STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County
Roger L. Couch, Circuit Court Judge

THE STATE,

PETITIONER,

V.

ASHLEY EUGENE MOORE,

RESPONDENT

APPELLATE CASE NO. 2013-002309

BRIEF OF RESPONDENT

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COUNTERSTATEMENT OF ISSUE PRESENTED

Whether the Court of Appeals correctly held the Trial Court erred in refusing to suppress the evidence found in the vehicle Respondent was driving at the time of his arrest where: (1) the officer's continued detention of Respondent exceeded the scope of the traffic stop and constituted a seizure for purposes of the Fourth Amendment; and (2) the evidence presented by the State did not establish that the officer had reasonable and articulable suspicion of a serious crime when he chose not to conclude the traffic stop?

COUNTERSTATEMENT OF THE CASE

On October 22, 2010, Respondent Ashley Eugene Moore was indicted by the Spartanburg County Grand Jury for: (1) trafficking cocaine base, first offense; and (2) possession of a weapon during the commission of a violent crime. App. 235.

On April 25, 2011, Moore proceeded to trial before the Honorable Roger L. Couch and a jury. App. 60. Moore was represented by Robert Hall, and the State was represented by Assistant Solicitor Eddie Hunter. App. 60. The jury found Moore guilty as charged. App. 231, 22 – 232, 5. Judge Couch sentenced Moore to: (1) twenty-five years imprisonment on the trafficking cocaine base conviction; and (2) five years imprisonment on the possession of a weapon during the commission of a violent crime conviction. App. 233, 23 – 234, 4. The sentences were to run concurrently. App. 233.

On April 27, 2011, Moore timely filed and served a notice of intent to appeal. On July 17, 2013, the South Carolina Court of Appeals reversed Moore's convictions and sentences, holding Moore's continued detention during a traffic stop was unlawful where the State did not present sufficient evidence to establish the police officer's reasonable and articulable suspicion of a serious crime. The Court of Appeals further held that because the continued detention was illegal, the drugs discovered during the search of the vehicle must be suppressed. State v. Moore, 404 S.C. 634, 746 S.E.2d 352 (Ct. App. 2013).

The State filed a Petition for Rehearing *En Banc* on July 29, 2013 which was denied by the Court of Appeals on September 17, 2013. App. 251 – 279.

The State filed a Petition for Writ of Certiorari on October 28, 2013, to which Moore filed a Return on January 27, 2014. This Court granted the certiorari on November 20, 2014.

The State filed its Brief on December 22, 2014. This is Respondent's Brief.

COUNTERSTATEMENT OF THE FACTS

Background

On June 30, 2010, Officers Dale Owens and Ken Hancock of the Spartanburg County Sheriff's Office performed a traffic stop on the vehicle Moore was driving for speeding and failing to maintain his lane. App. 64, 18 – 68, 10. After Moore had been informed he was receiving a warning citation and had declined Officer Owens' request to search the vehicle, Officer Owens continued to detain Moore for an *additional* fifteen to sixteen minutes so that the "drug detection K-9" could conduct a sniff search of the vehicle. App. 97, 18 – 105, 6. After thirty-two minutes into the traffic stop, the police dog alerted to an odor and Moore was arrested for cocaine and a gun found during a search of the vehicle. App. 105, 10 – 107, 14; State's Exhibit 1 (DVD of traffic stop, on file with this Court). On October 22, 2010, the grand jury of Spartanburg County indicted Moore for drug trafficking and possession of a firearm during the commission of a violent crime. App. 235.

Pre-trial, Moore moved to suppress the evidence seized from the vehicle on the basis that Officer Owens did not have reasonable suspicion for extending the stop. App. 61, 20 – 62, 6.

Suppression Hearing

Officers Dale Owens and Jason Carraway testified at the suppression hearing. App. 64, 9 – 131, 25. Thus, the following evidence was elicited at the suppression hearing regarding the traffic stop and the evidence seized during the search of the vehicle.

Officer Dale Owens

At the suppression hearing, Officer Owens maintained that on June 30, 2010, he and Officer Hancock "were around the lower end of [Spartanburg] County on [interstate] 85 around the 60-mile marker sitting stationary observing traffic at that time." App. 67, 9-15. Officer

Owens claimed at "[a]pproximately 1:10 in the morning[,]" he and Officer Hancock "observed [Moore] operating at above the posted speed limit" based on his "visual estimation" that Moore was driving above 70 miles-per-hour (mph) in a posted 60 mph speed zone. App. 68, 1-2. Without the assistance of a radar gun, Officer Owens asserted that he "pulled up behind [Moore's] vehicle" and "paced"[1] Moore's speed at 70 mph. App. 68, 4-21. Officer Owens said that while he was "pacing" Moore's speed, Moore "drove over the white dotted line." App. 68, 8-10.

Officer Owens said that the camera system in his patrol car is "probably one of the oldest systems . . . it's VHS recorded." App. 69, 20-23. Officer Owens also stated that, although the camera system in his patrol car had been fixed on several occasions, the audio portion of Moore's traffic stop was not recorded. App. 70, 4 – 71, 7. Officer Owens noted that he converted the VHS recording of the traffic stop to DVD. App. 71, 17 – 72, 3. The video of the traffic stop was then played corresponding with Officer Owens' testimony.

Officer Owens admitted that he did not know whether Moore accidentally or purposefully initiated the left turn signal prior to hitting the right turn signal, but based on his "training and experience . . . this appeared to [him that Moore] was preparing to flee." App. 74, 16 – 75, 8. Notably, Moore did not flee. Officer Owens recalled that the right turn signal stayed on after Moore had pulled the car off the road. App. 76, 2-5. Officer Owens claimed that leaving the turn sign on is "one of our criminal indicators. When you leave the [turn] signal on, basically

[1] Officer Owens maintained that pacing is "a way to measure speed." App. 68, 11-12. Officer Owens stated, "[I]f you're operating a vehicle with a certified speedometer, . . . all [of] our vehicles . . . have certified speedometers, and are calibrated, we use that for our measuring device. In maintaining the same speed and distance, then you determine what speed [the car in front of you is going]." App. 68, 16-21.

your heart rate's gotten [ ] so accelerated that you've lost audio . . . ." App. 76, 5-15. Officer Owens further claimed, "[I]t took me a little longer to get out of my vehicle and walk up there because I am concerned that [Moore] may put [the car] in drive . . . and decide to take off [be]cause that's a practice of, of fleeing felons." App. 76, 20 – 77, 3. Again, Moore never attempted to flee.

Officer Owens asserted that Moore was talking on the phone when he approached the passenger side of the vehicle and that he had to ask Moore to hang up the phone. App. 78, 1-4. Officer Owens maintained, "On many times that I've been involved in criminal cases . . . most innocent people hang up the phone when you walk up." App. 78, 8-12. Although the purpose of the traffic stop was for speeding and failing to maintain his lane, the assistant solicitor asked Officer Owens, "Specifically, with drug trafficking cases, what does that indicate?" and Officer Owens speculated:

> Well, a lot of times . . . they're having to answer to a higher person, and they're having that higher person on the phone hearing what's happening. Sometimes they have an auto answer. Sometimes . . . they don't even hang the phone up . . . [to] let them know that, you know, what's happening or . . . if they're deciding they're gonna (sic), it's gonna (sic) be a foot pursuit, they let them know the area that they're in just in case they get separated from communication so somebody can come and get them as well.

App. 78, 14-25.

Yet again, although the traffic stop was for speeding and for failing to maintain his lane, Officer Owens proceeded to give detailed explanations as to the differences between alleged "escort" vehicles, "decoy" vehicles, and "protection" vehicles in drug trafficking cases. App. 79, 1-17. Officer Owens admitted that he "*had no indication at the time*" Moore's car fell within one of these three purported vehicles used for drug trafficking. App. 79, 18-20 (emphasis

added).

Additionally, Officer Owens noted that Moore was "slightly slumped in the driver's seat behind the steering wheel" when he approached the vehicle. App. 80, 4-7. Officer Owens maintained that he "smelled the odor of alcohol coming from inside the vehicle[.]" App. 80, 8-11. Once more, although the traffic stop had nothing to do with drug trafficking, the assistant solicitor asked Officer Owens, "[D]oes the odor of alcohol reflected (sic) anyway on drug trafficking?" and Officer Owens replied, "[S]everal cases that I've been involved in, a lot of the people have been drinking alcohol and I mean I've even had them tell me it's, it calms their nerves . . . ." App. 80, 25 – 81, 5.

