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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

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

The State, Appellant,

vs.

Scott Eugene Williams, Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

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

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

STATEMENT OF THE CASE

On or about March 26, 2011, Respondent was ticketed for DUI. (Uniform Traffic Citation F062451; R. 69). He proceeded to trial on March 14, 2013 before the Honorable Jesse A. McCall, Jr., Cleveland Town Magistrate. Prior to trial, Respondent moved to dismiss the case. After holding a hearing, Judge McCall dismissed the case based on a finding the State lacked probable cause. (Magistrate's Return; R. 1-2). After a hearing on April 10, 2013, the magistrate court denied the State's motion to reconsider. (Order dated April 17, 2013; R. 3).

The State filed a timely Notice of Appeal to the circuit court. (Notice of Appeal dated May 14, 2013 and Brief of Appellant; R. 107; 77-82). The Honorable G. Edward Welmaker heard the appeal on August 5, 2013. By Order dated August 9, 2013, he affirmed the decision of the magistrate court and denied the State's appeal. (Order dated August 9, 2013; R. 4-5). The State filed a motion to reconsider which Judge Welmaker denied by Order dated September 24, 2013. (Motion to Reconsider dated August 27, 2013; Order dated September 24, 2013; R. 12-17; 6-7). The State filed a timely Notice of Appeal. This brief follows.

STATEMENT OF FACTS

On or about March 26, 2011, Respondent was ticketed for DUI. (Uniform Traffic Citation F062451; R. 69). The Highway Patrol established a driver's license checkpoint on Highway 183 in Greenville. The checkpoint was located at the bottom of a hill near Cedar Lane Road. (Audio Recording of Magistrate's Hearing March 14; 3/14T.12; Magistrate's Return filed May 29; South Carolina Highway Patrol Driver/Vehicle Inspection Report; R.70). Respondent approached the checkpoint. Shortly after Respondent topped the hill and was able to see the checkpoint, he slowed and conducted a U-turn. (Audio Recording of Magistrate's Hearing March 14; 3/14T.5; 11-12; R.23; 30-31).

Trooper Robinson notified his supervisor of Respondent's maneuver to avoid the checkpoint and was instructed to pursue Respondent. Trooper Robinson traveled up the hill and observed the vehicle Respondent was operating stopped in a parking lot on the backside of the lot with his lights turned off. Trooper Robinson exited his vehicle and approached Respondent in his car to make contact with him. When he did, Trooper Robinson noted he could smell the odor of alcohol, Respondent's eyes were glassy, and Respondent slurred some speech. (Audio Recording of Magistrate's Hearing March 14; 3/14T.5; R. 23). Trooper Robinson issued Respondent a citation for driving under the influence.

ARGUMENT

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

The circuit court erred in affirming the magistrate's decision requiring the State to provide evidence supporting the constitutionality of the checkpoint on SC-183 on March 26, 2011. Respondent never went through the checkpoint or was otherwise detained by the checkpoint so the validity of the checkpoint need not be established. The circuit court erred in finding the State failed to provide sufficient reasonable suspicion to stop Respondent based on his evading the checkpoint and conducting a U-turn on a hill. Finally, Trooper Robertson never stopped Respondent as he was parked at the time the Trooper approached. As a result, he did not need to have reasonable suspicion to stop Respondent, and upon approaching and smelling alcohol, did have reasonable suspicion for any further detainment of Respondent. The determinations of the magistrate and circuit courts should be reversed and this case remanded for trial.

<u>**Constitutionality of Checkpoint**</u>

The magistrate and the circuit court erred in requiring the State to establish the validity of the checkpoint in this case in order to establish probable cause or reasonable suspicion to stop Respondent. It is undisputed Respondent did not enter and was not

stopped by the checkpoint in question. It is undisputed Respondent performed a U-turn prior to going through the checkpoint. As a result, he is not able to challenge the validity of the checkpoint as he was never seized by the checkpoint and his Fourth Amendment rights have not been implicated.

In Fourth Amendment search and seizure cases, the appellate court is limited to determining if there is any evidence to support the trial court's findings and can only reverse due to clear error. State v. Flowers, 360 S.C. 1, 5, 598 S.E.2d 725, 727 (Ct. App. 2004). The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." U.S. Const. amend. IV. This guarantee protects against unreasonable searches and seizures. "The touchstone of the Fourth Amendment is reasonableness." Florida v. Jimeno, 500 U.S. 248, 250 (1991). As the United States Supreme Court stated in Alderman v. United States, 394 U.S. 165, 174 (1969): "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted."

