STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ELLIOTT JUDON, JR.

APPELLANT

APPELLANT CASE NO. 2015-000728

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES 2

STATEMENT OF ISSUES ON APPEAL 4

STATEMENT OF THE CASE 5

STATEMENT OF FACTS 6

ARGUMENT

I. The trial court erred in denying Appellant Judon's motion to dismiss the case because crucial evidence of the in-car video from the police car was missing and had never been requested to be retrieved from the server by the arresting officers which was a violation of Appellant Judon's constitutional rights to a fair trial pursuant to the United States Constitution and the South Carolina Constitution and was indicative of bad faith on the part of the officers 17

II. The trial court erred in denying Appellant Judon's motion to suppress the drugs when the police officer's continued detention of Appellant, after stopping him for an illegal window tint and finding his driver's license valid, exceeded the scope of the stop and was a seizure pursuant to the Fourth Amendment thus making Appellant's consent to search his vehicle invalid as he was not free to leave 21

III. The trial court erred in denying Appellant Judon's motion to suppress his statement to police that he had drugs on his person when his statement was in furtherance of questioning by the officer, and was the product of coercion by the police as he was in handcuffs, had been arrested, and there was no proof that Miranda rights were provided which made his statement a violation of his constitutional rights 24

CONCLUSION 27

TABLE OF AUTHORITIES

Cases

Arizona v. Gant, 556 U.S. 332, 129 S. Ct. 1710 (2009) 21

Arizona v. Youngblood, 488 U.S. 51 (1988) 13, 18, 19

Brady v. Maryland, 373 U.S. 188 (1972) 18

Commonwealth v. Henderson, 582 N.E.2d 496 (Mass. 1991) 19

Jackson v. Denno, 378 U.S. 368 (1964) 15, 25

Miranda v. Arizona , 384 U.S. 436 (1966) ..... *passim*

Rodriguez v. United States, _____ U.S._____, 135 S. Ct. 1609 (2015) 21

State v Harvey Jones and Melissa Jones, 325 S.C. 310, 479 S.E.2d 517 (Ct. App. 1996) ... 18

State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001) 18, 19

State v. Easler, 327 S.C. 121, 489 S.E.2d 617 (1997) 24

State v. Ferguson, 2 S.W.3d 912 (Tenn. 1999) 19

State v. Kennerly, 331 S.C. 442, 503 S.E.2d 214 (Ct. App. 1998) 17, 24

State v. Moore, 415 S.C. 245, 781 S.E.2d 897 (2016) 22, 23

State v. Osakalumi, 461 S.E.2d 504 (W. Va. 1995) 19

State v. Osborne, 291 S.C. 265, 353 S.E.2d 276 (1987) 17

State v. Reaves, 414 S.C. 118, 777 S.E.2d 213 (2015) 19

State v. Tindall, 388 S.C. 518, 698 S.E.2d 203 (2010) 14, 21, 23

Thornton v. United States , 541 U.S. 615 124 S. Ct. 2127 (2004) 22

Unites States v. Sullivan, 138 F. 3d 126 (4th Cir. 1998) 21

Other Authorities

Norman C. Bay, *Old Blood, Bad Blood, and Youngblood, Lost Evidence, and Limits of Bad Faith,* 86 Wash. U.L. Rev, 242 (2008) 18

Rules

Rule 5, SCRCrimP 9, 10

Constitutional Provisions

S.C. Const.§ 3 ..... 17, 24

S.C. Const. § 14 17

U.S. Const. amend. IV 1, 4, 21

U.S. Const. amend. V 17, 24

U.S.Const. amend. XIV 17, 24

STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in denying Appellant Judon's motion to dismiss the case because crucial evidence of the in-car video from the police car was missing and had never been requested to be retrieved from the server by the arresting officers which was a violation of Appellant Judon's constitutional rights to a fair trial pursuant to the United States Constitution and the South Carolina Constitution and was indicative of bad faith on the part of the officers?

2. Did the trial court err in denying Appellant Judon's motion to suppress the drugs when the police officer's continued detention of Appellant, after stopping him for an illegal window tint and finding his driver's license valid, exceeded the scope of the stop and was a seizure pursuant to the Fourth Amendment thus making Appellant's consent to search his vehicle invalid as he was not free to leave?

