STATE OF SOUTH CAROLINA

ORIGINAL

IN THE COURT OF APPEALS

Appeal from York County

John C. Hayes, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TROY TERRELL BAXTER,

APPELLANT

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

Whether the trial court reversibly erred by failing to suppress evidence gleaned from the stop and search of Appellant's vehicle due to erroneously finding law enforcement had probable cause to search under the automobile exception where the traffic stop for speeding was wrongfully delayed by the arresting officer, and where any reasonable articulable suspicion regarding the presence of drugs was already investigated and dispelled by a second officer and a drug dog?

STATEMENT OF THE CASE

Appellant Troy T. Baxter was indicted by the York County grand jury on March 25, 2010, with possession with intent to distribute marijuana. Tr. 5, lines 10-13; R.* (Indictment). His case proceeded to trial from February 28 through March 1, 2011, before the Honorable John C. Hayes, III, and a jury. Appellant was represented by Ashley Anderson (Counsel), while his codefendant Larick P. Burris was represented by Robert Reeves. The State was represented by Teasa Weaver. Tr. 1.

The jury found Appellant and codefendant guilty of the lesser included offense of simple possession of marijuana. Tr. 248, lines 6-19. The trial court imposed a sentence of one year. Tr. 252, lines 10-11.

STATEMENT OF THE FACTS

Appellant Troy T. Baxter (Appellant) and Larick P. Burris (Codefendant) were driving northbound along I-77 in York County on September 11, 2009, when they were stopped at approximately 5:05 PM by Deputy Lonnie Vinesett, Jr., of the York County Sheriff's Department for driving 66 or 67 mph in a 60 mph speed zone.[1] Tr. 24, line 24—Tr. 26, line 8; Tr. 114, lines 8-24; Tr. 116, lines 4-20; Tr. 132, lines 15-24. After Vinesett initiated his blue lights,[2] Appellant pulled his car safely off the roadway with plenty of room on the side and Vinesett pulled up behind. Tr. 135, lines 16-25.

Vinesett exited the police cruiser and approached the passenger side of Appellant's car. Tr. 26, lines 9-14; Tr. 80, lines 6-8. Because it was still daylight, Vinesett neither had the headlights of his police cruiser on to illuminate Appellant's car, nor did he bring a flashlight with him when he approached to see inside Appellant's vehicle; it was not raining, and Vinesett did not have any difficulty with visibility. In short, Vinesett was able to see clearly inside the vehicle. Tr. 40, line 23—Tr. 41, line 9; Tr. 116, line 18—Tr. 117, line 10.

At the very beginning of the traffic stop, Vinesett observed Codefendant lighting a cigarette. When Vinesett arrived at the front passenger window, he asked for Appellant's driver's license and registration, and received Appellant's license, and a copy of the rental agreement for the vehicle. Tr. 26, line 17—Tr. 27, line 2; Tr. 31, lines 10-15. According to

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[1] Vinesett did not determine Appellant's speed by radar; rather, he purportedly estimated Appellant's speed through "pacing" Appellant's vehicle from several traffic lanes away and where other vehicles were present. Tr. 114, line 11—Tr. 115, line 19; Tr. 135, lines 1-2.

[2] The video of the traffic stop showed that the letter "L" appeared on the display immediately after Vinsett radioed to dispatch that he was making a traffic stop. Appellant pulled his car over shortly after blue lights were activated. R* (State's Exhibit #1, DVD).

Vinesett, he also saw four to five small green particles on the black shirt of Codefendant, which Vinesett later stated he believed was marijuana residue. Tr. 28, line 8—Tr. 29, line 12; Tr. 80, line 22—Tr. 81, line 9; Tr. 140, lines 3-16. However, Vinesett did not have Codefendant exit the vehicle when he saw what he believed was marijuana, nor did he ask Codefendant what was on the shirt, nor did he search the vehicle at the time. Tr. 38, lines 9-22; Tr. 119, lines 4-18. Instead, Vinesett had Appellant exit the vehicle and walk to the back of the car, and while walking Appellant to the back of the vehicle Vinesett radioed for Deputy William R. Gibson, II, (Gibson) to assist on the scene.[3] Tr. 29, lines 6-14; Tr. 40, lines 5-8; Tr. 81, lines 12-20; Tr. 84, lines 8-11; Tr. 119. lines 4-6.

Once at the back of Appellant's car, Vinesett questioned Appellant about where he was coming from and where he was going. Appellant explained that he was coming from Rock Hill where he saw his sick grandmother, picked up his little cousin, ate lunch at the Shrimp Boat, and was headed back to Charlotte. Tr. 27, lines 12-21; Tr. 30, lines 8-23; Tr. 82, lines 2-13; R.* (State's Ex. #1, DVD). While speaking with Appellant, Vinesett already determined he was just going to write a warning ticket for speeding. As a result, Vinesett indeed wrote a warning ticket to Appellant approximately three minutes from when the vehicle was stopped and showed it to Appellant; however, V inesett did not hand the warning ticket to Appellant at the time. Tr. 39, line 4—Tr. 40, line 4; Tr. 118, lines 5-11; R.* (State's Exhibit #1, DVD).

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[3] Gibson is a senior officer with 17 years of law enforcement experience and specially trained with the drug interdiction team, with illegal substances such as marijuana, and to handle drugs sniffing canines such as "Justice," the certified drug sniffing dog with which Gibson was working on September 11, 2009. Tr. 153, line 10—Tr. 155, line 21; Tr. 159, lines 12-16.

