

**ORIGINAL**

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals  
Appeal From Spartanburg County  
Hon. Roger L. Couch, Circuit Court Judge  
Appellate Case No. 2013-002309

**RECEIVED**

OCT 30 2013

**S.C. Supreme Court**

THE STATE,

Petitioner,

v.

ASHLEY EUGENE MOORE,

Respondent.

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**APPENDIX**

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STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Spartanburg County

Roger L. Couch, Special Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

ASHLEY EUGENE MOORE,

APPELLANT

Appellate Case No. 2011-191327

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FINAL BRIEF OF APPELLANT

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**STATEMENT OF ISSUE ON APPEAL**

Did the trial court err in refusing to suppress the evidence found in the vehicle Appellant was driving at the time of his arrest where: the officer's continued detention of Appellant exceeded the scope of the traffic stop and constituted a seizure for purposes of the Fourth Amendment; the officer did not have reasonable and articulable suspicion of a serious crime when he chose not to conclude the traffic stop; and Appellant declined the officer's request to search the vehicle?

**STATEMENT OF THE CASE**

On October 22, 2010, Appellant Ashley Moore was indicted by the Spartanburg County Grand Jury for: (1) trafficking cocaine base, first offense; and (2) possession of a weapon during the commission of a violent crime. R. 176.

On April 25, 2011, Appellant proceeded to trial before the Honorable Roger L. Couch and a jury. R. 1. Appellant was represented by Robert Hall, and the State was represented by Assistant Solicitor Eddie Hunter. R. 1. The jury found Appellant guilty as charged. R. 285, l. 13 – 286, l. 22. Judge Couch sentenced Appellant to: (1) twenty-five years imprisonment on the trafficking cocaine base conviction; and (2) five years imprisonment on the possession of a weapon during the commission of a violent crime conviction. R. 289, l. 23 – 290, l. 4. The sentences were to run concurrently. R. 177.

This appeal follows.

## STATEMENT OF FACTS

### **Background**

On June 30, 2010, Officers Dale Owens<sup>1</sup> and Ken Hancock of the Spartanburg County Sheriff's Office performed a traffic stop on the vehicle Appellant was driving for speeding and failing to maintain his lane. R. 30, l. 18 – 34, l. 10. After Appellant had been informed he was receiving a warning citation and had declined Officer Owens' request to search the vehicle, Officer Owens continued to detain Appellant for an *additional* fifteen to sixteen minutes, so that the "drug detection K-9" could conduct a sniff search of the vehicle. R. 62, l. 18 – 71, l. 6. After thirty-two minutes into the traffic stop, the police dog alerted to an odor and Appellant was arrested for evidence found during a search of the vehicle. R. 71, l. 10 – 73, l. 14; (DVD of traffic stop).

Pre-trial, Appellant moved to suppress the evidence seized from the vehicle on the basis that Officer Owens did not have reasonable suspicion for extending the stop and cited *State v. Tindall*, 388 S.C. 518, 698 S.E.2d 203 (2010) as controlling authority. R. 27, l. 20 – 28, l. 6. The State then argued that the facts of this case are distinguishable from the facts presented in *Tindall* and are more analogous to this Court's decision in *State v. Provet*, 391 S.C. 494, 706 S.E.2d 513 (Ct. App. 2011).

### **Suppression Hearing**

Officers Owens and Jason Carraway testified at the suppression hearing. R. 30, l. 9 – 97, l. 25. Thus, the following evidence was elicited at the suppression hearing regarding the traffic stop and the evidence seized during the search of the vehicle.

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<sup>1</sup> Officer Owens' actions were also reviewed by this Court in *State v. Provet*, 391 S.C. 494, 706 S.E.2d 513 (Ct. App. 2011).

### Officer Dale Owens

At the suppression hearing, Officer Owens maintained that on June 30, 2010, he and Officer Hancock “were around the lower end of [Spartanburg] County on [interstate] 85 around the 60-mile marker sitting stationary observing traffic at that time.” R. 33, ll. 9-15. Officer Owens claimed at “[a]pproximately 1:10 in the morning[,]” he and Officer Hancock “observed [Appellant] operating at above the posted speed limit” based on his “visual estimation” that Appellant was driving above 70 miles-per-hour (mph) in a posted 60 mph speed zone. R. 34, ll. 1-2. Without the assistance of a radar gun, Officer Owens asserted that he “pulled up behind [Appellant’s] vehicle” and “paced”<sup>2</sup> Appellant’s speed at 70 mph. R. 34, ll. 4-21. Officer Owens further stated that while he was “pacing” Appellant’s speed, Appellant “drove over the white dotted line.” R. 34, ll. 8-10.

Officer Owens stated that the camera system in his patrol car is “probably one of the oldest systems . . . it’s VHS recorded.” R. 35, ll. 20-23. Officer Owens also stated that, although the camera system in his patrol car had been fixed on several occasions, the audio portion of Appellant’s traffic stop was not recorded. R. 36, l. 4 – 38, l. 7. Officer Owens noted that he converted the VHS recording of the traffic stop to DVD. R. 37, l. 17 – 38, l. 3. The video of the traffic stop was then played corresponding with Officer Owens’ testimony.

Officer Owens admitted that he did not know whether Appellant accidentally or purposefully initiated the left turn signal prior to hitting the right turn signal, but based on

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<sup>2</sup> Officer Owens maintained that pacing is “a way to measure speed.” R. 34, ll. 11-12. Officer Owens stated, “[I]f you’re operating a vehicle with a certified speedometer, . . . all [of] our vehicles . . . have certified speedometers, and are calibrated, we use that for our measuring device. In maintaining the same speed and distance, then you determine what speed [the car in front of you is going].” R. 34, ll. 16-21.

his "training and experience . . . this appeared to [him that Appellant] was preparing to flee." R. 40, l. 16 – 41, l. 8. Notably, Appellant did not flee from police. Officer Owens recalled that the right turn signal stayed on after Appellant had pulled the car off the road. R. 42, ll. 2-5. Officer Owens claimed that leaving the turn sign on is "one of our criminal indicators. When you leave the [turn] signal on, basically your heart rate's gotten [ ] so accelerated that you've lost audio . . . ." R. 42, ll. 5-15. Officer Owens further claimed, "[I]t took me a little longer to get out of my vehicle and walk up there because I am concerned that [Appellant] may put [the car] in drive . . . and decide to take off [be]cause that's a practice of, of fleeing felons." R. 42, l. 20 – 43, l. 3. Again, Appellant never attempted to flee the police.

Officer Owens asserted that Appellant was talking on the phone when he approached the passenger side of the vehicle and that he had to ask Appellant to hang up the phone. R. 44, ll. 1-4. Officer Owens maintained, "On many times that I've been involved in criminal cases . . . most innocent people hang up the phone when you walk up." R. 44, ll. 8-12. Although the purpose of the traffic stop was for speeding and failing to maintain his lane, the assistant solicitor asked Officer Owens, "Specifically, with drug trafficking cases, what does that indicate?" and Officer Owens speculated:

Well, a lot of times . . . they're having to answer to a higher person, and they're having that higher person on the phone hearing what's happening. Sometimes they have an auto answer. Sometimes . . . they don't even hang the phone up . . . [to] let them know that, you know, what's happening or . . . if they're deciding they're gonna (sic), it's gonna (sic) be a foot pursuit, they let them know the area that they're in just in case they get separated from communication so somebody can come and get them as well.

R. 44, ll. 14-25.

Yet again, although the traffic stop was for speeding and for failing to maintain his lane, Officer Owens proceeded to give detailed explanations as to the differences between alleged “escort” vehicles, “decoy” vehicles, and “protection” vehicles in drug trafficking cases. R. 45, ll. 1-17. Officer Owens admitted that he “*had no indication at the time*” Appellant’s car fell within one of these three purported vehicles used for drug trafficking. R. 45, ll. 18-20 (emphasis added).

Additionally, Officer Owens noted that Appellant was “slightly slumped in the driver’s seat behind the steering wheel” when he approached the vehicle. R. 46, ll. 4-7. Officer Owens maintained that he “smelled the odor of alcohol coming from inside the vehicle[.]” R. 46, ll. 8-11. Once more, although the traffic stop had nothing to do with drug trafficking, the assistant solicitor asked Officer Owens, “[D]oes the odor of alcohol reflected (sic) anyway on drug trafficking?” and Officer Owens replied, “[S]everal cases that I’ve been involved in, a lot of the people have been drinking alcohol and I mean I’ve even had them tell me it’s, it calms their nerves . . . .” R. 46, l. 25 – 47, l. 5.

Officer Owens recalled that Appellant thought the speed limit was 70 mph, not 60 mph as posted. R. 47, ll. 13-25. Officer Owens also recalled that Appellant “advised me it was a rental car” and “provide[d] me with a rental agreement, and then his driver’s license.” R. 49, ll. 5-8. Officer Owens maintained that he noticed Appellant’s “hand was heavily shaking” and noted that “it’s just an indicator that we look for, and basically we’re measuring his nervousness.” R. 49, ll. 7-11. Officer Owens also claimed that Appellant’s “breathing was accelerated, and the pulse in his neck also appeared to be elevated and pounding . . . .” R. 49, ll. 17-20.

Officer Owens stated that Appellant admitted to having "a couple of drinks." R. 50, ll. 9-17. Officer Owens also stated that Appellant attempted to pick up his cell phone prior to exiting the vehicle, which "is consistent in many cases, with criminal behavior when people to decide to flee." R. 51, ll. 3-9. Appellant never attempted to flee the officers. Officer Owens further maintained that based on his training, Appellant tried to calm his nerves by putting a cigarette in his mouth after exiting the vehicle. R. 52, ll. 9-18.

Officer Owens noted that Appellant "raised his hands voluntarily" while he conducted a pat-down search for weapons and that "[Appellant] continue[d] to keep his hands . . . [in] what we call the felony position." R. 52, l. 23 – 53, l. 18. Officer Owens also noted that during the pat-down search "[he] felt what [he] perceived as a large sum of wadded money in [Appellant's] pocket" and that "[Appellant] pulled out the wad of money" and moved it to his back pocket. R. 53, ll. 8-10. When Officer Owens was asked the dollar amount of the "wad of money," Officer Owens stated his opinion, "Well, it's more . . . folded money than I carry . . . bordering a thousand dollars."<sup>3</sup> R. 53, l. 19 – 54, l. 1. Officer Owens claimed "that would be reason for alarm as well" because Appellant told him he was unemployed. R. 54, ll. 2-11.

Officer Owens stated that Appellant "stuck his hand in his pocket, he's looking down. It's - - this is what we call the defeated look. . . . [Appellant is] trying to dissipate his nervous energy . . . and [is going to] assume the felony position again, you know. [Appellant is] gonna (sic) do all kind of things to try to dissipate that nervous energy." R.

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<sup>3</sup> The State later stipulated that the amount of money found in Appellant's pocket was approximately six-hundred dollars, not one-thousand dollars as Officer Owens stated. R. 233, ll. 2-22.

55, ll. 11-20. Officer Owens then recalled that Appellant's name was not on the rental agreement and that Appellant was coming from Lawrenceville, Georgia. R. 56, l. 21 – 57, l. 4. Officer Owens noted that Lawrenceville is a suburb of Atlanta, Georgia, “[w]hich is a known drug source, [a] major drug source city” and that “[t]hird party rental vehicles are consistent in many many many (sic) cases with criminal activity.” R. 57, l. 5 – 58, l. 13.

Furthermore, Officer Owens stated that Appellant informed him that he was on his way to North Carolina to visit his grandmother and provided his opinion that “[g]eneral people, are not gonna (sic) go visit grandma at one o'clock in the morning.” R. 59, l. 2 – 60, l. 11. Officer Owens also claimed that Appellant “placed his hands behind his back[,]” which is what [police] call assuming the position of arrest.” R. 60, l. 21 – 61, l. 1.

Notably, when asked about his prior mention of writing Appellant's name on a warning ticket, Officer Owens testified:

[A] lot of times what we [police] do is when we're writing that warning [ticket] is we, we'll tell them it's basically to put them at ease, to help calm their nerves a little bit, and I look for a reaction from that because a lot of times when you tell somebody well, I'm gonna (sic) write you a warning for that infraction, and I mean for that moving infraction, and the moving infraction only, . . . you'll see that easiness . . . and they're not worried anymore. That never disappeared with [Appellant].

R. 61, l. 4 – 63, l. 8. Officer Owens also testified that he conducted three field sobriety tests on Appellant and ultimately found that Appellant was not impaired: “*I feel like it would [have] been an injustice to [Appellant] if I had arrested him for driving under the influence.*” R. 68, ll. 6-11; 72, ll. 1-3; R. 80, ll. 11-14 (emphasis added).

Additionally, Officer Owens testified, "*I asked [Appellant] if there were any weapons, alcohol, drugs, or anything like that in the vehicle and he told me no.*" R. 68, ll. 19-22 (emphasis added). Officer Owens then admitted that Appellant *declined* his request to search the vehicle. R. 68, l. 23 – 69, l. 15 (emphasis added). Officer Owens also admitted that he "*explain[ed] the warning [citation]*" to Appellant and that he continued to detain Appellant based on his belief that Appellant was "involved in criminal activity" and "to wait for a drug detection K-9 to come to the vehicle." R. 68, l. 6 – 70, l. 6 (emphasis added). Specifically, Officer Owens claimed, "I'm detaining [Appellant] based on my experience, my training, and everything's telling me there's more to this traffic stop than just the driving infraction." R. 71, ll. 18-23.

Fifteen to sixteen minutes later, "approximately 31 minutes and 13 seconds into the stop[.]" the K-9 unit arrived and the drug dog alerted to an odor. R. 72, ll. 1-16. The Officers then searched the vehicle and found an "alcoholic beverage" under the front passenger seat, "contraband . . . consistent with crack cocaine" in the trunk, "a semiautomatic weapon[.]" and a bundle of currency [\$4,000]." R. 72, l. 17 – 73, l. 14.

On cross-examination, Officer Owens stated that "*it's not unusual* for [people who are stopped police on the interstate] *to be nervous*, [and claimed] it is unusual in the demeanor that [Appellant] had that he was overly nervous, and that continued through the whole stop even after [Appellant] *was advised he was gonna (sic) get a warning, even after he was told that he passed . . . the two of the three field sobriety tests.*" R. 78, ll. 1-11 (emphasis added). Officer Owens admitted that he had *informed* Appellant he was receiving a warning ticket for the traffic violations and that it was not until *after* Appellant declined his request to search the vehicle that Appellant was told he was being

detained. R. 78, ll. 12-19 (emphasis added).

### **Officer Jason Carraway**

Officer Carraway, the K-9 handler, stated at the suppression hearing that his K-9 does “a passive alert” (sitting or laying) when detecting an odor resembling an illegal substance. R. 85, l. 16 – 86, l. 7; R. 94, ll. 2-5. On cross-examination, Officer Carraway admitted that the police dog alerted on the passenger door, not on the trunk where the drugs were found. R. 96, ll. 14-23.

### **Trial Court’s Ruling**

In making his ruling, the trial court reviewed the cases cited by Appellant and the State: *Tindall*, 388 S.C. 518, 698 S.E.2d 203; and *Provet*, 391 S.C. 494, 706 S.E.2d 513. R. 113, ll. 18-21. The trial court noted that this Court “distinguished *Provet* from *Tindall*” and that this Court “articulated its reasoning in *Provet*[:.]”

[An] officer must have an objectively reasonable and articulable suspicion [that] illegal activity has occurred or is occurring. Particularly because . . . [*Provet*] says reasonable suspicion required particularized and objective basis that would lead one to suspect another of criminal activity. I am required to consider the totality of the circumstances, and give due weight to the common sense judgments reached by officers in light of experience and training.

R. 113, l. 24 – 114, l. 7. The trial court then stated, “*I have my doubts* that the car was driven from Morganton to Lawrenceville and back to Marion to visit a grandmother. That’s a long way to go around to visit your grandmother. . . . So, *it appears* that he may have been less than truthful about the purpose of his trip.” R. 114, ll. 8-17 (emphasis added). The trial court also stated, “[F]or someone unemployed, to be carrying such a large amount of cash in their pocket also would obviously give a[n] officer reasonable suspicions.” R. 114, ll. 17-20. The trial court ultimately held, “[T]he other factors as

noted, I have given those the weight required, and in this case I am going to refuse to suppress.” R. 114, ll. 20-22.

At trial, defense counsel renewed his prior objections to the evidence when admitted. R. 215, l. 13 – 222, l. 2. Upon completion of the State’s case, Appellant renewed his motion to suppress the evidence seized in the vehicle, and the trial court again denied Appellant’s motion to suppress. R. 232, l. 21 – 236, l. 11.

### ARGUMENT

**The trial court erred in refusing to suppress the evidence found in the vehicle Appellant was driving at the time of his arrest where: the officer's continued detention of Appellant exceeded the scope of the traffic stop and constituted a seizure for purposes of the Fourth Amendment; the officer did not have reasonable and articulable suspicion of a serious crime when he chose not to conclude the traffic stop; and Appellant declined the officer's request to search the vehicle.**

Pre-trial, Appellant moved to suppress the evidence seized from the vehicle on the basis that Officer Owens did not have reasonable and articulable suspicion for extending the stop and cited *State v. Tindall*, 388 S.C. 518, 698 S.E.2d 203 (2010) as controlling authority. R. 27, l. 20 – 28, l. 6. This case is distinguishable from this Court's holding in *State v. Provet*, 391 S.C. 494, 706 S.E.2d 513 (Ct. App. 2011) for three reasons: (A) Officer Owens' continued detention of Appellant exceeded the scope of the traffic stop and constituted a seizure for purposes of the Fourth Amendment; (B) Officer Owens did not have a reasonable and articulable suspicion of a serious crime when he chose not to conclude the traffic stop; and (C) Appellant declined Officer Owens' request to search the vehicle. Therefore, the trial court erred in refusing to suppress the evidence seized because the search of the vehicle was invalid, as it was the product of an unlawful detention under the Fourth Amendment. See U.S. Const. amend. IV.; *Accord Tindall*, 388 S.C. 518, 698 S.E.2d 203; *State v. Rivera*, 384 S.C. 356, 682 S.E.2d 307 (Ct. App. 2009); *State v. Williams*, 351 S.C. 591, 571 S.E.2d 703 (Ct. App. 2002).

**A. Officer Owens' continued detention of Appellant exceeded the scope of the traffic stop and constituted a seizure for purposes of the Fourth Amendment.**

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "[T]he underlying command of the Fourth Amendment is always that

searches and seizures be reasonable.” *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995). The Fourth Amendment is applicable to the States through the Due Process Clause of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643 (1961).

Traffic stops are reviewed under the standard set forth in *Terry v. Ohio*, 392 U.S. 1 (1968), because a traffic stop is more analogous to an investigative detention than a custodial arrest. See *United States v. Rusher*, 966 F.2d 868, 875 (4th Cir. 1992). 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. *Rusher*, 966 F.2d at 875.

As to the scope component of the second prong, “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.” *Florida v. Royer*, 460 U.S. 491, 500 (1983) (plurality opinion). With regard to the duration component of the second prong, a traffic stop may become “unlawful if it is prolonged beyond the time reasonably required to complete [its] mission.”<sup>4</sup> *Illinois v. Caballes*, 543 U.S. 405, 407 (2005); See *Royer*, 460 U.S. at 500 (noting the scope of a seizure “must be carefully tailored to its underlying justification,” and that the government bears the burden to “demonstrate that the seizure it

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<sup>4</sup> See *State v. Corley*, 383 S.C. 232, 241, 679 S.E.2d 187, 192 (Ct. App. 2009) (noting during a traffic stop, “the police may briefly detain and question a person upon a reasonable suspicion, short of probable cause for arrest, that the person is involved in criminal activity”; “[t]he scope and duration of [this investigative] detention must be strictly tied to and justified by the circumstances that rendered its initiation proper”; and normally, this permits an officer to attempt to obtain information confirming or dispelling the officer's suspicion), *aff'd as modified*, 392 S.C. 125, 708 S.E.2d 217 (2011)).

seeks to justify . . . was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure”).

Furthermore, temporary detention of individuals during a traffic stop by police, even if only for a brief period and for a limited purpose, constitutes a seizure of the persons within the meaning of the Fourth Amendment. *See Whren v. United States*, 517 U.S. 806, 809–10 (1996); *see also United States v. Arvizu*, 534 U.S. 266, 273 (2002) (noting the Fourth Amendment's protection against “unreasonable searches and seizures” extends to “brief investigatory stops of persons or vehicles”). “As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.” *Whren*, 517 U.S. at 810.

However, a traffic stop typically ends when the police officer has “no further need to control the scene, and inform[s] the driver and passengers they are free to leave.” *Arizona v. Johnson*, 555 U.S. 323 (2009); *See United States v. Sullivan*, 138 F.3d 126, 132 (4th Cir. 1998) (finding the test for determining if a particular encounter constitutes a seizure within the meaning of the Fourth Amendment is “whether, under the totality of the circumstances surrounding the encounter, a reasonable person in the suspect’s position would have felt free to decline the officer’s requests or otherwise terminate the encounter”). Accordingly, “[o]nce the purpose of that stop has been fulfilled, the continued detention of the car and the occupants amounts to a second detention.” *State v. Pichardo*, 367 S.C. 84, 998, 623 S.E.2d 840, 848 (Ct. App. 2005); *See Tindall*, 388 S.C. at 522-23, 698 S.E.2d at 205-06 (2010) (finding “the officer’s continued detention of Tindall exceeded the scope of the traffic stop and constituted a seizure for purposes of the Fourth Amendment”).

In this case, Officer Owens unlawfully extended the traffic stop because the purpose of the traffic stop was accomplished when Officer Owens found that Appellant was not impaired<sup>5</sup> and had informed Appellant that he would receive a warning citation. R. 61, l. 4 – 63, l. 8; R. 68, l. 6 – 72, l. 3; R. 78, l. 1 – 80, l. 14; *See Rivera*, 384 S.C. 356, 682 S.E.2d 307 (finding the purpose of the traffic stop was accomplished when the officer informed Rivera he would receive a warning citation and found the officer's questions regarding the transport of drugs exceeded the scope of the initial traffic stop and constituted a second and illegal detention); *see also Tindall*, 388 S.C. at 522, 698 S.E.2d at 205 (finding the purpose of the traffic stop was accomplished when the dispatcher reported no problems with Tindall's driver's license and vehicle, and the only remaining task was the issuance of the warning ticket, and a continued detention occurred when the officer questioned Tindall for approximately six to seven minutes *after* the purpose of the stop was accomplished).

Furthermore, this case is distinguishable from *Provet* for three reasons. First, Appellant's traffic stop lasted over 30 minutes (approximately fifteen minutes after the purpose of the stop was accomplished), unlike in *Provet*, where "the entire traffic stop amounted to less than eleven minutes." R. 72, ll. 1-16; (DVD of traffic stop); *Provet*, 391 S.C. at 499, 706 S.E.2d at 516; *See State v. Williams*, 351 S.C. 591, 571 S.E.2d 703 (Ct. App. 2002) (finding illegal detention accompanied by a lack of valid consent and noting the occupants of the vehicle were detained between twenty-five and forty minutes as opposed to

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<sup>5</sup> Officer Owens testified that he conducted three field sobriety tests on Appellant and ultimately found that Appellant was not impaired: "*I feel like it would [have] been an injustice to [Appellant] if I had arrested him for driving under the influence.*" R. 68, ll. 6-11; R. 72, ll. 1-3; R. 80, ll. 11-14 (emphasis added).

the officer's normal traffic stop time of nine to eleven minutes). Second, the "additional factors" cited in *Provet* do not exist in this case: (1) "Owens testified Provet's vehicle contained several air freshners[;]" and (2) "Provet admitted he did not have any luggage for his two-day stay in Greenville." *Id.* at 502, 706 S.E.2d at 517. Third, "Owens was waiting to hear from dispatch regarding Provet's license and registration" and "Owens developed his reasonable suspicion as a result of additional factors that were not present in *Tindall*." *Id.* at 504, 706 S.E.2d at 518.

Similar to *United States v. Digiovanni*, 650 F.3d 498, 508-09 (4th Cir. 2011), Officer Owens "definitely abandoned the prosecution of the traffic stop and embarked in another sustained course of investigation." (citation and internal quotation marks omitted). It is clear that Officer Owens was conducting a drug investigation and not a traffic violation, particularly when Officer Owens continued to detain Appellant for an additional fifteen minutes after the purpose of the traffic stop was accomplished to have a drug dog conduct a periphery sniff of the vehicle. R. 72, ll. 1-16; (DVD of traffic stop). Notably, Appellant told Officer Owens that there were no weapons, alcohol, or drugs in the vehicle before Officer Owens called for the drug dog. R. 68, ll. 19-22. Officer Owens also admitted that he "*had no indication at the time*" whether the vehicle was being used for drug trafficking. R. 45, ll. 18-20 (emphasis added).

Accordingly, Officer Owens' "continued detention of [Appellant] exceeded the scope of the traffic stop and constituted a seizure for the purposes of the Fourth Amendment" because a reasonable person in Appellant's position "would not have felt free to terminate the encounter." *See Tindall*, 388 S.C. at 522-23, 698 S.E.2d at 205-06; accord *Arizona v. Johnson*, 555 U.S. 323; *United States v. Sullivan*, 138 F.3d at 132.

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

The extension of a lawful traffic stop is permitted when: (1) the encounter becomes consensual; or (2) the officer has a reasonable, articulable suspicion of other illegal activity. *See Pichardo*, 367 S.C. at 99, 623 S.E.2d at 848; *see also United States v. Brugal*, 209 F.3d 353, 358 (4th Cir. 2000) (finding “[t]he *Terry* reasonable suspicion standard required an officer to have a reasonable suspicion that criminal activity is afoot before he may . . . continue to seize a person following the conclusion of the purposes of a valid stop”). The State has the burden to articulate facts, which are sufficient to support an officer’s reasonable suspicion that criminal activity has occurred or is occurring. *See generally State v. Butler*, 343 S.C. 198, 539 S.E.2d 414 (Ct. App. 2000); *see also Tindall*, 388 S.C. at 527, 698 S.E.2d at 208 (“[T]he nature of the reasonableness inquiry [in determining the existence of reasonable suspicion] is highly fact-specific”).

Reasonable suspicion requires “ ‘a particularized and objective basis’ that would lead one to suspect another of criminal activity.” *State v. Lesley*, 326 S.C. 641, 644, 486 S.E.2d 276, 277 (Ct. App. 1997) (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981)). Reasonable suspicion also requires “something more than an inchoate and unparticularized suspicion or hunch.” *State v. Rogers*, 368 S.C. 529, 534, 629 S.E.2d 679, 682 (Ct. App. 2006). It is also important to determine when a traffic stop “ends” because an officer must gain reasonable suspicion of a serious crime *before* detaining a suspect beyond the conclusion of the traffic stop. *See Tindall*, 388 S.C. at 518, 698 S.E.2d at 205 (a traffic stop ends when the purpose of the initial stop is accomplished) (emphasis added). Therefore, in determining whether reasonable suspicion exists, the trial court must consider the totality of the circumstances. *Id.*

In this case, Officer Owens did not have reasonable and articulable suspicion that criminal activity had occurred or was occurring because Officer Owens had already found that Appellant was not impaired and had previously stated his intention to issue a warning citation. R. 61, l. 4 – 63, l. 8; R. 68, l. 6 – 72, l. 3; R. 78, l. 1 – 80, l. 14. The facts of this case mirror the facts presented in *Tindall*, except that Appellant *did not* consent to a search of the vehicle. *Id.*, 388 S.C. at 523, 698 S.E.2d at 206. In *Tindall*, the South Carolina Supreme Court found that the officer had an insufficient basis for reasonable suspicion to exist: (1) Tindall was stopped for speeding, following another vehicle too closely, and failing to maintain his lane; (2) Tindall was going to visit his brother in Durham, North Carolina, a known “drug hub[;]” (3) “Tindall was driving a rental car rented the previous day by another individual which was to be returned to Atlanta on the day of the stop[;]” (4) “Tindall did a ‘felony stretch’ on exiting the vehicle[;]” (5) “Tindall seemed nervous[;]” and (5) the officer “sense[d] that something wasn’t right[.]” *Id.*

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

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

(internal citation omitted).

The Fourth Circuit also emphasized:

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

*Foster*, 634 F.3d at 248-49 (emphasis added) (citing *Terry*, 392 U.S. at 12-13 (finding “Courts which sit under our Constitution cannot and will not be made party to lawless invasion of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions)). The *Foster* Court further noted, “The Government cannot rely upon post hoc rationalizations to validate those seizures that happen to turn up contraband.” *Id.* 634 F.3d at 249; (citing *United States v. Martinez-Fuerte*, 428 U.S. 543, 565 (1976) (noting one purpose of the Fourth Amendment is to “prevent hindsight from coloring the evaluation of the reasonableness of a search or seizure”).

Here, the State has failed to meet its burden to articulate facts, which are sufficient to support Officer Owens’ reasonable suspicion of a serious crime. *See Tindall*, 388 S.C. at 527, 698 S.E.2d at 208 (“[T]he nature of the reasonableness inquiry [in determining the existence of reasonable suspicion] is highly fact-specific”). Based on Officer Owens’ speculation and opinion during a traffic stop, he labeled innocent facts as “suspicious:” (1) Appellant voluntarily raised his hands during the pat-down search (“felony position”); (2) Appellant put his hands in his pockets (“defeated look”); (3) Appellant placing his arms behind his back (“assuming the position of arrest”); (3)

Appellant talking on the cell phone as Officer Owens approached the vehicle from the passenger side of the vehicle (“innocent people hang up the phone” and “having to answer to a higher person”); and (4) coming from a *suburb* of a major city (“drug source”). R. 44, ll. 14-25; R. 52, l. 23 – 53, l. 18; R. 55, ll. 11-20; R. 56, l. 21 – 58, l. 13; R. 60, l. 21 – 61, l. 1. *See Foster*, 634 F.3d at 248; *Cf. United States v. Wilson*, 951 F.2d 116, 124-25 (4th Cir. 1991) (finding “[a] suspect’s arrival from a ‘source city’ is still noted by many courts as a factor lending support for a ‘reasonable suspicion’ finding, *but the vast number of persons coming from those ‘source cities’ relegates this factor to a relatively insignificant role*”) (emphasis added). Thus, Officer Owens relied heavily on his subjective speculation in finding reasonable suspicion, instead of objective facts, as required. *See Pichardo*, 367 S.C. at 99, 623 S.E.2d at 848.

Furthermore, the videotape of the traffic stop does not have sound and fails to demonstrate that Appellant was any more nervous than would expect an ordinary person after being stopped for a traffic violation and performing field sobriety tests on the side of the interstate. R. 36, l. 4 – 38, l. 7; R. 78, ll. 1-11; *See Delaware v. Prouse*, 440 U.S. 648, 657 (1979) (finding although “extreme nervousness” is a factor to be considered in a reasonable suspicion analysis, courts must be skeptical of using nervousness as a factor because a traffic stop is an “unsettling show of authority” that may “create substantial anxiety”); *see also State v. Pichardo*, 367 S.C. 84, 104, 623 S.E.2d 840, 851 (Ct. App. 2005) (finding nervousness of the defendant alone is not sufficient to support reasonable suspicion of “some other crime”) (citation omitted).

As previously stated, this Court found “additional factors” in *Provet* that are clearly not found in this case (e.g., air freshners, no luggage for a two-day trip, and fast

food bags), which eliminate a substantial portion of innocent travelers. *Provet*, 391 S.C. at 502, 706 S.E.2d at 518; *See United States v. Foreman*, 369 F.3d. 776, 781 (4th Cir. 2004) (finding “[t]he articulated factors together must serve to eliminate a substantial portion of innocent travelers before the requirement of reasonable suspicion will be satisfied”). In denying Appellant’s motion to suppress, the trial court stated, “*I have my doubts that the car was driven from Morganton to Lawrenceville and back to Marion to visit a grandmother. That’s a long way to go around to visit your grandmother. . . . So, it appears that he may have been less than truthful about the purpose of his trip.*” R. 114, ll. 8-17 (emphasis added). The trial court also stated, “[F]or someone unemployed, to be carrying such a large amount of cash in their pocket also would obviously give a[n] officer reasonable suspicions” and “the other factors as noted, I have given those the weight required[.]” R. 114, ll. 17-22. The trial court erroneously denied Appellant’s motion to suppress because the trial court based its decision purely on his subjective disbelief that Appellant would not be traveling that far to see his grandmother and that an unemployed person would not be in possession of six-hundred dollars. R. 233, ll. 2-22.

Therefore, under the totality of the circumstances, Officer Owens did not have reasonable and articulable suspicion of a serious crime when he chose not to conclude the traffic stop; therefore, the continued detention was illegal and the evidence seized during the search of the vehicle must be suppressed. *See Rivera*, 384 S.C. at 360, 682 S.E.2d at 309 (noting there must be “sufficient indicators of criminal activity to justify any continued detention”); *see also Terry*, 392 U.S. 22 (noting the failure to suppress evidence seized from an unlawful search would “invite intrusion upon constitutionally guaranteed rights based on nothing more than inarticulate hunches”).

**C. Appellant declined Officer Owens' request to search the vehicle.**

The United States Supreme Court created the exclusionary rule to safeguard Fourth Amendment rights. *United States v. Calandra*, 414 U.S. 338 (1974). The exclusionary rule prohibits the use of evidence obtained directly or indirectly through an unlawful search or seizure under the fruits of the poisonous tree doctrine. See *Wong Sun v. United States*, 371 U.S. 471, 484 (1963); see also *State v. Nelson*, 336 S.C. 186, 519 S.E.2d 786 (1999) (finding evidence is not admissible under the "fruit of the poisonous tree" doctrine when the police exploit an unlawful search to seize evidence that would not have otherwise come to light). The Fourteenth Amendment incorporates the rule of excluding evidence obtained through an illegal search or seizure and makes it applicable to the states. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

"The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'" *United States v. Mendenhall*, 446 U.S. 544, 553-54 (1980) (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976)). The United States Supreme Court and the Supreme Court of this State have recognized and applied the principle that police officers are not granted under *Terry*, "a general warrant to rummage and seize at will" and that any evidence seized from an unlawful detention must be excluded as "fruit of the poisonous tree." *State v. Woodruff*, 344 S.C. 537, 549, 544 S.E.2d 290, 296-97, n. 1 (2001) (citing *Texas v. Brown*, 460 U.S. 730, 748 (1983) (Stevens, J., concurring) (The United States Supreme Court "has been sensitive to the danger . . . that officers will enlarge a specific authorization, furnished by a warrant or an exigency, into the equivalent of a general

warrant to rummage and seize at will") (emphasis added).

"Undoubtedly, a law enforcement officer may request permission to search at any time. However, when an officer asks for consent to search after an unconstitutional detention, the consent procured is per se invalid unless it is both voluntary and not an exploitation of the unlawful detention." *Tindall*, 388 S.C. at 523-24, 698 S.E.2d at 206 (quoting *Adams*, 377 S.C. at 339, 659 S.E.2d at 275) (finding "any time" meaning (1) during a lawful traffic stop, (2) post-traffic stop investigatory detention, or (3) a consensual encounter)); See *Wong Sun*, 371 U.S. 471 ("We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.") (citation and internal quotation marks omitted).

In this case, Officer Owens admitted that he had *informed* Appellant that he was receiving a warning ticket for the traffic violations and that it was not until *after* Appellant declined his request to search the vehicle that Appellant was told he was being detained. R. 78, ll. 12-19 (emphasis added). Thus, unlike in *Provet*, Appellant did not voluntarily consent to a search of the vehicle. Regardless, even if Appellant had consented to a search of the vehicle, it would have been invalid as "an exploitation of the unlawful detention." *Tindall*, 388 S.C. at 523-24, 698 S.E.2d at 206 (citation and quotation omitted). This is because the purpose of the traffic stop had been accomplished and a reasonable person in Appellant's position would not have felt free to terminate the

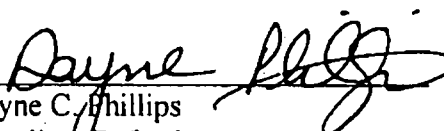
encounter when being detained by three police officers for an additional fifteen minutes to allow the K-9 unit to arrive on the scene. *See Sullivan*, 138 F.3d at 132 (finding the test for determining if a particular encounter constitutes a seizure within the meaning of the Fourth Amendment is “whether, under the totality of the circumstances surrounding the encounter, a reasonable person in the suspect’s position would have felt free to decline the officer’s requests or otherwise terminate the encounter”).

Notably, the evidence was not discovered until *after*: (1) the purpose of the traffic stop had been accomplished; (2) Appellant had declined Officer Owen’s request to search the vehicle; and (3) Appellant was unlawfully detained. R. 61, l. 4 – 63, l. 8; R. 68, l. 23 – 69, l. 5; R. 78, l. 1 – 80, l. 14. Accordingly, the evidence seized from this unlawful detention must be excluded as “fruit of the poisonous tree.” *See* U.S. Const. amend. IV; *see also Woodruff*, 344 S.C. at 549, 544 S.E.2d at 296-97, n. 1 (citing *Brown*, 460 U.S. at 748 (Stevens, J., concurring) (The United States Supreme Court “*has been sensitive to the danger . . . that officers will enlarge a specific authorization, furnished by a warrant or an exigency, into the equivalent of a general warrant to rummage and seize at will*”) (emphasis added).

CONCLUSION

For the foregoing reasons, Appellant Ashley Moore respectfully requests that this Court reverse his convictions and remand this case to the Pickens County Court of General Sessions for a new trial.

Respectfully submitted,

  
Dayne C. Phillips  
Appellate Defender

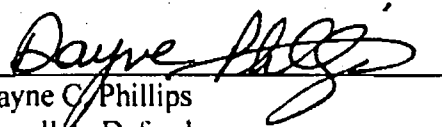
ATTORNEY FOR APPELLANT

This 6th day of December, 2012.

## CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

December 6th, 2012

  
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STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Spartanburg County

Roger L. Couch, Special Circuit Court Judge  
\_\_\_\_\_

THE STATE,

RESPONDENT,

V.

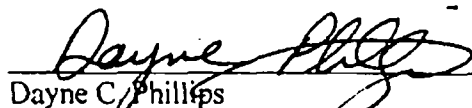
ASHLEY EUGENE MOORE,

APPELLANT

Appellate Case No. 2011-191327  
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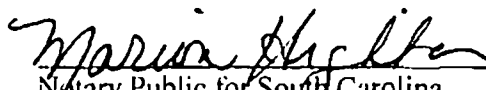
CERTIFICATE OF SERVICE  
\_\_\_\_\_

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant 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 6th day of December, 2012.

  
\_\_\_\_\_  
Dayne C. Phillips  
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 6<sup>th</sup> day of December, 2012.

 (L.S.)  
Notary Public for South Carolina

My Commission Expires: October 30, 2022.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Spartanburg County  
Honorable Roger L. Couch, Circuit Court Judge

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THE STATE,

Respondent,

vs.

ASHLEY EUGENE MOORE,

Appellant.

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**FINAL BRIEF OF RESPONDENT**

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**STATEMENT OF ISSUE ON APPEAL****I.**

**The trial judge properly denied Appellant's motion to suppress the illegal narcotics discovered during a traffic stop because the officer's decision to extend the scope and duration of the stop was reasonable and justified under the totality of the circumstances based on the existence of multiple factors establishing a reasonable and articulable suspicion of criminal activity.**

**STATEMENT OF THE CASE**

On October 22, 2010, a Spartanburg County Grand Jury indicted Appellant for trafficking cocaine base (first offense) and possession of a weapon during the commission of a violent crime.

On April 25, 2011, Appellant proceeded to trial before a jury. Robert Hall represented Appellant, and Assistant Solicitor Eddie Hunter represented the State. The jury found Appellant guilty as charged.

Thereafter, the Honorable Roger L. Couch sentenced Appellant to twenty-five years of imprisonment for the trafficking cocaine base conviction and five years of imprisonment for the possession of a weapon during the commission of a violent crime conviction. Judge Couch ran the sentences concurrently.

On April 27, 2011, Appellant served a timely Notice of Appeal. This appeal follows.

### STATEMENT OF FACTS

On June 30, 2010, at approximately 1:10 a.m., Officer Dale Owens and Corporal Ken Hancock observed Appellant driving on Interstate 85 ("I-85") above the posted speed limit. (R. pp. 8-9.) In addition, Appellant failed to maintain his lane. (R. p. 9.) When Officer Owens first observed Appellant, Appellant was driving in the far right hand lane. (R. p. 14.) However, Appellant eventually moved to the center lane. (R. p. 14.) When Officer Owens turned his blue lights on to pull Appellant over for speeding and failing to maintain his lane, Appellant turned on his left turn signal. (R. pp. 14-15.) Appellant eventually turned on his right turn signal; however, according to Officer Owens, it took Appellant longer than the average time to pull over and come to a stop. (R. p. 15.) In Officer Owens' training and experience, it appeared to him that Appellant was preparing to flee. (R. pp. 15-16.)

After Appellant pulled over, Appellant failed to turn off his right hand turn signal, which, according to Officer Owens, was indicative of criminal behavior. (R. p. 17.) When Officer Owens approached Appellant's vehicle, Appellant was talking on the phone. (R. p. 19.) Officer Owens had to tell Appellant to hang up the phone. Officer Owens testified that, in his experience, most innocent people hang up the phone when they get pulled over. (R. pp. 19-21.) However, drug traffickers often have to answer to a higher person. (R. p. 19.) In some drug trafficking cases, when a drug trafficker gets pulled over, he or she will leave the phone on so that the person he or she answers to can hear what is happening during the stop. Sometimes, the drug trafficker will leave the phone on so that in case he or she decides to flee, the person the drug trafficker answers to will know where the drug trafficker is located.

When Officer Owens approached Appellant's vehicle, Officer Owens smelled alcohol coming from inside the vehicle. (R. p. 21.) Officer Owens gave a signal to Corporal Hancock indicating that he smelled alcohol. In Officer Owens training and experience, people who traffic drugs will often drink alcohol in order to calm their nerves. (R. pp. 21-22.)

Officer Owens asked Appellant for Appellant's driver's license and registration. (R. p. 24.) Appellant informed Officer Owens that the car he was driving was a rental car. Appellant provided the rental agreement and his driver's license. Officer Owens noticed that Appellant's hand was shaking heavily. In Officer Owens' report, he noted that Appellant was overly nervous. Additionally, Appellant's breathing was accelerated, and the pulse in his neck appeared to be elevated and pounding.

