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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
Kristi Lea Harrington, Circuit Court Judge

THE STATE,

Respondent,

vs.

ELLIOTT JUDON, Jr.,

Appellant.

Appellant Case No. 2015-000728

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I.

The trial court did not err in denying Appellant's motion to dismiss because a video recording was not downloaded before it was erased from the server storing patrol vehicle recordings. No evidence existed that the recording, if it ever existed, possessed exculpatory value.

II.

Evidence supports that Appellant validly consented to the search of his vehicle and he was not unlawfully detained. Appellant consented to the search within three minutes of being stopped for illegal tint in his windows, and the short detention was supported by numerous factors supporting reasonable suspicion that he was committing an offense. The issue is not preserved for review.

III.

Appellant's statement to law enforcement was voluntarily made without coercion and after Appellant was advised of his rights. Appellant did not renew his objection before the jury, and any error is harmless since Appellant admitted to the jury he possessed the crack cocaine found in his pants.

STATEMENT OF THE CASE

Appellant Judon was indicted for trafficking cocaine base in excess of ten grams. Judon's motion to dismiss the case was heard and denied on March 13, 2015. Judon was found guilty by a jury following trial on March 16-18, 2015. The Honorable Kristi L. Harrington presided over both the motion to dismiss and the trial that followed the next week, and she sentenced Judon to life without parole because the resulting conviction was Judon's third conviction for a serious offense.

STATEMENT OF FACTS

Officer John Stott, Jr., testified he has been a police officer since 2006. Stott has roughly eighty hours of drug interdiction courses in addition to other police training. R. p. 64. Stott testified he was in the Dorchester Whalen Terrace neighborhood when he observed a vehicle with extremely tinted windows. Stott testified that validation stickers are required for any window that has after-market film. R. p. 70. Stott also believed the car was a rental car based on several factors: "It was a new model. It was cleaned. It was well maintained. There was no personal items on it, no plate border, no indication of a – no dealership decal, no stickers, or anything that indicated that it was somebody's personal vehicle." R. p. 71, lines 8-12. Stott testified it was unusual for a rental vehicle to have tinting and testified "it can go hand in hand with criminal activity." R. p. 71, lines 13-18.

Officer Stott later explained, "the rental car . . . having window tint on it, that's an indicator in and of itself." R. p. 184, lines 9-10. He noted, "Major rental companies do not put any window tint on their vehicles." R. p. 184, lines 15-16. At trial, Officer Stott testified that since major rental companies do not put window tint on their vehicles, that would be something done by the lessee. R. p. 277.

Based on these observations, Officer Stott's partner, Officer Kirk, initiated blue lights to effect a traffic stop. R. p. 71. However, Judon did not immediately pull over his vehicle. R. p. 72.

At trial, Officer Stott explained the following

We were on Meeting Street road, which is a busier road than any of the side roads, and we passed a side road that would have afforded him a safer place to pull over. And we went – we proceeded past that turn, and I would say approximately a hundred yards past that turn, and then pulled over on the right shoulder.

R. p. 264, line 25 – p. 265, line 5.

Officer Stott requested Judon roll down his window so he could ask for Judon's license, registration, and proof of insurance, and also so Officer Stott could explain the violation. Officer Stott noticed Judon's zipper was down and his belt was open and undone. R. p. 72; p. 265. Judon provided the rental agreement kept in the glove box of the car. R. p. 177, lines 1-4.

Officer Kirk used a tint meter to determine the tint was unlawful. R. p. 73. Officer Stott asked Judon to exit the vehicle and he willingly complied. R. p. 73. Officer Stott noticed Judon was trying to conceal or cover up what was showing as he stepped out of the vehicle. Officer Stott asked Judon some questions; Judon was evasive about where he was coming from and where he was going. When Officer Stott asked Judon about why his pants were undone, Judon said he had used the bathroom. R. pp. 74-75; p. 178, lines 6-9. At that point, Officer Stott asked Judon for consent to search the vehicle, and Judon said he could search the vehicle and added he could also search Judon's person. R. p. 75. Officer Stott estimated he asked Judon for consent a couple of minutes after the initial stop. R. p. 178, lines 10-15. Officer Stott described Judon's demeanor at first as "overly cooperative." R. p. 182, lines 21-24. However, once asked to step out of the car, Judon took a concealing stance to "keep us from noticing that his pants were undone." R. p. 182, line 25 – p. 183, line 4.

