

STATE OF SOUTH CAROLINA
In The Supreme Court

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On Writ of Certiorari to the Court of Appeals **S.C. Supreme Court**
Appeal from Spartanburg County

The Honorable J. Derham Cole, Circuit Court Judge

Appellate Case No. 2013-002089

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

STEPHENO JEMAIN ALSTON,

PETITIONER.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUE ON CERTIORARI

The Court of Appeals properly affirmed the trial judge's denial of Petitioner's motion to suppress the cocaine found in his car where the officer had reasonable suspicion to stop Petitioner's vehicle based upon the car's drifting back and forth in its lane and probable cause to stop the vehicle based upon the car's failure to properly maintain its lane; where the officer had not measurably detained Petitioner beyond the normal course of the traffic stop at the time the officer requested consent to search; where, even if there was a prolonged detention of Petitioner, it was justified based on the reasonable suspicion acquired by the officer; and where Petitioner's consent to search was given freely and voluntarily and was not an exploitation of any unlawful detention.

STATEMENT OF THE CASE

Petitioner was indicted in Spartanburg County in June of 2011 for trafficking in cocaine. On March 18, 2013, Petitioner's case was called for trial before the Honorable J. Derham Cole and a jury. Petitioner was tried in his absence after he failed to appear for trial. On March 19, 2013, the jury found Petitioner guilty as charged, and Judge Cole sealed the sentence. On September 19, 2013, the sealed sentence of twenty-five years was opened and read in Petitioner's presence. A timely notice of appeal was served and filed.

On July 29, 2015, the South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. State v. Alston, Opinion No. 2015-UP-381 (S.C. Ct. App. filed July 29, 2015). Petitioner's request for rehearing was denied on September 15, 2015. Petitioner timely submitted a Petition for Writ of Certiorari and this Return follows.

ARGUMENT

The Court of Appeals properly affirmed the trial judge's denial of Petitioner's motion to suppress the cocaine found in his car where the officer had reasonable suspicion to stop Petitioner's vehicle based upon the car's drifting back and forth in its lane and probable cause to stop the vehicle based upon the car's failure to properly maintain its lane; where the officer had not measurably detained Petitioner beyond the normal course of the traffic stop at the time the officer requested consent to search; where, even if there was a prolonged detention of Petitioner, it was justified based on the reasonable suspicion acquired by the officer; and where Petitioner's consent to search was given freely and voluntarily and was not an exploitation of any unlawful detention.

Relevant Facts

The State hereby incorporates by reference its "Relevant Facts" section from the Final Brief of Respondent. See Brief of Respondent, pp. 3-9.

Applicable Law

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). In Fourth Amendment search and seizure cases, the appellate court is limited to determining if there is any evidence to support the trial court's findings and can only reverse due to clear error. State v. Flowers, 360 S.C. 1, 5, 598 S.E.2d 725, 727 (Ct. App. 2004); see State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000) ("[W]e will review the trial court's ruling like any other factual finding and reverse if there is clear error. We will affirm if there is any evidence to support the ruling."). The reviewing court may conduct its own review of the record to determine whether the trial judge's ruling is supported by the evidence. State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 460 (2002). However, the appellate court must affirm the trial court if there is any evidence in the record to support the ruling. State v. Pichardo, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005). The appellate court will not reverse merely because it would have reached a different conclusion than the trial judge. State v. Rivera, 384 S.C. 356, 361, 682 S.E.2d 307, 310 (Ct. App. 2009), *overruled in*

part on other grounds by State v. Provet, 405 S.C. 101, 108, 747 S.E.2d 453, 457 (2013)
(citations omitted).

The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. amend. IV. That guarantee protects against unreasonable searches and seizures, including those involving only a brief detention. Pichardo, 367 S.C. at 97, 623 S.E.2d at 847. “The touchstone of the Fourth Amendment is reasonableness.” Florida v. Jimeno, 500 U.S. 248, 250 (1991). Thus, only unreasonable searches and seizures are prohibited. State v. Foster, 269 S.C. 373, 378, 237 S.E.2d 589, 591 (1977); see Maryland v. Buie, 494 U.S. 325, 331 (1990) (“It goes without saying that the Fourth Amendment bars only unreasonable searches and seizures[.]”).

For Fourth Amendment purposes, a traffic stop of a vehicle, along with the detention of individuals during the stop, constitutes a seizure. State v. Maybank, 352 S.C. 310, 315, 573 S.E.2d 851, 854 (Ct. App. 2002). The reasonableness of a stop or detention “is measured in objective terms by examining the totality of the circumstances.” Ohio v. Robinette, 519 U.S. 33, 39 (1996). The test regarding whether reasonable suspicion exists is an objective assessment of the circumstances, and the officer's subjective motivations are irrelevant. State v. Provet, 405 S.C. 101, 108, 747 S.E.2d 453, 457 (2013) (citations omitted). However, the initiation of a traffic stop is reasonable *per se* when probable cause exists to believe a traffic violation has occurred. State v. Williams, 351 S.C. 591, 598, 571 S.E.2d 703, 707 (Ct. App. 2002). A traffic stop is also not unreasonable under the Fourth Amendment when an officer has a reasonable suspicion the occupants are involved in criminal activity. State v. Burgess, 394 S.C. 407, 412, 714 S.E.2d 917, 919 (Ct. App. 2011); see also State v. Rogers, 368 S.C. 529, 534, 629 S.E.2d 679, 682 (Ct. App. 2006) (“[A] policeman who lacks probable cause but whose observations lead

him reasonably to suspect that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly in order to investigate the circumstances that provoke that suspicion.”) (citations omitted). A law enforcement officer’s subjective intentions generally play no role in a Fourth Amendment analysis. See State v. Corley, 383 S.C. 232, 241, 679 S.E.2d 187, 192 (Ct. App. 2009).