3. Did the trial court err in denying Appellant Judon's motion to suppress his statement to police that he had drugs on his person when his statement was in furtherance of questioning by the officer, and was the product of coercion by the police as he was in handcuffs, had been arrested, and there was no proof that Miranda rights were provided which made his statement a violation of his constitutional rights?

STATEMENT OF THE CASE

On December 9, 2013, the Charleston County Grand Jury indicted Elliott J. Judon, Jr. on the charge of trafficking in cocaine base in excess of ten grams. On March 13-18, 2015, Appellant Judon proceeded to trial before the Honorable Kristi L. Harrington and a jury. Judon was represented by Melisa W. Gay, and the state was represented by Lauren B. Mulkey and Culver Kidd. R. 1 – 2. The jury returned a verdict of guilty as indicted. R. 406, ll. 1 – 25. Judge Harrington sentenced Appellant Judon to the mandatory life without parole (LWOP). R. 411, ll. 13 – 17.

This appeal follows.

STATEMENT OF FACTS

On August 26, 2013, Appellant Elliott Judon, had picked up his stepson from school and had taken him to Judon's aunt's house on Constitution Avenue. R. 46, ll. 1 – 24. Judon left and was riding down Dorchester to the Meeting Street intersection. He noticed police officers following him closely. The officers initiated their blue light and Judon stopped shortly after. The officers approached Judon's car, and Judon gave them his driver's license and the rental agreement for the car he was driving. He had tinted the windows of this car as he did upholstery work and tinted windows sometimes. R. 330, ll. 1 – R. 333, ll. 7. The officers returned to the patrol car for five to ten minutes. R. 334, ll. 1 – R. 335, ll. 12.

At that point, according to Judon, one of the officers returned to Judon after checking his driver's license, and told him to step out of the car and step in front of the patrol car. Judon said he knew the patrol car had a camera because the officer told him to step in front of the camera. According to Judon's testimony, when he got out of the car, the officer patted him down and "played around his [Judon's] pants zipper area." R. 336, ll. 24 – R. 338, ll. 17.

One of the officers started asking him questions, and the other officer started searching Judon's car. According to Judon, neither of the officers had asked for Judon's consent to search his vehicle. The officer searching Judon's car found a digital scale and a knife located in the armrest of the car. R. 336, ll. 1 – 16.

The officer returned to Judon and told him of finding the scales and knife which the officer said had drug residue on them. Judon was placed in handcuffs and arrested because the officer said there were crumbs of crack found inside the car as well. R. 267, ll. 9 – 21; R. 269, ll. 1 – 7; R. 339, ll. 18 – R. 340, ll. 5.

Then Judon's testimony was that the officer patted him down again. The officer did not read his Miranda rights to him, but told Judon that he thought Judon had something on him. Judon denied this. Everyone was silent for a short time, and then Judon told the officer that he did have something on him. Judon said his pants were still undone from the officer patting him down earlier. The officer put on gloves and retrieved drugs from under Judon's crotch area inside his underwear briefs. Judon said he had put the drugs inside his pants before he left his aunt's house. These drugs were for his personal use. The officer did not ask consent to search Judon's person. R. 340, ll. 6 – R. 345, ll. 12; R. 350, ll. 17 – R. 351, ll. 25.

Officer John Stott, Jr. testified that he was sent to the Dorchester Whalen Terrace community on August 26, 2013 following a shooting that had occurred there earlier. The police department wanted to be visible to the community and to observe what was going on there. R. 260, ll. 1 – R. 264, ll. 2.

He observed Judon's car which had the windows tinted so darkly that he could not see inside the car. The dark window tint was the reason he stopped the car. Officer Stott was in a marked police car and had initiated his blue lights for Judon to stop. When he approached the car, according to the officer, Judon had his pants unzipped and his belt was open. Officer Stott explained the reason for the stop was the window tint, and he procured the driver's license and rental agreement. He described Judon as being "overly cooperative." R. 264, ll. 1 – R. 265, ll. 25.

The officer used the window tint meter and confirmed that the tint was over the legal limit. Officer Stott then had Judon get out of the car and had him stand at the rear of Judon's car and in front of the marked police car. R. 266, ll. 1 – 17; R. 283, ll. 9. Officer Stott asked

Judon for consent to search Judon's vehicle which Judon granted. The officer found the scales and the knife with residue of crack on them and pieces of crack throughout the front seat. These tested positive for crack on the field test. R. 266, ll. 10 – R. 267, ll. 21.

