STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

Robert E. Hood, Circuit Court Judge

Opinion No. 5489 (S.C. Ct. App. filed May 31, 2017)
Appellate Case No. 2015-000390

THE STATE,

Petitioner,

vs.

ERIC TERRELL SPEARS,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUE ON APPEAL

The trial court properly denied Respondent's motion to suppress the crack cocaine because law enforcement engaged Respondent in a consensual street encounter when they walked a little faster than Respondent to reach him, politely asked to speak with Respondent, and asked questions in a respectful manner. Walking a little faster to catch up to a person to speak with them is not a show of authority that creates a seizure and merely asking incriminating questions does not turn a consensual encounter into a seizure.

STATEMENT OF THE CASE

Respondent Spears was indicted for trafficking between ten and twenty-eight grams of crack cocaine. Spears was convicted as charged by a jury following trial on February 17-18, 2015. Spears did not attend his trial; therefore, the presiding judge, the Honorable Robert E. Hood, placed the sentence under seal. On February 19, 2015, Spears was brought before Judge Hood and the sentence was unsealed. Judge Hood sentenced Spears to thirty years imprisonment for his third offense trafficking cocaine.

Spears appealed his conviction and sentence. Following briefing and oral argument, the Court of Appeals reversed the conviction and sentence in a published opinion on May 31, 2017. State v. Spears, ___ S.C. ___, 802 S.E.2d 803 (Ct. App 2017). Judge Konduros wrote the majority opinion, which Judge Short joined. Judge Williams dissented. The State filed its petition for rehearing on June 15, 2017. The Court of Appeals denied the petition for rehearing on August 18, 2017, with Judge Williams voting to grant the petition for rehearing.

STATEMENT OF FACTS

Spears smuggled crack cocaine to Columbia from New York City by bus. While law enforcement spoke with Spears during a street encounter, Spears repeatedly fidgeted with his shirt and even put his hands underneath his shirt, causing officers to reasonably fear he was armed and necessitating a Terry[1] frisk. As the result of the search, a package containing eleven grams of crack cocaine was found in Spears' waistband.

The trial court conducted a pre-trial suppression motion. The State's lone witness for the suppression motion was Special Agent Dennis Tracy who was employed with the Lexington County Sheriff's Office and is a task officer with Immigration and Customs Enforcement (ICE), renamed Homeland Security by the time of trial. On March 29, 2012, Agent Tracy and two other officers were at a drop-off point for what is commonly known as a Chinese bus line. ICE was assisting the Drug Enforcement Agency (DEA) with a tip they received that two black men were transporting narcotics on a bus. Agent Tracy has nineteen years' law enforcement experience and ten years' experience in narcotics. R. p. 110, lines 1-5. The DEA asked for Agent Tracy's assistance because he was certified for interdiction. R. pp. 12-15. Agent Tracy explained the role of the interdiction unit is to stop the flow of narcotics into neighborhoods by nontraditional means such as common carrier parcel systems like Fed Ex, UPS, DHL, or people transporting narcotics by mass transit such as airplane, bus, or train. R. p. 109, lines 1-7.

The bus line is a low-budget bus line operating out of the Chinatown neighborhood of Manhattan whose buses run straight to North and South Carolina with few stops. No identification

[1] See Terry v. Ohio, 392 U.S. 1, 26 (1968).

or security is required to travel on the buses, so the bus line is "commonly used by felons, by wanted subjects, by people trafficking narcotics and counterfeit goods. There's a whole slew of people using these buses because of the lack of security." R. pp. 15-16 (direct quote, p. 15, line 24 – p. 16, line 3). Agent Tracy explained to the jury the bus line does not have a real station, but instead drops off its customers at a parking lot or closed business. They were aware of a drop-off point at Dutch Square Mall and another location they went to, a hotel parking lot by Broad River Road near Interstate 20. R. pp. 113-114.

Agent Tracy and two other officers were positioned at the Broad River Road drop-off point. R. p. 16. Agent Tracy testified most of the people they observed got off the bus, were greeted by relatives or friends, made calls, or left in cabs. However, two people attracted the agents attention as they retrieved a large number of bags, four bags total from underneath the bus. The couple engaged in conversation with themselves, looked at the officers, and proceeded to walk up the street toward the post office. R. p. 17, lines 5-14. The couple was Spears and his girlfriend. Agent Tracy explained why their attention raised the officers' suspicions, "Most of the other people didn't pay that much attention to us, they would look and go on with their business, but these two subjects continued to – what appeared to us is that they kept looking at us and talking amongst themselves." R. p. 18, lines 2-6.