Officer Stott explained Judon's change in demeanor after stepping out of the car prompted him to ask for consent to search for the vehicle. Officer Stott also explained, "I wanted to gauge his response and see if that put him in a sense of relief that I was taking the attention off of him and [that] was obvious to me." R. p. 184, lines 22-24.

Officer Stott found a digital scale with a white powder substance. The powder field-tested positive for cocaine. Officer Stott also found crumbs of crack cocaine and a field utility knife with

cocaine residue on it. The scale and most of the crumbs were in the center console, but the crumbs were also scattered in the coin tray and the driver's seat. The knife was in the coin tray. R. p. 78; p. 267. Officer Stott testified the reason Judon may have consented to allowing the vehicle to be searched was to take attention off of him and put it on the car. R. p. 79, lines 17-20. Officer Stott further noted Judon did not seem overly concerned about what Officer Stott was doing while searching the vehicle, suggesting Judon was more concerned about what was hidden in his pants. R. p. 183, lines 5-11.

Officer Stott explained that if Judon did not consent, he would not have been free to leave because "I was aware that a drug dog was working and after these indications that I had, I would have requested a K-9 to respond." R. p. 82, lines 10-12.

Officer Stott explained the significance of the items he found in Judon's car:

... [S]cales are commonly used to weigh illegal drugs so they can be sold. The knife, in and of itself, is just a utility knife but the fact that it had residue on it led me to believe that it had been used to cut what's referred to as a cookie of crack cocaine. Once it's cooked, it settles and hardens at the bottom of usually a glass dish like a Pyrex jar and when that is removed, in order to break it up into smaller pieces for sale, a lot of times a sharp object like a utility knife would be used to do that.

R. p. 83, line 19 – p. 84, line 3.

Officer Stott read Judon his Miranda¹ rights, and Judon indicated he understood his rights and wished to speak with Officer Stott and answer his questions. R. p. 84. Officer Stott asked Judon if he kept more drugs in his underwear and advised Judon that since he was under arrest, the jail would require a strip search for any drug arrest. R. pp. 84-85; p. 181, lines 7-13. Although initially

¹ Miranda v. Arizona, 384 U.S. 436 (1966).

denying he carried drugs, Judon ultimately indicated he concealed drugs in his crotch area, and Officer Stott donned plastic gloves and removed a plastic bag containing 11.5 grams of crack cocaine. R. pp. 86-87; pp. 271-273. Officer Stott explained he did not need to reach far into Judon's pants to retrieve the crack. R. p. 187, lines 3-5. Law enforcement also found two cell phones, which is common for drug dealers. R. pp. 274-275. Officer Stott estimated it took ten minutes from the time the officers initiated the stop until they arrested Judon. R. p. 81; p. 288, line 7.

Officer Kirk testified that using a tint-meter, he determined the tint in the rental vehicle was only 18% which is darker than the legal limit of 27%. R. pp. 296-297. The forensic chemist testified the substance seized was 10.1 grams of crack cocaine. R. p. 323.

ARGUMENT

I.

The trial court did not err in denying Appellant's motion to dismiss because a video recording was not downloaded before it was erased from the server storing patrol vehicle recordings. No evidence existed that the recording, if it ever existed, possessed exculpatory value.

Judon argues that the trial court erred in denying his motion to dismiss because law enforcement failed to make a hard copy of the patrol vehicle video recording that may have once existed. The recording, if one ever existed, was deleted from the server 180 days after the incident pursuant to the police department's standard practice. No evidence exists that law enforcement allowed the recording to lapse in bad faith or the video possessed apparent exculpatory value.