Moreover, Appellant admitted he had been drinking. (R. p. 25.) At that point, Officer Owens asked Appellant to exit the vehicle. As Appellant exited his vehicle, he tried to pick up his cell phone, which was an indicator to Officer Owens that Appellant might try to flee. (R. p. 26.) When Appellant exited the vehicle, he started walking towards Officer Owens' patrol car; however, Appellant left the door to his rental car open. (R. pp. 25-26.) Appellant started smoking a cigarette, which indicated to Officer Owens that Appellant was trying to calm his nerves. (R. p. 27.)

Thereafter, Appellant consented to a pat down. (R. pp. 27-28.) Appellant raised his hands in the air even though the officers did not ask him to raise his hands. (R. p. 28.) Officer Owens felt like what he perceived to be a large sum of wadded money in Appellant's pocket. Corporal Hancock took the wad of money out of Appellant's pocket. Appellant continued to keep his hands in the air in the "felony position." (R. p. 28.)

During the suppression hearing, Officer Owens testified that, in his estimation, Appellant had approximately \$1,000 in his pocket. (R. pp. 28-29.) Because Appellant told the officers that he was unemployed, the amount of money in Appellant's pocket alarmed the officers of potential criminal activity. (R. p. 29.) Furthermore, Officer Owens continued to smell alcohol on Appellant even though he was no longer near Appellant's car. Even though the officers told Appellant not to place his hands in his pockets, Appellant placed his hands in his pockets. (R. pp. 30-31.)

Appellant told Officer Owens that he was coming from Lawrenceville, Georgia, which is a suburb of Atlanta, Georgia. (R. p. 32.) According to Officer Owens, Atlanta is a major drug source city. In Officer Owens' fourteen years of experience, approximately 95 percent of the drugs he has found on I-85 came from Atlanta.

Moreover, according to the rental agreement, Appellant was not the one who rented the vehicle Appellant was driving. (R. p. 24; R. pp. 31-33.) According to Officer Owens, a third party rental vehicle is one of the largest indicators of criminal activity. (R. p. 33.) Another thing that raised Officer Owens' suspicion was the fact Appellant told Officer Owens that he was on the way to visit his grandmother. (R. pp. 34-35.) Generally, most people do not visit their grandparents that late at night. (R. p. 35.)

Thereafter, Officer Owens administered three field sobriety tests to Appellant. (R. pp. 38-43.) Officer Owens concluded that Appellant was not impaired. (R. p. 43.) Appellant claimed he did not have any weapons, alcohol, or drugs in the vehicle. (R. p. 43.) After Officer Owens administered the field sobriety tests, he asked Appellant for consent to search Appellant's car; however, Appellant refused to give his consent. (R. pp. 43-44.) In fact, Appellant told the officers that he did not want them to search his luggage, which was located in his trunk. (R. p. 44.)

Afterwards, Officer Owens gave Appellant a warning ticket.<sup>1</sup> However, Officer Owens advised Appellant that he was detaining Appellant based on his reasonable suspicion that Appellant was involved in criminal activity (other than the traffic violations and impaired driving). (R. pp. 44-45.) Officer Owens informed Appellant that they had to wait for a drug detection unit to come to the vehicle. Appellant was in an investigative detention; however, he was not handcuffed. (R. p. 46.)

Fifteen minutes later, approximately 31 minutes and 13 seconds into the stop, the drug detection unit arrived and the drug dog alerted to an odor. (R. pp. 45-47; R. p. 69.) The officers searched Appellant's vehicle and found an opened alcoholic beverage under the front passenger seat of the vehicle. (R. pp. 47-48.) Moreover, the officers found two containers of crack cocaine, a semiautomatic weapon, and approximately \$4,000 in the trunk of Appellant's vehicle. (R. p. 48.)

After hearing all arguments, the trial judge denied Appellant's motion to suppress the contraband. (R. p. 89.)

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<sup>1</sup> According to Officer Owens, most people calm down after he tells them they are only getting a warning for the traffic violation; however, Appellant remained nervous. (R. p. 38; R. p. 53.)

## ARGUMENT

### I.

**The trial judge properly denied Appellant's motion to suppress the illegal narcotics discovered during a traffic stop because the officer's decision to extend the scope and duration of the stop was reasonable and justified under the totality of the circumstances based on the existence of multiple factors establishing a reasonable and articulable suspicion of criminal activity.**

Appellant asserts the trial judge erred in denying his suppression motion. Appellant maintains his detention during the traffic stop was unreasonable and any extension of the stop was not supported by a reasonable and articulable suspicion of criminal activity. To the contrary, Officer Owens detained Appellant for a reasonable period of time while he completed the traffic stop and field sobriety test. During the course of the stop, Officer Owens developed a reasonable and articulable suspicion after observing numerous indicators of criminal activity, which led him to extend the duration of the stop to investigate further. The officer's actions during the traffic stop were objectively reasonable under the totality of the circumstances, and Appellant's detention was proper in scope and duration. The trial judge properly denied Appellant's suppression motion, and his ruling is supported by the evidence. Thus, Appellant's conviction should be affirmed.

### Standard of Review

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). In Fourth Amendment search and seizure cases, the appellate court is limited to determining if there is any evidence to support the trial court's findings and can only reverse due to clear error. State v. Flowers, 360 S.C. 1, 5, 598 S.E.2d 725, 727 (Ct. App. 2004); see State v. Brockman, 339 S.C. 57,

66, 528 S.E.2d 661, 666 (2000) (“[W]e will review the trial court’s ruling like any other factual finding and reverse if there is clear error. We will affirm if there is any evidence to support the ruling.”). The reviewing court may conduct its own review of the record to determine whether the trial judge’s ruling is supported by the evidence. State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 460 (2002). However, the appellate court must affirm the trial court if there is any evidence in the record to support the ruling. State v. Pichardo, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005). The appellate court will not reverse merely because it would have reached a different conclusion than the trial judge. State v. Rivera, 384 S.C. 356, 361, 682 S.E.2d 307, 310 (Ct. App. 2009).

#### **Applicable Law**

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

For Fourth Amendment purposes, a traffic stop of a vehicle, along with the detention of individuals during the stop, constitutes a seizure. State v. Maybank, 352 S.C. 310, 315, 573 S.E.2d 851, 854 (Ct. App. 2002). While the Fourth Amendment requires a stop to be reasonable under the circumstances, a traffic stop is reasonable per

se when probable cause exists to believe a traffic violation has occurred. State v. Williams, 351 S.C. 591, 598, 571 S.E.2d 703, 707 (Ct. App. 2002). The reasonableness of a stop or detention “is measured in objective terms by examining the totality of the circumstances.” Ohio v. Robinette, 519 U.S. 33, 39 (1996). “[A] minor traffic violation arrest will not be rendered invalid by the fact it was a ‘mere pretext for a narcotics search.’ ” State v. Corley, 383 S.C. 232, 240, 679 S.E.2d 187, 191-192 (Ct. App. 2009) (citations omitted). “Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.” Whren v. United States, 517 U.S. 806, 813 (1996).

Once a lawful traffic stop is initiated, an officer may order the driver out of the vehicle and “may request a driver’s license and vehicle registration, run a computer check, and issue a citation.” Pichardo, 367 S.C. at 98, 623 S.E.2d at 847 (citing United States v. Sullivan, 138 F.3d 126 (4th Cir. 1998)); see also Muehler v. Mena, 544 U.S. 93, 100-101 (2005) (instructing additional questioning during a detention unrelated to the original purpose of the detention does not constitute an additional seizure or independent Fourth Amendment violation). Such an investigatory stop must be temporary and last no longer than necessary to effectuate its purpose. Pichardo, 367 S.C. at 98, 623 S.E.2d at 848; see also United States v. Branch, 537 F.3d 328, 336 (4th Cir. 2008) (“The maximum acceptable length of a routine traffic stop cannot be stated with mathematical precision. Instead, the appropriate constitutional inquiry is whether the detention lasted longer than was necessary, given its purpose.”)

Even if a traffic stop is initially lawful, the detention “can become unlawful if it is prolonged beyond the time reasonably required to complete [its] mission.” Illinois v. Caballes, 543 U.S. 405, 407 (2005); see Pichardo, 367 S.C. at 98, 623 S.E.2d at 848 (“Once the purpose of that stop has been fulfilled, the continued detention of the car and

the occupants amounts to a second detention.”). However, a further detention extending the scope of a traffic stop beyond its original purpose is not automatically unconstitutional. Pichardo, 367 S.C. at 99, 623 S.E.2d at 848. Instead, continued questioning beyond the duration of an initial traffic stop is lawful and permissible where: (1) the officer has a reasonable articulable suspicion of other illegal activity; or (2) the traffic stop becomes a consensual encounter. Id.

Reasonable suspicion consists of “‘a particularized and objective basis’ that would lead one to suspect another of criminal activity.” State v. Lesley, 326 S.C. 641, 644, 486 S.E.2d 276, 277 (Ct. App. 1997) (quoting United States v. Cortez, 449 U.S. 411, 417 (1981)). “Reasonable suspicion ‘is not readily, or even usefully, reduced to a neat set of legal rules, but, rather, entails common sense, nontechnical conceptions that deal with factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act.’ ” State v. Provet, 391 S.C. 494, 500, 706 S.E.2d 513, 516 (Ct. App. 2011) (quoting United States v. Foreman, 369 F.3d 776, 781 (4th Cir. 2004)). “In this highly fact-specific inquiry, reasonable suspicion ‘is a fluid concept which takes its substantive content from the particular context in which the standard is being assessed.’ ” State v. Wallace, 392 S.C. 47, 51-52, 707 S.E.2d 451, 453 (Ct. App. 2011) (certiorari granted April 5, 2012) (quoting Foreman, 369 F.3d at 781).

The reasonable suspicion standard “is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence[.]” Illinois v. Wardlow, 528 U.S. 119, 123 (2000). “Reasonable suspicion is more than a general hunch but less than what is required for probable cause.” State v. Willard, 374 S.C. 129, 134, 647 S.E.2d 252, 255 (Ct. App. 2007); see State v. Rogers, 368 S.C. 529, 534, 629 S.E.2d 679, 682 (Ct. App. 2006) (“Reasonable suspicion is something more

than an inchoate and unparticularized suspicion or hunch.”). In order for an officer to have reasonable suspicion regarding the presence of illegal drugs, the officer is required to have a particularized and objective basis arising from the totality of the circumstances that would lead an individual to suspect drugs are located in a lawfully stopped vehicle. State v. Banda, 371 S.C. 245, 254, n. 4, 639 S.E.2d 36, 41 (2006).

In determining the existence of reasonable suspicion, the totality of the circumstances must be considered. Pichardo, 367 S.C. at 104, 623 S.E.2d at 85. In reviewing the totality of the circumstances, the individual factors of the traffic stop must not be considered piecemeal or in isolation. See Branch, 537 F.3d at 337 (“Courts must look at the ‘cumulative information available’ to the officer . . . and not find a stop unjustified based merely on a ‘piecemeal refutation of each individual’ fact and inference[.]” (citations omitted)). Instead, all of the circumstances of the stop must be considered as a whole to determine whether the officer’s actions were reasonable in light of all of the information available to him at the time. See United States v. Mason, 628 F.3d 123, 129 (4th Cir. 2010) (“[J]ust as one corner of a picture might not reveal the picture’s subject or nature, each component that contributes to reasonable suspicion might not alone give rise to reasonable suspicion.”). “In applying the concept of reasonable suspicion to the various facts of a case, ‘[i]t is the entire mosaic that counts, not single tiles.’ ” Wallace, 392 S.C. at 52, 707 S.E.2d at 453 (quoting United States v. Whitehead, 849 F.2d 849, 858 (4th Cir. 1988)). Thus, the presence of several factors seemingly consistent with innocent travel can establish reasonable suspicion when viewed together in totality. United States v. Sokolow, 490 U.S. 1, 9 (1989).

South Carolina courts have addressed what constitutes reasonable suspicion of criminal activity in the context of a traffic stop in several recent cases. In State v.

Tindall, Tindall was stopped by law enforcement for speeding, swerving, and driving too closely. 379 S.C. 304, 307, 665 S.E.2d 188, 190 (Ct. App. 2008). Shortly thereafter, Tindall was given a warning ticket, but the officers continued to question him. Id. Approximately fifteen to twenty minutes into the stop, Tindall consented to a search of the vehicle and cocaine was discovered. Id. Subsequently, the trial court denied Tindall's motion to suppress the narcotics as the product of an illegal detention and search, and the Court of Appeals affirmed. Id. at 311, 665 S.E.2d at 192.

In affirming the denial of the suppression motion, the Court of Appeals ruled the initial traffic stop ended when Tindall's license was returned and he was issued a warning. Id. However, the Court determined the officer had a reasonable suspicion of criminal activity warranting Tindall's further detention based on the existence of the following indicators: (1) Tindall was nervous even after receiving a warning; (2) Tindall was driving a rental car he had not rented; (3) Tindall was only driving one way; (4) Tindall's planned driving time was approximately eighteen hours in one day; and (5) the cities involved in the trip were known "drug hubs." Id.

However, in a sharply-divided opinion, the Supreme Court reversed the decisions of the trial judge and the Court of Appeals. State v. Tindall, 388 S.C. 518, 520, 698 S.E.2d 203, 204 (2010). The majority of the Supreme Court determined the officer completed the initial purpose of the traffic stop when he informed Appellant he would issue a warning ticket and learned from dispatch Appellant's license and registration were problem-free. Id. at 522, 698 S.E.2d at 205. The majority concluded the information available to the officer at that time was not sufficient to constitute a reasonable suspicion of criminal activity. Id. at 523, 698 S.E.2d at 206. Thus, the majority held "the continued

detention was illegal and the drugs discovered during the search of the vehicle must be suppressed.” Id.

More recently, in State v. Provet, a law enforcement officer stopped Provet for driving and equipment infractions on I-85 in Greenville County. 391 S.C. at 496, 706 S.E.2d at 514. During the course of the stop, the officer observed several signs of nervousness displayed by Provet, including shaking hands and accelerated breathing. Id. The officer asked Provet several questions about where he was coming from and the purpose of his trip, and Provet provided seemingly deceptive responses. Id. at 497, 706 S.E.2d at 514. The officer additionally observed several air fresheners, numerous fast food bags, a cell phone, and some receipts in Provet’s car. Id. at 497, 706 S.E.2d at 515. Based on his experience and observation, the officer believed Provet was involved in criminal activity. Id. Subsequently, after issuing a warning ticket, the officer immediately asked Provet if he had anything illegal in the car and asked for consent to search. Id. at 497-498, 607 S.E.2d at 514. Provet consented and then fled when the officer attempted to remove a fast food bag from the car filled with cocaine. Id. at 498, 706 S.E.2d at 515. During trial, Provet moved to suppress the cocaine as the product of an illegal search, and the trial judge denied the motion, finding the officer had a reasonable suspicion of criminal activity justifying an extension of the traffic stop. Id.

On appeal, this Court affirmed. Id. at 496, 706 S.E.2d at 514. Regarding the initial detention, this Court found the stop was proper as the officer’s questioning was tangentially related to the traffic stop. Id. at 499, 706 S.E.2d at 516. This Court further found that the questioning did not unreasonably extend the traffic stop because the officer had not completed the initial purpose of the stop and the stop was only eleven minutes long. Id. at 499-500, 706 S.E.2d at 516. Regarding the extension of the traffic stop after

the warning was issued, this Court determined the officer possessed reasonable suspicion to extend the stop based on the presence of the following factors: (1) Provet's nervous behavior; (2) the fact third-party vehicle registration is common in drug trafficking; (3) Provet's inconsistent or deceptive responses to several questions; (4) the presence of numerous fast food bags, a cell phone, and some receipts; and (5) the presence of numerous air fresheners. Id. at 504-505, 706 S.E.2d at 518-519. Based on the factors present coupled with the officer's considerable experience, this Court concluded the trial court did not err in finding an extension of the stop was justified under the circumstances. Id. at 506, 706 S.E.2d at 519-520.

Most recently, in State v. Wallace, Wallace was stopped on I-85 for committing a traffic violation. 392 S.C. at 50, 707 S.E.2d at 452. The officer took twelve minutes to complete the traffic stop and issued Wallace a citation. Id. However, based on his observations during the stop, the officer continued to question Wallace after issuing the ticket and requested consent to search the vehicle. Id. Wallace refused consent, and the officer walked a drug-sniffing dog around the vehicle. Id. The dog alerted on Wallace's car, and the officer found a substantial quantity of cocaine inside the car. Id. During trial, Wallace moved to suppress the drugs found in his vehicle, and the trial judge denied the motion. Id.

On appeal, this Court affirmed the trial judge's ruling. Id. This Court determined the following factors observed by the officer during the traffic stop established a reasonable articulable suspicion to extend the duration of the stop: (1) Wallace's abnormal braking after the officer initiated the stop; (2) Wallace's fumbling of his paperwork for an unusually long period of time; (3) the fact the passenger stared straight ahead and did not acknowledge the officer; (4) Wallace and the passenger's inconsistent

responses about the trip; (5) Wallace's increasing nervousness throughout the stop; (6) the fact an unknown car pulled up behind Wallace's vehicle for several minutes during the stop; (7) Wallace's cell phone ringing during the stop; (8) the fact drug dealers frequently use decoy cars and communicate via cell phones; (9) the fact the passenger would not look at the officer while they were talking; (10) the fact the passenger was sweating and visibly nervous on a mild day; (11) the fact Wallace changed his story after the officer spoke with his passenger; (12) the fact the car was owned by a third-party, which is common in drug cases; (13) I-85's status as a known drug corridor; and (14) Atlanta's status as a known drug hub. *Id.* at 55, 707 S.E.2d at 455. While noting none of the factors taken in isolation established a reasonable articulable suspicion of criminal activity, this Court held the presence of all of the factors together established a reasonable suspicion when examined in totality as required. *Id.*

#### **Application of Law to Facts**

In the case sub judice, the trial judge properly denied Appellant's suppression motion because the officer observed numerous indicators of criminal activity during the course of the traffic stop before he extended the duration and scope of the stop. Much like in Wallace and Provet, Officer Owens detected multiple suspicious signs of criminal activity during the course of the traffic stop before he issued the warning citation. After observing those indicators, the officer elected to extend the detention and have a drug-detection dog perform a sniff search of Appellant's vehicle after completing the purpose of the initial stop. As the officer's observations during the stop established a reasonable and articulable suspicion of criminal activity, the officer's decision to extend the stop was reasonable and justified under the totality of the circumstances. Therefore, the trial judge committed no error in denying Appellant's suppression motion.

As Appellant has conceded, Officer Owens was justified in initially stopping Appellant's vehicle after observing several driving violations. Thus, the sole issue on appeal is whether or not the detention was prolonged beyond the time reasonably required to complete its mission. Due to the fact Appellant exhibited signs of intoxication and the fact Appellant admitted to drinking a few alcoholic beverages, the traffic stop was reasonably extended in order for Officer Owens to conduct a field sobriety test. Officer Owens detained Appellant for approximately 31 minutes before he issued Appellant a warning for the traffic violations and impairment violation, which was a reasonable amount of time under the circumstances. See United States v. Sharpe, 470 U.S. 675, 683 (1985) (finding a twenty-minute detention during an investigatory traffic stop was objectively reasonable); see also Branch, 537 F.3d at 338 ("We begin with the basic fact that much of Branch's 30-minute detention was justified by the 'ordinary inquiries incident' to a routine traffic stop." (citations omitted)); United States v. Jeffus, 22 F.3d 554, 557 (4th Cir. 1994) (finding a fifteen-minute traffic stop to be reasonable); see, e.g., United States v. Jones, 44 F.3d 860, 872 (10th Cir. 1995) (approving of a thirty-minute traffic stop); United States v. Hardy, 855 F.2d 753, 761 (11th Cir. 1988) (finding a fifty-minute investigatory stop to be reasonable).

Approximately 31 minutes into the stop, Officer Owens decided to further detain Appellant after issuing the warning citation. Officer Owens' decision to extend the stop was based on his detection of the following indicators of criminal activity while he was preparing the citation and completing the stop: (1) Appellant turned on his left turn signal when he was initially pulled over (sign Appellant might flee); (2) Appellant took a long time to pullover (sign Appellant might flee); (3) Appellant never turned his turn signal off (sign of nervousness); (4) Appellant admitted he had been drinking (common in drug

trafficking cases in order for the trafficker to calm nerves); (5) Appellant started smoking a cigarette (sign of attempt to calm nerves); (6) Appellant continued to talk on his cell phone even after he was pulled over (common in drug trafficking cases because most traffickers often have to answer to a higher person); (7) Appellant's hands were shaking heavily (sign of nervousness); (8) Appellant's breathing was accelerated (sign of nervousness); (9) Appellant's pulse was elevated (sign of nervousness); (10) Appellant tried to pick up his cell phone once he got out of the car (sign that Appellant might attempt to flee); (11) Appellant had a large amount of cash in his pocket even though he was unemployed; (12) Appellant drove a rental car that was rented by someone else (common in drug trafficking cases); (13) Appellant was driving on I-85 (known drug corridor); (14) Appellant was traveling from Atlanta (known as a major drug hub); (15) Appellant claimed he was on the way to visit his grandmother (most people do not visit their grandparents at 1:00 a.m.); (16) Appellant raised his hands in the felony position even though the officers did not ask him to do so; and (17) Appellant remained extremely nervous even after he was advised he would only receive a warning citation.

Although some of the factors observed by the officer were potentially consistent with innocent travel, all of the factors taken together established a reasonable and articulable suspicion Appellant was involved in criminal activity. Based on the existence of a reasonable and articulable suspicion, Officer Owens was justified in extending the traffic stop and having a drug-detection dog perform a sniff search of Appellant's vehicle.

Coupled with Officer Owens' extensive training and experience, these factors established a reasonable and articulable suspicion Appellant was involved in criminal activity when viewed together under the totality of the circumstances. Thus, Officer

Owens was justified in extending the traffic stop after issuing the warning citation, which ultimately led to the discovery of the narcotics and Appellant's arrest.

Appellant contends Officer Owens improperly extended the duration of the stop, primarily relying on the Supreme Court's ruling in State v. Tindall. However, Appellant's case is markedly different from the circumstances in Tindall. Unlike the officer in Tindall, the officer in this case observed all of the indicators of criminal activity **prior** to requesting Appellant's consent to search and detaining him further during the course of the canine sniff search of his vehicle. Compare Tindall, 388 S.C. at 522, 698 S.E.2d at 205 ("At this point, the purpose of the traffic stop was accomplished except for the issuance of the warning ticket. However, rather than issue the ticket, the officer continued to question Tindall for an additional six to seven minutes[.]") with Provet, 391 S.C. at 504, 706 S.E.2d at 518 ("Conversely, Owens' series of questions and observations occurred prior to the conclusion of the traffic stop because Owens was waiting to hear from dispatch regarding Provet's license and registration and a warning citation had yet to be issued.")

During the course of the traffic stop, Officer Owens observed numerous indicators of criminal activity after stopping Appellant for traffic violations. Although some of the factors observed by the officer were potentially consistent with innocent travel, all of the factors taken together established a reasonable and articulable suspicion Appellant was involved in criminal activity. Based on the existence of a reasonable and articulable suspicion, Officer Owens was justified in extending the traffic stop and having a drug-detection dog perform a sniff search of Appellant's vehicle.

Viewing the circumstances of the stop in totality, the length of Appellant's detention was not objectively unreasonable, and the scope and duration of the stop were

only extended after the officer developed a reasonable articulable suspicion of criminal activity. See, e.g., Branch, 537 F.3d at 338 (“[W]ithin minutes of detaining Branch, Officer White had observed enough ‘specific and articulable facts’ to generate a ‘reasonable suspicion’ of illegal activity.”). Therefore, the trial judge properly denied Appellant’s suppression motion, and his ruling is supported by the evidence presented at trial. Applying the appropriate deferential standard of review, there is no basis to overturn the trial judge’s ruling. See Provet, 391 S.C. at 506, 706 S.E.2d at 520 (“[W]e conclude the trial court did not err in finding reasonable suspicion existed to further detain Provet **because there is evidence in the record to support the trial court’s ruling.**”) (emphasis added). Therefore, Appellant’s conviction should be affirmed.

**CONCLUSION**

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

December 11, 2012

## STATE OF SOUTH CAROLINA

## IN THE COURT OF APPEALS

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Appeal from Spartanburg County  
Honorable Roger L. Couch, Circuit Court Judge

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THE STATE,

Respondent,

vs.

ASHLEY EUGENE MOORE,

Appellant.

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CERTIFICATE OF COUNSEL

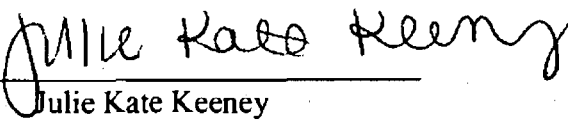
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The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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December 11, 2012

## STATE OF SOUTH CAROLINA

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Appeal from Spartanburg County  
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THE STATE,

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vs.

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Appellant.

**PROOF OF SERVICE**

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I, Norma Bigbee, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Dayne C. Phillips, Esquire  
S.C. Commission on Indigent Defense  
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I further certify that all parties required by Rule to be served have been served.  
This 11<sup>th</sup> day of December, 2012.

  
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## STATE OF SOUTH CAROLINA

In The Court of Appeals

## APPEAL FROM SPARTANBURG COUNTY

Roger L. Couch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ASHLEY EUGENE MOORE,

APPELLANT

APPELLATE CASE NO. 2011-191327

## RECORD ON APPEAL

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**STATE'S EXHIBITS #1 (DVD OF TRAFFIC STOP FILED WITH THE COURT)**

1 STATE OF SOUTH CAROLINA }  
2 COUNTY OF SPARTANBURG } COURT OF GENERAL SESSIONS

3  
4 STATE OF SOUTH CAROLINA, } TRANSCRIPT  
5 PLAINTIFF, } OF  
6 vs. } RECORD  
7 ASHLEY EUGENE MOORE, } 2010-GS-42-5975  
8 DEFENDANT. }

9  
10 April 25<sup>th</sup>, 2011  
11 Spartanburg, South Carolina  
12

13 B E F O R E:

14 THE HONORABLE ROGER L. COUCH, Judge, and a jury.

15 A P P E A R A N C E S:

16 EDDIE HUNTER  
17 ASSISTANT SOLICITOR  
18 Attorney for the State

19 ROBERT HALL  
20 ASSISTANT PUBLIC DEFENDER  
21 Attorney for the Defendant

22  
23  
24 PAMELA E. GREEN  
25 Circuit Court Reporter  
Seventh Judicial Circuit

1 THE COURT: Well, I believe the, the answer was given  
2 to a question that had to do with whether or not there was  
3 any bias or prejudice against people in this situation.  
4 And, and, so, his answer was in direct response to the  
5 question that I had asked. He stated his opinion, and, of  
6 course, after that I asked if any of the jurors are present  
7 knew of any reason whatsoever why they shouldn't serve in  
8 this case, and particular, their ability to be both fair and  
9 impartial to both the state and the defense. No juror  
10 indicated that that comment had effected them in any fashion  
11 out of the entire panel.

12 So, it's my finding that his answer was in response to  
13 a question that I asked, and the jurors did not indicate  
14 that there was any bias or prejudice that they had as a  
15 result of his comment. So, therefore, I'll deny the motion.

16 MR. HALL: Thank you, Your Honor.

17 THE COURT: Now, I believe there's other motions that  
18 you wanted to make, Mr. Hall.

19 MR. HALL: Yes, sir, there is.

20 The issue -- but this is a traffic stop on the  
21 interstate, and it involves issuing a warning ticket after  
22 field sobriety test, and then detention of some 15 or 16  
23 minutes after that warning ticket. I have the case, State  
24 versus Terry Tindall, that I'm passing up, and I believe  
25 you've got it.

1 SOLICITOR HUNTER: I have a copy.

2 MR. HALL: And we make the motion to suppress the  
3 evidence seized, the crack cocaine, and the pistol, as in  
4 violation of the search and seizure, that it was an un,  
5 unreasonable detention on the side of the road based on that  
6 case, Your Honor. We'd ask that you suppress the evidence.

7 THE COURT: All right. The State's position.

8 SOLICITOR HUNTER: Your Honor, obviously we had spoken  
9 earlier. We had the officer coming from the emergency  
10 medical procedure. He'll be here shortly. We'll gladly put  
11 him on the stand to describe what he did. The State's  
12 position would be that recently released case by the Court  
13 of Appeals State v. Provet.

14 Do you have that?

15 MR. HALL: No.

16 SOLICITOR HUNTER: Here's a copy for you.

17 THE COURT: Pass it up.

18 SOLICITOR HUNTER: Here's a copy for you, Your Honor.

19 It's dealing---

20 THE COURT: All right.

21 SOLICITOR HUNTER: ---with basically---

22 THE COURT: Go ahead.

23 SOLICITOR HUNTER: ---the same issue. In this case,  
24 it's actually the same officer in Provet as the same officer  
25 that's on this case, Your Honor. In that case, it says that

1 if you can determine the facts that lead to reasonable and  
2 articulable suspicion, that investigative detention longer  
3 than the initial stop is fine, and I believe the Tindall  
4 case, they found the facts that were stated in that case  
5 didn't rise to that level. However, I believe the facts in  
6 this case will rise to that level.

7 THE COURT: All right. Why don't we go ahead and we'll  
8 break for lunch at this time. We'll reconvene at let's  
9 say -- you think he'll be here by one o'clock?

10 SOLICITOR HUNTER: Mr. Hancock's gonna go out and call  
11 him right now, Your Honor, if you don't mind sitting on the  
12 bench for 30 seconds.

13 THE COURT: I'll sit on 30 seconds and we'll find out  
14 where he is. That sounds good.

15 SOLICITOR HUNTER: This is also the case Mr. Hall and I  
16 approached last week. The chemist is in training in  
17 Columbia. If the suppression hearing goes in our favor, we  
18 figure we'll probably go through the day, and hope to call  
19 her as early in the morning as possible as the judge will  
20 allow, Your Honor.

21 THE COURT: Okay.

22 (Pause.)

23 SOLICITOR HUNTER: He'll be here at one o'clock.

24 THE COURT: All right. The Court will be in recess  
25 till one o'clock. We'll convene for the hearing. Thank you

1 very much.

2 (WHEREUPON, Court was in recess for the lunch break.)

3 THE COURT: All right. Are you ready to begin?

4 SOLICITOR HUNTER: I believe so.

5 THE COURT: All right. You may call your first  
6 witness.

7 SOLICITOR HUNTER: The State would call officer Dale  
8 Owens.

9 THE COURT: Sir, come forward to my left and be sworn.

10 DALE OWENS, having been first duly  
11 sworn, testified as follows:

12 THE COURT: Have a seat please and state your name for  
13 the record.

14 WITNESS: Dale Owens.

15 THE COURT: Your witness, Mr. Hunter.

16 DIRECT EXAMINATION

17 BY SOLICITOR HUNTER:

18 Q Officer Owens, would you please go through your history  
19 as a Sheriff's Office employee?

20 A With a Sheriff's Office employee would be very brief,  
21 but for about the last year and a half. Prior to that, 17  
22 years -- for 17 years I was with the South Carolina  
23 Department of Public Safety assigned to the Highway Patrol.  
24 Twelve years of that I was assigned to the Aggressive Crime  
25 Enforcement Unit. Of those 12 years, nine of those years I

Dale Owens - Direct examination  
by Solicitor Hunter

1 was the first line supervisor for the Aggressive Criminal  
2 Enforcement Unit in the Upstate. Prior to my being a state  
3 trooper, I had two years of law enforcement experience with  
4 the City of Columbia with the Airport Police Department.

5 Q So, how, how many years total have you been a police  
6 officer?

7 A Going on 20 years.

8 Q And how many years of that have involved interdiction?

9 A Fourteen.

10 Q Can you please explain to the Court what interdiction  
11 is?

12 A Interdiction is -- it's actually the apprehension and,  
13 and location of criminal, criminals being whether it be drug  
14 inter, interdiction, any type of criminal interdiction,  
15 large sums of money, illegal money, kidnapping, weapons  
16 charges, anything that goes on in the interstate. We're  
17 assigned to the interstate --

18 Q So---

19 A -- enforcement.

20 Q -- any major crimes on the interstate?

21 A Yes, sir.

22 Q Okay.

23 A Murders. I mean we've caught all kinds. It's --.

24 Q Little bit of everything?

25 A It's everything. It's everything and it even involves

Dale Owens - Direct examination  
by Solicitor Hunter

1 simple traffic violations.

2 Q And what type of experience do you have in specifically  
3 drug interdiction?

4 A In drug interdiction, for the last 14 years I've  
5 received over, well over a thousand hours in advanced  
6 criminal interdiction. I'm an instructor for NHTSA and for  
7 the South Carolina Criminal Justice Academy in criminal  
8 interdiction, in criminal patrol techniques. Been certified  
9 as a master interdictor through the National Criminal  
10 Enforcement Association. Like I said, over, over a thousand  
11 hours just in advanced training in criminal interdiction,  
12 criminal detection, and drug interdiction detection.

13 Q Okay. Now, do you remember June 30<sup>th</sup>, 2010?

14 A Yes, sir, I do.

15 Q And what were you doing on that date?

16 A I was working for the Spartanburg County Sheriff's  
17 Office. We were working on the evening patrol that evening.  
18 My supervisor was working with me, was actually riding with  
19 me that evening, Deputy Hancock, Corporal Hancock. It was  
20 one week that we were working night shift --

21 Q Who else was on---

22 A -- on the interstate?

23 Q Who else was on your team, you said the Interstate  
24 Criminal Enforcement Team?

25 A Currently assigned to my team, it's myself, which is

Dale Owens - Direct examination  
by Solicitor Hunter

1 led by Corporal Ken Hancock, our K-9 handler, Deputy Jason  
2 Carraway, and then we have another interdiction officer,  
3 Donnie Gilbert, who's a deputy as well.

4 Q And who were with you on that night?

5 A Actually that evening -- all four of us were working  
6 that evening in close proximity on the interstate. But  
7 actually that night, Corporal Hancock was riding with me on  
8 that evening.

9 Q Okay. And where were you stationed or located that  
10 evening?

11 A On that evening we were working the 85 corridor from  
12 Spartanburg County to Cherokee County. At that time -- at  
13 the time that we observed Mr. Moore, we were around the  
14 lower end of the county on 85 around the 60-mile marker  
15 sitting stationary observing traffic at that time.

16 Q Going which way?

17 A Northbound.

18 Q Going -- so, you were on the northbound side?

19 A That's correct.

20 Q Okay. And that's within Spartanburg County?

21 A Yes, sir, it is.

22 Q Okay. Approximately 1:10 in the morning, what did you  
23 observe?

24 A Initially we observed Mr. Moore operating at above the  
25 posted speed limit. At that area of the interstate is, it's

Dale Owens - Direct examination  
by Solicitor Hunter

1 well posted, 60 miles per hour. When we observed him, my  
2 visual estimation was, was, was above 70. We pulled out on  
3 him, and by the time we got to the rear of his vehicle or  
4 pulled up behind his vehicle, he had maintained a steady  
5 speed of 70 miles per hour, which was still well above the  
6 posted speed limit, but he was maintaining 70 miles per  
7 hour. We paced him at that speed.

8 During that time that we were pacing him, he actually  
9 drove over the white dotted line. He failed to maintain his  
10 lane as well.

11 Q Can you explain to the Court what pacing means?

12 A Pacing, it's when -- it's, it's a way to measure speed.  
13 It's what we're trained, we're trained in the Highway  
14 Patrol. It's when you're -- you've maintained the same  
15 distance behind another vehicle for a period of time judging  
16 your speed -- if you're, if you're operating a vehicle with  
17 a certified speedometer, which we are, which we do, all our  
18 vehicles are certified speedometers, have certified  
19 speedometers, and are calibrated, we use that for our  
20 measuring device. In maintaining the same speed and  
21 distance, than you determine what speed it is.

22 Q And you determined his speed at that point to be?

23 A Seventy miles per hour.

24 Q Okay. So, well above the 60 mile per hour that's  
25 posted?

Dale Owens - Direct examination  
by Solicitor Hunter

1 A That's correct.

2 Q Okay. And any time between -- and to your knowledge,  
3 if you have knowledge of this, between the state line and  
4 Georgia, to the 63-mile marker, is it ever 70 miles an hour?

5 A No, sir, it's not. It's 70 in Georgia. As soon as you  
6 cross into the State of South Carolina at the Oconee line,  
7 the State, South Carolina state line, it turns to 60.

8 Q Okay.

9 A Sixty-five. At 65 down there actually.

10 Q Okay. And, in fact, it doesn't turn 70 until, back to  
11 70 miles an hour until what mile marker?

12 A The 68-mile marker in Spartanburg County.

13 Q Okay. When you noticed the, these traffic violations,  
14 what did you do?

15 A I then initiated -- I, of course, conversed with Deputy  
16 Hancock or Corporal Hancock at that time. Stated we were  
17 gonna stop the vehicle, and then I initiated the blue  
18 lights. At that time, the camera came on and we proceeded  
19 to stop Mr. Moore for the moving infractions.

20 Q Okay. When you said the camera came on, can you speak  
21 a little bit about your camera system?

22 A It's probably one of the oldest systems, systems we  
23 have. It's, it's VHS recorded. It's a mobile vision. It's  
24 one of the newer, one of the earliest models of the  
25 Mobilevision that we have, and it's act, it's activated one

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by Solicitor Hunter

1 of two ways. Either by when you turn on the blue lights it  
2 comes on or when you activate your wireless mic it will come  
3 on.

4 Q Okay. Have you had issues with your video?

5 A Yes, sir, I have.

6 Q What type of issues have you had?

7 A I -- the microphone has issues with cutting in and out.  
8 Sometimes it doesn't come on. The only time you can really  
9 know that it does that is when you go to review the  
10 videotape. You don't know at the time. The indicator light  
11 still comes on and everything, but it's had issues several  
12 times. It's been taken to Shepherd's to be fixed and --.

13 Q Have you attempted to fix these issues?

14 A On several occasions.

15 Q And how did you---

16 A Two that, two that I've done since I've had the car.  
17 But I don't know prior.

18 Q And how, how are you suppose to go about that?

19 What's the policy of the Sheriff's Office?

20 A Well, I don't, I don't know what the policy is. I  
21 know -- I can tell you what I'm suppose to do is notify my  
22 supervisor. My supervisor, supervisor then notifies or  
23 tells me where to go with it. At that time, I tell --  
24 actually it comes from Sergeant Bradley, First Sergeant  
25 Bradley who advises us to, where to take it. And, on both -

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by Solicitor Hunter

1 occasions, he's told me to take it to Shepherd's.

2 Q Okay. And after you took them there, it worked for a  
3 period of time and then broke again?

4 A As far as I know, yes, sir.

5 Q When I say broke, what, what do I mean?

6 A Oh, well, you just don't hear audio. It doesn't, it  
7 doesn't -- something's happening with the receiver in the  
8 box, in the vault with the camera system is that---

9 Q Obviously you're not an audio video expert.  
10 That's why you take it somewhere?

11 A Exactly.

12 Q Okay.

13 A It's in a secured box. I can't -- I don't get into  
14 that.

15 Q You said it was a VHS system?

16 A Yes, it is.

17 Q How do you copy that to be able to play it in court?

18 A We actually have a VHS to DVD recorder in our office  
19 and we record it on that.

20 Q So, explain how it goes from your car to---

21 A I take the VHS, I take the VHS out of my patrol car. I  
22 take it inside to our office. We have a VHS to DVD  
23 recorder. I place the VHS in the DVD recorder and I  
24 place -- it's a blank CD or DVD in the recorder in the  
25 recording side, and I put it in and I mash copy.

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by Solicitor Hunter

1 Q Have you -- did you make a recording that night or did  
2 your vehicle make a recording that night?

3 A Yes, it did.

4 Q And were you able to retrieve that, that recording?

5 A Yes, I did.

6 Q Was there anything wrong with it?

7 A The audio portion of it.

8 Q But, but you still see video in it?

9 A That is correct.

10 Q Okay. And what did you do with that vide?

11 Did you do any of that procedure you just---

12 A I did. I did.

13 Q Okay. Let me show you---

14 A And then when I, when I observed that the audio was  
15 out, my first thing was to advise the supervision.

16 SOLICITOR HUTNER: Robert, do you have any objection,  
17 for purposes of this hearing, to admit this into evidence?

18 MR. HALL: No objection for this hearing.

19 THE COURT: Without objection, it will be marked for  
20 purposes of this hearing.

21 (WHEREUPON, the DVD was marked as State's Exhibit No. 1  
22 and received into evidence for purposes of this hearing  
23 only.)

24 Q I'm gonna go ahead and start showing a little bit of  
25 it.

Dale Owens - Direct examination  
by Solicitor Hunter

1 A Yes, sir.

2 (WHEREUPON, a portion of the video was played at this  
3 time.)

4 Q What did you first view after you noticed him going  
5 70 miles an hour, and, and failure to maintain lane?

6 What, what did he do next once you turned your blue  
7 lights on?

8 A Well, initially when I observed him, when he passed us  
9 at the 60, he was in the far right-hand lane.

10 Q When you say the far -- so, he's in the slow lane---

11 A Right, we call that the number---

12 Q ---the lane of travel?

13 A We call that the number three lane. From the center  
14 wall is number one, two, three. Initially when he passed he  
15 was in the number three lane.

16 Q Okay.

17 A All right.

18 Q Where did he go from there?

19 A Then he went to the number two lane.

20 Q Okay.

21 A All right. Which that's the lane he's in now.

22 Q Okay.

23 A That's when we blue lighted him. When we blue lighted  
24 him, you see he first initially turns on his left turn  
25 signal, and then turns on his right turn signal like he's

Dale Owens - Direct examination  
by Solicitor Hunter

1 gonna go left and then he's gonna go right.

2 Q Okay. And then, at this point in the video, I think we  
3 started here for about one second. I couldn't get it all  
4 the way back. It keeps wanting to play.

5 Is this -- your blue lights are on on this point?

6 A Yes, they are, and that's what activated the camera.

7 Q Okay. If you could go ahead and let it play for about  
8 two minutes.

9 (WHEREUPON, another portion of the video was played at  
10 this time.)

11 Q Actually go ahead and pause it right here.

12 Okay. Now, we're 52 seconds into the video being  
13 turned on.

14 As you said, it turns on by the blue lights?

15 A Right.

16 Q What did you notice when pulling him over?

17 A Initially, like I said, initially his intent was to go  
18 left or that's the way it appeared his intent was because  
19 you see the vehicle move left. You see him turn his left  
20 turn signal on. He appears to move left and then he moves  
21 right. He turns his right turn signal on and then takes him  
22 more than a, a longer than average time to pull over and  
23 come to a stop. Actually, with my training and experience  
24 and times like this, this, this appeared to me like he was  
25 preparing to flee.