A lawful traffic stop begins at the point an officer stops a vehicle to investigate a traffic violation and “ordinarily continues, and remains reasonable, for the duration of the stop.” Arizona v. Johnson, 555 U.S. 323, 333 (2009). Once a lawful traffic stop is initiated, an officer may order the driver and any passengers out of the vehicle pending completion of the stop and “may request a driver’s license and vehicle registration, run a computer check, and issue a citation.” Pichardo, 367 S.C. at 98, 623 S.E.2d at 847 (citing United States v. Sullivan, 138 F.3d 126 (4th Cir. 1998)); see Maryland v. Wilson, 519 U.S. 408, 415 (1997) (“[A]n officer making a traffic stop may order passengers to get out of the car pending completion of the stop.”). “Normally, the stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave.” Johnson, 555 U.S. at 333.

During the course of the stop, an officer can inquire into matters unrelated to the initial justification for the stop without converting the stop into something other than a lawful seizure so long as the unrelated questioning does not *measurably* extend the duration of the stop. Id.; see also Muehler v. Mena, 544 U.S. 93, 100-101 (2005) (instructing additional questioning during a detention unrelated to the original purpose of the detention does not constitute an additional seizure or independent Fourth Amendment violation). “Notwithstanding that an officer may not lawfully extend the duration of a traffic stop in order to engage in off-topic questioning, this rule

does not limit the scope of the officer's questions to the motorist during the traffic stop.” State v. Provet, 405 S.C. at 108-109, 747 S.E.2d at 457.

Even if a traffic stop is initially lawful, the detention “can become unlawful if it is prolonged beyond the time reasonably required to complete [its] mission.” Illinois v. Caballes, 543 U.S. 405, 407 (2005); see Pichardo, 367 S.C. at 98, 623 S.E.2d at 848 (“Once the purpose of that stop has been fulfilled, the continued detention of the car and the occupants amounts to a second detention.”). However, a further detention extending the scope of a traffic stop beyond its original purpose is not automatically unconstitutional. Pichardo, 367 S.C. at 99, 623 S.E.2d at 848. “The officer's observations while conducting the traffic stop may create reasonable suspicion to justify further search or seizure.” Provet, 405 S.C. at 109, 747 S.E.2d at 457 (citation omitted).

Reasonable suspicion consists of “‘a particularized and objective basis’ that would lead one to suspect another of criminal activity.” State v. Lesley, 326 S.C. 641, 644, 486 S.E.2d 276, 277 (Ct. App. 1997) (quoting U.S. v. Cortez, 449 U.S. 411, 417 (1981)). Reasonable suspicion “is not readily, or even usefully, reduced to a neat set of legal rules, but, rather, entails common sense, nontechnical conceptions that deal with factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act.” U.S. v. Foreman, 369 F.3d 776, 781 (4th Cir. 2004) (citation omitted). “In this highly fact-specific inquiry, reasonable suspicion ‘is a fluid concept which takes its substantive content from the particular context in which the standard is being assessed.’” State v. Wallace, 392 S.C. 47, 51-52, 707 S.E.2d 451, 453 (Ct. App. 2011) (quoting Foreman, 369 F.3d at 781). The reasonable suspicion standard “is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence[.]” Illinois v. Wardlow, 528 U.S. 119, 123 (2000). “Reasonable

suspicion is more than a general hunch but less than what is required for probable cause.” State v. Willard, 374 S.C. 129, 134, 647 S.E.2d 252, 255 (Ct. App. 2007); see State v. Rogers, 368 S.C. 529, 534, 629 S.E.2d 679, 682 (Ct. App. 2006) (“Reasonable suspicion is something more than an inchoate and unparticularized suspicion or hunch.”).

In determining the existence of reasonable suspicion, the totality of the circumstances must be considered. Pichardo, 367 S.C. at 104, 623 S.E.2d at 85. In reviewing the totality of the circumstances, the individual factors of the traffic stop must not be considered piecemeal or in isolation. See U.S. v. Branch, 537 F.3d 328, 337 (4th Cir. 2008). Instead, all of the circumstances of the stop must be considered as a whole to determine whether the officer’s actions were reasonable in light of all of the information available to him at the time. See U.S. v. Mason, 628 F.3d 123, 129 (4th Cir. 2010) (“[J]ust as one corner of a picture might not reveal the picture’s subject or nature, each component that contributes to reasonable suspicion might not alone give rise to reasonable suspicion.”). “In applying the concept of reasonable suspicion to the various facts of a case, ‘[i]t is the entire mosaic that counts, not single tiles.’” Wallace, 392 S.C. at 52, 707 S.E.2d at 453 (quoting U.S. v. Whitehead, 849 F.2d 849, 858 (4th Cir. 1988)); see also U.S. v. Arvizu, 534 U.S. 266, 273-78 (2002) (rejecting the lower court’s “evaluation and rejection of seven of the listed [reasonable suspicion] factors in isolation from each other” because it failed to take into account the totality of the circumstances, and holding that although “each of these factors alone is susceptible of innocent explanation, and some factors are more probative than others,” taken together they sufficed to form a particularized and objective basis for the stop, “making the stop reasonable within the meaning of the Fourth Amendment.”). Thus, courts must look at the cumulative information available to an officer and “may not find a

stop unjustified based merely on a piecemeal refutation of each individual fact and inference.”
State v. Taylor, 401 S.C. 104, 112, 736 S.E.2d 663, 667 (2013) (citations omitted).

