STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable John C. Hayes, III, Circuit Court Judge

Appellate Case No. 2016-002382

Erick Hewins,.....Respondent,

v.

State of South Carolina,.....Petitioner.

SUPPLEMENTAL APPENDIX

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

The Honorable G. Edward Welmaker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ERICK E. HEWINS,

APPELLANT

Appellate Case No. 2013-000224

FINAL BRIEF OF APPELLANT

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2. WHETHER THE TRIAL COURT ERRED WHEN IT FOUND OFFICER GARDNER HAD REASONABLE SUSPICION SUFFICIENT TO CONDUCT A *TERRY* FRISK WHERE OFFICER GARDNER FAILED TO ARTICULATE FACTS TO SUPPORT HIS BELIEF THAT DEFENDANT WAS ARMED AND DANGEROUS AND WHERE OFFICER GARDNER ALLOWED TOO MUCH TIME TO ELAPSE BETWEEN ASKING DEFENDANT TO EXIT HIS VEHICLE AND ACTUALLY CONDUCTING THE FRISK.

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STATEMENT OF THE CASE

This case arises out of an arrest that occurred in Greenville, South Carolina on August 9, 2010. At that time, Officers Gardner and Hall of the Greenville City Police Department were assigned to the Aggressive Patrol Unit. The Officers, dressed in plain clothes, and driving an unmarked vehicle, would patrol the city, targeting areas identified during the briefing prior to patrol (R. p. 6, lines 4-25).

On this particular evening, Officers Gardner and Hall drove to the parking lot of the Clarion Inn off of Haywood Road. The Officers had received no communication regarding any alleged crime ongoing at this site, but were instead engaged in routine patrol. Both Officers testified that the surrounding area is considered "high crime", (R. p.25, lines 23-24, R. pp. 40-41), known for prostitution, drugs, and automobile break-ins. However, during his cross examination of the Officers, Defendant's trial counsel, Mr. Chase Harbin, introduced evidence that crime at this particular location had rapidly declined over the year and a half immediately preceding Defendant's arrest. (R. p. 22, lines 7-23).

At approximately 12:36 A.M., the Officers pulled their patrol car into the parking lot of the Clarion Inn, which was empty of vehicles except for Defendant's car, a black Lexus, parked next to a Toyota Camry. The Officers noted that Defendant's car was backed into a space and the Camry was pulled in, and it appeared that the occupants of the two vehicles were speaking to one another. (R. p. 8, lines 1-20). Officer Gardner testified that from the location of the vehicles, he determined that "they [the defendant, and occupants of the Camry] were just sitting there having - they appeared to have a meeting for some reason." (R. p. 8, lines 9-10). As the Officers vehicle approached they

noted that the Defendant was an African American male, and that two White females were in the Toyota Camry.

At that time, Officer Hall parked the patrol car directly behind, and horizontal to, the two parked vehicles. (R. p. 259). While testimony is inconsistent as to the amount of room between the detained vehicles and the Officers' patrol car, Appellant and witness Megan Newman both testified that neither vehicle would be able to leave without hitting the patrol vehicle. (R. p. 71, lines 3-17, R. pp. 81-82).

Once Officer Hall parked, Officer Gardner exited the patrol car and came to stand between the Defendant's vehicle and the Toyota Camry, in the vehicles' A-Frames just at the driver and passenger doors, respectively. Officer Gardner testified that he did this to enable him to see all three individuals. (R. pp. 31-32, line 6). While between the two vehicles, Officer Gardner did not observe any drugs in plain view in either vehicle, nor did he observe any odors of either drugs or alcohol, any guns, money or drug paraphernalia, or other indicia of criminal activity. Yet Officer Gardner proceeded to ask Defendant questions about drugs, stating that the area was known for "heavy hitters." (R. p. 69, lines 15-21). Defendant testified that he told Officer Gardner, "I don't know nothing about no car break-ins or no drugs." (R. p. 69, lines 20-21).

After Officer Gardner had already begun questioning Defendant about drugs, he asked Defendant and the two women sitting in the Toyota Camry for identifying information. Defendant stated that he did not have his license, but provided his name and social security number. Officer Hall ran the check on this information. Both Officers testified that while the women's information came back right away, Defendant's information was not coming back. (R. p. 46, lines 1-7, lines 19-25, R. p. 47, lines 1-2).

Meanwhile, Officer Gardner continued to question Defendant about what he was doing at that particular hotel. According to Officer Gardner, Defendant continued to touch his pants pocket throughout Officer Gardner's investigatory stop, and this alerted Officer Gardner that Defendant could have had either drugs, or a weapon on him. (R. p. 13, lines 9-20). Officer Gardner then stated that he called for backup and asked Defendant to step out of the vehicle. [1]

Before backup arrived, Defendant relayed to Officer Gardner that he was at the Clarion Inn to visit his "baby mama", who was staying in room 237. (R. p. 57, lines 10-25, R. p. 58, lines 1-3). Approximately twelve (12) minutes after Officers Gardner and Hall arrived and began their investigation of Defendant, Officer Cothran arrived. Officer Gardner relayed to Officer Cothran what Defendant had told Officer Gardner about why he was at the Clarion Inn, and Officer Cothran went to check on these statements with the front desk. After Officer Cothran had verified Defendant's story, and was coming back toward the vehicle, he saw Officer Gardner perform a pat-down of Defendant. (R. p. 59, lines 19-25, R. p. 60, lines 1-25, R. P. 61, lines 1-11).

