2011-192746

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions
Carmen T. Mullen, Circuit Court Judge

Case No.: 2002-GS-23-4288; 2005-GS-23-3478

THE STATE,

RESPONDENT,

v.

KARRIEM PROVET,

PETITIONER.

PETITION FOR WRIT OF CERTIORARI

TRICIA A. BLANCHETTE

Law Office of Tricia A. Blanchette
Post Office Box 12725
Columbia, SC 29211
(803) 988-0008

ATTORNEY FOR PETITIONER

Other Counsel of Record:

Deborah R.J. Shupe
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEY FOR RESPONDENT

INDEX

INDEX.....1

TABLE OF AUTHORITIES.....2

CERTIFICATE OF COUNSEL.....3

QUESTION PRESENTED.....4

STATEMENT OF THE CASE.....5

STATEMENT OF THE FACTS.....7

ARGUMENT.....11

CONCLUSION 21

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS:

U.S. Const. amend. IV.....11

S.C. Const. art. I, § 10.....11

FEDERAL CASES:

Ohio v. Robinette, 519 U.S. 33, 117 S.Ct. 417 (1996).....11

Pennsylvania v. Mimms, 434 U.S. 106, 98 S.Ct. 330 (1977).....11, 12

United States v. Boone, 245 F.3d 352 (4th Cir. 2001).....20

United States v. Sprinkle, 106 F.3d 613 (4th Cir. 1997).....14

United States v. Sullivan, 139 F.3d 126 (4th Cir. 1998).....12

Whren v. United States, 517 U.S. 806, 116 S.Ct. 1769 (1996).....11

STATE CASES:

State v. Pichardo, 367 S.C. 84, 623 S.E.2d 840 (Ct. App. 2005).....11, 18

State v. Rivera, 384 S.C. 356, 682 S.E.2d 307 (Ct. App. 2009).....12-15

State v. Robinette, 80 Ohio St.3d 234, 685 N.E.2d 762 (Ohio 1997).....19

State v. Tindall, 665 S.E.2d 188 (Ct. App. 2008).....12, 15, 16, 17

State v. Williams, 351 S.C. 591, 571 S.E.2d 703 (Ct. App. 2002).....12, 18, 19

State v. Woodruff, 344 S.C. 537, 544 S.E.2d 290 (Ct. App. 2001).....12, 14

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled upon by the Court of Appeals on May 5, 2011.

QUESTION PRESENTED

DID THE COURT OF APPEALS ERR IN AFFIRMING THE LOWER COURT'S DENIAL OF THE PETITIONER'S MOTION TO SUPPRESS THE EVIDENCE RESULTING FROM A TRAFFIC STOP WHEN THE PETITIONER ARGUED THAT HE WAS SUBJECTED TO AN UNREASONABLE SEARCH AND SEIZURE IN VIOLATION OF THE FOURTH AMENDMENT.

STATEMENT OF THE CASE

During the November 2002 term of the Greenville County Grand Jury, the Petitioner was indicted for Resisting Arrest (2002-GS-23-4288) and Trafficking Cocaine (2002-GS-23-4289). R. pp. 323-326. During the May 2005 term of the Greenville County Grand Jury, the Petitioner was indicted for Trafficking Cocaine (2005-GS-23-3478). R. p. 327. On August 7-8, 2007, a jury trial was held in front of the Honorable Carmen T. Mullen at the Greenville County Courthouse. R. p. 1. The Petitioner was represented by William B. Long, Jr., Esquire. The State was represented by John D. Newkirk, Esquire. R. p. 1.

At the close of the trial, the jury found the Petitioner guilty as indicted. R. p. 310. The Honorable Carmen T. Mullen sentenced the Petitioner to a term of twenty-five (25) years for trafficking (2005-GS-23-3478) and a concurrent term of one year for resisting arrest (2002-GS-23-4289). R. p. 318.

