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July 16, 2014

**RECEIVED**

DEC 31 2015

**VIA UNITED STATES MAIL**

The Honorable Jenny A. Kitchings  
Clerk, South Carolina Court of Appeals  
Post Office box 11629  
Columbia SC, 29211

**S.C. Supreme Court**

*RE: State v. Erick E. Hewins – Appellate Case No. 2013-000224  
Supplemental Citation Pursuant to Rule 208(b)(7), SCACR*

Dear Clerk Kitchings:

Pursuant to Rule 208(b)(7), SCACR, Appellant, by and through his counsel, Ms. Jessica H. Lerer, writes to advise the Court of a new citation, decided by the South Carolina Supreme Court on July 16, 2014:

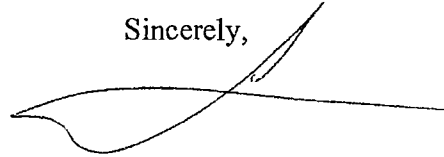
The case, Opinion No. 27415, is *State v. Erick Eton Hewins*. In it, our Supreme Court reversed Mr. Hewins's conviction for possession of crack cocaine on two bases, one of which is directly relevant to this Appeal. Specifically, the Supreme Court determined that the trial Court should have granted Mr. Hewins's Motion to Suppress Evidence because the arresting Officer, a C. Cothran, lacked reasonable suspicion of criminal activity to justify continued detention of Mr. Hewins beyond the initial traffic stop, *Opinion No. 27415, Issue 3*.<sup>1</sup>

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<sup>1</sup> Opinion No. 27415 stems from an arrest that occurred in Greenville, South Carolina, on September 15, 2009, sometime after 11:45 P.M. In support of Officer Cothran's continued detention of Appellant beyond the initial traffic stop, Officer Cothran argued that the following supported reasonable suspicion: (1) earlier in the evening he has seen Hewins drive in a known drug area; (2) Hewins remained nervous despite being given a warning citation rather than a traffic ticket; and (3) when questioned, Hewins quickly responded that he did not have any drugs.

The facts of the instant appeal and the recently decided case share many similarities, including several parties. In addition, the issues in the instant appeal and the recently decided case are very similar. For these reasons, Counsel offers this case as a supplemental citation in support, to be included in the instant appeal. The opinion has been attached to this letter for the Court's review.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jessica H. Lerer', written over a horizontal line.

Jessica H. Lerer  
STROM LAW FIRM, LLC

cc: Mary S. Williams, Esquire  
Robert M. Dudek, Esquire

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

RECEIVED

DEC 31 2015

APPEAL FROM GREENVILLE COUNTY  
Court of General Sessions

S.C. Supreme Court

The Honorable G. Edward Welmaker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ERICK E. HEWINS,

APPELLANT

Appellate Case No. 2013-000224

2015-000595

REPLY BRIEF OF APPELLANT

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## ARGUMENTS

### **I. OFFICER GARDNER FAILED TO JUSTIFY HIS INITIAL STOP OF APPELLANT BY ARTICULABLE FACTS OF PRESENT CRIMINAL ACTIVITY**

As Appellant acknowledged in his initial brief, “[n]ot all personal encounters between policemen and citizens involve ‘seizures’ of persons thereby bringing the Fourth Amendment into play.” *State v. Rodriguez*, 323 S.C. 484, 476 S.E.2d 161 (Ct.App. 1997). “As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person’s liberty or privacy,” that would require Constitutional justification. *United States v. Mendenhall*, 446 U.S. 544 at 554, 100 S.Ct. 1870 at 1877 (1980). However, where, “in view of all the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave,” that person has been seized within the meaning of the Fourth Amendment.” *Id.*

Here, there is no question that Appellant was seized within the meaning of the Fourth Amendment from the time that Officer Gardner’s vehicle came to a stop. Officers Gardner and Hall entered the Clarion Inn parking lot and parked their vehicle directly in front of Appellant’s vehicle preventing him from driving away. (Trial transcript, p. 106, ll. 5-21). Furthermore, Officer Gardner came to question Appellate in Appellant’s doorframe, preventing Appellant from leaving his vehicle and walking away from the encounter. (Trial transcript, p. 107, ll. 15-25).

Additionally, with no more information than Officer Gardner had when he and Officer Hall entered the parking lot, Officer Gardner testified that had Appellant attempted to drive off, Officer Gardner would have pursued him. (Trial transcript p. 219,

ll. 13-15). Officer Gardner also corroborated Appellant's testimony that the police vehicle was parked directly in front of Appellant's vehicle. (Trial Transcript, p. 215, ll. 11-14). Thus no individual in Appellant's position would reasonably have thought they were free to leave the parking lot, and disregard Officer Gardner's questions.

Therefore, Officer Gardner's questioning of Appellant constituted an investigatory detention within the meaning of the Fourth Amendment from the moment his vehicle came to a rest. The question then becomes whether, given the totality of the circumstances, at the time Officer Gardner entered the parking lot, he had reasonable, articulable suspicion that Appellant was presently engaged in criminal activity.

The term "reasonable suspicion" requires a particularized and objective basis that would lead one to suspect another of criminal activity." *State v. Blessingame*, 338 S.C. 240, 248, 525 S.E.2d 535, 539 (Ct.App. 1999). Officers may not base reasonable suspicion on a gut feeling, or a "hunch" of illegal activity. *United States v. Sokolow*, 490 U.S. 1, 8, 109 S.Ct. 1581, 1585 (1989). The query is fact specific and must take into account the totality of the circumstances. *Id.*

In the instant case, Officer Gardner, testified that the night of the incident, he was on routine patrol and had not received any particular calls about criminal activity in the area. (Trial transcript, p. 217, ll. 1-21). He further testified that when he pulled into the Clarion Inn parking lot, he saw Appellant's car parked next to another car and observed the occupants of the vehicles talking to one another. (*Id.*)

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<sup>1</sup> It is important to note that Officer Gardner had been an Officer for approximately four (4) years at the time of the trial of this matter. (Trial transcript, p. 43, ll. 11-17) Therefore, on the night of this encounter, he had been an officer for approximately two (2) years.

Never once did Officer Gardner testify that he observed any indication of ongoing criminal activity. In fact, he acknowledged that the occupants of the vehicles were making no attempt to exit their vehicles, nor did they appear to have any luggage. (Trial transcript p. 192, ll. 2-7). Officer Gardner further acknowledged that there was nothing illegal about being in a hotel parking lot. (Trial transcript, p. 217, ll. 17-21). Finally, when Officer Gardner stood at Appellant's window questioning him, he observed no indicia of criminal activity. Indeed, Officer Gardner confirmed that at the time he entered the parking lot, the only indicators he had to support reasonable suspicion of criminal activity were the purported high crime area,<sup>2</sup> that the Appellant was backed into a space<sup>3</sup> and that it was nighttime. (Trial transcript, p. 210, ll. 3-11). These facts fail to create reasonable suspicion of criminal activity sufficient to support Officer Gardner's initial investigatory detention. Thus this seizure was improper and infected the entirety of the encounter, and the trial court should have suppressed the evidence seized as a result of this encounter.

## **II. OFFICER GARDNER FAILED TO JUSTIFY HIS *TERRY* FRISK OF APPELLANT BY ARTICULABLE FACTS TO SUPPORT REASONABLE SUSPICION THAT APPELLANT WAS ARMED AND DANGEROUS**

By virtue of the fact that Respondent argues Officer Gardner performed a *Terry* frisk in this case, the Respondent concedes that, at some point, a seizure within the meaning of the Fourth Amendment occurred. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968). Appellant maintains that the Respondent has presented insufficient grounds to support its initial investigatory detention of Appellant. However, Respondent also

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<sup>2</sup> Please see Appellant's initial brief regarding statistical data of decreasing crime in that area in the year leading up to Appellant's arrest.