He placed Judon under arrest for possession of cocaine base or crack. . R. 269, ll. 7 – R. 270, ll. 20. According to Officer Stott, he read Judon's Miranda rights to him then from a card Officer Stott had with him. Then Officer Stott said that he confronted Judon with his "suspicions that he was concealing more drugs in his pants" because his pants were undone. Judon initially denied the accusation. R. 270, ll. 18 – R. 271, ll. 19. Then Officer Stott said he told Judon:

> I explained to him that since he was under arrest for a drug violation, that once at the county jail, it's their policy to do a strip search and that if he was, in fact, concealing something inside of his pants, that he would be ---they would be located at that time.

R. 271, ll. 20 – R. 272, ll. 1.

Officer Stott then described Judon as becoming "increasingly nervous." The officer did not remember Judon's exact words but Judon admitted that drugs were concealed in the front of his pants. Judon nodded down and indicated that's where they would find them since his hands were behind his back. The officer found the drugs inside Judon's boxers. He was charged with trafficking crack based on the weight of the drugs. R. 272, ll. 2 – 25.

Lawrence Zivkovich was the forensic chemist with the South Carolina Law Enforcement Division (SLED) who analyzed the drugs found in Judon's case. R. 314, ll. 1 – 25; R. 318, ll. 1 – 17. He confirmed that the all of the drugs were cocaine base. The weight of the drugs found on Judon was 10.1 grams, and the drugs from the car weighed .0-.1 grams. The drugs were admitted into evidence at that time. R. 322, ll. 1 – R. 323, ll. 20.

Officer Matthew Kirk testified that he was with Officer Stott during this incident with Judon on August 26, 2013. Officer Kirk was the backup officer for Officer Stott as Officer Stott was the one who talked with Judon. Officer Kirk said he heard Judon give consent to search. He ran Judon's license and found his license to be valid. Accoding to Officer Kirk, Officer Stott found the items after Officer Kirk ran the check on Judon's driver's license. Officer Kirk stated that they normally issue a ticket for a window tint violation. The person would not be arrested for that. They would be issued the ticket and told to be in court in three weeks and that would be it. R. 295, ll. 1 – R. 304, ll. 25. Officer Kirk also verified that Judon was standing in front of the police car in range of the video camera. R. 305, ll. 1 – R. 306, ll. 2.

In a pretrial motion, defense counsel moved to dismiss the case against Judon on the basis that the police in-car video of the stop and arrest of Judon was never provided to the defense although a Rule 5 discovery request was submitted by the defense within a couple of weeks of his arrest. The video was not turned into evidence by the police. According to police procedure, the video was purged or taped over within 180 days if the officer did not request to have it turned into evidence. R. 6, ll. 1 – 8; R. 11, ll. 1 – R. 14, ll. 8.

Defense counsel argued that Judon was arrested by a marked patrol car, and Judon was told to stand in front of patrol car and was "basically told he was on video camera." Counsel argued that the police said this was a consent case, and Judon said he did not give consent. There was not a video to demonstrate which story was correct. Counsel reminded the court that at the status conference the prior week, Judon asked for the video as he said he was standing in front of the marked police car. R. 8, ll. 17 – R. 10, ll. 25.

The state acknowledged that the unit [car] which the police officers were driving was capable of recording as it had a camera and an in-car video. However, the state could not prove that it was working, but the state conceded that the recording was never entered into evidence. R. 8, ll. 3 12; R. 14, ll. 9 – 11. The state explained that the camera was activated automatically when the blue light came on, so it would have activated when the officers stopped Judon for the "equipment" violation. However, the officers would not know there was a problem with the camera until it was downloaded onto the server. The solicitor stated that the officers did not have any reason to believe the camera was not working but they did not see any reason or need to download the video. R. 14, ll. 6 – R. 16, ll. 11.

Defense counsel argued that there a video did exist as there was a working camera. The officers just did not preserve the video. Counsel argued that the officer "made some kind of subjective decision that it wasn't---it didn't have evidentiary value." She argued that it had significant value to Judon who believed the police report was not accurate. R. 16, ll 15 – R. 21, ll. 25.

