STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from York County
Honorable John C. Hayes, III, Circuit Court Judge

THE STATE,

Respondent,

vs.

KENNETH DARRELL MORRIS, II,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Procedural History

Petitioner Kenneth Darrell Morris, II was arrested following a traffic stop during which illegal narcotics were discovered. On July 3, 2008, the York County grand jury indicted Morris for trafficking in Ecstasy and possession of marijuana with intent to distribute. On April 15, 2009, a jury trial was commenced in the York County court of general sessions with the Honorable John C. Hayes, III, circuit court judge, presiding. At the conclusion of trial, the jury convicted Morris of trafficking in Ecstasy and the lesser-included offense of simple possession of marijuana. The trial judge sentenced Morris to concurrent terms of imprisonment of thirty years for the trafficking conviction and one year for the simple possession conviction while fining Morris $50,000 for the trafficking conviction. Morris then filed and perfected an appeal.

Subsequently, following oral argument, the Court of Appeals unanimously affirmed Morris' conviction. State v. Morris, Op. No. 4872 (S.C. Ct. App. filed Aug. 17, 2011). Morris petitioned the Court of Appeals for rehearing, and the petition was denied. However, the Court of Appeals withdrew its previous opinion and filed a substituted opinion. State v. Morris, Op. No. 4872 (S.C. Ct. App. re-filed Nov. 2, 2011). Morris then filed a petition for a writ of certiorari in the Supreme Court.

Factual History

On the afternoon of February 6, 2008, Officer L.T. Vinesett, Jr., a member of the York County Sheriff's Office's highway interdiction team, was patrolling I-77 in York County with a state constable when he observed a Ford 500, which he knew to be a common rental car, following another vehicle too closely. (R. pp. 6-7). In response, Officer Vinesett drove towards the Ford. (R. p. 7). As the officer drew closer, the driver

of the Ford quickly exited the interstate and drove onto another highway. (R. p. 7). Officer Vinesett followed the Ford to a gas station, activated his blue lights, and initiated a traffic stop. (R. pp. 7-8). The traffic stop began at approximately 2:06 p.m. (State's Ex. # 16 (Videotape of the Traffic Stop)).

After stopping the vehicle, Officer Vinesett approached from the passenger's side and observed two occupants inside. (R. p. 8). He asked the driver for his license and registration, and Petitioner Kenneth Darrell Morris, II, the driver of the vehicle, produced a North Carolina driver's license while Brandon Nichols, the passenger, produced a rental agreement for the Ford. (R. pp. 8-9). The rental agreement indicated Nichols rented the vehicle and was the only authorized driver. (R. pp. 9-10).

When Officer Vinesett initially approached the Ford, the passenger window of the vehicle was open. (R. p. 10). Through the open window, Officer Vinesett noticed an odor of marijuana emanating from inside. (R. p. 10). Additionally, he observed hollowed-out cigars and loose tobacco scattered all over the interior of the car, including on the center console and on the floorboards of the vehicle. (R. p. 11). Officer Vinesett took note of the hollowed-out cigars because his experience taught him that drug users commonly hollow out cigars and replace the tobacco inside with marijuana to allow the users to covertly smoke marijuana while creating the appearance they are only smoking cigars. (R. p. 11).

After obtaining Morris' license, Officer Vinesett asked Morris to step out of the vehicle and move to the front passenger seat of the officer's patrol car in order to avoid the rain. (R. p. 10; p. 13). Officer Vinesett spoke with Morris in the patrol car at approximately 2:08 p.m. (State's Ex. # 16). During his conversation with Officer Vinesett, Morris claimed he and Nichols were returning from a trip to Atlanta and had

gone to visit some girls. (R. p. 13). Morris also revealed he had a prior criminal record resulting from drug charges. (R. p. 32; p. 78; State's Ex. # 16). After speaking with Morris, Officer Vinesett left Morris in the patrol car and went to speak with Nichols. (R. p. 14). Officer Vinesett's conversation with Nichols took place at approximately 2:10 p.m. (State's Ex. # 16). Outside of the presence of Morris, Nichols offered a different account of their activities, claiming he and Morris were returning from Atlanta and had gone to see Morris' cousin play basketball. (R. p. 14). Nichols then exited the Ford, and Officer Vinesett again noticed the odor of marijuana coming from the vehicle. (R. p. 14).

After speaking with both Morris and Nichols, Officer Vinesett requested the assistance of a canine unit at approximately 2:12 p.m. (R. p. 35; State's Ex. # 16). At that time, Officer Vinesett also continued checking Morris' license while completing the initial purpose of the traffic stop. (R. p. 32). Officer Vinesett noted he was still working on the traffic stop at approximately 2:13 p.m. (State's Ex. # 16). Then, shortly before 2:14 p.m., Officer Vinesett frisked Morris with consent, allowed him to go to the restroom while accompanied by the state constable, and informed him the traffic stop was not yet complete. (R. pp. 34-35; State's Ex. # 16).