Petitioner’s Case

Justification for the Initial Stop

In this case, Deputy Gilbert had both reasonable suspicion and probable cause to stop Petitioner’s vehicle. First, Petitioner’s drifting back and forth within his lane several times provided Deputy Gilbert with reasonable suspicion that Petitioner was impaired or under the influence; consequently, Deputy Gilbert was justified in performing an investigatory stop. See People v. Loucks, 481 N.E.2d 1086, 1087 (Ill. App. Ct. 1985) (“Weaving within the lane of traffic in which a vehicle is traveling provides a sufficient basis for an investigatory stop of a motor vehicle, and in the instant case the evidence was undisputed that the vehicle the defendant was driving was weaving within its own lane of travel continuously for a distance of about two blocks. Such erratic driving provided Officer Cassidy with articulable facts that there was a substantial possibility that the defendant had committed, was committing, or was about to commit an offense. The undisputed evidence showed that Officer Cassidy had sufficient basis for making an investigative stop of the defendant’s motor vehicle.”); State v. Dorendorf, 359 N.W.2d 115, 116-17 (1984) (after noting that “[c]ourts in other jurisdictions have held that the observation of a vehicle weaving within its own lane of traffic gives rise to probable cause to stop a vehicle for investigation,” the court held that “an examination of the facts in this case leads us to conclude that the officers were justified in stopping Dorendorf for investigation. Officers Fulwider and Clock observed the weaving of the Dorendorf vehicle as it approached them. Fulwider then turned the patrol car around and followed Dorendorf, at which time both Fulwider and Clock observed Dorendorf’s smooth, continuous weave within his own lane of

traffic.”); State v. Bailey, 51 Or.App. 173, 175, 624 P.2d 663, 664 (1981) (“We now hold . . . that the observation of a vehicle weaving within its own lane for a substantial distance gives rise to probable cause to believe that the driver is driving under the influence of intoxicants and justifies a stop for further investigation.”); State v. Ellanson, 293 Minn. 490, 491, 198 N.W.2d 136, 137 (1972) (holding that an officer had the right to stop the defendant in order to investigate the cause of his unusual driving where the officer observed the defendant’s automobile weaving within its own lane on the highway); State v. Lange, 255 N.W.2d 59, 63 (1977) (“Although [the defendant] places great emphasis on the fact that his vehicle did not at any time cross the center line, we do not think a police officer who has been alerted to a possible DWI suspect and who observes the vehicle wandering in its lane of traffic need wait for the driver to commit a traffic offense or become involved in an accident before he has probable cause to stop the vehicle.”); State v. Hodge, 147 Ohio App.3d 550, 559, 771 N.E.2d 331, 338-39 (Ohio App. Ct. 2002) (indicating that officers may have a duty to investigate the cause of weaving or erratic driving in order to protect the public and also the driver against such possible causes as the driver being under the influence, the driver being unduly mentally fatigued or sleepy, or even some mechanical defect of the car); see also Murphy v. State, 392 S.C. 626, 628, 709 S.E.2d 685, 686 (Ct. App. 2011) (stating that the officer pulled the defendant over after noticing her “swerving and weaving”; the defendant was subsequently arrested for driving under the influence); State v. Knighton, 334 S.C. 125, 127, 512 S.E.2d 117, 118 (Ct. App. 1999) (defendant was stopped by a trooper after the trooper received reports of his erratic driving and then personally observed him weaving between lanes and saw his tire cross over the shoulder of the road; defendant was subsequently charged with driving under the influence). In that vein, Interstate 85 is a large and often busy roadway and officers should be permitted to investigate the cause of erratic driving

which could pose a threat to the safety of the motoring public. Notably, Deputy Gilbert clearly expressed his concern about Petitioner's possible impairment at the very outset of the traffic stop. (See State's Exhibit #2, DVD, at 00:55:19-52).