A seizure occurs "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." Terry v. Ohio, 392 U.S. 1, 19, n. 16, 88 S.Ct. 1868, 1879, n. 16, 20 L.Ed.2d 889 (1968). "[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." United States v. Mendenhall, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980).

In Brower v. County of Inyo, 489 U.S. 593 (1989), the United States Supreme Court considered whether a roadblock placed to stop a fleeing individual effectuated a seizure of that individual. The Court found: "We think it enough for a seizure that a person **be stopped** by the very instrumentality set in motion or put in place in order to achieve that result." Id. at 599 (emphasis added). The Court continued: "It was enough here, therefore, that, according to the allegations of the complaint, Brower was meant to be stopped by the physical obstacle of the roadblock—and that **he was so stopped**." Id. (emphasis added).

The Court again considered whether a seizure occurred in the case of California v. Hodari D., 499 U.S. 621 (1991). The Court explained a seizure occurs when there is an application of any physical force, even if the subject subsequently breaks free. The Court then differentiated a show of authority during which a seizure occurs only when the subject submits or yields to the show of authority. Id. at 625-626. The Court found where the police exercised a show of authority—as may be found in this case with the checkpoint—there was no seizure for Fourth Amendment purposes when a defendant did not acquiesce in the show of police authority. Id. at 629 ("assuming that Pertoso's pursuit in the present case constituted a 'show of authority' enjoining Hodari to halt, since Hodari did not comply with that injunction he was not seized until he was tackled").

In United States v. Scheetz, 293 F.3d 175 (4th Cir. 2002), the defendant made an argument nearly identical to the argument in this case, maintaining he avoided an illegal checkpoint and so his subsequent stop should be found invalid. The Fourth Circuit found he was never seized by the checkpoint because he turned around prior to entering and being stopped by the checkpoint. Id. at 183. The Court found the defendant could not

challenge the checkpoint because he was never seized and therefore did not have his Fourth Amendment rights violated. Id. at 183-184. The Court found the only consideration was whether the actual stop as a result of his illegal U-turn was valid, and because it was, no evidence should be suppressed. Id. at 184. See also, Coffman v. State, 759 S.W.2d 573, 576 (1988) (finding "First, we simply do not agree that an unlawful roadblock would infect the validity of appellant's arrest" when he was stopped pursuant to reasonable suspicion after avoiding the roadblock).

In this particular instance, as the State maintained below, Respondent never was "seized" by the checkpoint. His Fourth Amendment rights were not implicated by the checkpoint. Whether it was a constitutional or unconstitutional checkpoint is not relevant to the subsequent investigation because his liberty was never restrained by the checkpoint. Respondent could not assert the rights of any other drivers, and as a result both the magistrate court and the circuit court erred in requiring the State to establish the validity of the checkpoint.

Reasonable Suspicion

Because Respondent cannot challenge the validity of the checkpoint, the only issue is whether the magistrate and circuit court erred in finding the Trooper lacked probable cause or reasonable suspicion to stop and detain Respondent. The State only must show reasonable suspicion to justify an investigatory stop and detention. "A police officer may 'stop and briefly detain a person for investigative purposes' if he 'has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot'. . . ." State v. Provet, 405 S.C. 101, 108, 747 S.E.2d 453, 457 (2013) (quoting United States v. Sokolow, 490 U.S. 1, 7 (1989)). The test whether reasonable suspicion exists is an

objective assessment of the circumstances; the officer's subjective motivations are irrelevant. Id. As the South Carolina Supreme Court recently explained:

> Reasonable suspicion is something more than an "inchoate and unparticularized suspicion" or hunch. Instead, looking at the totality of the circumstances, reasonable suspicion requires there be an objective, specific basis for suspecting the person stopped of criminal activity. The police officer may make reasonable inferences regarding the criminality of a situation in light of his experience, but he must be able to point to articulable facts that, in conjunction with his inferences, "reasonably warrant" the intrusion.

Robinson v. State, 407 S.C. 169, 182, 754 S.E.2d 862, 868-869 (2014) (internal citations omitted). "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." Id. at 182. 754 S.E.2d at 869.

As the State maintained, the magistrate committed an error of law in requiring a showing of probable cause. The circuit court continued this error in its application of the law even though it acknowledged in its order that the standard may be reasonable suspicion. The State presented ample evidence the Trooper had reasonable suspicion to justify a stop and detention of Respondent, even though in actuality no stop took place.