Thereafter, the requested canine officer arrived on the scene. (R. p. 14). At approximately 2:15 p.m., which was roughly nine minutes into the stop, the officers asked Nichols for consent to search the vehicle, and Nichols refused. (State's Ex. # 16). In the rainy weather conditions, the police dog walked around the exterior of the car at approximately 2:16:30 p.m. (R. p. 15; State's Ex. # 16). After walking around the vehicle, the dog did not alert to the presence of drugs. (R. p. 15). However, Officer Vinesett noticed the police dog was not focusing on the vehicle, was shaking off rain

water, and was looking around. (R. p. 15). The officer concluded the dog did not appear to like being out in the rainy conditions. (R. p. 15).

Subsequently, Officer Vinesett informed Nichols he smelled marijuana in the car during the stop, but Nichols denied any marijuana had been smoked. (State's Ex. # 16). At approximately 2:20 p.m., which was roughly fourteen minutes into the stop, Officer Vinesett briefly searched the interior of the car without consent. (R. p. 16; pp. 40-41; State's Ex. # 16). The search of the interior lasted less than thirty seconds. (State's Ex. # 16). Officer Vinesett then looked into the trunk of the vehicle and, within less than thirty seconds, located a gift box with a sandwich bag inside containing 393 Ecstasy pills. (R. pp. 16-17; pp. 40-41; State's Ex. # 16). Following the discovery of the narcotics, both men were quickly arrested. (R. p. 17). Subsequently, approximately one-half pound of marijuana was discovered hidden under the spare tire during an inventory search of the vehicle. (R. p. 66). The drugs recovered from the vehicle were analyzed and conclusively identified as illegal narcotics. (R. p. 70; p. 71). Morris was then indicted for trafficking in Ecstasy and possession of marijuana with intent to distribute, and he proceeded to trial. (R. pp. 91-94).

At the outset of trial, Morris moved to suppress the recovered drugs as the fruits of an illegal search and an unlawful detention, and the trial judge conducted a suppression hearing on Morris' motion.[1] (R. p. 4). During the suppression hearing, Officer Vinesett recounted the details of the traffic stop. (R. p. 6). Specifically, Officer Vinesett testified he noticed the smell of marijuana coming from the vehicle when he initially approached the vehicle. (R. p. 10). After smelling the odor of marijuana, Officer Vinesett stated he believed there was cause to extend the traffic stop and question Morris

[1] A recording of the traffic stop was played during the suppression hearing. (Tr. p. 46; State's Ex. # 16).

and Nichols. (R. pp. 32-33). Furthermore, he testified about the hollowed-out cigars and loose tobacco he observed and the inferences he drew from those items. (R. p. 11). Officer Vinesett also testified about the police dog's failure to alert on the vehicle and explained why he did not believe that lack of an alert was dispositive due to the dog's unfocused demeanor in the rain. (R. p. 15).

On cross-examination, Officer Vinesett testified the average traffic stop without any indicators of criminal activity usually lasted approximately five minutes. (R. p. 20). He further acknowledged he did not include references to any indicators of the presence of drugs in his initial police report, but he identified the indicators he observed at the scene, which primarily consisted of the hollowed-out cigars and the smell of marijuana.[2] (R. p. 23; p. 29). Additionally, he conceded the drug dog's failure to alert was a fair indicator that no drugs were present. (R. p. 38). However, he explained his experience enabled him to distinguish between the smell of marijuana and the smell of cigars and testified he concluded that, based on his training and the indicators he observed, someone was or had been smoking marijuana in the rental car. (R. p. 31; pp. 43-44).

At the conclusion of the hearing, defense counsel argued the extension of the traffic stop was not supported by a reasonable articulable suspicion and no probable cause existed to search the trunk of the vehicle. (R. pp. 51-56). After considering the arguments from counsel, the trial judge denied the motion to suppress. (R. p. 57). The trial judge found the detention was reasonable and the scope of the stop was not exceeded. (R. p. 57). He ruled the stop was not excessively long, and the police dog's

[2] In addition to Officer Vinesett's testimony, Commander Marvin Brown, the supervisor of the York County Sheriff's Office's narcotics unit, also testified during the suppression hearing. (R. p. 49). Commander Brown indicated Officer Vinesett did not include any indicators in his initial incident report based on unit policies. (R. p. 49). He noted case summaries prepared after the incident report contained the reasons for the stop and all indicators. (R. p. 50). Officer Vinesett included the indicators leading to the search in his case summary of Morris' stop. (R. pp. 50-51).