Officer Gardner testified that, during the pat-down, he felt a hard lump on the outside of Defendant's pocket, and reached into Defendant's pocket to reveal a wad of cash. Officer Gardner asked Defendant several questions about the cash, and then, went back into Defendant' pocket. At this time, Officer Gardner found four (4) small pills, revealed later to be a Schedule IV substance. After finding these pills, Officer Gardner

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[1] The exact order and timeframe of what happened is subject to debate. The Officers and Defendant presented slight variations on what happened, but there was no recording, or any other affirmation as to what actually happened or how long it took, except for CAD reports demonstrating that Officers Gardner and Hall arrived on the scene at 12:36 A.M., and Officer Cothran arrived at 12:48 A.M., at which time Defendant was outside of his vehicle but Officer Gardner had not yet performed the pat-down.

placed Defendant under arrest. Following his arrest, Defendant's information came back from Officer Hall's search. Officer Gardner called a tow truck, and in the process of inventorying the vehicle prior to tow, found a large rock of what appeared to be crack cocaine as well as several smaller cookies.

This case came before the Greenville County Circuit Court, G. Edward Welmaker on January 13, 2013, on Defendant's indictments for trafficking in excess of 10 grams of cocaine base, and possession of a schedule IV controlled substance. After swearing in the jury, Judge Welmaker heard Defendant's motion to suppress. Defendant's counsel argued that there were two distinct 4th Amendment Issues presented in this case, both of which precluded admission of the drugs. (R. pp. 91-99 line 16). First, Defendant's counsel argued that from the moment Officers Gardner and Hall pulled in behind Defendant's vehicle in an otherwise empty parking lot, the officers had initiated an investigatory detention, and that this detention was not based upon reasonable, articulable suspicion that Defendant was actually engaged in criminal activity. (R. pp. 93 - 94).

Second, Defendant's counsel argued that Officer Gardner failed to support his pat-down of Defendant with reasonable, articulable facts that Defendant was armed or otherwise a threat to Officer Gardner or the public. (R. p. 97, lines 1-18). Counsel relied on several factors in his argument including the length of time that passed between when Officer Gardner asked Defendant to step out of his vehicle and when Officer Gardner actually initiated the pat-down. (R. pp. 98 -99). Defendant's counsel also cast doubt on Officer Gardner's decision to go back into Defendant's pocket a second time after removing the lump that Officer Gardner testified he felt upon his pat-down of Defendant.

In opposition to Defendant's Motion to Suppress, the State argued that Officers Gardner and Hall did have reasonable, articulable suspicion of criminal activity sufficient to support an investigatory detention. The State argued the location of Defendant's vehicle parked beside the Toyota Camry indicated to the Officers that the occupants were meeting in a high crime area, at night. (R. p. 102, lines 1-19). Specifically the State argued "[the vehicles' occupants] are not going into a hotel room. They're not getting out of their cars. They are sitting in the parking lot which led [the officers] to believe that they may be planning to do something." (R. p. 102, lines 10-12).

Despite these arguments, Judge Welmaker denied Defendant's motion to suppress. Judge Welmaker relied upon the South Carolina Supreme Court decision in *State v. Taylor*, 401 S.C. 104, 736 S.E.2d 663 (2013), the State's classification of the Clarion parking lot as a "high crime area," the experience and training of Officers Gardner and Hall, and the lateness of the hour. (R. p. 111, lines 1-15). The Court also held that the frisk did not take an unlawful amount of time, and held, as a matter of law, that the "frisk took place within the time period when backup was coming." (R. p. 113, lines 20-22). The Court made this ruling despite testimony from the Officer Cothran that he arrived at the scene after Officer Gardner had removed Defendant from his vehicle, but before the pat down occurred.

The court specifically heard arguments from the Defendant and the State regarding the two separate 4th Amendment violations committed by Officers Gardner and Hall. Yet, in his ruling, Judge Welmaker confused the two separate search issues presented, instead finding only that the Officers had reasonable articulable suspicion to support the *Terry* frisk. (R. p. 111, lines 1-15). The court stated that Defendant's counsel

was noted for the record, indicating that the court did not intend to change its position, and that further argument would not help Defendant's case. (R. p. 111, lines 15-25).

Following the court's ruling, the jury heard opening statements and was then released for Defendant's motion to exclude evidence based upon the State's failure to properly present a chain of custody. Prior to trial, Defendant made a Rule 6, South Carolina Rules of Criminal Procedure (S.C.R.Crim.P.) demand for the appearance of all witnesses in the chain of custody. The state however, failed to present the initial evidence custodian who retrieved the evidence dropped off by Officer Gardner following Defendant's arrest. The State further failed to submit a sworn statement from this individual. In the absence of either the person or his sworn statement, Defendant argued that the state had failed to identify this person, or the condition of the evidence at the time this person retrieved it. (R. p. 121, lines 6-20). The court denied Defendant's motion to exclude, finding that the evidence was admissible absent proof of ill-motive, bad faith, or tampering. (R. p. 123, lines 6-24).

The trial continued, and ultimately the jury found Defendant guilty of possession of a controlled substance, as well as trafficking in greater than 10 grams of cocaine base. The court sentenced Defendant to one year on the possession charge, and twenty five years on the trafficking charge, to run consecutive.