Traffic Violation

Violation of motor vehicle codes provides an officer reasonable suspicion to initiate a traffic stop. Provet, 405 S.C. at 108, 747 S.E.2d at 457. In the instant case, Trooper Robinson indicated one reason he pursued Respondent resulted from Respondent's making a U-turn just after the crest of a hill in violation of section 56-5-

2140 of the South Carolina Code. (Audio Recording of Magistrate's Hearing March 14, 2013; 3/14T. 5; R.23). The statute provides in pertinent part:

> (b) No vehicle shall be turned so as to proceed in the opposite direction upon any curve or upon the approach to or near the crest of a grade where such vehicle cannot be seen by the driver of any other vehicle approaching from either direction within five hundred feet.

S.C. Code Ann. § 56-5-2140 (b)(Supp. 2011).

The Trooper testified as he looked up at the hill, Respondent made his U-turn approximately 200 feet from the crest of the hill as he came down approaching the checkpoint. (Audio Recording of Magistrate's Hearing March 14; 3/14T.11; R. 29). The Trooper admitted he was estimating the distance and did not measure the distance to the crest of the hill. (Audio Recording of Magistrate's Hearing March 14; 3/14T.12; R. 30).

The magistrate incorrectly found this testimony insufficient based on a totality of the circumstances to establish Trooper Robinson had a reasonable suspicion to pursue and stop Respondent. The magistrate acknowledged the Trooper believed it was within 200 feet of the crest where Respondent made his turn, which would make the turn a violation of section 56-5-2140 requiring 500 feet of visibility. However, the magistrate found the testimony insufficient because the officer was "guestimating" and no measurement was ever taken. (Magistrate's Return filed May 29, 2013; R. 1). This level of proof requirement is significantly more than the reasonable suspicion required based on a totality of the circumstances. Requiring near certainty as opposed to a reasonable suspicion is an error of law. See United States v. Cortez, 449 U.S. 411, 418 (1981) ("The process does not deal with hard certainties, but with probabilities. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but

as understood by those versed in the field of law enforcement."); see also, Robinson, 407 S.C. at 182, 754 S.E.2d at 868 ("Reasonable suspicion is something more than an "inchoate and unparticularized suspicion" or hunch. . . . Instead, looking at the totality of the circumstances, reasonable suspicion requires there be an objective, specific basis for suspecting the person stopped of criminal activity.").

The magistrate further compounds his error by holding: "The court also found insufficient evidence of probable cause for a stop of the defendant's vehicle since there was no credible evidence that the turn was made within 500 feet of the crest of the hill . . . ." (Magistrate's Return filed May 29, 2013; R. 1). As discussed above, the standard is not probable cause but reasonable suspicion, a lesser standard. The magistrate committed errors of law in requiring measuring and proof of a traffic violation instead of just the Trooper's reasonable suspicion a violation occurred prior to the stop.

These errors of law were continued by the circuit court. The circuit court, while seeming to acknowledge reasonable suspicion is the correct standard to apply, found the State failed to meet its burden with regard to the U-turn. The circuit court indicated: "The State was unable to prove the u-turn by the Defendant was illegal, but instead only that it appeared to be an evasive maneuver as a result of the checkpoint." (Circuit Court Order dated August 9, 2013; R. 4-5).

The circuit court, like the magistrate court, required the State to "prove" the illegality of the U-turn. Instead, the correct analysis is whether under the totality of the circumstances the Trooper had a reasonable suspicion to believe Respondent violated the law. The facts indicate Trooper Robinson saw Respondent make a U-turn on the hill "as he came over, as soon as I saw the vehicle, uh he abruptly slowed, made the u-turn in to

well in within that 500 uh it couldn't have been no more than 200 feet from the crest from where it starts to grade down." (Audio Recording of Magistrate's Hearing March 14; 3/14T.11; R. 29). Further, Trooper Robinson was familiar with the traffic laws. Based on the totality of these circumstances Trooper Robinson had reasonable suspicion to stop and briefly detain Respondent for an investigatory stop. See State v. Khingratsaiphon, 352 S.C. 62, 69, 572 S.E.2d 456, 459 (2002) ("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.") (citing Terry v. Ohio, 392 U.S. 1 (1968)).

