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SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

October 29, 2012

Honorable William K. Suter
Clerk, Supreme Court of the United States
1 First Street, N.E.
Washington, DC 20543

Re: David Lee Brown v. State of South Carolina

Dear Mr. Suter:

Enclosed are the petition for writ of certiorari, a motion for leave to proceed *in forma pauperis*, and an affidavit of **David Lee Brown** in support of motion to proceed *in forma pauperis*. The certificate of service is attached to the original petition. Representing the State of South Carolina is **Ashleigh Wilson**, Esquire, of the Office of the Attorney General, Post Office Box 11549, Columbia, South Carolina 29211-1549. Her phone number is (803) 734-3970. I represent petitioner David Lee Brown. The other information required by Rule 29.5 is contained above. If additional information is desired, please contact me.

Sincerely,

Robert M. Pachak
Attorney at Law

RMP/pcm

Enclosure

cc: Honorable Jenny Abbott Kitchings
Honorable Daniel E. Shearouse
Ashleigh Wilson, Esquire

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Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

October 29, 2012

Honorable William K. Suter
Clerk
Supreme Court of the United States
Washington, DC 20543

Re: David Lee Brown v. South Carolina

Dear Mr. Suter:

Enclosed is petitioner's Certificate of Filing by Mail in the above-referenced case.

Sincerely,

Robert M. Pachak
Attorney at Law

RMP/pcm

Enclosure

cc: Ashleigh Wilson, Esquire
Honorable Jenny Abbott Kitchings
Honorable Daniel E. Shearouse, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2012

No. 12-

DAVID LEE BROWN,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent

CERTIFICATE OF FILING BY MAIL

I hereby certify that I am a member of the Bar of this Court and that on October 29, 2012, I filed the petition for writ of certiorari in the above-referenced case, together with a motion for leave to proceed in forma pauperis, by causing the originals and ten copies of the same to be deposited in the United States Mail, postage prepaid, and properly addressed to the Clerk of this Court.

Robert M. Pachak
Counsel of Record

SUBSCRIBED AND SWORN TO before me
this 29th day of October, 2012.

(L.S.)
Notary Public for South Carolina
My Commission Expires: August 23, 2014.

SCCID
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Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

October 29, 2012

The Honorable Jenny Abbott Kitchings
Clerk, S.C. Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: David Lee Brown v. State of South Carolina

Dear Ms. Kitchings:

Please be advised that I have filed a petition for writ of certiorari in this case with the United States Supreme Court today. I have attached a copy of that petition.

Please contact me if you have any questions.

Sincerely,

Robert M. Pachak
Appellate Defender

RMP/pcm
Enclosure

cc: Honorable Daniel E. Shearouse
Ashleigh Wilson, Esquire
Kathrine Hudgins, Esquire
Jeffrey Bloom, Esquire

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2012

No. 12-

DAVID LEE BROWN,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SOUTH CAROLINA COURT OF APPEALS

ROBERT M. PACHAK
Attorney at Law

Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
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QUESTION PRESENTED

Whether the South Carolina Court of Appeals erred in affirming the trial court's ruling refusing to suppress evidence that was seized after the detention of a motor vehicle and its occupants in violation of the Fourth Amendment to the United States Constitution when the police did not have reasonable suspicion of criminal activity?

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CONSTITUTIONAL PROVISIONS

STATUTORY PROVISIONS

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2012

No. 12-

DAVID LEE BROWN,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SOUTH CAROLINA COURT OF APPEALS

Counsel for David Lee Brown petitions the Court to issue a writ of certiorari to review the decision of the South Carolina Court of Appeals affirming his convictions for armed robbery and possession of a weapon.

CITATION TO OPINION BELOW

The South Carolina Court of Appeals' opinion is reported as The State v. David Lee Brown, Unpublished Opinion No. 2011-UP-185 (Heard April 7, 2011 - Filed April 25, 2011), The opinion is reproduced in the Appendix to this petition at pages 1-2.

