ORIGINAL

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

STEPHENO JEMAIN ALSTON,

APPELLANT

APPELLATE CASE NO. 2013-002089

Appeal from Spartanburg County

J. Derham Cole, Circuit Court Judge

Opinion No. 2015-UP-381

PETITION FOR REHEARING

On July 29, 2015, this Court affirmed Appellant's conviction for trafficking in cocaine in State v. Alston, 2015-UP-381 (S.C. Ct. App. Filed July 29, 2015). Pursuant to Rule 221(a), SCACR, Appellant respectfully petitions this Court for rehearing in light of the significant points overlooked and misapprehended by this Court in rendering its opinion.

First, this Court incorrectly held Deputy Gilbert had probable cause to stop Appellant for failure to maintain a lane and further had reasonable suspicion to briefly detain Appellant because his vehicle was "drifting" within its own lane. Second, while this Court correctly held Deputy

Gilbert's continued questioning of Appellant after Gilbert received notification from dispatch that there were no problems with either Appellant's license or registration exceeded the scope of the initial traffic stop, this Court incorrectly found the extended detention was permissible because Deputy Gilbert had an objectively reasonable and articulable suspicion that illegal activity was occurring. In so finding, this Court overlooked significant Fourth Amendment case law in this state and throughout the country. Moreover, this Court also incorrectly found Appellant's consent to search was freely and voluntarily given considering all the surrounding circumstances.

The Fourth Amendment, made applicable to the states by way of the Fourteenth Amendment, guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV; Mapp, 367 U.S. 643. "[T]he underlying command of the Fourth Amendment is always that searches and seizures be reasonable." Wilson v. Arkansas, 514 U.S. 927, 931 (1995). "Thus, the Fourth Amendment protects against unreasonable searches and seizures, including seizures that involve only a brief detention." State v. Pichardo, 367 S.C. 84, 97, 623 S.E.2d 840, 847 (2005) (citing United States v. Mendenhall, 446 U.S. 544 (1980)).

"A traffic stop is not unreasonable if conducted with probable cause to believe a traffic violation had occurred, or when the officer has reasonable suspicion the occupants are involved in criminal activity." State v. Vinson, 400 S.C. 347, 352, 734 S.E.2d 182, 184 (Ct. App. 2012) (citing State v. Burgess, 394 S.C. 407, 412, 714 S.E.2d 917, 919 (Ct. App. 2011)).

Deputy Gilbert testified that he stopped Appellant's car for failure to maintain a lane. He explained during the suppression hearing that before he pulled Appellant over, Appellant's left tire "struck" the dotted line dividing the middle lane and the fast lane. He said, "Now, when I say struck, what I would mean by that is that tire could have covered that whole line, but it didn't go all

the way across it. But it did make contact with that line and then drift back into the middle of that lane." Gilbert admitted Appellant never crossed the dotted line. Appellant merely "rode on top of it." R. 43, l. 21 – 45, l. 2.

South Carolina Code Ann. § 56-5-1900, states in relevant part: "Whenever any roadway has been divided into two or more clearly marked lanes for traffic . . . [a] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from the lane until the driver has first ascertained that such movement can be made with safety."

In this case, Appellant was traveling on Interstate 85, which had six lanes of traffic: three lanes traveling northbound and three lanes traveling southbound divided by a median. Appellant was traveling northbound in the middle lane and allegedly struck the white dotted line dividing the middle lane in which he was traveling and the far left lane or "fast lane." Merely striking the dotted line is not a violation of § 56-5-1900. Section 56-5-1900 permits a driver to move from the lane in which he is traveling when "such movement can be made with safety." There was no testimony that another vehicle was traveling in the far left lane or that it would have been unsafe at the time Appellant allegedly struck the white dotted line for him to change lanes. Because Appellant could have legally and safely changed lanes at the time he allegedly struck the white dotted line dividing the middle lane and the far left lane, Appellant did not violate § 56-5-1900. See Texas v. Cerny, 28 S.W.3d 796, 800-801 (Tex. Ct. App. 2000); see also Hernandez v. Texas, 983 S.W.2d 867, 868-871 (Tex. Ct. App. 1998).