<sup>3</sup> This is a ticketable, but not custodial offense. Furthermore, Officer Gardner asked Appellant not a single question about why he backed his vehicle into a space.

maintains that, given the totality of the circumstances of the frisk, Respondent failed to articulate a reasonable basis to believe that Appellant was armed and dangerous at the time of this incident, sufficient to support a *Terry* frisk. *Terry* (see Footnote 18: “This demand for specificity in the information upon which police action is predicated is the central teaching of this Court’s Fourth Amendment jurisprudence.”)

To determine whether the Officer acted reasonably in performing a weapon’s pat down of Appellant the Court must consider, “not [Officer Gardner’s] inchoate and unparticularized suspicion... but... the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.” *Terry* at 26, 88 S.Ct. 1868 at 1882. This search is a limited search, justified solely for the protection of the police officer and others nearby, and must therefore be confined in scope to “an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of a police officer.” *Terry* at 28, 88 S.Ct. at 1884. Furthermore, this right to search for weapons must be incident to a legal investigatory stop, precipitated by articulable suspicion of criminal activity. *Id.* at 30-31, 88 S.Ct. at 1884-1885.

Here, the initial detention of Appellant is not reasonable, thus no legal *Terry* frisk can follow. Additionally, Officer Gardner testified directly to the fact that his search of Appellant was not limited to a search for weapons. Indeed, he testified that during this encounter, the Appellant touched his pants pocket and that this can indicate that “an individual either has weapons or that they have contraband or drugs inside their pocket.” (Trial transcript p. 51, ll. 9-20). Officer Gardner testified that the following provided reasonable suspicion that the suspect was armed: (1) that when Officer Gardner

questioned Appellant he appeared nervous; (2) that Appellant touched his pocket during the encounter.

As a preliminary matter, Appellant has a stutter, which can be exacerbated by nervousness. Furthermore, it is important for the purpose of investigatory stop and frisks, not to “overplay a suspect’s nervous behavior in situations where citizens would normally expect to be upset[.]” *United States v. Glover*, 662 F.3d 694 (4<sup>th</sup> Cir. 2011), citing *State v. Massenber*, 654 F.3d 480, 490 (4<sup>th</sup> Cir. 2011). Here, Officer Gardner was not aware of any ongoing crime in the area, had not observed Appellant engaged in any behavior other than sitting in his vehicle in a parking lot, and observed only nervous behavior from Appellant once Officer Gardner approached him.

Officer Gardner’s justifications for a *Terry* frisk are further undermined by the extensive delay between when he pulled Appellant from his vehicle and when he actually conducted the *Terry* frisk. As Officer Cothran testified, when he arrived on the scene approximately 12 minutes after Officer Gardner initiated the investigatory detention, Appellant had already been removed from his vehicle, but had not yet been frisked. (Trial transcript, p. 95-100). Furthermore, Officer Cothran testified that only after he and Officer Gardner briefly conferred about the stop, and Officer Cothran checked out Appellant’s story with the hotel front desk, did he watch Officer Gardner administer a pat down of Appellant. (Trial transcript, p. 258-263).

The general purpose of a *Terry* frisk is to briefly pat down a suspected criminal when there is reason to believe the suspect is armed and poses a threat to officer safety.

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<sup>4</sup> To the extent that Officer Hall provided any testimony regarding Appellant’s actions, her testimony cannot be the basis for Officer Gardner’s reasonable suspicion because she did not convey this information to Officer Gardner. (Trial transcript p. 91, ll. 15-25, p. 92, ll 1-9).

*Terry, supra*. Not only did Officer Gardner fail to support his frisk with reasonable suspicion that Appellant was armed, but the general timing of the encounter is fatal to the credibility of the limited frisk for weapons. The record of this case indicates that a young Officer observed Appellant parked in his vehicle, and, based upon a hunch, detained the Appellant. Officer Gardner failed to articulate any suspected ongoing criminal activity at the Clarion, nor could he provide more than a recitation of disparate crimes when asked what he suspected of Appellant. Once the detention began, the Officer observed nothing more than nervous behavior from Appellant, consistent with police-citizen encounters. Officer Gardner then attempted to use Appellant's nervous behavior as his sole basis to justify a *Terry* frisk. However, whatever the search was in this matter, it was not the limited search authorized under *Terry*. Therefore, the Court should have suppressed all evidence that resulted from this search.

**III. RESPONDENT'S ARGUMENT THAT APPELLANT VOLUNTARILY CONSENTED TO A SEARCH IS NOT PROPERLY PRESERVED FOR THIS COURT, AND, EVEN IF PROPERLY PRESERVED, THERE IS NO EVIDENCE IN THIS MATTER TO INDICATE THAT APPELLANT COULD HAVE, OR WOULD HAVE, PROVIDED VOLUNTARY CONSENT TO A SEARCH OF HIS PERSON**

~~The trial court did not make any ruling as to consent in this matter. Furthermore, the solicitor withdrew her jury charge regarding consent. Therefore, consent is not an issue properly before this Court, and should be disregarded. However, were the issue of consent properly before this Court, no Court could find that Appellant consented to the search, or that any consent gained was voluntary, and not coerced by the circumstances.~~

A warrantless search is reasonable within the meaning of the Fourth Amendment when voluntary consent is given for the search. *State v. Provet*, 405 S.C. 101, 747 S.E.2d 453 (S.C. 2013), citing *Palacio v. State*, 333 S.C. 506, 514, 511 S.E.2d 62, 66 (S.C.

1999). The existence of voluntary consent is determined from the totality of the circumstances. *Provet* at 114, 747 S.E.2d at 460. A law enforcement officer may request permission to search at any time. *State v. Pichardo*, 367 S.C. 84, 623 S.E.2d 840 (Ct.App. 2009). “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. *Id.* at 105, 623 S.E.2d at 851. Finally, in determining if a consent is voluntary, whether an individual is told of their right to refuse consent is highly relevant to the factual inquiry. *Mendenhall supra.*”

*United States v. Mendenhall* dealt, in part, with the issue of whether the Defendant voluntarily consented to a search of her person. 446 U.S. 544, 100 S.Ct. 1870 (1980). In *Mendenhall*, the Respondent was arriving from a Los Angeles flight and was approached by DEA agents because she allegedly met a “drug courier profile.” *Id.* at 550, 100 S.Ct. at 1875. After she was approached, she consented to accompany the agents for questioning, and then consented to a search of her person, after being told on two occasions that she had the right to refuse. The Court determined first that the Respondent’s consent was procured not as a result of an illegal seizure.

The Court then affirmed Respondent’s consent based on the totality of the circumstances. *Id.* The Court noted the Respondent’s age and education level, and also found it highly relevant that the Respondent was informed twice that she was free to decline consent, and that on both occasions, the Respondent still unequivocally indicated her consent to search. *Id.* at 559, 100 S.Ct. 1870 at 1879-1880. In light of these factors, the Court affirmed the lower court’s determination that Respondent’s consent was freely and voluntarily given. *Id.*

The facts of the instant case diverge markedly from the facts in *Mendenhall*. First, no court engaged in a conversation about Appellant's age or level of education, or any other factors indicative of Appellant's ability to provide consent. However, Appellant's own testimony is that he did not provide consent for Officer Gardner to go into his pocket. (Trial transcript, p. 113-114, ll. 1-23). Furthermore, Officer Gardner produced no video or corroborating evidence of the encounter to support his rendition of the events. Finally, had Officer Gardner asked Appellant to consent to an in-the-pockets search at the point in time that he felt a lump on the outside of Appellant's pocket, any "consent" should be deemed coercive, and, pursuant to the circumstances of the "consent," was not voluntary. In addition, that "consent" would be limited to removal of the lump only, based upon Officer Gardner's own testimony that all he felt during his over-the-clothes pat down was the lump.

