ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Spartanburg County

J. Derham Cole, Circuit Court Judge

Opinion No. 2015-UP-381 (S.C. Ct. App. filed 7/29/2015)

11-GS-42-3090

THE STATE,

RESPONDENT,

V.

STEPHENO JEMAIN ALSTON,

PETITIONER.

APPELLATE CASE NO. 2015-002134

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on September 15, 2015. App. 22.

QUESTIONS PRESENTED

1.

Did the Court of Appeals err in finding the trial judge properly denied Petitioner's motion to suppress the evidence found in his vehicle where the officer did not have reasonable suspicion Petitioner was involved in criminal activity or probable cause to stop Petitioner's car for a traffic violation?

2.

Did the Court of Appeals err in finding the trial judge properly denied Petitioner's motion to suppress the evidence found in his vehicle where the officer's continued detention of Petitioner exceeded the scope of the traffic stop and constituted a second seizure for purposes of the Fourth Amendment and where the officer did not have reasonable and articulable suspicion of a serious crime or Petitioner's consent?

3.

Did the Court of Appeals err in finding the trial judge properly denied Petitioner's motion to suppress the evidence found in his vehicle where Petitioner's consent to search was not freely and voluntarily given, and even if it was freely and voluntarily given, was invalid as an exploitation of an unlawful detention?

STATEMENT OF THE CASE

Procedural History

A Spartanburg County Grand Jury indicted Petitioner at the June 20, 2011 term of General Sessions for trafficking in cocaine. R. 211-212. His case was called to trial on March 18, 2013 before the Honorable J. Derham Cole, and a jury. R. 1. Petitioner was tried in his absence after he did not appear for trial. R. 6, ll. 20-25; R. 97, l. 3 – 98, l. 9. Assistant Solicitor J. Edward Hunter represented the state, and Andrew J. Johnston represented Petitioner. R. 1.

On March 19, 2013, the jury found Petitioner guilty. R. 202, ll. 19-25. The sealed sentence was opened on September 19, 2013. R. 203. Judge Cole sentenced Petitioner to twenty-five years imprisonment and a $200,000 fine. R. 206, ll. 20-24.

The Court of Appeals affirmed Petitioner's conviction and sentence on July 29, 2015. State v. Alston, 2015-UP-381 (S.C. Ct. App. filed July 29, 2015); App. 1-8. Petitioner filed a petition for rehearing on August 13, 2015. App. 9-21. On September 15, 2015, the Court of Appeals denied the petition for rehearing. App. 22.

Petitioner now files this petition for writ of certiorari requesting review of the Court of Appeals' decision.

Relevant Facts

Petitioner moved pretrial to suppress the cocaine seized from his vehicle in violation of his Fourth Amendment rights. R. 7, ll. 24-25. In response to Petitioner's motion, the state called Deputy Donnie Gilbert of the Spartanburg County Sheriff's Office to testify.

A. Testimony

On Monday, March 28, 2011, Deputy Gilbert was monitoring traffic on Interstate 85 in Spartanburg County. R. 12, ll. 13-17. He was parked perpendicular to traffic on the northbound side of the interstate when he "observed a Hyundai Santa Fe pass [his] location and failed to

maintain its lane of travel." Gilbert claimed, "[A]fter it passed by me its left side tire struck the dotted line that divides the middle lane, which it was traveling in, and the fast lane, which would've been to its left. Then it drifted back into the middle of that middle lane." Due to this perceived traffic violation, Gilbert pursued the vehicle and, once he caught up to it, activated his blue lights. The driver immediately pulled over to the "emergency shoulder" on the right side of the road. R. 12, l. 22 – 14, l. 10.

Gilbert maintained that as he approached the vehicle, "the first thing [he] noticed was in the rear cargo area there was some luggage covered up by a blanket." R. 16, ll. 3-6. He said, "That's not common with the motoring public that I come into contact with every day. You just don't see that. You don't see the people to actually take the time to cover it with a blanket. They put their luggage in there and go." R. 40, l. 19 – 41, l. 2.

After noticing the luggage, Gilbert said he walked to the passenger side window and the driver, who was later identified as Petitioner, immediately asked him "why he was being stopped." R. 16, ll. 5-9. Gilbert claimed Petitioner's question was not "normal." He said, "It's not consistent with the innocent motoring public. Ninety-nine percent of the time [motorists] will let - - they will let me explain why, basically get to that point." R. 17, ll. 2-6.