Avoidance of Checkpoint

Further, the magistrate court and circuit court erred in finding Respondent's avoidance of the checkpoint did not constitute reasonable suspicion to effect a stop and investigate Respondent's actions. The action of avoiding a checkpoint should be sufficient to establish reasonable suspicion that criminal activity, likely a violation of section 56-1-20 of the South Carolina Code (driver's license required); section 56-5-2930 (DUI); section 56-10-225 (failure to have proof of insurance); or many other possibly applicable statutes. If the avoidance alone is not sufficient, then the avoidance coupled with Respondent's subsequent actions after making the U-turn on a hill certainly provided Trooper Robinson with reasonable suspicion required to make an investigatory stop.

The United States Supreme Court discussed the suspicion aroused by "headlong flight" stating:

> Headlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such. In reviewing the propriety of an officer's conduct, courts do not have available empirical studies dealing with inferences drawn from suspicious behavior, and we cannot reasonably demand scientific certainty from judges or law enforcement officers where none exists. Thus, the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior.

Illinois v. Wardlow, 528 U.S. 119, 124-125 (2000). The Court continued:

> [Finding officers justified in suspecting the defendant was involved in criminal activity and in investigating further] is entirely consistent with our decision in Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983), where we held that when an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about his business. Id., at 498, 103 S.Ct. 1319. And any "refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure." Florida v. Bostick, 501 U.S. 429, 437, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991). **But unprovoked flight is simply not a mere refusal to cooperate. Flight, by its very nature, is not "going about one's business"; in fact, it is just the opposite.** Allowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual's right to go about his business or to stay put and remain silent in the face of police questioning.

Id. at 125 (emphasis added).

In U.S. v. Smith, 396 F.3d 579 (4th Cir. 2005), the Fourth Circuit analyzed a stop of a motorist after he evaded a roadblock:

> We believe that the principles of Wardlow apply to evasive conduct by drivers approaching a police roadblock. As with an individual who encounters police on foot, "[h]eadlong flight" or other "nervous, evasive behavior" in response to a roadblock may contribute to reasonable suspicion that the driver is engaged in criminal activity. Such evasive behavior is "not going about one's business," but instead suggests that the driver is avoiding the roadblock for other

> than innocent reasons. Indeed, we have repeatedly recognized that evasive reactions to the presence of police may be considered in determining whether reasonable suspicion exists for an investigatory stop.

Id. at 584. The Court concluded:

> We therefore hold that when law enforcement officers observe conduct suggesting that a driver is attempting to evade a police roadblock—such as unsafe or erratic driving or **behavior indicating the driver is trying to hide from officers**—police may take that behavior into account in determining whether there is reasonable suspicion to stop the vehicle and investigate the situation further. See United States v. Montero–Camargo, 208 F.3d 1122, 1138–39 (9th Cir.2000) (en banc) (holding that U-turn of defendants' vehicles shortly before reaching border checkpoint, combined with other factors, including fact that vehicle subsequently stopped on side of highway in isolated area, provided reasonable suspicion for investigatory stop); United States v. Duguay, 93 F.3d 346, 351 (7th Cir.1996) (holding that defendant's apparent **attempt to avoid roadblock by turning into parking lot** was a factor supporting reasonable suspicion to stop vehicle); see also United States v. Brignoni–Ponce, 422 U.S. 873, 884–85, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975) (explaining that among other factors officers may consider in determining whether reasonable suspicion exists to stop a vehicle near the border,"[t]he driver's behavior may be relevant, as erratic driving or **obvious attempts to evade officers can support a reasonable suspicion**").

Id. at 585 (emphasis added).

As the Indiana Court of Appeals explained:

> [W]hile a driver approaching a roadblock is not "seized" until actually reaching the roadblock, a driver's attempt to avoid the roadblock, by making a turn around, does raise a "specific and articulable fact" which gives rise to a reasonable suspicion on the part of a police officer that the driver may be committing a crime. Such a suspicion entitles the officer to detain the driver of the vehicle something short of a full arrest to further investigate whether or not probable cause exists for a search or arrest of the driver.