JURISDICTION

The judgment of the South Carolina Court of Appeals was entered on April 25, 2011. A petition for rehearing was denied on May 13, 2011. The South Carolina Supreme Court denied a petition for writ of certiorari on August 10, 2012. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a), Petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

> Amendment IV: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath on affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Petitioner was indicted by the Charleston County Grand Jury for armed robbery and possession of a firearm during the commission of a violent crime. Petitioner proceeded to trial along with two co-defendants on June 22-25, 2009, before the Honorable Deadra L. Jefferson, and a jury. Petitioner and the co-defendants were found guilty as charged. They were all sentenced to fifteen (15) years for armed robbery and to five (5) years for possession of a firearm.

FACTS RELEVANT TO THE DETENTION OF THE VEHICLE AND ITS OCCUPANTS

Around 9:45 PM on February 26, 2009, four (4) black males with pistols and their faces covered entered Benders Bar & Grill in West Ashley and robbed patrons and management. Officer Danik was first to arrive at the scene. She broadcast a description of the suspects as being four (4) black males around 20 years old with black clothing. No further description was given and no description of a vehicle was given because no one was sure if the suspects left on foot or in a vehicle. (ROA p. 75, lines 1-10; ROA p. 81, lines 14-15). At 10:06 PM while on

routine patrol, Officer Bonanni saw a car parked in the darkened fenced in area of James Island Christian Church on Sawgrass Road, some 8-11 miles from the crime scene. Initially, he did not see who was in the car. He thought maybe it was a couple or that somebody from the church had left a car there. But he decided not to ignore it. (ROA p. 94, line 12 – p. 95, line 24; ROA p. 104, lines 10-13). Officer Bonanni said he had heard about an armed robbery that occurred earlier at a bar about 8-11 miles away. But no description of a vehicle was given. (ROA p. 96, lines 12-18; ROA p. 103, line 23 – p. 104, line 1). All he knew was four (4) black males, no other details. (ROA p. 99, lines 5-10). He never testified that he drew a connection between the armed robbery and the car when he saw it parked at the church.

Officer Bonanni proceeded on through the parking lot. He put on his lights and came upon four (4) black males in the vehicle. (ROA p. 95, lines 24-25). When he pulled into the parking lot, he parked at an angle to keep the vehicle from leaving. He used his lights to see inside the vehicle. He said the police use the lights at night when they perform traffic stops.[1] (ROA p. 98, lines 9-24). He approached the driver, asked for his driver's license, went back to his car and asked for a backup. (ROA, p. 97, lines 10-13). He kept the driver's license. (ROA p. 101, lines 20-22). He admitted that he did not know how long the vehicle was parked at the lot and that the individuals were not committing a crime. (ROA p. 102, lines 16-24). There was no testimony that this was a "high crime" area. Officer Bonanni said after backup arrived they took over the investigation because they were more experienced than he was. (ROA p. 97, lines 14-25). Earlier, the officer testified that he had law enforcement experience dating back to 1985. (ROA p. 93, lines 13-22).

---

[1] The record is not clear as to exactly when the officer turned on his lights – as he was going through the parking lot, as he was hedging – in the vehicle, or after he hedged in the vehicle.

Defense counsel argued that the four co-defendants were seized when their car was hemmed-in by the police car. Officer Bonanni had no reasonable articulable suspicion to detain the defendants for back-up officers. He did not have a description of a car or the occupants. The officer did not see them do anything wrong and he found nothing wrong with the driver's license. (ROA p. 165, line 21 p. 168, line 21; ROA p. 169, line 20 p. 170, line 13) The coincidence and happenstance of the officer coming upon this vehicle did not equal a reasonable articulable suspicion. The trial court ruled that the stop was legal and all the evidence was admissible. (ROA p. 180, line 15 – p. 188, line 14) That ruling was in error.

REASON FOR GRANTING THE WRIT

Police may stop a motor vehicle and briefly detain and question an occupant if they have a reasonable suspicion that the occupant is involved in criminal activity. Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983); State v. Robinson, 306 S.C. 399, 412 S.E.2d 411 (1991). This suspicion must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868, 18780, 20 L.Ed.2d 889, 906 (1968). The police may also order an occupant out of the vehicle and, if the exercise of reasonable caution so warrants, frisk the occupant for weapons. Pennsylvania v. Mimms, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977).