The officers decided to make contact with Spears and his girlfriend. Later on cross-examination, Agent Tracy explained the following:

> The reason we contacted them was to first of all identify them, and second of all to ascertain if they were involved in any criminal activity, specifically under our ICE authority it would be trafficking counterfeit goods. They have four large bags coming out of a known

> source area for counterfeit goods, we thought that might be something we wanted to take a look at.

R. p. 39, lines 6-12.

The two subjects walked up the street, towards the post office, and the officers walked behind them. Agent Tracy saw the female reach into her bag and pull out an unknown object, then appear to hand the unknown item to the male. Because the male never brought his hands above his waist, the officers expected the object would be in his hands, his waistband, or his pockets. As the two subjects walked, they continued to look back at the officers. As the officers were fifteen to twenty feet away from the subjects, the officers asked to speak with them and they stopped walking. Officer Tracy testified they said "something nonthreatening like, 'Excuse us, do you mind if we have a word with you.'" R. p. 14, lines 4-6. Officer Tracy described catching up to Spears and his companion as follows: "They're walking, we're walking behind them, we didn't run. However quickly we could walk **a little faster than they did** to make contact with them." R. p 31. Officer Tracy explained to the jury that "us running after somebody is more of a show of force so we didn't want to run after them." R. p. 134, line 24 – p. 135, line 2. He denied defense counsel's suggestion they were chasing Spears. R. p. 135, lines 6-8.

The officers identified themselves, made small talk, and asked about their travels. R. pp. 18-19. Special Agent Tracy agreed Spears and his girlfriend would have been free to leave if they chose not to talk to law enforcement. R. p. 20, lines 2-7. He explained what happened next:

> We then asked them if they had – or we told them the bus lines, that we had had problems in the past with drugs and wanted subjects and counterfeit merchandise, and we asked them for ID. I noted that while I was speaking with the male subject he continued to put his hands underneath his shirt and I guess the motion would be like puff

his shirt away from his waistband.

R. p. 20, lines 9-15. On cross-examination, Agent Tracy described the shirt as a baggy type of sweatshirt. R. p. 39. Agent Tracy noted that in casual conversation, Spears' answers "were very forthcoming." R. p. 21, lines 10-12. However, when he asked Spears if he had any weapons on him or his possessions, Spears hesitated before answering "no." R. p. 21, lines 12-14. Agent Tracy became suspicious because his training and experience taught him people hesitate when they are confronted with a question they do not want to answer truthfully. R. p. 21, lines 16-20.

Agent Tracy asked Spears to keep his hands where he could see them because Spears started pulling his shirt and moving his hands around his waistband and pocket. However, Spears continued to do the same thing a couple more times and became frustrated when Agent Tracy asked him to stop. Noting, "Drugs and guns are commonly hand in hand, criminals often have designated weapons in their possession," Agent Tracy decided to pat down Spears to ensure he did not have any weapons. R. p. 20, line 17 - p. 21, line 5 (direct quote, p. 20, lines 23-25).

Before the jury, Agent Tracy explained the following:

> I didn't know what he had. I didn't know if he was concealing a weapon in his waistband, I didn't know what he had in his waistband but I didn't want him to [pull at his shirt and waistband] because hands are what can hurt you from a law enforcement perspective. If I . . . can't see your hands that's a concern for me, **it's an officer safety concern.**

R. p. 120, lines 13-19. During trial, Agent Tracy explained his actions were not based on the tip, but solely on Spears' actions. R. p. 132.

When he conducted the pat down, Agent Tracy found a balled-up object in the waistband that felt consistent with crack cocaine. Agent Tracy removed the object, which was wrapped in a napkin.

Opening the napkin, Agent Tracy saw what looked like crack cocaine and also a little marijuana. At that point, the officers detained Spears. R. pp. 21-22. On cross-examination, Agent Tracy explained "I've gotten plenty of crack out of a waistband before and that's what it felt like." R. p. 44, lines 5-6.

Spears called his quondam girlfriend, Tracy Jenkins, as a witness at the suppression hearing. She testified she did not feel she was free to leave, but was hazy on the timing of events. She explained she was told to sit down, but that seemed to occur after Spears was already in handcuffs. R. pp. 54-59.

The trial court denied the motion to suppress. R. pp. 83-86. Agent Tracy was the State's first witness at trial and testified consistent with his in camera testimony. The second witness was one of the other two officers with Agent Tracy, Investigator Briton Lorenzen, with Homeland Security. He was the officer who was notified about the tip by the DEA. He, Agent Tracy, and Deputy Frank Finch conducted surveillance at the hotel parking lot by Broad River Road. It turned out the two targets were not on the bus, but were on another bus that went to the other drop-off point by Dutch Square Mall. R. pp. 143-144; p. 149. But while watching the exiting bus passengers go about their business, he observed two passengers paying close attention to the officers. The officers were all in plain clothes, but Investigator Lorenzen's gun and badge were visible. R. pp. 143-145. Investigator Lorenzen explained weapons are often found in a waistband. R. p. 147.