This appeal follows.

STANDARD OF REVIEW

This case presents three separate issues governed by three separate standards of review. In cases where the Court of Appeals is asked to determine reasonable suspicion, the Court conducts its review *de novo*. *State v. Blassingame*, 338 S.C. 240, 525 S.E.2d 535 (Ct.App. 1999). In overturning a trial court's Fourth Amendment suppression ruling, the reviewing court may reverse only when there is clear error, given the facts. *State v. Taylor*, 401 S.C. 104, 736 S.E.2d 663 (2013) However, this deferential review does not preclude an appellate court from conducting its own review of the record to determine whether the trial judge's decision is supported by evidence. *State v. Tindall*, 388 S.C. 518, 520, 698 S.E.2d 203, 205 (2010). Finally, on appeal from a trial court's decision on admission of evidence, the question becomes whether the trial court's decision is controlled by an error of law or lacks evidentiary supports. *State v. Taylor*, 360 S.C. 18, 598 S.E.2d 735 (Ct.App. 2004)

ARGUMENTS

I. THE TRIAL COURT ERRED BY FAILING TO SUPPRESS EVIDENCE SEIZED BY OFFICER GARDNER FOLLOWING HIS UNLAWFUL FOURTH AMENDMENT SEIZURE OF DEFENDANT BECAUSE OFFICER GARDNER FAILED TO ARTICULATE ANY REASON THAT HE REASONABLY SUSPECTED DEFENDANT WAS ENGAGED IN CRIMINAL ACTIVITY AT THE TIME THE OFFICERS SAW DEFENDANT SITTING IN HIS VEHICLE.

a. Seizure pursuant to the Fourth Amendment.

The Fourth Amendment provides that "the right of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated[.]" U.S.Const.Amend.IV, *State v. Rodriquez*, 323 S.C. 484, 476 S.E.2d 161 (Ct.App.1997). "Not all personal encounters between policeman and citizens involve 'seizures' of persons thereby bringing the Fourth Amendment into play." *Rodriquez* at 592, 476 S.E.2d at 161, quoting *State v. Culbreath*, 300 S.C. 232, 237, 387 S.E.2d 255, 257 (1990). Instead, a person has been seized within the meaning of the Fourth Amendment when the officer "by means of physical force or show of authority has in some way restrained the liberty of the citizen[.]" *Rodriquez* at 491, 476 S.E.2d at 165, citing *Terry v. Ohio*, 329 U.S. 1 at 19, 88 S.Ct. 1868 at 1879. In determining whether an encounter between a law enforcement official and a citizen constitutes a seizure, and thereby implicates Fourth Amendment protection, the correct inquiry is whether, considering all the circumstances surrounding the encounter, a reasonable person would have believed he was not free to leave. *Rodriquez* at 491, 476 S.E.2d at 165, citing *U.S. v. Mendenhall*, 446 U.S. at 545, 100 S.Ct. at 1872-73.

The first question presented in the instant case is whether the Officers' initial stop, parking their car behind Defendant's vehicle, and standing in Defendant's doorframe, constituted a seizure within the meaning of the Fourth Amendment.

In *State v. Rodriquez*, 323 S.C. 484, 476 S.E.2d 161 (Ct.App. 1997), the Officers involved were alerted to Defendant's presence on a Charleston commuter train after reviewing the train's manifest and identifying Defendant's surname. According to one officer, the name Rodriquez was significant because police had arrested a drug courier with the same last name some months earlier. The officer further noted that Rodriquez was on a return trip to Charleston from New York, and that his stay in New York was short. Officers arrived at the station approximately 45 minutes before the train's expected arrival, and the train was one hour behind schedule.

Based upon a vague description of Rodriquez provided by a confidential informant, the Officers approached Rodriquez when he exited the train, identified themselves as officers and asked if they could pat him down for weapons. Rodriquez refused. For the next thirty minutes, Officers continually asked Rodriquez if he would consent to a search. Rodriquez continually refused and also asked why the Officers were detaining him. During examination at the motion to suppress, one Officer admitted that while they allegedly told Rodriquez he was not being detained, they also told him that they wanted to do a short search of his belongings and if nothing was found, he'd be free to go.

The Officers eventually contacted a K-9 unit and notified Rodriquez that they intended to perform a pat down. Rodriquez reportedly lifted his arms to ask "why," at which time the Officers saw a pistol on his waistband and arrested him. Subsequent to the arrest, the Officers found various contraband.

Following a totality of the circumstances evaluation, the trial court denied Defendant's motion to suppress finding that Rodriquez was never seized. Rodriquez

appealed. On appeal, the Court considered two issues: (1) whether the police seized Rodriquez within the meaning of the 4th Amendment; and (2) if a seizure did occur, whether the seizure was reasonable in scope and duration, pursuant to *Terry*.

As to the first issue, whether Rodriquez was "seized" pursuant to the 4th Amendment, the Court of Appeals found that the proper inquiry was whether, considering all the circumstances surrounding the encounter, the reasonable person would have believed he was not free to leave. *Rodriquez* at 491, 476 S.E.2d at 165, citing *Mendenhall* at 554, 100 S.Ct. at 1877 (1979) (so long as the person approached and questioned remains free to disregard the Officer's questions and walk away, no intrusion upon the person's liberty or privacy has taken place and, therefore, no constitutional justification for the encounter is necessary.)

