

STATE OF SOUTH CAROLINA
In the Supreme Court

Certiorari from Spartanburg County
Roger L. Couch, Circuit Court Judge

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DEC 28 2011

S.C. Supreme Court

PETITIONER,

THE STATE,

v.

ANDRE JACKSON,

RESPONDENT.

APPENDIX

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STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY

Roger L. Couch, Special Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANDRE JACKSON,

APPELLANT

RECORD ON APPEAL

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4	S-1	DVD	17	18, 84
5	S-2	Marijuana	19	114
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2		<u>Court's Exhibits</u>		
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P R O C E E D I N G S

(The following takes place outside the presence of the entire jury panel.)

THE COURT: All right. Mr. Hunter, is the State ready to proceed in this case?

SOLICITOR HUNTER: Yes, Your Honor.

THE COURT: You want to call the cases please.

SOLICITOR HUNTER: Your Honor, the matter before the Court today is Indictment 09-GS-42-0268, The State versus Andre Jackson, for indictment with possession with intent to distribute marijuana as well as 09-GS-42-0761, State versus Nicholas Carl Davy. Also possession with intent to distribute marijuana.

THE COURT: You want to pass those up please.

MRS. PRICE: Your Honor, Andre Price for Mr. Jackson. Mr. Jackson is present and ready to proceed in this matter.

THE COURT: All right. And Mr. Poole.

MR. POOLE: May it please the Court, Your Honor.

I am here on behalf of Nicholas Davy. Our office picked him up back in September of last year. Since I've been with the office in January up until the present time we have notified him of court appearances. I've attempted to contact him by correspondence and telephone numbers that are, have been left with us and I've been unable to make

1 contact with him. But I am here.

2 THE COURT: All right. I assume that your client, Mrs.
3 Price, has been arraigned and is pleading not guilty and
4 demanding trial by jury?

5 SOLICITOR HUNTER: Yes, Your Honor.

6 THE COURT: And is that -- the same is true?

7 MR. POOLE: The same is true here.

8 THE COURT: Okay. He's demanding trial by jury and
9 pleading not guilty?

10 MR. POOLE: That's right, Your Honor.

11 THE COURT: Okay. Madam Clerk, in the case of Mr.
12 Davy, before we start the trial, I'll ask that you produce a
13 copy of his bond so that we can put on, and any notices that
14 were sent out for this term of court so that we can
15 establish the fact that a condition of his bond is that he
16 appear for trial.

17 All right. All right. We had a brief pretrial
18 conference earlier this morning in these matters and I was
19 informed the defense has some motions you wish to make.

20 MRS. PRICE: Yes, Your Honor.

21 THE COURT: You may proceed.

22 MRS. PRICE: Your Honor, it's the position of both
23 defendants that this was a stop that is not within the, for
24 several reasons, is an invalid stop and we will be
25 proceeding with a hearing before, out of the presence of the

1 jury and before the selection of the jury in that regard.

2 THE COURT: Mr. Poole, you join in the motion?

3 MR. POOLE: We join in the motion that is---

4 THE COURT: Is it your position that the stops were
5 without probable cause?

6 Is that what you're saying?

7 MRS. PRICE: Yes, Your Honor.

8 THE COURT: All right. Mr. Hunter.

9 SOLICITOR HUNTER: Your Honor, obviously the State
10 opposes that motion. Currently Mr. McCarty is calling our
11 officer. He was told to be here at two o'clock. We'd like
12 to offer his testimony to show the probable cause in this
13 case, Your Honor.

14 THE COURT: Is he present?

15 SOLICITOR HUNTER: The officer?

16 THE COURT: Yes.

17 SOLICITOR HUNTER: We've -- he's outside calling him
18 right now.

19 MRS. PRICE: No, he's not.

20 SOLICITOR HUNTER: No, sir.

21 THE COURT: Is there an explanation as to where he
22 might be?

23 SOLICITOR HUNTER: No, sir, I'm waiting for Mr. McCarty
24 to get back. He's---

25 THE COURT: All right. Step outside and tell Mr.

1 McCarty the Court's ready to find out what's going on.

2 SOLICITOR HUNTER: Yes, Your Honor.

3 (Pause.)

4 THE COURT: Your Honor, I will tell the Court his, his
5 car is here with it running with his dog, his K-9 here. So,
6 he's in the courthouse. But we don't, we don't have an
7 exact location as of yet.

8 THE COURT: All right. Well, let's find him.

9 SOLICITOR HUNTER: Okay.

10 (Pause.)

11 THE COURT: I think your officer is present.

12 SOLICITOR HUNTER: I apologize for any inconvenience.
13 I believe he was in my office.

14 THE COURT: Do you wish to call a witness?

15 SOLICITOR HUNTER: Yes, Your Honor. I wish to call
16 Officer Montjoy.

17 THE COURT: Come forward, sir, to be sworn right here
18 to my left.

19 JONATHAN MONTJOY, being first duly
20 sworn, testified as follows:

21 THE COURT: Have a seat, sir. Once you're seated,
22 state your name for the record.

23 WITNESS: Jonathan Montjoy.

24 THE COURT: Mr. Hunter.

25 SOLICITOR HUNTER: Your Honor, may I, may I ask the

Jonathan Montjoy - Direct examination
by Solicitor Hunter

1 Court if they oppose just the probable cause of the vehicle
2 stop or the entire stop?

3 THE COURT: Well, I'm not sure exactly -- specifically
4 are you challenging probable cause to stop the vehicle or to
5 make the search or both?

6 MRS. PRICE: Stop, make the search, and jurisdiction.

7 THE COURT: All right.

8 SOLICITOR HUNTER: Thank you, Your Honor.

9 THE COURT: And what now, stop, make the search, and
10 what?

11 MRS. PRICE: Jurisdiction, Your Honor.

12 THE COURT: Okay. Proceed.

13 MR. POOLE: And Defendant Davy joins in that motion.

14 THE COURT: Joins in that motion?

15 MR. POOLE: Yes, sir.

16 THE COURT: Okay.

17 DIRECT EXAMINATION

18 BY SOLICITOR HUNTER:

19 Q All right. Officer Montjoy, who's your employer?

20 A Duncan Police Department.

21 Q Okay. How long have you been employed there?

22 A Going on six years.

23 Q And where were you employed before that?

24 A Woodruff.

25 Q Okay. And what have your assignments been over this

Jonathan Montjoy - Direct examination
by Solicitor Hunter

1 past six years?

2 A Just routine patrolman.

3 Q Routine patrol.

4 Are you also a K-9 officer?

5 A Yes.

6 Q Okay. Did you have occasion to be on I-85 on
7 September 18th or September 16th, 2008?

8 A Yes.

9 Q And where exactly on 85 were you?

10 A Around Mile Marker 63 southbound.

11 Q Okay. And what city is that?

12 A Duncan.

13 Q within what county?

14 A Spartanburg.

15 Q what did you view that day?

16 A I've -- I observed a black in color vehicle traveling
17 in the middle lane, which is lane two of three, at a real
18 low rate of speed slower than the other traffic.

19 Q was this northbound or southbound?

20 A Southbound.

21 Q Okay. So, what did you do after that?

22 A Activated the radar and got a reading of 54 miles per
23 hour in a posted 60.

24 Q Okay. what was the other traffic like around that
25 vehicle?

Jonathan Montjoy - Direct examination
by Solicitor Hunter

- 1 A Normal traffic flow that time of day is about 70 to 75.
2 Q What, what time of day is that?
3 A It's around 5:30, six o'clock.
4 Q So, towards the tail end of rush hour?
5 A Right.
6 Q Okay. And after you pulled them over, what did you do?
7 A I asked him for his license and informed him the reason
8 why I was stopping him and asked him to step to the rear of
9 the car while I conducted all the business.
10 Q Okay. And did he provide you with his license and
11 registration?
12 A Yes, he provided me with the license. It was a rental
13 car and he didn't have the paperwork right there in his
14 hand.
15 Q Do you know where the rental car was from?
16 A Maryland I believe.
17 Q Okay. Now, when you approached the -- in your
18 experience as a law officer, have you had the opportunity to
19 smell marijuana?
20 A Yes, sir.
21 Q And when you approached the car, did you smell
22 anything?
23 A Yes, I smelled the odor of marijuana in the car.
24 Q Okay. So, at that point what did you do?
25 A I asked him to step to the rear of the car, and as I

Jonathan Montjoy - Direct examination
by Solicitor Hunter

- 1 was talking to him, and checking his license, and I was in
2 the process of getting the warning written, I had to go back
3 up to the car to get the paperwork for the vehicle, and I
4 could smell the odor again.
- 5 Q Well, before you go -- who, who was driving at this
6 point?
- 7 A Mr. Davis.
- 8 Q Is it Mr. Davy?
- 9 A Davy, yeah.
- 10 Q All right. Who was the passenger?
- 11 A Last name's Jackson.
- 12 Q Okay. So, you pulled Mr. Davy out of the car and bring
13 him back?
- 14 A Yes.
- 15 Q And so, when you went to go back up to get the
16 paperwork, who were you working to then?
- 17 A Mr. Jackson.
- 18 Q Okay. In talking to either Mr. Davy or Mr. Jackson,
19 did you notice anything about their answers?
- 20 A They weren't real accurate as far as where they were
21 going. They both stated they were going to Greenville, but
22 neither one of them could actually give me a location where
23 they were headed that day and were basically real
24 stand-offish with their conversation.
- 25 Q Did you tell -- did they tell you where they were

Jonathan Montjoy - Direct examination
by Solicitor Hunter

- 1 coming from?
- 2 A They just stated down in North Carolina.
- 3 Q Okay. And they didn't tell you where they were going?
- 4 A To Greenville. Didn't know exactly where.
- 5 Q Any more specific than that?
- 6 A No.
- 7 Q What did you do at that point?
- 8 A When I went back to the, to him, I was still checking
- 9 all his information and I asked him if there's anything in
- 10 the car, any marijuana, cocaine, any type of illegal drugs
- 11 that shouldn't be in there and he stated no. I asked for
- 12 consent. He denied consent. Said he was in a real big
- 13 hurry.
- 14 Q Okay. So, what did you do after that?
- 15 A I informed him that I was gonna deploy my K-9 around
- 16 the vehicle and the K-9 alerted to the vehicle.
- 17 Q Okay. Before we go any further, your, your K-9, how
- 18 old is your K-9?
- 19 A He is five years old.
- 20 Q How long have you been with him?
- 21 A About three and a half years.
- 22 Q Where is he originally from?
- 23 A He's from Belgium.
- 24 Q Belgium.
- 25 What, what type of training does your K-9 get?

Jonathan Montjoy - Direct examination
by Solicitor Hunter

1 A They're trained all the, all the way from when they're
2 about six months old over in Belgium, and they come over
3 here and they're imprinted with all the odors of illegal
4 narcotics. And then we have to go through a 80 hour seminar
5 with them before we ever get---

6 Q Okay. So, they're trained in Belgium?

7 A Right.

8 Q They're trained here and then you yourself go through
9 an 80 hour training with them?

10 A Yes.

11 Q Do you do any type of training during the year?

12 A Yes, we have to train every week.

13 Q How many hours?

14 A Four hours a week.

15 Q Okay. And do you do anything -- are you certified with
16 this drug dog?

17 A Yes, we get certified every year. We get recertified
18 and the eight hours course is certification for the
19 handling.

20 Q Were you certified at the point of this traffic stop?

21 A Yes.

22 Q Okay. With, with your dog, are they taught to, to hit,
23 as you said earlier, on any substance other than controlled
24 substances?

25 A No, we only train on illegal narcotics.

Jonathan Montjoy - Direct examination
by Solicitor Hunter

1 Q So, he's not on -- he's not gonna hit on a bomb, as a
2 bomb dog?

3 A No.

4 Q He's not gonna hit on any other substance other than a
5 controlled substance?

6 A Only controlled substance.

7 Q And how much time do you spend together?

8 A Pretty much everyday.

9 Q Okay. Now, after -- you said earlier that he hit on
10 the car.

11 What exactly does that mean?

12 A He was alerting showing to be in the odor of some kind
13 of illegal narcotic.

14 Q Okay. But what does, what does he do?

15 A He will -- he'll stop at the point where he catches the
16 odor and won't go past it and he sits down and won't go or
17 either he'll lock out right there at the point of the odor
18 and you can coach him and try to get him to come off of it,
19 but he won't until you reward.

20 Q So, what did you do after he, after he hit on this
21 vehicle?

22 A I informed the driver that he had alerted on the
23 vehicle and we searched it from that point.

24 Q And what did you find?

25 A Found four clear plastic bags with green leafy

Jonathan Montjoy - Direct examination
by Solicitor Hunter

1 substance in them consistent with marijuana up under the
2 center console.

3 Q So, what did, what did you do after that?

4 A We, at that point, placed them under arrest for
5 possession with intent to distribute marijuana and
6 transported them to the detention center.

7 Q Hold on a second.

8 (Pause.)

9 Q At the time, did your car have a dashboard camera?

10 A Yes.

11 Q And what exactly does the dashboard camera record?

12 A Everything from the time when we actually cut the
13 lights on to, to wherever we cut them off.

14 Q Okay.

15 (Whereupon, a DVD was marked as State's Exhibit No. 1
16 for identification purposes only at this time.)

17 SOLICITOR HUNTER: Your Honor, may I approach the
18 witness?

19 THE COURT: You may.

20 Q Officer Montjoy, I'm gonna show you what's been
21 premarked as State's Exhibit No. 1.

22 Do you recognize this?

23 A Yes, that's the in car camera.

24 Q Have you had an opportunity to view this today?

25 A Yes.

Jonathan Montjoy - Direct examination
by Solicitor Hunter

1 SOLICITOR HUNTER: Your Honor, at this point I'd like
2 to submit this for the Court's record for the pretrial
3 hearing.

4 THE COURT: Any objection for purposes of this hearing?

5 MR. POOLE: Your Honor, we do have in our possession
6 what's called a copy and I assume that's what we have. Our
7 computers, we tried to look at it. I thought it was
8 probably just copies of paperwork that we had received and
9 was not clearly aware that this was a video. We're not
10 making a big issue out of the fact of not, no discovery
11 being made available, available to us. But we have not nor
12 has Mrs. Price been able to view this on our computers in
13 our offices. So, like -- again, I'm not making a big issue
14 about lack of discovery. It's just---

15 THE COURT: You haven't seen it yet?

16 MR. POOLE: I haven't seen it yet.

17 THE COURT: Well, I mean are you objecting -- right now
18 he's asking it be admitted for purposes of this hearing.

19 Do you have some objection as to its authenticity,
20 whether or not it's---

21 MR. POOLE: No, sir, not at this point. But subject to
22 be, being able to see it, you know.

23 THE COURT: It will be admitted.

24 (Whereupon, State's Exhibit No. 1 was received into
25 evidence for purposes of this hearing only at this time.)

Jonathan Montjoy - Direct examination
by Solicitor Hunter

1 SOLICITOR HUNTER: Your Honor, may I publish it?

2 THE COURT: You may.

3 SOLICITOR HUNTER: Your Honor, I beg, beg the Court's
4 indulgence. It's not playing on the screen.

5 SOLICITOR McCARTY: I think I know what happened, Your
6 Honor. I think what happened, Your Honor, is we didn't shut
7 it down and it's a technical glitch. I'm sorry.

8 (Whereupon, State's Exhibit No. 1 was played for the
9 Court at this time.)

10 THE COURT: Bring the lights up, Mr. Scruggs.

11 Q Officer Montjoy, I have a few more questions.

12 (Whereupon, the marijuana was marked as State's Exhibit
13 No. 2 for identification purposes only at this time.)

14 Q Officer Montjoy, in the video we, we see you pulling
15 some things out of the vehicle.

16 where did you find those?

17 A They were under the center console where the gear
18 shifter is under the plastic.

19 Q Okay. I'm gonna hand you what's been premarked as
20 State's Exhibit 2.

21 Do you recognize this?

22 A Yes, this would be where I logged it into evidence.
23 This is the four bags of---

24 Q Do you mind opening, opening the seal just to make sure
25 that those are the bags.

Jonathan Montjoy - Direct examination
by Solicitor Hunter

- 1 A Yes, they're all there.
- 2 Q Those are the bags of green plant material you found in
3 the vehicle?
- 4 A Yes.
- 5 Q That you believed to be marijuana?
- 6 A Yes.
- 7 Q Okay. Just a few more things.
- 8 At the beginning of the video you said you were -- how
9 fast were they going?
- 10 A They were going 54 in a posted 60.
- 11 Q And in which lane were, they were in layman's terms?
12 I know you said lane two of three.
- 13 A Not the lane directly up against the wall. It'd be the
14 next lane and then there's the outside lane next to the
15 emergency lane.
- 16 Q Do those lanes have, have names that we usually call
17 them?
- 18 A You have -- the, the slow lane's the far right lane,
19 and the hammer lane. The fast lane is the inside lane.
- 20 Q Were there any vehicles passing them on the right side,
21 on the right in the---
- 22 A Yes.
- 23 Q ---the slow lane?
- 24 A Yes, there were people passing them on both sides of
25 them.

Jonathan Montjoy - Direct examination
by Solicitor Hunter

1 Q Okay. And where did the stop occur?

2 A In the city limits of Duncan at Mile Marker 66.

3 Q What county?

4 A Sixty-three.

5 Q In what county?

6 A Spartanburg.

7 Q Thank you, Your Honor.

8 THE COURT: Mrs. Price, your witness.

9 CROSS-EXAMINATION

10 BY MRS. PRICE:

11 Q Officer Montjoy, you made a report in this case, didn't
12 you?

13 A Yes.

14 Q And in that report did you review that in preparation
15 for this case?

16 A Yes, I read over it briefly.

17 Q And that's standard procedure for an officer to come to
18 Court, isn't it?

19 A Yes.

20 Q And isn't it true in that report you stated that this
21 vehicle was going 55 miles an hour?

22 A I didn't actual look at the speed on the actual report
23 there.

24 Q Well, the speed, the speed is the pretext for the stop,
25 isn't it?

Jonathan Montjoy - Cross-examination
by Mrs. Price

- 1 A Right.
- 2 Q And isn't it true that the posted speed limit where you
3 clocked this vehicle at either 54 or 55 miles an hour,
4 depending upon on if it's your testimony or the report which
5 is prepared in reference to the stop, isn't it true that the
6 posted speed limit is 60 miles an hour?
- 7 A Yes, the, the speed limit is 60, yes.
- 8 Q And isn't it true that the posted minimum speed limit
9 is 45 miles an hour?
- 10 A Right, that's the minimum.
- 11 Q Yes.
- 12 And 55, you would agree is, or 54, is between 45 and
13 60?
- 14 A Yes, it is.
- 15 Q And isn't it your testimony here today that there, that
16 Mr., the driver, Mr. Davy, was impeding traffic by going 55
17 miles an hour in a 60-mile an hour zone?
- 18 A Right, he was impeding traffic. He was in the middle
19 lane.
- 20 Q And he was impeding traffic because it was also your
21 testimony here today that most people in this 60-mile an
22 hour maximum zone go between 70 and 75 miles an hour?
- 23 A Yeah, in rush hour, yes, ma'am, while everybody's
24 coming home from work.
- 25 Q Yes.

Jonathan Montjoy - Cross-examination
by Mrs. Price

1 So, you'll stop a car that's going 55 in a 60, but not
2 one that's going 75 in a 60?

3 SOLICITOR HUNTER: Objection, Your Honor. Relevance.

4 THE COURT: Sustain the objection.

5 Q Officer---

6 THE COURT: You haven't establish that he clocked him
7 and the car was going that speed at that time. What you've
8 established is that, during rush hours, quite often they go
9 that fast. The reason for my ruling is what they generally
10 do is interesting. What they were doing on this occasion
11 might be more specific.

12 Q Mr. Davy was not speeding beyond the posted speed
13 limit, was he?

14 A No.

15 Q But there were cars passing him, weren't there?

16 A Yes, and there were a line of cars behind him waiting
17 to pass him.

18 Q What -- how long had you been on patrol that day if you
19 remember?

20 A Maybe a couple hours that day.

21 Q So, is it -- would it be correct in assuming you were
22 on patrol during rush hour?

23 A Yes.

24 Q Okay. And just, in your experience, how many cars
25 travel down that stretch of highway?

Jonathan Montjoy - Cross-examination
by Mrs. Price

- 1 A I don't know. A lot.
- 2 Q Okay. Now, at Mile Marker 63, is that before or after
- 3 the Highway 290 bridge if you're going south on 85?
- 4 A Mile Marker 63 if you're going south?
- 5 Q Yes.
- 6 A You would be approaching it when you went under the
- 7 bridge.
- 8 Q Okay. So, is that Highway 290, is that right?
- 9 A Yes.
- 10 Q Okay. You also said in your report that -- excuse me.
- 11 Let me ask this.
- 12 When -- you said that you clocked Mr. Davy going 54 or
- 13 55 in a 60?
- 14 Do you remember when you clocked him?
- 15 At what point on the highway?
- 16 A In the city limits.
- 17 Q That's -- do you remember exactly where you were on the
- 18 highway?
- 19 A As we were approaching Mile Marker 63.
- 20 Q Okay. How back -- how far were you from Mile Marker
- 21 63?
- 22 A Don't really remember.
- 23 Q Okay. And you, when you stopped Mr. Davy, you
- 24 approached the passenger side?
- 25 A Yes.

Jonathan Montjoy - Cross-examination
by Mrs. Price

- 1 Q Because the driver side was exposed to the highway?
- 2 A Right.
- 3 Q And it wouldn't be safe?
- 4 A No.
- 5 Q Okay. I don't blame you. You wouldn't do it either.
- 6 But you approached the passenger side?
- 7 A Uh-huh. (Affirmative).
- 8 Q And you saw these two gentlemen in a car?
- 9 A Yes.
- 10 Q And at that point you asked Mr. Davy to step out?
- 11 A I asked him for his license.
- 12 Q Okay. You asked him for his license.
- 13 Did he give you his license?
- 14 A Yes.
- 15 Q Okay. And at some point you said you asked him to step
- 16 out of the vehicle?
- 17 A Yes.
- 18 Q He complied?
- 19 A Uh-huh. (Affirmative).
- 20 Q And you took him out of the view of the camera?
- 21 I'm assuming that's your, your car?
- 22 A Yes, that's my car.
- 23 Q Just happened to have a drug dog in the back?
- 24 A Yes, I'm a K-9 handler.
- 25 Q Yeah.

Jonathan Montjoy - Cross-examination
by Mrs. Price

- 1 Do you always have a dog with you?
- 2 A Yes.
- 3 Q Okay. And you and Mr. Davy had a conversation?
- 4 A Uh-huh. (Affirmative).
- 5 Q Okay. And y'all went back to -- you stated in your
- 6 report here that Mr. Jackson -- you went back to the car?
- 7 A Uh-huh. (Affirmative).
- 8 Q Did you have the dog with you?
- 9 A When I went back up there, yes.
- 10 Q Okay. You didn't have that in the report though, did
- 11 you?
- 12 A That I had the dog, no.
- 13 Q Okay. In fact, you said you -- later you said that you
- 14 told Mr. Davy at, if he had anything in the car and he said
- 15 no. And it was at that point in your report you mentioned
- 16 the dog.
- 17 A Okay.
- 18 Q Is that fair to say?
- 19 If you need to review that I have a copy of it.
- 20 A If that's in the report, but---
- 21 Q Okay. So, so, you found the, the alleged marijuana or
- 22 what you thought to be marijuana at the time in the console
- 23 of the car?
- 24 A Under the console.
- 25 Q Okay. And is, is that in the middle of the car, on the

Jonathan Montjoy - Cross-examination
by Mrs. Price

1 right side, or left side, if you remember?

2 A The console is in-between the car.

3 Q Okay.

4 A The two front seats.

5 Q Okay. And did this, did this have bucket seats or
6 bench seats if you recall?

7 A Bucket seats.

8 Q Bucket seats.

9 okay. Officer Montjoy, when did you call the plates in
10 on this car if you remember?

11 A I normally call the plate in right before I put my blue
12 lights on in case an incident, if they take off running so I
13 won't have to give that out over the radio so it will be
14 there.

15 Q Okay. Okay. And at some point you called for backup
16 from Officer Miller, is that right?

17 A Mathis.

18 Q Mathis. Excuse me.

19 A Yes.

20 Q Do you remember when that was?

21 A As I was talking to the driver.

22 Q Okay. That's all I have.

23 MR. POOLE: May I ask a few questions, Your Honor?

24 THE COURT: Mr. Poole, yes, sir.

25 CROSS-EXAMINATION

Jonathan Montjoy - Cross-examination
by Mr. Poole

1 BY MR. POOLE:

2 Q Officer Montjoy, at mile, 63 mile marker, is it in
3 the---

4 A The city limits actually splits the 64 and the 63.

5 Q Okay.

6 A It goes, kind of joins both of them miles there, yes,
7 sir.

8 MR. POOLE: Okay. Beg the Court's indulgence for a
9 moment please.

10 THE COURT: Yes, sir.

11 (Pause.)

12 MR. POOLE: May I approach the witness, Your Honor?

13 THE COURT: You may.

14 Q Officer, I show you here a map that was taken from the
15 Spartanburg County government website --

16 A Uh-huh. (Affirmative).

17 Q -- which indicates Duncan, South Carolina municipal
18 boundaries, and this white area seems to indicate, on 85,
19 where the municipal boundaries are in relation to 85.

20 A Right.

21 Q And could you mark on here -- well, let me ask you
22 this.

23 It appears that 85, the jurisdictional limit of the
24 municipality is, ends with 290, is that correct?

25 A Negative. No, it goes from here to this.

Jonathan Montjoy - Cross-examination
by Mr. Poole

1 Q Goes from here to here?

2 A Yep.

3 Q Okay. So, is this an inaccurate map?

4 A Yeah, that's inaccurate.

5 Q Okay. Was this the boundary in 2005 when this was
6 placed on the website?

7 A In 2005?

8 Q Uh-huh. (Affirmative).

9 A Yes, back then it was.

10 Q It was back then?

11 A Yeah, this was---

12 Q So, Duncan has expanded, expanded since, since then?

13 A Yes, we have annexed.

14 Q Okay. All right. Could you show me where Mile Marker
15 63 is on this map?

16 A Mile Marker 63 starts right here and Mile Marker 64 is
17 right here.

18 Q Okay. Right.

19 Could you put a -- could you just mark 64 and 63?

20 A (Witness complies.)

21 SOLICITOR HUNTER: Your Honor, may I approach and see
22 where he's marking?

23 THE COURT: Sure.

24 Q Could you number them for me, please, which is 63 and
25 which is 64.

Jonathan Montjoy - Cross-examination
by Mr. Poole

- 1 A (Witness complies.)
- 2 Q Okay. So, 63 would be toward Greenville?
- 3 A Yes.
- 4 Q And 64 would be closer to Spartanburg?
- 5 A Yes.
- 6 Q And 63 would be at the outer most southernmost portion?
- 7 A It's a portion of the city limits.
- 8 Q Okay. In your report you stated that he was southbound
- 9 around Mile Marker 63 inside the city limits, you activated
- 10 your blue lights, and then you stopped him at Mile Marker
- 11 63.
- 12 A Right. We always refer to the mile marker that you're
- 13 approaching because there's no half mile markers out there.
- 14 Q Well, you, you observed him at Mile Marker 63 and he
- 15 was leaving the city, wasn't he?
- 16 A No.
- 17 Q City limits?
- 18 A He was in the city limits and he was approaching the
- 19 edge of the city limits, yes. But the violation was
- 20 committed inside the city limits.
- 21 Q Okay. In your report you say you were traveling on
- 22 I-85, he was traveling on I-85 southbound around Mile Marker
- 23 63 inside the city limits of Duncan.
- 24 A Yes.
- 25 Q Then you, then you started your car, called in the

Jonathan Montjoy - Cross-examination
by Mr. Poole

1 tags, caught up with him, and you, you stopped, initiated a
2 traffic, "initiated a traffic stop on the vehicle at Mile
3 Marker 63?"

4 A Yes.

5 MR. POOLE: So, let me approach you again if I may,
6 Your Honor?

7 (The Court nods affirmatively.)

8 Q Where were you?

9 A I believe in my report it actually says I was running
10 moving mode radar.

11 Q Moving mode radar?

12 A Yeah, we were actually approaching him when I activated
13 my blue light.

14 Q okay. So, you were not stationary?

15 A No.

16 Q All right. So, you were in moving mode, and I think
17 you're right, it is in your report you were in moving mode.

18 A Yes.

19 Q Where were you when you determined his speed to be 54
20 to 55?

21 A Right here.

22 Q Could you put your initials right there please?

23 A (Witness complies.)

24 Q Thank you.

25 Now, you initiated the stop because he was impeding

Jonathan Montjoy - Cross-examination
by Mr. Poole

- 1 traffic.
- 2 A Right.
- 3 Q Is that your testimony?
- 4 A He was traveling below the posted speed in the faster
- 5 lane.
- 6 Q Below the posted speed limit?
- 7 A Yes.
- 8 Q Okay. Well, one is not to exceed the speed limit, is
- 9 there, is one?
- 10 A No.
- 11 Q Okay. And you talked to him the -- I'm talking about
- 12 Nicholas, Nicholas Davy.
- 13 You talked to him about why you stopped him, didn't
- 14 you?
- 15 A Yes, I did.
- 16 Q And you started writing out a citation for?
- 17 A A warning.
- 18 Q A warning?
- 19 A Yes.
- 20 Q Okay. And you were -- and you got -- he was
- 21 cooperative in giving you the information to give that
- 22 information to you that was necessary to fill out a, a
- 23 warning ticket, is that right?
- 24 A Yes.
- 25 Q Okay. So, he was compliant with you, wasn't he?

Jonathan Montjoy - Cross-examination
by Mr. Poole

- 1 A Yes, sir.
- 2 Q And were you writing out this ticket while he was in
3 your car?
- 4 A He never was in my car.
- 5 Q Okay.
- 6 A He was standing on the front passenger quarter panel.
- 7 Q Oh, okay. But he was out of the view of the camera?
- 8 A Right. We do that for safety issues.
- 9 Q Sure. I see.
- 10 And so, you wrote out the citation?
- 11 A The warning.
- 12 Q Uh-huh. (Affirmative).
- 13 And, and then you were engaging in this dialogue with
14 him that we heard?
- 15 A As I was writing.
- 16 Q As you were writing?
- 17 A Yeah.
- 18 Q And, and then you got the dog or, or the dog -- you
19 have the dog in your car, right?
- 20 A Yes.
- 21 Q And you handled the dog and went up to the car?
- 22 A Right.
- 23 Q Is that the sequence of events?
- 24 A Yes.
- 25 Q Okay. The sequence of events is what you've indicated

Jonathan Montjoy - Cross-examination
by Mr. Poole

- 1 on this map---
- 2 A Yes.
- 3 Q ---as the locations and times and you stopped him for
- 4 impeding traffic, and you didn't---
- 5 A Traveling too slow in the lane of traffic.
- 6 Q Traveling in the slower lane of travel?
- 7 A Traveling too slow in the lane of traffic.
- 8 Q Okay. And you wrote him a warning citation?
- 9 A A warning. It's not a citation.
- 10 Q And then the search of the car was commenced?
- 11 A The search of the car was conducted after the positive
- 12 alert from the K-9?
- 13 Q Okay. Right. Understood -- I understand that, but you
- 14 stopped, wrote out a citation, wrote, got the dog, searched
- 15 the car, got the marijuana, right?
- 16 A while, while I was still waiting on my information to
- 17 come back as far as his license, warrants, tags, and make
- 18 sure everything is clear in our system, that's when I
- 19 deployed the dog.
- 20 MR. POOLE: Okay. I ask the Court's indulgence for one
- 21 more minute, Your Honor.
- 22 THE COURT: Yes, sir.
- 23 (Pause.)
- 24 MR. POOLE: That's all the questions I have, Your
- 25 Honor.