The term "reasonable suspicion" requires "a particularized and objective basis" that would lead one to suspect another of criminal activity. United States v. Cortez, 449 U.S. 411, 417, 101 S.Ct. 690, 695, 66 L.Ed.2d 621, 629 (1981).

In petitioner's case there was no description of the vehicle and there was no reasonable suspicion based on specific and articulable facts to support hemming the vehicle in front of the

fence.

In Brendlin v. California, 551 U.S. 249, 127 S.Ct. 2400 (2007) this Court ruled that passengers of vehicles may challenge the constitutionality of a stop. The court noted that "the stopping of a vehicle and the detention of its occupants constitute a "seizure" within the meaning of the Fourth Amendment." 551 U. S. at 256, 127 S.Ct. at 2406 quoting Colorando v. Bannister, 449 U.S. 1, 4, n. 3, 101 S.Ct. 42 (1980) In Brendlin, this Court ruled that the passenger was seized from the moment the driver's car came to a halt on the side of the road. In our case, at the time Officer Bonanni hedged in the vehicle, petitioner and the other co-defendants were seized.[2] No reasonable person would believe he was free to leave. Brendlin. Keeping the driver's license only made sure of that. The officer did not articulate any reasonable suspicion of criminal activity based on specific and articulable facts. He simply said he decided not to ignore the vehicle. Intrusions upon constitutionally protected rights have to be based on more than inarticulate hunches. Simple good faith on the officer's part is not enough.[3] Terry v. Ohio, 392 U.S. at 22, 88 S.Ct. at 1880. "The Government cannot rely on post hoc rationalizations to validate those seizures that turn up contraband." United States v. Foster, 634 F.3d 243 (4th Cir. 2011). See, also Smith v. Ohio, 494 U.S. 541, 110 S.Ct. 1288 (1990).

The cases relied upon by the Court of Appeals in its opinion deal with altogether different fact patterns from petitioner's case. In Hiibel v. Sixth Jud. Dist. Ct. of Nev. Humboldt County, 542 U.S. 179,124 S.Ct. 2451 (2004), the police had reasonable suspicion to stop the defendant when they received a telephone call reporting an assault, describing the vehicle, and the location. Police

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[2] For a Terry stop to be constitutionally permissible, the officer's action has to be justified at its inception. Terry v. Ohio, 392 U.S. at 20, 88 S.Ct. at 1879.

[3] To suggest that Officer Bonanni's reasonable and articulable suspicion was because he saw four black males in the car and a robbery occurred earlier with four black males would be "racial profiling" and an inarticulate hunch.

arrived at the scene found the truck and the defendant standing by it. In Illinois v. Wardlow, 528 U.S. 119, 120 S.Ct. 673 (2000), the defendant's unprovoked flight from officers in an area of heavy narcotics trafficking supported reasonable suspicion that the defendant was involved in criminal activity and justified the stop. In United States v. Hensley, 469 U.S. 221, 105 S.Ct. 675 (1985), the investigatory stop of the defendant in reliance on a police department "wanted flyer" which was issued on the basis of articulable facts supported a reasonable suspicion that the person wanted had committed the offense. In United States v. Quarles, 330 F.3d 650 (4th Cir. 2003), information provided by 911 caller, to the effect that the defendant was wanted for involvement in a felony, was sufficiently reliable to provide police with reasonable suspicion to conduct a Terry stop. And in State v. Blassingame, 338 S.C. 240, 525 S.E.2d 535 (1999), the officer had reasonable suspicion to stop the defendant based on the defendant's presence near the victim's abandoned truck and his appearance, which closely matched the victim's description of the kidnapping, carjacking, and armed robbery suspect.