Based upon this test, the Court of Appeals concluded that a reasonable person in Rodriquez's position would not feel free to leave, and that therefore, a seizure had occurred. *Rodriquez* at 491-92, 476 S.E.2d at 165, *see Mendenhall* ("Examples of circumstances that might indicate a seizure where the person did not attempt to leave, would be the threatening presence of several officers... or the use of language or tone of voice indicating that compliance with the officer's request must be compelled.")

In the instant case, Officers Gardner and Hall pulled into the parking lot at the Clarion Inn and saw two vehicles parked side by side whose occupants appeared to be talking. The Officers, without more information, parked their patrol car behind those vehicles so that, according to testimony from the Defendant and witness Megan Newman, the Defendant would be unable to leave from his spot without hitting the patrol car. Once parked, Officer Gardner exited his vehicle in a shirt marked police and came to stand

between the Defendant's vehicle and the Toyota Camry in the vehicles' A-Frames. According to Ms. Newman, Officer Gardner's position prohibited Defendant from exiting the vehicle, without hitting Officer Gardner. Furthermore, Officer Gardner testified that, had Defendant attempted to leave, Officer Gardner would have pursued him. (R. pp. 150-159, lines 1-15). From the moment the Officers parked their vehicle behind Defendant, they were showing force that would lead a reasonable man to believe he was not free to go. Thus, from that time forward, Defendant had been seized within the meaning of the Fourth Amendment.

b. Whether Officers Gardner and Hall violated Defendant's Fourth Amendment rights by subjecting him to an investigatory detention without reasonable, articulable suspicion of criminal activity.

Because Defendant was seized pursuant to the 4th Amendment, the Court must consider whether Officers Hall and Gardner violated Defendant's 4th Amendment rights in detaining him. This analysis differs depending on whether the Court considers the stop a routine traffic stop, or an investigatory detention similar to a street stop.

"It is well established that the police may stop and briefly detain and question a person, without treading upon his 4th Amendment rights, upon a reasonable suspicion supported by articulable facts, short of probable cause for arrest, that the person is involved in criminal activity." *Rodriquez* at 492, 476 S.E.2d at 166, citing *State v. Foster*, 269 S.C. 373, 379, 237 S.E.2d 589, 591 (1977). The stopping of a vehicle and the detention of its occupants constitutes a seizure and implicates the 4th Amendment's prohibition against unreasonable searches and seizures. *State v. Butler*, 353 S.C. 387, 577 S.E.2d 498 (Ct.App. 2003).

The underlying purpose for a traffic stop must be lawful, however, *Butler* at 391, 577 S.E.2d at 502, and a law enforcement officer must limit their investigation in scope and duration to the underlying justification for the stop. *State v. Tindall*, 388 S.C. 518, 698 S.E.2d 203 (2010). 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. *Tindall* at 521, 698 S.E.2d at 203, citing *U.S. v. Sullivan*, 138 F.3d 126, 131 (C.A.4 1998).

The term "reasonable suspicion" requires a particularized and objective basis that would lead one to suspect another of criminal activity. *State v. Blassingame*, 338 S.C. 240, 248, 525 S.E.2d 535, 539 (Ct.App. 1999). In determining whether reasonable suspicion exists, the whole picture must be considered. *Id.* citing *U.S. v. Sokolow*, 490 U.S. 1, 109 S.Ct. 1581 (1989).

In the instant case, Officers Gardner and Hall pointed to the parked position of Defendant's vehicle as one reason that they approached. Specifically, Officer Gardner testified that backing into a spot violated a city ordinance, and was a ticketable offense. Once Officer Gardner approached Defendant's vehicle, however, it was immediately clear that Officer Gardner was not concerned about how Defendant's vehicle was parked. Officer Gardner did not testify that he asked Defendant a single question about the position of the vehicle, nor did Officer Gardner attempt to ticket Defendant for this violation. Because Officer Gardner's underlying traffic stop was improper, every question thereafter exceeded the limited scope and duration of questions allowed under *Terry* and its progeny.

If the Court treats Defendant's detention instead as a simple investigatory stop where the Defendant was nonetheless seized pursuant to the 4th Amendment, the state still bears the burden of demonstrating a reasonable, articulable suspicion that Officer Gardner believed Defendant was engaged in criminal activity. Recently, our State Supreme Court has considered this inquiry through the lense of two cases decided by the Fourth Circuit Court of Appeals: *U.S. v. Lender*, 985 F.2d 151 (C.A.4 1993), and *U.S. v. Sprinkle*, 106 F.3d 613 (C.A.4 1997).

In *Lender*, Officers observed a group of four or five men including the Defendant huddled together at approximately 12:50 A.M. in an area known for its heavy drug traffic. The Defendant was holding his hand out palm up, and the remaining men were looking into his outstretched hand. The Officers approached, and the group dispersed. The Defendant walked away from the Officers, and continued walking despite police requests for him to stop. Following multiple requests, the Defendant finally stopped, and a semi-automatic weapon fell to the ground. The Officers then placed Defendant under arrest.

On Defendant's motion to suppress the gun, Defendant argued that the Officers did not have reasonable suspicion to justify stopping him, and that he was seized from the moment he came to a stop after the Officer's second call for him to do so. The District Court denied the Defendant's motion finding that while the Officers had no reasonable suspicion to stop him, the Defendant was not seized when the gun fell into plain view.