Jonathan Montjoy - Redirect examination
by Solicitor Hunter

1 THE COURT: Redirect?

2 SOLICITOR HUNTER: Yes, Your Honor, briefly.

3 THE COURT: Yes, sir.

4 REDIRECT EXAMINATION

5 BY SOLICITOR HUNTER:

6 Q Mr. Poole was asking a, a time line of events, of
7 events just now.

8 A Yes.

9 Q And, in fact, before you went to search your or before
10 you took the dog to the car, you originally went to Andre
11 Jackson's window, is that right, from what we saw in the
12 video, the passenger?

13 A I -- before I actually ran the dog around the vehicle,
14 yes, I talked---

15 Q What, what were you looking for?

16 A At that point I was looking for a rental agreement and
17 checking to see if he had any ID on him in his name.

18 Q You hadn't finished writing the warning because you
19 didn't have the rental agreement?

20 A Right.

21 SOLICITOR HUNTER: That's all, Your Honor.

22 THE COURT: Recross by either---

23 MRS. PRICE: I have one last question, Your Honor.

24 THE COURT: Yes, ma'am.

25 RECROSS EXAMINATION

Jonathan Montjoy - Recross examination
by Mrs. Price

1 BY MRS. PRICE:

2 Q Just so I understand, you were -- you didn't finish
3 writing your -- you were writing him a warning?

4 A Yes.

5 Q And what exactly were you writing him a warning for?

6 A Traveling too slow in the lane of traffic --

7 Q Okay.

8 A -- that time of day.

9 THE COURT: Anything further, Mr. Poole?

10 MR. POOLE: No, sir.

11 THE COURT: You may step down, sir.

12 Any other witnesses on the motion?

13 SOLICITOR HUNTER: No other witnesses, Your Honor.

14 THE COURT: Defense wish to put up any witnesses,
15 Mrs. Price?

16 MRS. PRICE: No, Your Honor.

17 THE COURT: Mr. Poole.

18 MR. POOLE: No, Your Honor.

19 THE COURT: All right. Mrs. Price, it's your motion.

20 I'll hear argument.

21 MRS. PRICE: Thank you, Your Honor.

22 And Mr. Poole, just for the record, is adopting this on
23 behalf of his client, Mr. Davy, as well.

24 Your Honor, I think it's pretty clear that we have
25 established that driving 55 miles an hour in a 60 mile an

1 hour lane, that the State, I think it's gonna be their
2 position, that he was, you know, impeding traffic. Your
3 Honor, however, in Mr. Montjoy, excuse, Officer Montjoy's
4 testimony, of course, he never says anything about impeding
5 traffic. He just says going 55 in a 60, which is in the
6 middle lane on I-85. As you know, Your Honor, this is
7 about -- at the Highway 290 exit. I know Your Honor is
8 familiar with that. It does have three lanes on either
9 side.

10 THE COURT: Very familiar with it, yes, ma'am.

11 MRS. PRICE: Your Honor, you've also heard that the
12 maximum speed limit is 60 miles an hour. Now, if one is
13 going 60 miles an hour, which is the maximum speed limit,
14 albeit during rush hour as people are going home, 55 miles
15 an hour is not too far out of line to be considered to be
16 impeding traffic. There is a minimum. There is a maximum.
17 And as we've heard from Officer Love -- excuse me. Montjoy,
18 I went to school with an Officer Lovejoy. Excuse me.

19 As you heard, it is a 45. It is a 60. He was well
20 within those boundaries, Your Honor. He was not in the far
21 left-hand passing lane. He was in the middle lane. He was
22 in a rental car in an unfamiliar place.

23 Your Honor, it would be our testimony today that,
24 excuse me, it would be our motion today that he is just not
25 going slowly enough in order to be qualified for a stop in

1 this matter.

2 THE COURT: Any -- you had indicated you also had a
3 motion concerning jurisdiction?

4 Are you---

5 MRS. PRICE: Your Honor, Mr. Poole is gonna handle that
6 aspect of it.

7 THE COURT: Oh, okay. I thought maybe you weren't gonna
8 argue that.

9 Go ahead, Mr. Poole.

10 MR. POOLE: Your Honor, I'm aware that the law, there
11 is a statute that says that if it happens within the -- if
12 the violation occurs within the jurisdiction, then pursuit
13 can be made. I'm just submitting for the Court's
14 consideration that there's some confusion here about how,
15 you know, you can instantaneously stop a car at Mile Marker
16 63, which is at the very end of the road or where the
17 boundary is as far as Duncan is concerned. And to observe
18 one going 55 miles per hour at Mile Marker 63, and then
19 stopping them around Mile Marker 63 is a strange a jewel.
20 It's incredible or incredulous, and I would submit to the
21 Court to consider that as far as the jurisdictional matters
22 is concerned.

23 In addition, if I may submit to the Court for the
24 Court's consideration a case of The State versus William
25 Javier Revera and Jose M. Medaro.

1 THE COURT: Pass it up.

2 Yes, sir, I'll hear from you on this.

3 MR. POOLE: Your Honor, I'd give the Court this case to
4 show that it's got a lot of factual similarities in the
5 situation in the incident case. The holding basically is
6 that once -- it's on Page 126. Once Langley, the officer
7 informed Revera, the driver, he would receive a warning
8 citation, the purpose of the stop ended and officers
9 continued questioning concerning the transport of drugs on
10 the interstate or any further involvement and basically
11 involved a second and illegal detention. And so, once that
12 citation had been written, the purpose of the stop was
13 ended, and any further detention, Your Honor, we submit was
14 excessive.

15 THE COURT: Anything further?

16 MR. POOLE: No, sir.

17 THE COURT: Who's got this, Mr. Hunter, Mr. McCarty?

18 SOLICITOR McCARTY: I think we're both gonna do a
19 little bit, Your Honor.

20 THE COURT: Okay. Go ahead.

21 SOLICITOR HUNTER: Your Honor, I'm gonna start on Mrs.
22 Price's motion, and I believe Mr. McCarty is gonna handle
23 Mr. Poole's motions.

24 If I may, I'll pass up to you the South Carolina Code
25 56-5-1560 and 56-5-1810, copies have been provided to the

1 defense, as well as the U.S. v. Whitlow case that we went
2 over in your chambers. Your Honor, 56-5-1810 says upon all,
3 a -- specifically upon all roadways of sufficient width, a
4 vehicle shall be driven upon the right half of the roadway
5 except as following:

6 When overtaking or passing another vehicle proceeding
7 in the same direction under rules governing such movement,
8 and then also if you look at B, upon all roadways, any
9 vehicle proceeding at less than the normal speed of traffic
10 at the time and place under the conditions then existing
11 shall be driven in the right-hand lane.

12 We've heard testimony from Officer Montjoy that this
13 vehicle was in the middle lane of the three lanes. He had
14 vehicle, traffic passing him on the left side, on the right
15 side, and we heard, during her cross-examination, that
16 vehicles were lining up behind him.

17 Also under 56-5-1560, which is the minimum speed limit,
18 impeding traffic by slow speed, slow speed is prohibited and
19 that no person shall drive a motor vehicle at such a slow
20 speed as to impede the normal and reasonable movement of
21 traffic.

22 In this case, again, we hear testimony that the normal
23 speed of traffic at the time was going much faster than what
24 Mr. Davy was driving. Also under the U.S. v. Whitlow case,
25 we have persuasive authority that this, almost this exact

1 situation happened at almost the exact same spot. It was in
2 Duncan where Judge Hurlong found that a car, car going 52
3 miles an hour in a 60 mile an hour zone was impeding traffic
4 and required that the slower vehicle traveling in the
5 right-hand lane, and it's almost exactly like this, this
6 case except plus two or three miles per hour.

7 I believe Ryan's gonna handle the jurisdiction as well
8 as the U.S. v. Williams case.

9 SOLICITOR McCARTY: May it please the Court, Your
10 Honor?

11 THE COURT: Yes, sir.

12 SOLICITOR McCARTY: Your Honor, I'll start with the
13 jurisdiction. I think that will be pretty easy to wrap up.

14 They're challenging the jurisdiction of the stop as
15 maybe being outside the municipal or corporate limits of the
16 City of Duncan. I know Mr. Poole went over a map. We
17 haven't exactly seen all the markings on it.

18 Your Honor, I would argue that under State Statute
19 17-13-40, 17-13-40, Your Honor, that governs the law
20 enforcement officer's jurisdiction when in pursuit. Your
21 Honor, also I bookend that with the case of State versus
22 Padgett. It can be found under 354 SC 268.

23 Your Honor, in Padgett that case relies heavily on this
24 statute here in which the officers attempted to initiate the
25 traffic stop within the jurisdictional limits of the town or

1 the corporate limits of the town in which they were in.
2 Your Honor, the statute, under 17-13-40, does provide at, in
3 the last full sentence under Section A, that when, when the
4 traffic stop or the arrest is attempted to be initiated,
5 that it can be done within that corporate limits or within a
6 mile or within a place within a radius of three miles of the
7 corporate limits.

8 I believe it's been Officer Montjoy's testimony that
9 was a, attempted to be initiated within the city limits of
10 Duncan. Your Honor, the mile markers in reference to, as
11 they are referenced into the case report obviously are not
12 exact locations. This isn't a GPS location with longitude
13 and latitude, latitude. It's a reference point, Your Honor,
14 so that we know where we are on the interstate so that, in
15 case of an emergency or otherwise, a radio call can be given
16 out with a generalized location on the interstate.

17 Again, it's not an absolute figure. It's not an
18 absolute science, but it's a reference point so it's
19 identifiable. And, Your Honor, I would argue that Mile
20 Marker 63, as he's testified, is within the corporate limits
21 or the city limits within the Town of Duncan separately. It
22 may not still be, it's still within, in the three mile or
23 limit or radius as governed under 17-30, 13-40, Your Honor.

24 Your Honor, Mr. Poole's point that I think may be a
25 little more questionable, which was under the Medaro Rivera

1 case, Your Honor, I agree that the language in that, as he
2 stated, does state that once he stated he would receive a
3 warning the purpose of the stop has ended except for that
4 last sentence there. It says unless Langley, they're
5 referring to the officer, entertained a reasonable
6 suspicious of illegal activities sufficient to warrant the
7 detention.

8 Your Honor, Officer Montjoy's direct testimony was upon
9 approach of the vehicle smells the odor of marijuana. He
10 recognizes it to be a rental vehicle. Your Honor,
11 separately they -- both occupants were giving vague
12 non-responsive answers.

13 So, at the point in which he may have told him that the
14 citation would be issued doesn't necessarily end for the
15 purpose of this traffic stop. There are other indications,
16 when taken into the totality, Your Honor, that I believe
17 would give the officer reasonable suspicion if not, at that
18 point, probable cause based upon the smell of marijuana in
19 the vehicle to detain them further for the purpose of
20 deploying his K-9, which was readily available to him.

21 Thank you, Your Honor.

22 THE COURT: Anything further, Mrs. Price?

23 MRS. PRICE: Oh, yes, Your Honor. As with regard to
24 what Mr. McCarty just said, he, when he pulled -- he said he
25 walked up to the -- and you can see fairly on the tape. He

1 is on the passenger side of the vehicle. He, he kind of
2 leans in, you know, like police officers do. And it's at
3 that point that it should of been his testimony that he
4 smelled marijuana. If that was true, he should of pulled
5 them both out of that car.

6 But that's not what his testimony was, judge. What his
7 testimony was from that officer right there is that he got
8 him out and started writing him a citation for, and I wrote
9 this down because I've never heard of it before, traveling
10 too slow in the lane of traffic. That was the purpose of
11 this stop, Your Honor.

12 With regard to Mr. Hunter's argument, I am--

13 THE COURT: Well, now, I did hear him testify that he
14 smelled the odor of marijuana.

15 When did you hear that he said, he said that?

16 MRS. PRICE: Well, he said he did smell the odor of
17 marijuana, but at the point he said he smelled the odor of
18 marijuana was not the point that he got them out of the
19 vehicle, Your Honor.

20 THE COURT: When he first approached is what I heard
21 him say.

22 MRS. PRICE: Okay. But if that's the case, then why is
23 he writing him a citation for traveling too slow in the lane
24 of traffic?

25 That's, that's our argument, Your Honor.

1 Your Honor, and also in regard to Mr. Hunter's argument
2 oh, he was driving on the right side of the roadway, it is
3 true that you're suppose to drive on the right side of the
4 roadway, and he was on the right side of the roadway. There
5 are three---

6 THE COURT: He was in the center---

7 MRS. PRICE: Yes.

8 THE COURT: ---of the roadway.

9 MRS. PRICE: Yes, yes, but he was on the correct side
10 of the roadway for -- those, those three lanes, I would
11 argue, would be considered the right side of the roadway for
12 the purposes of I-85. It's -- you can't drive on the right
13 side of the roadway and be in three lanes at the same time.
14 You just can't do it.

15 Your Honor, and also, you've also heard from Officer
16 Montjoy up here that no person shall drive at a slow speed
17 to impede the normal and reasonable movement of traffic.
18 You've also heard that the normal and reasonable movement of
19 traffic in this particular place on I-85 is, is speeding.
20 It's breaking the law.

21 And in regard to Mr. Hunter's citation of Whitlow
22 versus U.S. or U.S. versus Whitlow, this is, Your Honor,
23 from a thing called the Federal Sentence, and what the
24 Federal Sentence is the reporter of unpublished opinions,
25 Your Honor. And for unpublished opinions -- and there are

1 rules, as you know, for federal and state citations. I'm
2 gonna start with the federal one first since this is a
3 federal case, Your Honor.

4 Your Honor, Local Rule 32.1 consists of the citations
5 of unpublished and it says, "citation of this Courts
6 unpublished opinions, excuse me, dispositions issued prior
7 to January 1st, '07, in reasonable and normal arguments in
8 this Court and the District Courts within this circuit is
9 disfavored except for three limited purposes, res judicata,
10 estoppel, or the law of the case meaning the law of that
11 particular case such as if you were citing this in a, in a
12 appellate brief or something of that nature, Your Honor.

13 And then it goes on to say the party believes that an
14 unpublished disposition issued prior to has precedently
15 value in relation to a material issue in a case that there
16 is no other published opinion that would serve that well
17 such disposition may be cited if it were, conforms to the
18 requirements of 32.1(b).

19 Your Honor, in -- that has to do with citing the
20 judicial positions of a, of a copy required and I'll be glad
21 to pass this up if Your Honor would like a copy of it.

22 THE COURT: No, I'm, I'm familiar with how you should
23 treat unpublished opinions. I haven't seen that there are
24 any, cited by either side, any published opinions directly
25 on this point.

1 MRS. PRICE: Yes, Your Honor, and also there is a --
2 also, as Your Honor knows, 239 was a state rule providing
3 and I understand that we are not arguing, dealing with a
4 state case. We're dealing with a federal case in State
5 Court. So, I would submit to the Court that---

6 THE COURT: I'll hear you---

7 MRS. PRICE: Thank you.

8 THE COURT: I'll give it the appropriate weight it
9 deserves.

10 MRS. PRICE: Thank you, Your Honor.

11 MR. POOLE: I have nothing really to add except that
12 Defendant Davy joins in with everything that's been said on
13 this side of the table.

14 THE COURT: All right.

15 MR. POOLE: The aisle.

16 THE COURT: In reviewing the Code Section, which is
17 56-5-1560 that has to do with impeding traffic, Subparagraph
18 A talks about impeding traffic by slow speed is prohibited.
19 They don't talk in terms of, terms of speed limits in that
20 Code section. It talks about no person shall drive a motor
21 vehicle at such a slow speed as to impede the normal and the
22 reasonable movement of traffic except when reduced speed is
23 necessary for safe operation or in compliance with the law.

24 In this particular case I understand your argument that
25 all three lanes constitute the right side of the road, but I

1 think it's generally accepted, when you're driving on a
2 three lane interstate highway, that the left lane of the
3 direction in which you're traveling is the faster lane or
4 passing lane or the one you should go to if you're traveling
5 faster. And then across the interstate to the right would
6 be as you go slower and slower. I would -- I think that's
7 generally the way you do that, and, of course, slower
8 traffic stays to the right. I've seen that posted on roads
9 all over the State for years.

10 And in this particular case the defendant was traveling
11 in the center lane, and, according to the testimony, had a
12 long line of cars behind him. He was being passed on both
13 sides. That would be by slower traffic or to people that
14 considered themselves slower and people considering
15 themselves faster.

16 The question here is not guilt or innocence. The
17 question is probable cause, and I find that there was
18 probable cause then to make the stop based on statute, based
19 on the facts as related to me by the police officer.

20 Now, I do note the Revera case. It is a Court of
21 Appeals case and I do not know whether or not it has gone on
22 to our Supreme Court at this point in time. However, I also
23 note, as did the prosecutor, that, that where there's
24 additional investigation necessary, the purpose of the stop
25 may not have been fulfilled. I don't know how any police

1 officer stopping a car, until he approached the car, would
2 have any knowledge of any type of illegal activity such as
3 marijuana consumption or other things in a car. Driving
4 down the highway, you can't detect that.

5 No doubt the purpose of the initial stop was for
6 reasons that we stated it appears for the impeding of
7 traffic. However, when he approached his testimony was that
8 he immediately smelled the odor of marijuana, which would
9 give a police officer a reasonable suspicion to go further
10 in the investigation.

11 In this particular case he had a K-9 with him as
12 opposed to having to get it. The K-9 alerted. So, it's my
13 finding that he had probable cause to conduct the search and
14 it was conducted in a fashion sufficient to allow it to be
15 admitted into evidence in this case.

16 As to jurisdiction, it's my finding that he was within
17 his jurisdiction according to the testimony that I've heard.

18 Any other issues that I need to rule on prior to trial?

19 MRS. PRICE: No, Your Honor.

20 THE COURT: From the plaintiff's point of view?

21 SOLICITOR MCCARTY: None from the State, Your Honor.

22 (Pause.)

23 THE COURT: Now, I have received from the Clerk's
24 Office a certified copy of Nicholas Carl Davy's bond in the
25 case. I note that as a condition of the acknowledgment

1 Madam Clerk, please swear the prospective jury panel.
2 (Whereupon, the jury panel was placed under oath at
3 this time.)

4 THE COURT: If any member of the jury panel failed or
5 refused to take the oath just administered by the clerk I'd
6 ask that you now please stand.

7 (No response.)

8 THE COURT: And the record will reflect, reflect that
9 all prospective jurors have been sworn for purposes of my
10 questioning.

11 Ladies and gentlemen, I'm now going to go over with you
12 the indictments in this case. And as I have told you
13 earlier, the indictments represent the charge that brings
14 the case before the Court and can not be used by you in any
15 fashion in determining guilt or innocence of a defendant.
16 I'm going over them simply for the purpose of you
17 understanding the charge, who's involved, when it occurred
18 so that you can more fully answer some questions that I have
19 concerning this matter.

20 Now, the first indictment that I will discuss with you
21 is in Case Number 09-GS-42-268. The indictment is for
22 possession with intent to distribute. The indictment states
23 that Andre Jackson did, in Spartanburg County, on or about
24 September 16 of 2008, manufacture, distribute, dispense,
25 deliver, purchase, or otherwise aid, abet, attempt, or

1 conspire to manufacture, distribute, dispense, deliver, or
2 purchase, or possess with the intent to manufacture,
3 distribute, dispense, deliver, or purchase a quantity of
4 marijuana, a Schedule I controlled substance, or a
5 controlled substance analogue in violation of Section
6 44-53-370 of the Code of Laws of South Carolina, 1976 as
7 amended, against the peace and dignity of the State and
8 contrary to the statute in such case made and provided.

9 The other case before the Court is 09-GS-42-761. This
10 is also for possession with intent to distribute. This
11 indictment states that Nicholas Carl Davy did, in
12 Spartanburg County, on or about September 16 of 2008,
13 manufacture, distribute, dispense, deliver, purchase, or
14 otherwise aid, abet, attempt, or conspire to manufacture,
15 distribute, dispense, deliver, or purchase, or possess with
16 the intent to manufacture, distribute, dispense, deliver, or
17 purchase a quantity of marijuana, a controlled, a Schedule I
18 controlled substance or controlled substance analogue in
19 violation of Section 44-53-370 of the Code of Laws of South
20 Carolina, 1976 as amended, against the peace and the dignity
21 of the State and contrary to, to such case, in such case
22 made and provided.

23 Those are the indictments, and, again, I go over those
24 with you for the purpose of you understanding the nature of
25 the charge, when it occurred, and who's alleged to have been

1 involved, and, again, it can not be used by you in the
2 determination of guilt or innocence.

3 I'll go through, as we did before, a series of
4 questions. If you have a response I'll ask that you stand.
5 I'll need to identify you on the record before I take your
6 response.

7 My first question, has any member of the jury panel
8 ever been related by blood or marriage to either Nicholas
9 Carl Davy or Andre Jackson, if that's true, please stand.

10 (No response.)

11 THE COURT: Has any member of the prospective jury
12 panel ever had a close personal or a social relationship
13 with either Nicholas Carl Davy or Andre Jackson, if that's
14 true, please stand.

15 (No response.)

16 THE COURT: As far as the attorneys who are involved in
17 this case, has any member of the jury panel ever been
18 represented by any of the attorneys involved in the trial of
19 this case or have they ever appeared on the other side of
20 some legal matter from you, if that's true, please stand.

21 (No response.)

22 THE COURT: Is there any member of the jury panel who
23 has been related by blood or marriage or do you have a close
24 personal or a social relationship with any of the attorneys
25 involved in the trial of this case, if that is true, please

1 MRS. PRICE: None of behalf of Mr. Jackson.

2 THE COURT: And Mr. Poole?

3 MR. POOLE: No, sir.

4 THE COURT: All right. I'm gonna declare then that the
5 jury panel, as now constituted, is qualified to serve in the
6 case. I'll ask the clerk, again, to prepare a list of
7 potential jurors. Once that's completed we'll begin the
8 jury selection process. And, again, I'll remind you, bring
9 with you any personal belongings when you come down front.
10 If you're selected, you'll be going directly into the jury
11 box.

12 I'll ask the attorney to approach briefly.

13 (Whereupon, a bench conference was held out of the
14 hearing of the jury at this time.)

15 THE COURT: All right. In this case the State will
16 have five strikes, the defendants will have five. We'll
17 select one alternate with the State having one strike, the
18 defense having two.

19 Madam Clerk, you can begin the jury selection process.

20 (Whereupon, a jury panel, including one alternate, was
21 selected at this time.)

22 THE COURT: Any objection to the jury selection process
23 from the State?

24 SOLICITOR HUNTER: None, Your Honor.

25 THE COURT: Any objection from the defense, Mrs. Price?

1 MRS. PRICE: None from the defense.

2 THE COURT: Mr. Poole?

3 MR. POOLE: No, sir.

4 THE COURT: All right.

5 (Pause.)

6 THE COURT: All right. Ladies and gentlemen, you've
7 been selected to serve as jurors in this case. We've been
8 having some other hearings already this afternoon and so
9 we're gonna take a short break at this point in time. I'll
10 ask you not to discuss anything about this case during the
11 break. When you return to the courtroom you'll be taking an
12 oath concerning your duties and responsibilities in this
13 trial to decide the case based on the evidence and the law
14 as presented. You've been selected as jurors with an open
15 mind concerning the issues that may exist in this case, and
16 I'm gonna ask you to keep that open mind. And one way to do
17 that is not to discuss anything about the case, even what
18 the charges are about, or anything else until such time as I
19 instruct you to begin your deliberations at the close of the
20 trial.

21 So, at this point in time the bailiffs will take you
22 back to the jury room and allow you to take a short break.

23 Mr. Humphries, you can take them back.

24 (Whereupon, the following takes place outside the
25 presence of the jury.)

1 THE COURT: This Court will be in recess for about ten
2 minutes.

3 Court's in recess.

4 (Whereupon, a short recess was taken at this time.)

5 THE COURT: All right. Is the State ready to proceed?

6 SOLICITOR HUNTER: Yes, Your Honor.

7 THE COURT: Defense ready to proceed?

8 MRS. PRICE: Yes, Your Honor.

9 THE COURT: Bring the jury in.

10 (Whereupon, the following takes place within the
11 presence of the jury.)

12 THE COURT: All right. The record will reflect that
13 all jurors have returned to the courtroom.

14 At this time, Madam Clerk, I'd ask that you swear the
15 prospective jury panel.

16 (Whereupon, the jury panel was placed under oath at
17 this time.)

18 THE COURT: Now, if any member of the jury panel failed
19 or refused to take the oath just administered by the clerk,
20 please stand.

21 (No response.)

22 THE COURT: The record will reflect that all jurors
23 have been sworn for purposes of this trial.

24 Before we begin the trial there's some matters that I
25 want to go over with you to discuss with you the roles and

1 I want to be sure that I haven't violated anyone's
2 rights in my opening statement.

3 Is there objection from the State?

4 SOLICITOR HUNTER: No objection.

5 THE COURT: Any objection from the defense?

6 MRS. PRICE: None on behalf of Mr. Jackson.

7 MR. POOLE: Nor on behalf of Mr. Davy.

8 THE COURT: Thank you.

9 Now, ladies and gentlemen, I indicated the State has
10 the only burden of proof in this case. And for that reason
11 we let the State go first with the arguments and
12 presentation of evidence followed by the defense. Once all
13 the evidence has been presented, they'll be closing
14 arguments and then I'll charge you concerning the law. So,
15 that's the process we'll follow.

16 At this time the State may make its opening statement.
17 Mr. Hunter, is that gonna be you?

18 SOLICITOR HUNTER: Yes, Your Honor.

19 THE COURT: You may proceed.

20 SOLICITOR HUNTER: Thank you, Your Honor.

21 May it please the court?

22 THE COURT: Yes, sir.

23 SOLICITOR HUNTER: Ladies and gentlemen of the jury,
24 this is a simple case. What the State is alleging is that
25 Andre Jackson and Nicholas Davy possessed with the intent to

1 distribute marijuana. I'm gonna tell you a little bit of
2 what that means.

3 The State Legislature likes to use the hoity toity
4 lawyer language of possession with intent to distribute. If
5 you break it down, it really means that Mr. Jackson and
6 Mr. Davy knowingly possessed a controlled substance, which
7 is marijuana, with the intent to distribute it, with the
8 intent to give it away, to sell it.

9 What you're gonna hear from is you're gonna hear from
10 Officer Montjoy there in the middle, he stood up earlier,
11 how he stopped Mr. Davy driving a car in Duncan around Mile
12 Marker 63 and we've all gone on 85 right there at Highway
13 290 where it crosses over in the City of, of Duncan near
14 Byrnes High School.

15 You're gonna hear how he stopped the car, how he then
16 had an opportunity to take his K-9, Pico, around the car on
17 an open air sniff, how he then alerted to the car, searched
18 the car, and found almost 448 grams of marijuana. Again,
19 language, a pound of marijuana. Almost exactly a pound.

20 You're also gonna hear from Officer Pitts over there
21 from Inman who is the analysis, the person who analyzed,
22 analyzed, excuse me, who analyzed the marijuana in this
23 case.

24 You're gonna hear that it was, in fact, marijuana, a
25 controlled substance. It's pretty simple. I not only ask

1 they are presumed innocent, and I'm just simply asking that,
2 as being a fundamental part of democracy as Judge Couth has
3 stated that you are, that is a decision maker and a finder
4 of truth, to delay that decision until all of the evidence
5 is in, and you've heard the whole entire story, and then
6 when you render your decision, everybody will abide by it,
7 of course, because, by then, the process of justice will be
8 rendered.

9 Verdict means, in Latin, that which speaks the truth,
10 and I'm sure that the 12 of you who will make the
11 deliberations and deliver, and deliberate and deliver a
12 verdict will do that.

13 So, thank you for being here, thank you for your time,
14 and thank you for your attention.

15 THE COURT: The State may call its first witness.

16 Oh, excuse me, do you wish to make an opening
17 statement?

18 MRS. PRICE: No, Your Honor.

19 THE COURT: I'm sorry.

20 MRS. PRICE: I was shifting in my chair.

21 THE COURT: Okay. I saw you -- I thought you were
22 getting up.

23 All right. You may proceed.

24 SOLICITOR HUNTER: Your Honor, the State would call
25 Officer Jonathan Montino.

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1 you to use your common sense in this case, that's it. And
2 Judge Couch, he said it earlier, use your common sense.

3 Thank you.

4 THE COURT: For the defense, Mrs. Price or Mr. Poole,
5 I'm not sure who's gonna go first.

6 Mr. Poole.

7 MR. POOLE: May it please the Court?

8 THE COURT: Yes, sir.

9 MR. POOLE: Good afternoon. Hope everybody's doing
10 good.

11 I'm Roger Poole, and once again, I represent Nicholas
12 Davy. And I'm going to be very brief because of -- although
13 this probably will be a brief case. I tend to agree with
14 the solicitor that it may, it may be a short case, but it's
15 an important case. It's important to the State of South
16 Carolina. It's important to the two defendants who are
17 charged with this crime, the crime, as the solicitor is
18 stated, is possession of marijuana with intent to
19 distribute.