Second, Petitioner's driving on the lane marker several times provided Deputy Gilbert with probable cause that Petitioner violated S.C. Code § 56-5-1900. In pertinent part, this statute states as follows: "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." S.C. Code § 56-5-1900(a). In State v. Vinson, this Court addressed a similar issue under this statute. See State v. Vinson, 400 S.C. 347, 349, 734 S.E.2d 182, 183 (Ct. App. 2012), *cert. denied* Dec. 19, 2013. In Vinson, a trooper observed the defendant's vehicle drift back and forth between the double yellow lines that separated the two opposing lanes of traffic. Id. at 349, 734 S.E.2d at 183. The trooper activated his dash camera and followed the defendant for approximately two-tenths of a mile, but the vehicle did not drift again into the center of the double yellow lines and it did not completely cross into the opposing lane. Id. This Court held that the defendant's action of crossing into the area between the double yellow lines that separated the opposing lanes of traffic was, in and of itself, a violation of S.C. Code § 56-5-1900(a). Id. at 353-54, 734 S.E.2d at 185. This Court pointed out there was testimony establishing there were no other cars on the road that would have prompted the defendant's decision to cross the center line; consequently, this Court concluded it was practicable for the defendant to remain within his lane of traffic. Id. at 353, 734 S.E.2d at 185. Therefore, this

Court found that the trooper's stop of the defendant's vehicle was justified. Id. at 353-54, 734 S.E.2d at 185.

The Vinson court noted that there is a "split of authority" in cases from other jurisdictions regarding the interpretation of similar "failure to maintain a single lane" statutes; however, the court stated it was "persuaded by the line of cases in which courts have found the purpose of the 'as nearly as practicable' language is to keep both drivers and pedestrians safe, not to allow motorists the option of when they will or will not abide by a lane requirement." Id. at 354, 734 S.E.2d at 185 n3 (citing U.S. v. Bassols, 775 F.Supp.2d 1293, 1300-01 (D.N.M.2011); People v. Smith, 172 Ill.2d 289, 216 Ill.Dec. 658, 665 N.E.2d 1215, 1218-19 (1996); State v. Hodge, 147 Ohio App.3d 550, 771 N.E.2d 331, 338 (2002); and State v. McBroom, 179 Or.App. 120, 39 P.3d 226, 228-29 (2002)).

In Petitioner's case, Deputy Gilbert had probable cause to stop Petitioner's vehicle for a violation of S.C. Code § 56-5-1900(a) based upon Petitioner's driving on top of the lane marker "several times." (R. p. 13, line 23 – p. 14, line 3). As noted in Vinson, a motorist cannot be driving "entirely within" a single lane if he or she is driving on top of the lane marker because such an interpretation would lead to the absurd result that two vehicles could both properly occupy the same space at the same time. Vinson at 354, 734 S.E.2d at 185 n3 (citing U.S. v. Bassols, 775 F.Supp.2d 1293, 1300-01 (D.N.M.2011)). Further, as was also noted in Vinson, the purpose of the statute is to keep both drivers and pedestrians safe, "not to allow motorists the option of when they will or will not abide by a lane requirement." Id.; cf. State v. Parker, 271 S.C. 159, 161, 245 S.E.2d 904, 905 (1978) (construing S.C. Code § 56-5-1810, which requires, among other things, that vehicles be driven on the right half of the roadway subject to certain

exceptions). Therefore, Petitioner's driving on top of the lane marker meant he was not "entirely within" a single lane.

Moreover, just as in the Vinson case, there was no evidence it was not "practicable" for Petitioner to stay entirely within his lane at the time.¹ "Practicable" has been defined as "reasonably capable of being accomplished, feasible." Black's Law Dictionary (9th ed. 2009). Our Supreme Court has defined it in other settings to mean "reasonably possible" or "that which is possible of reasonable performance" or "capable of and being done or performed." See Woody v. S.C. Power Co., 202 S.C. 73, 24, S.E.2d 121 (1943); Fort Sumter Hotel v. S.C. Tax Comm., 201 S.C. 50, 21 S.E.2d 393, 396 (1942). Taken in context, the term "as nearly as practicable" means that a driver must remain in his single lane unless an exigent circumstance makes the operation of the vehicle in the single lane impossible. Other jurisdictions have construed this statutory term similarly. See People v. Smith, 665 N.E.2d 1215 (Ill. 1996); Texas Dep't of Public Safety v. Chang, 994 S.W.2d; State v. Hodge, 771 N.E.2d 331 (Ohio 2002); Unverzagt v. Prestera, 13 A.2d 46 (Pa. 1940); Beech Fork Coal Co. v. Pocahontas Corp., 152 S.E.785 (W.Va. 1930); People. ex rel. Williams v. Errant, 82 N.E.271 (1907).

In Petitioner's case, it is clear from the record and the video of the traffic stop that there were no exigent circumstances or adverse driving conditions making in impracticable for Petitioner to stay entirely within his lane of travel. It was early afternoon on a clear day and Petitioner was driving on a well-maintained, normal interstate. (See State's Exhibit #2, DVD, at 00:54:20-30). Significantly, after the officer explained the reason for the stop, i.e., Petitioner's driving on top of the lane marker several times, Petitioner made no claim that some emergency

¹ Note that Petitioner did not argue at trial or on appeal that it was not practicable for him to drive within his lane. (See R. p. 84-88; see Petition for Writ of Certiorari to The Court Of Appeals, p. 14-17).

or road condition made it impracticable for him to stay within his lane. (See State's Exhibit #2, DVD, at 00:55:17-52). Accordingly, since Petitioner failed to stay entirely within his lane despite the fact that it was "practicable" for him to do so, Deputy Gilbert had probable cause to stop Petitioner's vehicle. See, e.g., State v. Williams, 351 S.C. at 598, 571 S.E.2d at 707 (the initiation of a traffic stop is reasonable *per se* when probable cause exists to believe a traffic violation has occurred).

