

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM YORK COUNTY

John C. Haynes, III, Circuit Court Judge

Opinion No. 4872 (S.C. Ct. App. Filed August 17, 2011
Withdrawn, Substituted and Refiled November 2, 2011)

State of South Carolina, ...Respondent,

v.

Kenneth Darrell Morris, II. Appellant.

APPENDIX

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S.C. Supreme Court

Alan M. Wilson
Attorney General

John W. McIntosh
Deputy Attorney General

Salley W. Elliott
Assistant Deputy Attorney General

Mark Farthing
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

Kevin S. Brackett,
Solicitor, Sixteenth Judicial Circuit

Moss Justice Center
1675-1A York,
York, SC 29745
(803) 628-3020

Johnny Gardner
212 Main Street
Conway, SC 29526
(843) 248-7135

ATTORNEY FOR APPELLANT

ATTORNEYS FOR RESPONDENT

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Kenneth Darrell Morris, II,

Appellant.

Appeal From York County
John C. Hayes, III, Circuit Court Judge

Opinion No. 4872
Heard March 8, 2011 – Filed August 17, 2011
Withdrawn, Substituted and Refiled November 2, 2011

AFFIRMED

Johnny Gardner and Jonathan Hiller, both of
Conway, for Appellant.

Attorney General Alan M. Wilson, Chief Deputy
Attorney General John W. McIntosh, Assistant
Deputy Attorney General Salley W. Elliott, and
Assistant Attorney General Mark R. Farthing, all of
Columbia; and Solicitor Kevin S. Brackett, of York,
for Respondent.

THOMAS, J.: During a traffic stop, police officers searched the trunk of a car driven by Kenneth Darrell Morris, II, and discovered a quantity of ecstasy pills. A large amount of marijuana was also found during the subsequent inventory search. During his trial for trafficking ecstasy and possession of marijuana with intent to distribute, Morris unsuccessfully moved to suppress the drugs as fruit of an illegal search. A jury convicted Morris of both charges. Morris appeals the trial court's decision not to suppress the drugs. We affirmed the decision in a published opinion filed August 17, 2011. We now issue this amended opinion to emphasize the outcome of this appeal is governed by our standard of review.

FACTS

On the afternoon of February 6, 2008, Morris and a passenger, Brandon Nichols, were traveling northbound on I-77 in York County in a rented Ford 500. While riding in an unmarked police cruiser, Officer L.T. Vinesett, Jr., and Constable W.E. Scott noticed the Ford following a truck too closely. The vehicle exited the interstate and proceeded to a gas station and rest area, where Officer Vinesett initiated a traffic stop.

Officer Vinesett approached the passenger side of the vehicle, where Nichols was sitting. Officer Vinesett asked for Morris's license and registration, and after a rental agreement was produced, Officer Vinesett noticed the car was rented to Nichols and Morris was not an authorized driver. Speaking through the passenger window, Officer Vinesett instructed Morris to exit the car, and as Morris opened the driver's side door, Officer Vinesett noticed hollowed Phillies Blunts¹ in the center console and blunt tobacco in the center console and on the floorboard.

To avoid the rain, Officer Vinesett had Morris sit in the front passenger seat of the police cruiser while he inquired about Morris's travel plans. Morris told him Nichols rented the vehicle the previous day in Greensboro, North Carolina, and they were on their way back from visiting some women

¹ Phillies Blunts are a brand of inexpensive, American-made cigars. The tobacco inside a Phillies Blunt is often emptied in order to roll a marijuana cigar.

in Atlanta, Georgia. Officer Vinesett also asked Morris whether Morris had a drug record. Morris disclosed he had been arrested for a marijuana offense when he was a minor.

Officer Vinesett returned to the Ford, and outside the presence of Morris, Nichols stated the pair was returning from a basketball game in Atlanta. Officer Vinesett consequently radioed for a nearby canine unit to bring a drug dog to the scene. He explained that he pulled over two men who offered conflicting stories of their plans, one of whom had a previous drug conviction, and that he had seen loose blunt tobacco in the car, suggesting they had been rolling marijuana in the blunts.

While waiting for the drug dog, Morris consented to a search of his person, and the search yielded no contraband. Morris then went to the restroom under Constable Scott's supervision. Officer Vinesett asked Nichols to exit the car and requested consent to search Nichols's person. Nichols consented, and again, the search yielded no contraband.

Moments later, Officer Gibson arrived with a drug dog. While Morris was still in the restroom, Officer Vinesett and Officer Gibson asked Nichols for permission to search the car, saying the officers would use the drug dog if consent was not given. Nichols refused to give consent, so Officer Gibson walked the dog around the car twice. The dog did not alert on either lap around the car and was returned to the police cruiser. Officer Vinesett again asked Nichols for consent to search the car, and Nichols again refused. Roughly thirteen minutes after the stop had been initiated, Nichols stated he "was ready to go."

Shortly thereafter, the officers held a conversation away from Morris and Nichols. Officer Vinesett returned to the Ford, leaned through the still open window of the car, and looked around for a few moments. He then returned to Nichols, who was still seated in the police cruiser, and stated that he could have "swor[n he] could smell some marijuana." Nichols responded that Officer Vinesett was confusing the smell of the Black & Mild he recently smoked with marijuana and he neither had marijuana, nor was he a marijuana smoker.

At that time, Officer Vinesett and Officer Gibson returned to the car and searched the passenger compartment. The emptied blunts contained no marijuana or marijuana residue, and the officers found no other evidence of contraband in the passenger compartment. However, Officer Vinesett searched the trunk and eventually found a plastic bag containing 393 ecstasy pills inside a gift box. The men were arrested slightly over fourteen minutes after the initiation of the stop. The car was impounded, and a subsequent inventory search of the car yielded nearly a half pound of marijuana hidden under the spare tire.

At trial, Morris moved to suppress the drug evidence, arguing the officers illegally extended the scope and length of the traffic stop and probable cause did not support the search of the trunk. During the suppression hearing, Officer Vinesett testified that, although he failed to mention it to Constable Scott at the scene or Officer Gibson when he requested the dog, he smelled the odor of burnt marijuana when he first approached the car. The trial court denied the motion. It specifically discounted what Officer Vinesett classified as Morris's and Nichols's "inconsistent stories." However, it found Officer Vinesett's testimony regarding the smell of marijuana credible, and it held the length and scope of the stop was reasonable in light of the circumstances. Additionally, the trial court found that even though the dog did not alert on the car, the marijuana smell, loose tobacco, and hollowed blunts, in light of the officer's knowledge and experience, amounted to probable cause to search the entire car, including the trunk. This appeal followed.

ISSUES ON APPEAL

- I. Did the trial court err in finding the officers had reasonable suspicion to expand the scope and length of the traffic stop?
- II. Did the trial court err in finding the search of the trunk was supported by probable cause?

STANDARD OF REVIEW

In Fourth Amendment search and seizure cases, our standard of review is limited to the following:

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling. The appellate court will reverse only when there is clear error.

State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011) (citations and internal quotation marks omitted). "[T]his deference does not bar this Court from conducting its own review of the record to determine whether the trial judge's decision is supported by the evidence." State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010).²

² Tindall articulated the standard of review subsequently repeated in Wright. However, Tindall's ensuing discussion included a footnote explaining that this standard of review requires a two-part analysis: (1) whether the record supports the trial court's factual findings and (2) whether those factual findings establish reasonable suspicion or probable cause. See Tindall, 388 S.C. at 523 n.5, 698 S.E.2d at 206 n.5 ("While we acknowledge that we review under the deferential 'any evidence' standard, this Court still must review the record to determine if the trial judge's ultimate determination is supported by the evidence. In short, we must ask first, whether the record supports the trial court's assumed findings . . . and second, whether these facts support a finding that the officer had reasonable suspicion of a serious crime to justify continued detention of Tindall." (citation omitted)).

I. Scope and Length of the Stop

Morris argues the trial court erred in failing to suppress the drugs because (1) Officer Vinesett's testimony he smelled burnt marijuana during the detention lacks credibility and (2) Officer Vinesett unlawfully extended the traffic stop.

Upon a lawful traffic stop, an officer "may order the driver to exit the vehicle . . . [,] request a driver's license and vehicle registration, run a computer check, and issue a citation." State v. Pichardo, 367 S.C. 84, 98, 623 S.E.2d 840, 847 (Ct. App. 2005) (citations omitted). However, a lawful traffic stop "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 also Pichardo, 367 S.C. at 98, 623 S.E.2d at 848 ("Once the purpose of that stop has been fulfilled, the continued detention of the car and the occupants amounts to a second detention."). The extension of a lawful traffic stop is permitted if (1) the encounter becomes consensual or (2) the officer has a reasonable, articulable suspicion of other illegal activity. Pichardo, 367 S.C. at 99, 623 S.E.2d at 848.

Reasonable suspicion requires "'a particularized and objective basis' that would lead one to suspect another of criminal activity." 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)). It "is something more than an inchoate and unparticularized suspicion or hunch." State v. Rogers, 368 S.C. 529, 534, 629 S.E.2d 679, 682 (Ct. App. 2006). Therefore, in determining whether reasonable suspicion exists, the trial court must consider the totality of the circumstances. Id.

Initially, we must reject Morris's first argument. Regardless of whether we believe Officer Vinesett's testimony that he smelled marijuana, the trial court found that testimony to be credible. The appellate court's task in reviewing the trial court's factual findings on a Fourth Amendment issue is simply to determine whether any evidence supports the trial court's findings. See State v. Asbury, 328 S.C. 187, 193, 493 S.E.2d 349, 352 (1997) ("This Court's scope of review is determined by our State constitution which limits our scope of review in law cases to the correction of errors of law. In

criminal cases, appellate courts are bound by fact findings in response to preliminary motions where there has been conflicting testimony or where the findings are supported by the evidence and not clearly wrong or controlled by an error of law." (citations omitted)).

We must also reject Morris's second argument. Under the facts of this case as found by the trial court, we must affirm the trial court's holding reasonable suspicion existed to extend the duration and scope of the stop for a reasonable investigation of drug activity. Officer Vinesett testified he smelled marijuana as he approached the car, and after requesting Morris's license and registration, he learned Morris was not an authorized driver. Cf. State v. Butler, 353 S.C. 383, 390, 577 S.E.2d 498, 501 (Ct. App. 2003) (finding that an officer's detection of the odor of alcohol during a traffic stop justified the extension of the stop based on the reasonable suspicion that open containers were located in the vehicle) (per curiam); see also State v. Odom, 376 S.C. 330, 335, 656 S.E.2d 748, 751 (Ct. App. 2007) (indicating that the sight of Swisher Sweet cigars, the strong odor of marijuana, the defendant's admission he smoked marijuana earlier in the day, and the presence of a gun holster in the back seat amounted to reasonable suspicion of the existence of drugs). Upon stopping the Ford, moreover, Officer Vinesett had the authority to order Morris out of the car, and when he did so, he observed the hollow blunts and loose tobacco, which in his experience indicated drug use. See Pichardo, 367 S.C. at 98, 623 S.E.2d at 847-48 (providing that upon a lawful traffic stop, an officer may order the driver out of the vehicle, "request a driver's license and vehicle registration, run a computer check, and issue a citation"). Thus, Officer Vinesett properly gained reasonable suspicion Morris and Nichols were using drugs, and he was permitted to take reasonable steps to confirm or dispel this suspicion. See State v. Corley, 383 S.C. 232, 241, 679 S.E.2d 187, 192 (Ct. App. 2009) (providing that during a traffic stop, "the police may briefly detain and question a person upon a reasonable suspicion, short of probable cause for arrest, that the person is involved in criminal activity"; "[t]he scope and duration of [this investigative] detention must be strictly tied to and justified by the circumstances that rendered its initiation proper"; and normally, this permits an officer to attempt to obtain information confirming or dispelling the officer's suspicion), aff'd as modified, 392 S.C. 125, 708 S.E.2d 217 (2011). He did

so by asking both Morris and Nichols a series of questions, receiving consent to search their persons, and calling in a drug dog.

II. The Search

Morris next argues the trial court erred in declining to suppress the drug evidence as fruit of an illegal search. Morris does not contest Officer Vinesett's search of the passenger compartment, but he argues Officer Vinesett lacked probable cause to search the trunk. We disagree.

The Fourth Amendment prohibits unreasonable searches, and a warrantless search generally is unreasonable. State v. Peters, 271 S.C. 498, 501, 248 S.E.2d 475, 476 (1978). However, the ready mobility of and the lessened expectation of privacy in automobiles endorse an exception to that rule based upon probable cause. State v. Cox, 290 S.C. 489, 491, 351 S.E.2d 570, 571 (1986). A probable cause analysis involves the use of a fact-based, objective perspective that requires more than reasonable suspicion of criminal activity:

Probable cause is a commonsense, nontechnical conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. Probable cause to search exists where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found in a particular place. The principal components of the determination of probable cause will be whether the events which occurred leading up to the search, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause.

State v. Brown, 389 S.C. 473, 482, 698 S.E.2d 811, 816 (Ct. App. 2010) (internal citations omitted).

"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). Therefore, "[i]f probable cause justifies the [warrantless] 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." United States v. Ross, 456 U.S. 798, 825 (1982); see also State v. Brannon, 347 S.C. 85, 94, 552 S.E.2d 773, 777 (Ct. App. 2001) (Anderson, J., concurring in result only) ("Under the automobile exception, if probable cause exists to justify the warrantless 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.").

In this case, the trial court made no separate rulings to support its finding of probable cause beyond those supporting its pronouncement of reasonable suspicion. The trial court simply stated, "He had probable cause to search." In light of the summary nature of this ruling, we must determine whether the same factual findings that supported the finding of reasonable suspicion also support a determination of probable cause. Emphasizing our deferential standard of review, we determine they do.

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.

CONCLUSION

For the aforementioned reasons, the ruling of the trial court is

AFFIRMED.

FEW, C.J., and KONDUROS, J., concur.

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM YORK COUNTY

John C. Haynes, III, Circuit Court Judge

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SC Court of Appeals

State of South Carolina, ... Respondent,

v.

Kenneth Darrell Morris, II, ... Appellant.

Opinion No. 4872

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for Kenneth Darrell Morris, II petitions the Court for rehearing. In support of this Petition, the Appellant submits the following Fourth Circuit Court of Appeals Opinion: United States v. Stephen Gerard Digiovanni, ___ F. 3d __ (4th Cir. 2011) (Opinion No.10-4417).

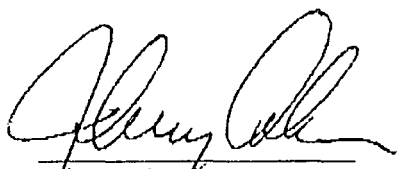
Digiovanni was decided during the pendency of this appeal. The undersigned is informed and believes that Digiovanni is relevant to the issues of the continued detention and the warrantless search of the vehicle in the present case.

Additionally, Appellant respectfully submits that the Court of Appeals opinion misapprehended the facts relative to the officer's allegation that he smelled marijuana and the law regarding probable cause for a warrantless search of an automobile.

Appellant submits that even if the officer smelled burnt marijuana that this fails to establish probable cause to search the trunk. Appellant respectfully submits that probable cause to search would only allow a search where the item might logically be found. *United States v. Ross* 456 U.S. 798 (1982). In the present case, it would not be reasonable to expect to find burnt marijuana in the trunk of the automobile.

Based on the above argument, the undersigned seeks rehearing.

Respectfully submitted,



Johnny Gardner
Gardner Law Firm, P.A.
212 Main Street
Conway, SC 29526

September 1, 2011

ATTORNEY FOR APPELLANT

The South Carolina Court of Appeals

The State,

Respondent,

v.

Kenneth Darrell Morris, II,

Appellant.

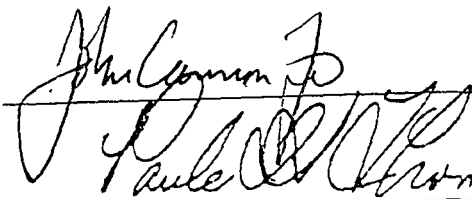
The Honorable John C. Hayes, III
York County
Trial Court Case No.
2008-GS-46-02834
2008-GS-46-02837

ORDER

After a careful consideration of the Petition for Rehearing, the Court is unable to discover any material fact or principle of law that has been either overlooked or disregarded. Hence, there is no basis for granting a rehearing, and it is ordered that the Petition for Rehearing be denied. The Court hereby withdraws opinion number 4872, filed August 17, 2011, and substitutes the attached opinion to emphasize the outcome of this appeal is governed by our standard of review.

FILED

NOV 2 2011

 C.J.

 J.

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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM YORK COUNTY

John C. Haynes, III, Circuit Court Judge

State of South Carolina, ...Respondent,

v.

Kenneth Darrell Morris, II. Appellant.

RECORD ON APPEAL

Johnny Gardner, Esq.
P.O. Box 1001
Conway, SC 29526
(843) 248-7135

Jonathan Hiller, Esq.
P.O. Box 1001
Conway, SC 29526
(843) 248-7135

ATTORNEYS FOR APPELLANT

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(PROCEEDINGS, APRIL 15, 2009)

THE COURT: All right, Mr. Springs.

MR. SPRINGS: This Mr. Irby Walker and Mr. Johnny Gardner.

MR. GARDNER: Johnny Gardner, yes, sir.

MR. SPRINGS: I believe Johnny is from Myrtle Beach.

Your Honor, if I may, I would call the next case before this Honorable Court.

THE COURT: All right.

MR. SPRINGS: We are ready to begin the trial of the State of South Carolina versus Kenneth Darrell Morris, II..

I'm holding two indictments True Billed by our York County Grand Jury, the first one numbered 2008-GS-46-2837 charging Mr. Morris with trafficking in Ecstasy. It's going to be a number of dosage units between one hundred and five hundred units. It would be a third offense, one of those twenty-five to thirty offenses.

And the other indictment is possession of marijuana with intent to distribute on 2008-GS-46-2834, possession of marijuana with intent to distribute. It would be a third offense.

Mr. Walker, how does Mr. Morris plead to those two charges, sir?

1 MR. WALKER: If it please the court, Your Honor,
2 he pleads not guilty.

3 MR. SPRINGS: Your Honor --

4 THE COURT: I have other two indictments up here.

5 MR. SPRINGS: We are not proceeding on those two
6 proximity indictments.

7 THE COURT: Let me -- those -- yeah, they are
8 proximity. Okay. Let me give them back to you so I won't
9 end up telling the jury something that's not correct.

10 MR. SPRINGS: Your Honor, the jury panel is coming
11 in at 11:30.

12 THE COURT: All right.

13 MR. SPRINGS: We do have some pretrial. We would
14 like to go ahead and get that done before our jury panel
15 gets here.

16 THE COURT: All right. I have got a memorandum of
17 law in support of the search issue, so I guess it's a motion
18 to suppress --

19 MR. SPRINGS: Yes, sir.

20 MR. WALKER: Yes, sir. We have a memorandum, Your
21 Honor, we would like to pass up.

22 THE COURT: Okay.

23 MR. GARDNER: And, judge, I would apologize to the
24 court and to the solicitor, it was -- I caught a couple of
25 typos after I had left Conway.

1 THE COURT: That's all right.

2 Mr. Morris, you can sit down.

3 MR. GARDNER: We will just flip through where we
4 are on that.

5 THE COURT: Let me hear the defense issue as to --
6 or let me hear the motion. I have got it in writing, but
7 let me hear the motion.

8 MR. WALKER: Mr. Gardner will be presenting the
9 motion, Your Honor.

10 MR. GARDNER: Thank you, judge.

11 Well, the motion is basically to suppress both the
12 marijuana -- or both the marijuana and the other drugs as
13 fruit of an illegal search and an unlawful detention.

14 I don't know how the court would wish to proceed
15 with this --

16 THE COURT: Well, I read --

17 MR. GARDNER: -- at this time.

18 THE COURT: I read their brief --

19 MR. GARDNER: Yes, sir.

20 THE COURT: -- Mr. Springs gave me, so I know a
21 little bit about the facts, so I guess we might as well go
22 ahead and start taking testimony on that.

23 MR. GARDNER: Yes, sir.

24 MR. SPRINGS: Thank you.

25 We call Officer Vinesett.

1 If you would, step up and be sworn.

2 THE COURT: Is that okay, to go ahead?

3 MR. GARDNER: Yes, sir, I think that's fine.

4 The facts, the way that they are written in the
5 briefs are a little bit different, but the facts are the
6 facts, and that's why I would like to take the testimony.

7 THE COURT: Yes.

8 MR. GARDNER: And also, judge, we have got a
9 videotape of the whole incident and that would speak pretty
10 clear, I do believe.

11 THE COURT: Okay.

12 MR. GARDNER: Officer Vincent?

13 MR. SPRINGS: Vinesett.

14 MR. WALKER: Vinesett.

15 OFFICER L.T. VINESETT, JR., having been first duly
16 sworn, testified as follows:

17 THE COURT: I'm getting a little confused, because
18 they have got a right to cross-examine modestly, but do you
19 have any questions?

20 MR. SPRINGS: Before we begin the proffer?

21 I believe --

22 THE COURT: Let's just go and do it like we always
23 do. You go ahead and present your witnesses.

24 MR. SPRINGS: Yes, sir.

25

1 DIRECT EXAMINATION BY MR. SPRINGS:

2 Q. Officer, tell everybody your name, sir.

3 A. Lonnie Vinesett, Jr..

4 Q. Are you a member of what's known as the HIT team, the
5 highway interdiction team?

6 A. Yes, sir.

7 Q. And what is the mission briefly of the HIT team?

8 A. We normally work the major highways and interstates of
9 York County as a proactive enforcement, to locate contraband
10 or illegal items, warning people, or anything illegal
11 happening on the interstate.

12 Q. Okay. All right. And as part of that mission, do you
13 stop a number of cars -- a good many cars out on the
14 highways here in the county?

15 A. Yes, sir.

16 Q. All right. I'm going to ask you about things that
17 happened on February the 6th, 2008, around two o'clock in
18 the afternoon. What highway were you on around two o'clock
19 that afternoon?

20 A. I was on I-77.

21 Q. Okay. And what was the weather like?

22 A. It was rainy and cloudy.

23 Q. Anybody with you in your car?

24 A. Yes, sir, Constable Scott.

25 Q. Okay. And about two o'clock that afternoon did you --

1 did anything get your attention? Did anything get your
2 attention a little bit after two o'clock?

3 A. I was traveling 77 northbound and saw a vehicle, a Ford
4 500. That's pretty known to be a rental car. There are
5 certain indicators that let us know that more than likely
6 that a car is a rental. I saw the vehicle following another
7 vehicle too close.

8 Q. Yes, sir.

9 A. As I was --

10 Q. Let me stop you. Is that a violation of the South
11 Carolina traffic laws, to follow another vehicle too close?

12 A. Yes.

13 Q. All right. Did you have some specialized training
14 before you started this HIT team work?

15 A. Yes, sir, we have had several trainings all over the
16 nation, specializing in highway interdiction and drug
17 enforcement.

18 Q. Okay. So you said you noticed it was a rental car and
19 it was following too closely. Then what happened?

20 A. As I was getting closer to the vehicle, the vehicle
21 made a quick exit off the interstate onto Highway 21 and was
22 taking a loop around to go back over 21 heading back north.

23 Q. Okay. And then what did that car do, that car that was
24 following too closely? Are you now following it?

25 A. Yes, sir.

1 Q. What did that car then do?

2 A. The vehicle pulled into the Exxon right beside the
3 Waffle House on the western side of 77.

4 Q. And had you activated your blue lights or siren before
5 it pulled into the filling station?

6 A. As it was pulling in, I activated the siren -- I mean
7 the blue lights.

8 Q. Very good.

9 Did that also turn on your in-car video there at the
10 filling station?

11 A. Yes, sir.

12 Q. And did you get out of your car and go up to the Ford
13 rental car?

14 A. Yes, sir.

15 Q. And which side of the car did you go up to?

16 A. On the passenger's side.

17 Q. How many people were in the car?

18 A. Two.

19 Q. All right. From the passenger's side, did you ask the
20 driver for anything?

21 A. Yes, sir, I asked him for his driver's license and
22 vehicle registration.

23 Q. Okay. And what did he give you?

24 A. He gave me a driver's license, and I believe it was the
25 passenger that gave me the rental agreement. I can't

1 remember which one gave me the rental agreement.

2 Q. Okay. And do you recall the names of the two people
3 that were in the car?

4 A. Mr. Nicholson (sic) or Mr. Morris.

5 Q. All right. I'm going to hand you a copy of your own
6 report. You refer to it if you need to refresh your memory
7 at any time.

8 A. Yes, sir.

9 Q. Now, who was the driver of the car when you pulled it
10 over?

11 A. Mr. Morris.

12 Q. Okay. The defendant in this case?

13 A. Yes, sir.

14 Q. And he gave you a driver's license?

15 A. Yes, sir.

16 Q. What state driver's license?

17 A. North Carolina.

18 Q. And you had a rental agreement. Describe the rental
19 agreement. Who rented the car?

20 A. The passenger was the one that rented it, Mr. Nichols.

21 Q. And did the rental agreement list the drivers of the
22 car?

23 A. It listed the one who rented it. It didn't list who
24 was actually driving it at the time that I stopped them.

25 Q. All right. Did it list any additional drivers, other

1 the man Nichols who had rented the Ford?

2 A. No, sir, I believe it specifically stated no other
3 driver is permitted, or something, or no additional drivers.

4 MR. SPRINGS: Would you mark this, please?

5 (Rent A Car Agreement marked as State's Exhibit
6 No. 1 for identification)

7 BY MR. SPRINGS:

8 Q. Did you make a xerox copy of the rental agreement?

9 A. Yes, sir.

10 Q. Did you give the original back to these fellows later?

11 A. I believe it was put back in their property.

12 Q. That's State Exhibit No. 1, is that the xeroxed copy of
13 the rental agreement?

14 A. Yes.

15 Q. Thank you very much.

16 Now, as you are talking to these fellows, are you
17 standing at the passenger window?

18 A. Yes, sir.

19 Q. The window open?

20 A. Yes, sir.

21 Q. Did you sense or detect anything?

22 A. An odor of marijuana coming from the vehicle.

23 Q. All right. And what did you have the driver of the car
24 do at that point?

25 A. I had him step out of the vehicle.

1 Q. Okay. As he gets out of the car, were you able to see
2 better inside the car?

3 A. Yes, sir.

4 Q. Did you see anything that caught your attention?

5 A. I saw a lot of hollowed out Blunts, a lot of blunt
6 tobacco in the car - the center console, on the floor area,
7 and pretty much all over the vehicle.