20 Now, these defendants are innocent. They're innocent
21 up until the time that you deliver a verdict, which will be
22 tomorrow. More likely than not it will be tomorrow, and you
23 will have heard all of the evidence that's been presented
24 and you will make that decision as to whether one or both
25 are guilty beyond a reasonable doubt. Up until that time

Jonathan Montjoy - Direct examination
By Solicitor Hunter

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

2 JONATHAN MONTJOY, being first duly
3 sworn, testified as follows:

4 THE COURT: Sir, have a seat. And once you're
5 comfortable, I'd ask that you state your name for the
6 record.

7 WITNESS: Jonathan Montjoy.

8 THE COURT: Mr. Hunter, your witness.

9 SOLICITOR HUNTER: Thank you, Your Honor.

10 DIRECT EXAMINATION

11 BY SOLICITOR HUNTER:

12 Q Officer Montjoy, where are you currently employed?

13 A Duncan Police Department.

14 Q And how long have you been employed there?

15 A Going on six years.

16 Q And where were you previously employed before that?

17 A Woodruff Police Department.

18 Q And how long were you employed there?

19 A Right at a year and a half.

20 Q So, what's your total law enforcement experience?

21 A I'm -- right at around seven and a half, seven years.

22 Q Okay. And as a member of the Duncan Police Department,
23 what are your current assignments or responsibilities?

24 A Just routine patrol---

25 Q So---

Jonathan Montjoy - Direct examination
By Solicitor Hunter

- 1 A ---throughout the city.
- 2 Q So, anything?
- 3 A Anything.
- 4 Q Okay. Did you have an occasion to be on I-85 on
- 5 September 16th, 2008?
- 6 A Yes.
- 7 Q Okay. What did you notice on that date?
- 8 A I was traveling south around Mile Marker 63, and I
- 9 observed a white in color vehicle traveling in the middle
- 10 lane, lane two of three, at a slower rate of speed than the
- 11 other traffic causing traffic to back up behind it and cars
- 12 were passing it on both sides. Got a reading from my radar
- 13 that the vehicle was traveling 55 miles an hour in a posted
- 14 60, and conducted a traffic stop on the vehicle.
- 15 Q Now, I know this is gonna sound, sound funny to the
- 16 jury, but why would you stop a car that was going 55 in a,
- 17 in a 60 mile an hour zone?
- 18 A At that time of the day it's slower than normal speed
- 19 of traffic and it was causing traffic to back up behind it
- 20 causing a---
- 21 Q What time of day is this?
- 22 A It's during rush hour traffic after people were getting
- 23 off of work and going home.
- 24 Q Okay. So, when you pulled the car over, what did you
- 25 do next?

Jonathan Montjoy - Direct examination
By Solicitor Hunter

1 A I approached the car and asked the driver for his
2 driver's license and informed him why I stopped him and
3 asked him to step to the rear of the car so I could talk to
4 him about why I stopped him and give him a warning for
5 the---

6 Q Who was that driver?

7 A It was Nicholas Davy.

8 Q Nicholas Davy.

9 What did you, what did you talk about with Mr. Davy
10 when you pulled him out of the car?

11 A Informed him of the reason why I stopped him because he
12 was traveling so low in that lane of traffic and just told
13 him that I was gonna give him a warning and conducted,
14 started writing the warning, and checking his license.

15 Q What, what type of questions were you asking him?

16 A I was asking him where they were headed. They were
17 both from out of town. He stated they were heading to
18 Greenville. Didn't really know exactly where they were
19 going in Greenville. Stated he had some family down there,
20 but didn't know exactly where he was going.

21 Q So, how would you describe his answers?

22 A Kind of evasive and didn't really, right to the point
23 of the incident or kind of around them.

24 Q When he stepped out of the car, did he have any
25 information on him?

Jonathan Montjoy - Direct examination
By Solicitor Hunter

- 1 A Just had his license---
- 2 Q Okay.
- 3 A ---he gave me.
- 4 Q And what type of vehicle was it?
- 5 A It was a Chevrolet Impala.
- 6 Q Was it Mr. Davy's vehicle?
- 7 A No, sir, it was a rental.
- 8 Q So, how did you get the rental car agreement?
- 9 A I had to go back up to the passenger and let him locate
- 10 it for me.
- 11 Q Okay. Did you -- in your experience as a law
- 12 enforcement officer, have you ever had the opportunity to
- 13 smell marijuana?
- 14 A Yes.
- 15 Q When you went back up to the car, what did the car
- 16 smell like?
- 17 A I could smell the odor of marijuana in the vehicle.
- 18 Q Okay. And that's when you went back up to the car?
- 19 A I could actually smell it on the initial approach, but
- 20 then when I went back up to the car I could---
- 21 Q Okay.
- 22 A ---smell it stronger.
- 23 Q What did you do at that point?
- 24 A At that point we, I ran my, deployed the K-9 around the
- 25 vehicle and---

Jonathan Montjoy - Direct examination
By Solicitor Hunter

- 1 Q If I might stop you there for a second and talk a
2 little bit about your K-9.
3 What is his name?
4 A Pico.
5 Q Okay. And how long have you known -- how long have you
6 and Pico been working together?
7 A About three and a half years.
8 Q Okay. And where is he originally from?
9 A He's from Belgium.
10 Q Okay. So, what did, what did Pico do in Belgium?
11 A That's where he was trained as far as the imprinting of
12 the illegal narcotics.
13 Q What, what type of training does he receive?
14 A They imprint them. They get them where they're, where
15 they're looking for the odor of marijuana, cocaine, crack,
16 heroin, all the illegal narcotics.
17 Q Okay. And when did you first, I guess I don't, I don't
18 want to say receive your dog, but when did you and Pico
19 start working together?
20 A About three and a half years ago.
21 Q Okay. So, how old was he then?
22 A At that point he was about a year and a half to two
23 years.
24 Q Okay. Was he straight -- did you receive him as soon
25 as he came from Belgium?

Jonathan Montjoy - Direct examination
By Solicitor Hunter

1 A No, he actually went to another school over here where
2 they did some more training with him before we actually---

3 Q How much training do they do?

4 A They do several months. Probably three to four months
5 with him before we actually start training with him.

6 Q Okay. And then once you and Pico were put together,
7 did y'all go and do any training together?

8 A Yes, we had an 80 hour training session that we have to
9 go through.

10 Q Are you certified?

11 A Yes.

12 Q What is the certification?

13 A At the end of your training, your 80 hours, you have to
14 pass a certification through that training facility, but
15 then we get recertified every year.

16 Q You do -- do you do training during the, during the
17 year before the certification or is it just the
18 certification?

19 A Yes, we do it every week.

20 Q And how many hours a week?

21 A Four hours.

22 Q So, this upcoming week you're gonna have another four
23 hours of training---

24 A Yes.

25 Q ---with Pico?

Jonathan Montjoy - Direct examination
By Solicitor Hunter

1 Okay. What is -- how much time do you spend together,
2 you and Pico?

3 A He's pretty much with me all the time.

4 Q So, he's, he's your dog whether you're working or---

5 A Right.

6 Q ---or you're not?

7 Okay. Now, you said -- earlier you were talking about
8 how you took the K-9 around, around the car.

9 Can you continue with that?

10 A We deployed the K-9 around it to sniff the air coming
11 from the vehicle. Never did we actually try to get him in
12 the car. And he actually alerted on the passenger side of
13 the vehicle.

14 Q Okay. When you say alerted, what does that mean?

15 A He recognized that the odor of some kind of illegal
16 narcotic was present, and he sits or he locks out to where
17 the odor is at.

18 Q So, what, what type of alert is it?

19 Is it passive, aggressive, or what, what is---

20 A It's a passive.

21 Q Okay. What exactly does that mean?

22 A Passive basically means that he, he recognizes the odor
23 and stops where the odor is and doesn't scratch or bark.

24 Q Okay. Does he -- excuse me.

25 Is he taught to smell any other type of substances?

Jonathan Montjoy - Direct examination
By Solicitor Hunter

1 A No, just illegal narcotics.

2 Q So, in your time working with him, has he smelled any
3 other substances?

4 A No.

5 Q Okay. After he smelled what you believed was a
6 controlled substance, what did you do?

7 A At that point we stepped the passenger out and we began
8 to search the vehicle.

9 Q And who, and who was the passenger?

10 A It was a Mr. Jackson.

11 Q Okay. And then you began to search the vehicle?

12 A Yes.

13 Q And where did, where did -- first, let me go back.
14 where did this stop occur?

15 A It occurred in the city limits of Duncan around Mile
16 Marker 63.

17 Q What county?

18 A Spartanburg County.

19 Q Okay. And what did -- when you were searching the car,
20 what happened?

21 A Under the center console where the gearshifter is, the
22 plastic housing there, I located four plastic bags with a
23 green leafy substance in it consistent with marijuana.

24 Q So, when you located this green leafy substance, what
25 did you do next?

Jonathan Montjoy - Direct examination
By Solicitor Hunter

1 A We placed the two subjects under arrest for possession
2 with intent to distribute marijuana.

3 Q Okay. And excuse me for a second.

4 Your Honor, may I approach the witness?

5 THE COURT: Yes, sir.

6 Q I'm showing you what's been premarked as State's
7 Exhibit 2.

8 Do you recognize that, Officer Montjoy?

9 A Yes, this is the evidence chain and the bags where we
10 dropped it into the evidence locker.

11 Q Okay. Could you please look at it to make sure
12 that's---

13 A Yes, there's four bags.

14 Q Okay. Were those the four bags you found --

15 A Yes.

16 Q -- on September 16th?

17 A Yes.

18 Q Okay. And are they in the same, substantially the same
19 condition --

20 A Yes.

21 Q -- as when you saw them then?

22 A Uh-huh. (Affirmative).

23 Q Okay. When you put the green plant like substance in
24 that bag, did you fill out any forms?

25 A Yes, we fill out the evidence chain here.

Jonathan Montjoy - Direct examination
By Solicitor Hunter

1 Q Okay. And what is that meant for?

2 A That's to show where we have dropped it into evidence,
3 and if anybody takes it out of evidence to test it they have
4 to sign it out showing where it goes.

5 Q So, to make sure that no one is tampering with the
6 evidence?

7 A Yes.

8 Q Okay. I'm showing you what's been premarked as State's
9 Exhibit 1.

10 Do you recognize that?

11 A Yes, this is the copy of the in car camera.

12 Q Have you had an opportunity to review that?

13 A Yes.

14 Q And when was that?

15 A Today.

16 Q Today.

17 Does it fairly and accurately depict the scene as you
18 remember it on September 16th, 2008?

19 A Yes.

20 SOLICITOR HUNTER: Your Honor, at this time the State
21 would offer State's Exhibit 1 into evidence.

22 MRS. PRICE: Without objection.

23 THE COURT: Without objection, it will be admitted.

24 (Whereupon, State's Exhibit No. 1 was received into
25 evidence at this time.)

Jonathan Montjoy - Direct examination
By Solicitor Hunter

1 SOLICITOR HUNTER: Your Honor, may I publish?

2 THE COURT: You may.

3 SOLICITOR HUNTER: Thank you, Your Honor.

4 (Whereupon, State's Exhibit No. 1 was published to the
5 jury at this time.)

6 Q When we were watching the video, Officer Montjoy, you
7 were saying something to your dog as he went around the car.
8 What were you saying?

9 A It's actually his search command. It's Zoop.

10 Q So, it's in German for search?

11 A Right.

12 Q Okay. Now, we saw you pull something out of their car.
13 Is State's Exhibit 2 what you pulled out of that car?

14 A Yes, it was the four plastic bags with the green leafy
15 substance in them.

16 Q And earlier you said it was a rental car?

17 A Yes.

18 Q Do you know who rented it, who rented it?

19 A I'm not sure who rented it.

20 Q Okay. But who was driving it?

21 A Mr. Davy.

22 Q Okay. Please answer any questions that the defense
23 counsel may have.

24 THE COURT: Mrs. Price.

25 CROSS-EXAMINATION

Jonathan Montjoy - Cross-examination
by Mrs. Price

1 BY MRS. PRICE:

2 Q Officer Montjoy, you filled out a report in regards to
3 this investigation, didn't you?

4 A Yes.

5 Q Okay. And you reviewed that report in regards to your
6 testimony here today?

7 A Yes.

8 Q That's part of your job as a police officer, you do
9 reports, and come to court and testify and that sort of
10 thing?

11 A Right.

12 Q Okay. And you know you've testified today that
13 Mr. Davy was traveling in this vehicle at 54 miles an hour,
14 is that right?

15 A Earlier I did testify to him traveling 54, but I read
16 my report and he was actually driving 55 according to my
17 report.

18 Q Okay. And you also testified today that the posted
19 speed limit in this area of I-85 is actually 60 miles an
20 hour, is that right?

21 A Yes, the maximum speed is 60 miles an hour.

22 Q What is the minimum speed if you know?

23 A It is 45.

24 Q And we would both agree that 54 or 55 is in-between 45
25 and 60?

Jonathan Montjoy - Cross-examination
by Mrs. Price

1 A Yes.

2 Q Okay. And you've also testified here today that when
3 you first approached the car, as we saw it on video just
4 now, when you first approached the car, you approached it on
5 the passenger side --

6 A Yes.

7 Q -- is that right?

8 And who was on the passenger side again?

9 A Mr. Jackson.

10 Q And Mr. Jackson is this gentleman over here?

11 A Yes.

12 Q Okay. And when you approached Mr. Jackson, you, you
13 kind of just leaned down, kind of, kind of stuck your head
14 in the car just to---

15 A Right.

16 Q -- kind of initiate a conversation between them?

17 And you testified here today that you smelled marijuana
18 at that point, is that right?

19 A Yes, I could smell the odor of marijuana as I---

20 Q But in your report you didn't say anything about
21 marijuana on the initial contact --

22 A Right.

23 Q -- is that right?

24 And we also saw on the tape where you got, got Mr. Davy
25 out of the car and he was driving?

Jonathan Montjoy - Cross-examination
by Mrs. Price

1 A Right.

2 Q And he got out of the vehicle and out the side closest
3 to the interstate?

4 A Yes.

5 Q And he kind of walks around the car cause it's kind of
6 dangerous standing out on the side of the road?

7 A Yes, ma'am.

8 Q Especially when they're cars going by?

9 A Yes, ma'am.

10 Q For -- it's dangerous for everybody.

11 So, you brought him toward, more towards your vehicle
12 on the other side?

13 A Uh-huh. (Affirmative).

14 Q All right. And as you were asking him where he was
15 going, he said to Greenville?

16 A Yes.

17 Q Okay. And at some point you actually said in your
18 report I believe that you actually went up to the passenger
19 side where Mr. Jackson was?

20 A Right, to, to get the paperwork on the vehicle.

21 Q Right. Because Mr. Davy had told you that it was a
22 rental car?

23 A Right.

24 Q Did you get that paperwork?

25 A I think he showed me the paperwork there, and he gave

Jonathan Montjoy - Cross-examination
by Mrs. Price

- 1 me his ID.
- 2 Q And -- but -- and -- but did he, he -- what I'm asking
- 3 is did he give you the rental agreement?
- 4 A No, I did not take the rental agreement from him.
- 5 Q Okay. So, you didn't check to see whose car this was?
- 6 A You could see at the top of it.
- 7 Q Whose car---
- 8 A It said, said Enterprise lease.
- 9 Q So, it was rented -- but did you see who rented it?
- 10 A No.
- 11 Q Okay. And now you also said that Mr., Mr. Jackson,
- 12 when he, you -- he eventually came out of the car and this
- 13 was after Pico alerted on the vehicle?
- 14 A Right.
- 15 Q And you said that previously in your testimony here
- 16 today when he alerts on a vehicle he doesn't make a big
- 17 ruckus, is that, that true?
- 18 A Right, he's a passive alert dog.
- 19 Q And by passive alert dog, you mean he sits?
- 20 A Sits or locks out in the area of which he's in.
- 21 Q Okay. Could you tell me what lock out is?
- 22 A Stop and doesn't go past that point.
- 23 Q Does he do -- does he wag his tail?
- 24 A He will wag his tail when he gets excited cause he
- 25 recognizes the odor.

Jonathan Montjoy - Cross-examination
by Mrs. Price

- 1 Q Okay. Does he wag his tail any other time?
- 2 A I mean he's a dog. Dogs wag their tail. But his
- 3 change in behavior when he, he gets an odor.
- 4 Q That's, that's exactly what I'm asking you. That's
- 5 what I'm trying to get to.
- 6 A Yes, it's behavioral changes.
- 7 Q I'm sorry. I don't speak German, but what is the word
- 8 you used before?
- 9 A Zoop.
- 10 Q Zoop?
- 11 A Yeah.
- 12 Q Does he alert if you don't say Zoop?
- 13 A Zoop is just his search command, which---
- 14 Q Uh-huh. (Affirmative).
- 15 A ---he only searches when we put him under.
- 16 Q So, if he smelled marijuana -- so, if he came in here
- 17 today, and this, based on your experience, he came in here
- 18 today and you didn't say Zoop, would he alert on that
- 19 marijuana if you, if you know?
- 20 A If I didn't take him near it or actually tell him to
- 21 search that area, no, he wouldn't do it on his own go to it.
- 22 Q If, if he came in and you were, he was sitting in the
- 23 box with you, do you know if he would alert on it?
- 24 A Yeah, he'd smell the odor, yes---
- 25 Q Okay.

Jonathan Montjoy - Cross-examination
by Mrs. Price

- 1 A ---coming.
- 2 Q Okay. But what I'm asking you is would he let you know
3 that he alerted on it?
- 4 A Yes, he would show us---
- 5 Q Okay.
- 6 A ---by behavior changes.
- 7 Q Okay. At some point you had a short conversation with
8 Mr. Jackson, is that right?
- 9 A Yes.
- 10 Q When you walked up to the vehicle?
- 11 A Right.
- 12 Q And when you walked up to the vehicle with Mr. Jackson,
13 you walked up to him with Pico on his leash?
- 14 A Right.
- 15 Q And that was when you got the -- that was when you
16 asked to see the rental agreement?
- 17 A Right, the paperwork on the vehicle and for his ID.
- 18 Q Okay. And so -- but according to your report, you
19 didn't have -- you didn't say anything about having Pico
20 when you walked up to his window, did you, the second time?
- 21 A No. No, ma'am. But down below it does say where we
22 did deploy the K-9.
- 23 Q What I'm, what I'm trying to, to get at, Officer
24 Montjoy, is when you took, took Pico up to his window---
- 25 A Right.

Jonathan Montjoy - Cross-examination
by Mrs. Price

1 Q ---and you asked to see his identification and whatever
2 paperwork he had on the vehicle, is that before or after you
3 asked Mr. Davy if you could look in the car?

4 A Mr. Davy had already said that he was in a hurry and
5 did not want us in his vehicle.

6 Q But in your report you said you went to the window
7 first and then Mr. Davy said that, is that right?

8 If you need a minute to review, that's fine too.

9 A Well, I may of put in my report, yeah, that after I
10 talked to Mr. Jackson then I deployed the K-9. The K-9 was
11 actually with me while I was talking to Mr. Jackson.

12 Q But -- yeah, but, again, you didn't put that in your
13 report, did you?

14 A That he was with me, no.

15 Q Right. With you.

16 A But I did put below it that I did deploy the K-9 after
17 talking to him.

18 Q But, but at that point you already had the K-9, but you
19 didn't put that in there?

20 A Right.

21 Q Okay. We're gonna go back to the, to the speed limit
22 in this situation.

23 A All right.

24 Q I know we talked a lot, lot about that before.

25 A Yes.

Jonathan Montjoy - Cross-examination
by Mrs. Price

1 Q He was going 55 miles an hour, 54 or 55 miles an hour?

2 A Right.

3 Q Which is below the posted speed limit?

4 A Yes.

5 Q And you said there were people passing him on either
6 side?

7 A Right.

8 Q Because he was in the middle lane?

9 A Right.

10 Q And now, Officer Montjoy, you've been patrolling in
11 this area, particular area around Duncan and I-85 for a
12 couple of years now?

13 A Yes.

14 Q And, in your opinion, based, based on your patrol
15 experience, do people normally go 60 miles an hour?

16 A They do maintain the speed limit. Rush hour it's
17 normally a little bit faster due to the traffic flow.

18 Q Right.

19 And so, is it fair to say that there were some cars on
20 this highway who were going faster than 55 miles an hour
21 based on your observation that day?

22 A Yes, the norm during rush hour traffic is about 70 to
23 75.

24 Q So, 70 to 75 miles an hour---

25 A Right.

Jonathan Montjoy - Cross-examination
by Mrs. Price

- 1 Q ---instead of the posted speed limit of 60?
- 2 A Yes.
- 3 Q And you pulled Mr. Davy---
- 4 A Right.
- 5 Q ---at about 55 miles an hour?
- 6 A Yes, we, we work a lot of wrecks due to people going
- 7 slow and causing traffic to back up causing wrecks.
- 8 Q Okay.
- 9 A He had a line of cars behind him from driving so slow.
- 10 Q Okay. And with regard, with regard to that line of
- 11 cars, about how many cars would you say that was from your
- 12 observation?
- 13 A Maybe a handful or a little bit more.
- 14 Q Was it four or five?
- 15 A Five to ten probably.
- 16 Q Five to ten?
- 17 A Yeah.
- 18 Q And, again, he was going five miles below the speed
- 19 limit approximately?
- 20 A Yes.
- 21 Q Okay. That's all I have. But Mr. Poole may have some
- 22 questions for you.
- 23 MR. POOLE: May it please the Court?
- 24 THE COURT: Yes, sir.
- 25 CROSS-EXAMINATION

Jonathan Montjoy - Cross-examination
by Mr. Poole

1 BY MR. POOLE:

2 Q Officer Montjoy, also in your report that we have
3 obtained you stated that the, that Mr. Davy told you that he
4 was going to Greenville to see some friends?

5 A Friends and family, yes.

6 Q Okay. Well, you testified family a moment ago, and I
7 just see friends in the report.

8 A On the video there I think I did say do you have some
9 family in Greenville and he stated yes.

10 Q Okay. Well, you agree with me the sound on the video
11 is a little hard to pick up, isn't it?

12 A It's pretty clear. You can hear it pretty good.

13 Q Okay. And you -- while you were talking -- when you
14 first stopped him, you were stopping him for a traffic
15 violation?

16 A Right.

17 Q And Mr. Davy was the driver of the vehicle?

18 A Yes.

19 Q And you approached the car from the passenger side and
20 you asked the driver to get out, that is Mr. Davy?

21 A Yes.

22 Q And he readily complied with you, didn't he?

23 A Yes, sir.

24 Q And he engaged in a conversation with you, didn't he?

25 A Yes, sir.

Jonathan Montjoy - Cross-examination
by Mr. Poole

1 Q And you asked him if, well, about the car and he told
2 you it was a rented car?

3 A Right.

4 Q And he told you the name of the company, which is
5 Enterprise?

6 A Yes.

7 Q One of the largest car rental agencies in the nation,
8 right?

9 A I reckon.

10 Q Okay. And in your report you stated that, at some
11 point in time, you went back up to the passenger in the
12 vehicle and asked him to locate the paperwork on the
13 vehicle---

14 A Yes.

15 Q ---which would of been related to the Enterprise
16 rental?

17 A Right.

18 Q Is that what you were looking for?

19 A Yes.

20 Q well, did you obtain it?

21 A I didn't physically put it in my hand, no. He showed
22 me all the paperwork for the vehicle and his ID.

23 Q Okay. And so, while you had the dog on this video, you
24 were asking him about the, the paperwork on the car?

25 A Yes, and his ID.

Jonathan Montjoy - Cross-examination
by Mr. Poole

- 1 Q Okay. And so, you had the dog down here---
- 2 A Right.
- 3 Q ---at the passenger side---
- 4 A Uh-huh. (Affirmative).
- 5 Q ---where you allegedly claimed to have smelled the
- 6 marijuana?
- 7 A Right.
- 8 Q And you were asking for, at the same time, the
- 9 paperwork?
- 10 A Yes.
- 11 Q And then you began to search around the car, is that
- 12 right?
- 13 A Yes, sir.
- 14 Q And giving the German command to search?
- 15 A Yeah.
- 16 Q And then the dog stopped right where you started,
- 17 right?
- 18 A No, sir, I started at the front driver's headlight is
- 19 where he first got his command at.
- 20 Q Okay. All right. But the dog stopped, stopped at the
- 21 passenger's---
- 22 A Passenger side.
- 23 Q ---window?
- 24 A Actually the, in-between the passenger's front door and
- 25 the passenger back-door at that post.

Jonathan Montjoy - Cross-examination
by Mr. Poole

1 Q Okay. And that's near where you were standing talking
2 to Mr. Jackson who was in the car?

3 A Yes.

4 Q All right. And Mr. Davy cooperated with you for the
5 most part, did he not?

6 A Yes, sir.

7 Q Also we could see from the video that the dog started
8 barking when, after Mr. Davy got out of the car?

9 A Right.

10 Q And that was because -- was it because Mr. Davy was
11 near the dog?

12 A The dog kind of thinks that the kennel in the back is
13 his house. I mean it's just like a dog in a fence.

14 Q The territorial thing?

15 A Yes.

16 Q Okay. And so, the dog was, was barking at him, wasn't
17 he?

18 A Not necessarily at him, but barking because there was
19 somebody around the vehicle, yes.

20 Q Okay. But you did not get the paperwork or make any
21 copies of it?

22 A No, sir.

23 Q All right. Thank you, Officer Montjoy.

24 THE COURT: Redirect.

25 SOLICITOR HUNTER: Yes, sir, Your Honor, briefly.

Jonathan Montjoy - Redirect examination
by Solicitor Hunter

1 THE COURT: Yes, sir.

2 REDIRECT EXAMINATION

3 BY SOLICITOR HUNTER:

4 Q Officer Montjoy, Mrs. Price was asking questions about
5 your report.

6 A Yes.

7 Q When is that report written?

8 A It's written directly probably 30 to 45 minutes after
9 we do our tow logs and get everything back and get
10 everything logged into evidence.

11 Q So, did you transport Mr. Jackson and Mr. Davy away
12 from the scene?

13 A Yes, we actually go to the police department, do all
14 the booking process, and then to the detention center.

15 Q So, how long would you say actually transpired between
16 when you actually sit down and write your report and the,
17 and the actual, the scene?

18 A Anywhere from 30, maybe up to an hour by the time we
19 get all that stuff done.

20 Q And so, your time line may not exactly be correct when
21 you write down on your report?

22 A Right.

23 Q It's more what you see, see on the video should be the
24 correct time line?

25 A Right.

Jonathan Montjoy - Redirect examination
by Solicitor Hunter

1 Q And in the report you say you, you saw -- you talked to
2 Mr. Davy and asked him about the car?

3 A Right.

4 Q Before you deployed Pico?

5 A Yes.

6 Q Okay. Mr. Poole was asking about the family.

7 Did Mr. Davy or Mr. Jackson go into specifics about the
8 family?

9 A No, neither one of them.

10 Q How would you describe their answers when you were
11 talking to them?

12 A Like I said, very very vague, not real elaborate on the
13 answer. Just basically they were going to Greenville and
14 were coming back tonight.

15 Q Thank you.

16 THE COURT: Mrs. Price, anything further on recross?

17 MRS. PRICE: Yes, Your Honor.

18 RECROSS EXAMINATION

19 BY MRS. PRICE:

20 Q Officer Montjoy, getting back to that report again, you
21 made this report just a few hours after we saw this tape?

22 A Right, about an hour or so, yes.

23 Q So, about the same day?

24 A Yeah, it's the same day.

25 Q And what you're testifying to today happened a little

Jonathan Montjoy - Recross examination
by Mrs. Price

1 over a year ago now, isn't that right?

2 A Yes.

3 Q Okay. Thank you.

4 THE COURT: Anything further?

5 MR. POOLE: No, sir.

6 THE COURT: Sir, you may step down.

7 Ladies and gentlemen of the jury, we're a little past
8 five o'clock. It's a break point in the case and we're
9 going to adjourn for the afternoon. We'll resume at nine
10 o'clock in the morning. I'll ask you to be back in the jury
11 room that's in use for this trial at that point in time, and
12 we should be able to begin shortly thereafter.

13 Over the evening, please don't discuss the case with
14 anyone. It's okay to tell someone you've been selected in a
15 case, but don't discuss the particulars because, again, that
16 may begin to cloud your judgment and don't attempt to gather
17 any information outside of the courtroom during our break.
18 Should anyone attempt to contact you concerning your service
19 on this jury, please report that to the Court. Jury
20 tampering in this state is a felony. I take it seriously
21 and I'll see that the proper investigation occurs should
22 someone attempt to contact you concerning your participation
23 in this case.

24 At this time we're going to adjourn for the evening.
25 Have a good evening. The bailiffs will show you where to

wednesday, October 14th, 2009

THE COURT: All right. Is the State ready to proceed?

SOLICITOR HUNTER: Yes, Your Honor.

THE COURT: Defense ready to proceed?

MRS. PRICE: Yes, Your Honor.

MR. POOLE: Yes, sir.

THE COURT: Bring the jury in.

(Whereupon, the following takes place within the presence of the jury.)

THE COURT: All right. The record will reflect that all jurors have returned to the courtroom.

I trust everyone had a good evening and you're ready to proceed with the trial of the case this morning. When we broke yesterday afternoon the State was in the process of presenting its evidence and you may proceed.

Mr. Hunter.

SOLICITOR HUNTER: Thank you, Your Honor.

The State would call Officer Chris Miller.

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

CHRIS MILLER, being first duly sworn, testified as follows:

THE COURT: Sir, once you're seated I'd ask that you state your name for the record.

WITNESS: Chris Miller.

Chris Miller - Direct examination
by Solicitor Hunter

1 THE COURT: Mr. Hunter, your witness.

2 SOLICITOR HUNTER: Thank you, Your Honor.

3 DIRECT EXAMINATION

4 BY SOLICITOR HUNTER:

5 Q Officer Miller, who are you employed by?

6 A Duncan Police Department.

7 Q And how long have you been with the Duncan Police?

8 A Approximately seven and a half years.

9 Q And what is your job with the Duncan Police Department?

10 A I am a shift supervisor which includes routine patrol
11 duties and I'm the supervisor over one particular shift.

12 Q Okay. Have you ever served as an evidence tech?

13 A Yes, I'm currently the evidence custodian for the Town
14 of Duncan.

15 Q And what are the responsibilities of the evidence tech?

16 A The -- once the evidence is collected by the officers
17 it's dropped in a, one of the secure drop boxes or the
18 secure lockers. I then remove it from that, store it in
19 the, process it into our system, and store it in our
20 evidence room for safe keeping until it needs to be
21 transported for testing or court purposes, things of that
22 nature.

23 Q And when evidence is dropped in the drop box, is it
24 packaged in a certain way?

25 A Yes, it's sealed by the original officer and it's dated

Chris Miller - Direct examination
by Solicitor Hunter

1 and times whenever they sealed it and it's kept that way
2 until, until it's opened for court or testing purposes.

3 Q would you handle the package if it's not correctly
4 sealed?

5 A No, if I take it out and it's not correctly sealed, I
6 make a note of that. I do a follow-up investigation with
7 the officer, why it's not correctly sealed, and then he sits
8 down at that point and, and fixes the problem or we go
9 through our business as set by protocol.

10 Q And when you receive evidence of illegal narcotics,
11 what do you usually do with them?

12 A The -- depending on what type of narcotics it is,
13 depending on the basis of what kind of testing it goes
14 through, once I take it in, I store it, like I said, in the
15 evidence room for safe keeping. Then I transfer it out in
16 my custody and take it to the testing agency or whoever is
17 gonna test that narcotics for us. Once they're done with
18 their testing, it's resealed, and placed back in the
19 evidence room for safe keeping until further notice.

20 Q All right. Did you receive illegal substances in the
21 case against Andre Jackson and Nicholas Davy?

22 A Yes, I did.

23 SOLICITOR HUNTER: May I approach the witness?

24 THE COURT: You may.

25 Q I'm showing you what's been previously marked as

Chris Miller - Direct examination
by Solicitor Hunter

1 State's Exhibit 2.

2 Do you recognize this?

3 A Yes, I do.

4 Q And how do you recognize this?

5 A This -- I removed this on September the 25th from the
6 drop box, which is where the original, which is where the
7 road officers, once they collect their evidence, they drop
8 it in a secured drop box, which only myself and the captain
9 over, the captain of the department has a key to the drop
10 box. I removed it from that drop box and entered it into
11 our system and then stored it in the evidence room.

