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STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of General Sessions
Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2015-001176

THE STATE,RESPONDENT

v.

JERRY JEROME ANDREWS, IIIAPPELLANT.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. The trial court properly found the evidence of Appellant's drugs and gun should not be suppressed because officers had reasonable suspicion justifying their stop of Appellant where Appellant and two other men were walking down the street towards Lander University at 2:15 a.m., one of the men disappeared when an officer drove past them a second time, there was no reasonable place for the third man to have disappeared at that time, campus police were aware of crimes against students and other property crimes occurring on campus, and the officer did not recognize the men as any of the approximate thirty students living on campus at that time.
2. The trial court properly found the evidence of Appellant's drugs and gun should not be suppressed because officers did not discover the evidence pursuant to a search, and even if their actions did constitute a search, the officers had reasonable suspicion justifying their search of Appellant for weapons due to Appellant's nervous behavior, inconsistent stories, and disobedience.

STATEMENT OF THE CASE

On March 27, 2015, Appellant was indicted by the Horry County Grand Jury for unlawful carrying of a handgun (2015-GS-24-01753), possession of a pistol after being convicted of a violent crime (2015-GS-24-01754), resisting arrest (2015-GS-24-00395), and possession of marijuana (2015-GS-24-00394). On May 12, 14, 15, and 18, 2015, Appellant proceeded to a jury trial before the Honorable Frank R. Addy, Jr. Thomas Adducci, Esquire, represented Appellant; and Assistant Solicitors Brian Moroney, Esquire, and Demetri Andrews, Esquire, represented the State. The jury found Appellant guilty of the resisting arrest and possession of marijuana charges, and the trial judge sentenced him to an aggregate sentence of four months' imprisonment. (R.p.239, line 22–R.p.240, line 5; R.p.248, line 2–R.p.249, line 6).

Appellant filed a timely Notice of Appeal and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

On June 30, 2012, at approximately 2:15 a.m., Officer Steve Osborne of the Lander University Police Department was out on patrol when he noticed three men in dark clothing walking towards campus. He continued on his patrol to Lide Apartments, the sole residential facility for the estimated thirty Lander students living on campus that summer. On his return from the apartments, he noticed one of the men had disappeared and that the remaining two men, later identified as Appellant and Shantavius Johnson, were walking in the road, despite the availability of sidewalks. (R.p.26, line 1–R.p.27, line 4; R.p.28, lines 3–5; R.p.33, lines 7–14; R.p.110, line 10–R.p.111, line 12; R.p.118, lines 20–25; R.p.127, line 1–R.p.128, line 13).

Officer Osborne testified that based on his observations, he became suspicious of the men because the campus facilities in that area were closed for the summer, and based on his "familiarity" with the non-campus residences in the area and his awareness of break-ins and sexual assaults which had happened on campus in recent months,¹ he was unaware of any buildings the missing man could have been in without committing some crime. Moreover, Officer Osborne was familiar with the thirty students who lived on campus at that time, and observed that none of the men appeared to be one of those students. Officer Osborne was also concerned for the men's safety, as they were walking in the roadway late at night instead of using the sidewalk, and were coming over the crest of a hill, so any oncoming vehicle would likely collide with them. (R.p.27, lines 4–10; R.p.27, line 18–R.p.29, line 16; R.p.111, line 13–R.p.112, line 2).

¹ On March 21, 2012, two Presbyterian College students sexually assaulted three Lander students in their campus residences. Both men pled guilty to their crimes. Officer Osborne also testified Lander had issues with "various other property crimes." (R.p.29, lines 4–16); 2012-GS-24-01295–98; 2012-GS-24-01303–06.

Due to these concerns, Officer Osborne resolved he would stop the men and ask them a few questions. Before doing so, he called his supervisor, Officer Peppers, who was on patrol nearby and training a new officer, Officer Link, and asked them to assist him. Officer Osborne then pulled up behind the men and initiated his blue lights. (R.p.27, lines 11–14; R.p.112, lines 3–9).