The Fourth Circuit Court of Appeals disagreed. They found that, given the totality of the circumstances, reasonable suspicion existed for the Officers to briefly stop the Defendant. In its finding, the Court noted: "Here the officers personally knew that the

area they were patrolling had a large amount of drug traffic. While the Defendant's mere presence in a high crime area is not by itself enough to raise reasonable suspicion, an area's propensity toward criminal activity is something an officer may consider. Additionally, the Officers observed the Defendant engage in behavior that they suspected to be a drug transaction... "we cannot say that a reasonable Officer was required to regard such conduct as innocuous..." *Lender* at 154. The Court also addressed the Defendant's attempt to flee the scene saying, "[e]vasive conduct, although stopping short of headlong flight, may inform an officer's appraisal of a street corner encounter." *Id.*

On the other hand, in *Sprinkle*, the Fourth Circuit held that the Officers did not have reasonable suspicion sufficient to justify an investigative stop. *Sprinkle*, 106 F.3d at 619. The Officers in *Sprinkle* observed Poindexter, a man with a known narcotics record, sitting in a car around 5:30 in the evening in a neighborhood where police reported a high incidence of narcotics traffic. Defendant Sprinkle entered the passenger side of the vehicle.

The Officers watched the two men huddle together over or near the console with their hands close together. The Officers believed Defendant was passing or about to pass something to Poindexter, though the Officers admitted they could see inside the car and could see everyone's hands but saw no drugs, money, guns, or drug paraphernalia.

Poindexter pulled the car into the street and began driving obeying all traffic signals and laws. Poindexter then came up to an unrelated road block, and the observing Officers activated their blue lights. Defendant stepped out of the vehicle and attempted to run as police immediately initiated a pat down. In the ensuing chase, Defendant pulled

out a hand game, later recovered by the police. The District Court granted the Defendant's motion to suppress the gun and the government appealed.

The government argued that five factors taken together provided police the basis for reasonable suspicion of criminal activity: (1) knowledge of Poindexter's past criminal record for narcotics violations; (2) the subjects spotted in a "high crime" neighborhood; (3) the two men huddled toward the vehicle's center console with their hands close together; (4) Poindexter's efforts to hide his face from view; and (5) Poindexter leaving the scene when Officers drive by the car. *Sprinkle* at 616-17. The government also relied heavily on the Court's opinion in *Lender*. *Id.* at 619, N.3.

The Fourth Circuit distinguished *Lender* however. First, the Court determined that although police could not see into Lender's open hand, the fact that several men were looking into his hand indicated that something was actually in it. In *Sprinkle*, the Officers admitted that they saw Defendant's hands and saw nothing in it passed between the two men. Second, in *Lender*, the Defendant engaged in evasive conduct when he tried to walk away from the Officers despite multiple attempts by the Officers to get Defendant to stop. In *Sprinkle*, the Court specifically determined that Defendant had not engaged in evasive conduct. Finally, the Court noted that the lateness of the hour properly contributed to reasonable suspicion in *Lender* whereas the Defendant in *Sprinkle* was apprehended at 5:30 P.M. The Court held that "[i]n sum, *Lender* is distinguishable to the point that it is not controlling." *Id.*

In *State v. Taylor*, the South Carolina Supreme Court analyzed both *Lender* and *Sprinkle*, but found that Taylor's case more closely mirrored *Lender*. *Taylor* at 112, 736 S.E.2d at 667. The police were alerted in *Taylor* via an anonymous tip that a black male

on a bicycle was selling narcotics at an unpaved portion of a local street in a high crime area around 11 P.M. Officers at the scene observed the Defendant, an African American male, on a bicycle, "huddled up" with another male. *Taylor* at 111-112, 736 S.E.2d at 667. As the Officers approached, the Defendant attempted to pedal away from the scene in an "undisputed attempt to avoid them." *Id.* The Court in Taylor determined that, given the totality of the circumstances, the Officers had reasonable suspicion of criminal activity. *Id.*

The instant case aligns more closely with *Sprinkle* than *Lender.* Defendant was merely sitting in his vehicle speaking to the occupants of another vehicle when Officers Gardner and Hall arrived. The Officers were on routine patrol and had not been alerted to any potential criminal activity in the area. The Officers arrived in the parking lot, saw Defendant speaking to the women in the Toyota Camry, and failed to articulate any suspected criminal activity that was presently ongoing. Both Officers testified that it appeared the vehicles' occupants were meeting "for a purpose," that neither the Defendant nor the women in the Camry appeared to be moving from their vehicles, and that they were talking across the cars.

Once the Officers parked their vehicle and approached Defendant to stand in the A-Frame of Defendant's car, Defendant was completely cooperative. Furthermore, given Officer Gardner's position in the A-Frame, he was able to see into Defendant's vehicle and did not observe any drugs, drug paraphernalia, money, guns, or other indicia of illegal activity. In their testimony, Officers Gardner and Hall pointed to three things to support their argument regarding reasonable suspicion: (1) the time of day; (2) the purported "high crime" area; and (3) their experience in the field. (R. p. 150, lines 3-11).