12 Q Who placed it in the drop box?

13 A Officer Montjoy.

14 Q Okay. And when you took that package, put it back over
15 here now, where did you take it?

16 A I transported it to the Inman Police Department where
17 Officer Pitts conducted the, the test on it.

18 Q Were you with the bag the entire way?

19 A Yes, I was.

20 Q And, after the test, did you bring it back?

21 A Yes, after the test it was, it was repackaged and
22 resealed and put back in the evidence room.

23 Q Was it tampered with when you saw it---

24 A No, it wasn't.

25 Q ---at the beginning?

Chris Miller - Direct examination
by Solicitor Hunter

1 Was it tampered with during the test?

2 A No, it wasn't.

3 Q Was it tampered with afterwards?

4 A No, it wasn't.

5 Q Okay. Now, are you familiar with fingerprinting of
6 certain evidence?

7 A Yes, I am.

8 Q You're not a fingerprint examiner?

9 A No, I'm not.

10 Q Okay. But -- and is it the Duncan Police Department
11 normal routine or practice to fingerprint drugs---

12 A No, we don't.

13 Q ---in a package?

14 Why not?

15 A Due to the fact that if we have suspects on hand we
16 don't, we do not fingerprint any illegal narcotics. If
17 there's any -- if there's no suspects on hand, that calls
18 for a different type of procedures to where we have in the
19 past do that if there's no suspects. But if we have
20 suspects in constructive possession of the, of the
21 narcotics, then we don't fingerprint them.

22 SOLICITOR HUNTER: Thank you, Your Honor.

23 Please answer any questions the defense might have for
24 you.

25 THE COURT: Mrs. Price, your witness.

Chris Miller - Direct examination
by Solicitor Hunter

1 MRS. PRICE: No questions, Your Honor.

2 MR. POOLE: No questions, Your Honor.

3 THE COURT: Sir, you may step down.

4 The State may call its next witness.

5 SOLICITOR HUNTER: Thank you, Your Honor.

6 The State calls Officer Pitts.

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

8 R.W. PITTS, being first duly sworn,

9 testified as follows:

10 THE COURT: Have a seat please, sir, and once you're
11 seated state your name for the record.

12 WITNESS: Richard Pitts.

13 THE COURT: And Mr. Hunter, it's your witness.

14 SOLICITOR HUNTER: I'll let him get settled.

15 THE COURT: All right.

16 DIRECT EXAMINATION

17 BY SOLICITOR HUNTER:

18 Q Officer Pitts, where do you currently -- where are you
19 currently employed?

20 A I work for the Inman Police Department.

21 Q And how long have you been employed there?

22 A The 26th of this month will be four years.

23 Q Okay. And before that, where were you employed?

24 A City of Cowpens Police Department.

25 Q For how long?

R.W. Pitts - Direct examination
by Solicitor Hunter

- 1 A Approximately 18 months.
- 2 Q And then before that where were you employed?
- 3 A I worked in the Gollie County Sheriff's Department in
4 Texas.
- 5 Q Okay. And that's your first law enforcement --
- 6 A Yes.
- 7 Q -- experience?
- 8 So, how long have you been in law enforcement?
- 9 A Roughly ten years.
- 10 Q Okay. What position do you hold currently at the Inman
11 Police Department?
- 12 A I'm a police officer there. I, I, I'm---
- 13 Q What are your routine -- what are your routine
14 assignments?
- 15 A Routine patrol. We work traffic. We do
16 investigations.
- 17 Q Do you have any other assignments?
- 18 A Marijuana analyst, Data Master operator.
- 19 Q And how long have you been, been a marijuana analyst?
- 20 A Since January of 2006.
- 21 Q Okay. And this incident occurred September 16th,
22 2008?
- 23 A Yes, sir.
- 24 Q What training must you have to qualify as a marijuana
25 analyst?

R.W. Pitts - Direct examination
by Solicitor Hunter

1 A You have to go to Columbia to SLED. I successfully
2 completed marijuana analyst certification program at the
3 South Carolina Law Enforcement Division. It's commonly
4 known as SLED. I apologize. That certification program
5 requires that we analyze 100 separate samples with a hundred
6 percent accuracy, and we also have to take a written test
7 where we have to score an 80 or better.

8 Q So, as part of your certification you have to correctly
9 analyze a hundred samples?

10 A Yes, sir.

11 Q Are some of those samples marijuana and some of them
12 not?

13 A Yes.

14 Q Okay. So, you have to correctly analyze and say
15 that---

16 A You have to---

17 Q ---some are not marijuana?

18 A Yes.

19 Q Okay. Do you have to be recertified in this?

20 A Yes, sir, every three years.

21 Q Okay. And how many times have you had the occasion to
22 analyze marijuana---

23 A Approximately---

24 Q ---since you've being certified?

25 A ---seven or eight times.

R.W. Pitts - Direct examination
by Solicitor Hunter

1 Q Is it part of your regular duties?

2 A It is.

3 Q Okay. Have you ever testified in court about this?

4 A No, sir, not yet.

5 Q So, this is your first time---

6 A It is.

7 Q ---testifying?

8 Okay. Your Honor, at this time the State would declare
9 Mr. Pitts as an expert in the field of marijuana analysis.

10 THE COURT: Any objection to his being qualified?

11 MRS. PRICE: No, sir.

12 THE COURT: Without objection, he'll be qualified as an
13 expert.

14 Ladies and gentlemen of the jury, let me explain to you
15 what this means. Under South Carolina law, generally
16 witnesses are not allowed to state their opinions on
17 subjects. An exception to that rule is made for witnesses
18 who are qualified as experts. That's someone who has some
19 specialized training or experience within a field or a
20 science or a profession such that they are in a position to
21 offer opinions within that field.

22 In this case, this witness has been offered as an
23 expert within the field of analysis of materials for
24 marijuana and the, he is being qualified as such. That
25 allows him to give his opinion within that field and state

R.W. Pitts - Direct examination
by Solicitor Hunter

1 the reasons for his opinion.

2 I'll go over with you in my charge later on a little
3 more detail about how you can handle or take the testimony
4 of an expert. But at this point in time he's been qualified
5 as such and he will be allowed to proceed as an expert in
6 the field.

7 Mr. Hunter, you may proceed.

8 Q Officer Pitts, I'm gonna show you what's been
9 previously marked as State's Exhibit 2.

10 Do you recognize this?

11 A Yes, I do.

12 Q And how do you recognize that?

13 A It was brought to me by Officer Miller with the Duncan
14 County, Duncan Police Department for analysis.

15 Q Okay. Did you mark the exhibit?

16 A I did.

17 Q Where does it say -- where do you mark it?

18 A It's marked right here where I took it into my custody.

19 Q Okay. Would you please look inside the bag just to
20 make sure that those are the packages as you saw them?

21 A Yes, sir, it is.

22 Q And those are the bags you tested?

23 A Yes, it is.

24 SOLICITOR HUNTER: Your Honor, at this point the State
25 would like to offer exhibit, State's Exhibit 2 into

R.W. Pitts - Direct examination
by Solicitor Hunter

1 evidence.

2 THE COURT: Any objection?

3 MRS. PRICE: Without objection, Your Honor.

4 MR. POOLE: Without objection.

5 THE COURT: Without objection, it will be admitted as
6 marked.

7 (Whereupon, State's Exhibit No. 2 was received into
8 evidence at this time.)

9 Q You can actually leave those out, Officer Pitts.

10 A All right.

11 THE COURT: You may proceed, Mr. Hunter.

12 SOLICITOR HUNTER: Thank you.

13 Q Has this exhibit -- was this exhibit, excuse me, this
14 piece of evidence in your control the entire time when you
15 were testing it?

16 A Yes, sir, it was.

17 Q And was there anybody else there with you?

18 A Officer Miller.

19 Q What type of tests do you perform on the marijuana?

20 A It's actually two separate tests.

21 Q Okay.

22 A We have to do a microscope test and also a chemical
23 test on the marijuana.

24 Q What does the microscope test look for?

25 A The microscope test looks for hairs on the marijuana.

R.W. Pitts - Direct examination
by Solicitor Hunter

1 They're commonly known as systolic hairs or bare claws, the
2 unicellular claw, and multicellular claws, hairs. And what
3 they are, they basically look like little hairs on the top
4 of the marijuana and you have to all, have all three of
5 those hairs on the leaf with the THC for it to be marijuana.

6 Q And what is the chemical test?

7 A The chemical test is a duquenois lavine. It's a couple
8 of different chemicals mixed together to make the duquenois
9 solution, which you pull a sample of the marijuana and you
10 put it inside of it and it has a chemical reaction.

11 Q Now, before you perform these tests, do you weight the
12 marijuana?

13 A Yes, we do.

14 Q Okay. And in these four bags, can you tell me the
15 weight there as you see it?

16 A The first---

17 Q You can refer to your report if you need to.

18 A Oh, thank you. The first bag here you see, it has
19 112.90 grams. It's gonna be this bag here. The second bag
20 has 113.41 grams, which will be this bag here. The third,
21 which has 114.3 grams, is here, and the fourth, which has
22 105.94 grams is here.

23 Q Okay. So, obviously with these decimal points, what
24 was the approximate weight total?

25 A Approximately 440 something.

R.W. Pitts - Direct examination
by Solicitor Hunter

1 Q Okay. So, close to a pound?

2 A Yes, close to a pound of marijuana.

3 Q Okay. And you performed a microscopic test on each one
4 of those bags?

5 A I did.

6 Q And what were the results?

7 A Positive.

8 Q On all four?

9 A Yes, sir.

10 Q And you performed a chemical test on all these?

11 A The test results were positive on the chemical.

12 Q So, in your expert opinion, what is that substance
13 there in front of you?

14 A This is marijuana.

15 Q So, is it the marijuana that was delivered to you by
16 officer Miller?

17 A Yes, sir.

18 Q Please answer any questions the defense has.

19 THE COURT: Mrs. Price, your witness.

20 MRS. PRICE: Thank you.

21 CROSS-EXAMINATION

22 BY MRS. PRICE:

23 Q Officer Pitts, when you received these bags of what was
24 reported to be marijuana at the time, were they wrapped in
25 the plastic just like that?

R.W. Pitts - Cross-examination
by Mrs. Price

- 1 A No, ma'am, they weren't.
- 2 Q Who wrapped it up in plastic?
- 3 A These evidence bags?
- 4 Q Yes, sir.
- 5 A I believe those are ours.
- 6 Q So---
- 7 A Let me see them.
- 8 Q So, you wrapped these up in plastic at, in Inman?
- 9 A Yes.
- 10 Q Okay. And so, when they came -- when it came to you,
- 11 was it in these food saver bags?
- 12 A Yes.
- 13 Q Okay. And Officer Pitts, how much of each bag of
- 14 marijuana did you test if you remember?
- 15 A You pinch a small piece off.
- 16 Q Approximately what was the weight on that?
- 17 A I don't know. It wasn't weighed. It was pulled off
- 18 with a pair of tweezers.
- 19 Q Okay. Approximately how many leaves maybe if you can
- 20 just give us an idea?
- 21 A No, no leaves. Just a pinch of the leaf of --.
- 22 Q Okay. And you did just one sampling out of each bag?
- 23 A Yes, ma'am.
- 24 Q And that was on the edge or in the middle?
- 25 A I'm sorry?

R.W. Pitts - Cross-examination
by Mrs. Price

1 Q when you pinched off the sample --

2 A Yes, ma'am.

3 Q -- do you remember where exactly you took it from in
4 the bag?

5 A No, ma'am, I just pulled it from the bulk.

6 Q Okay. And you did a, one test on each bag?

7 A Yes, ma'am.

8 Q Okay. Thank you.

9 THE COURT: Mr. Poole.

10 MR. POOLE: No questions.

11 THE COURT: You may step down unless there's any
12 redirect.

13 SOLICITOR HUNTER: Your Honor, just one question.

14 THE COURT: Yes, sir.

15 REDIRECT EXAMINATION

16 BY SOLICITOR HUNTER:

17 Q when you -- excuse me. when you test the marijuana,
18 does it not ruin the evidence after you do the chemical
19 test?

20 A It does not.

21 Q It doesn't?

22 A The evidence that's tested?

23 Q yes, the actual, the actual thing that you pinch off --

24 A Yes.

25 Q -- that's kind of ruined?

R.W. Pitts - Redirect examination
by Solicitor Hunter

1 A It's ruined and discarded.

2 Q All right. Thank you.

3 THE COURT: Any other questions to follow-up?

4 MRS. PRICE: No, Your Honor.

5 THE COURT: Sir, now you may step down.

6 OFFICER: Thank you.

7 THE COURT: The State may call its next witness.

8 SOLICITOR HUNTER: Your Honor, the State rests.

9 THE COURT: Ladies and gentlemen, that completes the
10 presentation of evidence by the State in this matter. At
11 this point in time there are some matters that I do need to
12 take up with the attorneys before we proceed further. So,
13 we'll take a short break and allow you to retire to the jury
14 room. Again, I'll instruct you, as I will everytime you
15 leave the courtroom, not to begin any discussions concerning
16 this case until I advise you to do so.

17 You may retire to the jury room.

18 Thank you very much.

19 (Whereupon, the following takes place outside the
20 presence of the jury.)

21 THE COURT: Any motions from the defense?

22 MRS. PRICE: Yes, Your Honor.

23 At this time, on behalf of Mr. Jackson, I would like to
24 move for a directed verdict in this matter. Your Honor, as
25 you've heard the evidence is that Mr. Jackson was driving in

1 a car which was driven by Mr. Davy, which the contract on
2 which we still don't know who rented it. Your Honor,
3 Mr. Jackson would assert, based upon his previous objections
4 and previous arguments that have been heard both in and
5 outside the presence of the jury, that the State is not met
6 its burden in this case in proving that, not only did he
7 make, not even have what was a good constructive possession
8 of any marijuana, that he may not have even known it was in
9 there. There is no evidence in that matter, Your Honor, and
10 based on that argument we would move for a directed verdict
11 on behalf of Mr. Jackson.

12 MR. POOLE: Likewise, Defendant Nicholas Davy would
13 move for a directed verdict based upon the lack of evidence
14 presented in the testimony and the evidence presented by way
15 of other means to the jury during the course of this case,
16 and the motions made prior to the seating of the panel.

17 THE COURT: Hear from the State.

18 SOLICITOR HUNTER: Yes, Your Honor.

19 We've heard testimony from Officer Montjoy that the
20 marijuana, which was tested by Officer Pitts, was found in
21 the center console of the vehicle with both passengers in
22 the bucket seats beside him hidden underneath the, the
23 gearshifter. As such, we believe a case for constructive
24 possession has been made because obviously they have control
25 and can, dominion over the marijuana which was hidden under

1 the gearshift.

2 THE COURT: At this stage of the proceedings I am
3 required to view the facts in the light most favorable to
4 the non-moving party. I find that there are sufficient
5 facts to establish a case for constructive possession in the
6 case, and, therefore, I will allow it to go to the jury.

7 Any other motions from the defense?

8 MRS. PRICE: No, Your Honor.

9 SOLICITOR MCCARTY: Your Honor, if I may be heard just
10 on one issue. I don't know if the defense plans on putting
11 up a case. I notice they didn't have any witnesses.

12 When we do move to final argument, Your Honor, I would
13 ask that the issue regarding our pretrial suppression motion,
14 which was the nature of the stop, be limited in their
15 address in closing remarks by both defense counsel. Your
16 Honor, that's already a motion that's been ruled upon by you
17 and the stop being valid. I just don't want to have the
18 jury be sought for nullification of that stop for that
19 purpose, Your Honor.

20 THE COURT: Hear from the defense.

21 MR. POOLE: Well, Your Honor, I think that we, we
22 should be able to go into the, the, the reason for the stop
23 being that it was driving too slow and we saw the traffic on
24 the video and then the jury saw that too. So, I think we
25 should be able to talk a little bit about the nature of the

1 stop in that regard because it was -- I've said impeding
2 traffic, but driving too slowly or whatever it was was the
3 reason for the stop, and the Court is ruled that it's valid.
4 We recognize that. But I think we need to be able to talk
5 about it to a certain extent.

6 THE COURT: Well, I'm not sure I understand what, what
7 regard you intend to talk about it. So, maybe that's the
8 question that he's raising.

9 SOLICITOR MCCARTY: I think that might be my concern,
10 Your Honor. I don't want Mr. Poole or Mrs. Price really to
11 be seeking a nullification of the stop to the jury when Your
12 Honor has already previously ruled that it's a valid stop,
13 and Your Honor's been witness to it, seen the video, heard
14 the testimony, and determined that impeding traffic, driving
15 too slow, whatever the conditions may of been, that that was
16 a valid reason for the stop and it was purposeful and thus
17 not to allow the jury to be swayed or persuaded in, in that
18 regard, Your Honor.

19 MR. POOLE: Your Honor, the, the -- what I'm concerned
20 about is we saw the video and, and the reason given by the
21 officer for the stop was driving too slowly. Now, from what
22 I saw, that traffic was not that bad, not that congested on
23 that part of 85 at that time.

24 THE COURT: Well, I think the issue, the real issue is
25 whether it was that bad at the time of the stop. What we

1 saw was what it looked like after he had been stopped. You
2 know -- and traffic varies on a highway. It doesn't stay
3 the same at all times. I'm not, you know, I'm not gonna say
4 that that necessarily shows the conditions at the time of
5 the stop. It shows the conditions at the time they were
6 sitting on the side of the road.

7 MR. POOLE: And the conditions -- I mean it was almost
8 an immediate stop too. So, you know, if the reason was
9 moving slowly and fast in congested traffic or faster moving
10 traffic, I think the jury has seen the video which shows
11 that the traffic was just not that thick, congested, or, or
12 filled up.

13 THE COURT: Well, my ruling was as a matter of law as
14 to whether or not that was a, a---

15 SOLICITOR McCARTY: Yes, sir.

16 THE COURT: ---valid stop or whether there was probable
17 cause for the stop, and my ruling was that the statute does,
18 is not tied to the speed limit. The statute doesn't refer
19 to the speed limit or the minimum speed limit. It talks in
20 terms of, of impeding traffic. That's what it talks in
21 terms of.

22 SOLICITOR McCARTY: Yes, sir.

23 THE COURT: If it was tied to speed limit or minimum
24 speed limit, they may have a really good argument here, but
25 that's not what that statute says. And so, you know, there

1 is a issue as to whether or not they were impeding traffic.
2 I didn't find as a matter of fact that they were. I just
3 said that given the testimony that I heard.

4 SOLICITOR MCCARTY: Yes, sir.

5 THE COURT: He gave sufficient testimony to indicate
6 that he had a reason to stop them from impeding traffic. He
7 said there was a line of cars backed up behind him. There
8 were cars passing him on both sides. He was in the center
9 lane rather than the far right lane. And so, I found that
10 there was sufficient testimony to allow the case to go on
11 to, on to the jury. I didn't stop it from going to the
12 jury. So, I'm not gonna prevent them from commenting on
13 that.

14 SOLICITOR MCCARTY: Yes, sir.

15 THE COURT: And it's not a question of nullifying my
16 ruling. My ruling is whether or not they had a right to
17 just bar it altogether.

18 SOLICITOR MCCARTY: Yes, sir.

19 THE COURT: And my ruling is that they don't have a
20 right to do that, that that's an issue that goes on to the
21 jury.

22 SOLICITOR MCCARTY: Thank you.

23 THE COURT: It's on to the jury.

24 MR. POOLE: Thank you, sir.

25 THE COURT: All right. Now, your client's right to

1 testify.

2 MRS. PRICE: Yes, Your Honor.

3 THE COURT: Does he intend to testify?

4 MRS. PRICE: He does, Your Honor.

5 THE COURT: All right. Then I probably need to discuss
6 some matters with you.

7 Sir, if you'll---

8 MRS. PRICE: Yes, Your Honor.

9 THE COURT: If you'll come forward and just stand right
10 here, and if you'll swear the gentleman for me.

11 (Whereupon, Defendant Jackson was placed under oath at
12 this time.)

13 THE COURT: All right, sir. You are Mr. Andre Jackson,
14 is that right?

15 DEFENDANT: Yes, sir.

16 THE COURT: And Mr. Jackson, we have reached the stage
17 of this trial where you have the right to present your case,
18 the defense's case in this matter. And at this point in
19 time I need to be sure that you're aware of certain of your
20 constitutional rights in regards to testifying in this case.

21 I'm going to go over that right with you and be sure
22 that you understand it. When I finish, if you have any
23 questions about what I've explained to you, I'll allow you
24 to ask those questions before we proceed.

25 Do you understand what we're doing at this point in

1 time?

2 DEFENDANT: Yes, Your Honor.

3 THE COURT: Sir, I want to make you aware of a right
4 that you have under the Fifth Amendment to the United States
5 Constitution, and that amendment says that no person shall
6 be compelled, in any criminal case, to be a witness against
7 himself. What that means is that you can not be compelled
8 or required to testify in this matter.

9 You certainly have the right to testify. You also have
10 the right not to testify and remain silent. I will advise
11 you that if you do decide to testify that jury testimony
12 will be governed by the same rules that govern the testimony
13 of any other witness in the case. That means that you would
14 be examined by your lawyer and, of course, in the case, by
15 Mr. Davy's, Davy's lawyer, and you'd be cross-examined by
16 the State's attorney.

17 In addition to that cross-examination, should you have
18 any convictions, criminal convictions on your record which
19 involve false statements or dishonesty or which this Court
20 determines that the probative value of that evidence
21 outweighs its prejudicial effect to you, in that case the
22 State may be in a position to introduce your criminal record
23 to attack your credibility.

24 Now, the decision as to whether or not to testify is
25 entirely up to you. No one else makes that decision but

1 you.

2 You have the right to consult with anyone you choose to
3 consult with concerning this particular decision. Your
4 attorney, family, friends, anyone else. But in the final
5 analysis it's your decision as to whether or not you would
6 testify. You have to do so knowing, having knowledge of
7 your right not to testify and of the consequences that could
8 result from your decision to testify.

9 Now, do you understand the right that I have explained
10 to you?

11 DEFENDANT: Yes, Your Honor.

12 THE COURT: Do you have any questions about that right?

13 DEFENDANT: No, Your Honor.

14 THE COURT: All right. Have you had an opportunity to
15 discuss your decision as to whether or not to testify with
16 your lawyer?

17 DEFENDANT: Might I speak with her?

18 But I'd like to talk to her.

19 THE COURT: Okay. Well, I'll give you some time to
20 talk to her at this point in time.

21 Court will be in recess for about ten minutes.

22 MRS. PRICE: Thank you, Your Honor.

23 DEFENDANT: Thank you, Your Honor.

24 THE COURT: Thank you.

25 And before he begins that consultation, I'll just ask

1 the State are there any matters that you would tend to, that
2 you would, that you would expect to introduce to impeach
3 this gentleman's testimony?

4 SOLICITOR HUNTER: At this point in time I do not
5 believe so, Your Honor.

6 THE COURT: Okay. I'll take about a ten minute break.

7 MRS. PRICE: Thank you, judge.

8 SOLICITOR MCCARTY: Thank you, Your Honor.

9 (Whereupon, a short recess was taken at this time.)

10 THE COURT: All right. Mr. Jackson, have you had an
11 opportunity to consult with your attorney?

12 DEFENDANT: Yes, Your Honor.

13 THE COURT: And have you made a decision as to whether
14 or not you intend to testify?

15 DEFENDANT: Yes, Your Honor.

16 THE COURT: Do you intend to testify?

17 DEFENDANT: Yes, Your Honor.

18 THE COURT: All right. Thank you very much.

19 Anything else from the State before we bring the jury
20 back?

21 SOLICITOR HUNTER: No, Your Honor.

22 THE COURT: Anything from the defense before we bring
23 the jury back?

24 MRS. PRICE: No, Your Honor.

25 MR. POOLE: No, sir.

1 THE COURT: Let's bring the jury in.

2 (Whereupon, the following takes place within the
3 presence of the jury.)

4 THE COURT: All right. The record will reflect the
5 jury has returned to the courtroom.

6 When we broke earlier the State had presented the
7 evidence that it intended to present. At this time the
8 defense has a right to present any evidence that it chooses
9 to present.

10 Mrs. Price.

11 MRS. PRICE: Thank you, Your Honor.

12 The defense calls Mr. Andre Jackson.

13 THE COURT: Sir, if you'll come forward to my left to
14 testify, to swear, to be sworn please.

15 ANDRE JACKSON, being first duly
16 sworn, testified as follows:

17 THE COURT: Sir, once you're seated and comfortable,
18 state your name for the record please.

19 WITNESS: My name is Andre Jackson.

20 MRS. PRICE: Okay.

21 THE COURT: Okay. Mrs. Price, it's your witness.

22 MRS. PRICE: Thank you, Your Honor.

23 DIRECT EXAMINATION

24 BY MRS. PRICE:

25 Q Now, Mr. Jackson, how old are you?

Andre Jackson - Direct examination
by Mrs. Price

- 1 A I'm 42.
- 2 Q Do you have any children?
- 3 A Yes, ma'am.
- 4 Q How many?
- 5 A I got three with my wife that's sitting in the
6 courtroom and I got a son and a daughter in Maryland.
- 7 Q Okay. How old are your children?
- 8 A My son is 22.
- 9 Q Okay.
- 10 A And I got a daughter that's 25.
- 11 Q Okay. Now, your son that you just talked about, he's
12 an adult?
- 13 A Yes, ma'am.
- 14 Q And he has adult friends?
- 15 A Yes, ma'am.
- 16 Q And do you know Mr. Davy?
- 17 A Yes, ma'am, I met Mr. Davy through my, my grand kids
18 birthday party in Maryland of my son.
- 19 Q What's the connection between Mr. Davy and your son?
- 20 A I think they're from school friends.
- 21 Q Okay. Now, Mr. Davy, you are not from here originally,
22 are you?
- 23 A No, I'm not from Charlotte or Concord, ma'am.
- 24 Q Okay. Where are you from originally?
- 25 A Originally I'm from Maryland.

Andre Jackson - Direct examination
by Mrs. Price

1 Q Okay. Where did you live before Maryland?

2 A In Washington D.C.

3 Q Okay. How long have you lived in Charlotte or in the
4 Charlotte area?

5 Excuse me.

6 A I been living in the Charlotte area say about seven,
7 seven years, eight years, seven years.

8 Q Mr. Davy, do you -- excuse me.

9 Mr. Jackson, do you have a job?

10 A Yes, ma'am.

11 Q What do you do?

12 A Well, right now I work for Cabarras Plastic and also
13 I'm a musician and I do a catering and I have catering on
14 the side.

15 Q Okay. Now, I'm gonna take you back to September of
16 2008.

17 Did you have the occasion to come into contact with
18 Mr. Davy?

19 A Yes, ma'am.

20 Q How did you do that?

21 A Well, prior to this Mr. Davy had called me when,
22 through my son, and he say he was coming, he was going to I
23 think it was Florida or Georgia and he wanted to stop over
24 for the night, and I consult with my wife and she say, you
25 know, well, if it's okay with you, you know, it's okay, and

Andre Jackson - Direct examination
by Mrs. Price

- 1 I told him well, he could stop over, you know, just for the
2 night to rest.
- 3 Q At some point did you, Mr. Davy came to your home?
- 4 A Yes, ma'am.
- 5 Q And at some point y'all left in a car?
- 6 A Yeah, Mr. Davy, when he was leaving -- when he came
7 that night I told him I was going to Greenville cause I had
8 a gig in Greenville where I was suppose to go down there and
9 promote it.
- 10 Q Okay.
- 11 A That's before---
- 12 Q Now, when you say a gig, what type of---
- 13 A A reggae gig cause I'm a musician.
- 14 Q A reggae gig?
- 15 A Yes, ma'am.
- 16 Q Because you're a reggae musician on the side?
- 17 A Yes, ma'am.
- 18 Q Cause you're originally from Jamaica?
- 19 A Yes, ma'am.
- 20 Q You were born there?
- 21 A Well, my parents---
- 22 Q Okay.
- 23 A My parents is and I grew up in Jamaica.
- 24 Q So, you were needed to go to Greenville?
- 25 A Yes, ma'am.

Andre Jackson - Direct examination
by Mrs. Price

- 1 Q And you just testified that you were going to
2 Greenville to look at a job?
- 3 A Yes, ma'am.
- 4 Q Or what you call a gig?
- 5 A A gig, yes.
- 6 Q Okay. At that point you and Mr. Davy ended up in the
7 Impala?
- 8 A Yes, ma'am.
- 9 Q Where were you sitting in the Impala?
- 10 A On the passenger side.
- 11 Q Okay. Do you drive, Mr. Jackson?
- 12 A Not right now. My---
- 13 Q Why not?
- 14 A My license been suspended for a period of time.
- 15 Q Why has your license been suspended?
- 16 A Cause I owe speeding ticket and I get driving under
17 suspension---
- 18 Q Okay.
- 19 A ---and they suspend my license.
- 20 Q When Mr. Davy arrived at your house, what kind of car
21 were you driving?
- 22 A He was driving a beige black Impala.
- 23 Q Is that the Impala that y'all were ultimately stopped
24 in?
- 25 A Yes, ma'am.

Andre Jackson - Direct examination
by Mrs. Price

1 Q So, at some point did y'all leave Charlotte, your home?

2 A Yes, ma'am.

3 Q And y'all were driving down -- where were you -- where
4 were you headed?

5 Excuse me.

6 A Well, we was heading to Greenville. That's my stop in
7 Greenville. And while we driving on 85, I noticed, you
8 know, a lot of -- he was slowing down, you know, for some
9 reason. I didn't know why he was slowing down.

10 So, when I looked at him, you know, he say it's an,
11 it's an officer, a police car behind me. For that matter I
12 didn't, you know, care cause, you know, why he -- you know,
13 I know he got his driver's license as far as, you know, to
14 my knowledge. So, I wonder why he was slowing down, and by
15 that time we got pulled over by the police officer.

16 Q And who was that police officer?

17 A The officer sitting in the middle.

18 Q Okay.

19 A Right there.

20 Q Officer Montjoy?

21 A Yes, ma'am.

22 Q And what happened when y'all got pulled over?

23 A Well, the officer came to my side of the window, and he
24 stuck his head in like, you know, and he asked for, he asked
25 him for his driver's license and the registration and the

Andre Jackson - Direct examination
by Mrs. Price

1 proper, the regular, you know, driving license, registration
2 I think.

3 Q Okay. Did you give him any information on yourself?

4 A Not at that point.

5 Q Okay. At some point the dog came up to the car, is
6 that right?

7 A Yes, after he took Mr. Davy out the car and I was still
8 sitting in the car, the officer came to the car with the
9 dog, holding the dog on a leash. Then he asked me for my
10 ID. You know, he asked me my name and I told him my name
11 and he asked me for my identification and I reached in and I
12 pulled it up. Then he said, he said step out the car.