Judon moved prior to trial for dismissal due to the supposed lost video recording. During the hearing, Officer Stott testified that if working properly, the patrol car video camera will activate when the vehicle's blue lights are activated. Officer Stott testified he typically watches any video recording afterwards, but did not recall watching the video of the stop leading to Judon's arrest. Officer Stott testified that if he determined a video recording held evidentiary value, he would attain a disc copy of the video recording from the evidence technician. During the stop, Judon was cooperative and there was no struggle or argument between Judon and the officers. Judon freely consented to a search of the vehicle. Officer Stott testified he is not required by law or department policy to turn in a video into-evidence. Officer Stott testified he did not personally delete any video recording of the incident that might have existed, nor did he request anyone to delete a video recording. R. pp. 80-82. Cross-examination consisted of Judon's counsel cherry-picking provisions of the department's manual and reading them out loud rather than asking actual questions. So it was

mostly counsel just talking; cross-examination possessed no evidentiary value.² Counsel ceased cross-examination after the trial court requested counsel to stop testifying. R. pp. 96-103. On redirect, Officer Stott clarified as follows:

Q: Officer Stott, as far as you know, your vehicle – your in-car video, or the in-car video for the vehicle that you were in, was operating just fine that day?

A: Sure.

Q: And you didn't do anything to deactivate it? To interfere with it?

A: No.

Q: And it activated automatically when your blue lights came on?

A: In theory. I mean, it would.

Q: And the decision, ultimately, of whether to put what it recorded into evidence is up to you, the officer?

A: Yes. It's just discretionary.

Q: And do you agree that that's what the policy says?

A: Yes.

Q: You make that decision based on the facts of each stop?

A: Yes.

Q: And the facts of this stop did not lead you to believe that that video needed to be placed into evidence?

A: Correct.

R. p. 104, lines 3-24.

² See Bowers v. Bowers, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991) (“Arguments of counsel are . . . not evidence.”); Shinn v. Kreul, 311 S.C. 94, 102, 427 S.E.2d 695, 700 (Ct. App. 1993) (“A court cannot consider facts appearing only in argument of counsel.”).

Sergeant Scott Hille, the police department's technology coordinator, testified the department utilizes a nationally used system. The video recording unit in the patrol vehicle has a continuous loop digital recording capturing pre-event by twenty seconds and runs until recording is terminated. The video is stored on a compact flash card in the patrol vehicle's digital video recorder. The unit is downloaded at City Hall into a private Wi-Fi system and stored at City Hall. After being uploaded to the server, the recording is available for officers to review for ninety days. They can request a video recording be burned to a hard copy and submit the hard copy into evidence. The video recording is automatically purged from the system after 180 days due to the limits in storage. R. pp. 109-112.

Sergeant Hille explained the necessity of purging the videos as follows: "We create a lot of videos. We're one of the larger departments in the area and it would be nearly impossible to fund the storage indefinitely for every video." R. p. 111, lines 19-22. Sergeant Hille testified it is within the officer's discretion to have a video recording downloaded to DVR. R. p. 117, lines 8-16.

The State does not have an absolute duty to preserve potentially useful evidence, and a defendant must demonstrate either: 1) the State destroyed evidence in bad faith; or 2) the evidence's exculpatory value was readily apparent before the evidence was destroyed, and the defendant cannot obtain other evidence of comparable value by other means. State v. Moses, 390 S.C. 502, 520, 702 S.E.2d 395, 404 (Ct. App. 2010) (citing State v. Mabe, 306 S.C. 355, 412 S.E.2d 386 (1991)). The bad faith requirement limits the extent of the State's obligation to preserve evidence to reasonable bounds, and confines it to cases in which the police conduct indicates the evidence could form a basis for exonerating the defendant. Arizona v. Youngblood, 488 U.S. 51, 58 (1988); Moses, 702 S.E.2d at 403.

Youngblood is factually analogous. In Youngblood, clothes from the child-victim in a sexual assault case were not properly refrigerated. Id. at 53. Experts for Arizona and the defendant confirmed semen on the clothes could have been tested if refrigerated properly. Id. at 54. In that case, unlike the present case, identity was an issue.