This list alone does not support a finding of reasonable suspicion, and thus the Officers' investigatory detention of Defendant violated his 4th Amendment rights. Based upon the totality of the circumstances, the Court should have found that the Officers did not have reasonable suspicion to detain Defendant, and should have granted Defendant's motion to suppress evidence seized as a result of this unlawful detention.

II. THE TRIAL COURT ERRED WHEN IT FOUND OFFICER GARDNER HAD REASONABLE SUSPICION SUFFICIENT TO CONDUCT A *TERRY* FRISK WHERE OFFICER GARDNER FAILED TO OFFER SUPPORT FOR HIS BELIEF THAT DEFENDANT WAS ARMED AND DANGEROUS AND WHERE OFFICER GARDNER ALLOWED TOO MUCH TIME TO ELAPSE BETWEEN ASKING DEFENDANT TO EXIT HIS VEHICLE AND ACTUALLY CONDUCTING THE FRISK.

Even if the lower court could have found that Officers Gardner and Hall had reasonable suspicion to detain Defendant, the trial court erred by finding that Officer Gardner had reasonable suspicion to conduct a *Terry* frisk.

South Carolina law recognizes that, for an Officer to properly conduct a pat-down, or *Terry* frisk, "[a]n officer must be able to specify the particular facts on which he or she based his or her belief the suspect was armed and dangerous." *State v. Butler*, 353 S.C. 383, 577 S.E.2d 498, quoting *Sibron v. New York*, 392 U.S. 40, 88 S.Ct. 1889 (1968) (mere knowledge of the suspect being a known narcotics dealer who put his or her hand into a pocket as the police approached does not provide justification [for a *Terry* frisk].) In accessing whether a suspect is armed and dangerous, the officer need not be absolutely certain the individual is armed; rather, the question is whether a reasonably prudent person in those circumstances would be warranted in the belief that his safety or that of others is in danger. *Butler* at 393, 577 S.E.2d at 503.

In *Butler*, the Court was asked to determine whether reasonable suspicion existed for Officer Todd Cook to pat-down Defendant Butler following a lawful traffic stop. Butler was a passenger in a van pulled over by Officer Cook for driving without taillights. Officer Cook testified that, as he wrote the driver a warning ticket, he smelled alcohol, and had reason to suspect that there was alcohol inside the vehicle. *Id.* at 386, 577 S.E.2d at 499. Officer Cook then proceeded to the passenger side of the vehicle and asked Defendant Butler to step from the van. After Officer Cook removed Defendant Butler from the vehicle, he performed a pat down of Defendant, which revealed a pistol, and a large quantity of cocaine.

During the Defendant's motion to suppress, Counsel for the Defendant repeatedly asked Officer Cook to articulate anything that the Defendant was doing that would cause a reasonable person to fear for their safety. Officer Cook was unable to respond. The trial court, however, found that Officer Cook had reasonable suspicion to ask the passengers to vacate the vehicle and pat them down. *Butler* at 388, 577 S.E.2d at 500. At trial, the Defendant was convicted of trafficking cocaine, and unlawful carrying of a pistol. Defendant appealed.

The Court of Appeals reversed the trial court. First, the Court noted that "[u]nder the mandates of *Terry*... a police officer must have a reasonable suspicion that an individual is armed and dangerous before conducting a pat down or frisk of the [Defendant]." *Butler* at 389, 577 S.E.2d at 501, quoting *Terry v. Ohio*, 392 U.S. at 27, 88 S.Ct. at 1883. The Court also emphasized that the purpose of the limited *Terry* frisk is not to discover evidence of a crime, but to allow the officer to pursue his investigation without fear of violence. *Butler* at *supra.*, quoting *Maryland v. Bule*, 494 U.S. 325, 332,

110 S.Ct. 1093, 1097 (1990) (limited pat-down for weapons is authorized where a reasonably prudent Officer would be warranted in the belief, based on specific and articulable facts, and not on a mere inchoate and unparticularized suspicion or hunch, that he is dealing with an armed and dangerous individual.)

The Court of Appeals thus determined that Defendant Butler's trial court "failed to make any determination that the Officer had the necessary apprehension of danger to justify a pat-down search." *Butler* at 392-93, 577 S.E.2d at 503. In fact, the Court determined that the Officer had no fear of Butler, but "was merely continuing his investigation of a possible open container violation." *Id.* The Court opined that, "[c]learly, the trial court improperly assumed if the Officer was entitled to remove Butler from the vehicle in furtherance of his investigation, he was automatically entitled to frisk the passenger." *Id.* The Court determined that the "only basis for suspicion [Officer Cook] had was that he smelled alcohol and the driver had provided him with an incorrect name for the passenger." *Butler* at 393-394, 577 S.E.2d at 503. The Court concluded that without more, Officer Cook's search was unlawful. *Id.* see *State v. Burton*, 349 S.C. at 440, 562 S.E.2d at 673. (Where only activity detective pointed to as "suspicious" was individual's refusal to answer questions, and fact that individual kept his right hand in his pocket, detective failed to articulate, valid, reasonable suspicion for stop and search of individual, in spite of detective's testimony he feared for safety of those around him.)

In the instant case, Officer Gardner failed to support his pat down of Defendant by reasonable articulable facts that he feared Defendant was armed and dangerous. According to Officer Gardner, Defendant repeatedly touched his pocket while Officer Gardner questioned him, and Defendant also appeared nervous. These facts, without

more, fail to validate reasonable suspicion. Furthermore, even if Officer Gardner's decision to ask Defendant to vacate his vehicle was supported by reasonable suspicion that Defendant was armed, such suspicion was created by Officer Gardner through his unlawful investigative detention of Defendant.