13 Q And what did you do at that point?

14 A I stepped out the car.

15 Q Okay. Did Officer Montjoy ever tell you why you were
16 stepping out of the car?

17 A No, ma'am.

18 Q Okay. At some point, and we saw on the video
19 yesterday, you ended up being arrested?

20 A Yes, ma'am.

21 Q Okay. And you also saw on the tape and you heard the
22 testimony here today what was reported and what was
23 ultimately tested and determined to be marijuana?

24 A Yes, ma'am.

25 Q Okay. Mr. Jackson, did you know anything about any

Andre Jackson - Direct examination
by Mrs. Price

1 marijuana being in that vehicle?

2 A No, ma'am, not to my knowledge.

3 Q Did you ever see any marijuana in that vehicle?

4 A No, ma'am.

5 Q Who -- and did you rent that vehicle?

6 A No, ma'am.

7 Q Was that vehicle -- did that vehicle belong to your
8 wife?

9 A No, ma'am.

10 Q Who came to your house with that vehicle?

11 A Mr. Davy. He came -- he had that vehicle.

12 Q Thank you, Mr. Jackson. That's all I have.

13 THE COURT: Mr. Poole, your witness.

14 MR. POOLE: May it please the Court?

15 THE COURT: Yes, sir.

16 CROSS-EXAMINATION

17 BY MR. POOLE:

18 Q Mr. Jackson, just a couple of questions.

19 Did Officer Montjoy ever ask you for paperwork related
20 to the car?

21 A No, not that I can remember asking me for paperwork.

22 Q Okay. So, you only had one discussion with him, a
23 discussion with him while he had a dog, the dog on the leash
24 and he was on your side of the car, is that right?

25 A Yes, sir.

Andre Jackson - Cross-examination
by Mr. Poole

1 Q And that discussion related to who you were and asking
2 for some ID, is that true?

3 A Matter of fact I think he asked me where I was going
4 also and I told him to Greenville.

5 Q Okay.

6 A I think he did from my recollection.

7 Q And that, in fact, was your destination?

8 A Yes, sir.

9 Q But, again, did he ask you about anything about the,
10 the nature of the car?

11 A No, sir.

12 Q For the paperwork showing that it was rented or
13 otherwise?

14 A No, sir.

15 Q He did not?

16 A No, I do not remember that.

17 Q Okay. Thank you very much.

18 THE COURT: Mr. McCarty.

19 SOLICITOR MCCARTY: Thank you, Your Honor.

20 THE COURT: Yes, sir.

21 CROSS-EXAMINATION

22 BY SOLICITOR MCCARTY:

23 Q Mr. Jackson, where were you going in Greenville?

24 A Well, I was going to -- I did a, a few gigs at the
25 Elk's. It's called the Elk's. It's downtown Greenville.

Andre Jackson - Cross-examination
by Solicitor McCarty

- 1 Q Okay. And is that a reggae club?
- 2 A Well, it's not just a reggae club. It's a large way.
- 3 You rent it out and you can, you know, promote your act,
- 4 whatever you do.
- 5 Q You testified you're into reggae music.
- 6 Is that your promotion?
- 7 A Yes, sir.
- 8 Q So, you promote it, you listen to it, reggae music?
- 9 A Yeah. Yes, sir.
- 10 Q What about the life-style?
- 11 You said you're from Jamaica.
- 12 Kind of that reggae life-style, that Bob Marley kind of
- 13 life-style?
- 14 A Yeah. Well---
- 15 Q Rastafarian?
- 16 A Reggae music is, is cultured music.
- 17 Q So, it's a cultural kind of music?
- 18 A Yeah, it's cultured music. I mean---
- 19 Q And Bob Marley is probably the person that we would all
- 20 associate most with that music?
- 21 A Cause a lot -- yeah, a lot of people know Bob Marley
- 22 cause in the United States he's more famous for the reggae
- 23 music.
- 24 Q And with Bob Marley, that's sometimes often associated
- 25 images and certain things with reggae music such as

Andre Jackson - Cross-examination
by Solicitor McCarty

1 marijuana, am I correct?

2 A Well, I would say that. But not everybody that's
3 reggae music smoke marijuana.

4 Q Certainly, but---

5 A I'm saying that, you know---

6 Q I would agree with you one hundred percent.

7 A Okay.

8 Q But wouldn't you agree with me, as somebody who's
9 familiar with that music and that reggae life-style and
10 that, that, that's part of that culture. It may not be for
11 everybody, but it's part of that culture as you've described
12 it and I'll use your word.

13 What---

14 A No, I would not say it's a part of the culture.

15 Q So, you don't agree with me that there's images of Bob
16 Marley appearing to smoke marijuana, images often associated
17 with reggae and reggae life-style that involves marijuana?

18 A I say Bob Marley, but not the, the image of the music
19 itself.

20 Q Okay. That's fair enough. Let me ask you -- excuse
21 me.

22 When Mrs. Price was asking you some questions she said
23 Nicholas Davy, how do you know him, and your -- I believe
24 your testimony was you said you think Mr. Davy and your son
25 are school friends, is that correct?

Andre Jackson - Cross-examination
by Solicitor McCarty

1 A No, I said Mr. Davy is a friend of my son from school
2 days.

3 Q Okay. From school days. I maybe misunderstood you.

4 So, how long had you known Mr. Davy prior to getting in
5 the car with him on that day?

6 A Okay. Let me see. My grandson birthday was in about I
7 think in June. So, this happened in September and I met
8 Mr. Davy at my grandson's birthday party. That's my son --
9 that's his, in Maryland, that his son birthday party.

10 Q Uh-huh. (Affirmative).

11 A So, I say probably about four or five months somewhere.

12 Q So, you barely knew him really?

13 A Yeah.

14 Q Didn't -- he didn't grow up with your son or anything
15 like that.

16 He drove the car that night to your house, is that
17 correct?

18 A Yes, from Maryland, he came down.

19 Q And he spent the night at your house?

20 A Yeah, he stayed over.

21 Q Okay. What about putting -- did you put anything into
22 the car that day as you were driving to Greenville, your
23 promotional materials, your luggage?

24 A No, I didn't have a luggage.

25 Q Okay. What about promotional materials, did you have

Andre Jackson - Cross-examination
by Solicitor McCarty

1 CD's, posters, t-shirts, whatever it was you were doing to
2 promote or bring to that event?

3 A No, the -- what I -- I didn't have no promotional
4 materials. I was going to Greenville to check to see if I
5 can book a date at the lodge---

6 Q Okay.

7 A ---and speak to the people there.

8 Q So, it wasn't exactly?

9 A I didn't, I didn't already have my promotion stuff, no
10 flyers or nothing made up for that show.

11 Q So, it wasn't a gig like Mrs. Price described?

12 It was in hopes, in anticipation of getting a gig?

13 A Well, I know I was gonna get it because I did it there
14 before a couple of times.

15 Q Okay.

16 A And I, you know, I'm familiar with the owner and the
17 people there.

18 Q And you knew Mr. Davy prior to getting into the car
19 with him?

20 His intended destination was not Greenville, am I
21 correct?

22 A No, sir, it's---

23 Q He was going on to Georgia or Florida?

24 A Yes, sir, as far as---

25 Q Am I correct?

Andre Jackson - Cross-examination
by Solicitor McCarty

1 A As far as he told me.

2 Q Then how were you gonna get from Greenville back to
3 Charlotte that night if Mr. Davy was going on to Georgia or
4 Florida?

5 A Well, I was, at the beginning, I was gonna take the bus
6 to Greenville and back, but like I usually do or sometime my
7 wife take me, you know, places when I---

8 Q But on this day Mr. Davy was driving you down there, is
9 that right?

10 A Because he was going in that direction he say he could
11 use -- I told him I was going. He say he could use the
12 company. So, I told him okay, you drop me then and I'll
13 take the bus back home. That's how I usually do it.

14 Q Okay. So, you knew that you weren't gonna be able to
15 get a ride back with Mr. Davy?

16 A No, sir.

17 Q And you didn't have any knowledge -- well, how long
18 were you in the car?

19 where, where do you live at in Charlotte in relation to
20 Greenville?

21 A I live in Concord outside of Charlotte.

22 Q How long -- were you there this morning before we came
23 to court today?

24 A Yes, sir.

25 Q How long did it take you to get from there down to here

Andre Jackson - Cross-examination
by Solicitor McCarty

1 today?

2 A It will take me say about an hour and, and, hour and a
3 half, an hour. It depends on how you're driving I guess and
4 the traffic.

5 Q Okay. So, it's a little more than an hour?

6 A Yes.

7 Q In a little more than an hour you're sitting in the
8 passenger seat of the car?

9 A Yes, sir.

10 Q And Mr. Davy's sitting right here in the driver's seat?

11 A Yes, sir.

12 Q And between you is a pound of marijuana give or take a
13 little bit?

14 There's approximately a pound of marijuana and in that,
15 that hours car trip, you didn't smell a pound of marijuana
16 sitting between the two of you?

17 A No, sir, I sure didn't smell the marijuana.

18 Q You testified you didn't know there was marijuana in
19 the vehicle?

20 A I did not know there was marijuana.

21 Q You didn't place the marijuana in the vehicle?

22 A No, sir.

23 Q So, it's your testimony that Mr. Davy didn't put the
24 marijuana in the vehicle?

25 A well, I can not say. Like I said, he came to my house.

Andre Jackson - Cross-examination
by Solicitor McCarty

1 I didn't see him put it in there, and I did not have a
2 knowledge of it in there. So, I---

3 Q You're saying -- well, you're saying that you didn't
4 know it was there, right?

5 A I did not know it was there. That's, you know---

6 Q Didn't know a pound of marijuana was sitting right next
7 to you---

8 A No, sir.

9 Q In the middle of the car for more than an hour---

10 A No, sir.

11 Q ---with a guy who you'd only know for three months who
12 was driving from Maryland on his way to Georgia or Florida,
13 you're not certain of the destination yourself?

14 A No.

15 Q You weren't aware of that was in the vehicle?

16 A No, sir.

17 Q And you're driving to Greenville to promote a reggae
18 concert, is that correct?

19 A Yes, sir.

20 Q Thank you, Mr. Jackson. I don't have any further
21 questions.

22 THE COURT: Redirect.

23 REDIRECT EXAMINATION

24 BY MRS. PRICE:

25 Q Mr. Jackson, just so that I'm clear, what -- when you

Andre Jackson - Redirect examination
by Mrs. Price

1 were riding in the Impala, what kind of seats did it have if
2 you remember?

3 A It's a bucket seat.

4 Q Bucket seats?

5 A Right. Two separate here and it's a---

6 Q Okay.

7 A ---it's a, where the gears and stuff in the, in the
8 center of it.

9 Q Okay. So, when Mr. McCarty says that there's a pound
10 of marijuana between you, there's, there's actually a
11 console between you?

12 A Yes, ma'am.

13 Q And there's an actual gearshift between you?

14 A Yes, ma'am.

15 Q And you didn't see any marijuana?

16 A No, ma'am.

17 Q Okay. Thank you.

18 THE COURT: Mr. Poole.

19 MR. POOLE: No questions.

20 SOLICITOR McCARTY: Nothing.

21 THE COURT: You may step down, sir.

22 WITNESS: Thank you.

23 THE COURT: The defense may call its next witness.

24 MRS. PRICE: Your Honor, at this point the defense
25 rests.

1 THE COURT: The State wish to call any witnesses in
2 reply or rebuttable?

3 SOLICITOR HUNTER: No, Your Honor.

4 THE COURT: All right. Ladies and gentlemen of the
5 jury, that completes the presentation of the evidence.
6 There, again, are some matters that I need to take up with
7 the lawyers before I go into the closing arguments, and it
8 will be very brief. But I'm gonna ask you to step back to
9 the jury room briefly and, again, don't begin any discussion
10 until I've advised you to do so.

11 (Whereupon, the following takes place outside the
12 presence of the jury.)

13 THE COURT: All right. The defense has presented
14 evidence.

15 Does the State wish to open on the law and close or do
16 you waive opening?

17 SOLICITOR HUNTER: We waive to open on the law.

18 THE COURT: All right. I'll give you -- yes, sir, Mr.
19 Poole.

20 MR. POOLE: May it please the Court, Your Honor.

21 THE COURT: Yes, sir.

22 MR. POOLE: If I had a client he would be seated near
23 me, but, in addition, does the, does the Court have a
24 standard charge about the, the absence of a defendant?

25 THE COURT: Yeah, I do.

1 MR. POOLE: Okay. All right. And---

2 THE COURT: I will charge that, that his failure to
3 testify and appear can not be held against him.

4 MR. POOLE: Thank you, sir. And as far as order of
5 argument is concerned, since there has been no presentation
6 on the---

7 THE COURT: Well, that's an interesting point.
8 Do you wish to go last?

9 MR. POOLE: I think so, yes, sir.

10 THE COURT: So, we'll have a sandwiched argument it
11 sounds like.

12 MRS. PRICE: So, Your Honor, it sounds like I'll go
13 first followed by Mr. Hunter---

14 THE COURT: The State.

15 MRS. PRICE: ---or Mr. McCarty and then Mr. Poole.

16 THE COURT: And then Mr. Poole.

17 MRS. PRICE: Okay.

18 THE COURT: All right. I'll give you five minutes or
19 so to think about your closing before we call the jury back
20 in.

21 MRS. PRICE: I think, I believe we need to make another
22 motion, don't we, Roger?

23 MR. POOLE: Oh, yes, sir, just to renew, renew our
24 motions.

25 THE COURT: Renew the motions that you made previously?

1 MRS. PRICE: Yes, Your Honor.

2 MR. POOLE: Yes, Your Honor.

3 THE COURT: All right. That's noted and the ruling
4 would remain the same.

5 MRS. PRICE: Thank you, sir.

6 (Whereupon, a short recess was taken at this time.)

7 THE COURT: State ready to proceed?

8 SOLICITOR McCARTY: Yes, Your Honor.

9 THE COURT: Defense ready to proceed?

10 MRS. PRICE: Yes, Your Honor.

11 MR. POOLE: Yes, sir.

12 THE COURT: Bring the jury in.

13 (Whereupon, the following takes place within the
14 presence of the jury.)

15 THE COURT: The record will reflect that all the jurors
16 have returned to the courtroom.

17 We've completed the presentation of evidence. And at
18 this time the attorneys will have an opportunity to give
19 their closing statements or argument.

20 Mrs. Price, I believe you're going to be going first.
21 You may proceed.

22 MRS. PRICE: Thank you, Your Honor.

23 Ladies and gentlemen, when Mr. Poole talked to you
24 yesterday he assured you that this would probably be a short
25 case and he was right. It's just now a little bit after

1 10:00 on the second day. You've just been here for a few
2 hours, and we thank you for your service. We know it's not
3 easy to sit on a jury. But we do thank you for listening.
4 I know I do and I know Mr. Poole does, and I'm sure that Mr.
5 McCarty and Mr. Hunter do as well.

6 But ladies and gentlemen, when you're driving home
7 today, first of all, I don't encourage people to speed. But
8 I can tell you I've been doing criminal defense since I was
9 in law school, which has been about ten years. And so,
10 when -- as I go, work through cases, I've seen a lot of
11 traffic tickets. I've seen a lot of police reports. I've
12 seen a lot of things. But I can tell you this is the first
13 case I've ever had where anybody was pulled over for driving
14 too slowly, and driving too slowly being within the posted
15 speed limit of 45 to 60.

16 Now, you heard the testimony that Officer Montjoy said
17 that he pulled Mr. Davy over for impeding traffic, for going
18 to slow, something, something of that nature. And you also
19 heard his testimony, when I talked to him yesterday, that
20 there were about five to ten cars behind him. There's a lot
21 of difference between five and ten, but anyway.

22 And as they're driving down the interstate, you heard
23 they were in the middle lane of three on I-85. I think most
24 of us have probably been down that stretch of highway, and
25 there was testimony that there were cars passing him on both

1 sides. But you also heard testimony that the speed, the
2 speed limit is 60 and that he was going 55 and they're cars
3 passing him. And you've also heard Officer Montjoy say that
4 a lot of cars that go through there go about 70 to 75 miles
5 an hour, which is ten to fifteen miles an hour above the
6 posted speed limit.

7 well, I would submit to you too that when you're
8 driving down the road, and they're cars behind you, and
9 you're being passed on both sides, but you're still doing
10 the speed limit, could it possibly maybe be that those cars
11 are speeding?

12 Could it maybe be that they're going a lot faster than
13 55?

14 Could it be possible that they're going 70?

15 Yet, they're speeding and yet, possibly, and yet it's
16 Mr. Davy, with Mr. Jackson as a passenger, that gets pulled
17 over.

18 You also heard Officer Montjoy testify yesterday and
19 you also heard, excuse me, you also saw and heard the video
20 that was played and you'll -- that will actually go back to
21 the jury room with you, and can, can actually view it again
22 if you like. The judge will tell you all about that in a
23 few minutes.

24 But you also saw that when Mr. Davy is pulled, is
25 pulling over and crossing, you see cars going by. And from

1 officer Montjoy's testimony, he said that there was a, cars
2 behind him. You can actually look at that testimony and see
3 if you think that's true or not. It's up to you. You're
4 the finders of facts in this.

5 And you also heard Officer Montjoy say that he, he got
6 the dog out. But there is a discrepancy between that and
7 his written report that we also talked about yesterday that
8 when he went to Mr. Jackson's window for the second time, he
9 didn't have the dog with him, but we saw clearly that he
10 did.

11 And he, at that point, Mr. -- he gets out of his car.
12 He says the dog alerts on the car and they find marijuana in
13 the console hidden, those are the words of the prosecutor,
14 hidden in the, underneath the gearshift console area. You
15 also heard Mr. Jackson get up here and say that is not my
16 car. I don't have a driver's license. We all know from
17 personal experience that you can't even rent a car without a
18 driver's license. That's been my experience.

19 So, this car is not Mr. Jackson's. He got picked up in
20 it. He got picked up in it and for a ride to see about a
21 gig, what he called a gig at the Elk's Club over in
22 Greenville. You heard him say he's like a reggae kind of DJ
23 type person. For a legitimate reason he gets in this car
24 with his son's friend.

25 Now, I don't have any children. I'm sure some of you

1 do. But I would think to, to trust my kids friends. They
2 seem nice. He comes in a car. Hey, you want a ride.
3 Absolutely. Save me a little bit of money on bus fair. And
4 so, they go down 85 and get caught, and, for, get stopped
5 going the speed limit or within the speed limit.

6 And so, they pull Mr. Jackson out of the car. Mr.
7 Jackson tells him this is not his car, and we don't know who
8 exactly is on the contract because nobody bothered to look.
9 we don't know about any fingerprints that are on this bag
10 because nobody bothered to look because this is a
11 constructive possession case, and it's our policy if we have
12 constructive possession that we don't fingerprint anything
13 cause we got our people.

14 Not Mr. Jackson's car. Not Mr. Jackson's marijuana.
15 And what I find is kind of the strangest about all of this
16 other than getting stopped for going 55 in a 60 for impeding
17 traffic is when Officer Montjoy testified that he got
18 Mr. Davy out of the car and that Mr. Davy's the driver and
19 he starts writing him a warning ticket for the driving, but
20 yet he testified that he smelled a strong odor of marijuana
21 on approach to the car, and when he got there he saw him.
22 He said Mr. Jackson's window and he says he smelled
23 marijuana, but yet he's sitting there writing him a warning
24 for obstructing traffic.

25 There's a lot of things wrong with this case, ladies

1 and gentlemen. But it's time to do something right, and
2 what would be right is to find Mr. Jackson not guilty.

3 Thank you.

4 THE COURT: Mr. Hunter.

5 SOLICITOR HUNTER: Thank you, Your Honor.

6 May it please the Court?

7 THE COURT: You may proceed.

8 SOLICITOR HUNTER: I'm confident, when this is all
9 over, after Mr. Poole has spoken, that you're going to come
10 back here with a verdict of guilty for Nicholas Davy and for
11 Andre Jackson.

12 Now, Mrs. Price just stood up here and said she didn't
13 like it. She doesn't like it. Well, that's fine. She's
14 not on the jury. We have what we have and the law says you
15 can not impede traffic.

16 You heard the testimony from Officer Montjoy. He saw a
17 car in the middle lane doing 55 in a posted 60 mile an hour
18 zone. Cars are passing him on the left side. Cars are
19 passing him on the right side doing 70, 75 miles an hour.
20 Cars are lined up behind him five to ten cars.

21 Who's the one car that sticks out in the lane of
22 traffic?

23 The car going slower than everybody. The car that
24 could cause an accident.

25 This was at the end of rush hour. You know, closer to

1 6:00 p.m. So, these cars are all passing him.

2 So, this isn't about the stop. This is a possession
3 with intent to distribute marijuana case, and you've heard
4 officer Montjoy say that when he stopped the car he smelled
5 marijuana. He then got his dog out to take it around the
6 car. The dog goes up and hits on the smell of marijuana.

7 He searches the car and what does he find?

8 Almost a pound of marijuana. I want you to look at
9 that for a second. Finds four separate bags. You also
10 heard testimony from Officer Miller, and Officer Miller is
11 basically here to say that no one tampered with these drugs
12 after Officer Montjoy found them and since he brought them
13 here today. And we heard from Officer Pitts, an analyst who
14 analyzed that this is, in fact, marijuana.

15 Now, we also heard from Andre Jackson, the guy who came
16 up here and said I had known Mr. Davy for I believe he said
17 four months. Met him in June at his grandson's birthday
18 party and then saw him again that September when he wanted a
19 ride.

20 So, here's a guy he's known for four months. We don't
21 know if he ever met him two times. He's met him that one
22 time at his grandson's birthday party. He let's him stay at
23 his house on the way to Georgia and Florida, and then he
24 gives him a ride or takes a ride to Greenville to go back to
25 a gig at the Elk's Lodge. He doesn't take CD's. He doesn't

1 take any promotional material with him, and he's a reggae
2 musician in the culture.

3 I asked you earlier when I came up here at the first to
4 use your common sense. Here's a guy in a rental car only
5 knows, met the guy once, a friend of his son, on the way to
6 Greenville with no ride back, with a pound of marijuana
7 sitting right between him. A pound of marijuana that
8 Officer Montjoy said he can smell when he came up to the
9 car. And you heard Andre Jackson, I didn't smell the
10 marijuana. Use your common sense.

11 Now, there's three things I told you when I first came
12 up here yesterday afternoon, and it was to prove possession
13 with intent to distribute there's three elements. Three
14 main elements. You knowingly possess, a controlled
15 substance, with intent to distribute. I'll take the easiest
16 of those right now. A controlled substance. You have it
17 right here in front of you.

18 Now, the knowingly possess, you're gonna hear the judge
19 give a charge here after we're finished and he's gonna tell
20 you the law. So, I'm not gonna tell you the law cause he
21 does a much better job than I do of it. But this case, as
22 you heard with Officer Miller and Mrs. Price say, is
23 constructive possession.

24 We don't have to prove that he had it in his hands or
25 that he had it in his hands when the police pulled him over.

1 The marijuana was sitting in-between both Mr. Jackson and
2 Mr. Davy.

3 It's kind of like my keys here. Five minutes later
4 those keys are sitting there. Those aren't in my
5 possession.

6 But do I still have dominion and control over them?

7 Yes, because I can reach them right here.

8 That's what this case is.

9 And with intent to distribute, State Law has allowed us
10 to tell the jury you can infer that once marijuana is over
11 28 grams, which is one ounce, this is close to a pound,
12 close to sixteen ounces, you can infer the intent to
13 distribute.

14 Again, repeat what I said when I first came up here.
15 I'm confident that when you come back in here you'll bring
16 back a verdict of guilty on both Mr. Nicholas Davy and Andre
17 Jackson.

18 Thank you.

19 THE COURT: Mr. Poole.

20 MR. POOLE: May it please the Court?

21 THE COURT: Yes, sir.

22 MR. POOLE: Good morning. Hope everyone is well today.

23 Thank you for your attention. Along with Mrs. Price,
24 I, I want to say that. And I, of course, yes, it is a short
25 trial. But an important one.

1 Allow me for a moment to possess marijuana and I'm
2 gonna put it right back over here. Now, while I possess
3 this marijuana right now, I'm not intending to distribute
4 it. I'm just moving it from one place to another.

5 Judge Couch will tell you what it means to knowingly
6 possess with intent to distribute marijuana. He will tell
7 you about what possession is, and I want to go a little bit
8 further if I may and follow-up on what Mr. Hunter said on
9 this possession here.

10 There, there's what you call actual possession and
11 there's constructive possession. Now, I actually possessed
12 that marijuana for a moment. I had no criminal intent and
13 you have to have, knowingly possess it with a criminal
14 intention.

15 Okay. And there's what you call actual possession,
16 which I actually possessed that marijuana, and then there's
17 constructive possession. And then you -- that's followed up
18 with the language about the ability to exercise control and
19 dominion. Those are probably words that are hundreds of
20 years old in the English language whenever you talk about
21 any type of possession case.

22 In the context of actual possession, having the keys in
23 the pocket. Constructive possession, I do have dominion and
24 control over these keys that are hidden from me.
25 Constructive possession, I have the right to exercise

1 dominion and control. Just like that pad right over there
2 that I just put up on the railing. I have the right cause
3 that's mine. The green book that sits to the left of Mrs.
4 Price is mine. I have the right to exercise dominion and
5 control. But I have to know that it is there before I can
6 be convicted if it were an illegal substance.

7 Now, the State has the burden and this is where your
8 role is so important and it's where you have to have the
9 discipline to exercise your reason in applying the law to
10 the facts. This is where it's going to require a great deal
11 of focus and an understanding and a deep consideration of
12 the facts that's been presented to you.

13 Did Nicholas Davy knowingly possess with intent to
14 distribute marijuana, and did the State prove the elements
15 of the crime and all the other things necessary to convince
16 you of his guilt beyond a reasonable doubt?

17 Let me deviate for a moment and submit to you that
18 anytime we are in a new experience or when we come to become
19 a juror for the first time or for the second time or
20 whenever that or any type of learning experience we should,
21 we should always take away something that we've learned.
22 And I submit to you, respectfully I submit to you that if
23 you happen to be on I-85 between Mile Marker 63 and 64 you
24 better exceed the speed limit or you might get pulled.
25 Especially if it's around six o'clock.

1 Mr. Davy, who was driving this car, was pulled for
2 going below the posted speed limit.

3 Now, how does that sound?

4 He was pulled, he was pulled over and then on the video
5 you saw yesterday that he got out of the car. He, he
6 immediately complied with the officer. He went over to the
7 other side of the car away from traffic for safety sake and
8 you heard, you heard Pico start barking because his
9 territory was becoming compromised. That's -- if you got
10 dogs, you know they're gonna be that way. And then he
11 answered all the questions that Officer Montjoy asked him.
12 He was cooperative and he said he was going to Greenville,
13 and Mr. Jackson today said he was going to Greenville in the
14 hopes of getting a gig or obtaining a gig. And, therefore,
15 it was not necessary for him to take promotional materials
16 because I believe he testified that he had done this before
17 and it was necessary for him just to merely talk apparently
18 aware that the person with whom he was going to speak was,
19 knew of him and his product and of his entertainment
20 ability.

21 So, what, what we have is a lot of inconsistencies that
22 have been written in the report that the officer wrote up
23 immediately after this incident and those inconsistencies
24 have been pointed out and picked over by Mrs. Price as she
25 was closing in her closing argument and I won't go over all

1 those again.

2 But wouldn't it be nice if, although that standard
3 operating procedure dictates to the Duncan Police Department
4 that it is not necessary to take fingerprints in a
5 constructive possession case, wouldn't it be nice if there
6 was some fingerprints showing that Mr. Davy's fingerprints
7 were indeed on them or whomever?

8 wouldn't it be nice if there was some Enterprise rental
9 documents?

10 Use your common sense where you start deliberating.
11 Whenever you -- if you ever rent a car, and I've only done
12 it a couple of times, but they, they ask for a whole lot of
13 information.

14 wouldn't it be nice to have that type of information to
15 be presented into evidence to show to whom this car was
16 rented, where the destination was, for what purpose the
17 travel log, et cetera, et cetera, et cetera?

18 The testimony from the officers wants you to believe
19 that there was some hesitancy and some nervousness on the
20 part of trying to give the answers as to where they were
21 headed. Greenville was the answer. To see someone. Either
22 family or friends or someone.

23 Mr. Jackson cleared that up. They were on their way to
24 Greenville. Ultimately where they were going we do not
25 know. But Mr. -- but Officer Montjoy states that he came up

1 to the car to ask Mr. Jackson for the papers regarding the
2 car. That's in the statement. Mr. Jackson said no, nothing
3 was asked about the car.

4 You remember also in the video, nothing was asked about
5 paperwork on this car. Okay. Just merely who he was, the
6 ID. He already had the dog there, and the dog was right
7 near the window where he said he, he smelled the marijuana.
8 And you saw the video also on the dog. The dog was obscured
9 from your view because there was another officer -- I
10 couldn't see it. I couldn't see the dog do his work. I
11 heard the officer testify as to how the dog worked, but the
12 dog I could not see do, do much of anything except go around
13 the car it looked like to me from the beginning of where he
14 began to where he ended up, and then we have the testimony
15 of Officer Montjoy said yeah, yep, he did his signal and
16 that's it. But the dog began where the officer ostensibly
17 said he smelled the marijuana.

18 Now, what, what all this means is that you got the
19 evidence before you and you've got to decide whether two
20 people are, are guilty beyond a reasonable doubt on this
21 charge, and you got to take it all into consideration. You
22 got to take this, the credibility of all the witnesses that
23 you've heard from and you've got -- and one thing that I'll
24 go back to and I won't mention it anymore.

25 This bit about impeding traffic because you're going

1 55 miles per hour in a 60-mile zone, what's a driver suppose
2 to do?

3 You know, what are you suppose to do?

4 Are you suppose to go faster than the posted speed
5 limit?

6 Are you suppose to just keep up with the flow of
7 traffic?

8 What if the traffic was going 95 miles an hour and then
9 you're going 70?

10 I mean what's the signs for?

11 What do they mean?

12 And if you recall, and what I saw on that video, that
13 traffic was not that bad. The stop was made, according to
14 the testimony of Officer Montjoy, almost immediately after
15 he did the radar. So, that traffic wasn't that bad.

16 If any of you travel 85 in this, in that area between
17 Spartanburg and Greenville at that time, sometimes it is
18 bad. It's an autobahn. A dangerous one. But not on that
19 day.

20 So, take all this into consideration, and, and know
21 this. On this rented car that we don't have much
22 information about, this marijuana was under a console. It
23 was concealed and this -- has the State proved that the
24 people that were in it knew that the marijuana was in there?

25 No.

1 That's the answer.

2 Thank you for your time. I think that after you
3 consider all of this case in its totality that you will
4 render a verdict, a true verdict of not guilty against
5 Nicholas Davy.

6 Thank you.

7 THE COURT: Ladies and gentlemen of the jury, that
8 completes the attorneys' closing or final arguments and I
9 told you that once that we reached this stage of the trial
10 we would begin or I would give you the law in this matter.