Following sentencing, trial counsel informed the court that that the Petitioner would need the assistance of the Office of Appellate Defense. R. p. 318. A timely Notice of Intent to Appeal was submitted and an Initial Anders Brief was filed by the Office of Appellate Defense on July 3, 2008. On August 25, 2008, Tricia A. Blanchette, undersigned counsel, filed a Motion for Substitution of Counsel and Substitution of Brief of Appellant. The State submitted a Return to Motion for Substitution of Counsel and Substitution of Brief of Appellant on September 4, 2008. On September 19, 2008, the South Carolina Court of Appeals issued an Order granting the Petitioner's Motion.

On April 14, 2009, the Final Brief of Appellant and Record on Appeal were filed with the Court of Appeals and served on opposing counsel. On May 21, 2011, the State filed and served on counsel the Final Brief of Respondent. Oral arguments were requested and heard by the Court of Appeals on May 18, 2010. Thereafter, the Court of Appeals affirmed the Petitioner's

conviction and sentence. State v. Karriem Provet, Op. No. 4787 (S.C. Ct. App. filed January 31, 2011). App. p. 1.

On February 11, 2011, the Petitioner, through counsel, filed a Petition for Rehearing and Petition for Rehearing *En Banc*. App. p. 14. On March 24, 2011, the Court of Appeals issued an Order Denying Petition for Rehearing, which was rescinded via Order on March 28, 2011. App. pp. 21, 23. On May 5, 2011, the Court of Appeals issued an Order Denying Petition for Rehearing and Order Denying Petition for Rehearing *En Banc*, from which this Petition for Writ of Certiorari follows. App. pp. 24, 26.

STATEMENT OF THE FACTS

After the jury was selected, the trial court heard the Petitioner's motion to suppress "all evidence", which counsel explained as the highway patrol video, testimony of his client, and the drug evidence. R. p. 25. During the motion hearing, the State called Corporal J.D. Owens, South Carolina Highway Patrol, and Officer Eddie Aman, formerly with the South Carolina Highway Patrol.

On direct, Corporal Owens testified that he conducted a traffic stop for moving violations involving the Petitioner on May 1, 2002. R. p. 28. The moving violations were following too closely (less than two car lengths) and a defective tag light. R. p. 28. When requested, the Petitioner provided third party registration. R. p. 30. He further testified that the Petitioner had "extreme hand-shaking" combined with "accelerated breathing", which is disputable by the video evidence. R. pp. 30-31. The Petitioner agreed to step out of the vehicle and consented to a pat down. R. p. 31-32. After informing the Petitioner that he would be issuing a warning citation, he questioned the Petitioner, as reflected in the video, and determined the following information: 1) Petitioner had stayed with girl at Holiday Inn; 2) Vehicle belonged to a different girl; 3) Petitioner did not have a job; and 4) Petitioner was driving a sports utility vehicle. R. pp. 32-34. He further testified that his notes indicated "delaying tactics" by the Petitioner, which are not evidenced in the video. R. p. 34.

Corporal Owens further recounted that he called Officer Aman (canine unit) for back-up and called dispatch for a license and registration check. R. pp. 36-37. When he conducted a vehicle identification number (VIN) check on the vehicle, he noticed fast food bags, a cell phone, air freshener(s), one luggage bag and receipts. R. p. 38. Corporal Owens stated: "All of these within the totality of the circumstances also with the questions or items that were related by the

defendant, all of these would indicated that there was other criminal activity being afoot." R. p. 38, lines 19-22. He went on to explain that the fast food bags were particularly suspicious because drugs are a fast food type of business. R. pp. 39-40.

After checking the VIN, Corporal Owens testified that Officer Aman and his canine arrived, which is disputable by the video evidence. R. p. 41. After Aman arrived, he returned the Petitioners documents, gave him the citation, and asked for consent to search. R. p. 41. Prior to running the drug dog, Officer Aman approached the vehicle and removed a fast food bag. R. p. 44. The Petitioner took off, and the Officer Aman caught him. R. p. 44.