Since Gilbert did not have probable cause to stop Appellant's vehicle for failure to maintain his lane, he unreasonably seized Appellant in violation of the Fourth Amendment. Moreover, this Court incorrectly held Gilbert had reasonable suspicion to support a brief investigatory stop because he allegedly observed Appellant drifting within his own lane of travel.

There was no testimony or evidence that Appellant was weaving between lanes or drifting between two lanes of traffic that would lead one to believe he was under the influence. Appellant was merely moving within his own lane of travel. Vehicles every day on the roadway move slightly from side to side within their own lane of travel. This is a common occurrence that does not rise to reasonable suspicion sufficient to warrant a traffic stop. Moreover, the traffic stop occurred during the early afternoon hours when it is unlikely to find a driver under the influence. Therefore, this Court incorrectly concluded Gilbert had probable cause and reasonable suspicion to stop Appellant.

Additionally, while this Court correctly held Deputy Gilbert's continued questioning of Appellant exceeded the scope of the initial traffic stop, this Court incorrectly found the extended detention was permissible because Deputy Gilbert had an objectively reasonable and articulable suspicion that illegal activity was occurring.

"The officer's purpose in an ordinary traffic stop is to enforce the laws of the roadway, and ordinarily to investigate the manner of driving with the intent to issue a citation or warning." Pichardo, 367 S.C. at 98, 623 S.E.2d at 848 (citing Ferris v. State, 355 Md. 356, 735 A.2d 491 (1991)). "Once the purpose of that stop has been fulfilled, the continued detention of the car and the occupants amounts to a second detention." Id.; see State v. Tindall, 388 S.C. 518, 522-523, 698 S.E.2d 203, 205-206 (2010) (finding "the officer's continued detention of Tindall exceeded the scope of the traffic stop and constituted a seizure for purposes of the Fourth Amendment"); see also United States v. Jones, 234 F.3d 234, 241 (5th Cir. 2000) ("The basis for the stop was essentially completed when the dispatcher notified the officers about the defendants' clean records, three minutes before the officers sought consent to search the vehicle. Accordingly, the

officers should have ended the detention and allowed the defendants to leave. And the failure to release the defendants violated the Fourth Amendment.").

As this Court found, Sergeant Gilbert unlawfully extended the traffic stop when he continued to question Appellant for approximately a minute and a half after he learned from dispatch that Appellant's license and registration were valid and after he completed the warning citation because the purpose of the traffic stop had already been accomplished. R. 53, l. 21 – 55, l. 15; R. 59, ll. 11-18; R. 61, ll. 12-23; R. 66, ll. 3-7. See Tindall, 388 S.C. at 522, 698 S.E.2d at 205 (finding the purpose of the traffic stop was accomplished when the dispatcher reported no problems with Tindall's driver's license and vehicle, and the only remaining task was the issuance of the warning ticket, and a continued detention occurred when the officer questioned Tindall for several minutes after the purpose of the stop was accomplished).

Furthermore, the record clearly reveals that Gilbert was purposefully prolonging the stop in order to allow enough time for a second officer to arrive on scene. Gilbert admitted he was "waiting on somebody to get there" because he planned to ask Appellant for consent to search the car and did not want to ask for consent until a second officer arrived. R. 35, l. 22 – 36, 16. The record also clearly reveals that Gilbert was purposefully prolonging the stop to allow time for Deputy Carraway to go home, pick up his narcotics dog, and travel to the scene. Gilbert testified that he had "a K-9 on the way." R. 35, l. 22 – 36, l. 21; R. 56, l. 12 – 58, l. 16.