11 We began the case yesterday, you may recall, with my
12 going over with you the two indictments in this case. I'm
13 going to do that again so that you understand what the
14 charges are that are before the Court.

15 In the case of Mr. Nicholas Carl Davy, that's Case
16 Number 09-GS-42-761. The indictment is possession with the
17 intent to distribute, and in the body the indictment states
18 that Nicholas Carl Davy did, in Spartanburg County, on or
19 about September 16 of 2008, manufacture, distribute,
20 dispense, deliver, purchase or otherwise aid, abet, attempt,
21 or conspire to manufacture, distribute, dispense, deliver,
22 or purchase, or possess with the intent to manufacture,
23 distribute, dispense, deliver, or purchase a quantity of
24 marijuana, a Scheduled I controlled substance or controlled
25 substance analogue, in violation of Section 44-53-370 of the

1 Code of Laws of South Carolina, 1976 as amended, against the
2 peace and dignity of the state and contrary to the statute
3 in such case made and provided. That's the indictment
4 charging Mr. Davy.

5 The second indictment that's before the Court is
6 against Mr. Jackson, Andre Jackson, and that is Case Number
7 09-GS-42-268. The indictment reads somewhat or mostly like
8 the one I just read to you, but I'll go over it with you
9 because these, these defendants are both charged with
10 separate offenses. This indictment states that Andre
11 Jackson did, in Spartanburg County, on or about
12 September 16th of 2008, manufacture, distribute, dispense,
13 deliver, purchase, or otherwise aid, abet, abet, attempt, or
14 conspire to manufacture, distribute, dispense, deliver, or
15 purchase, or possess with the intent to manufacture,
16 distribute, dispense, deliver, or purchase a quantity of
17 marijuana, a scheduled I controlled substance or controlled
18 substance analogue, in violation of Section 44-53-370 of the
19 Code of Laws of South Carolina, 1976 as amended, against the
20 peace and dignity of the state and contrary to such statute,
21 in such statute made and provided.

22 Now, those are the two indictments that are before this
23 Court, and I'll remind you of the fact that a defendant has
24 been arrested, charged, and even indicted in a case is not
25 evidence in the case, and can not be considered by you as

1 evidence of guilt in the case. And it does not create a
2 presumption of innocence or inference of guilt. Those are
3 just the documents that bring the case before the Court. It
4 informs this Court of the charges to be tried and it informs
5 the defendants of the charges lodged against them.

6 Now, in this case I've indicated already to you there
7 are two separate defenses, defendants in this case each of
8 whom is charged with the same or similar offense. The case
9 of each defendant and the evidence and the law concerning
10 that defendant should be considered separately and
11 individually by you in reaching your verdict. Your verdict
12 does not have to be the same for both defendants.

13 The fact that you may find one defendant guilty or not
14 guilty should not control your verdict as to the other
15 defendant. Where more than one person is charged with the
16 commission of a crime, if the evidence, if the evidence
17 warrants it, you may convict one and acquit the other or you
18 may acquit both or you may convict both. It will depend
19 upon your view of the testimony and the evidence that you've
20 seen in the case. You must take each defendant and consider
21 the evidence as to that defendant and my instructions on the
22 law to you should be considered individually as to each
23 defendant, and you will be called upon to write a separate
24 verdict for each individual defendant of either guilty or
25 not guilty.

1 Now, both of the defendants in this case have pled not
2 guilty to the indictments that are before the Court. That
3 puts the burden of proof upon the State to prove the
4 defendants' guilty. I'll tell you now that a person charged
5 with the commission of a criminal offense in this state is
6 never required to prove himself innocent.

7 I charge you it's an important rule of law that a
8 defendant, in a criminal trial, no matter what the
9 seriousness of the crime might be, will always be presumed
10 to be innocent of the crime for which the indictment has
11 been issued unless guilt has been proven to you, the jury,
12 by evidence that satisfies you of the guilt of the defendant
13 beyond a reasonable doubt. The presumption of innocence
14 doesn't end when you begin your deliberations. It continues
15 throughout the trial and into your deliberations.

16 People describe the presumption of innocence sometimes
17 like the robe that I wear into the courtroom. It remains
18 about the shoulders of a defendant throughout the trial and
19 into deliberations until such time as that robe has been
20 stripped from the defendant and then and only then by guilt
21 that satisfies you of that defendant's guilt beyond a
22 reasonable doubt.

23 Now, the presumption of innocence is not a mere legal
24 theory and it's not just a legal phrase. It's a substantial
25 right that all defendants are entitled to regardless of the

1 seriousness of the crime until you, the jury, are satisfied
2 from the evidence of the defendant's guilt beyond a
3 reasonable doubt.

4 Now, already in my charge I've discussed with you on
5 three different times or mentioned to you the fact that
6 proof in this case must be beyond a reasonable doubt, and
7 obviously that's an important concept in our criminal juris
8 prudence in this country. You may ask yourself well, just
9 what is meant by the phrase beyond a reasonable doubt or
10 what is reasonable doubt.

11 A reasonable doubt is that kind of doubt which would
12 cause a reasonable person to hesitate to act and the State
13 has the burden of proving the defendants in this case guilty
14 beyond a reasonable doubt.

15 Some of you may have served as jurors in civil cases.
16 Now, civil cases -- or been involved in civil cases. That's
17 where someone's seeking monetary damages from someone else
18 either because of injury or some tort or perhaps because of
19 breach of contract or something of that nature. So, that's,
20 that's a civil case, and in those types of cases the
21 standard of proof is different.

22 In those cases the standard of proof in our country and
23 in our system is by the greater weight or the preponderance
24 of the evidence. Sometimes that's described as the scales
25 of justice tilting ever so slightly in favor of either the

1 plaintiff or the defendant in a civil case. That's not the
2 standard of proof in a criminal case. Again, proof in this
3 case is more powerful than that. It is proof beyond a
4 reasonable doubt.

5 Proof beyond a reasonable doubt is that kind of proof
6 that leaves you firmly convinced of the defendant's guilt.
7 Now, there's very few things that go on in our lives on a
8 day-to-day basis that, if called upon, we could prove beyond
9 any doubt, and the State is not put to that burden. They
10 are not required to prove their case beyond any possible
11 doubt.

12 The standard of proof is proof beyond a reasonable
13 doubt. Excuse me. I will tell you that if, after viewing
14 all the evidence and considering all of the evidence, if you
15 are firmly convinced that the defendant is guilty of the
16 crime charged, again, beyond a reasonable doubt, you must
17 find the defendant guilty. However, on the other hand, if
18 you think there's a real possibility that the defendant is
19 not guilty, you must give the defendant the benefit of that
20 doubt and find the defendant not guilty.

21 I'm going to go back to some of the things I discussed
22 with you at the beginning of the trial about our duties and
23 responsibilities. You and I have separate duties and
24 responsibilities in this case. As the trial judge, it's
25 been my responsibility to preside over the trial and this is

1 not been a trial where there's been a great deal of
2 objections or, or issues that had to be ruled on. But I
3 will tell you that if you see anything that I do in the
4 discharge of my duties that leads you to believe that I may
5 have some opinion one way or the other as to how you
6 determine the facts in this case, I'll tell you now to
7 disregard that notion.

8 The law does then allow me an opinion on that subject,
9 and I don't have an opinion as to how you determine the
10 facts in this case. You're to consider only the competent
11 evidence that's before the Court and only the evidence
12 that's been admitted into the record of this case in
13 reaching your verdict.

14 Now, I have the additional duty of charging you
15 concerning the law in this case. And as the presiding
16 judge, I have told you our Constitution and our laws make me
17 the sole judge of the law in this case. Again, it's your
18 responsibility to take the law now as I give it to you and
19 apply it to the facts as you find them to be. That should
20 place you in a position then to reach a just and a true
21 verdict between the parties that are before this Court.

22 And I, again, told you that you should take the law
23 exactly as I give it to you and not be, not let your
24 judgment be clouded by any notions that you may have had
25 prior to this trial as to what the law is or what it ought

1 to be. In other words, you must accept the law as I give it
2 to you.

3 Now, the same law that makes me the sole judge of the
4 law in this case makes you the sole judge of the facts in
5 this case. You're the sole and exclusive judges of the
6 facts in this case.

7 Now, as to the evidence that you heard, there are two
8 separate types of evidence that you have the right to
9 consider as jurors in reaching your verdict in this case.
10 We classify those two types of evidence as direct evidence
11 and circumstantial evidence. Let me explain to you the
12 difference between those two so that you'll understand what
13 you have a right to consider in reaching your verdict.

14 Direct evidence is testimony by a person who claims to
15 have direct knowledge about the facts that they're
16 testifying on. For example, someone who was an eye witness
17 to the event, someone who directly experienced the matters
18 about which the person testified. They saw something. They
19 heard something. They smelled something. They tasted
20 something. In other words, direct evidence concerning the
21 facts as testimony from a person who claims to have direct
22 knowledge of the facts about which they testify. That's
23 what we mean by direct evidence.

24 The other type of evidence that you can, can consider
25 in reaching a verdict is circumstantial evidence.

1 Circumstantial evidence is different from direct evidence.
2 It's described as proof of collateral facts from which some
3 main fact might be reasonably inferred. I'll give you a
4 very simple example of proof of a fact by circumstantial
5 evidence.

6 Let's say last night, when you went to bed, you looked
7 outside and it might even fit the rain path, the pattern of
8 weather that we had today. You looked outside your home.
9 The, the driveway was dry. The stars were shining. The
10 trees were dry, a beautiful evening. You went to bed, slept
11 well all night, didn't hear or see a thing. You woke up the
12 next morning, looked out the same window that you looked out
13 before you went to bed, the sun was out. But in this case
14 the trees are dripping with water. The lawn is wet. The
15 driveway has puddles. The street in front of the house is
16 soaking wet.

17 Now, you didn't hear it rain. You didn't see it rain.
18 But from the facts that you know to be true, the collateral
19 facts, you could reasonably infer that during the night at
20 some point in time it did rain. So, that's what is meant by
21 proof of collateral facts from which a main fact might be
22 reasonably inferred.

23 And circumstantial evidence is that. It is based on
24 inference and not on direct knowledge or, or, of facts.

25 Now, the law makes absolutely no distinction between

1 the weight or the value that you can give to either direct
2 or circumstantial evidence. Nor is there a greater degree
3 of certainty required of circumstantial evidence than that
4 of direct. I'll advise you that you should consider all of
5 the evidence in the case. And if, after weighing all the
6 evidence, if you are firmly convinced of the defendant's
7 guilt beyond a reasonable doubt, you must find the defendant
8 guilty. On the other hand, if you are not convinced of the
9 guilt of the defendant beyond a reasonable doubt, you must
10 find the defendant not guilty.

11 Now, also as the finders of fact you must determine the
12 credibility or the believability of those who have testified
13 in front of you. That's what credibility means. It means
14 believability. It's your duty, as jurors, to analyze the
15 testimony, evaluate the evidence, determine which evidence
16 convinces you of its truth. In determining believability of
17 witnesses who've testified, you may believe one against all
18 or all against one. You can believe part of what somebody
19 told you, all of what somebody told you, or none of what
20 somebody tells you.

21 You're the sole judges of the facts. You're the sole
22 judges of the credibility and believability of the
23 witnesses. You may consider whether any witness has
24 exhibited any interest or bias or prejudice or other motive
25 in testifying. You may also consider the appearance and the

1 manner in which the witnesses have testified. Take all
2 those factors into consideration. As I told you at the
3 beginning of the trial, use your own good common sense in
4 determining credibility or believability of those who have
5 testified in this case.

6 Now, ladies and gentlemen, it's been apparent during
7 the trial of this case that one of the defendants in this
8 matter is not present. Mr. Carl, Nicholas Carl Davy has not
9 appeared, and under the law of this state and under our
10 Constitution a defendant may be tried even if the defendant
11 does not attend the trial. But the fact that a defendant is
12 not present may not be considered against the defendant in
13 any manner whatsoever.

14 Again, the defendant has no burden of proof in this
15 case, and is not required to prove himself innocent of
16 anything.

17 So, the fact that a defendant may not be present at
18 trial should not even be discussed by you in your
19 deliberations in this matter, and, also, for that particular
20 defendant, that defendant did not appear and testify. And I
21 will instruct you that the fact that a defendant did not
22 testify in this case is not a factor to be considered by you
23 in any way in your deliberations and consideration on the
24 question of guilt or innocence. It must not be considered
25 by you in any manner whatsoever.

1 Defendants have a constitutional right to remain
2 silent, and the assertion of that right to remain silent
3 must not be considered by you in your deliberations at all.
4 I repeat, under your oath as jurors, you are to draw no
5 conclusion whatsoever from the fact that a defendant did not
6 testify in this case. The fact that a defendant did not
7 testify, again, is another matter that should not even be
8 discussed by you in your deliberations. The burden of proof
9 always, in a criminal case, is with the State. The
10 defendant, again, is not required to prove innocence in this
11 case, and the burden of proof remains upon the State to
12 prove guilt beyond a reasonable doubt throughout the trial.

13 Now, in reading, reading the indictment to you and
14 going over with you in a minute the crime that's been
15 alleged in this case, you will hear the word intent used and
16 I want to go over with you what is legally meant by the word
17 intent. In order to establish criminal liability, criminal
18 intent is always required. That's, for example, the mental
19 state that's required to be proven by the State for a
20 particular crime to have existed or been committed. That
21 level of intent may be purpose. It may be intent. It may
22 be knowledge. In some cases, it doesn't apply in this one,
23 recklessness or criminal negligence can even supply intent.

24 Criminal intent must be proven by the State beyond a
25 reasonable doubt. Criminal intent is always a matter that

1 must be determined by the jury from the circumstances
2 surrounding the situation. Again, as I indicated, as in the
3 case of circumstantial evidence.

4 The reason for that is there is no way that we have in,
5 in our science or abilities today to look into someone's
6 brain when something's occurring, and look to see exactly
7 what they intended to do in any situation. We don't have
8 the ability to do that. So, therefore, criminal intent must
9 be proven from the facts and circumstances that were shown
10 to have existed at the time the alleged incident occurred.

11 So, criminal intent is always a matter that must be
12 determined by the jury from the circumstances surrounding
13 the situation. That's how you make a determination as to
14 whether or not the element of a crime requiring intent was
15 present. It's not necessary and, in, again, it's not
16 possible to establish intent by direct and positive
17 evidence. Intent may be established by inference the same
18 way as any other fact taking into consideration the acts of
19 the parties and all the facts and circumstances surrounding
20 the incident of the case.

21 Now, criminal intent is a mental state. It's a
22 conscious wrongdoing. It's up to you to determine what the
23 defendants, each of them and separately, intended to do
24 based upon the circumstances which have been shown to you to
25 have existed at the time of this alleged incident.

1 Also, I will charge you that the mere presence of
2 someone at the scene of the crime is not sufficient to prove
3 someone guilty of that crime. A defendant's presence where
4 a crime is being committed or mere association with a person
5 who commits a crime does not make a defendant an accomplice,
6 an aider, or abettor, or a person committing the crime.
7 Again, the burden, the burden upon the State is to prove
8 every element of the crime charged. And if you find, after
9 reviewing all of the evidence, that the State has proved
10 that a defendant was only present at a scene of a crime, and
11 that they have not proved beyond a reasonable doubt any
12 other participation in the crime, you must find the
13 defendant not guilty.

14 Also there has been some discussion of probable cause
15 to arrest. Probable cause is a good faith belief that a
16 person has committed a crime. That belief rests on grounds
17 that would make an ordinary, prudent, and cautious person,
18 under the circumstances, to have the same belief. Probable
19 cause for arrest in misdemeanor cases without a warrant is
20 something more than a mere suspicion that the person
21 committed a crime. An arrest made on a hunch or a mere
22 belief or a guess unsupported by facts and circumstances or
23 credible information that a person has committed a crime is
24 not made on probable cause. Probable cause is somewhere
25 between suspicion and sufficient evidence to convict.

1 In deciding whether there was probable cause to arrest,
2 probability can not be technical, but must be based on
3 factual, practical considerations of everyday life on which
4 reasonable and prudent and cautious, cautious people act.

5 Now, the charge in this case is possession with the
6 intent to distribute. Both defendants are charged with the
7 same crime and that is possession with the intent to
8 distribute marijuana. The State must prove beyond a
9 reasonable doubt that each of the defendants, again
10 considered separately, possessed marijuana with the intent
11 to distribute it.

12 Excuse me. To prove possession, the State must prove
13 beyond a reasonable doubt that the defendant had both the
14 power and the intent to control the disposition and use of
15 the marijuana. Possession may be either actual or
16 constructive.

17 Actual possession means that the marijuana was in the
18 physical custody of the particular defendant. Constructive
19 possession means that the defendant had dominion and control
20 or the right to exercise dominion and control over either
21 the marijuana itself or the property in which the marijuana
22 was found. Mere presence at a scene where drugs are found
23 is not enough to prove possession. The defendant's
24 knowledge and possession may be inferred when a substance is
25 found under, in the property which is under the defendant's

1 control. However, this inference is simply an evidentiary
2 fact to be taken into consideration by you along with the
3 other evidence in the case and it should be given the weight
4 you decide it should have.

5 I will charge you that two or more persons can have
6 joint possession of a drug in this state. The State must
7 prove beyond a reasonable doubt that the defendant intended
8 to distribute the marijuana. Distribution means to deliver
9 other than by administering or dispensing a drug according
10 to the law.

11 Intent may be shown by acts and conducts of the
12 defendant and other circumstances from which you may
13 naturally and reasonably infer intent. In determining
14 whether the defendant had the intent to distribute the
15 marijuana, you can consider the circumstances surrounding
16 the defendants alleged possession. You may consider the
17 amount of the substance alleged to have been possessed, the
18 manner in which it was allegedly possessed, possessed, the
19 place where it was allegedly possessed, and other factors
20 which you consider to be important.

21 You must find that the defendant did not have the
22 intent to have the marijuana solely for his own use.
23 Possession of more than 28 grams or one ounce of marijuana
24 creates an inference under the law that the defendant
25 possessed the marijuana with the intent to distribute it.

1 This inference does not relieve the State from proving,
2 beyond a reasonable doubt, that the defendant had the intent
3 to distribute it. It also is an evidentiary fact that you
4 can take into consideration along with the other evidence in
5 the case and it should be given the weight that you think it
6 should have.

7 Now, there are two possible verdicts in this case as to
8 each defendant. That is either guilty or not guilty of the
9 charge that's before the Court, and you will be writing a
10 separate verdict for each of the defendants.

11 Before a verdict can be final from this jury, each and
12 every one of you must agree upon the verdict before it is
13 final. At that point in time the foreperson of the jury
14 will record the verdict.

15 Mr. Brent Cox, raise your hand please.

16 (Juror complies.)

17 THE COURT: You're gonna be the foreperson of the jury.
18 That means that you will be the person who will preside over
19 the deliberations of the jury. If, at anytime during the
20 deliberations of the jury, the jury has a question that
21 you'd like to ask, that they like to ask, you will be the
22 person who records that question in writing, submits it
23 through the bailiff to the Court for the Court's
24 consideration.

25 I'll advise the jury that I'm not allowed to answer

1 each and every question that you may have during your
2 deliberations. I've told you we have separate functions
3 here. I can't enter into your fact finding determination
4 function. I could answer questions concerning the evidence
5 that's been presented, the procedure that we followed, the,
6 the law that I've charged you on. But I'm not asking you
7 to, to edit your questions or you to edit the questions.
8 Simply record the question, present it to me, and I'll
9 decide the appropriate response, if any, the Court can make
10 to the question that you'd have.

11 The other function that the foreperson would serve is
12 to sign the verdict form once it's been completed. And,
13 again, inform the bailiff that a verdict has been reached so
14 that we can bring you back into the courtroom to take the
15 verdict. Also, if there's any need to communicate with the
16 jury concerning whatever matters might come up during your
17 deliberation, that would be done by the Court through the
18 bailiff to the foreperson.

19 Now, again, your verdict must be unanimous. That means
20 each and every one of you has an equal say in the verdict of
21 this case. No verdict can be reached until all 12 have
22 unanimously agreed upon the verdict of the jury.

23 Now, at this point in time I've gone over a lot of
24 matters with you. I want to be sure that I haven't
25 misstated something or stated something incorrectly. Also,

1 we'll be sending the evidence back in the jury room for your
2 consideration. I have to be sure that we only send back the
3 proper evidence. So, there's a couple of housekeeping
4 matters that I need to take care of.

5 Excuse me. I'm gonna ask you one more time to step
6 into the jury room. Do not begin your deliberations until I
7 bring you back out and give you final instructions.

8 At this point in time you may retire to the jury room.

9 (Whereupon, the following takes place outside the
10 presence of the jury.)

11 THE COURT: Any objections to the charge from the
12 State?

13 SOLICITOR HUNTER: None, Your Honor.

14 THE COURT: Any from the defense?

15 MRS. PRICE: None on behalf of Mr. Jackson.

16 MR. POOLE: None here.

17 THE COURT: Come forward if you don't mind. Take a
18 look at the exhibits and be sure we have the proper
19 exhibits. I have the verdict forms here. You can review
20 those.

21 (Pause.)

22 THE COURT: All right. Any objection to the exhibits
23 or the verdict form?

24 MRS. PRICE: None on behalf of Mr. Jackson.

25 MR. POOLE: None from Mr. Davy.

1 SOLICITOR HUNTER: None.

2 THE COURT: And from the State?

3 SOLICITOR HUNTER: No, sir.

4 THE COURT: All right. Let's bring the jury back.

5 (Whereupon, the following takes place within the
6 presence of the jury.)

7 THE COURT: Pass those over please.

8 (Bailiff complies.)

9 THE COURT: All right. Mr. Foreman, that, those are
10 the verdict forms to be used in this case. There's one for
11 each defendant. I'll go over them with you so that you'll
12 have an understanding of what we've done.

13 At the top of the page you'll see it indicates the
14 State and county that we're in, the Court that's
15 functioning. It has the caption of the case just below that
16 and then there's one question submitted to the jury as to
17 each defendant. That is, as to the indictments, and I won't
18 go through the numbers and everything and the charges, that
19 you, the jury, unanimously find that defendant and below
20 there's a not guilty place for a verdict and a guilty place
21 for a verdict. You'll check the line in front of the
22 appropriate verdict once it's been reached and then sign the
23 document below there indicating that it's been a unanimous
24 verdict.

25 Once both verdicts have been reached you'll inform the

1 bailiff that a verdict has been reached and we'll return you
2 to the courtroom for your, for, to receive the verdict.

3 Now, I will tell you that the, if you -- again, you, if
4 we have a need to order a lunch, I notice we're at 11:20,
5 11:10, don't know how long you'll deliberate. Not telling
6 you how long to deliberate. But if it becomes necessary
7 that we order lunch for the jury, we'll be sending someone
8 from the Clerk's Office into the jury room to, for that
9 purpose, to get an order from the jury for lunch. Takes
10 about an hour, hour and ten minutes to get a lunch delivered
11 here to the courthouse and served.

12 So, that's the time frame that we would be in if we
13 decide to do that. Of course, the jury can request that of
14 the, through the bailiff and we'll take care of that. But
15 when that person is in the jury room taking that order,
16 please don't discuss anything about the case with that
17 individual. Suspend deliberations until the order's been
18 taken and allow the person to leave before you resume those
19 deliberations. I don't know that we'll get to that point.
20 But if we get to that point I wanted to make you aware of
21 how we'll handle that.

22 Ma'am, you are the alternate. I'm gonna ask you to
23 remain seated. I'll instruct the remainder of the jury to
24 retire to the jury room and begin your deliberations.

25 Thank you very much.

1 (Whereupon, the following takes place outside the
2 presence of the jury with the alternate juror being
3 dismissed at this time.)

4 THE COURT: Any objection to the final instructions
5 from the State?

6 SOLICITOR HUNTER: No, Your Honor.

7 THE COURT: Any from the defense?

8 MRS. PRICE: None, Your Honor.

9 THE COURT: Mr. Poole.

10 MR. POOLE: No, sir.

11 THE COURT: All right. Then this case will be in
12 recess until such time as a verdict has been reached.

13 Thank you very much.

14 SOLICITOR MCCARTY: Thank you, Your Honor.

15 (Whereupon, the jury began deliberations at 11:12 and
16 returned with a question at 12:09.)

17 THE COURT: All right. Ready to call the jury back?

18 SOLICITOR MCCARTY: We're trying to get sound.

19 (Pause.)

20 SOLICITOR MCCARTY: We're ready.

21 THE COURT: All right. Bring the jury in.

22 (Whereupon, the following takes place within the
23 presence of the jury.)

24 THE COURT: All right. The record will reflect that
25 the jury has returned to the courtroom.

1 I've received a document with four inquiries from the
2 jury. I'm going to go over these with you in the order that
3 you've asked them. Before I do that, let me make you aware
4 of, of the fact that you have the right to ask about
5 evidence that went into the record of the case. If,
6 however, if you wish to review that evidence that would be
7 available only from a recording that's made during the
8 trial.

9 We do not have the transcripts. We don't have other
10 ways of reproducing the testimony other than by a tape. And
11 so, I'll just make you aware that that is available. Of
12 course, you don't have to review it if you don't think you
13 need to review it.

14 Now, the first question, is the evidence that Mr. Davy
15 was the renter of the Enterprise car?

16 I discussed that with the attorneys, and, again, I
17 can't enter into your findings in the facts in this case.
18 But I can tell you that through agreement of counsel, the
19 agreement is that there was no direct evidence of any rental
20 agreement introduced during the trial or any documents that
21 would enter, that would of entered a contract of any kind
22 into the record. That was not a part of the record.

23 As to what was in the record, either direct or
24 circumstantial evidence, that's up for you to decide.
25 That's your, your area that you have to consider, and I

1 really can't comment on that in the questioning, in the form
2 of this question.

3 And that's the answer to question number two as well.
4 Can it be clarified whether the marijuana was inside a
5 closed compartment in the console. I can not add to or
6 supplement what's in the record at this point in time.
7 whatever's in the record is there. Of course, you were
8 present, heard the testimony, and I can't supplement it or
9 add to it through a response to a question in this form.

10 So, I won't be able to answer that question for you
11 other than to say what was testified was there. You have
12 the right to consider both the direct and the circumstantial
13 evidence that was placed into the record concerning that
14 particular issue.

15 The next question regards, says question regarding
16 Mr. Jackson for the judge. Does Mr. Jackson's possible
17 knowledge of a presence of marijuana infer guilt according
18 to the law. What I'm going to do is I'm going to recharge
19 you concerning the law on possession with the intent to
20 distribute marijuana, which will also include a charge
21 concerning actual and constructive possession, and that's
22 the, basically the comment that I can give you concerning
23 how the law would view this particular situation because
24 that's what the charge is that's before the Court.

25 In this case, both defendants were charged with

1 possession with intent to distribute marijuana. The State
2 must prove, beyond a reasonable doubt, that the defendant
3 possessed marijuana with the intent to distribute it. To
4 prove possession, the State must prove, beyond a reasonable
5 doubt, that the defendant both had the power and the intent
6 to control the disposition or use of the marijuana.

7 Now, possession can be either actual or constructive.
8 Actual possession means that the marijuana would of been in
9 the actual physical custody of the particular defendant.
10 Constructive possession means that the defendant had
11 dominion or control, and control, excuse me, not or,
12 dominion and control or the right to exercise dominion or
13 control over either the marijuana itself or the property on
14 which the marijuana was found.

15 Mere presence at the scene where drugs were found is
16 not enough to prove possession. The defendant's knowledge
17 and possession may be inferred when a substance is found on
18 property under the defendant's control. However, inference,
19 this inference is simply an evidentiary fact to be taken
20 into consideration by you along with the other evidence in
21 the case. You can give it the weight you decide that it
22 should have.

23 I will also tell you that two or more persons may have
24 joint possession of a drug. The State must prove, beyond a
25 reasonable doubt also, that the defendant intended to

1 distribute the marijuana. Distribution means to deliver
2 other than by administering or dispensing a drug. Intent
3 may be shown by acts and conduct of the defendant and other
4 circumstances from which you might naturally and reasonably
5 infer intent.

6 In determining whether the defendant had the intent to
7 distribute marijuana, you may consider the circumstances
8 surrounding the defendant's alleged possession. You may
9 consider the amount of substance alleged to have been
10 possessed, the manner in which it was allegedly possessed,
11 the place where it was allegedly possessed, and other
12 factors which you consider to be important.

13 You must find that the defendant did not intend to have
14 the marijuana solely for his own use. Possession of more
15 than 28 grams or one ounce of marijuana creates an inference
16 that the defendant possessed the marijuana with the intent
17 to distribute it. This inference does not relieve the State
18 from the burden of proving, beyond a reasonable doubt, that
19 the defendant had the intent to distribute it. It is,
20 again, a, simply an evidentiary fact to be taken into
21 consideration by you along with the other evidence in this
22 case and be given the weight that you think that it should
23 have.

24 That was my charge concerning both the charge that's
25 before the Court and the question of possession with intent

1 to distribute.

2 Now, the final request that you had was a request that
3 you be allowed to view the video again. We've gotten it
4 into the, the video recording or playing device. I'll ask
5 that the lights be lowered and we'll play that tape for you.

6 (Whereupon, State's Exhibit No. 1 was played again from
7 the jury at this time.)

8 THE COURT: Ask the attorneys to approach.

9 (Whereupon, a bench conference was held out of the
10 hearing of the jury at this time.)

11 THE COURT: I'm informed by counsel that the only thing
12 else that will be shown on this will be the tow of the
13 vehicle away by a tow truck. I don't know that you need to
14 see that. I think you've probably seen everything that you
15 need to see. I don't know. I haven't seen it to the end
16 myself. So, I don't know exactly where it went. But that's
17 what I'm informed. It's certainly in evidence. If you'd
18 like to see the whole thing you can. But I think that's
19 responsive to your questions.

20 So, at this time I'll ask you to retire to the jury
21 room and continue your deliberations.

22 Thank you very much.

23 (Whereupon, the following takes place outside the
24 presence of the jury.)

25 THE COURT: Any objection to my response from the

1 State?

2 SOLICITOR HUNTER: No objection.

3 THE COURT: Any from the defense?

4 MRS. PRICE: No, Your Honor.

5 THE COURT: We'll remain in recess until a verdict is
6 reached.

7 The questions will be made a part of the Court's record
8 as an exhibit.

9 (Whereupon, the note from the jury was marked as
10 Court's Exhibit No. 2 for identification purposes only at
11 this time.)

12 THE COURT: Thank you.

13 (Whereupon, the jury began deliberations again at 12:45
14 and returned with a verdict at 2:07.)

15 THE COURT: I understand that a verdict has been
16 reached, thank you, verdict in the trial.

17 Is the State ready to proceed?

18 SOLICITOR HUNTER: Yes, Your Honor.

19 THE COURT: Defense ready to proceed?

20 MRS. PRICE: Yes, Your Honor.

21 MR. POOLE: Yes, sir.

22 THE COURT: Bring the jury in.

23 (Whereupon, the following takes place within the
24 presence of the jury.)