Dale Owens - Direct examination  
by Solicitor Hunter

1 Q And what did the turning, the turn left signal indicate  
2 to you when he's obviously moving to the right, right-hand  
3 side?

4 A Well, I mean he, he may be preparing to flee. I don't  
5 know what he, I don't know what -- we'd have to ask him what  
6 his intent was. I don't know what it was. But that --  
7 those -- this type of behavior is consistent with the people  
8 that we've had in the past run from us.

9 Q Okay. Now, did you use your spotlight?

10 A I did.

11 Q And how many times in your career have you had to use a  
12 spotlight?

13 A I, I don't make it -- I don't generally use the habit  
14 of having -- when I was on the patrol I didn't have a  
15 spotlight---

16 Q Okay.

17 A ---in the car. When I was assigned to the aggressive  
18 criminal enforcement, I didn't have a spotlight on the  
19 vehicle that I had, and probably -- and while I've been with  
20 the Sheriff's Office, I may of used it twice. I don't  
21 generally use that because it really illuminates me when I  
22 get out of the car and go up to the vehicle. But, you know,  
23 in this case, I went ahead and illuminated him because I  
24 wanted him to know I was there, like I said, because it took  
25 him so long to pull over. It wasn't what's consistent with

Dale Owens - Direct examination  
by Solicitor Hunter

1 the normal mode of public when we blue light somebody.

2 Q Did you notice anything about the back of the vehicle  
3 that indicated anything to you?

4 A The back of the -- I -- when he stops, he leaves the  
5 turn signal on, and that's -- I mean that's an indicator of  
6 us that really -- what's happening, just like we're trained  
7 in law enforcement, and the best analogy I can use when I  
8 say this, he's, he leaves the signal on and that's one of  
9 our criminal indicators. When you leave the signal on,  
10 basically your heart rate's gotten so, so accelerated that  
11 you've lost audio, and just like when we're getting to --  
12 when officers are in shootings, a lot times they can't tell  
13 you how many times they shot. They don't remember how many  
14 times they shot for the simple reason their heart rate is so  
15 fast that they lose audible hearing and that's a fact.

16 Q All right. Could you, at this point, tell whether the  
17 car was in park or drive?

18 A No, I can't tell at this time. It appears that his  
19 foot is still on the brake. So, it could be in drive.

20 Q Okay. So, at this point you're still worried about him  
21 fleeing?

22 A Yeah, it takes me a little longer to get out of my  
23 vehicle and, and walk up there, but I'm more hesitant to  
24 walk up there than normal if you -- it took me a little  
25 longer to get out of my vehicle and walk up there because I

Dale Owens - Direct examination  
by Solicitor Hunter

1 am concerned that he may put it in drive or keep it in drive  
2 and decide to take off cause that's a practice of, of  
3 fleeing felons.

4 Q Can you go ahead and play one more minute?

5 MR. HALL: Does that show the time up there?

6 SOLICITOR HUNTER: It's -- yeah, I just have to move  
7 this.

8 All right. You can go ahead and play it. It should be  
9 about 1:42, 1:43.

10 (WHEREUPON, another portion of the video was played at  
11 this time.)

12 Q All right. When you first approached the car, why do  
13 you approach the passenger side?

14 A That's the way I train officers, and that's, that's the  
15 best and the safest practice especially when you're working  
16 on an interstate like, like 85, as busy as it is, that's our  
17 safest practice and that's the way I train officers in doing  
18 criminal patrol, to walk up on the passenger side. You see,  
19 you see a lot more and there's many different safety aspects  
20 of why you should walk up on the passenger side.

21 Q Okay.

22 A It's, it's what we do 95 percent of the time. The only  
23 time I don't walk up on a passenger side is if I'm in a  
24 parking lot or if they pull up against that concrete wall  
25 over there, which sometimes happens as well.

Dale Owens - Direct examination  
by Solicitor Hunter

1 Q Okay. What was Mr. Moore doing when you approached?

2 A He was actually talking on the phone.

3 Q Okay. Did he hang up when you first approached?

4 A No, he did not. I had to ask him to hang up.

5 Q Okay. Did that indicate anything to you?

6 A Yes, that's, that's consistent as well. On many times  
7 that I've been involved in criminal cases, that, that's been  
8 consistent. Most people, when, when you stop them, most  
9 innocent public people hang up the phone when you walk up,  
10 but prior to even getting up there. Now, you stop people,  
11 and they'll be on the phone, but they generally hang it up  
12 before I ever get up there. He, he stayed on it, was on it  
13 even while I was at his passenger window.

14 Q Specifically, with drug trafficking cases, what does  
15 that indicate?

16 A Well, a lot of times they're, they're having to answer  
17 to a higher person, and they're having that higher person on  
18 the phone hearing what's happening. Sometimes they have an  
19 auto answer. Sometimes they leave -- they don't even hang  
20 the phone up, but they let them know that, you know, what's  
21 happening or if -- and in, in some cases, if they're gonna,  
22 if they're deciding they're gonna, it's gonna be a foot  
23 pursuit, they let them know the area that they're in just in  
24 case they get separated from communication so somebody can  
25 come and get them as well.

Dale Owens - Direct examination  
by Solicitor Hunter

1 Q What is an escort vehicle?

2 A An escort vehicle is a vehicle that's in the drug  
3 organization, what we consider in the drug organization that  
4 is sometimes a decoy or it's just along for the purposes of,  
5 of security of the load, whether it be for the load or for  
6 the person that it's going to. So, it generally tips people  
7 off to or the organization to understand that hey, you know,  
8 law enforcement's alerted, they've stopped the vehicle, hey,  
9 if it proceeds on, you know, it might not be something you  
10 want to, to be involved in because it might be a set-up,  
11 and, you know, that's why they do escort vehicles. And then  
12 you have decoy vehicles, and then you have protection  
13 vehicles and all, which all those work basically along the  
14 same lines except they all have a specific function within  
15 that organization. Either protect the load in one way or by  
16 decoying or, you know, getting in, getting involved in an  
17 altercation with law enforcement.

18 Q Did you have any indication that this could be an  
19 escort vehicle or involved with an escort vehicle?

20 A I had no indication at the time, no.

21 Q Okay. Did talking on the phone---

22 A Well, it raises your senses. I mean, I mean that's  
23 consistent with criminal behavior. I mean that's an  
24 indicator. It's not, it's not a tall tail sign (sic) that  
25 that's what's happening.

Dale Owens - Direct examination  
by Solicitor Hunter

1 Q I understand.

2 A But that's an indicator of what could be happening,  
3 yes.

4 Q When you approached the vehicle, how was the defendant  
5 seated?

6 A He was actually slightly slumped in the driver's seat  
7 behind the steering wheel.

8 Q Now, when you approached the vehicle, did you smell  
9 anything coming out of the vehicle?

10 A Yes, I did. I actually smelled the odor of alcohol  
11 coming from inside the vehicle, and then I even, just prior  
12 to this being stopped, you could see me, I actually gave a  
13 signal to Corporal Hancock that I smelled alcohol. I was  
14 actually showed the drinking glass.

15 Q Can you make that -- show the judge exactly what you---

16 A I just tilted my hand up like I was drinking a drink.

17 Q Okay.

18 A I mean that's -- those are signals that we normally use  
19 in law enforcement especially with our team so to let the  
20 other person know, without hollering back there to Deputy  
21 Hancock or Corporal Hancock, hey, he's drinking, you know.  
22 We don't always -- we just give signals so that, so that the  
23 person that we're dealing with doesn't always know what,  
24 what, what we see or hear or smell.

25 Q Now, does the odor of alcohol reflected anyway on drug

Dale Owens - Direct examination  
by Solicitor Hunter

1 trafficking?

2 A It's several, several cases that I've been involved in,  
3 a lot of the people have been drinking alcohol and I mean  
4 I've even had them tell me it's, it calms their nerves, what  
5 they think calms their nerves. But I mean and that's  
6 only -- I mean and that's a fact. I mean it's a depressant.  
7 I mean that's what it does, that's what it's designed to do.  
8 It calms some people. Now, some people, it doesn't have the  
9 opposite effect, but many people it, it calms them.

10 Q Now, your first communication with Mr. Moore, what did  
11 you state?

12 A I'm sorry?

13 Q Your first communication with Mr. Moore, what did you  
14 do?

15 A I actually told him -- I actually identified myself,  
16 Deputy Owens with the Spartanburg County Sheriff's Office,  
17 and then I tell them the reason that I stopped him. And it  
18 was at that time -- I told him that the reason that I  
19 stopped him, I told him that, you know, I observed him  
20 speeding. He stated that he thought the speed limit was  
21 70 miles per hour. I then corrected him and told him that  
22 it was -- it was in a well posted 60 mile per hour zone. He  
23 didn't -- he told me he wasn't aware of that.

24 Q Okay. Did he tell you anything else about the failure  
25 to maintain lane?

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by Solicitor Hunter

1 A He, he started into a conversation about a car was  
2 following him real close. There was no other vehicles  
3 around him at the time. When I, when I went to pull him,  
4 there was nothing around him, and you'll actually, if you  
5 watch, if you go back and watch the video, a car doesn't --  
6 it's actually -- the first vehicle to pass him is a truck,  
7 to pass us is a truck.

8 Q Uh-huh. (Affirmative).

9 A There, there wasn't another car around him when I was  
10 observing him. Now, what happened five miles or six miles  
11 down the road I don't know.

12 Q Well, five or six miles is not even Spartanburg County,  
13 correct?

14 A Exactly.

15 Q Okay. You can go ahead and play it till he exits the  
16 car. That will be the 2:45 mark.

17 (WHEREUPON, another portion of the video was played at  
18 this time.)

19 Q All right. From -- I believe at the 1:41 mark, you  
20 made the drinking signal that you testified to?

21 A Yes, sir.

22 Q What was the defendant's behavior in-between that time  
23 or actually the whole time that you, you had stopped him?

24 A Well, during that time, you know, like I said, he was  
25 slightly slumped at the time, and then while I was talking

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by Solicitor Hunter

1 to him, I, you know -- and I told him the reason for the  
2 stop, and then he tried to explain, you know, his action and  
3 trying to justify what, what he was doing. During that  
4 time, you know, I also asked him for his driver's license,  
5 registration information. He advised me it was a rental  
6 car. He provides me with a rental agreement, and then his  
7 driver's license. And when he did that, I noted that his  
8 hand was heavily shaking. It's just something we look for  
9 when they hand me the driver's license and their  
10 registrations. It's, it's just an indicator that we look  
11 for, and basically we're measuring his nervousness.

12 During that time, I also looked at, you know, the  
13 carotid artery in the neck and his breathing, you know,  
14 whether it's -- the rise and fall of his chest is fast and  
15 stuff like that. And, at that time, I noted, and in the  
16 report I even showed that I noted that he was overly  
17 nervous. And when I say that, his hand was heavily shaking,  
18 and his breathing was accelerated, and the pulse in his neck  
19 also appeared to be elevated and pounding, and that, and  
20 that would also be supported by leaving the turn signal on.  
21 I mean, he's racing right now from whatever reason. And  
22 then -- so, then I---

23 MR. HALL: Your Honor, I'm gonna object. He's  
24 charging -- he keeps -- he racing, he's this. If he will  
25 describe instead of draw conclusions. He's -- I don't know

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by Solicitor Hunter

1 what he means by racing at this point in whatever he's  
2 saying. But I don't know what -- but if he wants to say  
3 what he observed I think it will be all right, but---

4 THE COURT: Well, I'm gonna let him testify as to what  
5 he observed and he described it as racing. You can ask him,  
6 on cross-examination, exactly what that means.

7 Overruled.

8 MR. HALL: Thank you.

9 A And then, and then, at that point, I asked him to exit  
10 the vehicle. He's already admitted that he's been drinking  
11 some.

12 Q So, you, you had asked him if he had been drinking?

13 A Yes, I did.

14 Q Because of the odor of alcohol in the vehicle?

15 A That's correct.

16 Q What did he admit to you?

17 A That he had had a couple of drinks.

18 Q Okay.

19 A And that was his exact word, that he had had a couple.

20 Q Okay. And then, at that point, I asked him to step out  
21 of the vehicle and I motioned to Corporal Hancock to watch  
22 him as he exits the vehicle. As you observed when he gets  
23 out the vehicle, which we just observed, he gets out of the  
24 vehicle, and for whatever reason, whatever his attention or  
25 his nervousness or whatever, he actually gets out of the

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by Solicitor Hunter

1 vehicle and starts to walk to the back and leaves the door  
2 open.

3 Q Okay. Did he try to pick up anything as he was exiting  
4 the vehicle?

5 A His cell phone.

6 Q And why would that raise suspicion in your---

7 A Well, there's -- that's -- that, again, is consistent,  
8 in many cases, with criminal behavior when people decide to  
9 flee. It's their, it's their device for communication.

10 Q Would he have any reason to use---

11 A We don't, we do allow them to use the phone on a  
12 traffic stop. That's just our -- that's just safety. It's  
13 officer safety issues. But we do note when somebody picks  
14 up their phone, and we, we immediately tell them and  
15 instruct them, leave your phone in the car.

16 Q So, you didn't advise him to pick up his phone?

17 A No, I did not.

18 Q Okay. And he'd have no reason to use it when he was  
19 outside the vehicle speaking with you?

20 A Well, I wouldn't think so.

21 Q Okay.

22 A We wouldn't let him use it if he, if he had of, a  
23 reason for it.

24 Q If you would go ahead and leave it playing for a little  
25 bit.

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1 (WHEREUPON, another portion of the video was played at  
2 this time.)

3 Q You can go ahead and stop it. That's at the 4:14 mark.  
4 Now, once he exits the door, you said he leaves the  
5 door open, what is the next action?

6 A He starts -- he leaves the door open and he begins to  
7 walk back towards us, and then he goes back and he shuts his  
8 door.

9 Q Okay. Did he light a cigarette?

10 A As he walks back, yes, he begins to put a cigarette in  
11 his mouth.

12 Q Did that indicate anything to you?

13 A Well, I, I know that -- well---

14 Q Just based upon your training, what, what does that---

15 A Based on training, you know, people light cigarettes a  
16 lot of times on traffic stops to calm their nerves. It's,  
17 it's a, it's a, it's a drug that calms their nerves and  
18 that's the purpose for lighting the cigarette.

19 Q Okay. And then you begin speaking with them?

20 A I did.

21 Q Okay. What do you and Mr. Hancock do once he gets back  
22 right there in front of your vehicle?

23 A We ask him -- I generally ask him can I pat him down  
24 for weapons or can I search his person to make sure he  
25 doesn't have any weapons. That -- Corporal Hancock, many,

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by Solicitor Hunter

1 on many times says can I search you for weapons, and he, he  
2 more than happily he, he gave us no problems at that time  
3 and said yes, you can. He even raised his hands  
4 voluntarily. We don't tell him to raise his hands. He  
5 actually raises his hands and then he actually puts them on  
6 the top of his head and he starts scratching his head for  
7 whatever reason.

8 And then, you know, during that time, Deputy Hancock --  
9 I actually patted his pocket down. I felt what I perceived  
10 as a large sum of wadded money in his pocket, and I left it  
11 there, and then Deputy or Corporal Hancock proceeded in  
12 checking his pockets, then he pulled out the wad of money,  
13 and then puts it back in his pocket. During that time,  
14 Mr. Moore also, after he scratches his head, he continues to  
15 keep his hands -- this is what we call the felony position.  
16 He's not asked to put his hands on his head or anything. At  
17 no point in time did we ever ask him to raise his hands or  
18 put his hands on his head or anything like that.

19 Q Okay. Now, you indicated that you felt a large wad of  
20 money. I believe we just saw it on the video. Mr. Hancock  
21 took it out of his pocket.

22 A Yeah.

23 Q How big would you say it was?

24 A Well, it's more, more than folded money than I carry.  
25 I would, I would said it was at least, you know, bordering a

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by Solicitor Hunter

1 thousand dollars.

2 Q Okay. And in speaking with Mr. Moore during this  
3 traffic stop, did you ask him about his employment?

4 A I did.

5 Q And what did he indicate to you?

6 A That he was unemployed.

7 Q Okay. And, so, he had a large amount of cash in his  
8 pocket and he was unemployed?

9 A Yes, sir.

10 Q okay.

11 A That would be reason for alarm as well.

12 Q Now that he's out of the vehicle and you're not on the  
13 passenger side, did you smell anything coming from Mr.  
14 Moore?

15 A Yes, I did. I continued to smell the odor of alcohol.

16 A lot of times, when you're on the passenger side, you're  
17 not quite sure if it's coming from the actual occupant or if  
18 it's coming from a spilled beverage in the vehicle, which  
19 happens a lot of times, and that's, you know, that's another  
20 reason you get them out. And then when you're in close  
21 proximity to them, as we are here, you know, I continue to  
22 smell the odor of alcohol.

23 Q Okay. Did you ask him, again, how much he had to  
24 drink?

25 A I did.

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by Solicitor Hunter

1 Q And what did he---

2 A Two beverages.

3 Q ---reply back to you?

4 A Two beverages.

5 Q Okay. If you will go ahead and let it play for a  
6 while. We can go ahead and let it play until he starts  
7 field sobriety tests.

8 (WHEREUPON, another portion of the video was played at  
9 this time.)

10 SOLICITOR HUNTER: If you pause it for a second.  
11 what did you notice right there?

12 A Well, I mean he just, he just stuck his hand in his  
13 pocket, he's looking down. It's -- this is what we call the  
14 defeated look. I mean it's -- I mean that's just a nervous  
15 energy that he's doing. He's trying to dissipate his  
16 nervous energy and by sticking his hands in his pocket, and  
17 you'll see him during, at several times right here, he's  
18 gonna raise his hands and he's gonna assume the felony  
19 position again, you know. He's gonna do all kind of things  
20 to try to dissipate that nervous energy.

21 Q At any time did you or Corporal Hancock ever tell him  
22 anything to where to put his hands?

23 A Well, we tell them not to put their hands in their  
24 pockets.

25 Q But you don't tell them where to place their hands?

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by Solicitor Hunter

1 A No.

2 Q Just not in their pockets?

3 A Just not in your pockets. Even after we pat them down  
4 or search their person, we still tell them not to put their  
5 hands in their pocket.

6 Q In fact, what pocket is he going into?

7 A That right front pocket where the money was located.

8 Q Okay. Actually one more, one more thing.

9 Just throughout this entire video, that right turn  
10 signal on the vehicle remains on?

11 A It's still on.

12 Q Okay.

13 A See and now his hands are going back up and above his  
14 shoulders.

15 Q And you didn't tell him to put it there?

16 A No, sir, I did not.

17 Q Okay.

18 A Now he's checking his pocket again. It was very  
19 consistent with nervous behavior.

20 Q And what are you doing at this point?

21 A Looking at the rental agreement, and actually we're  
22 talking about the rental agreement because his name is not  
23 on the rental agreement.

24 Q Okay. And is he explaining his story?

25 A Yes.

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by Solicitor Hunter

1 Q Okay. Did you ask him where he's coming from?

2 A Yes, I did.

3 Q And where was he coming from?

4 A He stated Lawrenceville, Georgia.

5 Q And are you aware of where Lawrenceville, Georgia is?

6 A Very aware of it.

7 Q Where, where is it located?

8 A It's actually a suburb of Atlanta, Georgia.

9 Q Okay.

10 A Which is a known drug source, major drug source city.

11 Q And how do you know that?

12 A In the 14 years that I've been doing drug interdiction  
13 on Interstate 85, I would say 95 percent of the drugs that  
14 we catch are coming from the Atlanta source.

15 Q Okay. You talked about a rental agreement.

16 If you want to go ahead and pause it for a second.

17 MR. HALL: May I have a moment, Your Honor?

18 THE COURT: Yes, sir.

19 MR. HALL: I've just not seen it. I was wondering if  
20 it was still here.

21 (Pause.)

22 MR. HALL: No objection for the purposes of this  
23 hearing.

24 THE COURT: All right. It will be marked as an exhibit  
25 for purposes of the hearing.

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by Solicitor Hunter

1 (WHEREUPON, the rental agreement was marked as State's  
2 Exhibit No. 2 and received into evidence for purposes of  
3 this hearing only.)

4 Q I show you what's been marked State's Exhibit 2.

5 Do you recognize this document?

6 A Yes, sir, it's the actual rental agreement that was  
7 provided to me by Mr. Moore on that date and time.

8 Q Okay. Did Mr. Moore actually rent the vehicle?

9 A No, he did not.

10 Q Okay. And what, what about the, the rental vehicle?

11 A Third party rental vehicles are consistent in many many  
12 many cases with criminal activity. It's, it's probably one  
13 of the largest indicators of criminal activity that we see  
14 on the interstate in criminal patrol, and you can obviously  
15 see on this rental agreement that it's -- they're several  
16 things on this rental agreement that bring attention to me.

17 One, the initialing that he didn't rent the car, and  
18 the person that rented the car isn't in the car. I mean to  
19 say that it's a third party rental -- a lot of times you  
20 have people that rent the car that are actually in the car.  
21 That---

22 Q Like a husband rents a car, but his wife is driving it?

23 A Right, and, and that would be consistent in many cases  
24 with the normal motoring public, but this -- the renter's  
25 not present in the vehicle, all right, and on top of that,

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by Solicitor Hunter

1 you have that the operation of the vehicle is only to be in  
2 South Carolina when he's telling us that he rented the  
3 vehicle -- well, it's rented in Georgia, and he's going to  
4 North Carolina to visit his grandmother, you know.

5 So, that's another, that's another thing. It does have  
6 on here that Mr. Moore is an additional driver. But like I  
7 said, a lot of times that's, that's what's consistent with  
8 the criminal behavior, and you also notice that the vehicle  
9 was rented at four o'clock, I'm sorry, that's when it's  
10 gonna be returned. I'm sorry. So, it was still rented at  
11 four o'clock in the morning or in the afternoon. 3:59 on  
12 the 29<sup>th</sup>.

13 Q On the 29<sup>th</sup>?

14 A Uh-huh. (Affirmative).

15 Q Where did he say he was going?

16 A Morgan -- Marion. I'm sorry.

17 Q Specifically what was he---

18 A Marion.

19 Q What was he gonna do there?

20 A He stated he was going to see, visit his grandmother.

21 Q What, what time is this traffic stop occurring?

22 A One o'clock in the morning.

23 Q And he admitted to drinking to you?

24 A Yes, sir.

25 Q Okay. Did that indicate anything to you?

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by Solicitor Hunter

1 A Well, I mean -- yes, it's several. I mean I can't  
2 say -- I don't know.

3 Q Well, not specifically.

4 A Yeah, I mean---

5 Q But generally?

6 A Generally, I mean, you're going -- you're not gonna go  
7 visit your grandma at one o'clock in the morning or most of  
8 the, most---

9 Q The general public.

10 A General people are, are not gonna go visit grandma at  
11 one o'clock in the morning. Generally, I'm not -- I don't  
12 encounter people who are going to visit grandma at one  
13 o'clock in the morning that have been drinking on top of  
14 that, and then, you know, if he rented this car -- if this  
15 car was rented at 3:59 in the, in the afternoon, at four  
16 o'clock, why didn't he go earlier. He doesn't have a job.  
17 So, why didn't he go -- why didn't he proceed there earlier  
18 prior to drinking on top of that, you know.

19 I mean it, it raises several questions I mean -- but  
20 only Mr. Moore can answer as to the reason why.

21 Q Now, this position -- watch out there.

22 This position -- this is that same position you were  
23 speaking of earlier?

24 A Yes. Now, he's -- instead of raising his hands, he's  
25 placed his hands behind his back. That's what we call

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by Solicitor Hunter

1 assuming the position of arrest.

2 Q Okay. Well, arrest position.

3 You can go ahead and keep playing.

4 Now, what are you writing right there?

5 A At this point I made be writing notes, notes on, on my  
6 pad. Writing -- I may even be writing his name on a warning  
7 pad. I don't -- I really can't tell. I take notes  
8 especially when I'm doing, when I'm gonna do field sobriety  
9 tests. I just take notes on what the test that I perform  
10 and their results and conclusion.

11 Q So, you decided, at this point, you're gonna give him a  
12 field sobriety test?

13 A Oh, yes, sir.

14 Q And why did -- why is that?

15 A Well, I mean because it's our obligation, it's our duty  
16 to make sure that he's not impaired I mean, and if -- that  
17 he can proceed on.

18 Q And what specific factors led you to believe that you  
19 needed to---

20 A Well, I mean his driving, number one. Then, number  
21 two, the odor of the alcohol, and it still being consistent  
22 on his, on his person when I've gotten him out of the  
23 vehicle.

24 Q And it's, it's around this point that you're asking  
25 about his employment?

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by Solicitor Hunter

1 A Yes, some time during this time, yes. Now he's  
2 explaining to me the driving, and the reason for the  
3 violation or what he did.

4 Q You're about to fall off again.

5 A Can I move down there so I can see the---

6 Q If the judge doesn't mind.

7 THE COURT: That's fine. You can step up -- you can  
8 stand up, if you'd like.

9 WITNESS: I just can't see around the corner of the  
10 bench.

11 THE COURT: That's okay.

12 A And you, and you still see he's hanging his hands from  
13 his shoulders and stuff like that. That's just consistent  
14 with nervousness.

15 Q At that point you look back and---

16 A Viewed the tag information to make sure it's consistent  
17 with what's on the rental agreement.

18 Q You said earlier about a warning ticket.

19 A Yep.

20 Q What would that warning ticket be for?

21 A Well, we write warning tickets for, for violations, you  
22 know, for infractions on the interstate. Now, of course, we  
23 don't want anyone driving under the influence or, you know,  
24 any drug violations or anything like that. But a lot of  
25 times what we do is when we're writing that warning is we,

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by Solicitor Hunter

1 we'll tell them it's basically to put them at ease, to help  
2 calm their nerves a little bit, and I look for a reaction  
3 from that because a lot times when you tell somebody well,  
4 I'm gonna write you a warning for that infraction, and I  
5 mean for that moving infraction, and the moving infraction  
6 only, you know, you'll see, you'll see that easiness come  
7 from and they're not worried anymore. That never  
8 disappeared with Mr. Moore.

9 Q So, his nervous behavior continued?

10 A It continued all the way through the stop.

11 Q And you see Deputy or Corporal Hancock there, he's  
12 starting to call in the information as far as the license  
13 information, driver's license information, and the tag  
14 information, and that's what he's doing now.

15 Q And now, now he hands it back to me, and now, you know,  
16 of course, we're waiting for a response from dispatch.

17 Q Do you remember ever getting a response?

18 A I'm, I'm sure we got a response. I don't remember what  
19 it was.

20 Q But nothing indicated that the vehicle was stolen or---

21 A No, sir.

22 Q ---or that Mr. Moore had warrants at that time or  
23 anything?

24 A No, sir. At this point I advised Corporal Hancock if  
25 he would turn off the blue lights so that I can administer

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by Solicitor Hunter

1 the field sobriety tests.

2 Q Is that the procedure, the policy of the Spartanburg  
3 county Sheriff's Office?

4 A Yes, it is.

5 Q And why is that?

6 A It's just because when you're doing the horizontal gaze  
7 nystagmus test you're not blinding them, and it's, and it's  
8 not giving you any false readings or anything like that.

9 Q Now, what is this test that you're performing right  
10 here?

11 A This is the horizontal gaze nystagmus.

12 Q Can you please explain it?

13 A Yes, it's the test, it's to test the involuntary  
14 jerking of the eyes to tell if there's alcohol present in  
15 his, in his system, in his body and if it's affecting his  
16 ability to do motor tasks.

17 Q In your estimation, you believe Mr. Moore passed the  
18 test?

19 A He did pass this test.

20 Q Okay. And what's the next test you're gonna perform?

21 A I always do the order, the horizontal gaze nystagmus  
22 any then I do the one leg stance. Then I do the walk and  
23 turn unless there's something else that prevents me from  
24 doing those tests, one of those tests, and that just  
25 depends, but Mr. Moore, this was -- these are the three

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by Solicitor Hunter

1 tests that I was able to perform. They're standardized  
2 tests, and that's, that's what I did, and he was able to  
3 perform them.

4 Q What is the one leg stand?

5 A I'm sorry, what is it?

6 Q Yes.

7 A It's a, it's a standardized test that's made  
8 standardized from the National Highway Traffic Safety  
9 Administration. It's a stance to test his balance and motor  
10 function and things like that.

11 Q And what do you ask them before you give them the  
12 instructions to do the test?

13 A I actually -- you explain to them what you're gonna do.  
14 You explain the test to them. You explain how to do the  
15 test. I show them how to do the test for a brief period,  
16 and then I ask him to perform the test.

17 Q And that's---

18 A And I asked them do they understand the instruction, of  
19 course.

20 Q And do you ask them if they have any problems with  
21 their legs?

22 A With their legs, anything like that, yes, I do.

23 Q So, this is you performing the tests?

24 A Yes, it is. And what I do is I like to perform the  
25 test on the same, in the same area that they are to show

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by Solicitor Hunter

1 that it can be done in that area that's not an unreasonable  
2 task.

3 Q What indicator are you looking for, for impairment in  
4 this test?

5 A Well, you have, you have to actually and, look if he  
6 follows instructions. You're actually looking to see if he  
7 places his foot down on the ground, if he raises his arms,  
8 or if he sways back and forth or if he hops. Those are the  
9 things you're looking for, and it only takes two -- it only  
10 takes two indicators here to fail this test.

11 Q And who, who standardizes this test?

12 A NHTSA.

13 Q And what is NHTSA?

14 A National Highway Traffic Safety Administration.

15 Q And that's you with your right leg up?

16 A That's correct, and I let them choose whichever leg  
17 they want to stand. I mean that's, that's up to them.

18 Q Okay. And, again, notice his hands, where is his --

19 A And he places his foot back down, raises his arms.  
20 He's talking and everything else too.

21 Q Did he just switch feet?

22 A He just switched feet, raising his arms, places his  
23 foot down, and you, you perform this test for 30 seconds.  
24 Sometimes this test is for 30 seconds. Basically what I'm  
25 doing is I'm counting in my head 1,001, 1,002. He can

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by Solicitor Hunter

1 count -- he's got to count as well. But I'm really not  
2 paying attention to his counting. I'm paying attention to  
3 my counting.

4 Q Did you give him another opportunity to do it?

5 A I did.

6 Q And?

7 A Failed it.

8 Q Okay. So, each time he had the opportunity to do the  
9 one legged stand he failed that test?

10 A That is correct.

11 Q What is the next test that you administer?

12 A The one -- I'm sorry. The walk and turn.

13 Q Can you briefly explain that one?

14 A Yes, it's a -- it's, again, it's an agility test to  
15 test balance as well, and what you do is basically you, you  
16 have him walk up nine steps, down a line, an imaginary line,  
17 and nine steps back, heel to toe making sure that he counts  
18 his steps, and that he does a proper turn when he turns, and  
19 then he does his nine steps back, heel to toe as well,  
20 keeping your arms to your side, keeping your heel to toe,  
21 actually heel clicking your toe, and that you don't step off  
22 the line. And I -- then when I say step off the line, it's  
23 an imaginary line. If you step to the right, you know,  
24 things like that.

25 You'll see him -- that's an improper turn. You're

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by Solicitor Hunter

1 suppose to take three small steps, make your right turn, and  
2 you can explain that to him as well. But I didn't fail him  
3 for this test. I didn't -- really that's all he did was the  
4 improper turn, and this, again, is to fail this test, you  
5 got to have two, and I didn't fail him on that test.

6 Q Okay. So, in your estimation, did you believe, at that  
7 time, that he was impaired?

8 A Not at that time I did not.

9 Q Okay. So, you would not have brought in him at that  
10 time for impairment?

11 A Not at that time I would not.

12 Q Okay. Did you ask any questions about items in the  
13 vehicle?

14 A I asked him if there was any alcohol in the vehicle.

15 Q And what was his response?

16 A No, but he looked back at the car. He looked -- when I  
17 asked him the question, he looked back at the car as if, as  
18 if I could see it, but he stated no.

19 Q Okay. Did you ask for any other illegal items?

20 A Yeah, I asked him if there were any weapons, alcohol,  
21 drugs, or anything like that in the vehicle and he told me  
22 no.

23 Q Okay. Did you ask him for consent to search the  
24 vehicle?

25 A I did.

Dale Owens - Direct examination  
by Solicitor Hunter

1 Q And what did he say at that time?

2 A No basically.

3 Q You can go ahead and let it play for a little bit.

4 A He did, he did claim that he had some luggage in the  
5 trunk that belonged to him. That's all he had. And his  
6 exact response was I don't want you searching my luggage.

7 Q Now, are you finishing up writing, writing a warning  
8 ticket at this point?

9 A I am.

10 Q And he's asking me questions, and I'm, and I'm replying  
11 to them as well.

12 Q Okay. What is Mr. Hancock doing right here?

13 A I just asked for consent to search the vehicle, and he,  
14 he declined consent, and I -- and Corporal Hancock's  
15 actually calling Deputy Carraway to come to the scene---

16 Q If you would, go ahead and pause it right here.

17 A ---with his drug detection K-9.

18 I'm sorry?

19 Q No, I was asking Mr. Carraway to pause it. Just go  
20 ahead.

21 What are you informing him of at this time?

22 A I'm explaining the warning, what I stopped him for, and  
23 I'm advising him that I'm detaining him based on my  
24 reasonable suspicion to believe that he's involved in  
25 criminal activity, and that I'm going to wait for a drug

Dale Owens - Direct examination  
by Solicitor Hunter

1 detection K-9 to come to the vehicle.

2 Q And that's criminal activity other than the impaired  
3 driving and the---

4 A That is correct.

5 Q ---traffic violations---

6 A That is correct.

7 Q ---you pulled him for? So --.

8 MR. HALL: Your Honor, if he's gonna have Corporal  
9 Hancock testify, I think we can foregoing -- I'll ask him  
10 about that time frame, that 15 minutes or so.

11 SOLICITOR HUNTER: I'm gonna put Jason up after him  
12 unless you're gonna call him.

13 MR. HALL: But I --

14 SOLICITOR HUNTER: If you want to, you can go ahead and  
15 fast forward till the point we were getting here.

16 Well, actually, what's he -- what is, what is he doing  
17 right now?

18 A He's standing there talking.

19 Q What's in his mouth?

20 A He's wanting to smoke a cigarette I think. I can't, I  
21 can't -- I -- my attention was diverted from you for a  
22 minute. I'm sorry. From the video. I think -- yeah, a  
23 cigarette.

24 Q So, he's, according to your training and exercise, he's  
25 calming his nerves again?

Dale Owens - Direct examination  
by Solicitor Hunter

1 A That is correct.

2 Q And for the next, I believe it's about 15 to 16  
3 minutes, y'all are off to the side of the road?

4 A Yeah, just step away between the vehicles just in case  
5 something were to happen. It's a little safer over there.  
6 It's not much safer, but it is a little bit safer.

7 Q And how would you describe traffic that night?

8 A Very very light. At this time, for 85, this is very  
9 light.

10 SOLICITOR HUNTER: Your Honor, I'm gonna fast forward  
11 the next 15 minutes without objection from the defense.

12 THE COURT: All right.

13 Q So, at this point, it's just you and Corporal Hancock  
14 there.

15 A Yes, sir.

16 Q And he's not in cuffs?

17 A No, he's not.

18 Q I mean but he is in investigative detention. However,  
19 he's still---

20 A Yeah, he's being detained. I'm detaining him based on  
21 my experience, my training, and everything's telling me  
22 there's more to this traffic stop than just the driving  
23 infraction.

24 Q And, and the impaired driving?

25 A That's correct. Well -- and I'm not -- he's not, he's

Dale Owens - Direct examination  
by Solicitor Hunter

1 not being detained because he's impaired. I don't, I don't  
2 feel that his impairment is to the point where he would be,  
3 I would be justified to take him to jail.

4 Q What do you see right there in the bottom right-hand---

5 A You see the lights pulling up where Investigator  
6 Carraway's pulling up.

7 Q So, approximately 31 minutes and 13 seconds into the  
8 stop?

9 A That's correct.

10 Q Okay. This is approximately a little bit over 32  
11 minutes into the traffic stop?

12 A That's correct.

13 Q What are Mr. -- what is Mr. Carraway alert to you?

14 A Well, through my training and more so my experience, I  
15 know that when that particular dog sits, I know that he's  
16 alerted to an odor.

17 Q Okay. So, at this point you're gonna search the  
18 vehicle?

19 A That is correct.

20 Q What did you find in the front passenger, I believe  
21 under the front passenger seat of the vehicle?

22 A A bottle of alcoholic, alcoholic beverage.

23 Q Was the seal broken?

24 A Yes, it was, and you can actually see it on the video  
25 here in a minute when you bring it back. It's about half

Dale Owens - Direct examination  
by Solicitor Hunter

1 full, three-quarters to half full.

2 Q And that would be consistent with the smell of alcohol?

3 A Yeah, I mean I don't know what that alcohol smells  
4 like. I didn't open it and smell it. At this point right  
5 here we're placing him under arrest. We've located  
6 contraband that's consistent with crack cocaine in two  
7 containers that were in the bag, that were in a bag, the  
8 only bag in the, in the trunk actually. Along with that,  
9 this, these two containers of contraband that's consistent  
10 and that has been tested to be positive for cocaine base,  
11 there was also a semiautomatic weapon and a bundle of  
12 currency as well.

13 Q How much currency did you locate?

14 A It was 4,000 in total.

15 MR. HALL: We have no objection for purposes of the  
16 hearing.

17 THE COURT: What are you putting in?

18 SOLICITOR HUNTER: Your Honor, for the purposes of the  
19 hearing, we're putting State's Exhibit 3, which is the white  
20 off-white, white off-white rock like substance found in the  
21 vehicle as well as the .45 caliber gun.

22 THE COURT: All right. Be admitted as marked.

23 (WHEREUPON, the drugs were marked as State's Exhibit  
24 No. 3. The gun was marked as State's Exhibit No. 4. Both  
25 of the items were received into evidence for purposes of

Dale Owens - Direct examination  
by Solicitor Hunter

1 this hearing only.)

2 A And as you saw, the handgun was loaded and had one  
3 chambered.

4 Q Okay.

5 A Actually you'll see it right here. When he cocks it  
6 back, you'll see that a round has just ejected.

7 Q Fell out.

8 Your Honor, no further questions for Mr. Owens.

9 THE COURT: All right. Mr. Hall, your witness.

10 MR. HALL: Your Honor, he's -- I'm gonna ask him to run  
11 the DVD back to the start---

12 THE COURT: Okay.

13 MR. HALL: ---with the sound on. I thought I had sound  
14 at the very beginning of it when I listened to mine. I  
15 couldn't tell here.

16 THE COURT: Okay.

17 CROSS-EXAMINATION

18 BY MR. HALL:

19 Q All right. Deputy Owens, do you still have this system  
20 that, with VHS?

21 A Oh, yes, sir, I do.

22 Q And are you still having the problems?

23 A Yes, sir, I do.

24 Q All right. Do you have any records for the Court about  
25 the problems you're having when you're getting it fixed?

Dale Owens - Cross-examination  
by Mr. Hall

1 A I, I don't have any records, no, sir, I don't. If he  
2 bills the county, I have no idea what he does. We go down  
3 there, we talk it down there, I don't fill out any  
4 paperwork, he takes care of it.

5 Q All right. It's been ten months, almost 11 months.  
6 All right. Ten months since this happened.

7 How many times has this gone out?

8 A I've, I've taken it to Shepherd's twice in my year and  
9 a half here. We're suppose -- we got new cars sitting down  
10 at Shepherd's now we're suppose to have the new camera  
11 system in it. So, I'm -- to say they're gonna do any more  
12 fixing to it, I don't know.

13 Q All right. Has the audio gone out since Mr. Moore's  
14 arrest?

15 A Not that I'm aware of.

16 Q Okay. Cause I thought you said you had it repaired at  
17 least twice?

18 A And, and I say twice. I don't remember if it was once  
19 before Mr. Moore's and then once after. I, I really -- I  
20 know -- I can recall going twice.

21 Q But presumably you had it fixed after this?

22 A Yes.

23 Q If it's working---

24 A Yes.

25 Q ---it's been worked on now.

Dale Owens - Cross-examination  
by Mr. Hall

1 All right. Can you put it on the sound?

2 Well, we can wait, we can wait a little bit if we need  
3 the speaker.

4 (Pause.)

5 Q But are your blue lights on at this point?

6 A Yes, sir, you can kind of see---

7 Q They just come on?

8 A ---them flashing up at the top right.

9 See them flashing at the top right?

10 Q Yeah, I see.

11 When I asked the question, were they already on?

12 A I'm sorry?

13 Q They, they were on -- they come on when -- that's what  
14 activated the video?

15 It wasn't the, the---

16 A No, no.

17 Q What's that we're hearing here?

18 A You got me.

19 Q Cause if it's like mine it's gonna stop in a few  
20 seconds when you get out.

21 A I have no idea what it is.

22 Q Might just be the DVD I've got. Okay.

23 A I don't know what's making that sound. I just know it  
24 ain't working right.

25 Q So, have you ever heard that type of, on any of your---

Dale Owens - Cross-examination  
by Mr. Hall

1 A Not that I, not that I -- no, not that I can recall,  
2 no.

3 Q Okay. All right. We can stop that. And -- all right.

4 A Most of time it's like that.

5 Q And you're continuing to use this and then convert the  
6 DVD, I mean the, the VHS to a DVD system playback?

7 A That's all I have.

8 Q All right. Do we have the DVD, the VHS today?

9 A I, I don't have the VHS, no. I have it in the office.  
10 I, I wasn't aware -- I wasn't advised to bring that today.

11 Q A while ago I wasn't aware of it at all.

12 Now, have you ever, other than in a big criminal  
13 interdiction, had somebody get the blinkers, the wrong  
14 blinkers to start with and then they change?

15 A I'm sure I have.

16 Q Okay. Don't think you're old enough to have teenage,  
17 teenagers, but some---

18 A Close.

19 Q ---some people are almost attached to their phones,  
20 aren't they?

21 They talk to girlfriends, friends all the time?

22 I mean there are people who live with their phone, they  
23 sleep with their phone?

24 Are you aware of that?

25 A Yes, sir, I am.

Dale Owens - Cross-examination  
by Mr. Hall

1 Q Okay. And, some people, I'm going through the  
2 indicators you went through, slump in the seat, but it's not  
3 unusual, is it, for people to be nervous when they get  
4 pulled over?

5 A It's, it's -- no, it's not unusual for them to be  
6 nervous, but it is unusual in the demeanor that Mr. Moore  
7 had that he was overly nervous, and that continued through  
8 the whole stop even after he was advised he was gonna get a  
9 warning, even after he was told that he passed the field  
10 three, the three field sobriety tests, or two of the three  
11 field sobriety tests.