8 Q. And do you work with narcotics cases a good bit,
9 Officer Vinesett?

10 A. Yes.

11 Q. What is Blunt tobacco? What does that mean to a
12 narcotics officer? Tell us all about that.

13 A. To me it means that somebody is hollowing out the Blunt
14 cigar to put marijuana in it.

15 Q. That's a brand name, isn't it, Blunt cigar?

16 A. Yes, sir.

17 Q. And they hollowed out -- people do what to the cigar?

18 A. They hollow it out and place the marijuana in there, so
19 if you did see them riding down the road smoking anything,
20 it would look like they were just smoking a blunt.

21 Q. Okay. And later did you take some pictures of that
22 marijuana -- of that Blunt tobacco that you saw in the car?

23 A. Yes, sir.

24 (Photograph marked as State's Exhibit No. 2 for
25 identification)

1 (Photograph marked as State's Exhibit No. 3 for
2 identification)

3 (Photograph marked as State's Exhibit No. 4 for
4 identification)

5 (Photograph marked as State's Exhibit No. 5 for
6 identification)

7 (Photograph marked as State's Exhibit No. 6 for
8 identification)

9 (Photograph marked as State's Exhibit No. 7 for
10 identification)

11 MR. SPRINGS: And let the record know that I did
12 hand the court a copy of the rental agreement, State's
13 Exhibit No. 1.

14 BY MR. SPRINGS:

15 Q. Officer, later on did you take some pictures of this
16 car, and this Blunt tobacco, and such things?

17 A. Yes, sir.

18 Q. Would you look at State's Exhibit No. 2 through 7 and
19 tell us if those are your pictures?

20 A. Yes, sir.

21 Q. And these are the things that you were seeing with your
22 own eyes as Mr. Morris gets out of the car?

23 A. Yes, sir.

24 Q. All right.

25 THE COURT: Seen with his own eyes? It's good to

1 know that. All right.

2 BY MR. SPRINGS:

3 Q. You said it was raining. Did you make Mr. Morris stand
4 out in the rain?

5 A. No, sir, I asked him to have a seat in my passenger's
6 seat.

7 Q. Did you go talk to him?

8 A. Yes, sir.

9 Q. Did you ask him where he was coming from?

10 A. Yes, sir.

11 Q. What did he say?

12 A. He said he was coming -- they were coming from Atlanta.

13 Q. Okay. Did you ask him what was the occasion for his
14 trip to Atlanta, why did he go down there?

15 A. Yes, sir, he said that he had went down there to --
16 they had went down there to see some girls.

17 MR. WALKER: I couldn't understand you. I'm
18 sorry. Speak up.

19 A. They said that they were -- they had went to Atlanta to
20 visit some girls.

21 BY MR. SPRINGS:

22 Q. Okay. Why don't you put that mike up a little higher.
23 Thank you.

24 Now, did you then go talk to Mr. Nichols, the
25 passenger?

1 A. Yes, sir.

2 Q. And let me make this real clear. The passenger, Mr.
3 Nichols, who was not driving, he was the guy that rented the
4 car?

5 A. Yes, sir.

6 Q. With the rental agreement that said no additional
7 drivers?

8 A. Yes, sir.

9 Q. Okay. Did you ask Mr. Nichols outside of the presence
10 of Mr. Morris where they were coming from?

11 A. Yes, sir.

12 Q. What did Mr. Nichols say?

13 A. He also said that they were coming from Atlanta.

14 Q. Okay. And did you ask him why they had been to
15 Atlanta?

16 A. He said that they had went to see the driver of the
17 vehicle's cousin, I believe, play basketball.

18 Q. Okay. Did Mr. Nichols, the passenger, step out of the
19 car?

20 A. Yes, sir.

21 Q. Did you sense or notice anything unusual about Mr.
22 Nichols?

23 A. I could smell an odor of marijuana.

24 Q. And did a canine officer arrive on the scene?

25 A. Yes, sir.

1 Q. Was it still raining?

2 A. Yes, sir.

3 Q. Did the -- were the doors of the -- did the dog walk
4 around the car?

5 A. Yes, sir.

6 Q. Were the doors to the car closed?

7 A. Yes, sir.

8 Q. And had you ever seen this particular dog walk around a
9 car before?

10 A. Several times.

11 Q. Describe how the dog walked around the car in the rain.

12 A. On this particular occasion, a lot of the times if the
13 dogs searching the vehicle, its nose just normally stays on
14 the vehicle all the way around the vehicle. This time it
15 was shaking the water off of him. It was looking around.
16 My only assumption was that he didn't like being out in the
17 rain.

18 Q. All right. So did the dog jump up and down and give
19 indications that he smelled drugs?

20 A. The dog didn't alert.

21 Q. And did you police officers by that time -- there must
22 have been another officer -- the canine officer is on the
23 scene right?

24 A. Yes.

25 Q. Did you officers ask Mr. Nichols if you could search

1 the rental car that he had rented?

2 A. Yes, sir.

3 Q. What did he say, yes or no?

4 A. No.

5 Q. And at that point did you officers decide you were
6 going to search the car anyway?

7 A. Yes, sir.

8 Q. And did you search the car?

9 A. Yes, sir.

10 Q. Tell the court if you found anything interesting in the
11 car.

12 A. In the trunk of the vehicle there was like a gift box
13 and a bag inside of it. And inside the bag was like a
14 sandwich bag full of what appeared to be Ecstasy pills.

15 Q. Okay. Have you ever seen Ecstasy pills before this
16 day?

17 A. Yes, sir.

18 Q. Okay.

19 (Drugs marked as State's Exhibit No. 8 for
20 identification)

21 THE COURT: With your own eyes?

22 THE WITNESS: Yes, sir.

23 BY MR. SPRINGS:

24 Q. Our human eyes?

25 A. Yes, sir.

1 Q. I'm showing you what's been marked State's Exhibit No.

2 8. Do you recognize what's in that bag?

3 A. Yes, sir.

4 Q. What is it?

5 A. The Ecstasy that was in the sandwich bag.

6 Q. And I don't expect you to remember the exact number,
7 but approximately how many pills was it?

8 A. 393.

9 Q. And when you found that in the box in the trunk of the
10 car, did you arrest these two men?

11 A. Yes, sir.

12 Q. And did you Mirandize them?

13 A. Yes, sir.

14 MR. SPRINGS: Your Honor, I think for purposes of
15 this suppression hearing I'm probably safe starting out, but
16 I will stop and I would like to reserve the right, if
17 necessary, if they think things that happened after this are
18 pertinent, reserve the right to recall Officer Vinesett.

19 THE COURT: All right.

20 BY MR. SPRINGS:

21 Q. Answer any questions the defense attorneys have.

22 MR. GARDNER: Thank you, Your Honor.

23 THE COURT: Yes, sir, Mr. Gardner.

24 CROSS EXAMINATION BY MR. GARDNER:

25 Q. Okay. I just have a few, I do believe, Mr. Vinesett?

1 A. Yes, sir.

2 Q. All right. I apologize.

3 You pulled the vehicle over once it was in the parking
4 lot, is that right?

5 A. I'm not sure if I turned my blue lights on as it was
6 turning in, but they did mention that they had to go to the
7 restroom. I believe -- I believe as they was turning in I
8 was turning my blue lights on.

9 Q. Yeah. I believe your testimony was that you activated
10 the blue lights as it pulled into the gas station.

11 A. Yes.

12 Q. So it's fair enough to say that this stop didn't occur
13 until they were in the parking lot of the gas station?

14 A. Yes, sir.

15 Q. All right. And the purpose of the stop, if I
16 understand your testimony, was because of a following too
17 close?

18 A. Yes.

19 Q. And that occurred on the interstate?

20 A. Yes, sir.

21 Q. So you are telling the court that you saw a traffic
22 violation on the interstate, but you waited until they got
23 into the gas station parking lot before you pulled them
24 over, is that right?

25 A. Yes, sir.

1 Q. All right. What is your normal time average for a
2 normal traffic stop?

3 A. As far as being the entire length?

4 Q. Well, let me give you a scenario and see if you can
5 follow it.

6 You see a car on the interstate traveling too closely.
7 You pull them over. You normally pull them over on the
8 interstate, or you --

9 A. If they don't exit.

10 Q. Sir?

11 A. If they don't exit the interstate I do.

12 Q. So you pull them over and you do what you are supposed
13 to do, investigate the violation --

14 A. Yes.

15 Q. -- right.

16 And then at some point in time you write a ticket, I'm
17 assuming? Maybe, maybe not?

18 A. Yes, sir.

19 Q. And the driver goes on his way --

20 A. Yes, sir.

21 Q. -- right.

22 So that would be a normal traffic stop, is that right?

23 A. Yes, sir.

24 Q. How much time, average, on that type of average traffic
25 stop, from pulling him over, talking to them, writing a

1 ticket, writing them a warning ticket, or telling them have
2 a nice day, and them driving off?

3 A. With absolutely no indicators of anything?

4 Q. Yes, sir.

5 A. I would say five minutes.

6 Q. Five minutes. Fair enough.

7 Now, during that five minutes, you -- I'm just using
8 you probably look at their driver's license?

9 A. Yes, sir.

10 Q. Run a computer check?

11 A. Sometimes, yes.

12 Q. Maybe talk to them. Write a ticket, or a warning
13 ticket?

14 A. Yes, sir.

15 Q. Right?

16 A. Yes.

17 Q. And maybe not a ticket? Your discretion, right?

18 A. We have to write something.

19 Q. Oh, you do write something?

20 A. Yes, sir.

21 Q. All right. So five minutes, basically. All right.

22 And in this case there was no consent given to search
23 the car, is that right?

24 A. Correct.

25 Q. None from either defendant?

1 A. I'm not -- I don't believe -- I can't remember if I
2 asked Mr. Morris or not, but consent wasn't given.

3 Q. All right. The solicitor spent a lot of time talking
4 about this rental agreement, that the passenger was supposed
5 to be the only driver. That's a contract with him and the
6 rental company?

7 A. Yes.

8 Q. Okay. Did he give you a reason -- did anybody give you
9 a reason why the other fellow was driving?

10 A. I don't recall.

11 Q. Okay. Do you recall saying that the other one was
12 sleepy and that's why they swapped driving?

13 A. Could possibly be. I don't remember.

14 Q. And that would be a normal explanation, wouldn't it?

15 A. Yes, sir.

16 Q. All right. I want to get one thing -- well, I'm going
17 to wait, because I think the solicitor may want to talk to
18 you a little bit more when I finish.

19 You -- what I was asking you about a normal stop, you
20 started talking about with no indicators. Is that the word
21 that you used?

22 A. Yes, sir.

23 Q. Indicators, is that something in your training that
24 heightens your suspicion?

25 A. Suspicion, yes, sir.

1 Q. Suspicion, okay.

2 All right. And you make a police report once you have
3 made an arrest, is that right?

4 A. Yes, sir.

5 Q. And did you that in this case?

6 A. Yes, sir.

7 Q. And the police reports are important because it's a
8 memorandum of what's going on, what happened, and it's done
9 pretty early on in the case, right?

10 A. Before we go home.

11 Q. Before you go home?

12 A. Yes, sir.

13 Q. When everything is fresh in your mind, right?

14 A. The report, yes, sir.

15 Q. Everything is fresh in your mind when you make the
16 report?

17 A. Yes, sir.

18 Q. And then at some point in time you make the solicitor's
19 case file report, is that right?

20 A. Yes, sir.

21 Q. When is that normally made?

22 A. We have to have it turned in within five days.

23 Q. Five days. Okay.

24 So you have one that's done before you go home and then
25 you have got another that's done within five days?

1 A. Yes, sir.

2 Q. All right. These indicators that you talked to the
3 solicitor about this morning, none of those are in your
4 police report, is that right?

5 A. In the original report?

6 Q. Yes, sir.

7 A. No, sir.

8 Q. None of them. We -- we -- no doubt about that, right?

9 A. Yes, sir.

10 Q. So in your first report that you made when the incident
11 is fresh in your mind, you don't put anything in there about
12 these indicators that you have testified, correct?

13 A. That's correct.

14 Q. You don't say anything about the smell of marijuana?

15 A. In the original report?

16 Q. Yes, sir.

17 A. I would have to look at it, but I don't believe I did.

18 Q. I believe we can find a copy for you.

19 MR. GARDNER: The original police report?

20 MR. SPRINGS: I think that's a copy. Did I not
21 give you a copy?

22 A. Yes, sir, I apologize. I thought it was just the case
23 folder.

24 BY MR. GARDNER:

25 Q. I don't know.

1 MR. GARDNER: May I approach and look at what you
2 got?

3 THE COURT: Yes.

4 MR. GARDNER: Thank you, judge.

5 BY MR. GARDNER:

6 Q. Okay, just to clarify, I believe it's --

7 COURT REPORTER: It's not marked.

8 MR. GARDNER: It's not marked for evidence?

9 COURT REPORTER: No, sir.

10 MR. GARDNER: Judge, for the purposes of this
11 hearing, and this hearing only, I would propose --

12 MR. SPRINGS: No objection.

13 THE COURT: Make it a Court's Exhibit.

14 MR. GARDNER: Court's Exhibit. Thank you, judge.

15 (Drug Enforcement Unit Report marked as Court's
16 Exhibit No. 1 for identification)

17 MR. GARDNER: Thank you, sir.

18 BY MR. GARDNER:

19 Q. Sir, I'm going to hand you back the document that you
20 handed me. It's been marked as Court Exhibit No. 1. Tell
21 me what it is. It contains two documents?

22 A. It contains two documents. The original report that
23 was done that day and the case folder that was done a couple
24 days after.

25 Q. And for the record purposes, the police report, the

1 second document, is the one that was filled out that day?

2 A. Yes, sir.

3 Q. And the first document, the case summary file, is the
4 one that was supposed to be filled out no later than five
5 days, is that right?

6 A. Yes, sir.

7 Q. Okay. Just to make sure we are all clear, look, if you
8 will, on the police report, the first one that was done when
9 its fresh in your mind, do you put anything in there about
10 the smell of marijuana?

11 A. No, sir.

12 Q. Do you know when you prepared the case file report for
13 the solicitor's office in this case?

14 A. Within five days. I mean, I'm not -- I'm not sure if I
15 came in the next day and did it, or waited three days, four
16 days.

17 Q. You just don't recall?

18 A. No.

19 Q. And that case file report is important, too, right?

20 A. Yes, sir.

21 Q. All right. So the police report is important, because
22 that's filled out when it's freshest in your mind and you
23 want to lay the basis for the foundation for what it is that
24 you did, is that right?

25 A. The report is done that day.

1 The case summary I do the day that I watch the tape and
2 dubbed the tape for the solicitor's office. Watch over the
3 tape, make notes of everything that happened, and then
4 that's how I generate my case summary.

5 Q. Excellent point. I was wondering how you did that.

6 A. Yes, sir.

7 Q. So you viewed the tape of this stop --

8 A. Yes.

9 Q. -- and used that to help fill out that solicitor's case
10 file report?

11 A. Yes, sir.

12 Q. Excellent point. Okay.

13 So even though that may have been five days later, it
14 was pretty fresh in your mind, because you were experiencing
15 it on a video?

16 A. Yes.

17 Q. Okay. Now, your normal traffic stop on normal a case,
18 you are going to write a ticket, unless something happens to
19 get you suspicious, right?

20 A. Yes.

21 Q. Is that fair.

22 And the solicitor said that you got good training in
23 that area, is that right?

24 A. Yes, sir.

25 Q. And in this case you -- I want to ask you if these are

1 what we think are the -- what we think might be the
2 indicators.

3 This marijuana -- I mean, I'm sorry, the tobacco that
4 you saw, right?

5 A. Yes, sir.

6 Q. Okay. And that was the cigar?

7 A. Yes, sir.

8 Q. Okay. Cigar tobacco. All right.

9 The smell of marijuana?

10 A. Yes, sir.

11 Q. As to -- were there any -- did I leave any out?

12 A. The --

13 Q. You can look at your stuff, if you need to.

14 A. Could I see the pictures?

15 THE COURT: If you refer to a picture, refer to it
16 by exhibit number, please.

17 THE WITNESS: Yes, sir.

18 A. Exhibit No. 7, the Red Bull energy drinks.

19 BY MR. GARDNER: --

20 Q. Yes, sir.

21 A. -- which in my training and experience has been people
22 making trips --

23 Q. Okay.

24 A. -- trying to stay awake, trying to get to where they
25 need to go quick and get back.

1 Q. That makes sense. I could have used one last night,
2 but that was not talked about in the direct, was it?

3 A. No, sir.

4 Q. Okay. You can talk about it anything that you want to,
5 okay?

6 A. Yes, sir.

7 Q. I don't mind. I don't object. If it's in the record,
8 we will talk about it, all right? But let's -- for now
9 let's talk about the ones that you talked to the solicitor
10 about, okay?

11 A. Yes, sir.

12 Q. All right. We have got -- well, let me just see what
13 we got.

14 This is State's Exhibit 4 and that contains what looks
15 to me like a cigar butt, is that right?

16 A. Yes, sir.

17 Q. Okay. All right. So that would be an indicator,
18 right?

19 A. The cigar?

20 Q. Yeah.

21 A. The hollowed out Blunt on the floor would be, but just
22 a regular Blunt itself, no, sir.

23 Q. All right. Show me -- I don't know what a hollowed out
24 Blunt looks like. Could you show me, and for the record,
25 let us know what --

1 A. If you see right here in this picture of the cup,
2 State's Exhibit No. 3?

3 Q. Right.

4 A. They actually take out this portion of the Blunt. I'm
5 not sure exactly why, but I have seen it in a lot of them,
6 they will take this part out and then put the tobacco and
7 the marijuana in. They --

8 Q. That looks like part of the --

9 A. The inside of the Blunt on the --

10 Q. The stuff inside that comes out?

11 A. Yes, sir.

12 Q. And you think that's what that is?

13 A. That's what it is, yes, sir.

14 Q. Okay. All right.

15 THE COURT: Which number is that, 3?

16 THE WITNESS: Yes, sir.

17 MR. GARDNER: Yes.

18 BY MR. GARDNER:

19 Q. Actually that's one.

20 And then you talked to the solicitor about the smell of
21 marijuana, correct?

22 A. Yes, sir.

23 Q. Out of all that, which one would be the biggest
24 indicator of further criminal activity?

25 A. The odor of marijuana.

1 Q. The odor of marijuana. Okay.

2 All right. What kind of marijuana are we talking
3 about?

4 A. As in?

5 Q. What did you -- you said that you smelled marijuana.
6 What did you smell?

7 A. Burnt marijuana.

8 Q. Burnt marijuana, okay, because that's not in your
9 report either, is it?

10 A. In the original report that day?

11 Q. Yes, sir.

12 A. No, sir.

13 Q. All right. Is it in the solicitor's report?

14 A. In the case folder, yes, sir.

15 Q. It is?

16 A. A smell and odor of marijuana.

17 Q. And smell and the odor of marijuana. But it doesn't
18 say in there burnt marijuana, right?

19 A. No, sir.

20 Q. So somebody reading that might be tempted to think that
21 it's -- we either got raw marijuana or burnt marijuana, no
22 other kinds, right?

23 A. Yes, sir.

24 Q. There is no doubt what you are talking about is burnt
25 marijuana?

1 A. Yes, sir.

2 Q. Okay. All right.

3 So out of all the indicators that you have got - the
4 soda cans, or whatever it is that you want to say --

5 A. Energy drink.

6 Q. -- that you got, no doubt about it in your mind the
7 most important one was the smell of burnt marijuana?

8 A. Yes, sir.

9 Q. Is that right?

10 A. Yes, sir.

11 Q. Okay. So with all your police training, you believed
12 at that time that somebody was in the car smoking marijuana,
13 right?

14 A. Yes, sir, or had been.

15 Q. Had been, okay. All right.

16 And you -- did you smell that when you first went to
17 the car?

18 A. Yes, sir.

19 Q. The very first time that you got there?

20 A. Yes, sir.

21 Q. And then you get the driver out of the car, bring him
22 back, put him in your squad car --

23 A. Yes, sir.

24 Q. -- and starting talking to him about normal traffic
25 stuff, but then talked to him about some additional stuff --

1 A. Yes.

2 Q. -- unrelated to the traffic stop, right?

3 A. Yes, sir.

4 Q. So you would agree with me at that point in time we
5 were prolonging what would normally be a normal traffic
6 stop, right?

7 A. If I'm not mistaken, in the video you can hear me
8 running his license on the computer and I do actually
9 mention something to him about speeding tickets, or some
10 type of ticket --

11 Q. Some time of ticket?

12 A. -- while I'm running it and I'm talking with him.

13 Q. And, in fact, you talked to him about his prior
14 criminal record, right?

15 A. Yes, sir.

16 Q. Okay. So let's say that you are doing this extended
17 investigation while you are doing --

18 A. Yes, sir.

19 Q. My wife says multi-tasking, fair enough?

20 A. Yes, sir.

21 Q. So you are doing that. And then at some point in time
22 you go back to the car to interview the passenger?

23 A. Yes, sir.

24 Q. Okay.

25 A. The renter.

1 Q. Sir?

2 A. The renter of the vehicle.

3 Q. Yes, sir. He's the passenger, right?

4 A. Yes, sir.

5 Q. Okay. And you talked to him about his travel plans, is
6 that right?

7 A. Yeah.

8 Q. And there is no doubt that that has nothing to do with
9 the traffic stop, right?

10 A. The traffic stop in itself, no.

11 Q. Okay. So that clearly extended the normal traffic
12 stop?

13 A. Yes, sir. Once I smelled marijuana, I believe that was
14 the reason.

15 Q. And, in fact, you went again while you were up there
16 talking with him, did you smell marijuana then?

17 A. Yes, sir.

18 Q. Okay. All right.

19 Then you went back to your car and talked to the
20 defendant Morris again, is that right? He's still in the
21 car?

22 A. Yes, sir.

23 Q. Morris, he told you he had to go to the bathroom at
24 some point in time, right?

25 A. Yes.

1 Q. Early on?

2 A. At first he had told me that's the reason they had
3 pulled in there.

4 Q. Okay. And despite that, though, he didn't get to go to
5 the bathroom for quite some time, is that fair to say?

6 A. It wasn't long after the stop.

7 Q. Okay. However long it was, we will find out --

8 A. Yeah.

9 Q. -- okay?

10 But prior to going to the bathroom, you asked, or he
11 was asked, for consent to search his person --

12 A. Yes, sir.

13 Q. -- is that right.

14 And he said okay, or --

15 A. Yes.

16 Q. Then he was searched?

17 A. Yes.

18 Q. And you made the statement, words to the effect of that
19 he can't go to the bathroom unless Officer Scott goes with
20 him, is that right?

21 A. I would have to listen to it again, but I believe so.

22 Q. Well, the intent is that he wasn't allowed to go
23 without an escort?

24 A. Yes, sir.

25 Q. Okay. So no doubt he was in detention at that time,

1 correct?

2 A. With the blue lights on and his car stopped, yes, sir.

3 Q. Searched?

4 A. Yes.

5 Q. Armed escort to the bathroom, right?

6 A. A police officer escort, yes, sir.

7 Q. Yes, sir. Okay.

8 While he's gone to the bathroom, that's when you called
9 Officer Gibson on the radio, is that right?

10 A. I believe so.

11 Q. I believe so. Okay.

12 And you called Officer Gibson on the radio and you
13 asked him if he wants to bring Justice down, is that right?

14 A. Yes, sir.

15 Q. And Justice is the canine drug dog, correct?

16 A. Yes, sir.

17 Q. And you tell him a little bit about the case. Do you
18 remember that?

19 A. Yes, sir.

20 Q. You tell him that -- you want to tell him, I'm
21 guessing, what your indicators are, right?

22 A. Yes, sir, before he gets there.

23 Q. Before he gets there so he will know.

24 And you have already testified about the number one
25 indicator is the smell of marijuana, is that right?

1 A. Yes, sir.

2 Q. You never mentioned that to Officer Gibson.

3 A. No.

4 Q. You tell him about a prior record. You tell him about
5 travel plans. You tell him about shake, right?

6 A. Yes, sir.

7 Q. Never say anything about the smell of marijuana?

8 A. No, sir.

9 Q. And then it gets into a conversation about consent. Do
10 you remember that?

11 A. Yes, sir.

12 Q. All right. And, in fact, y'all talk about trying to
13 get consent before deploying the dog, correct?

14 A. Yes, sir.

15 Q. And that was important in your mind, wasn't it?

16 A. We -- we normally try to get consent.

17 Q. All right.

18 And, in fact, that's the first thing that Officer
19 Gibson does when he gets there. Were you able to observe
20 Officer Gibson when he approaches the car?

21 A. Yes, sir.

22 Q. The first thing he does, he approaches without the dog,
23 correct?

24 A. Yes, sir.

25 Q. And basically asked for consent, right?

1 A. Yes, sir.

2 Q. "Or do I got to get the drug dog?"

3 A. Yes, sir.

4 Q. So the passenger is forced with two decisions at that
5 time, right; consent, or they are going to get the drug dog,
6 fair enough to say?

7 A. Yes, sir.

8 Q. But we have already testified and it's clear that there
9 was no consent given?

10 A. That's correct.

11 Q. So they bring the drug dog in at that time, right?

12 A. (Shaking head yes).

13 Q. And the drug dog -- we can watch the video. I believe
14 that you said that there was maybe something about his nose
15 on the car, is that right?

16 A. Yes, sir.

17 Q. Did you tell the solicitor that?

18 A. Yes.

19 Q. All right. I don't know what that means, but I have
20 watched the video. He goes around that car twice with that
21 dog, doesn't he?

22 A. Yes, sir.

23 Q. All right. And that dog does not hit, does not alert,
24 is that right?

25 A. That's correct.

1 Q. With your training in narcotics, that is a fair
2 indicator that there is no narcotics in the vehicle,
3 correct?

4 A. Fair indicator, yes.

5 Q. Fair indicator. Okay.

6 Now, when you were going on the -- when the search had
7 been extended with the driver in the car, you said that you
8 were working on tickets and stuff like that?

9 A. I was checking his license.

10 Q. Checking his license. You had mentioned the word
11 tickets.

12 All right. In fact, when you called Gibson, you tell
13 him that you were working on the warrant, right? Do you
14 remember that?

15 A. I believe so.

16 Q. Okay. That means that you were going to write him, the
17 driver, a warning ticket, right?

18 A. Yes, sir.

19 Q. That warning ticket was going to be traveling too close
20 on the interstate?

21 A. Following too close, yes, sir.

22 Q. Despite the fact that you didn't pull him over until he
23 was in the gas station parking lot?

24 A. Yes.

25 Q. All right. Now, you told the solicitor that you -- you

1 made the assumption the dog didn't like rain, is that fair?

