with, that that gave them reasonable suspicion to continue the detention and to continue the further investigation." (February 15 Tr. 74, lines 5-13.) See U.S. v. Sprinkle, 106 F.3d 613 (4th Cir. 1997) ("[A]n officer can couple knowledge of prior criminal involvement with more concrete factors in reaching a reasonable suspicion of current criminal activity."). The trial court determined that the intervening circumstance gave reasonable suspicion to the officers to ask for consent to search the car, which was given by the co-defendant. Moreover, the trial court ruled that once the officers found illegal drugs in the back seat, that gave them reasonable suspicion to ask if there might be additional drugs and ask for consent to search the rest of the car. Finally, the trial court stated, "For all of those reasons I find that the motions to suppress for both defendants should be denied." (R. p.74, lines 24- 25.)

Appellant argues the detention of Appellant went beyond the scope of the traffic stop, resulting in an unreasonable seizure and search. He repeatedly asserts the purpose of the traffic stop, to write a warning ticket for brake lights, was complete and had ended.

(App. Br. 4, 7, 8.) However, Bowers' testimony made clear he had actually not completed writing the ticket at the time Lt. McLemore informed him of Appellant's outstanding warrants, which Bowers then confirmed through a computer check. (R. p.18, lines 10-22; R. p.19, lines 1-21.) Thus, the reason for prolonging the traffic stop was to arrest Appellant after Bowers confirmed he did indeed have warrants. Accordingly, Appellant's assertion that the brake/tail light activity had been resolved, thereby rendering the extended/second detention and search unlawful, is without merit. (App. Br. 4.) Similarly, his contentions that "the initial undertaking regarding the traffic stop (non-operating brake/tail lights) was complete in purpose and Officer Bowers had no new suspicion of criminal activity" and that "Officer Bowers' purpose for the traffic stop was complete, but **then** Officer McLemore arrived suggesting that there were warrants out on appellant" misconstrue the facts on record. (App. Br. 7-8.) (emphasis added.) Bowers not only had suspicion of criminal activity, he had actual confirmation of this criminal activity as soon as he checked his computer and discovered Appellant indeed had outstanding warrants.

Appellant also argues "that although the scope of the stop may be enlarged, the scope and duration of the seizure must be strictly tied to and justified by the circumstances which rendered its initial undertaking proper," citing State v. Morris, 395 S.C. 600, 720 S.E.2d 468 (2011) and Sikes v. State, 323 S.C. 28, 448 S.E.2d 560 (1994). (App. Br. 5.) In State v. Provet, 405 S.C. 101, 747 S.E.2d 453 (2013), our Supreme Court took the opportunity to correct State v. Rivera's² suggestion "that police questioning must have some relationship to the purpose of the stop in order to withstand Fourth Amendment scrutiny." Provet, 405 S.C. at 110, 747 S.E.2d at 458. Further, the

² 384 S.C. 356, 682 S.E.2d 307 (Ct. App. 2009).

Supreme Court clarified that Rivera's suggestion "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" was also incorrect. Id. at 110, 747 S.E.2d at 458. The Court based its clarification in Provet on recent Fourth Amendment precedent from the United States Supreme Court and went so far as to state, "To 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.

South Carolina appellate courts have held that the detainment of an individual after a traffic stop may occur if supported by reasonable suspicion. See State v. Butler, 353 S.C. 383, 577 S.E.2d 498 (Ct. App. 2003) ("A police officer may stop and briefly detain and question a person for investigative purposes, without treading upon his Fourth Amendment rights, when the officer has a reasonable suspicion supported by articulable facts, short of probable cause for arrest, that the person is involved in criminal activity. In determining whether reasonable suspicion exists, the circumstances must be considered as a whole, and if the officer's suspicions are confirmed or further aroused, the stop may be prolonged and the scope enlarged."). Here, as soon as McLemore informed Bowers that Appellant had outstanding warrants, Bowers had reasonable suspicion that at least one person in the car was involved in criminal activity. That circumstance, combined with the confirmation of those warrants discovered while conducting the long-held right of an officer to run a computer check while in the process of issuing a citation, were certainly sufficient to establish reasonable suspicion. Thus, the traffic stop was not impermissibly extended and the drugs were not seized in violation of the Fourth Amendment.

II.

The trial court properly denied Appellant's motion for directed verdict because the State presented substantial circumstantial evidence to establish guilt.

Appellant argues the trial court erred in denying Appellant's motion for directed verdict because he was merely present and was not in actual or constructive possession of the drugs seized during the traffic stop. Specifically, Appellant maintains no evidence was presented to establish either actual or constructive possession because Appellant was merely a passenger in the back seat of the vehicle. On the contrary, the State provided evidence that Appellant was in the back seat with the bags of drugs on the seat right beside him and they were not hidden from view. Thus, Appellant was in constructive possession by being in the position to have dominion or control, or the right to exercise dominion or control, over the drugs and the trial court properly denied the directed verdict motion.

"When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). When reviewing a denial of a directed verdict, an appellate court views the evidence and all reasonable inferences in the light most favorable to the State. Id. "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this Court must find the case was properly submitted to the jury." Id. at 292-93, 625 S.E.2d at 648. The trial court should grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty. State v. Hernandez, 382 S.C. 620, 625-26, 677 S.E.2d 603, 605-06 (2009). A defendant is entitled to a directed verdict when the State

fails to produce evidence of the offense charged. State v. Ladner, 373 S.C. 103, 120, 644 S.E.2d 684, 693 (2007).

