STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County
Honorable Thomas W. Cooper, Jr., Circuit Court Judge
Appellate Case No. 2011-196666

THE STATE,

Respondent,

vs.

ANDRE DECOSTA,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial judge properly denied Appellant's motion to suppress the incriminating evidence discovered during an investigatory stop of the vehicle in which Appellant was riding because, under the totality of the circumstances, the experienced officer who conducted the stop possessed a reasonable articulable suspicion of criminal activity after he observed the driver of the vehicle driving in a suspiciously slow manner at approximately 2:52 a.m. in an area devoid of any other vehicles roughly a half mile away from the scene of a burglary that had been committed less than four minutes earlier. However, even if the investigatory stop had not been supported by reasonable articulable suspicion, the trial judge committed no error in denying the suppression motion because both the attenuation or intervening act doctrine and the inevitable discovery doctrine were applicable under the circumstances of Appellant's case.

STATEMENT OF THE CASE

On November 29, 2010, Appellant Andre Decosta was arrested following an investigation into a suspicious fire and burglary. In January of 2011, the Beaufort County Grand Jury indicted Appellant for one count of second-degree burglary, one count of third-degree arson, and one count of grand larceny in an amount greater than or equal to $10,000. On July 25, 2011, a bench trial was commenced in the Beaufort County Court of General Sessions with the Honorable Thomas W. Cooper, Jr., circuit court judge, presiding. At the conclusion of the bench trial, the trial judge convicted Appellant as indicted. Following the verdict, the trial judge sentenced Appellant to concurrent terms of imprisonment of fifteen years for the burglary conviction, fifteen years for the arson conviction, and ten years for the grand larceny conviction. Appellant then timely filed a notice of appeal.

STATEMENT OF FACTS

At approximately 2:39 a.m. on November 29, 2010, officers from the Bluffton Police Department were dispatched to Dan's Fan City, a retail store located in Bluffton, South Carolina, after an emergency call was received indicating the business was on fire. (Supp. Hrg. Tr. pp. 6-7; Trl. Tr. pp. 18-22; pp. 34-35). Shortly thereafter, several officers, including Sergeant Christopher Gonzales, arrived at Dan's Fan City and observed the rear portion of the business completely engulfed in flames. (Supp. Hrg. Tr. p. 7; Trl. Tr. pp. 21-22; p. 34). The officers then waited for the fire department to respond to the scene, and, due to the fact several diversionary fires had recently been set in the area to serve as distractions for burglaries, Sergeant Gonzales instructed his fellow officers to remain alert for the possibility of a burglary alarm being triggered nearby. (Supp. Hrg. Tr. pp. 8-9; Trl. Tr. p. 22; pp. 33-35).

Moments later, at approximately 2:48 a.m., Sergeant Gonzales and the other officers were alerted a burglary alarm had been triggered at Ligato's Fine Jewelry, a jewelry store located roughly a half mile to a mile away from Dan's Fan City. (Supp. Hrg. Tr. p. 7; pp. 10-11; p. 33; Trl. Tr. p. 29; p. 35). In response, Sergeant Gonzales rapidly drove to the jewelry store, passing a single vehicle on his way, and arrived at the scene only two minutes later. (Supp. Hrg. Tr. p. 11; p. 34; Trl. Tr. p. 35). Sergeant Gonzales then quickly drove to the rear of the store while another officer, Officer John DeStasio, inspected the front. (Supp. Hrg. Tr. pp. 11-12; Trl. Tr. pp. 23-24). Upon approaching the front of the store, Officer DeStasio observed the front window was smashed along with the jewelry cases inside. (Supp. Hrg. Tr. p. 12; Trl. Tr. p. 24). Officer DeStasio then alerted Sergeant Gonzales of the burglary, and Sergeant Gonzales

quickly drove away from the store in an effort to locate the vehicle he had passed earlier as he was responding to the burglary alarm. (Supp. Hrg. Tr. p. 12; Trl. Tr. p. 28; p. 35).