When he returned to the scene, Corporal Owens further testified that another officer had arrived, which is captured by the video evidence. R. p. 44. Upon return, Officer Aman ran the drug dog and the drug evidence was located. R. p. 45.

On cross-examination, Corporal Owens admitted that the Petitioner was under seizure until his documents were returned and the warning was issued. R. p. 55. He further testified that he did not tell the Petitioner that he was "free to go." R. pp. 56, 65. He explained that the purpose of returning his documents was so he would feel free to go, but he was not free to go. R. pp. 61-62, 64-65. He specifically stated: "At the point where I asked for consent, I was not going to let him go." R. p. 62, lines 19-20.

When asked by defense counsel, Corporal Owens admitted that he did not take the fast food bags, air freshener(s), cell phone, receipts or luggage into evidence. R. p. 57. He further explained that Officer Aman did not open the fast food bag – he just removed it. R. p. 59.

On direct examination, Officer Aman testified that he pulled out the fast food bag and began to pull out a clear bag when the Petitioner fled. R. p. 68. He further testified that the Petitioner gave verbal consent to search the vehicle. R. p. 69.

During cross-examination, Officer Aman explained that the warning ticket had been issued when he arrived and that Corporal Owens was explaining the ticket to the Petitioner[1]. R. p. 72. He further explained that he removed the food container because they had obtained verbal consent, without such consent he would have only conducted an exterior search. R. p. 73.

Following the testimony presented by the State, defense counsel argued that "there was no real reason to suspect that there were drugs involved other than the fact that this young black male with dread locks --- was alone in a vehicle." R. pp. 86-86, lines 24-25, 1-3. Counsel further argued that verbal consent was not audible on the video nor did the State meet the test for voluntary consent since the officers testified that the Petitioner was never free to go. R. pp. 87-88, 95-96.

In response, the State argued that the secondary detention was not a consensual encounter but was a lawful detention due to the officer's reasonable suspicion. R. p. 91. The State explained that this reasonable suspicion was based upon a number of factors, not just nervousness since "overt nervousness is not enough." R. p. 93. Regarding the search, the Solicitor stated:

> Your Honor, if the detention is supported by reasonable suspicion which it is in this case, then we determine whether or not consent is voluntary. Both of these officers have testified that this Defendant was asked, they asked for consent to search and he granted them consent to search his vehicle.

R. p. 93, lines 16-22.

In making her ruling, the trial court noted that she looked at three questions: 1) Whether there was probable cause to make the initial traffic stop; 2)Whether there was reasonable suspicion to further detain the Petitioner; and 3) Whether there was voluntary consent to search.

[1] On direct examination, Corporal Owens testified that Officer Aman arrived before he finished writing the warning ticket. R. p. 41.

R. pp. 102-107. The trial court held that there was probable cause for the initial traffic stop, reasonable suspicion to further detain, and voluntary consent to search. R. pp. 102-107.

After receiving the court's ruling, defense counsel stated that the Petitioner would appeal the court's ruling. R. p. 111. Counsel further stated that the Petitioner would not accept a plea since he did not want to waive his right to appeal the court's ruling on the suppression motion. R. p. 117.

During the trial, the State called Corporal Owens and Officer Aman to the stand. R. pp. 132, 168. The State also introduced the video into evidence, State's Exhibit #1. R. p. 149. The video was admitted into evidence and played for the jury.

ARGUMENT

I. The Court of Appeals Erred By Affirming the Lower Court's Denial of the Petitioner's Motion To Suppress The Evidence Since The Petitioner Was Subjected To An Unreasonable Search And Seizure in Violation of the Fourth Amendment.