failure to alert to the presence of drugs did not require the officers to terminate the detention. (R. pp. 58-59). He also ruled the subsequent inventory search was valid. (R. p. 60). The trial judge based his rulings on the smell of marijuana, the training of the officer, and the testimony regarding the hollowed-out cigars and tobacco observed in the vehicle. (R. p. 57). While noting the inconsistencies in Morris and Nichol's stories may have heightened the officer's suspicions, the trial judge declined to rely on those inconsistencies in reaching his decision. (R. pp. 61-62). The trial judge also found the search was supported by probable cause. (R. p. 62). Thereafter, Morris was convicted of trafficking in Ecstasy and simple possession of marijuana, and he appealed.

On appeal, the Court of Appeals affirmed Morris' convictions. State v. Morris, 395 S.C. 600, 603, 720 S.E.2d 468, 469 (Ct. App. 2011). Regarding the reasonableness of the detention, the Court held the officer had reasonable suspicion to extend the length and scope of the traffic stop after the officer detected the odor of marijuana and observed hollowed-out cigars and loose tobacco in Morris' vehicle. Id. at 608, 720 S.E.2d at 471-472. In reaching that conclusion, the Court specifically noted the trial judge found Officer Vinesett's testimony regarding the smell of marijuana to be credible. Id. at 607-608, 720 S.E.2d at 471. Regarding the reasonableness of the search, the Court instructed:

> The trial court specifically found that in Officer Vinesett's experience blunts are often hollowed to accommodate the smoking of marijuana. Similarly, the loose tobacco in the car indicated the blunts were recently hollowed in the car. Considering these factors in conjunction with the background odor of marijuana, the circumstances are sufficient to warrant a reasonable and prudent person to believe Morris and Nichols possessed marijuana. Accordingly, the officers had probable cause to search anywhere in the vehicle where marijuana could be located. The trial court properly admitted the drug evidence discovered in the trunk.

Id. at 610, 720 S.E.2d at 473.

ARGUMENT

The Court of Appeals properly affirmed the trial judge's denial of Morris' suppression motion because, under the totality of the circumstances, the officers had a reasonable articulable suspicion justifying the extension of the traffic stop after detecting several suspicion factors indicative of drug activity, including the odor of marijuana, and had probable cause to search anywhere in the vehicle where drugs might be found, including in the trunk of the vehicle where the narcotics were discovered, based on the indicators of criminal activity detected by the officers.

Morris contends the Court of Appeals erred in affirming the trial judge's denial of his suppression motion. Morris maintains the officers did not have a reasonable articulable suspicion justifying the expansion of the scope and length of the traffic stop and did not have probable cause to search the trunk of the vehicle Morris was driving. To the contrary, the officers possessed a reasonable articulable suspicion of criminal activity under the totality of the circumstances after detecting several suspicious factors consistent with drug activity, including the odor of marijuana. Furthermore, based on the detection of the odor of marijuana along with the other suspicious factors, the officers had probable cause to search anywhere in the vehicle where marijuana might be found, including in the trunk. Accordingly, the trial judge properly denied Morris' motion to suppress the drugs discovered during the search of the car, and the Court of Appeals correctly affirmed the trial judge's ruling after finding it was supported by the evidence. Morris' petition for a writ of certiorari should be denied.

STANDARD OF REVIEW

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

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

ANALYSIS

A. Reasonableness of the Detention

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

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

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

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

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

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

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

The reasonable suspicion standard "is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence[.]" Illinois v. Wardlow, 528 U.S. 119, 123 (2000). "Reasonable suspicion is more than a general hunch but less than what is required for probable cause." State v. Willard, 374 S.C. 129, 134, 647 S.E.2d 252, 255 (Ct. App. 2007). In order for an officer to have reasonable suspicion regarding the presence of illegal drugs, the officer is required to

have a particularized and objective basis arising from the totality of the circumstances that would lead an individual to suspect drugs are located in a lawfully stopped vehicle. State v. Banda, 371 S.C. 245, 254, n. 4, 639 S.E.2d 36, 41 (2006).

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

In the case sub judice, the traffic stop and detention of Morris was objectively reasonable under the totality of the circumstances, and any further extension of the scope of the stop was supported by reasonable articulable suspicion. Initially, Officer Vinesett unquestionably had probable cause to initiate the traffic stop after observing Morris

commit a traffic infraction. See State v. Nelson, 336 S.C. 186, 193, 519 S.E.2d 786, 789 (1999) ("As a general matter, the decision to stop an automobile is reasonable where police have probable cause to believe that a traffic violation has occurred."). Thereafter, during the course of the ensuing traffic stop, Officer Vinesett developed a reasonable articulable suspicion based on the suspicious factors he detected, which permitted the officer to extend the scope and duration of the stop.