Following much discussion, the judge decided to hold a hearing on the motion to dismiss. R. 21, ll. 18 – R. 40, ll. 25. Luke Malloy testified that he represented Judon as his attorney initially. He served the Rule 5 request on the solicitor's office on August 29, 2013, and with the clerk's office on August 30, 3013. R. 42, ll. 1 – R. 45, ll. 23.

Appellant Judon testified that the police activated the blue light before they stopped him. The blue light continued to run. He was told to stand in front of the police car when they got him out of the car. The officers did not ask for his consent to search his car and he did not give consent. He did give them a bag of drugs from his crotch area. He did not

believe he was free to leave as the officers still had his driver's license. He did not receive a ticket for any traffic violation. R. 46, ll. 1 – R. 53, ll. 6.

Officer Stott testified at the hearing that Judon was stopped for an equipment violation and he activated the blue lights to make a stop of Judon. The violation was the window tint was unlawful. R. 71, ll.19 – R. 73, ll. 24. Officer Stott said he asked for consent to search Judon's car and his person which Judon granted. R. 75, ll. 9 – R. 77, ll. 10. The patrol car that he and Officer Kirk were in that day was equipped with an in-car video. The camera was mounted on the windshield inside. It recorded until the officer turned it off. Officer Stott said that he "typically watched these videos afterwards." However, he did not recall watching this video of Judon. He stated that he was not required by law to enter the video into evidence. R. 79, ll. 22 – R. 80, ll. 25. The solicitor asked what factors he used in deciding what should be admitted into evidence. He replied:

> With this kind of charge, I mean, if it—if there was something that was of evidentiary value that wasn't already going to be submitted into evidence, maybe you would do that.

R. 81, ll. 8 – 13.

On cross examination, the officer admitted that he knew that a person who consents to a search could still constitutionally challenge the consent and the evidence could potentially be excluded. R. 91, ll. 10 – 25. He admitted that the video would have been helpful to clarify the situation when he and Judon had different views. R. 93, ll. 1 – R. 94, ll. 25.

Defense counsel then discussed the North Charleston Police Department Policy and Procedure Manual which was submitted by the solicitor in her Motion In Opposition to Dismissal. R. 419 - 428. Counsel pointed out Section III. N. 1 (b) which provided that prior

to each shift, the officers assigned to a vehicle equipped with a motor vehicle camera recorder will inspect the equipment, and will notify their immediate supervisor of any defect in the operation of the equipment. The supervisor will notify the properties service section who will have the technician repair the equipment and document it in the maintenance records. Officer Stott did not recall telling his supervisor of any problems with the in-car camera. Counsel reviewed the next section (c) which required officers to notify their supervisor if they could not log into MRI system prior to beginning their tour of duty. Officer Stott did not notify his supervisor of any problem logging into the system on August 26, 2013. R. 95, ll. 5 – R. 99, ll. 25.

Counsel then read Section (j) which provided that vehicle video tapes containing information that may be of value for case prosecution will be secured by the officer as evidence and placed into the North Charleston Police Department Property Room in accordance with Policy 0-08. Counsel then read Section (l) which provided that officers will document in incident, arrest, and related reports when MVR recordings were made during the incident in question. The officer responded that all of this assumed that the video camera was working. However, defense counsel pointed out that there was no evidence that the video camera was not working. R. 96, ll. 1 – R. 102, ll. 13. Officer Stott admitted that the decision of whether to put the recorded information into evidence was strictly up to the officer. It was "discretionary" with the officer. It was based on the facts of each stop. R. 104, ll. 1 – R. 106, ll. 21.

During his trial testimony before the jury, Officer Stott admitted that the Policy and Procedures Manual provided that if the information from the in-car video may be helpful, the officer will put the video into evidence. He testified that he did not ask for the video to

be put into evidence. R. 286, ll. 1 – 25. Officer Stott admitted that he did not ask to have a CD burned of the in-car video because he did not think it was necessary. He never saw the video. He admitted that he thought the video would have been helpful. He said: "I don't disagree that it [video] would be beneficial." R. 290, ll. 1 – R. 292, ll. 8.