While looking for the vehicle he had passed on his way to the jewelry store, Sergeant Gonzales observed a different vehicle approximately one-half of a mile away from the jewelry store less than four minutes after the burglary alarm had gone off driving in the direction of Highway 278. (Supp. Hrg. Tr. pp. 12-13; p 22; p. 38; Trl. Tr. pp. 36-38). As Sergeant Gonzales watched the vehicle, which was the only other vehicle in the area at that time, its driver drove the vehicle at a "real slow" speed for approximately a mile before turning onto Highway 278.[1] (Supp. Hrg. Tr. pp. 13-14; p. 39; Trl. Tr. p. 36; p. 46). Based on the officer's roughly fifteen years of law enforcement experience, Sergeant Gonzales believed the vehicle's slow movement speed to be highly suspicious under the circumstances, and he began to pursue the vehicle in order to conduct an investigatory stop. (Supp. Hrg. Tr. p. 14; pp. 17-19; p. 39; Trl. Tr. p. 36; p. 38; p. 46). He then moved into position behind the vehicle, relayed the vehicle's license tag information to dispatch, and activated his blue lights at approximately 2:52 a.m. (Supp. Hrg. Tr. p. 14; Trl. Tr. pp. 36; pp. 38-39; State's Ex. # 3 (In-Car Recording)). In response, the driver of the vehicle quickly exited the highway, pulled into the parking lot of a nearby pharmacy, and brought the vehicle to a stop. (Supp. Hrg. Tr. p. 14; Trl. Tr. pp. 38-39; State's Ex. # 3).

After the driver stopped the vehicle, Sergeant Gonzales was advised by dispatch the license tag of the vehicle was suspended.[2] (Supp. Hrg. Tr. pp. 14-15; Trl. Tr. p. 39;

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[1] During the suppression hearing, Sergeant Gonzales opined the vehicle could have been travelling as slowly as only one to two miles per hour when he first saw it. (Supp. Hrg. Tr. p. 39).

[2] During trial, Sergeant Gonzales explained he customarily stopped any vehicle he encountered with a suspended tag, issued a ticket to the driver, and had the vehicle towed from the scene. (Trl. Tr. pp. 44-45).

State's Ex. # 3). The officer then exited his patrol vehicle and approached the vehicle from the passenger side. (Supp. Hrg. Tr. p. 15; Trl. Tr. p. 39; State's Ex. # 3). As he did so, he looked inside and observed Appellant Andre Decosta lying across the rear passenger seat on top of something, and the officer immediately jumped back in surprise before ordering Appellant to sit up and reveal his hands. (Supp. Hrg. Tr. p. 15; Trl. Tr. pp. 39-40; State's Ex. # 3). Sergeant Gonzales then requested backup, advised Appellant and the driver, Anthony Hamilton, of the reason for the stop, and asked them for their names and information. (Supp. Hrg. Tr. p. 16; Trl. Tr. p. 40; p. 66). Appellant, who – along with Hamilton – was sweating and dressed all in black, falsely responded his name was "Michael Scott." (Supp. Hrg. Tr. pp. 15-16; Trl. Tr. pp. 40-401). Sergeant Gonzales then waited for his backup to arrive and, when it did so, successfully obtained consent to search the vehicle from Hamilton and advised the men they were being detained. (Supp. Hrg. Tr. p. 16; Trl. Tr. pp. 40-41; p. 44). At that point, Appellant became highly agitated, jumped out of the vehicle, and was rapidly subdued by the officer who arrived to provide support to Sergeant Gonzales. (Supp. Hrg. Tr. p. 17; Trl. Tr. p. 41; p. 44). After that, Sergeant Gonzales looked inside of the vehicle, lifted a jacket that Appellant had been lying on top of off of the back seat, and discovered a bag full of jewelry hidden underneath. (Supp. Hrg. Tr. p. 17; Trl. Tr. p. 41). Appellant and Hamilton were then quickly placed under arrest. (Supp. Hrg. Tr. p. 17; Trl. Tr. p. 42).

Shortly thereafter, Detective James Duke arrived at the scene of the investigatory stop and conducted a more thorough search of the vehicle in which Appellant had been discovered. (Trl. Tr. p. 50; pp. 53-54). Inside, he found a bag containing the items stolen from the jewelry store along with Appellant's wallet, an axe with pieces of broken glass embedded in it, two black masks, two pairs of gloves, two lighters, and several other

articles of clothing.[3] (Trl. Tr. p. 31; p. 33; pp. 54-63). Additionally, Detective Duke recovered a cell phone from Hamilton, and the phone was later determined to have been the phone used to place the emergency call that alerted the authorities of the fire at Dan's Fan City. (Trl. Tr. p. 66; p. 75). Thereafter, Appellant and Hamilton were transported to the police department, and Appellant subsequently made several incriminating statements in which he confessed his involvement in the arson and burglary committed on November 29, 2010. (Trl. Tr. p. 93; p. 101; pp. 106-108; State's Ex. # 24 (Statement)).