Officer Owens said that Moore thought the speed limit was 70 mph, not 60 mph as posted. App. 81, 13-25. Officer Owens also recalled that Moore "advised me it was a rental car" and "provide[d] me with a rental agreement, and then his driver's license." App. 82, 5-8. Officer Owens maintained that he noticed Moore's "hand was heavily shaking" and noted that "it's just an indicator that we look for, and basically we're measuring his nervousness." App. 82, 7-11. Officer Owens also claimed that Moore's "breathing was accelerated, and the pulse in his neck also appeared to be elevated and pounding . . . ." App. 82, 17-20.

Officer Owens stated that Moore admitted to having "a couple of drinks." App. 84, 9-17. Officer Owens also stated that Moore attempted to pick up his cell phone prior to exiting the vehicle, which "is consistent in many cases, with criminal behavior when people to decide to flee." App. 85, 3-9. Again, Moore never attempted to flee. Officer Owens further maintained that based on his training, Moore tried to calm his nerves by putting a cigarette in his mouth after exiting the vehicle. App. 86, 9-18.

Officer Owens noted that Moore "raised his hands voluntarily" while he conducted a pat-down search for weapons and that "[Moore] continue[d] to keep his hands . . . [in] what we call the felony position."[2] App. 86, 23 – 87, 18. Officer Owens also noted that during the pat-down search "[he] felt what [he] perceived as a large sum of wadded money in [Moore's] pocket" and that "[Moore] pulled out the wad of money" and moved it to his back pocket. App. 87, 8-10. When Officer Owens was asked the dollar amount of the "wad of money," Officer Owens stated his opinion, "Well, it's more . . . folded money than I carry . . . bordering a thousand dollars." App. 87, 19 – 88, l. 1. Officer Owens claimed "that would be reason for alarm as well" because Moore told him he was unemployed. App. 88, 2-11. The State later stipulated at trial that the amount of money found in Moore's pocket was approximately six-hundred dollars, not one-thousand dollars as Officer Owens stated. App. 227, 2-22.

Officer Owens stated that Moore "stuck his hand in his pocket, he's looking down. It's -- this is what we call the defeated look. . . . [Moore is] trying to dissipate his nervous energy . . . and [is going to] assume the felony position again, you know. [Moore is] gonna (sic) do all kind of things to try to dissipate that nervous energy." App. 89, 11-20. Officer Owens then recalled that Moore's name was not on the rental agreement and that Moore was coming from Lawrenceville, Georgia. App. 90, 21 – 91, 4. Officer Owens noted that Lawrenceville is a suburb of Atlanta, Georgia, "[w]hich is a known drug source, [a] major drug source city" and that "[t]hird party rental vehicles are consistent in many many many (sic) cases with criminal activity." App. 91, 5 – 92, 13.

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[2] The video of the traffic stop shows the officer motion for Moore to remove his hands from his pocket, which Moore could reasonably have construed as a directive to raise his hands above his head. State's Exhibit 1 (DVD of traffic stop).

Furthermore, Officer Owens stated that Moore informed him that he was on his way to North Carolina to visit his grandmother and provided his opinion that "[g]eneral people, are not gonna (sic) go visit grandma at one o'clock in the morning." App. 93, 2 – 94, 11. Officer Owens also claimed that Moore "placed his hands behind his back[,]" which is what [police] call assuming the position of arrest." App. 94, 21 – 95, 1.

Notably, when asked about his prior mention of writing Moore's name on a warning ticket, Officer Owens testified:

> [A] lot of times what we [police] do is when we're writing that warning [ticket] is we, we'll tell them it's basically to put them at ease, to help calm their nerves a little bit, and I look for a reaction from that because a lot of times when you tell somebody well, I'm gonna (sic) write you a warning for that infraction, and I mean for that moving infraction, and the moving infraction only, . . . you'll see that easiness . . . and they're not worried anymore. That never disappeared with [Moore].

App. 95, 4 – 97, 8. Officer Owens also testified that he conducted three field sobriety tests on Moore and ultimately found that Moore was not impaired: "*I feel like it would [have] been an injustice to [Moore] if I had arrested him for driving under the influence.*" App. 102, 6-11; App. 106, 1-3; App. 114, 11-14 (emphasis added).

Additionally, Officer Owens testified, "*I asked [Moore] if there were any weapons, alcohol, drugs, or anything like that in the vehicle and he told me no.*" App. 102, 19-22 (emphasis added). Officer Owens then admitted that Moore *declined* his request to search the vehicle. App. 102, 23 – 103, 15 (emphasis added). Officer Owens also acknowledged that he "*explain[ed] the warning* [citation]" to Moore and that he continued to detain Moore based on his belief that Moore was "involved in criminal activity" and "to wait for a drug detection K-9 to come to the vehicle." App. 102, 6 – 104, 6 (emphasis added). Specifically, Officer Owens

claimed, "I'm detaining [Moore] based on my experience, my training, and everything's telling me there's more to this traffic stop than just the driving infraction." App. 105, 18-23.

Fifteen to sixteen minutes later, "approximately 31 minutes and 13 seconds into the stop[,]" the K-9 unit arrived and the drug dog alerted to an odor. App. 106, 1-16. The Officers then searched the vehicle and found an "alcoholic beverage" under the front passenger seat, "contraband . . . consistent with crack cocaine" in the trunk, "a semiautomatic weapon[,] and a bundle of currency [$4,000]." App. 106, 17 – 107, 14.

On cross-examination, Officer Owens stated that "*it's not unusual* for [people who are stopped police on the interstate] *to be nervous*, [and claimed] it is unusual in the demeanor that [Moore] had that he was overly nervous, and that continued through the whole stop even after [Moore] *was advised he was gonna* (sic) *get a warning, even after he was told that he passed . . . the two of the three field sobriety tests.*" App. 112, 1-11 (emphasis added). Officer Owens admitted that he had *informed* Moore he was receiving a warning ticket for the traffic violations and that it was not until *after* Moore declined his request to search the vehicle that Moore was told he was being detained. App. 112, 12-19 (emphasis added).

Officer Jason Carraway

Officer Carraway, the K-9 handler, stated at the suppression hearing that his K-9 does "a passive alert" (sitting or laying) when detecting an odor resembling an illegal substance. R. 85, l. 16 – 86, l. 7; R. 94, ll. 2-5. On cross-examination, Officer Carraway admitted that the police dog alerted on the passenger door, not on the trunk where the drugs were found. R. 96, ll. 14-23.

Trial Court's Ruling

In making his ruling, the Trial Court stated, "*I have my doubts* that the car was driven from Morganton to Lawrenceville and back to Marion to visit a grandmother. That's a long way

to go around to visit your grandmother. . . . So, *it appears* that he may have been less than truthful about the purpose of his trip." App. 148, 8-17 (emphasis added). The Trial Court also stated, "[F]or someone unemployed, to be carrying such a large amount of cash in their pocket also would obviously give a[n] officer reasonable suspicions." App. 148, 17-20. The Trial Court ultimately ruled, "[T]he other factors as noted, I have given those the weight required, and in this case I am going to refuse to suppress." App. 148, 20-22.

At trial, defense counsel renewed his prior objections to the evidence when admitted. App. 209, 13 – 216, 2. Upon completion of the State's case, Moore renewed his motion to suppress the evidence seized in the vehicle, and the Trial Court again denied Moore's motion to suppress. App. 226, 21 – 230, 11.

The Court of Appeals held that the facts relied upon by Officer Owns did not provide a reasonable suspicion of a serious crime, noting the similarity of these facts to Tindall.[3] As a result, the continued detention was illegal and the drugs discovered during the search of the vehicle must be suppressed.

[3] State v. Tindall, 388 S.C. 518, 698 S.E.2d 203 (2010).

ARGUMENT

The Court of Appeals correctly held the Trial Court erred in refusing to suppress the evidence found in the vehicle Respondent was driving at the time of his arrest where: (1) the officer's continued detention of Respondent exceeded the scope of the traffic stop and constituted a seizure for purposes of the Fourth Amendment; and (2) the evidence presented by the State did not establish that the officer had reasonable and articulable suspicion of a serious crime when he chose not to conclude the traffic stop.