“Constructive possession can be established by circumstantial as well as direct evidence, and possession may be shared.” State v. Hudson, 277 S.C. 200, 202, 284 S.E.2d 773, 775 (1981). Constructive possession is proven by showing the accused has dominion and control, or the right to exercise dominion and control, over the contraband. Id. at 202, 284 S.E.2d at 774-75. Acts, declarations, or conduct of the accused may create an inference that the accused knew of the existence of the contraband. State v. Mollison, 319 S.C. 41, 45, 459 S.E.2d 88, 91 (Ct. App. 1995). “The proper charge on constructive possession is to instruct the jury that the defendant’s knowledge and possession may be inferred if the substance was found on premises under his control.” State v. Adams, 291 S.C. 132, 135, 352 S.E.2d 483, 486 (1987).

Appellant argues no evidence establishes Appellant had any possessory control of the drugs found in the car. He cites State v. Heath, 370 S.C. 326, 635 S.E.2d 18 (2006), in which the Supreme Court reversed Heath’s conviction. In Heath, the Court found that because the defendant lived with his mother, but his mother owned the house, the State had failed to present evidence that he could exercise dominion and control over the crack cocaine that was found in a recycling bin outside the home. Id. at 330, 635 S.E.2d at 19. The Court emphasized the difference between a right to access an area where drugs are found and actual dominion and control of the drugs. Id.

Heath can be distinguished from the case sub judice. There, evidence was presented showing the defendant’s mother owned the home rather than the defendant. Furthermore, the drugs at issue were found in a recycling bin outside the home. Here, the evidence presented demonstrated that Appellant was the sole passenger in the back seat

of the car, sitting right beside the bags containing drugs that were clearly out in the open. The drugs were certainly within his reach and, thus, it was established that he had dominion and control, or the right to exercise dominion and control. "Where contraband materials are found on premises under the control of the accused, this fact in and of itself gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury." State v. Muhammed, 338 S.C. 22, 26-27, 524 S.E.2d 637, 639 (Ct. App. 1999) (citing Hudson, 277 S.C. at 203, 284 S.E.2d at 775).

The trial court also was able to consider Bowers' testimony of Appellant's looking behind him and fumbling around in the back seat after he saw Bowers pursuing the car to conduct the traffic stop. See State v. Mollison, 319 S.C. 41, 45, 459 S.E.2d 88, 91 (Ct. App. 1995) ("Acts, declarations, or conduct of the accused may create an inference that the accused knew of the existence of the contraband.").

Appellant cites several cases to support its argument that the State did not show Appellant had constructive possession. However, each case can be distinguished from the case at hand. First, in State v. Pradubsri, 403 S.C. 270, 743 S.E.2d 98 (2013), the Supreme Court found insufficient evidence existed to prove the defendant was in constructive possession of drugs that were found on his girlfriend. Here, the drugs were found on the car seat next to where Appellant was sitting, not on another person. Further, in State v. Jackson, 395 S.C. 250, 717 S.E.2d 609 (2011), the Supreme Court found insufficient evidence of constructive possession when the drugs were found under the center console and were not visible. Here, the drugs that were found in the back seat would have to have been visible to Appellant while he was in the car based on where they were found. Similarly, in State v. Brown, 267 S.C.311, 227 S.E.2d 674 (1976), the Court focused on the fact that the front seat passenger could not have seen or known about an

opaque bag of marijuana found on the rear floorboard of the vehicle, which is inapplicable to this case where the drugs were in full view right beside where Appellant was sitting. Finally, Appellant cites State v. Hernandez, 382 620, 677 S.E.2d 603 (2009), in which the Court held the evidence was insufficient to sustain the denial of a directed verdict because the defendants had no knowledge of the drugs in the trailer they were following. Again, in this case, Appellant was seated in the back seat next to the bags of drugs, allowing an inference to the jury that he had knowledge the drugs were there and possessed the right to exercise dominion or control over them. Accordingly, sufficient evidence existed of constructive possession to withstand a directed verdict motion and submit the case to the jury.

CONCLUSION

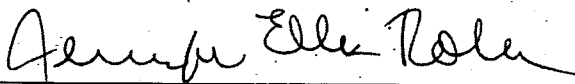
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

February 24, 2014

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lancaster County
The Honorable Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No. 2013-000373

THE STATE,

Respondent,

v.

DERRICK A. MCILWAIN,

Appellant.

CERTIFICATE OF COUNSEL

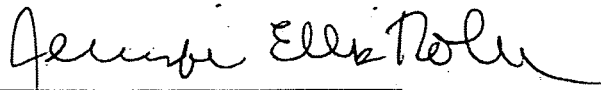
The undersigned hereby certifies that the Final Brief of Respondent complies with Rule
211(b), SCACR.

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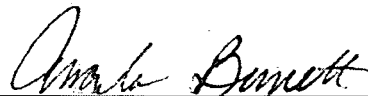
Appellant.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.
This 24th day of February, 2014.



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