Additionally, at the time Gilbert asked Appellant for consent to search his vehicle, a second officer had arrived at the scene and Gilbert had not returned Appellant's driver's license or the rental agreement. A reasonable person in this situation would not have felt free to leave. Accordingly, Gilbert's "continued detention of [Appellant] exceeded the scope of the traffic stop and constituted a seizure for the purposes of the Fourth Amendment" because a reasonable

person in Appellant's position "would not have felt free to terminate the encounter." See Tindall, 388 S.C. at 522-523, 698 S.E.2d at 205-206 (citing Florida v. Bostick, 501 U.S. 429, 434 (1991)).

Despite correctly ruling that Deputy Gilbert exceeded the scope of the initial traffic stop, this Court misapprehended and overlooked significant case law when it found Deputy Gilbert had objectively reasonable and articulable suspicion that illegal activity was occurring.

"Lengthening the detention for further questioning beyond that related to the initial stop is permissible in two circumstances. First, the officer may detain the driver for questioning unrelated to the initial stop if he has an objectively reasonable and articulable suspicion illegal activity has occurred or is occurring. Second, further questioning unrelated to the initial stop is permissible if the initial detention has become a consensual encounter." Pichardo, 367 S.C. at 99, 623 S.E.2d at 848 (quoting United States v. Hunnicutt, 135 F.3d 1345, 1349 (10th Cir. 1998)); See United States v. Brugal, 209 F.3d 353, 358 (4th Cir. 2000) (finding "[t]he Terry reasonable suspicion standard required an officer to have a reasonable suspicion that criminal activity is afoot before he may. . . continue to seize a person following the conclusion of the purposes of a valid stop"). The state has the burden to articulate facts, which are sufficient to support an officer's reasonable suspicion that criminal activity has occurred or is occurring. See State v. Butler, 343 S.C. 198, 539 S.E.2d 414 (Ct. App. 2000); see also Tindall, 388 S.C. at 527, 698 S.E.2d at 208 ("[T]he nature of the reasonableness inquiry [in determining the existence of reasonable suspicion] is highly fact-specific").

Reasonable suspicion requires "'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 also requires "something more than an inchoate and unparticularized suspicion or hunch." Lesley, 326 S.C. at 644, 486 S.E.2d at 277 (citing Butler, 343 S.C. at 202, 539 S.E.2d at 416). "In determining whether reasonable suspicion exists, the totality of the circumstances—the whole picture—must be considered." State v. Rogers, 368 S.C. 529, 534, 629 S.E.2d 679, 682 (Ct. App. 2006) (quoting Cortez, 449 U.S. at 417).

In State v. Burgess, 394 S.C. 407, 415, 714 S.E.2d 917, 921 (2011), our Supreme Court recognized the same concerns as the Fourth Circuit Court of Appeals in United States v. Foster, 634 F.3d 243, 248 (4th Cir. 2011):

> **We are mindful of concerns regarding the State 'using whatever facts are present, no matter how innocent, as indicia of suspicious activity' and that the State 'must do more than simply label a behavior as 'suspicious' to make it so.'** The State must 'be able to either articulate why a particular behavior is suspicious or logically demonstrate, given the surrounding circumstances, that the behavior is likely to be indicative of some more sinister activity than may appear at first glance.'

(internal citation omitted) (emphasis added); see State v. Moore, 404 S.C. 634, 643-644, 746 S.E.2d 352, 357 (Ct. App. 2013).

The Fourth Circuit also emphasized in Foster:

> **We are deeply troubled by the way in which the Government attempts to spin these largely mundane acts into a web of deception.** Although these matters generally only come before this Court where a police seizure uncovers some wrongdoing, we would be remiss if we did not acknowledge that **the exclusionary rule is our sole means of ensuring that police refrain from engaging in the unwarranted harassment or unlawful seizure of anyone**—whether he or she is one of the most affluent or most vulnerable members of our community.

Foster, 634 F.3d at 248-249 (emphasis added) (citing Terry v. Ohio, 392 U.S. 1, 12-13 (1968) (finding "Courts which sit under our Constitution cannot and will not be made party to lawless

invasion of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions.")).