The State contends that the Court of Appeals majority misapplied the standard of review in Fourth Amendment cases and misapprehended the totality of the circumstances test applied in Fourth Amendment cases. "On appeals from a motion to suppress based on Fourth Amendment grounds, this Court applies a deferential standard of review and will reverse if there is clear error. However, this Court reviews questions of law de novo." State v. Adams, 409 S.C. 641, 647, 763 S.E.2d 341, 344 (2014) (internal citations and quotations omitted). The reviewing Court must ask first, whether the record supports the trial court's assumed findings, and second, whether these facts support a finding that that the officer had reasonable suspicion of a serious crime to justify continued detention. State v. Tindall, 388 S.C. 518, 523, n. 5, 698 S.E.2d 203, 206, n. 5.

In its decision, the Court of Appeals noted that Moore concedes that the initial stop was legal, leaving the issue "whether Officer Owens developed a reasonable, articulable suspicion that Moore was trafficking drugs at the time he intended to issue the warning citation such that the continued detention was unlawful." App. 244. The Court of Appeals further noted that the Trial Court placed heavy emphasis on "Moore's trip from Morganton to Lawrenceville to Marion" in finding that reasonable suspicion existed. App. 244. The majority determined that this finding was not supported by the evidence and thus was not a valid factor considered by the officers. App. 244-45. Therefore, they evaluated the remaining factors to determine if there was reasonable suspicion under a totality of the circumstances, only one of which was specifically referenced by the Trial

Court in its findings. App. 245. The other specific factor referenced by the Trial Court was that an unemployed person was carrying a large amount of cash in their pocket. App. 246. The Court of Appeals found that because the officer did not know the amount of cash held by Moore, "this fact does not reasonably contribute to his reasonable suspicion." App. 246. The Court of Appeals ultimately held that under the totality of the circumstances the facts relied upon by Officer Owens did not provide reasonable suspicion of a serious crime and there was no consent to the search. App. 246.

This Court should uphold the Court of Appeals' decision where the Court of Appeals correctly applied the established law of Fourth Amendment cases to the facts of this case and found that there was no evidence to support the Trial Court's finding of a reasonable and articulable suspicion of criminal activity to justify the further detention of Moore such that Moore's convictions should be reversed.

I. The Continued Detention of Moore Exceeded the Scope of the Traffic Stop and Constituted a Seizure for Purposes of the Fourth Amendment

The Fourth Amendment guarantees "[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. "[T]he underlying command of the Fourth Amendment is always that searches and seizures be reasonable." Wilson v. Arkansas, 514 U.S. 927, 931 (1995). The Fourth Amendment is applicable to the States through the Due Process Clause of the Fourteenth Amendment. Mapp v. Ohio, 367 U.S. 643 (1961).

Traffic stops are reviewed under the standard set forth in Terry v. Ohio, 392 U.S. 1 (1968), because a traffic stop is more analogous to an investigative detention than a custodial arrest. See United States v. Rusher, 966 F.2d 868, 875 (4th Cir. 1992). Consequently, Terry

outlines a two-prong test for analyzing the constitutionality of a traffic stop: (1) whether the police officer's action was justified at the inception of the traffic stop; and (2) whether the police officer's subsequent actions were reasonably related in scope and duration to the circumstances that justified the stop. Rusher, 966 F.2d at 875.

As to the scope component of the second prong, "the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." Florida v. Royer, 460 U.S. 491, 500 (1983) (plurality opinion). With regard to the duration component of the second prong, a traffic stop may become "unlawful if it is prolonged beyond the time reasonably required to complete [its] mission." [4] Illinois v. Caballes, 543 U.S. 405, 407 (2005); see Royer, 460 U.S. at 500 (noting the scope of a seizure "must be carefully tailored to its underlying justification," and that the government bears the burden to "demonstrate that the seizure it seeks to justify . . . was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure").

Furthermore, temporary detention of individuals during a traffic stop by police, even if only for a brief period and for a limited purpose, constitutes a seizure of the persons within the meaning of the Fourth Amendment. See Whren v. United States, 517 U.S. 806, 809–10 (1996); see also United States v. Arvizu, 534 U.S. 266, 273 (2002) (noting the Fourth Amendment's protection against "unreasonable searches and seizures" extends to "brief investigatory stops of

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[4] See State v. Corley, 383 S.C. 232, 241, 679 S.E.2d 187, 192 (Ct. App. 2009) (noting during a traffic stop, "the police may briefly detain and question a person upon a reasonable suspicion, short of probable cause for arrest, that the person is involved in criminal activity"; "[t]he scope and duration of [this investigative] detention must be strictly tied to and justified by the circumstances that rendered its initiation proper"; and normally, this permits an officer to attempt to obtain information confirming or dispelling the officer's suspicion), *aff'd as modified,* 392 S.C. 125, 708 S.E.2d 217 (2011)).

persons or vehicles"). "As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." Whren, 517 U.S. at 810.

However, a traffic stop typically ends when the police officer has "no further need to control the scene, and inform[s] the driver and passengers they are free to leave." Arizona v. Johnson, 555 U.S. 323 (2009); see United States v. Sullivan, 138 F.3d 126, 132 (4th Cir. 1998) (finding the test for determining if a particular encounter constitutes a seizure within the meaning of the Fourth Amendment is "whether, under the totality of the circumstances surrounding the encounter, a reasonable person in the suspect's position would have felt free to decline the officer's requests or otherwise terminate the encounter"). Accordingly, "[o]nce the purpose of that stop has been fulfilled, the continued detention of the car and the occupants amounts to a second detention." State v. Pichardo, 367 S.C. 84, 99, 623 S.E.2d 840, 848 (Ct. App. 2005); see State v. Tindall, 388 S.C. 518, 522-23, 698 S.E.2d 203, 205-06 (2010) (finding "the officer's continued detention of Tindall exceeded the scope of the traffic stop and constituted a seizure for purposes of the Fourth Amendment"). "Lengthening the detention for further questioning beyond that related to the initial stop is acceptable in two situations: (1) the officer has an objectively reasonable and articulable suspicion illegal activity has occurred or is occurring; or (2) the initial detention has become a consensual encounter." State v. Provet, 391 S.C. 494, 706 S.E.2d 513 (2011) (citing State v. Pichardo, 367 S.C. at 99, 623 S.E.2d at 848).

In the present case, the extension of the traffic stop for an additional fifteen to sixteen minutes waiting for and then conducting the K-9 search lengthened the detention such that the officer must have either an objectively reasonable and articulable suspicion of illegal activity or

consent.[5] This issue was not contested by the State at the Court of Appeals. In fact, the State's Respondent's Brief at the Court of Appeals, rephrased the issue to "The trial judge properly denied Appellant's motion to suppress the illegal narcotics discovered during a traffic stop because *the officer's decision to extend the scope and duration of the stop* was reasonable and justified under the totality of the circumstances based on the existence of multiple factors establishing a reasonable and articulable suspicion of criminal activity." Therefore, where the State did not contest that the duration of the initial traffic stop was extended before the Court of Appeals, it cannot raise the issue before this Court. TNS Mills, Inc. v. S.C. Dep't of Revenue, 331 S.C. 611, 617, 503 S.E.2d 471, 474 (1998) ("An issue conceded in a lower court may not be argued on appeal.").

Additionally, despite its discussion of the duration of the stop in its Petitioner's Brief to this Court,[6] the State again admits that the initial purpose of the stop ended when Officer Owens issued the warning citation and that the continued detention of Moore is only justified, in the present case, *if* the officer has reasonable suspicion of serious criminal activity. Petitioner's Brief, p. 19 ("Approximately fifteen minutes into the stop, Officer Owens decided to further detain Respondent after issuing the warning citation. Officer Owens' decision to extend the stop was based on his [claim of] detection of ... indicators of criminal activity while he was preparing the citation and completing the stop. . . ."); see State v. Pichardo, 367 S.C. at 99, 623 S.E.2d at 848.