Vinesett also walked back to the passenger window and took Codefendant's identification as well. Codefendant was questioned; he likewise indicated he was coming from Rock Hill, and said he was coming from the court, which Vinesett believed was a basketball court due to Codefendant's apparel. Codefendant further mentioned that he ate lunch at the Shrimp Boat. Tr. 30, lines 4-7; Tr. 82, lines 15-23. During this time, Vinesett noticed no green particles on Codefendant's shirt. Tr. 28, lines 16-19. Regardless, Vinesett later stated that he had all intentions of searching the vehicle once he saw what he believed was marijuana residue on Codefendant's shirt. Yet, rather than investigating the matter himself after another officer arrived, Vinesett instead elected to call Gibson in order to "basically get his opinion to see if he can see it. To get the dog just basically to verify what [he] had [seen]."[4] Tr. 51, line 17—Tr. 52, line 1.

Gibson arrived, and Vinesett told him that the driver's hand was shaking, and that the occupants gave conflicting stories. Tr. 29, lines 22-25; R.* (State's Ex. #1, DVD). As indicated on the video itself, Vinesett tells Gibson he "could have sworn [he] saw little green particles on [Codefendant's] shirt," and asked Gibson to speak with Codefendant and "see if he could see anything." Tr. 31, lines 2-4; Tr. 40, lines 12-22; Tr. 84, lines 8-17; Tr. 141, line 13—Tr. 142, line 2; Tr. 154, lines 7-23; R.* (State's Ex. #1, DVD) (emphasis added). As requested, Gibson investigated by walking up, removing Codefendant from the car, and speaking with him; he then returned to Vinesett and indicated that he did not see anything on Codefendants shirt except cigarette ashes, and that Codefendant was smoking. Tr. 31, lines

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[4] At the suppression hearing, Vinesett admitted that he could not conclusively say that the green particles he claimed to have seen on Codefendant's shirt when he first walked up was marijuana at that point. Tr. 49, line 22—Tr. 50, line 2; Tr. 51, lines 5-9.

5-15; Tr. 42, line 20—Tr. 43, line 7; Tr. 50, lines 3-10; Tr. 85, lines 2-8; Tr. 119, line 22—Tr. 120, line 13; Tr. 142, lines 3-19; Tr. 154, line 24—Tr. 155, line 1; Tr. 158, line 1—Tr. 159, line 11. Additionally, Gibson did not indicate that anything fell off Codefendant's shirt, nor did he see any green plant material anywhere else in the car when the door was opened and Codefendant exited the vehicle. Tr. 42, line 20—Tr. 43, line 13; Tr. 159, lines 8-11. Vinesett then acknowledged to Gibson that Codefendant "lit up a cigarette shortly after the stop." Tr. 50, lines 8-10; Tr. 85, lines 4-8; R* (State's Ex. #1, DVD).

Despite Gibson's observations, Vinesett decided to further investigate. Tr. 142, lines 9-21. Specifically, Vinesett instructed Gibson to ask Appellant for permission to search the vehicle, and for Gibson to run his drug-sniffing canine around the vehicle if Appellant did not consent. Tr. 31, lines 20-22; Tr. 85, lines 9-15; Tr. 154, line 12—Tr. 155, line 4. Vinesett finally radioed to dispatch to check Appellant's driver's license; at this point, approximately eight minutes had transpired since Vinesett initiated the stop. Tr. 40, lines 9-11; R* (State's Ex. #1, DVD).

Appellant refused to give consent to the search of his vehicle. Tr. 32, lines 14-20; Tr. 43, lines 17-19; Tr. 85, lines 11-15; Tr. 163, lines 12-13. Gibson then proceeded to work his drug-sniffing canine, "Justice," around the vehicle beginning at the front passenger side of the car, then around the back of the vehicle and up to the front grill, and then back around to the trunk area, and up to the front passenger-side again. Moreover, Gibson actively pointed to areas on the vehicle for "Justice" to smell, which specifically included the area around the passenger door. In fact, "Justice" was actually stood-up with paws and head directly in the open passenger window area. Tr. 32, lines 1-3; Tr. 43, line 23—Tr. 44, line 4;

Tr. 50, lines 17-21; Tr. 85, lines 16-18; Tr. 121, lines 1-3; Tr. 143, line 1—Tr. 144, line 8; Tr. 159, line 17—Tr. 160, line 10; R* (State's Ex. #1, DVD).

However, "Justice" never alerted to the presence of drugs at any time. Tr. 32, lines 4-8; Tr. 44, lines 5-7; Tr. 50, lines 22-23; Tr. 86, lines 2-3; Tr. 120, lines 23-25; Tr. 144, lines 9-10; Tr. 156, line 2; Tr. 160, lines 11-14; R* (State's Ex. #1, DVD). Furthermore, Gibson detected no odor of marijuana in the car or on either Appellant or Codefendant, and saw no marijuana or any drug paraphernalia either in the car or on Appellant or codefendant.[5] Tr. 43, lines 5-13; Tr. 158, lines 5-22; Tr. 160, lines 15-21; Tr. 162, line 19—Tr. 163, line 4.

By the time Gibson returned to Vinesett's cruiser, Vinesett had already finished running Appellant's driver's license and information, which came back without any outstanding warrants. Tr. 44, lines 7-16; Tr. 45, line 25—Tr. 46, line 5. By this time, over twelve had passed since Vinesett initiated the traffic stop. R* (State's Ex. #1, DVD). Yet, Vinesett still further inquired to dispatch whether Appellant had any special South Carolina designations on his North Carolina license ostensibly regarding prior convictions. R* (State's Ex. #1, DVD).