Officer Scott Hille, the technology coordinator for the North Charleston Police Department, testified that he oversees the maintenance of the in-car videos system. He explained that after the video was "captured', it was stored on a compact flash card within the digital video recorder (DVR). When the unit arrived at a Wi-Fi location at City Hall, it automatically downloaded via the Wi-Fi system and was stored internally at City Hall. The video was visible for officers to review for ninety days and then became invisible. After another ninety days, the video was purged. Then no record existed. During the first ninety days, the officers could review the video and request that a copy be burned and have the copy submitted into evidence. R. 109, ll. 1 – R. 112, ll. 2. He confirmed that the download was automatic but the review was done by the officers. Whether the officers submitted the video into evidence was entirely up to the discretion of the officer. R. 117, ll. 1 – 16.

Defense counsel then presented argument to the court citing the South Carolina Constitution which she argued "broadened some of those protections even more." R. 133, ll. 1 – R. 134, ll. 24; Defense Motion to Dismiss. Counsel then cited case law which included Arizona v. Youngblood, 488 U.S. 51 (1988). R. 133, ll. 1 – R. 151, ll. 18. Which held that when material evidence was missing, a defendant must show bad faith on the part of the police. R. 158, ll. 1 –R. 159, ll. 25. Counsel argued:

> And so in Youngblood it says that there's two prongs, Your Honor, and I believe we've met them. It's material. We know it's material. And it was evident to the officer, the value or the materiality of it. And that—that's, I think, what we really are talking about, Your Honor. A

> video of a stop is material. I mean, if they're going to say it's not, then that makes no sense.

R. 158, ll. 24 – R. 159, ll. 6.

Following the arguments of the state and defense counsel, the judge denied defense counsel's motion to dismiss. R. 152, ll.1 – R. 167, ll. 4. The judge held that defense counsel had not established a due process violation, and the testimony failed to establish the exculpatory value of the evidence. R. 164, ll. 20 – R. 165, ll. 25.

Defense counsel also made a motion to suppress Judon's consent to search the car and the evidence from the car based on the lack of reasonable suspicion for the officers to exceed the scope of the stop. Judon's consent was the product of the unlawful detention. Counsel conceded that the initial stop for unlawful window tint was reasonable. However, the officer had no reasonable suspicion to go beyond obtaining Judon's driver's license and the rental agreement for the car. Counsel argued there were no facts to establish any reason for the officer to have removed Judon from his car. Counsel cited the case of State v. Tindall, 388 S.C. 518, 698 S.E.2d 203 (2010). Judon was detained and not free to leave. The officers did not have reasonable suspicion to believe that Judon was doing anything criminal. This consent and evidence were the "fruit of the poisonous tree." R. 231, ll. 1 – R. 234, ll. 25.

Judon testified that he was not free to leave during that time because the officers still had his driver's license, and he said he could not have driven off without his driver's license and rental car agreement. R. 132, ll. 1 – 11.

The judge ruled that there was reasonable suspicion to support the detention of Judon beyond the initial traffic stop. The judge cited the reasons of the appearance of Judon and his pants, the rental status of the car, and his anxious behavior in trying to hide the

unzipped portion of his pants. The officer testified that Judon consented to the search of his car. R. 247, ll. 21 – R. 248, ll. 19.

Defense counsel also moved to suppress Judon's statements to the police because they were made in furtherance of questioning and were not spontaneous nor voluntary. Counsel argued that "just because a person is supposed to have consented does not mean that there is not a constitutional problem." He was handcuffed, detained and seized. The officer said he Mirandized Judon, but Judon said he did not. There was no paperwork nor statement that Judon signed or was supposed to have signed for Miranda. Counsel argued this was an unlawful seizure and was unconstitutional. R. 234, ll. 16 –R. 237, ll. 21.

The judge found, pursuant to Jackson v. Denno, 378 U.S. 368 (1964), that all of the statements in the case were made voluntarily under the totality of the circumstances, and the statements were admissible. She stated that in order to find that the confession was not voluntary, she must find that there was coercive police activity. She ruled that there was no indication of coercive activity by the police. The judge said to defense counsel: "Note your exception to my ruling." R. 248, ll. 20 – R. 251, ll. 1.

At the close of the state's case, defense counsel made a motion for a directed verdict. She also renewed all of her prior motions which included her motion to dismiss, her motion to suppress, and her motion to suppress his statements. The state objected. The judge denied the motion. R. 325, ll. 1 – R. 327, ll. 16.

Following the testimony of Judon and at the close of the defense's case, defense counsel again renewed all of her motions. She stated that these included: "my motion for a directed verdict, my motion to dismiss, my motion to suppress statements and evidence, and any other motions that I've made objections along the way." R. 370, ll. 1 – 16.