Subsequently, Appellant was indicted for second-degree burglary, third-degree arson, and grand larceny, and he proceeded to trial. (Trl. Tr. p. 12; Indictments). At the outset of trial, defense counsel moved for the trial judge to suppress the incriminating evidence discovered in Appellant's case on the basis the stop of the vehicle Appellant was riding in was allegedly not supported by reasonable suspicion or probable cause. (Supp. Hrg. Tr. p. 5). The trial judge then conducted a pre-trial suppression hearing on the issue, and, during the hearing, Sergeant Gonzales testified about his response to the arson and burglary committed on the date of the incident and his investigatory stop of the suspicious vehicle that culminated in Appellant's arrest. (Supp. Hrg. Tr. pp. 6-40).

At the conclusion of Sergeant Gonzales' testimony, defense counsel challenged the reasonableness and constitutionality of the investigatory stop, arguing the fact the driver of the vehicle was driving slowly was allegedly not suspicious and the fact the vehicle was located less than a mile from the scene of a recently-committed crime late at night was allegedly not a sufficient reason for the vehicle to be stopped. (Supp. Hrg. Tr. pp. 41-43). In rebuttal, the solicitor asserted the stop was supported by reasonable

[3] During trial, testimony was presented establishing the items stolen from the jewelry store were worth approximately $15,000. (Trl. Tr. pp. 30-31).

suspicion based on the fact the vehicle was discovered at approximately 3:00 a.m. in close proximity to the scenes of both an arson and a burglary minutes after a burglary alarm had been triggered while moving so slowly it was suspicious to an officer with over a decade of law enforcement experience. (Supp. Hrg. Tr. pp. 50-53). After considering the arguments of counsel, the trial judge denied the suppression motion after finding the totality of the circumstances created a reasonable suspicion justifying the stop of the vehicle in light of the facts the vehicle was located in close proximity to the scenes of a burglary and an arson that had been committed only minutes earlier, the vehicle was stopped early in the morning at a time when traffic in the area where the vehicle was first observed was very limited, and the vehicle was moving in an extremely slow and suspicious manner when it was first observed. (Supp. Hrg. pp. 58-61).

Following the trial judge's ruling, Appellant waived his right to a jury trial, and the trial proceeded forward as a bench trial. (Trl. Tr. pp. 13-14; pp. 17-18). Thereafter, at the conclusion of trial, the trial judge reviewed all of the evidence that had been presented and found Appellant guilty of all three indicted offenses beyond a reasonable doubt. (Trl. Tr. pp. 185-191). The trial judge then sentenced Appellant to an aggregate term of imprisonment of fifteen years. (Trl. Tr. p. 200).

ARGUMENT

The trial judge properly denied Appellant's motion to suppress the incriminating evidence discovered during an investigatory stop of the vehicle in which Appellant was riding because, under the totality of the circumstances, the experienced officer who conducted the stop possessed a reasonable articulable suspicion of criminal activity after he observed the driver of the vehicle driving in a suspiciously slow manner at approximately 2:52 a.m. in an area devoid of any other vehicles roughly a half mile away from the scene of a burglary that had been committed less than four minutes earlier. However, even if the investigatory stop had not been supported by reasonable articulable suspicion, the trial judge committed no error in denying the suppression motion because both the attenuation or intervening act doctrine and the inevitable discovery doctrine were applicable under the circumstances of Appellant's case.

Appellant contends the trial judge erred in refusing to suppress incriminating evidence discovered during an investigatory stop of a vehicle in which he was riding. In support of that contention, Appellant maintains the stop violated his constitutional rights because it was allegedly not supported by either reasonable articulable suspicion or probable cause. Contrary to Appellant's assertions, the officer who conducted the stop possessed a reasonable articulable suspicion of criminal activity after he observed the driver of the vehicle driving in a manner he considered to be suspiciously slow based on his fifteen years of law enforcement experience at approximately 2:52 a.m. in an area in which no other vehicles were located roughly a half mile away from the scene of a burglary that had been committed only a few minutes earlier. Therefore, the trial judge properly declined to suppress the incriminating evidence discovered during the stop. However, even assuming the investigatory stop had not been supported by reasonable articulable suspicion, the trial judge nonetheless committed no error in denying the suppression motion because any taint that could have resulted from the initiation of the investigatory stop was sufficiently purged by the officer's discovery of an independent intervening circumstance that provided justification for the stop prior to the discovery of

any incriminating evidence. Likewise, the trial judge's decision to deny the suppression was also proper and correct because the incriminating evidence would have inevitably been discovered even if the officer had not conducted the investigatory stop based on his suspicions of criminal activity. Accordingly, Appellant's convictions should be affirmed.