2 My comment on it, was that fair?

3 A. The way it looked, yeah.

4 Q. It looked like he didn't like rain.

5 Despite the fact that the dog didn't alert, you
6 searched the car?

7 A. Yes, sir.

8 Q. All right. So you were searching that car for burnt
9 marijuana, fair enough?

10 A. Marijuana, yes, sir.

11 Q. Marijuana. Okay.

12 Well, let's talk about it.

13 A. Burnt marijuana would --

14 Q. Sir?

15 A. Burnt marijuana would possibly be ashes.

16 Q. Okay.

17 A. I was searching for marijuana.

18 Q. All right. But the reason that you were searching for
19 marijuana is because you smelled it, right?

20 A. Yes, sir.

21 Q. So you would be looking for burnt marijuana --

22 A. Yes, sir.

23 Q. -- wouldn't you?

24 You wouldn't be looking for raw marijuana, would you?

25 A. Like I said, if I'm not mistaken, burnt marijuana is

1 ashes and smoke. I mean --

2 Q. All right. Well, the judge has the exhibits that's got
3 the cigar in it, right?

4 A. Yes, sir.

5 Q. Okay. If that cigar had marijuana in it, that would be
6 burnt marijuana, wouldn't it?

7 A. If it had been smoked, yes, sir.

8 Q. And if it, in fact, had marijuana in it?

9 A. Yes, sir.

10 Q. And it didn't, right?

11 A. No, sir.

12 Q. All right. So I'll ask you again, when you searched
13 the compartment of the car, the passenger, where the people
14 sit t and drive, you were looking for burnt marijuana?

15 A. I was looking for marijuana.

16 Q. Looking for marijuana?

17 A. I had smelled burnt marijuana. I was searching the car
18 for marijuana.

19 Q. Okay. You were looking for what you thought you might
20 find?

21 A. Yes, sir.

22 Q. Fair enough.

23 All right. And you didn't find it?

24 A. In the passenger compartment?

25 Q. That's correct.

1 A. No, sir.

2 Q. No illegal contraband in the passenger compartment of
3 the car whatsoever?

4 A. No, sir.

5 Q. Nothing? No burnt marijuana, no guns, no drugs,
6 nothing?

7 A. No, sir.

8 Q. All right. And despite that fact, you went to the
9 trunk and searched the trunk, right?

10 A. Yes, sir.

11 Q. I'm not trying to be funny. Were you looking for burnt
12 marijuana in the trunk?

13 A. I was looking for marijuana.

14 Q. Marijuana in the trunk of the car. All right.

15 So you got what you think burnt marijuana, correct?

16 A. Yes, sir.

17 Q. Okay. You got a dog that tells you there is no
18 marijuana, correct?

19 MR. SPRINGS: Objection. That's argumentative.
20 He can't conclude that.

21 MR. GARDNER: All right, I'll rephrase it then.

22 BY MR. GARDNER:

23 Q. The dog didn't hit, right?

24 A. The dog didn't alert.

25 Q. And you were aware of that at the time?

1 A. Yes, sir.

2 Q. And you were aware at the time that there was no
3 contraband inside the compartment of the vehicle?

4 A. That I could find, yes, sir.

5 Q. And despite that fact, that you went looking in the
6 trunk?

7 A. Yes, sir.

8 Q. Okay. If I understand, the most important indicator of
9 all the indicators that you observed was the odor of
10 marijuana, correct?

11 A. Yes.

12 Q. And you did not talk to Officer Gibson about the smell
13 of marijuana?

14 A. No, sir.

15 Q. And the dog did not hit on the car?

16 A. No, sir.

17 Q. And you searched the compartment because you thought
18 that you smelled burnt marijuana?

19 A. Yes, sir.

20 Q. And you didn't find anything?

21 A. No, sir.

22 Q. And then you looked in the trunk?

23 A. Yes, sir.

24 Q. Okay. When you talked to -- it's in your report. I'm
25 paraphrasing, but something about talking to one of the

1 people, I believe it was the passenger, about smoking
2 marijuana. You tell him something like "somebody has been
3 smoking marijuana," or something like that. I believe you
4 say in your report that "he doesn't answer," or "he couldn't
5 answer," is that fair?

6 A. I believe that's what I read. "He didn't give me an
7 answer."

8 Q. Didn't give you an answer. Okay.

9 Do you remember, though, when you watched the video,
10 doesn't he say "I don't smoke marijuana. I have never
11 smoked marijuana. I wasn't smoking marijuana." Something
12 like that?

13 A. The passenger?

14 Q. Yes, sir.

15 A. Yes, sir, I believe so.

16 Q. Okay. And he also told that your cigar was a black and
17 mild?

18 A. Yes, sir.

19 Q. In your experience have you smelled black and mild
20 cigars?

21 A. Yes.

22 Q. Are they similar to the smell of marijuana?

23 A. No, they're usually a sweet smell.

24 Q. You can distinguish between the two?

25 A. Of marijuana and a black and mild?

1 Q. Yes, sir.

2 A. Yes, sir.

3 Q. Black and milds, are you experienced enough to answer
4 this, don't they have a different smell than a regular
5 cigar?

6 A. Yes, sir.

7 Q. Okay. And that black and mild smells a little bit
8 closer to marijuana than the other cigars?

9 A. I wouldn't say that.

10 Q. Okay. Well, have you had training or experience on
11 that?

12 A. Of the smell of cigars?

13 Q. Yes, sir.

14 A. I haven't had training on it how to smell the cigar,
15 no.

16 Q. You told the solicitor that you had training, if I
17 understood you right. I may have misunderstood you. I
18 believe you told the solicitor something about your
19 training, and then you talked about the cigars and the
20 blunts, right?

21 A. Hollowed out and everything.

22 Q. That comes from the Philly Blunt, correct?

23 A. Philly?

24 Q. Philly Blunt is the name of the cigar that started all
25 this. Are you aware of that from your training?

1 A. I'm not sure exactly which particular Blunt started it.

2 Q. But there is no doubt that cigar smells different?

3 Each cigar is different. Do you know that?

4 A. More than likely.

5 Q. Okay. All right.

6 A. I don't -- I don't smoke.

7 Q. Okay.

8 MR. GARDNER: Your Honor, if you would indulge me,
9 please?

10 THE COURT: Yes.

11 (Off the record)

12 (Back on the record)

13 MR. GARDNER: Your Honor, since I have Officer
14 Vinesett up on the stand now, I would ask the court to allow
15 me to play the videotape. I guess it speaks to the truth of
16 the matter.

17 THE COURT: All right.

18 MR. GARDNER: I'll do that at this time.

19 MR. SPRINGS: May I help you start it?

20 MR. GARDNER: Yeah. Do you have it already cued
21 up?

22 MR. SPRINGS: Do you have it marked? You can mark
23 it as a State's Exhibit.

24 MR. GARDNER: Thank you.

25 Judging, I would propose to mark this tape as

1 Court's Exhibit 2, if I may.

2 THE COURT: Yes, sir.

3 (Videotape marked as Court's Exhibit No. 2 for
4 identification)

5 BY MR. GARDNER:

6 Q. For purposes of the record, do you recognize that as
7 the videotape of your patrol car --

8 A. Yes, sir.

9 Q. -- made on the date of the incident in question?

10 MR. WALKER: May I ask a question? Can the judge
11 see the tape?

12 THE COURT: Yeah, I can see it all right.

13 MR. GARDNER: I think they will play it right
14 there.

15 (Whereupon, Court's Exhibit No. 2, the videotape,
16 was played)

17 (Tape stopped)

18 BY MR. GARDNER:

19 Q. We are in the gas station parking lot, is that right?

20 A. Yes, sir.

21 (Tape played)

22 A. That's the interstate exit ramp in front of us.

23 (Tape stopped)

24 BY MR. GARDNER:

25 Q. Sir, I want to make sure I asked you this. That was

1 when you were calling for the drug dog for Officer Gibson,
2 right?

3 A. Actually -- actually whenever you first heard the first
4 conversation he had with me is he said "I'm turning around
5 at the county line." Most of the time if I stop a car or he
6 stops a car, we start that way."

7 Q. Yes, sir.

8 My question is you just got off the phone with him,
9 right?

10 A. Yes, sir.

11 Q. And you were talking about bringing the drug dog,
12 right?

13 A. Yes, sir.

14 Q. And there is no doubt now in your mind that you never
15 mentioned anything about the smell of marijuana?

16 A. To him, no, sir.

17 Q. All right. And there is no doubt now in your mind that
18 Defendant Morris is in custody or detention, because he's
19 being escorted to the restroom, is that right?

20 A. He was going to the restroom and we still have his car
21 stopped, yes, sir.

22 Q. And he's been searched?

23 A. I think it's getting ready to take place.

24 Q. And he's going to be escorted by the state constable,
25 an armed guard, is that right?

1 A. Yes.

2 (Tape played)

3 (Tape stopped)

4 BY MR. GARDNER:

5 Q. Okay. That's Officer Gibson, correct, and he is the
6 drug dog handler?

7 A. Yes, sir.

8 Q. And he is asking for consent at this time, right?

9 A. Yes, sir.

10 Q. And he's -- "or do I need to get the drug dog out?"

11 A. Yes, sir.

12 (Tape started)

13 (Tape stopped)

14 BY MR. GARDNER:

15 Q. All right. That window is down, is that correct?

16 A. Yes, sir.

17 Q. That window was down when the dog went around and did
18 the search twice, is that right?

19 A. Yes, sir.

20 (Tape started)

21 (Tape stopped)

22 BY MR. GARDNER:

23 Q. There you just continued the search and --

24 A. Yes, sir.

25 Q. -- end up going to the police department, the normal

1 stuff.

2 That's all questions that I have. Thank you, sir.

3 A. Thank you.

4 MR. SPRINGS: Nothing further.

5 We would like to call one other person.

6 THE COURT: All right. You can step down. Thank
7 you, officer.

8 MR. SPRINGS: Just lay that mike, Officer
9 Vinesett.

10 We call Marvin Brown.

11 COMMANDER MARVIN BROWN, having been first duly
12 sworn, testified as follows:

13 DIRECT EXAMINATION BY MR. SPRINGS:

14 Q. Tell us your name, please, sir.

15 A. Marvin Brown.

16 Q. And are you the head of the York County narcotics unit?

17 A. Yes, I'm the supervisor.

18 Q. And do you supervise Officer Vinesett's paperwork?

19 A. I do.

20 Q. You told him how you want the paperwork done?

21 A. I approve all of his paperwork. If it's not done the
22 way I want it done -- not the content, so much as I approve
23 it. I red pen it and give it back and he makes changes.

24 Q. Hand me that report right there. It's a court exhibit.

25 Now, a case is done by the HIT team and by the

1 narcotics unit. Are they basically two parts; a standard
2 statewide incident report plus a summary?

3 A. Yes, that's correct.

4 Q. How have you told Officer Vinesett you want him to do
5 the incident report, the statewide report, as opposed to the
6 summary?

7 A. Yeah, the incident report is the first report, the
8 basic report, and it's just the reason for the stop and it's
9 the charges which are found. We do not go into search and
10 seizure. We do not go into indicators. And the reason for
11 that is Freedom of Information Act.

12 The case summary, which is done within five days.
13 Normally it's done the next day, or sometimes that same day.
14 The case summary could be two, three, four, five pages long.
15 That spells out the stop and the reason for the stop and the
16 indicators and all this, but not the incident report.

17 Q. All right. So Officer Vinesett was specifically told
18 by you to make the statewide incident report short and
19 sweet, just the reason for the initial encounter?

20 A. Yes. All the -- there are 25 of us on the drug team,
21 counting interdiction. We all do it that way. Every
22 incident we do from drug arrests are done that way.

23 Q. Okay. And in the summary in this case, and I think you
24 are holding a copy, did Officer Vinesett go into the odor of
25 marijuana, the Blunt tobacco, and the odor of marijuana on

1 the passenger?

2 A. Yes, and three different -- once on the front page,
3 twice on the second page.

4 Q. Okay. Thank you.

5 MR. SPRINGS: Nothing further. Thank you.

6 MR. GARDNER: No questions, judge.

7 THE COURT: You can step down. Thank you.

8 MR. SPRINGS: That's our proffer on the search of
9 the car.

10 THE COURT: Okay. Mr. Gardner, do you have any
11 witnesses that you wish to call?

12 MR. GARDNER: Judge, no, sir, we don't.

13 THE COURT: All right. I'm ready to hear your
14 argument.

15 MR. GARDNER: Thank you, sir.

16 I believe that -- and I don't -- I believe that if
17 he wants to introduce this evidence, that the burden would
18 be on him, but I want to talk a little bit about this law on
19 for Williams, Jones, and Ricardo, but I want to skip down to
20 what I think is the heart of the matter in this case.

21 Assuming that everything else was right, and we
22 dispute that, but just for the sake of argument, as in -- as
23 they might say, judge, once that dog did not alert on that
24 car, there was no more reasonable articulable suspicion of
25 additional crime or criminal activity taking place. They

1 had nothing to do from then on. That's the heart of the
2 matter, judge. No articulable suspicion at that point in
3 time. He's --

4 I will go into the Williams law, because I think
5 it's important, because it talks about these things. We all
6 know what the police are allowed to do, once they make a
7 stop. If they make a legal stop, then they are allowed to
8 do the driver's license check, the computer check, write the
9 ticket, if they want to, or a warning ticket, or whatever.

10 They can only prolong that stop if they have one
11 of two things that happen. One is the reasonable
12 articulable suspicion of further criminal activity,
13 something that's a crime that's afoot at the time; or two, a
14 consensual encounter. This -- I don't think I need to talk
15 about consensual encounter, because they were not even
16 allowed to go to the bathroom without having a guard, so
17 consensual does not apply, so we have to look at whether or
18 not there was reasonable and articulable suspicion of
19 criminal activity under foot. And they need to justify each
20 and every step that they have for continuing or prolonging
21 the detention.

22 We have testimony that a normal traffic stop for
23 this officer, a normal traffic stop, five minutes. This one
24 lasted about fifteen minutes. This one actually
25 transitioned, judge, from a traffic stop with some

1 indicators into what I would call a full-blown criminal drug
2 investigation. We have the people detained. We have -- as
3 far as the Williams court and the other court cases that
4 support that, we have got almost the same thing there. We
5 have got three armed guards, three police officers. We have
6 got the dog there. We have got the people that are not free
7 to go.

8 There is no justifiable reasonable articulable
9 reason to detain these fellows any longer than -- or as long
10 as they did. They basically went on a fishing expedition.

11 I'll consent to some of these indicators are what
12 they are, indicators. But standing alone, none of them are
13 enough to prolong the search or to prolong the detention,
14 and certainly not evidence of further criminal activity. No
15 evidence of further criminal activity. He's not allowed to
16 do that.

17 The big thing, though, judge, and I can't find any
18 case law on it. There may be and I may have missed it, but
19 I can't find any case law on it, as far as what to do when
20 the dog says no. I mean, I believe it's obvious to
21 everybody in this courtroom that the dog went around twice
22 and didn't hit, didn't alert. They can say it's raining, it
23 might be something, but that's -- if the rain was a problem,
24 he's had -- the testimony is his experience with the drug
25 dog, he's seen the drug dog several times. If he thought

1 that the rain was going to be a problem, why bother calling
2 the dog?

3 One of the telling factors of this is the fact
4 that if you smelled the odor of marijuana, that would be the
5 first thing that he did when he radioed your canine friend
6 to come down there, "I smelled marijuana in the car."

7 Or, quite frankly, judge, you smell marijuana in
8 the car, you search the car, the passenger's side of the
9 car.

10 I submit that the odor of marijuana is not as
11 strong an argument as the State has set forth. For those --
12 it's just a credibility issue. And all these cases on the
13 Fourth Amendment turn on the facts and turn on the
14 credibility. We have got the facts that this was an
15 unreasonable search, an unreasonable prolonged detention.

16 But assuming that he did smell marijuana, judge, I
17 haven't found any cases in South Carolina that talk about
18 burnt marijuana. We have got testimony in here that's what
19 he smelled, but I have got a lot of Federal Court cases that
20 talk about cases just like this. I know they are not
21 binding on this court, but they are certainly persuasive,
22 and the logic makes sense to me, Your Honor.

23 For consideration, I would like to hand one of
24 those up, if I may. They are all about the same, and this
25 court may be aware of that, but basically stands for the

1 proposition that if an officer during a routine traffic stop
2 smells the odor of burnt marijuana - that's what we have got
3 here in this case, and, the facts most favorable to the
4 State - then he has probable cause to search the compartment
5 of the vehicle. The United States Supreme Court has said
6 that you can search for what you are looking for. Logically
7 what you are looking for, where it can be, and where it can
8 be is where you can search. The officers exact testimony
9 comported with that. I asked him "did you search for what
10 you were looking for?" And that's what he was doing. The
11 only thing that he and I disagree on was -- I said "you are
12 looking for burnt marijuana," and he said he was looking for
13 marijuana.

14 Even if he smelled the marijuana and even if that
15 gave him the right to search the compartment of the car to
16 look for burnt marijuana, he found, undisputed testimony on
17 the record, no evidence of any contraband. So, therefore,
18 he did not have the right to search the trunk. That's what
19 all these Federal Court cases say.

20 What distinguishes those Federal Court cases,
21 judge, is this in compliance with the United States Supreme
22 Court, is a lot of times that when they search in the
23 compartment of the car, they find evidence of contraband and
24 then you have probable cause to search the vehicle. The
25 smell of marijuana, in a light most favorable to the State,

1 only gives them to search the compartment of the car,
2 because you are not going to look in the trunk for burnt
3 marijuana.

4 THE COURT: Well, the case that you handed up,
5 United States v. Parker, was the 10th Circuit Court of
6 Appeals.

7 MR. GARDNER: Yes.

8 THE COURT: And then I'm going to point this out
9 to you. Maybe Mr. Springs will consent that you have been
10 discussing says "the odor of marijuana in the passenger
11 compartment of the vehicle is not, however, standing alone
12 establish probable cause to search the trunk of the
13 vehicle," and it cites Neilson.

14 Then it says "rather, an officer obtains probable
15 cause to search the trunk of the vehicle once he smells
16 marijuana in the passenger compartment and finds
17 corroborating evidence of contraband."

18 MR. GARDNER: That's correct. And what they found
19 in Neilson was additional drugs. So what this case is,
20 there is no drugs found, so there was no corroborating
21 evidence to justify searching the trunk.

22 THE COURT: Well -- okay.

23 MR. GARDNER: Yes, sir. Thank you, judge.

24 THE COURT: Anything, Mr. Springs?

25 MR. SPRINGS: No, Your Honor. If you have read

1 our brief, I would simply refer to it and say that the odor
2 of marijuana is ample probable cause to search this vehicle
3 and any container or area in it which could obtain the
4 object of the search, which was the marijuana, which would
5 presumably be green marijuana and not something that's
6 disappeared into smoke.

7 THE COURT: Well, I'm going to deny the motion to
8 suppress. I find that the detention in this case did not go
9 beyond the scope of the stop, considering that they had a
10 reasonable suspicion of a serious crime and that they --
11 serious, they don't mean, I don't believe this case -- this
12 is Chardo was talking about the categories of serious,
13 statutory serious, and most serious. I think he's talking
14 about something other than reasonable suspicion, some minor
15 offense, which, of course, possession of marijuana is -- not
16 just simple possession of marijuana, first offense, is not
17 what most people consider a serious crime, but I believe the
18 officer did have objective reasonable and articulable
19 suspicion of criminal activity from the smell of marijuana
20 and based on his training and knowledge of the hollowing out
21 of the blunts to be used as a vehicle for smoking.

22 It's a little different, but it's analogous,
23 anyway, to having seen a crack pipe, or something like that.
24 This, of course, is something that you buy in the store. I
25 guess you buy crack pipes in the store, too.

1 I don't find that the Red Bull Energy gave any
2 validity to the reasonableness of the search. I think we
3 are going a little far when we start basing searches on soft
4 drinks that -- I don't remember. My kids do, and I hate to
5 think they got stopped and they got searched just because
6 they had a Red Bull Energy can in their car.

7 I don't see any real difference, although, the
8 10th Circuit case that we talked about a moment ago, it just
9 talked about the odor of marijuana, but I don't see any real
10 significant difference in burnt marijuana and raw marijuana.
11 There has been no testimony by anybody that -- in fact,
12 Officer Vinesett, to the contrary, that black and mild and
13 burnt marijuana have the same smell. In fact, he testified
14 that they do not. I find his testimony is credible.

15 I find that the stop and detention, while it was
16 about -- I have got about thirteen minutes, based on the
17 times that I was jotting down, but I believe it was only
18 five minutes -- I have trouble reading my notes, but I
19 believe it was only about five minutes before they -- from
20 14:07 to 14:12. I believe about 14:12 was when they got the
21 passenger out and indicated he smelled marijuana, or at
22 least I have got a statement about that within five minutes,
23 but I think detention was not excessively long. I don't
24 know there is any bright line test for what is or is not a
25 reasonable time.

1 I did struggle a little bit, quite candidly, even
2 before you brought it with the dog not alerting, how that
3 factors in. I don't know that -- again, if you use the word
4 bright line, but I don't believe there is any bright line
5 indicator -- that's not the right word. I'm having trouble
6 articulating.

7 I don't think there is any requirement that chain
8 of suspicion is broken by some other event, such as the dog
9 not alerting. I guess the courts will have to decide that,
10 just like they will have to decide what is burnt marijuana
11 smell, but I don't think that they had any obligation to
12 stop the search. I don't believe that -- that certainly
13 didn't mediate or do away with the fact that he had smelled
14 marijuana. Whether the dog smells it or not, the officer
15 testified he did. The dog's nose may be better, and we
16 usually don't see officers running around sniffing like we
17 do a dog, but I affirmatively find, so this would hopefully
18 be clear on the record, that there was no -- that there was
19 no requirement that the search stop and detention stop -- or
20 that the detention stop at the time the dog did not alert.

21 And, as I have already said, I find that based on
22 the main indicator, the smell of marijuana. Also the
23 blunts, his knowledge of how blunts are used and the
24 evidence that, as shown through his testimony and as shown
25 in the photographs, that tobacco had been spilled in the car

1 on the floorboard and the presence of the hollowed out
2 portions in the cups, the Exhibits 3 and 2. So I deny the
3 motion.

4 Let me -- that includes the search at the -- after
5 the car was towed. I believe once the car was towed and in
6 the possession of law enforcement, they had a right -- in
7 fact, I think they have got an obligation to do an inventory
8 search so that they will know what's in there while it's in
9 their possession and someone won't come in later and say "I
10 had \$3,000 in the trunk and when you gave my car back, the
11 \$3,000 wasn't there," so I deny the motions.

12 MR. WALKER: Your Honor, can I ask one question?

13 THE COURT: Yes.

14 MR. WALKER: We could still argue before the jury
15 that it's illegal, right? You will charge Fourth Amendment,
16 or the applicable --

17 THE COURT: I have never charged -- I don't know.
18 You would have to show me some law on that. This is a --
19 I'm the judge of the facts -- the judge of the law --

20 MR. WALKER: Yes, I understand that.

21 THE COURT: -- and this is a legal question, not a
22 fact question, I don't believe.

23 MR. WALKER: All right.

24 THE COURT: So I'm going to find -- unless you can
25 show me some law. I have never had anybody even ask that.

1 That doesn't mean that you are wrong, but --

2 MR. WALKER: Well, I don't know if I'm right, to
3 be honest with you.

4 THE COURT: Well, the law that comes out of Conway
5 is usually pretty good, but -- and we certainly enjoy having
6 Judge Hyman here this week, but I'm not going to -- unless
7 you, between now and when we get to closing arguments, find
8 some law, then I'm not going to allow that to be --

9 MR. WALKER: Okay.

10 THE COURT: -- to be argued. That's a legal
11 question.

12 MR. WALKER: Thank you.

13 MR. SPRINGS: Now, at this point our jury panel
14 should be downstairs. We do have a Jackson v. Denno, which
15 wouldn't take very long. We can go ahead and do that now.
16 All our necessary people are here, or we can pick the jury.

17 THE COURT: Why don't we go ahead and do it.

18 MR. SPRINGS: Very good.

19 Officer Vinesett, if you will take the stand.

20 THE COURT: You are still under oath.

21 I forgot to mention, while I don't think in and of
22 itself stories about the trip to Atlanta, which are arguably
23 not really inconsistent, you could be going to see girls and
24 watch them play basketball, with the some discrepancy in
25 those may have heightened the suspicion, but I find that the

1 suspicion existed -- the reasonable articulable suspicion
2 existed, regardless of those inconsistencies. I'm not
3 relying on those inconsistencies.

4 MR. SPRINGS: And you could say he had probable
5 cause to search?

6 THE COURT: He had probable cause to search, yes.

7 MR. SPRINGS: Thank you, sir.

8 DIRECT EXAMINATION BY MR. SPRINGS:

9 Q. Now, Officer Vinesett, we have just watched a movie, a
10 video, which is been marked as a Court's Exhibit. Did you
11 watch the movie?

12 A. Yes, sir.

13 Q. And on the movie it showed you interacting with Mr.
14 Kenneth Morris, the defendant here, and his companion, Mr.
15 Brandon Nichols, on February 6th, 2008. And you said "hook
16 them up," and I think you told these fellows they were under
17 arrest. Did you see that?

18 A. Yes, sir.

19 Q. Now, after you arrested them, did you read their
20 rights, according to Miranda, to them?

21 A. Yes, sir.

22 Q. And where were they when you read them those rights?

23 A. In the back seat of my patrol vehicle.

24 Q. How many minutes would you say it was after you said
25 "hook them up. You guys are under arrest," I think you said

1 Q. Is it against the law to commit a traffic violation on
2 the highways in York County, South Carolina?

3 A. Yes, sir.

4 Q. All right. Let's cut to the chase. Let's talk about
5 February 6th, 2008. Were you on duty and in your patrol car
6 about two o'clock that afternoon?