Petitioner argued for the first time to The Court of Appeals that because he "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, [he] did not violate § 56-5-1900(a)." (Brief of Appellant p. 16) (See R. p. 84-88). Petitioner makes this same argument in his Petition for Writ of Certiorari. (Petition for Writ of Certiorari to The Court of Appeals, p. 16). In addition to not being preserved for review, this argument is without merit. As explained in Smith and McBroom - which were both cited in this Court's opinion in Vinson - the failure to maintain a single lane statutes generally state two distinct requirements for lane usage. The first part requires that a motorist drive a vehicle as nearly as practicable entirely within one lane. The second part states that a motorist may not *move* a vehicle from a lane of traffic - i.e., change lanes - until the motorist has determined the movement can be safely made. The second part of the statute does not, however, excuse drivers from staying within their lanes as required by first part unless they are actually moving from one lane to another and they first make certain that they can do so safely. In Petitioner's case, the second part of the statute does not apply because Petitioner was not performing a lane change. At the very least, Deputy Gilbert could have reasonably concluded Petitioner was not changing lanes at the time he failed to stay entirely within his lane.

See McBroom at 125-26, 39 P.3d at 229. Therefore, Petitioner's argument that he could have legally changed lanes is of no avail.

The two Texas cases Petitioner cites in support of his position are, in the State's view, poorly reasoned, and are in any event distinguishable. (See Petition for Writ of Certiorari to The Court of Appeals, p. 16). In both cases, the Texas Court of Appeals construed a statute that required drivers to drive "as nearly as *practical*" entirely within a single lane. See State v. Cerny, 28 S.W.3d 796, 800 (Tex. App. Ct. 2000) & Hernandez v. State, 983 S.W.2d 867, 871 (Tex. App. Ct. 1998) (emphasis added). Our South Carolina statute requires motorists to drive "as nearly as *practicable*" entirely within a single lane. See S.C. Code § 56-5-1900(a) (emphasis added). The terms "practical" and "practicable" have different meanings and the distinction was not lost on the Texas Court of Appeals. In Hernandez, the Texas Court of Appeals explained the difference in the two terms as follows: the term "practicable" has "a somewhat more definite meaning: 'capable of being accomplished; feasible; possible,'" while the term "practical" "is more ambiguous: manifested in practice; capable of being put to good use." Hernandez at 871 (citation omitted). Since the statute discussed in Petitioner's Texas cases contains language meaningfully different than the language in South Carolina's statute, this Court should give little or no weight to these cases as persuasive authority.

In sum, the initial stop of Petitioner was justified because Petitioner's drifting back and forth within his lane several times provided Deputy Gilbert with reasonable suspicion that Petitioner was impaired or under the influence, and because Petitioner's driving on top of the lane marker several times provided Deputy Gilbert with probable cause that Petitioner violated S.C. Code § 56-5-1900(a).

Detention of Petitioner

Discussion of Recent Cases

In its Brief of Respondent submitted to the Court of Appeals, the State submitted a detailed analysis of the facts and holdings of State v. Provet, 405 S.C. 101, 474 S.E.2d 453 (2013), State v. Wallace, 392 S.C. 47, 707 S.E.2d 451 (Ct. App. 2011), and State v. Jones, 364 S.C. 51, 610 S.E.2d 846 (Ct. App. 2005). (Final Brief of Respondent, pp. 26-34). In Provet, the South Carolina Supreme Court held that an officer's off-topic questioning did not measurably extend the duration of the stop, where the time from initial seizure up until the point the officer requested consent to search the defendant's vehicle was only approximately ten minutes. 405 S.C. at 109, 747 S.E.2d at 457-58. In Wallace, the Court of Appeals found factors observed by the officer during the traffic stop established a reasonable articulable suspicion to extend the duration of the stop. 392 S.C. at 55, 707 S.E.2d at 455. In Jones, the Court found no Fourth Amendment violation where the officer did not question the defendant and his passenger after returning the defendant's license and registration and the questions asked by the officer did not exceed the scope of the traffic stop such as would convert the stop into an illegal detention. 364 S.C. at 59, 610 S.E.2d at 850.

No Measureable Extension of the Traffic Stop

The State first submits that there was no unlawful detention beyond the scope of the traffic stop. As the Supreme Court stated in Provet, off-topic questioning by the officer is permissible where it does not measurably extend the traffic stop. See Provet, 405 S.C. at 108-111, 747 S.E.2d at 457-59; see also Arizona v. Johnson, 555 U.S. 323, 333 (2009); Muehler v. Mena, 544 U.S. 93, 100-101 (2005). In his Petition, Petitioner indicates that the purpose of the traffic stop was completed around fifteen minutes and ten seconds into the stop, when Deputy Gilbert puts away his pen, rips the warning off the pad, and places the warning in his right hand.