Investigator Brian Gwyn, now with the Lexington County Sheriff's Department, was with the Richland County Sheriff's Department at the time of the arrest. He was involved with investigating the tip. Investigator Gwyn was monitoring both drop-off points; he initially went to the Broad River location to help set up surveillance and then went to the other drop-off point by Dutch Square Mall

when informed that another bus arrived at that location. When he returned, he found the three officers with Spears. He received the seized rocks from Agent Tracy and the rocks field-tested positive for crack cocaine, so they arrested Spears. Investigator Gwyn took over the case as a Richland County case. R. pp. 154-155. Investigator Gwyn testified Spears made several statements. Spears claimed to not know what the rocks were, explaining, "Just because it's on me doesn't mean I know what it is." R. p. 157. Spears complained he felt he was set up because he never saw law enforcement on the bus line before. Spears admitted he was paid $2,000 to transport the contraband because it was not worth as much in New York. R. pp. 157-158.

Deputy Frank Finch from the Lexington County Sheriff's Department was part of the DEA task force at the Broad River location with Special Agent Tracy and Investigator Lorenzen. He testified consistently with the other two officers involved in the arrest. He explained that as Spears and his girlfriend walked away from the station and the officers followed them, they kept looking back: "As they were walking away they kept looking behind them, kind of looking anxious. Most people were just kind of milling around waiting someone to pick them up, get in their car or on a cell phone to call a ride, whereas these people were literally waking away." R. p. 186, lines 21-25. Deputy Finch noted Spears kept pulling at his shirt even after Agent Tracy asked him twice to stop. This drew their attention to Spears' shirt because, Deputy Finch explained, **"We are taught the eyes won't kill you but the hands will."** R. p. 189, lines 6-19. Therefore, Agent Tracy conducted the pat down search. R. p. 189.

The forensic chemist testified the substance seized was 11.43 grams of crack cocaine. R. p. 176.

ARGUMENT

The trial court properly denied Respondent's motion to suppress the crack cocaine because law enforcement engaged Respondent in a consensual street encounter when they walked a little faster than Respondent to reach him, politely asked to speak with Respondent, and asked questions in a respectful manner. Walking a little faster to catch up to a person to speak with them is not a show of authority that creates a seizure and merely asking incriminating questions does not turn a consensual encounter into a seizure.

The Court of Appeals erred because, as noted in Judge Williams' dissent, it failed to recognize that evidence supported the trial court's ruling finding no Fourth Amendment violation. Spears was not seized when law enforcement followed him on foot a short distance, accelerated to a brisk walk to reach him, politely asked to speak with him, and questioned whether he had any dangerous weapons. Federal law is clear that even asking incriminating questions does not render a voluntary encounter into a seizure. Further, the majority opinion's findings are similar to the appellant's "investigative pursuit" argument rejected by the United States Supreme Court in Michigan v. Chesternut, 486 U.S. 567, 575 (1988). Walking briskly is not a show of force – if so, law enforcement would be restricted to questioning only those people headed in their direction or standing still, an absurd result.

The majority failed to properly apply the standard of review.

The central error in the Court of Appeals' opinion is despite referencing the requisite standard of review, the majority made its own findings of facts and inferences without regard to evidence supporting the trial court's ruling. In "South Carolina appellate courts review Fourth Amendment determinations under a clear error standard." State v. Provet, 405 S.C. 101, 107, 747 S.E.2d 453,

456 (2013). "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). "Under the clear error standard, 'an appellate court will not reverse a trial court's finding of fact simply because it would have decided the case differently.'" State v. Vickery, 399 S.C. 507, 732 S.E.2d 218 (Ct. App. 2012).

In the instant case, Judge Williams dissented from the majority opinion, noting, "One of the guiding principles shaping our state's Fourth Amendment jurisprudence is that, in a fact-based Fourth Amendment challenge, an appellate court is restricted by the 'any evidence' standard of review." State v. Spears, 802 S.E.2d 803, 810 (S.C. Ct. App. 2017) (J.Williams dissenting). Judge Williams believed the standard of review required affirming the trial court's ruling. He noted the appellate court should not reverse a circuit court's findings of fact merely because it would decide the case differently than the circuit court. Judge Williams noted "faithful adherence to the 'any evidence' standard of review will prevent any misconception that we have substituted our own findings in place of those of the circuit court." Id.

The majority's opinion creates precedent that threatens officer safety and law enforcement's ability to investigate criminal activity.