Most critically, Officer Vinesett detected the odor of marijuana and observed hollowed-out cigars and loose tobacco scattered throughout the vehicle shortly after initiating the traffic stop. Based on his training and experience, Officer Vinesett perceived the smell of marijuana and the hollowed-out cigars to be strong indicators that marijuana might be hidden in the vehicle. See State v. Odom, 376 S.C. 330, 335, 656 S.E.2d 748, 751 (Ct. App. 2007) (holding the officer had a reasonable articulable suspicion of the existence of drugs after smelling a strong odor of marijuana, observing a cigar on the dashboard, hearing Odom admit he has smoked marijuana earlier, and seeing an empty holster in vehicle); State v. Butler, 353 S.C. 383, 390, 577 S.E.2d 498, 501 (Ct. App. 2003) (holding the officer was justified in extended the scope of a traffic stop after smelling the odor of alcohol). Furthermore, although not relied upon by the trial judge in his analysis of the stop, Morris and his passenger presented inconsistent stories to the officers about their trip, Morris was driving a rental car, which has been recognized as an indicator of drug activity, and Morris and his passenger stated they were travelling from Atlanta, which has been recognized as a known drug hub. See Wallace, 392 S.C. at 55, 707 S.E.2d at 455 (finding inconsistent stories between a driver and passenger, third-party vehicle ownership, and Atlanta's status as a drug hub to be relevant factors in establishing a reasonable articulable suspicion of drug activity); Provet, 391 S.C. at 504,

706 S.E.2d at 518 (considering the fact third-party vehicle ownership is commonly connected with drug trafficking in finding the officer had reasonable suspicion to extend a traffic stop). However, even without consideration of those additional factors, the odor of marijuana and the presence of the hollowed-out cigars established a reasonable articulable suspicion of criminal activity under the totality of the circumstances. Therefore, Officer Vinesett was justified in expanded the scope of his investigation and the length of the traffic stop.

Morris' challenge to the reasonableness of the stop primarily focuses on the length of the detention and the credibility of Officer Vinesett's testimony regarding the odor of marijuana. The length of the detention from the moment of the activation of the officer's blue lights to the time of Morris' arrest was approximately fifteen minutes. Cf. Provet, 391 S.C. at 499, 706 S.E.2d at 516 (finding the initial traffic stop was not unreasonably extended even if the officer's questioning was unrelated to the purpose of the traffic stop where the entire stop lasted less than eleven minutes). While there is no firm rule as to the appropriate length of a stop and detention, Morris' stop was arguably reasonable in length notwithstanding the existence of reasonable suspicion to expand the scope of the stop. See United States v. Sharpe, 470 U.S. 675, 683 (1985) (finding a twenty-minute detention during an investigatory traffic stop was objectively reasonable); see also Branch, 537 F.3d at 338 ("We begin with the basic fact that much of Branch's 30-minute detention was justified by the 'ordinary inquiries incident' to a routine traffic stop." (citations omitted)); United States v. Jeffus, 22 F.3d 554, 557 (4th Cir. 1994) (finding a fifteen-minute traffic stop to be reasonable); see, e.g., United States v. Jones, 44 F.3d 860, 872 (10th Cir. 1995) (approving of a thirty-minute traffic stop); United States v. Hardy, 855 F.2d 753, 761 (11th Cir. 1988) (finding a fifty-minute investigatory

stop to be reasonable). Regardless, under the totality of the circumstances, the officer was justified in extending the stop based upon reasonable suspicion even if the scope of the initial traffic stop was exceeded.

Regarding the credibility of Officer Vinesett's testimony, the trial judge was in the best position to weigh the credibility of the testimony and evidence presented during the suppression hearing. See State v. Smith, 383 S.C. 159, 167-168, 679 S.E.2d 176, 181 (2009) ("Clearly, the trial judge was in the best position to assess the credibility of the witnesses that testified at the hearing on the motion for a new trial."); State v. Cutro, 332 S.C. 100, 117, 504 S.E.2d 324, 332 (1998) ("The trial judge, not this Court, is in the best position to be the arbiter of [the witness'] credibility."); State v. Tutton, 354 S.C. 319, 325, 580 S.E.2d 186, 190 (Ct. App. 2003) ("The determination of a witness's credibility must be left to the trial judge who saw and heard the witness and is therefore in a better position to evaluate his or her veracity."). Critically, the trial judge found Officer Vinesett's unrefuted testimony in regards to the odor of marijuana to be credible, and the trial judge's factual findings are entitled to substantial deference on appeal. See Baccus, 367 S.C. at 48, 625 S.E.2d at 220 ("This Court is bound by the trial court's factual findings unless they are clearly erroneous.").