Gibson informed Vinesett that "Justice" did not alert to the presence any drugs. Tr. 156, lines 3-9. Although Appellant's driving information had come back clean, and despite the fact that Vinesett already wrote out a warning ticket, and despite the fact that further investigation—at Vinesett's direction—by both an experienced drug interdiction officer and

[5] It is also notable that Vinesett detected no order of marijuana either emanating from the vehicle or when dealing with Appellant or Codefendant, and that he saw no marijuana paraphernalia either in the car or on Appellant or Codefendant. Tr. 107, line 20—Tr. 108, line 20.

"Justice," a trained drug-sniffing police dog, yielded negative results for the presence of drugs, Vinesett still refused to release Appellant and Codefendant. Instead, Vinesett continued to run Codefendant's identification through dispatch for warrants. Tr. 46, lines 12-25. Approximately fourteen minutes had passed by this time. R* (State's Ex. #1, DVD).

After finally giving Codefendant's information to dispatch, Vinesett took the flashlight from his cruiser, walked to the passenger door of Appellant's car, and shined his light straight down the inside of the passenger door through the top window area. He then claimed to see "a couple of pieces" of green plant material particles on the floor between the seat and the door "right on the door crack." Tr. 32, line 21—Tr. 33, line 13; Tr. 36, lines 2-12; Tr. 44, line 5—Tr. 45, line 18; Tr. 46, lines 3-25; Tr. 49, lines 11-21; Tr. 86; Tr. 124, line 4—Tr. 125, line 9; Tr. 144, line 17—Tr. 146, line 25; R* (State's Ex. #1, DVD). Approximately fourteen minutes and forty-four seconds expired from the time Vinesett initiated the traffic stop for speeding. R* (State's Ex. #1, DVD).

Vinesett subsequently opened the door and found a mason jar wrapped in a damp shirt beneath the front passenger seat. The jar contained bagged marijuana, as did the coin drawer on the driver's side dash located below the headlight switch area. Tr. 33, line 14—Tr. 34, line 4; Tr. 89, lines 1-7; Tr. 91, line 14—Tr. 92, line 2; Tr. 103, line 14—Tr. 105, line 11; Tr. 128, lines 1-20; Tr. 148, lines 10-24.

Appellant's case proceeded to trial. A pre-trial suppression hearing was held where Vinesett was the sole witness. Tr. 24, lines 12-25. Appellant argued that the traffic stop was unlawfully extended; therefore, even if a warrant exception applied at the time Vinesett looked down inside of the passenger door through the window area with his flashlight and saw a green plant material on the door crack, it would still be unlawful as fruit of the

poisonous tree. Counsel further asserted that even if the traffic stop was not unlawfully extended, Vinesett's search was not supported by probable cause. Tr. 53, lines 1—Tr. 58, line 15.

The State responded by asserting Vinesett had probable cause to search the car once he saw what he believed to be green particles on Codefendant's shirt when he first walked up to the vehicle, but "still wanted to verify what he saw was to confirm that what he saw was marijuana. He asked the other officer . . . to confirm that." Tr. 58 line 19—Tr. 59, line 5 (emphasis added). It further argued that Vinesett was allowed to extend the traffic stop "to try to get consent or to, to walk the drug dog, but . . . he could have searched the vehicle when he first saw that, and the fact that he just wanted to confirm what he saw, your Honor, he could extend the traffic stop." Tr. 59, line 7—Tr. 60, line 4.

The trial court denied Appellant's motion to suppress, and found that the automobile exception applied. Tr. 64, 14-15. Specifically, the court reasoned as follows:

> [The State] kind of hit on it at the end of everything else when [it] said, that is, Officer Vinesett, would have a right, once he saw the, what he considered to be marijuana on the shirt of the passenger, Mr. Burris. They're a lot of issues that ran through my mind on this case including whether the dog not hitting, Officer Gibson not confirming that there was, whether or not that, in effect, rendered a reasonable suspicion or probable cause, ineffective that is, to have a reasonable suspicion, and then it's not confirmed by two other sources, does that mean your reasonable suspicion or probable cause disappears.
>
> I don't think it does. So I'm gonna deny the motion to suppress that based solely on the automobile exception.

Tr. 62, line 14—Tr. 63, line 2. Thus, the trial court followed the State's reasoning, and ruled that Vinesett had probable cause to search based on the presence of what he believed was

marijuana on the shirt of Codefendant, and that such reasonable suspicion or probable cause did not dissipate due to the intervening investigation by Gibson and the drug-sniffing dog that failed to indicate the presence of drugs. Tr. 62, line 14—Tr. 63, line 5.

Vinesett was the first witness called by the State during trial, and he specifically testified to finding marijuana in Appellant's vehicle. Tr. 87, line 1—Tr. 89, line 7; Tr. 91, line 2—Tr. 100, line 22; Tr. 103, line 17—Tr. 106, line 6. Cynthia Mitchum, of the York County Sheriff's Office drug analysis department, testified on behalf of the State is an expert in chemical analysis and identification of substances. Over Counsel's objection based upon her pretrial arguments regarding omissions of all items found from search, the trial court admitted the marijuana into evidence.[6] Tr. 184, lines 2-21; Tr. 190, lines 7-17.

Moreover, the State repeatedly referred to the presence of marijuana found in Appellant's car during its closing argument. For example, State maintained that it did not think "there's gonna be a real big dispute about what was found in this car was marijuana." Tr. 202, lines 7-8. It continued to attack the defense by saying, "[t]he fact they found that the marijuana in the car confirms what [Vinesett] saw. They are not gonna want you to focus on that. " Tr. 204, lines 17-19; Tr. 205, lines 21-22; Tr. 206, lines 21-22.