25 THE COURT: All right. The record will reflect that

1 all jurors have returned to the courtroom.

2 Mr. Morris, has a verdict been reached in the case?

3 FOREMAN: Yes, Your Honor. We have reached a verdict.

4 THE COURT: If you'll pass it to the bailiff.

5 (Foreman complies.)

6 THE COURT: Thank you, sir.

7 You may publish the verdicts.

8 CLERK: The State of South Carolina, County of
9 Spartanburg, Spartanburg, the State versus Nicholas Carl
10 Davy, on Indictment 2009-GS-42-0761, we, the jury, Your
11 Honor, find the defendant, Nicholas Carl Davy, as to the
12 charge of possession with intent to distribute marijuana,
13 guilty. Signed by the foreperson. Dated October 14th,
14 2009.

15 THE COURT: You may proceed.

16 CLERK: The State versus Andre Jackson. We, the jury,
17 unanimously find defendant, Andre Jackson, concerning the
18 charge for possession with intent to distribute marijuana,
19 on Indictment Number 2009-GS-42-0268, guilty. Signed by the
20 foreperson. Dated October 14th, 2009.

21 Ladies and gentlemen, if this is your verdict and still
22 your verdict, if you'd please raise your right hand.

23 (All jurors raise their hands at this time.)

24 CLERK: So say you-all.

25 THE COURT: Thank you, ma'am.

1 State have anything further before I release the jury?

2 SOLICITOR HUNTER: No, Your Honor.

3 THE COURT: Defense have anything further before we
4 release the jury?

5 MRS. PRICE: Request the jury be polled, Your Honor.

6 THE COURT: Poll the jury.

7 And would you request polling for your client as well?

8 MR. POOLE: Yes, sir.

9 THE COURT: All right. Madam Clerk, if you would ask
10 them if this is both their verdicts, if it's still your
11 verdict.

12 You may proceed.

13 CLERK: Ladies and gentlemen of the jury, I will pose a
14 question and ask you stand with your individual response to
15 the question. In both cases, if this is your verdict and
16 still your, still your verdict.

17 Juror Number 32, Brent Cox, is this your verdict?

18 JUROR: Yes.

19 CLERK: Juror Number 22, Tonya Calloway.

20 JUROR: Yes, this is my verdict.

21 CLERK: Juror 65, Dorothy Hawthorne.

22 JUROR: Yes, this is my verdict.

23 THE COURT: Juror 150, Cheryl Westrup.

24 JUROR: Yes, this is my verdict.

25 CLERK: Juror 53, Jewell Garland.

1 JUROR: Yes, it is my verdict.
2 CLERK: Juror 44, Martin Farwell.
3 JUROR: Yes, this is my verdict.
4 CLERK: Juror 67, Carolyn High.
5 JUROR: This is my verdict.
6 CLERK: Juror 28, Kathleen Cobb.
7 JUROR: Yes, this is my verdict.
8 CLERK: Juror 153, Robert Whitmore.
9 JUROR: Yes, this is my verdict.
10 CLERK: Juror 19, Sheila Bryson.
11 JUROR: Yes, this is my verdict.
12 CLERK: Juror 50, Carla Fowler.
13 JUROR: This is my verdict.
14 THE COURT: Juror 31, Elizabeth Cook.
15 JUROR: Yes, this is my verdict.
16 CLERK: Your Honor, the jury has been polled.
17 THE COURT: Thank you.
18 Anything further before I release the jury from the
19 defense?
20 MRS. PRICE: No, Your Honor.
21 THE COURT: Mr. Poole.
22 MR. POOLE: No, sir.
23 THE COURT: Thank you.
24 (Whereupon, the jury was released at this time.)
25 THE COURT: Thank you, sir.

1 Anything further from the defense?

2 MRS. PRICE: No, Your Honor.

3 THE COURT: Mr. Poole?

4 MR. POOLE: Yes, Your Honor. Motion for, on behalf of
5 Nicholas Davy for a new trial. This motion is based upon
6 the motions previously, previously made prior to trial, the
7 suppression hearing, and, and the motion made at the
8 directed verdict, and, and we are making that a motion for
9 new trial based upon those prior motions already made.

10 MRS. PRICE: Mr. Jackson joins in, Your Honor.

11 THE COURT: All right. The Court will note they have
12 been made. Heard and denied.

13 Yes, sir, do you have the sentencing information
14 together for me please?

15 SOLICITOR MCCARTY: Your Honor, we have one matter I
16 guess on the sentence of Mr. Jackson. With regard to
17 Mr. Jackson, he has two out-of-state charges from the State
18 of Maryland. We'd like I guess the Court's---

19 THE COURT: Charges or record?

20 Is it a record?

21 SOLICITOR HUNTER: I'm sorry, Your Honor. They are a
22 record.

23 THE COURT: Has Mrs. Price looked at those?

24 MRS. PRICE: Yes, Your Honor. Mr. Jackson does dispute
25 one of those. He does admit he does have a, one

1 paraphernalia charge from the State of Maryland.

2 SOLICITOR HUNTER: Your Honor, also shows possession of
3 cannabis charge in 1995 from Washington D.C.

4 THE COURT: Okay. That's the one he's disputing?

5 MRS. PRICE: Yes, Your Honor.

6 THE COURT: All right. Do you wish to seek any records
7 or anything to show to the Court before we go through
8 sentencing?

9 MRS. PRICE: No, Your Honor. Except note that the
10 State has only produced a rap sheet. Those have three
11 different social security numbers on them for my client, and
12 that they have not produced any certified records in that
13 matter today.

14 SOLICITOR MCCARTY: Your Honor, it's the State's
15 contention in the report as we have his information listed
16 produces that as a conviction upon his record, and we
17 believe that if they're challenging the nature of the
18 conviction they should have to produce a record to show you
19 one---

20 THE COURT: Well, does the rap sheet have three
21 different social security numbers?

22 Is that true or not true?

23 SOLICITOR MCCARTY: Your Honor, at the beginning of one
24 of the rap sheets I see different social security numbers on
25 here.

1 THE COURT: why don't you step over and see if you'd
2 like -- y'all talk about that just a second.

3 MRS. PRICE: Right there. One, two, three, Your Honor.
4 It indicates scars that my client does not have as personal
5 description of this individual with these particular
6 charges. It indicates he has scars on his forehead above
7 his right eye and he does not have those.

8 THE COURT: Gentlemen.

9 SOLICITOR HUNTER: Your Honor, also indicates the date
10 of birth. I believe that's the date of birth of the
11 defendant.

12 THE COURT: well, your record does indicate that he has
13 scars?

14 SOLICITOR HUNTER: It looks like it says he does have
15 scars on him.

16 SOLICITOR MCCARTY: A scar on his forehead is what it
17 says and also---

18 MRS. PRICE: A scar over the left eye, right eye scar.

19 SOLICITOR MCCARTY: All right. We'll agree to a first,
20 first.

21 THE COURT: All right. State agrees to sentence to a
22 first.

23 Pass it up please.

24 As to your client, Mr. Poole.

25 MR. POOLE: Your Honor, Mr. Davy is 24 years of age.

1 He's not married according to the records at least as of
2 last year, the end of last year. He lives in the Washington
3 area. As far as I can tell, I've not been provided a, a
4 record of any sort. I'm unaware of any prior record.

5 SOLICITOR HUNTER: Your Honor, he has no record.
6 Mr. Davy does.

7 THE COURT: He has no prior record?

8 SOLICITOR HUNTER: No prior record.

9 THE COURT: All right. Anything in mitigation
10 concerning Mr. Jackson?

11 MRS. PRICE: Thank you, Your Honor.

12 Before the Court is Mr. Andre Jackson. You heard from
13 the witness stand he is married. His wife is present in the
14 courtroom. This is the lady in the black blazer in the
15 black and white dress. She's been supportive throughout
16 this whole ordeal. As you heard, he works. He also had a
17 side job as a reggae artist, musician/DJ. His father is
18 originally from Jamaica. You picked up the slight accent
19 from the witness stand, Your Honor.

20 Your Honor, we would ask, considering the facts and
21 circumstances of this case, and the fact that after a -- I
22 had several conversations with Mr. Jackson and his wife. He
23 did want to come to trial to maintain his innocence. I know
24 the jury felt differently. We would just ask that Your
25 Honor take into consideration all the circumstances and the

1 testimony in light of sentencing Mr. Jackson today.

2 THE COURT: Anything you'd like to say, Mr. Jackson?

3 DEFENDANT: well, Your Honor, I just say I'm innocent
4 even though the jury found me guilty of possession. But I'm
5 still innocent. You know, I wasn't aware of what was in
6 that car, you know, as of this time, even though they find
7 substantial evidence to find me guilty. And I mean I just
8 was in the wrong place and time, Your Honor.

9 THE COURT: Now, as far as -- is there any undisputed
10 prior record?

11 SOLICITOR HUNTER: The -- yeah, the paraphernalia
12 charge on Mr. Jackson.

13 THE COURT: Okay. Is there any time for when he was
14 arrested?

15 MRS. PRICE: Yes, Your Honor. He says two or three
16 days, Your Honor.

17 THE COURT: Or your charge, the Sentence is -- it's the
18 Sentence of the Court you be confined to the State
19 Department of Corrections for a period of three years. I
20 have suspended that to the time you served and probation for
21 three years and given you credit for the three days you
22 already served. And during your period of probation you
23 will provide 160 hours of public service employment. You'll
24 be subject to substance abuse classes and your probation can
25 transfer to North Carolina if they will accept the probation

1 case, and that you can pay your public defender's fee, be
2 required to pay your public defender's fee during the
3 probation.

4 Good luck to you, sir.

5 DEFENDANT: Thank you, Your Honor.

6 THE COURT: Now, as to your client, Mr. Poole, we will
7 seal the sentence. I'm directing the Clerk's Office prepare
8 a bench warrant for his arrest.

9 THE COURT: Thank you very much.

10 MR. POOLE: Thank you, sir.

11

12 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

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WITNESSES

DUNCAN

1. SENTENCE MADE

2. REPORT ENDED

3. CARD PULLED

4. INDEXED

5. CHECKED WARRANTS
ARREST WARRANT NUMBER

6. CHECKED SIGNATURE

7. ASSESSMENT AND
FINE CARD

M023949

8. TRAFFIC VIOLATION COPY

ACTION OF GRAND JURY

Foreperson of Grand Jury
Date:

VERDICT

09:51

08/10/2010

Foreperson of Petit Jury
Date:

DOCKET NO.

09-GS-42-0268

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

JAN 19 2009

TERM

THE STATE
VS.

ANDRE JACKSON

Indictment for

POSSESSION WITH INTENT TO DISTRIBUTE
MARIJUANASC Code: 44-53-370
CDR Code:
Class MIS/AFILED
CLERK OF COURT
SPARTANBURG COUNTY
2009 JAN 15 AM 11:22
MARC KITCHENS

186

184

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

INDICTMENT

JAN 09 2009

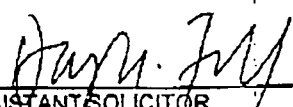
At a Court of General Sessions, convened on _____ the

Grand Jurors of Spartanburg County present upon their oath:

POSSESSION WITH INTENT TO DISTRIBUTE

That Andre Jackson did in Spartanburg County on or about September 16, 2008, manufacture, distribute, dispense, deliver, purchase, or otherwise aid, abet, attempt or conspire to manufacture, distribute, dispense, deliver or purchase, or possess with intent to manufacture, distribute, dispense, deliver, or purchase a quantity of Marijuana, a schedule I controlled substance or controlled substance analogue, in violation of § 44-53-370, *THE CODE OF LAWS OF SOUTH CAROLINA, (1976), as amended.*

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

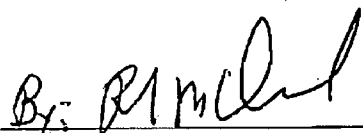

ASSISTANT SOLICITOR

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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."

September 17th, 2010

By: 

M. Celia Robinson
Appellate Defender

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

Roger L. Couch, Special Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANDRE JACKSON,

APPELLANT

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

1. Where the State failed to present evidence reasonably supporting the officer's having the reasonable suspicion of criminal activity required in order to allow the officer to stop this vehicle because the driver was driving 54 or 55 miles per hour in an area of the highway where the maximum speed allowed is 60 miles per hour and the minimum speed is 45 miles per hour did the trial judge err in denying the defense motion to suppress in violation of the state and federal constitutional guarantees against unreasonable searches and seizures?
2. Did the trial judge err in denying appellant's motion for directed verdict based on the fact that appellant was merely present and that there was no evidence that appellant had any knowledge of or dominion and control over the marijuana found inside the console of the rental car driven by Mr. Davy?

STATEMENT OF THE CASE

Andre Jackson, appellant, was indicted by the Spartanburg County Grand Jury for two counts of possession with intent to distribute (PWID) marijuana (09-GS-42-0268 and -0761). On October 13, 2009, appellant proceeded to trial along with co-defendant Nicholas Carl Davy before the Honorable Roger L. Couch and a jury. Upon the jury's finding him guilty of first offense PWID marijuana, Judge Couch sentenced appellant to three years incarceration, provided that upon time served, the performance of 160 hours of public service employment, and three years probation, the sentence was suspended.

ARGUMENT

I. Where the State failed to present evidence reasonably supporting the officer's having the reasonable suspicion of criminal activity required in order to allow the officer to stop this vehicle because the driver was driving 54 or 55 miles per hour in an area of the highway where the maximum speed allowed is 60 miles per hour and the minimum speed is 45 miles per hour so that the trial judge erred in denying the defense motion to suppress in violation of the state and federal constitutional guarantees against unreasonable searches and seizures.

At the outset of trial, prior to the jury being sworn, defense counsel argued that the stop of the vehicle the African-American, forty-two-year-old appellant was riding in was invalid and requested a hearing outside the presence of the jury. (R. p. 7). Appellant's attorney sought to suppress the drugs found because the officers conducted an illegal stop of the vehicle in which appellant was a passenger. (R. p. 10). The trial judge erred reversibly in denying the motion to suppress.

The officer lacked reasonable suspicion to conduct an investigatory stop where the vehicle appellant occupied was being driven legally. The stop, search, and seizure of appellant violated his rights against unreasonable searches and seizures as guaranteed by the Federal Constitution, and the distinct right to privacy guaranteed by Article I, §10 of the South Carolina Constitution. The stopping of a vehicle and the detention of its occupants constitutes a seizure and implicates the Fourth Amendment's prohibition against unreasonable searches and seizures. Delaware v. Prouse, 440 U.S. 648, 653-54, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979). "Therefore, an automobile stop implicates the Fourth Amendment prohibition against unreasonable searches and seizures, imposing a standard of 'reasonableness' upon the exercise of discretion by state law enforcement officials." State v. Banda, 371 S.C. 245, 639 S.E.2d 36 (2006).

Generally, the decision to stop an automobile is reasonable when the police have probable cause to believe a traffic violation has occurred. Banda, 371 S.C. at 252, 639 S.E.2d at

40. "A police officer may stop and briefly detain and question a person for investigative purposes, without treading upon his Fourth Amendment rights, when the officer has a reasonable suspicion supported by articulable facts, short of probable cause for arrest, that the person is involved in criminal activity." Evidence seized in violation of the Fourth Amendment must be excluded from trial. A police officer may stop and briefly detain and question a person for investigative purposes without treading upon his Fourth Amendment rights only when the officer has a reasonable suspicion supported by articulable facts, short of probable cause for arrest, that the person is involved in criminal activity. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); State v. Woodruff, 344 S.C. 537, 546, 544 S.E.2d 290, 295 (Ct.App.2001).

"Reasonable suspicion" requires a "particularized and objective basis that would lead one to suspect another of criminal activity." United States v. Cortez, 449 U.S. 411, 418, 101 S.Ct. 690, 695, 66 L.Ed.2d 621, 629 (1981). In determining whether reasonable suspicion exists, "the totality of the circumstances-the whole picture-" must be considered. Id. 449 U.S. at 417, 101 S.Ct. at 695, 66 L.Ed.2d at 629; State v. Khingratsaiphon, 352 S.C. 62, 69, 572 S.E.2d 456, 459 (2002). Here, defense counsel indicated that probable cause or reasonable suspicion to stop the vehicle and to search the vehicle were being challenged. (R. p. 10, line 6). During the hearing, Duncan Police Department Officer Jonathon Montjoy testified on behalf of the prosecution as to the traffic stop he initiated on September 16, 2008, on I-85 in Spartanburg County. (R. pp. 10-36). Officer Montjoy agreed that the maximum speed limit along that particular stretch of the interstate is 60 miles per hour while the minimum speed limit is 45 miles per hour. Officer Montjoy testified that appellant's vehicle was traveling in the center lane of the three lane highway at a rate of 54 miles per hour which the officer characterized as "a real low rate of speed slower than the other traffic." (R. p. 11, lines 16-18). However, Montjoy then agreed that the pretext for the stop was

slow speed and that his written report indicated that the vehicle was actually going 55 miles per hour. (R. p. 21, lines 20-25; p. 61; p. 71, lines 12-17).

Montjoy confirmed that the posted speed limit, i.e., the speed limit he was tasked with enforcing, was 60 miles per hour. (R. p. 22, lines 2-7). Montjoy further testified that, during rush hour traffic, the average speed of the drivers is 70 to 75 miles per hour. (R. p. 12, lines 1-5). However, despite testifying that the many of the cars in the flow of traffic were exceeding the speed limit, Montjoy did not choose to stop any of the drivers who were speeding down the highway at upwards of 70 miles per hour and passing the vehicle in which appellant was riding as it obeyed the speed limit. Instead, Montjoy decided only to stop the vehicle occupied by this African-American man because, while the car was driving within the posted speed limit and over the posted minimum speed, it was being driven more slowly than the majority of the drivers so that the officer concluded that the driver was committing the crime of "impeding traffic." (R. p. 22, lines 15-19).

Officer Montjoy testified that as he approached the vehicle to obtain license and registration, he smelled the odor of marijuana in the car. The officer recalled that the vehicle was driven by the co-defendant, Davy, while appellant was seated in the passenger seat. (R. p. 13, lines 5-11). The officer testified that he took Davy to the rear of the vehicle to complete the paperwork. Officer Montjoy testified that upon talking to appellant and the driver, he noticed, "They weren't real accurate as far as where they were going. They both stated they were going to Greenville, but neither one of them could actually give me a location where they were headed that day and were basically real stand-offish with their conversation." (R. p. 13, lines 18-24).

Officer Montjoy testified, "When I went back to the, to him, I was still checking all his information and I asked him if there's anything in the car, any marijuana, cocaine, any type of illegal drugs that shouldn't be in there and he stated no. I asked for consent. He denied consent.

Said he was in a real big hurry.” (R. p. 14, lines 8-13). Officer Montjoy recalled that it was at that point that he determined to deploy his K-9 search dog. He indicated, “I informed him that I was gonna deploy my K-9 around the vehicle and the K-9 alerted to the vehicle.” (R. p. 14, lines 15-16). The officer testified, “I informed the driver that he had alerted on the vehicle and we searched it from that point.” (R. p. 16, lines 22-23). The officer further testified that he found four clear plastic bags containing a green, leafy substance consistent with marijuana. (R. pp. 16-17; 20). The trial judge erred in refusing to suppress evidence of the drugs seized where the vehicle appellant was riding in should never have been stopped by the officer.

This stop was along I-85 as it goes through Spartanburg and passes near Duncan. Although the State asserted that appellant should have been traveling in the inside, right lane, the trial judge should have recognized and found as a matter of general knowledge that that far right lane is more properly considered the lane dedicated to decelerating traffic exiting from the highway and accelerating traffic merging on to the highway. Under these circumstances, where appellant’s vehicle was being operated correctly and within the law on the right-hand side of a three lane highway, Officer Montjoy’s explanation that he stopped appellant for “impeding traffic” was plainly insufficient to validate the stop where the officer lacked probable cause or even reasonable suspicion to stop appellant’s vehicle.

The officer predicated his stop of appellant on the fact that appellant was driving 54 or 55 miles per hour in an area of the interstate where the speed limit is 60 miles per hour and the minimum is 45 miles per hour. (R. p. 20, lines 10-15; p. 22, lines 2-14). Thus, the prosecution argued that the officer had a reasonable suspicion that appellant was breaking the law because he was driving five or six miles per hour under the maximum speed limit and nine or ten miles per

hour over the minimum speed limit. The officer noted no other circumstance which aroused his suspicion. Mr. Davy was apparently driving his vehicle competently within his lane.

The officer agreed that he stopped this vehicle because he believed it was "impeding traffic by going 55 miles an hour in a 60-mile an hour zone." (R. p. 22, lines 15-18). However, this single circumstance articulated by the officer, slower than average but lawful speed, could not objectively give rise to the level of reasonable suspicion necessary to justify this investigative stop. Defense counsel argued, "Your Honor, you've also heard that the maximum speed limit is 60 miles an hour. Now if one is going 60 miles an hour, which is the maximum speed limit, albeit during rush hour as people are going home, 55 miles an hour is not too far out of line to be considered to be impeding traffic. There is a minimum. There is a maximum. . . .As you heard, it is a 45. It is a 60. He was well within those boundaries. He was not in the far left-hand passing lane. He was in the middle lane. He was in a rental car in an unfamiliar place. Your Honor, it would be our testimony today that, excuse me, it would be our motion today that he is just not going slowly enough in order to be qualified for a stop in this matter." (R. p. 37).

In fact, South Carolina Code Ann. Section 56-5-1560, titled, Minimum Speed Limits, provides in subsection "(a) Impeding traffic by slow speed prohibited. -- No person shall drive a motor vehicle at such a slow speed as to impede the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation or in compliance with law." Defense counsel rightly argued that the vehicle's proceeding at 55 miles per hour in a zone where the speed limit is 60 and the minimum is 45 could not reasonably be considered to be driving at such a slow speed as to impede the "normal and reasonable movement of traffic." In addition, subsection (b) provides,

Establishing minimum speed zones; signs. Whenever the Department of Transportation or local authorities within their respective

jurisdictions determine on the basis of an engineering and traffic investigation that slow speeds on any part of a highway consistently impede the normal and reasonable movement of traffic, the Department of Transportation or local authority may determine and declare a minimum speed limit below which no person shall drive a vehicle except when necessary for safe operation or in compliance with law, when appropriate signs giving notice thereof are erected along the part of the highway for which a minimum speed limit is established. Also any minimum speed limit adopted by a municipality for a section of the state highway within the municipality shall not be effective until such minimum speed has been approved by the Department of Transportation.

Thus, pursuant to the statutory requirements, those in authority in Duncan along with the South Carolina Department of Transportation have determined that, along this section of the interstate, only a vehicle traveling at *less than* 45 miles per hour could reasonably be found to be impeding the normal and reasonable movement of traffic under the statute.

All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute. State v. Morgan, 352 S.C. 359, 365-66, 574 S.E.2d 203, 206 (Ct.App.2002); State v. Hudson, 336 S.C. 237, 246, 519 S.E.2d 577, 581 (Ct.App.1999). The legislature's intent should be ascertained primarily from the plain language of the statute. State v. Landis, 362 S.C. 97, 102, 606 S.E.2d 503, 505 (Ct.App.2004); Morgan, 352 S.C. at 366, 574 S.E.2d at 206. When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. Miller v. Aiken, 364 S.C. 303, 307, 613 S.E.2d 364, 366 (2005). If a statute's language is unambiguous and clear, there is no need to employ the rules of statutory construction and this Court has no right to look for or impose another meaning. Tilley v. Pacesetter Corp., 355 S.C. 361, 373, 585 S.E.2d 292, 298 (2003); Paschal v. State Election Comm'n, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995).

In construing a statute, the court looks to the language as a whole in light of its manifest purpose. State v. Dawkins, 352 S.C. 162, 166, 573 S.E.2d 783, 785 (2002). A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers. Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention. Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000); Kiriakides v. United Artists Commc'ns, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994). A court should not consider a particular clause in a statute as being construed in isolation, but should read it in conjunction with the purpose of the whole statute and the policy of the law.

When a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant.” State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991) (citing State v. Cutler 274, S.C. 376, 274 S.C. 376, 264 S.E.2d 420 (1980)); see also State v. Dingle, 376 S.C. 643, 649-50, 659 S.E.2d 101, 105 (2008); State v. Gordon, 356 S.C. 143, 153, 588 S.E.2d 105, 110 (2003); State v. Graves, 269 S.C. 356, 360, 237 S.E.2d 584, 586 (1977) (Because statute at issue is penal in nature “we must approach it's interpretation by invoking the rule of strict statutory construction and resolve any uncertainty or ambiguity against the State and in favor of the respondent.”)

Section 56-5-1560 specifically indicates that, where there is a problem with drivers impeding the normal movement of traffic, a decision must be made as to a minimum speed limit to be put in place in order to prevent drivers from impeding the normal flow of traffic. Along this stretch of I-85, the minimum speed limit under which a vehicle could be found to be impeding the normal and reasonable movement of traffic, has been set at 45. Under these circumstances, the trial

judge erred in construing the statute so as to find that it was reasonable for the officer to suspect that appellant was impeding traffic in violation of the statute where he was exceeding the minimum speed limit set by law.

Counsel rightly argued that the statute's indication that slower traffic must travel in the right-hand lane must include the two lanes on the right where the roadway includes three lanes. Counsel argued that in regard to the allegation that appellant was improperly driving in the middle of three lanes, "[I]t is true that you're supposed to drive on the right side of the roadway, and he was on the right side of the roadway. There are three - - - Yes, yes, but he was on the correct side of the roadway for - - those, those three lanes, I would argue would be considered the right side of the roadway for the purposes of I-85. It's - - you can't drive on the right side of the roadway and be in three lanes at the same time. You just can't do it." (R. p. 45, lines 1-14).

The trial judge erroneously construed the statute against the defense to find, "In this particular case, I understand your argument that all three lanes constitute the right side of the road, but I think it's generally accepted, when you're driving on a three lane interstate highway, that the left lane of the direction in which you're traveling is the faster lane or passing lane or the one you should go to if you're traveling faster. And then across the interstate to the right would be as you go slower and slower. I would - - I think that's generally the way you do that, and, of course, slower traffic stays to the right. I've seen that posted on roads all over the State for years." (Tr. p. 47, line 24-p. 48, line 9). The trial judge should have construed the statute in favor of the accused in order to find that the fact that the driver of this vehicle was driving more slowly than other drivers, i.e., those drivers that the officer testified were breaking the law by speeding, did not raise the requisite level of reasonable suspicion that this driver was breaking the law required to justify the stop. "Reasonable suspicion is something more than an inchoate and unparticularized suspicion or

hunch.” State v. Rogers, 368 S.C. 529, 629 S.E.2d 679 (Ct. App. 2006); State v. Butler, 343 S.C. 198, 202, 539 S.E.2d 414, 416 (Ct. App. 2000). Other than the mere fact that the vehicle was traveling slightly under the posted maximum speed limit, nothing observed by the officer legitimately gave him any reason to suspect that the vehicle’s occupants were committing a crime. Therefore, the trial judge erred in finding that the officer had the necessary probable cause or reasonable suspicion to stop the vehicle.

“Reasonable suspicion requires a ‘particularized and objective basis that would lead one to suspect another of criminal activity.” State v. Rogers, 368 S.C. 529, 629 S.E.2d 679 (Ct. App. 2006); State v. Khingratsaiphon, *supra*; Florida v. J.L., 529 U.S. 266, 120 S.Ct. 1375, 146 L.E.2d 254 (2000). Here, Officer Montjoy made no observation which even arguably suggested that the driver of the vehicle in which appellant was riding was, at that point, breaking the law. The officer’s incorrect indication that appellant’s vehicle was driving so slowly as to break the law prohibiting impeding traffic should not have been accepted as a legitimate basis for a reasonable suspicion of criminal activity where appellant was driving well above the minimum speed which has been determined to be necessary to prevent law-abiding drivers from impeding traffic.

The trial judge erred in denying appellant’s motion to suppress the drugs found as the result of the unwarranted stop of the vehicle prosecuted without reasonable suspicion in violation of the constitutional guarantees against unreasonable search and seizure. Under these circumstances, the trial court judge erred reversibly in denying appellant’s motion to suppress the drugs. Therefore, appellant’s conviction should be overturned.

II. The trial judge erred in denying appellant's motion for directed verdict on the basis that appellant was merely present and that there was no evidence that appellant had any knowledge of or dominion or control over the marijuana found inside the console in the rental car driven by Mr. Davy.

Appellant testified that he had been living in the Charlotte area for seven or eight years. He was working for Cabarras Plastics and also working as a caterer and a musician. Appellant explained that he is originally from Jamaica and that he works as a professional reggae musician on the side. (R. p. 115). Appellant testified that he met Mr. Davy through his son during a birthday party for his grandchildren in appellant's home state of Maryland. Appellant testified that he believed that his son and Mr. Davy were school friends. (R. pp. 113; 123). Appellant testified that on September 16, 2008, Mr. Davy had contacted him through his son, indicating that he was going to Florida or Georgia and that he wanted to stop over and stay for the night with appellant and his wife in Charlotte. Appellant testified, "I told him, well, he could stop over, you know, just for the night to rest." (R. p. 114-115).

Appellant testified that Mr. Davy came to his house and that, later, Davy gave him a ride to Greenville. Appellant testified that he had a musical "gig" in Greenville and that he was supposed to go to Greenville to promote the occasion. (R. p. 115). However, appellant explained that he needed a ride because his license was suspended. Appellant testified that he and Mr. Davy left with Davy driving the Impala he had arrived in. (R. p. 116).

Appellant testified that as they were driving on I-85, he noticed that Mr. Davy had slowed down for some reason. Appellant testified, "So, when I looked at him, you know, he say 'it's an, it's an officer, a police car behind me.' For that matter I didn't, you know, care cause, you know, why he - - you know, I know he got his driver's license as far as, you know, to my knowledge. So, I wonder why he was slowing down and by that time we got pulled over by the police officer." (R. p.

117, lines 6-15). Appellant testified that neither he nor his wife rented the Impala that Mr. Davy arrived at their house driving. (R. p. 119).

Appellant testified that he knew nothing about there being marijuana in Mr. Davy's vehicle. He testified that he never saw or smelled any marijuana. (R. pp. 126; 128). Officer Montjoy offered no testimony even suggesting that appellant possessed the drugs found in the center console of Davy's car. In order to prove constructive possession, the "State must show a defendant had dominion and control, or the right to exercise dominion and control over the [illegal substance]." State v. Halyard, 274 S.C. 397, 400, 264 S.E.2d 841, 842 (1980). Such possession can be established by circumstantial or direct evidence or a combination of the two. State v. Brown, 267 S.C. 311, 227 S.E.2d 674 (1976). The defendant's knowledge and possession may be inferred if the substance was found on premises under his control. State v. Adams, 291 S.C. 132, 135, 352 S.E.2d 483, 486 (1987). However, possession requires more than mere presence. State v. Muhammed, 338 S.C. 22, 524 S.E.2d 637 (Ct.App.1999). The State must show the defendant had dominion or control over the thing allegedly possessed or had the right to exercise dominion or control over it. Id.