After obtaining Petitioner's driver's license, Gilbert learned Petitioner's identity and that he was from Rome, Georgia, which the officer maintained was south of Atlanta. The fact that Petitioner was from an area near Atlanta caused Gilbert some concern. He explained, "Me being involved in the interdiction community, Atlanta is a major hub for criminal activity in the southeast." Moreover, Gilbert maintained the fact that Petitioner was traveling on Interstate 85 also caused him some concern. He said, "Again, me being involved in the interdiction community, Interstate 85 is a major criminal activity corridor connecting Atlanta to many routes to the south and to the north of that." R. 17, l. 8 – 18, l. 6.

When Gilbert asked Petitioner for the paperwork for the car, Petitioner produced a rental contract. R. 18, ll. 10-13. Gilbert learned from the contract that the car was rented in Cartersville, Georgia, which is also in the Atlanta area. The car was rented on Saturday, March 26, 2011, which was two days before the stop, to a Tomeka Harris.[1] Gilbert maintained the fact that the vehicle was rented to a third party raised his suspicion because "in [his] training and experience, that is very common when it comes to criminal activity. They will have a third-party rental in their possession. That way if they are involved in criminal activity they're not in their vehicle. So that vehicle won't get seized when they get caught." R. 20, l. 13 – 21, l. 2. Gilbert also said he thought it was suspicious the car was rented in a female's name because "a lot of your criminal organizations will rent a vehicle in a woman's name for the simple fact that law enforcement does not - - they are not threatened by a woman. They don't recognize criminal activity with a female. At least that's what the drug trafficking organizations think." R. 21, ll. 3-11.

According to Gilbert, the rental contract indicated the car was only allowed to be operated in five states: Georgia, Tennessee, Kentucky, Virginia, and West Virginia. Since Petitioner was stopped in South Carolina, he was driving in a state that was not listed on the rental contract as a place where Petitioner was permitted to travel. R. 21, ll. 12-24. Gilbert said, "Another thing that raised a big flag with me is why he's putting the states on here like Georgia, Tennessee, Kentucky, West Virginia, and Virginia. In my mind that automatically makes me think that from the beginning of the trip he was trying to avoid Interstate 85." R. 26, ll. 10-14.

Additionally, Gilbert testified, "There was a key in the ignition that is consistent with the car being a rental, just one key. And on the key ring there was two house keys on the key ring, which is very odd. I mean, you don't see that. Anytime somebody rents a vehicle, in my training and

[1] This person is also referred to as Tomesha Harris in other places in the record.

experience and in the fourteen years of being involved in law enforcement, you don't see other people took or take their house keys and put [them] on the key ring for the rental. To us, in my training and experience, they're trying to personalize the vehicle." R. 22, ll. 13-25.

Gilbert eventually asked Petitioner to get out of the car and stand near his patrol vehicle. As Petitioner did so, Gilbert noticed an air freshener in the "driver's door pocket." Gilbert maintained, "To me, that's also odd because in a rental vehicle you just don't see people go straight to a store and buy an air freshener and put it in a rental vehicle if it's not yours." He claimed an air freshener "could be used as a masking agent to hide odors of other things, which could be drugs, could be anything that he's trying to hide that he doesn't want you to smell."[2] R. 23, l. 1 – 24, l. 24.

When questioned by Gilbert, Petitioner told him that Tomeka Harris was his girlfriend. Petitioner also explained he was traveling to Newark, New Jersey to pick up his mother and bring her back to Georgia for Mother's Day. Gilbert said this was "another red flag" since New Jersey was another state not listed on the rental agreement and because Mother's Day was not until May and this was the end of March. R. 25, l. 15 – 27, l. 6. Petitioner later told Gilbert he was concerned about his mother's health and was afraid she was not being honest about her condition so "[he] figured [he] would go up there and see what's going on." R. 35, ll. 1-5.