Following testimony in the motion to suppress, defense counsel renewed her motion to dismiss. R. 227, ll. 1 – R. 228, ll. 17. After pretrial motions and just prior to the trial beginning, defense counsel renewed all of her motions. R. 252, ll. 1-6.

ARGUMENT

1.

The trial court erred in denying Appellant Judon's motion to dismiss the case because crucial evidence of the in-car video from the police car was missing and had never been requested to be retrieved from the server by the arresting officers which was a violation of Appellant Judon's constitutional rights to a fair trial pursuant to the United States Constitution and the South Carolina Constitution and was indicative of bad faith on the part of the officers.

The Due Process clause of the Fifth and Fourteenth Amendments mandate a defendant's fundamental right to a fair trial. State v. Kennerly, 331 S.C. 442, 503 S.E.2d 214 (Ct. App. 1998) The Fourteenth Amendment secures all persons against any state action which results in either deprivation of life, liberty, or property without due process of law. U.S.Const. amend. XIV.

Section 3 of the South Carolina Constitution provides that "the privileges and immunities of the citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprives of life, liberty, or property without due process of law."

Section 14 of the South Carolina Constitution provides that he defendant should be "fully informed of the nature of and cause of the accusation, and to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor."

In State v. Osborne, 291 S.C. 265, 353 S.E.2d 276 (1987) the Supreme Court ruled that the prosecution's nondisclosure of tape recordings of statements made by key state's

witness in prosecution of defendants for conspiracy, armed robbery, kidnapping, and murder deprived defendants of fair trial requiring new trial.

In Brady v. Maryland, 373 U.S. 188 (1972), the United State Supreme Court declared the suppression of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. State v Harvey Jones and Melissa Jones, 325 S.C. 310, 479 S.E.2d 517 (Ct. App. 1996) citing Brady v. Maryland, *supra.*

In Arizona v. Youngblood, 488 U.S. 51 (1988), the United States Supreme Court held that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence did not constitute a denial of due process of law. Youngblood was accused of sexually assaulting and sodomizing a ten year old boy. The police collected a rectal swab for semen and the child's clothing. However, the police failed to refrigerate the clothing and failed to perform tests on the semen samples. None of their information was concealed from the respondent at trial, and the evidence was made available to the respondent's expert who declined to perform any tests on the samples.[1]

In his dissent in Arizona v. Youngblood, id. , Justice Blackmun wrote that a defendant was entitled to a fair trial, and not a "good faith" try at a fair trial.

The South Carolina Supreme Court held in State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001), that to establish a due process violation based on the destruction of evidence, a defendant must demonstrate (1) that the state destroyed the evidence in bad faith; or (2) that the evidence possessed an exculpatory value before the evidence was

[1] Youngblood was later exonerated by DNA evidence. See Norman C. Bay, *Old Blood, Bad Blood, and Youngblood, Lost Evidence, and Limits of Bad Faith,* 86 Wash. U.L. Rev, 242, 276 (2008).

destroyed and the defendant cannot obtain other evidence of comparable value by other means.

Judon's case is distinguished from State v. Cheeseboro, id. because the evidence was never presented to Judon.

In State v. Reaves, 414 S.C. 118, 777 S.E.2d 213 (2015), the Supreme Court cited several states that have declined to follow the bad faith standard of Youngblood. These include: State v. Ferguson, 2 S.W.3d 912, 917 (Tenn. 1999) which held that because the Court "deemed the preservation of the defendant's fundamental right to a fair trial to be a paramount consideration, we join today those jurisdictions which have rejected the Youngblood analysis in its pure form." State v. Osakalumi, 461 S.E.2d 504, 512 (W. Va. 1995) held that "as a matter of state constitutional law, we find that fundamental fairness requires this Court to evaluate the State's failure to preserve potentially exculpatory evidence in the context of the entire record." Commonwealth v. Henderson, 582 N.E.2d 496 (Mass. 1991) held that "the rule under the due process provisions of the Massachusetts Constitution is stricter than that stated in the Youngblood opinion."