The jury found Appellant guilty of the lesser included offense of simple possession of marijuana, and the trial court imposed the maximum sentence of one year.

This appeal follows.

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[6] Counsel again renewed all of her prior motions both at the close of evidence, and after the jury rendered its verdict, which were denied by the trial court. Tr. 194, lines 5-7; Tr. 249, lines 5-7.

ARGUMENT

The trial court reversibly erred by failing to suppress evidence gleaned from the stop and search of Appellant's vehicle due to erroneously finding law enforcement had probable cause to search under the automobile exception where the traffic stop for speeding was wrongfully delayed by the arresting officer, and where any reasonable articulable suspicion regarding the presence of drugs was already investigated and dispelled by a second officer and a drug dog.

The trial court reversibly erred by failing to suppress evidence of marijuana taken from Appellant's car. First, the scope and duration of the investigation required for the initial traffic stop for speeding concluded prior to the search for marijuana. See § A, infra. Moreover, Vinesett possessed neither reasonable articulable suspicion nor probable cause to prolong the traffic stop into a second investigatory detention and search for drugs. See § B, infra. Yet, even assuming *arguendo* that police had a reasonable articulable suspicion to initiate a second investigative detention for the presence of drugs, the suspicions supporting such an investigative detention were objectively and conclusively dispelled by the subsequent investigations of an officer and a drug-sniffing canine. See § C, infra. As a result, Appellant was prejudiced by the trial court's failure to suppress the tainted evidence in his trial for possession of marijuana. See § D, infra.

"The Fourth Amendment to the Constitution of the United States grants citizens the right to be secure against unreasonable search and seizure." State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010) (citing U.S. Const. amend. IV). Also, the Fourth Amendment is applicable to the States through the Due Process Clause of the Fourteenth Amendment. Mapp v. Ohio, 367 U.S. 643, 655, 81 S.Ct. 1684, 1691 (1961). Further, it is well settled that "[t]emporary detention of individuals during the stop of an automobile by the police, even if only for a brief period a nd limited purpose, constitutes a seizure of

persons within the meaning of the Fourth Amendment." State v. Pichardo, 367 S.C. 84, 623 S.E.2d 840, 847 (Ct. App. 2005) (citing Whren v. United States, 517 U.S. 806, 116 S.Ct. 1769 (1996)); see also Delaware v. Prouse, 440 U.S. 648, 653, 99 S.Ct. 1391, 1396 (1979) ("[S]topping an automobile and detaining its occupants constitutes a 'seizure' within the meaning of [the Fourth and Fourteenth] Amendments, even though the purpose of the stop is limited and the resulting detention quite brief.").

Traffic stops are reviewed under the standard set forth in Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968), because a traffic stop is more analogous to an investigative detention than a custodial arrest. See United States v. Digiovanni, 650 F.3d 498, 8506 (4th Cir. 2011). Consequently, Terry outlines a two-prong test for analyzing the constitutionality of a traffic stop: (1) whether the police officer's action was justified at the inception of the traffic stop; and (2) whether the police officer's subsequent actions were reasonably related in scope and duration to the circumstances that justified the stop. Id. (emphasis added).

Under the "scope and duration" prong, "detention must be strictly tied to and justified by the circumstances which rendered its initiation proper." State v. Rodriquez, 323 S.C. 484, 493, 476 S.E.2d 161, 166 (Ct. App. 1996) (citing Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319 (1983)); see also Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994) ("The scope and duration of seizure must be strictly tied to and justified by the circumstances which rendered its initiation proper."). "It is the State's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure." Royer, 460 U.S. at 500, 103 S.C. at 1326; see also State v. Woodruff, 344 S.C.

537, 551, 544 S.E.2d 290, 297-98 (Ct. App. 2001).

As to the scope component, "the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." Royer, 460 U.S. at 500, 103 S.C. at 1325-26 (citing United States v. Brignoni-Ponce, 422 U.S. 873, 881-81, 95 S.Ct. 2574, 2580-81 (1975)); See also Digiovanni, 650 F.3d at 507. Moreover, with regard to the duration component, a traffic stop "can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." Illinois v. Caballes, 543 U.S. 405, 407, 125 S.Ct. 834, 837 (2005). Thus, "we evaluate 'whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.'" Digiovanni, 650 F.3d at 507 (quoting United States v. Sharpe, 470 U.S. 675, 686, 105 S.Ct. 1568 (1985)).

A. The scope and duration of the investigation required for the initial traffic stop for speeding concluded prior to the search for marijuana.

The scope and duration required for Vinesett to complete the purpose of the traffic stop for speeding was complete prior to Vinesett's continued detention of Appellant and investigation for drugs. "In carrying out a routine traffic stop, a law enforcement officer may request a driver's license and vehicle registration, run a computer check, and issue a citation." Tindall, 388 S.C. at 521, 698 S.E.2d at 205 (citing United States v. Sullivan, 138 F.3d 126, 131 (4th Cir. 1998); see also Pichardo, 367, S.C. at 98, 623 S.E.2d at 847. Additionally, "[a]ny further detention for questioning is beyond the scope of the stop and therefore illegal unless the officer has reasonable suspicion of a serious crime." Id.

In the present case, the purpose of the traffic stop for speeding was complete once Vinesett indicated he was going to cite Appellant with a warning; any further detention based on speeding was beyond the scope and duration of the stop, and thus amounted to an unlawful detention. Appellant was stopped ostensibly for driving 66 mph to 67 mph in a 60 mph zone.