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). In Fourth Amendment search and seizure cases, the appellate court is limited to determining if there is any evidence to support the trial judge'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); see State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000) ("[W]e will review the trial court's ruling like any other factual finding and reverse if there is clear error. We will affirm if there is any evidence to support the ruling."). 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 judge if there is any evidence in the record to support his or her ruling. State v. Pichardo, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005). Critically, 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).

ANALYSIS

A. Propriety of the Investigatory Stop

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. This guarantee protects against unreasonable searches and seizures, including those involving only a brief detention. Pichardo, 367 S.C. at 97, 623 S.E.2d at 847. "The touchstone of the Fourth Amendment is reasonableness." Florida v. Jimeno, 500 U.S. 248, 250 (1991). Thus, only unreasonable searches and seizures are prohibited. State v. Foster, 269 S.C. 373, 378, 237 S.E.2d 589, 591 (1977); see Maryland v. Buie, 494 U.S. 325, 331 (1990) ("It goes without saying that the Fourth Amendment bars only unreasonable searches and seizures[.]").

Pursuant to the Fourth Amendment, "[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." State v. Blassingame, 338 S.C. 240, 248, 525 S.E.2d 535, 539 (Ct. App. 1999); see State v. Robinson, 306 S.C. 399, 402, 412 S.E.2d 411, 413 (1991) ("To justify a brief stop and detention, the police officer must have a reasonable suspicion that the person has been involved in criminal activity."); see also United States v. Sokolow, 490 U.S. 1, 7 (1989) ("[T]he police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot,' even if the officer lacks probable cause." (citation omitted)). The reasonableness of a stop or detention "is measured in objective terms by examining the totality of the circumstances." Ohio v. Robinette, 519 U.S. 33, 39 (1996).

For Fourth Amendment purposes, an automobile stop, along with the detention of individuals during the stop, constitutes a seizure. State v. Maybank, 352 S.C. 310, 315, 573 S.E.2d 851, 854 (Ct. App. 2002). However, the initiation of an automobile stop is reasonable per se when either probable cause exists to believe a traffic violation has

occurred **or** reasonable suspicion exists to believe the occupants of the vehicle are involved in criminal activity. See Knight v. State, 284 S.C. 138, 141, 325 S.E.2d 535, 537 (1985) ("[A] police officer may stop an automobile and briefly detain its occupants, even without probable cause to arrest, if he has a reasonable suspicion that the occupants are involved in criminal activity."); State v. Williams, 351 S.C. 591, 598, 571 S.E.2d 703, 707 (Ct. App. 2002) ("Where probable cause exists to believe that a traffic violation has occurred, the decision to stop the automobile is reasonable per se."); State v. Morris, 312 S.C. 116, 117, 439 S.E.2d 291, 292 (Ct. App. 1993) ("[U]nder Terry, an officer may stop an automobile."); see also Whren v. United States, 517 U.S. 806, 810 (1996) ("An automobile stop is thus subject to the constitutional imperative that it not be 'unreasonable' under the circumstances. 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.").

Reasonable suspicion consists of " 'a particularized and objective basis' that would lead one to suspect another of criminal activity." State v. Lesley, 326 S.C. 641, 644, 486 S.E.2d 276, 277 (Ct. App. 1997) (quoting United States v. Cortez, 449 U.S. 411, 417 (1981)). "Reasonable suspicion 'is not readily, or even usefully, reduced to a neat set of legal rules, but, rather, entails common sense, nontechnical conceptions that deal with factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act.' " State v. Provet, 391 S.C. 494, 500, 706 S.E.2d 513, 516 (Ct. App. 2011) (quoting United States v. Foreman, 369 F.3d 776, 781 (4th Cir. 2004)). "In this highly fact-specific inquiry, reasonable suspicion 'is a fluid concept which takes its substantive content from the particular context in which the standard is being assessed.' " State v. Wallace, 392 S.C. 47, 51-52, 707 S.E.2d 451, 453 (Ct. App.