To the extent this Court does review this issue, there was a temporal extension of the stop, which would have concluded after approximately sixteen minutes but instead lasted an additional fifteen to sixteen minutes for the K-9 officer to arrive and conduct a drug sniff. The purpose of the

[5] There is no evidence of consent in the present case.

[6] The State's references to duration may be referring to the length of the initial stop after which the officer issued the warning citation, the duration of which is not disputed.

traffic stop was accomplished when Officer Owens found that Appellant was not impaired[7] and had informed Appellant that he would receive a warning citation. R. 61, l. 4 – 63, l. 8; R. 68, l. 6 – 72, l. 3; R. 78, l. 1 – 80, l. 14; see Tindall, 388 S.C. at 522, 698 S.E.2d at 205 (finding the purpose of the traffic stop was accomplished when the dispatcher reported no problems with Tindall's driver's license and vehicle, and the only remaining task was the issuance of the warning ticket, and a continued detention occurred when the officer questioned Tindall for approximately six to seven minutes *after* the purpose of the stop was accomplished).

Similar to United States v. Digiovanni, 650 F.3d 498, 508-09 (4th Cir. 2011), Officer Owens "definitely abandoned the prosecution of the traffic stop and embarked in another sustained course of investigation." (citation and internal quotation marks omitted). It is clear that Officer Owens was conducting a drug investigation and not a traffic violation, particularly when Officer Owens continued to detain Appellant for an additional fifteen minutes after the purpose of the traffic stop was accomplished to have a drug dog conduct a periphery sniff of the vehicle. R. 72, ll. 1-16; (DVD of traffic stop). Notably, Appellant told Officer Owens that there were no weapons, alcohol, or drugs in the vehicle before Officer Owens called for the drug dog. R. 68, ll. 19-22.

Accordingly, Officer Owens' "continued detention of [Appellant] exceeded the scope of the traffic stop and constituted a seizure for the purposes of the Fourth Amendment" because a reasonable person in Appellant's position "would not have felt free to terminate the encounter." See Tindall, 388 S.C. at 522-23, 698 S.E.2d at 205-06; accord Arizona v. Johnson, 555 U.S. 323;

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[7] Officer Owens testified that he conducted three field sobriety tests on Appellant and ultimately found that Appellant was not impaired: "***I feel like it would [have] been an injustice to [Appellant] if I had arrested him for driving under the influence.***" App. 102, 6-11; App. 106, 1-3; App. 114, 11-14 (emphasis added).

United States v. Sullivan, 138 F.3d at 132.

II. The Court of Appeals Correctly Found that the Evidence Did Not Support a Finding that the Officer Had Reasonable and Articulable Suspicion of a Serious Crime When He Chose Not to Conclude the Traffic Stop.

A. The Court of Appeals Applied the Correct Standard of Review

The State contends that the Court of Appeals' majority opinion misapplied or misapprehended the standard of review.

On appeals from a denial of a motion to suppress based on Fourth Amendment grounds, the appellate courts of this State apply a deferential standard of review and will reverse if there is clear error. State v. Tindall, 388 S.C. at 521, 698 S.E.2d at 205. This deference, however, does not bar appellate courts from conducting their own review of the record to determine whether the trial judge's decision is supported by the evidence. Id. The appellate courts will affirm if there is any evidence to support the trial court's ruling. State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 460 (2002). The reviewing Court must ask first, whether the record supports the trial court's assumed findings, and second, whether these facts support a finding that that the officer had reasonable suspicion of a serious crime to justify continued detention. Tindall, 388 S.C. at 523, n. 5, 698 S.E.2d at 206, n. 5.

The Court of Appeals correctly found that the evidence did not support the Trial Court's finding that reasonable suspicion was supported by dishonesty regarding the purpose of Moore's trip when Moore drove the car from Morganton, North Carolina to Lawrenceville, Georgia, and was now headed Marion, North Carolina, "a long way round to visit your grandmother." App. 244-45. The State incorrectly argues that the Trial Court focused on Moore's explanation that he was driving to his grandmother's house at 1:00 a.m. in finding that reasonable suspicion existed. This is not a

complete and accurate statement of the Trial Court's finding for his ruling. Instead, the Trial Court, in denying the motion to suppress, stated:

> In particular, the problem I have with the or the facts that are revealed by the rental agreement indicate the rental in North Carolina on the evening, afternoon before the stop was made at one o'clock in the morning. I have my doubts that the car was driven from Morganton [North Carolina] to Lawrenceville [Georgia] and back to Marion [North Carolina] to visit a grandmother. That's a long way to go around to visit your grandmother. Morganton and Marion is a much shorter trip.
>
> So, it appears that he may have been less than truthful about the purpose of this trip.

App. 148, 8-17.

As the majority properly held, there was no evidence in the record to support this finding by the Trial Court, constituting clear error. While the rental agreement may have indicated that the car was rented by a third-party in North Carolina that afternoon, Officer Owen's testimony indicates that that he believed that Moore was traveling from Lawrenceville, Georgia to North Carolina. App. 93, 1-4; App. 91, 3-4. The officer noted that it was third-party rental, but made no reference to its rental in North Carolina. App. 90, 21-23. In fact, though Officer Owens later testified at trial that the rental agreement shows the car was rented in North Carolina, his testimony at the suppression hearing was that the vehicle was rented in Georgia. Compare App. 93, 1-4, with App. 169, 17-24. This indicates that Officer Owens was not aware that the vehicle was rented in North Carolina at the time of the stop; in fact, he was not aware of it until the solicitor pointed out that fact to the court in argument. Thus, any inconsistency between the rental agreement and Moore's statements could not have factored into the officer's objective determination of "reasonable suspicion" because they were not known to the officer during the traffic stop.

Additionally, even if the officer had observed that the car was rented in North Carolina, there is no evidence that Moore was the individual who actually drove the car from North Carolina

to Georgia. App. 144, 7-21. Moore only said that he was driving from Lawrenceville, Georgia to North Carolina. App. 91, 1-8; App. 93, 3-4 and 15-18. There is nothing unusual about a person driving from Georgia to North Carolina in one evening. The "round about" travel plan was merely raised in argument by the Solicitor, who had appreciably more time to review the rental document than Officer Owens had during the traffic stop. App. 141, 18 – 142, 3; App. 142, 21-23; see Bowers v. Bowers, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991) (arguments by counsel are not evidence). Therefore, the Trial Court's finding that Moore made a trip from North Carolina, to Georgia, and back to North Carolina in one day and that such was a proper factor in Officer Owens assessment of a reasonable suspicion is unsupported by the evidence and clear error.

The Court of Appeals also applied the proper standard in finding that Moore's possession of a large sum of wadded money in his pocket though unemployed was not a reasonable consideration by the officer where the evidence showed that the officer did not know the amount of money. During a patdown conducted by Officer Owens on Moore, Owens testified that he "felt what I perceived as a large sum of wadded money in his pocket." App. 87, 9-10. Then Deputy Hancock pulled out the wad of money from Moore's pocket, but then immediately put it back in Moore's pocket. App. 87, 11-13. Neither officer actually saw the denomination of the bills, nor did either officer count how much money it was at the time.[8] The officers did not know if Moore was carrying a large amount of cash with him or was simply carrying a number of one dollar bills. When the officers did not know at the time how much cash Moore was actually carrying, the Trial Court's finding that "for someone unemployed, to be carrying such a large amount of cash in their

[8] Officer Owens testified at the suppression hearing that the "wad" of money was "bordering a thousand dollars, though the State later stipulated that it was approximately six hundred dollars. App. 87, 23 – 88, 1; App. 227, 18-21.

pocket also would obviously give a [sic] officer reasonable suspicions" is unsupported by the actual evidence. App. 148, 17-22.

Further, the trial judge's statement indicates that there is no legitimate reason an unemployed person could have a large amount of cash; however, someone unemployed may validly possess a large amount of cash for a variety of reasons including, they do not have a bank account and therefore cash their unemployment benefits checks, they withdrew cash from money saved while employed, or they are paid cash for legal side-jobs that would not qualify as "employment" per se. See United States v. Foster, 624 F.3d 243, 247 (4th Cir. 2011) (casting doubt on the government's argument that the passenger's lack of immediate visibility was "suspicious behavior" when "there are an infinite number of reasonable explanations, unrelated to any criminal behavior, to explain why a passenger would not immediately be visible in a car. For example, he may have simply been bending over to retrieve a dropped item from the floor of the car."). There was no testimony that the officers asked Moore for any explanation for how he validly had a sum of cash despite his unemployment, and an automatic inference of illegality is not reasonable.