~~The Court should disregard Respondent's position that Appellant consented to a search because this argument was not properly preserved for review. However, even if the Court considers whether Appellant consented in this matter, the Court must find that consent was the product of an illegal detention, and that no voluntary consent existed sufficient to justify a warrantless search of Appellant absent probable cause.~~

#### **IV. THE TRIAL COURT ERRED BY ADMITTING EVIDENCE WHERE THE ORIGINAL EVIDENCE CUSTODIAN WAS NEVER IDENTIFIED AND THERE WAS NO INDICATION ABOUT THE CONDITION OF THE EVIDENCE AT THE TIME IT WAS LOGGED IN**

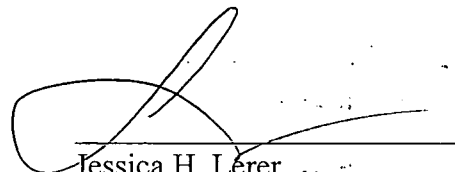
Appellant strongly encourages this Court to review its initial argument regarding the evidentiary issue presented. It is undisputed that at the initial trial of this matter, the evidence custodian who initially logged the evidence into the property and evidence division never appeared to testify, nor were they identified by sworn affidavit. While at

trial the state attempted to identify Mr. Israel Flounders as this initial evidence custodian, the State presented no proof of identification, nor did the state present a single witness who could positively identify Mr. Flounders as the initial custodian. Thus, the identity of the initial evidence custodian, along with the condition of the evidence when logged in, remains unknown, and the Court erred in admitting this evidence at the trial.

### CONCLUSION

For the reasons provided herein, as well as those reasons enunciated in Appellant's initial brief, the trial court erred by failing to suppress evidence seized in violation of Appellant's Fourth Amendment rights, and by admitting evidence where the initial evidence custodian was never properly identified, nor was the condition of the evidence identified at the time the evidence was logged in. The trial court should therefore be reversed, and this case remanded for further decision.

This 12<sup>th</sup> day of May, 2014.



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STATE OF SOUTH CAROLINA  
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APPEAL FROM GREENVILLE COUNTY  
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THE STATE,

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Appellate Case No. 2013-000224

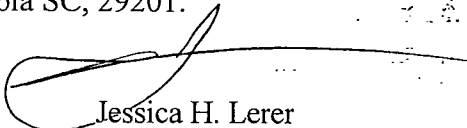
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CERTIFICATE OF SERVICE

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I certify that I have served Appellant's Reply Brief upon counsel for the Respondent, the State, by delivering a copy via United States mail, postage prepaid on May 12, 2014, to the State's attorney of record Mary Williams at South Carolina Office of Attorney General, Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia SC, 29201.

This 12 day of May, 2014

  
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Chief Appellate Defender

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ERICK HEWINS

This 23 day of DECEMBER, 2015

RECEIVED

DEC 31 2015

S.C. Supreme Court

STATE OF SOUTH CAROLINA  
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APPEAL FROM GREENVILLE COUNTY  
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THE STATE,

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Appellate Case No. 2013-000224

2015-000595

INITIAL BRIEF OF APPELLANT

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## STATEMENT OF ISSUES ON APPEAL

1. WHETHER THE TRIAL COURT ERRED BY FAILING TO SUPPRESS EVIDENCE SEIZED BY OFFICER GARDNER FOLLOWING HIS UNLAWFUL FOURTH AMENDMENT SEIZURE OF DEFENDANT WHERE OFFICER GARDNER FAILED TO ARTICULATE ANY REASON THAT HE REASONABLY SUSPECTED DEFENDANT WAS ENGAGED IN CRIMINAL ACTIVITY AT THE TIME THE OFFICERS SAW DEFENDANT SITTING IN HIS VEHICLE.

2. WHETHER THE TRIAL COURT ERRED WHEN IT FOUND OFFICER GARDNER HAD REASONABLE SUSPICION SUFFICIENT TO CONDUCT A *TERRY* FRISK WHERE OFFICER GARDNER FAILED TO ARTICULATE FACTS TO SUPPORT HIS BELIEF THAT DEFENDANT WAS ARMED AND DANGEROUS AND WHERE OFFICER GARDNER ALLOWED TOO MUCH TIME TO ELAPSE BETWEEN ASKING DEFENDANT TO EXIT HIS VEHICLE AND ACTUALLY CONDUCTING THE FRISK.

3. WHETHER THE TRIAL COURT ERRED IN FAILING TO SUPPRESS EVIDENCE SEIZED BY OFFICER GARDNER DURING A SECOND UNLAWFUL SEARCH OF DEFENDANT.

4. WHETHER THE TRIAL COURT ERRED IN ADMITTING EVIDENCE WHERE THE STATE FAILED TO PROPERLY IDENTIFY BY TESTIMONY OR SWORN STATEMENT THE EVIDENCE CUSTODIAN INITIALLY RESPONSIBLE FOR RETREIVING THE EVIDENCE OR THE CONDITION OF THE EVIDENCE WHEN IT WAS IN.

## STATEMENT OF THE CASE

This case arises out of an arrest that occurred in Greenville, South Carolina on August 9, 2010. At that time, Officers Gardner and Hall of the Greenville City Police Department were assigned to the Aggressive Patrol Unit. The Officers, dressed in plain clothes, and driving an unmarked vehicle, would patrol the city, targeting areas identified during the briefing prior to patrol (Trial Transcript, p. 44, ll. 4-25).

On this particular evening, Officers Gardner and Hall drove to the parking lot of the Clarion Inn off of Haywood Road. The Officers had received no communication regarding any alleged crime ongoing at this site, but were instead engaged in routine patrol. Both Officers testified that the surrounding area is considered "high-crime", (Trial Transcript p. 63, ll. 23-24, p. 78-79), known for prostitution, drugs, and automobile break-ins. However, during his cross examination of the Officers, ~~Defendant's trial counsel, Mr. Chase Harbin, introduced evidence that crime at this particular location had rapidly declined over the year and a half immediately preceding Defendant's arrest.~~ (Trial Transcript, p.60, ll. 7-23).

At approximately 12:36 A.M., the Officers pulled their patrol car into the parking lot of the Clarion Inn, which was empty of vehicles except for Defendant's car, a black Lexus, parked next to a Toyota Camry. The Officers noted that ~~Defendant's car was backed into a space~~ and the Camry was pulled in, and it appeared that the occupants of the two vehicles were speaking to one another. (Trial Transcript, p. 46, ll. 1-20). Officer Gardner testified that from the location of the vehicles, he determined that " they [the defendant, and occupants of the Camry] were just sitting there having --- they appeared to have a meeting for some reason." (Trial Transcript p. 46, ll. 9-10). As the Officers vehicle

approached they noted that the Defendant=~~was an African American male, and that two White females were in the Toyota Camry.~~

At that time, Officer Hall parked the patrol car directly behind, and horizontal to, the two parked vehicles. (Defense Exhibit 2). While testimony is inconsistent as to the amount of room between the detained vehicles and the Officers' patrol car, ~~Appellant and witness Megan Newman both testified that neither vehicle would be able to leave without hitting the patrol vehicle.~~ (Trial Transcript, p. 109, ll. 3-17, p. 119-120, ll. 15-25, ll. 1-24).

*Off. Classic imprisonment 103 s.ct 1319*

Once Officer Hall parked, Officer Gardner exited the patrol car and came to stand between the Defendant's vehicle and the Toyota Camry, in the vehicles' A-Frames just at the driver and passenger doors, respectively. Officer Gardner testified that he did this to enable him to see all three individuals. (Trial Transcript, p. 69, ll 23-25, p. 70, ll. 1-6). While between the two vehicles, ~~Officer Gardner did not observe any drugs in plain view in either vehicle, nor did he observe any odors of either drugs or alcohol, any guns, money or drug paraphernalia, or other indicia of criminal activity.~~ Yet Officer Gardner ~~proceeded to ask Defendant questions about drugs, stating that the area was known for "heavy hitters."~~ (Trial Transcript, p. 107, ll. 15-21). Defendant testified that he told Officer Gardner, "~~I don't know nothing about no car break ins or no drugs.~~" (Trial Transcript, p. 107, ll. 20-21).

After Officer Gardner had already begun questioning Defendant about drugs, he asked Defendant and the two women sitting in the Toyota Camry for identifying information. Defendant stated that he did not have his license, but provided his name and social security number. Officer Hall ran the check on this information. Both Officers

testified that while the women's information came back right away, Defendant's information was not coming back. (Trial Transcript p. 84, ll. 1-7, ll. 19-25, P. 85, ll. 1-2).