Moreover, Gilbert testified he asked Petitioner how long he planned on staying in New Jersey and Petitioner "advised somewhere around a week, yeah, something like that, just whenever [his mother] gets ready to leave, when [Petitioner] get[s] rested up." Gilbert said he specifically asked Petitioner if he was going to stay in New Jersey until the following Monday and Petitioner

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[2] While Gilbert claimed during the suppression hearing that cocaine has an odor depending on its volume and the way it is packaged, he admitted he did not smell any cocaine that day and, later during his trial testimony, that he could not smell any odor coming from the four hundred and thirty-four grams of cocaine present in the courtroom. R. 51, l. 9 – 52, l. 6; R. 144, l. 25 – 145, l. 13; R. 169, ll. 21-22.

said, "Yeah, something like that . . ." Gilbert noted the rental vehicle was due back the upcoming Saturday, which was two days before Petitioner said that he expected to head back to Georgia. R. 34, l. 20 – 35, l. 21; R. 27, l. 10 – 28, l. 1.

While Gilbert was writing Petitioner a warning ticket for failure to maintain a lane, the officer asked Petitioner what he did for a living. Gilbert testified Petitioner told him he owned a clothing store in Rome, Georgia, and that "he had to make a living somehow, he had six kids to feed." Gilbert asked Petitioner how old his children were and Petitioner allegedly gave the ages of seven kids. When asked by the solicitor what this meant to him, Gilbert testified, "He's not keeping up with - - it's the stress of the situation. He's not even being able to keep up with how old the kids are and how many he's got." R. 33, l. 7 – 34, l. 11.

After Gilbert checked Petitioner's license, he went back to his vehicle and called Deputy Jason Carraway. Gilbert testified he was trying "to figure out if [Carraway] was close to [him] or not." However, Carraway responded he had to go home to pick up his drug dog and then come back. Since Carraway would not be able to arrive at the scene with his drug dog for some time, Gilbert explained, "I went ahead and switched to channel 1 to see if anybody on uniform patrol was close to me at that point in time." Gilbert said, "They had somebody coming to me, but I think it was - - they didn't say how long it was going to be, but [the person coming] wasn't necessarily in the same area as me." R. 31, ll. 1-11.

Gilbert continued to wait for another law enforcement officer to arrive at the scene. He knew he was going to ask Petitioner for consent to search his vehicle, but he explained, "I've done got to the point to where I'm not going to ask for consent until I actually get somebody else there with me for the simple fact that a lot of times things start getting a lot - - a little tense and people start figuring out what's actually going on when you start asking for consent to search." R. 35, l. 22 – 36, l. 21.

About sixteen minutes and thirty seconds into the traffic stop, and after "First Sergeant Barnett from the uniform patrol" arrived on scene, Gilbert asked Petitioner for consent to search his car. R. 38, l. 25 – 39, l. 1. Gilbert testified, "I then asked for consent to search the vehicle. And instead of answering the question, which I encounter sometimes, Mr. Alston [Petitioner] explained, 'I'm just trying to figure all - - what all this is about.' I advised him that I'm just asking a question. He said, I mean yeah you can search it, quoting him." Petitioner then asked Gilbert "why you want to search the vehicle? And [Gilbert] explained to him I'm not going to answer that until everything's done." At some point, Gilbert claimed he advised Petitioner he had a right to refuse consent, but Petitioner still indicated to Gilbert that he could search the vehicle. R. 37, l. 6 – 38, l. 21. Gilbert then began to search Petitioner's car and "Captain Hollifield and Deputy Carraway arrived at the scene shortly thereafter and assisted as well." R. 40, ll. 7-10.

On cross-examination, Gilbert testified that before he pulled Petitioner over, Petitioner's left tire "struck" the dotted line dividing the middle lane and the fast lane. He explained, "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 Petitioner never crossed the dotted line. Petitioner merely "rode on top of it." R. 43, l. 21 – 45, l. 2.

Gilbert conceded that when he approached the passenger window, he did not see any guns or any other weapons nor did he smell alcohol, marijuana, or cocaine. R. 50, l. 14 – 52, l. 6. He admitted he called both the tag for the vehicle and Petitioner's driver's license into dispatch and both came back "clear." Gilbert testified, "Everything was clear on his license, and the tag came back to that vehicle." R. 53, l. 21 – 54, l. 24. Moreover, Gilbert maintained he learned this information from dispatch while he was writing Petitioner a warning for failure to maintain a lane. R. 54, l. 25 – 55, l. 5.