By contrast, in United States v. Foster, 634 F.3d 243 (4th Cir. 2011) a synopsis of the opinion showed as follows:

> Police officer's investigative detention of defendant was not supported by reasonable suspicion; officer saw parked vehicle with a man in driver's seat, then saw defendant sit up in passenger seat from a crouched position, and officer recognized defendant and knew he had previously been arrested for a marijuana-related crime, and officer called drug unit supervisor and was told defendant was under investigation, and officer saw defendant's arms shifting and "going haywire" when he saw officer, but officer did not see defendant's hands, and when officer walked by and asked vehicle's occupants what they were doing, defendant did not appear nervous or apprehensive when he replied, "just chilling," and the men did not flee, but remained in parked vehicle for 15 minutes after exchange with officer.[4]

[4] In Foster, the police also used their vehicle to hem in the car Foster was in. Both parties in that case agreed that, for Fourth Amendment purposes, the officers seized Foster.

The court in Foster also wrote:

> Although these matters generally only come before this Court where a police seizure uncovers some wrongdoing, we would be remiss if we did not acknowledge that the exclusionary rule is our sole means of ensuring that police refrain from engaging in the unwarranted harassment or unlawful seizure of anyone-whether he or she is one of the most affluent or most vulnerable members of our community.

634 F.3d at 248 -249.

United States v. Sprinkle, 106 F.3d 613 (4th Cir. 1997) is a similar case. There, the officers did not have reasonable suspicion of criminal activity to justify a stop where the officer observed the defendant's companions, who had recently served time for a drug offense, in a neighborhood with a high incidence of drug traffic. The defendant and the companion also huddled together towards the center console of the car with their hands close together, but the officer did not see anything pass between them and the companion tried to hide his face. Those factors taken together did not justify a stop.

CONCLUSION

Based on the foregoing, a writ of certiorari should be granted to allow full briefing on this issue.

Respectfully submitted,

ROBERT M. PACHAK
Counsel of Record

South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

October 29, 2012

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2011

No. 12-

DAVID LEE BROWN,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent

CERTIFICATE OF SERVICE

I certify that copies of the petition for writ of certiorari and appendix in this case have been served upon opposing counsel by mailing copies in envelopes properly addressed with postage prepaid on this 29th day of October, 2012.

ROBERT M. PACHAK
Counsel of Record

SWORN TO BEFORE me this 29th day
of October, 2012.

(L.S.)
Notary Public for South Carolina
My Commission Expires: August 23, 2014.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2012

No. 12-

DAVID LEE BROWN,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent

A P P E N D I X

ROBERT M. PACHAK
Attorney at Law

South Carolina Commission on Indigent Defense
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Post Office Box 11589
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(803) 734-1330

ATTORNEY FOR PETITIONER

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID LEE BROWN,

APPELLANT

FINAL BRIEF OF APPELLANT

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT.

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TABLE OF AUTHORITIES

Cases

STATEMENT OF ISSUES ON APPEAL

Whether the trial court erred in failing to exclude evidence that was seized after the detention of a motor vehicle without reasonable suspicion of criminal activity?

STATEMENT OF THE CASE

Appellant was convicted of armed robbery and possession of a firearm after a jury trial held before the Honorable Deadra L. Jefferson on June 22-25, 2009, in Charleston County. Respective sentences of twelve (12) years and five (5) years were imposed.

This appeal follows.

ARGUMENT

The trial court erred in failing to exclude evidence that was seized after the detention of a motor vehicle and its occupants without reasonable suspicion of criminal activity.

On the evening of February 26, 2009, four (4) black males with pistols and their faces covered entered Benders Bar & Grill in West Ashley and robbed the patrons and management. Everybody was told to get on the floor. As a result none of the patrons could identify the suspects' faces. Colleen Denham saw black Timberlands on one man and black high-top Nikes (Willie D's) on another man. (ROA p. 15, line 17 – p. 16, line 3) After the robbers left the police arrived in minutes. (ROA p. 18, lines 10-14) Mary Nance, a bartender, said the four men came in around 9:45 PM (ROA p. 60, line 22 – p. 62, line 1) Officer Danik testified that she was the first officer to respond to the scene. It was at 9:51 PM.