(See Petition for Writ of Certiorari to The Court of Appeals, p. 19). Assuming Petitioner's interpretation of the video is correct,² the additional minute of discussion before Deputy Gilbert requested consent to search did not measurably extend the stop so as to render it an unlawful second detention. See Provet, Johnson, Mena; see also U.S. v. Mason, 628 F.3d 123, 131-32 (4th Cir. 2010) (stating that brief discussion about matters unrelated to the traffic violation does not violate the Constitution and finding that one to one and a half minutes of questioning on matters unrelated to the traffic stop did not measurably extend the traffic stop); U.S. v. Olivera-Mendez, 484 F.3d 505, 510 (8th Cir.2007) (“[A]n officer does not violate the Fourth Amendment by asking a few questions about matters unrelated to the traffic violation, even if this conversation briefly extends the length of the detention” (citing U.S. v. Alcaraz-Arellano, 441 F.3d 1252, 1259 (10th Cir.2006); U.S. v. Burton, 334 F.3d 514, 518–19 (6th Cir.2003); U.S. v. Childs, 277 F.3d 947, 951–54 (7th Cir.2002) (en banc)); U.S. v. Everett, 601 F.3d 484, 492–94 (6th Cir.2010) (relying on Mena and Johnson in holding that brief questioning unrelated to the purpose of a traffic stop does not violate the Fourth Amendment); U.S. v. Derverger, 337 F. App'x 34, 36 (2nd Cir. 2009) (concluding that five minutes of additional questioning did not significantly extend the time the defendant was detained); U.S. v. Harrison, 606 F.3d 42, 45 (2nd Cir. 2010) (finding that an officer who had all of the information necessary to issue a traffic ticket after speaking with the driver did not measurably extend the traffic stop by subsequently speaking with the passengers for several minutes in an attempt to corroborate the driver's story); cf. State v. Tindall, 388 S.C. 518, 698 S.E.2d 203 (2010) (holding that an officer's continued questioning of the defendant for “an additional six to seven minutes,” as the

² It is not entirely clear what is occurring in the video because Deputy Gilbert is mostly off-camera at this point. (See State's Exhibit #2, DVD, at 01:09:30).

defendant sat in a patrol car with a police dog in the back and two other officers standing outside the patrol car, exceeded the scope of the traffic stop and constituted a second seizure).

In fact, at the time Deputy Gilbert requested consent to search, only about sixteen minutes had elapsed since the commencement of the traffic stop. Cf. Provet, 405 S.C. at 109, 747 S.E.2d at 457-458 (approving a ten-minute detention as reasonable and not measurably extended); U.S. v. Sharpe, 470 U.S. 675, 683 (1985) (concluding that a twenty-minute detention during an investigatory traffic stop was objectively reasonable); Branch, 537 F.3d at 338 (stating that a thirty-minute detention was justified by the ordinary inquiries incident to a routine traffic stop); U.S. v. Jeffus, 22 F.3d 554, 557 (4th Cir. 1994) (finding a fifteen-minute traffic stop to be reasonable); U.S. v. Jones, 44 F.3d 860, 872 (10th Cir. 1995) (approving of a thirty-minute traffic stop); U.S. v. Hardy, 855 F.2d 753, 761 (11th Cir. 1988) (finding a fifty-minute investigatory stop to be reasonable); U.S. v. Jeffus, 22 F.3d 554, 557 (4th Cir. 1994) (approving fifteen-minute traffic stop); U.S. v. Mincey, 321 Fed.Appx. 233, 240-42 (4th Cir. 2008) (approving a thirty-five-minute stop); U.S. v. Jones, 289 Fed.Appx. 593, 598-600 (4th Cir. 2008) (twenty minute stop); U.S. v. Ramirez, 29 Fed.Appx. 111, 113-14 (4th Cir. 2002) (fifteen minute stop); U.S. v. Purcell, 236 F.3d 1274, 1279 (11th Cir. 2001) (fourteen minutes); U.S. v. Olivera-Mendez, 484 F.3d 505, 510 (8th Cir. 2007) (fifteen minutes).

Although Deputy Gilbert acknowledged he waited for another officer to arrive before he asked for consent to search Petitioner's vehicle, any questioning of Petitioner that was unrelated to the traffic stop, including the officer's request for consent to search, did not measurably extend the traffic stop. Further, the overall detention length of sixteen minutes was also reasonable. Accordingly, there was no unlawful detention of Petitioner beyond the scope of the traffic stop.

Reasonable Suspicion Supported a Continued Detention

However, even assuming there was a detention beyond the scope of the traffic stop, a continued detention was permissible because, prior to the time Deputy Gilbert requested permission to search Petitioner's car, he had acquired reasonable suspicion of criminal activity. Specifically, Deputy Gilbert's decision to extend the stop was supported by the following factors: (1) Deputy Gilbert's fourteen years of experience in law enforcement and his extensive interdiction training; (2) the fact that as soon as Petitioner passed Deputy Gilbert, who was parked on the side of the road, he began weaving in his lane, suggesting he was looking back at the officer in his rearview mirror and was concerned about his presence; (3) the fact that the cargo area of Petitioner's vehicle contained luggage covered by a blanket, which could be viewed as a tactic to divert attention to the luggage and away from other areas in the vehicle;³ (4) the fact that Petitioner immediately questioned Deputy Gilbert about the reason he was being stopped, which suggested Petitioner was nervous and which Deputy Gilbert testified was unusual in his experience because ninety-nine percent of the time people allow him to reach that point on his own; (5) the fact that Petitioner had placed an air freshener in the driver's door pocket of his rental vehicle despite the fact that he denied being a smoker; (6) the fact that Petitioner had placed two house keys on the same ring as the rental car key, which Deputy Gilbert stated he had not seen in his fourteen years of experience and which he interpreted as Petitioner attempting to "personalize" the vehicle; the fact that Petitioner's house keys were on the rental car key ring was especially suspicious where Petitioner was, according to his story, not going home but was instead going to visit his mother in New Jersey; (7) the fact that Petitioner was traveling in South Carolina, a state not permitted in the rental contract, and that Petitioner stated he was going to

³ This diversionary tactic worked well in Petitioner's case as illustrated by the fact that Deputy Gilbert began his search with the luggage covered by a blanket and continued searching this area for an extended period. (See State's Exhibit #2, DVD, at 01:12:55 – 01:19:48).