12 Q But you say you, you give him a warning, but you tell  
13 them you're gonna keep it, right?

14 A I'm gonna keep it?

15 What do you mean?

16 Q You're gonna keep him there. You're not gonna let him  
17 go.

18 A Well, that was after he refused, but I told him I was  
19 gonna keep him there.

20 Q All right. Now---

21 A That's -- I think that's my duty---

22 Q You gave a percentage of cars from Atlanta, some  
23 90 percent or something, drugs in the car, 90 percent of the  
24 car---

25 A Ninety percent of the people that I've arrested in

Dale Owens - Cross-examination  
by Mr. Hall

1 major criminal drug cases have come from Atlanta.

2 Q Okay. Do you know how many people, in any given period  
3 of time, you pulled over from Atlanta that didn't have  
4 drugs?

5 A No, sir, I don't.

6 Q Okay. Pull a lot of cars -- well, you -- is there any  
7 way you can tell a car's from Atlanta from---

8 A No, sir, I can not.

9 Q -- that county or anything like that?

10 A Well, I mean you can, you can, on some Georgia  
11 vehicles. But if, if, only if they got like Fulton County  
12 at the bottom of the tag. I mean that's the only one you  
13 can tell for certain. But that doesn't tell you that that's  
14 where that vehicle's coming from if it's a rental, you know.

15 Q I understand that.

16 But you don't know how many or how often you pull over  
17 cars from Atlanta that don't have drugs in them, that don't  
18 end up in a, an interdiction arrest?

19 A No, sir, I don't know exactly. I mean it's a lot. I  
20 mean---

21 Q Okay.

22 A But I can say this, they don't have all the indicators  
23 I had with your client.

24 Q You said moving his hands.

25 A Moving his hands?

Dale Owens - Cross-examination  
by Mr. Hall

- 1 Q Yeah, you said he---
- 2 A It's -- yes.
- 3 Q ---put his hands behind his back.
- 4 A The positioning of his hands, yes, sir.
- 5 Q Touching his pockets.
- 6 A Raising his hands above his shoulders, on his head,
- 7 behind his head, behind his back, yes, sir.
- 8 Q Okay. But there's no doubt that you did not have a
- 9 reason to arrest him for DUI based on your opinion, what you
- 10 observed, the test and everything else?
- 11 You said you weren't gonna arrest him for DUI?
- 12 A Once he completed the test, I, I feel like it would of
- 13 been an injustice to Mr. Moore if I had arrested him for
- 14 driving under the influence.
- 15 Q All right. Now, holding or leaving the car door open
- 16 for a few seconds when he got out, is that unusual?
- 17 A Yes, sir, it is. On I-85, yes, sir, it is.
- 18 Q Now, do you recall if somebody said close it or he
- 19 turned around and closed it cause it looks---
- 20 A I don't, I don't recall.
- 21 Q He pretty much just stepped out?
- 22 A I don't recall.
- 23 Q Stepped back and closed the door?
- 24 A I don't recall.
- 25 Q All right.

Dale Owens - Cross-examination  
by Mr. Hall

1 A He could have very well and then I could have very well  
2 told him. I don't, I don't remember.

3 Q But just -- we can't tell from here?

4 A Yeah.

5 Q Now, at one point it looks like he turned to one of you  
6 when he did have his hands above you and you could almost  
7 read his lips and he said can I put my hands down.

8 Do you remember him saying that?

9 A I don't remember. I never told him to put his hands up  
10 there. So, yeah, he could of asked me to pull them down.

11 Q It may of been Corporal Hancock behind him at that  
12 point, but he turned and you could see him -- I'm not a lip  
13 reader---

14 A I don't know what he said.

15 Q ---a lip reader, but that's what it looked like.

16 A I, I don't know.

17 Q Okay. Now, it's clear from the time he got the warning  
18 tickets to know to, to the consent search, he was there for  
19 15 or, or 16 minutes waiting on a dog?

20 A That's correct.

21 Q All right. Do you ever pull people or how often, if  
22 you can recall, do you pull people from speeding and they  
23 say gosh, I didn't know, I thought it was 70 when they were  
24 going 70 or 75?

25 That happens a good bit or never or what?

Dale Owens - Cross-examination  
by Mr. Hall

1 A That happens a good bit.

2 Q Okay. So, it's not that unusual for people to assume  
3 the speed limit's a certain speed---

4 A Well, I, I wouldn't say---

5 Q ---or at least---

6 A It's not a safe measure to assume anything. As to what  
7 they assume, I don't know. I mean it's clearly printed on  
8 the sign 60.

9 Q Yeah.

10 But a lot of people tell you oh, I thought it was 70---

11 A They do.

12 Q ---or 60?

13 A Yes, they do.

14 Q And I think when you were testifying about it's not 70  
15 until --

16 A The 68 mile marker.

17 Q -- the 68 mile marker, you gave 65, 50, or 55?

18 A No, no 55.

19 Q So, from Georgia to 68, it's 55 the whole way?

20 A No, it's 65 until about mile marker 33 or at least it  
21 was a year and a half ago, let me say that. I haven't  
22 traveled down that way since the last year and a half. If I  
23 haven't, I haven't paid it any attention. It use to be  
24 around the 33 to 35-mile marker. It changed from 65 to 60  
25 as you came through the metropolitan of Greenville, and then

Dale Owens - Cross-examination  
by Mr. Hall

1 it changed to 70 at the 68 mile marker.

2 Q So, coming from Georgia, there is some variance in that  
3 speed?

4 A It varies.

5 Q It goes down?

6 A It varies. As soon as you hit the state line, it's 65  
7 until you get to the 33 mile marker, 33 to 35, somewhere  
8 right in that area, and then it changes to 60. And then it  
9 stays from 60 from the 33 to the 35 until the 68 mile marker  
10 and that's when it changes to 70. He had not reached the 70  
11 yet.

12 Q Okay. Be about eight miles when he pulled over, about  
13 six miles is what you said, 60 and 62?

14 A It's still not there yet.

15 Q All right. And he cooperated with you during the pat  
16 down and all that?

17 In fact, you said it was usual, he raised his hands and  
18 kept them up?

19 A He did.

20 Q All right. All right. You know if -- excuse me.  
21 Forget that.

22 Now, in this video, you and Corporal Hancock, y'all  
23 moved your arms around and adjust your pants and pockets and  
24 at times look really exaggerated?

25 That's -- those type of things aren't that unusual, are

Dale Owens - Cross-examination  
by Mr. Hall

1 they?

2 A For what?

3 Q I mean somebody standing on the side of the road, just  
4 been pulled over by the police, you're saying that these  
5 things he did were so indicative of certain nervous behavior  
6 that you knew there was something more going on.

7 A Well, I don't think you saw me or Deputy Hancock place  
8 our hands on our head, scratch our head, both hands behind  
9 our back. I don't think you say that. That's what's  
10 consistent to us as criminal behavior, and you don't -- I  
11 don't think you saw that from Deputy Hancock or from me. I  
12 mean we could watch the videotape again if you wanted to,  
13 but that's what your, that's what your client displayed to  
14 me, and that's what, through my training and experience,  
15 that's what I saw and that's what I detected as nervous  
16 behavior.

17 Q I'm saying that you adjusted your pants on this video,  
18 did you not?

19 A Well, I'm probably sure I did, but I also got a gun and  
20 a, and everything else attached to my belt that pulls my  
21 pants down.

22 Q And your, your pants fit?

23 You don't have to worry about baggy pants?

24 Yours -- they fit?

25 A No, sir.

Dale Owens - Cross-examination  
by Mr. Hall

1 Q As a uniform, they don't let you wear baggie or pants  
2 like is the style today?

3 A They only buy me two pairs a year. So, I get what I  
4 get.

5 Q But it's safe to say they're not baggy?

6 A No, sir, they're not.

7 MR. HALL: Okay. Your Honor, no further questions of  
8 this witness.

9 THE COURT: Anything further?

10 SOLICITOR HUNTER: Nothing, Your Honor.

11 THE COURT: You may step down.

12 State wish to call additional witnesses?

13 SOLICITOR HUNTER: Yes, the State would call Jason  
14 Carraway.

15 THE COURT: Come forward and be sworn, sir.

16 JASON CARRAWAY, having been first duly  
17 sworn, testified as follows:

18 THE COURT: Have a seat please and state your name.

19 WITNESS: Jason Carraway.

20 MR. HALL: Your Honor, if we may approach?

21 THE COURT: Beg your pardon?

22 MR. HALL: Approach.

23 (WHEREUPON, a bench conference was held at this time.)

24 DIRECT EXAMINATION

25 BY SOLICITOR HUNTER:

Jason Carraway - Direct examination  
by Solicitor Hunter

1 Q I don't, I don't think it's -- we're not arguing  
2 whether you showed up or not, but from the point that he  
3 called you to the point you showed up was approximately 15  
4 to 16 minutes?

5 A Approximately 15 minutes, yes, sir, that's correct.

6 Q When -- you're a, you're a K-9 handler?

7 A Yes, that's correct.

8 Q And how many K-9 handlers does Spartanburg County  
9 Sheriff's Office have?

10 A In total, there's a -- they're narcotic K-9's. There's  
11 four that's on uniform patrol. The one that I have and the  
12 one assigned to narcotics. So, there's six, six in all, but  
13 all those are not working at the same time.

14 Q So, at any one time the most K-9's on the road is  
15 three?

16 A That's on a good day.

17 Q Okay. And how is that?

18 A Well, the four that are assigned to uniform patrol,  
19 they each work separate shifts. So --.

20 Q And how are your shifts broken down?

21 A They're broken down in 12 hour shifts. One shift works  
22 7:00 a.m. to 7:00 p.m. The other works 7:00 p.m. to 7:00  
23 a.m., and then, then they rotate days with, with two other  
24 groups that work those same hours.

25 Q Okay. So -- and, and how is it broken down?

Jason Carraway - Direct examination  
by Solicitor Hunter

- 1 Is it broke down by letters, numbers?
- 2 A Yes, Alpha, Charlie or Alpha, Bravo, Charlie, Delta.
- 3 Q So, if Alpha's on duty, that means that it's gonna be
- 4 daytime shifts and Bravo is off?
- 5 A That's correct.
- 6 Q And then someone, either Charlie or Delta, will come on
- 7 at night?
- 8 A That's correct.
- 9 Q Okay. And then whoever comes on at night, the other
- 10 three are off?
- 11 A Right.
- 12 Q Okay. What team are you assigned to?
- 13 A I'm assigned to the Interstate Criminal Enforcement
- 14 Team.
- 15 Q Okay. And who does that consist of?
- 16 A That's, consist of four members, Corporal Hancock,
- 17 myself, Deputy Owens, and Deputy Donnie Gilbert.
- 18 Q Okay. And where do you do all of your investigation
- 19 and traffic stops?
- 20 Are you, are you specific to one location?
- 21 A Mainly we work the interstates.
- 22 Q So---
- 23 A We were working 85.
- 24 Q 85 and 26?
- 25 A Correct.

Jason Carraway - Direct examination  
by Solicitor Hunter

1 Q Okay. And on this particular night, June 30<sup>th</sup>, who  
2 were you assigned with?

3 A I was assigned with the Interstate Criminal Enforcement  
4 Team.

5 Q Okay. And who were you actually with that night?

6 A That night, all four of us were working.

7 Q Okay.

8 A I think, at the time, Deputy Gilbert and myself were up  
9 on the northern end of the county around the 80 mile marker,  
10 and Hancock and Owens were down further south. We generally  
11 try to stay in a closer area, but being that they were a two  
12 man unit that night, you know, it wouldn't be unusual, since  
13 they had a backup there with them, to maybe go a little  
14 further away. You know, with traffic stops, it may take a  
15 few miles to catch up and stop someone.

16 Q Okay.

17 A It's not uncommon to get separated at times.

18 Q Did you receive a call to bring your dog to this  
19 location?

20 A I did.

21 Q Okay. And where -- again, you were located around the  
22 80 mile marker?

23 A I was around the 80 mile marker.

24 Q On which side of the road?

25 A On the southbound side.

Jason Carraway - Direct examination  
by Solicitor Hunter

1 Q Okay. When you received that call, what did you do?

2 A Immediately proceeded south on the interstate. I had  
3 to go, actually go -- if I remember correctly, they were  
4 around the 62 mile marker northbound. With there a concrete  
5 barrier, I had to go all the way down to Exit 60, which is  
6 101, and then turn around and come two miles further north.  
7 So, you're looking at about 22 miles that it took me to get  
8 to where they were at from where I was at when they called  
9 me.

10 Q Did you stay up at the 80 mile marker when you were  
11 called?

12 A No, I, I went ahead straight that way once they called  
13 me.

14 Q Did you continue down to their location as soon as the  
15 call came in?

16 A I did.

17 Q Okay. And it took you approximately 15 to 16 minutes  
18 to get there?

19 A That, that sounds about right with that distance, yeah.

20 Q And, again, there were only about two of you, probably  
21 at the most three, but at least two of you on the road?

22 A Yeah.

23 Q Can you---

24 A I'm not even sure if the night shift had a dog working  
25 that night, but, you know, if they had training or vacation,

Jason Carraway - Direct examination  
by Solicitor Hunter

1 there's, there's times that they don't have a dog at all.  
2 So, it's quite possible I was the only one that night. But  
3 with us working together as a team, you know, we usually --  
4 they always use me unless I'm not available for some reason,  
5 and they might try and go outside to the shift if they need  
6 a dog and I'm not there.

7 Q Was it 15 or 16 minutes normal as far as response time  
8 if you're not around them?

9 A It is. I mean even, even if I'm only a few miles away,  
10 depending on the time of day with traffic, and if they're on  
11 the opposite side, I get off and flip around. It's just not  
12 uncommon for it to take 10 to 15 minutes, maybe a little  
13 longer sometimes.

14 Q Okay. Would you hold on one second?

15 (Pause.)

16 Q What is your K-9's name?

17 A His name's Deuce.

18 Q And what type of training do you and Deuce go through?

19 A We use actually what's called a full patrol dog. He  
20 does tracking, handler protection, apprehension, article  
21 searches, and he's also trained in narcotics detection.

22 Q And who does this training?

23 A The initial training, I'm his second handler. His  
24 original handler left for another job. But they, they go  
25 through several several weeks of basic training with the

Jason Carraway - Direct examination  
by Solicitor Hunter

1 dog, and then once that dog goes through that training,  
2 they're given a certificate, and at a later date he goes to  
3 an accredited agency to be certified.

4 Q Who originally certified him?

5 A I believe Charlotte Mecklenburg was the original  
6 certifying agency.

7 Q And I believe you said he had to be re -- he had to  
8 be---

9 A Annually we go through recertification.

10 Q Okay. And, at this time, has he been certified?

11 A Yes.

12 Q Okay. What type of training do you specifically do  
13 with the dog?

14 A On top of the, the original training that we go through  
15 and the annual certification, we do monthly maintenance  
16 training what we call, which is a minimum of 16 hours a  
17 month that we go through just to kind of, you know, what we  
18 call maintenance upkeep of the, of the dog, and its  
19 performance.

20 Q Now, obviously you trained for the detection of  
21 narcotic substances?

22 A Right.

23 Q Do you ever train so that they will not alert when it's  
24 a non-narcotic substance?

25 A Yeah, I mean it's common for us, when we go through

Jason Carraway - Direct examination  
by Solicitor Hunter

1 training and also certifications, where they put other items  
2 out that may be present at times when they are searching  
3 vehicles or houses or whatever else to make sure that  
4 they're not alerting to that, to make sure they're alerting  
5 to the odor of the narcotics and not the odor of, for  
6 instance, you know, air fresheners or whatever else may be  
7 present at that time.

8 Q Okay. And through your weekly training, your annual  
9 certification, and the dog certification, do you keep  
10 records of the pass rates or the---

11 A Yes, we do.

12 Q Okay. And what rate does your dog alert to narcotic  
13 substances?

14 A Are you, you talking about control or uncontrolled  
15 environment?

16 You talking about in training or out on the---

17 Q Okay. Do you keep it for both of them?

18 A We do, yes.

19 Q Okay. And how about the uncontrolled?

20 A The uncontrolled will be in the roadway. I think, for  
21 the past two years that I've had him, it's been right around  
22 90 percent. I don't have the exact number right in front of  
23 me. I have, you know, records at the office that I can---

24 Q So, that 90 percent, 90 percent of the time he alerts  
25 there is a narcotic substance---

Jason Carraway - Direct examination  
by Solicitor Hunter

1 A That's correct.

2 Q ---found?

3 A Right.

4 Q Okay. And in the controlled environment?

5 A Controlled, he's never -- I've never had a problem with  
6 him.

7 Q And how long have you had him?

8 A This past February was two years.

9 Q Okay. So, in the two years in your training, your,  
10 and, and off-the-road and not working, he's never not  
11 alerted to the substance of narcotics?

12 A That's correct.

13 Q And on this night, what did you do?

14 A That night, they called me to come down. Like I said,  
15 it took maybe approximately 15 minutes or so from where I  
16 was at. I arrived on scene. I think maybe Deputy Owens may  
17 have been standing off to the right-hand side. I don't, I  
18 don't recall.

19 Usually, if they have a refusal, they'll, they'll let  
20 me know over the radio when they call me that it's a refusal  
21 so I know to go ahead and get the dog out when I get there.  
22 I think, on that night, I did. I just went ahead and got  
23 him out and walked up, and you see in the video I come up. I  
24 actually had him start his exterior sniff of the vehicle at  
25 the back trunk area, and then work around the

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1 counterclockwise pattern up the passenger side.

2 Q what kind of alert does your dog give?

3 A He's a passive alert. So, he'll sit or lay depending  
4 on if it's -- sometimes he'll lay if it's a low, an odor's  
5 coming from a low source or whatever. But --.

6 Q And what did your dog do on this location?

7 A He actually---

8 Q Did he hit?

9 A He actually -- he sat near the passenger door.

10 Q And for, for how long?

11 A Until I had him get up and move. He was rewarded with  
12 his toy and---

13 Q When he sits, do you try to pull him off?

14 A I do. If you can see, I actually had to -- I started  
15 to go around the corner and he stopped, and I actually --  
16 the leash was pulled tight and I had to come back toward  
17 him.

18 Q And what is that to make sure of?

19 A That let's me know that he's committed to what he's  
20 detecting. You know, he---

21 Q So, in other words, he's just not sitting there?

22 A Right.

23 Q He's actually doing his, his alert?

24 A Right.

25 Q Okay.

Jason Carraway - Direct examination  
by Solicitor Hunter

1 A That's correct.

2 Q Now, you spoke about reward, what -- explain what that  
3 is.

4 A Dogs, whether they're trained, he's, he's searching.  
5 He, he associates that odor with looking for a toy, and when  
6 he smells that odor, that's how he's rewarded, you know,  
7 with that toy. For him, it's just a plastic pipe.

8 Q If they don't smell the odor, are they still rewarded?

9 A No, they're not.

10 Q Okay. Is it possible for him to just alert just so he  
11 gets the toy?

12 A No, sir.

13 Q Why not?

14 A Well, outside of him just sitting, he's also -- you  
15 also see behavior changes. In the dog before, prior to him  
16 doing that, that's -- the change in behavior is actually an  
17 alert, and the sit itself is, is what we call the final  
18 response or final indication. So, even though a person can  
19 train a dog to sit when he smells that odor, you can't train  
20 that behavior response into them when they, you know, they  
21 get excited, maybe they're -- different dogs do different  
22 things.

23 Their breathing changes. Their search pattern changes,  
24 things like that. That can't be trained into a dog. That's  
25 all that -- it's, it's natural in the dog itself. You know,

Jason Carraway - Direct examination  
by Solicitor Hunter

1 the only thing that he's trained to do is to sit.

2 Q Okay.

3 A So, when he's showing me those behavior changes, that's  
4 something that he does on his own that I have no control  
5 over.

6 Q So, what would you do if he didn't change his behavior,  
7 but still sat, would you consider that an alert?

8 A No, I would not.

9 Q Okay. And he alerted on this vehicle?

10 A Yes, he did.

11 Q Robert.

12 CROSS-EXAMINATION

13 BY MR. HALL:

14 Q You were there when the drugs was found?

15 A I was off to the side of the car. I was out of view of  
16 the camera, but I was off, off the side there.

17 Q But they weren't found in the passenger compartment,  
18 were they?

19 A They were not.

20 Q The dog indicated on the trunk or the passenger, or the  
21 passenger door?

22 A He alerted on the passenger door, but there's reasons  
23 behind why he may do that.

24 Q I just---

25 A It can be explained.

Jason Carraway - Cross-examination  
by Mr. Hall

1 Q Thank you. No further questions.

2 THE COURT: You may step down. You can step down, sir.

3 WITNESS: Oh.

4 THE COURT: Other testimony?

5 SOLICITOR HUNTER: Nothing further from the State, Your  
6 Honor.

7 THE COURT: Defense wish to offer any testimony?

8 MR. HALL: May I have a moment with my client, Your  
9 Honor?

10 THE COURT: Yes, sir.

11 MR. HALL: I don't know if we can step out.

12 THE COURT: Do you want to confer outside?

13 MR. HALL: Yes, sir, he's -- and he needs to go to the  
14 restroom.

15 THE COURT: All right. We'll take about a five, ten  
16 minute break.

17 Court's in recess.

18 (WHEREUPON, a short recess was taken at this time.)

19 THE COURT: All right. Mr. Hall, does the defense wish  
20 to call any witnesses on this matter?

21 MR. HALL: Your Honor, I've spoke with my client about  
22 the possibility of testifying, but he is going to not  
23 testify, and because of that, I don't think we will have --  
24 I know we won't have any witnesses, and we can, I think, go  
25 into---

1 THE COURT: All right. Well, then I'll -- at this time  
2 I'll hear from you concerning your motions.

3 MR. HALL: All right. Thank you, Your Honor.

4 THE COURT: Yes, sir.

5 MR. HALL: Let me get the cases.

6 what we have articulated from the deputy basically are  
7 common things that could happen to people in a stop. He, I  
8 think, attempted to say that it took him a while to stop.  
9 But he apparently hit the wrong blinker, but did put the  
10 blinker on and pull over. I thought -- you saw the video.  
11 Seemed like a reasonable time. It's not unusual for people  
12 to be on the phone. I don't know if drug dealers talk on  
13 the phone when they're going down the road, but I think it's  
14 unfortunately common for a lot of people to talk on the  
15 phone, and some people, in our culture, are attached to the  
16 phone.

17 what they have to show is some reasonable suspicion,  
18 suspicion to keep the detention of my client that we assert  
19 is in violation of his rights doing. The things, other than  
20 the odor of alcohol, he went through the field sobriety  
21 test, and he's okay, decided not to place him under arrest  
22 for that. It's the other things, the signal, the using the  
23 phone, driving slumped in the seat, looks at his pockets  
24 after he's been searched, these are things that, you know,  
25 people will do.

1       He held his hands up when he was searched, but that may  
2 indicate that he's watched TV or seen that kind of police  
3 duty to hold your hands up. That's gonna be the best way to  
4 be searched.

5       These things, Your Honor, are not that unusual.  
6 Particularly in somebody who's traveling and has been pulled  
7 over by the police.

8       The case law lists different things that are to be, you  
9 know, to be considered and I know it's a totality of the  
10 circumstances, and combination of common place items with  
11 other circumstances can arise to suspicion, but I don't  
12 think we have the things here.

13       They list things like air fresheners indicating  
14 traveling for several days and not having luggage. This is  
15 a man who tells them, yeah, I'm going to visit my  
16 grandmother before some surgery I think it was. He stood on  
17 his right, said I don't want you to search, and, you know,  
18 unfortunately, we have something of a tape that was  
19 converted to DVD and the audio on it doesn't work. So, we  
20 can't hear what's being said, but we can see it.

21       And, Your Honor, he's there in front of the camera for  
22 a good portion of the time. I don't -- I couldn't see any  
23 sweating, any veins bulging or pulsing, those type things,  
24 and saying it, I don't think, is enough. There has to be  
25 evidence of it, and unfortunately we can't hear the way he

1 sounds when he speaks. But we certainly can see him.

2 And, Your Honor, on that tape, I don't see the over  
3 nervousness other than a man that moves his hands around.  
4 When the police are searching, he puts his hands up. He  
5 appears to look, asked permission to take his hands down  
6 when the search is finished. He checks his pockets after  
7 the police have been through his pockets.

8 I think those reasonable behaviors on his part,  
9 somebody in his position. I don't think that what has been  
10 evidenced here through this video is enough for a reasonable  
11 suspicion to keep him detained and wait for the dog, and I  
12 understand that the substance here involved in this case is  
13 a menace on this society and there's apparently a good deal,  
14 deal of it, but it's not what was found or how much was  
15 found. It is was the detention lawful, and I think, given  
16 the circumstances here, we've had a lot of the buzz words  
17 that have been testified, but that's really not backed up on  
18 that video except the signal.

19 I think you can see, within, of the lights coming on, I  
20 think the first stop was 52 seconds. He's pulled over and  
21 the officer's already on the road. That's not long.

22 He did hit the left signal for a second, put it in the  
23 right signal, and pulled over. He says he was slumped in  
24 the seat. That's not that unusual. Talking on the phone,  
25 that's not unusual unfortunately in this day.

1       He put his hands up when the police were patting him  
2 down, searching him, and he felt his pockets afterwards. He  
3 left the door opened for a second or two, stepped, started  
4 to step away, stepped back, closed the door. Unfortunately  
5 we can't hear if he was told to do that or if he just did it  
6 on his own.

7       Your Honor, there's too many questions left when we  
8 don't, we have equipment that malfunctioned. It's not our  
9 equipment. It's the State's equipment. There's some  
10 questions that could be answered if we could hear, things  
11 that we can not hear, and based on all this, Your Honor, I  
12 feel that, ask that you find that there's no reasonable  
13 suspicion to keep the detention after he had been given the  
14 warning ticket and kept for 15 or 16 minutes before the dog  
15 got there, that he should of been released after he was  
16 given the warning tickets and said no, I don't want you  
17 searching my stuff, which is everybody's right.

18       And I ask that you find that there was no reasonable  
19 suspicion to keep him detained, and it was a, in any event,  
20 any detention was unreasonable and that the evidence that is  
21 seized be suppressed.

22       Thank you.

23       THE COURT: Mr. Hunter.

24       SOLICITOR HUNTER: Yes, Your Honor.

25       Reading from State versus I believe it's Provet,

1 obviously lengthening the detention for further questioning  
2 of the suspect is acceptable in only two situations. One of  
3 those which doesn't apply here, but the one that does is  
4 that the officer has an objectively and reasonable  
5 articulable suspicion that illegal activity has occurred or  
6 is occurring, and the test for that reasonable suspicion is  
7 a totality of the circumstances and the Court---

8 THE COURT: well, now, what's the, what's the  
9 difference between objective and subjective?

10 SOLICITOR HUNTER: Objective is fact, fact based.

11 THE COURT: Yes, sir.

12 SOLICITOR HUNTER: Okay. However---

13 THE COURT: There's got to be some facts that you base  
14 it on.

15 SOLICITOR HUNTER: Correct. However, Courts must  
16 consider the totality of the circumstances and give due  
17 weight to common sense judgment reached by officers in light  
18 of their experience and training. Obviously this case that  
19 I handed up to you earlier, Mr. Owens was the officer in  
20 that case as well. So, he's well aware of what the  
21 indicators that he needs to articulate reasonable suspicion.

22 THE COURT: Of course, now this one was handed down  
23 after---

24 SOLICITOR HUNTER: After the---

25 THE COURT: ---the arrest in this case.

1 MR. HALL: Yes, sir.

2 SOLICITOR HUNTER: This one was handed down after---

3 THE COURT: I mean before, before the arrest in this --  
4 no, after the arrest in this case.

5 SOLICITOR HUNTER: It was actually heard before the  
6 arrest and handed down after the arrest.

7 THE COURT: Yes, sir, that decision wasn't on record  
8 when he made this arrest.

9 SOLICITOR HUNTER: Correct, Your Honor.

10 THE COURT: Okay.

11 SOLICITOR HUNTER: And as to Robert's point---

12 THE COURT: Now, Provet, I'm looking at it, and what  
13 happened in that case was you have -- you had a fellow that  
14 claimed he was staying at the Holiday Inn with his  
15 girlfriend, but the officer in that case had followed him  
16 past that exit, knew he didn't stop at that exit, and didn't  
17 come from that exit.

18 SOLICITOR HUNTER: Correct.

19 THE COURT: So, he lied. That's, that's something  
20 objective. That's a fact you can observe. The car was full  
21 of air fresheners. Claimed he had luggage, but there wasn't  
22 any -- denied he had luggage. There wasn't any luggage in  
23 sight, but he's going on a long trip. I mean there was some  
24 factors there that just didn't make any sense at all.

25 SOLICITOR HUNTER: That's correct, Your Honor.

1 However, I believe this case would be more in line with  
2 Provet, the Tindall case that Robert, Mr. Hall is urging the  
3 court to consider.

4 THE COURT: Well, I don't---

5 SOLICITOR HUNTER: And I don't---

6 THE COURT: It seems to me in this case what we're  
7 talking about is some physical characteristics of somebody  
8 like they were, how they held their hands, and, you know, to  
9 be honest with you, in listening to it, I'm not sure where  
10 he could of put his hands.

11 SOLICITOR HUNTER: However, the Courts have found that  
12 the felony stretch is something that officers, in their  
13 training, and expertise---

14 THE COURT: well, I was gonna ask, is there a book  
15 somewhere that tells us where people that are involved in  
16 this sort of thing put their hands?

17 SOLICITOR HUNTER: I've, I've actually been to the  
18 National Criminal Enforcement Association because I---

19 THE COURT: They, they talk about the felony stretch in  
20 one of the cases. I mean one of the---

21 SOLICITOR HUNTER: They talk about it in a lot of the  
22 cases, Your Honor.

23 THE COURT: And -- yes, sir. So, I saw that.

24 SOLICITOR HUNTER: But that's just one of the factors  
25 of many, Your Honor. If I could list them out for the

1 Court.

2 THE COURT: Please do.

3 SOLICITOR HUNTER: All right.

4 THE COURT: Cause I'm listening for something objective  
5 and something -- cause that's what -- I'm just reading that,  
6 that when -- even the case that goes in your favor, Provet,  
7 they say that it's got to be objective, objectively  
8 reasonable and articulable suspicion of illegal activity is  
9 occurred or is about to occur or has occurred. So, it's --  
10 I mean it talks about objective things, things that you  
11 don't -- it's not an interpretation by you. Something you  
12 observe, a fact that you observe.

13 SOLICITOR HUNTER: I offer, lower down, also under  
14 Section B on Page 3, it says the Courts must give due weight  
15 to common sense judgments reached by officers in light of  
16 their experience and training in, in---

17 THE COURT: Yes, sir, and I would give that some  
18 weight, but that's not gonna carry the day in this case  
19 because otherwise why have a judge. Leave it up to the  
20 officer.

21 SOLICITOR HUNTER: Well, I understand, Your Honor. But  
22 if I could list these out.

23 THE COURT: Go ahead.

24 SOLICITOR HUNTER: Okay. Again, he's, he's already  
25 noticed the turn left signal on when he's moved right. The

1 long time pullover, which in his common sense and training  
2 in 14 years, alerts him to the fact that he may be getting  
3 ready to flee. The turn signal stays on. His foot's on the  
4 break. He couldn't tell whether the car's in park or in  
5 drive, which could give him reason to or give him the  
6 opportunity to flee once Officer Owens steps out of the car.  
7 That's not something that a normal person being pulled over  
8 for speeding would do.

9 THE COURT: Uh-huh. (Affirmative).

10 SOLICITOR HUNTER: He explains the reason for the stop.  
11 He noticed that there's an odor of alcohol coming from the  
12 vehicle, which he testified to that, in his training and  
13 experience, could lead them to believe that something other  
14 than the driving infraction is going on, that either he's  
15 impaired driving or that he's trying to calm his nerves.  
16 The smoking of the cigarette both. When he gets out of the  
17 car and while he's waiting for the officer with the K-9 to  
18 arrive, he continued talking on the cell phone.

19 He testified that when he comes up to the door, the  
20 driver is talking on the cell phone at that point and he  
21 doesn't hang up. That's not normal for someone whose been  
22 pulled over by police at one o'clock in the morning, police  
23 knock on the door, that you don't hand up your cell phone.

24 He appeared to be nervous. He has his hands shaking  
25 when he hands over the license. His pulse is rapid. His

1 breathing is also heavy. He admits to drinking to the  
2 officer. He even tried to pick up his phone once he got out  
3 of the car, which, again, alerts the officer that he may be  
4 trying to flee. He leaves the door open.

5 THE COURT: say that again, the last thing you just  
6 said.

7 SOLICITOR HUNTER: He tried to pick up his cell phone  
8 once the officer asked him to exit the vehicle, and they do  
9 a pat down for safety, and here's one of the, one of the big  
10 facts. They find a large wad of cash in this man's pocket.  
11 He admits he does not have a job. He is unemployed.

12 THE COURT: And he's had somebody else rent a car for  
13 him. He didn't rent it.

14 SOLICITOR HUNTER: And actually I'd like to point that  
15 out, Your Honor. On this rental agreement, it appears that  
16 the car was rented -- if I may pass this up.

17 THE COURT: Yes, sir, please pass it up.

18 SOLICITOR HUNTER: Your Honor, it was rented on  
19 June 29<sup>th</sup> around four o'clock in the morning in North  
20 carolina. According to the story given by the defendant,  
21 he's on his way from Lawrenceville, Georgia back up to  
22 Morganton, North carolina. So, if that rental agreement is  
23 true, that car's been driven from North carolina, down to  
24 Lawrenceville, Georgia, a hub city known for drug  
25 trafficking, as he said 90 to 95 percent of all the major

1 cases he has done on I-85 come out of Atlanta, and then  
2 driven back up that night to see his grandmother at one  
3 o'clock in the morning.

4 THE COURT: Where is Morganton?

5 SOLICITOR HUNTER: While he's---

6 THE COURT: Well, where is Morganton?

7 SOLICITOR HUNTER: ---been drinking.

8 THE COURT: Where's Morganton?

9 OFFICER: It's, it's on 18 above Shelby.

10 THE COURT: Okay. That's what I'm thinking.

11 MR. HALL: Your Honor, I think his testimony was  
12 Marion. He said Morganton.

13 THE COURT: Well, no, he said, he said he's going to  
14 Marion, but the car was rented in Morganton.

15 MR. HALL: Yeah. Okay. Okay.

16 THE COURT: And I'm just trying -- is it---

17 OFFICER: Marion's above Morganton.

18 THE COURT: Before you get to Hickory, up that way?

19 OFFICER: Yeah, Marion, Marion's above Morganton.

20 THE COURT: Okay.

21 SOLICITOR HUNTER: But obviously the car was rented  
22 that day, driven to Georgia, and back, which means his story  
23 was not exactly consistent. He also---

24 THE COURT: And at four o'clock in the afternoon?

25 SOLICITOR HUNTER: The car was rented at four o'clock

1 in the afternoon of that day, and nine hours later he's  
2 pulled over after saying he's already coming back up to  
3 North Carolina.

4 THE COURT: Go ahead.

5 SOLICITOR HUNTER: It's obviously a third party  
6 vehicle. He is on that rental agreement as one of the  
7 drivers. However, he did not rent the vehicle. He's the  
8 only person in the car. The person who rented the vehicle  
9 is not in the vehicle. We don't know where he is.

10 Again, as I said, he's going to his grandmother at  
11 1:10 a.m. He's been drinking, and I think one of the big  
12 ones I've already stated is they pulled a large wad of cash,  
13 which is consistent with drug trafficking especially when  
14 someone is unemployed. They continue to see this nervous  
15 behavior while they're talking to him.

16 When asked about the illegal products or the illegal  
17 activities or illegal products in his car, that's when  
18 Deputy Owens testified that he looked at the vehicle, looked  
19 down as if he could see what was in the vehicle, but then  
20 stated that there was nothing in the vehicle. I think all  
21 of these, taken together, while they both, Provet and  
22 Tindall, say -- let me get the exact language, and that some  
23 items found in the vehicle are common place and consistent  
24 with innocent travel. When reviewing the record, they  
25 found, the totality of the circumstances, all these things

1 taken together would give him reasonable suspicion not, not  
2 just a hunch, but not as much as probable cause, but some  
3 type of illegal activity other than those driving  
4 infractions and the impaired driving is going on, Your  
5 Honor.

6 THE COURT: Anything else, Mr. Hall?

7 MR. HALL: Yes, sir, if I can just reply to some of  
8 that. It's -- as far as the rental agreement and the car  
9 being in North Carolina, from North Carolina, he never said  
10 I rented the car in North Carolina, and my, with my cousin  
11 or whatever. He said I'm driving the car. My -- whoever  
12 cousin or friend, whoever it was, rented the vehicle. I'm  
13 driving it to North Carolina to see my grandmother.

14 THE COURT: Somebody name Edwin Hemphill.

15 MR. HALL: There's noting inconsistent about that. He  
16 never said I drove it from North Carolina or I rented it  
17 from Georgia. He said I'm driving it from home in  
18 Atlanta---

19 THE COURT: Lawrenceville.

20 MR. HALL: ---to North Carolina to visit my  
21 grandmother. Your Honor, as far as the brake in park and  
22 the phone and fleeing, Deputy Owens was looking in the  
23 window. You can see if a car's in park or whatever or you  
24 can ask him to cut it off. But it -- I don't think it's  
25 unusual for people to sit there with their foot on the

1 brake, but certainly his eyes could of told him whether or  
2 not the car was park or drive or whatever.

3 The signal, Your Honor, could be accident. Could be  
4 I'm gonna get out of the way of this police officer. Then  
5 you realize the police officer's is after him, your turn  
6 signal goes the other way, and it's not unusual for people  
7 to smoke a cigarette especially in a situation where they're  
8 being pulled over. And I think we've already covered over  
9 the phone. That's just, unfortunately, a normal thing in  
10 our society. People are, feel married to their phone and  
11 have to have it and use it all the time.

12 And as far as looking down, I don't know that I  
13 wouldn't look down if they said can we search your car for  
14 drugs. That's just the, I think a normal reaction someone  
15 would have. I still feel that maybe they've got a hunch,  
16 but I don't think that was objective reasonable suspicion  
17 necessary for the case to go forward, and ask that you  
18 suppress the evidence.

19 THE COURT: All right. Anything further, Mr. Hunter?

20 SOLICITOR HUNTER: Just one final thing. If we look at  
21 the, in Provet, Trooper Owens, it specifically says they're  
22 looking for, excuse me, you're looking for sufficient  
23 indicators of criminal activity to justify continued  
24 detention, and in the Provet case, one of the indicators was  
25 that he was nervous as displayed by the extreme shaking of

1 the hands and accelerated breathing. We have that in this  
2 case.

3 The third party vehicle registrations, very common in  
4 drug trafficking. We have that in this case.

5 Now, some of the -- it talks about what he, Provet, and  
6 Mr. Owens had a conversation, and what that conversation  
7 amounted to. Just like here, he had a large amount of cash.  
8 He admitted he wasn't working. That's very consistent with  
9 drug trafficking. He also had a cell phone.

10 In this case, number six, the presence of numerous fast  
11 food bags, a cell phone, and some receipts were in Provet's  
12 vehicle. Now, obviously we didn't have the fast food bags  
13 and receipts in this vehicle, but the cell phone was there.  
14 He was talking on it.

15 We don't have to have the exact six factors that they  
16 list out in Provet because there was a couple of cases  
17 where---

18 THE COURT: Oh, I didn't say you had to have the exact  
19 same facts.

20 SOLICITOR HUNTER: I understand. I understand. I just  
21 wanted to get---

22 THE COURT: But it's got to be more, more than just  
23 subjective impressions by the police officer too.

24 SOLICITOR HUNTER: It's not just---

25 THE COURT: There's got to be some objective facts.

1 SOLICITOR HUNTER: It's not his, his -- the objective  
2 facts that the witnesses, but also what he gleams from the  
3 facts based on his training and experience, and we would say  
4 that you were specific and articulable facts that rose to  
5 the level of reasonable suspicion in this case.

6 THE COURT: All right. I see you in, in get up  
7 position; Mr. Hall.

8 Do you want one more time?

9 MR. HALL: Well, Your Honor, if we rely on his  
10 experience to that extent, to turn things that aren't, that  
11 are subjective into objective, we're also -- he was looking  
12 in the car. He couldn't tell whether it was in park or not,  
13 you know. So, Your Honor, there's just not enough here.  
14 There's -- it's kind of -- I don't want to say read the case  
15 and then testified accordingly, but, Your Honor, I just  
16 think they have, like I say, subjective things. They try to  
17 make them sound objective, but they just don't rise to it.

18 THE COURT: All right. I have reviewed the Tindall  
19 case, which I know is a Supreme Court case. I have reviewed  
20 the Provet case, which I do acknowledge is a Court of  
21 Appeals case. However, they distinguished Provet from  
22 Tindall. Tindall had already been decided when the Court of  
23 Appeals articulated its reasoning in Provet, and in there  
24 they do indicate that you must have -- the officer must have  
25 an objectively reasonable and articulable suspicion illegal

1 activity has occurred or is occurring.

2 Particularly because of the -- and it says reasonable  
3 suspicion requires particularized and objective basis that  
4 would lead one to suspect another of criminal activity. I  
5 am required to consider the totality of the circumstances,  
6 and give due weight to the common sense judgments reached by  
7 officers in light of experience and training.

8 In particular, the problem I have with the or the facts  
9 that are revealed by the rental agreement indicate the  
10 rental in North Carolina on the evening, afternoon before  
11 the stop was made at one o'clock in the morning. I have my  
12 doubts that the car was driven from Morganton to  
13 Lawrenceville and back to Marion to visit a grandmother.  
14 That's a long way to go around to visit your grandmother.  
15 Morganton and Marion is a much shorter trip than that.

16 So, it appears that he may of been less than truthful  
17 about the purpose of his trip. Also, for someone  
18 unemployed, to be carrying such a large amount of cash in  
19 their pocket also would obviously give a officer reasonable  
20 suspicions. The other factors as noted, I have given those  
21 the weight required, and in this case I am going to refuse  
22 to suppress.

23 MR. HALL: Thank you, Your Honor.

24 THE COURT: Are you ready to go forward with other  
25 motions?

1 Thank you.

2 Your Honor, we have one thing we need to address before  
3 we get started.

4 THE COURT: You may approach.

5 (WHEREUPON, a bench conference was held out of the  
6 hearing of the jury at this time.)