7 A. Yes, sir.

8 Q. Is it an unmarked car?

9 A. Yes, sir.

10 Q. Did you have anybody riding in the car with you?

11 A. Yes, sir, Constable Scott.

12 Q. You say he's a constable?

13 A. Yes.

14 Q. Now, what is your jurisdiction and what geographic area
15 can you arrest somebody?

16 A. In York County.

17 Q. Your jurisdiction is York County as a deputy?

18 A. Yes.

19 Q. What is the jurisdiction for a constable?

20 A. It's statewide jurisdiction.

21 Q. Now, the constable that was with you, what's his name?

22 A. Walter Scott.

23 Q. All right. Was that constable being paid for his time
24 with you that day?

25 A. No, sir.

1 Q. And did you find anything illegal in the passenger
2 compartment?

3 A. No, sir.

4 Q. Did you find anything illegal in the trunk?

5 A. Yes, sir.

6 Q. I'm showing you what's been marked State's Exhibit 8
7 for identification. Just give me one second.

8 MR. WALKER: No objection, Your Honor.

9 THE COURT: Admitted without objection.

10 MR. WALKER: One moment, Your Honor.

11 (Off the record)

12 (Back on the record)

13 MR. SPRINGS: I'm not offering it yet.

14 MR. WALKER: You are not offering it yet?

15 MR. SPRINGS: I'm not offering it, no, sir.

16 BY MR. SPRINGS:

17 Q. I'm showing you what's been marked State's Exhibit 8.
18 Have you ever seen the stuff in that bag before?

19 A. Yes, sir.

20 Q. What is that stuff?

21 A. It's Ecstasy pills.

22 Q. And where did you see it the first time?

23 A. In the trunk of the vehicle in a bag.

24 Q. In the trunk of this Ford rental car?

25 A. Yes, sir.

1 Q. Was it more than a hundred?

2 A. Yes, sir.

3 Q. Did you count the pills?

4 A. Yes, sir.

5 Q. Did you -- do you recall how many you did count?

6 A. 393.

7 Q. When you found those pills, did you arrest anybody?

8 A. Yes, sir.

9 Q. Who did you arrest?

10 A. Mr. Nichols and Mr. Morris.

11 Q. Okay. And what did you charge them with?

12 A. Trafficking. Trafficking in Ecstasy.

13 Q. Okay. Now, let me see if I can take a look at that.

14 And while we are talking about State's Exhibit 8, let
15 me ask you if you bagged up this drug evidence later?

16 A. Yes, sir.

17 Q. Did you put it in an evidence bag?

18 A. Yes, sir.

19 Q. Did you seal that bag up?

20 A. Yes, sir.

21 Q. Did you put some identifying writing on the evidence
22 bag?

23 A. Yes, sir.

24 Q. Until you got it to an official police evidence bag,
25 was it in your custody and control the whole time?

1 Q. And the Ford rental car, how did it get to the -- did
2 it go to the police station as well?

3 A. Yes, sir.

4 Q. And how did it get to the police station?

5 A. Constable Scott drove it to the police station.

6 Q. Okay. And when the Ford rental car got to the police
7 station, did you search it more thoroughly?

8 A. Yes, sir.

9 Q. And did you find anything else in the Ford rental car
10 when you got it to the police station out of the rain and
11 searched it more thoroughly?

12 A. Yes, sir.

13 Q. What did you find?

14 A. I found approximately a half pound of marijuana located
15 in the trunk, actually underneath the spare tire.

16 Q. Okay. All right.

17 Before I talk to you about that marijuana, let's go
18 back for a minute about the Ecstasy. What kind of a
19 container was it in the trunk?

20 A. It was in like a -- almost like a gift box.

21 Q. Okay.

22 MR. WALKER: Your Honor, we have a matter of law
23 to take up.

24 THE COURT: I'm going to let the jury go to the
25 jury room just for a few minutes. It won't be a long break.

1 Q. A bunch of rubber bands.

2 Put that back in there, if you would.

3 MR. SPRINGS: Your Honor, we do offer State's
4 Exhibit 10 into evidence.

5 MR. WALKER: We object, Your Honor, on the grounds
6 we previously stated.

7 THE COURT: All right. The objection is overruled
8 for the reasons I previously stated.

9 MR. WALKER: Okay.

10 BY MR. SPRINGS:

11 Q. And you said the Ecstasy was in bags in the box?

12 A. One bag.

13 Q. One bag.

14 All right. Now, let's back up to the police station.
15 You have got the Ford rental car at the Rock Hill police
16 station out of the rain. You did a more thorough search and
17 what else did you find in there?

18 A. Located under the spare tire in the trunk was
19 approximately a half a pound of marijuana.

20 Q. Okay.

21 (Drugs marked as State's Exhibit No. 11 for
22 identification)

23 BY MR. SPRINGS:

24 Q. I'm showing you what's been marked as State's Exhibit
25 No. 11 for identification. Have you ever seen that green

1 A. Yes, sir.

2 Q. And it was in a plastic bag?

3 A. Yes, sir.

4 Q. Okay. Were those plastic bags that you have been
5 talking about checked for fingerprints?

6 A. Yes, sir.

7 Q. Were any identifiable quality fingerprints found?

8 A. No, sir.

9 (Evidence Bag marked as State's Exhibit No. 12 for
10 identification)

11 (Evidence Bag marked as State's Exhibit No. 13 for
12 identification)

13 (Evidence Bag marked as State's Exhibit No. 14 for
14 identification)

15 (Evidence Bag marked as State's Exhibit No. 15 for
16 identification)

17 BY MR. SPRINGS:

18 Q. I'm showing you what's marked State's Exhibit 12, 13,
19 14 and 15. Did these contain the plastic bags?

20 A. Yes, sir.

21 Q. What's all that black stuff?

22 A. Fingerprint dust.

23 Q. All right.

24 MR. SPRINGS: Your Honor, we do offer into
25 evidence State's 13, 14, 15 and 12, the plastic bags these

1 materials were found in.

2 THE COURT: All right.

3 MR. WALKER: The same objection, Your Honor.

4 THE COURT: Objection overruled.

5 MR. WALKER: All right.

6 THE COURT: They are in evidence over objection.

7 BY MR. SPRINGS:

8 Q. And was Mr. Morris and the friend, Mr. Nichols, were
9 they actually interviewed and questioned at the police
10 station?

11 A. Yes, sir.

12 Q. And did Mr. Morris talk to an officer?

13 A. Yes, sir.

14 Q. Was that at the Rock Hill city police station?

15 A. Yes, sir, it was.

16 Q. And who is the supervisor of the entire York County
17 narcotics unit? What's his name?

18 A. Commander Marvin Brown.

19 Q. Did he take an interest in this case that day and get
20 involved after the Ecstasy was found?

21 A. Yes, sir.

22 Q. And who was the narcotics supervisor for that one
23 particular office, the Rock Hill city police officer?

24 A. Lieutenant Jason Dalton.

25 Q. Jason Dalton?

1 A. State's Exhibit 8 contains
2 Methylenedioxymethamphetamine, otherwise known as MDMA.

3 Q. Does it have a street name?

4 A. It does.

5 Q. What is that?

6 A. That would be Ecstasy.

7 Q. Okay. And how many pills were -- how many Ecstasy
8 pills?

9 A. The amount that I tested, 254 tablets.

10 Q. Okay. Were Ecstasy?

11 A. That's correct.

12 Q. Okay. All right.

13 Now, let me show you -- by the way, did you seal it
14 back up in a bag after you tested it?

15 A. Yes, sir, I did. My seal was across the bottom here
16 with my initials and the date seal.

17 Q. Okay. Now, is this actually a bag in a bag? The bag
18 that you got, you opened and tested it and you put it back
19 in your own bag and sealed it up, is that right?

20 A. That's correct.

21 Q. Okay. Is this still sealed up the way you sealed it up
22 after you tested it?

23 A. Yes, sir, the seal falls across my initials.

24 Q. Very good.

25 MR. SPRINGS: We do offer State's Exhibit 8 into

1 time offer it into evidence.

2 MR. WALKER: We would object on the grounds as
3 previously stated.

4 THE COURT: Your objection is overruled as
5 previously ruled.

6 BY MR. SPRINGS:

7 Q. Now, let's look at State's Exhibit No. 11. Have you
8 ever seen that and done business with what's in that bag?

9 A. Yes, I have.

10 Q. Where did you first receive that?

11 A. This evidence, State's Exhibit 11, was received from
12 Barbara Traylor on March the 3rd of 2008.

13 Q. Okay. Over here in the drug lab, in the evidence room?

14 A. That's correct.

15 Q. Okay. And was the bag you received sealed up, or did
16 it look like it had been tampered with?

17 A. It was sealed.

18 Q. Okay. And did you open the bag and do an analysis of
19 the green stuff that was in the bag?

20 A. Yes, I did.

21 Q. And what did you find the green stuff in the bag to be?

22 A. State's Exhibit 11, which is item number 5 on the
23 report, was found to be marijuana.

24 Q. And how much is the weight?

25 A. In the amount of 219.7 grams.

1 (Jury Note marked as Court's Exhibit No. 8 for
2 identification)

3 (Jury Note marked as Court's Exhibit No. 9 for
4 identification)

5 (Whereupon, at 1:05 p.m., proceedings were
6 recessed, pending the verdict of the jury panel)

7 (Whereupon, at 1:25 p.m., proceedings were
8 reconvened)

9 THE COURT: I understand we have a verdict in the
10 Morris trial, so we can bring in -- he's present with
11 counsel and bring in the jury.

12 (Whereupon, at 1:29 p.m., the jury panel returned
13 to open court to report its verdict)

14 THE COURT: All right. I understand that you have
15 reached a verdict?

16 JURY FORELADY: Yes, sir.

17 THE COURT: If you will hand them to the bailiff,
18 then they will hand them up to me.

19 Okay.

20 THE CLERK: Indictment 2008-GS-46-2837, the State
21 versus Kenneth Morris, indictment for trafficking in
22 Ecstasy, "we, the jury, find the defendant guilty of
23 trafficking Ecstasy."

24 Signed by the foreperson, dated today's date.

25 Indictment 2008-GS-46-2834, the State versus

1 Kenneth Morris, indictment for possession of marijuana with
2 intent to distribute, "we, the jury, find the defendant
3 guilty of the lesser included offense of simple possession
4 of marijuana."

5 Signed by the foreperson, dated today's date.

6 Ladies and gentlemen of the jury, if that be your
7 verdict, say you all by raising your right hand.

8 Let the record show that all jurors confirmed this
9 verdict.

10 THE COURT: Anything from the State before the
11 jury is dismissed?

12 MR. SPRINGS: No, sir.

13 THE COURT: Anything from the defense before the
14 jury is dismissed?

15 MR. GARDNER: No, Your Honor.

16 MR. WALKER: No, Your Honor.

17 THE COURT: All right. Thank you for your help.
18 I don't require you to stay for sentencing. Madam Forelady,
19 we have got you to come up. We have got one thing else --
20 two things for you to sign. You can leave, or you can go
21 out the back and come in and sit back there while we go
22 through the sentencing procedure, but I don't -- we have
23 already been here a week, so I don't require you to stay
24 while we go through at the point where I'm told if he has
25 any prior record, or anything like that, and make a decision

1 caught up in a bad situation and -- I mean, I'm here and --
2 I mean --

3 THE COURT: You got caught up in a bad situation?
4 You drove to Atlanta and picked up a bunch of drugs and
5 driving the car back. How does to mean you got caught up in
6 a bad situation?

7 THE DEFENDANT: As far as who I was riding with,
8 sir. I feel like I was in a bad situation, just caught up.
9 Some things I didn't know about. And being that they gave
10 him such a sweet deal, he told me to my face that he would
11 choose his family over me. He didn't really care and that's
12 why he wrote the letter. When it came back to him finding
13 out that he could go to jail because of that letter, he
14 changed up again. I mean, he basically told me that he has
15 a family and -- I mean, he would choose them.

16 THE COURT: You told the officers on that day that
17 you were involved.

18 THE DEFENDANT: The officers made a few bad
19 statements. But, I mean, I can't -- I'm not going to get
20 into what they said that day. I'll just leave it at what it
21 is.

22 THE COURT: The sentence is thirty years and
23 \$50,000 fine on the Ecstasy.

24 One year on the marijuana charge to run
25 concurrent. Thank you.

1 Officer Vinesett: How y'all doing?
2 Mr. Morris: All right.
3 Officer Vinesett: Deputy Vinesett with the
4 Sheriff's office. You got your driver's
5 license and ---
6 Mr. Morris: Yeah. I got to pee, man.
7 Officer Vinesett: The reason why I stopped
8 you is you were following that box truck
9 entirely too close.
10 Mr. Morris: Oh no, I was trying to get
11 off the exit. Nah, I got to pee bad. That's
12 why I came over here.
13 Officer Vinesett: All right. You got your
14 vehicle registration?
15 Mr. Morris: Yeah, it's right there.
16 This is my friend right here. He's all about
17 to fall asleep right there.
18 Officer Vinesett: You got your ID with you?
19 Mr. Nichols: Yes.
20 Officer Vinesett: Y'all been running into
21 much of this storm?
22 Mr. Morris: It ain't been too bad.
23 Officer Vinesett: All right. If you'll just
24 step back here and let me explain this to you?
25 Mr. Morris: All right.

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1 Officer Vinesett: You can sit right over
2 here.
3 Mr. Morris: All right.
4 Officer Vinesett: Wes, you want to stand
5 right over there?
6 Mr. Morris: Owie, killing myself.
7 Officer Vinesett: Where are y'all coming from
8 today?
9 Mr. Morris: From Atlanta, Georgia.
10 Officer Vinesett: What did y'all have going
11 on down there?
12 Mr. Morris: Went to visit some girls.
13 Officer Vinesett: Uh-oh, y'all don't work?
14 Mr. Morris: Yeah, I work --
15 (unintelligible.)
16 Officer Vinesett: Is everything straight with
17 your license?
18 Mr. Morris: Yeah.
19 Officer Vinesett: What's your last name?
20 Mr. Morris: Morris.
21 Officer Vinesett: How long was y'all down in
22 Atlanta?
23 Mr. Morris: We just went for a day to
24 see ---
25 Unidentified radio voice: (Unintelligible.)

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1 Officer Gibson: Yeah. I'm turning around at
2 the county line.
3 Officer Vinesett: All right. I got a guy in
4 the front seat with me, getting ready to check
5 his license and stuff.
6 Officer Gibson: Okay.
7 Unidentified radio voice: I got this 18-wheeler
8 turning around heading in the right direction.
9 Unidentified radio voice: Okay.
10 Mr. Morris: I work nights.
11 Officer Vinesett: What kind of work you do?
12 Mr. Morris: I work with
13 (unintelligible).
14 Officer Vinesett: Where'd y'all meet them
15 girls at. the hotel?
16 Mr. Morris: Yeah.
17 Officer Vinesett: Uh-oh, (unintelligible.)
18 Mr. Morris: And I got family down
19 there, too though. Yeah, down south.
20 Officer Vinesett: Oh, you got family?
21 Mr. Morris: Yeah.
22 Officer Vinesett: Okay. You stay with the
23 family?
24 Mr. Morris: Nah, the hotel.
25 Officer Vinesett: Which one?

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1 Mr. Morris: The Hilton.
2 Officer Vinesett: Who checked you in, him or
3 you?
4 Mr. Morris: He checked us in.
5 Officer Vinesett: You like to speed, too.
6 don't you?
7 Mr. Morris: Yeah. I done had some
8 tickets.
9 Officer Vinesett: Has your license ever been
10 suspended?
11 Mr. Morris: Yeah, a while ago.
12 Officer Vinesett: Have you ever been arrested
13 for anything?
14 Mr. Morris: Yeah, when I was younger.
15 Officer Vinesett: What was that for?
16 Mr. Morris: Like weed, and stuff like
17 -- I was in eleventh grade. I graduated from
18 (unintelligible) in Greensboro. That's where
19 my daughter's living at. That's where we was
20 about to go.
21 Officer Vinesett: Which one is that Hilton?
22 Is that the big tall one?
23 Mr. Morris: Whatever it was it wasn't
24 that nice though. It was downtown. TV, they
25 had a 17-inch TV in there.

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1 Officer Vinesett: What floor was y'all on?
2 Mr. Morris: 15.
3 Officer Vinesett: Goodness.
4 Mr. Morris: 1547. 1548.
5 Officer Vinesett: Was that even close to the
6 top?
7 Mr. Morris: 28. (Unintelligible.)
8 Officer Vinesett: All right.
9 Mr. Morris: I'm about to pee, so we can
10 switch up, take over ---
11 Officer Vinesett: Hold on one second, hold
12 on, got to get some information from him.
13 Officer Vinesett: Where y'all coming from
14 today?
15 Mr. Nichols: Atlanta.
16 Officer Vinesett: What did y'all have going
17 on down there?
18 Mr. Nichols: A little basketball game.
19 Officer Vinesett: Who was playing?
20 Mr. Nichols: A, a cousin.
21 Officer Vinesett: Y'all didn't go down there
22 and see the Hawks or nothing?
23 Mr. Nichols: Huh-uh (negative response).
24 Officer Vinesett: Your rental agreement says
25 "No additional drivers."

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1 Mr. Nichols: Uh-huh (affirmative
2 response).
3 Officer Vinesett: Any reason why he was
4 driving?
5 Mr. Nichols: I was tired. He just took
6 over for me.
7 Officer Vinesett: How long was y'all down
8 there, a few days?
9 Mr. Nichols: Nah. Yesterday.
10 Officer Vinesett: Oh, okay. Who won?
11 Mr. Nichols: They did.
12 Officer Vinesett: That's good. All right.
13 I'm going to check your -- Everything straight
14 with your license?
15 Mr. Nichols: Everything's straight.
16 Officer Vinesett: I'll be right back with
17 you.
18 Constable Scott: You got to get his driver's
19 license?
20 Officer Vinesett: Yeah. Nope, that one.
21 Sir?
22 Mr. Morris: Yes.
23 Officer Vinesett: Could you step out here and
24 give this guy your information right quick?
25 Mr. Morris: All right.

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1 Officer Vinesett: Hey.
2 Officer Gibson: I'm ready.
3 Officer Vinesett: Two young guys born in '83
4 coming from Atlanta. One said they went down
5 there to visit some girls. They stayed in a
6 hotel, the Hilton, last night. They from
7 Greensboro. Go up there and talk to the other
8 one, he said they went down there for his
9 friend's cousin had a basketball game, went
10 down there and watched the basketball game.
11 Driver admitted he's been arrested before in
12 the past for drugs. Can see shake all in the
13 car and on them like they've been rolling
14 marijuana, but I was going to see if you wanted
15 to get Justice out.
16 Officer Gibson: Yeah, you ---
17 Officer Vinesett: You broke up. I heard
18 "Yeah" and "you."
19 Officer Gibson: You want me to go ahead and
20 just get the dog out, or you want us to get the
21 consents?
22 Officer Vinesett: Yeah -- go -- where you at
23 right now? Come on in and ask the passenger.
24 I'm getting ready to get started on the warning
25 and check 29's, but go ahead and ask the

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1 passenger and look around on the center console
2 too and see if you can -- Hey, Wes, come here.
3 Constable Scott: I'm with the driver ---
4 Officer Vinesett: Hold on one second.
5 Officer Gibson: I'm getting off on Anderson
6 now.
7 Officer Vinesett: All right. Hold on.
8 (Unintelligible.)
9 Officer Vinesett: Yeah. If he goes to the
10 bathroom, you're going with him. You're going
11 to stand in the stall with him.
12 (Unintelligible.) Do you want to use the
13 restroom?
14 Mr. Morris: Yes, sir.
15 Officer Vinesett: All right. The traffic
16 stop is not over.
17 Mr. Morris: Uh-huh (affirmative
18 response).
19 Officer Vinesett: I'm still checking some
20 stuff on the computer; but before I let you go
21 in there, you got anything illegal on you?
22 Mr. Morris: No. I'm good.
23 Officer Vinesett: Can I search you?
24 Mr. Morris: Sure.
25 Officer Vinesett: Turn around for me. You

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1 ain't got to hold your hands up. man. What is
2 that?
3 Mr. Morris: (Unintelligible.)
4 Officer Vinesett: Oh okay. All right. He's
5 going to walk with you, all right?
6 Mr. Morris: Okay. Is there a problem?
7 Officer Vinesett: No, no. We just don't like
8 people getting away, walking away from a
9 traffic stop.
10 Mr. Morris: Okay.
11 Mr. Nichols: Can I go to the bathroom?
12 Officer Vinesett: You got anything illegal on
13 you?
14 Mr. Nichols: No, sir.
15 Officer Vinesett: All right. Do you mind if
16 I search you ---
17 Mr. Nichols: (Unintelligible.)
18 Officer Vinesett: --- before you go. Come on
19 out.
20 Mr. Nichols: (Complies with request.)
21 Officer Vinesett: All right, turn around. We
22 just, we just ain't finished with the traffic
23 stop, so we don't want to ---
24 Mr. Nichols: That's cool.
25 Officer Vinesett: --- let people walk away or

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1 nothing.
2 Mr. Nichols: All right.
3 Officer Vinesett: The other guy had to use
4 the bathroom real bad now.
5 Mr. Nichols: I do too.
6 Officer Vinesett: He's got to pee.
7 Officer Gibson: Is anything in the car
8 illegal?
9 Mr. Nichols: No, sir.
10 Officer Gibson: Can I search it?
11 Mr. Nichols: I mean, for what? I mean
12 ---
13 Officer Gibson: Do I need to get the drug
14 dog out?
15 Mr. Nichols: You don't need no drug dog.
16 (Unintelligible.)
17 Officer Vinesett: What is this?
18 Mr. Nichols: That's my syringe. I'm
19 diabetic.
20 Officer Vinesett: I'm just going to lay this
21 right there, all right?
22 Mr. Nichols: All right. I'm ready to
23 get home, to the house.
24 Officer Vinesett: Stand over here for me?
25 All right. If you don't mind, just step back

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1 there and wait on that guy, all right?

2 Mr. Nichols: All right.

3 Officer Vinesett: You can have a seat in my

4 passenger seat. Right here. Right here.

5 Mr. Nichols: Can one of y'all walk with

6 me?

7 Officer Vinesett: He's getting ready to.

8 Mr. Nichols: He was speeding or

9 something?

10 Officer Vinesett: He was following like a box

11 truck entirely too close.

12 Mr. Nichols: Dang.

13 Officer Vinesett: Just wait right there.

14 Hold on one second. No, no, you ain't got to

15 stand in the rain. Stand back a little bit.

16 Has your license ever been suspended?

17 Mr. Nichols: Nah, it ain't never been

18 suspended.

19 Officer Vinesett: Have you ever been arrested

20 for anything?

21 Mr. Nichols: No.

22 Officer Vinesett: Never.

23 Mr. Nichols: Never been arrested.

24 Officer Vinesett: When's the last time you

25 smoked marijuana? You can tell me this

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1 morning, and there ain't nothing I can do to
2 you.

3 Mr. Nichols: What?

4 Officer Vinesett: You can tell me this
5 morning, and there ain't nothing I can do to
6 you.

7 Mr. Nichols: I mean, ---

8 Officer Vinesett: Was it while y'all was in
9 Georgia?

10 Mr. Nichols: (Unintelligible.)

11 Officer Vinesett: You said he didn't have to
12 get the drug dog out. Does that mean there's
13 nothing in there?

14 Mr. Nichols: Right.

15 Officer Vinesett: And he can search it?

16 Mr. Nichols: I mean, I -- that's a waste
17 of time. Why would you search the car? I
18 mean, I'm ready to go. I'm ready to go.

19 Officer Vinesett: Hold on one second.

20 Officer Vinesett: (Exits the vehicle.)

21 Mr. Nichols: Can one of y'all take me,
22 just take me to pee, please?

23 Unidentified Speaker: In just a minute.

24 Mr. Nichols: I'm going to pee in my
25 pants, man.

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1 Unidentified Speaker: Huh?
2 Mr. Nichols: I'm going to pee in my
3 pants. He already peed. Can I go with one of
4 y'all to take me, please?
5 Unidentified Speaker: In just a minute.
6 Mr. Nichols: All right.
7 Officer Vinesett: Hold up. Hold up, hold up.
8 hold up. You said, you said you ain't smoked
9 no marijuana the last time you know?
10 Mr. Nichols: Nah.
11 Officer Vinesett: All right. Whenever I was
12 up here talking to you I called him, and
13 whenever I got you out, I swore I could smell
14 some marijuana coming ---
15 Mr. Nichols: You probably smelled Black
16 & Mild. I smoke Black & Mild, that's all.
17 Officer Vinesett: I smelled marijuana.
18 Mr. Nichols: We didn't have no
19 marijuana.
20 Officer Gibson: Is anything in the car?
21 Mr. Nichols: No, there's nothin' in the
22 car. You didn't smell any marijuana. It's
23 Black & Mild, 'cause I don't smoke marijuana.
24 (unintelligible.)
25 Officer Vinesett: All right, you step out

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1 here.
2 Mr. Nichols: I don't have any marijuana
3 in there.
4 Officer Vinesett: Step out here. Step over
5 here.
6 (Unintelligible.)
7 Officer Vinesett: Step over here. Step over
8 here.
9 (Unintelligible.)
10 Officer Gibson: Hey, you see the phone
11 keeps going off?
12 Officer Vinesett: Yeah.
13 Officer Gibson: Where'd they get a ticket
14 from?
15 Officer Vinesett: Two days ago in Gaffney.
16 Officer Gibson: I'm going to wait for you.
17 (Unintelligible.)
18 Officer Gibson: God damn, hook them up,
19 (Unintelligible.)
20 Officer Vinesett: Huh?
21 Officer Gibson: Hook them up. God damn.
22 there's a bunch of this.
23 Officer Vinesett: Huh?
24 Officer Gibson: Hook them up.
25 Officer Vinesett: (Unintelligible.)

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1 Officer Gibson: Yes.
2 Officer Vinesett: Put your hands behind your
3 back right now. Put your hands behind your
4 back. Put your hands behind your back. Y'all
5 both are under arrest for (unintelligible).
6 (Unintelligible.)
7 Officer Vinesett: Somebody has been smoking
8 marijuana in that car.
9 Mr. Nichols: No, they have not. No,
10 they have not.
11 Mr. Morris: Nobody's been smoking in
12 this car.
13 Officer Gibson: There ain't nobody that's
14 been smoking marijuana?
15 Mr. Nichols: Black & Mild.
16 (Unintelligible.)
17 Mr. Nichols: Nobody's been smoking
18 marijuana in that car.
19 (Unintelligible.)
20 Unidentified Speaker: Ain't but about five
21 minutes away, right?
22 Unidentified Speaker: Hold on.
23 (Unintelligible.)
24 Officer Vinesett: Put it in the trunk, Wes.
25 Constable Scott: I am.

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1 Officer Vinesett: Both of y'all, if you
2 would, listen up for me, all right?

3 (Unintelligible.)

4 Officer Vinesett: If y'all would, listen up.
5 You have the right to remain silent. Anything
6 you say can and will be used against you in a
7 court of law. You have the right to talk to a
8 lawyer and have him present with you while
9 you're being questioned. If you cannot afford
10 to hire a lawyer, one will be appointed to
11 represent you before any questions, if you
12 wish. You can decide at any time to exercise
13 these rights and not answer any questions or
14 make any statements. Do you understand each of
15 these rights that I have explained to you? Do
16 you understand, sir?