The Fourth Amendment guarantees the right to be secure from unreasonable searches and seizures. U.S. Const. amend IV. The South Carolina Constitution provides similar protections against unlawful searches and seizures. See S.C. Const. art. I, §10. Evidence obtained in violation of the Fourth Amendment is inadmissible and subject to suppression by the trial court. See Pennsylvania v. Mimms, 434 U.S. 106, 98 S.Ct. 330 (1977), Ohio v. Robinette, 519 U.S. 33, 117 S.Ct. 417 (1996), State v. Williams, 351 S.C. 591, 571 S.E.2d 703 (Ct. App. 2002), State v. Pichardo, 367 S.C. 84, 623 S.E.2d 840 (Ct. App. 2005).

It is well established that temporary detention of a person during a traffic stop, even if for a brief period of time and limited purpose, constitutes a seizure under the Fourth Amendment. Whren v. United States, 517 U.S. 806, 116 S.Ct. 1769 (1996). A seizure that is lawful at its inception can violate the Fourth Amendment if its manner and execution unreasonably infringes on an interest protected by the Constitution. The Petitioner submits that the Court of Appeals erred in finding that "the traffic stop was not unreasonably extended", that there was "reasonable suspicion of a serious crime" and that the Petitioner's gave voluntary consent to search the vehicle.

A. The Court of Appeals erred in finding that the traffic stop was not unreasonably extended and that Corporal Owens had reasonable suspicion of a serious crime.

The Petitioner submits that the Court of Appeals erred in finding that the traffic stop was not unreasonably extended and that Corporal Owens had reasonable suspicion of a serious crime. Under the clear error standard of review, the Petitioner submits that the traffic stop was unreasonably extended after Corporal Owens informed the Petitioner that he was issuing a

warning citation since he failed to articulate facts leading to the conclusion that an objective manifestation of criminal activity existed under the totality of the circumstances.

During a traffic stop, an officer may request a driver's license and vehicle registration, order the individual to step out the vehicle, run a computer check, and issue a citation. See United States v. Sullivan, 138 F.3d 126 (4th Cir. 1998), Mimms, 434 U.S. 106, 98 S.Ct. 330 (1977). Any further detention for questioning is beyond the scope of the stop and therefore illegal unless the officer has a reasonable suspicion of a serious crime. See Sullivan, 138 F.3d 126. A traffic stop cannot be used as a fishing expedition for unrelated criminal activity. See Williams, 351 S.C. at 599, 571 S.E.2d at 708. Reasonable suspicion requires a particularized and objective basis that would lead one to suspect another of criminal activity. State v. Woodruff, 344 S.C. 537, 546, 544 S.E.2d 290, 295 (Ct. App. 2001).

As was argued in the Petition for Rehearing, the Court of Appeals analysis pursuant to State v. Rivera, 384 S.C. 356, 682 S.E.2d 307 (Ct. App. 2009) and State v. Tindall, 388 S.C. 518, 698 S.E.2d 203 (2010) errantly distinguished the Petitioner's case to support their ruling that the traffic stop was reasonable and passed constitutional muster. The Petitioner submits that the proper application of Rivera and Tindall actually support his position and demonstrate the erroneous ruling of the trial court.

The Court of Appeals, explained and reasoned as follows:

> In Rivera, an officer stopped Rivera for following another vehicle too closely. Id. at 359, 682 S.E.2d at 309. During the stop, the officer asked Rivera to step out of the vehicle and asked where he and the passenger, Medero, were coming from, how long they had been there, where they were going, and the purpose of their trip. Id. Rivera and Medero gave conflicting stories regarding the purpose of their trip. Id. The officer informed Rivera he would receive a traffic warning citation and then proceeded to call for backup. Rivera, 384 S.C. at 359-60, 682 S.E.2d at 309. The officer then discussed the transport of drugs on the interstate and asked if any weapons, drugs, or large sums of money were in the vehicle. Id. Rivera replied in the negative. Id. at 360, 682 S.E.2d at 309. The officer