Within approximately three minutes, Vinesett requested and received Appellant's driver's license and vehicle rental agreement in lieu of vehicle registration. Moreover, within the same three minutes, Vinesett already determined to write a warning ticket for the speeding traffic stop, and in fact showed it to Appellant as well. Tr. 39, line 4—Tr. 40, line 4; Tr. 118, lines 5-11; R.* (State's Ex. #1, DVD). At this point, any investigation into the purpose of the traffic stop had ended, and any further detention based on speeding would amount to a second detention as it was beyond the scope and duration

necessary for the purpose of the original stop. See, e.g., State v. Rivers, 384 S.C. 356, 362, 682 S.E.2d 307, 310 (Ct. App. 2009); see also, United States v. Rusher, 966 F.2d 868, 876 (1992) ("When the driver has produced a valid license and proof that he is entitled to operate the car, he must be allowed to proceed on his way, without being subject to further delay by police for additional questioning.").

Furthermore, even if Vinesett would still be permitted to prolong the traffic stop to check Appellant's license for any outstanding warrants as part of the scope, despite already writing a warning ticket and showing it to Appellant, that too was completed before Vinesett continued to detain Appellant and search his vehicle. Tr. 44, lines 7-16; Tr. 45, line 25—Tr. 46, line 5; R* (State's Ex. #1, DVD). Specifically, over twelve minutes into the stop, dispatch informed Vinesett that Appellant's license was clear. R* (State's Ex. #1, DVD). Yet, Vinesett still delayed the stop even more by making further inquiries to dispatch regarding South Carolina designations on Appellant's North Carolina license ostensibly regarding restrictions due to prior convictions. R* (State's Ex. #1, DVD). "However, in most circumstances, 'a prior criminal record is not, standing alone, sufficient to create reasonable suspicion.'" United States v. Powell, 666 F.3d 180, 188 (2011) (quotingUnited States v. Foster, 634 F.3d 243, 246-47 (4th Cir. 2011). Additionally, Vinsesett's extension of the traffic stop to check the passenger's identification after the driver's paperwork already came back clean further exceeded the scope of the traffic stop for speeding by Appellant, and amounted to an unlawful second detention, as it would have had nothing to do with the purpose of the original traffic stop of speeding. See, e.g., Sikes, 323 S.C. at 31, 448, S.E.2d at 562-63; see also 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.") (emphasis added). Accordingly, the scope and duration necessary to the traffic stop for speeding was satisfied prior to Vinesett's continued detention and investigation for drugs, and any detention thereafter was unlawful "unless the officer has reasonable suspicion of a serious crime." Tindall, 388 S.C. at 521, 698 S.E.2d at 205.

B. Police did not possess either reasonable articulable suspicion or probable cause to prolong the traffic stop into a second investigatory detention and search for drugs.

"The question therefore becomes whether the officer reasonably suspected a serious crime at the point at which he chose not to conclude the traffic stop, despite his stated intention to issue a warning ticket . . . ." Tindall, 388 S.C. at 523, 698 S.E.2d at 206. "The term 'reasonable suspicion' requires a particularized and objective basis that would lead one to suspect another of criminal activity." Pichardo, 367 S.C. at 104, 623 S.E.2d at 851 (citing United State v. Cortez, 449 U.S. 411, 101 S.Ct. 690 (1981). Specifically, "[t]he articulated innocent factors collectively must serve to eliminate a substantial portion of innocent travelers before the requirement of reasonable suspicion will be satisfied." Digiovanni, 650 F.3d at 511 (citing United States v. Foreman, 369 F.3d 776, 781 (4th Cir. 2004)).

Because the reasonable suspicion standard is an objective one, the facts within the knowledge of Vinesett must be examined to determine the presence or nonexistence of reasonable suspicion. Id. Vinesett claimed to see the following in support of his eventual search of Appellant's car: (1) that Codefendant leaned slightly forward before the stop; (2) that Codefendant's hand was shaking when Vinesett approached the window the second time and took his identification; (3) that the stories of Appellant and Codefendant allegedly did not match; and (4) that when he initially received Appellant's license and rental agreement, he purportedly saw four to five green particles on Codefendant's shirt. Our courts have "expressed 'concern about the inclination of the Government toward using whatever facts are present, no matter how innocent, as indicia of suspicious

activity.'" Digiovanni, 650 F.3d at 512 (quoting Foster, 634 F.3d at 248)). The same can be said about many of the facts utilized by Vinesett.

First, not only is it normal, innocent behavior for a person to move in their seat while riding in a vehicle, but it is also normal, innocent, and entirely expected behavior for occupants to lean forward at some point when being pulled over, as they will inevitably have to retrieve the necessary documents from wallets, purses, or glove compartments in the vehicle to hand to the officer who stopped the car. See, e.g., Rivera, 384 S.C. at 362-63, 682 S.E.2d at 210-11; see also Foster, 634 F.3d at 247 ("[T]here are an infinite number of reasonable explanations, unrelated to any criminal behavior, to explain why a passenger would not immediately be visible in a car. . . . We therefore are extremely wary of accepting the Government's argument that an officer may acquire a reasonable suspicion of criminal wrongdoing simply because a person becomes observable"). Vinesett's characterization of this normal, innocent, and expected behavior simply amounts to the State using whatever facts are present as indicia of suspicious activity.