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(843) 248-5252

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

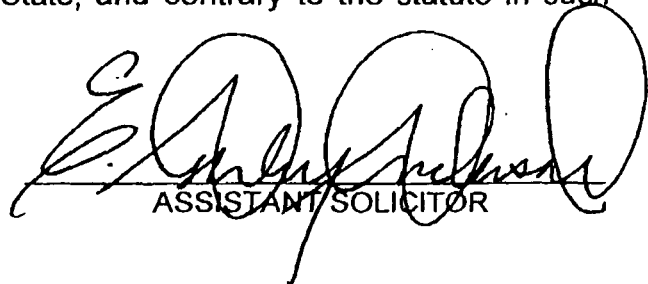
INDICTMENT

At a Court of General Sessions, convened on July 3, 2008, the Grand Jurors of York County present upon their oath:

TRAFFICKING ECSTASY (MDMA)

That on or about February 6, 2008, in York County, South Carolina, the Defendant, Kenneth Darrell Morris, II, did wilfully, unlawfully and knowingly sell, manufacture, deliver, purchase, or bring into this State, or did provide financial assistance or otherwise aid, abet, attempt, or conspire to sell, manufacture, deliver, purchase, or bring into this State, or was knowingly in actual or constructive possession or knowingly attempted to become in actual or constructive possession of a Ecstasy (also known as Methylenedioxymethamphetamine, or MDMA) in a quantity greater than One Hundred (100) dosage units, all in violation of Section 44-53-370 of 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

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

WITNESSES

The State of South Carolina
County of York

Defendant

COURT OF GENERAL SESSIONS

July 3, Term 2008

I hereby appear in my own proper person and plead guilty to the within indictment or to

REST WARRANT NUMBER

THE STATE

Defendant

vs.

Witness:

KENNETH DARRELL MORRIS, II

C.C.C. PLS. AND G.S.

ACTION OF GRAND JURY

BILL

via S. Morris
n of Grand Jury
7/3/08

VERDICT

Indictment for

POSSESSION OF MARIJUANA WITH
INTENT TO DISTRIBUTE

SC Code: 44-53-370
CDR Code: 0188

n of Petit Jury

STATE OF SOUTH CAROLINA)

INDICTMENT

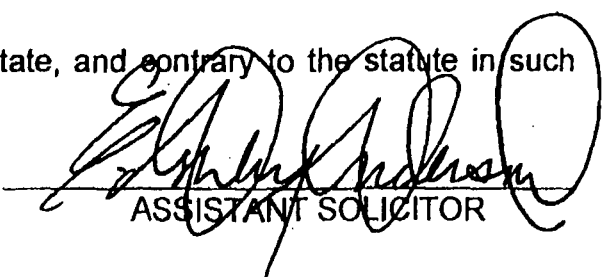
COUNTY OF YORK)

At a Court of General Sessions, convened July 3, 2008, the Grand Jurors of York County present upon their oath:

POSSESSION OF MARIJUANA WITH INTENT TO DISTRIBUTE

That on or about February 6, 2008, in York County, South Carolina, the Defendant, Kenneth Darrell Morris, II, did possess with intent to distribute, dispense, or deliver a quantity of marijuana, a controlled substance under the provisions of Section 44-53-110, et seq., of the Code of Laws of South Carolina (1976, as amended); or did otherwise aid, abet, attempt, or conspire to manufacture, distribute, dispense, or deliver marijuana, all in violation of Section 44-53-370 of 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

After being fully advised as to my
legal rights, I hereby waive presentment
to the Grand Jury.

WITNESSES

The State of South Carolina

County of York

Defendant

COURT OF GENERAL SESSIONS

July 3, Term 2008

I
hereby appear in my own proper person and plead
guilty to the within indictment or to

ARREST WARRANT NUMBER

THE STATE

Defendant

VS.

Witness:

ACTION OF GRAND JURY

KENNETH DARRELL MORRIS, II

C.C.C. PLS. AND G.S.

VERDICT

Indictment for

TRAFFICKING ECSTASY (MDMA)

SC Code: §44-53-370
CDR Code: 2914

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	OF THE ~~FOURTH~~ JUDICIAL CIRCUIT
COUNTY OF YORK	)	<i>SIXTEENTH</i>
	)	
STATE OF SOUTH CAROLINA	)	MOTION TO SUPPRESS AND
	)	INCORPORATED MEMORANDUM
v.	)	OF LAW
	)	
Kenneth Darrell Morris, II,	)	Warrant No.: J-165012; J-165014;
	)	J-165016; J-165018
	)	Charge: Trafficking Ecstasy 3 rd ;
	)	PWID Ecstasy Close Proximity to School;
Defendant.	)	PWID Marijuana;
	)	PWID Marijuana Close Proximity to School.

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO SUPPRESS

This matter is before the Court upon the Motion of the Defendant, Kenneth Darrell Morris, II, to suppress the evidence discovered during his detention following a traffic stop on February 6, 2008. For the following reasons, the Court should suppress the fruits of the seizure and search as a violation of the Fourth Amendment of the United States Constitution and as a violation of Article I Section 10 of the South Carolina Constitution.

I. Factual Background

On February 6, 2008, Kenneth Darrell Morris, II, was driving north on I-77. Brandon James Nichols was the passenger. As they passed through York County, they exited the interstate to find a restroom. After they pulled into the parking lot of a gas station, Officer L.T. Vinesett, Jr., stopped them for following too close on I-77 north bound. Constable W.E. Scott was riding with Officer Vinesett.

Officer Vinesett approached the vehicle from the passenger side and asked the driver, Morris, for his driver's license and vehicle registration. Vinesett then ordered Morris out of the vehicle and to sit in the patrol car. Vinesett then began questioning Morris on issues unrelated to the traffic stop. Vinesett then went back to the vehicle and asked the passenger for his driver's license and questioned him about their travel plans.

Vinesett returned to his patrol car. Morris asked to go to the restroom. Before Morris was

allowed to go to the restroom, Vinesett asked for and received permission to search him. Nothing illegal was found. Constable Scott escorted Morris to the restroom.

Officer Vinesett called Officer W.R. Gibson to bring K-9 Justice to the scene. Officer Gibson arrived at the traffic stop approximately eight and one-half minutes after the initial stop. He and Vinesett approached the passenger side of the vehicle. Gibson asked Nichols if he could search the car or if he needed to get the drug dog out and he refused. Vinesett asked Nichols to step out of the vehicle again. Gibson then deployed K-9 Justice and conducted a sniff of the vehicle. Justice did not alert on the vehicle. Despite the fact that the drug dog did not alert on the vehicle, Officer Vinesett searched the interior of the vehicle. He did not find any contraband. Officer Vinesett then searched the trunk of the vehicle. This search resulted in a seizure of what is alleged to be 393 ecstasy pills. Afterwards, Constable Scott drove the vehicle to the Rock Hill Police Department and a second search of the vehicle resulted in a seizure of what is alleged to be 227 grams of marijuana, which was also discovered in the trunk of the vehicle.

Vinesett states that “[w]ith probable cause Officer Vinesett and Officer Gibson searched the vehicle and located in the trunk...” Although Vinesett does not set out specifically what the “probable cause” was, or why the prolonged detention of the Defendants was justified, a review of his report indicates the following: an odor of marijuana coming from the vehicle; blunt tobacco in the vehicle; both defendants said they were in Atlanta, however, Morris said they went to visit some girls and Nichols said they went to see the driver’s cousin play basketball.¹ Approximately fourteen minutes passed from the initial contact of the officer and the officer’s search of the vehicle.

II. Law/ Analysis

A. Violation of the Fourth Amendment

The Fourth Amendment guarantees “[t]he right of the people to be secure in their

¹ General Sessions Case File Summary.

persons, houses, papers, and effects, against unreasonable searches and seizures.”² The Fourth Amendment protects against unreasonable searches and seizures, including seizures that involve only a brief detention.³ Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a seizure of persons within the meaning of the Fourth Amendment.⁴

Police may stop and briefly detain a vehicle for a traffic violation and once the vehicle is stopped, the police may order the driver to exit the vehicle.⁵ In carrying out the stop, an officer may request a driver’s license and vehicle registration, run a computer check, and issue a citation.⁶ Any further detention for questioning is beyond the scope of the stop and therefore illegal unless the officer has a reasonable suspicion of a serious crime.⁷ Once the reason for the stop has been satisfied, the stop may not be used as a “fishing expedition for unrelated criminal activity.”⁸

The police may lengthen a detention for further questioning beyond that related to the initial stop in two circumstances. The officer may detain the driver for questioning unrelated to the initial stop: 1) if he has an objectively reasonable and articulable suspicion of criminal activity, or 2) if the initial detention has become a consensual encounter.⁹

B. State v. Williams

In State v. Williams,¹⁰ the Court of Appeals affirmed the trial court’s suppression of evidence where there was no reasonable, articulable suspicion to support the continued detention of the passenger of a vehicle after completion of a traffic stop. In Williams, the officer asked the

² *U.S. Const. amend IV.*

³ *State v. Pichardo*, 367 S.C. 84, 97 (Ct.App. 2005), citing *U.S. v. Mendenhall*, 446 U.S. 544 (1980).

⁴ *Id.*, citing *Whren v. U.S.*, 517 U.S. 806 (1996).

⁵ *Id.*, citing *Pennsylvania v. Mimms*, 434 U.S. 106 (1977).

⁶ *Id.*, citing *U.S. v. Sullivan*, 138 F.3d 126 (4th Cir.1998).

⁷ *Id.*

⁸ *State v. Williams*, 351 S.C. 591, 598 fn 1 (Ct.App. 2002).

⁹ *State v. Pichardo*, 367 S.C. 84, 99 (Ct.App. 2005).

¹⁰ 351 S.C. 591 (Ct.App. 2002).

driver to step out of the vehicle while the passenger remained seated.¹¹ Once he had explained the ticket to the driver and returned his license and registration, the officer said he wanted to ask a few questions.¹² The officer asked the driver where they were coming from, where they were headed, the name of the passenger, and what their relationship was.¹³ The officer said that he became suspicious because the driver and passenger gave inconsistent answers to his questions.¹⁴ The driver then consented to a search of the car, and the officer discovered twenty-five pounds of marijuana.¹⁵

The detention in Williams lasted between twenty-five and forty minutes.¹⁶ Despite the officer's testimony that the Defendant was free to leave before answering the questions, the court held that the Defendant was not free to leave and that the Defendant was seized for purposes of the Fourth Amendment.¹⁷ In deciding whether a Fourth Amendment seizure had occurred, the Court noted "the detention associated with roadside searches is unlike a mere field interrogation where an officer may question an individual without grounds for suspicion. Roadside consent searches are instead more akin to an investigatory stop that does involve a detention."¹⁸

The circumstances the Court considered included: it was a roadside traffic stop; the presence of two uniformed officers and a drug dog; the officer asked the driver to exit his car so that the officer could talk to driver and passenger separately; the officer asked a second officer to stand by the driver at the rear of the car while the first officer questioned the passenger; and the seemingly innocuous but immediate transition from the valid traffic stop such that the defendants may not have realized that the initial seizure had ended.¹⁹

In addition, the Court concluded that the consent to search was not valid, because: it was

¹¹ *Id.* at 595.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 596.

¹⁵ *Id.*

¹⁶ *Id.* at 602.

¹⁷ *Id.* at 601.

¹⁸ *Id.* at 601-2.

¹⁹ *Id.* at 602.

obtained through the officer's exploitation of the unlawful detention; a minimal amount of time had passed between the seizure and the ensuing consent; there were no intervening or attenuating circumstances; and the detention had no legal basis.²⁰

There was no consent to search in this case. However, as in Williams, the search in the instant case was an exploitation of the unlawful detention, there was no reasonable, articulable suspicion of criminal activity to justify the prolonged detention, and the evidence that was acquired as a result should be suppressed.

The incident report does not reflect the officer's basis for reasonable suspicion to prolong the Defendant's detention. The following information, however, is contained in the General Sessions Case File Summary:

- a. Officer Vinesett could smell an odor of marijuana coming from the vehicle;
- b. He noticed all throughout the vehicle blunt tobacco all in the floor and on the center console of the vehicle; and
- c. The two suspects' stories were inconsistent with the reason for the trip;

Vinesett first approached the passenger side window of the vehicle, and then asked the driver, Kenneth Darrell Morris, II, to accompany him to his patrol car. Vinesett questioned Morris as to where they were coming from and what they had going on there. Morris responded that were coming from Atlanta and they were there to visit some girls.

After questioning Morris, Vinesett returned to the passenger side window and asked Brandon James Nichols similar questions. Nichols responded that they were coming from Atlanta and that they went to see the driver's cousin play basketball.²¹

Vinesette did not inquire as to whether Morris and Nichols were in Atlanta to see the same people or the same family members. He did not inquire as to whether the girls were family members or friends of the cousin. The fact that each of them stated a different reason for being in

²⁰ *Id.* at 604.

²¹ General Sessions Case File Summary

Atlanta, without further inquiry as to the details of their visits, was not inconsistent to the point of creating a reasonable suspicion that the Defendants were engaged in criminal activity.

Similarly, the officer's observation of tobacco in the vehicle does not give rise to the point of establishing a reasonable suspicion that the Defendants were engaged in criminal activity.

With regard to the odor of marijuana, the Defendant concedes that case law supports the proposition that the odor of marijuana has been held to establish probable cause. This case, however, can be distinguished. First, Morris challenges the reliability of Officer Vinesette's statement. When Vinesett radios the drug dog handler, he never mentions the smell of marijuana. In fact, Vinesett and Gibson discuss getting consent to search. When Officer Gibson arrived, he immediately asked for consent to search or he would get the drug dog. Once consent was denied, Gibson deployed the drug dog (over ten minutes after the initial contact with Officers Vinesette and Scott). The drug dog did not alert.²²

Once the drug dog did not alert, the officers had absolutely no reasonable, articulable suspicion of criminal activity or to support the continued detention of the Defendant. Approximately fourteen minutes passed from the initial contact of the officer and the officer's search of the vehicle.

C. State v. Pichardo

State v. Pichardo²³ is another case where the Court found no reasonable suspicion to justify a prolonged detention, and that the search was an exploitation of the original stop.²⁴ The officer said that the driver appeared nervous, and the Defendants were driving from Miami to New

²² Video tape of traffic stop.

²³ 367 S.C. 84 (Ct. App. 2005). There is a discussion in *Pichardo* of whether the Defendant Reyes spoke sufficient English to consent to the search of his vehicle. However, the opinion is clear that the basis for the Fourth Amendment violation is that there was no reasonable, articulable suspicion of criminal activity ("when the Deputy asked for consent the Defendants were detained anew, triggering the Fourth Amendment," *Id.* at 104.)

²⁴ *Id.* at 104.

York.²⁵ The Deputy returned their paperwork and then asked if he could ask a question – he then explained the situation they had with people running contraband on the interstate, and asked for consent to search the car.²⁶ A kilo of heroin was found inside the car door.²⁷ The Court held that when the Deputy asked for consent the Defendants were detained anew, triggering the Fourth Amendment.²⁸

By prolonging the initial stop beyond its proper scope, the Deputy rendered the ensuing encounter coercive.²⁹ The circumstances considered by the Court in determining that the Defendants were not free to leave included: the two men were isolated when questioned; the Deputy requested them to separately step to the rear of the vehicle; two uniformed officers were present; and both Defendants were physically searched.³⁰

D. State v. Jones

State v. Jones³¹ is another Court of Appeals case that illustrates a detention that is reasonable. In Jones, the Court held that a detention was not unreasonably prolonged where the passenger jumped from the car and ran before the officer finished explaining the ticket to the driver, throwing 230.83 grams of crack to the ground as he ran.³² The Court found that there was no further detention for questioning beyond the scope of the stop – the purpose of the stop, the issuance of the traffic ticket, had not been fulfilled when the passenger jumped from the car and ran, throwing objects to the ground.³³ The detention was at most eleven minutes.³⁴

In contrast, in the instant case the detention lasted for approximately ^{five}~~thirty-one~~ minutes, and there was no precipitating event such as the passenger leaping from the car throwing crack rocks as he ran. As in Williams, in the instant case the officer questioned the car's occupants, later

²⁵ *Id.* at 92.

²⁶ *Id.* at 93.

²⁷ *Id.*

²⁸ *Id.* at 104.

²⁹ *Id.* at 103.

³⁰ *Id.*

³¹ 364 S.C. 51 (Ct.App. 2005).

³² *Id.* at 55-6.

³³ *Id.* at 58.

³⁴ *Id.* at 56.

stating that their statements were inconsistent, and then requested consent to search the vehicle, thereby extending the traffic stop beyond its proper scope and exploiting the original stop.

E. Suppression of the evidence is the proper remedy

The detention of the Defendant and search of the car were unlawful and in violation of the Constitution, therefore the evidence which was obtained should be inadmissible as fruit of the poisonous tree.³⁵

F. Violation of the South Carolina Constitution

The Court should suppress the evidence discovered during the seizure and search of the Defendants and the vehicle on February 6, 2008, because the officer's conduct violated Article One, section ten of the South Carolina Constitution.

Like the Federal Constitution, the South Carolina Constitution protects against unreasonable searches and seizures. Specifically, Article One, section ten of the South Carolina Constitution states, in pertinent part, "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures *and unreasonable invasions of privacy* shall not be violated[.]"³⁶

"It is firmly established that state courts may interpret their own constitutions in such a way as to expand rights conferred by the Federal Constitution."³⁷ On several occasions, the Supreme Court of South Carolina has interpreted the South Carolina Constitution in a manner more expansive than the Federal Constitution.³⁸

³⁵ *Sikes v. State*, 323 S.C. 28 (1994), citing *Wong v. U.S.*, 371 U.S. 471 (1963).

³⁶ S.C. Const. Art. I, Sec. 10 (emphasis added).

³⁷ *State v. Austin*, 306 S.C. 9, 16 (Ct. App. 1991). See also *South Carolina v. Forrester*, 343 S.C. 637, 644 (2001) (stating "the people of South Carolina have indicated that searches and seizures that do not offend the federal Constitution may still offend the South Carolina Constitution resulting in the exclusion of the discovered evidence").

³⁸ See, e.g., *Jernigan v. South Carolina*, 340 S.C. 256, 264 n.5, 531 S.E.2d 507, 511 n.5 (2000) ("[W]e find the change in parole consideration under § 24-21-645 offends S.C. Const. art. I, § 4, even if the federal constitution is not offended."); *Singleton v. South Carolina*, 313 S.C. 75, 89, 437 S.E.2d 53, 61 (1993) ("We hold that the South Carolina Constitutional right to privacy would be violated if the State were to sanction forced medication solely to facilitate execution."). See also *Forrester*, 343 S.C. at 645, 541 S.E.2d at 841 ("The South Carolina Constitution, with an express right to privacy provision included in the article

As discussed above, the South Carolina Constitution provides greater protections to its citizens than the Federal Constitution. In this case, the officer's detention of the Defendants and search of Rivera's vehicle violated Article I, § 10 of the South Carolina Constitution because the officer had no reason for the detention and search. Such a suspicion-less detention and search not only violates the Fourth Amendment of the United States Constitution, but it also violates the Defendants' right to privacy under the South Carolina Constitution.

The inclusion of the express privacy language in Article I, § 10 of the South Carolina Constitution and the decisions in Singleton, Austin, Jernigan, and Forrester, where the supreme court gave the citizens greater protection under the South Carolina Constitution based upon the express privacy language in Article I, § 10 of the South Carolina Constitution, demonstrate that the seizure of the Defendant and the search of Rivera's vehicle violated the Defendant's right to privacy under the South Carolina Constitution.

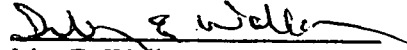
III. Conclusion

As in Williams, the search in this case was an exploitation of the unlawful detention, there was no reasonable, articulable suspicion of criminal activity to justify the prolonged detention, and the evidence which was acquired as a result should be suppressed.

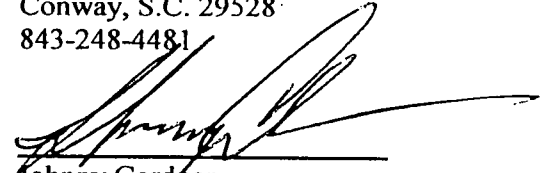
For the foregoing reasons, the Court should suppress the fruits of the seizure and search as a violation of the Fourth Amendment of the United States Constitution and as a violation of Article I Section 10 of the South Carolina Constitution.

prohibiting unreasonable searches and seizures, favors an interpretation offering a higher level of privacy protection than the Fourth Amendment.”).

Respectfully submitted,



Irby E. Walker
212 Elm Street
P.O. Box 1138
Conway, S.C. 29528
843-248-4481



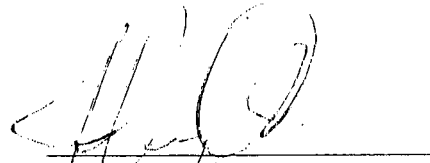
Johnny Gardner
1413 Tenth Avenue
P.O. Box 1001
Conway, S.C. 29528
843-248-7135

Attorneys for the Defendant

April 14, 2009

CERTIFICATE OF COUNSEL

Counsel for Appellant Kenneth Darrell Morris, II certifies that the forgoing Record on Appeal contains all material proposed to be included by all parties to this action. Counsel further certifies that this Record on Appeal includes no other materials.

A handwritten signature in black ink, appearing to read "Johnny Gardner", is written over a horizontal line.

Johnny Gardner
Gardner Law Firm, P.A.
1423 Tenth Avenue
Conway, SC 29526
(P) 843-248-7135
(F) 843-248-0270

ATTORNEY FOR THE APPELLANT

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM YORK COUNTY

John C. Haynes, III, Circuit Court Judge

State of South Carolina, ...Respondent,

v.

Kenneth Darrell Morris, II. Appellant.

FINAL BRIEF OF APPELLANT

**Johnny Gardner, Esq.
P.O. Box 1001
Conway, SC 29526
(843) 248-7135**

**Jonathan Hiller, Esq.
P.O. Box 1001
Conway, SC 29526
(843) 248-7135**

ATTORNEYS FOR APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

I. Did the trial judge commit clear error when he denied the appellant's motion to suppress drugs found during the traffic stop when, after a prolonged detention, the officer conducted a warrantless vehicle search without probable cause or consent?

II. Did the trial judge commit clear error when he accepted the allegation that one officer smelled burnt marijuana during the detention?

STATEMENT OF THE CASE

The York County Grand Jury indicted the appellant, Kenneth Darrell Morris, II, (Morris) on July 3, 2008 for trafficking ecstasy and for possession of marijuana with intent to distribute. The grand jury also indicted a co-defendant, Brandon Nichols, (Nichols) who accepted a plea deal. Morris pleaded not guilty and requested a jury trial.

At the request of the defense, the Honorable John C. Haynes, III conducted a suppression hearing before the start of Morris's trial. Both the solicitor and defense counsel handed up written motions that addressed the admissibility of the drugs (R. p. 3, lines 16-22). At the end of the hearing, the trial judge respectfully denied the motion to suppress the drugs found in Morris's vehicle (R. p. 57, lines 7-8). Judge Haynes found that the search was supported by probable cause, (R. p. 62, line 6), and that the duration of the traffic stop was not unreasonable (R. p. 58, line 23). Morris's trial began on April 15, 2009.

During the State's case-in-chief, the solicitor moved to introduce the drugs into evidence (R. p. 67, lines 3-4; R. p. 68, lines 24-25). Defense counsel objected appropriately (R. p. 67, lines 5-6; R. p. 69, line 3). Consistent with his ruling at the suppression hearing, Judge Haynes overruled the objections and admitted the drugs into evidence (R. p. 67, lines 7-8; R. p. 69, lines 4, 6). On April 17, 2009, the jury returned a verdict of guilty on the charge of trafficking ecstasy and returned a verdict of guilty on the lesser-included offense of simple possession of marijuana (R. p. 72, lines 22-23; R. p. 73, lines 2-4). At the trial's conclusion, Judge Haynes sentenced Morris to 30 years in prison (R. p. 74, lines 22-25). Morris timely filed and served his Notice of Appeal on April 24, 2009.

STATEMENT OF THE FACTS

During the early afternoon hours of February 6, 2008, Morris and Nichols were driving northbound on I-77 through York County, SC. Around 2:00 p.m., Morris exited I-77 to take a brief rest stop at an Exxon gas station (R. p. 8, lines 2-3). As he pulled into the station's parking lot, Officer L.T. Vinesett Jr. (Vinesett) of the York County Highway Interdiction Team (HIT) executed a traffic stop on Morris's vehicle because he had observed Morris commit a traffic infraction on I-77. The time stamp on the camera mounted inside Vinesett's unmarked patrol car reveals the detention began at 14:06:18 p.m. Videotape: Kenneth Morris Traffic Stop (On file with the South Carolina Court of Appeals).

Vinesett exited his patrol car and approached the passenger side of Morris's rented vehicle (the Ford). At the same time, Constable W.E. Scott (Scott), who was riding with Vinesett, took up a position near the trunk of the Ford. Vinesett asked Morris to produce his license and registration and told Morris that he had been stopped for following another vehicle too closely (R. p. 75, lines 7-9). Morris began to explain that he stopped at the Exxon to use the restroom (R. p. 75, lines 6, 10-12).

While speaking with Morris, Vinesett saw what he recognized as loose cigar tobacco laying around the center console area of the Ford (R. p. 11, lines 6-7). He also observed some partially-smoked, "hollowed out" cigars in the same vicinity (R. p. 11, line 5). The case summary report he prepared some days later indicates that Vinesett detected the smell of burnt marijuana too (R. p. 30, lines 5-14). But he did not mention this smell to Morris or Nichols. Instead, Vinesett ordered Morris out of the Ford to discuss the traffic violation (R. p. 75, lines 23-24). Because of rainy conditions that afternoon, he asked Morris to get into his patrol car (R. p. 13, lines 3-6).

Inside the patrol car, Vinesett inquired about Morris's travel plans (R. p. 76, lines 7-11, 21-22). He discovered Nichols had rented the Ford the previous day in Greensboro, and that Morris and Nichols were on their way back from a rendezvous with some girls in Atlanta (R. p. 13, lines 19-20). Vinesett then peppered Morris with specific questions about the trip, the girls, and the prior evening's accommodations. He also questioned Morris about his criminal record and learned that Morris had previously been convicted of a drug related offense (R. p. 78, lines 16-17). Once finished questioning Morris, Vinesett asked Nichols about his travel itinerary. Nichols said he was returning from Atlanta where he watched a basketball game (R. p. 14, lines 12-17).

The video recording of the traffic stop reveals that at 14:11:25 p.m. (just over five minutes into the detention) Vinesett ended his interrogation of Nichols, returned to his patrol car, and told Morris to get out. He placed Morris under the custody of Scott, (R. p. 80, lines 23-24), and then called Officer W.R. Gibson (Gibson), a K-9 officer with HIT (R. p. 81, lines 1-2). He asked Gibson to bring a drug dog to the scene (R. p. 35, lines 12-13). To support his request, Vinesett said he had detained two young guys coming from Atlanta (R. p. 81, lines 3-4). He told Gibson that Morris said they made the trip to visit some girls, but Nichols said they went to watch a basketball game. He also mentioned Morris's prior record and said he could see "shake"¹ inside the Ford (R. p. 81, lines 12-14). He never once mentioned the smell of burnt marijuana (R. p. 35-36, lines 24-25, 1-3).