Applying the appropriate deferential standard of review, the evidence and testimony presented during the suppression hearing established Officer Vinesett conducted the traffic stop in a reasonable manner and developed a reasonable articulable suspicion of criminal activity before extending the stop. See Segura v. United States, 468 U.S. 796, 806 (1984) ("By its terms, the Fourth Amendment forbids only 'unreasonable' searches and seizures."). The trial judge properly determined the traffic stop was reasonable under the totality of the circumstances, and his ruling was supported by the

evidence. See State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011) ("When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling."). The Court of Appeals properly affirmed the trial judge's ruling. Morris' petition for a writ of certiorari should be denied.

B. Validity of the Search

The Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const. amend. IV. Any evidence seized as the result of an unreasonable search and seizure must be excluded from trial. State v. Weaver, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007). The well-settled rule is warrantless searches are unreasonable per se unless they fall under an exception to the Fourth Amendment's warrant requirement. State v. Peters, 271 S.C. 498, 501, 248 S.E.2d 475, 476 (1978). South Carolina courts have recognized several exceptions to the warrant requirement, including the automobile exception. State v. Bailey, 276 S.C. 32, 36, 274 S.E.2d 913, 915 (1981).

The automobile exception is based on: (1) the ready mobility of automobiles along with the potential that evidence may be lost or removed before a warrant is obtained; and (2) the lessened expectation of privacy in motor vehicles. State v. Cox, 290 S.C. 489, 491, 351 S.E.2d 570, 571 (1986). Under this exception, law enforcement officers can conduct a warrantless search of an automobile based on probable cause alone. State v. Bultron, 318 S.C. 323, 332, 457 S.E.2d 616, 621 (Ct. App. 1995). "If a vehicle is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment permits police to search the vehicle without more." Weaver, 374 S.C. at 320, 649 S.E.2d at 482. Furthermore, the rationale for the search does not disappear even after the vehicle is immobilized or taken into police custody. State v. Moore, 377 S.C. 299, 310, 659 S.E.2d 256, 262 (Ct. App. 2008).

If probable cause exists supporting the search of a lawfully stopped automobile, the search can be extended to every part of the vehicle and all of its contents potentially containing the object of the search. Bultron, 318 S.C. at 332, 457 S.E.2d at 621; see also Wyoming v. Houghton, 526 U.S. 295, 307 (1999) ("We hold that police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search."). "The scope of a warrantless search based on probable cause is no narrower – and no broader – than the scope of a search authorized by a warrant supported by probable cause." United States v. Ross, 456 U.S. 798, 823 (1982). "The scope of a warrantless search of an automobile is defined by the object of the search and the places in which there is probable cause to believe that it may be found." State v. Perez, 311 S.C. 542, 546, 430 S.E.2d 503, 505 (1993).

Probable cause is "a justifiable determination, based upon the totality of the circumstances and in view of all the evidence available to law enforcement officials at the time of the search, that there exists a practical, nontechnical probability that a crime is being committed or has been committed and incriminating evidence is involved." Bultron, 318 S.C. at 332, 457 S.E.2d at 621. "Probable cause may be found somewhere between suspicion and sufficient evidence to convict." State v. Blassingame, 338 S.C. 240, 250, 525 S.E.2d 535, 540 (Ct. App. 1999). However, the probable cause standard does not require absolute certainty. In re Care and Treatment of Brown v. State, 372 S.C. 611, 619, 643 S.E.2d 118, 122 (Ct. App. 2007).

Numerous courts have considered the issue of the level of significance that the existence of an odor of marijuana has to a probable cause determination. The overwhelming majority position in both state and federal courts is the detection of an odor of marijuana establishes probable cause justifying a warrantless search. See State v.