This case, as published by the Court of Appeals, creates issues of officer safety and an impediment to the State's legitimate and significant interest in enforcing the State's narcotics laws. In its opinion, the Court of Appeals found Spears was seized by officers merely because they increased their speed to a brisk walk to catch up to Spears, finding the brisk walk "exhibited threatening behavior." Spears, 802 S.E.2d at 807. Additionally, the Court of Appeals found Spears

was seized "at the latest" when asked if he had any illegal weapons or items on him or his property. Id. The opinion is at odds with federal precedent that requires more than the police officers' status of being police officers to constitute a seizure.

Only when officers "by means of physical force or show of authority" **restrains** the liberty of a citizen is a voluntary interaction transformed into a Fourth Amendment seizure. Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968); see Michigan v. Chesternut, 486 U.S. 567, 575 (1988) ("While the very presence of a police car driving parallel to a running pedestrian could be somewhat intimidating, this kind of police presence does not, standing alone, constitute a seizure. . . . Without more, the police conduct here – a brief acceleration to catch up with respondent, followed by a short drive alongside him – was not 'so intimidating' that respondent could reasonably have believed that he was not free to disregard the police presence and go about his business."). The officers walked "briskly" as they described it, to reach Spears and his companion, not as a show of authority, but as a matter of practicality. Under the standard of review, the trial court did not err in finding an accelerated walk was not a restraint of Spears' liberty.

The State is especially concerned with the proposition that merely asking a person if they are carrying a weapon will turn a consensual encounter into a seizure. For officer safety, this is problematic. It also is simply erroneous. See United States v. Little, 18 F.3d 1499, 1506 (9th Cir. 1994) (*en banc*) ("The asking of 'incriminating questions' is irrelevant to the totality of the circumstances surrounding the encounter;" and citing Florida v. Bostick, 501 U.S. 429, 434 (1991)).

Additionally, the opinion inhibits good, fair, community policing in response to the infiltration of dangerous controlled substances in our community. See United States v. Mendenhall,

446 U.S. 544, 561-62 (1980) ("The public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit. Few problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances. . . . And many drugs . . . may be easily concealed. As a result, the obstacles to detection of illegal conduct may be unmatched in any other area of law enforcement.").

The present case was a simple street encounter.

The present case was a voluntary street encounter that only became a seizure when law enforcement necessarily performed a Terry frisk. As discussed below, the Court of Appeals' opinion departs from established precedent allowing law enforcement to approach an individual on a public street and ask questions without implicating Fourth Amendment protections. Florida v. Bostick, 501 U.S. 429, 434 (1991).

A law enforcement officer may ask a citizen questions and the citizen ordinarily may refuse to answer. In order to stop a person and **require** a response to questioning, the Fourth Amendment demands the law enforcement officer have a "reasonable suspicion" the person was engaged in misconduct. Terry v. Ohio, 392 U.S. 1, 27 (1968). When a law enforcement officer "accosts an individual and restrains his freedom to walk away, [the officer] has 'seized' that person." Id. at 16. But of course, "not all personal intercourse between policemen and citizens involves 'seizures' of persons." Id. at 19, n.16.

"Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." Id. "[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on

the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions." Florida v. Royer, 460 U.S. 491, 497 (1983). "[E]ven when police officers **have no basis** for suspecting a particular individual, they may generally ask questions of that individual, ask to see identification, and request to search his or her luggage – as long as the police do not convey a message that compliance with their request is required." Bostick, 501 U.S. at 434-35 (emphasis added, citations omitted).

"Moreover, characterizing every street encounter between a citizen and the police as a 'seizure,' while not enhancing any interest secured by the Fourth Amendment, would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices." United States v. Mendenhall, 446 U.S. 544, 554 (1980). The Mendenhall court noted the need for police questioning for effective enforcement: "Without such investigation, those who were innocent might be falsely accused, those who were guilty might wholly escape prosecution, and many crimes would go unsolved. **In short the security of all would be diminished.**" Id. (emphasis added, citation and internal quotation marks omitted).

In order to determine whether an incident is a seizure or a consensual street encounter, the trial court must determine whether, under the totality of circumstances, "a reasonable person would have believed that he was free to leave." Id. ("Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be

compelled."). The issue is considered not from the viewpoint of a reasonable person, but a reasonable innocent person. Bostick, 501 U.S. at 438 ("[T]he 'reasonable person' test presupposes an *innocent* person) (emphasis in the original).

The majority erred in finding Spears was seized when he was asked if he had any weapons because law enforcement has the liberty, like any other citizen, to address questions to persons they encounter, whether or not the questions are potentially incriminating.