Gilbert said he finished filling out the warning ticket after another officer arrived on scene, but he claimed he could not remember whether he had completed the warning ticket when he asked Petitioner for consent to search the car. He testified, "At this point in time, I don't know. I can't tell you one way or the other because I don't remember." After a lot of back and forth with defense counsel, Gilbert said, "It's not on camera, so I really don't know. If we can watch the tape to try to figure it out, that's fine with me, but at this point in time I can't tell you one way or the other." But Gilbert did explain that he never gave the warning ticket to Petitioner nor did he return Petitioner's license and paperwork before he asked for consent to search. He also admitted the warning form was very simple and that it required very little information to complete. R. 59, l. 1 – 60, l. 11; R. 61, l. 12 – 63, l. 15.

Additionally, Gilbert testified he did not inform Petitioner he was free to leave before he asked for consent to search the car. He said, "In my judgment [he was] not free to leave as it is." Gilbert clarified that even though he had checked Petitioner's license and paperwork, which both came back clear, and had written Petitioner a warning, he did not think Petitioner was free to leave. R. 63, l. 16 – 64, l. 13. Gilbert refused to speculate whether Petitioner believed at that point that he was free to leave. But he did admit again that he had not informed Petitioner he was free to leave and, at this point, a second police officer had arrived on scene and parked behind Gilbert's vehicle. R. 64, l. 14 – 65, l. 15.

Gilbert further explained that after this second officer arrived on scene and Gilbert had finished writing the warning ticket, but had not given it to Petitioner, he asked Petitioner for consent to search the car. When asked for consent to search, Gilbert claimed Petitioner responded that he was "just trying to figure out what this is all about." However, according to Gilbert, Petitioner eventually told Gilbert that he could search his car. Gilbert then began to approach Petitioner's car, but hesitated and walked back to Petitioner. He told Petitioner he could refuse consent, but, despite

informing Petitioner he could refuse, Petitioner allegedly told Gilbert he could search the car. Petitioner did say at one point, however, that "I'm not giving you consent, you the one giving consent." Petitioner also repeatedly asked why Gilbert wanted to search the car. R. 66, l. 3 – 69, l. 17. Gilbert ultimately searched Petitioner's vehicle and, with the assistance of Captain Hollifield, discovered cocaine in the steering column. R. 156, l. 21 – 159, l. 21.

Gilbert again conceded that at the time he asked for consent to search, he had not seen or smelled any drugs or alcohol nor had he seen any weapons. He also confirmed he had checked Petitioner's license, the vehicle tag, and the rental agreement, and all were valid. Gilbert claimed he ultimately asked Petitioner for consent to search the car after he had observed behavior he found to be suspicious and after noting that Petitioner was traveling from the Atlanta area on Interstate 85. R. 69, l. 20 – 70, l. 25.

B. Arguments by Counsel

After Gilbert finished testifying, defense counsel told the court he had "some concern about the initial reason for the stop." He said, "The officer stated that the vehicle being driven by Mr. Alston [Petitioner] never crossed the dotted line, but he used the word struck, that [the car] had struck [the line] and then it went back into his lane, which would've been the proper thing to do." Defense counsel argued this was not a "sufficient basis for the stop." R. 84, l. 16 – 85, l. 5.

Counsel also argued there was no valid consent to search the vehicle. He pointed out that Petitioner unequivocally stated, "I'm not giving consent, you're giving consent." However, counsel argued that "if there was, in fact, a valid consent, it was obtained by prolonged detention." He asserted that after the officer determined Petitioner had a valid license and that the vehicle tag was clear, he wrote Petitioner a warning. R. 85, l. 6 – 86, l. 5. He continued:

> [B]ut the officer did not give the warning to Mr. Alston, we would argue, because the officer was stalling for time to allow another officer to come on the scene.

> There is no clear delineation between the end of the stop and the request for consent. They run completely into one another. The officer never says, okay, I've checked you out, here's your citation, you can leave. Oh, and by the way, do you mind if I search your car? There is no such demarcation between those two things in this case.
>
> Your honor, it is our position that Mr. Alston was illegally seized at that point because the purpose of the stop had been fulfilled. As I said earlier, all of the things that the officer's entitled to do had been done and the officer had begun to write the warning citation with that very little bit of information that it requires.
>
> So we move from a situation where he doesn't have anything left to do with the traffic stop and he begins to conduct a narcotics investigation. But he's conducting that narcotics investigation without reasonable articulable suspicion.
>
> Mr. Alston was not free to go per the officer. And I think the officer concedes that Mr. Alston would have known that he wasn't free to leave. The fact that another officer had come on the scene, the fact that he'd been pulled over with a blue light, the fact that the officer was [in] uniform, has his guns, gun with him, I think that Mr. Alston is at that point seized. And I would argue to the court that based on the cases that that seizure, that second seizure was in violation of the Fourth Amendment because it was without probable cause and without reasonable articulable suspicion.