Second, the stories of Appellant and Codefendant were not so misaligned as to raise any suspicion. Indeed, they both indicated they were leaving from the same town of Rock Hill, and both indicated they ate at the same restaurant, the Shrimp Boat, prior to leaving. Third, although Vinesett could rely in some degree on Codefendant's trembling hands, the video reveals that he appeared quite calm when he was removed from the car and taken to the back of Vinesett's cruiser. R* (State's Ex. #1, DVD). See id. Again, as with Codefendant's leaning-forward movement inside Appellant's car, Vinesett's characterization of similar stories as inconsistent, and temporary nervousness by a person

detained by law enforcement amounts to the State using whatever facts were present as indicia of suspicious activity.

Fourth, Vinesett's purported observation of four to five small green particles on Codefendant's shirt does not amount to either probable cause or reasonable suspicion. The presence of colored particles on a person's shirt could be easily, and innocently explained as cigarette tobacco or ash—as Gibson stated he saw; further, Vinesett himself confirmed that Codefendant lit a cigarette at the beginning of the stop. Tr. 31, lines 5-15; Tr. 42, line 20—Tr. 43, line 7; Tr. 50, lines 3-10; Tr. 85, lines 2-8; Tr. 119, line 22—Tr. 120, line 13; Tr. 142, lines 3-19; Tr. 154, line 24—Tr. 155, line 1; Tr. 158, line 1—Tr. 159, line 11. Moreover, Vinesett himself admitted at the suppression hearing that he could not conclusively say that the green particles he claimed to have seen on Codefendant's shirt when he first walked up was marijuana at that point. Tr. 49, line 22—Tr. 50, line 2; Tr. 51, lines 5-9.

Likewise, Vinesett did not have probable cause to search the vehicle under the automobile exception to the warrant requirement. The automobile exception applies if and only if the officer has probable cause to believe that contraband or evidence of a crime will be found in a particular place. See, e.g., United States v. Ross, 456 U.S. 798, 825, 102 S.Ct. 2157, 2173 (1982) ("We hold that the scope of the warrantless search authorized by that exception is no broader and no narrower than a magistrate could legitimately authorize by warrant. If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle . . . ."); see also State v. Brown, 389 S.C. 473, 482, 698 S.E.2d 811, 816 (Ct. App. 2010) (citing Ornelas v. United States, 517 U.S. 690, 695-96, 116 S.Ct. 1657 (1996)

The United States Supreme Court has framed the probable cause standard as follows:

> The quantum of information which constitutes probable cause—evidence which would "warrant a man of reasonable caution to believe" that a felony has been committed—must be measured by the facts of the particular case. The history of the use, and not infrequent abuse, of the power to arrest cautions that a relaxation of the fundamental requirements of probable cause would "leave law-abiding citizens at the mercy of the officers' whip or caprice."

Wong Sun v. United States, 371 U.S. 471, 479, 83 S.Ct. 407, 413 (1963) (quoting Carroll v. United States, 267 U.S. 132, 162, 45 S.Ct. 280, 288 (1925), and Brinegar v. United States, 338 U.S. 160, 176, 69 S.Ct. 1302, 1311 (1949)) (internal citations omitted). Moreover, the probable cause standard for permitting warrantless searches is higher and more demanding than the reasonable suspicion standard. See, e.g., Florida v. J.L., 529 U.S. 266, 272, 120 S.Ct. 1375, 1379 (2000). Thus, in order for Vinesett to conduct a warrantless search under the automobile exception, the State must show that Vinesett knew of facts and circumstances sufficient to warrant a reasonably cautious person to believe that a felony had been committed.

However, the mere presence of four to five particles on a person's shirt fails to meet this standard, especially where, as here, the investigating officer admitted he could not conclusively say the green particles he thought he saw were indeed marijuana. Tr. 49, line 22—Tr. 50, line 2; Tr. 51, lines 5-9 Additionally, Vinesett's uncertainty regarding what he saw highlights the lack of probable cause in this case, as it shows he did not have cause to believe what he saw truly was contraband, or that felonious activity was afoot. This

uncertainty was made evident by Vinesett's actions: Vinesett specifically sought the assistance of Gibson, an experienced officer with "special training regarding illegal substances such as marijuana," and "Justice," a canine specially trained to detect the presence of marijuana, in order to "get his opinion to see if he can see it. To get the dog just basically to verify what [he] had [seen]." Tr. 51, line 17—Tr. 52, line 1; Tr. 153, line 19—Tr. 154, line 6; Tr. 155, lines 2-21. As the video reveals, Vinesett specifically tells Gibson he "could have sworn [he] saw little green particles on [Codefendant's] shirt," and asked Gibson to speak with Codefendant and "see if he could see anything." R.* (State's Ex. #1, DVD) (emphasis added). As noted above, such uncertainty of what he saw, coupled with the stated need for another, more experienced narcotics officer and trained drug-sniffing dog to attempt to verify his hunch or suspicion belies the reasonable articulable suspicion standard; therefore, *a fortiori*, it cannot possibly serve to satisfy the higher standard of probable cause. See, e.g., J.L., 529 U.S. at 272, 120 S.Ct. at 1379.

It is also notable that neither Vinesett nor Gibson detected the odor of marijuana either emanating from the vehicle or when dealing with Appellant or Codefendant, and that they saw no marijuana paraphernalia either in the car or on Appellant or Codefendant. Tr. 43, lines 5-13; Tr. 107, line 20—Tr. 108, line 20; Tr. 158, lines 5-22; Tr. 160, lines 15-21; Tr. 162, line 19—Tr. 163, line 4. Therefore, when the whole picture is considered, it is clear that the State failed to meet its burden of articulating facts sufficient to support reasonable suspicion—let alone probable cause—as the facts relied upon by Vinesett, "without more, simply do not eliminate a substantial portion of innocent travelers," Digiovanni, 650 F.3d at 513, and do not warrant a man of reasonable caution to believe that a felony has been committed. Wong Sun, 371 U.S. at 479, 83 S.Ct. at 413.