It was appropriate for law enforcement to approach Spears in order to ask him some questions, the record indicates he was free to not answer the questions posed to him. The Mendenhall court cited with approval Justice White's concurring opinion in Terry as follows: "There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets . . . . Police officers enjoy the liberty (again, possessed by every citizen) to address questions to other persons, . . . although ordinarily the person addressed has an equal right to ignore his interrogator and walk away." Mendenhall, 446 U.S. at 553 (quoting Terry, 392 U.S. at 31-34 (J.White, concurring)) (citations and internal quotations omitted).

While a First Circuit Court of Appeals judge, future Justice Breyer, in a dissenting opinion wrote, "The Fourth Amendment forbids unreasonable seizures. 'Reasonableness' is a matter of interest balancing. Here, the police interest in *voluntary* questioning is great. To hold that police cannot even ask voluntary questions of those who strike them as knowledgeable or suspicious would severely interfere with their ability to detect or investigate burglaries, murders, drug traffic and other crimes." United States v. Berryman, 717 F.2d 651, 661 (1st Cir. 1983) (J. Breyer dissenting) (emphasis in the original) (citing United States v. Berry, 670 F.2d 583, 595 (5th Cir. 1982) (*en banc*) ("informing our police that they cannot approach citizens to enlist their voluntary support in ending

this [drug epidemic] may be tantamount to preventing its interdiction at all."). Judge Breyer noted "[T]he privacy interest is minimal. While many of those questioned may feel 'pressure' to cooperate, most will not mind helping the police investigate. Those who do mind can always answer the query 'May I ask you some questions?' with the word 'no.'" Id. Although a dissent, Judge Breyer's views ultimately prevailed: the First Circuit, *en banc*, reversed the panel's decision finding an unlawful detention, and affirmed the district court's judgment for the reasons found Judge Breyer's dissent. United States v. Berryman, 717 F.2d 650 (1st Cir. 1983) (*en banc*).

The United States Supreme Court made clear "police questioning by itself, is unlikely to result in a Fourth Amendment violation." INS v. Delgado, 466 U.S. 210, 216 (1984) ("While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response."). The analysis does not change merely because law enforcement asks questions that are potentially incriminating or suggest law enforcement is investigating potential crime. United States v. Kim, 27 F.3d 947 (3d Cir. 1994) *cert denied*, 513 U.S. 1110 (1995) ("We do not believe an innocent person would feel compelled to cooperate with police by some potentially incriminating questions."); United States v. Little, 18 F.3d 1499, 1506 (9th Cir. 1994) (*en banc*) ("The asking of 'incriminating questions' is irrelevant to the totality of the circumstances surrounding the encounter."); United States v. Ringold, 335 F.3d 1168, 1173 (10th Cir. 2003) (noting that whether officers asked incriminating questions is not relevant to the totality-of-circumstances inquiry, instead the manner in which the questions are asked are what matters). In the present case, the record shows law enforcement was respectful and polite in their questions, and nothing in the records indicates they used language or a tone of voice

which would compel compliance.

The facts of Mendenhall are instructive. In Mendenhall, the U.S. Supreme Court found no seizure occurred during a consensual encounter between law enforcement and Mendenhall in the concourse of the airport: the agents were in plain clothes and did not display their weapons, they approached the defendant and identified themselves as federal agents, and they requested to see the defendant's identification and plane ticket. Id. at 555.

In the instant case, the police followed Spears and his girlfriend in a public setting for a brief time before asking him to stop. The necessity created by the couple's head start naturally required the officers to walk faster – briskly – to catch up, but this can hardly be considered a display of authority as contemplated in Terry or Mendenhall. Further, as in Mendenhall, more than one officer approached Spears and his girlfriend, the officers were dressed in plain clothes, and the officers asked to see identification. Demonstrating that Spears voluntarily spoke with the officers, Agent Tracy observed Spears was "very forthcoming" during the conversation and in his answers to the officers' questions. Until officer safety made the frisk necessary, the officers did not physically touch Spears. The officers never told Spears he could not leave, nor did they put him in handcuffs. If Spears and his girlfriend decided to walk away from the officers prior to the frisk, they would have been free to do so.

The majority is incorrect as a matter of law that merely following Spears and walking briskly to reach him constituted a show of force resulting in a seizure.