Therefore, the Court of Appeals' majority properly held that the two primary factors relied upon by the Trial Court in determining that the officers had reasonable suspicion of illegal activity to lengthen the traffic stop detention of Moore were not supported by any evidence. Accordingly, the Court of Appeals' majority did not misapply the standard of review and correctly reversed the Trial Court's ruling having found clear error.

B. The Court of Appeals Properly Applied the Totality of the Circumstances Test

The State also argues that the Court of Appeals misapplied or misapprehended the totality of the circumstances test used in Fourth Amendment cases. Although the totality of the circumstances evaluation requires more than a piecemeal refutation of each fact and inference, courts can still

discuss the individual factors "one by one as [they] put them into the mix" in evaluating "the combined strength of these factors." United States v. Sprinkle, 106 F.3d 613, 617 (4th Cir. 1997). If the individual factors "gain little, if any, strength when put together," reasonable, articulable suspicion of criminal activity will not exist. Id. at 618-19.

The Court of Appeals analyzed the remaining factors advanced by the State and correctly determined that they did not, when taken together, give rise to reasonable suspicion when they do not eliminate a substantial portion of innocent travelers. App. 244-46. The Court of Appeals found that any indicators of flight "lost much of their significance once Moore cooperated and stayed through the initial traffic stop and sobriety test." App. 246. They also found that many of the factors listed were individual indicators of nervousness, a bolstering attempt by the State. App. 246. As discussed *supra*, the Court of Appeals determined than any reliance on the cash in Moore's pocket was not reasonable when the officers did not even know the amount. App. 246. Lastly, the admission of drinking was not a relevant factor to reasonable suspicion, beyond the nervousness previously addressed, because the officer admitted that Moore was not impaired and he was not going to be cited for any alcohol-related offense. App. 246. Viewing those factors in their totality, the Court of Appeals found the facts analogous to Tindall and held that that Officer Owens did not have reasonable suspicion of a serious crime. App. 246.

The State contends that the Court of Appeals erred in its assessment of the factors giving rise to reasonable suspicion. The State disagrees with the Court's findings regarding the multiplicity of the factors related to nervousness and the viability of the drinking and driving. The State also argues that the Court of Appeals ignored the officer's extensive training and experience.

The Court of Appeals "share[d] the Fourth Circuit's concern regarding the State's inclination toward using whatever facts are present, no matter how innocent, as indicia of suspicious

activity." App. 245-46. "The Government cannot rely upon *post hoc* rationalizations to validate those seizures that happen to turn up contraband." Foster, 634 F.3d at 249. The Court recognized that under the totality of circumstances analysis, multiple seemingly innocent factors can give rise to reasonable suspicion when taken together; however, they found that such culmination into reasonable suspicion did not occur here. App. 246.

The State's statement "some of the factors observed by the officer were potentially consistent with innocent travel" is indicative of the perversion of reasonable suspicion often made by the government. In the present case, **all** of the factors cited by the State **are** individually consistent with innocent behavior, and they do not rise to the level of reasonable suspicion consisting of a particularized and objective basis when combined that would lead one to suspect another of criminal activity. The State cites the following factors as giving rise to a reasonable suspicion[9]: (1) Moore turned on his left turn signal when he was initially pulled over; (2) Moore took a long time to pullover;[10] (3) Moore never turned his signal off; (4) Moore admitted he had been drinking, although Officer Owens concluded that Moore was not impaired [R.p. 38, l. 25 – 43,

[9] While the State also includes the factor that Moore had a large amount of cash in his pocket, as discussed *supra*, there is no evidentiary support that the officers knew the amount of cash in Moore's pocket before they conducted the illegal search.

[10] The video recording of the traffic stop began when Officer Owens turned on his blue lights. The video shows that Moore was traveling in the center lane. App. 69, 15-19; App. 74, 5-6. The video shows that Moore moved to the far right line in eight seconds. He entered the shoulder a total of eighteen seconds after initiation of the stop. Moore was completely stopped on the shoulder after a total of thirty-two seconds after the stop. The video shows that he began entrance onto the shoulder where there was a guardrail on the right side of his vehicle. He proceeded past the end of the guardrail to an area where he could pull partially onto the grass. See State's Exhibit 1 (DVD of traffic stop).

l. 11]; (5) Moore began smoking a cigarette;[11] (6) Moore continued to talk on his cell phone after he was pulled over; (7) Moore was nervous with hands shaking, accelerated breathing, and an elevated pulse; (8) Moore tried to pick up his cell phone once he got out of the car; (9) Moore drove a car rented by someone else; (10) Moore was driving on I-85; (11); Moore was traveling from the Atlanta area; (12) Moore said he was traveling to North Carolina to visit his grandmother even though it was 1:00 a.m.; (13) Moore raised his hands in the felony position even though the officers did not ask him to do so;[12] and (14) Moore remained nervous after receiving a warning citation.

These factors combined simply show that Moore was someone traveling late at night from the Atlanta area to North Carolina on a heavily traveled interstate who was pulled over for speeding and possibly for drinking while driving and who was understandably very nervous. The factors provided by the State gain little, if any, strength when put together. Together, they did not give the officers in this case the necessary reasonable, articulable suspicion of criminal activity. In addition, while the Trial Court made a cursory reference to these remaining factors, his ruling was primarily based on Moore's alleged driving from North Carolina to Georgia and then back to North Carolina in one day and the large amount of cash Moore was carrying, which as set forth *supra*, were findings not supported by any evidence.

The Court of Appeals' majority therefore correctly reversed the Trial Court's denial of Moore's motion to suppress the contraband found during the illegal search.

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[11] The video recording shows that Moore got out of his vehicle smoking a cigarette. There is no indication of when it was lit. He does not re-light the cigarette until after the officers' continued detention and call for the K-9 unit. See State's Exhibit 1 (DVD of traffic stop).

[12] A "felony stretch" occurs when an individual raises his hands in a stress relief action. State v. Provet, 391 S.C. at 502 n.2, 706 S.E.2d at 517 n.2.

1. The Court of Appeals Properly Considered and Weighed Respondent's Nervousness

The Court of Appeals majority observed: "[T]he State attempted to expand the factor of nervousness into several factors by listing Moore's specific nervous conduct throughout the stop." The State argues that these "multiple factors of nervousness" where reflective of Moore's being overly nervous, beyond that which most people experience during a normal traffic stop. While such may be the case, it does not contradict the Court of Appeal's finding. The Court is merely highlighting that Moore's nervousness, even his being overly nervous, is one factor to consider in the determination of reasonable suspicion and does not constitute eight separate factors as set forth by the State.

Nervous, evasive behavior is considered a pertinent factor when determining reasonable suspicion. Illinois v. Wardlow, 528 U.S. 119, 124 (2000). In fact, nervousness is a factor identified in a majority of the cases dealing with an officer's determination of reasonable suspicion, including both cases finding reasonable suspicion and those that do not. See State v. Hewins, 409 S.C. 93, 760 S.E.2d 814 (2014) (one factor was the defendant being nervous despite being issued a warning citation, though ultimately finding no reasonable suspicion); State v. Corley, 392 S.C. 125, 708 S.E.2d 217 (2011) (one factor included nervousness displayed by being "fidgety," short of breath, and avoiding eye contact); State v. Wallace, 392 S.C. 47, 707 S.E.2d 451 (Ct App. 2011) (driver become increasingly nervous instead of gradually relaxing and passenger's hand was unsteady passing identification and was sweating despite mild temperature – notably the State did not expand each indicator of nervousness into separate items on its list of 14 factors - RAS); State v. Provet, 391 S.C. 494, 706 S.E.2d 513 (Ct. App. 2011) (one factor was defendant's nervousness as displayed by extreme hand shaking and accelerated breathing); State v. Tindall, 388 S.C. 518, 698

S.E.2d 203 (2010) (the "felony stretch" – designated as a sign of stress – and nervousness listed as separate factors on list of four factors, but ultimately finding no reasonable suspicion); State v. Picardo, 367 S.C. 84, 623 S.E.2d 840 (2005) (finding the officer's sole reliance on the defendant's nervousness insufficient to establish reasonable suspicion); United States v. Mason, 628 F.3d 123 (4th Cir. 2010) (one factor was that the defendant was sweating and unusually nervous, which became more pronounced as the traffic stop continued); United States v. Foreman, 369 F.3d at 785 (4th Cir. 2004) (one factor was that the defendant was exceptionally nervous, which became more pronounced when trooper raised the issue of drug trafficking); see also Robinson v. State, 407 S.C. 169, 754 S.E.2d 862 (2014).