New Jersey, another state not listed in the rental contract; (8) the fact that Petitioner's stated travel plans did not match up with the information in the car rental contract, and that his story about bringing his mother back for Mother's Day, which was more than a month away, further conflicted with his previously-stated travel plans; (9) the fact that Petitioner initially lied about the fact that his license had been suspended in the past and only admitted the previous suspension after Deputy Gilbert ran the license check; (10) the fact that Petitioner was coming from the Atlanta area (a well-known drug hub) and was traveling on Interstate 85 (a major crime corridor); (11) the fact that the vehicle was rented by a third party who was not present in the vehicle, and that this third party rental was done in a female's name inasmuch as Deputy Gilbert stated that in his training and experience, many drug trafficking organizations rent vehicles using female names in an attempt to throw off suspicion; (12) the fact that Petitioner stated he had six children but then gave the ages for seven children, which Deputy Gilbert stated indicated to him that the "stress of the situation" was affecting Petitioner.

Taking into account Deputy Gilbert's extensive experience and training, his observation of the above indicators, considered together under the totality of the circumstances, provided him with reasonable suspicion that Petitioner was involved in drug activity, and this reasonable suspicion was sufficient to justify a brief continued detention to allow Deputy Gilbert to request voluntary consent to search Petitioner's car. See Wallace, 392 S.C. at 55, 707 S.E.2d at 455 (finding inconsistent stories, third-party vehicle ownership, and Atlanta's status as a drug hub to be relevant factors in establishing a reasonable articulable suspicion of drug activity); Provet, 391 S.C. at 504, 706 S.E.2d at 518 (considering the fact that third-party vehicle ownership is commonly connected with drug trafficking in finding that an officer had reasonable suspicion to extend a traffic stop); United States v. Davis, 636 F.3d 1281, 1291 (10th Cir. 2011) ("our cases

note drug traffickers often use rental vehicles to transport narcotics”); see also Robinson v. State, 407 S.C. 169, 184, 754 S.E.2d 862, 870, n. 9 (2014) (“[T]he facts and inferences relied on by the officer must be *articulable*, not necessarily *articulated*.”) (emphasis in original); cf. State v. Tindall, 388 S.C. 518, 523, 698 S.E.2d 203, 206 (2010) (finding that the following four factors were insufficient to establish reasonable suspicion: (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).

Although some of the factors observed by Deputy Gilbert might appear to be consistent with innocent travel to a person lacking the officer’s experience and training, all of the factors **taken together** established a reasonable articulable suspicion Petitioner was involved in drug activity. See Robinson v. State, 407 S.C. 169, 185, 754 S.E.2d 862, 870 (2014) (referencing the Provet opinion and pointing out that “[d]espite the fact that the Court agreed with the defendant that the existence of several factors were indicative of innocent travel, the Court noted, “we must affirm when *any evidence* in the record supports” the trial court’s finding.”) (emphasis in original), citing Provet at 112, 747 S.E.2d at 459; U.S. v. Arvizu, 534 U.S. 266, 277-78 (2002) (“A determination that reasonable suspicion exists, however, need not rule out the possibility of innocent conduct. Undoubtedly, each of these factors alone is susceptible of innocent explanation, and some factors are more probative than others. Taken together, we believe they sufficed to form a particularized and objective basis for Stoddard’s stopping the vehicle, making the stop reasonable within the meaning of the Fourth Amendment.”) (citation omitted); Illinois v. Wardlow, 528 U.S. 119, 130 n4 (2000) (noting that in Terry v. Ohio, “reasonable suspicion was supported by a concatenation of acts, each innocent when viewed in isolation, that when

considered collectively amounted to extremely suspicious behavior”); U.S. v. Sokolow, 490 U.S. 1, 10 (1989) (reiterating that in making a determination regarding probable cause, the relevant inquiry is not whether particular conduct is innocent or guilty but the degree of suspicion that attaches to particular types of *noncriminal acts*; that principle applies equally well to the reasonable suspicion inquiry) (citations omitted); see State v. Taylor, 401 S.C. at 113, 736 S.E.2d at 667 (reiterating the “well-settled principle that courts must give due weight to common sense judgments reached by officers in light of their experience and training”); State v. Burgess, 394 S.C. 407, 414, 714 S.E.2d 917, 920 (Ct. App. 2011) (failing to afford the proper weight to an officer’s inferences stemming from his experience would be to fail to consider the totality of the circumstances) (citation omitted); Taylor at 108, 736 S.E.2d at 665 (instructing that courts must consider the cumulative information available to the officer and pointing out that each individual factor might not alone give rise to reasonable suspicion) (citations omitted); see also Mason, 628 F.3d at 129 (“[J]ust as one corner of a picture might not reveal the picture’s subject or nature, each component that contributes to reasonable suspicion might not alone give rise to reasonable suspicion.”). Accordingly, Petitioner’s detention for the brief period of time it took to request consent to search his car was not unlawful, and the trial judge’s denial of Petitioner’s suppression motion should be affirmed. See Provet, 405 S.C. at 107, 747 S.E.2d at 456 (“South Carolina appellate courts review Fourth Amendment determinations under a clear error standard. We affirm if there is any evidence to support the trial court’s ruling.” (citations omitted)); State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011) (“When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling.”). Because reasonable suspicion justified a second detention of Petitioner, this Court should affirm the trial court’s denial of Petitioner’s suppression motion.