7 THE COURT: Mr. Hunter, call your first witness.

8 SOLICITOR HUNTER: State would call Deputy Dale Owens.

9 THE COURT: Come forward to my left and be sworn  
10 please, sir.

11 DALE OWENS, having been first duly  
12 sworn, testified as follows:

13 THE COURT: Have a seat, sir. Once seated, state your  
14 name.

15 WITNESS: Dale Owens.

16 THE COURT: Mr. Hunter, your witness.

17 DIRECT EXAMINATION

18 BY SOLICITOR HUNTER:

19 Q Deputy, can you please tell the jury your law  
20 enforcement background?

21 THE COURT: Bring the lights up. He's not quite ready  
22 for that. I'm sorry.

23 Excuse me, Mr. Hunter.

24 SOLICITOR HUNTER: That's all right.

25 THE COURT: Let's get the lights back up. It takes a

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by Solicitor Hunter

1 second sometimes. Here they are.

2 All right. Mr. Hunter, you may proceed.

3 Q Can you please tell the jury your law enforcement  
4 background?

5 A Yes, sir, I started in law enforcement after college at  
6 Citadel in '91. I started with the Columbia Airport Police  
7 Department for two years, and then I went to the South  
8 Carolina Highway Patrol where I worked for 17 years.

9 During my capacity with the Highway Patrol, for 12 of  
10 those years, I was assigned to the Aggressive Criminal  
11 Enforcement Unit. Nine of those years I was the first line  
12 supervisor for the Aggressive Criminal Enforcement Unit  
13 assigned to the Upstate region, which involves I-85 and  
14 I-26.

15 During that time, I received over, well over a thousand  
16 hours in aggressive criminal enforcement and criminal patrol  
17 training. I also became an instructor through the South  
18 Carolina Criminal Justice Academy in teaching criminal  
19 patrol techniques, and aggressive, aggressive criminal  
20 patrol enforcement, and then I also was certified through  
21 the National Highway Traffic Safety Administration as an  
22 instructor for also criminal patrol techniques as well.

23 Q So, your total---

24 A And then the last two years for -- well, actually the  
25 last year and eight months I've been assigned -- I gained

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1 employment with the Spartanburg County Sheriff's Office,  
2 and, and currently assigned with their ICE unit, their  
3 Interstate Criminal Enforcement Unit.

4 Q So, your total law enforcement background is how many  
5 years?

6 A A little over 20 years.

7 Q Okay. And specifically with your time on the  
8 aggressive criminal enforcement, Highway Patrol, your  
9 interstate criminal background here in Spartanburg County,  
10 what type of jobs or duties did you have?

11 A while I mean it's all to protect and serve, but our  
12 main duty was to patrol the interstates looking for all  
13 types of a criminal activity. whether it be drug  
14 trafficking, money laundering, kidnapping, murders, you name  
15 it, we pretty much did it. That's what our job is to do, to  
16 seek, detect, and, and apprehend persons involved in those  
17 types of crimes. But mostly drug trafficking, weapons,  
18 weapons, and stuff like that.

19 Q Okay. What were you doing on the night of June, or  
20 excuse me, the morning of June 30<sup>th</sup>?

21 A On the morning of the -- the morning of June 30<sup>th</sup>,  
22 slightly after midnight, around one o'clock a.m., I was on  
23 routine patrol in Spartanburg County on Interstate 85. At  
24 that -- my supervisor at that time was riding with me. Just  
25 safety precautions. It's just something we did. Sometimes

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1 we do that. We double up just for safety.

2 That evening, Corporal Hancock was riding with me, and  
3 we were monitoring the traffic on Interstate 85, and, at  
4 that time, we're on the northbound side near exit 60---

5 Q So, what county---

6 A ---which is Highway 101.

7 Q ---is that in?

8 A That's in Spartanburg County.

9 Q Okay. And whose vehicle were you in?

10 A Mine.

11 Q And is your vehicle equipped with a dashboard camera?

12 A Yes, sir, it is.

13 Q Okay. Did you record a video of the incident that  
14 we're here for today?

15 A Yes, I did.

16 Q Did you encounter a problem with that video?

17 A Yes, it has a problem with its audio in just the audio  
18 portion of it. It has fairly good visual, but no audio.

19 Q Can you explain the set-up of your video within your  
20 car?

21 A It's probably one of the older models that we have with  
22 the Sheriff's Office. It's a VHS recording. It actually --  
23 there's two ways you can activate it. One is by when you  
24 turn on the blue lights, the, the actual camera comes on and  
25 begins recording and another is by -- we have a remote on

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1 our belt, which is the, also the mic remote that you can  
2 push a button on it and it will start, begin recording at  
3 that time, and that's generally how it operates, and then  
4 you have to manually stop it in the car to make it stop.

5 Q Now, you said that there was a problem with the audio  
6 on this one?

7 A Yes, sir, I did.

8 Q Have you had that problem before?

9 A I've had it, I know of, on two occasions with this  
10 particular camera, and both times, when I've detected it,  
11 I've sent it back or I've taken it where my supervisor has  
12 told me to take it to repair it.

13 Q Okay. And was it repaired, to your knowledge, both  
14 those times?

15 A To my knowledge, yes, sir.

16 Q Okay. And, in fact, when do you realize that the audio  
17 may be out?

18 A When you go back and review the tape. When you have an  
19 incident or that's when you detect it.

20 Q Is---

21 A That's the only time you -- I don't review the tapes on  
22 a, on an occasional basis or anything like that. The only  
23 time I review it is when I have a case, when I've made a  
24 charge or something like that.

25 Q Okay. So, you wouldn't know that the audio was out

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1 until after the incident occurred?

2 A That's correct.

3 Q Okay. What happened about 1:10 that morning?

4 A About 1:10 that morning, I was on -- like I said, I was  
5 on patrol on Interstate 85 on the northbound side. I was  
6 sitting stationary right there at Exit 60 at 101. During  
7 that time, I observed the vehicle that Mr. Moore was driving  
8 pass us. It was in the far right-hand line, which we  
9 consider the number three lane. When it, went it came --  
10 when it approached and passed us, it appeared to be going  
11 well above the posted speed limit, in excess of 70 miles an  
12 hour. The, the posted speed limit is 60, is 60 in this  
13 area.

14 So, then I pulled out on it. As I caught up to the  
15 vehicle, I observed the vehicle change lanes from the number  
16 three lane to the number two lane, which is the middle lane,  
17 without giving a signal, and failed to maintain his single  
18 lane. Therefore, changing lanes without giving signals.  
19 So, then I got behind him in the middle lane, activated the  
20 blue lights, and, at that point, the video camera came on.

21 Q Okay. So, the blue lights activate your camera?

22 A That's correct.

23 Q Have you had an opportunity to review the video?

24 A Yes, sir, I did.

25 Q Okay.

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1 MR. HALL: Can we approach, Your Honor?

2 THE COURT: You may.

3 (WHEREUPON, a bench conference was held out of the  
4 hearing of the jury at this time.)

5 THE COURT: Ladies and gentlemen of the jury, there is  
6 a matter I'm gonna have to take up with the attorneys  
7 outside of your hearing at this point in time. It shouldn't  
8 take us very long. But I'm gonna ask you to step back to  
9 the jury room. Don't begin any discussions until I've asked  
10 you to do so.

11 You may retire at this time.

12 (WHEREUPON, the following takes place outside the  
13 presence of the jury.)

14 THE COURT: Mr. Hall, you want to put your---

15 MR. HALL: Yes, sir, and I apologize.

16 THE COURT: ---issue on the record?

17 MR. HALL: Yes, sir. I apologize. It just didn't  
18 strike me before. But the testimony earlier in the  
19 suppression hearing was that VHS to DVD, and I wasn't aware  
20 of that fact until the testimony this afternoon, and I've,  
21 obviously, then not had an opportunity to, to look at the  
22 VHS to see if there's anything different, if it's, you  
23 know -- I'm not alleging that they've done anything, but I  
24 don't know. You know, maybe we'll get some sound on that.  
25 I have no idea. But, Your Honor---

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1 THE COURT: All right. Well, Mr. Hunter, you indicated  
2 to me at the sidebar---

3 SOLICITOR HUNTER: I believe, in my speaking with Mr.  
4 Owens, the video cassette still is in existence.

5 WITNESS: It is.

6 THE COURT: Okay. All right. I'm gonna -- what I'll  
7 do is I'll require he make that available to you, Mr. Hall.

8 MR. HALL: Yes, sir.

9 THE COURT: And you'll have an opportunity, before you,  
10 you get to your case and before he rests, to have reviewed  
11 it. If it turned out to be something different than what is  
12 related here in the Court, I'll take the appropriate action  
13 and we'll see that that gets put in the record so you can  
14 have that available to you.

15 MR. HALL: All right. Thank you, Your Honor. It's  
16 just---

17 THE COURT: All right.

18 MR. HALL: I apologize. I should of said it before,  
19 but it was just---

20 THE COURT: That's quite all right.

21 Now, as to the, the DVD that's been presented, is there  
22 any objection to that subject to your having reviewed the,  
23 the VHS?

24 MR. HALL: No, sir, no objection subject to viewing  
25 VHS, yes, sir.

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1 THE COURT: All right. Then I'm gonna allow it to come  
2 in. And, of course, if the VHS turns out to be something  
3 different, it's gonna come in.

4 SOLICITOR HUNTER: I understand.

5 THE COURT: It's gonna come in too.

6 All right. Now, let's bring the jury back.

7 (WHEREUPON, State's Exhibit No. 1 was received into  
8 evidence at this time.)

9 SOLICITOR HUNTER: Your Honor, is it okay, I have the  
10 video already set up to play here, if I just use the --  
11 we've marked the outside cover of the video.

12 THE COURT: Yes, sir.

13 SOLICITOR HUNTER: If we take it out and put it back  
14 in.

15 THE COURT: That will be fine.

16 (WHEREUPON, the following takes place within the  
17 presence of the jury.)

18 THE COURT: All right. The record will reflect the  
19 jury has returned to the courtroom.

20 I've admitted the DVD subject to certain restrictions.  
21 You may proceed, Mr. Hunter.

22 SOLICITOR HUNTER: Just to clarify, the DVD is now been  
23 admitted into evidence?

24 THE COURT: Yes, sir, it has.

25 SOLICITOR HUNTER: Okay.

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1 CONTINUED DIRECT EXAMINATION

2 BY SOLICITOR HUNTER:

3 Q When you first pulled him over, was there anybody else  
4 in the vehicle other than Mr. Moore?

5 A No, sir, there was not.

6 Q Okay.

7 A The whole time he was the sole occupant of this  
8 vehicle.

9 Q And how long did it take him to pull over from the  
10 middle lane into the side of the road?

11 A Around twenty---

12 Q Not, not in seconds, but generally.

13 A Forty to fifty seconds, somewhere in there.

14 Q Okay.

15 A Longer than usual.

16 Q Now, that's you driving the vehicle with the dashboard  
17 camera?

18 A That is correct, and I'm in an unmarked Crown Victoria.

19 Q And that's Mr. Moore driving the vehicle in front of  
20 you?

21 A That is, and I've just now turned on the spotlight  
22 cause he's taking a, what I consider an extended period of  
23 time to pull over to the right shoulder.

24 Q And can you read this sign that's going right there  
25 right now?

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1 A I think it said Wellford Duncan exit. I'm not sure.  
2 But we're just prior to 290.

3 Q Okay. When you approached the car, what side of the  
4 vehicle do you approach on?

5 A On the passenger side.

6 Q Why---

7 A And that's what I teach.

8 Q ---do you do that?

9 A It's, it's -- the biggest advantage is officer safety  
10 especially with -- well, it doesn't have as much traffic on  
11 it now, but Interstate 85 is a very, has a bunch of traffic  
12 on it, and it's much safer on the passenger side for many  
13 reasons, and that's what we train our officers to approach.

14 Q What's that on the back right side of his vehicle right  
15 now?

16 A Right now he still has his foot on the brake and the  
17 signal is staying on. He's left the signal on.

18 Q How long does the signal stay on?

19 A In this particular case, it's stays on the whole time  
20 the car's stopped.

21 Q What---

22 A And that's unusual. I mean that's ---.

23 Q What was he doing when you approached that side of the  
24 vehicle?

25 A He's actually talking on his cell phone and he

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1 continues to talk on it even while I'm standing at the  
2 passenger, the window.

3 Q Okay. And when you're looking at him, how would you  
4 describe his posture?

5 A He's slightly slumped over the wheel and talking on  
6 the, on the cell phone.

7 Q Did you notice any smell coming from the vehicle?

8 A Yes, I did. I detected a strong odor of alcoholic  
9 beverage coming from inside the vehicle. During that time,  
10 I'm also looking at the driver. During that time, I'm also  
11 looking at the posture of the driver, looking at his  
12 demeanor as well, and also telling him, during this whole  
13 time, I'm actually telling him who I am, identifying myself,  
14 telling him the reason for the traffic stop, and all those  
15 things, and I'm also doing a, a safety scan of the car  
16 looking for any potential weapons or anything like that.

17 And during that time, that's when I noticed that, you  
18 know, I'm looking at Mr. Moore seeing that his, his  
19 breathing's accelerated by, by looking at the rise and fall  
20 of his chest, and I can also see the pulse in his neck, the  
21 carotid artery. You can see that it's very rapid as well.

22 Q Okay. About the 1:41 mark here, you make a gesture to  
23 Corporal Hancock.

24 What is that gesture?

25 You make it here.

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by Solicitor Hunter

- 1 A It's a, it's a tipping the glass signal --
- 2 Q Okay.
- 3 A -- to show that I smell alcohol or that I know that
- 4 alcohol is -- there's some drinking involved.
- 5 Q Okay.
- 6 A It's just a, it's a, just a, to let him know what I'm
- 7 seeing or smelling.
- 8 Q Okay. Did you ask him about the alcohol?
- 9 A I did. He stated that he had had approximately two
- 10 alcohol beverage drinks that he consumed.
- 11 Q Okay.
- 12 A Two drinks.
- 13 Q So, at this point you're just asking normal license,
- 14 registration?
- 15 A That's right. We -- I may even ask him what, you know,
- 16 where are you coming from or something like that, or if it's
- 17 not his car, you know, if he, if he's, if it's a rental car
- 18 or whatever like that, cause I'm asking for those type of
- 19 documents, your driver's license, your registration, and
- 20 telling him the reason for the stop. He actually tries to
- 21 explain to me a justification as to why he was breaking the
- 22 law.
- 23 Q Okay. Right here he's about to exit the phone (sic).
- 24 Did he do anything that raised your suspicion?
- 25 A Exit the car, just prior to him exiting the car, he

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1 picks his phone back up. He picks his phone back up, and  
2 then I tell him to put it back down, and then he exits the  
3 vehicle, and then you'll also notice, when he exits the  
4 vehicle, he actually walks away from the door leaving the  
5 door open and then he returns back to close it.

6 Q And what's in his mouth at this point?

7 A He's already lit a cigarette and put a cigarette in his  
8 mouth as well.

9 Q At this point, what are you and Corporal Hancock -- do,  
10 do normal traffic stops, what do you do coming up right  
11 here?

12 A Well, normally what we do, when you have clothes like  
13 that, especially with his shirt hanging over his pants, you  
14 want to check and make sure he doesn't have any weapons.

15 Q And you just told him to do something right there. He  
16 had his hands in his pockets.

17 A Yeah, you want to make sure he don't put his hands in  
18 his pockets, but you don't -- we don't, we don't tell them  
19 to raise their hands up high or anything like that.

20 That's -- we don't, we don't do that. He did that on his  
21 own.

22 Q Now, you were there with Corporal -- you're obviously  
23 here or on the right side there where Corporal Hancock is---

24 A That's right.

25 Q ---doing the search?

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by Solicitor Hunter

1 A Right.

2 Q Did you feel anything in the right front pocket?

3 A I felt what, what I knew, through my experience is, I  
4 felt what I knew was a good bundle of money in his, in his  
5 right front pocket.

6 Q And we're about to see that money come out of his  
7 pocket with Corporal Hancock.

8 A Yeah, Corporal Hancock, since he's got the gloves on,  
9 he'll, he'll go in there and Mr. Moore consented to that. I  
10 mean we asked him could we search his person for weapons.

11 Q But you do that for officer safety?

12 A Oh, most definitely.

13 Q Now, at this point he's close to you as opposed to when  
14 you approach on the passenger side of the vehicle.

15 Do you smell anything here?

16 A I continue to smell the, the odor of alcohol coming  
17 from, now emitting from his person, what I believe is his  
18 person.

19 Q Okay. Did you ask him again about drinking?

20 A I did.

21 Q And what did he state?

22 A He, he continued to stick with the story that he had  
23 two, two beverage drinks.

24 Q Now, obviously he's, he's not in handcuffs or anything  
25 at this point, is he?

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1 A No, sir, he's not.

2 Q That's just him putting his hands behind his back?

3 A Yeah, that's what, that's what we call just releasing,  
4 releasing nervous tension.

5 Q Okay.

6 A You'll see him do that during the, putting his hands up  
7 there, scratching his neck, scratching his head, that's all  
8 him doing that. We're not -- the only thing we don't want  
9 him to do is put his hands in his pockets.

10 Q Okay.

11 A Now he's squeezing the money in his pocket again for  
12 whatever reason.

13 Q Okay. For these next couple of minutes y'all have a  
14 conversation, is that correct?

15 A Yes, sir, I talk -- I've got the rental agreement right  
16 there in my hand. It's a rental agreement that he gave to  
17 me when I asked for his license and vehicle information.  
18 Now he's telling me where he's come from, where he's going,  
19 things like that.

20 Q Okay. And where was, did he tell you he was coming  
21 from?

22 A He said he was coming from Lawrenceville, Georgia.

23 Q Okay. And are you aware of where Lawrenceville,  
24 Georgia is?

25 A Yes, sir, I am.

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by Solicitor Hunter

- 1 Q And where is that located?
- 2 A It's a suburb of Atlanta.
- 3 Q In your experience and training as an officer, what
- 4 does Atlanta have to do with drug trafficking?
- 5 A Well, in the, in the little over 14 years of criminal
- 6 interdiction, I'd say 95 percent of the cases, large cases
- 7 that I've made, and I've made probably 400 or more large
- 8 trafficking cases, 90 percent of them or more come from
- 9 Atlanta.
- 10 Q Okay. Where did he tell you he was going?
- 11 A He said he was going to Marion, North Carolina.
- 12 Q And who was he going to visit?
- 13 A He stated he was going to visit his grandmother.
- 14 Q Okay. And what time of the morning is this or late
- 15 afternoon---
- 16 A This is---
- 17 Q ---or evening?
- 18 A This is at one o'clock in the morning.
- 19 Q Okay. And he's already admitted to you that he was
- 20 drinking?
- 21 A That's correct.
- 22 Q Okay. Did you ask him about his employment?
- 23 A I did.
- 24 Q And what did he state to you?
- 25 A He was unemployed.

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1 Q Okay. Did you ask him about alcohol again or any other  
2 illegal---

3 A Yeah, I asked him---

4 Q ---substances?

5 A I asked him if he had any alcohol in the car. When I  
6 asked him that specific question, he said -- he looked down  
7 at the car and back at the car and said no. And then I  
8 asked him if he had any illegal narcotics or any illegal  
9 contraband or weapons in the car, and I asked him that  
10 question as well, he looked down and looks back at the car  
11 as well, and I just note that stuff. I mean that's what  
12 we're trained to detect. It's not necessarily what your  
13 mouth tells us, it's what your body tells us.

14 Q Okay. Did you ask him if he had anything in the  
15 vehicle?

16 A I did.

17 Q And what was his response?

18 A His only response is that he had in the vehicle was the  
19 luggage bag in the trunk was his.

20 Q Okay. If you want to please play. Let's play it a  
21 little while.

22 And, so, the question you just answered, they're all  
23 happening now?

24 A Yes, sir.

25 Q Did you ask him about his traffic violations, the

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1 failure to maintain, the speeding?

2 A I did, and he'll explain -- well, you'll see him kind  
3 of explain it with his hands here in a minute. He was  
4 stating that a vehicle was following him too closely prior  
5 to me stopping him, and that that was why he was speeding,  
6 and that was the reason for his lane change. But there was  
7 no vehicle behind him. There was no vehicle between me and  
8 him. Actually, if you watch the video again, the first  
9 vehicle to pass him is a truck.

10 Q And how would you describe vehicle traffic on---

11 A It's very light.

12 Q ---that night?

13 A I mean very light for Interstate 85. I mean --

14 Q You mean---

15 A -- normally by now you would of had 50 done past you,  
16 and we've only had two right then. I mean this is very,  
17 very, very light.

18 Q Now, at this point you decide to write a warning  
19 ticket?

20 A well, I'm proceeding with a warning ticket, but I'm not  
21 only gonna rely on that when I'm smelling alcohol. So,  
22 right now I'm maybe writing down, you know, indicators of,  
23 of driving under the influence.

24 Q And the warning ticket was just for the---

25 A Moving infraction.

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- 1 Q The moving -- speeding and the failure to maintain?  
2 A The speeding and the failure to main (sic) lane.  
3 Q And we just saw him---  
4 A And he's -- that was him describing that a car was  
5 following him too closely, and he also makes the statement  
6 that he thought the speed limit was 70, and it's clearly  
7 posted that it is 60.  
8 Q And any point on northbound 85 from the Georgia line in  
9 South Carolina is the speed limit 70 --  
10 A No, sir, it's not.  
11 Q -- to your knowledge?  
12 A When you, when you change into South Carolina, it does  
13 not -- it's not 70 until you get to the 68 mile marker.  
14 Q And that's the new 85?  
15 A That's correct.  
16 Q Business 85.  
17 A That's correct.  
18 Q Where it splits?  
19 Q Yeah, that's just, just below the split, 84 business  
20 split.  
21 Q What did he just do right there?  
22 A He did the same thing I did, talking about drinking.  
23 Q So, at this point, with the smelling of alcohol and he  
24 admitting to drinking, what is your next step in the  
25 investigation?

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1 A Well, it's, it's necessary that we do standardized  
2 field sobriety tests just to make sure we check his, his  
3 level of impairment to see if he's impaired or not impaired.

4 Q Right.

5 A Right there you see Corporal Hancock calling in the  
6 traffic information or the license information and tag  
7 information.

8 Q And that, and that document in your hand, it kind of  
9 waves around, he's trying to grab for it right there, what  
10 is that?

11 A That's the rental agreement.

12 Q Did you ask him about the rental agreement?

13 A I did, because he didn't rent it. He didn't rent the  
14 car.

15 Q Who did he say rented the vehicle?

16 A His cousin.

17 Q Okay. He was on the rental agreement as an additional  
18 driver, but still, the rental agreement didn't match all of  
19 his story either. The rental agreement actually would show  
20 that he rented the car or his cousin or whoever the name at  
21 the top is, he stated his cousin, but it stated that it was  
22 rented in Morganton, North Carolina earlier that day at four  
23 o'clock, and he was on his way back from Lawrenceville at  
24 one o'clock in the morning. So --.

25 Q Can you pause it for a second?

Dale Owens - Direct examination  
by Solicitor Hunter

1 At this time the State's gonna show you what is been  
2 premarked as State's Exhibit 2.

3 Do you recognize this document?

4 A That's the rental agreement that Mr. Moore provided me  
5 on the traffic stop.

6 SOLICITOR HUNTER: Okay. At this time the State would  
7 seek to admit State's Exhibit 2 in evidence.

8 THE COURT: Objections?

9 MR. HALL: No objections.

10 THE COURT: Without objection it will be admitted as  
11 marked.

12 (WHEREUPON, State's Exhibit No. 2 was received into  
13 evidence at this time.)

14 THE COURT: You may proceed.

15 SOLICITOR HUNTER: Can the witness step off the witness  
16 stand please?

17 THE COURT: Certainly.

18 (Witness comes down from the stand.)

19 Q If you can show this to the jury?

20 Can you show where the vehicle was rented and where it  
21 was rented from?

22 A It was rented from Enterprise Leasing Corporation at  
23 1021---

24 THE COURT: Just one second.

25 All right. The lights are up. You can go ahead.

Dale Owens - Direct examination  
by Solicitor Hunter

1 A Berkmont Avenue in Morganton, North Carolina, and it  
2 was rented on June the 29<sup>th</sup> at 3:59, around four o'clock  
3 in the afternoon.

4 Q Okay. If you could come down here and let the jurors  
5 see it over here.

6 A (Witness complies.)

7 Location, rental, time of rental, and the person's name  
8 at the top who rented it.

9 Q I think they wanted to see that back. Just hand it  
10 back.

11 THE COURT: You can, you can pass it around.

12 Q In fact, they can, we can---

13 THE COURT: Just let them pass it around. There you  
14 go.

15 Q Now, on the rental agreement and in your conversations  
16 with Mr. Moore, he agreed that he did not rent the vehicle?

17 A That is correct.

18 Q But he is listed as one of the drivers for it?

19 A He is listed down, about half way down that as the  
20 additional driver, yes, he is.

21 Q Okay. And his story to you was that, at this time, one  
22 o'clock in the morning, he's coming back from Lawrenceville  
23 Georgia?

24 A That's what he had stated, yes, and that he was now in  
25 route to his grandmother's house in what I believe was

Dale Owens - Direct examination  
by Solicitor Hunter

1 Marion, North Carolina.

2 Q Okay. Now, at this point you're gonna do some field  
3 sobriety tests?

4 A That is correct.

5 Q Can you -- let's -- why do you turn the blue lights off  
6 there?

7 A Why do we do it?

8 Well, it's just our standard procedures with the  
9 Sheriff's Office and many law enforcement agencies, when  
10 you, when you conduct the standardized field sobriety test,  
11 especially this portion right here, the horizontal gaze  
12 nystagmus, when you check, when you're checking for  
13 involuntary jerking of the eyes, that way the light doesn't  
14 effect that test.

15 Q Okay. Now, you performed, I believe, three tests on  
16 Mr. Moore?

17 A Yes, sir, they're all standardized field sobriety  
18 tests, yes, sir.

19 Q And the first test is the horizontal, horizontal gaze  
20 nystagmus test?

21 A That's correct.

22 Q And in your estimation, he, he passed this test,  
23 correct?

24 A Yes, he did.

25 Q Okay.

Dale Owens - Direct examination  
by Solicitor Hunter

1 A You're looking for six clues in there, and you have to  
2 have four to, to fail this test, and I didn't have four of,  
3 four of the clues. So, I didn't have four out of the clues  
4 to constitute a failure in my opinion.

5 Q Now, not with just this test, let's talk overall about  
6 the field sobriety test.

7 What, what are your instructions?

8 How do you go about---

9 A Well, you have an instructional---

10 Q ---what you're doing?

11 A Well, with not necessarily this test, but the other  
12 two tests, you have an instructional phase, and then you  
13 actually have a performance phase where you're actually  
14 performing it, and, you know, this test, what I'm looking  
15 for is lack of smooth pursuit. I'm also looking for equal  
16 pupil size, and I'm also looking for any jerking of the eyes  
17 either at 45 degrees or at maximum deviation, and I didn't  
18 see that in this case. And I did, I didn't see enough clues  
19 to constitute him failing this test.

20 Q And what was the next test that you performed?

21 A It's the one leg stance.

22 Q Okay. And could you describe that for the jury?

23 A Yes, sir, it's a -- there's an instructional phase  
24 where I go through the instructions or the processes of  
25 instructing the, Mr. Moore of what to do and how to do it

Dale Owens - Direct examination  
by Solicitor Hunter

- 1 and when to begin. And what I do is basically I go through  
2 the process, and I show him how to do it. During that time  
3 I'm also telling him how to do it, and then, at the end of  
4 the instruction phase, I ask him does he understand the  
5 process of it, and I'm, and I also check to make sure that  
6 he can perform it, that he doesn't have any problems with  
7 either one of his legs, and he so much said that he didn't  
8 have any problems with his legs. I felt that he could of  
9 performed the test, and he, he attempts that in this case.
- 10 Q Okay.
- 11 A He actually fails that test.
- 12 Q How many times did he attempt to, to stand on the one  
13 leg?
- 14 A And you'll see it on the video. I think it's at least  
15 twice, maybe three times.
- 16 Q Okay. And what, what instructions, as far as how long  
17 he has to do it, do you give?
- 18 A Well, I tell him to keep counting until I tell him to  
19 stop, but I'm looking for 30 seconds. I'm not really  
20 listening to his counting or anything cause that's -- even  
21 if he messes up counting, that's not part of the test.  
22 That's not what I'm listening for. I'm actually looking for  
23 his balance. I'm looking for him not raising his arms. I'm  
24 looking for him not jumping and not putting his foot down,  
25 and not beginning before I tell him to begin.

Dale Owens - Direct examination  
by Solicitor Hunter

1 Q And based on what you observed that night, and what you  
2 observed him do in this video, in your estimation, did he  
3 pass or fail this test?

4 A He actually failed the one leg stance. That's the only  
5 test that he did fail out of the three standardized tests.

6 Q So, at this point, this is where you're showing him how  
7 to do tests?

8 A Yes, sir.

9 Q And that's your right leg lifted off the ground?

10 A Yep.

11 Q And he's---

12 A And I'm telling him eyes pointed at the toe, toe lifted  
13 off the ground, yep. Counting 1,001, 1,002, 1,003, and I  
14 tell him to continue counting until I tell you to stop  
15 because the test is actually for 30 seconds.

16 Q Pretty soon you'll move out of view of this video and  
17 you'll see---

18 A Yeah, and I'll let him perform it. Exactly.

19 Q Okay.

20 A He puts his foot down right there. He's lifting his  
21 arms. Now he tries his other foot, and he loses and goes  
22 there.

23 Q So, he doesn't even last ten seconds?

24 A No, sir.

25 Q So, you're---

Dale Owens - Direct examination  
by Solicitor Hunter

1 A So now I'm showing him again how to do the test. See  
2 I'm telling him to look down at his toe. He's not looking  
3 at his toe. Now when he starts to look at his toe, that's  
4 where he loses his balance. That's part of the test. You  
5 have to focus on the tip of your toe. Now I'm asking him to  
6 stand to the side while I give him another instruction for  
7 another test.

8 Q This is the---

9 A Now this is the walk and turn.

10 Q Okay. And I'm not gonna ask you questions about this  
11 cause, in your opinion, he, he passed this test based on  
12 your training and experience?

13 A That's right, right. That's correct.

14 Q At this time, do you -- what are you asking him?

15 A I basically explained to him, you know, that I don't  
16 think that he's to the point where he's impaired to the  
17 legal limit. Let's put it that way, and I explained to him  
18 that, you know, I'm not gonna arrest him for the actual  
19 offense of driving under the influence. I think---

20 Q Are you asking him questions about what's in the  
21 vehicle?

22 A I do. I asked him about if he has any alcohol or  
23 anything illegal in the vehicle. He looks down and back at  
24 the car as if I can see it, and then I ask him about any  
25 illegal narcotics, weapons, or anything like that and then

Dale Owens - Direct examination  
by Solicitor Hunter

1 it's the same thing he looks down and at the vehicle as if I  
2 could see it.

3 Q You asked him for consent to search?

4 A I do.

5 Q And?

6 A He says -- he initially says I don't want you searching  
7 my luggage, and then he tells me no cause I asked him again  
8 can I search the vehicle.

9 Q At that point, at that point, what did you and Corporal  
10 Hancock do?

11 A Corporal Hancock then notifies our drug, our K-9  
12 handler and he gets him beginning to come in route to the,  
13 to the location.

14 Q Okay. And where do you put Mr. Moore at this, from  
15 this point?

16 A I just stand him to the side of the video or to the  
17 side of the car, which is to the side of the video. That  
18 way he's not between the two cars if someone were to hit it.

19 Q Okay.

20 A Actually I, I stand between -- I kind of keep, for his  
21 safety, which isn't much safer, but is it a little safer,  
22 keep him out from between the cars from that point.

23 Q Is he in handcuffs?

24 A No, he's not.

25 Q Okay. And is he in your patrol car?

Dale Owens - Direct examination  
by Solicitor Hunter

1 A No, he's not.

2 Q He's allowed to stand free out there?

3 A Yeah, he does. He actually, he actually then begins to  
4 smoke a cigarette again.

5 Q Okay. Approximately how many minutes before  
6 Mr. Carraway and the K-9 come?

7 A It's about 15 minutes.

8 SOLICITOR HUNTER: All right. Your Honor, the State,  
9 at this point, would like to fast forward the video for 15  
10 minutes.

11 THE COURT: All right. You may do so.

12 Q At this point, why, why are you detaining him further  
13 after you've given the field sobriety test?

14 A For my training and experience, I feel that Mr. Moore  
15 is involved in some major criminal activity.

16 Q Upon the dog getting there, and Mr. Carraway will  
17 testify, but did you search this vehicle?

18 A Prior?

19 Q Did you search -- no, no, no. After the dog gets  
20 there.

21 A Yes, I did.

22 Q Did you ultimately search the vehicle?

23 A Yes, I did.

24 Q What did you personally find?

25 A Underneath the passenger front seat, I actually found a

Dale Owens - Direct examination  
by Solicitor Hunter

1 bottle of liquor underneath the passenger front seat.

2 Q Was the seal broken---

3 A Yes, it was.

4 Q ---on that?

5 A You can actually see it on video. It's about half to  
6 three-quarters full --

7 Q Okay.

8 A -- or empty, whichever way you want to say it.

9 A You personally found the bottle of alcohol?

10 A I did. And then -- when I retrieved that, I brought  
11 that back. Deputy Hancock was in the process of searching  
12 the trunk, and I walked up to him, and watched him search  
13 the trunk, and there was only one bag in the trunk and he  
14 was in the process of searching that when I walked back to  
15 him.

16 Q Okay. And, again, what, what county did this take  
17 place in?

18 A Spartanburg County.

19 Q All right. Thank you. Please answer any questions  
20 that Robert may have for you.

21 THE COURT: Mr. Hall, your witness.

22 MR. HALL: Thank you, Your Honor.

23 CROSS-EXAMINATION

24 BY MR. HALL:

25 Q Let's try to get through this.

Dale Owens - Cross-examination  
by Mr. Hall

- 1       How long does it normally take somebody to pull over?  
2       You said this 45 to 40 seconds was longer than normal.  
3   A   Probably 15.  
4   Q   All right. If he's going 70 miles an hour --  
5   A   (Witness nods affirmatively.)  
6   Q   -- and 15 seconds he can---  
7   A   Yes, sir, he can.  
8   Q   -- change lanes and pull over?  
9   A   Yes, sir, he can. That's what's normally consistent.  
10   Q   Now, you said you didn't tell him to put his hands up.  
11   Now, I understand we can only see on the video, but if you  
12   looked, and the jury will have this to look at later along  
13   with pulling over, it looked like, with your right-hand, his  
14   left-hand, you do like this a couple of times and that's  
15   when he puts his hands up the first time?  
16   A   No, I don't---  
17   Q   Did you see that?  
18   A   I don't.  
19   Q   Okay.  
20   A   And I mean, I mean I could be asking him do you have  
21   any weapons on you or anything like that because I'm looking  
22   at the length of his shirt and everything and that's the  
23   most common place for a weapon to be concealed.  
24   Q   You're doing like this.  
25   A   Well, I don't know.

Dale Owens - Cross-examination  
by Mr. Hall

1 Q I know you got your hand out like this and you go like  
2 that. It's not unusual to go on up.

3 A I don't know.

4 Q That would be reasonable?

5 I mean---

6 A Maybe to you.

7 Q You've got this training, but if somebody's hand  
8 putting, going out like that, you do like that.

9 A But he does it several times, Mr. Hall.

10 Q All right. Well, we have the video.

11 Now, do you have those indicators that you said you  
12 were writing down?

13 A I don't have them with me.

14 Q Do you -- do they exist?

15 A What?

16 Q You said you were writing the -- you testified, you  
17 said---

18 A Oh, you mean over there?

19 Q ---I'm writing down, I'm writing down the indicators.

20 A No, cause I didn't charge him with DUI.

21 Q So, you made notes in this case and you didn't keep  
22 them?

23 A I made notes of what he was doing on the test. When I,  
24 when he passed those tests, there was no need to keep those  
25 notes. I mean those -- when you pass that part of the test,

Dale Owens - Cross-examination  
by Mr. Hall

1 I don't see the need in keeping those, those notes of what  
2 you're failing or what you're missing.

3 Q So, so, you don't?

4 A I, I didn't keep those, no.

5 Q Do you know if you've thrown them out or whatever?

6 A I didn't keep them. I just jot those on the front of  
7 my pad until I need them if I need them.

8 Q All right. So, so, the notes you made in this major  
9 case you tossed out.

10 You testified---

11 A I didn't charge him with DUI, Mr. Hall.

12 Q I understand that, but it's still a, notes made in this  
13 case.

14 A Well, I guess if I were to charge him with DUI I would  
15 of kept those notes, but I didn't charge him with that.

16 Q But the answer to my question is, in this case that  
17 we're here on now, you made some notes and you don't have  
18 them anymore, you tossed them out?

19 A Of the DUI, right.

20 Q I understand you didn't charge him with DUI.

21 A Right. Those are only notes in regards to DUI.

22 Q Okay. Now, you also just said, again, he's standing  
23 free, but he was not free to leave, was he?

24 A At that point, no, sir, he was not free to leave.

25 Q Okay. He made the point, Mr. Hunter made the point of

Dale Owens - Cross-examination  
by Mr. Hall

1 he's standing free. He's not in handcuffs, but he's not  
2 free to leave now?

3 A No, sir.

4 MR. HALL: Beg the Court's indulgence just a moment,  
5 Your Honor.

6 THE COURT: Yes, sir.

7 (Pause.)

8 Q Now, when you're -- you approached the vehicle from the  
9 passenger side, and you're -- was the window up or down when  
10 you approached it?

11 A It was up.

12 Q It was up.

13 okay. And apparently, from the video, he puts on the  
14 brake and the blinker's on, right, from the---

15 A Correct.

16 Q ---video?

17 Did you look and see if the car was in park or tell him  
18 to cut the car off or anything?

19 A I, I did not.

20 Q Now, did he roll the window down because you were able  
21 to smell the alcohol and then give the sign I guess it's  
22 almost the international sign of drinking?

23 so, did the window come down at some point?

24 A Yes, sir.

25 Q Okay. All right. And you had some conversation with

Dale Owens - Cross-examination  
by Mr. Hall

- 1 him and spoke with him at that point?
- 2 A That is correct.
- 3 Q Okay. But you didn't say cut it off or put it in park?
- 4 A No, sir.
- 5 Q All right. If you had come up on a car like that and
- 6 they still had it in gear, you would not say just put it in
- 7 park or anything?
- 8 A I may if I noticed it's in drive, yeah, I'll tell them
- 9 to put it in park.
- 10 Q All right. What kind of car was this?
- 11 A I, I don't recall.
- 12 Q This is a small car, two door car?
- 13 A I guess. Yeah, small to midsize I guess you would say.
- 14 I'm -- it's not, it's not a large car, no.
- 15 Q No.
- 16 A It's a four door.
- 17 Q It's a four door?
- 18 A I believe it was.
- 19 Q Okay. But you couldn't see if the car was in park or,
- 20 or drive or---
- 21 A I didn't make note of it, Mr. Hall.
- 22 Q All right. Well, I mean you -- it's a Cobalt according
- 23 to this rental agreement.
- 24 A There's two doors and four doors of those.
- 25 Q Now, where were you when you noticed the accelerated

Dale Owens - Cross-examination  
by Mr. Hall

1 breathing?

2 A I was at the passenger's window.

3 Q Were you looking in?

4 A I was at the passenger's window looking in.

5 Q All right. What does that mean, accelerated from what?

6 A Accelerated. I mean it just looks rapid to me.

7 Q All right. No further questions.

8 THE COURT: Redirect?

9 SOLICITOR HUNTER: Nothing from the State, Your Honor.

10 THE COURT: You may step down.

11 SOLICITOR HUNTER: Can Deputy Owens be excused, Your

12 Honor?

13 THE COURT: Any objections?

14 MR. HALL: I have no objections.

15 THE COURT: You're free to go, sir.

16 WITNESS: Thank you, sir.

17 THE COURT: The State may call its next witness.

18 SOLICITOR HUNTER: State would call Deputy Jason

19 Carraway.

20 THE COURT: Come forward, sir, to my left and be sworn.

21 JASON CARRAWAY, having been first duly

22 sworn, testified as follows:

23 THE COURT: Have a seat, sir.

24 (Witness complies.)

25 THE COURT: State your name.

Jason Carraway - Direct examination  
by Solicitor Hunter

1 WITNESS: Jason Carraway.

2 THE COURT: Your witness, Mr. Hunter.

3 DIRECT EXAMINATION

4 BY SOLICITOR HUNTER:

5 Q Please tell the jury your law enforcement experience.

6 A I graduated from the University of South Carolina in  
7 2000 with a Bachelor's Degree in Criminal Justice, and  
8 immediately, immediately, upon graduating from college, I  
9 started with Spartanburg County in 2000. So, I've been  
10 there approximately ten and a half years.

11 Q Okay. And how did you first start out?

12 A I started out uniform patrol, answering calls for  
13 service, doing routine patrol, that thing. I did that for  
14 about two and a half years, and then I moved on into the  
15 traffic division, and then when our Interstate Criminal  
16 Enforcement Team was started up about six and a half years  
17 ago, I started in that and that's where I've been since  
18 then.

19 Q Okay. And who's on the Interstate Criminal Enforcement  
20 Team?

21 A At this time it's myself, Corporal Hancock, Deputy  
22 Owens, and Deputy Gilbert. It's a four member team.

23 Q Now, do you have a K-9?

24 A I do.

25 Q What's his name?

Jason Carraway - Direct examination  
by Solicitor Hunter

1 A His name is Deuce.

2 Q And how long have you been working with Deuce?

3 A I've been with Deuce for a little over two years. He  
4 had a previous handler. He's seven years old now. So, he's  
5 been on the road about five years. But that handler took  
6 another job. So, I took over as the handler when he left.

7 Q Okay. And how is your dog certified to do this type of  
8 thing?

9 A They -- when they're first trained, they go through  
10 their initial training and certification. I believe what he  
11 went through is at Charlotte-Mecklenburg school, and then  
12 they go through maintenance training every month to do at  
13 least sixteen hours of maintenance training with the dog,  
14 and then annually we go through certifications through a, a  
15 separate organization that's nationally accredited that does  
16 our certification for the dog annually.