In the present case, Officer Owens testified that the following led him to believe Moore was "overly" nervous: Moore's failure to turn off his turn signal, consumption of alcohol, smoking a cigarette, shaking hands, accelerated breathing, elevated pulse, unilateral placement of hands in the felony position, and remaining nervous after notified that he would only receive a warning citation. Rather than listing "Defendant's excessive nervousness throughout the stop based on ..." as one factor, the State listed each fact related to nervousness separately, doubling the number of "indicators" of reasonable suspicion. The Court of Appeals recognized this bolstering attempt and noted it in their opinion. However, the Court of Appeals still recognized "**the** factor of nervousness" and weighed it in its analysis of the factors in their totality. In fact, in summarizing the factors, the Court stated "[Moore] assumed the felony position, and he displayed nervous conduct throughout the entire stop." Therefore, the Court of Appeals properly considered and weighed Moore's nervousness in its assessment of whether there was reasonable suspicion under the totality of the circumstances.

2. The Court of Appeals Properly Considered and Weighed Respondent's Consumption of Alcohol

The Court of Appeals stated in its opinion, "The State argues Moore's admission of drinking also contributed to Officer Owens' reasonable suspicion, but Officer Owens admitted Moore was not impaired and it would have been unfair to issue a ticket for an alcohol-related offense." App. 246. The State argues that the Court of Appeals erred in its analysis because drinking and driving is common in drug trafficking cases, and was therefore a proper factor for consideration even though Moore was not impaired.

Moore's drinking was referenced twice in the State's brief, first as an indicator of nervousness, discussed *supra*, and second as Moore's admission to drinking authorized the extension of the traffic stop to conduct field sobriety tests. The Court of Appeals clearly noted the myriad of indicators of nervousness cited by the State. Thus, the Court's comment regarding the weight of the alcohol consumption appears to relate to the other argument that the officer was justified in extending the stop to assess Moore's impairment. However, as the Court of Appeals noted, once the officer determined Moore was not impaired and that he would not issue a ticket for any alcohol-related offense, any reasonable, articulable suspicion would have to relate to some other suspected criminal activity.

The State did not support its averment that drinking and driving is common in drug trafficking with any authority. Presumably, the State is relying upon Officer Owen's testimony during the suppression hearing. When asked how alcohol consumption relates to drug trafficking, Officer Owens testified that, in several cases in which he has been involved, people have told him that they were drinking alcohol to calm their nerves. App. 81, 2-9. He made no indication of the specific number of cases in which such a statement was made or if those cases involved drug

trafficking. The banality of this testimony is such that it provides little support to the officer's alleged reasonable suspicion. The State did not provide and Respondent cannot locate any other South Carolina or federal case in which a defendant's alcohol consumption was an indicator of drug trafficking because it was "common" to calm nerves. Despite their references to other common indicia of drug trafficking, alcohol consumption is not listed as an indicator of drug trafficking in Picardo, Tindall, Provet, Wallace, or Hewins. Nevertheless, to the extent that alcohol consumption was an indicator of nervousness, the Court of Appeals noted that Moore "displayed nervous conduct throughout the entire stop."

In so far as the officer was reasonable in conducting the field sobriety tests due to Moore's admission of drinking, this does not appear to be a matter in dispute. The elongated detention of Moore began after completion of the field sobriety tests, once Officer Owens provided the warning citation. At that point, the officer no longer had any reasonable suspicion of an alcohol-related offense. Thus, the continued detention of Moore had to be premised on a reasonable and articulable suspicion of another crime.

Similarly, the Court of Appeals found that the flight indicators, cited by the State as three separate factors, "lost much of their significance once Moore cooperated and stayed throughout the initial traffic stop and sobriety test." App. 246. The State cited the following factors as leading the officer to believe Moore may flee: Moore turned on his left turn signal when he was initially pulled over, took a "long" time to pullover, continued to talk on his cell phone after he was pulled over, and tried to pick up his cell phone once he got out of the car. However, Moore did not actually make any attempt to flee the scene. In fact, at the point of the continued detention, Moore had already remained at the scene for sixteen minutes and undergone three field sobriety tests, so any prior impression that he was a flight risk would have subsided. The officer never testified that his

reasonable suspicion of criminal activity was related to a suspicion that Moore would abscond; it was clear that criminal activity the officer suspected was drug related.

Therefore, the Court of Appeals properly considered Moore's alcohol consumption as it related to nervousness and properly determined that once Officer Owens determined that Moore was not impaired, the alcohol consumption did not support any further extension of the stop.

3. The Court of Appeals Properly Considered and Weighed the Officer's Training and Experience

Addressing the State's contention that the Court of Appeals ignored Officer Owen's training and experience, the Court in Digiovanni noted:

> While it is true that we rely upon the experience and specialized training of the police officer, the Government must also be able to either articulate why a particular behavior is suspicious or logically demonstrate, given the surrounding circumstances, that the behavior is likely to be indicative of some more sinister activity than may appear at first glance.

650 F.3d at 512 (internal citations and quotations omitted). The Court of Appeals noted in its recitation of the facts that the officer's opinions were based on his training, the details of which were contained in the record during both the suppression hearing and trial portions of the transcript. App. 240-41. The Court of Appeals also stated in the Law/Analysis portion of their opinion that "[C[ourts must consider the totality of the circumstances and give due weight to common sense judgments reached by officers in light of their experience and training." App. 244. In United States v. Johnson, 599 F.3d 339 (4th Cir. 2010), the Fourth Circuit Court of Appeals explained:

> Getting the balance right is never guaranteed, but the chances of doing so are improved if officers, through training, knowledge, and experience in confronting criminality, are uniquely capable both of recognizing its signatures, and by the same token, of not reading suspicion into perfectly innocent and natural acts. In this way,

> experience leads not just to proper action but to prudent restraint. "Reasonableness" is a matter of probabilities, and probability in turn is best assessed when one has encountered variations on a given scenario many times before.
>
> . . .
>
> But while officers have the advantage of experience, they do not necessarily have the advantage of neutrality, and that is where district courts come in.

599 F.3d at 343.[13]

In the present case, the Court of Appeals noted its concern with the State's labeling any and all facts as suspicious, no matter how innocent. App. 245-46. The Court never discounted the officer's ability to evaluate nervousness, they simply found that the multiple factors listed individually relating to nervousness were an attempt to make the sole factor of appearing "overly" nervous appear grander. Additionally, the Court of Appeal's assessment of the officer's failure to determine the amount of money in Moore's pocket was a matter of fact, not experience. Lastly, as explained *supra*, the admission of drinking by Moore could have been reasonable, articulable suspicion to detain him longer – in fact it did justify the field sobriety tests. However, once Officer Owens determined he was not impaired, this was no longer a factor to consider in so far as he did not have a reasonable suspicion of an alcohol related offense. Conceivably the consumption of alcohol also related to nervousness, which the Court of Appeals already noted to be a factor in determining reasonable suspicion.

Regardless, an officer's experience will not authorize his *post hoc* labeling of **any** fact as suspicious. In Digiovanni, the Court rejected the officer's contention that certain facts were

[13] The video of the traffic stop shows the officers "fist-bump" after they discover drugs in the vehicle and place Moore under arrest. State's Exhibit 1 (DVD of traffic stop).

indicative of drug trafficking, characterizing reliance on some of the facts as "absurd."[14] 650 F.3d at 512. Thus, an officer's experience only accords so much weight in evaluating his alleged "common sense judgments." The court still sits in ultimate review of those judgments and determines if they amount to reasonable, articulable suspicion of criminal activity under the totality of the circumstances.

Therefore, the Court of Appeals did consider the training and experience of the officers and gave due weight to the factors that they determined where reasonably relied upon by the officers in assessing reasonable suspicion.