R. 86, l. 5 – 87, l. 11.

In response, the solicitor argued the officer had probable cause that a traffic violation had occurred, had reasonable articulable suspicion to detain Petitioner longer than necessary to issue the warning ticket, and that Petitioner had voluntarily consented to the search. Therefore, the state concluded the cocaine should not be suppressed. R. 95, ll. 9-15. The solicitor claimed Gilbert had reasonable articulable suspicion to prolong the stop because of a multitude of factors, including (1) Interstate 85 is a "known criminal corridor;" (2) Atlanta is a "source city for drugs;" (3) the discrepancies between Petitioner's answers and the rental agreement; (4) the luggage was covered by a blanket; (5) the additional keys on the key ring; (6) the air freshener found in the car; and (7) the third party rental. R. 90, l. 12 - 93, l. 18.

C. Court Ruling

The court ultimately held, "I find that the stop made by the officer was pursuant to a valid traffic stop, that it was based upon probable cause, that the detention resulting from that stop was based upon the totality of the circumstances as presented by the evidence in this cause, was reasonable under the Fourth Amendment and that the search made of the vehicle which resulted in the seizure of evidence to be used in the trial against him was based upon consent and in this case with actual acknowledge of his right to refuse consent. All right. And, therefore, the motion to suppress is denied." R. 98, ll. 10-20.

ARGUMENT

1.

The Court of Appeals erred in finding the trial judge properly denied Petitioner's motion to suppress the evidence found in his vehicle where the officer did not have reasonable suspicion Petitioner was involved in criminal activity or probable cause to stop Petitioner's car for a traffic violation.

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 v. Ohio, 367 U.S. 643 (1961). A traffic stop constitutes a Fourth Amendment seizure and, therefore, must be reasonable under the circumstances. State v. Vinson, 400 S.C. 347, 351, 734 S.E.2d 182, 184 (Ct. App. 2012) (internal citations omitted). "Reasonableness is measured in objective terms by examining the totality of circumstances." Vinson, 400 S.C. at 352, 734 S.E.2d at 184 (quoting State v. Pichardo, 367 S.C. 84, 101, 623 S.E.2d 840, 849 (2005)) (internal quotation marks omitted). "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." Vinson, 400 S.C. at 352, 734 S.E.2d at 184 (citing State v. Burgess, 394 S.C. 407, 412, 714 S.E.2d 917, 919 (Ct. App. 2011)); see Whren v. United States, 517 U.S. 806, 810 (1996) ("As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred."). "Moreover, a police officer's subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." Vinson, 400 S.C. at 352, 734 S.E.2d at 184 (quoting State v. Corley, 383 S.C. 232, 241, 679 S.E.2d 187, 192 (Ct. App. 2009)) (internal quotation marks omitted).

Here, Deputy Gilbert illegally seized Petitioner in violation of the Fourth Amendment because he did not have reasonable suspicion Petitioner was involved in criminal activity or probable cause to stop Petitioner's car for a traffic violation. Gilbert claimed he stopped Petitioner's car for failure to maintain a lane. He asserted during the suppression hearing that, before he pulled Petitioner over, Petitioner'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 Petitioner never crossed the dotted line. Petitioner merely "rode on top of it." R. 43, l. 21 – 45, l. 2.

The written warning completed by Gilbert during the traffic stop also indicated the "nature of contact" was "fail to maintain lane." R. 210. (Defendant's Exhibit No. 1). Presumably, although not explicitly stated during trial, Petitioner was stopped and later warned for allegedly violating S.C. Code Ann. § 56-5-1900, which states in relevant part: "Whenever any roadway has been divided into two or more clearly marked lanes for traffic the following rules in addition to all others consistent herewith shall apply: (a) 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 his argument at trial, the solicitor cited Vinson in support of his position that Gilbert had probable cause to stop Petitioner's vehicle for failure to maintain his lane. Based on the Court of Appeals' holding in Vinson, the solicitor argued that "just striking the lane . . . is a violation of that statute and did give reason for Deputy Gilbert to pull the vehicle over." R. 89, l. 3 – 90, l. 4. Based on his reliance on Vinson, it is clear the statute the solicitor was referring to was S.C. Code Ann. § 56-5-1900.