¹ The term "shake" is often used as a slang word for small fragments of marijuana. Urban Dictionary, <http://www.urbandictionary.com/define.php?term=shake> (last visited Nov. 23, 2009). However, very early on in the suppression hearing Vinesett readily admitted that he recognized the "shake" he saw in the passenger compartment of the Ford as loose tobacco, not loose marijuana (R. p. 11, lines 5-7).

Before the drug dog arrived, Vinesett asked Morris if he still needed to use the restroom (R. p. 82, lines 12-13). Morris responded that he did. But before he allowed Morris to go inside the gas station under Scott's supervision, Vinesett conducted a consensual search of Morris's person. It produced no contraband (R. p. 34, lines 10-17). Once Morris and Scott left the scene, Vinesett asked Nichols to step outside the Ford, and he complied.

He did not mention the smell of burnt marijuana to Nichols at this time; though much later in the stop Vinesett would state that when Nichols exited the Ford, he "swore [he] could smell some marijuana" (R. p. 87, lines 13-14). Instead, Vinesett completely ignored any odor he detected and asked for consent to search Nichols's person (R. p. 83, lines 15-16). After the search failed to reveal any evidence of illegal activity, Vinesett still made no mention of the smell of burnt marijuana. He merely told Nichols that the traffic stop was not over (R. p. 83, lines 22-23).

About the time Vinesett finished his search of Nichols (eight and one-half minutes after he made the stop) Gibson arrived at the gas station with the drug dog. Both officers tried to get consent to search the Ford with the threat that Gibson would get his dog out if Nichols refused to give consent (R. p. 84, lines 10-15). Nichols would not give his consent, so Gibson went for his dog (R. p. 37, lines 8-11).

While Gibson and the dog worked, Vinesett continued his drug investigation. He asked Nichols if his license had ever been suspended or if he had ever been arrested (R. p. 85. Lines 14-23). Nichols responded in the negative to both questions. Then, Vinesett asked Nichols to tell him about the last time he smoked marijuana (R. p. 85, lines 24-25). He assured Nichols that he could not do anything to him if Nichols admitted to smoking earlier that day (R. p. 86, lines 4-5). The microphone Vinesett wore failed to capture Nichols's

exact response, but never once during the detention did Nichols admit to smoking marijuana (R. p. 87, lines 22-23; R. p. 89, lines 9-10, 15-18).

Gibson walked the dog around the Ford twice with at least one window rolled down (R. p. 48, lines 15-18). The dog did not alert, and he finally gave up and returned the dog to his vehicle (R. p. 37, lines 23-25). Vinesett then asked Nichols for consent to search the Ford a second time. Nichols again refused to consent (R. p. 86, lines 15-18). The officers then engaged in a hushed conversation that Vinesett's microphone failed to capture. After that conversation ended (thirteen minutes into the detention) Vinesett for the first time claimed that he "swore [he] could smell some marijuana," (R. p. 87, lines 13-14), when Nichols exited the Ford. Not once during the detention did Vinesett say that he smelled burnt marijuana as he first approached the Ford, which was his testimony during the suppression hearing (R. p. 10, lines 16-22).

Nichols denied the allegation and attributed any odor Vinesett detected to his Black and Mild cigar (R. p. 87, lines 15-16). The officer walked over to the Ford and searched the center console area of the passenger compartment (R. p. 40-41, lines 22-25, 1-7). He examined the partially-smoked, "hollowed out" cigars he had seen earlier and determined those cigars did not contain any marijuana residue (R. p. 40, lines 5-11). The search of the passenger compartment produced no evidence that either Morris or Nichols had engaged in any criminal activity.

Without any further evidence, Vinesett then engaged in a full-blown search of the Ford. He opened the trunk and proceeded to riffle through the personal belongings it contained. Inside a gift box, he found a plastic bag containing ecstasy pills (R. p. 16, lines

12-14). An inventory search conducted at the impound lot revealed marijuana hidden under the spare tire. From start to finish, the detention lasted just over fourteen minutes.

Standard of Review

An appellate court may only review a trial court's ruling on a Fourth Amendment search and seizure issue for clear error. State v. Brockman, 339 S.C. 57, 528 S.E.2d 661 (2000). Under this standard, "[a]n appellate court must affirm the trial court's ruling if there is any evidence to support the ruling," id. at 66, 528 S.E.2d at 666, and cannot reverse "a trial court's finding of fact simply because it may have decided the case differently." State v. Corley, 383 S.C. 232, 239, 679 S.E.2d 187, 191 (Ct. App. 2009). While the clear error standard is deferential to the discretion of the trial court, an appellate court may still reverse if "on the entire evidence, it is left with the definite and firm conviction that a mistake has been committed." Easley v. Cromartie, 532 U.S. 234, 242 (2001) (internal citations omitted).

ARGUMENT

The trial judge committed clear error when he failed to suppress the drugs found during Vinesett's warrantless search of the Ford. First, assuming (but not conceding) that Vinesett was acting on more than a mere hunch of criminal activity during the traffic stop, he never had probable cause to conduct a warrantless vehicle search as required by the automobile exception to the Fourth Amendment's warrant requirement.

Vinesett extended the scope of the traffic stop numerous times to corroborate his suspicion that Morris and Nichols had engaged in criminal conduct, which he testified to be the consumption of marijuana (R. p. 40, lines 12-18). But not one of these extensions produced any evidence from which a reasonably cautious person could conclude that contraband would be found in the Ford's trunk. Blind to the totality of the circumstances,

Vinesett searched anyway. In so doing, he conducted a warrantless search of the Ford without probable cause.

Vinesett also illegally extended the duration of the traffic stop. The fourteen-minute detention lasted much longer than was necessary for Vinesett to request Morris's driver's license and registration, run a license check, and issue a traffic citation. Both the transcript and the video recording of the traffic stop reveal that Vinesett wholly abandoned the reason he executed the traffic stop five minutes into the detention. He transformed it into a blatant fishing expedition for evidence of criminal activity that culminated in an illegal search.

For these reasons, Vinesett's search was patently unlawful; the trial court's decision to admit the drugs into evidence was clear error, and Morris's conviction should be reversed.

I. The trial court should have suppressed the drugs because the officer's warrantless, full-blown search of the vehicle was not supported by probable cause.

The Fourth Amendment of the Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend IV. This constitutional protection extends to the use of automobiles. "[A]n automobile stop implicates the Fourth Amendment prohibition against unreasonable searches and seizures, imposing a standard of 'reasonableness' upon the exercise of discretion by [law enforcement officers]." State v. Banda, 371 S.C. 245, 252, 639 S.E.2d 36, 40 (2006). South Carolina courts have provided our officers with abundant guidance on what constitutes the reasonable exercise of discretion as they perform their law enforcement duties.

The decision to stop a vehicle is reasonable per se when an officer has probable cause to believe a traffic violation has occurred. State v. Rivera, 384 S.C. 356, 361, 682 S.E.2d 307, 310 (Ct. App. 2009) (citing Whren v. U.S., 517 U.S. 806 (1996)). "In carrying out the stop,

an officer ‘may request a driver’s license and vehicle registration, run a computer check, and issue a citation . . .’” State v. Williams, 351 S.C. 591, 598, 571 S.E.2d 703, 707 (Ct. App. 2002) (quoting U.S. v. Sullivan, 138 F.3d 126, 131 (4th Cir. 1998)). But, prolonging the stop to engage in further questioning is “‘beyond the scope of the [] stop and . . . illegal unless the officer has a reasonable suspicion of a serious crime.’” Id. (quoting Sullivan, 138 F.3d at 131). Thus, even if an officer suspects that a person, who has been lawfully detained for a traffic violation, could be engaged in criminal activity, he or she cannot prolong the stop without “‘a particularized and objective basis’ that would lead [the officer] to suspect [the person] of criminal activity.” State v. Lesley, 326 S.C. 641, 644, 486 S.E.2d 276, 277 (Ct. App. 1997) (quoting U.S. v. Cortez, 449 U.S. 411 (1981)).

Though the Fourth Amendment will certainly permit an officer to expand the scope and duration of a traffic detention provided his or her reasonable suspicion of criminal activity is particularized and objective, a warrantless search of a vehicle will only withstand constitutional scrutiny if it is supported by probable cause. Ornelas v. U.S., 517 U.S. 690, 693 (1996) (“An investigatory stop is permissible . . . if supported by reasonable suspicion, and a warrantless search of a car is valid if based on probable cause.”) (internal citations omitted); accord State v. Weaver, 374 S.C. 313, 320, 649 S.E.2d 479, 482 (2007) (“Pursuant to the automobile exception, if there is probable cause to search a vehicle, a warrant is not necessary [if] the search is based on facts that would justify the issuance of a warrant . . .”).

An officer has the probable cause needed to conduct a warrantless search when the “‘circumstances known to [the] officer are such as to warrant a person of reasonable caution [to believe] that a search would reveal incriminating evidence.’” State v. Moultrie, 316 S.C. 547, 552 fn. 3, 451 S.E.2d 34, 37 (Ct. App. 1994) (quoting U.S. v. Thornton, 733 F.2d 121,

127 (D.C. Cir. 1984). As the United States Supreme Court has explained, “the question is whether the totality of the circumstances is sufficient to warrant a reasonable person to believe that contraband or evidence of a crime will be found in a particular place.” Ornelas, 517 U.S. at 696 (emphasis supplied).

A. Based on all the information gathered by the officer prior to the search, a reasonable person would not have had cause to believe contraband would be found in the trunk.

When he denied Morris’s motion to suppress, the trial judge found Vinesett had a reasonable suspicion of criminal activity (R. p. 57, lines 18-19). He based this finding on Vinesett’s detection of burnt marijuana and the officer’s knowledge that “hollowed out” cigars can be used to smoke marijuana (R. p. 57, lines 19-21). However, the trial judge never stated that Vinesett’s warrantless search was supported by probable cause until prompted to make that finding by the solicitor (R. p. 62, lines 4-7). Thus, the record is bereft of any evidence from which to conclude that the trial judge’s probable cause analysis rested on more than the uncorroborated odor of burnt marijuana and Vinesett’s knowledge that “hollowed out” cigars can be used as a receptacle for marijuana.

When he found Vinesett had probable cause to search the Ford based on the above grounds, the trial judge entirely overlooked the fact that Vinesett had already conducted a plain view search of the passenger compartment of the Ford about three minutes prior to his full-blown, warrantless search. That first search, which is grounded on the plain view exception to the warrant requirement, included an inspection of the exact same “hollowed out” cigars that Vinesett suspected had been used to smoke marijuana. It revealed those cigars were not paraphernalia and failed to produce any evidence to corroborate Vinesett’s

allegation that marijuana had been smoked in the Ford. The trial judge's failure to properly factor the result of that plain view search into his probable cause analysis was clear error.

1. The plain view doctrine allowed the officer to examine the cigars observed in the passenger compartment of the vehicle.

The plain view doctrine applies to "any object falling within the plain view of [an] . . . officer who is lawfully in a position to view the object." State v. Abdullah, 357 S.C. 344, 352, 592 S.E.2d 344, 349 (Ct. App. 2004) (citing State v. Brown, 289 S.C. 581, 588, 347 S.E.2d 882, 885 (1986)). Under this doctrine, an officer may seize evidence or contraband if: "the initial intrusion which afforded the [officer] the plain view was lawful; the discovery of the evidence was inadvertent; and the incriminating [nature of the] evidence was immediately apparent to the seizing [officer]." Id. at 352-53, 592 S.E.2d at 344.

In the present case, Vinesett was in the process of investigating a lawfully executed traffic stop when he approached the Ford and observed partially-smoked, "hollowed out" cigars. In his case summary report, which a court's exhibit during the suppression hearing, (R. p. 24, lines 13-16), he wrote that he smelled marijuana immediately and claimed to smell burnt marijuana when Nichols exited the Ford (R. p. 87, lines 11-14). Vinesett also testified that, based on his training and experience, he suspected the cigars he saw had been hollowed out for the purpose of smoking marijuana (R. p. 11, lines 13-14). Assuming but not conceding he was certain that he really did smell burnt marijuana, then, under the plain view doctrine, Vinesett was likely justified in further investigating his suspicion by inspecting the cigars.

As the Supreme Court has explained, "[t]he plain view doctrine is often considered an exception to the general rule that warrantless searches are presumptively unreasonable, but this characterization overlooks the important difference between searches and seizures. If an

article is already in plain view, neither its observation nor seizure would involve any invasion of privacy.” Horton v. California, 496 U.S. 128, 133 (1990). Thus, under Horton, the plain view search of the Ford’s passenger compartment appears justified. But, because it revealed no evidence of criminal activity, Vinesett should have ended his drug investigation when his plain view search ended. See Arizona v. Hicks, 480 U.S. 321, 328 (1987) (“[T]he plain view doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.”).

On cross-examination during the suppression hearing, Vinesett admitted, in no uncertain terms, that he found no evidence of marijuana consumption inside the passenger compartment of the Ford.

COUNSEL: All right. So I’ll ask you again, when you searched the [passenger] compartment of the car . . . you were looking for burnt marijuana?

VINESETT: I was looking for marijuana.

COUNSEL: Looking for marijuana?

VINESETT: I had smelled marijuana. I was searching the car for marijuana.

COUNSEL: Okay. You were looking for what you might find?

VINESETT: Yes sir.

COUNSEL: Fair enough. All right. And you didn’t find it?

VINESETT: In the passenger compartment?

COUNSEL: That’s correct.

VINESETT: No sir.

COUNSEL: No illegal contraband in the passenger compartment of the car?

VINESETT: No sir.

COUNSEL: Nothing? No burnt marijuana, no guns, no drugs, nothing?

VINESETT: No sir.

(R. p. 40-41, lines 12-25, 1-7). Clearly stated, Vinesett's own admission was that he was looking for evidence of marijuana use during his search of the Ford's passenger compartment, but never found any evidence to confirm his suspicion that Nichols or Morris used marijuana.²

2. The officer conducted the subsequent full-blown, warrantless search without probable cause.

The moment the plain view search of the Ford ended is the crucial center of focus for a proper probable cause analysis. It is also the moment during the traffic detention that the trial court failed to properly consider. Vinesett had just eliminated the "hollowed out" cigars as the source of the uncorroborated odor of burnt marijuana, watched a drug dog fail to alert on the Ford, and searched both Morris and Nichols to no avail. The only available avenue remaining for him to further explore his hunch that drugs were present was to conduct a warrantless, full-blown vehicle search. Vinesett elected to take this avenue, but did so without probable cause, so the drugs he found should have been suppressed.

A panel of this Court recently decided a case that involved a warrantless search conducted after an officer issued the defendant a warning ticket for speeding on I-85. State v. Tindall, 379 S.C. 304, 306, 665 S.E.2d 188, 190 (Ct. App. 2009) (cert. granted ___ S.C. ___, ___ S.E.2d ___). About 20 minutes into this detention, the officer (allegedly acting with the

² Even though he never mentioned the odor to anyone (including his fellow officers) until after the plain view search ended, apparently Vinesett was also looking for evidence of that Morris or Nichols had consumed marijuana when he searched Morris and Nichols prior to the drug dog's arrival. The purpose of calling the drug dog at the scene also seemed to be to uncover evidence of marijuana consumption. Neither effort was successful.

defendant's consent) searched and found 2,380 grams of cocaine hidden under the rear bumper of Tindall's rented vehicle. Id., 665 S.E.2d at 190.

The officer extended the duration of the traffic stop beyond the initial detention because he suspected Tindall was a drug runner. To support his suspicion, he observed that: Tindall remained nervous even after he was told he would receive only a warning ticket; he was driving a rental car he had not rented (though he was an authorized driver); he was driving one way between two "drug hubs," and he was planning to be on the road for approximately eighteen hours that day. Id. at 311, 665 S.E.2d at 192.

The panel found it unnecessary to even consider the argument that Tindall failed to give valid consent to the search, reasoning that it did not need to reach that argument because it found "evidence in the record to support the determination that [the officer] had a reasonable suspicion something illegal was occurring." Id., 665 S.E.2d at 192 (emphasis supplied). Because of the officer's reasonable suspicion, the panel held "the search and seizure did not violate Tindall's Fourth Amendment rights, and the trial court did not err in admitting the cocaine." Id., 665 S.E.2d at 192.

The appellant respectfully disagrees with the Tindall Court's conclusion that a mere reasonable suspicion of criminal activity is sufficient to conduct a warrantless vehicle search. Ever since announcing the automobile exception in Carroll v. United States, the United States Supreme Court has never relaxed the standard that probable cause is required before an officer may search a vehicle without a warrant. See, e.g. California v. Acevedo, 500 U.S. 565, 569 (1991) ("[A] warrantless search . . . based upon probable cause . . . [does] not contravene the Warrant Clause of the Fourth Amendment.") (internal citations omitted), and

Pennsylvania v. Labron, 518 U.S. 938, 940 (1996) (if probable cause exists to believe a vehicle contains contraband, the Fourth Amendment permits police to search without more).

Prior to Tindall, no South Carolina appellate court has ever suggested that a full-blown, warrantless vehicle search could be supported by less than probable cause. “A warrantless search of a vehicle may be made if there is probable cause to believe the vehicle contains evidence of a crime; and there are exigent circumstances arising out of the mobility of the vehicle and its consequently likely disappearance if the search is not executed immediately.” State v. Brannon, 347 S.C. 85, 91, 552 S.E.2d 773, 776 (Ct. App. 2001) (Anderson, J., concurring in result); see also State v. Moore, 377 S.C. 299, 309, 659 S.E.2d 256, 261-62 (Ct. App. 2008) (finding sufficient information to establish probable cause which, combined with the automobile exception, justified the warrantless vehicle search).

Based on the above, the automobile exception to the Fourth Amendment’s warrant requirement only allows an officer to forego the process of obtaining a warrant to search a vehicle “so long as the search is based on facts that would justify the issuance of a warrant.” Weaver, 374 S.C. at 320, 649 S.E.2d at 482. The warrantless search of Morris’s vehicle that began approximately fourteen minutes into the detention was not based on facts that would allow a magistrate, objectively viewing all the evidence, to issue of a search warrant. Any evidence Vinesett had of drug activity was simply not sufficient to allow a reasonably cautious person to conclude that the search of a locked trunk would produce evidence of recent marijuana consumption after the plain view search of the passenger area of the Ford

revealed no such evidence; a drug dog gave no such alert, and the search of both Morris's person and Nichols's person produced no such evidence.³

Thus, the trial judge committed clear error when he upheld Vinesett's search. His analysis as he articulated it was integrally based on the officer's knowledge that "hollowed out" cigars can be used to smoke marijuana (R. p. 59, lines 22-23). He simply failed to properly evaluate the fact that Vinesett knew the cigars – the logical and only potential source of the smell – did not contain any evidence to support the allegation he smelled burnt marijuana.⁴

B. The uncorroborated odor of burnt marijuana with no additional evidence of marijuana consumption should not give an officer probable cause to conduct a warrantless vehicle search.

During the suppression hearing, the solicitor argued that the odor of burnt marijuana, standing alone, is sufficient to establish probable cause to conduct a warrantless search (R. p. 57, lines 1-6). However, this argument is misguided. Fourth Amendment jurisprudence is seldom amenable to bright-line tests, and allowing an officer to conduct a warrantless search a vehicle based on nothing more than the unsubstantiated allegation the he smelled burnt marijuana creates a potential for abuse. This is especially true when the burden imposed by requiring an officer to first corroborate the odor before conducting a search is marginal.

³ United States v. Ross, 456 U.S. 798 (1982) is of no help to the State because it stands for the proposition that an officer may search the entire vehicle provided he or she has probable cause to initiate the search. Here, the appellant argues that Vinesett never had probable cause to search the passenger compartment of the Ford, and any right he had to conduct that search was grounded solely on the plain view exception to the warrant requirement.

⁴ In fact, Vinesett testified that he knew Black and Mild cigars and burnt marijuana have different smells (R. p. 43, lines 19-23). The judge found this testimony credible (R. p. 58, line 14). But this lending of credibility to Vinesett's testimony does not at all square with the fact that Vinesett unequivocally admitted the "hollowed out" cigars were not paraphernalia.

The better approach is to treat an officer's alleged detection of burnt marijuana as a reasonable suspicion of criminal activity until it is confirmed or corroborated. Only after the presence of the odor is somehow substantiated should an officer be permitted to engage in a warrantless vehicle search. This approach resonates with prior South Carolina treatment of the odor of burnt marijuana when detected during a traffic stop. It also better ensures that officers will continue to take into account the totality of circumstances known to them during a traffic stop instead of focusing solely on one aspect of the stop to the exclusion of others.

1. The Fourth Amendment is seldom amenable to bright-line tests as an officer must evaluate the totality of the circumstances when engaged in a probable cause analysis.

The United States Supreme Court has repeatedly cautioned that bright-line tests are seldom appropriate in the Fourth Amendment context. "The [Fourth] Amendment's touchstone is reasonableness, which is measured in objective terms by examining the totality of the circumstances. In applying this test, the Court has consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry." Ohio v. Robinette, 519 U.S. 33, 34 (1996). From a policy standpoint, a bright-line test in this context is inappropriate precisely because the circumstances surrounding each case that involves the alleged detection burnt marijuana are fact-specific and unique.

As an example, the Georgia Court of Appeals encountered a case where an officer testified he "could smell a strong odor of burnt marijuana almost smelling like it was smoldering and burning inside the vehicle . . . Long's eyes were extremely red and 'all washed out,' [and] both Long and [his passenger] 'were scared to death.'" State v. Long, 239 Ga. App. 463, 463-64, 521 S.E.2d 401, 402 (Ga. Ct. App. 1999). The Georgia appellate court reversed and remanded the case to correct an error made by the trial judge and noted in

dicta that “the odor of marijuana emanating from a car and driver, along with physical characteristics such as those manifested by Long, may provide probable cause to search a vehicle.” Id. at 465, 521 S.E.2d at 403 (emphasis provided). Here, with seemingly strong testimony provided by an officer that marijuana was present, the court was still unwilling to craft a bright-line rule that would allow the officer to search based solely on the smell of burnt marijuana alone.

The adoption of a bright-line rule in South Carolina that would allow an officer, in the context of a traffic stop, to conduct a full-blown vehicle search based only on the allegation that he or she smelled burnt marijuana would effectively eviscerate the requirement that officers must consider the totality of the circumstances known to them when seeking to establish probable cause to search. Appellant would respectfully urge this Court to reject a bright-line approach such as this as a violation of the spirit (if not the letter) of Fourth Amendment jurisprudence and consider instead the approach adopted by the Tenth Circuit.

The odor of burnt marijuana in the passenger compartment of a vehicle does not, standing alone, establish probable cause to search the trunk of the vehicle. Rather, an officer obtains probable cause to search the trunk of a vehicle if he smells marijuana in the passenger compartment and finds corroborating evidence of contraband.

United States v. Bradshaw, 423 F.3d 1149, 1160 (10th Cir. 2005) (internal citations omitted).

The corroboration requirement advanced by this approach would ensure the concern that law enforcement officers could abuse their power by claiming to smell marijuana when none is present is kept to a minimum. Also, the Tenth Circuit’s approach is reasonable and would not impose an undue burden on law enforcement endeavors.⁵ Finally, to adopt an

⁵ In most instances, corroboration of the presence of a controlled substance will occur as a matter of course during the investigation. The presence of marijuana can easily be confirmed in many ways, including: the competent testimony of other officers at the scene, the physical presence of illegal drugs or paraphernalia (e.g. found using the plain view doctrine or during

approach such as this would help keep the focus of law enforcement officers properly on the totality of the circumstances known to them.

In the present case, Vinesett ignored the totality of the circumstances known to him when he searched the Ford, and he certainly was unable to corroborate his alleged detection of burnt marijuana. Neither the search of Morris nor the search of Nichols revealed any corroborating evidence of marijuana use; the drug dog failed to alert on any part of the Ford, and Vinesett examined the “hollowed out” cigars and concluded they contained no marijuana residue before he made the decision to search the Ford’s trunk.⁶ Thus, to find Vinesett’s search supported by probable cause only because he claimed to smell burnt marijuana would be to ignore the greater weight of the evidence and the totality of the circumstances known to him during the traffic stop.

2. The uncorroborated odor of marijuana plus the observation of a partially-burnt cigar should at most create a reasonable suspicion of criminal activity.

While the uncorroborated odor of burnt marijuana standing alone should not give an officer probable cause to search, it is also clear that law enforcement officers cannot and should not be expected to ignore such an odor when potentially detected. The mandate that an officer must consider the totality of the circumstances when determining whether probable cause exists rejects this conclusion. Thus, the odor of burnt marijuana should be treated as a reasonable suspicion of criminal activity sufficient to allow the officer latitude to prolong the

[continued from p. 16] a lawfully conducted Terry frisk), the defendant’s manifestation of the physical effects of marijuana consumption, or by a positive alert from a drug dog. The Georgia case discussed above is a perfect example. The defendant appeared to display “symptoms” of marijuana use while he was speaking with the law enforcement officers.

⁶ Furthermore, the record contains no evidence that Morris or Nichols appeared to be under the influence of marijuana or any other controlled substance. Neither does it contain any evidence that the other officers at the scene (Gibson and Scott) also smelled burnt marijuana.

scope and duration of the detention to further investigate whether marijuana is present and to attempt to locate its source.

Treating an officer's detection of burnt marijuana as a reasonable suspicion of criminal activity appears consistent with prior South Carolina case law. Recently, a panel of the Court of Appeals heard a case involving facts somewhat analogous to those present here. That case involved a traffic stop executed on James Odom because an officer observed him driving without his seatbelt fastened. State v. Odom, 376 S.C. 330, 334, 656 S.E.2d 748, 751 (S.C. Ct. App. 2007). As he approached the vehicle, the officer smelled "a strong odor of marijuana and recognized a Swisher-Sweet cigar on the dashboard." Id., 656 S.E.2d at 748.

Unlike the present case, Odom admitted he had smoked marijuana earlier that morning. Id., 656 S.E. at 748. While the officer never actually examined the cigar to see if it contained marijuana, he did notice an empty holster in the back seat of Odom's vehicle. Based on a concern for officer safety, he ordered Odom out of the vehicle and performed a Terry frisk. Id., 656 S.E.2d at 748. During the frisk, he felt and immediately recognized a bundle of raw marijuana on Odom's person and placed him under arrest. Id., 656 S.E.2d at 748. A search incident to lawful arrest produced more marijuana.