4. The Court of Appeals Properly Determined that Under the Totality of the Circumstances the Officer Lacked Reasonable, Articulable Suspicion to Extend the Traffic Stop

After listing the factors cited by the State in support of reasonable suspicion and discussing several of them in more depth, the Court of Appeals ultimately determined that the facts did not provide Officer Owens with a reasonable suspicion of a serious crime. App. 244-46. The Court of Appeals stated:

> Once we have view the factors in their totality, we find the State presented a similar case to Tindall: Moore was driving to visit a family member, Moore was driving a vehicle rented by a third-party, he was coming from a major city known as a drug hub and traveling along a known drug route, he assumed the felony position, and he displayed nervous conduct throughout the stop.

App. 246.

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[14] The trooper in Digiovanni was "a member of the Pro–Active Criminal Enforcement Team (PACE), a Maryland State Police task force that focuses on criminal traffic enforcement on Maryland roadways to identify drug, criminal, and terrorist organizations that use motor vehicles in the furtherance of their illicit activities." 650 F.3d at 502 n.2. There was no mention in Digiovanni of how many years of experience the trooper had in law enforcement or any his specific training.

The Court of Appeals noted the similarity of the present case to Tindall. The officer obtained copies of Tindall's license, registration, and the car rental agreement and asked him to sit in the front of his police car after pulling him over for traffic offenses. 388 S.C. at 522, 698 S.E.2d at 205. The officer testified that Tindall did a "felony stretch" upon exiting his vehicle, an indicator of stress. Id. Tindall responded to the officer's questions by telling him that he was traveling to Durham to visit his brother. Id. The officer then called in the driver's information and received a response back three minutes later indicating that there were no problems. Id. The officer told Tindall he would write him a warning ticket only, but rather than writing the ticket, he continued to question Tindall another six to seven minutes. Id. In response, Tindall indicated that he was recently laid off and he and his wife were opening a daycare center. Id. The officer also inquired into the purpose of his trip, what exit he would take for Durham, whether he had been charged with a drug crime, and various questions about his business. Id. Tindall then consented to the search of his vehicle, which uncovered drugs. Id.

This Court found that continued detention of Tindall after he was notified he would receive a warning exceeded the scope of the traffic stop and constituted a seizure for purposes of the Fourth Amendment. Id. This continued detention could only be lawful if the officer reasonably suspected a serious crime when he chose to continue the detention. Id. at 523, 698 S.E.2d 206. The facts known the officer at that time were (1) Tindall was driving to Durham, a "drug hub" according to the officer, to visit his brother; (2) Tindall was driving a rental car rented the previous day by a third party, to be returned in Atlanta on the day of the stop (Tindall was stopped in the morning); (3) Tindall did a "felony stretch" upon exiting his vehicle; and (4) Tindall seemed nervous. This Court found these facts did not provide the requisite reasonable suspicion. Id. Tindall's subsequent consent was also invalid because it was the product of the unlawful detention.

The facts relied upon in present case are similar to those in Tindall. In addition to the signs of nervousness and flight discussed *supra*, the State cited the following indicators of drug trafficking: Moore's continuing to talk on his cell phone after pulled over, driving a car rented by a third party, driving on I-85 from the Atlanta area, and carrying a large amount of cash though unemployed. The officer also questioned Moore's honesty regarding the purpose of his trip to North Carolina, as he found it odd to travel to visit a grandmother at 1:00 a.m. Thus, what the State presents as a multitude of factors boils down to (1) continued nervousness, (2) a felony stretch, (3) continued use of cell phone after being pulled over,[15] (4) driving a third party's rental car, (5) traveling from the Atlanta area to North Carolina,[16] and (6) late night travel to see a relative. The officers did not testify to any innocent explanation of these facts by Moore because they neither inquired about nor wanted an innocent explanation. However, even without further explanation by Moore, these facts combined are insufficient to support a finding of reasonable suspicion that a serious crime was afoot.

This Court's more recent decision in State v. Hewins, 409 S.C. 93, 760 S.E.2d 814 (2014), is also instructive. In Hewins, in the interest of judicial economy, this Court reviewed the merits of the Appellant's suppression argument. Id. at 113, 760 S.E.2d at 825. While not employing the same deferential standard of review as required in this case, the analysis is still useful. Hewins was stopped for making an improper turn. Id. at 116, 760 S.E.2d at 826. The Officer elongated the

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[15] This fact was listed in the Court of Appeal's opinion as one argued by the State to be an indicator giving rise to a reasonable suspicion, but was not listed in their summation of the totality of circumstances at the end of their opinion. The Court likely gave this fact little weight due to the overreaching label by the State of cell phone use as being "common in drug trafficking cases because it indicates he is attempting to let a superior know he has been stopped by law enforcement" when there was no evidence to support this far-fetched presumption.

[16] The officers did not know how much cash was in Moore's pocket; thus, like the trial court, their heavy reliance upon this fact is not reasonable and is misplaced.

detention and deployed a drug dog based on the following: "(1) earlier in the evening he had seen Hewins drive in a known drug area; (2) Hewins remained nervous despite being given a warning citation rather than a traffic ticket; and (3) when questioned, Hewins quickly responded that he did not have any drugs." Id. This Court concluded that these aggregate facts did not provide a reasonable suspicion of criminal activity was afoot, finding that an observation that Hewins was nervous, drove through a known drug area, and immediately denied possessing drugs when asked, **cannot** justify Officer Cothran's decision to detain Hewins. Id.

This Court further noted that the facts in Hewin are distinguishable from State v. Provet, 405 S.C. 101, 747 S.E.2d 453 (2013), and State v. Wallace, 392 S.C. 47, 707 S.E.2d 451 (2011), where there was "considerably more evidence present . . . to support a finding that the officer had reasonable suspicion of a serious crime to justify the continued detention." Id. Similarly, Provet and Wallace are distinguishable from the instant case. Both cases had the seemingly hallmark observations of nervousness and driving a third party rental car. However, they are distinguishable because they both involved dishonesty by the defendants that the officers objectively observed, which in turn made the other facts appear less innocent. In Provet, the officer observed the Appellant pass the exit for the hotel where he indicated he was staying. 405 S.C. at 112, 747 S.E.2d at 459. In Wallace, the officer heard inconsistent stories from the driver and passenger regarding where they had been and where they were headed. 392 S.C. at 53-55, 707 S.E.2d at 454-55. In the present case, the officer claims that he was suspicious of Moore's assertion that he was headed to visit his grandmother due to the hour of the stop. Any suspicion of dishonesty based on the hour was not objectively reasonable and the officer should not be saved by his lack of further inquiry into the matter. If he would have inquired further, Moore may have provided a reasonable explanation, perhaps that he got a late start or planned to stay in

a motel when he arrived in Marion, North Carolina, making the hour irrelevant. Moreover, as discussed *supra*, the Trial Court's finding was not based on the hour of travel alone. Rather, the Trial Court cited to the suspicious round-about travel pattern from North Carolina to Georgia and back to North Carolina, which Officer Owens did not testify to observing. See discussion *supra* Part II.A.