area where it was observed by Sergeant Gonzales, was the first vehicle Sergeant Gonzales had encountered after leaving the jewelry store, and was only the second vehicle the officer had seen since he was alerted the jewelry store's burglary alarm had been triggered. See State v. Campbell, 188 N.C. App. 701, 706, 656 S.E.2d 721, 726 (N.C. Ct. App. 2008) ("The proximity to a crime scene, the time of day, or the absence of other persons in and of themselves may be insufficient to establish reasonable suspicion, **but taken together, such factors certainly may suffice**." (emphasis added)). Likewise, the driver of the vehicle was operating the vehicle at such a slow speed it was highly unusual and suspicious to the officer based on his fifteen years of law enforcement training and experience. See Wilson v. Porter, 361 F.2d 412, 415 (9th Cir. 1966) ("We cannot say that the circumstances of a car making inordinately slow progress along a street in the small hours of the morning could not reasonably have aroused the suspicions of a local officer alert to the unusual within his beat, and lead him to investigate."); see also Cortez, 449 U.S. at 418 ("[A] trained officer draws inferences and makes deductions – **inferences and deductions that might well elude an untrained person**." (emphasis added)); see generally Arvizu, 534 U.S. at 277 ("A determination that reasonable suspicion exists . . . need not rule out the possibility of innocent conduct.").

When viewing those suspicious circumstances in conjunction with one another and not in isolation, Sergeant Gonzales was aware the driver of the vehicle Appellant was riding in was driving in a suspiciously slow manner just before 3:00 a.m. in an area devoid of any other vehicles a short distance away from the scenes of an arson and a burglary that had been committed just minutes earlier. See State v. Miller, 137 Conn. App. 520, 539-540, 48 A.3d 748, 760 (Conn. App. Ct. 2012) (explaining temporal proximity and locational proximity of a stop to the scene of a crime are highly significant

not required to simply allow the driver of the vehicle to continue to move away from the vicinity of the recently-committed crimes and escape. See Adams v. Williams, 407 U.S. 143, 145 (1972) ("The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape."); see also Brooks v. State, 830 S.W.2d 817, 821 (Tex. Ct. App. 1992) (finding an officer's decision to stop and investigate Brooks, who was leaving the immediate area of a reported burglary in progress, to be reasonable and proper under the circumstances due to the fact burglary suspects are typically already gone or in the process of leaving the area when officers arrive at the scene of a recently-committed burglary). Instead, Sergeant Gonzales was permitted to conduct a brief investigatory stop of the vehicle to maintain the status quo while he quickly investigated his suspicions to confirm or dispel them. See Adams, 407 U.S. at 146 ("A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.").

Because all of the circumstances detected by the officer rendered his decision to conduct the investigatory stop entirely reasonable, Appellant's constitutional rights were not violated by the stop, and the evidence discovered during the course of the stop was not rendered inadmissible. See Lesley, 326 S.C. at 645, 486 S.E.2d at 278 ("Because there was a reasonable suspicion to stop Lesley, Lesley's arrest for unlawful possession of the gun was proper and any evidence seized during the stop was admissible."). Accordingly, the trial judge committed no error in denying Appellant's suppression motion, and the trial judge's ruling was fully supported by the evidence presented during the suppression hearing and during trial. See State v. Pope, 410 S.C. 214, 222, 763

S.E.2d 814, 818 (Ct. App. 2014) ("In Fourth Amendment search and seizure cases, our review is limited to determining whether there is any evidence to support the trial court's finding."); see also State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011) ("When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling."); see generally Foster, 269 S.C. at 378, 237 S.E.2d at 591 ("It is only unreasonable searches and seizures that are prohibited."). Appellant's convictions should be affirmed.

B. Admissibility of the Incriminating Evidence Regardless of the Propriety of the Investigatory Stop Due to the Existence of Intervening Circumstances and the Inevitability of the Discovery of the Incriminating Evidence

The Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const. amend. IV. When an unreasonable search or seizure occurs, any evidence seized as the result of that unconstitutional action **generally** must be excluded from trial pursuant to the exclusionary rule, a judicially-created remedy designed to serve as a deterrent sanction against unconstitutional conduct. State v. Weaver, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007); see State v. Brown, 401 S.C. 82, 88, 736 S.E.2d 263, 266 (2012) ("The Fourth Amendment itself provides no remedy for a violation of the warrant requirement. However, the United States Supreme Court has fashioned a judicially-created remedy, the exclusionary rule, which is a deterrent sanction by which the prosecution is barred from introducing evidence obtained in violation of the Fourth Amendment." (citation omitted)). Importantly though, the exclusion of evidence following an unconstitutional search "is 'not a personal constitutional right,' nor is it designed to redress the injury occasioned by an unconstitutional search." Davis v. United States, __ U.S. __, 131 S. Ct. 2419, 2426 (2011) (citations omitted). Due to the heavy costs exacted by the exclusion of evidence on both the judicial system and society as a