Finally, in the instant case, Officer Gardner's testimony is made less credible by the amount of time that passed between asking Defendant to exit his vehicle and when Officer Gardner actually performed the pat down for weapons. Though inexact, the testimony at trial creates a period of between five to ten minutes from the time Defendant exited his vehicle until Officer Gardner actually performed the frisk. Furthermore, Officer Gardner testified that Defendant touching his pocket did not alert Officer Gardner to weapons alone, but, instead, "can be a big indicator that an individual either has weapons or that they have contraband or drugs inside their pocket." (R. p. 13, lines 18-20). During this time, as additional Officers arrived on the scene, Defendant remained at the back of his vehicle, and was completely cooperative. Importantly, all the information Defendant provided the Officers was true.

Given the totality of the circumstances, a reasonable man in Officer Gardner's position would not have believed that Defendant was armed and dangerous, and therefore Officer Gardner's pat-down of Defendant violated Defendant's 4th Amendment rights. The trial court therefore erred by not suppressing evidence seized as a result of this unlawful pat-down.

III. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS EVIDENCE SEIZED BY OFFICER GARDNER DURING A SECOND UNLAWFUL SEARCH OF DEFENDANT.

When Officer Gardner conducted a pat down on the outside of Defendant's clothing, he felt a hard lump in Defendant's pants' pocket. Officer Gardner placed his hand into Defendant's pocket to reveal that the hard lump was a wad of cash. Officer Gardner asked Defendant questions about the cash, which Defendant answered.

Officer Gardner then placed his hand back into Defendant's pocket because, he testified, Defendant could have had anything in his pocket. (R. p. 36, lines 4-11). The Officer continued by testifying about additional weapons he though the Defendant might have had, though the testimony is uncontroverted that, during Officer Gardner's pat down of Defendant, he felt only the hard lump that turned out to be a wad of cash. Officer Gardner never testified that he felt anything other than this lump outside Defendant's clothes.

The second search revealed four small pills, which, taken together, were approximately the size of a penny or nickel. Upon discovery of these pills, Defendant was placed under arrest, roughly twenty minutes after Officers Gardner and Hall first detained Defendant. The Court should have applied the same reasonable, articulable suspicion standard to this second search. However, the Court combined all three of these issues in its analysis.

During Defendant's motion to suppress, the trial court determined that Officer Gardner had reasonable suspicion to conduct a *Terry* frisk based upon the following: (1) the high crime area; (2) the lateness of the hour; (3) "nervous behavior" by the Defendant; (4) that the Defendant allegedly touched his pocket; and (5) the experience of

the Officers. (R. p. 111, lines 1-15). None of these factors articulates what criminal activity the Officers believed Defendant to be engaged in at the time of their initial detention. These factors also fail to articulate the reason Officer Gardner believed Defendant was armed and dangerous. Finally, all Officer Gardner felt upon an over the clothes pat of Defendant's pocket was what turned out to be a wad of cash. Officer Gardner failed to identify a single reason he believed Defendant was still armed after the cash was removed. In short, Officer Gardner engaged in a fishing expedition based upon a hunch and persisted until he discovered contraband. *Sikes v. State*, 323 S.C. 28, 448 S.E.2d 560 (1994), see *United States v. Foster*, 634 F.3d 243 (C.A.4 2011).

Given the totality of the circumstances, Officer Gardner's second frisk of Defendant was not supported by reasonable suspicion that Defendant was armed and dangerous. Officer Gardner testified that Defendant provided consent to perform the second search. However, "consent" must be (1) knowing and voluntary and (2) given by one with authority to consent. *U.S. v. Digiovanni*, 650 F.3d 498 (C.A.4 2011). Whether consent was voluntarily given is a question of fact, but ultimately rests on whether the person providing consent reasonably believed the Officer's request was voluntary. *Digiovanni* at 514. The facts in this case do not support an argument that Officer Gardner's request was voluntary, nor does Defendant concede that he voluntarily consented to search.

For the reasons stated above, Officer Gardner's second search of Defendant violated Defendant's 4th Amendment rights, and the Court erred by failing to suppress evidence seized pursuant to this unlawful search.

IV. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE WHERE THE STATE FAILED TO PROPERLY IDENTIFY BY TESTIMONY OR SWORN STATEMENT THE EVIDENCE CUSTODIAN INITIALLY RESPONSIBLE FOR RETREIVING THE EVIDENCE OR THE CONDITION OF THE EVIDENCE WHEN IT WAS LOGGED IN.

Rule 6(b), South Carolina Rules of Criminal Procedure, provides that:

> "[f]or the purpose of establishing a chain of physical custody or control of evidence entered under Part A of this Rule, a certified or sworn statement signed by each successive person having custody of the evidence that he or she delivered it to the person stated is evidence that the person had custody and made delivery as stated without the necessity of the person who signed the statement being present in court provided: (1) the statement contains a sufficient description of the substance or its container to distinguish it; and (2) the statement says the substance was delivered in substantially the same condition as when received."