On appeal, the panel affirmed the trial court's decision not to suppress the marijuana and explained why the trial court properly allowed the marijuana into evidence.

The officer smelled a strong odor of marijuana as he approached Odom's car and noticed a common indicium of paraphernalia, a Swisher-Sweet cigar, on the dashboard. Additionally, Odom admitted to smoking marijuana earlier in the day, and [the officer] observed an empty gun holster in the back seat. Having cause to fear for his own safety and reasonable suspicion of the existence of drugs, [the officer] asked Odom to exit the vehicle and conducted a Terry search.

Id., 656 S.E.2d at 751 (emphasis supplied). Implying the observation of the empty holster coupled with some evidence of drug activity was sufficient to give the officer the reasonable

suspicion he needed to justify a Terry frisk, the Court held: “[t]he existence of the evidence described above gave [the officer] the reasonable suspicion necessary to perform a pat down for weapons . . .” Id. at 336, 656 S.E.2d at 751.

Comparing the rationale adopted by the Odom Court to the present case, Vinesett’s uncorroborated claim that he smelled burnt marijuana plus his observation of a partially-smoked “hollowed out” cigar should have provided him with nothing more than a reasonable suspicion of the existence of drugs. Appropriately armed with this particularized and objective basis for his reasonable suspicion, Vinesett would then be justified in prolonging the scope and duration of the traffic stop while he continued to investigate his suspicions. Thus, the search of Morris and Nichols, the use of a drug dog, and the plain view search of the passenger compartment of the Ford were all at least arguably proper as Vinesett was merely continuing to investigate his reasonable suspicion of drug use (however it arose) without infringing on Morris’s Fourth Amendment rights.

But because not one of the investigative techniques he employed revealed any physical evidence of contraband, Vinesett was left without sufficient facts “to warrant a reasonable person to believe that contraband or evidence of a crime will be found in a particular place.” Ornelas, 517 U.S. at 696. In the end, he acted without probable cause when he searched the Ford’s trunk, so the trial court should have suppressed the fruit of the search.

II. The trial court should have suppressed the drugs because the officer extended the length of the detention illegally.

At the conclusion of the suppression hearing, the trial court ruled that the “detention was not excessively long” (R. p. 58, line 23). For some reason, the trial judge’s analysis focused on the moment Vinesett got Nichols out of the Ford (before the drug dog arrived) so he could search him. When he issued his ruling, the trial judge stated:

I find the stop and detention, while it was about – I have got about thirteen minutes, based on the times I was jotting down, but I believe it was only about five minutes before they – from 14:07 to 14:12. I believe about 14:12 was when they got the passenger out and indicated he smelled marijuana, or at least I have got a statement about that within five minutes, but I think the detention was not excessively long. I don't know that is any bright-line test for what is or is not a reasonable time

(R. p. 58, lines 1-25). Simply restated, the trial court's logic appears to be as follows.

Vinesett got Nichols out of the Ford about five minutes into the detention. Then, about five minutes later, Vinesett said he smelled burnt marijuana back when Nichols exited the Ford.⁷ Thus, the length of the detention was not excessive.

This analysis, like the probable cause analysis, amounted to clear error. As a threshold matter, the trial court's time calculations are inaccurate. The time stamp on the on-board camera that captured the stop reveals that Vinesett got Nichols out of the Ford a little over eight minutes after the traffic stop began. Five minutes into the stop, Vinesett was speaking with Nichols, but he was doing so to compare Nichols's story to the one Morris had just provided. Then, from the inception of the stop, it took Vinesett a full thirteen minutes to allege that he smelled burnt marijuana. In the intervening time, the search of Morris and Nichols occurred, the drug dog failed to alert on the Ford, and the plain view search of the cigars in the passenger compartment did not corroborate the presence of that odor. Only after all the time it took to conduct the above investigation transpired did Vinesett allege he smelled burnt marijuana and search the Ford's trunk.

This fact raises an important reason the length of the detention violated the Fourth Amendment. Vinesett stopped Morris because he observed him commit a traffic infraction. The appellant contends the length of the traffic stop had already far exceeded constitutional

⁷ For reasons unstated, the trial judge either refused or neglected to credit Vinesett's claim that he smelled burnt marijuana from the moment he approached the Ford.

limits when, thirteen minutes after the stop, Vinesett finally informed Nichols about the smell of burnt marijuana and proceeded to conduct the warrantless search of the Ford.

A. The officer extended the initial traffic stop multiple times to engage in a blatant fishing expedition for drugs.

When an officer conducts a traffic stop after he or she observed a traffic infraction occur, that officer “may briefly detain the vehicle and its occupants . . .” Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994) (emphasis in original) (citing Delaware v. Prouse, 440 U.S. 648, 653 (1979)). During a typical traffic stop the officer may ask to see the driver’s license and vehicle registration, run a computer check, and issue a traffic citation.⁸ Williams, 351 S.C. at 598, 571 S.E.2d at 707 (quoting Sullivan, 138 F.3d at 131). But the detention “must be temporary and last no longer than necessary to effectuate the purpose of the stop.” Florida v. Royer, 460 U.S. 491, 500 (1983) (plurality opinion).

In the typical case, after an officer has “fulfilled” the purpose for the initial traffic stop, the detention may only be extended if the officer has an objectively reasonable suspicion of illegal activity or if the encounter becomes consensual. State v. Pichardo, 367 S.C. 84, 99, 623 S.E.2d 840, 847-48 (S.C. Ct. App. 2005). Though the precise moment a traffic detention ends is often elusive, a rough general rule seems to be that the initial stop is “fulfilled” when the officer issues a traffic citation and warning ticket. See Tindall, 379 S.C. at 311, 665 S.E.2d at 192 (cert. granted ___ S.C. ___, ___ S.E.2d ___) (“We find the traffic stop ended when [the officer] issued a warning ticket and returned Tindall’s license.”).

⁸ The United States Supreme Court has held that law enforcement officers may even utilize drug detection techniques during a lawfully conducted traffic stop. Illinois v. Caballes, 125 U.S. 834 (2005). However, the Court also cautioned “a seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission.” Id. at 837.

Appellant concedes that Vinesett's initial seizure was justified since he observed Morris commit a traffic infraction. But, the detention became unlawful when, approximately five minutes into the detention, Vinesett ceased addressing the traffic infraction and instead engaged in a full-blown fishing expedition for drugs. The moment he abandoned the traffic stop came when he had Morris in his police car and went to the Ford to interrogate Nichols.⁹

At the suppression hearing, Vinesett testified that a typical traffic stop without any indication of criminal activity lasts approximately five minutes (R. p. 20, line 5). He further stated that at the end of every traffic stop he is required to write either a traffic citation or a warning ticket (R. p. 20, line 18). The record below almost conclusively reveals that Vinesett did not complete the initial stop by writing Morris a traffic citation or warning. Almost seven minutes into the stop, Vinesett ended his call to the K-9 officer by stating he was about to get started on a warning ticket (R. p. 81, line 24). After that statement, the video recording of the traffic stop never captures Vinesett returning Morris's documents and a citation to him.

When he first approached the Ford, the first thing Vinesett did was ask Morris to get into his police cruiser so he could "explain" the situation to him (R. p. 75, lines 23-24). As soon as they sat down inside the cruiser, Vinesett launched into a series of specific questions about Morris's travel plans, including the floor on which his hotel room was located (R. p. 6, line 1). Once he had the answers he wanted, Vinesett presented Nichols with similar questions (R. p. 79, lines 13-22). As soon as he found an inconsistency, Vinesett immediately returned to his police car, ordered Morris out, and called the K-9 officer. After

⁹ The State may argue that Vinesett was justified in immediately launching into a drug investigation because he detected marijuana as soon as he approached the Ford. That argument is simply unsupported by the record and will be addressed in Part II-B, *infra*.

the call ended and instead of writing a warning ticket and “check[ing] 29s,”¹⁰ which is what he said he was going to do, Vinesett approached Morris and asked for consent to search him (R. p. 82, line 23). Morris cooperated with this request just as he and Nichols did throughout the detention.

When Gibson arrived on the scene around eight and one-half minutes after Vinesett initiated the traffic stop, Vinesett had just finished (or was about to finish) his search of Nichols. While Gibson and the dog worked, Vinesett did not return to the traffic citation. He was interviewing Nichols about his driving record, criminal record, and potential drug habits instead. Thus, over ten minutes into the detention, all three officers at the scene were actively engaged in exploring the suspicion that Morris and Nichols were engaged in criminal activity: Vinesett interviewed Nichols; Gibson worked the dog, and Scott kept a custodial eye on Morris.

Then, after the dog failed to alert, Vinesett detained Morris and Nichols for another three minutes while they conducted the plain view search of the passenger compartment of the Ford that eliminated the partially-burnt, “hollowed-out” cigars as the source of burnt marijuana. A full thirteen minutes into the detention, Vinesett finally “swore” he smelled marijuana five minutes earlier (R. p. 87, lines 11-14). He then opened the doors to the Ford, popped the trunk, and began to riffle through its contents.

The facts presented in this case are immediately distinguishable from another decision this Court recently issued. During a traffic stop initiated because the driver was speeding, the officer (Elrod) became suspicious because several passengers gave inconsistent

¹⁰ “Check 29s” is shorthand for 10-29, the code for running a criminal background check. Police Codes, <http://www.radiolabs.com/police-codes.html> (last visited Dec. 3, 2009). At the suppression hearing, Vinesett stated he ran a check of Morris’s license while speaking with him in the police car early on in the detention (R. p. 32, lines 7-9).

stories about their travel itinerary. State v. Jones, 364 S.C. 51, 54, 364 S.E.2d 846, 847 (S.C. Ct. App. 2005). Jones indicated they had been in Greenville; another stated they had been in Spartanburg, and a third told him they were traveling from Atlanta. Id., 346 S.E.2d at 847. Elrod learned of these inconsistencies while he spoke to the front seat passenger (Patterson) who was searching for proof the vehicle was properly registered.

About seven minutes into that stop, Elrod called for backup support, which arrived three or four minutes later. While waiting, he continued to fill out paperwork related to the traffic stop. When the backup officer arrived, Elrod was in the process of explaining the finished citation to Jones. Id. at 54, 346 S.E.2d at 848. “Almost simultaneous” with the backup officer’s arrival, Patterson bolted from the car. The backup officer gave chase and observed him throw what was later identified as crack cocaine into a patch of briars. Id. at 54-55, 346 S.E.2d at 484.

Defense counsel argued that Elrod impermissibly extended the duration to engage in a fishing expedition for criminal activity. A panel of this Court affirmed the trial court’s ruling to admit the drugs into evidence finding

no question but that the vehicle was detained lawfully for a traffic violation . . . [and] [u]nlike the Williams case, there was no further detention for questioning beyond the scope of the stop here . . . Trooper Elrod had not completed the issuance of the traffic ticket, and the purpose of the stop had not yet been fulfilled when Patterson jumped from the car and ran, throwing objects to the ground. Although Jones alluded . . . that Elrod essentially extended the stop beyond a reasonable time by going on a “fishing expedition” prior to the issuance of the ticket, there is evidence to support the trial judge’s determination that the . . . extension of time was attributable to the additional time required in obtaining the car registration, and the questions asked of Jones and the passengers did not exceed the scope of the traffic stop such as would convert the stop into an illegal detention.

Id. at 58, 346 S.E.2d at 849-50 (emphasis in original).

The subtle differences between the present case and Jones are clear. In Jones, the officer was in the process of filling out the citation when Patterson fled the scene and had justifiably been delayed in completing the citation. Vinesett abandoned his paperwork after his discussion with Nichols five minutes into the stop. Further, the fourteen-minute detention of Morris and Nichols was in no way attributable to their lack of cooperation, while Jones's inability to produce his vehicle's registration contributed to the extra time his traffic stop lasted. Finally, the questions asked by Vinesett had nothing to do with the reason for the stop, while those asked by Elrod, at least in some respect, related to the speeding ticket.

The remaining differences between the traffic stops are patent. While he was supposed to be addressing a traffic infraction, Vinesett searched both Morris and Nichols, called a drug dog to the scene, and conducted a plain view search of the Ford's passenger compartment. Each extension of the detention provided no evidence that either Nichols or Morris had engaged in criminal activity, but the duration of the detention still continued to escalate. Thus, Vinesett transformed the traffic stop into an illegal detention that culminated in a warrantless search of the Ford in violation of Morris's Fourth Amendment rights.

B. The officer's testimony that he smelled burnt marijuana during the detention is unsupported by the evidence and lacks believability.

As was the argument at the suppression hearing, the State's position on appeal likely will remain that Vinesett smelled marijuana as soon as he approached the Ford. Therefore, the argument will probably be that the present case is distinguishable from Jones and other cases cited above because those cases do not involve the olfactory detection of illegal drugs by an officer. The State will also point to the trial judge's ruling (the limitations of which have been discussed at length) and argue the clear error standard should prevent this Court from reversing his ruling as to the admissibility of the drugs.

Although the trial court accepted Vinesett's testimony that he smelled burnt marijuana during the traffic stop, (R. p. 59, lines 12-14), this Court is not bound by the trial court's factual finding on that point if it was clearly erroneous. See State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001) (defining the appropriate standard of review in Fourth Amendment cases); State v. Maybank, 352 S.C. 310, 318, 573 S.E.2d 851, 855 (Ct. App. 2002) ("[T]his Court is bound by the trial court's factual findings unless they lack evidentiary support or are clearly erroneous."). Appellant would respectfully urge this Court to examine all the evidence on the record under the appropriate standard of review. Then, after a thorough review of the video recording of the stop contrasted against Vinesett's testimony during the suppression hearing, conclude the trial court's factual finding that Vinesett smelled burnt marijuana during the stop lacks evidentiary support.

Vinesett may have had some level of suspicion about drug activity on which he based his decision to extend the duration of the traffic stop. But the record contains two completely dissimilar versions of how that detention actually unfolded – and what those suspicions really were. One version is found in the video recording of the stop that played in open court (R. p. 46, lines 15-16). The other is found in Vinesett's case summary report, which was entered as a court's exhibit for the defense during the suppression hearing, (R. p. 24, line 15-16), and the testimony he gave during the suppression hearing.

No matter what revisionist account of the traffic stop Vinesett created in the case summary report he prepared in the days following the search, the incontrovertible video evidence is that he never once, not even to his fellow officers, breathed a word about the smell of burnt marijuana until he mentioned it to Nichols thirteen minutes into the detention (R. p. 41, lines 2-3; R. p. 87, lines 13-14). Further, the evidence of drug activity that he did

vocalize during the traffic stop was insufficient to support a fourteen-minute traffic stop that was only cut short by a warrantless vehicle search.

The facts of the present case are well rehearsed above and need not be repeated at length again. Appellant would simply and respectfully request this Court to consider the evidence relied upon by Vinesett when he called the K-9 officer as the true measure of his suspicions. The evidence Vinesett provided at that time, when he had absolutely zero reason, incentive, or motivation to minimize his suspicions, is as follows:

VINESETT: Hey.

GIBSON: I'm ready.

VINESETT: Two young guys born in '83 coming from Atlanta. One said they went down there to visit some girls. They stayed at a hotel, the Hilton, last night. They from Greensboro. Go up there and talk to the other one, he said they went down there for his friend's cousin had a basketball game, went down there and watched the basketball game. Driver admitted he's been arrested before in the past for drugs. Can see shake all in the car and on them like they've been rolling marijuana, but I was going to see if you wanted to get Justice¹¹ out.

(R. p. 81, lines 1-15). Vinesett's failure to mention the odor of burnt marijuana is a very strong indication that the smell simply was not present.¹² Further, the fact the drug dog failed

¹¹ Justice is the name of the drug dog that failed to alert on the car (R. p. 35, line 15).

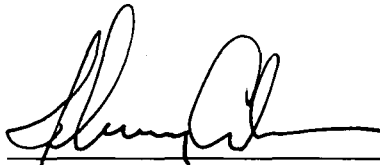
¹² As a point of stark contrast to Vinesett's reaction to the odor he alleged to detect, compare another officer's reaction to the smell of marijuana. "When [the officer] returned to his patrol car with Ross's license and registration, he immediately told [his partner] that he had smelled marijuana in Ross's car and intended to investigate further, with her assistance. His subsequent conversation with Ross confirmed his suspicion that there was contraband in the car." United States v. Ross, 300 Fed. App'x. 386, 390 (6th Cir. 2008) (unreported decision).

to alert on the Ford, with the passenger window rolled down, a mere two minutes after Vinesett claimed he smelled marijuana also severely undermines Vinesett's credibility. Finally, the fact that Vinesett never found one shred of physical evidence to corroborate the smell strongly implies that he never detected the odor of burnt marijuana. For all these reasons, the trial court's finding that Vinesett smelled burnt marijuana during the traffic stop was clear error.

CONCLUSION

For the above reasons, the appellant respectfully requests this Court to reverse the decision of the trial court to allow the drugs into evidence and remand the case for a new trial with instructions to suppress both the drugs found during the warrantless search of Morris's vehicle and the drugs found at the police impound lot as the fruit of an unlawful search.

Respectfully Submitted,



Johnny Gardner
Gardner Law Firm P.A.



Jonathan Hiller
Gardner Law Firm, P.A.

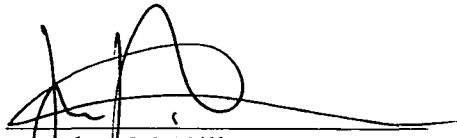
ATTORNEYS FOR THE APPELLANT

This 17th day of March, 2010.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability, this Final Brief of the 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."

Dated: March 17, 2010



Jonathan M. Hiller
Gardner Law Firm, P.A.
P.O. Box 1001
Conway, SC 29528

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STATEMENT OF ISSUE ON APPEAL

The trial judge committed no error in denying Appellant's motion to suppress the illegal narcotics discovered during a traffic stop because Appellant's detention was reasonable under the totality of the circumstances and the search of the vehicle was supported by probable cause.

STATEMENT OF THE CASE

Appellant 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 Appellant for trafficking in Ecstasy and possession of marijuana with intent to distribute. A jury trial was held in the York County court of general sessions on April 15, 2009, with the Honorable John C. Hayes, III, circuit court judge, presiding. On April 17, 2009, the jury convicted Appellant of trafficking in Ecstasy and simple possession of marijuana. Appellant was sentenced to concurrent terms of thirty (30) years with a \$50,000 fine for the trafficking offense and one (1) year for the simple possession offense. Appellant subsequently filed a timely notice of appeal.

STATEMENT OF FACTS

On February 6, 2008, Appellant Kenneth Darrell Morris, II and a passenger, Brandon Nichols, were arrested after officers uncovered drugs in the trunk of the rental car Appellant was driving. (R. p. 63; pp. 64-65). At the outset of his trial, Appellant sought to suppress the recovered drugs as the fruits of an illegal search and an unlawful detention, and a suppression hearing was held. (R. p. 4).

During the suppression hearing, Officer L.T. Vinesett, Jr., an officer with the York County Sheriff's Office's Highway Interdiction Team, testified about his traffic stop of Appellant. (R. p. 6). On the day of the stop, Officer Vinesett, along with a state constable, was patrolling I-77 in York County. (R. p. 6). Officer Vinesett observed a Ford 500, a well-known rental car, following a truck too closely on the interstate. (R. p. 7). As the officer closed on the Ford, the driver made a quick exit from the interstate 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).

After stopping the vehicle, Officer Vinesett approached from the passenger's side and observed two occupants. (R. p. 8). He asked the driver for his license and registration, and the occupants produced a license and rental agreement. (R. pp. 8-9). The rental agreement indicated the passenger, Nichols, had rented the vehicle and was the only authorized driver. (R. pp. 9-10).

At this time, Officer Vinesett noticed the smell of marijuana coming from the vehicle. (R. p. 10). Additionally, he observed hollowed-out cigars and loose tobacco scattered all over the interior of the car. (R. p. 11). The officer noted cigars are frequently hollowed out and the tobacco replaced with marijuana, allowing a drug user to

smoke marijuana while appearing to merely smoke an ordinary cigar. (R. p. 11). He then had Appellant step out of the vehicle and sit in the front passenger seat of his patrol car in order to avoid the rain. (R. p. 10; p. 13). After smelling the odor of marijuana, Officer Vinesett believed there was cause to extend the traffic stop and question Appellant and Nichols. (R. pp. 32-33).

When asked about where he was coming from, Appellant stated they were returning from Atlanta and had gone to visit some girls. (R. p. 13). Additionally, during the questioning, Appellant told Officer Vinesett about his prior criminal record. (R. p. 32). Outside of the presence of Appellant, Nichols offered a different account of their activities, stating they were coming from Atlanta and had gone to see Appellant's cousin play basketball. (R. p. 14). Nichols then stepped out of the Ford, and Officer Vinesett again noticed the odor of marijuana. (R. p. 14).

Officer Vinesett frisked Appellant with consent and allowed him to go to the restroom while accompanied by the state constable. (R. pp. 34-35). The officer then requested a canine unit. (R. p. 14; p. 35). In rainy weather, the police dog walked around the exterior of the car. (R. p. 15). After walking around the vehicle, the dog did not alert to the presence of drugs. (R. p. 15). 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 rain. (R. p. 15).

The officers on the scene requested consent to search the vehicle, but consent was not given. (R. pp. 15-16). Officer Vinesett informed Nichols he had smelled marijuana in the car during the stop, but Nichols denied any marijuana had been smoked. (State's Exhibit 16 - Videotape of the Traffic Stop). Without consent, Officer Vinesett searched

the interior of the car and then the trunk. (R. p. 16; pp. 40-41). In the trunk, he located a gift box with a sandwich bag inside containing 393 Ecstasy pills. (R. pp. 16-17).

Following this discovery, both men were arrested. (R. p. 17). Although not discussed during the suppression hearing, a subsequent search of the vehicle at the police station revealed approximately one-half pound of marijuana hidden under the spare tire. (R. p. 66). The drugs recovered from the vehicle were analyzed and identified as illegal narcotics. (R. p. 70; p. 71).

On cross examination, Officer Vinesett testified the average traffic stop without any indicators of criminal activity usually lasts approximately five minutes. (R. p. 20). He acknowledged his lack of references to any indicators of the presence of drugs in his initial police report, but he revealed the indicators he observed at the scene, which consisted of the hollowed-out cigars and the smell of marijuana. (R. p. 23; p. 29). However, he conceded the drug dog's failure to alert was a fair indicator that no drugs were present. (R. p. 38). He also noted he was able to distinguish between the smell of marijuana and the smell of cigars. (R. pp. 43-44). Ultimately, Officer Vinesett determined, based on his training and the indicators he observed, someone was or had been smoking marijuana in the rental car. (R. p. 31). During the officer's testimony, the videotape of the traffic stop was played for the trial judge. (R. p. 46).

Commander Marvin Brown, the supervisor of the York County 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 Appellant's stop. (R. pp. 50-51).

Following argument 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 failure to alert to the presence of drugs did not require the detention to cease. (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 in the vehicle. (R. p. 57). While noting the inconsistencies in Appellant 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). Ultimately, the trial judge found the search was supported by probable cause. (R. p. 62).

ARGUMENT

The trial judge committed no error in denying Appellant's motion to suppress the illegal narcotics discovered during a traffic stop because Appellant's detention was reasonable under the totality of the circumstances and the search of the vehicle was supported by probable cause.

Appellant asserts the trial judge erred by refusing to suppress the illegal drugs recovered during a search of a rental vehicle driven by Appellant. Appellant contends his detention was unlawful and unreasonably long in violation of the Fourth Amendment, the officer's testimony regarding the odor of marijuana was not credible and was uncorroborated, the search of the vehicle was not supported by probable cause, and the search of the trunk unlawfully exceeded the permissible scope of the search. However, Appellant was lawfully stopped based on a traffic violation, and the traffic stop was conducted in a reasonable manner. Furthermore, any extension in the duration of the stop was supported by reasonable suspicion, and a subsequent search of the vehicle was supported by probable cause. The trial judge, after hearing and evaluating the testimony and evidence, properly denied Appellant's suppression motion. The trial judge's ruling should be affirmed.

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). The reviewing court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000). The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but instead, simply determines whether the trial judge's ruling is supported by any evidence. State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001).

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). 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, ___, 682 S.E.2d 307, 310 (Ct. App. 2009). 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). The appellate court must affirm the trial court if there is any evidence in the record to support the ruling. State v. Pichardo, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005).

A. The Detention

Appellant maintains his detention was unreasonably long in violation of the Fourth Amendment's prohibition against unreasonable searches and seizures and was "a blatant fishing expedition for drugs." Appellant's traffic stop was reasonable, and any extension in the length and focus of the detention was supported by reasonable suspicion.

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. However, "[t]he purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'" United

States v. Mendenhall, 446 U.S. 544, 553-554 (1980) (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976)).

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).

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)). 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.

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.”). But, further detention for questioning subsequent to the conclusion of the purpose for the initial stop is not automatically unconstitutional. State v. Tindall, 379 S.C. 304, 310, 665 S.E.2d 188, 192 (Ct. App.

2008), cert. granted (Apr. 10, 2009). Continued questioning beyond the scope of the initial traffic stop is lawful and permissible if: (1) the officer has a reasonable articulable suspicion of other illegal activity; or (2) the traffic stop becomes a consensual encounter. Pichardo, 367 S.C. at 99, 623 S.E.2d at 848.

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

In 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 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); see, e.g., United States v. Sokolow, 490 U.S. 1, 9 (1989) (finding factors, which might be innocent by themselves, can equate to reasonable suspicion when considered as a whole).

Furthermore, “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).

South Carolina courts have previously considered what constitutes reasonable suspicion of further criminal activity in the context of a traffic stop. Our courts have addressed situations where reasonable suspicion was present and where reasonable suspicion was lacking. However, the courts in all of these cases afforded great deference to the findings and conclusions of the trial judges.

In State v. Williams, the Court of Appeals affirmed the trial court’s findings regarding the lack of reasonable suspicion. Id. at 605, 571 S.E.2d at 711. In Williams, the officer’s only evidence of another crime was the prior suspension of the driver of the vehicle’s license. Id. at 603, 571 S.E.2d at 710. The court concluded this evidence was insufficient to serve as the basis for reasonable suspicion, which was required to extend the scope of the detention. Id.

In State v. Pichardo, the Court of Appeals affirmed the trial court’s suppression of recovered narcotics. Id. at 108, 623 S.E.2d at 853. The only evidence offered to establish suspicion was the nervousness of a passenger in the vehicle. Id. at 104, 623 S.E.2d at 851. The court concluded the passenger’s nervousness alone was insufficient to establish reasonable suspicion in light of his inability to speak English. Id.