whole, application of the exclusionary rule is only appropriate where the deterrent benefits of the rule outweigh the heavy costs its application would exact. Brown, 401 S.C. at 88, 736 S.E.2d at 266. As a result, not every Fourth Amendment violation warrants the application of the exclusionary rule, and several judicially-created exceptions to the exclusionary rule have been established, including the attenuation or intervening act doctrine and the inevitable discovery doctrine. State v. Adams, 409 S.C. 641, 647, 763 S.E.2d 341, 345 (2014); see also State v. Spears, 393 S.C. 466, 482, 713 S.E.2d 324, 332 (Ct. App. 2011) ("The inevitable discovery doctrine, one exception to the exclusionary rule, states that if the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means, the information is admissible despite the fact it was illegally obtained.").

Pursuant to the attenuation or intervening act doctrine, " 'not all evidence conceivably derived from an illegal search need be suppressed if it is somehow attenuated enough from the violation to dissipate the taint.' " Adams, 409 S.C. at 648, 763 S.E.2d at 345 (citation omitted). In determining whether evidence has been purged of the taint of an unlawful search or seizure under the attenuation or intervening act doctrine, the following factors may be considered: (1) the amount of time between the illegal action and the acquisition of the evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct. Id.; see United States v. Najjar, 300 F.3d 466, 477 (4th Cir. 2002) ("[A] direct unbroken chain of causation is necessary, but not sufficient to render derivative evidence inadmissible. To determine whether the fruit is no longer poisonous, we consider several factors, including: 1) the amount of time between the illegal action and the acquisition of the evidence; 2) the presence of intervening circumstances; and 3) the purpose and flagrancy

of the official misconduct."). If – after the relevant factors are considered – there is sufficient attenuation between the unlawful search or seizure and the acquisition of the incriminating evidence, the exclusionary should not be applied and the evidence should be admitted. See United States v. Gaines, 668 F.3d 170, 173 (4th Cir. 2012) ("[W]here there is sufficient attenuation between the unlawful search and the acquisition of evidence, the 'taint' of that unlawful search is purged."); see also Wong Sun v. United States, 371 U.S. 471, 491 (1963) ("We have no occasion to disagree with the finding of the Court of Appeals that [Wong Sun's] arrest . . . was without probable cause or reasonable grounds. At all events no evidentiary consequences turn upon that question. For Wong Sun's unsigned confession was not the fruit of that arrest, and was therefore properly admitted at trial.").

Likewise, pursuant to the inevitable discovery doctrine, if the prosecution can establish by a preponderance of the evidence information or evidence would inevitably have been discovered by lawful means, then the discovered evidence – even if obtained by unlawful means – should not be excluded during trial. Nix v. Williams, 467 U.S. 431, 444 (1984). "Exclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial." Id. at 446. Thus, while the exclusionary rule is designed to ensure the prosecution will not be placed in a better position than it would have been without an illegal search or some police misconduct, the inevitable discovery doctrine ensures the prosecution is not placed in a worse position simply because of some earlier police error or misconduct. Id. at 443.

In the case at bar, even assuming arguendo the investigatory stop of the vehicle Appellant was riding in constituted an unlawful seizure, the evidence discovered during the course of the stop was nonetheless properly admitted during trial because Sergeant

Gonzales discovered a probable cause basis justifying the stop directly after he initiated it and before he discovered any of the incriminating evidence. Furthermore, under the circumstances of Appellant's case, the discovery of the incriminating evidence was inevitable in light of the fact the vehicle in which Appellant was riding would have inevitably been stopped for a suspended tag violation if Sergeant Gonzales had not stopped the vehicle based on his suspicions of criminal activity. Under those circumstances, the trial judge committed no error in denying Appellant's suppression motion, and the incriminating evidence was properly admitted during trial.

Significantly, regarding the applicability of the attenuation or intervening circumstances doctrine, Sergeant Gonzales discovered the vehicle in which Appellant was riding had a suspended license tag immediately after he stopped the vehicle and **before** he had discovered any of the incriminating evidence introduced during Appellant's trial. Based on the officer's discovery of the tag violation, Sergeant Gonzales had an independent probable cause basis to seize the vehicle even if his initial seizure of the vehicle was improper. See Williams, 351 S.C. at 598, 571 S.E.2d at 707 (recognizing automobile stops are "reasonable per se" when supported by probable cause of a traffic violation); see also State v. Davis, 354 S.C. 348, 358, 580 S.E.2d 778, 783 (Ct. App. 2003) ("Based upon the status of the vehicle's suspended license plate this stop was proper[.]"). As a result, Sergeant Gonzales' detention of the vehicle became reasonable based on the unquestionable violation of law he discovered, and the officer could then properly approach the vehicle and make contact with its occupants without infringing on Appellant's constitutional rights. Critically, when he did so, he quickly found Appellant hiding in the rear of the vehicle, which confirmed his suspicions about the vehicle's involvement in the arson and the burglary and permitted him to continue his