Officer Bonanni testified that on 10:06 PM while on patrol he saw a car parked at 12 Sawgrass Road. The four-door vehicle was parked in the darkened fenced in area of James Island Christian Church. The vehicle was burgundy or maroon in color and he saw four (4) black males inside. The officer said he had heard a dispatch about an armed robbery but a description of the vehicle was not given. (ROA p. 94, line 25 – p. 96, line 18) The front end of the car he saw was facing the fence. Officer Bonanni called 911 and gave a description of the plate. He approached the driver and asked for his driver's license. Sgt. Ray and Officer Sigmon arrived in one to two minutes as back up and they took over the investigation.

On cross-examination, Officer Bonanni said when he pulled into the parking lot he parked at an angle right behind the vehicle so it could not leave. (ROA p. 98, lines 9-17)

He also kept the driver's license. (ROA p. 101, lines 20-22) He did not know how long the car was sitting there and the occupants were not committing a crime. (ROA p. 102, line 16 – p. 107, line 2) On redirect, the officer said where the car was parked was about 8 to 11 miles from Benders Bar & Grill. (ROA p. 103, line 23 – p. 104, line 1)

Andre Thompson, the general manager of the bar, testified next. He noticed one of the robbers had tennis shoes like his – they were red and black Air Jordan shoes, but they had white laces. (ROA p. 107, line 19 – p. 108, line 3) He was taken to the location where the four (4) black males were detained. He could not recognize anyone but he did recognize the red and black Air Jordans. (ROA p. 132, line 11 – p. 134, line 23) On cross-examination Mr. Thompson admitted that in his earlier statement he merely described the shoes as black Air Jordans. (ROA p. 137, lines 10-23)

Sgt. Ray testified that he responded to 12 Sawgrass Road at 10:09 PM. When he arrived Officer Bonanni was talking to the driver of the car. Sgt. Ray asked the driver, Clarence Robinson, to get out of the vehicle and he patted him down. He was asked if he asked anyone else to get out of the car and he said yes. (ROA p. 146, line 21 – p. 151, line 1) When he was asked who, defense counsel said he had a matter of law. He said the police had no articulable suspicion. The trial court said the suspicion was seeing the vehicle. Defense counsel said the police should have let the suspects go because there was no articulable suspicion to stop. (ROA p. 147, line 1 – p. 151, line 23) Sgt. Ray was then allowed to say that he asked Darnel Brown to get out of the car and he patted them down for weapons. Officer Morel, who was also at the scene, had Colin Boston and appellant get out of the car. At this point the solicitor said he may have a matter of law to discuss and the jury was sent out. (ROA p. 152, line 12 – p. 154, line 15)

An in-camera examination continued with Sgt. Ray. He said when appellant was removed from the vehicle he saw a silver-black handgun on the floorboard of the car. The handgun was a .22 caliber with no serial number. All of the defendants were placed under arrest and were read their Miranda rights. Sgt. Ray continued to search the car. (ROA p. 154, line 17 – p. 156, line 1) Three more handguns were found in the trunk along with clothing, gloves, a knit hat, handkerchiefs and a pair of red and black Nike shoes. (ROA p. 158, lines 2-25)

On the in-camera cross-examination Sgt. Ray said he could not recall a description of the vehicle being put over the radio. He just remembered four males with guns. (ROA p. 160, line 17 – p. 161, line 12)

Defense counsel argued that the four co-defendants were seized when their car was hemmed-in by the police car. Officer Bonanni had no reasonable articulable suspicion to detain the defendants for back-up officers. He did not have a description of a car or the occupants. The officer did not see them do anything wrong and he found nothing wrong with the driver's license. (ROA p. 165, line 21 p. 168, line 21; ROA p. 169, line 20 p. 170, line 13) The trial court ruled that the stop was legal and all the evidence was admissible. (ROA p. 180, line 15 – p. 188, line 14) That ruling was in error.