Youngblood held, as follows:

We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interest of justice most clearly requires it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of the law.

Id. at 58.

In the instant case, no evidence suggests law enforcement acted in bad faith. See United States v. Agurs, 427 U.S. 97, 109-10 (1976) ("The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense."). Instead, evidence in the record merely indicates negligence at most. State v. Reaves, 414 S.C. 118, 128, 777 S.E.2d 213, 218 (2015) (finding that although the police investigation was severely flawed with several failures to preserve evidence, "the record . . . contains no indication these flaws were the product of more than mere negligence."). Even that is a stretch, Judon is attempting to substitute his judgment for the officer, but Youngblood represents the pragmatic realization that a more stringent standard would require law enforcement to indefinitely store warehouses of minimal-value evidence on the off-chance a defendant would protest imagined utility in a destroyed item. Youngblood at 58 (explaining its reluctance to impose "on the

police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution.”). The defendant’s burden to show bad faith is not relaxed merely because the lost or destroyed evidence is the defendant’s “only hope of exoneration” or is “essential to and determinative of the outcome of the case.” Illinois v. Fisher, 540 U.S. 544, 548 (2004).³

Judon cites Brady v. Maryland, 373 U.S. 83 (1972) in attempt to conflate the concepts from Brady with Youngblood. The United State Supreme Court compared the two cases in Fisher as follows:

We have held that when the State suppresses or fails to disclose material exculpatory evidence, the good or bad faith of the prosecution is irrelevant: a due process violation occurs whenever such evidence is withheld. See Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.E.2d 215 (1963); United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). In Youngblood, by contrast, we recognized that the Due Process Clause “requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.” 488 U.S. at 57, 109 S.Ct. 333. We concluded that the failure to preserve this “potentially useful evidence” does not violate due process “*unless a criminal defendant can show bad faith on the part of the police.*” Id., at 58, 109 S.Ct. 333 (emphasis added).

Id. at 547-48 (finding destroyed narcotics in Fisher were like the “potentially useful evidence referred to in Youngblood, not the material exculpatory evidence addressed in Brady and Agurs.”).

Judon conflates the concepts at work in Youngblood and Brady further by relying on State v.

³ Further, Judon’s prior Rule 5, SCRCrimP request does not alter the result. The United States Supreme Court explained: “We have never held or suggested that the existence of a pending discovery request eliminates the necessity of showing bad faith on the part of police.” Fisher, 540 U.S. at 548 (2004). Judon does not raise Rule 5, SCRCrimP, as a ground for relief in his brief.

Osborne, 291 S.C. 265, 353 S.E.2d 276 (1987). The Supreme Court's opinion in Osborne offers, at most, a truncated analysis of a Brady violation for the purpose of correcting, but affirming in result, the Court of Appeals' opinion that incorrectly analyzed the materiality prong of Brady. See State v. Osborne, 289 S.C. 142, 345 S.E.2d 256 (Ct. App. 1986). The facts in Osborne are more clearly stated in the Court of Appeals' opinion in which the Court of Appeals noted that audio recordings of an inmate witness were not disclosed until the close of the State's case and after the inmate testified. The audio recordings contained multiple statements by the inmate possessing significant impeachment value. Id. at 146-47 n. 3, 345 S.E.2d at 259 n. 3.

Judon is not relieved of Youngblood's demand that he demonstrate bad faith by law enforcement, and therefore, Judon's reliance on Brady and Osborne is misplaced.

Further, no evidence in the record establishes a video recording was made. The most the record indicates is that the equipment appeared to be working at the time of the traffic stop. Even this assumption fails to show that the recording would contain useful information for the jury, much less exculpatory information. Knowing a video exists does not establish that an audio recording captured relevant conversation during the stop. Of course, the record fails to show that a video that might have existed at one time possesses exculpatory information. See Moses, 390 S.C. at 519, 702 S.E.2d at 404 (finding appellant failed to demonstrate erased video possessed exculpatory value).