The majority found the officers engaged in a display of authority that became a seizure because they walked too fast. The majority's analysis is reminiscent of the state court findings of an "investigative pursuit" rejected by the United States Supreme Court in Michigan v. Chesternut, 486

U.S. 567 (1988). In Chesternut, the Supreme Court reversed the Michigan Court of Appeals determination that any "investigatory pursuit" by law enforcement constitutes a Fourth Amendment seizure. Id. at 569. In that case, the defendant was standing on the corner when a man exited a car that pulled up to the curb. The defendant saw the patrol car approach and so he turned and began to run. The patrol car quickly caught up to the defendant and drove alongside him for a short distance. The defendant began to discard packets of pills from his right-hand pocket. Id. The magistrate dismissed the case on the perceived Fourth Amendment violation and the Michigan Court of Appeals upheld the result, opining any "investigative pursuit" was a seizure under Terry. Id. at 571. The Supreme Court rejected the defendant's argument that "any and all police 'chases' are Fourth Amendment seizures," and emphasized that the totality of circumstances is the proper test. Id. at 572.

Reversing both the state trial and appellate courts' determinations, the Supreme Court found, "While the very presence of a police car driving parallel to a running pedestrian could be somewhat intimidating, this kind of police presence does not, standing alone, constitute a seizure. . . . Without more, the police conduct here – a brief acceleration to catch up with appellant, followed by a short drive alongside him – was not 'so intimidating' that respondent could reasonably have believed that he was not free to disregard the police presence and go about his business." Id. at 576 (citations omitted). As in Chesternut, the officers followed Spears and needed to "accelerate" to make up some distance. However, as in Chesternut, this did not transform a consensual encounter into an "investigative pursuit."

Like the Michigan Court of Appeals' "investigative pursuit" analysis, the majority's opinion

in the instant case is erroneous. Courts have found more dramatic approaches to not turn an encounter into a seizure. See United States v. Ford, 548 F.3d 1, 5 (1st Cir. 2008) (finding non-threatening that officers drove their vehicle the wrong way on a one way street to approach Ford, a pedestrian, and speak with him); O'Malley v. City of Flint, 652 F.3d 662, 669 (6th Cir. 2011) (finding when officer parked his vehicle behind O'Malley's vehicle in the driveway as O'Malley walked towards his house. O'Malley not only reasonably thought he was free to leave, but was walking away; officer's subsequent approach and statement to O'Malley that he was an officer and wanted to talk to him was likewise consensual, fact O'Malley stopped to speak with the officer did not by itself transform the encounter into a seizure); Tavolacci, at 1425 (finding the presence of officers in the doorway of a train roomette who questioned Tavolacci and asked for his ticket and identification did not defeat the "free to leave test."); Delgado, at 218-19 (finding factory workers were not seized during INS surveys where INS agents were placed near the exits of the factory sites; "the mere possibility that they would be questioned if they sought to leave the buildings should not have resulted in any reasonable apprehension by any of them that they would be seized or detained in any meaningful way."); DePeiza, (finding no seizure occurred when officers passed DePeiza a second time, called out to him, asked questions, and both got out of patrol vehicle. A seizure only occurred when officers first attempted to frisk DePeiza).

Even under the factors set out in State v. Williams, 351 S.C. 591, 571 S.E.2d 703 (Ct. App. 2002), a traffic stop case, the trial court's ruling is supported by evidence.

The Court of Appeals errantly relied on State v. Williams, 351 S.C. 591, 571 S.E.2d 703 (Ct. App. 2002), which posited a list of non-exhaustive factors to consider whether a reasonable person would consider themselves free to leave during a traffic stop. Of course, traffic stops differ

significantly from mere street encounters, as noted in the Williams opinion, because a traffic stop as a preexisting seizure enhances the coercive nature of the situation and is markedly different from a person approached by officers on the street or in a public place. Id. at 600-01, 571 S.E.2d at 708-09; Mendenhall, 446 U.S. at 556-57 ("Moreover, stopping or diverting an automobile in transit, with the attendant opportunity for a visual inspection of areas of the passenger compartment not otherwise observable, is materially more intrusive than a question put to a passing pedestrian, and the fact that the former amounts to a seizure tells very little about the constitutional status of the latter.").

Arguably, the enumerated factors referenced in Williams may offer some utility in determining whether a street encounter became a seizure. However, even when utilizing the Williams factors to analyze the facts of the instant case, the trial court did not abuse its discretion as reasonable minds could differ and find the encounter was consensual:

(1) Time and place of encounter: The encounter took place during daylight in a public setting, near a post-office building. Accordingly, the encounter took place in a setting that was not inherently coercive. Further, Spears and his companion were pedestrians who could have walked away from the encounter. Unites States v. Weaver, 282 F.3d 302, 311-12 (1st Cir. 2002) (noting Weaver, as a pedestrian, could have walked away from the encounter; pedestrian encounters "are much less restrictive of an individual's movements" than situations occurring during a traffic stop).

(2) Number of officers present: Three officers approached Spears and his girlfriend. In other words, Spears and his companion were outnumbered three to two. See United States v. Tavolacci, 895 F.2d 1423 (D.C. Cir. 1990) (noting "the presence of two officers does not itself transform a contact into a seizure, citing United States v. Carrasquillo, 877 F.2d 73, 75 (D.C. Cir.