In State v. Lesley, 326 S.C. 641, 486 S.E.2d 276 (1997) this court wrote:

> Police may stop a motor vehicle and briefly detain and question an occupant if they have a reasonable suspicion that the occupant is involved in criminal activity. Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983); State v. Robinson, 306 S.C. 399, 412 S.E.2d 411 (1991). This suspicion must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868,

> 18780, 20 L.Ed.2d 889, 906 (1968). The police may also order an occupant out of the vehicle and, if the exercise of reasonable caution so warrants, frisk the occupant for weapons. Pennsylvania v. Mimms, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977).
>
> The term "reasonable suspicion" requires "a particularized and objective basis" that would lead one to suspect another of criminal activity. Untied States v. Cortez, 449 U.S. 411, 417, 101 S.Ct. 690, 695, 66 L.Ed.2d 621, 629 (1981).

In Lesley the police had reasonable suspicion to stop a motor vehicle because it matched "the description of the suspect's car, including color, make and particular dealer's paper tags, and driven by a black male near complainant's residence." In appellant's case there was no description of the vehicle and there was no reasonable suspicion based on specific and articulable facts to support hemming the vehicle in front of the fence.

In Brendlin v. California, 551 U.S. 249, 127 S.Ct. 2400 (2007) the United States Supreme Court ruled that passengers of vehicles may challenge the constitutionality of a stop. The court noted that "the stopping of a vehicle and the detention of its occupants constitute a "seizure" within the meaning of the Fourth Amendment." 551 U. S. at 256, 127 S.Ct. at 2406 quoting Colorando v. Bannister, 449 U.S. 1, 4, n. 3, 101 S.Ct. 42 (1980) In Brendlin the court ruled that the passenger was seized from the moment the driver's car came to a halt on the side of the road. In our case appellant was seized when their car was detained. "Inarticulate hunches" do not support detentions. Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 99 S.Ct. 1391 (1979); Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968). The search was not constitutional because the fruits justified the arrests. Smith v. Ohio, 494 U.S. 541, 110 S.Ct. 1288 (1990).

CONCLUSION

Appellant's conviction should be reversed.

Respectfully submitted,

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT.

This 6th day of July, 2010.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

July 6, 2010

Robert M. Pachak
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID LEE BROWN,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Matthew J. Friedman, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 6th day of July, 2010.

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 6th day of July, 2010.

(L.S.)
Notary Public for South Carolina
My Commission Expires: June 21, 2020 .

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

David Lee Brown, Appellant.

Appeal From Charleston County
Deadra L. Jefferson, Circuit Court Judge

Unpublished Opinion No. 2011-UP-185
Heard April 7, 2011 – Filed April 25, 2011

AFFIRMED

Appellate Defender Robert M. Pachak, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley Elliott, Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, for Respondent.

PER CURIAM: Appellant David Lee Brown appeals his convictions for armed robbery and possession of a firearm during the commission of a violent crime. On appeal, Brown argues the trial court erred in failing to exclude evidence seized after the detention of a vehicle without reasonable suspicion.[1] We affirm pursuant to Rule 220(b), SCACR, and the following authorities: Hiibel v. Sixth Jud. Dist. Ct. of Nev., Humboldt Cnty., 542 U.S. 177, 185 (2004) ("In the ordinary course a police officer is free to ask a person for identification without implicating the Fourth Amendment."); id. ("[A] law enforcement officer's reasonable suspicion that a person may be involved in criminal activity permits the officer to stop the person for a brief time and take additional steps to investigate further."); Illinois v. Wardlow, 528 U.S. 119, 129 n.3 (2000) ("A shrewd man sees trouble coming and lies low. . . ."); U.S. v. Hensley, 469 U.S. 221, 229 (1985) (noting the ability of the police to briefly stop a person suspected of involvement in a past crime, ask questions, or check identification in the absence of probable cause promotes the strong government interest in solving crimes and bringing offenders to justice); U.S. v. Quarles, 330 F.3d 650, 653 (4th Cir. 2003) (finding law enforcement officials may detain a defendant upon reasonable suspicion that the person they encountered was involved in or wanted in connection with a completed felony); State v. Blassingame, 338 S.C. 240, 248, 525 S.E.2d 535, 539 (Ct. App. 1999) ("The term 'reasonable suspicion' requires a particularized and objective basis that would lead one to suspect another of criminal activity."); id. ("In determining whether reasonable suspicion exists, the whole picture must be considered.").