Accordingly, the trial court did not err in denying Judon's motion to dismiss the case based on the alleged failure to preserve evidence.

II.

Evidence supports that Appellant validly consented to the search of his vehicle and he was not unlawfully detained. Appellant consented to the search within three minutes of being stopped for illegal tint in his windows, and the short detention was supported by numerous factors supporting reasonable suspicion that he was committing an offense. The issue is not preserved for review.

Judon argues that law enforcement illegally detained him and he did not validly consent to the search of his car. However, law enforcement's testimony established that he provided consent less than three minutes after the valid stop, and law enforcement had reasonable suspicion based on the circumstances to detain him.

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). "Where probable cause exists to believe that a traffic violation has occurred, the decision to stop the automobile is reasonable per se." State v. Adams, 377 S.C. 334, 338, 659 S.E.2d 272, 274 (Ct. App. 2008) (citing Whren v. United States, 517 U.S. 806, 810 (1996)).

"When a vehicle has been lawfully detained for a traffic violation, a police officer may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures." Adams, 377 S.C. at 338, 659 S.E.2d at 274-75 (citing Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977)).

"The constitutional immunity from unreasonable searches and seizures may be waived by valid consent." Palacio v. State, 333 S.C. 506, 514, 511 S.E.2d 62, 66 (1999) (citing Katz v. United States, 389 U.S. 347 (1967)). A warrantless search and seizure is reasonable if conducted with voluntary consent. Id. Consent is determined from the totality of circumstances. Id. This totality of

circumstances approach applies in both non-custodial and custodial situations. State v. Mattison, 352 S.C. 577, 584, 575 S.E.2d 852, 855 (Ct. App. 2003). The question of the voluntariness of consent to search is solely a question of fact and will not be reversed absent clear evidence. State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000). The ruling will be affirmed if supported by any evidence. Id.

Law enforcement may request permission to search at any time. State v. Tindall, 388 S.C. 518, 523, 698 S.E.2d 203, 206 (2010). “However, when an officer asks for consent to search after an unconstitutional detention, the consent procured is per se invalid unless it is both voluntary and not an exploitation of the unlawful detention.” Id. at 523-524, 698 S.E.2d at 206 (quoting Adams, 377 S.C. at 339, 659 S.E.2d at 275) (quotation marks omitted).

In the instant case, Judon does not contest that law enforcement had probable cause to stop Judon’s car based on the unlawful tint in the vehicle. Further, officers were allowed to request Judon to exit his vehicle. Officers did not complete the purpose of the stop at the time they asked for consent to search the vehicle: they did not give Judon a ticket for the tinted window and no evidence in the record indicated they completed a check on the driver’s license. Judon consented to a vehicle search in less than three minutes into the traffic stop. R. p. 82, lines 22-24. Additionally, Officer Stott testified the officers did not coerce or make a show of force to effectuate consent. R. p. 179.

The consent and search occurred promptly and during the normal course of the stop and therefore, did not impermissibly extend the duration of the stop. However, to the extent law enforcement was required to establish a reasonable suspicion to extend the duration of the stop, the officers provided evidence justifying the length of the traffic stop.

The Fourth Circuit Court of Appeals recently opined as follows:

While conducting the tasks associated with a traffic stop, a police officer's questions or actions need not be solely and exclusively focused on the purpose of that detention. . . . Rather, a police officer may ask questions unrelated to the purpose of the stop, provided that the unrelated questioning does not extend the encounter beyond the period reasonably necessary to effectuate the purposes of the lawful detention.

United States v. Digiovanni, 650 F.3d 498, 507 (4th Cir. 2011) (internal quotations and citation omitted).

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 State v. Pichardo, 367 S.C. 84, 98, 623 S.E.2d 840, 848 (Ct. App. 2005) (“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. “An officer’s inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop.” Arizona v. Johnson, 555 U.S. 323 (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 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 n. 4 (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).