As Officer Osborne began to exit his vehicle, he noticed Johnson throw a silver-colored can onto the shoulder of the road. Upon closer inspection, he discovered it was an open beer can. As he began to question the two men, Officers Peppers and Link arrived to assist him. Officer Osborne began questioning the two men and requested their drivers' licenses. Pursuant to office procedure, he called his dispatcher and asked him to search for any outstanding warrants against the men. (R.p.29, line 17–R.p.30, line 14; R.p.112, lines 6–22; R.p.113, lines 5–12; R.p.115, lines 1–7).

While he waited for the results of the search, Officer Osborne questioned the men while Officers Peppers and Link stood behind them. Officer Osborne noticed both men smelled of alcohol. Officers also noticed Appellant acted suspiciously; when officers began questioning Appellant, they noticed he repeatedly reached towards his pockets and waistband area. Officers told him to stop doing so because of their safety concerns, but Appellant ignored their warnings and pulled out his cell phone and asked for permission to call his mom, which they denied. Additionally, officers noticed Appellant: incessantly rubbed his hands together, repeatedly touched his face, was in a constant state of motion, continuously shifted his gaze among the three officers, and appeared as if he was ready to flee at any moment. (R.p.31, lines 23–24; R.p.34, lines 3–13; R.p.41, lines 13–16;

R.p.59, lines 5–10; R.p.113, line 22–R.p.114, line 5; R.p.135, line 22–R.p.136, line 20; R.p.150, line 6–R.p.151, line 6; State's Exhibit 1).

When questioned about the location of the third man, the men claimed their friend had left them on a nearby street to go to his family's house. However, Officer Osborne was familiar with that family, and noted that the third man did not resemble anyone he knew in the family. (R.p.114, lines 10–19).

The dispatcher radioed Officer Osborne, and asked him to call the station. When Officer Osborne called, he was informed that Johnson had an outstanding warrant for attempted murder, and that he had already notified the Greenwood City Police Department of the situation. Officer Williams returned to the men and other officer and, in an effort to keep the situation calm and under control, set his equipment down on the pavement, made eye contact with Officer Peppers, and together the two men handcuffed Johnson while advising him he was under arrest for the open container. Officer Osborne did not inform Johnson he was also under arrest for attempted murder because he did not want to alert Johnson that he was aware of the attempted murder charge and potentially escalate the situation. At this point, Appellant "tensed up" and appeared even more nervous than before. (R.p.31, lines 1–14; R.p.115, line 8–R.p.117, line 15; R.p.137, lines 19–24; State's Exhibit 1).

Officer Osborne, still fearing for the officers' safety and wishing to keep the situation as calm as possible, asked Appellant whether the officers could pat down the exterior of his clothing to make sure he was not in possession of any weapons. Appellant refused the request, at which point Officer Osborne informed him that they would have to pat him down anyway. As Officer Link approached Appellant to pat him down,

Appellant reached for his waistband and pocket area. Officers shouted at Appellant to stop and keep his hands up, but Appellant did not comply. While holding on to Johnson, Officer Osborne reached for Appellant's right wrist while Officer Link grabbed his left, to keep him from grabbing for some item in that area. While Appellant struggled against the officers, a gun fell from his waistband. Appellant took off running, but was caught across the street when he fell down an embankment. Officers Peppers and Link told Appellant to stay on the ground and present his hands, but he refused to do so. After approximately fifteen seconds, the officers were able to obtain control of his arms. As they pulled his right hand out of his pocket, officers saw a small bag of marijuana fall onto the ground. (R.p.31, line 16–R.p.33, line 23; R.p.43, lines 6–13; R.p.50, line 13–R.p.52, line 23; R.p.60, line 11–R.p.61, line 12; R.p.117, line 16–R.p.119, line 6; R.p.138, line 2–R.p.139, line 24; R.p.152, line 4–R.p.153, line 23; State's Exhibit 1).

While the other officers pursued and restrained Appellant, Officer Osborne asked Johnson whether he too was in possession of a weapon. Johnson admitted he was, and allowed Officer Osborne to remove it from his waistband. (R.p.34, line 20–R.p.35, line 9; R.p.119, lines 7–24).

ARGUMENT

I.