AFFIRMED.

FEW, C.J., and HUFF and PIEPER, JJ., concur.

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[1] At oral arguments, counsel confirmed our reading of the appellant's brief that Brown only challenges the initial acts of Officer Bonanni in requesting the driver's license and parking behind the driver's vehicle. Brown does not challenge the actions of any of the other officers.

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

DAVID LEE BROWN,

APPELLANT

Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

Opinion No. 2011-UP-182

PETITION FOR REHEARING

Pursuant to Rule 221, SCACR appellant petitions this Court for rehearing concerning Unpublished Opinion No. 2011-UP-185, filed April 25, 2011, as it may have overlooked or misapprehended the following points.

For a Terry stop to be constitutionally permissible the officer's action has to be justified at its inception. Terry v. Ohio, 392 U.S. 1, 20, 88 S.Ct. 1868, 1879 (1968). Officer Bonanni had to have reasonable suspicion that the occupants of the vehicle he saw were engaged in criminal activity. This suspicion must be based on specific and articulable facts. It requires a particularized and objective basis. State v. Lesley, 326 S.C. 641, 486 S.E.2d 276 (1997); United States v. Foster, 634 F.3d 243 (4th Cir. 2011).

When Officer Bonanni happened upon a four door vehicle parked in the James Island Church parking lot at 10:06 PM he did not initially see who was in the car. He thought maybe it was a couple or that somebody from the church left a car there. But he decided not to ignore it. (ROA p. 94, line 12 – p. 95, line 24; ROA p. 104, lines 10-13).

Officer Bonanni testified that he did hear about an armed robbery that occurred early at a bar around 8-11 miles away. But no description was given of the vehicle. (ROA p. 96, lines 12-18; ROA p. 103, line 23 – p. 104, line 1). In fact, the police did not even know if the suspects left on foot or in a vehicle. (ROA p. 86, lines 14-15).

Officer Bonanni said he proceeded on through the parking lot. He put his lights on and saw four black males in the vehicle. (ROA, p. 95, lines 24-25). He said when he pulled into the parking lot he parked at an angle to keep the vehicle from leaving. He used his lights to see inside the vehicle. He said the police use the lights at night when they perform traffic stops. (ROA p. 98, lines 9-24). Officer Bonanni approached the driver, asked for his driver's license, came back and asked for a backup. (ROA 97, lines 10-13). When he heard about the prior armed robbery he heard four black males were involved but did not hear any other details. (ROA p. 99, lines 5-10). He never testified that he drew a connection between the robbery suspects and the four individuals he found in the vehicle. He kept the driver's license. (ROA p. 101, lines 20-22). He said he did not know how long the car was parked at the lot and the individuals were not committing a crime. (ROA p. 102, lines 16-24). There was also no testimony that this was a high crime area.

At the time Officer Bonanni hedged in the vehicle, appellant and the other co-defendants were seized. No reasonable person would have believed he was free to leave. Brendlin v. California, 551 U.S. 249, 127 S.Ct. 2400 (2007). Keeping the driver's license only made sure of that. The officer did not articulate any reasonable suspicion of criminal activity based on specific and

articulable facts. He simply said he decided not to ignore the vehicle. Intrusions upon constitutionally protected rights have to be based on more than inarticulate hunches. Simple good faith on the officer's part is not enough.[1] Terry v. Ohio, 392 U.S. at 22, 88 S.Ct. at 1880. "The Government cannot rely on post hoc rationalizations to validate those seizures that turn up contraband." United States v. Foster, 634 F.3d at 249.