Consent to Search

“Warrantless searches and seizures are reasonable within the meaning of the Fourth Amendment when conducted under the authority of voluntary consent.” Palacio v. State, 333 S.C. 506, 514, 511 S.E.2d 62, 66 (1999). “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.” State v. Pichardo, 367 S.C. 84, 105, 623 S.E.2d 840, 851 (Ct. App. 2005) (emphasis in original). Whether consent to a search is voluntary is a question of fact to be determined from the totality of the circumstances. State v. McKnight, 352 S.C. 635, 656, 576 S.E.2d 168, 179 (2003).

In Petitioner’s case, since Deputy Gilbert possessed reasonable suspicion of criminal activity at the time he requested permission to search Petitioner’s vehicle, Petitioner’s subsequent consent to the search was not the product of any unlawful detention. See Provet at 114-15, 747 S.E.2d at 460 (where the officer had reasonable suspicion for an additional seizure and the defendant’s consent was voluntary, there was no Fourth Amendment violation); State v. Willard, 374 S.C. 129, 135-36, 647 S.E.2d 252, 256 (Ct. App. 2007) (same); see also U.S. v. Boone, 245 F.3d 352, 362 (4th Cir. 2001) (“If individual voluntarily consents to a search while justifiably detained on reasonable suspicion, the products of the search are admissible.”) (citing Florida v. Royer, 460 U.S. 491, 502 (1983)).

The record also supports that Petitioner’s consent was freely and voluntarily given. Deputy Gilbert requested permission to search Petitioner’s vehicle only sixteen minutes into the stop. (R. p. 37, lines 1-6; p. 62-66). Petitioner appeared to have the education necessary to understand what Deputy Gilbert was asking of him. (R. p. 39, lines 15-17). Deputy Gilbert had

given no indication to Petitioner that he was not free to leave and did not suggest Petitioner would be detained if he declined to provide consent. Further, even though Petitioner initially agreed to the search after asking what “all this” was about, rather than immediately searching Petitioner’s vehicle, Deputy Gilbert instead specifically informed Petitioner that he had the right to refuse consent to search. (R. p. 37). Deputy Gilbert never pulled out his weapon or coerced Petitioner into giving consent, and no other officers were present in the vicinity at the time Deputy Gilbert requested consent.⁴ (R. p. 38, line 25 – p. 39, line 14). After receiving a definite “yes” answer from Petitioner, Deputy Gilbert proceeded to search the car, and Petitioner never withdrew his consent while the search was ongoing. (R. p. 38-39; p. 40, lines 14-18). Notably, Petitioner did not testify during the pre-trial hearing and there was no testimony or evidence indicating Petitioner’s will was overborne or that his giving consent was anything other than the independent product of his free will.

The record supports that Petitioner’s consent was voluntary and that it was not the product of an unlawful detention. Accordingly, the trial judge’s finding that Petitioner’s consent was valid should be upheld. (See R. p. 98, lines 16-20). See State v. Adams, 377 S.C. 334, 339-40, 659 S.E.2d 272, 275 (Ct. App. 2008) (finding the circuit court did not abuse its discretion in finding the defendant gave consent to search his vehicle and that the consent was voluntary in nature); State v. Mattison, 352 S.C. 577, 584–85, 575 S.E.2d 852 (2003) (applying a deferential standard of review to the trial court's findings on issues of fact regarding the voluntariness of consent).

⁴ There was no evidence refuting Deputy Gilbert’s testimony that Petitioner’s back was completely turned when a second officer arrived on the scene. (R. p. 65, line 20 – p. 66, line 2). See State v. Dye, 384 S.C. 42, 48-49, 81 S.E.2d 23, 27 (Ct. App. 2009) (citation omitted) (because no competing testimony was introduced to contradict the officer’s statements, the circuit court was free to accept the officer’s version of events in making a voluntariness determination); State v. Saltz, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001) (pointing out that the appellant did not testify at the Jackson v. Denno hearing and his attorney’s questions did not constitute evidence; therefore, there was no evidence in the record to contradict the officers’ version of events).

CONCLUSION


For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 24, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County

The J. Derham Cole, Circuit Court Judge

RECEIVED

NOV 24 2015

S.C. Supreme Court

THE STATE,

RESPONDENT,

v.

STEPHANO J. ALSTON,


PETITIONER.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari, has been served upon opposing party by mailing two (2) copies in the United States mail, postage prepaid:

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This 24th day of November, 2015


NORMA BIGBEE
LEGAL ASSISTANT