However, Vinson is factually different from this case. In Vinson, the defendant was traveling on a two-lane roadway in which traffic was moving in opposite directions in each lane. The two lanes of travel were divided by two solid yellow lines indicating that passing was prohibited. The defendant was stopped for allegedly striking the double yellow lines. Vinson, 400 S.C. at 349, 734 S.E.2d at 183. In its opinion, the Court of Appeals maintained that, under the plain language of § 56-5-1900, a driver must maintain his vehicle "entirely within a single lane" unless "it is not practicable or the driver can safely change lanes." The court held the officer was justified in stopping Vinson for a perceived violation of § 56-5-1900 because "Vinson's front tire crossed into the area between the double yellow lines that separated opposing lanes of traffic in a 'no passing' zone" and because it was practicable for Vinson to remain within his lane of traffic. Id. at 353, 734 S.E.2d at 185.

In this case, Petitioner was traveling on Interstate 85, which had six lanes of traffic: three lanes traveling northbound and three lanes traveling southbound divided by a median. Petitioner 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." This action 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 Petitioner allegedly struck the white dotted line for him to change lanes. Because Petitioner 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, Petitioner 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).

Moreover, the Court of Appeals incorrectly held Gilbert had reasonable suspicion to support a brief investigatory stop because he allegedly observed Petitioner drifting within his own lane of travel. There was no testimony or evidence that Petitioner was weaving between lanes or drifting between two lanes of traffic that would lead one to believe he was under the influence as Gilbert suggested. Petitioner 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, the Court of Appeals incorrectly concluded Gilbert had reasonable suspicion to stop Petitioner.

Because Deputy Gilbert had neither reasonable suspicion Petitioner was involved in criminal activity or probable cause that he committed a traffic violation, the trial court erred in denying Petitioner's motion to suppress the cocaine found in his vehicle. See Wong Sun v. United States, 371 U.S. 471, 484 (1963) (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.).

2.

The Court of Appeals erred in finding the trial judge properly denied Petitioner's motion to suppress the evidence found in his vehicle where the officer's continued detention of Petitioner exceeded the scope of the traffic stop and constituted a second seizure for purposes of the Fourth Amendment and where the officer did not have reasonable and articulable suspicion of a serious crime or Petitioner's consent.

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." Pichardo, 367 S.C. at 97, 623 S.E.2d at 847 (citing United States v. Mendenhall, 446 U.S. 544 (1980)).

A. Deputy Gilbert's continued detention of Petitioner exceeded the scope of the traffic stop and constituted a seizure for purposes of the Fourth Amendment.

"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 the Court of Appeals correctly found, Deputy Gilbert unlawfully extended the traffic stop when he continued to question Petitioner for approximately a minute and a half after he learned from dispatch that Petitioner's license and rental contract were valid and after he had completed the warning citation because the purpose of the traffic stop had already been

accomplished. 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 license and vehicle, and the only remaining task was the issuance of the warning, and a continued detention occurred when the officer questioned Tindall for several minutes after the purpose of the stop was accomplished); see also State v. Rivera, 384 S.C. 356, 682 S.E.2d 307 (Ct. App. 2009) (finding the purpose of the traffic stop was accomplished when the officer informed Rivera he would receive a warning and found the officer's questions regarding the transport of drugs exceeded the scope of the initial traffic stop and constituted a second and illegal detention).

The recording of the traffic stop in this case shows Gilbert had completed the warning approximately fifteen minutes and ten seconds into the traffic stop. (DVD of Traffic Stop). At this time, one can clearly see Gilbert put away his pen, rip off the warning from his pad, and place the warning in his right hand. (DVD of Traffic Stop). After this is completed, instead of giving Petitioner the warning and returning his license and rental agreement, Gilbert continued to ask Petitioner questions unrelated to the purpose of the traffic stop. Specifically, Gilbert asked Petitioner whether the rental company had originally given Petitioner a Nissan Cube, which the rental agreement indicated, and whether everything in the vehicle belonged to Petitioner. (DVD of Traffic Stop). While Gilbert was asking Petitioner these questions, a second officer arrived, and Gilbert asked Petitioner for consent to search his car. (DVD of Traffic Stop); R. 66, ll. 3-7.