1989); United States v. Palen, 793 F.2d 853 (7th Cir. 1986); and United States v. Viegas, 639 F.2d 42 (1st Circ. 1981) ("all involving two officers")). Notably, the officers did not position themselves to prevent Spears or his companion from walking away. Commonwealth v. Depeiza, 868 N.E.2d 90 (Mass. 2007) (finding officers positioned on either side of the defendant did not block defendant's path or otherwise restrict his freedom of movement).

(3) Whether the officers were uniformed: The officers were in plain clothes. The officers' badges were visible, but they did not flash their badges or use their badges to obtain compliance with their requests. They were armed, but their weapons were holstered. United States v. Ringold, 335 F.3d 1168, 1172 (10th Cir. 2003) (noting officers were uniformed and armed, but neither officer touched or brandished their weapon). It was appropriate and not intimidating to the reasonable innocent person for the officers' identity as law enforcement officers to be apparent and for them to be carrying holstered weapons, which they did not draw.

(4) Length of detention: The record suggests the encounter was brief before it became apparent that Spears was hiding something in his waistband, which officers reasonably feared might be a weapon.

(5) Move to a different location or isolate: Law enforcement did not take any action to isolate Spears or move him to a different location. The encounter occurred as Spears and his companion walked towards apartments and occurred out in the open. Spears chose to walk away from the bus, not law enforcement. See United States v. Ringold, 335 F.3d 1168, 1173 (10th Cir. 2003) (noting the "defendants themselves chose to leave the highway and voluntarily stopped their vehicle at the service station.").

(6) Law enforcement did not inform Spears he was free to leave. Of course, this factor alone is not dispositive. See United States v. Ringold, 335 F.3d 1168, 1174 (10th Cir. 2003).

(7) Whether law enforcement indicated the person was a suspect in a crime: Law enforcement advised Spears of problems such as drug trafficking on the bus line, but did not directly accuse Spears of violating any law. See United States v. Ringold, 335 F.3d 1168, 1171, 1173 (10th Cir. 2003) (finding no seizure when the officer advised Ringold that he had heard of transportation of drugs and weapons on the interstate and asked Ringold if he had anything like that. The district court noted the conversation was polite and friendly in tone.); United States v. Tavolacci, 895 F.2d 1423, 1425 (D.C. Cir. 1990) (Tavolacci asked what the questioning was about and the officer advised Tavolacci he was with the drug interdiction unit investigating narcotics before asking for Tavolacci's ID again); United States v. Kim, 27 F.3d 947 (3d Cir. 1994) *cert denied*, 513 U.S. 1110 (1995) ("We do not believe an innocent person would feel compelled to cooperate with police by some potentially incriminating questions."); United States v. Little, 18 F.3d 1499, 1506 (9th Cir. 1994) (*en banc*) ("The asking of 'incriminating questions is irrelevant to the totality of the circumstances surrounding the encounter."). Note that while this factor may be relevant to a traffic stop case like Williams, in which questioning may prolong the initial detention – the traffic stop itself – it is not relevant to a street encounter or public encounter because no detention has yet occurred. Little, supra. Reliance on this factor demonstrates the Court of Appeals' misapprehension of the law in the instant case.

(8) Whether law enforcement retained person's documents: Law enforcement asked for identification, and he produced his New York identification, but the record fails to indicate that they

kept his identification. Any retention of the identification was not accompanied by any other action compounding any sense of restraint. Further, Spears was free to refuse showing identification, unlike a motorist in a traffic stop. See United States v. Ford, 548 F.3d 1, 6 (1st Cir. 2008) (finding while retaining the license was an important consideration, declining to elevate it above other factors and noting that Ford was on foot on a public street, differing the case from airport cases, where citizens need documentation to move from place to place); United States v. Weaver, 282 F.3d 302, 313 (4th Cir. 2002) (finding retaining pedestrian's identification differs from officers retaining a driver's license during a traffic stop; unlike a traffic stop, an individual is free to refuse when asked for identification); Tavolacci at 1425-26 (finding retention of papers may transform an interview into a seizure where it is prolonged or accompanied by some other act compounding an impression of restraint).