The Court Appeals also cited the Fourth Circuit Court of Appeals' decision in United States v. Digiovanni, 650 F.3d 498 (4th Cir. 2011). A state trooper pulled Digiovanni over for traveling too close to the car in front of him. 650 F.3d at 501-02. Digiovanni provided his Massachusetts driver's license, the car's registration, and the rental agreement. 650 F.3d at 502. According to the trooper, Digiovanni's hands were trembling when he passed him the requested items. Id. The trooper noticed two shirts hanging in the rear passenger compartment, a hygiene bag on the back seat, and that the car's interior was clean. Id. The trooper testified at the suppression hearing that these items were suggestive of drug trafficking because non-drug traffickers traveling on vacation would have their clothing packed in a bag, the hygiene bag was the only visible luggage in the car, and the clean interior indicated he was driving non-stop.[17] Id. The rental contract was also viewed as suspicious because it indicated that the car was rented at Fort Lauderdale International Airport the previous day and should be returned at Logan International Airport in Boston. Id. When asked about this, Digiovanni explained that he had taken Amtrak Auto Train to Florida to visit his family and was returning to his home in Massachusetts via the rental car, planning to stop at his sister's in New York on the way. Id. at 502-03. Digiovanni also confirmed that he had

[17] Interestingly, in Provet the officer testified that "numerous fast food bags, receipts, and cell phone he observed in the vehicle were consistent with the tight schedule maintained by drug traffickers." 405 S.C. at 112, 747 S.E.2d at 459. In Digiovanni, it was the cleanliness that reflected drug trafficking. This is illustrative of an officer's inclination to make any innocent fact seem sinister.

luggage in the trunk and that everything belonged to him. Id. at 503. Digiovanni said "oh boy" as he tossed his cigarette over the guardrail. Id. The trooper found this "extremely suspicious" and asked what was the matter, to which Digiovanni responded "it's just so hot." Id. In response to the trooper's question regarding marijuana in the vehicle, Digiovanni responded "No sir. I never smoked marijuana in my life. It puts me to sleep." Id. This was also "extremely suspicious" to the trooper because he felt it nonsensical – you could not know it puts you to sleep if you have never tried it. Id. Diogiovanni consented to the search of his vehicle, but could not open the trunk, which the trooper noted is often disabled by drug traffickers. Id. Over ten minutes into the stop, the trooper called for back-up "because he believed Digiovanni was engaged in criminal activity" and finally began to process the license check. Id. at 504. The ultimate search of the vehicle, after the issuance of a warning ticket, yielded 34,091 Oxycodone pills and $1,450.00 in United States currency. Id.

The district court granted Digiovanni's suppression motion, finding that the traffic stop lasted longer than necessary to complete its purpose and no reasonable suspicion of criminal activity supported same.[18] Id. at 505. The Fourth Circuit Court of Appeals reviewed the district court's factual findings for clear error and its legal conclusions *de novo.* Id. at 506 (citing United

[18] The district court noted that while the car was traveling from Florida, a source state for drugs, so are many other states on the I–95 corridor. Id. The court also found that the nervousness and "oh boy" comment were of "limited relevance" because Digiovanni did not fumble to obtain the provided documents and remained cooperative and "oh boy" was not said in response to a question and immediately explained. Id. While the court admitted that the itinerary was unusual, the use of the Auto Train "cut against the government's argument, because most drug traffickers would not want to surrender control of their cars to ride on the Auto Train." Id. The court found that the trooper's reliance on the hanging shirts, hygiene bag, and cleanliness of the car was itself suspect because the trooper offered **no reasonable explanation** for his reliance on these factors. Id. Additionally, the court noted that "Digiovanni's appearance and demeanor fit into the category of a retired person, one traveling from Florida to the northeast." Id. The Court further found that despite the trooper saying "you are free to go," the encounter was not consensual and the consent not valid. Id.

States v. Perkins, 363 F.3d 317, 320 (4th Cir. 2004)). The Court rejected the government's argument that the trooper's extension of the stop was valid based on a reasonable suspicion that criminal activity was afoot. Id. at 511. In its analysis the Court noted that "[t]he reasonable suspicion standard is an objective one, so [the court] examine[s] the facts **within the knowledge of [the officer]** to determine the presence or nonexistence of reasonable suspicion." Id. (emphasis added). The Court listed the following facts relied upon by the trooper:

> (1) the car was rented; (2) the car was coming from a known drug source state (Florida); (3) the car was traveling on I–95, a known drug corridor; (4) the car was clean; (5) two shirts were hanging in the rear passenger compartment; (6) there was a hygiene bag on the back seat; (7) Digiovanni's hands were trembling when he handed over his driver's license and the rental contract; (8) during the travel history questions, instead of answering the question, "[s]o you're coming from Florida?," with a "yes," Digiovanni replied, "I have property in Florida"; (9) Digiovanni's travel itinerary; and (10) Digiovanni's "oh boy" comment.

Id. at 512. The Court echoed the concern expressed in United States v. Foster, 634 F.3d 243 (4th Cir. 2011), "about the inclination of the Government toward using whatever facts are present, no matter how innocent, as indicia of suspicious activity." Id.

In evaluating the facts relied upon by the trooper, the Court found that the trooper's reliance on the hanging shirts, hygiene bag on the back seat, and cleanliness of the car "borders on the absurd." Id. While some degree of reliance on Digiovanni's trembling hands was proper, as nervous behavior is a pertinent factor, the district court understandably discounted that fact because the video displayed a calm and cooperative Digiovanni. Id. The Court found that it could not disturb the district court's finding that "oh boy" was not an expression of nervousness. Id. They further found that the trooper's reliance on the "oh boy" comment and Digiovanni's answer to the question "so you're coming from Florida?" are "examples of '*post*

hoc rationalizations to validate those seizures that happen to turn up contraband.'" Id. (quoting Foster, 634 F.3d at 249). The Court found that some reliance was also properly placed on the car rental, traveling on I–95, and traveling from Florida. Id. Additionally, some degree of reliance upon the unusual nature of the travel itinerary was appropriate. Id. at 513. Nevertheless, the Fourth Circuit Court of Appeals agreed that reasonable suspicion was not present because the articulated facts, in their totality, do not eliminate a substantial portion of innocent travelers. Id. They found that the unusual travel itinerary was "not keyed to other compelling suspicious behavior." Id.; see United States v. Brugal, 209 F.3d 353 (4th Cir. 2000) (holding that unusual travel itinerary, coupled with, among other factors, evidence of flight, and *defendant's implausible story* that he exited the interstate to look for gas at an exit that showed no signs of activity created reasonable suspicion permitting the continuation of a traffic stop). Aside from the unusual itinerary, the Court found nothing compellingly suspicious about the case, stating:

> There is no evidence of flight, suspicious or furtive movements, or suspicious odors, such as the smell of air fresheners, alcohol, or drugs. All the government can link to the unusual travel itinerary are the facts that Digiovanni rented a car from a source state, was stopped on I–95, and was initially nervous. Such facts, without more, simply do not eliminate a substantial portion of innocent travelers."

Digiovanni, 650 F.3d at 513.

In the present case, a reading of the officer's testimony as a whole shows that he found every move Moore made, or did not make, was a sign of nervousness or suspicious. However, a review of the video shows no demonstrative signs of nerves other than what would be reasonable under the circumstances, especially in light of the field sobriety tests and Moore's prior

conviction for driving under the influence.[19] App. 233, 11-12; State's Exhibit 1 (DVD of traffic stop). The Court of Appeals had good reason to be suspicious of the laundry list of indicators cited by the officer and the State in support of reasonable suspicion. They correctly found that the circumstances described do not eliminate a substantial portion of innocent travelers.

Therefore, the majority Opinion of the Court of Appeals correctly held that the Trial Court erred in denying Respondent Moore's motion to suppress the contraband where Moore's continued detention after a traffic stop was unlawful when the police officers lacked reasonable suspicion of a serious crime. The Court of Appeals therefore properly concluded that Moore's convictions and sentences should be reversed where the contraband discovered during the illegal detention should have been suppressed at trial. The Opinion of the Court of Appeals is supported by well-established law and the facts present in this case.

[19] S.C. CODE ANN. § 56-5-2933 provides for increased penalties for a second DUI offense. Moore's prior DUI conviction was from 2009 in Georgia. Pursuant to S.C. CODE ANN. § 56-5-2933(D), this would constitute a prior conviction for the purposes of the repeat offender provisions of the statute. Moore's nervousness was thus reasonable in light of the possible penalties for DUI, a five thousand dollar fine and up to one year incarceration.

CONCLUSION

For the reasons set forth herein, it is respectfully submitted that the decision of the Court of Appeals be affirmed.

Respectfully submitted,

Laura R. Baer
Appellate Defender

ATTORNEY FOR RESPONDENT.

This 21st day of January, 2015

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Spartanburg County

Roger L. Couch, Circuit Court Judge

THE STATE,

PETITIONER,

V.

ASHLEY EUGENE MOORE,

RESPONDENT

APPELLATE CASE NO. 2013-002309

CERTIFICATE OF SERVICE

I certify that a true copy of the brief of respondent, in this case has been served on Mary S. Williams, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Ashley Moore # 345798 at Kirkland Correctional Institution, this 21st day of January, 2015.

Laura R. Baer
Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 21st day
of January, 2015.

Bailey Reed (L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021