“In applying the concept of reasonable suspicion to the various facts of the case, it is the entire mosaic that counts not single tiles.” State v. Wallace, 392 S.C. 47, 707 S.E.2d 451 (Ct. App. 2011) (citation and internal quotation marks omitted); see also United States v. Branch, 537 F.3d 328 (4th Cir. 2008) (judicial review of evidence offered to demonstrate reasonable suspicion must be commonsensical, focus on the evidence as a whole, and be cognizant of both context and the particular experience of police officers).

Factors consistent with innocent travel can give rise to reasonable suspicion of criminal activity when considered together and in context. Sokolow, 490 U.S. at 9. While individual factors standing alone may be insufficient to establish reasonable suspicion, in concert they may raise more than a simple hunch that criminal activity is afoot. United States v. Arvizu, 534 U.S. 266, 277 (2002) (“A determination that reasonable suspicion exists . . . need not rule out the possibility of

innocent conduct”); Branch, 537 F.3d at 339; United States v. McCoy, 513 F.3d 405 (4th Cir. 2008); United States v. Foreman, 369 F.3d 776, 785 (4th Cir. 2004). The Fourth Circuit recently noted the following:

... But just as one corner of a picture might not reveal the picture’s subject or nature, each component that contributes to reasonable suspicion might not alone give rise to reasonable suspicion. Indeed, it is often noted that the existence of reasonable suspicion is a case-specific inquiry, based on the totality of circumstances. Thus, each factor contributing to reasonable suspicion might be consistent with innocent travel but when taken together, might give rise to reasonable suspicion.

United States v. Mason, 628 F.3d 123, 129 (4th Cir. 2010) (internal quotations and citations omitted).

In State v. Provet, 391 S.C. 494, 706 S.E.2d 513 (Ct. App. 2011), this Court noted: “the combination of the commonplace items (i.e., numerous air fresheners, fast food bags, and several receipts) together with the surrounding circumstances (i.e., traveling two days without any luggage and inconsistent stories about where he was coming from and going to) eliminate a substantial portion of innocent travelers.” Id., 391 at 505, 706 S.E.2d at 519.

In the instant case, Officer Stott identified numerous factors justifying Judon’s continued detention: (1) the vehicle appeared to be a rental vehicle based on the lack of personal identifying features; (2) the vehicle had an illegal tint; (3) contrary to law, the car lacked the requisite sticker for a vehicle with tinted windows;⁴ (4) the lessee must have tinted the vehicle since major rental companies do not have tinted windows on their vehicles; (5) Judon did not immediately stop his vehicle and bypassed an ideal side street before ultimately pulling his vehicle to the side of the road; (6) Judon’s zipper was open and his belt was undone on his pants; (7) Judon’s explanation for having

⁴ Officer Kirk testified the lack of a validation sticker also constituted a violation. R. p. 301.

his pants open was that he had to use the bathroom, an answer Officer Stott found odd; (8) Judon gave evasive answers about where he is going or where he came from; and (9) Judon tried to conceal himself so the officers did not notice his pants being open.

This odd behavior provided Officer Stott reasonable suspicion that Judon was hiding contraband. “Courts are not remiss in crediting the practical experience of officers who observe on a daily basis what transpires on the street.” Foreman, 369 F.3d at 782 (*quoting United States v. Lender*, 985 F.2d 151, 154 (4th Cir.1993)). Accordingly, Officer Stott had reasonable suspicion to extend the search at the time he attained Judon’s voluntary consent to search the vehicle. “South Carolina appellate courts review Fourth Amendment determinations under a clear error standard.” Provet, 405 S.C. at 107, 747 S.E.2d at 456. “When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling.” State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011). In the instant case, the trial court’s ruling is supported by evidence. Accordingly, the trial court did not err in denying the motion to suppress the crack cocaine.

Further, the issue is not preserved for review because Judon did not renew his objection to the crack cocaine when it was offered into evidence. R. p. 323. A pre-trial ruling on the admission of evidence is not considered final and a party must renew his objection at the time the evidence is admitted. State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993). “We caution Bench and Bar that these pre-trial motions are granted to prevent prejudicial matter from being revealed to the jury, but do not constitute final rulings on the admissibility of evidence.” State v. Floyd, 295 S.C. 518, 521, 369 S.E.2d 842, 843 (1988). Since Judon did not renew the objection, this issue should not be reviewed.