The trial court erred in denying Judon's motion to dismiss his charges because of the bad faith of the officers in intentionally not retrieving the crucial evidence of the in-car video and allowing it to be destroyed. The fact that Officer Stott testified that he "usually reviewed these videos" but did not remember doing so in Judon's case is highly suspicion because there was a conflict in his story and Judon's. Giving Miranda rights is crucial to any arrest. This would have been significant to the prosecution of the case as required by the Policy and Procedures Manual; of the North Charleston police. There was no other evidence that Miranda was given other than this in-car video. There was no written statement and

only the word of the two officers. Miranda is crucial here because it was only Judon's statement to the officers that led to the trafficking amount of drugs. R. 340, l. 1 – 23.

The video was crucial as well to the continued detention of Judon and whether he gave consent for Officer Stott to search his car. Judon said he did not give consent, and Officer Stott said he did. It is reasonable to believe that any officer who makes an arrest in a drug trafficking case would know that proof of consent would be crucial to the prosecution. There was no other evidence of the consent to search. The fact that the officer saw no reason to preserve the video lends credibility to Judon's claim that the video was exculpatory to him.

Not having the video was prejudicial to Judon in at least two significant ways. If Judon was correct that the officer did not provide his Miranda rights,and that Judon did not give consent to search his car nor person, then the charge would likely have been dismissed. If the video showed that Officer Stott was correct and Judon consented and the officer read the Miranda rights, then Judon would very likely have taken the plea offer of twenty years and would not be serving a life sentence for drugs.

ARGUMENT

2.

The trial court erred in denying Appellant Judon's motion to suppress the drugs when the police officer's continued detention of Appellant, after stopping him for an illegal window tint and finding his driver's license valid, exceeded the scope of the stop and was a seizure pursuant to the Fourth Amendment thus making Appellant's consent to search his vehicle invalid as he was not free to leave.

In State v. Tindall, 388 S.C. 518, 698 S.E.2d 203 (2010) the court wrote:

> In carrying out a routine traffic stop, a law enforcement officer may request a driver's license and vehicle registration, run a computer check and issue a citation. *See Unites States v. Sullivan*, 138 F. 3d 126, 131 (4th Cir. 1998). Any further detention for questioning is beyond the scope of the stop and therefore illegal unless the officer has reasonable suspicion of a serious crime. *Id.*
>
> We find the officer's continued detention of Tindall exceeded the scope of the traffic stop and constituted a seizure for purposes of the Fourth Amendment.
>
> The fact that Tindall "consented" to the search of the vehicle does not alter our conclusion as the consent was the product of the unlawful detention. 388, S.C. at 521-523, 698 S.E.2d at 205-206

In Rodriguez v. United States, _____ U.S._____, 135 S. Ct. 1609 (2015) the court held that "a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures." 135 S. Ct. at 1612.

In Arizona v. Gant, 556 U.S. 332, 129 S. Ct. 1710 (2009) the Court wrote:

> "we also conclude that circumstances unique to the automobile context justify a search incident to arrest when it

> is reasonable to believe that evidence of the offense of arrest might be found in the vehicle" 556 at 335, 129 S. Ct. at 1714.

Later in decision the court wrote:

> Although it does not follow from *Chimel*, we also conclude that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." *Thornton*, 541 U.S., at 632, 124 S. Ct. 2127 (SCALIA, J., concurring in judgment). In many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence. 556 at 344, 129 S.Ct. at 1719.

The South Carolina Supreme Court held in State v. Moore, 415 S.C. 245, 781 S.E.2d 897 (2016), that the deputy had reasonable suspicion to further detain Defendant Moore after the initial stop for several reasons. A large sum of money of $600 was found on Moore who was stopped for speeding and said he was unemployed. The officer smelled a strong smell of alcohol in the car. The rental agreement showed that the car was rented to a third party in North Carolina the day before. Defendant Moore claimed that he was traveling on I-85 from Georgia to visit his grandmother in North Carolina. Moore exhibited extreme nervousness.

Judon's case is distinguished from Moore as none of the factors in Moore apply in Judon's case. The only suspicious factor in Judon's case was the window tint. His pants being unzipped, if they were as claimed by Officer Stott was not indicative in itself of drugs. Officer Stott said Judon was extremely cooperative and did not mention his exhibiting extreme nervousness. The officer only said he showed anxiety at trying to cover his unzipped pants which would have been reasonable for anyone in that situation. R. 74, ll 1 –

R. 75, ll. 10. Later the officer said Judon was sweating heavily. The incident occurred around 4:00 in the afternoon in August in Charleston. R. 85, ll. 8 – 24. It would be only reasonable for any person to be sweating after being stopped on the side of the road for a period of time in the Charleston heat. It was only speculation on the officer's part that Judon was sweating more than usual because he had no knowledge of how much Judon usually did sweat.