> subsequently asked for permission to search the vehicle, and Rivera consented. Id. The search revealed heroin in the vehicle's engine. Rivera, 384 S.C. at 360, 682 S.E.2d at 309.
>
> At trial, Rivera and Medero moved to suppress the evidence on the basis that the traffic stop was unlawfully prolonged and the consent was invalid. Id. The trial court granted the suppression motion on the basis that the officer lacked "sufficient indicators of criminal activity to justify any continued detention" beyond the purpose of the traffic stop. Id. In granting deference to the trial court because of the "any evidence" standard of review, this court upheld the trial court's suppression of the evidence. Id. at 363, 682 S.E.2d at 311.
>
> First, this court found the rental vehicle was lawfully detained and the officer's questioning of Rivera and Medero regarding the purpose, destination, and duration of their trip was reasonably related to the traffic stop. Rivera, 384 S.C. at 362, 682 S.E.2d at 310. However, this court found the purpose of the traffic stop was accomplished when the officer informed Rivera he would receive a warning citation. Id. As a result, our court concluded the officer's discussion concerning the transport of drugs on the interstate exceeded the scope of the traffic stop and constituted a second and illegal detention unless the continued detention was supported by reasonable suspicion. Id.
>
> In analyzing whether the officer had reasonable suspicion, this court found Rivera and Medero's nervousness standing alone did not create suspicion of criminal behavior, and their stories were not so inconsistent as to indicate criminal behavior. Id. at 362-63, 682 S.E.2d at 310-11. Furthermore, this court found the absence of luggage in the back seat did not provide reasonable suspicion particularly when the trunk, the usual place for luggage, "was filled" with suitcases. Rivera, 384 S.C. at 363, 682 S.E.2d at 311. Finally, this court found that there was no evidence of air fresheners located in the vehicle based on the trial court's order. Id.

App. pp. 6-7.

Interestingly, the Court of Appeals noted that in Rivera it was held that the purpose of the traffic stop was accomplished when the officer informed Rivera he would receive a warning citation, yet the Court of Appeals failed to apply this standard in the instant case. It is clear from Corporal Owens' testimony and the car video, which was admitted at trial and provided to the Court of Appeals, that Corporal Owens informed the Petitioner that he would receive a warning citation well before his questioning and observations that the Court of Appeals relied upon for

their finding of reasonable suspicion[2]. Prior to informing the Petitioner that he would be issuing a warning citation, the only factor Corporal Owens had was his own hunch or suspicion, which does not amount to reasonable suspicion. An officer's impression that a person is engaged in criminal activity without confirmation does not amount to reasonable suspicion. United States v. Sprinkle, 106 F.3d 613 (4th Cir. 1997). See State v. Woodruff, 344 S.C. 537, 544 S.E.2d 290 (Ct. App. 2001) (Finding that law enforcement officers are suspicious by training but are constrained by the courts objective analysis of reasonable suspicion). Furthermore, Corporal Owens readily admitted that he was not going to let the Petitioner leave nor was he ever free to leave. R. pp. 61-62, 64-65. As a result, the Petitioner submits that the entire process was tainted by Corporal Owens personal and subjective determination that he was not going to let the Petitioner continue on his way.

On appeal, the Petitioner argued that the trial court failed to consider the following factors that were given by Corporal Owens that are indicative of innocent travel: 1) the address the Petitioner gave for his girlfriend checked out with dispatch, 2) the Appellant had been in no trouble with law enforcement, 3) the Petitioner had recently graduated from tech school, 4) no hesitation by the Petitioner, and 5) no negative information was reported by dispatch regarding the Petitioner or the vehicle. R. pp. 34-35, 51. Instead of objectively addressing the true totality of the circumstances and the factors that were indicative of innocent travel, the Court of Appeals reasoned:

> Similar to Rivera, Owens' questions concerning Provet's destination and the purpose of his trip were reasonably related to the traffic stop, but unlike in Rivera, there are additional factors to be considered in this case. Owens testified Provet's vehicle contained several air fresheners. Additionally, Provet admitted he did not have any luggage for his two-day stay in Greenville.