Meanwhile, Officer Gardner continued to question Defendant about what he was doing at that particular hotel. According to Officer Gardner, Defendant continued to touch his pants pocket throughout Officer Gardner's investigatory stop, and this alerted Officer Gardner that Defendant could have had either drugs, or a weapon on him. (Trial Transcript, p. 51, ll. 9-20). Officer Gardner then stated that he called for backup and asked Defendant to step out of the vehicle. <sup>\*</sup> <sup>1</sup>

~~Before backup arrived, Defendant relayed to Officer Gardner that he was at the Clarion Inn to visit his "baby mama", who was staying in room 237. (Trial Transcript, p. 95, ll. 10-25, p. 96, ll. 1-3). Approximately twelve (12) minutes after Officers Gardner and Hall arrived and began their investigation of Defendant, Officer Cothran arrived. Officer Gardner relayed to Officer Cothran what Defendant had told Officer Gardner about why he was at the Clarion Inn, and Officer Cothran went to check on these statements with the front desk. After Officer Cothran had verified Defendant's story, and was coming back toward the vehicle, he saw Officer Gardner perform a pat-down of Defendant. (Trial Transcript p. 97, ll. 19-25, p. 98 ll. 1-25, p. 99, ll. 1-8).~~

Officer Gardner testified that, during the pat-down, he felt a hard lump on the outside of Defendant's pocket, and reached into Defendant's pocket to reveal a wad of cash. Officer Gardner asked Defendant several questions about the cash, and then, went

Wrong Theory  
→

<sup>1</sup> The exact order and timeframe of what happened is subject to debate. The Officers and Defendant presented slight variations on what happened, but there was no recording, or any other affirmation as to what actually happened or how long it took, except for CAD reports demonstrating that Officers Gardner and Hall arrived on the scene at 12:36 A.M., and Officer Cothran arrived at 12:48 A.M., at which time Defendant was outside of his vehicle but Officer Gardner had not yet performed the pat-down.

back into Defendant' pocket. At this time, Officer Gardner found four (4) small pills, revealed later to be a Schedule IV substance. After finding these pills, Officer Gardner placed Defendant under arrest. ~~Following his arrest, Defendant's information came back from Officer Hall's search.~~ Officer Gardner called a tow truck, and in the process of inventorying the vehicle prior to tow, found a large rock of what appeared to be crack cocaine as well as several smaller cookies.

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This case came before the Greenville County Circuit Court, G. Edward Welmaker on January 13, 2013, on Defendant's indictments for trafficking in excess of 10 grams of cocaine base, and possession of a schedule IV controlled substance. After swearing in the jury, Judge Welmaker heard Defendant's motion to suppress. Defendant's counsel argued that there were two distinct 4<sup>th</sup> Amendment Issues presented in this case, both of which precluded admission of the drugs. (Trial Transcript, p. 140-148, ll. 1-16). First, Defendant's counsel argued that from the moment Officers Gardner and Hall pulled in behind Defendant's vehicle in an otherwise empty parking lot, the officers had initiated an investigatory detention, and that this detention was not based upon reasonable, articulable suspicion that Defendant was actually engaged in criminal activity. (Trial Transcript, p. 142, ll. 18-25, p. 143, ll. 1-6).

Second, Defendant's counsel argued that Officer Gardner failed to support his pat-down of Defendant with reasonable, articulable facts that Defendant was armed or otherwise a threat to Officer Gardner or the public. (Trial Transcript, p. 146, ll. 1-18). ~~Counsel relied on several factors in his argument including the length of time that passed between when Officer Gardner asked Defendant to step out of his vehicle and when Officer Gardner actually initiated the pat-down.~~ (Trial Transcript, p. 147, ll. 9 – p. 148, ll.

1-14). Defendant's counsel also ~~cast doubt on Officer Gardner's decision to go back into Defendant's pocket a second time, after removing the lump that Officer Gardner testified he felt upon his pat down of Defendant.~~

In opposition to Defendant's Motion to Suppress, the State argued that Officers Gardner and Hall did have reasonable, articulable suspicion of criminal activity sufficient to support an investigatory detention. ~~The State argued the location of Defendant's vehicle parked beside the Toyota Camry indicated to the Officers that the occupants were meeting in a high crime area, at night. (Trial Transcript, p. 151 ll. 1-19). Specifically the State argued "[the vehicles' occupants] are not going into a hotel room. They're not getting out of their cars. They are sitting in the parking lot which led [the officers] to believe that they may be planning to do something."~~ (Trial Transcript, p. 151, ll. 10-12).

Despite these arguments, Judge Welmaker denied Defendant's motion to suppress. Judge Welmaker relied upon the South Carolina Supreme Court decision in *State v. Taylor*, 401 S.C. 104, 736 S.E.2d 663 (2013), the State's classification of the Clarion parking lot as a "high crime area," the experience and training of Officers Gardner and Hall, and the lateness of the hour. (Trial Transcript, p. 160, ll. 1-15). The Court also held that the frisk did not take an unlawful amount of time, and held, as a matter of law, that the "frisk took place within the time period when backup was coming." (Trial Transcript, p. 162, ll. 20-22). The Court made this ruling despite testimony from the Officer Cothran that he arrived at the scene after Officer Gardner had removed Defendant from his vehicle, but before the pat down occurred.

The court specifically heard arguments from the Defendant and the State regarding the two separate 4<sup>th</sup> Amendment violations committed by Officers Gardner and

Hall. Yet, in his ruling, Judge Welmaker confused the two separate search issues presented, instead finding ~~only that the Officers had reasonable articulable suspicion to support the Terry frisk.~~ (Trial Transcript, p. 160, ll. 1-15). ~~The court stated that Defendant's counsel was noted for the record, indicating that the court did not intend to change its position, and that further argument would not help Defendant's case.~~ (Trial Transcript, p. 160, ll. 15-25).

*Case Law* → Following the court's ruling, the jury heard opening statements and was then released for Defendant's motion to exclude evidence based upon the State's failure to properly present a chain-of-custody. Prior to trial, Defendant made a ~~Rule 6, South Carolina Rules of Criminal Procedure (S.C.R.Crim.P.) demand for the appearance of all witnesses in the chain of custody.~~ The state however, failed to present the initial evidence custodian who retrieved ~~the evidence dropped off by Officer Gardner following Defendant's arrest.~~ The State further failed to submit a sworn statement from this individual. In the absence of either the person or his sworn statement, Defendant argued that the state had failed to identify this person, ~~or the condition of the evidence at the time this person retrieved it.~~ (Trial Transcript, p. 179, ll. 6-20). The court denied Defendant's motion to exclude, finding that the evidence was admissible ~~absent proof of ill motive, bad faith, or tampering.~~ (Trial Transcript, p. 181, ll. 6-24).

*Note* →

*Issue* →

The trial continued, and ultimately the jury found Defendant guilty of possession of a controlled substance, as well as trafficking in greater than 10 grams of cocaine base. The court sentenced Defendant to one year on the possession charge, and twenty five years on the trafficking charge, to run consecutive.

*The state i think testified*

This appeal follows.