In *State v. Chisolm*, 355 S.C. 175, 584 S.E.2d 401 (Ct.App. 2003), the Court of Appeals held that "[c]ustodial signatures on an evidence bag fail to establish an adequate chain of custody where the custodians do not provide testimony under oath or produce a sworn statement pursuant to Rule 6(b), S.C.R.Crim.P." In *State v. Taylor*, 360 S.C. 18, 598 S.E.2d 735 (Ct.App. 2004), the Court of Appeals clarified that the cornerstone of *Chisolm* was adequately establishing the identify of evidence custodians.

In *Taylor*, the Defendant challenged the admissibility of evidence where the evidence custodian who retrieved the evidence from the arresting Officer was not available to testify. The state attempted to establish a chain of custody via affidavit, as proscribed by Rule 6(b), S.C.R.Crim.P., but Defendant objected.

The trial court found the evidence (36.16 grams of crack cocaine, and a firearm) admissible, ruling that the state had provided sufficient evidence of the chain of custody without the testimony of the absent evidence custodian. The jury found Defendant guilty

of trafficking cocaine and possession of a firearm during the commission of a violent crime.

On appeal, Taylor argued that *Chisolm* required the testimony of every person in the chain of custody to establish admissibility of the evidence. The Court of Appeals rejected this argument. Instead, the Court found that the issue in *Chisolm* and its progeny was identity. See *State v. Williams,* 297 S.C. 290, 293, 376 S.E.2d 773, 774 (1989) (Where the analyzed substance has passed through several hands, the evidence must not leave it to conjecture as to who had it and what was done with it between the taking and the analysis). The Court noted that the question presented in *Taylor* was one of credibility rather than admissibility stating, "where there is evidence to establish the identity of those who have handled the evidence and the manner in which it was handled, a weakness in the chain raises a question of credibility, not admissibility." *Taylor* at 24, 590 S.E.2d at 737.

In *Chisolm*, the Court excluded evidence where the record failed to establish how long the first technician possessed the evidence, in what condition it was received, where or how it was stored, or how the second technician came into possession of it. Furthermore, neither the first nor second technician testified at trial. *Id.* at 26, 598 S.E.2d at 739. The Court determined that these lapses in the chain left to conjecture the identity of those who handled the evidence, as well as how the evidence was handled.

The Court in *Taylor*, however, found that the state established the identity of every person in the chain through sworn statements, under the mechanism provided in Rule 6(b), S.C.R.Crim.P. Therefore, the question went to credibility rather than admissibility. 360 S.C. at 738, 598 S.E.2d at 737-738.

In the instant case, the state provided custodial signatures of Isreal Flounders, the initial evidence custodian, but did not offer Mr. Flounders' testimony or a sworn statement to identify Mr. Flounders, or the condition of the evidence at the time it was logged in. The state offered three property and evidence witnesses to attempt to establish the chain of custody. On cross examination of the first witness, Ms. Bennick, Defendant's counsel first established that in the normal course of business, the Greenville County Department of Property and Evidence will use an affidavit to verify the identity of technicians and the condition of evidence. (R. p. 225, lines 1-22).

Defendant's counsel then verified that the department created no such affidavit in this case to verify the items dropped off by Officer Gardner. The state's next two witnesses, all employed as evidence custodians at Greenville County Property and Evidence, could not verify that Mr. Flounders was the person responsible for retrieving the evidence in this matter, nor what the condition of the evidence was at the time of retrieval. Thus none of the state's witnesses could identify Mr. Flounders, nor could these witnesses verify the condition of the evidence when it arrived at the Department. (R. pp. 217-229, R. pp. 232-236).

Because the state failed to identify the single most important evidence custodian in this matter, and further failed to identify the condition of the evidence at the time it was logged in, the trial court erred by admitting this evidence.

CONCLUSION

For the reasons provided more fully above, the trial court erred by failing to suppress evidence seized in violation of 4th Amendment rights against unlawful searches and seizures, and further failed by admitting evidence despite the state's failure to properly identify each evidence custodian in the chain of custody, or the condition of the evidence at the time it was logged in with Greenville County's property and evidence division. Thus the trial court must be reversed, and this case remanded, to be decided in accord with the law.

This 1st day of July, 2014

By: RJ mdl

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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 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."

July 1, 2014

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

The Honorable G. Edward Welmaker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ERICK E. HEWINS,

APPELLANT

Appellate Case No. 2013-000224

CERTIFICATE OF SERVICE

I certify that I have served Appellant's Final Brief upon counsel for the Respondent, the State, to the State's attorney of record Mary S. Williams at South Carolina Office of Attorney General, Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia SC, 29201.

This 1st day of July, 2014.

By: JHL

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SUBSCRIBED AND SWORN TO before me
this 1st day of July, 2014.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022

ALAN WILSON
ATTORNEY GENERAL

September 14, 2017

The Honorable Daniel E. Shearouse
Clerk of Court — SC Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: **Erick Hewins v. State of South Carolina**
Appellate Case No. 2016-002382
Lower Court Case No. 2016-CP-23-2656

Dear Mr. Shearouse:

Attached is the original and one copy of the **Supplemental Appendix** in the above referenced case for filing in your office.

Sincerely,

DeShawn H. Mitchell
Assistant Attorney General
SC Bar #101813

DHM/jacc
Enclosures

cc: Taylor D. Gilliam, Esquire
Trisha Allen, Director - Victim Advocacy Division (without enclosure)