[2] Officer Aman testified that the warning ticket had been issued when he arrived and Corporal Owens was explaining the ticket. R. p. 72.

App. p. 7. The Court of Appeals found the instant case distinguishable due to two factors – air fresheners and luggage, which were mischaracterized. The Court failed to acknowledge that Corporal Owens failed to take the air fresheners into evidence, which is factually similar to State v. Rivera, 384 S.C. 356, 363, 682 S.E.2d 307, 311 (Ct. App. 2009). Furthermore, as was noted by the Court of Appeals, Corp. Owens testified that there was a bag on the rear seat. App. p. 3.

Additionally, the Petitioner submits that the Court of Appeals improperly distinguished his case from this Court's ruling in Tindall. Turning to Tindall, the Court of Appeals explained:

> In Tindall, an officer stopped Tindall for speeding, following another vehicle too closely, and failing to maintain his lane. Tindall, 388 S.C. at 520, 698 S.E.2d at 204. The officer asked Tindall for his driver's license, registration, insurance, and the rental car agreement. Id. at 522, 698 S.E.2d at 205. The officer then asked Tindall to exit his vehicle and to sit in the patrol car. Id. While Tindall was exiting his vehicle, the officer testified that Tindall did a "felony stretch." Id. The officer subsequently patted down Tindall and placed him in the patrol car. Tindall, 388 S.C. at 522, 698 S.E.2d at 205. At this point, the officer questioned Tindall regarding his destination, and Tindall informed the officer he was visiting his brother in Durham, North Carolina. Id. The officer called in Tindall's driver's license and registration to dispatch. Id. Approximately three minutes later, dispatch reported no problems with Tindall's driver's license and vehicle, and the officer told Tindall he would write him a warning ticket. Id. However, the officer refused to issue the ticket at this point and continued to question Tindall for approximately another six to seven minutes regarding "where he was going," "the purpose of the trip," "what exit he would take to get to Durham," "whether he had ever been charged with any drug crimes," "what type of business he was in," and "various questions about his business." Tindall, 388 S.C. at 522, 698 S.E.2d at 205.
>
> Approximately fifteen to twenty minutes into the traffic stop, the officer asked Tindall if he could search his vehicle, and Tindall replied, "I don't care" or "I don't mind." Id. at 520, 698 S.E.2d at 204. The search revealed a substantial amount of cocaine. Id. at 520-21, 698 S.E.2d at 204. Tindall was convicted of trafficking cocaine in excess of four hundred grams and assessed a $250,000 fine. Id. at 520, 698 S.E.2d at 204. On appeal to our supreme court, Tindall argued the court of appeals erred in affirming the trial court's denial of his motions to suppress the cocaine and his statement to the police. Tindall, 388 S.C. at 520, 698 S.E.2d at 204.

Our supreme court held the "officer's continued detention of Tindall exceeded the scope of the traffic stop and constituted a seizure for purposes of the Fourth Amendment." Id. at 522, 698 S.E.2d at 205. The court found 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. Id. The court concluded the continued questioning of Tindall exceeded the scope of the traffic stop and constituted a seizure under the Fourth Amendment. Id. Specifically, the court stated, "[A] reasonable person in Tindall's position – seated in the front seat of the patrol car with two officers standing at his door, another officer to his left, and a police dog in the back seat – would not have felt free to terminate the encounter." Tindall, 388 S.C. at 522-23, 698 S.E.2d at 205

Our supreme court next analyzed whether the officer had reasonable suspicion of a serious crime when he chose not to conclude the traffic stop, despite his stated intention to issue a warning ticket. At the time of the continued detention, the officer discovered the following: (1) "Tindall was driving to Durham to meet his brother"; (2) "Tindall was driving a rental car rented the previous day by another individual which was to be returned to Atlanta on the day of the stop"; (3) "Tindall did a 'felony stretch' on exiting the vehicle"; and (4) "Tindall seemed nervous." Id. at 523, 698 S.E.2d at 206. The court concluded these facts did not provide a sufficient basis for reasonable suspicion. Id. Therefore, the supreme court reversed the trial court's ruling on the motion to suppress the cocaine. Id. Additionally, the supreme court held Tindall's consent to the search of his vehicle was invalid because it was the product of an unlawful detention under the Fourth Amendment. Id.