17 Q And as far as you can remember, on June 30<sup>th</sup>, 2010,  
18 were you and Eagle certified?

19 A Or Deuce?

20 Q Or Deuce.

21 A Yes, we were.

22 Q I'm getting words mixed up. I'm sorry.

23 A That's all right.

24 Q What type of training do you and Deuce do together?

25 A Well, being as that he was previously, had gone through

Jason Carraway - Direct examination  
by Solicitor Hunter

1 all his initial training, he was what we call a fully  
2 trained dog, I went through a two week course with him, with  
3 a, with a certified trainer basically to familiarize me with  
4 the dog and get me up to speed with him. He already knew  
5 exactly what he was doing. It's just me becoming accustomed  
6 to working with him. And then after that we go through a,  
7 do monthly training. We actually train on every Wednesday  
8 is our training day, and what we try to do is sixteen hours  
9 minimum a month maintenance training to make sure that he's  
10 performing where he needs to, and I also go through a yearly  
11 certification through North Carolina Police Work Dog  
12 Association that does certification for trial's force.

13 Q And when you do just your monthly training with Deuce,  
14 what -- excuse me. Let me go back.

15 What type of K-9 is he?

16 A He's what we call a full patrol dog. He's -- he  
17 tracks. He does handling protection and apprehension. He  
18 searches for articles and he also is certified in narcotics  
19 detection.

20 Q Okay. And back to your monthly training, what type of  
21 narcotics detection task do you perform in your training  
22 exercises?

23 A What we do is we a, do a, all different types of  
24 things, but we have -- we do vehicle searches, searches in  
25 houses, outdoor searches, and the drugs that he's detected

Jason Carraway - Direct examination  
by Solicitor Hunter

1 or trained to detect would be marijuana, cocaine, crack  
2 cocaine, meth, or heroin, or anything derived from those.  
3 So, we put those actual drugs out and have them search for  
4 those drugs.

5 Q And in your training, what success rate does he have in  
6 detecting narcotic substances that y'all place in the  
7 different areas?

8 A He's a hundred percent in training. That's what---

9 Q And on the road?

10 A Training's what we call a controlled environment. We  
11 know when drugs have been there and when they haven't.  
12 Uncontrolled environment would be out on the road when we're  
13 working, and his success rate on the road is approximately  
14 90 percent over the past two years that I've had him, him.  
15 And the way we figure that out is we use -- every time we  
16 get him out of the car and use him for anything, there's a  
17 report done.

18 In that report, if there's something that's located, an  
19 illegal drug, we note the drug, the amount, or weight, and  
20 where it was located, that kind of thing. If there wasn't a  
21 drug located, if there was like residue, you know, marijuana  
22 shake or whatever else where he could still detect that  
23 odor, even though there may not be an arrest made, we would  
24 note that in the report.

25 Also, there's times that there's what we call lingering

Jason Carraway - Direct examination  
by Solicitor Hunter

1 odor. The best way I can describe that is to say you go to  
2 Little Ceasar's and pick a pizza up, put it in the car, you  
3 drive home, take the pizza out, you go in and eat it, you  
4 may come back out to your car an hour later, it still smells  
5 like that pizza inside, but there's no pizza in there.

6 A dog has a much bigger sense of smell than a human  
7 does. So, you know, he smells things that we can't smell,  
8 you know, that, that odor's still present. So, you know, if  
9 I -- if we stop someone and I have him sniff around the car  
10 and he alerts, I may ask him, look, has there been anything  
11 illegal in there, and they may say yeah, I had a, you know,  
12 a joint or I had marijuana in the car a couple of hours ago.

13 And he's, his sense of smell is so good he can still  
14 smell it even though I can't. So, that, that still supports  
15 his alert that, you know, something has been present. So --  
16 and then there's a few times that he may alert that we don't  
17 find anything at all, and they may say well, you know, I  
18 don't know if there's anything in there or not. I give them  
19 the benefit of the doubt and say, you know, nothing was  
20 found.

21 So, all those reports are tallied up at the end of the  
22 month, and it shows on there if he alerted, what was found,  
23 that kind of thing, and there's also times that we run a car  
24 that he doesn't alert, and, you know, if he doesn't alert,  
25 there's nothing there. You know, that, that proves his

Jason Carraway - Direct examination  
by Solicitor Hunter

1 reliability as well.

2 So, that's where that 90 percent comes in.

3 Q So, so, nine times out of the ten, if he alerts, that  
4 means you're gonna, you found something---

5 A Right.

6 Q ---in the vehicle?

7 A That's correct.

8 Q So, you only had the ten percent rate where he alerts  
9 and there's nothing in the vehicle?

10 A Right, that we can't support anything.

11 Q And on the night of June 30<sup>th</sup>, where were you  
12 located?

13 A I was on I-85 working southbound. I was around the 80  
14 mile marker.

15 Q Okay. So, you were on the opposite side of, of the  
16 county from---

17 A Right.

18 Q ---from this?

19 A That's correct.

20 Q Okay. And when you got the call, what did you do?

21 A I think it's Corporal Hancock that called. Usually  
22 they'll call me and let me know if they need just me to come  
23 or if they need me to come because of the dog. I think he  
24 may of told me that he had a refusal, and usually if I'm far  
25 away, I'll try to tell them, you know, I'm leaving from the

Jason Carraway - Direct examination  
by Solicitor Hunter

1 80 mile marker so they know it's gonna be a few minutes  
2 before I get there. But as soon as he called, I pull out  
3 and start heading that way.

4 Q How many K-9 units are there in the Spartanburg County  
5 Sheriff's Office?

6 A They're six that are trained to detect narcotics total.

7 Q Okay. So, that's yours and who else?

8 A I have one. Narcotics has one assigned to them, and  
9 then our uniform patrol division has four that are, that are  
10 assigned to tell. Each -- they have one dog for each what  
11 we call platoon or shift. So, if anytime there's only on  
12 platoon working, they'll have one dog assigned to them.

13 Q Okay. So, that's, that's only three dogs on the road  
14 at one time at best?

15 A At the most, yeah. Usually it's either one or two at  
16 the most.

17 Q Okay. So, on this night you get the call, and can you  
18 explain what a priority is?

19 A Yeah, priority for us is where we, where we respond  
20 with our lights and siren on.

21 Q It's where a K-9 -- when they call for a K-9, it's  
22 where you respond priority?

23 A Yeah, not for a drug sniff. The only time we would --  
24 you know, it's like an armed robbery or something like that,  
25 and we have to get there quick to run a track or, you know,

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by Solicitor Hunter

1 something of that sort. But not for just a refusal for a  
2 car, for a sniff.

3 Q So, once they call, it takes you about 15 or 16 minutes  
4 to get from the top of the county---

5 A Right. I, I actually left -- I was on the south end  
6 side. I left from the 80 mile marker, which if you're  
7 familiar with Gossett Road area, 221 area, I had to drive  
8 south all the way down to Exit 60, which is Highway 101, and  
9 I had to go down there and turn around and come back two  
10 miles since there's a center wall there. I couldn't cross  
11 the median. So, I had to go down and come back two miles to  
12 get to where they were at.

13 Q Okay. And your lights weren't flashing or---

14 A No, they weren't. They were not.

15 Q When you get to that location, what do you do?

16 A When I pull up, like I said, I believe Corporal Hancock  
17 had already told me that it was a refusal. I usually just  
18 go ahead and get the dog out, and come straight to the car,  
19 make sure they have everybody out of the car, and at that  
20 time I give him his command to begin the exterior sniff of  
21 the vehicle.

22 Q I believe in a few seconds, in a few minutes you'll see  
23 another set of lights pull up here on the bottom right of  
24 the video.

25 Was anyone with you that night?

Jason Carraway - Direct examination  
by Solicitor Hunter

- 1 A No, I was alone. Deputy Gilbert was also working. He  
2 was in a separate vehicle. I think he actually arrived  
3 around the same time that I did cause he was the only other  
4 person that was out working on that team with us that night.  
5 You know, Deputy Owens and Corporal Hancock were in the same  
6 car. So, when I left to go down, he just came down with me.
- 7 Q There were no, no other subjects, only police officers?
- 8 A Right. That's correct.
- 9 Q Okay. Do you see that light right there?  
10 Is that you showing up?
- 11 A I believe that is, that is me pulling up behind his  
12 car.
- 13 Q What kind of K-9 is Deuce?
- 14 A He's actually a Dutch Shepherd, and it takes me just --  
15 I have to get out and actually get his leash and, and a toy  
16 that I use to reward him with.
- 17 Q But where, where, where do you start the sniff at?
- 18 A I start at the back, the rear of the car. You'll see  
19 me come up in a minute where the trunk's at, and I work  
20 around a counter-clock wise pattern. You can do it any  
21 number of ways. The reason I choose to do it that way is I  
22 want to go up the clean side of the car first, what we call  
23 the clean side away from traffic, and you know, if I have --  
24 if it doesn't, don't have an alert there, then I can go back  
25 down the opposite side, and I'm actually facing into traffic

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by Solicitor Hunter

1 so I can see if the car is coming. I don't want to have to  
2 turn my back to oncoming traffic or somebody in that lane.  
3 I think you actually see us coming up in the, in the shadow  
4 there now.

5 Q And that's you and the dog?

6 A It is.

7 Q Okay. What type of an alert does your dog do?

8 A He's what is called a passive alert. There's, there's  
9 two different kinds. There's what's called aggressive  
10 alert, which what they do is when they detect the odor of  
11 whatever it is they're trained to detect, they'll scratch.  
12 These is what we call passive alert. What he does is when  
13 he detects that odor, whatever odor it is he's trained,  
14 he's, he's searching for, he'll sit or sometimes if the  
15 odor's coming from real low to the ground, he may lay down.  
16 But he -- that, that's how he goes---

17 Q What's the actual, what's the actual thing that alerts  
18 you that he's alerting to the presence of narcotics?

19 A There's several things that we look for. Obviously,  
20 the reason why he sits is because he's trained to sit when  
21 he smells that odor. But in the course of his training, you  
22 know, he begins to associate his, his toy with the odor or  
23 whatever it is he's trained with. That's what's he's, in  
24 his mind, he's looking for, which is the reason why we carry  
25 a toy to reward him with.

Jason Carraway - Direct examination  
by Solicitor Hunter

1 But when he starts to detect that odor or getting what  
2 we call a scent call of, of whatever it is he's searching  
3 for that he's trained to detect, you'll start to see  
4 behavior changes in the dog that we can't train him to do.  
5 They, they do it naturally, and, you know, different dogs do  
6 different things.

7 With him, you'll have a change in breathing, his search  
8 pattern may change, and I may be having him work this way  
9 and stop for a second and want to go back to that odor,  
10 different things like that that I look for that he does  
11 before he even goes into what we call the final indication  
12 or response where he actually sits.

13 Q Okay. But -- so, on this night, did he alert on this  
14 vehicle?

15 A Yes, he did.

16 Q And approximately where did he alert?

17 A He was up around the passenger door area on the  
18 passenger side.

19 Q You said that you reward him.

20 A Right.

21 Q Can, can you make him alert for his, for a reward?

22 A I mean I can make him sit, but he wouldn't have all  
23 these behavior changes that he has when he detects one of  
24 those odors, marijuana, cocaine, crack, and heroin.

25 Q And, so, if he had alerted in one of the training

Jason Carraway - Direct examination  
by Solicitor Hunter

1 sessions in a controlled environment, he would have those  
2 and he would sit as well?

3 A Right, the, the behavior changes, in conjunction with  
4 the final trained response, which is to sit or to lay, is --  
5 and that, after that's when he's rewarded. When we go  
6 through out certification, they actually do what's called  
7 blind hides which is I don't know where the hides are at.  
8 Only the, only the person doing the certifications knows  
9 where they are, and there's no way that I can cue him or  
10 make him sit in a certain spot and pass that because I don't  
11 know where the hides are at.

12 He has to locate them on his, on his own and I have to  
13 be able to read him to say yes, he's alerted to a narcotic  
14 odor and reward him for that. So --.

15 Q Do you go to traffic stops where he, he doesn't sit or  
16 have any changes in behavior?

17 A Yes, I do.

18 Q Okay. And you said in the training he has a hundred  
19 percent in a controlled environment?

20 A Yes, no false alerts in training.

21 Q And that includes the blind hides where you don't know  
22 where---

23 A That's correct.

24 Q ---the narcotics are?

25 Now, because he alerted on the passenger side of the

Jason Carraway - Direct examination  
by Solicitor Hunter

1 vehicle, does that mean that the narcotic substances would  
2 of been found there?

3 A Not necessarily. There's several different factors.  
4 One thing with this car, the driver, the defendant left the  
5 window rolled down on the passenger side. So, even though  
6 something's in a different spot, the way the, the way the  
7 odor moves around, it's kind of like smoking.

8 I know everybody's seen, you know, trash burning or  
9 whatever else. It's gonna go up and it's gonna follow the  
10 flow or current of the wind, different things like that, you  
11 know, and when the car gets full, if you fill the car with  
12 smoke, eventually there's gonna be no more room for it to  
13 do. So, it's gonna start coming out door handles, cracks,  
14 or out that open window, which is the path of least  
15 resistance.

16 So -- and then you, you also have outside wind  
17 direction, which, if you've got a car that comes down the  
18 road, a big truck, which they're several that pass by during  
19 the time of the stop, it's gonna make the wind blow from the  
20 back of the car towards the front of the car. So, it's  
21 gonna be pushing that odor from back to front and then also  
22 it's gonna be coming out that open window, which is, which  
23 is where he alerts at.

24 Q In your training and experience, is it uncommon for, to  
25 have a dog alert on the side or the front of a vehicle and

Jason Carraway - Direct examination  
by Solicitor Hunter

1 actually find a substance on the opposite side?

2 A Not, not at all. There's times that he, that he may  
3 alert and it be -- he may alert at the trunk and it's in the  
4 trunk or he may alert, in this case, at the driver's door or  
5 the passenger door and it's in the trunk. So, there's a lot  
6 of factors that depend on how that odor travels or where he  
7 picks it up at.

8 Q Okay. Thank you. Please answer any questions that  
9 Mr. Hall may have for you.

10 A Yes, sir.

11 THE COURT: Mr. Hall, we're gonna save that till in the  
12 morning.

13 Bring the lights up please.

14 I believe one of the jurors needed to pick someone up,  
15 and, so, we're gonna let you get out of here a little  
16 quicker than we normally would.

17 But at any rate, over the evening, I'm going to ask  
18 that you follow the same instructions that I gave you at  
19 lunch time today. Again, don't attempt to gather any  
20 information outside of the courtroom. Don't listen to,  
21 watch, or read any media reports. Don't discuss the case  
22 with anyone and don't allow anyone to discuss it with you.

23 We're gonna begin again in the morning at nine o'clock.  
24 I'll ask that you be back in the jury room that's in use for  
25 this case at that time. I trust everyone will have a good

1 I trust everyone had a good evening.

2 Now, is -- was there any juror who had any difficulty  
3 in following my instructions when you, that I gave you when  
4 you left the courthouse yesterday evening, please stand.

5 (No response.)

6 THE COURT: It indicates then that all jurors have,  
7 were able to follow my directions.

8 And when we broke yesterday, the State had completed  
9 its direct examination of this witness, and at this time the  
10 defense has the right to cross-examine the witness.

11 Mr. Hall, your witness.

12 MR. HALL: Thank you, Your Honor.

13 THE COURT: Yes, sir.

14 CROSS-EXAMINATION

15 BY MR. HALL:

16 Q Deputy Carraway?

17 A Yes, sir.

18 Q You say the aroma the dog alerts on is like smoke or  
19 like a smell of a pizza?

20 A No, sir, I was giving that as a comparison to the jury  
21 so they could---

22 Q All right. You used that as a comparison.

23 A Right.

24 Q Let me rephrase that.

25 A Yes, sir.

Jason Carraway - Cross-examination  
by Mr. Hall

1 Q But you can't tell how long that aroma's been around,  
2 can you?

3 A It -- once the whatever it is in question is taken out,  
4 I mean it's gonna remain for a period of time and dissipate  
5 eventually.

6 Is, is that what you're asking or---

7 Q Yeah.

8 But you can't say how long that was---

9 A No, I don't, I don't know how long.

10 Q But -- so, you're saying that it's not unusual for  
11 something to be in a completely different part of the  
12 vehicle and the dog alerts somewhere else?

13 A That's correct, because of the flow of air, it's gonna  
14 push that odor around depending which way the air's moving  
15 inside the vehicle and outside the vehicle. So --.

16 Q Okay. Now, you said something about times the dog does  
17 not alert.

18 A Right.

19 Q How do you know that that was correct unless you  
20 searched the vehicle?

21 A There are times that consent was given to search the  
22 vehicle and we ran the dog beforehand anyway. Of course,  
23 there was times in maybe a refusal that, that I ran the dog  
24 around the car and he didn't alert. But, of course, you  
25 know, there's many reasons that people may refuse. They may

Jason Carraway - Cross-examination  
by Mr. Hall

1 be weapons in the car. He's not trained to detect any kind  
2 of weapons, bombs, or things like that. He's only detect,  
3 trained to detect those odors of narcotics that I named  
4 yesterday. So --.

5 Q We're just talking about narcotics.

6 A Right.

7 Q I'm not talking about bombs and those type of things.

8 A Right.

9 Q Dead bodies or anything---

10 A Right.

11 Q ---you use dogs for.

12 But have you ever had the opportunity to be involved in  
13 a situation where your dog did not alert, but there was  
14 something later found?

15 A Not that I'm aware of. Not -- you talking about on the  
16 street or---

17 Q I'm talking about in real life situations that's  
18 controlled.

19 A There's, there's been -- not in -- there's been times  
20 in training that there was a drug present that he may of  
21 missed. He's never alerted and there's not been drugs there  
22 at that place. But as far as on the street, I can't, I  
23 can't recall a time that's --.

24 Q But does it happen where he doesn't catch the scent  
25 and---

Jason Carraway - Cross-examination  
by Mr. Hall

1 A Yeah, I mean he's---

2 Q ---there's something there?

3 A Just like us, he's not perfect. There may be a time  
4 that there's something there he may miss, but --.

5 MR. HALL: All right. Beg the Court's indulgence.

6 THE COURT: Yes, sir.

7 (Pause.)

8 Q All right. And from your notes or anything, do you  
9 have a record of when you got your call to proceed?

10 I know you said you were at the, approximately 80 mile  
11 marker and had to go to the 60 and back to 62.

12 A Right. I -- we do a report. It's on -- it's noted on  
13 my report. I don't have it up here with me, but it has our  
14 times that our dispatcher, that I notify the dispatcher I  
15 was in route and also the time that I arrived on the scene.

16 MR. HALL: Your Honor, that's one I think I had. I do  
17 apologize. I do have that. I'm sorry. I'm sorry.

18 Let me hand you -- if I may approach the witness, Your  
19 Honor?

20 THE COURT: You may.

21 Q And that reflects the time you got your call or  
22 dispatch?

23 A Yes, sir, the dispatch time would be the time that I  
24 was requested to respond, and I told him that I was in  
25 route, which was 01:23. It was in the morning. 1:23.

Jason Carraway - Cross-examination  
by Mr. Hall

1 Q Okay. And this occurred -- this whole event started  
2 about 1:10?

3 A 1:10, right.

4 Q That's 13 minutes in?

5 A Yes, sir.

6 Q And how long did it take you to get there?

7 A Looks like it was 13 minutes. I arrived at 1:36 is the  
8 time that I called out on scene.

9 Q Roughly 22 miles?

10 A Yes, sir.

11 Q Okay. No further questions.

12 THE COURT: Redirect.

13 SOLICITOR HUNTER: Nothing from the State, Your Honor.

14 THE COURT: You may step down, sir.

15 WITNESS: Thank you, sir.

16 THE COURT: You wish to excuse the witness?

17 SOLICITOR HUNTER: If the defense has no objection.

18 THE COURT: Any objection?

19 MR. HALL: No objection.

20 THE COURT: Sir, you're free to go if you'd like. You  
21 can stay also.

22 WITNESS: Thank you.

23 THE COURT: All right. You may call your next witness,  
24 Mr. Hunter.

25 SOLICITOR HUNTER: State would call Lieutenant Beth

Jack Westmoreland - Direct examination  
by Solicitor Hunter

1 Q At this time, answer any questions Mr. Hall may have  
2 for you.

3 MR. HALL: No questions.

4 THE COURT: You may step down, sir.

5 WITNESS: Thank you, sir.

6 SOLICITOR HUNTER: I would ask he be excused. He does  
7 have to work today. So --.

8 THE COURT: I understand.

9 You may call your next witness.

10 SOLICITOR HUNTER: State would call Officer Hancock.

11 THE COURT: Sir, if you'd come forward to be sworn,  
12 please.

13 KEN HANCOCK, having been first duly  
14 sworn, testified as follows:

15 THE COURT: Be seated please.

16 (Witness complies.)

17 THE COURT: State your name please, sir.

18 WITNESS: I'm Kenneth Hancock.

19 THE COURT: Mr. Hunter, your witness.

20 DIRECT EXAMINATION

21 BY SOLICITOR HUNTER:

22 Q Mr. Hancock, would you go through your law enforcement  
23 experience?

24 A Yes, sir. I started with the Sheriff's Office in 1991,  
25 August of 1991. I was in uniform patrol on third shift for

Ken Hancock - Direct examination  
by Solicitor Hunter

1 a while. After that I went to the academy. Before I went  
2 to third shift, then I went to the academy and trained, I  
3 became a narcotics officer probably in '93 I guess. Stayed  
4 in narcotics for 12 years. Three of those years I was  
5 lieutenant over the narcotics unit. Then in January of 2005  
6 I took over as team leader of the Interstate Criminal  
7 Enforcement Team and put it together for the Sheriff's  
8 office and I've been there ever since. Maybe seven or eight  
9 months ago I got promoted as corporal over that team.

10 Q Okay. Can you please explain what the ICE team is?

11 A It's the Interstate Criminal Enforcement.

12 Q And what is your -- what are y'all's duties and goals?

13 A Basically we work the interstates in Spartanburg  
14 County, I-26 and I-85. Our number one goal is to protect  
15 the motoring public of Spartanburg County on the  
16 interstates. The second goal is basically to, to hunt out  
17 and seek -- I mean to detect criminal activity on the  
18 interstates such as drug activity, illegal money or money  
19 laundering, anybody, fugitives, murder suspects, stolen  
20 property, counterfeit goods. Any kind of crime you can  
21 imagine that somebody would leave another state or come  
22 through our state or from Spartanburg, that's the kind of  
23 work we're out there to protect against the citizens of the  
24 county and the state.

25 SOLICITOR HUNTER: Your Honor, at this time, we're

Ken Hancock - Direct examination  
by Solicitor Hunter

1 gonna show the videotape that's been put into evidence as  
2 state's Exhibit 6.

3 THE COURT: You may do so.

4 (WHEREUPON, a portion of the videotape was played for  
5 the jury at this time.)

6 Q Now, this is the point where we left off yesterday in  
7 Jason's testimony.

8 A Can I stand up?

9 Q Yes, you can.

10 (Witness stands.)

11 Q That's you on the left?

12 A It is.

13 Q Okay. And what are you doing at this point?

14 A Basically after the dog's alerted, got a positive  
15 alert, that gave probable cause to search the vehicle, and  
16 at that time we began searching the vehicle.

17 Q Did you see Officer Owens find anything?

18 A I believe he found a bottle of alcohol underneath the  
19 passenger seat. I believe it was under the passenger's  
20 seat. It was a bottle of liquor. Matter of fact, it was a  
21 bottle of E&J Brandy that he had already, the seal had been  
22 broke and some of it had been drank out of it.

23 Q Did you find anything in the passenger compartment of  
24 the vehicle?

25 A I wasn't---

Ken Hancock - Direct examination  
by Solicitor Hunter

- 1 Q You yourself.
- 2 A I wasn't searching the passenger compartment.
- 3 Q Well, when I say passenger compartment, the -- where
- 4 passenger, where anybody would be sitting?
- 5 A No, sir, not as I can recall.
- 6 Q So then where did you go?
- 7 A Then to the trunk.
- 8 Q Is that that bottle you were speaking of?
- 9 A Yes, sir.
- 10 Q What did you locate right there?
- 11 A There was an Enfamil baby food can that you might see
- 12 at the store when you get powder in it or milk or for making
- 13 a baby bottle. It was empty. For baby food. But inside of
- 14 the can was several plastic bags containing crack cocaine or
- 15 what I, what I presume to be crack cocaine from my years of
- 16 training. It was individually packaged and the can was
- 17 pretty much full.
- 18 (WHEREUPON, the Enfamil can was marked as State's
- 19 Exhibit No. 7. A baby wipe container was marked as State's
- 20 Exhibit No. 8. A bag was marked as State's Exhibit No. 9.
- 21 All of the above exhibits were for identification purposes
- 22 only at this time.)
- 23 Q I'd like to show you what's been -- if you'll go ahead
- 24 and sit down.
- 25 A (Witness complies.)

Ken Hancock - Direct examination  
by Solicitor Hunter

1 Q Show you what's been premarked as State's Exhibit 7 .

2 Do you recognize that item?

3 A I do.

4 Q And what is it?

5 A It's a Enfamil General Lease for baby formula.

6 Q You don't have to go into it that specifically.

7 A It's for baby formula.

8 Q And is the same, substantially the same condition as  
9 you found it that night?

10 A It is.

11 Q And is that the same box or cannister?

12 A It is.

13 SOLICITOR HUNTER: Okay. Your Honor, at this time, the  
14 State would seek to admit State's Exhibit 7 into evidence.

15 MR. HALL: Your Honor, I think he's marked 7, 8, and 9  
16 I assume. Other than my previous objection, none, no  
17 objection at this time.

18 THE COURT: All right. Subject to the previous  
19 objections, it will be admitted as marked.

20 You may proceed.

21 (WHEREUPON, State's Exhibit No. 7 was received into  
22 evidence at this time.)

23 Q So, what are you pulling out of the Enfamil can?

24 A Basically those are plastic baggies containing what  
25 appeared to be crack cocaine.

Ken Hancock - Direct examination  
by Solicitor Hunter

1 Q Is that all you found?

2 A No, sir.

3 Q And what else did you find?

4 A Also inside of the bag, if you'll notice, that's,  
5 that's a bag and red canvas bag. Inside of it was a, looks  
6 like it's a baby wipe container used to, if you have  
7 children, use to wipe babies when they use the bathroom in  
8 their diaper or whatever like that. It was, also contained  
9 plastic packages of crack cocaine. Also in that canvas bag  
10 was a .45 caliber, excuse me, a .45 caliber pistol that was,  
11 was loaded, and also about, probably \$4,023 cash, U.S.  
12 currency --

13 Q Okay.

14 A -- broke down in different denominations.

15 SOLICITOR HUNTER: Your Honor, at this time, I believe  
16 defense has stated they have no objection to Defense Exhibit  
17 8 and 9 being admitted into evidence.

18 THE COURT: Subject to your previous objections, is  
19 that my understanding?

20 MR. HALL: Yes, sir.

21 THE COURT: They'll be admitted as marked.

22 (WHEREUPON, State's Exhibit No. 8 and 9 were received  
23 into evidence at this time.)

24 Q Now, that baby wipe can that you're holding as well as  
25 the bags, those are the other substances where the rest of

Ken Hancock - Direct examination  
by Solicitor Hunter

1 the crack cocaine or cocaine base was found?

2 A Yes.

3 Q Okay. You also mentioned a weapon.

4 A Yes, sir.

5 Q Let me show you what's been marked as State's Exhibit 4  
6 including the contents.

7 Do you recognize what's inside that box?

8 A I do.

9 Do you want me to take it---

10 Q And what's inside that box?

11 A Do you want me to take it out?

12 Q Yes.

13 A It's a .45 caliber handgun, which is Springfield arms,  
14 with a clip, and also it was loaded with the rounds inside  
15 the clip, and also one in the, one in the pipe as we call  
16 it.

17 Q So, you found the gun.

18 Is that in the same or substantially the same condition  
19 as when you found it?

20 A It was. It was just loaded.

21 SOLICITOR HUNTER: Okay. At this time the State would  
22 seek to admit State's Exhibit 3 into evidence, the gun and  
23 the bullets and the magazine.

24 THE COURT: Any objection?

25 MR. HALL: Again, subject to the earlier objections.

Ken Hancock - Direct examination  
by Solicitor Hunter

1 THE COURT: All right. It will be admitted as marked.

2 (WHEREUPON, State's Exhibit No. 4 was received into  
3 evidence at this time.)

4 Q All right. Now, I want you to watch a little of what's  
5 in this tape.

6 When you messed with this weapon, what did you notice  
7 about it here in a second?

8 A Right there, I released the magazine out of the weapon,  
9 and then, for safety purposes, for our safety purposes, I  
10 take and actually clear the weapon, which means I eject the  
11 weapon back, and when I ejected it back, as you see on the  
12 video, a round comes out of the chamber.

13 Q And what does that mean?

14 A It's means that -- it means the gun was loaded.

15 Q Okay. You can go ahead and take a seat.

16 A (Witness complies.)

17 Q Let me move some of this stuff out of your way.

18 I want you to take a look at State's Exhibit 5, the  
19 B.E.S.T. Bag right in front of you.

20 A Yes, sir.

21 Q Do you recognize that item?

22 A I do.

23 Q How do you recognize that item?

24 A It has my name printed on it, K. Hancock, and it also  
25 has my signature on, on it.

Ken Hancock - Direct examination  
by Solicitor Hunter

1 Q And that is your handwriting?

2 A It is.

3 SOLICITOR HUNTER: Your Honor, at this time the State  
4 would seek to admit State's Exhibit 5 into evidence.

5 THE COURT: Any objection?

6 MR. HALL: Again, just subject to the earlier  
7 objections.

8 THE COURT: All right. Subject to the earlier  
9 objections, it will be admitted as marked.

10 (WHEREUPON, State's Exhibit No. 5 was received into  
11 evidence at this time.)

12 Q What is the purpose of the B.E.S.T. Bag?

13 A It's mainly used for drugs such as cocaine, crack  
14 cocaine, and heroin, methamphetamine, or pills of some sort  
15 other than marijuana, anything other than marijuana as in a  
16 drug, as in the drug field. It's also -- it's put in here  
17 and sealed up with the seal right here. This seal's very  
18 sticky. It's like tape. You pull it off and it's sticky.  
19 If you take and you open it up, it looked -- you can --  
20 there's -- you'll have to rip the bag apart in order to open  
21 it up to show where it would be tampered with. Basically  
22 it's to seal this up so that nobody will be able to tamper  
23 with it is what it is.

24 Q Okay. And when you have a large amount of drugs, what  
25 is the policy of the Sheriff's Office?

Ken Hancock - Direct examination  
by Solicitor Hunter

1 A When you have more than would fit into this bag, which  
2 like 32 packages, you kind of want to keep the packages the  
3 way I always, just for evidence wise, you keep the packages  
4 the way -- you keep it sealed the way you found it, which I  
5 put in 32 packages of this. When it was bagged up, 32 bags  
6 of crack would not fit in this bag.

7 So, I took this bag, which is the larger bag. If you  
8 had say, ten or twelve kilos of cocaine or 50 pounds of  
9 marijuana, you would take and put it in a box or you would  
10 put it in a bag or a box. Even with the cocaine, you take  
11 it and put it in this bag, fill the front of this bag out,  
12 take your B.E.S.T. Bag and fill it out along with the chain  
13 of custody inside the B.E.S.T. Bag. You take, you take this  
14 tape, you seal it around the bag, once you fold it over, you  
15 seal it around the bag. You put your initials and date on  
16 it, you seal it up.

17 I, even after I put this tape on it, I got tape and I  
18 staple the top of the bag also cause that way it's got to  
19 be -- you can see where it had been ripped if anybody  
20 tampered with it. I take the B.E.S.T. Bag itself, which is  
21 in the brown envelope, put it on the outside and staple it  
22 to the bag and it would look as so when it's dropped into  
23 the box.

24 Q Okay. And other than when we opened it today, has it  
25 been in the same or substantially the same condition as when

Ken Hancock - Direct examination  
by Solicitor Hunter

1 you put it in the drop box?

2 A It is other than the B.E.S.T. bag being attached and  
3 you, it being opened and everything, but it's in the same  
4 condition.

5 Q Okay. And where did you -- once you left the roadside,  
6 where did you take it?

7 A Basically we take the evidence, it stays in my custody,  
8 I take it to the Spartanburg County Sheriff's Office. That,  
9 that's when we take and put it in this bag. After I sealed  
10 it up, fill all the paperwork out and everything, then I  
11 took it down to where the evidence room is at. There's what  
12 officer Westmoreland explained as to evidence drop box.

13 To make, make you understand what the drop box looks  
14 like, it looks like a huge mailbox. The handle pulls down,  
15 but it's, it's a steel door, like steel door, it pulls down,  
16 you lay this inside of it, and when you close it, it drops  
17 it in there. You can't get it back out unless whoever the  
18 evidence guy that's got a key. That's the only way you can  
19 do that.

20 Q Did you do that in this case?

21 A I did.

22 Q Okay. In looking at the two packages in front of you,  
23 other than the fact that Beth separated them once she had to  
24 test them and weighed those substances, are they in the same  
25 or substantially the same condition as when you found them

Ken Hancock - Direct examination  
by Solicitor Hunter

1 on that roadside?

2 A There is. It's just been broken down.

3 SOLICITOR HUNTER: Your Honor, at this time the State  
4 would seek to admit State's Exhibit 3 including the contents  
5 of the crack cocaine and the baggies into evidence.

6 MR. HALL: Just as before, Your Honor, over my previous  
7 objection.

8 THE COURT: All right. It will be admitted as marked.

9 (WHEREUPON, State's Exhibit No. 3 was received into  
10 evidence at this time.)

11 SOLICITOR HUNTER: Permission to publish to the jury,  
12 Your Honor?

13 THE COURT: You may.

14 Q So, all of this came in 32 separate bags?

15 A It did.

16 Q Your Honor -- excuse me, Mr. Hancock. If you'd please  
17 answer any questions Mr. Hall has for you.

18 THE COURT: Mr. Hall, your witness.

19 CROSS-EXAMINATION

20 BY MR. HALL:

21 Q All right. In the video, it's obvious you were there  
22 the whole time?

23 A Yes, sir.

24 Q All right. But to start with, you were back from the  
25 car and Owens was up to the car?

Ken Hancock - Cross-examination  
by Mr. Hall

1 A Yes, sir.

2 Q All right. But you were up there when he got out of  
3 the car, when Mr. Moore got out of the car?

4 A Yes, sir.

5 Q All right. Did you hear Deputy Owens say you know,  
6 you've forgot your door or close your door or anything?

7 Do you remember that?

8 A No, sir, I don't, I don't remember. I can't recall  
9 that. But I know the door was left open, but I don't  
10 remember if he told him to go back and shut it. I don't  
11 remember that.

12 Q Okay. Now, have you reviewed this video before you  
13 came to court?

14 A No, sir.

15 Q All right. In your report, I assume you reviewed your  
16 report?

17 Do you, do you have it?

18 If your -- if I can approach?

19 THE COURT: You may.

20 Q I don't want to mess with it, but you've got a report,  
21 and he's got a report, and Detective Carraway has a report.

22 A Okay.

23 Q And yours is labeled five of five and your, in the new  
24 paper saving program we have.

25 A Okay.

Ken Hancock - Cross-examination  
by Mr. Hall

1 Q All right. You got your report.

2 Now, did you notice the, I think it was accelerated  
3 breathing, pulsing neck, or any of that?

4 A When I went up to the car?

5 Q When you were---

6 A No, sir.

7 Q ---around when he went to the car?

8 A Basically, when he came back, standing back there to  
9 the back, just from standing off watching Officer Owens do  
10 his job, he had mainly most of the contact. I was, I was  
11 the contact, the backup officer for Officer Owens. In  
12 watching his actions, through doing years of narcotics  
13 investigation, traffic stops on the interstate, basically  
14 his behavior was different than the regular motoring public  
15 that we would get stopped. If you were stopped for a  
16 traffic violation, it the, the -- his demeanor was different  
17 than that of any of the normal motoring public.

18 Q All right. But that's not included in your report?

19 A Basically, I tell you what this -- Officer Owens wrote  
20 this report and this one too. He wrote both of these.

21 Q Oh, but this one reads more like you wrote it?

22 A This one -- basically he wrote this the night of the  
23 incident at two o'clock in the morning, signed a warrant,  
24 then he went back and made the notes. This is basically  
25 technically his notes is basically what this is where he

Ken Hancock - Cross-examination  
by Mr. Hall

1 watches the video and does a detailed report.

2 Q When you mentioned the notes, will you look in that  
3 file and see if there's any notes of any kind?

4 SOLICITOR HUNTER: Your Honor, can we take up a matter  
5 outside the presence of the jury?

6 THE COURT: Yes, you may.

7 Ladies and gentlemen of the jury, I'll ask you to step  
8 back to the jury room. As always, I'll instruct you not to  
9 begin any discussions until I've advised you to do so.

10 You may retire.

11 (WHEREUPON, the following takes place outside the  
12 presence of the jury.)

13 SOLICITOR HUNTER: Your Honor, at this time I believe  
14 he's gonna ask him to take out two pages of the stenopad  
15 notes that were written by Deputy Owens. In reviewing the  
16 video on Brian's incident report, they're basically a rough  
17 draft of the incident report, and I would argue they're work  
18 product. Any, anything -- he has no knowledge of those  
19 notes. They're not his notes. So, I don't see why Mr. Hall  
20 can go into those notes on the---

21 THE COURT: Well, I haven't let him go into them.

22 SOLICITOR HUNTER: Well, that's why I wanted to make  
23 sure that, at this point, if he'd like to proffer that at  
24 this point I'd be okay with it, but---

25 MR. HALL: Just are there notes in there.

Ken Hancock - Cross-examination  
by Mr. Hall

1 WITNESS: Yes.

2 THE COURT: Have you seen those notes, Mr. Hall?

3 MR. HALL: I saw them yesterday the first time that,  
4 again, it was another surprise where all of the VHS, the  
5 Carraway's report, and these notes.

6 SOLICITOR HUNTER: It was a surprise to all of us, Your  
7 Honor.

8 THE COURT: All right.

9 MR. HALL: In fact, Mr. Owens said oh, maybe these are  
10 the notes. No, these are my rough draft, but basically  
11 they're my notes. I just wanted -- they're some notes. And  
12 if they want to go into it after that, that's fine. I'm not  
13 gonna go into the contents of it.

14 THE COURT: Well, you know, the report itself is not  
15 admissible.

16 MR. HALL: Yes, sir.

17 THE COURT: Now, I'd -- if these are not his notes, he  
18 couldn't even use them to refresh his memory cause they're  
19 not his.

20 MR. HALL: No, sir, I'm not asking him to. It's just  
21 the fact that they exist, and I'm---

22 THE COURT: That's all you want to ask him is are there  
23 some notes in there?

24 MR. HALL: And that if they're not his notes, then  
25 they're either -- they're involved in this case or they're

Ken Hancock - Cross-examination  
by Mr. Hall

1 either Deputy Owens or Deputy Carraway, and if they want to  
2 put up Deputy Carraway. But just that they exist, Your  
3 Honor.

4 THE COURT: Do you object to him asking---

5 SOLICITOR HUNTER: We'll stipulate that those are Owens  
6 notes, but the inference he's trying to draw that those are  
7 the notes that he talks about in his testimony. But I, I  
8 watched the video. He doesn't actually write notes on the  
9 video.

10 MR. HALL: No, I'm not, I'm not inferring.

11 SOLICITOR HUNTER: That's what the jury is gonna infer.

12 MR. HALL: Well, I don't mind if he says these are,  
13 these appear to be Owens notes to help him do his report.

14 SOLICITOR HUNTER: We'll stipulate to that.

15 THE COURT: All right.

16 SOLICITOR HUNTER: He can ask that question.

17 THE COURT: Okay.

18 MR. HALL: Yes, sir.

19 THE COURT: He'll let you ask that question.

20 MR. HALL: Yeah, I, I, I know that there's nothing in  
21 there with field sobriety notes or anything like that that  
22 I'm asking him about.

23 THE COURT: Now, let's -- let me ask about the larger  
24 question here to me, and we've gone over the videotape. I  
25 didn't hear that there was any change in the evidence that

Ken Hancock - Cross-examination  
by Mr. Hall

1 was presented to you in discovery between the two. One's a  
2 better quality, but I don't see there's been any alteration  
3 or change of the evidence.

4 Is that correct?

5 MR. HALL: Not that I can note, no, sir.

6 THE COURT: All right. And as to the -- what were the  
7 other matters that you said you just learned of?

8 SOLICITOR HUNTER: Just the notes.

9 THE COURT: These notes.

10 Have you had a chance to review them?

11 MR. HALL: I had a brief chance to review them  
12 yesterday and---

13 THE COURT: Do you need longer to review them?

14 MR. HALL: If I can let my, let my client see them.

15 THE COURT: Oh, certainly.

16 MR. HALL: That's what we need to do.

17 THE COURT: And I'm gonna make Officer Owens available  
18 to you if we have to do that after you've seen them---

19 MR. HALL: I don't think that would be necessary.

20 THE COURT: ---to testify concerning them, but --.

21 MR. HALL: And, again, Your Honor, I apologize, but  
22 it's, it's something that I haven't had before.

23 THE COURT: Well, that's quite all right. I just  
24 wanted to make sure that if there's a problem with discovery  
25 we solve it now.

Ken Hancock - Cross-examination  
by Mr. Hall

1 MR. HALL: Yes, sir.

2 (Pause.)

3 MR. HALL: Your Honor, we -- I've reviewed them, Your  
4 Honor, and pretty much they outline the incident reports  
5 now.

6 THE COURT: All right. So, no new information that you  
7 see there?

8 MR. HALL: No, sir.

9 THE COURT: All right. And other -- what was the other  
10 question you had about something that is here?

11 MR. HALL: No, it was just that we had gotten Deputy  
12 Carraway's report yesterday.

13 THE COURT: Well, we excluded that, didn't we?

14 MR. HALL: Well, yeah, he just -- I got that---

15 SOLICITOR HUNTER: He asked him about it though. I had  
16 no problem.

17 THE COURT: Yeah, but was there anything in there that  
18 would require you to bring that, Officer Carraway back or---

19 MR. HALL: No, sir.

20 THE COURT: Any additional witnesses?

21 MR. HALL: No, sir, not on that.

22 SOLICITOR HUNTER: He had the report in his  
23 cross-examination.

24 THE COURT: I understand. I just want to be sure that  
25 there's any discovery, anything that this discovery leads to

Ken Hancock - Cross-examination  
by Mr. Hall

1 that the defense has an opportunity to get to it. So --.

2 MR. HALL: Well---

3 THE COURT: I want to be sure that that discovery has  
4 not created the need for other witnesses or other evidence  
5 to be presented.