investigation, and he subsequently discovered the incriminating evidence that led to Appellant's arrest during the ensuing investigation. See Robinson v. State, 407 S.C. 169, 182, 754 S.E.2d 862, 869 (2014) ("If, during the stop of the vehicle, the officer's suspicions are confirmed or further aroused – even if for a different reason than he initiated the stop – the stop may be prolonged, and the scope of the detention enlarged as circumstances require."); see also Sutton v. United States, 267 F.2d 271, 272-273 (4th Cir. 1959) ("It is one thing to say that officers shall gain no advantage from violating the individual's rights; it is quite another to declare that such a violation shall put him beyond the law's reach even if his guilt can be proved by evidence that has been obtained lawfully. . . . When the illegality of the detention does not result in evidence which could be used against the defendant, the rule has no application.").

Thus, before any incriminating evidence was discovered, Sergeant Gonzales became aware of an intervening circumstance that justified his decision to seize the vehicle even if his original decision to do so was not justified. See State v. Nelson, 336 S.C. 186, 193, 519 S.E.2d 786, 789 (1999) ("[N]ew and distinct criminal acts following an illegal stop do not qualify as fruit of the poisonous tree simply because such acts were causally connected to the police misconduct."); see also United States v. Sprinkle, 106 F.3d 613, 619 (4th Cir. 1997) ("[A] new and distinct crime, **even if triggered by an illegal stop**, is a sufficient intervening event to provide independent ground for arrest. . . . Because the arrest for the new, distinct crime is lawful, evidence seized in a search incident to that lawful arrest is admissible." (emphasis added and citation omitted)). Moreover, Sergeant Gonzales' initial decision to stop the vehicle, which was based on his own significant experience as a law enforcement officer and was found to be proper by an experienced and distinguished trial judge, did not constitute a flagrant act of official

misconduct and, instead, was – at worst – simply a marginally-wrong decision in a case where the question of whether reasonable suspicion existed was the subject of legitimate debate. Under those circumstances, the initial seizure of the vehicle was sufficiently attenuated from the discovery of the incriminating evidence to render that evidence proper and admissible during trial. See United States v. Johnson, 383 F.3d 538, 546 (7th Cir. 2004) (holding the district court judge properly denied Johnson's motion to suppress evidence discovered as a result of an investigatory stop because, despite the fact the investigatory stop was not supported by reasonable suspicion, "[t]he officers' knowledge that Johnson was wanted on an outstanding warrant constituted an intervening circumstance, which gave officers probable cause to arrest Johnson independent of the illegality of the initial unlawful stop"); see also Nelson, 336 S.C. at 194-195, 519 S.E.2d at 790 ("[E]ven assuming Officer Hadden's initial attempt to stop [Nelson] was unlawful , [Nelson]'s act of running the stop sign and speeding through the neighborhood constituted new and distinct crimes for which Officer Hadden had probable cause to stop Defendant. Thus, any evidence lawfully obtained as a result of the stop was admissible at [Nelson]'s trial." (citation omitted)).

Furthermore, regarding the applicability of the inevitable discovery doctrine, the discovery of the incriminating evidence in Appellant's case was inevitable, and, thus, there was no valid reason for the evidence to be suppressed during Appellant's trial. See Nix, 467 U.S. at 444 ("If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . then the deterrence rationale has so little basis that the evidence should be received. Anything less would reject logic, experience, and common sense."). Critically, **prior** to initiating his blue lights to stop the vehicle in which Appellant was

riding, Sergeant Gonzales began following the vehicle based on his suspicions of criminal activity **and** relayed the vehicle's license tag information to dispatch. Based on those actions, Sergeant Gonzales' discovery of the suspended status of the vehicle's tag was inevitable, and that discovery inevitably would have provided the officer with probable cause and led him to stop the vehicle in light of the fact he customarily stopped vehicles being operated with suspended tags. See United States v. Hall, 40 F.3d 275, 277 (8th Cir. 1994) (finding the exclusionary rule did not require the suppression of incriminating evidence discovered during an investigatory stop not supported by reasonable suspicion of criminal activity because Hall's vehicle inevitably would have been properly stopped a short time after the improper investigatory stop was commenced and the evidence would have inevitably been discovered during that proper stop had the improper stop not first occurred); see also Nix, 467 U.S. at 449-450 (concluding a search party would inevitably have resumed a search and discovered the victim's body if Williams had not earlier led police to the location of the victim's body). Accordingly, the incriminating evidence discovered in Appellant's case would have been discovered regardless of whether the initial investigatory stop had been initiated, and there was no legitimate reason for that evidence to be suppressed during trial. See Nix, 467 U.S. at 447 ("Suppression, in these circumstances, would do nothing whatever to promote the integrity of the trial process, but would inflict a wholly unacceptable burden on the administration of criminal justice.").