App. pp. 7-9.

The Court of Appeals reasoned:

We conclude the present case is distinguishable from Tindall. In Tindall, the officer questioned Tindall for approximately six to seven minutes after the purpose of the traffic stop was accomplished, and thus, a continued detention occurred. Tindall, 388 S.C. at 522, 698 S.E.2d at 205. Conversely, Owens' series of questions and observations occurred prior to the conclusion of the traffic stop because Owens was waiting to hear from dispatch regarding Provet's license and registration and a warning citation had yet to be issued. We conclude Owens developed his reasonable suspicion as a result of additional factors that were not present in Tindall.

In the case at hand, the trial court found reasonable suspicion existed to support Owens' further detention of Provet based on Owens ascertaining (1) Provet was nervous as displayed by extreme shaking of the hands and accelerated breathing, (2) third-party vehicle registration is very common in drug trafficking, (3) Provet's admission to visiting one girlfriend while driving a different girlfriend's

> vehicle, (4) Provet's claim he was coming from the Holiday Inn even though the traffic violation occurred prior to that hotel's exit, (5) Provet's presence in Greenville for two days without any luggage, (6) the presence of numerous fast food bags, a cell phone, and some receipts in Provet's vehicle, and (7) the presence of several air fresheners in the vehicle that produced a strong odor.

App. pp. 9-10.

The Petitioner submits that the Court of Appeals failed to consider the factors that were indicative of innocent travel, and that the Court mischaracterized several of the factors that were considered in their flawed analysis. As was argued by the Petitioner, Corporal Owens failed to take any of the evidence, such as the fast food bags, receipts and air fresheners, into evidence. Additionally, the Court of Appeals had identified a number of factors in Tindall that are not present in the instant case. These factors include the following: 1) Tindall was nervous even after receiving the warning; 2) Tindall was driving a rental car that he had not rented; 3) Tindall was driving only one way and then dropping the car off; 4) Tindall planned on driving approximately eighteen hours in one day; and, 5) the cities involved were both "drug hubs." See State v. Tindall, 379 S.C. 304, 665 S.E.2d 188 (Ct. App. 2008) *reversed by* 388 S.C. 518, 698 S.E.2d 203 (2010). The Petitioner submits that the factors present in Tindall far exceed the factors set forth in the instant case and it appears that Court of Appeals stands to limit this Court's ruling in Tindall.

B. The Court of Appeals erred in finding that the Petitioner gave voluntary consent to search the vehicle.

The Petitioner submits that the Court of Appeals erred in finding that he gave voluntary consent to search the vehicle. In State v. Williams, the Court of Appeals held that "when an officer asks for consent to search after an unconstitutional detention, the consent procured is per se invalid unless it is 'both voluntary and not an exploitation of the unlawful detention.'" 351 S.C. at 604, 571 S.E.2d at 710 (Ct. App. 2000). Even if this Court finds that there was not an unconstitutional detention, the burden is still on the State to prove the voluntariness of the consent. State v. Pichardo, 367 S.C. 84, 623 S.E.2d 840 (Ct. App. 2005).