In the Stanley case, the court found substantial circumstantial evidence reasonably tending to prove guilt and sufficient to submit the charge to the jury where the arresting officer found a large bag containing more than ten grams of crack cocaine on the ground beneath the accused and the officer also found \$4,220 in cash in his pockets and plastic bags and scales on the passenger's side floorboard of the vehicle. The accused had been sitting in the passenger seat. Witness testimony indicated that the vehicle's driver was driving the accused to "sell somebody something." Under these circumstances, the Stanley Court held that the trial judge did not err in denying the accused's

motion for a directed verdict. State v. Stanley, 365 S.C. 24, 42-43, 615 S.E.2d 455,464 - 465 (S.C.App.,2005).

In contrast, in appellant's case, the drugs were found inside the closed center console of Mr. Davy's vehicle and there was no testimony that appellant accessed the console. In addition, there was no testimony indicating that appellant was in any way involved with the drugs and no other evidence of drug paraphernalia being found. In State v. Heath the State did not dispute that the crack cocaine was found at Heath's residence but not in his actual possession. The police had obtained a warrant to search for crack in and around the house owned by Heath's mother. When the police arrived at the house to execute the warrant, Heath and his brother were outside in front of the house. Heath appeared to have just finished washing his car in front of the house. As the officers approached, Heath remained by the car in the front of the house; however, his brother immediately ran into the house and locked himself in the bathroom. After Heath's brother was restrained, the police discovered crack cocaine and approximately two thousand, five hundred dollars in cash. In addition, the officers discovered scales and a small crack rock in the house. Further, officers discovered numerous plastic baggies; allegedly the type used by crack dealers.

A police dog discovered a car-washing mitt in a recycling bin near the back door of the house containing crack cocaine. Accordingly, the issue was whether the State proved that Heath was knowingly in constructive possession of crack cocaine. The State presented no direct or circumstantial evidence linking Heath to the crack found. As a result, the question was whether Heath had dominion and control over the property where the crack was found. It was undisputed that Heath lived in the house where the crack cocaine was found. However, the Supreme Court concluded, as a result of the fact that the home was owned by Heath's mother and not by Heath himself, that the State's evidence had arguably established only that Heath had the right to access

the area where the crack was found, not actual dominion and control of the property. Where the State was not able to establish that Heath had dominion and control over the controlled substance itself, the South Carolina Supreme Court reversed Heath's conviction because the State failed to establish an essential element of the crime charged. State v. Heath, 370 S.C. 326, 328-330, 635 S.E.2d 18, 18 - 19 (2006).

Here, as in Heath, the State presented no direct or circumstantial evidence tying appellant to the drugs but only testimony that appellant was present, riding in the passenger seat of the vehicle in whose closed console the drugs were found. However, mere presence is insufficient to prove constructive possession. State v. Tabor, 260 S.C. 355, 364, 196 S.E.2d 111, 113 (1973). A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. McKnight, 352 S.C. 635, 576 S.E.2d 168 (2003). The trial judge should grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty. State v. Zeigler, 364 S.C. 94, 610 S.E.2d 859 (Ct.App.2005); State v. Wilds, 355 S.C. 269, 584 S.E.2d 138 (Ct.App.2003); State v. Stanley, 365 S.C. 24, 42, 615 S.E.2d 455, 464 (Ct.App.2005); State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001).

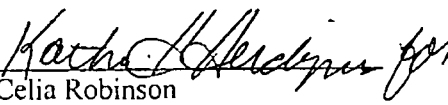
Here, given the absence of direct or circumstantial evidence establishing anything more than that appellant was merely present in the location where the drugs were found, the trial judge erred in denying appellant's motion for directed verdict. Defense counsel indicated that the car was driven by Mr. Davy and, therefore, presumably, the car was rented by Mr. Davy, although there was no evidence of a rental contract. Defense counsel argued, "Your Honor, Mr. Jackson would assert, based upon his previous objections and previous arguments that have been heard both in and outside the presence of the jury that the State is not met its burden in this case in proving that, not only did he make, not even have what was a good constructive possession of any marijuana, that he may not

have even known it was in there. There is no evidence in that matter, Your Honor, and based on that argument we would move for a directed verdict on behalf of Mr. Jackson.” (R. p. 103). The trial judge ruled, “I find that there are sufficient facts to establish a case for constructive possession in the case, and therefore, I will allow it to go to the jury.” (R. p. 104, lines 206). Under these circumstances, where the State failed to submit direct or circumstantial evidence suggesting that appellant had dominion or control over the drugs, the trial judge erred in denying appellant’s motion for directed verdict.

CONCLUSION

For all the forgoing reasons, appellant’s conviction should be reversed.

Respectfully submitted,


M. Celia Robinson
Appellate Defender

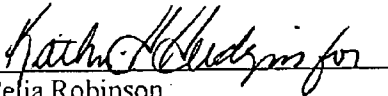
ATTORNEY FOR APPELLANT

This 7th day of October, 2010.

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."

October 7, 2010


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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

Roger L. Couch, Special Circuit Court Judge

THE STATE,

RESPONDENT,

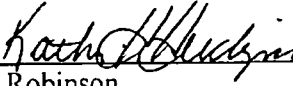
V.

ANDRE JACKSON,

APPELLANT

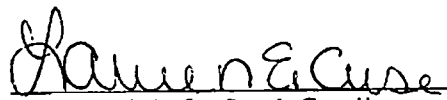
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Harold M. Coombs, Jr., Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201; and on Andre Jackson, at 915 Rock Meadow Lane, Concord, NC 28025 this 7th day of October, 2010.


M. Celia Robinson
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 7th day of October, 2010.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: August 23, 2014.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Spartanburg County
Honorable Roger L. Couch, Judge

THE STATE,

Respondent,

vs.

ANDRE JACKSON,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. The defendant states that there was no reasonable suspicion to stop the vehicle and asks whether the court erred in denying a defense motion to suppress.
2. The defendant states that he was merely present and asks whether the court should have granted his motion for directed verdict.

STATEMENT OF THE CASE

The Spartanburg County Grand Jury charged the defendant with possession with intent to distribute marijuana (09-GS-42-0268). The defendant and his counsel came to trial October 13, 14, 2009 before the Honorable Roger L. Couch, Judge, and a jury. Co-defendant (Nicholas Carl Davy [09-GS-42-0761]) was represented by counsel and tried jointly in his absence. The jury found the defendant guilty, and the court sentenced him to imprisonment for three years suspended upon time served, probation for three years, and 160 hours public service employment during probation. The defendant served a timely notice of appeal to opposing counsel.

ARGUMENT

I.

The court soundly denied the defendant's challenge to the stop.

Before trial, defense counsel said the stop was made without probable cause and challenged the stop and search. (ROA. pp. 7-8; 10).

The state opposed the challenge and offered in limine testimony. An officer saw a vehicle in the middle lane of Interstate 85 below the speed limit (54/60) - substantially less than the normal flow of traffic (54/70-75) - and impeding traffic. (ROA. pp. 10-12; 22-23; 36). Vehicles were passing on both sides. (ROA. p. 20). The minimum speed was 45 miles per hour. (ROA. p. 22). The officer stopped the vehicle. He noted the smell of marijuana when he first approached the passenger side of the vehicle and again during the course of checking the paperwork. He issued a warning ticket. The driver and defendant/passenger both said that they were going from North Carolina to Greenville but neither could give a location. Both were "stand-offish with their conversation." (ROA. pp. 12-13; 25; 27; 32-34). The officer's drug dog partner detected the odor of illegal narcotic. Officers found four clear plastic bags with green leafy substance - consistent with marijuana - under the center console between the two front seats and arrested the men. (ROA. pp. 14-17; 26-27).

The court found that the officer had probable cause to stop the vehicle based upon his assertion that the vehicle was traveling - in the middle lane of the highway - slower than the other traffic and impeding traffic. After smelling marijuana, the officer had reasonable suspicion to investigate further. When the dog alerted, the officer had

probable cause to search. (ROA. pp. 47-49). S. C. Code § 56-5-1810 (vehicle below prevailing speed of traffic to be driven in right-hand lane).

The defendant states that there was no reasonable suspicion to stop the vehicle and asks whether the court erred in denying a defense motion to suppress. (Appellant's Statement of Issue on Appeal 1). First, Respondent questions whether the defendant made a motion to suppress. Next, Respondent notes that the ground at trial for the challenge (supposed want of probable cause) is not the same as the ground on appeal (supposed want of reasonable suspicion). Assume for argument that the assignment of error to the trial court is preserved for appeal. There was no error. The officer observed a traffic violation - impeding traffic - and stopped the vehicle. The officer's observation was probable cause to believe that a traffic violation had been committed, and it justified the stop. See e.g., Whren v. United States, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d (1996). Reasonable suspicion is "less demanding than probable cause." Illinois v. Wardlow, 528 U.S. 119, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000).

II.

There was evidence viewed in the light most favorable to the state that the defendant was not merely present. Rather, he knew about the marijuana and had dominion and control, or the right to exercise dominion and control, over the marijuana.

The officer stopped a vehicle after seeing it traveling slower than the traffic flow in the middle lane of an interstate during rush hour and causing traffic to back-up. He first approached the passenger's (defendant's) side of the vehicle and smelled marijuana. The officer asked the driver (co-defendant Davy) for his driver's license, told him the reason for the stop, and asked him to step the rear of the car so that he could explain the reason for the stop and give him a warning ticket. The driver said they were going to Greenville - he had family there - but didn't know exactly where they were going in Greenville. The officer thought him kind of evasive. Similarly, the defendant was very vague. They were going to Greenville and coming back that night. The driver declined consent to search the rental vehicle since he was in a hurry. The officer went back to the car to ask the defendant for identification and to look for the paperwork on the vehicle and again smelled marijuana. He took his drug dog around the vehicle to sniff the air coming from the vehicle. The dog alerted on the passenger's (defendant's) side, near where the officer was standing talking to the defendant. The officer found four plastic bags containing substance consistent with marijuana under the plastic housing of the center console. (ROA. pp. 61-97; 70; 72-77; 80-85). The substance was close to a pound of marijuana. (ROA. pp. 98-99).

The defendant testified. He barely knew Davy and had met him at a child's birthday in Maryland. Months later when Davy was traveling to Florida, or maybe Georgia, the defendant agreed to let Davy spend the night at the defendant's home in Charlotte. (ROA. pp. 113-114; 123). The defendant needed to attend to his reggae music business in Greenville, but his driver's license was suspended. The defendant said these circumstances accounted for Davy driving him to Greenville¹ and the stop on the interstate. (ROA. pp. 115-117). Davy had the vehicle, and the defendant did not know about the marijuana (ROA. p. 118, line 21-p. 118, line 11). Insofar as the state claimed that there was a pound of marijuana between [Davy and the defendant], the car had bucket seats and a console, but he saw no marijuana. (ROA. p. 128). Unlike the officer, the defendant did not smell the marijuana. (ROA. p. 126).

The defendant moved for a directed verdict on the ground of lack of evidence reasonably tending to prove that he had constructive possession of the marijuana or that he knew of its presence. To wit, the co-defendant was driving the vehicle rented by an undetermined person. (ROA. pp. 102-103, line 17). The state opposed the motion. The evidence established that the defendant and co-defendant were beside the marijuana that was hidden in the center console, and both had dominion and control over the marijuana. (ROA. p. 103, line 18-p. 104, line 1). The court found sufficient evidence of constructive possession for the case to go to the jury. (ROA. p. 104, line 7). At the close of the

¹ The defendant said the Greenville destination was "my stop," and he rode in the car about an hour. (ROA. p. 117, lines 6-7; p. 126, lines 7-9). He planned returning home by bus. (ROA. pp. 124-125).

evidence, the defense renewed its previous motions, and the court stated that its ruling remained the same. (ROA. p. 128, line 23-p. 131, line 4).

On appeal, the defendant states that he was merely present and asks whether the court should have granted his motion for directed verdict. (Appellant's Statement of Issue on Appeal 2).

- Conviction of possession of [contraband] requires proof of possession - either actual or constructive, coupled with knowledge of its presence. Actual possession occurs when the [contraband is] found in the actual physical custody of the person charged with possession. To prove constructive possession, the State must show a defendant had dominion and control, or the right to exercise dominion and control, over the [contraband]. Constructive possession can be established by circumstantial as well as direct evidence, and possession may be shared.

State v. Hudson, 277 S.C. 200, 284 S.E.2d 773 (1981). The co-defendant was driving the rental vehicle in a manner that was potentially hazardous to other motorists, but his driving could have been intended to be overly cautious with an eye toward avoiding the attention of police. The officer stopped the vehicle and first smelled marijuana when he went initially to the defendant's/passenger's side. The driver's and defendant's vagueness about their destination or purpose in the trip - that accommodated a return trip that very night - did nothing to allay his suspicion. The rental vehicle so reeked with the scent of marijuana that the drug dog could only affirm its presence. At the time of the traffic investigation, the defendant testified that the co-defendant was taking him to a destination in Greenville, and after that point the co-defendant was free to continue his business. While other inferences could have been urged for consideration by the jury, it can be reasonably inferred that the marijuana was the purpose for the defendant and co-defen-

dant getting together for their trip to Greenville, and the defendant and co-defendant shared constructive possession of the marijuana - concealed from open view in the centrally located console. (See ROA. pp. 136-139).

A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. In reviewing a motion for directed verdict, the trial judge is concerned with the existence of the evidence, not with its weight. On appeal from the denial of a directed verdict, an appellate court must view the evidence in the light most favorable to the State. If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, we must find the case was properly submitted to the jury.

State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001)(internal citation omitted). The motion for directed verdict was correctly denied.

CONCLUSION

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

Respectfully submitted,

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September 22, 2010

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Spartanburg County
Honorable Roger L. Couch, Judge

THE STATE,

Respondent,

vs.

ANDRE JACKSON,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule
211(b), SCACR.

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September 22, 2010

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Spartanburg County
Honorable Roger L. Couch, Judge

THE STATE,

Respondent,

vs.

ANDRE JACKSON,

Appellant.

PROOF OF SERVICE

I, Harold M. Coombs, Jr., 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 his attorney of record, M. Celia Robinson, Esquire, Appellate Defender, South Carolina Commission of Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.

This 22nd day of September, 2010.

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ATTORNEY FOR RESPONDENT . .

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Andre Jackson, Appellant.

Appeal From Spartanburg County
Roger L. Couch, Circuit Court Judge

Opinion No. 4894
Heard June 15, 2011 - Filed October 5, 2011

REVERSED

Kathrine Haggard Hudgins, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy
Attorney General John W. McIntosh, Assistant
Deputy Attorney General Salley W. Elliott, Senior
Assistant Attorney General Harold M. Coombs, of
Columbia, for Respondent.

KONDUROS, J.: Andre Jackson appeals his conviction of possession with intent to distribute (PWID) marijuana arising out of a traffic stop. He

argues the trial court erred in failing to exclude the stop and denying his motion for a directed verdict due to his mere presence. We reverse.

FACTS/PROCEDURAL HISTORY

On September 16, 2008, Jackson was riding in a car being driven by Nicholas Carl Davy on I-85 in Spartanburg County. Davy was driving between 54 and 55 miles per hour when Officer Jonathan Montjoy signaled for him to pull his vehicle over. The posted maximum speed limit was 60 miles per hour and the minimum was 45 miles per hour. A search of the car produced four bags of marijuana.

Jackson and Davy were both indicted for PWID marijuana, and their cases were tried together, but Davy was not present at trial. At the outset of trial, Jackson argued the stop resulting in his arrest was invalid because the officer was without probable cause to stop and search the car. Officer Montjoy testified the vehicle was in the middle of three lanes of traffic and traveling much slower than the other drivers on the road. He also provided that the car was impeding the flow of traffic; cars were passing the vehicle on both sides, and there was a line of cars waiting to pass him. Officer Montjoy determined by radar gun that the car was traveling 54 miles per hour. He testified the normal speed for that time (rush hour) on that road is 70 to 75 miles per hour.

Officer Montjoy testified that once he pulled the car over, he approached it and smelled marijuana in the car. He then asked Davy, the driver, to step to the rear of the vehicle. After talking to Davy and Jackson separately while processing the warning, he noticed their answers were not "real accurate." Although they both told him they were coming from North Carolina and going to Greenville, they could not give an actual location. Officer Montjoy also attempted to find a rental car agreement and Jackson's ID. Officer Montjoy then deployed his K-9 around the vehicle, and the dog alerted on the vehicle. Officers searched the vehicle and found four clear plastic bags with marijuana "[u]nder the center console, where the gear shifter is, the plastic housing there," which was in between the two front bucket seats. Both Davy and Jackson were then arrested for PWID marijuana.

The trial court found section 56-5-1560 of the South Carolina Code (2006) does not reference speed limits and states that no person should drive a vehicle at such a slow speed to impede the normal and reasonable flow of traffic. The trial court noted the testimony was that the vehicle was traveling in the center lane with a long line of traffic behind it and being passed on both sides. The trial court found the officer had probable cause to stop the car based on the statute.

At the close of the State's case, Jackson moved for a directed verdict, arguing the State had not met its burden in proving he had constructive possession of the marijuana or knew it was in the car. The trial court found the State had presented sufficient facts to establish a case for constructive possession and denied the motion.

Jackson testified that he met Davy once. Jackson's twenty-two-year-old son and Davy were school friends, and Jackson and Davy met at Jackson's grandchild's birthday party. Davy asked to stay with Jackson overnight at his home in Charlotte, North Carolina, on a trip from Maryland to Florida or Georgia. Davy was giving Jackson a ride to Greenville, South Carolina because Jackson had a music "gig" he needed to promote, and Jackson's driver's license was suspended at the time. At the close of the defense's case, Jackson renewed his motion for a directed verdict, which the trial court again denied.

The jury convicted Jackson of PWID.¹ The trial court sentenced him to three years suspended to the three days he had already served and probation for three years. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court is bound by the trial court's factual findings unless they are clearly erroneous. Id.

¹ The jury also convicted Davy of PWID.

LAW/ANALYSIS

I. Directed Verdict

Jackson maintains the trial court erred in denying his motion for a directed verdict because he was merely present at the scene. We agree.

In reviewing a denial of a motion for a directed verdict, an appellate court must review the evidence in the light most favorable to the State. State v. Venters, 300 S.C. 260, 264, 387 S.E.2d 270, 272 (1990). If any direct or any substantial circumstantial evidence reasonably tends to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury. State v. Weston, 367 S.C. 279, 292-93, 625 S.E.2d 641, 648 (2006).

When considering a motion for a directed verdict, a trial court is concerned only with the existence of evidence, not its weight. State v. Stuckey, 347 S.C. 484, 498, 556 S.E.2d 403, 410 (Ct. App. 2001). Grant of a defense motion for directed verdict of acquittal is proper only "if there is a failure of competent evidence tending to prove the charge." Rule 19(a), SCRCrimP; State v. Jenkins, 278 S.C. 219, 222, 294 S.E.2d 44, 46 (1982). A trial court must submit the case to the jury if any direct or substantial circumstantial evidence has been presented that reasonably tends to prove the defendant's guilt or from which his guilt may be fairly and logically deduced. State v. Fennell, 340 S.C. 266, 270, 531 S.E.2d 512, 514 (2000). However, the trial court should grant a directed verdict motion when the evidence presented merely raises a suspicion of guilt. State v. Cherry, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004). Suspicion implies a belief or opinion as to guilt based upon facts or circumstances not amounting to proof, but the trial court is not required to find the evidence infers guilt to the exclusion of any other reasonable hypothesis. Id.

Conviction of possession of [illegal drugs] requires proof of possession-either actual or constructive, coupled with knowledge of its presence. Actual possession occurs when the drugs are found to be in

the actual physical custody of the person charged with possession. To prove constructive possession, the State must show a defendant had dominion and control, or the right to exercise dominion and control, over the [drugs]. Constructive possession can be established by circumstantial as well as direct evidence, and possession may be shared.

State v. Hudson, 277 S.C. 200, 202, 284 S.E.2d 773, 774-75 (1981). "Possession requires more than mere presence." State v. Stanley, 365 S.C. 24, 43, 615 S.E.2d 455, 465 (Ct. App. 2005). "In drug cases, the element of knowledge is seldom established through direct evidence, but may be proven circumstantially." State v. Hernandez, 382 S.C. 620, 624, 677 S.E.2d 603, 605 (2009). "Knowledge can be proven by the evidence of acts, declarations, or conduct of the accused from which the inference may be drawn that the accused knew of the existence of the prohibited substances." Id.

In Hernandez, the trial court denied the defendants' motion for a directed verdict on drug trafficking charges when they occupied a rented moving truck that arrived at a place designated for a controlled drug exchange closely behind a car driven by others implicated in the transaction. Id. at 622-23, 677 S.E.2d at 604. The supreme court found the State's contention that the defendants knew the occupants of car and thus had knowledge of the drugs in the tractor trailer being driven by undercover agents was pure speculation and insufficient to support the defendants' conviction. Id. at 625, 677 S.E.2d at 605. The court found that while the defendants' conduct may have been suspicious, mere suspicion was insufficient to support a guilty verdict. Id.

In State v. Brown, 267 S.C. 311, 315, 227 S.E.2d 674, 676 (1976):

The sum total of the State's evidence against Brown is that he was a passenger in a car on a deserted rural road about 1:00 A.M., that [the driver] had an undetermined sum of cash in a large roll, that Brown was nervous and had no identification, that there was a smell of marijuana in the car, and that there was a

large opaque bag containing eight pounds of marijuana on the rear floorboard. [The driver] knew Brown's name as Chuck Brown and Brown told [the driver] to be quiet when [the driver] started to admit the crime.

The court found the State presented no evidence "as to ownership of the car or any special relation [Brown] had with [the driver] or the owner from which Brown's control of the car or its contents might be inferred. The bag containing the marijuana was opaque and so situated that a front seat passenger might never have seen the bag, much less its contents." Id. "There was no evidence that Brown was a seller or user of drugs, or that he even recognized the odor of marijuana[,] or that he was a close friend of the driver, or that he spent a substantial part of the night with him." Id. at 315-16, 227 S.E.2d at 676-77 (citations omitted). "Although [the officer] testified he smelled the odor of burned marijuana[,] he found no residue of such in or about the car of the defendant." Id. at 316, 227 S.E.2d at 677. The court found "[The driver]'s statements in no way incriminated [Brown]." Id. at 317, 227 S.E.2d at 677. The court determined, "The evidence when reviewed in the light most favorable to the State fails to make a jury issue of [Brown]'s dominion and control of the marijuana, an essential element of both crimes. Therefore, the trial court was in error in denying [Brown]'s motion for a directed verdict." Id.

In United States v. Blue, 957 F.2d 106, 107 (4th Cir. 1992), a police officer conducting nighttime surveillance of a house for possible illegal drug activity saw two men leave the house and enter a parked car on the street. The officer pulled the car over in a well-lit area to investigate a seatbelt violation. Id. While approaching the car, the officer saw the shoulder of the passenger "dip as if the passenger were reaching under the seat with his right hand." Id. After the driver and passenger exited the car, the officer searched the passenger for any weapons and "discovered a needle, a syringe, and a small amount of heroin, and therefore placed [the passenger] under arrest." Id. A consensual search of the car revealed a loaded gun under the passenger seat. Id. Both the driver and the passenger denied knowledge or ownership of the gun. Id. The car did not belong to the passenger, and no evidence was presented that the passenger had been in the car before. Id. at 108.

The passenger was convicted of possession of a firearm by a convicted felon. Id. at 106. On appeal, he challenged the sufficiency of the evidence to support his conviction. Id. at 107. To support its case, the government had relied on (1) the officer's testimony the passenger's shoulder dipped as he approached the vehicle and (2) the discovery of the gun under the passenger seat. Id. at 107-08. The Fourth Circuit determined this evidence was insufficient to support the passenger's conviction:

Beyond [the officer's] claim that he saw [the passenger]'s shoulder dip and the discovery of the pistol underneath the passenger seat, the government did not substantiate its case against [the passenger]. It did not produce fingerprints or any other physical evidence which would link [him] with the gun. The government introduced no evidence demonstrating that [the passenger] owned the gun or testimony that [he] had been seen with the gun. The car in which the gun was found did not belong to [the passenger]; in fact, no evidence indicated that [he] had ever been in that car before. Without more evidence than that proffered by the government, we cannot sustain [the passenger]'s conviction.

Id. at 108.

The Blue court further noted although the shoulder dip alone did not transform the passenger from a mere passenger in the car to a possessor of whatever was discovered underneath the seat in which he was sitting, "the facts of this case fall outside, but just barely, the realm of the quantum of evidence necessary to support a finding of constructive possession." Id.

Although the State contends the center console was centrally located and thus within Jackson's dominion and control, Officer Montjoy testified the marijuana was "[u]nder the center console where the gear shifter is, the plastic housing there." Jackson did not own or rent the car; Davy provided it and was driving it. Additionally, Jackson and Davy had only met once.

previously, at Jackson's grandchild's birthday party. Although Officer Montjoy testified he smelled marijuana as soon as he approached the vehicle, an officer testified likewise in Brown. However, in Brown when officers found a large opaque bag containing eight pounds of marijuana on the rear floorboard, an officer's testimony he smelled marijuana and testimony the passenger was nervous were not enough evidence for the State's case to survive the passenger's directed verdict motion. Further, in Blue the officer testified the passenger made a shoulder dip and the gun was found under his seat in the car. However, this was not sufficient to sustain the passenger's conviction. Here, the evidence against Jackson is even less than in either Brown or Blue. The drugs were more out of sight, and the State presented no evidence that Jackson was nervous or made any suspicious movements. Accordingly, the State failed to present sufficient circumstantial evidence of knowledge to submit the case to the jury. Thus, the trial court erred in denying Jackson's motion for a directed verdict.

II. Traffic Stop

Jackson contends the trial court erred in failing to exclude or suppress the stop by finding the officer had probable cause to believe the driver had committed a traffic violation. Because we find the trial court erred in failing to direct a verdict in favor of Jackson, we need not consider this issue. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

CONCLUSION

Because the State failed to present sufficient evidence to establish Jackson had dominion and control over the marijuana, the trial court's denial of Jackson's directed verdict motion is

REVERSED.

SHORT and GEATHERS, JJ., concur.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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

THE STATE,

Respondent,

vs.

ANDRE JACKSON,

Appellant.

PETITION FOR REHEARING

Pursuant to Rule 221, SCACR, Petitioner submits with particularity points the Court may have overlooked or misapprehended in State v. Jackson, Opinion No. 4894 (S.C. Ct. App. filed Oct. 5, 2011) and asks this Court to rehear the case:

1. The officer stopped the vehicle after observing it traveling substantially less than the normal flow of rush hour traffic in the middle lane of an interstate and impeding traffic. (ROA. pp. 10-12; 22-23; 36; 61). A vehicle traveling below the prevailing speed of traffic should be driven in the right-hand lane. S. C. Code § 56-5-1810. (FBOR pp. 3-4).
2. The officer saw an Enterprise document but did not see who rented the vehicle. (ROA p. 74, lines 2-10). The defendant testified that he had not rented it, and his confederate had the vehicle. (ROA p. 119, lines 5-11).

3. At the scene, the officer understood that the defendant and his confederate gave him vague responses, but they were going to Greenville and coming back that very night. (ROA p. 85). At trial, the defendant testified with specificity: His confederate slowed down after spotting the police. Greenville was his stop for the purpose of attending to his music business, and his confederate was continuing. He planned on returning home by bus. He did not know that marijuana was in the vehicle, and he did not smell it. (ROA pp. 115-117; pp. 124-126).
4. The defendant testified about an established relationship between his confederate and himself. The defendant had invited his confederate to spend the previous night at the defendant's home. (ROA. pp. 113-114; p. 123).
5. The officer first smelled marijuana when he went to the defendant's/passenger's side. The rental vehicle so reeked with the scent of marijuana that the drug dog only affirmed the scent. (ROA. pp. 61-67; p. 70; pp. 72-77; pp. 80-85).
6. Supplemental citation for Issue II of the Final Brief of Respondent Pursuant to Rule 208 (7), SCACR dated June 9, 2011: Maryland v. Pringle, 540 U.S. 366, 124 S.Ct. 795, 157 L.Ed.2d 769 (2003)(Pringle was front seat passenger in vehicle, and drugs were found in armrest of back seat; no passenger acknowledged ownership of contraband, and officers had probable cause to arrest all passengers; a passenger will often be engaged in a common enterprise with the driver and have the same interest in concealing evidence of their wrongdoing; quantity of drugs and cash in the car indicated the likelihood of drug dealing, an enterprise to which a dealer would be unlikely to admit an innocent person with the potential to furnish evidence against him).

7. Supplemental citation for Issue II of the Final Brief of Respondent Pursuant to Rule 208 (7), SCACR dated June 9, 2011: Cochran v. State, 684 S.E.2d 136 (Ga. App. 2009)(finding sufficient evidence to establish a passenger's possession of raw marijuana after the vehicle was stopped for a traffic violation and police found the contraband hidden in the fender well; smell of hidden marijuana, manifested by odor noticeable by anyone inside vehicle, allowed an inference that, combined with other evidence, could show a connection between the defendant/passenger and the contraband - even without showing that defendant would necessarily recognize the odor; ostensible purpose of trip never happened, and defendant was on long journey with intimate partner; joint constructive possession of marijuana consistent with both defendant and driver having access to trunk of vehicle).

8. This Court found there was no need to consider Jackson's challenge to the officer having "probable cause to believe the driver had committed a traffic violation." State v. Jackson. The appellant challenged the existence of the officer's having "reasonable suspicion" for the stop. (Appellant's Statement of Issues on Appeal).

WHEREFORE, Petitioner asks that the Court rehear the case.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

October 6, 2011

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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

THE STATE,

Respondent,

vs.

ANDRE JACKSON,

Appellant.

PROOF OF SERVICE

I, Harold M. Coombs, Jr., certify that I have served the within Petition for Rehearing on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Kathrine H. Hudgins, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina 29211.

I further certify that all parties required by Rule to be served have been served.

This 6th day of October, 2011.

Harold M. Coombs, Jr.
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The South Carolina Court of Appeals

The State,

Respondent,

v.

Andre Jackson,

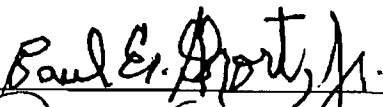
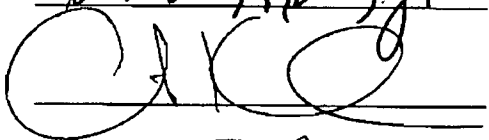
Appellant.

The Honorable Roger L. Couch
Spartanburg County
Trial Court Case No. 2009-GS-42-00268

ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a 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.

It is, therefore, ordered that the Petition for Rehearing be denied.


_____. J.

_____. J.

_____. J.

Columbia, South Carolina

cc: Kathrine Haggard Hudgins, Esquire
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Chief Deputy Attorney General John W. McIntosh
Assistant Deputy Attorney General Salley W. Elliott
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FILED
NOV 18 2011