The cases relied upon by the Court in its opinion deal with altogether different fact patterns than appellant's case. Hiible v. Sixth Jud. Dist. Ct. of Nev. Humboldt County, 542 U.S. 179, 124 S.Ct. 2451 (2004). Police had reasonable suspicion to stop the defendant when they received a telephone call reporting an assault, describing the vehicle, and the location. Police arrived at the scene found the truck and the defendant standing by it. Illinois v. Wardlow, 528 U.S. 119, 120 S.Ct. 673 (2000). The defendant's unprovoked flight from officers in an area of heavy narcotics trafficking supported reasonable suspicion that the defendant was involved in criminal activity and justified the stop. United States v. Hensley, 469 U.S. 221, 105 S.Ct. 675 (1985). Investigatory stop of the defendant in reliance on a police department "wanted flyer" which was issued on the basis of articulable facts supported a reasonable suspicion that the person wanted had committed the offense. United States v. Quarles, 330 F.3d 650 (4th Cir. 2003). Information provided by 911 caller, to the effect that the defendant was wanted for involvement in a felony, was sufficiently reliable to proved police with reasonable suspicion to conduct a Terry stop. State v. Blassingame, 338 S.C. 240, 525 S.E.2d 535 (1999). Officer had reasonable suspicion to stop the defendant based on the defendant's presence near the victim's abandoned truck and his appearance, which closely matched the victim's description of the kidnapping, carjacking, and armed robbery suspect.

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[1] To suggest that Officer Bonanni's reasonable and articulable suspicion was because he saw four black males in the car and a robbery occurred earlier with four black males would be "racial profiling" and an inarticulate hunch.

By contrast, in United States v. Foster, 634 F.3d 243 (4th Cir. 2011) a synopsis of the opinion showed as follows:

> Police officer's investigative detention of defendant was not supported by reasonable suspicion; officer saw parked vehicle with a man in driver's seat, then saw defendant sit up in passenger seat from a crouched position, and officer recognized defendant and knew he had previously been arrested for a marijuana-related crime, and officer called drug unit supervisor and was told defendant was under investigation, and officer saw defendant's arms shifting and "going haywire" when he saw officer, but officer did not see defendant's hands, and when officer walked by and asked vehicle's occupants what they were doing, defendant did not appear nervous or apprehensive when he replied, "just chilling," and the men did not flee, but remained in parked vehicle for 15 minutes after exchange with officer.

See, United States v. Sprinkle, 106 F.3d 613 (4th Cir. 1997) for a similar factual situation when officers did not have reasonable suspicion of criminal activity.

This Court's opinion in this case fails to even deal with the facts of appellant's case.

Appellant's petition for rehearing should be granted and his conviction should be reversed.

Respectfully submitted,

Robert M. Pachak
Appellate Defender

This 6th day of May, 2011.

The South Carolina Court of Appeals

The State, Respondent,

v.

David Lee Brown, Appellant.

The Honorable Deadra L. Jefferson
Charleston County
Trial Court Case Nos. 2008-GS-10-03920
2008-GS-10-03924

ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a careful consideration of the Petition for Rehearing, the court is unable to discover that any material fact or principle of law has been either overlooked or disregarded.

It is, therefore, ordered that the Petition for Rehearing be denied.

John Cannon Few, C.J.

Thomas E. Huff, J.

Daniel G. Pieper, J.

Columbia, South Carolina

cc: Appellate Defender Robert M. Pachak
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FILED
May 13, 2011

The Supreme Court of South Carolina

State of South Carolina, Respondent,

v.

David Lee Brown, Petitioner.

Appellate Case No. 2011-193387

ORDER

This matter is before the Court upon petition for a writ of certiorari to review the Court of Appeals' decision in *State v. Brown*, Op. No. 2011-UP-185 (S.C. Ct. App. filed Apr. 25, 2011). The petition is denied.

C.J.

FOR THE COURT

Columbia, South Carolina

August 10, 2012

cc:
The Honorable Jenny Abbott Kitchings
Harold M. Coombs, Jr.
Salley W. Elliott
Scarlett Anne Wilson
Robert M. Pachak
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