In finding the search voluntary, the Court of Appeals relied upon State v. Pichardo, 367 S.C. 84, 623 S.E.2d 840 (Ct. App. 2005), but failed to recognize that it is analogous to the instant case. Interestingly, in Pichardo the Court of Appeals upheld the suppression of the evidence and reasoned that there was an immediate transition from the traffic stop to the search such that the defendants did not know the initial search was over and they were free to go. See State v. Pichardo, 367 S.C. 84, 623 S.E.2d 840. After acknowledging that Corporal Owens admitted that he was not going to let the Petitioner leave when he asked for his consent to search, the Court of Appeals reasoned: "Provet should have felt free to go because his driver's license and vehicle registration were returned and his traffic warning citation was issued." App. p. 12. In complete contrast, in State v. Pichardo, the Court of Appeals reasoned that returning documents is not enough to demonstrate that an encounter has become consensual encounter. 367 S.C. at 102, 623 S.E.2d at 850. Interestingly, Corporal Owens testified that that the purpose of returning the Petitioner's documents was for him to feel free to go, but he was not free to go. R. pp. 61-62, 64-65. The Petitioner submits that Corporal Owens created the exact involuntary situation described by the Ohio Supreme Court, as follows:

> The transition between detention and a consensual exchange can be so seamless that the untrained eye many not notice that it has occurred. The undectability of that transition may be used by police officers to coerce citizens into answering questions that they need not answer, or to allow a search of a vehicle that they are not legally obligated to allow.

State v. Robinette, 80 Ohio St.3d 234, 685 N.E.2d 762, 770-71 (Ohio 1997). The Petitioner submits that the Court of Appeals failed to address the seamless transition that occurred when Corporal Owens explained the citation and in the same breath inquired about illegal contents and asked to search the vehicle.

Even though the Court of Appeals concluded "based on the totality of the circumstances, the trial court did not err in concluding Provet voluntarily consented to the search of the vehicle." App. p. 12. The Petitioner submits that the Court briefly considered the officers actions but failed to consider the true totality of the circumstances. In State v. Williams, 351 S.C. 591, 571 S.E.2d 703 (Ct. App. 2002), the Court of Appeals set forth the factors for determining whether a reasonable person would feel free to leave:

1) The time and place of the encounter;
2) The number of officers present;
3) The length of detention;
4) Whether the officer moved the person to a different location;
5) Whether the officer informed the person he was free to leave;
6) Whether the officer indicated to the person that he was suspected of a crime, and
7) Whether the officer retained the person's documents.

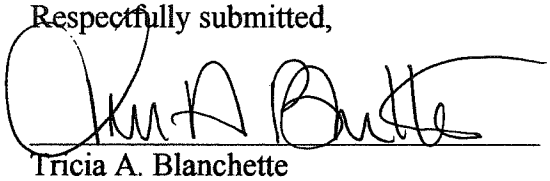
Here, the Court of Appeals failed to apply the above factors, and the trial court simply noted that the Petitioner's documents were returned and there were no threats or coercion. As was argued by the Petitioner on rehearing, the trial and appellate court failed to consider significant factors

such as whether the Petitioner was informed he was free to leave, as well as additional factors, including the characteristics of the Petitioner – age, maturity, education, intelligence and experience – as set forth in United States v. Boone, 245 F.3d 352 (4th Cir. 2001). Clearly, the Court of Appeals overlooked the fundamental question of whether a reasonable person would have felt free to leave under the totality of the circumstances. Here the totality of the circumstance included the following: 1) a young black male out of state driver, 2) removed from his vehicle on the side of a dark busy interstate, 3) subjected to a pat down search 4) was not informed he was free to go after being told he would receive a warning citation, 5) was subjected to questions from the Aggressive Crime Enforcement Unit of the South Carolina Highway Patrol, which included the presence of a canine unit, and 6) was being questioned by an officer that readily admitted that the Petitioner was not free to go. Upon proper consideration of these factors and those contained in the record and video, the Petitioner submits that the Court of Appeals erred in finding that a reasonable person would have felt free to go and that the Petitioner gave voluntary consent to search the vehicle.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court grant the Petition for Writ of Certiorari.

Respectfully submitted,



Tricia A. Blanchette
Post Office Box 12725
Columbia, South Carolina 29211
(803) 988-0008
Attorney for Petitioner

August 23, 2011