III.

Appellant's statement to law enforcement was voluntarily made without coercion and after Appellant was advised of his rights. Appellant did not renew his objection before the jury, and any error is harmless since Appellant admitted to the jury he possessed the crack cocaine found in his pants.

Judon argues his statement was involuntary. Evidence shows Judon was read his Miranda warnings and he was not coerced by law enforcement. Judon indicated during pre-trial motions that he informed law enforcement about the drugs in his underwear as a favor to him, so there is no basis to suggest that Judon's will was overborne. Judon freely admitted to the jury that the crack cocaine found in his pants was his, and therefore, the statement is cumulative to his own trial testimony. The issue is not preserved.

Based on the Fifth Amendment's protection against self-incrimination, the United States Supreme Court announced, "[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards. . . ." Miranda v. Arizona, 384 U.S. 436, 444 (1966). Before the accused is subjected to custodial interrogation, he or she must be informed of the right to remain silent; any statement made may be used as evidence against him or her; the right to the presence of an attorney; and if he or she cannot afford an attorney one will be appointed prior to questioning. State v. Kennedy, 325 S.C. 295, 303, 479 S.E.2d 838, 842 (Ct. App.1996).

Volunteered exculpatory or inculpatory statements arising from custodial interrogation are not barred by the Fifth Amendment. Id. "Where there is conflicting evidence as to whether a defendant's statement is voluntary, it is, in the first instance the province of the trial court to determine this factual issue by the preponderance of the evidence." State v. Miller, 375 S.C. 370,

383, 652 S.E.2d 444, 451 (Ct. App. 2007) (quotations and citations omitted).

“In order to determine whether a statement is voluntary, the trial court must inquire whether under the totality of the circumstances the suspect’s will was overborne.” State v. Carmack, 388 S.C. 190, 199, 694 S.E.2d 224, 228 (Ct. App. 2010). “Our courts have recognized that the appropriate factors to consider in the totality of circumstances analysis include: background, experience, conduct of the accused, age, length of custody, police misrepresentations, isolation of a minor from his or her parent, threats of violence, and promises of leniency.” State v. Dye, 384 S.C. 42, 47, 681 S.E.2d 23, 26 (Ct. App. 2009) (citations omitted).

Contrary to Judon’s argument, the Fifth Amendment does not require a written or video-recorded waiver of Miranda warnings. North Carolina v. Butler, 441 U.S. 369, 373-74 (1979) (finding an express statement of waiver is not required to find a statement is voluntary; appellant refused to sign waiver form but indicated he was willing to cooperate); United States v. Williams, 429 F.3d 767, 772 (8th Cir. 2005) (noting the Fifth Amendment does not require law enforcement to utilize a written waiver form or recording equipment in formal interrogation settings).

During his suppression motion and at trial, Judon contended law enforcement never read him his Miranda rights. R. p. 126; p. 193. Judon testified as follows during his motion to dismiss the charges:

When Officer Stott said – when Officer Stott said that we might can take you to jail for the residue, and I believe you got something – something on you, officer – the other officer, Kirk, says step in front of the camera and let me pat you down. . .

And that’s when he said again he might could take me to jail. And we got – everybody kind of stopped for about ten seconds. And that’s when I said, well, you know what, I’m just do y’all a favor. And that’s how the drugs got revealed.

R. p. 50, line 21 – p. 51, line 7. Counsel then asked, “Okay. So you admit that you voluntarily gave them a bag of drugs out of your crotch area?” Judon told his attorney that was correct. R. p. 51, lines 8-10. Judon provided further explanation as follows:

... My understanding – I didn’t believe I was going to jail because he didn’t – he didn’t say that I was under arrest or anything, so it was to my recollection that he was letting me go. So being for failure for – I said, you know, well, I’ll just – I’ll do y’all – I’m going to do y’all a favor.