The trial court properly found the evidence of Appellant's drugs and gun should not be suppressed because officers had reasonable suspicion justifying their stop of Appellant where Appellant and two other men were walking down the street towards Lander University at 2:15 a.m., one of the men disappeared when an officer drove past them a second time, there was no reasonable place for the third man to have disappeared at that time, campus police were aware of crimes against students and other property crimes occurring on campus, and the officer did not recognize the men as any of the approximate thirty students living on campus at that time.

Appellant argues the trial judge erred in denying defense counsel's motion to suppress Appellant's marijuana and gun because the officers did not have reasonable suspicion of criminal activity justifying their stop and detention of Appellant and Johnson. He contends that the mere fact that the third man in their group had left was insufficient to indicate that either Appellant or Johnson were participating in criminal activity. The State disagrees with Appellant's allegation of error; Officer Osborne did not base his decision to stop Appellant and Johnson solely on the disappearance of the third man, but rather considered numerous other factors when he decided to stop the men, including the area in which the third man disappeared, recent crimes on campus, and their violation of traffic laws by walking in the right lane of the road.

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 also, State v. Abdullah, 357 S.C. 344, 349, 592 S.E.2d 344, 347 (Ct. App.

2004) (“On appeal from a suppression hearing, this court is bound by the circuit court’s factual findings if any evidence supports the findings.”). A trial court’s Fourth Amendment suppression ruling must be affirmed if supported by any evidence, and an appellate court may reverse only when there is clear error. State v. Groome, 378 S.C. 615, 618, 664 S.E.2d 460, 461 (2008). 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).

Under the Fourth Amendment, in order to arrest a person without a warrant, a law enforcement officer must have probable cause that the person committed a crime. Terry v. Ohio, 392 U.S. 1, 26 (1968). In order to stop a person and require a response to questioning, the Fourth Amendment further demands a law enforcement officer have a “reasonable suspicion” the person was engaged in misconduct. Terry, 392 U.S. at 27. 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)); see United States v. Arvizu, 534 U.S. 266, 273 (2002) (“[T]he Fourth Amendment is satisfied if the officer’s action is supported by reasonable suspicion to believe that criminal activity ‘may be afoot’.”). 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.” 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) (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); see State v. Willard, 374 S.C. 129, 134, 647 S.E.2d 252, 255 (Ct. App. 2007) (“Reasonable suspicion is more than a general hunch but less than what is required for probable cause.”); 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.”). Notably, a violation of motor vehicle codes provides an officer with reasonable suspicion justifying a traffic stop. State v. Provet, 405 S.C. 101, 108, 747 S.E.2d 453, 457 (2013).

In the instant case, the trial judge properly found that Officer Osborne had reasonable suspicion to stop both Appellant and Johnson. Officer Osborne initiated the stop after noting, among other things, that both men were violating traffic laws by walking in the middle of the right lane of the road. See S.C. Code Ann. § 56-5-3160 (a)–(c) (2006) (stating that when a sidewalk is available, it is unlawful for a pedestrian to walk along and upon an adjacent roadway; if a sidewalk or shoulder is not available, the pedestrian must walk on the left side of a two-way road); Provet, 405 S.C. at 108, 747 S.E.2d at 457 (stating that the violation of motor vehicle laws provides an officer with reasonable suspicion justifying a traffic stop). Officer Osborne also testified that he stopped the men to warn them of the immense danger that they, and anyone driving on the road, were in, noting that the men's dark clothing, the time of night, and the general area made the men extremely difficult to spot to incoming motorists.

In addition to Appellant's and Johnson's violation of traffic laws, Officer Osborne was also justified to stop the men based on the suspicious circumstances of their walk. Osborne testified that the men, whom Officer Osborne did not recognize as any of the thirty students living on campus at that time, were walking in an area filled with buildings not accessible to students or nonstudents alike at that time of night. Officer Osborne reasonably suspected, based on the location of the third man's disappearance and the recent sexual assaults and break-ins on campus, that there was a strong possibility that the men were engaged in some crime. See, e.g., Wallace, 392 S.C. at 51-52, 707 S.E.2d at 453 (stating reasonable suspicion is a "fluid concept" based on the context of the situation).