Snyder v. State, 538 N.E.2d 961, 965 (Ind. App. 4 Dist. 1989). The Court continued with very valid reasoning:

> If police officers stationed at roadblocks were not permitted to stop such drivers, the very drivers the police seek to deter could flagrantly avoid the roadblocks and the stops would lose their deterrent value. . . . A finding of a reasonable suspicion must be determined on a case by case basis.
>
> The alternative is to tell police officers that in spite of their experience, they may not infer from a driver's attempt to avoid a roadblock that the driver is very likely engaged in the commission of a crime. **Such a rule would seem to tell police officers to "ignore reality."**

Id. at 965-966 (emphasis added). Other states have also found either evasion alone or evasion coupled with other behavior, such as in this case Respondent's retreat to a dark parking lot and turning off the lights of his car, is sufficient to warrant the investigatory stop. See e.g., Smith v. State, 515 So.2d 149, 150-151 (Ala. Crim. App. 1987) (holding that investigatory stop of defendant's vehicle was justified when officer observed vehicle come around a curve approximately 200 yards from roadblock, turn rapidly into a private driveway, and stop 50 feet from a residence with its lights off but engine running); State v. D'Angelo, 605 A.2d 68, 70–71 (Me. 1992) (finding reasonable suspicion when defendant's vehicle turned into private driveway 75 yards before checkpoint, officer knew some residents of home but had never seen defendant's vehicle parked there, and occupants of vehicle did not exit after stopping engine and turning off lights but instead turned to observe police activities); State v. Foreman, 527 S.E.2d 921, 922–23 (N.C. 2000) (concluding that officer possessed reasonable suspicion when defendant's vehicle made abrupt turn before reaching checkpoint, made second abrupt turn, and parked in residential driveway with its lights and engine off); Boches v. State, 506 So.2d 254, 264

(Miss. 1987) ("When a motorist evades a police roadblock we have recognized that police may stop them and check the validity of their license tag, and inspection sticker."); Steinbeck v. Commonwealth, 862 S.W.2d 912 (Ky. App. 1993) (finding avoidance plus the time of day and the uninhabited road on which he turned constituted reasonable suspicion); Coffman v. State, 759 S.W.2d 573, 575 (Ark. 1988) ("To a trained police officer, the fact that a motorist attempted to avoid the roadblock in this case would surely excite a reasonable suspicion that, at the very least, the motorist was drunk, driving a stolen vehicle, did not have a valid driver's license, or had some car light defect."); Stroud v. Commonwealth, 370 S.E.2d 721 (Va. App. 1988) (finding avoiding roadblock by turning around and pulling into private driveway created reasonable suspicion for an investigatory stop).

Respondent's action of making a U-turn immediately after cresting a hill allowing him to see the checkpoint, then driving to a dark parking lot and turning off his lights certainly created a reasonable suspicion for Trooper Robinson to conduct an investigatory stop. The evasive behavior and attempts to hide have repeatedly been held by courts around the country to be sufficient to support a trained officer's reasonable suspicion criminal activity of some kind is afoot. As a result, Respondent's behavior at the checkpoint was certainly sufficient to warrant an investigatory stop.

Additionally, the analysis of whether Trooper Robinson had a reasonable suspicion to stop Respondent is based on a totality of the circumstances. In viewing the totality of the circumstances and the reasonable inferences at the time of the stop: 1) Trooper Robinson saw Respondent conduct a U-turn near the top of a hill in what he believed was a violation of section 56-5-2140 as discussed above; 2) the U-turn was

made immediately after Respondent would have been able to see the checkpoint; 3) the U-turn was conducted for the purpose of avoiding the driver's license checkpoint; and 4) Respondent proceeded to pull into the backside of a parking lot, turn his lights off, and remain in the vehicle. These facts certainly provide Trooper Robinson with the reasonable suspicion to believe criminal activity may be afoot in Respondent's maneuvering to avoid the checkpoint. As a result, the magistrate court and circuit court erred in finding the stop invalid and in finding the case should be dismissed.

No Reasonable Suspicion Necessary

Finally, based on the facts of this case, Trooper Robinson did not affect a stop of Respondent. Respondent did not stop as a result of a show of authority from Trooper Robinson or as a result of physical force. He voluntarily pulled over into a parking lot, where he was already stopped when Trooper Robinson pulled up. As the United States Supreme Court has explained:

> [L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place; by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. See Dunaway v. New York, 442 U.S. 200, 210 n. 12, 99 S.Ct. 2248, 2255 n. 12, 60 L.Ed.2d 824 (1979); Terry v. Ohio, 392 U.S. 1, 31, 32–33, 88 S.Ct. 1868, 1885–1886, 20 L.Ed.2d 889 (1968) (Harlan, J., concurring); id., at 34, 88 S.Ct., at 1886 (WHITE, J., concurring). Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification. United States v. Mendenhall, 446 U.S. 544, 555, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980) (opinion of Stewart, J.).