## STANDARD OF REVIEW

This case presents three separate issues governed by three separate standards of review. In cases where the Court of Appeals is asked to determine reasonable suspicion, the Court conducts its review *de novo*. *State v. Blassingame*, 338 S.C. 240, 525 S.E.2d 535 (Ct.App. 1999). In overturning a trial court's Fourth Amendment suppression ruling, the reviewing court may reverse only when there is clear error, given the facts. *State v. Taylor*, 401 S.C. 104, 736 S.E.2d 663 (2013) However, this deferential review does not preclude an appellate court from conducting its own review of the record to determine whether the trial judge's decision is supported by evidence. ~~*State v. Tindall*, 388 S.C. 518, 520, 698 S.E.2d 203, 205 (2010).~~ Finally, on appeal from a trial court's decision on admission of evidence, the question becomes whether the trial court's decision is ~~controlled by an error of law or lacks evidentiary supports.~~ *State v. Taylor*, 360 S.C. 18, 598 S.E.2d 735 (Ct.App. 2004)

## ARGUMENTS

\* 2<sup>nd</sup> 1st

**I. THE TRIAL COURT ERRED BY FAILING TO SUPPRESS EVIDENCE SEIZED BY OFFICER GARDNER FOLLOWING HIS UNLAWFUL FOURTH AMENDMENT SEIZURE OF DEFENDANT BECAUSE OFFICER GARDNER FAILED TO ARTICULATE ANY REASON THAT HE REASONABLY SUSPECTED DEFENDANT WAS ENGAGED IN CRIMINAL ACTIVITY AT THE TIME THE OFFICERS SAW DEFENDANT SITTING IN HIS VEHICLE.**

*a. Seizure pursuant to the Fourth Amendment.*

The Fourth Amendment provides that “the right of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated[.]” U.S.Const.Amend.IV, *State v. Rodriquez*, 323 S.C. 484, 476 S.E.2d 161 (Ct.App.1997). “Not all personal encounters between policeman and citizens involve ‘seizures’ of persons thereby bringing the Fourth Amendment into play.” *Rodriquez* at 592, 476 S.E.2d at 161, quoting *State v. Culbreath*, 300 S.C. 232, 237, 387 S.E.2d 255, 257 (1990). Instead, a person has been seized within the meaning of the Fourth Amendment when the officer “by means of physical force or show of authority has in some way restrained the liberty of the citizen[.]” *Rodriquez* at 491, 476 S.E.2d at 165, citing *Terry v. Ohio*, 329 U.S. 1 at 19, 88 S.Ct. 1868 at 1879. In determining whether an encounter between a law enforcement official and a citizen constitutes a seizure, and thereby implicates Fourth Amendment protection, ~~the correct inquiry is whether, considering all the circumstances surrounding the encounter, a reasonable person would have believed he was not free to leave.~~ *Rodriquez* at 491, 476 S.E.2d at 165, citing *U.S. v. Mendenhall*, 446 U.S. at 545, 100 S.Ct. at 1872-73.

\*

The first question presented in the instant case is whether the Officers’ initial stop, parking their car behind Defendant’s vehicle, and standing in Defendant’s doorframe, constituted a seizure within the meaning of the Fourth Amendment.

In *State v. Rodriguez*, 323 S.C. 484, 476 S.E.2d 161 (Ct.App. 1997), the Officers involved were alerted to Defendant's presence on a Charleston commuter train after reviewing the train's manifest and identifying Defendant's surname. According to one officer, the name Rodriguez was significant because police had arrested a drug courier with the same last name some months earlier. The officer further noted that Rodriguez was on a return trip to Charleston from New York, and that his stay in New York was short. Officers arrived at the station approximately 45 minutes before the train's expected arrival, and the train was one hour behind schedule.

Based upon a vague description of Rodriguez provided by a confidential informant, the Officers approached Rodriguez when he exited the train, identified themselves as officers and asked if they could pat him down for weapons. Rodriguez refused. For the next thirty minutes, Officers continually asked Rodriguez if he would consent to a search. Rodriguez continually refused and also asked why the Officers were detaining him. During examination at the motion to suppress, one Officer admitted that ←  
while they allegedly told Rodriguez he was not being detained, they also told him that they wanted to do a short search of his belongings and if nothing was found, he'd be free to go.

The Officers eventually contacted a K-9 unit and notified Rodriguez that they intended to perform a pat down. Rodriguez reportedly lifted his arms to ask "why," at which time the Officers saw a pistol on his waistband and arrested him. Subsequent to the arrest, the Officers found various contraband.

Following a totality of the circumstances evaluation, the trial court denied Defendant's motion to suppress finding that Rodriguez was never seized. Rodriguez

appealed. On appeal, the Court considered two issues: (1) whether the police seized Rodriquez within the meaning of the 4<sup>th</sup> Amendment; and (2) if a seizure did occur, whether the seizure was reasonable in scope and duration, pursuant to *Ferry*.

As to the first issue, whether Rodriquez was "seized" pursuant to the 4<sup>th</sup> Amendment, the Court of Appeals found that the proper inquiry was whether, considering all the circumstances surrounding the encounter, the reasonable person would have believed he was not free to leave. *Rodriquez* at 491, 476 S.E.2d at 165, citing *Mendenhall* at 554, 100 S.Ct. at 1877 (1979) (so long as the person approached and questioned remains free to disregard the Officer's questions and walk away, no intrusion upon the person's liberty or privacy has taken place and, therefore, no constitutional justification for the encounter is necessary.)

Based upon this test, the Court of Appeals concluded that a reasonable person in Rodriquez's position would not feel free to leave, and that therefore, a seizure had occurred. *Rodriquez* at 491-92, 476 S.E.2d at 165, see *Mendenhall* ("Examples of circumstances that might indicate a seizure where the person did not attempt to leave, would be the threatening presence of several officers, or the use of language or tone of voice indicating that compliance with the officer's request must be compelled.")

In the instant case, Officers Gardner and Hall pulled into the parking lot at the Clarion Inn and saw two vehicles parked side by side whose occupants appeared to be talking. The Officers, without more information, parked their patrol car behind those vehicles so that, according to testimony from the Defendant and witness Megan Newman, the Defendant would be unable to leave from his spot without hitting the patrol car. Once parked, Officer Gardner exited his vehicle in a shirt marked police and came to stand

Description  
of  
Evidence

between the Defendant's vehicle and the Toyota Camry in the vehicles' A-Frames. According to Ms. Newman, Officer Gardner's position prohibited Defendant from exiting the vehicle, without hitting Officer Gardner. Furthermore, ~~Officer Gardner testified that,~~ ~~had Defendant attempted to leave,~~ ~~Officer Gardner would have pursued him.~~ (Trial Transcript, p. 210, ll. 1-15). From the moment the Officers parked their vehicle behind Defendant, they were showing force that would lead a reasonable man to believe he was not free to go. Thus, from that time forward, Defendant had been seized within the meaning of the Fourth Amendment.

b. *Whether Officers Gardner and Hall violated Defendant's Fourth Amendment rights by subjecting him to an investigatory detention without reasonable, articulable suspicion of criminal activity.*

Because Defendant was seized pursuant to the 4th Amendment, the Court must consider whether Officers Hall and Gardner violated Defendant's 4<sup>th</sup> Amendment rights in detaining him. This analysis differs depending on whether the Court considers the stop a routine traffic stop, or an investigatory detention similar to a street stop.

"It is well established that the police may stop and briefly detain and question a person, without treading upon his 4<sup>th</sup> Amendment rights, upon a reasonable suspicion supported by articulable facts, short of probable cause for arrest, ~~that the person is, involved in criminal activity.~~" *Rodriguez* at 492, 476 S.E.2d at 166, citing *State v. Foster*, 269 S.E.2d 373, 379, 237 S.E.2d 589, 591 (1977). The stopping of a vehicle and the detention of its occupants constitutes a seizure and implicates the 4<sup>th</sup> Amendment's prohibition against unreasonable searches and seizures. *State v. Butler*, 353 S.C. 387, 577 S.E.2d 498 (Ct.App. 2003).

~~The underlying purpose for a traffic stop must be lawful, however, Butler at 391, 577 S.E.2d at 502, and a law enforcement officer must limit their investigation in scope and duration to the underlying justification for the stop. State v. Tindall, 388 S.C. 518, 698 S.E.2d 203 (2010). Any further detention for questioning is beyond the scope of the stop and therefore illegal unless the officer has reasonable suspicion of a serious crime. Tindall at 521, 698 S.E.2d at 203, citing U.S. v. Sullivan, 138 F.3d 126, 131 (C.A.4 1998).~~

The term "reasonable suspicion" requires a particularized and objective basis that would lead one to suspect another of criminal activity. *State v. Blassingame*, 338 S.C. 240, 248, 525 S.E.2d 535, 539 (Ct.App. 1999). In determining whether reasonable suspicion exists, the whole picture must be considered. *Id.* citing *U.S. v. Sokolow*, 490 U.S. 1, 109 S.Ct. 1581 (1989).