As any taint that could have resulted from the initial seizure was purged by the discovery of an independent justification for the stop and the discovery of the incriminating evidence was inevitable, the heavy social costs that would have resulted from the exclusion of the evidence could not have been justified in Appellant's case. See

Davis, 131 S. Ct. at 2427 ("[S]ociety must swallow this bitter pill [of the exclusion of evidence] when necessary, but only as a 'last resort.' For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs." (citations omitted)). Therefore, the trial judge properly declined to grant Appellant's motion to suppress the evidence discovered as a result of the investigatory stop, and that evidence was properly introduced during trial. See Nix, 467 U.S. at 447 ("Fairness can be assured by placing the State and the accused in the same positions they would have been in had the impermissible conduct not taken place. However, if the government can prove that the evidence would have been admitted regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury in order to ensure the fairness of the trial proceedings. In that situation, the State has gained no advantage and the defendant has suffered no prejudice. Indeed, suppression of the evidence **would operate to undermine the adversary system** by putting the State in a worse position than it would have occupied without any police misconduct." (emphasis added)). Appellant's convictions should be affirmed.

CONCLUSION

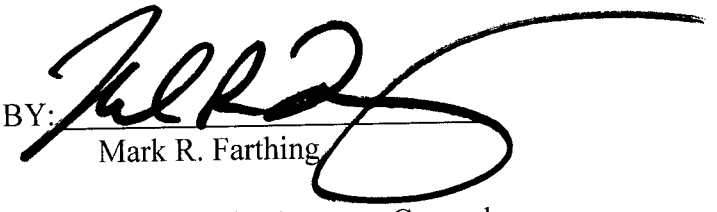
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General

ISAAC McDUFFIE STONE, III
Solicitor, Fourteenth Judicial Circuit

BY: 
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ATTORNEYS FOR RESPONDENT

February 9, 2015

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County
Honorable Thomas W. Cooper, Jr., Circuit Court Judge
Appellate Case No. 2011-196666

THE STATE,

Respondent,

vs.

ANDRE DECOSTA,

Appellant.

DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

In addition to the matter designated by Appellant, Respondent proposes the following to be included in the Record on Appeal:

(1) Pre-Trial Suppression Hearing Transcript, Pages 1 and 5-61;

(2) Trial Transcript, Pages 1 and 12-206;

(3) All Three Indictments;

(4) All Three Sentencing Sheets; and

(5) State's Exhibits # 3 (In-Car Recording); # 22 (Map); and # 24 (Statement).

To facilitate the preparation of the Final Brief, Respondent requests that counsel for Appellant retain the page numbers of the trial transcript in the Record on Appeal, in addition to the new page numbers.

The undersigned hereby certifies this Designation contains no matter which is irrelevant to this appeal.

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General

ISAAC McDUFFIE STONE, III
Solicitor, Fourteenth Judicial Circuit

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February 9, 2015

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SC Court of Appeals

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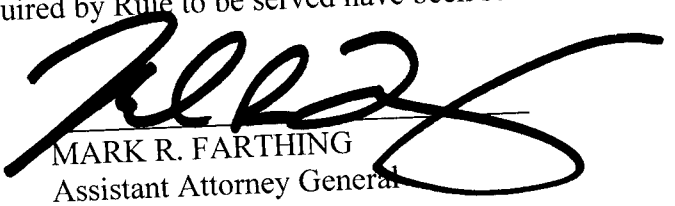
Appellant.

PROOF OF SERVICE

I, Mark R. Farthing, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Laura Ruth Baer, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 9th day of February, 2015.



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February 9, 2015

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RE: State v. Andre Decosta – Appellate Case No. 2011-196666

Dear Ms. Baer:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Mark R. Farthing
Assistant Attorney General
Bar Number 76901

MRF/
Enclosures

cc: Honorable Jenny A. Kitchings (original and one enclosed)
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