Recently, in State v. Rivera, the Court of Appeals affirmed the suppression of heroin recovered from the engine compartment of Rivera’s vehicle. Id. at ___, 682 S.E.2d

at 311. The following indicators were present during the traffic stop: (1) Rivera and the passenger were nervous; (2) they offered somewhat inconsistent stories; (3) luggage was absent from the back-seat of the car; and (4) the car allegedly contained numerous air fresheners. Id. at ___, 682 S.E.2d at 310-311. The court affirmed the trial court's ruling, finding these indicators did not sufficiently establish a reasonable suspicion of criminal activity. Id. at ___, 682 S.E.2d at 311.

In State v. Butler, 353 S.C. 383, 385-386, 577 S.E.2d 498, 499 (Ct. App. 2003), an officer initiated a traffic stop of a van in which Butler was riding. The officer smelled an odor of alcohol, either coming from the driver or from inside the van. Id. The trial court concluded the odor of alcohol established reasonable suspicion. Id. at 388, 577 S.E.2d at 500. The Court of Appeals found the extension of the scope and duration of the traffic stop was justified based on reasonable suspicion of criminal activity. Id. at 390, 577 S.E.2d at 501. However, the court reversed the trial court, finding the subsequent frisk of Butler for weapons was unlawful. Id. at 392-393, 577 S.E.2d at 503.

In State v. Odom, 376 S.C. 330, 333, 656 S.E.2d 748, 750 (Ct. App. 2007), Odom's vehicle was stopped after an officer observed him driving without a seatbelt. As the officer approached Odom's vehicle, he smelled marijuana, observed a Swisher-Sweet cigar on the dashboard, and noticed a empty gun holster in the passenger seat. Id. Additionally, Odom admitted to smoking marijuana earlier that morning. Id. A pat-down search and subsequent search of the car resulted in the discovery of marijuana. Id. The Court of Appeals noted the smell of marijuana along with Odom's admissions and the cigar on the dashboard, "a common indicium of paraphernalia," created a reasonable suspicion of the existence of drugs. Id. at 335, 656 S.E.2d at 751. The Court of Appeals

affirmed the denial of Odom's suppression motion, concluding Odom's detainment and subsequent pat-down search were lawful. Id. at 338, 656 S.E.2d at 752.

In State v. Tindall, Tindall's car was stopped after he was observed speeding and following another vehicle too closely. Id. at 307, 665 S.E.2d at 190. Shortly thereafter, Tindall was given a warning ticket, but officers continued to question him. Id. Approximately fifteen to twenty minutes into the stop, Tindall consented to a search of the vehicle and cocaine was discovered. Id. The officer noticed several physical manifestations of nervousness, but he failed to include these indicators in his police report. Id. The trial court denied Tindall's suppression motion, and the Court of Appeals affirmed. Id. at 311, 665 S.E.2d at 192. The court found the initial traffic stop ended when Tindall's license was returned and he was issued a warning. Id. However, the officer had a reasonable suspicion of criminal activity warranting Tindall's further detention, which ultimately resulted in Tindall consenting to a search. Id. The court found reasonable suspicion from the following indicators: (1) Tindall was nervous even after receiving a warning; (2) Tindall was driving a rental car he had not rented; (3) Tindall was only driving one way; (4) Tindall's planned driving time was approximately eighteen hours in one day; and (5) the cities involved in the trip were known "drug hubs." Id.

In the case sub judice, the stop and detention of Appellant was objectively reasonable under the totality of the circumstances, and any further extension of the scope of the stop was supported by reasonable suspicion. Before initiating the initial stop of Appellant, Officer Vinesett observed the commission of a traffic violation. Appellant's stop was reasonable per se based on probable cause of a traffic violation.

Additionally, there was reasonable suspicion of additional criminal activity warranting further investigation beyond the scope of the initial stop. The facts of Appellant's case are analogous to the facts in Butler and Odom, where courts found reasonable suspicion warranting further investigation based on the odor of alcohol and the odor of marijuana, respectively. Officer Vinesett properly expanded the scope of his investigation after smelling marijuana when he approached the vehicle because this odor created reasonable suspicion drugs were present. Like in Odom, Officer Vinesett's suspicions were based on the smell of marijuana and additional factors as well, including the presence of hollowed-out cigars and loose tobacco in the passenger compartment, which the officer knew to be a common indicator of drug usage based on his training and experience, along with the inconsistent stories offered by Appellant and Nichols.

Officer Vinesett's testimony showed he shifted the focus of his stop only after observing a number of indicators of criminal activity. As in Tindall, an officer's failure to specifically include indicators in an initial police report does not preclude a trial judge from accepting the officer's testimony of those indicators at a subsequent suppression hearing. Clearly, under the totality of the circumstances, there were sufficient indicators establishing reasonable suspicion to expand the investigation. The trial judge properly considered all available testimony, and the evidence in the record supports his conclusions.

Appellant's 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 Appellant's arrest was approximately fifteen minutes.

(State's Exhibit 16 - Videotape of the Traffic Stop). While there is no firm rule as to the appropriate length of a stop and detention, Appellant's stop was arguably reasonable in length notwithstanding the existence of reasonable suspicion to expand the scope of the stop. See 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."); see also State v. Jones, 364 S.C. 51, 58, 610 S.E.2d 846, 849-850 (Ct. App. 2005) (finding no further detention occurred in a lawful traffic stop lasting over ten minutes based on the circumstances of the stop). However, the trial judge properly concluded reasonable suspicion supported the extension of Appellant's stop.

Additionally, Officer Vinesett's testimony during the suppression hearing, specifically the testimony regarding the odor of marijuana and the hollowed-out cigars, established the basis for the extension of the traffic stop. While Appellant challenges the credibility of the officer's testimony, the trial judge was in the best position to weigh the credibility of the proffered testimony and evidence. 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."). On appeal, the focus is on whether any evidence exists to support the trial court's ruling. Testimony in the record established a reasonable suspicion to support further

investigation, and the trial judge found that testimony credible. The trial court's ruling should be affirmed.

B. The Search

After determining whether the detention itself was reasonable, the analysis then shifts to the reasonableness of the search. Appellant argues the search of Appellant's rental vehicle was not supported by probable cause and the search of the trunk exceeded the permissible scope of the search. The officers had probable cause to search the entire vehicle. The search did not violate Appellant's Fourth Amendment rights, and the trial court properly denied the suppression motion. The trial judge's ruling and appellant's convictions should be affirmed.

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: (1) search incident to a lawful arrest; (2) "hot pursuit"; (3) stop and frisk; (4) **automobile exception**; (5) the "plain view" doctrine; and (6) consent. State v. Bailey, 276 S.C. 32, 36, 274 S.E.2d 913, 915 (1981) (emphasis added).

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 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 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, 525 S.E.2d 535, 540 (Ct. App. 1999). A probable cause determination depends upon the totality of the circumstances. State v. Adams, 291 S.C. 132, 133-134, 352 S.E.2d 483, 485 (1987).

South Carolina courts have not yet specifically decided whether an officer’s detection of the odor of marijuana alone can equate to probable cause, which is necessary for a warrantless search of an automobile. However, a number of other jurisdictions have directly addressed this issue. The majority position in both state and federal courts is the 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 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 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 smell of marijuana upon opening passenger door provided officer with probable cause to search vehicle); State v. Smith, 192 N.C. App. 690, 694, 666 S.E.2d 191, 194 (N.C. Ct. App. 2008) (finding 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 the odor of 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.

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 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).

While not in the context of an automobile stop, the South Carolina Supreme Court has previously addressed whether 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 to be delivered to Lane's store. The delivery man contacted the police, an officer smelled 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 sub judice, the facts in the record clearly show the officers had probable cause to search Appellant’s rental vehicle based on the totality of the circumstances. The testimony shows Officer Vinesett smelled the odor of marijuana emanating from the car. The trial judge, who was in the best position to weigh the credibility of the testimony and evidence, accepted Officer Vinesett’s sworn statements. See 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.”); see also Thompson v. Brunson, 283 S.C. 221, 228, 321 S.E.2d 622, 626 (Ct. App. 1984) (“The trial judge was in the best position to assess the veracity of the testimony of the witnesses and we will accord great weight to his findings.”).

While the odor of marijuana was a factor to be considered in the analysis of the reasonableness of the detention, it is also relevant to the determination of the existence of probable cause to search. The officer’s detection of the odor of marijuana established probable cause for the search. Additionally, the officer observed hollowed-out cigars and loose tobacco in the vehicle, which his training and experience told him was common drug paraphernalia. Also, Appellant and Nichols offered inconsistent explanations for the purpose of their trip, and Appellant was driving a rental vehicle he was not authorized to drive. Arguably, the officer’s detection of the odor of marijuana alone was sufficient to establish probable cause. However, along with the additional indicators of criminal activity and of the presence of marijuana, Officer Vinesett clearly had 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.

While the police dog called to the scene failed to alert, this failure did not negate the officer's probable cause to search based on other indicators of criminal activity. Instead, it was merely a factor to be considered under the totality of the circumstances in deciding if probable cause existed. The lack of an alert by the police dog did not require Officer Vinesett to abandon his investigation and subsequent search when he had previously observed reliable indicators of criminal activity sufficient to establish probable cause.

Additionally, it is important to note the police dog's failure to alert in this case was erroneous. The vehicle examined by the police dog contained approximately one-half pound of marijuana concealed in its trunk, and the dog merely failed to alert. The testimony offered during the suppression hearing provided a possible explanation for the dog's failure to alert, which certainly was not based on the absence of drugs. The officers had probable cause to search the vehicle based on the totality of the circumstances independent of any alert or lack thereof by the police dog.

Under the automobile exception, the officers were authorized to search the entire vehicle, including the trunk where the drugs were 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 the odor of marijuana and the indicia of drug usage in the passenger compartment, the officers could reasonably conclude narcotics could be located in the

trunk of the car. Contrary to Appellant's assertion the search of the passenger compartment was supported by the "plain view" doctrine, the search of the entire car was supported by probable cause. Therefore, the search of the passenger compartment and trunk was lawful, and Appellant's Fourth Amendment rights were not violated.

In this case, the trial court found probable cause based on the totality of the circumstances of the stop, primarily arising from the officer's detection of the odor of marijuana. This probable cause was sufficient to warrant a search of the entire vehicle, including the trunk. The trial judge's findings are consistent with South Carolina case law and harmonize with the majority position in other state and federal jurisdictions. Furthermore, these findings were supported by the evidence in the record and should be afforded great deference on appeal.

The issue on appeal hinges on the existence of any evidence to support the trial court's ruling. The evidence in the record clearly establishes the detention of Appellant was reasonable and the subsequent search of the vehicle was supported by probable cause. The trial court properly refused to suppress the recovered drugs, and the evidence in the record supports this decision. Since there was no clear error, the trial judge's rulings and appellant's convictions should be affirmed.

CONCLUSION

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

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

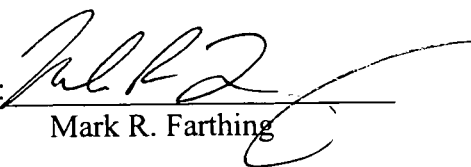
JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

MARK R. FARTHING
Assistant Attorney General

KEVIN S. BRACKETT
Solicitor, Sixteenth Judicial Circuit

BY:



Mark R. Farthing

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

March 15, 2010

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From York County
Honorable John C. Hayes, III, Circuit Court Judge

THE STATE,

Respondent,

vs.

KENNETH DARRELL MORRIS, II,

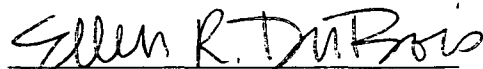
Appellant.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Final Brief of Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Johnny Gardner, Esquire
Post Office Box 1001
Conway, SC 29526

I further certify that all parties required by Rule to be served have been served.
This 15th day of March, 2010.



ELLEN R. DUBOIS
Legal Assistant
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From York County
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THE STATE,

Respondent,

vs.

KENNETH DARRELL MORRIS, II,

Appellant.

CERTIFICATE OF COUNSEL

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

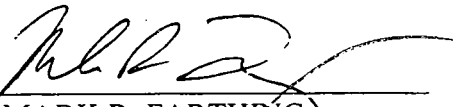
HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

MARK R. FARTHING
Assistant Attorney General

HAROLD W. GOWDY, III
Solicitor, Seventh Judicial Circuit

By: 
MARK R. FARTHING

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

March 15, 2010

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM YORK COUNTY

John C. Haynes, III, Circuit Court Judge

State of South Carolina, ... Respondent,

v.

Kenneth Darrell Morris, II. Appellant.

REPLY BRIEF

**Johnny Gardner, Esq.
P.O. Box 1001
Conway, SC 29528
(843) 248-7135**

**Jonathan Hiller, Esq.
P.O. Box 1001
Conway, SC 29528
(843) 248-7135**

ATTORNEYS FOR APPELLANT

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I. Respondent's brief fails to address the fact that Officer Vinesett knew the hollowed-out cigars did not contain evidence of marijuana consumption before he conducted the search of the trunk.

The primary thrust of Respondent's argument appears to be that the odor of burnt marijuana "along with additional indicators of criminal activity" gave Vinesett probable cause to search Appellant's vehicle (Resp't's. Br. 22). Specifically, Respondent points to the hollowed-out cigars and loose tobacco Vinesett observed in the vehicle as "additional indicators of criminal activity." Id. However, this argument lacks merit because it does not square with the facts of the case. Vinesett knew that the partially smoked cigars he observed were not paraphernalia prior to the beginning of his search of the vehicle's trunk.

The Record on Appeal is clear on the fact that Vinesett never found any physical evidence of marijuana consumption inside the passenger compartment of the vehicle (R. p. 41, lines 2-10). Furthermore, the investigation that preceded this inspection uncovered no physical evidence to suggest the crime of marijuana consumption had been committed by either occupant of the vehicle. The search of Appellant's person produced no incriminating evidence, the search of the passenger yielded no incriminating evidence, and the drug dog did not alert on the vehicle. To further cement the error in Respondent's argument, Vinesett himself testified at the suppression hearing that he knew the passenger compartment of the vehicle contained no evidence of marijuana consumption before he initiated the search of the trunk (R. p. 42, lines 2-6).

As a result, Respondent's claim that Vinesett had probable cause to search the trunk of the vehicle based on the "odor of marijuana and the indicia of drugs [sic] usage in the passenger compartment," (Resp't's. Br. at 23), cannot be correct. The only way Vinesett's search can possibly withstand constitutional scrutiny is if this Court determines that one

officer's unverified allegation that he smelled burnt marijuana – without any physical evidence to corroborate his claim – is sufficient to provide probable cause to conduct a warrantless search of a vehicle under the Carroll Doctrine.

II. To hold that the odor of burnt marijuana alone is sufficient to give an officer probable cause to search the trunk of a vehicle would strip of meaning the requirement that an officer must consider the totality of the circumstances when making a probable cause determination.

Vinesett was the only law enforcement officer to allege he smelled burnt marijuana coming from the passenger compartment of Appellant's vehicle, although two other officers (and a trained drug dog) were also present at the scene. Further, the lone officer that claimed to detect burnt marijuana is even inconsistent with respect to the basic issue of when he first detected that odor.¹ Finally, the fact that Vinesett waited thirteen full minutes to claim he smelled burnt marijuana defies all logic because the odor of marijuana was ostensibly the reason he decided to extend the traffic stop (R. p. 33, lines 11-14). Based on the above recitation of the facts, Appellant respectfully submits that to permit an officer to search a vehicle based on nothing more than the uncorroborated odor of burnt marijuana would tremendously chill the Fourth Amendment rights of all South Carolinian motorists.

Respondent has made much of what appears to be a trend towards holding that the odor of burnt marijuana alone provides probable cause to search a vehicle without a warrant. (Resp't's. Br. at 18-19). Specifically, Respondent would have this Court adopt the approach taken by Maryland in Wilson v. State, 174 Md. App. 434, 921 A.2d 881 (Md. Ct. Spec. App.

¹ Vinesett claimed in his incident report that he smelled marijuana at the beginning of the traffic stop. But this does not square at all with (1) his actions during the course of the investigation or (2) his on-scene statement that he could have "sworn" he smelled marijuana when the passenger exited the vehicle. It should be no surprise that Vinesett's suppression hearing testimony was consistent with his written report, but that incident report does not accurately reflect the events as they actually unfolded.

2007). In Wilson, an officer observed a traffic infraction and executed a traffic stop. As the officer spoke with Wilson about the reason for the stop, he detected the odor of burnt marijuana. Id. at 438, 921 A.2d at 883.² He then ordered Wilson out of the car and proceeded to search the passenger compartment of the vehicle. Id., 921 A.2d at 883. The search of the passenger compartment produced no physical evidence that Wilson had consumed marijuana, but the officer still searched the trunk and found six and one-half pounds of marijuana inside a suitcase. Id., 921 A.2d at 883.

The Maryland court refused to create what it viewed as a “safe harbor” for drugs within a vehicle, and held “[t]he odor of burnt marijuana emanating from a vehicle provides probable cause to believe that additional marijuana is present elsewhere in the vehicle.” Id. at 454, 921 A.2d at 892. Appellant respectfully disagrees with this position and the similar argument advanced in Respondent’s brief. This approach is erroneous because it permits an officer to disregard the totality of the circumstances and to instead rely exclusively on one alleged odor. If an officer claims he smells burnt marijuana during a traffic stop, but a search of the vehicle’s passenger compartment reveals no evidence of marijuana consumption, a search of each occupant of the vehicle produces no paraphernalia, and a drug dog fails to alert on the vehicle, then under the totality of the circumstances, it does not follow that the officer has still has probable cause to extend the scope of the search to the trunk.

South Carolina requires its law enforcement officers to utilize the totality of the circumstances test. State v. Adams, 291 S.C. 132, 134, 352 S.E.2d 483, 485 (S.C. 1987).

This test requires an officer to make “a justifiable determination, based upon the totality of

² As one would expect, the officer in Wilson addressed the odor of burnt marijuana with the driver immediately. As noted earlier, Vinesett waited thirteen minutes to mention the smell of burnt marijuana. He did not even mention the odor to his fellow officers when he had every opportunity and motivation to do so.

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 . . . has been committed and incriminating evidence is involved.” State v. Bultron, 318 S.C. 323, 332, 457 S.E.2d 616, 621 (Ct. App. 2003).

Based on this standard, Vinesett conducted his search without probable cause because, at the time he made the conscious decision to open the trunk, his fourteen minute detention of Appellant produced no evidence of marijuana consumption. This is evidenced by the facts that Vinesett: (1) found no contraband on the person of Appellant or his passenger, (2) uncovered no contraband inside the passenger compartment of the Ford, and (3) the drug dog failed to alert on any part of the vehicle. Thus Vinesett neither had a “practical, nontechnical probability” that Appellant had consumed marijuana nor any “incriminating evidence” against the Appellant. All he had was his uncorroborated and unproven allegation that he smelled burnt marijuana with nothing to back it up. This evidence does not rise to the level of probable cause to conduct a warrantless search.

III. United States v. Ross does not stand for the proposition that an officer may search the trunk of a vehicle based on the alleged odor of burnt marijuana alone.

Appellant also disputes Respondent’s contention that United States v. Ross, 456 U.S. 798 (1982), permits an officer to search the entire vehicle based on the alleged odor of burnt marijuana alone. (Resp’t’s Br. at 23). Contrary to this assertion, the Ross Court did not go so far as to provide an officer with blanket permission to search an entire vehicle because he or she claims to detect burnt marijuana (or any other odor). In Ross, officers received reliable information that Ross was selling narcotics out of his vehicle, a burgundy Chevrolet Malibu. Id. at 800. Later, the officers observed the Malibu being driven by a person matching Ross’s description. When the officers stopped the Malibu and determined that Ross was indeed the

driver, they opened the trunk without a warrant, searched through a bag located inside the trunk, and found heroine powder. Id. at 801.

The Ross Court determined the search was proper and held the “scope of a warrantless search of an automobile thus is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found.” Id. at 824. To give this seemingly abstract statement real-life application, the Court explained as follows.

Probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, [and] probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase. Probable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab.

Id. at 824. Post-Ross, several jurisdictions have had occasion to consider cases that involve the alleged odor of burnt marijuana emanating from a vehicle’s passenger compartment and determined an uncorroborated odor of marijuana alone does not give an officer probable cause to conduct a search the trunk or make an arrest.³

Of particular noteworthiness is a recent case decided by the Massachusetts Supreme Court. In that case, the Commonwealth argued (pursuant to Ross) that “a search is permitted

³ See, e.g. State v. Farris, 109 Ohio St.3d 519, 849 N.E.2d 985 (Ohio 2006) (light odor of marijuana alone does not provide an officer with probable cause to search the trunk); State v. Schmadeka, 136 Idaho 595, 38 P.3d 633 (Idaho Ct. App. 2001) (odor of marijuana alone is not necessarily sufficient to justify a search of the trunk of a vehicle); State v. Grande, 164 Wash.2d 135, 187 P.3d 248 (Wash. 2008) (“The court’s multifactored analysis does not support the State’s argument here that marijuana odor itself is a basis for probable cause to arrest a passenger.”); Com. v. Garden, 451 Mass. 43, 883 N.E.2d 905 (Mass. 2008) (“The search of the Honda’s trunk in this case exceeded the permissible scope of the search because [the officer] could not reasonably have believed that the source of the smell of burnt marijuana would be found in the trunk.”); State v. Morse, 331 Mont. 300, 132 P.3d 528 (Mont. 2006) (“Morse correctly points out that the odor of marijuana alone does not constitute probable cause.”).

whenever officers have probable cause to believe there is contraband in a car.” Com. v. Garden, 451 Mass. 43, 51, 883 N.E.2d 905, 914 (Mass. 2008). The court disagreed and labeled the Commonwealth’s interpretation of Ross as “too broad.” Id., 883 N.E.2d at 914. Instead, the court concluded that “nothing . . . suggests that where automobiles are concerned, the general rule that officers limit their search to those locations where the objects of the search might reasonably be found is somehow suspended.” Id., 883 N.E.2d at 914.

In addition, the Tenth Circuit has addressed a case where the officer claimed to smell burnt marijuana but the subsequent search of the vehicle’s passenger compartment revealed no contraband. The court determined that “[t]he smell of burnt marijuana would lead a person of ordinary caution to believe the passenger compartment might contain marijuana. U.S. v. Nielsen, 9 F.3d 1487, 1491 (10th Cir. 1993). However, the court refused to broaden the scope of the search to the trunk because, “under the circumstances [] there was [not] a fair probability that the trunk contained marijuana, or that a disinterested magistrate would so hold if asked to issue a search warrant. Id. (emphasis in original).

In South Carolina, the automobile exception to the Fourth Amendment’s warrant requirement allows an officer to forego the requirement of seeking out a magistrate to issue a search warrant but only when the warrantless search “is based on facts that would justify the issuance of a warrant.” State v. Weaver, 374 S.C. 313, 320, 649 S.E.2d 479, 482 (2007). Appellant respectfully contends that the alleged odor of burnt marijuana, standing alone and without any corroborating evidence of criminal activity, should not be sufficient to provide an officer with probable cause to search the trunk of a vehicle. As the above cases illustrate, it is not reasonable for an officer to conclude that evidence of recent marijuana consumption would be found inside the locked trunk of a vehicle that, prior to the traffic stop, had been

traveling at a high rate of speed. The better policy is to require an officer to first confirm the presence of a suspicious odor prior to conducting a warrantless search of a vehicle's trunk.

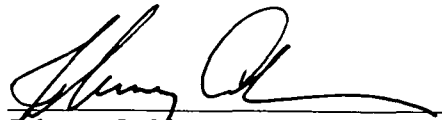
IV. Respondent appears to confuse the reasonable suspicion standard with the standard for probable cause.

In its brief, Respondent argues that the odor of burnt marijuana and the presence of the hollowed-out cigars provided Vinesett with a reasonable suspicion of criminal activity sufficient to prolong the length of the detention. Respondent then argues the exact same evidence also provided Vinesett with probable cause to search. Respondent's argument fails for two reasons. First, probable cause is a higher standard than reasonable suspicion, so the same evidence should not be allowed to satisfy both standards. Second, an accurate view of the sequence of events as they actually unfolded reveals that, at the time Vinesett chose to search the vehicle, he actually possessed little or no evidence from which to conclude that his search would reveal incriminating evidence. As the length of the detention progressed, Vinesett's suspicions should have dissipated because the investigation continually revealed less and less evidence that Appellant had committed any crime related to the consumption of illegal drugs.

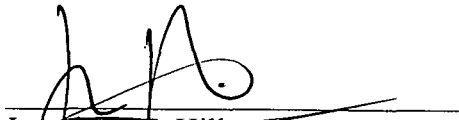
Respondent's brief attempts to justify the length of the detention by arguing that Vinesett's reasonable suspicion of criminal activity allowed him to extend the duration of the traffic stop (Resp't's. Br. at 8). According to Respondent's analysis, the officer's reasonable suspicion of criminal activity came from "the smell of marijuana and additional factors as well, including the presence of hollowed-out cigars and loose tobacco in the passenger compartment . . ." (Resp't's. Br. at 14). Later in the brief, Respondent asserts that the odor of burnt marijuana "along with additional indicators of criminal activity" gave Vinesett probable cause to search Appellant's vehicle (Resp't's. Br. 22).

Either Respondent's reasonable suspicion argument is unnecessary or the probable cause argument is incorrect because the prolonged detention yielded no further evidence of criminal conduct until the warrantless search of the trunk occurred. Appellant respectfully contends that the latter argument is incorrect. The alleged odor of marijuana together with the observation of potential contraband should at most create a reasonable suspicion of criminal activity. See State v. Odom, 376 S.C. 330, 334, 656 S.E.2d 748, 751 (Ct. App. 2007) (stating that the strong odor of marijuana coupled with the observation of a partially smoked cigar provided the officer with a reasonable suspicion of the existence of drugs). Thus, Vinesett never had probable cause to search Appellant's trunk, and the results of that search should have been suppressed as fruit of the poisoned tree.

Respectfully Submitted,



Johnny Gardner
Gardner Law Firm, P.A.
P.O. Box 1001
Conway, SC 29528
(843) 248-7135



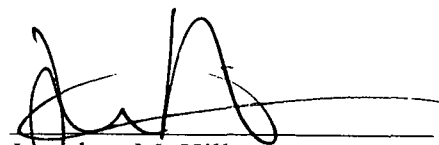
Jonathan M. Hiller
Gardner Law Firm, P.A.
P.O. Box 1001
Conway, SC 29528
(843) 248-7135

ATTORNEYS FOR THE APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability, this Reply Brief of the 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."

Dated: March 17, 2010



Jonathan M. Hiller
Gardner Law Firm, P.A.
P.O. Box 1001
Conway, SC 29528

RECEIVED

JAN 06 2012

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