Accordingly, because Officer Osborne's testimony clearly indicates Appellant and Johnson were violating traffic laws at the time of the stop, Officer Osborne had reasonable suspicion justifying the stop. See Provet. Moreover, the facts of the situation, including the recent crimes on campus, the disappearance of the third man, and the time and location where Officer Osborne spotted the three men walking, provided an independent basis for Officer Osborne's reasonable suspicion. See Groome.

II.

The trial court properly found the evidence of Appellant's drugs and gun should not be suppressed because officers did not discover the evidence pursuant to a search, and even if their actions did constitute a search, the officers had reasonable suspicion justifying their search of Appellant for weapons due to Appellant's nervous behavior, inconsistent stories, and disobedience.

Appellant argues the trial judge erred in finding the officers had reasonable suspicion in searching Appellant for weapons because none of the officers articulated any specific facts which led them to believe Appellant was armed and dangerous. The State disagrees. Initially, the State notes that no "search" of Appellant took place until after Appellant dropped a gun and fled from officers; the officers informed Appellant they needed to search him, but no search took place because Appellant frantically reached for waist area despite officer warnings. Appellant's gun, which fell out of his pants due to his struggle against the officer's efforts to prevent Appellant from drawing a weapon, and his subsequent escape attempt provided officers with the necessary justification for his arrest and subsequent search. Moreover, even if the officers' actions prior to and restraining his wrists constituted a "search," Appellant's suspicious behavior justified said search.

A traffic stop supported by reasonable suspicion of a traffic violation remains valid until the officer's purpose for initiating the stop is complete. Provet, 405 S.C. at 109, 747 S.E.2d at 457. In carrying out a routine traffic stop, an officer may request a driver's license and vehicle registration, run a computer check, and issue a citation. State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010). An officer may also inquire into matters unrelated to the traffic stop without converting the encounter into something

other than a lawful seizure, provided those questions do not "measurably extend" the duration of the stop. Provet, 405 S.C. at 109, 747 S.E.2d at 457. Additionally, an officer's observations while conducting the traffic stop may create reasonable suspicion justifying further search or seizure. Id.

The need for police to conduct a frisk or patdown is greater than just the governmental interest in investigating crime. Terry, 392 U.S. at 23. The more important purpose of allowing frisks is to protect the life of police officers. Id. (“[T]here is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him.”). Since police officers are all too often killed in the line of duty by armed criminals, “[c]ertainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties.” Id.

This Court has explained even when a Terry stop is proper, the police “must have a reasonable belief the defendant is armed and dangerous” before they may frisk a defendant. State v. Fowler, 322 S.C. 263, 267, 471 S.E.2d 706, 708 (Ct. App. 1996), citing Ybarra v. Illinois, 444 U.S. 85 (1979). All of the circumstances of the stop, including the officer’s own experience and specialized training, 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)). “In other words, a reasonable person in the position of the officer must believe the frisk was necessary to preserve the officer’s safety.” Fowler, 322 S.C. at 267, 392 U.S. at 27, citing Terry. Further, “[i]n assessing whether a suspect is armed and dangerous, the officer need not be absolutely certain the individual is armed.” State v. Blassingame, 338 S.C. 240, 249, 525 S.E.2d 535, 540 (Ct. App. 1999) (citing Terry); State v. Smith, 329 S.C. 550 (Ct. App. 1998). “The issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.” Blassingame. Moreover, the need for a Terry frisk may arise before an officer has probable cause to arrest the individual under investigation. See Terry, 392 U.S. at 26–27 (noting “a perfectly reasonable apprehension of danger may arise long before [an] officer is possessed of adequate information” justifying an arrest).