R. p. 51, lines 20-25. Later recalled in rebuttal for the motion to dismiss, Ludon explained why he told officers about the drugs in his underwear as follows: “My understanding – I was never under arrest, so I just believed, you know, since they did me a favor, I would just give it to them.” R. p. 128, lines 23-25.

The prosecution elicited the following during cross-examination:

Q: Mr. Judon, you said that you were never under arrest?

A: Never under arrest.

Q: So you just decided to give them these drugs because you said you wanted to give them to them?

A: Correct.

R. p. 131, lines 3-8. During the suppression hearing, Judon testified he was searched two times and then officers again asked Judon if he hid drugs in his pants. “Everybody got silent and it was just like a moment of silent [sic] at the time, and that’s when I admitted it.” R. p. 196, lines 6-8. Judon changed his testimony for the suppression hearing, whereas for the motion to dismiss he said he was not under arrest, for the suppression motion he said he was under arrest. R. pp. 201-202. Judon told the jury that he admitted having drugs on him following thirty seconds of silence. R. p. 340, lines

12-17.

Judon admitted the cocaine officers recovered from his underwear was his cocaine. He contended he put it there “[b]ecause that’s my use of cocaine during the daytime. Sometimes at night.” R. p. 350, lines 23-24. He claimed it was for personal use. R. pp. 350-351. Judon told the jury he uses seven grams a day. R. p 351, lines 4-5. Judon claimed he used the scale so he would not overdose himself. R. p. 351, lines 10-12. Judon also explained to the jury that although he only had the vehicle for ten days, he put the tint on it himself. R. pp. 363-364.

In contrast to Judon’s testimony, Officer Stott testified that he did provide Judon Miranda warnings, and Judon indicated he understood his rights and wished to speak with Officer Stott and answer his questions. R. p. 84. Officer Stott asked Judon if he kept more drugs in his underwear and advised Judon that since he was under arrest, the jail would require a strip search for any drug arrest. R. pp. 84-85; p. 181, lines 7-13. Although initially denying he carried drugs, Judon ultimately indicated he concealed drugs in his crotch area, and Officer Stott donned plastic gloves and removed a plastic bag containing 11.5 grams of crack cocaine. R. pp. 86-87; pp. 271-273.

“When reviewing a trial court’s ruling concerning voluntariness, this Court does not reevaluate the facts based on its own view of the preponderance of evidence, but simply determines whether the trial court’s ruling is supported by any evidence.” State v. Parker, 381 S.C. 68, 74, 671 S.E.2d 619, 622 (Ct. App. 2008) (internal quotation marks omitted).

The trial court’s ruling is supported by evidence. Officers testified they read Judon his Miranda warnings and he was willing to talk. In Judon’s version of events, he made his admission after several seconds of silence. In another version of events, Judon claimed he told officers about the crack as a favor. Clearly, his will was not overborne.

Further, any conceivable error is harmless because the statement to law enforcement at the scene is merely cumulative to Judon's trial testimony admitting that the crack cocaine was his (for personal use). When other properly admitted testimony reveals essentially the same information, the jury's exposure to improper evidence is harmless. State v. Brown, 344 S.C. 70, 75, 543 S.E.2d 552, 554-555 (2001). Finally, the issue is not preserved for review because Judon did not renew his objection before the jury. "In most cases '[m]aking a motion in limine to exclude evidence at the beginning of trial does not preserve an issue for review because a motion in limine is not a final determination. The moving party, therefore, must make a contemporaneous objection when the evidence is introduced.'" State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001) (citation omitted). Accordingly, the trial court did not err in admitting the statement into evidence.

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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July 18, 2016

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
Kristi Lea Harrington, Circuit Court Judge

RECEIVED

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SC Court of Appeals

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vs.

ELLIOTT JUDON, Jr.,

Appellant.

Appellant Case No. 2015-000728

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Respectfully submitted,

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PROOF OF SERVICE

I, Anne Mueller, certify that I have served the Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record LaNelle C. DuRant, Esquire, S.C. Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589.

I further certify that all parties required by Rule to be served have been served.

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