~~In the instant case, Officers Gardner and Hall pointed to the parked position of Defendant's vehicle as one reason that they approached. Specifically, Officer Gardner testified that backing into a spot violated a city ordinance, and was a ticketable offense. Once Officer Gardner approached Defendant's vehicle, however, it was immediately clear that Officer Gardner was not concerned about how Defendant's vehicle was parked. Officer Gardner did not testify that he asked Defendant a single question about the position of the vehicle, nor did Officer Gardner attempt to ticket Defendant for this violation. Because Officer Gardner's underlying traffic stop was improper, every question thereafter exceeded the limited scope and duration of questions allowed under Terry and its progeny.~~

If the Court treats Defendant's detention instead as a simple investigatory stop where the Defendant was nonetheless seized pursuant to the 4<sup>th</sup> Amendment, the state still bears the burden of demonstrating a reasonable, articulable suspicion that Officer Gardner believed Defendant was engaged in criminal activity. Recently, our State Supreme Court has considered this inquiry through the lense of two cases decided by the Fourth Circuit Court of Appeals: ~~U.S. v. Lender, 985 F.2d 151 (C.A.4 1993)~~, and ~~U.S. v. Sprinkle, 106 F.3d 613 (C.A.4 1997)~~.

In *Lender*, Officers observed a group of four or five men including the Defendant huddled together at approximately 12:50 A.M. in an area known for its heavy drug traffic. The Defendant was holding his hand out palm up, and the remaining men were looking into his outstretched hand. The Officers approached, and the group dispersed. The Defendant walked away from the Officers, and continued walking despite police requests for him to stop. Following multiple requests, the Defendant finally stopped, and a semi-automatic weapon fell to the ground. The Officers then placed Defendant under arrest.

On Defendant's motion to suppress the gun, Defendant argued that the Officers did not have reasonable suspicion to justify stopping him, and that he was seized from the moment he came to a stop after the Officer's second call for him to do so. The District Court denied the Defendant's motion finding that while the Officers had no reasonable suspicion to stop him, the Defendant was not seized when the gun fell into plain view.

The Fourth Circuit Court of Appeals disagreed. They found that, given the totality of the circumstances, reasonable suspicion existed for the Officers to briefly stop the Defendant. In its finding, the Court noted: "~~Here the officers personally knew that the~~

~~area they were patrolling had a large amount of drug traffic.~~ While the Defendant's mere presence in a ~~high-crime~~ area is not by itself enough to raise reasonable suspicion, an area's propensity toward ~~criminal activity~~ is something an officer may consider. Additionally, the Officers observed the Defendant engage in behavior that they suspected to be a drug transaction... "we cannot say that a reasonable Officer was required to regard such conduct as innocuous..." *Lender* at 154. The Court also addressed the Defendant's attempt to flee the scene saying, "[e]vasive conduct, although stopping short of headlong flight, may inform an officer's appraisal of a street corner encounter." *Id.*

On the other hand, in *Sprinkle*, the Fourth Circuit held that the Officers did not have reasonable suspicion sufficient to justify an investigative stop. *Sprinkle*, 106 F.3d at 619. The Officers in *Sprinkle* observed Poindexter, a man with a known narcotics record, ~~sitting in a car around 5:30 in the evening in a neighborhood where police reported a high incidence of narcotics traffic.~~ Defendant Sprinkle entered the passenger side of the vehicle.

The Officers watched the two men huddle together over or near the console with their hands close together. The Officers believed Defendant was passing or about to pass something to Poindexter, though the Officers admitted they could see inside the car and could see everyone's hands ~~but saw no drugs, money, guns, or drug paraphernalia.~~

Poindexter pulled the car into the street and began driving obeying all traffic signals and laws. Poindexter then came up to an unrelated road block, and the observing Officers activated their blue lights. Defendant stepped out of the vehicle and attempted to run as police immediately initiated a pat down. In the ensuing chase, Defendant pulled

out a hand game, later recovered by the police. The District Court granted the Defendant's motion to suppress the gun and the government appealed.

The government argued that five factors taken together provided police the basis for reasonable suspicion of criminal activity: (1) knowledge of Poindexter's past criminal record for narcotics violations; (2) the subjects spotted in a "high crime" neighborhood; (3) the two men huddled toward the vehicle's center console with their hands close together; (4) Poindexter's efforts to hide his face from view; and (5) Poindexter leaving the scene when Officers drive by the car. *Sprinkle* at 616-17. The government also relied heavily on the Court's opinion in *Lender. Id.* at 619, N.3.

The Fourth Circuit distinguished *Lender* however. First, the Court determined that although police could not see into Lender's open hand, the fact that several men were looking into his hand indicating that something was actually in it. In *Sprinkle*, the Officers admitted that they saw Defendant's hands and saw nothing in it passed between the two men. Second, in *Lender*, the Defendant engaged in evasive conduct when he tried to walk away from the Officers despite multiple attempts by the Officers to get Defendant to stop. In *Sprinkle*, the Court specifically determined that Defendant had not engaged in evasive conduct. Finally, the Court noted that the lateness of the hour properly contributed to reasonable suspicion in *Lender* whereas the Defendant in *Sprinkle* was apprehended at 5:30 P.M. The Court held that "[i]n sum, *Lender* is distinguishable to the point that it is not controlling." *Id.*

In *State v. Taylor*, the South Carolina Supreme Court analyzed both *Lender* and *Sprinkle*, but found that Taylor's case more closely mirrored *Lender*. *Taylor* at 112, 736 S.E.2d at 667. The police were alerted in *Taylor* via an anonymous tip that a black male

on a bicycle was selling narcotics at an unpaved portion of a local street in a high crime area around 11 P.M. Officers at the scene observed the Defendant, an ~~African-American~~ male, on a bicycle, ~~“huddled up” with another male.~~ *Taylor* at 111-112, 736 S.E.2d at 667. As the Officers approached, the Defendant attempted to pedal away from the scene in an “undisputed attempt to avoid them.” *Id.* The Court in *Taylor* determined that, given the totality of the circumstances, the Officers had reasonable suspicion of criminal activity. *Id.*

~~The instant case aligns more closely with *Sprinkle* than *Lender*.~~ Defendant was merely sitting in his vehicle speaking to the occupants of another vehicle when Officers Gardner and Hall arrived. The Officers were on routine patrol and had not been alerted to any potential criminal activity in the area. The Officers arrived in the parking lot, saw Defendant speaking to the women in the Toyota Camry, and failed to articulate any suspected criminal activity that was presently ongoing. Both Officers testified that it ~~appeared the vehicles’ occupants were meeting “for a purpose,” that neither the Defendant nor the women in the Camry appeared to be moving from their vehicles, and that they were talking across the cars!~~

Once the Officers parked their vehicle and approached Defendant to stand in the A-Frame of Defendant’s car, Defendant was completely cooperative. Furthermore, given Officer Gardner’s position in the A-Frame, ~~he was able to see into Defendant’s vehicle and did not observe any drugs, drug paraphernalia, money, guns, or other indicia of illegal activity.~~ In their testimony, Officers Gardner and Hall pointed to three things to support their argument regarding reasonable suspicion: (1) ~~the time of day;~~ (2) ~~the purported “high crime” area;~~ and (3) ~~their experience in the field.~~ (Trial Transcript, p.