Florida v. Royer, 460 U.S. 491, 497 (1983). Respondent, already stopped in a public parking lot, was approached by Trooper Robinson. When Trooper Robinson made contact with Respondent, he could smell alcohol and noted Respondent's eyes were glassy and Respondent slurred some speech. These observations gave rise to the necessary reasonable suspicion to further detain Respondent for any field sobriety tests or other investigation into DUI or in the alternative provided probable cause to arrest Respondent for DUI. Accordingly, the magistrate court and circuit court erred in even requiring reasonable suspicion for the stop when no stop actually occurred.

Therefore, based on the errors of law committed by the magistrate and circuit courts as well as the decisions of the courts being entirely without factual support, this Court should reverse the decision dismissing this case; remand the case for trial; find Respondent was never seized by the roadblock and, therefore, could not challenge its validity; and find the evidence can be properly admitted because it was seized as a result of a lawful investigatory stop supported by reasonable suspicion.

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

The trial court erred in considering Respondent's motions to dismiss and in dismissing the case. A magistrate may not hold what amounts to a preliminary hearing requiring the State to prove its case is based on probable cause. Further, the court in this case should have considered Respondent's motions as motions for suppression of evidence and determined whether suppression of evidence was appropriate. Accordingly, while the State believes the analysis provided above indicates no evidence should be suppressed and certainly the case should not be dismissed, the magistrate only had a right to suppress the evidence and dismissal would be a determination made by the State in light of any remaining evidence.

In State v. Ramsey, 381 S.C. 375, 673 S.E.2d 428 (2009), the South Carolina Supreme Court found magistrates do not have authority to conduct pre-trial preliminary hearings to determine whether the State's case is supported by probable cause when the charge is within their jurisdiction. Id. at 377, 673 S.E.2d 428, 429. The DUI charge in this case is within the magistrate's jurisdiction. See S.C. Code Ann. § 22-3-550 ("Magistrates have jurisdiction of all offenses which may be subject to the penalties of a fine or forfeiture not exceeding five hundred dollars, or imprisonment not exceeding thirty days, or both."); and S.C. Code Ann. § 56-5-2930(A)(1) (DUI first offense; "Notwithstanding the provisions of Sections 22-3-540, 22-3-545, and 22-3-550, a first offense charged for this item may be tried in magistrates court").

In the instant case, the only proper motions are to suppress evidence seized by the stop and not to dismiss the case. No statutory or other provision of law allows for the dismissal of the case. Further, the actions of the court in this case are similar to the dismissal of an indictment pre-trial. The solicitor may choose to dismiss a properly obtained indictment, but the court does not have such power. See State v. Needs, 333 S.C. 134, 146, 508 S.E.2d 857, 863 (1998) ("Furthermore, a trial court generally has no power to dismiss a properly drawn indictment issued by a properly constituted grand jury before trial unless a statute grants that power to the court. The prosecutor may, of course, request the dismissal of an indictment or charge."); State v. Ridge, 269 S.C. 61, 65, 236 S.E.2d 401, 402 (1977) (In the absence of a statute, "a court has no power . . . to dismiss a criminal prosecution except at the instance of the prosecutor.").

The court's dismissal in this case was analogous to the dismissal for lack of probable cause at a preliminary hearing. The court had the power to suppress evidence, and then the determination of whether to continue the prosecution or dismiss the case would reside with the solicitor. As a result, this Court should find the magistrate erred in considering Respondent's motions to dismiss instead of construing them as motions to suppress evidence. Further, this Court should find the magistrate exceeded his authority in dismissing the case as opposed to conducting a suppression hearing and then allowing the solicitor the determination of whether to proceed or dismiss the case. Accordingly, if this Court concludes the evidence in this case is not sufficient to support the investigatory stop of Respondent[1], then it should remand for a suppression hearing and vacate the dismissal entered by the magistrate and allowed to stand by the circuit court.

[1] The State of course maintains there is ample evidence indicating the investigatory stop by Trooper Robinson was supported by reasonable suspicion.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the decision of the circuit court affirming the dismissal by the magistrate should be reversed; this Court find the evidence resulting from Respondent's stop by Trooper Robinson to be properly admissible at trial; and this case remanded for trial.

Respectfully submitted,

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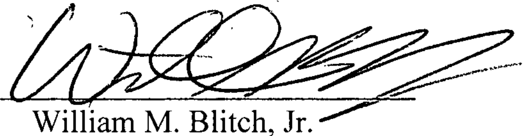
BY: 
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March 18, 2015

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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

The State, Appellant,

vs.

Scott Eugene Williams, Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled, "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings.

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PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Final Brief of Appellant on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.
This 18th day of March, 2015.

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