Zamora, 114 Ariz. 75, 77, 559 P.2d 195, 197 (Ariz. Ct. App. 1976) (finding an officer's detection of the faint odor of marijuana during a traffic stop, unverified by the other officers at the scene, provided probable cause to search the entire vehicle and trunk); State v. Betz, 815 So. 2d 627, 633 (Fla. 2002) ("Our conclusion here aligns this Court with a number of our sister jurisdictions in which courts have concluded that the smell of burnt marijuana, in combination with other circumstances, leads to law enforcement officers' possession of probable cause to search the entirety of a motor vehicle."); State v. Folk, 238 Ga. App. 206, 208, 521 S.E.2d 194, 198 (Ga. Ct. App. 1999) (holding an officer's detection of the odor of burning marijuana alone constituted probable cause for a warrantless vehicle search); People v. Kazmierczak, 461 Mich. 411, 416, 605 N.W.2d 667, 669 (Mich. 2000) ("Like the majority of courts in other states and jurisdictions, we are persuaded that detection of the odor of either fresh marijuana or marijuana smoke, standing alone, provides probable cause for a warrantless search."); Cowan v. Mississippi Bureau of Narcotics, 2 So.3d 759, 766 (Miss. Ct. App. 2009) (finding an officer had probable cause to search after smelling marijuana upon opening a passenger door); State v. Smith, 192 N.C. App. 690, 694, 666 S.E.2d 191, 194 (N.C. Ct. App. 2008) (finding an officer's detection of the odor of marijuana established probable cause to search even in a situation where no drugs were ever recovered); see also United States v. Johns, 469 U.S. 478, 482 (1985) ("After the officers came closer and detected the distinct odor of marihuana, they had probable cause to believe that the vehicles contained contraband."); see, e.g., Andrea Levinson Ben-Yosef, Annotation, Validity of Warrantless Search of Motor Vehicle Based on Odor of Marijuana – Federal Cases, 188 A.L.R. Fed. 487 (2003) ("The majority of courts have found that the odor of marijuana alone supplies probable cause for a warrantless search."); Andrea Levinson Ben-Yosef, Annotation, Validity of

Warrantless Search of Motor Vehicle Based on Odor of Marijuana – State Cases, 114 A.L.R. 5th 173 (2003) ("The majority of courts have found that the odor of marijuana alone supplies probable cause for a warrantless search.").

Additionally, the Fourth Circuit Court of Appeals has addressed whether the odor of marijuana can establish probable cause. In United States v. Haley, 669 F.2d 201, 202 (4th Cir. 1982), an officer smelled marijuana on the defendants and inside of a vehicle lawfully stopped for speeding. Before getting a search warrant, the officer unlocked the trunk, opened a large garbage bag, and discovered marijuana. Id. at 203. The car was later searched after the officer procured what he believed to be a warrant, and over two hundred pounds of marijuana were found in the trunk. Id. The Court of Appeals found "[s]ufficient probable cause arises when the officer smells marijuana inside the vehicle[,]" and reversed the district court's suppression of the drugs. Id. at 203-204.

Thereafter, in United States v. Scheetz, 293 F.3d 175 (4th Cir. 2002), the Fourth Circuit Court of Appeals again addressed the issue of whether probable cause can arise from the smell of marijuana. The defendant in Scheetz was stopped for performing an illegal u-turn directly after passing a sign notifying drivers of an impending police checkpoint. Id. at 182-183. An officer smelled marijuana emanating from the vehicle, and the car was searched. Id. at 183. The search revealed marijuana in a knapsack found in the vehicle. Id. The Court of Appeals affirmed the denial of the defendant's suppression motion, holding: "Once the car was properly stopped and the narcotics officers smelled marijuana, the narcotics officers properly conducted a search of the car." Id. at 184 (citing United States v. Morin, 949 F.2d 297, 300 (10th Cir. 1991)).

Although not controlling, the Maryland Court of Special Appeals addressed both probable cause based on the odor of marijuana and the scope of a resulting search in

Wilson v. State, 174 Md. App. 434, 921 A.2d 881 (Md. Ct. Spec. App. 2007). In Wilson, an officer stopped Wilson's rental vehicle for speeding. Id. at 438, 921 A.2d at 883. While talking with Wilson, the officer smelled the odor of burnt marijuana and decided to search the vehicle. Id. During the search of the passenger compartment, the officer found no evidence of a crime. Id. However, a subsequent search of the trunk revealed over six pounds of marijuana. Id. After a thorough review of United States Supreme Court cases along with federal and state cases, the Maryland Court of Special Appeals concluded the odor of burnt marijuana emanating from a vehicle provides probable cause to believe marijuana is located in the vehicle. Id. at 454, 921 A.2d at 892. In affirming the suppression of the recovered marijuana, the Court instructed:

> To adopt appellant's argument, the trunk, or any other area outside of the passenger compartment, becomes a safe harbor for the transportation of drugs for both users and traffickers who use drugs. We are not persuaded that a Fourth Amendment reasonableness analysis dictates that result. Probable cause is a "flexible, common-sense standard" to be applied in a "practical" and "non-technical" manner.

Id. at 455-456, 921 A.2d at 893 (citations omitted).