Although the Court in Moore wrote that in the test whether reasonable suspicion exists to further detain a driver for questioning unrelated to an initial traffic stop is an objective assessment of the circumstances; the officer's subjective motivations are irrelevant. The Court held that the Supreme Court must consider the totality of the circumstances.

As in Tindall, the police in Judon's case checked his driver's license and rental agreement and found all to be valid. Also, Officer Stott had not issued a citation ticket just as in Tindall's case. There was less reasonable suspicion in Judon's case than in Tindall as Tindall had the felony stretch and driving on the interstate to another state. The only reasonable suspicion in Judon's case was the window tint. The alleged unzipped pants were not sufficient for reasonable suspicion.

Under the totality of the circumstances, there was not reasonable suspicion for Officer Stott to detain Judon beyond the initial stop. His driver's license and rental agreement were valid.

ARGUMENT

3.

The trial court erred in denying Appellant Judon's motion to suppress his statement to police that he had drugs on his person when his statement was in furtherance of questioning by the officer, and was the product of coercion by the police as he was in handcuffs, had been arrested, and there was no proof that Miranda rights were provided which made his statement a violation of his constitutional rights.

The Due Process clause of the Fifth and Fourteenth Amendments mandate a defendant's fundamental right to a fair trial. State v. Kennerly, 331 S.C. 442, 503 S.E.2d 214 (Ct. App. 1998). The Fourteenth Amendment secures all persons against any state action which results in either deprivation of life, liberty, or property without due process of law. U.S.Const. amend. XIV.

Section 3 of the South Carolina Constitution provides that "the privileges and immunities of the citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprives of life, liberty, or property without due process of law."

In Miranda v. Arizona , 384 U.S. 436 (1966), the United States Supreme Court held that "statements obtained from defendants during incommunicado interrogation in police dominated atmosphere, without full warning of constitutional rights, were inadmissible as having been obtained in violation of his Fifth Amendment privilege against self-incrimination."

The South Carolina Supreme Court held in State v. Easler, 327 S.C. 121, 489 S.E.2d 617 (1997), citing Miranda v. Arizona, *supra,* that Miranda warnings were required for

official interrogations only when a suspect has been taken into custody or otherwise deprived of his freedom of action in any significant way." The Court also defined "interrogation" as either express questioning or its functional equivalent; it includes words or actions on the part of the police that police should know are reasonably likely to elicit an incriminating response.

In Jackson v. Denno, *supra,* the Untied States Supreme Court held that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard to truth or falsity of confession, and even though there is ample evidence aside from the confession to support the conviction.

The trial court erred in admitting Judon's statement to officers that he had drugs on his person into evidence. Judon was under arrest for possession of crack from the search of the car, and he was handcuffed. He was under the control of the officers. Any statement he made was under coercion. Although Officer Stott said he provided Miranda warnings to Judon; Judon said he did not. There was no evidence presented that Miranda was given other than the officer's word. There was nothing in writing that Judon had signed, and there was no in-car video of the incident which would have answered the question. There was coercion on the part of the officer as he asked Judon if he had drugs on him. When Judon said no, the officer was coercive in telling him that he would be strip searched at the jail.

The actions of the police Officer Stott were highly suspect when he said that he usually reviewed the videos but he did not in Judon's case, and then he did not have the video admitted into evidence. He knew there was nothing in writing to show he had provided Miranda warnings, and then he intentionally did not obtain the video. The video

was necessary. A reasonable assumption would be that the officer did not provide Miranda warnings.

CONCLUSION

Based on the above, Appellant Judon's conviction and sentence should be reversed, and the case remanded for a dismissal of the charges on Issue One and a new trial with evidence suppressed on Issues Two and Three.

Respectfully submitted,

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Appellate Defender

ATTORNEY FOR APPELLANT

This 7th day of July, 2016.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR.

July 7, 2016

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Charleston County

Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ELLIOTT JUDON, JR.

APPELLANT

APPELLANT CASE NO. 2015-000728

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon David Spencer, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 7th day of July, 2016.

Susan S. Hackett for
LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 7th day of July, 2016.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.