In finding Deputy Gilbert had an objectively reasonable and articulable suspicion that illegal activity was occurring, this Court cited to Gilbert's testimony where he described the various factors he observed that raised his suspicion, including (1) Appellant's luggage was covered by a blanket; (2) Appellant asked why he was being stopped as soon as Gilbert approached his car; (3) Appellant was from Rome, Georgia, near Atlanta, which is a "major hub for criminal activity in the southeast;" (4) Appellant was driving on Interstate 85, which is "a major criminal activity corridor;" (5) the car was rented in the name of a third party who was not present; (6) the car was rented in a woman's name; (7) the car was being driven in South Carolina, a state not permitted under the rental contract; (8) there was an air freshener in the car; (9) Appellant put his house keys on the key ring for the rental car which Gilbert said indicated he was trying to personalize the vehicle; (10) Appellant's travel plans did not comply with the rental agreement because he was not permitted to drive in New Jersey and would not be able to return the car on time; (11) Appellant said he was going to pick up his mother for Mother's Day, which was a month and a half away; and (12) Appellant said he had six children but listed the ages of seven children.

When considering the totality of the circumstances, these facts are insufficient to support Gilbert's suspicion that illegal activity was occurring. Gilbert essentially characterized everything he observed during the traffic stop as suspicious and twisted trivial and mundane facts into indicia of criminal activity. He apparently hoped the sheer number of observations he listed would satisfy the reasonable suspicion standard. Furthermore, Gilbert relied heavily on his

subjective speculation in finding reasonable suspicion, instead of objective facts, as required. See Pichardo, 367 S.C. at 99, 623 S.E.2d at 848.

When looked at objectively, all of these factors are entirely innocent and would not lead an objective detached person to think Appellant was involved in illegal activity. See United States v. Foreman, 369 F.3d. 776, 781 (4th Cir. 2004) (finding "[t]he articulated factors together must serve to eliminate a substantial portion of innocent travelers before the requirement of reasonable suspicion will be satisfied"). Notably, Gilbert testified that he did not see or smell any drugs or alcohol nor did he see any weapons during the traffic stop. R. 69, l. 20 – 70, l. 12. He also admitted Appellant did not appear to be nervous, a common observation officers use to create reasonable suspicion to further detain an individual. R. 76, l. 4 – 77, l. 22.

When finding Gilbert had an objectively reasonable and articulable suspicion that illegal activity was occurring, this Court overlooked significant case law in this area, including our Supreme Court's opinion in State v. Tindall, 388 S.C. 518, 698 S.E.2d 203 (2010) and this Court's opinions in State v. Pichardo, 367 S.C. 84, 623 S.E.2d 840 (2005) and State v. Moore, 404 S.C. 634, 746 S.E.2d 352 (Ct. App. 2013).

For example, in Moore, this Court held the facts observed during the traffic stop did not provide the officer with a reasonable suspicion that illegal activity was occurring and, as a result, the officer's continued detention of Moore beyond the scope of the traffic stop was illegal and the drugs discovered during the search of Moore's car should have been suppressed. The facts relied on by the officer in Moore were as follows: "(1) Moore turned on his left turn signal when he was initially pulled over (sign that Moore might flee); (2) Moore took a long time to pull over (sign that Moore might flee); (3) Moore never turned off his turn signal (sign of nervousness); (4) Moore admitted to drinking (typically used to calm a drug trafficker's nerves); (5) Moore

started smoking a cigarette (another sign of attempting to calm nerves); (6) Moore continued to talk on his cell phone after he was pulled over by officer (common in drug trafficking cases because it indicates he is attempting to let a superior know he has been stopped by law enforcement); (7) Moore's hands were shaking heavily and his pulse was elevated (additional signs of nervousness); (8) Moore tried to pick up his cell phone once he got out of the car (sign that Moore might flee); (9) Moore had a large amount of cash in his pocket even though he admitted to being unemployed; (10) Moore drove a rental car rented by a third-party (common in drug trafficking); (11) Moore was driving on I–85, coming from the Atlanta area (a known drug corridor and a major drug source); (12) Moore claimed to be on the way to visit his grandmother (unusual to visit grandmother at 1 a.m.); (13) Moore assumed the felony stretch position even though the officers did not ask him to do so; and (14) Moore remained extremely nervous even after he was advised he would only receive a warning citation." Id. at 643, 746 S.E.2d at 356-357.