Similarly, the South Carolina Supreme Court has previously addressed whether the detection of the odor of marijuana alone can equate to probable cause. In State v. Lane, 271 S.C. 68, 70, 245 S.E.2d 114, 115 (1978), a delivery man noticed an odor coming from two packages that were scheduled to be delivered to Lane's store. The delivery man contacted the police, an officer detected the odor of marijuana coming from the packages, the smaller package was opened, and marijuana was discovered. Id. The officers obtained a warrant, allowed the delivery of the packages to be completed, and subsequently arrested Lane. Id. at 71, 245 S.E.2d at 115. At trial, the trial judge refused to admit the package opened without a warrant, but he allowed the admission of the

second package. Id. at 71, 245 S.E.2d at 115-116. In determining whether the drugs recovered in the search of the second package were properly admitted, the Supreme Court considered whether the warrant to search the second package was independently supported by probable cause without relying on the knowledge obtained by opening the first package. Id. at 71, 245 S.E.2d at 116. The Court held: "From the record it is evident that the odor emanating from the packages alone was a sufficient basis to establish probable cause as to their contents when it is considered that an officer of the law, familiar with the odor of marijuana, believed the odor being emitted was that of marijuana." Id. at 72, 245 S.E.2d at 116.

In the case at bar, the officers had probable cause to search Morris' rental vehicle based on the totality of the circumstances. Most significantly, Officer Vinesett testified he smelled the odor of marijuana emanating from the car. The detection of the odor of marijuana coupled with the discovered of the hollowed-out cigars, which are commonly used to conceal marijuana use, established probable cause to search anywhere in the vehicle where marijuana might be hidden. Furthermore, Morris and Nichols offered inconsistent explanations for the purpose of their trip, and Morris was driving a rental vehicle he was not authorized to drive. Although the officer's detection of the odor of marijuana alone established a probable cause basis to conclude marijuana was hidden in the vehicle, the additional indicators of criminal activity coupled with the detection of the odor of marijuana provided Officer Vinesett with grounds to find the existence of "a practical, nontechnical probability that a crime is being committed or has been committed and incriminating evidence is involved." Bultron, 318 S.C. at 332, 457 S.E.2d at 621.

Morris' challenge to the reasonableness of the search focuses primarily on his contention that Officer Vinesett's suspicion that the crime of "marijuana consumption"

had been committed was allegedly dispelled before he searched the trunk. Initially, after Officer Vinesett detected the odor of burnt marijuana in the Ford, he had probable cause to believe the occupants of the vehicle were or had been in **possession** of marijuana, which was a necessary prerequisite for them to be able to smoke or consume it. See S.C. Code Ann. § 44-53-370(c) (prohibiting the possession – not consumption – of any controlled substance, including marijuana). Thus, Officer Vinesett had probable cause to look for marijuana in the vehicle. See, e.g., United States v. Lewis, 606 F.3d 193, 198 (4th Cir. 2010) ("When Lewis rolled down his window to comply, Mills smelled the odor of marijuana emanating from the vehicle. At that point, the officers possessed probable cause to search the vehicle[.]"); United States v. Humprhies, 372 F.3d 653, 658 (4th Cir. 2004) ("While smelling marijuana does not assure that marijuana is still present, the odor certainly provides probable cause to believe that it is."). Thereafter, Officer Vinesett observed hollowed-out cigars in the vehicle but did not locate any marijuana in his search of the interior. However, the fact he located hollowed-out cigars, which had **not** been used to smoke tobacco since the officer noticed it had been removed from them, supported his probable cause belief marijuana was hidden in the vehicle. Furthermore, although the police dog called to the scene failed to alert to the presence of narcotics, that failure did not negate the officer's probable cause to search based on other indicators of criminal activity he observed, particularly in light of the fact the officer believed the dog's failure to alert was due to its distracted, unfocused demeanor.[3] Instead, the failure to alert was merely one factor to be considered under the totality of the circumstances in

[3] Notably, the officer's belief that the police dog's failure to alert was not due to an absence of marijuana in the vehicle proved to be correct. Approximately one-half of a pound of marijuana was discovered hidden in the trunk of the vehicle Morris' was driving. (R. p. 66). Thus, the police dog's failure to alert was **not** because there was no marijuana for the dog to detect.

deciding if probable cause existed and, critically, did not require Officer Vinesett to abandon his investigation in light of the other indicators of criminal activity he detected.[4]

Under the automobile exception, the officers were authorized to search anywhere in the vehicle where marijuana could be concealed, including the trunk where the drugs were ultimately discovered. See Ross, 456 U.S. at 825 ("If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search."). Based on detection of the odor of marijuana and the discovery of the hollowed-out cigars, which Officer Vinesett knew to be commonly associated with drug use, in the passenger compartment, the officers had probable cause to believe narcotics could be located in the trunk of the car because it was