Moreover, the record clearly reveals Gilbert was purposefully prolonging the stop in order to allow enough time for a second officer to arrive. Gilbert admitted he was "waiting on somebody to get there." R. 35, ll. 22-25. He testified he planned to ask Petitioner for consent to search his car, but, because asking for consent sometimes causes tension, he did not want to ask for consent until a second officer arrived. R. 36, ll. 1-16. The record also shows Gilbert was purposefully prolonging the stop to allow time for Deputy Carraway to go home, pick up his

drug dog, and travel to the scene. Gilbert asserted he had "a K-9 on the way." R. 35, l. 22 – 36, l. 21; R. 56, l. 12 – 58, l. 16. This is likely why Gilbert took longer than necessary to complete the warning, which even Gilbert conceded required very little information and effort to complete. R. 59, l. 23 – 60, l. 16.

Additionally, at the time Gilbert asked Petitioner for consent to search his vehicle, a second officer had arrived at the scene and Gilbert had not returned Petitioner'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 [Petitioner] exceeded the scope of the traffic stop and constituted a seizure for the purposes of the Fourth Amendment" because a reasonable person in Petitioner'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)); see also Arizona v. Johnson, 555 U.S. 323 (2009); see also United States v. Sullivan, 138 F.3d 126, 132 (4th Cir. 1998).

B. Deputy Gilbert did not have reasonable and articulable suspicion of a serious crime when he chose not to conclude the traffic stop.

Despite correctly holding that Deputy Gilbert exceeded the scope of the initial traffic stop, the Court of Appeals incorrectly found Deputy Gilbert had objectively reasonable and articulable suspicion that illegal activity was occurring. App. 7.

"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), this 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, the Court of Appeals cited to Gilbert's testimony where he described the various factors he observed that allegedly raised his suspicion, including (1) Petitioner's luggage was covered by a blanket; (2) Petitioner asked why he was being stopped as soon as Gilbert approached his car; (3) Petitioner was from Rome, Georgia, near Atlanta, which is a "major hub for criminal activity in the southeast;" (4) Petitioner 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) Petitioner put his house keys on the key ring for the rental car which Gilbert said indicated he was trying to personalize the vehicle; (10) Petitioner'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) Petitioner said he was going to pick up his mother for Mother's Day, which was a month and a half away; and (12) Petitioner said he had six children but listed the ages of seven children. App. 6.

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. When looked at objectively, all of these factors are entirely innocent and would not lead an objective detached person to think Petitioner was involved in a serious crime. 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").

Gilbert 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. Notably, Gilbert testified he did not see or smell any drugs or alcohol nor did he see any weapons. R. 69, l. 20 – 70, l. 12. He also testified that Petitioner did not appear to be nervous. R. 76, l. 4 – 77, l. 22.

The Court of Appeals should have found 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 Petitioner 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 Petitioner 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 Petitioner 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.).

3.

The Court of Appeals erred in finding the trial judge properly denied Petitioner's motion to suppress the evidence found in his vehicle where Petitioner's consent to search was not freely and voluntarily given, and even if it was freely and voluntarily given, was invalid as an exploitation of an unlawful detention.

"Undoubtedbly, 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)).

Here, any consent Petitioner may have given was not voluntary. When asked for consent to search his car, Petitioner stated 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. Petitioner 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 by the time this discussion occurred and that Gilbert had not returned Petitioner's license and rental agreement or given Petitioner the warning citation, indicate Petitioner 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 Petitioner had voluntarily consented to the search of his car, it was invalid as "an exploitation of the unlawful detention" since Gilbert did not have reasonable articulable suspicion to prolong the traffic stop. Tindall, 388 S.C. at 523-524, 698 S.E.2d at 206 (internal citation and quotation marks omitted).

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the questions presented.

Respectfully submitted,

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of October, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
J. Derham Cole, Circuit Court Judge

Opinion No. 2015-UP-381 (S.C. Ct. App. filed 7/29/2015)
11-GS-42-3090

THE STATE,

RESPONDENT,

V.

STEPHENO JEMAIN ALSTON,

PETITIONER.

APPELLATE CASE NO. 2015-002134

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case have been served on Christina Catoe Bigelow, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and the South Carolina Court of Appeals, this 26th day of October, 2015.

Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 26th day
of October, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.