210, ll. 3-11). ~~This list alone does not support a finding of reasonable suspicion, and thus the Officers' investigatory detention of Defendant violated his 4<sup>th</sup> Amendment rights. Based upon the totality of the circumstances, the Court should have found that the Officers did not have reasonable suspicion to detain Defendant, and should have granted Defendant's motion to suppress evidence seized as a result of this unlawful detention.~~

**II. THE TRIAL COURT ERRED WHEN IT FOUND OFFICER GARDNER HAD REASONABLE SUSPICION SUFFICIENT TO CONDUCT A *TERRY* FRISK WHERE OFFICER GARDNER FAILED TO OFFER SUPPORT FOR HIS BELIEF THAT DEFENDANT WAS ARMED AND DANGEROUS AND WHERE OFFICER GARDNER ALLOWED TOO MUCH TIME TO ELAPSE BETWEEN ASKING DEFENDANT TO EXIT HIS VEHICLE AND ACTUALLY CONDUCTING THE FRISK.**

Even if the lower court could have found that Officers Gardner and Hall had reasonable suspicion to detain Defendant, the trial court erred by finding that Officer Gardner had reasonable suspicion to conduct a *Terry* frisk.

South Carolina law recognizes that, for an Officer to properly conduct a pat-down, or *Terry* frisk, “[a]n officer must be able to specify the particular facts on which he or she based his or her belief the suspect was armed and dangerous.” *State v. Butler*, 353 S.C. 383, 577 S.E.2d 498, quoting *Sibron v. New York*, 392 U.S. 40, 88 S.Ct. 1889 (1968) (mere knowledge of the suspect being a known narcotics dealer who put his or her hand into a pocket as the police approached does not provide justification [for a *Terry* frisk].). In assessing whether a suspect is armed and dangerous, the officer need not be absolutely certain the individual is armed; rather, the question is whether a reasonably prudent person in those circumstances would be warranted in the belief that his safety or that of others is in danger. *Butler* at 393, 577 S.E.2d at 503.

In *Butler*, the Court was asked to determine whether reasonable suspicion existed for Officer Todd Cook to pat-down Defendant Butler following a lawful traffic stop. Butler was a passenger in a van pulled over by Officer Cook for driving without taillights. Officer Cook testified that, as he wrote the driver a warning ticket, he smelled alcohol, and had reason to suspect that there was alcohol inside the vehicle. *Id.* at 386, 577 S.E.2d at 499. Officer Cook then proceeded to the passenger side of the vehicle and asked Defendant Butler to step from the van. After Officer Cook removed Defendant Butler from the vehicle, he performed a pat down of Defendant, which revealed a pistol, and a large quantity of cocaine.

During the Defendant's motion to suppress, Counsel for the Defendant repeatedly asked Officer Cook to articulate anything that the Defendant was doing that would cause a reasonable person to fear for their safety. Officer Cook was unable to respond. The trial court, however, found that Officer Cook had reasonable suspicion to ask the passengers to vacate the vehicle and pat them down. *Butler* at 388, 577 S.E.2d at 500. At trial, the Defendant was convicted of trafficking cocaine, and unlawful carrying of a pistol. Defendant appealed.

The Court of Appeals reversed the trial court. First, the Court noted that "[u]nder the mandates of *Terry*... a police officer must have a reasonable suspicion that an individual is armed and dangerous before conducting a pat down or frisk of the [Defendant]." *Butler* at 389, 577 S.E.2d at 501, quoting *Terry v. Ohio*, 392 U.S. at 27, 88 S.Ct. at 1883. The Court also emphasized that the purpose of the limited *Terry* frisk is not to discover evidence of a crime, but to allow the officer to pursue his investigation without fear of violence. *Butler* at *supra.*, quoting *Maryland-v-Bule*, 494 U.S. 325, 332,

~~1:0=S.Ct.=1093,=1097=(1990) (limited=pat=down=for=weapons=is=authorized=where=a  
reasonably=prudent=Officer=would=be=warranted=in=the=belief,=based=on=specific=and  
articulable=facts,=and=not=on=a=mere=inchoate=and=unparticularized=suspicion=or=hunch,=that  
he=is=dealing=with=an=armed=and=dangerous=individual.)~~ \*

The Court of Appeals thus determined that Defendant Butler's trial court "failed to make any determination that the Officer had the necessary apprehension of danger to justify a pat-down search." *Butler* at 392-93, 577 S.E.2d at 503. In fact, the Court determined that the Officer had no fear of Butler, but "was merely continuing his investigation of a possible open container violation." *Id.* The Court opined that, "[c]learly, the trial court improperly assumed if the Officer was entitled to remove Butler from the vehicle in furtherance of his investigation, he was automatically entitled to frisk the passenger." *Id.* The Court determined that the "only basis for suspicion [Officer Cook] had was that he smelled alcohol and the driver had provided him with an incorrect name for the passenger." *Butler* at 393-394, 577 S.E.2d at 503. The Court concluded that without more, Officer Cook's search was unlawful. *Id.* ~~see=State=v.=Burton,=349=S.C.=at 440,=562=S.E.2d=at=673? (Where=only=activity=detective=pointed=to=as="suspicious"=was individual's=refusal=to=answer=questions,=and=fact=that=individual=kept=his=right=hand=in his=pocket,=detective=failed=to=articulate,=valid,=reasonable=suspicion=for=stop=and=search=of individual,=in=spite=of=detective's=testimony=he=feared=for=safety=of=those=around=him?)~~

In the instant case, Officer Gardner failed to support his pat down of Defendant by reasonable articulable facts that he feared Defendant was armed and dangerous. According to Officer Gardner, Defendant repeatedly touched his pocket while Officer Gardner questioned him, and Defendant also appeared nervous. These facts, without

more, fail to validate reasonable suspicion. Furthermore, even if Officer Gardner's decision to ask Defendant to vacate his vehicle was supported by reasonable suspicion that Defendant was armed, such suspicion was created by Officer Gardner through his unlawful investigative detention of Defendant.

Finally, in the instant case, Officer Gardner's testimony is made less credible by the amount of time that passed between asking Defendant to exit his vehicle and when Officer Gardner actually performed the pat-down for weapons. Though inexact, the testimony at trial creates a period of between five to ten minutes from the time Defendant exited his vehicle until Officer Gardner actually performed the frisk. Furthermore, Officer Gardner testified that Defendant touching his pocket did not alert Officer Gardner to weapons alone, but, instead, "can be a big indicator that an individual either has weapons or that they have contraband or drugs inside their pocket." (Trial Transcript, p. 51, ll. 18-20). During this time, as additional Officers arrived on the scene, Defendant remained at the back of his vehicle, and was completely cooperative. Importantly, all the information Defendant provided the Officers was true.

Given the totality of the circumstances, a reasonable man in Officer Gardner's position would not have believed that Defendant was armed and dangerous, and therefore, Officer Gardner's pat-down of Defendant violated Defendant's 4<sup>th</sup> Amendment rights. The trial court therefore erred by not suppressing evidence seized as a result of this unlawful pat-down.

### III. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS EVIDENCE SEIZED BY OFFICER GARDNER DURING A SECOND UNLAWFUL SEARCH OF DEFENDANT.

When Officer Gardner conducted a pat down on the outside of Defendant's clothing, he felt a hard lump in Defendant's pants' pocket. Officer Gardner placed his hand into Defendant's pocket to reveal that the hard lump was a wad of cash. Officer Gardner asked Defendant questions about the cash, which Defendant answered.