Initially, the State notes that no “search” of Appellant began until he was placed under arrest after fleeing from officers. Black’s Law Dictionary defines a search as “[a]n examination of a person’s body, property, or other area that the person would reasonably be expected to consider as private.” (10th ed. 2014); see also Terry at 16 (noting that a search for weapons has occurred when an officer has “careful[ly] explor[ed] . . . the outer surfaces of a person’s clothing . . . in an attempt to find weapons”) While the officers were arresting Johnson, Officer Osborne asked Appellant whether he consented to a search. When Officer Osborne warned Appellant the officers were going to perform a search for weapons, Appellant began reaching for his waistband/pocket area, despite officer commands to refrain from doing so. Faced with this exigency, officers grabbed

Appellant's wrists to prevent him from reaching for any potential weapon, and it was Appellant's struggle against these restraints which caused his gun to fall out of his pants.

The State also submits that even if the discovery of the gun was the result of a "search," officers were more than justified to conduct said search. The State agrees with Appellant's assertion that before the police may frisk a defendant, they must have a reasonable belief that the defendant is armed and dangerous. However, Appellant fails to recognize that the officers based their decision to frisk him on numerous factors.

In the instant case, the officers, who were investigating Appellant's and Johnson's observed crimes—the open alcoholic beverage and the traffic violations—as well as the suspicious circumstances of the men's trip, were more than justified to collect the men's identification information and run a check on their names. See Tindall, 388 S.C. at 521, 698 S.E.2d at 205 (stating officers, during a routine traffic stop, may check driver's licenses and perform a records search). While awaiting the results of the record search, the officers investigated the initial suspicious behavior by asking the men about the missing third man and the reason(s) for their presence on campus. During this questioning, Appellant displayed extremely suspicious behaviors which not only supported the officers' initial suspicions that the men were engaged in criminal activity, but also suggested Appellant may be armed, justifying the need for the officers to perform a Terry frisk. Notably, Appellant: (1) repeatedly ignored officers' warning about reaching towards his waist and pockets; (2) incessantly rubbed his hands together; (3) repeatedly touched his face; (4) was in a constant state of motion and unable to stay still; (5) continuously shifted his gaze among the three officers; and (6) appeared as if he was ready to flee at any moment. Moreover, Appellant's suspicious behavior only intensified

after Johnson was placed in handcuffs. Accordingly, the officers were justified to conduct a frisk of Appellant to make sure he was unarmed, even if they did not have probable cause justifying his arrest at that time. See Terry, 392 U.S. at 24 ("When an officer is justified in believing that the individual whose suspicious behavior he is investigating . . . is armed and presently dangerous . . . it would be clearly unreasonable to deny the officer the power . . . to determine whether the person is in fact carrying a weapon."); Id. at 26–27 (noting "a perfectly reasonable apprehension of danger may arise long before [an] officer is possessed of adequate information" justifying an arrest).

Appellant exhibited numerous behaviors which led police to believe he may be armed, justifying the need for the officers to perform a Terry frisk. Applying the appropriate deferential standard of review, the evidence and testimony presented during the suppression hearing established the police conducted the stop in a reasonable manner and developed reasonable suspicion justifying their investigative detention once the stop occurred. See Segura v. United States, 468 U.S. 796, 806 (1984) ("By its terms, the Fourth Amendment forbids only 'unreasonable' searches and seizures."). Accordingly, the trial judge properly denied Appellant's motion to suppress after finding the investigative detention to be proper under the totality of the circumstances, and his ruling was supported by the evidence. See State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011) ("South Carolina appellate courts review Fourth Amendment determinations under a clear error standard. We affirm if there is any evidence to support the trial court's ruling."); Provet, 405 S.C. at 107, 747 S.E.2d at 456. Appellant's conviction was properly affirmed.

CONCLUSION

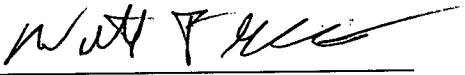
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

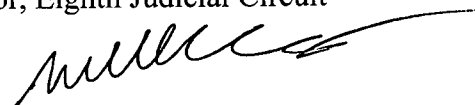
The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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JERRY JEROME ANDREWS, IIIAPPELLANT.

PROOF OF SERVICE

I, Anne Mueller, 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:

Tiffany L. Butler, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
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I further certify that all parties required by Rule to be served have been served.
This 12th day of April, 2016.



Anne Mueller
Legal Assistant

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