[4] Although the impact of a drug-detection dog's failure to alert has not yet been addressed in South Carolina, the overwhelming majority of courts considering the issue have concluded it is simply a factor to be considered under the totality of the circumstances and does not negate the existence of other factors establishing probable cause. See United States v. Jodoin, 672 F.2d 232, 236 (1st Cir. 1982) ("The dog's failure to react does not, in our view, destroy the 'probable cause' that would otherwise exist. It is just another element to be considered by the magistrate."), abrogated on other grounds by Bloate v. United States, __ U.S. __, 130 S. Ct. 1345 (2010); United States v. Frost, 999 F.2d 737, 744 (3rd Cir. 1997) (finding a drug-sniffing dog's failure to alert on a suitcase did not eliminate probable cause justifying a search of the suitcase derived from the other existing factors); United States v. Ramirez, 342 F.3d 1210, 1212-1213 (10th Cir. 2003) ("The factors giving rise to reasonable suspicion in the first place remained unchanged by the positive or negative results of the first sniff test. . . . We will not require investigators to cease an otherwise reasonable investigation solely because a dog fails to alert, particularly when we have refused to require that a dog sniff test be conduct at all."); State v. Sanchez-Loredo, 42 Kan. App. 2d 1023, 1029, 220 P.3d 374, 378 (Kan. Ct. App. 2009) (holding a drug-detection dog's failure to alert to the presence of narcotics did not eliminate the probable cause already established by the other circumstances); State v. Jackson, 42 So. 3d 368, 374 (La. 2010) (finding the officer had probable cause to search the vehicle after detecting the odor of marijuana even though a drug-sniffing dog failed to alert on the vehicle); McKay v. State, 149 Md. App. 176, 188, 814 A.2d 592, 599 (Md. Ct. Spec. App. 2002) ("[A] drug sniffing dog's failure to detect drugs does not automatically negate probable cause. It is, instead, but one factor to be considered in the probable cause determination."); State v. Williamson, 146 N.M. 488, 499, 212 P.3d 376, 387 (N.M. 2009) (finding a drug-detection dog's failure to alert did not negate probable cause for the search where the dog's failure to alert was sufficiently explained under the circumstances); State v. Alexander, 151 Ohio App. 3d 590, 604, 784 N.E.2d 1225, 1236 (Ohio Ct. App. 2003) (holding a drug-sniffing dog's failure to alert on a bag did not negate the other circumstances establishing probable cause and, instead, was a single factor to consider when evaluating the totality of the circumstances); Commonwealth v. Brown, 924 A.2d 1283, 1289 (Pa. Super. Ct. 2007) ("[T]he failure of a trained dog to respond to the alleged presence of narcotics is but one factor to be considered in adjudging whether the totality of the circumstances establishes probable cause. Given the recognized fallibility of the dogs' sense of smell and its vulnerability to confusion by other ambient odors, a dog's failure to alert will not defeat probable cause where other factors, viewed within the totality of the circumstances, continue to support it.").

an area where marijuana could easily be concealed. See Lane, 271 S.C. at 72, 245 S.E.2d at 116 (finding the detection of the odor of marijuana alone established probable cause supporting the issuance of a search warrant); see, e.g., Wilson, 174 Md. App. at 455, 921 A.2d at 892 ("It is not unreasonable for an officer to believe that the odor of burnt marijuana indicates current possession of unsmoked marijuana somewhere inside of the vehicle, including the trunk."). Accordingly, the search of the entire car, including the trunk, was supported by probable cause. Therefore, the search of the passenger compartment and trunk was lawful under the totality of the circumstances, and the search was not unreasonable. See Foster, 269 S.C. at 378, 237 S.E.2d at 591 ("It is only unreasonable searches and seizures that are prohibited.").

The trial judge properly determined the search of the vehicle was supported by probable cause under the totality of the circumstances of the traffic stop. That probable cause, which primarily arose from the officer's detection of the odor of marijuana, was sufficient to warrant a search of the entire vehicle, including the trunk. See Texas v. Brown, 460 U.S. 730, 741 (1983) (instructing probable cause is a flexible, common-sense standard). The trial judge's ruling was supported by the evidence and was entitled to substantial deference on appeal. Because the trial judge's ruling was supported by the evidence, the Court of Appeals correctly affirmed the denial of Morris' suppression motion. See Wright, 391 S.C. at 442, 706 S.E.2d at 326 ("When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling."). Morris' petition for a writ of certiorari should be denied.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 5, 2012

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

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S.C. Supreme Court

On Writ of Certiorari to the Court of Appeals
Appeal from York County
Honorable John C. Hayes, III, Circuit Court Judge

THE STATE,

Respondent,

vs.

KENNETH DARRELL MORRIS, II,

Petitioner.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Return to Petition for Writ of Certiorari on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Johnny Gardner, Esquire
212 Main Street
Conway, SC 29526

I further certify that all parties required by Rule to be served have been served. This 5th day of April, 2012.

Ellen R. DuBois

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