Officer Gardner then placed his hand back into Defendant's pocket because, he testified, Defendant could have had anything in his pocket. (Trial Transcript, p. 74, l. 4-11). The Officer continued by testifying about additional weapons he thought the Defendant might have had, though the testimony is uncontroverted that, during Officer Gardner's pat down of Defendant, he felt only the hard lump that turned out to be a wad of cash. ~~Officer Gardner never testified that he felt anything other than this lump outside Defendant's clothes.~~

<sup>v</sup> The second search revealed four small pills, which, taken together, were approximately the size of a penny or nickel. Upon discovery of these pills, Defendant was placed under arrest, roughly twenty minutes after Officers Gardner and Hall first detained Defendant. <sup>\*</sup> ~~The Court should have applied the same reasonable, articulable suspicion standard to this second search. However, the Court combined all three of these issues in its analysis.~~

<sup>7</sup> During Defendant's motion to suppress, the trial court determined that Officer Gardner had reasonable suspicion to conduct a *Terry* frisk based upon the following: (1) ~~the high crime area;~~ (2) ~~the lateness of the hour;~~ (3) "nervous behavior" by the Defendant; (4) that the Defendant allegedly touched his pocket; and (5) the experience of

the Officers. (Trial Transcript, p. 160, ll. 1-15). ~~None of these factors articulates what criminal activity the Officers believed Defendant to be engaged in at the time of their initial detention. These factors also fail to articulate the reason Officer Gardner believed Defendant was armed and dangerous. Finally, all Officer Gardner felt upon an over the clothes pat of Defendant's pocket was what turned out to be a wad of cash. Officer Gardner failed to identify a single reason he believed Defendant was still armed after the cash was removed. In short, Officer Gardner engaged in a fishing expedition based upon a hunch and persisted until he discovered contraband. Sikes v. State, 323 S.E.2d 448 S.E.2d 560 (1994); see United States v. Foster, 634 F.3d 243 (C.A.4 2011).~~

~~Given the totality of the circumstances, Officer Gardner's second frisk of Defendant was not supported by reasonable suspicion that Defendant was armed and dangerous. Officer Gardner testified that Defendant provided consent to perform the second search. However, "consent" must be (1) knowing and voluntary and (2) given by one with authority to consent. U.S. v. Digiovanni, 650 F.3d 498 (C.A.4 2011). Whether consent was voluntarily given is a question of fact, but ultimately rests on whether the person providing consent reasonably believed the Officer's request was voluntary. Digiovanni at 514. The facts in this case do not support an argument that Officer Gardner's request was voluntary, nor does Defendant concede that he voluntarily consented to search.~~

~~For the reasons stated above, Officer Gardner's second search of Defendant violated Defendant's 4<sup>th</sup> Amendment rights, and the Court erred by failing to suppress evidence seized pursuant to this unlawful search.~~

**IV. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE WHERE THE STATE FAILED TO PROPERLY IDENTIFY BY TESTIMONY OR SWORN STATEMENT THE EVIDENCE CUSTODIAN INITIALLY RESPONSIBLE FOR RETREIVING THE EVIDENCE OR THE CONDITION OF THE EVIDENCE WHEN IT WAS LOGGED IN.**

~~Rule 6(b), South Carolina Rules of Criminal Procedure, provides that:~~

~~“[f]or the purpose of establishing a chain of physical custody or control of evidence entered under Part A of this Rule, a certified or sworn statement signed by each successive person having custody of the evidence that he or she delivered it to the person stated is evidence that the person had custody and made delivery as stated without the necessity of the person who signed the statement being present in court provided: (1) the statement contains a sufficient description of the substance or its container to distinguish it; and (2) the statement says the substance was delivered in substantially the same condition as when received.”~~

770-892-0746  
In *State v. Chisolm*, 355 S.C. 175, 584 S.E.2d 401 (Ct.App. 2003), the Court of Appeals held that “[c]ustodial signatures on an evidence bag fail to establish an adequate chain of custody where the custodians do not provide testimony under oath or produce a sworn statement pursuant to Rule 6(b), S.C.R.Crim.P.” In *State v. Taylor*, 360 S.C. 18, 598 S.E.2d 735 (Ct.App. 2004), the Court of Appeals clarified that the cornerstone of *Chisolm* was adequately establishing the identify of evidence custodians.

In *Taylor*, the Defendant challenged the admissibility of evidence where the evidence custodian who retrieved the evidence from the arresting Officer was not available to testify. The state attempted to establish a chain of custody via affidavit, as proscribed by Rule 6(b), S.C.R.Crim.P., but Defendant objected.

The trial court found the evidece (36.16 grams of crack cocaine, and a firearm) admissible, ruling that the state had provided sufficient evidence of the chain of custody without the testimony of the absent evidence custodian. The jury found Defendant guilty

of trafficking cocaine and possession of a firearm during the commission of a violent crime.

On appeal, Taylor argued that *Chisolm* required the testimony of every person in the chain of custody to establish admissibility of the evidence. The Court of Appeals rejected this argument. Instead, the Court found that the issue in *Chisolm* and its progeny was identity. See ~~*State v. Williams*, 297 S.C. 290, 293, 376 S.E.2d 773, 774 (1989)~~ (where the analyzed substance has passed through several hands, the evidence must not leave it to conjecture as to who had it and what was done with it between the taking and the analysis). The Court noted that the question presented in *Taylor* was one of credibility rather than admissibility stating, “~~where there is evidence to establish the identity of those who have handled the evidence and the manner in which it was handled, a weakness in the chain raises a question of credibility, not admissibility.~~” *Taylor* at 24, 590 S.E.2d at 737.

~~In *Chisolm*, the Court excluded evidence where the record failed to establish how long the first technician possessed the evidence, in what condition it was received, where or how it was stored, or how the second technician came into possession of it. Furthermore, neither the first nor second technician testified at trial. *Id.* at 26, 598 S.E.2d at 739. The Court determined that these lapses in the chain left to conjecture the identity of those who handled the evidence, as well as how the evidence was handled.~~

The Court in *Taylor*, however, found that the state established the identity of every person in the chain through sworn statements, under the mechanism provided in Rule 6(b), S.C.R.Crim.P. Therefore, the question went to credibility rather than admissibility. 360 S.C. at 738, 598 S.E.2d at 737-738.

In the instant case, the state provided custodial signatures of Isreal Flounders, the initial evidence custodian, but did not offer Mr. Flounders' testimony or a sworn statement to identify Mr. Flounders, or the condition of the evidence at the time it was logged in. The state offered three property and evidence witnesses to attempt to establish the chain of custody. On cross examination of the first witness, Ms. Bennick, Defendant's counsel first established that in the normal course of business, the Greenville County Department of Property and Evidence will use an affidavit to verify the identity of technicians and the condition of evidence. (Trial Transcript, p. 285, ll. 1-22).

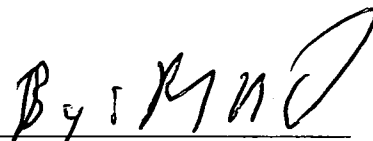
Defendant's counsel then verified that the department created no such affidavit in this case to verify the items dropped off by Officer Gardner. The state's next two witnesses, all employed as evidence custodians at Greenville County Property and Evidence, could not verify that Mr. Flounders was the person responsible for retrieving the evidence in this matter, nor what the condition of the evidence was at the time of retrieval. Thus none of the state's witnesses could identify Mr. Flounders, nor could these witnesses verify the condition of the evidence when it arrived at the Department. (Trial Transcript, p. 277-289, p. 292-296).

Because the state failed to identify the single most important evidence custodian in this matter, and further failed to identify the condition of the evidence at the time it was logged in, the trial court erred by admitting this evidence.

## CONCLUSION

For the reasons provided more fully above, the trial court erred by failing to suppress evidence seized in violation of 4<sup>th</sup> Amendment rights against unlawful searches and seizures, and further failed by admitting evidence despite the state's failure to properly identify each evidence custodian in the chain of custody, or the condition of the evidence at the time it was logged in with Greenville County's property and evidence division. Thus the trial court must be reversed, and this case remanded, to be decided in accord with the law.

This 27th day of December, 2013



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STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM GREENVILLE COUNTY  
Court of General Sessions

The Honorable G. Edward Welmaker, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

ERICK E. HEWINS,

APPELLANT

Appellate Case No. 2013-000224

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DESIGNATION OF MATTER TO BE  
INCLUDED IN THE RECORD ON APPEAL

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Appellant proposes the following to be included in the Record on Appeal:

1. Transcript of Trial: p. 39-128
2. Transcript of Trial: p. 140-162
3. Transcript of Trial: p. 172-184
4. Transcript of Trial: p. 187-295
5. Transcript of Trial: p. 307-309
6. Transcript of Trial: p. 320-328 *megan*
7. Defense Exhibit 2

I certify that this designation contains no matter which is irrelevant to this appeal.

[ Signature block to follow ]

This 27th day of December, 2013

This 23 day of December, 2015

By: RML

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