The facts in Moore are similar to the facts relied on by Deputy Gilbert in this case. Most significantly, Moore likewise was driving on Interstate 85 from the Atlanta area in a third party rental and claimed to be on his way to visit his grandmother at 1:00 am in the morning after he had been drinking, which was unusual. Like in Moore, this Court should have found that Deputy Gilbert did not have reasonable and articulable suspicion of a serious crime when he chose to exceed the scope of the traffic stop and ask Appellant for consent to search his car. See Moore, 404 S.C. 644, 746 S.E.2d at 357. Again, the sheer number of factors listed by the officer does not amount to reasonable and articulable suspicion. Additionally, the traffic stop never became a "consensual encounter" for it is undisputed that Appellant did not consent to continued detention beyond the scope of the initial traffic stop. See Pichardo, 367 S.C. at 99, 623 S.E.2d at 848.

Consequently, the continued detention of Appellant was illegal and the evidence seized during the search of his vehicle should have been suppressed. See Wong Sun, 371 U.S. at 484 (The exclusionary rule prohibits the use of evidence obtained directly or indirectly through an unlawful search or seizure under the fruits of the poisonous tree doctrine.).

Moreover, this Court incorrectly found Appellant freely and voluntarily consented to the search of this car. "Undoubtedly, a law enforcement officer may request permission to search at any time. However, 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." Tindall, 388 S.C. at 523-524, 698 S.E.2d at 206 (quoting State v. Adams, 377 S.C. 334, 339, 659 S.E.2d 272, 275 (Ct. App. 2008)); see Wong Sun, 371 U.S. 487-488 ("We need not hold that all evidence is fruit of the poisonous tree simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.") (internal citation and quotation marks omitted).

Here, any consent Appellant may have given was not voluntary. When asked for consent to search his car, Appellant stated that he was "just trying to figure what all this is about" and "I didn't do anything wrong." R. 38, l. 19; R. 66, ll. 21-24. Appellant also stated, "[N]ah, I'm not giving you consent, you the one giving consent." R. 69, ll. 12-19. These statements, along with the fact that a second officer had arrived at the scene by the time this discussion occurred and that Gilbert had not returned Appellant's license and rental agreement or given Appellant the warning citation, indicate that Appellant did not freely and voluntarily consent to the search. See

State v. Provet, 405 S.C 101, 114, 747 S.E.2d 453, 460 (2013) (affirming the lower court's finding that the defendant's consent to search his vehicle was voluntary where the officer had returned his driver's license and vehicle registration and had issued a warning citation and where only two officers were present).

However, even if Appellant had freely and voluntarily consented to the search of his car, it was invalid as "an exploitation of the unlawful detention" since Gilbert did not have objectively reasonable and articulable suspicion to exceed the scope of the initial traffic stop. Tindall, 388 S.C. at 523-524, 698 S.E.2d at 206 (internal citation and quotation marks omitted).

In light of the factors listed above that were overlooked and misapprehended by this Court in reaching its opinion, Appellant respectfully requests this Court grant rehearing and reverse his conviction and sentence.

Respectfully submitted,

Lara M. Caudy

Lara M. Caudy
Appellate Defender

This 13th day of August, 2015.

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APPELLATE CASE NO. 2013-002089

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above referenced case has been served upon Christina Catoe Bigelow, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 13th day of August, 2015.

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 13th day of August, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.