Accordingly, the trial court's ruling to the contrary is clearly erroneous.[7] See, e.g., Brown, 389 S.C. at 483, 698 S.E.2d at 816; Pichardo, 367 S.C. at 104, 623 S.E.2d at 852 (citing United States v. Sokolow, 490 U.S. 1, 109 S.Ct. 1581 (1989)).

[7] "The Appellate Court may only reverse where there is clear error." Pichardo, 367 S.C. at 95, 623 S.E.2d at 846 (citing State v. Brockman, 339 S.C. 57, 528 S.E.2d 661 (2000). "[T]he appellate court must ask whether, on the entire evidence, it is left with the definite and firm conviction that a mistake has been committed." Id. 367 S.C. at 96, 623 S.E.2d at 846 (citing Easley v. Cromartie, 532 U.S. 234, 121 S.Ct. 1452 (2001)).

C. Even assuming *arguendo* that police had reasonable articulable suspicion to initiate a second investigative detention for the presence of drugs, the suspicions supporting such an investigative detention were objectively and conclusively dispelled by the subsequent investigations of an officer and a drug-sniffing canine.

Finally, even assuming *arguendo* that Vinesett's purported observation of four to five small green particles on Codefendant's shirt when he first approached Appellant's vehicle in and of itself amounted to reasonable suspicion, such suspicions were dispelled when the matter was repeatedly investigated using the least intrusive means and yielded negative results.

As previously indicated, any further investigation beyond the scope of the traffic stop is illegal unless the officer has reasonable suspicion of a serious crime. Tindall, 388 S.C. at 521, 698 S.E.2d at 205. "The predicate permitting seizures on suspicion short of probable cause is that law enforcement interests warrant a limited intrusion on the personal security of the suspect." Royer, 460 U.S. at 500, 103 S.Ct. at 1325. Thus, even where an officer has reasonable articulable suspicion, the State must demonstrate that the seizure "was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure." Id. 460 U.S. at 500, 103 S.Ct. at 1326. As a result, it is clear that an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time. Id. 460 U.S. at 500, 103 S.Ct. at 1325-26 (emphasis added).

In the case at bar, even assuming Vinesett had reasonable articulable suspicion to support an investigatory detention for marijuana, his actions up to and including use of a

drug-sniffing dog should have objectively and conclusively dispelled his suspicions. Vinesett harbored a hunch or suspicion that he saw four to five green particles on Codefendant's shirt, and that it might be marijuana; however, Vinesett readily admitted that he called Gibson in order to "basically get his opinion to see if he can see it. To get the dog just basically to verify what I had saw [sic]." Tr. 51, line 24—Tr. 52, line 1 (emphasis added). At Vinesett's request to investigate, Gibson walked-up to the passenger window and spoke with Codefendant; he noticed cigarette ash, but no green particles.

Despite the results of Gibson's first brief and nonintrusive investigation, Vinesett again instructed Gibson to investigate even further. This time, Gibson used his drug-sniffing canine, "Justice," to detect the presence of controlled substances; yet, even after two passes around the vehicle and placing the nose of "Justice" in the opened car window, "Justice" never alerted to the presence of drugs at any time. Tr. 32, lines 1-8; Tr. 43, line 23—Tr. 44, line 7; Tr. 50, lines 17-23; Tr. 85, lines 16-18; Tr. 86, lines 2-3; Tr. 120, line 23—Tr. 121, line 3; Tr. 144, lines 8-10; Tr. 156, line 2; Tr. 159, line 17—Tr. 160, line 14; R* (State's Ex. #1, DVD). Furthermore, Gibson detected no odor of marijuana in the car or on either Appellant or Codefendant, and saw no marijuana or any drug paraphernalia either in the car or on either Appellant or codefendant. Tr. 43, lines 5-13; Tr. 158, lines 5-22; Tr. 160, lines 15-21; Tr. 162, line 19—Tr. 163, line 4.

Under these circumstances, Gibson's actions would constitute investigation regarding the presence of marijuana to dispel the officer's suspicions. Additionally, because Gibson was acting at the direct instruction of Vinesett, Vinesett's knowledge and information was imputed to Gibson. See, e.g., United States v. Massenburg, 654 F.3d 480, 492-93 (4th Cir. 2011) (explaining the "collective-knowledge doctrine"). Yet, even with the

information expressly stated to Gibson by Vinesett, and imputed to Gibson from Vinesett, Gibson was unable to detect the presence of any drugs on Appellant, or on Codefendant, or in Appellant's car.

Moreover, Gibson was clearly unable to detect the presence of drugs through the use of the trained drug-sniffing canine "Justice." As acknowledged by the United States Supreme Court, "[t]he courts are not strangers to the use of trained dogs to detect the presence of controlled substances . . . . A negative result would have freed [the defendant] in short order; a positive result would have resulted in his justifiable arrest on probable cause." Royer, 460 U.S. at 506, 103 S.Ct. at 1329 (emphasis added). Thus, once "Justice" did not detect the presence of drugs, the investigation for them should have ended and Appellant freed.