6 MR. HALL: Yes, sir, at this point, the reports have  
7 just caused a few delays here.

8 THE COURT: okay. Then otherwise it does not require  
9 us to take a break while you resolve something?

10 MR. HALL: No, sir.

11 THE COURT: okay. You can have a seat. Thank you.

12 MR. HALL: And I'm just gonna ask him if those are the  
13 notes in there and they---

14 THE COURT: Yeah, and I think his answers gonna be it  
15 looks like Officer Owens' notes to prepare the report.

16 MR. HALL: Yes, sir.

17 THE COURT: All right. Bring the jury back.

18 (WHEREUPON, the following takes place within the  
19 presence of the jury.)

20 THE COURT: All right. The record will reflect that  
21 the jury has returned to the courtroom.

22 During our break I was not required to make any  
23 rulings..

24 You may proceed with your examination.

25 CONTINUED CROSS-EXAMINATION

Ken Hancock - Cross-examination  
by Mr. Hall

1 BY MR. HALL:

2 Q Okay. And you have found some notes?

3 A Yes, sir.

4 Q And what -- just tell the jury what those are, what  
5 they appear to be.

6 A What these look like is Officer Owens, when he sits  
7 down after the next day, when he's had time to, he can sit  
8 down and review the tape and sit down and watch the tape and  
9 cut the tape on and off, he would make notes to do his final  
10 report and do what we call a supplemental report when you  
11 can be very detailed other than at two o'clock in the  
12 morning. That's what these look like.

13 Q Okay. I think you can turn those into the file.

14 A (Witness complies.)

15 Q So, you didn't do your own independent report with  
16 observations or anything?

17 A No, sir.

18 MR. HALL: Okay. I have no further questions of this  
19 witness, Your Honor.

20 THE COURT: Redirect?

21 SOLICITOR HUNTER: Nothing, Your Honor.

22 THE COURT: You may step down, sir.

23 SOLICITOR HUNTER: May Corporal Hancock be excused?

24 THE COURT: Any objection?

25 MR. HALL: No objection, Your Honor.

1 THE COURT: You're free to go if you'd like. Thank you  
2 very much.

3 State wish---

4 SOLICITOR HUNTER: State rests, Your Honor.

5 THE COURT: All right. Ladies and gentlemen, I know  
6 I've given you a lot of exercise today, and I don't intend  
7 to do that. But at this point in time, the State has  
8 completed the presentation of its evidence. There are some  
9 matters I have to take with you, up with the attorneys at  
10 this stage of the proceedings. So, again, I'm gonna ask you  
11 to step back to the jury room again. I'm gonna instruct you  
12 don't begin any discussions until I've advised you to do so.

13 You may retire.

14 (WHEREUPON, the following takes place outside the  
15 presence of the jury.)

16 THE COURT: Any motions from the defense?

17 MR. HALL: Yes, sir, Your Honor, a couple things.

18 We make the motion for a directed verdict cause the  
19 evidence is insufficient which they could find my client  
20 guilty, the jury could find my client guilty, my client  
21 guilty beyond a reasonable doubt. And, secondly, renew my  
22 motion on the suppression.

23 There was things that were not disclosed even to the  
24 state to start with, the videotape, the clearer videotape  
25 played and the notes. We don't know what else it could be

1 in there.

2 But, Your Honor, as I recall your ruling, let me get  
3 back, that there was a, the money which I think he testified  
4 was a thousand, I think actually was closer to 600. You  
5 said he had doubts about his story, and, Your Honor, we just  
6 ask that you reconsider that, that those are not  
7 quantitative things, substantial things. Just there's  
8 really no inconsistency in his story other than he's coming  
9 from Georgia and rented a car and going to North Carolina  
10 earlier, and we ask that, first, that you -- we renew our  
11 motion to suppress the evidence, and we do that in light, if  
12 not, then motion for directed verdict.

13 THE COURT: I'll hear from the State.

14 SOLICITOR HUNTER: Your Honor, first, on the directed  
15 verdict, I believe the State has presented the case that,  
16 viewed in the light most favorable to us, a reasonable jury  
17 can find the defendant guilty.

18 As far as the suppression motion, you've already ruled.  
19 We basically had the same testimony. I will stipulate that  
20 it is \$600 that was found or approximately \$600 found in his  
21 pocket. Obviously he had a large amount of cash in his  
22 pocket. He's unemployed.

23 We have the Enterprise rental agreement into evidence,  
24 which states that an Edward Hemphill, on nine hours  
25 previous, at 3:50 p.m. on June 29<sup>th</sup> rented the car in

1 Morganton, North Carolina, which, after looking up  
2 yesterday, is right up a few miles to the north, east of  
3 Marion, North Carolina, which is right up 221 past Chesnee a  
4 little ways up into North Carolina.

5 So, according to the defendant's story, the car was  
6 then rented in North Carolina, driven to Lawrenceville so  
7 that he could then visit his grandmother in Marion right  
8 where the car was rented. Very inconsistent story. He  
9 continued talking on his cell phone. He has an odor of  
10 alcohol coming from Atlanta, which is a hub city for drug  
11 trafficking, and all the little things that the officers  
12 testified that your ruling, your previous ruling on the  
13 suppression motion should stay in tact.

14 THE COURT: All right. Well, as to the motion for  
15 directed verdict, it would be denied just because I do find  
16 there's sufficient evidence in the State's case is  
17 sufficiently strong that the case should go to the jury.

18 As to the motion to distress, to suppress, again, the  
19 question, as presented in the, I guess it's Provet case  
20 talks about the lengthening of a detention period is that,  
21 being acceptable under two situations. One, where the  
22 officer has an objectively reasonable and articulable  
23 suspicion illegal activity has occurred or is occurring.  
24 The second basis is a consensual encounter, and that's not  
25 our case here.

1        So, we're looking at number one. I found that there  
2 were at least two objective suspicions, activities that  
3 someone would consider to be suspicious, and that is that  
4 the fact that the car was rented in Morganton by a third  
5 party. This defendant then told the police he was traveling  
6 for Lawrenceville to Marion to visit his grandmother. He  
7 was on I-85 heading north indicating he was coming from a  
8 southerly location such as Lawrenceville. However, makes  
9 little or no reasonable sense for someone to rent a car a  
10 short distance from your intended destination and then drive  
11 it to Lawrenceville and then back to Spartanburg especially  
12 at that hour of the morning.

13        That would cause, I think, any reasonable officer to be  
14 suspicious that illegal activity may be occurring, and it  
15 requires, again, a particularized and objective basis. The  
16 defendant, in just talking during the, the normal traffic  
17 stop, indicated that he was unemployed and did have a rather  
18 large sum of cash on his person, which is not, again,  
19 consistent with someone who's unemployed. Someone to be  
20 renting a vehicle, driving it a great distance with a large  
21 amount of cash does not seem to be the normal activities for  
22 unemployed, unemployed person.

23        Then, given the due weight it says that the Court must  
24 give to the common sense judgments reached by officers in  
25 light of their experience and training, I'm not gonna go

1 through all those items, but there were numerous items that  
2 the officers testified to that led them to a, an experience,  
3 excuse me, a suspicion based upon their experience and their  
4 training.

5       So, all of those factors, and, again, you must  
6 consider, it says here, the totality of the circumstances.  
7 I have considered the totality of the circumstances, and  
8 it's my finding that the lengthening of the detention was  
9 not, was not unreasonable, and, therefore, the later  
10 alerting by the dog gave probable cause for the search, and,  
11 therefore, I will not suppress the evidence at this time.

12       Now, have you discussed with your client the, his right  
13 to testify, Mr. Hall?

14       MR. HALL: Yes, sir, we have, Your Honor, and I think  
15 we do need to make sure we satisfy his record. I think I  
16 know what his decision's going to be, but I'm not sure  
17 what -- I'm trying to get to his criminal history.

18       THE COURT: All right. Well, Mr., Mr. Hunter, can you  
19 share with us any criminal history that the Court feels  
20 might be relevant in this case?

21       SOLICITOR HUNTER: I'll mark it off here in a second.

22       THE COURT: All right, sir.

23       SOLICITOR HUNTER: If you will, Your Honor, I'll show  
24 you his entire criminal record.

25       THE COURT: All right, sir.

1 Thank you very much.

2 (WHEREUPON, the jury began deliberations at 12:24 and  
3 returned with a verdict at 1:58.)

4 THE COURT: All right. I'm informed by the bailiffs  
5 that a verdict has been reached.

6 Is the State ready to receive the verdict?

7 SOLICITOR HUNTER: Yes, Your Honor.

8 THE COURT: Defense ready?

9 MR. HALL: Yes, sir.

10 THE COURT: Bring the jury in.

11 (WHEREUPON, the following takes place within the  
12 presence of the jury.)

13 THE COURT: Mr. Foreman, I've been informed by the  
14 bailiff that a verdict has been reached.

15 Is that true?

16 FOREMAN: Yes, sir.

17 THE COURT: Pass the verdict form to the bailiff.

18 (Foreman complies.)

19 THE COURT: Thank you, sir.

20 Madam Clerk, I'd ask that you publish the verdict  
21 please.

22 CLERK: In the State of South Carolina, in the Court of  
23 General Sessions, the County of Spartanburg, as to  
24 Indictment Number 2010-GS-42-5975, Count One, for  
25 trafficking methamphetamine or cocaine base, we, the jury,

1 unanimously find the defendant, Ashley Eugene Moore, guilty.

2 As to Indictment Number 2010-GS-42-5975, Count Two,  
3 possession of firearm or knife during commission of or  
4 attempt to commit a violent crime, we, the jury, unanimously  
5 find the defendant, Ashley Eugene Moore, guilty.

6 signed by the foreperson the 26<sup>th</sup> day of April, 2011.

7 Ladies and gentlemen of the jury, if this is your  
8 verdict and still your verdict, say so by raising your right  
9 hand.

10 (All jurors raise their right hand.)

11 THE COURT: Anything further from the jury before I  
12 release the jury from the State?

13 SOLICITOR HUNTER: Nothing from the State, Your Honor.

14 THE COURT: Anything from the defense?

15 MR. HALL: We would request polling of the jury, Your  
16 Honor.

17 THE COURT: Madam Clerk, please poll the jury.

18 (WHEREUPON, all jurors respond in the affirmative that  
19 this was and is still their verdict.)

20 THE COURT: Anything further from the defense before I  
21 release the jury?

22 MR. HALL: No, sir, Your Honor.

23 THE COURT: All right.

24 (WHEREUPON, the jury was dismissed at this time.)

25 THE COURT: All right. I'll ask you to approach the

1 out of North Carolina, and a 1998 conviction for assault  
2 with a deadly weapon to inflict serious injury. And also,  
3 in 1998, a charge of selling or delivery of cocaine.

4 with this charge, in South Carolina there's no first,  
5 second, or third offenses for trafficking over 400. So,  
6 that not would affect this charge.

7 He also had some charges out of Georgia including  
8 objecting or hindering persons making emergency telephone  
9 calls from 2007. He also had aggravated stalking in 2007.  
10 And also, in 2007, a willful obstruction of law enforcement  
11 officers by the use of threats or violence. And a 2009 DUI  
12 in Georgia.

13 THE COURT: All right. Mr. Solicitor, I know that the  
14 possession of the weapon carries five years.

15 Is that a mandatory consecutive sentence?

16 SOLICITOR HUNTER: I believe it's mandatory consecutive  
17 only if the minimum amount is less than, the maximus is less  
18 than five years. It can be run concurrent with this.

19 THE COURT: So, it can be run concurrent with this one?

20 SOLICITOR HUNTER: That's my understanding.

21 THE COURT: Okay. I know under certain circumstances  
22 it did have to be run consecutive.

23 All right. Mr. Moore, the Sentence of this Court is  
24 that you be confined in the State Department of Corrections  
25 on the trafficking in cocaine base charge for the period of

1 25 years. Consecutive to, excuse me, concurrently with that  
2 sentence I have sentenced you to five years on the  
3 possession of a weapon during the commission of a violent  
4 crime.

5 Good luck to you, sir.

6 SOLICITOR HUNTER: Your Honor, if I may?

7 I believe the sentence for trafficking also carries a  
8 mandatory \$200,000 fine.

9 THE COURT: It does.

10 SOLICITOR HUNTER: Because it's violent and a serious  
11 sentence.

12 THE COURT: Yes, sir, I have -- I will mark that as a  
13 \$200,000 fine as well.

14 Thank you very much.

15

16 \* \* \*END OF REQUESTED TRANSCRIPT OF RECORD\* \* \*

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25

WITNESSES

SPTG CO SHERIFF'S OFFICE

1. REPORT MADE

2. REPORT ENDED

3. CARD FILLED

4. INDEXED

5. CHECKED WARRANTS

6. CHECKED SIGNATURE

7. ASSESSMENT AND  
FINE CARD MADE

ARREST WARRANT NUMBER

M423909 and

Direct Indictment

ACTION OF GRAND JURY

Foreperson of Grand Jury

Date: 10-22-10

VERDICT

Count 1 Guilty

Count 2 Guilty

Foreperson of Petit Jury

Date: 4/26/11

DOCKET NO.

10-GS-42-3975

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

OCT 25 2010

TERM

THE STATE

vs.

ASHLEY EUGENE MOORE

Indictment for

TRAFFICKING IN METHAMPHETAMINE OR  
COCAINE BASE AND POSSESSION OF A  
FIREARM OR KNIFE DURING

COMMISSION OF OR ATTEMPT TO

COMMIT A VIOLENT CRIME

SC Code: 44-53-375: 16-23-490

CDR Code:

FILED  
CLERK OF COURT  
SPARTANBURG COUNTY

2010 OCT 26 PM 2:05

M. HOPE BLACKLEY

235

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF SPARTANBURG

STATE VS.  
Ashley Eugene Moore

AKA:

Race: B Sex: M Age: 31

05-11

Lawrenceville, GA 30043

DL#: 049909202 SIDH:

\*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

☒ CONVICTED OF or ☐ PLEADS

TO: Trafficking in Cocaine Base (Crack), 400 grams or more (25 - 30 years AND \$200,000) NS/NP COUNT 1

in violation of § 44-53-0375(C)(5) of the S.C. Code of Laws, bearing CDR Code # 0370

☐ NON-VIOLENT ☒ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

HUNTER, JAMES EDWARD

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,  
 for a determinate term of 95 days months/years or ☐ under the Youthful Offender Act not to exceed        years  
 and/or to pay a fine of \$ 200,000.00; provided that upon the service of        days/months/years and/or payment  
 of \$       ; plus costs and assessments as applicable\*; the balance is suspended with probation for       

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of  
 probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied  
by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal  
 Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

## SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ OrderedTotal: \$        plus 20% fee: \$       

Payment Terms:

☐ Set by SCDPPPS

Recipient:

\*Fine:

|                                        |         |              |
|----------------------------------------|---------|--------------|
| § 14-1-206 (Assessments 107.5 %)       | \$      | 215.00       |
| § 14-1-211(A)(1) (Conv. Surcharge)     | \$100   | \$ 100.00    |
| § 14-1-211(A)(2) (DUI Surcharge)       | \$100   | \$           |
| § 56-5-2995 (DUI Assessment)           | \$12    | \$           |
| § 56-1-286 (DUI Breath Test)           | \$25    | \$           |
| Proviso 47.9 (Public Def/Prob)         | \$500   | \$           |
| § 14-1-212 (Law Enforce. Funding)      | \$25    | \$ 25.00     |
| § 14-1-213 (Drug Court Surcharge)      | \$150   | \$ 150.00    |
| § 50-21-114 (BUI Breath Test Fee)      | \$50    | \$           |
| § 56-5-2942(J) (Vehicle Assessment)    | \$40/ea | \$           |
| Proviso 90.5 (SCCA Surcharge)          | \$5     | \$ 5.00      |
| § 44-53-450(C) (Conditional Discharge) | \$350   | \$           |
| 3% to County (if paid in installments) |         | \$ 6458.40   |
| TOTAL                                  |         | \$ 221738.40 |

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (06/2010)

INDICTMENT/CASE#: 2010GS4205975

A/W#: M423909

Date of Offense: 6/30/2010

S.C. Code § : 44-53-0375(C)(5)

CDR Code #: 0370

## SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

TO: Trafficking in Cocaine Base (Crack), 400 grams or more (25 - 30 years AND \$200,000) NS/NP COUNT 1

in violation of § 44-53-0375(C)(5) of the S.C. Code of Laws, bearing CDR Code # 0370

☐ NON-VIOLENT ☒ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,  
 for a determinate term of 95 days months/years or ☐ under the Youthful Offender Act not to exceed        years  
 and/or to pay a fine of \$ 200,000.00; provided that upon the service of        days/months/years and/or payment  
 of \$       ; plus costs and assessments as applicable\*; the balance is suspended with probation for       

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of  
 probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied  
by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal  
 Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

## SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ OrderedTotal: \$        plus 20% fee: \$       

Payment Terms:

☐ Set by SCDPPPS

Recipient:

\*Fine:

|                                        |         |              |
|----------------------------------------|---------|--------------|
| § 14-1-206 (Assessments 107.5 %)       | \$      | 215.00       |
| § 14-1-211(A)(1) (Conv. Surcharge)     | \$100   | \$ 100.00    |
| § 14-1-211(A)(2) (DUI Surcharge)       | \$100   | \$           |
| § 56-5-2995 (DUI Assessment)           | \$12    | \$           |
| § 56-1-286 (DUI Breath Test)           | \$25    | \$           |
| Proviso 47.9 (Public Def/Prob)         | \$500   | \$           |
| § 14-1-212 (Law Enforce. Funding)      | \$25    | \$ 25.00     |
| § 14-1-213 (Drug Court Surcharge)      | \$150   | \$ 150.00    |
| § 50-21-114 (BUI Breath Test Fee)      | \$50    | \$           |
| § 56-5-2942(J) (Vehicle Assessment)    | \$40/ea | \$           |
| Proviso 90.5 (SCCA Surcharge)          | \$5     | \$ 5.00      |
| § 44-53-450(C) (Conditional Discharge) | \$350   | \$           |
| 3% to County (if paid in installments) |         | \$ 6458.40   |
| TOTAL                                  |         | \$ 221738.40 |

☐ Condition Discharge, § 44-53-450(C) requires \$350 be paid to the Clerk prior to case disposition☐ Appointed PD or appointed other counsel, § 47.12 requires \$500 be paid to Clerk during probation.

Presiding Judge

Judge Code: 2135

Sentence Date: 4/26/11

## STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG  
STATE VS.

Ashley Eugene Moore

AKA:

Race: B Sex: M Age: 31  
05-

Lawrenceville, GA 30043

DL#: 049909202 STD#:

\*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: Possession of a Weapon during the Commission of a Violent Offense (5 years) COUNT II

in violation of § 16-23-0490 of the S.C. Code of Laws, bearing CDR Code # 0549

☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.ATTEST: 12/2/11 77517 James Edward Hunter Defendant J. B. Hall Attorney for Defendant 2596 SC Bar#WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 5 days/months/years or ☐ under the Youthful Offender Act not to exceed \_\_\_\_\_ years and/or to pay a fine of \$ \_\_\_\_\_; provided that upon the service of \_\_\_\_\_ days/months/years and/or payment of \$ \_\_\_\_\_; plus costs and assessments as applicable\*; the balance is suspended with probation for \_\_\_\_\_

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 4/26/11  
☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

## SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered PTUP  
Total: \$ \_\_\_\_\_ plus 20% fee: \$ \_\_\_\_\_ days/hours Public Service Employment

Payment Terms:

☐ Set by SCDPPPS

Recipient:

\*Fine:

|                                        |         |           |
|----------------------------------------|---------|-----------|
| § 14-1-206 (Assessments 107.5 %)       | \$      |           |
| § 14-1-211(A)(1) (Conv. Surcharge)     | \$100   | \$ 100.00 |
| § 14-1-211(A)(2) (DUI Surcharge)       | \$100   | \$        |
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| § 56-1-286 (DUI Breath Test)           | \$25    | \$        |
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| § 14-1-212 (Law Enforce. Funding)      | \$25    | \$ 25.00  |
| § 14-1-213 (Drug Court Surcharge)      | \$150   | \$        |
| § 50-21-114 (BUI Breath Test Fee)      | \$50    | \$        |
| § 56-5-2942(J) (Vehicle Assessment)    | \$40/ea | \$        |
| Proviso 90.5 (SCCA Surcharge)          | \$5     | \$ 5.00   |
| § 44-53-450(C) (Conditional Discharge) | \$350   | \$        |
| 3% to County (if paid in installments) | \$      | \$ 3.90   |
| TOTAL                                  | \$      | \$ 133.90 |

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA217 (06/2010)

## IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2010GS4205975A

A/W#: 2010GS4205975A

Date of Offense: 6/30/2010

S.C. Code § 16-23-0490

CDR Code #: 0549

## SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

COUNT II

in violation of § 16-23-0490 of the S.C. Code of Laws, bearing CDR Code # 0549

☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.ATTEST: 12/2/11 77517 James Edward Hunter Defendant J. B. Hall Attorney for Defendant 2596 SC Bar#WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 5 days/months/years or ☐ under the Youthful Offender Act not to exceed \_\_\_\_\_ years and/or to pay a fine of \$ \_\_\_\_\_; provided that upon the service of \_\_\_\_\_ days/months/years and/or payment of \$ \_\_\_\_\_; plus costs and assessments as applicable\*; the balance is suspended with probation for \_\_\_\_\_

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 4/26/11  
☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

## SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered PTUP  
Total: \$ \_\_\_\_\_ plus 20% fee: \$ \_\_\_\_\_ days/hours Public Service EmploymentObtain GED ☐

Attend Voc. Rehab. or Job Corp. \_\_\_\_\_

May serve W/E beginning \_\_\_\_\_

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐

Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ \_\_\_\_\_ beginning \_\_\_\_\_

\$ \_\_\_\_\_ paid to Public Defender Fund

Other: \_\_\_\_\_

☐ Condition Discharge, § 44-53-450(C) requires \$350 be paid to the Clerk prior to case disposition☐ Appointed PD or appointed other counsel, § 47.12 requires \$500 be paid to Clerk during probation.

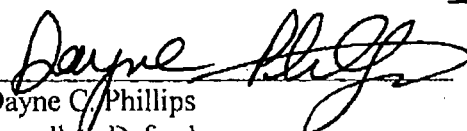
Presiding Judge

Judge Code: 2135Sentence Date: 4/26/11

## CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability, with the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

November 15th, 2012

  
Dayne C. Phillips  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, S. C. 29211-1589  
(803) 734-1330

ATTORNEY FOR APPELLANT

**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

The State, Respondent,

v.

Ashley Eugene Moore, Appellant.

Appellate Case No. 2011-191327

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Appeal From Spartanburg County  
Roger L. Couch, Circuit Court Judge

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Opinion No. 5160  
Heard April 2, 2013 – Filed July 17, 2013

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**REVERSED**

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Appellate Defender Dayne C. Phillips, of Columbia, for  
Appellant.

Attorney General Alan McCrory Wilson, Senior  
Assistant Deputy Attorney General Salley W. Elliott,  
Assistant Attorney General Julie Kate Keeney, all of  
Columbia, for Respondent.

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**LOCKEMY, J.:** Ashley Eugene Moore was convicted and sentenced for the charges of trafficking cocaine base and possession of a weapon during the commission of a violent crime. On appeal, he argues the trial court erred in denying his motion to suppress evidence discovered during a traffic stop. Specifically, he argues his continued detention was unlawful because the State did

not present sufficient evidence to establish the police officer's reasonable and articulable suspicion of a serious crime. We reverse.

## FACTS

Officers Dale Owens and Donnie Gilbert, Corporal Ken Hancock, and K-9 handler Deputy Jason Carraway, all with the Spartanburg County Sheriff's Office, were observing traffic along the I-85 corridor in Spartanburg County the evening of June 30, 2010. Around 1:10 a.m., Officer Owens observed Moore traveling at a rate above the posted speed limit of 60 miles per hour. Officer Owens began pacing Moore's vehicle<sup>1</sup> and determined Moore was keeping a steady speed of 70 miles per hour. Further, Moore failed to maintain his lane and crossed into the center lane from the far right-hand lane. Officer Owens initiated his blue lights, and Moore first activated his left turn signal, then his right turn signal. Officer Owens found those actions were an indicator that Moore might be preparing to flee. Officer Owens testified Moore also took longer than the average time to stop and that is consistent with people who have tried to run from him in the past. After stopping his vehicle, Moore failed to release his left turn signal, and Officer Owens opined this failure indicated Moore's heart rate might be so accelerated he had temporarily lost his hearing capability.

When Officer Owens approached Moore's vehicle, Moore was talking on a cell phone, and Officer Owens requested Moore end the call. Officer Owens opined the average person would end a phone call when an officer approached their vehicle. He added that drug traffickers may stay on the phone to report to a superior who needs to hear what is happening during the stop. An alcohol odor emanated from Moore's vehicle, and Moore admitted to having a couple of drinks. Officer Owens had worked on several cases in which drug traffickers were drinking alcohol, and he maintained the alcohol calmed their nerves. Moore further informed Officer Owens the vehicle was a rental and provided the rental agreement along with his driver's license. Officer Owens observed Moore's hand shaking heavily, which Officer Owens opined was a measurement of Moore's nervousness. Also during that time, Officer Owens observed Moore's carotid

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<sup>1</sup> Pacing is a method of measuring the speed of another vehicle. The officer maintains the same distance and speed behind the other vehicle for a period of time, and judging from the certified speedometer in the officer's car, the officer determines the other vehicle's speed.

artery and his breathing, and consequently stated he discerned Moore's pulse and breathing were accelerated, indicating nervousness.

Moore picked up his cell phone as he obeyed a request to exit his vehicle, which Officer Owens opined was an indicator of criminal activity because the cell phone is a person's device for communication when he tries to flee. Moore then lit a cigarette as he stood outside his vehicle, and Officer Owens explained that based on his training, people sometimes light cigarettes to calm their nerves. Moore agreed to a pat-down and voluntarily raised his hands to his head, which is a position known as the "felony position." Officer Owens felt what he perceived to be a large sum of wadded money. Moore moved the money from his front pocket to his back pocket, and Officer Owens said another alarm was triggered because Moore said he was unemployed. Officer Owens estimated the wad of money to be around one thousand dollars when he initially saw it, but subsequently, it was determined to be about six hundred dollars. Moore again admitted he had been drinking and placed his hands in his pockets with his head down, in a position Officer Owens described as a "defeated look." Officer Owens opined this action is used to dissipate nervous energy.

Moore was traveling from Lawrenceville, Georgia, which is a suburb of Atlanta, Georgia, to see his grandmother in Marion, North Carolina. Officer Owens testified ninety percent of the people he has arrested in major criminal drug cases have come from Atlanta. It raised some questions for Officer Owens when Moore explained he was traveling to visit his grandmother at one o'clock in the morning, especially after drinking. During questioning, Moore stated a third-party had rented the vehicle. Officer Owens explained third-party rental vehicles are one of the largest indicators of criminal activity in criminal patrol on the interstate. Officer Moore administered field sobriety tests to determine if Moore was impaired, and Moore passed two out of three. Officer Owens found Moore was not impaired and asked Moore if there was any alcohol in the vehicle. Moore denied having any alcohol, weapons, or drugs in the vehicle. Officer Owens also asked Moore if he could search the vehicle, but Moore declined consent.

Subsequently, Officer Owens decided to issue a warning ticket to Moore because he felt it would have been an injustice to arrest Moore for driving under the influence. However, he decided to detain Moore until the K-9 drug detection unit could arrive. Officer Carraway arrived after about fifteen minutes, a total of thirty-two minutes since the beginning of the traffic stop. Officer Carraway's dog alerted to an odor inside the car, and the officers searched the vehicle. A bottle of alcohol

was found under the front passenger seat of the vehicle, and contraband consistent with crack cocaine was found in two containers in a bag in the trunk of the vehicle. They also found a semiautomatic weapon and a bundle of currency. Moore was then arrested.

On October 22, 2010, Moore was indicted for trafficking cocaine base, first offense, and possession of a weapon during the commission of a violent crime. The case went to trial on April 25, 2011. The State cited *State v. Provet*, 391 S.C. 494, 706 S.E.2d 513 (Ct. App. 2011), *cert. granted*, Oct. 3, 2012, in support of its argument that Officer Owens had reasonable suspicion to further detain Moore beyond the scope of the initial traffic stop. It listed the following facts in support of finding a lawful detention: (1) Moore turned on his left turn signal when he was intending to turn right; (2) there was a distinctive odor of alcohol coming from Moore's vehicle; (3) Moore smoked two cigarettes during the traffic stop; (4) Moore failed to hang up his cell phone when Officer Owens approached; (5) Moore appeared nervous, evidenced by his shaky hands, rapid pulse, and heavy breathing; (6) Moore attempted to pick up his cell phone when Officer Moore asked him to exit the vehicle; (7) Moore had a large wad of cash on his person even though he stated he was unemployed; (8) Moore drove a vehicle rented by a third-party; (9) Moore was driving from Atlanta, a known hub for drug trafficking; and (10) Moore stated he was going to his grandmother's house, but it was already 1 a.m.

After hearing both parties' arguments and reviewing relevant case law, the trial court stated

In particular, the problem I have with the or the facts that are revealed by the rental agreement indicate the rental in North Carolina on the evening, afternoon before the stop was made at one o'clock in the morning. I have my doubts that the car was driven from Morganton to Lawrenceville and back to Marion to visit a grandmother. Morganton and Marion is a much shorter trip than that.

So, it appears that he may have been less than truthful about the purpose of his trip. Also, for someone unemployed, to be carrying such a large amount of cash in their pocket also would obviously give [an] officer reasonable suspicions. The other factors as noted, I have

given those the weight required, and in this case I am going to refuse to suppress.

The trial proceeded and Moore was convicted of both charges. He was sentenced to twenty-five years on his trafficking charge as well as five years on his possession charge, and the sentences were to run concurrently. This appeal followed.

## STANDARD OF REVIEW

"In Fourth Amendment cases, the trial court's factual rulings are reviewed under the 'clear error' standard." *Provet*, 391 S.C. at 498, 706 S.E.2d at 515 (citing *State v. Brockman*, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000)). "Under the clear error standard, an appellate court will not reverse a trial court's findings of fact simply because it would have decided the case differently." *Id.* (internal quotations omitted) (citing *State v. Pichardo*, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005)). "Therefore, we will affirm if there is any evidence to support the trial court's rulings." *Id.* (citing *State v. Khingratsaiphon*, 352 S.C. 62, 70, 572 S.E.2d 456, 460 (2002)).

## LAW/ANALYSIS

"The Fourth Amendment guarantees '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . .'" *Id.* at 499, 706 S.E.2d at 515 (alteration in original) (quoting U.S. Const. amend. IV). "Generally, the decision to conduct a traffic stop is [a] reasonable [seizure] when the police have probable cause to believe a traffic violation has occurred." *Id.* at 499, 706 S.E.2d at 515-16 (citing *Whren v. United States*, 517 U.S. 806, 810 (1996)).

"Lengthening the detention for further questioning beyond that related to the initial stop is acceptable in two situations: (1) the officer has an objectively reasonable and articulable suspicion illegal activity has occurred or is occurring; or (2) the initial detention has become a consensual encounter." *Id.* at 500, 706 S.E.2d at 516 (citing *Pichardo*, 367 S.C. at 99, 623 S.E.2d at 848). "Reasonable suspicion requires a particularized and objective basis that would lead one to suspect another of criminal activity." *Id.* (citing *State v. Woodruff*, 344 S.C. 537, 546, 544 S.E.2d 290, 295 (Ct. App. 2001)). "Reasonable suspicion is not readily, or even usefully, reduced to a neat set of legal rules, but, rather, entails common sense, nontechnical

conceptions that deal with factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act.'" *Id.* (quoting *United States v. Foreman*, 369 F.3d 776, 781 (4th Cir. 2004)). "Therefore, courts must 'consider the totality of the circumstances' and 'give due weight to common sense judgments reached by officers in light of their experience and training.'" *Id.* at 500-01, 706 S.E.2d at 516 (quoting *United States v. Perkins*, 363 F.3d 317, 321 (4th Cir. 2004)).

In *State v. Tindall*, 388 S.C. 518, 522, 698 S.E.2d 203, 205 (2010), an officer stopped Tindall for speeding, following too closely behind another vehicle, and failing to maintain his lane. The officer eventually informed Tindall that he would receive a warning ticket, but the officer then continued questioning Tindall for six to seven additional minutes, asking about drug crimes and various things about Tindall's business. *Id.* The issue before the court was "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, instead opting to continue his questioning." *Id.* at 523, 698 S.E.2d at 206. The court found when the officer decided to continue detaining Tindall, he had ascertained the following facts:

- (1) Tindall was driving to Durham to meet his brother;
- (2) Tindall was driving a rental car rented the previous day by a third-party which was to be returned to Atlanta on the day of the stop; (3) Tindall did a "felony stretch" on exiting the vehicle; and (4) Tindall seemed nervous.

*Id.* Our supreme court found those facts did not provide reasonable suspicion, and, thus, the continued detention was illegal. *Id.*

Moore concedes the initial stop was legal but contends Officer Owens exceeded the scope of the stop without reasonable suspicion of a serious crime. The question before this court is whether Officer Owens developed a reasonable, articulable suspicion that Moore was trafficking drugs at the time he intended to issue the warning citation such that the continued detention was lawful.

We first note the trial court placed a heavy emphasis on Moore's trip from Morganton to Lawrenceville to Marion in finding reasonable suspicion existed. The dissent believes the trial court's finding was consistent with Officer Owen's testimony, but we do not agree. Officer Owens simply stated the third-party rental

agreement was indicative of drug trafficking and that it was an odd time of night to be visiting a grandmother especially given that Moore had been drinking. Officer Owens did not testify that the exact route Moore allegedly took was suspicious and gave no specific testimony to support the trial court's finding that it was doubtful he had driven from Morganton to Lawrenceville and back to Marion. It is important that we analyze the factors that Officer Owens considered at the time of the detention and not factors put forth by the trial court at a later date. Thus, we do not address the trial court's finding as a factor in determining whether Officer Owens' continued detention of Moore was lawful.

The State argues there were many indicators giving rise to a reasonable suspicion: (1) Moore turned on his left turn signal when he was initially pulled over (sign that Moore might flee); (2) Moore took a long time to pull over (sign that Moore might flee); (3) Moore never turned off his turn signal (sign of nervousness); (4) Moore admitted to drinking (typically used to calm a drug trafficker's nerves); (5) Moore started smoking a cigarette (another sign of attempting to calm nerves); (6) Moore continued to talk on his cell phone after he was pulled over by officer (common in drug trafficking cases because it indicates he is attempting to let a superior know he has been stopped by law enforcement); (7) Moore's hands were shaking heavily and his pulse was elevated (additional signs of nervousness); (8) Moore tried to pick up his cell phone once he got out of the car (sign that Moore might flee); (9) Moore had a large amount of cash in his pocket even though he admitted to being unemployed; (10) Moore drove a rental car rented by a third-party (common in drug trafficking); (11) Moore was driving on I-85, coming from the Atlanta area (a known drug corridor and a major drug source); (12) Moore claimed to be on the way to visit his grandmother (unusual to visit grandmother at 1 a.m.); (13) Moore assumed the felony stretch position even though the officers did not ask him to do so; and (14) Moore remained extremely nervous even after he was advised he would only receive a warning citation.

We share the Fourth Circuit's concern regarding the State's inclination toward using whatever facts are present, no matter how innocent, as indicia of suspicious activity. *See State v. Burgess*, 394 S.C. 407, 415, 714 S.E.2d 917, 921 (2011) (citing *United State v. Foster*, 634 F.3d 243, 248 (4th Cir. 2011)).

[T]he State must do more than simply label a behavior as suspicious to make it so. The State must be able to either articulate why a particular behavior is suspicious or logically demonstrate, given the surrounding

circumstances, that the behavior is likely to be indicative of some more sinister activity than may appear at first glance.

*Id.* (internal quotations and citations omitted). We recognize that factors consistent with innocent travel can, when taken together, give rise to reasonable suspicion, but we do not believe the present factors eliminate a substantial portion of innocent travelers. See *United States v. Digiovanni*, 650 F.3d 498, 511-13 (4th Cir. 2011). In our view the present factors have been expanded by the State in an effort to distinguish this case from *Provet*. Despite this effort, the alleged flight indicators lost much of their significance once Moore cooperated and stayed throughout the initial traffic stop and sobriety test. Further, the State attempted to expand the factor of nervousness into several factors by listing Moore's specific nervous conduct throughout the stop. As to Moore's wad of money, Officer Owens had no way of determining the total amount of cash in Moore's pocket, and it could have consisted of one dollar bills or one hundred dollar bills. Thus, this fact does not reasonably contribute to his reasonable suspicion. The State argues Moore's admission of drinking also contributed to Officer Owens' reasonable suspicion, but Officer Owens admitted Moore was not impaired and it would have been unfair to issue a ticket for an alcohol-related offense. Once we have viewed the factors in their totality, we find the State presented a similar case to *Tindall*: Moore was driving to visit a family member, Moore was driving a vehicle rented by a third-party, he was coming from a major city known as a drug hub and traveling along a known drug route, he assumed the felony position, and he displayed nervous conduct throughout the entire stop.

Consequently, we find these facts did not provide Officer Owen with a reasonable suspicion of a serious crime. Moore also declined consent to search his vehicle. As a result, the continued detention was illegal, and the drugs discovered during the search of the vehicle must be suppressed.

## CONCLUSION

For the foregoing reasons, the trial court is

**REVERSED.**

**GEATHERS, J., concurs.**

**FEW, C.J., dissenting:** I would affirm the trial court's decision denying Moore's motion to suppress because there is evidence in the record to support the trial court's factual findings, and its legal conclusions are not clearly erroneous. *See State v. Tindall*, 388 S.C. 518, 523 n.5, 698 S.E.2d 203, 206 n.5 (2010) (summarizing our standard of review—"we must ask first, whether the record supports the trial court's assumed findings . . . and second, whether these facts support a finding that the officer had reasonable suspicion of a serious crime"). As explained by the majority, trial courts employ a "totality of the circumstances analysis" and "must give due weight to common sense judgments reached by officers in light of their experience and training." *State v. Taylor*, 401 S.C. 104, 112-13, 736 S.E.2d 663, 667 (2013). In this case, the trial court did just that in concluding the officer's observations and the circumstances under which he assessed the situation gave rise to a reasonable suspicion that Moore was engaged in serious criminal activity.

The majority's opinion lists numerous observations the officer made that led him to be suspicious of Moore. I agree many of the facts the officer observed are insignificant, and I share the majority's frustration over the officer's attempt to make innocent circumstances appear suspicious. In this case, however, the trial court made specific factual findings regarding observations it found to be significant, focusing on two key facts—the "large sum of wadded money in [Moore's] pocket" and Moore's explanation that he was driving to his grandmother's house at 1:00 a.m. Our standard of review forbids us to disagree with these findings if there is any evidence to support them. *See* 401 S.C. at 108, 736 S.E.2d at 665 ("A trial court's Fourth Amendment suppression ruling must be affirmed if supported by any evidence.").

The majority's decision expressly disregards this standard of review as to these key facts. First, the majority improperly reassesses the significance the officer placed on the money found in Moore's pocket. During the suppression hearing, the officer testified,

I felt what I perceived as a large sum of wadded money in his pocket, and I left it there, and then Deputy or Corporal Hancock proceeded in checking his pockets, then he pulled out the wad of money, and then put[] it back in his pocket.

When asked how much money he thought Moore had, the officer replied, "Well, it's more . . . folded money than I carry. I would . . . [say] it was at least . . . bordering a thousand dollars." The officer also testified that Moore told him he was unemployed. When asked about the apparently large amount of money in the possession of an unemployed suspect, the officer replied, "That would be cause for alarm."

The trial court found that "someone unemployed . . . [and] carrying such a large amount of cash in their pocket . . . would obviously give an officer reasonable suspicions." Despite the officer's testimony to support the trial court's finding, the majority disagrees. The majority states, "As to Moore's wad of money, [the officer] had no way of determining the total amount of cash in Moore's pocket, and it could have consisted of one dollar bills or one hundred dollar bills. Thus, this fact does not reasonably contribute to his reasonable suspicion."<sup>2</sup> In *State v. Wallace*, 392 S.C. 47, 52, 707 S.E.2d 451, 453 (Ct. App. 2011), this court stated "the application of the law to a specific set of facts in an individual case can be unsettling." By that, we meant it can be difficult to determine "whether [the trial court's factual findings] support a [legal conclusion] that the officer had reasonable suspicion of a serious crime"—the second step in the analysis set out in *Tindall*. See 388 S.C. at 523 n.5, 698 S.E.2d at 206 n.5. In the first step of the *Tindall* analysis—reviewing the factual findings themselves—we are not permitted to make it difficult. Rather, we are constrained to determine whether there is any evidence to support the finding. In this instance, the majority simply disagrees with the trial court despite evidence supporting the trial court's finding. In doing so, the majority has failed to observe our standard of review.

Second, the majority disregards our standard of review by minimizing the significance of the trial court's specific factual finding regarding Moore's pretextual explanation that he was driving to his grandmother's house at 1:00 a.m. along a highly improbable route. At the suppression hearing, the State offered in evidence the rental agreement the officer found in Moore's car, which showed the car had

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<sup>2</sup> I disagree with the majority's statement that this fact should not be considered because the officer "had no way of determining the total amount of cash in Moore's pocket." The officer made an on-the-spot assessment under the circumstances before him that Moore was carrying an unusual amount of money, and this made him suspicious. The trial court relied on this fact to find the officer's suspicion was reasonable. It makes no difference that the money could have been one dollar bills.

been rented in North Carolina the day before. Moore told the officer he had driven the car to a suburb of Atlanta, and was on his way back to Marion, North Carolina, to visit his grandmother. Based on this evidence, the trial court found:

[T]he rental agreement indicates the rental in North Carolina on the evening, afternoon before the stop was made at one o'clock in the morning. I have my doubts that the car was driven from Morganton to Lawrenceville [Georgia] and back to Marion to visit a grandmother. That's a long way to go around to visit your grandmother. Morganton and Marion is a much shorter trip than that. So, it appears that he may [have] been less than truthful about the purpose of his trip.

The majority ignores this finding because it claims the officer "did not testify to this particular detail." However, as part of his testimony regarding observations he made during the traffic stop, which was offered to show why he was suspicious, the officer testified he read the rental agreement and found Moore's story regarding the purpose of his trip to North Carolina to be dubious, given the hour and his alleged destination. Because the officer's testimony and the evidence produced at the hearing supports the court's finding that Moore was "less than truthful about the purpose of his trip," we are not permitted to simply ignore this finding.