However, rather than reasonably dispelling Vinesett's suspicions, he disregarded the negative result of Gibson's investigation, disregarded the negative result of "Justice," and instead continued to keep Appellant and Codefendant detained on the basis of (1) speeding, and (2) searching for drugs. First, as discussed above, the purpose of the traffic stop for speeding had already concluded when Vinesett told Appellant he was going to issue a warning ticket; further, even if he would still have been permitted to detain Appellant even longer to run his license and rental agreement, that too concluded at a point prior to Vinesett's continued seizure of Appellant after Gibson's investigations. See § A, supra. Second, assuming Vinesett possessed reasonable articulable suspicion to investigate for marijuana, the suspicions underlying the purpose of that investigatory detention were dispelled by Gibson's investigations.

Third, even operating under the assumption that Vinesett was initially justified in

prolonging the stop to conduct an investigatory detention for marijuana, the trial court's ruling that reasonable suspicion or probable cause do not disappear when the suspicions failed to be confirmed by two independent sources is in direct contradiction to standing law. Tr. 62, line 14—Tr. 63, line 2. As the Royer Court made clear, an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop, and the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time. Id. 460 U.S. at 500, 103 S.Ct. at 1325-26 (emphasis added). Thus, the trial court also abused its discretion by basing its ruling in whole or part on an error of law. See, e.g., Rivera, 384 S.C. at 360, 356 S.E.2d at 309 ("An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.") (citing State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000.

Therefore, the continued detention of Appellant after Gibson's investigation and Justice's indication of a negative presence for drugs constituted an unlawful seizure beyond the scope of either the traffic stop for speeding, or the investigatory detention for suspicion of marijuana. Accordingly, the evidence of marijuana subsequently obtained by Vinesett should have been suppressed as tainted fruit of the poisonous tree.[8] See Royer, 460 U.S. at 507-08, 103 U.S. at 1329; Wong Sun, 371 U.S. at 484-88, 83 S.Ct. at 415-17; Sikes, 323 S.C. at 32, 448 S.E.2d at 563; Woodruff, 344 S.C. at 549, 544 S.E.2d

[8] Appellant again notes that if there was no reasonable articulable suspicion to warrant further investigative detention after Gibson and "Justice" conducted their investigation for the presence of marijuana at Vinesett's direction, then *a fortiori* no basis existed to support probable cause to search Appellant's vehicle under the automobile exception. J.L., 529 U.S. at 272, 120 S.Ct. at 1379.

at 297 ("The courts of this state have recognized the principle that law enforcement officers are not granted, under the purview of *Terry*, a general warrant to rummage and seize at will, and that any evidence stemming from that unlawful detention must be excluded as 'fruit of the poisonous tree.'").

D. Appellant was prejudiced by the trial court's failure to suppress the tainted evidence.

Finally, Appellant was prejudiced by the trial court's failure to suppress evidence of drugs. See, e.g., Chambers v. Maroney, 399 U.S. 42, 53, 90 S.Ct. 1975, 1982 (1970). In the present case, the State expressly relied on the marijuana discovered in Appellant's car in order to gain the drug possession conviction. For example, Vinesett was the first witness called by the State, and he specifically testified to finding marijuana in Appellant's vehicle. Tr. 87, line 1—Tr. 89, line 7; Tr. 91, line 2—Tr. 100, line 22; Tr. 103, line 17—Tr. 106, line 6. Cynthia Mitchum, of the York County Sheriff's Office drug analysis department, also testified on behalf of the State as an expert in chemical analysis and identification of substances. Through her, the actual marijuana was introduced into evidence. Tr. 184, lines 2-21; Tr. 190, lines 7-17.

Moreover, the State repeatedly referred to the presence of marijuana found in Appellant's car during its closing argument. For example, State maintained that it did not think "there's gonna be a real big dispute about what was found in this car was marijuana." Tr. 202, lines 7-8. It continued to attack the defense by saying, "[t]he fact they found that the marijuana in the car confirms what [Vinesett] saw. They are not gonna want you to focus on that. " Tr. 204, lines 17-19; Tr. 205, lines 21-22; Tr. 206, lines 21-22. In short, the State's case was undeniably built around the presence of marijuana in Appellant's car; had the trial court properly suppressed such evidence and testimony regarding the marijuana, the State's case against Appellant for drug possession would have collapsed. Accordingly, Appellant was prejudiced as the constitutional error was not harmless beyond a reasonable

doubt.

CONCLUSION

For the foregoing reasons, Appellant Troy Baxter respectfully requests reversal of his conviction, and remand for a new trial.

Respectfully submitted,

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 18th day of September, 2012.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

John C. Hayes, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TROY TERRELL BAXTER,

APPELLANT

DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

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

(1) True–billed indictment;
(2) Trial transcript, pp. 1-5; pp. 14-16; pp. 22-64; pp. 68-196; pg. 198; pp. 201-232; pp. 247-253;
(3) State's Ex. #1 (DVD);
(4) Sentence sheet.

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

September 18, 2012

Breen Richard Stevens
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

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THE STATE,

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TROY TERRELL BAXTER,

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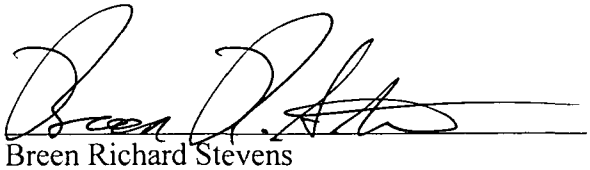
CERTIFICATE OF SERVICE

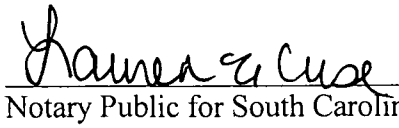
The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 18th day of September, 2012.



Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 18th day of September, 2012.



(L.S.)
Notary Public for South Carolina

My Commission Expires: August 23, 2014