In addition to these two key facts, the trial court relied on other observations made by the officer that support the reasonableness of the officer's suspicion. In the argument portion of the suppression hearing, the assistant solicitor listed, by my count, eighteen separate facts in support of reasonable suspicion. While some of those facts are almost completely insignificant by themselves, I find the following facts, considered as a whole, to be important to our analysis: (1) Moore turned on his left turn signal, even though he was pulling over to the right side of the road, after the officer activated his blue lights; (2) Moore took a long time to pull over; (3) the officer detected an odor of alcohol; (4) Moore smoked two cigarettes during the stop; (5) Moore continued talking on his cell phone during the stop; (6) the officer described Moore as "overly nervous;" (7) Moore's pulse was rapid; (8) Moore's breathing was heavy; (9) Moore tried to pick up his cell phone after he got out of the car; (10) someone other than Moore, who was not in the car, rented the car; (11) Moore was traveling from a city that is a known drug source; and (12) Moore looked down in a "defeated" fashion when asked if there were any illegal items in the car. The trial court clearly indicated it relied on these facts in addition

to the two key facts discussed above, stating, "The other factors as noted, I have given those the weight required." While none of these twelve observations, on their own, could give rise to a reasonable suspicion of criminal activity, when considered together with the two key facts discussed above, they support the trial court's finding.

We must also consider the officer's background in law enforcement, which is extensive and includes: (1) being a member of the Highway Patrol with the South Carolina Department of Public Safety for seventeen years; (2) spending twelve of those years with the Aggressive Crime Enforcement Unit—nine of which he served as the first line supervisor for the unit; (3) receiving over a thousand hours in advanced criminal interdiction, which included drug interdiction; (4) being certified as a "master interdictor" through the National Criminal Enforcement Association; and (5) serving as an instructor for the South Carolina Criminal Justice Academy in criminal interdiction. *See Wallace*, 392 S.C. at 52, 707 S.E.2d at 453 (relying on *United State v. Branch*, 537 F.3d 328, 336, (4th Cir. 2008), for the contention that courts should give weight to the practical experience of officers when determining the reasonableness of an officer's suspicion). In particular, I find the officer's experience in the Aggressive Crime Enforcement Unit and his training in drug interdiction important to support the reasonableness of his suspicion. *See id.* (considering the officer's education in drugs and drug interdiction in its analysis); *State v. Provet*, 391 S.C. 494, 506, 706 S.E.2d 513, 519 (Ct. App. 2011) (considering, in particular, the officer's experience with the Aggressive Criminal Enforcement Unit in determining the existence of reasonable suspicion).

Reviewing the record as a whole and considering the totality of the circumstances, the trial court did not err in concluding reasonable suspicion existed. Thus, I would affirm.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Spartanburg County  
Roger L. Couch, Circuit Court Judge  
Appellate Case No. 2011-191327

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THE STATE,

RESPONDENT,

V.

ASHLEY EUGENE MOORE,

APPELLANT

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**PETITION FOR REHEARING *EN BANC***

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On July 17, 2013, this Court issued an opinion in which it reversed Appellant's convictions and sentences. State v. Moore, Op. No. 5160 (S.C. Ct. App. filed July 17, 2013). Pursuant to Rules 219 and 221(a), SCACR, Respondent hereby respectfully petitions this Court for rehearing *en banc* because this appeal involves a question of exceptional importance and the following points were possibly misapprehended by the majority opinion. First, in seeking rehearing, the State respectfully submits that the majority's opinion misapplied the Court's limited standard of review in Fourth Amendment cases and improperly reassessed the trial court's specific factual findings. Second, the State respectfully submits that the majority's opinion misapprehended the totality of the circumstances test that is applied in Fourth Amendment cases.

### Standard of Review

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

#### **A. The Majority’s Opinion Misapplied the Standard of Review.**

First, the State respectfully submits that the majority’s opinion misapplied/misapprehended the standard of review.

As the dissent correctly pointed out, “the trial court made specific factual findings regarding observations it found to be significant, focusing on two key facts – the ‘large sum of wadded money in [Moore’s] pocket’ and Moore’s explanation that he was driving to his grandmother’s house at 1:00 a.m.” Notably, these two factual findings were supported by the evidence. (See R. pp. 28-29; R. pp. 34-35.) During the suppression hearing, the officer testified that he saw Appellant pull out a large wad of money from his pocket. (R. pp. 28-29.) Because

Appellant informed the officer that he was unemployed, the large wad of money in Appellant's pocket raised the officer's suspicions. (R. p. 29.) The majority dismisses this factor by stating that the officer "had no way of determining the total amount of cash in [Appellant's] pocket, and it could have consisted of one dollar bills or one hundred dollar bills. Thus, this fact does not reasonably contribute to his reasonable suspicion." This statement by the majority illustrates the majority's misapplication of the Court's limited standard of review. As the dissent properly pointed out, "[t]he majority's decision expressly disregards this standard of review as to these key facts. First, the majority improperly reassesse[d] the significance the officer placed on the money found in [Appellant's] pocket."

Additionally, the majority disregarded the Court's limited standard of review when it trivialized the trial court's specific factual finding regarding Appellant's explanation that he was on the way to his grandmother's house at 1:00 a.m. (R. pp. 34-35; R. p. 89.) The trial judge found that Appellant was "less than truthful about the purpose of his trip." (R. p. 89.) As the dissent properly pointed out, "we are not permitted to simply ignore this finding."

The State respectfully submits that the majority simply disagreed with the trial judge's conclusion and applied a de novo standard of review.

#### **B. The Majority's Opinion Misapplied the Totality of the Circumstances Test.**

Second, the State respectfully submits that the majority's opinion misapplied/misapprehended the totality of the circumstances test that is used in Fourth Amendment cases.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. This guarantee protects against unreasonable searches and seizures, including those involving

only a brief detention. Pichardo, 367 S.C. at 97, 623 S.E.2d at 847. “The touchstone of the Fourth Amendment is reasonableness.” Florida v. Jimeno, 500 U.S. 248, 250 (1991). Thus, only unreasonable searches and seizures are prohibited. State v. Foster, 269 S.C. 373, 378, 237 S.E.2d 589, 591 (1977); see Maryland v. Buie, 494 U.S. 325, 331 (1990) (“It goes without saying that the Fourth Amendment bars only unreasonable searches and seizures[.]”).

For Fourth Amendment purposes, a traffic stop of a vehicle, along with the detention of individuals during the stop, constitutes a seizure. State v. Maybank, 352 S.C. 310, 315, 573 S.E.2d 851, 854 (Ct. App. 2002). While the Fourth Amendment requires a stop to be reasonable under the circumstances, a traffic stop is reasonable per se when probable cause exists to believe a traffic violation has occurred. State v. Williams, 351 S.C. 591, 598, 571 S.E.2d 703, 707 (Ct. App. 2002). The reasonableness of a stop or detention “is measured in objective terms by examining the totality of the circumstances.” Ohio v. Robinette, 519 U.S. 33, 39 (1996). “[A] minor traffic violation arrest will not be rendered invalid by the fact it was a ‘mere pretext for a narcotics search.’ ” State v. Corley, 383 S.C. 232, 240, 679 S.E.2d 187, 191-192 (Ct. App. 2009) (citations omitted). “Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.” Whren v. United States, 517 U.S. 806, 813 (1996).

Once a lawful traffic stop is initiated, an officer may order the driver out of the vehicle and “may request a driver’s license and vehicle registration, run a computer check, and issue a citation.” Pichardo, 367 S.C. at 98, 623 S.E.2d at 847 (citing United States v. Sullivan, 138 F.3d 126 (4th Cir. 1998)); see also Muehler v. Mena, 544 U.S. 93, 100-101 (2005) (instructing additional questioning during a detention unrelated to the original purpose of the detention does not constitute an additional seizure or independent Fourth Amendment violation). Such an investigatory stop must be temporary and last no longer than necessary to effectuate its purpose.

Pichardo, 367 S.C. at 98, 623 S.E.2d at 848; see also United States v. Branch, 537 F.3d 328, 336 (4th Cir. 2008) (“The maximum acceptable length of a routine traffic stop cannot be stated with mathematical precision. Instead, the appropriate constitutional inquiry is whether the detention lasted longer than was necessary, given its purpose.”)

Even if a traffic stop is initially lawful, the detention “can become unlawful if it is prolonged beyond the time reasonably required to complete [its] mission.” Illinois v. Caballes, 543 U.S. 405, 407 (2005); see Pichardo, 367 S.C. at 98, 623 S.E.2d at 848 (“Once the purpose of that stop has been fulfilled, the continued detention of the car and the occupants amounts to a second detention.”). However, a further detention extending the scope of a traffic stop beyond its original purpose is not automatically unconstitutional. Pichardo, 367 S.C. at 99, 623 S.E.2d at 848. Instead, continued questioning beyond the duration of an initial traffic stop is lawful and permissible where: (1) the officer has a reasonable articulable suspicion of other illegal activity; or (2) the traffic stop becomes a consensual encounter. Id.

Reasonable suspicion consists of “‘a particularized and objective basis’ that would lead one to suspect another of criminal activity.” State v. Lesley, 326 S.C. 641, 644, 486 S.E.2d 276, 277 (Ct. App. 1997) (quoting United States v. Cortez, 449 U.S. 411, 417 (1981)). “Reasonable suspicion ‘is not readily, or even usefully, reduced to a neat set of legal rules, but, rather, entails common sense, nontechnical conceptions that deal with factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act.’ ” State v. Provet, 391 S.C. 494, 500, 706 S.E.2d 513, 516 (Ct. App. 2011) (quoting United States v. Foreman, 369 F.3d 776, 781 (4th Cir. 2004)). “In this highly fact-specific inquiry, reasonable suspicion ‘is a fluid concept which takes its substantive content from the particular context in

which the standard is being assessed.’ ” State v. Wallace, 392 S.C. 47, 51-52, 707 S.E.2d 451, 453 (Ct. App. 2011) (certiorari granted April 5, 2012) (quoting Foreman, 369 F.3d at 781).

The reasonable suspicion standard “is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence[.]” Illinois v. Wardlow, 528 U.S. 119, 123 (2000). “Reasonable suspicion is more than a general hunch but less than what is required for probable cause.” State v. Willard, 374 S.C. 129, 134, 647 S.E.2d 252, 255 (Ct. App. 2007); see State v. Rogers, 368 S.C. 529, 534, 629 S.E.2d 679, 682 (Ct. App. 2006) (“Reasonable suspicion is something more than an inchoate and unparticularized suspicion or hunch.”). In order for an officer to have reasonable suspicion regarding the presence of illegal drugs, the officer is required to have a particularized and objective basis arising from the totality of the circumstances that would lead an individual to suspect drugs are located in a lawfully stopped vehicle. State v. Banda, 371 S.C. 245, 254, n. 4, 639 S.E.2d 36, 41 (2006).

In determining the existence of reasonable suspicion, the totality of the circumstances must be considered. Pichardo, 367 S.C. at 104, 623 S.E.2d at 85. In reviewing the totality of the circumstances, the individual factors of the traffic stop must not be considered piecemeal or in isolation. See Branch, 537 F.3d at 337 (“Courts must look at the ‘cumulative information available’ to the officer . . . and not find a stop unjustified based merely on a ‘piecemeal refutation of each individual’ fact and inference[.]” (citations omitted)). Instead, all of the circumstances of the stop must be considered as a whole to determine whether the officer’s actions were reasonable in light of all of the information available to him at the time. See United States v. Mason, 628 F.3d 123, 129 (4th Cir. 2010) (“[J]ust as one corner of a picture might not reveal the picture’s subject or nature, each component that contributes to reasonable suspicion might not alone give rise to reasonable suspicion.”). “In applying the concept of reasonable

suspicion to the various facts of a case, '[i]t is the entire mosaic that counts, not single tiles.' ” Wallace, 392 S.C. at 52, 707 S.E.2d at 453 (quoting United States v. Whitehead, 849 F.2d 849, 858 (4th Cir. 1988)). Thus, the presence of several factors seemingly consistent with innocent travel can establish reasonable suspicion when viewed together in totality. United States v. Sokolow, 490 U.S. 1, 9 (1989).

South Carolina courts have addressed what constitutes reasonable suspicion of criminal activity in the context of a traffic stop in several recent cases. In State v. Tindall, Tindall was stopped by law enforcement for speeding, swerving, and driving too closely. 379 S.C. 304, 307, 665 S.E.2d 188, 190 (Ct. App. 2008). Shortly thereafter, Tindall was given a warning ticket, but the officers continued to question him. Id. Approximately fifteen to twenty minutes into the stop, Tindall consented to a search of the vehicle and cocaine was discovered. Id. Subsequently, the trial court denied Tindall’s motion to suppress the narcotics as the product of an illegal detention and search, and the Court of Appeals affirmed. Id. at 311, 665 S.E.2d at 192.

In affirming the denial of the suppression motion, the Court of Appeals ruled the initial traffic stop ended when Tindall’s license was returned and he was issued a warning. Id. However, the Court determined the officer had a reasonable suspicion of criminal activity warranting Tindall’s further detention based on the existence of the following indicators: (1) Tindall was nervous even after receiving a warning; (2) Tindall was driving a rental car he had not rented; (3) Tindall was only driving one way; (4) Tindall’s planned driving time was approximately eighteen hours in one day; and (5) the cities involved in the trip were known “drug hubs.” Id.

However, in a sharply-divided opinion, the Supreme Court reversed the decisions of the trial judge and the Court of Appeals. State v. Tindall, 388 S.C. 518, 520, 698 S.E.2d 203, 204

(2010). The majority of the Supreme Court determined the officer completed the initial purpose of the traffic stop when he informed Appellant he would issue a warning ticket and learned from dispatch Appellant's license and registration were problem-free. Id. at 522, 698 S.E.2d at 205. The majority concluded the information available to the officer at that time was not sufficient to constitute a reasonable suspicion of criminal activity. Id. at 523, 698 S.E.2d at 206. Thus, the majority held "the continued detention was illegal and the drugs discovered during the search of the vehicle must be suppressed." Id.

More recently, in State v. Provet, a law enforcement officer stopped Provet for driving and equipment infractions on I-85 in Greenville County. 391 S.C. at 496, 706 S.E.2d at 514. During the course of the stop, the officer observed several signs of nervousness displayed by Provet, including shaking hands and accelerated breathing. Id. The officer asked Provet several questions about where he was coming from and the purpose of his trip, and Provet provided seemingly deceptive responses. Id. at 497, 706 S.E.2d at 514. The officer additionally observed several air fresheners, numerous fast food bags, a cell phone, and some receipts in Provet's car. Id. at 497, 706 S.E.2d at 515. Based on his experience and observation, the officer believed Provet was involved in criminal activity. Id. Subsequently, after issuing a warning ticket, the officer immediately asked Provet if he had anything illegal in the car and asked for consent to search. Id. at 497-498, 607 S.E.2d at 514. Provet consented and then fled when the officer attempted to remove a fast food bag from the car filled with cocaine. Id. at 498, 706 S.E.2d at 515. During trial, Provet moved to suppress the cocaine as the product of an illegal search, and the trial judge denied the motion, finding the officer had a reasonable suspicion of criminal activity justifying an extension of the traffic stop. Id.

On appeal, this Court affirmed. Id. at 496, 706 S.E.2d at 514. Regarding the initial detention, this Court found the stop was proper as the officer's questioning was tangentially related to the traffic stop. Id. at 499, 706 S.E.2d at 516. This Court further found that the questioning did not unreasonably extend the traffic stop because the officer had not completed the initial purpose of the stop and the stop was only eleven minutes long. Id. at 499-500, 706 S.E.2d at 516. Regarding the extension of the traffic stop after the warning was issued, this Court determined the officer possessed reasonable suspicion to extend the stop based on the presence of the following factors: (1) Provet's nervous behavior; (2) the fact third-party vehicle registration is common in drug trafficking; (3) Provet's inconsistent or deceptive responses to several questions; (4) the presence of numerous fast food bags, a cell phone, and some receipts; and (5) the presence of numerous air fresheners. Id. at 504-505, 706 S.E.2d at 518-519. Based on the factors present coupled with the officer's considerable experience, this Court concluded the trial court did not err in finding an extension of the stop was justified under the circumstances. Id. at 506, 706 S.E.2d at 519-520.

Most recently, in State v. Wallace, Wallace was stopped on I-85 for committing a traffic violation. 392 S.C. at 50, 707 S.E.2d at 452. The officer took twelve minutes to complete the traffic stop and issued Wallace a citation. Id. However, based on his observations during the stop, the officer continued to question Wallace after issuing the ticket and requested consent to search the vehicle. Id. Wallace refused consent, and the officer walked a drug-sniffing dog around the vehicle. Id. The dog alerted on Wallace's car, and the officer found a substantial quantity of cocaine inside the car. Id. During trial, Wallace moved to suppress the drugs found in his vehicle, and the trial judge denied the motion. Id.

On appeal, this Court affirmed the trial judge's ruling. Id. This Court determined the following factors observed by the officer during the traffic stop established a reasonable articulable suspicion to extend the duration of the stop: (1) Wallace's abnormal braking after the officer initiated the stop; (2) Wallace's fumbling of his paperwork for an unusually long period of time; (3) the fact the passenger stared straight ahead and did not acknowledge the officer; (4) Wallace and the passenger's inconsistent responses about the trip; (5) Wallace's increasing nervousness throughout the stop; (6) the fact an unknown car pulled up behind Wallace's vehicle for several minutes during the stop; (7) Wallace's cell phone ringing during the stop; (8) the fact drug dealers frequently use decoy cars and communicate via cell phones; (9) the fact the passenger would not look at the officer while they were talking; (10) the fact the passenger was sweating and visibly nervous on a mild day; (11) the fact Wallace changed his story after the officer spoke with his passenger; (12) the fact the car was owned by a third-party, which is common in drug cases; (13) I-85's status as a known drug corridor; and (14) Atlanta's status as a known drug hub. Id. at 55, 707 S.E.2d at 455. While noting none of the factors taken in isolation established a reasonable articulable suspicion of criminal activity, this Court held the presence of all of the factors together established a reasonable suspicion when examined in totality as required. Id.

In the case sub judice, the trial judge properly denied Appellant's suppression motion because the officer observed numerous indicators of criminal activity during the course of the traffic stop before he extended the duration and scope of the stop. Much like in Wallace and Provet, Officer Owens detected multiple suspicious signs of criminal activity during the course of the traffic stop before he issued the warning citation. After observing those indicators, the officer elected to extend the detention and have a drug-detection dog perform a sniff search of

Appellant's vehicle after completing the purpose of the initial stop. As the officer's observations during the stop established a reasonable and articulable suspicion of criminal activity, the officer's decision to extend the stop was reasonable and justified under the totality of the circumstances. Therefore, the trial judge committed no error in denying Appellant's suppression motion.

As Appellant has conceded, Officer Owens was justified in initially stopping Appellant's vehicle after observing several driving violations. Thus, the sole issue on appeal is whether or not the detention was prolonged beyond the time reasonably required to complete its mission. Due to the fact Appellant exhibited signs of intoxication and the fact Appellant admitted to drinking a few alcoholic beverages, the traffic stop was reasonably extended in order for Officer Owens to conduct a field sobriety test. Officer Owens detained Appellant for approximately 31 minutes before he issued Appellant a warning for the traffic violations and impairment violation, which was a reasonable amount of time under the circumstances. See United States v. Sharpe, 470 U.S. 675, 683 (1985) (finding a twenty-minute detention during an investigatory traffic stop was objectively reasonable); see also Branch, 537 F.3d at 338 ("We begin with the basic fact that much of Branch's 30-minute detention was justified by the 'ordinary inquiries incident' to a routine traffic stop." (citations omitted)); United States v. Jeffus, 22 F.3d 554, 557 (4th Cir. 1994) (finding a fifteen-minute traffic stop to be reasonable); see, e.g., United States v. Jones, 44 F.3d 860, 872 (10th Cir. 1995) (approving of a thirty-minute traffic stop); United States v. Hardy, 855 F.2d 753, 761 (11th Cir. 1988) (finding a fifty-minute investigatory stop to be reasonable).

Approximately sixteen minutes into the stop, Officer Owens decided to further detain Appellant after issuing the warning citation. Officer Owens' decision to extend the stop was

based on his detection of the following indicators of criminal activity while he was preparing the citation and completing the stop: (1) Appellant turned on his left turn signal when he was initially pulled over (sign Appellant might flee); (2) Appellant took a long time to pullover (sign Appellant might flee); (3) Appellant never turned his turn signal off (sign of nervousness); (4) Appellant admitted he had been drinking (common in drug trafficking cases in order for the trafficker to calm nerves); (5) Appellant started smoking a cigarette (sign of attempt to calm nerves); (6) Appellant continued to talk on his cell phone even after he was pulled over (common in drug trafficking cases because most traffickers often have to answer to a higher person); (7) Appellant's hands were shaking heavily (sign of nervousness); (8) Appellant's breathing was accelerated (sign of nervousness); (9) Appellant's pulse was elevated (sign of nervousness); (10) Appellant tried to pick up his cell phone once he got out of the car (sign that Appellant might attempt to flee); (11) Appellant had a large amount of cash in his pocket even though he was unemployed; (12) Appellant drove a rental car that was rented by someone else (common in drug trafficking cases); (13) Appellant was driving on I-85 (known drug corridor); (14) Appellant was traveling from Atlanta (known as a major drug hub); (15) Appellant claimed he was on the way to visit his grandmother (most people do not visit their grandparents at 1:00 a.m.); (16) Appellant raised his hands in the felony position even though the officers did not ask him to do so; and (17) Appellant remained extremely nervous even after he was advised he would only receive a warning citation.

Contrary to the majority's opinion in this case, the multiple factors of nervousness that the officer observed was a proper consideration in the totality of the circumstances test. As a trained officer with extensive experience<sup>1</sup>, the officer noted these factors not to just point out that

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<sup>1</sup> The officer's background in law enforcement included the following: (1) he was a member of the Highway Patrol with the South Carolina Department of Public Safety for seventeen years; (2) he spent twelve of those years with the

Appellant was nervous, which most people are during traffic stops, but to note that Appellant was overly nervous. In addition, the majority's opinion ignored the officer's extensive training and experience when it applied the totality of the circumstances test. Further, contrary to the majority's opinion, the fact Appellant was drinking and driving was a viable factor to consider in the totality of the circumstances test even though the officer did not give Appellant a ticket for driving under the influence. The totality of the circumstances test does not require the officer to ignore the fact that Appellant was drinking and driving, which is common in drug trafficking cases, merely because the officer did not think it would be appropriate to issue Appellant a citation for driving under the influence.

Although some of the factors observed by the officer were potentially consistent with innocent travel, all of the factors taken together established a reasonable and articulable suspicion that Appellant was involved in criminal activity. Based on the existence of a reasonable and articulable suspicion, Officer Owens was justified in extending the traffic stop and having a drug-detection dog perform a sniff search of Appellant's vehicle. Coupled with Officer Owens' extensive training and experience, these factors established a reasonable and articulable suspicion Appellant was involved in criminal activity when viewed together under the totality of the circumstances. Thus, Officer Owens was justified in extending the traffic stop after issuing the warning citation, which ultimately led to the discovery of the narcotics and Appellant's arrest.

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Aggressive Crime Enforcement Unit—nine of which he served as the first line supervisor for the unit; (3) he received over a thousand hours in advanced criminal interdiction, which included drug interdiction; (4) he was certified as a "master interdicator" through the National Criminal Enforcement Association; and (5) he served as an instructor for the South Carolina Criminal Justice Academy in criminal interdiction. See Wallace, 392 S.C. at 52, 707 S.E.2d at 453 (relying on Branch, 537 F.3d at 336, for the contention that courts should give weight to the practical experience of officers when determining the reasonableness of an officer's suspicion); Provet, 391 S.C. at 506, 706 S.E.2d at 519 (considering, in particular, the officer's experience with the Aggressive Criminal Enforcement Unit in determining the existence of reasonable suspicion).

Appellant contends Officer Owens improperly extended the duration of the stop, primarily relying on the Supreme Court's ruling in State v. Tindall. However, Appellant's case is markedly different from the circumstances in Tindall. Unlike the officer in Tindall, the officer in this case observed all of the indicators of criminal activity prior to requesting Appellant's consent to search and detaining him further during the course of the canine sniff search of his vehicle. Compare Tindall, 388 S.C. at 522, 698 S.E.2d at 205 ("At this point, the purpose of the traffic stop was accomplished except for the issuance of the warning ticket. However, rather than issue the ticket, the officer continued to question Tindall for an additional six to seven minutes[.]") with Provet, 391 S.C. at 504, 706 S.E.2d at 518 ("Conversely, Owens' series of questions and observations occurred prior to the conclusion of the traffic stop because Owens was waiting to hear from dispatch regarding Provet's license and registration and a warning citation had yet to be issued.")

During the course of the traffic stop, Officer Owens observed numerous indicators of criminal activity after stopping Appellant for traffic violations. Although some of the factors observed by the officer were potentially consistent with innocent travel, all of the factors taken together established a reasonable and articulable suspicion Appellant was involved in criminal activity. Based on the existence of a reasonable and articulable suspicion, Officer Owens was justified in extending the traffic stop and having a drug-detection dog perform a sniff search of Appellant's vehicle.

Viewing the circumstances of the stop in totality, the length of Appellant's detention was not objectively unreasonable, and the scope and duration of the stop were only extended after the officer developed a reasonable articulable suspicion of criminal activity. See, e.g., Branch, 537 F.3d at 338 ("[W]ithin minutes of detaining Branch, Officer White had observed enough

'specific and articulable facts' to generate a 'reasonable suspicion' of illegal activity."). Therefore, the trial judge properly denied Appellant's suppression motion, and his ruling is supported by the evidence presented at trial. Applying the appropriate deferential standard of review, there is no basis to overturn the trial judge's ruling. See Provet, 391 S.C. at 506, 706 S.E.2d at 520 ("[W]e conclude the trial court did not err in finding reasonable suspicion existed to further detain Provet **because there is evidence in the record to support the trial court's ruling.**") (emphasis added). Therefore, Appellant's conviction should be affirmed.

In summary, the State respectfully asks this Court to rehear this case *en banc* because the majority's opinion misapplied the standard of review and misapplied the totality of the circumstances test that is used in Fourth Amendment cases, which is a matter of exceptional importance.

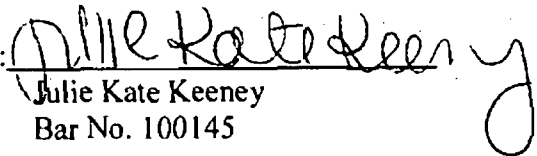
Conclusion

Based on the foregoing, Respondent requests that the panel reconsider this matter *en banc*, and affirm Appellant's conviction and sentence.

Respectfully submitted,

ALAN WILSON  
Attorney General

JULIE KATE KEENEY  
Assistant Attorney General

By:   
Julie Kate Keeney  
Bar No. 100145

Office of the Attorney General  
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July 29, 2013

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Spartanburg County  
Roger L. Couch, Circuit Court Judge  
Appellate Case No. 2011-191327

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THE STATE,

RESPONDENT,

V.

ASHLEY EUGENE MOORE,

APPELLANT

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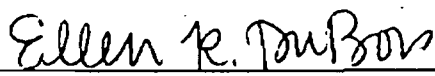
**PROOF OF SERVICE**

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I, Ellen R. DuBois, certify that I have served the within Respondent's Petition for Rehearing on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Carmen Ganjehsani, Esquire  
S.C. Commission on Indigent Defense  
Division of Appellate Defense  
Post Office Box 11589  
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.  
This 29th day of July, 2013.

  
ELLEN R. DuBOIS  
Legal Assistant

Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3727

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

---

THE STATE,

RESPONDENT,

V.

ASHLEY EUGENE MOORE,

APPELLANT

APPELLATE CASE NO. 2011-191327

---

Appeal from Spartanburg County  
Roger L. Couch, Circuit Court Judge

---

Opinion No. 5160

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**APPELLANT'S RETURN TO  
PETITION FOR REHEARING *EN BANC***

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On July 17, 2013, this Court issued its Opinion reversing the Trial Court's denial of Appellant Ashley Eugene Moore's motion to suppress evidence discovered during a traffic stop and reversing his convictions for trafficking and possession. The State thereafter filed a Petition for Rehearing *En Banc* pursuant to Rules 219 and 221(a), SCACR, arguing this Court misapplied the standard of review in Fourth Amendment cases and misapprehended the totality of the circumstances test applied in Fourth Amendment cases. Appellant Moore responds as follows:

This Court correctly applied the established law of Fourth Amendment cases to the facts of this case to reverse Moore's convictions where the State did not present sufficient evidence to establish that the officer conducting the traffic stop had reasonable and articulable suspicion that

criminal activity was afoot. Accordingly, this Court did not misapprehend or overlook any points requiring a rehearing. Furthermore, this case does not involve a question of exceptional importance requiring a rehearing *en banc*.

First, the State contends that this Court's majority opinion misapplied or misapprehended the standard of review.

On appeals from a denial of a motion to suppress based on Fourth Amendment grounds, the appellate courts of this State apply a deferential standard of review and will reverse if there is clear error. State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010). This deference, however, does not bar appellate courts from conducting their own review of the record to determine whether the trial judge's decision is supported by the evidence. Id. The appellate courts will affirm if there is any evidence to support the trial court's ruling. State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 460 (2002).

The State first incorrectly argues that the Trial Court focused on Moore's explanation that he was driving to his grandmother's house at 1:00 a.m. in finding that reasonable suspicion existed. This is not a complete and accurate statement of the Trial Court's finding for his ruling. Instead, the Trial Court in denying the motion to suppress stated:

In particular, the problem I have with the or the facts that are revealed by the rental agreement indicate the rental in North Carolina on the evening, afternoon before the stop was made at one o'clock in the morning. I have my doubts that the car was driven from Morganton [North Carolina] to Lawrenceville [Georgia] and back to Marion [North Carolina] to visit a grandmother. That's a long way to go around to visit your grandmother. Morganton and Marion is a much shorter trip.

So, it appears that he may have been less than truthful about the purpose of this trip.

R.p. 89, II. 8-17.

As the majority properly held, there was no evidence in the record to support this finding by the Trial Court. Officer Owens never testified that Moore told him that Moore had actually driven

the rental car from North Carolina to Georgia and then was driving back to North Carolina. While the rental agreement may have indicated that the car was rented by a third-party in North Carolina that afternoon, there is no evidence in the record that Moore was the individual who actually drove the car from North Carolina to Georgia. R.p. 85, ll. 7-21. Moore only said that he was driving from Lawrenceville, Georgia to North Carolina. R.p. 32, ll. 1-8; 34, ll. 3-4, 15-18. There is nothing unusual about a person driving from Georgia to North Carolina in one evening. The Trial Court's finding that Officer Owens had reasonable suspicion because Moore made a trip from North Carolina, to Georgia, and back to North Carolina in one day is completely unsupported by the evidence.

The State also argues that the second fact relied upon by the Trial Court in his ruling denying the motion to suppress - that Moore had a large sum of wadded money in his pocket - was also supported by the evidence. Again, this finding was not supported by the evidence. During a patdown conducted by Officer Owens on Moore, Owens testified that he "felt what I perceived as a large sum of wadded money in his pocket." R.p. 28, ll. 9-10. Then Deputy Hancock pulled out the wad of money from Moore's pocket, but then immediately put it back in Moore's pocket. R.p. 28, ll. 11-13. Neither officer actually saw what type of bills were included in the wad of money, nor did either officer count how much money it was at that time. The officers simply did not know if Moore was carrying a large amount of cash with him or was simply carrying a number of one dollar bills.

Therefore, when the officers did not know at the time how much cash Moore was actually carrying, the Trial Court's finding that "for someone unemployed, to be carrying such a large amount of cash in their pocket also would obviously give a [sic] officer reasonable suspicions" is also unsupported by the actual evidence. R.p. 89, ll. 17-22.

This Court's majority properly held that the two primary factors relied upon by the Trial Court in determining that the officers had reasonable suspicion of illegal activity to lengthen the traffic stop detention of Moore were not supported by any evidence. Accordingly, this Court's majority did not misapply the standard of review and correctly reversed the Trial Court's ruling.

The State also argues that this Court misapplied or misapprehended the totality of the circumstances test used in Fourth Amendment cases. Although it may be correct that in reviewing the totality of the circumstances, individual factors of the traffic stop must not be considered piecemeal or in isolation, courts can still discuss the individual factors "one by one as [they] put them into the mix" in evaluating "the combined strength of these factors." United States v. Sprinkle, 106 F.3d 613, 617 (4th Cir. 1997). If the individual factors "gain little, if any, strength when put together," reasonable, articulable suspicion of criminal activity will not exist. Id. at 618-19.

Here, the State's reliance on factors all consistent with innocent behavior, and most of which are signs of nervousness during a traffic stop, do not when combined rise to the level of reasonable suspicion consisting of a particularized and objective basis that would lead one to suspect another of criminal activity. The indicators relied upon by the State as giving rise to a reasonable suspicion consist of the following<sup>1</sup>: (1) Moore turned on his left turn signal when he was initially pulled over; (2) Moore took a long time to pullover (although the record does not indicate exactly how long it took Moore to pullover [R.p. 15, ll. 17-23]); (3) Moore never turned his signal off – a sign of nervousness; (4) Moore admitted he had been drinking, although Officer Owens concluded that Moore was not impaired [R.p. 38, l. 25 – 43, l. 11]; (5) Moore began smoking a cigarette; (6) Moore

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<sup>1</sup> While the State also includes the factor that Moore had a large amount of cash in his pocket, as set forth above, there is no evidentiary support that the officers knew this before they conducted the illegal search.

continued to talk on his cell phone after he was pulled over; (7) Moore was nervous with hands shaking, accelerated breathing, and an elevated pulse; (8) Moore tried to pick up his cell phone once he got out of the car; (9) Moore drove a car rented by someone else; (10) Moore was driving on I-85; (11); Moore was traveling from the Atlanta area; (12) Moore said he was traveling to North Carolina to visit his grandmother even though it was 1:00 a.m.; (13) Moore raised his hands in the felony position even though the officers did not ask him to do so; and (14) Moore remained nervous after receiving a warning citation.

These factors combined simply show that Moore was someone traveling late at night from the Atlanta area to North Carolina on a heavily traveled interstate who was pulled over for speeding and possibly for drinking while driving and who was understandably very nervous. The factors provided by the State gain little, if any, strength when put together. Together, they did not give the officers in this case the necessary reasonable, articulable suspicion of criminal activity, and to the extent the Trial Court's ruling relied on any of these remaining factors,<sup>2</sup> there is no evidence to support a finding of reasonable suspicion. "The Government cannot rely upon post hoc rationalizations to validate those seizures that happen to turn up contraband." United States v. Foster, 634 F.3d 243, 249 (4th Cir. 2011). This Court's majority therefore correctly reversed the Trial Court's denial of Moore's motion to suppress the contraband found during the illegal search.

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<sup>2</sup> While the Trial Court made a cursory reference to these remaining factors, his ruling was primarily based on Moore's alleged driving from North Carolina to Georgia and then back to North Carolina in one day and the large amount of cash Moore was carrying, which as set forth in this Return, were findings not supported by any evidence.

CONCLUSION

This Court's majority did not misapply or misapprehend the standard of review or the totality of circumstances tests used in Fourth Amendment cases and correctly reversed the Trial Court's denial of the motion to suppress. Accordingly, Appellant Ashley Eugene Moore respectfully requests this Court to deny the State's Petition for Rehearing *En Banc*.

Respectfully submitted,



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Carmen V. Ganjebsani  
Appellate Defender

This 8th day of August, 2013.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

\_\_\_\_\_  
Appeal from Spartanburg County  
Roger L. Couch, Circuit Court Judge  
\_\_\_\_\_

THE STATE,

RESPONDENT,

V.

ASHLEY EUGENE MOORE,

APPELLANT

\_\_\_\_\_  
CERTIFICATE OF SERVICE  
\_\_\_\_\_

The undersigned attorney hereby certifies that a true copy of the Return to Petition for Rehearing in the above-entitled case has been served upon Julie Kate Keeney, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and to Mr. Ashley Eugene Moore # 345798, Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 8th day of August, 2013.



\_\_\_\_\_  
Carmen V. Ganjehsani  
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 8th day  
of August, 2013.

Kane M. Loe (L.S.)  
Notary Public for South Carolina  
My Commission Expires: July 3, 2023.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

---

Appeal from Spartanburg County  
Roger L. Couch, Circuit Court Judge  
Appellate Case No. 2011-191327

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THE STATE,

RESPONDENT,

V.

ASHLEY EUGENE MOORE,

APPELLANT

---

**RESPONDENT'S REPLY TO APPELLANT'S RETURN TO PETITION FOR  
REHEARING *EN BANC***

---

On July 17, 2013, this Court reversed Appellant's convictions and sentences. On July 29, 2013, Respondent ("the State") filed a Petition for Rehearing *En Banc* pursuant to Rules 219 and 221(a), SCACR, arguing that this Court misapplied the standard of review in Fourth Amendment cases and misapprehended the totality of the circumstances test applied in Fourth Amendment cases. On August 8, 2013, Appellant served a Return to Petition for Rehearing *En Banc*, in which Appellant argued that the State failed to present sufficient evidence to establish that the officer conducting the traffic stop had reasonable and articulable suspicion that criminal activity was afoot. The State responds as follows:

On August 14, 2013, our Supreme Court issued an opinion in State v. Provet, Op. No. 27297 (S.C. Sup. Ct. filed August 14, 2013) (See attached Exhibit), in which it held that the officer had a reasonable suspicion supported by articulable facts that criminal activity was afoot,

justifying the expansion of the traffic stop. Notably, similar to the dissent's opinion in the case at hand, our Supreme Court's opinion in Provet reiterated the importance of its deferential standard of review:

We agree with the trial court and the Court of Appeals that Officer had a reasonable suspicion supported by articulable facts that criminal activity was afoot, justifying a second seizure. **Moreover, because the record contains evidence that supports the trial court's finding, under our deferential standard of review we must affirm its finding.**

Id. (emphasis added).

Thus, regardless of whether our Supreme Court agreed with the trial court's decision that reasonable suspicion existed to justify the expansion of the traffic stop, our Supreme Court pointed out that it had to affirm the trial court's ruling because the record contained evidence that supported the trial court's decision.

Further, in response to Provet's arguments that there were several factors indicative of innocent travel, our Supreme Court stated: "While we agree these facts could be found to weigh against Officer's reasonable suspicion, **that determination was for the trial court**, and we **must** affirm when any evidence in the record supports its finding." Provet, Op. No. 27297 (S.C. Sup. Ct. filed August 14, 2013) (emphasizes added). Moreover, our Supreme Court expressly rejected the proposition that the officer's subjective determinations could taint an objectively valid seizure. Id. Instead, our Supreme Court reemphasized that its standard of review required it to affirm the trial judge's ruling if there was any evidence in the record to support the trial judge's finding. Id.

In summary, the Supreme Court's analysis in Provet mirrors the dissent's analysis in the case at hand with respect to the majority's misapplication of the standard of review in the case at hand. Accordingly, this Court should grant the State's Petition for Rehearing *En Banc*.

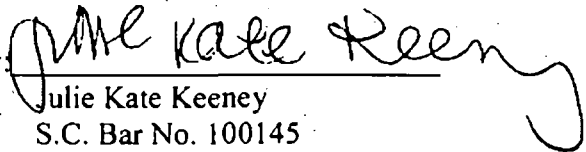
Conclusion

Based on the foregoing, Respondent requests that the panel reconsider this matter *en banc*, and affirm Appellant's conviction and sentence.

Respectfully submitted,

ALAN WILSON  
Attorney General

JULIE KATE KEENEY  
Assistant Attorney General

By:   
Julie Kate Keeney  
S.C. Bar No. 100145

Office of the Attorney General  
Post Office Box 11549  
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(803) 734-3727

August 14, 2013

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Spartanburg County  
Roger L. Couch, Circuit Court Judge  
Appellate Case No. 2011-191327

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THE STATE,

RESPONDENT,

V.

ASHLEY EUGENE MOORE,

APPELLANT

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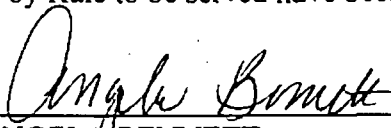
**PROOF OF SERVICE**

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I, Angela Bennett, certify that I have served the within Respondent's Reply to Appellant's Return to Petition for Rehearing *En Banc* on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Carmen Ganjehsani, Esquire  
S.C. Commission on Indigent Defense  
Division of Appellate Defense  
Post Office Box 11589  
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.  
This 14th day of August, 2013.

  
ANGELA BENNETT  
Legal Assistant

Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3727

## The South Carolina Court of Appeals

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ATTORNEY GENERAL  
OFFICE

The State, Respondent,

v.

Ashley Moore, Appellant.

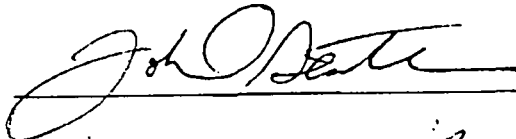
Appellate Case No. 2011-191327

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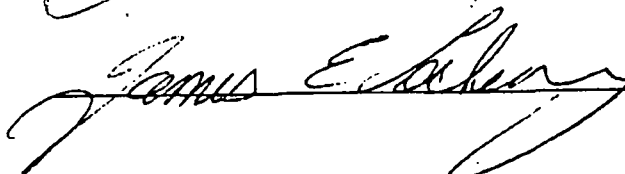
ORDER

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After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

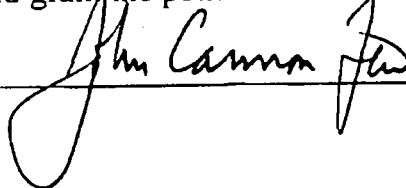


J.



J.

I adhere to my dissent, and I would grant the petition for rehearing.



C.J.

Columbia, South Carolina

cc:

Dayne C. Phillips  
Julie Kate Keeney

FILED

27 Sept 2013

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals  
Appeal From Spartanburg County  
Hon. Robert L. Couch, Circuit Court Judge  
Appellate Case No. 2013-002309

THE STATE,

Petitioner,

v.

ASHLEY EUGENE MOORE,

Respondent.

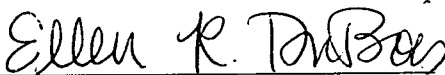
**PROOF OF SERVICE**

I, Ellen DuBois, certify that I have served the within Appendix on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record,

Dayne C. Phillips, Esquire  
South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
Post Office Box 11589  
Columbia, SC 29211-1589

I further certify that all parties required by Rule to be served have been served.

This 30<sup>th</sup> day of October, 2013.

  
ELLEN R. DuBOIS  
Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3727