Finally, officers did not exhibit threatening behavior or contact. While two officers may have been carrying visible weapons, all indications were the weapons were holstered and officers did not display or draw the weapons. When asked if she could see the officers' guns, Spears' companion responded, "I guess you could." R. p. 56. This indicates that the holstered weapons did not make much of an impression. Further, at a minimum, reasonable minds may differ on the significance that officers quickened their pace to reach Spears and his companion. The officers did not run or exhibit any threatening behavior as they approached. The manner of approaching Spears and the companion was simply appropriate. Officer Tracy testified that as they were closer to Spears and his companion, they said "something nonthreatening like, 'Excuse us, do you mind if we have a word with you.'" R. p. 14, lines 4-6. This is representative of the professional, respectful manner law enforcement

undertook in the encounter. Officer Tracy testified that beforehand, the officers met and discussed "steps about not to impede the person's movement." R. p. 15, lines4-8. Officer Tracy described catching up to Spears and his companion as follows: "They're walking, we're walking behind them, we didn't run. However quickly we could walk **a little faster than they did** to make contact with them." R. p 31. Officer Tracy explained to the jury that "us running after somebody is more of a show of force so we didn't want to run after them." R. p. 134, line 24 – p. 135, line 2. He denied defense counsel's suggestion they were chasing Spears. R. p. 135, lines 6-8. The trial court could reasonably conclude that merely walking more briskly, "a little faster," did not signal to a reasonable person that they were not free to walk away. See also United States v. Maragh, 894 F.2d 415 (D.C. Cir. 1990) (finding no detention where officer approached Maragh "from his left rear" and "stopped at an oblique angle" so Maragh could continue walking if he wanted to, then identified himself as a police officer while a detective positioned himself as back up and a third detective positioned himself out of sight).

The Terry frisk was permissible because of reasonable concerns for officer safety.

Spears persistence in fiddling with his waistband, despite Agent Tracy's admonitions, led Agent Tracy to justifiably perform a pat down frisk due to valid concerns Spears was armed and dangerous. Only at this point did a seizure occur, and it was justified by the important state interest of officer safety. The need for police to conduct a frisk or patdown is greater than just the governmental interest in investigating crime. Terry, 392 U.S. at 23. The more important purpose of allowing frisks is to protect the life of police officers. Id. ("[T]here is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not

armed with a weapon that could unexpectedly and fatally be used against him."). Since police officers are all too often killed in the line of duty by armed criminals, "[c]ertainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties." Id.

This Court has explained even when a Terry stop is proper, the police "must have a reasonable belief the defendant is armed and dangerous" before they may frisk a defendant. State v. Fowler, 322 S.C. 263, 267, 471 S.E.2d 706, 708 (Ct.App. 1996), citing Ybarra v. Illinois, 444 U.S. 85, 100 S.Ct. 338 (1979). "In assessing whether a suspect is armed and dangerous, the officer need not be absolutely certain the individual is armed." State v. Blassingame, 338 S.C. 240, 249, 525 S.E.2d 535, 540 (Ct. App. 1999) (citing Terry). "The issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." Blassingame.

In the instant case, Agent Tracy had a reasonable belief Spears was armed and dangerous. When Agent Tracy asked Spears if he had any weapons on him, Spears hesitated before answering "no." This raised suspicion for Agent Tracy because his training and experience taught him that hesitation often infers lying. More importantly, Spears began pulling his shirt and moving his hands around his waistband and pocket. Agent Tracy asked Spears twice to keep his hands where he could see them because he continued to pull at his shirt and touch his waistband and pocket. After the second time, Agent Tracy decided to pat the Spears down the safety of himself and the other officers.

Spears's failure to abide by Agent Tracy's request to keep his hands where he could see them, combined with Spears' movements, would cause a reasonable person in Agent Tracy's position to

believe the frisk was necessary to preserve the officers' safety. Fowler. Also, Agent Tracy recounted the specific facts which led Agent Tracy to believe Spears may be armed and dangerous. Id. Thus, the frisk was lawful and did not violate the Fourth Amendment.

Further, Agent Tracy lawfully seized the contraband found in Spears' waistline because upon feeling the item, he immediately recognized, based on his experience and training, the item was crack cocaine.[2] The crack cocaine was admissible under the plain feel doctrine of Minnesota v. Dickerson, 508 U.S. 366 (1993) because the incriminating nature of the contraband was immediately apparent to Agent Tracy, and he rightfully accessed the object during the Terry frisk.

In the instant case, law enforcement did not take any actions which violated the Fourth Amendment. The record shows the police engaged Spears in a consensual street encounter, conducted a lawful Terry frisk, and recovered the contraband properly through the plain feel doctrine. A trial court's ruling regarding a motion to suppress will be upheld when it is supported by any evidence. State v. Moore, 415 S.C. 245, 781 S.E.2d 897 (2016) (quoting State v. Provet, 405 S.C. 101, 107, 747 S.E.2d 453, 456 (2013)). The trial court's ruling was supported by evidence and therefore, the conviction and sentence should be affirmed.

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[2] Spears did not challenge the seizure of the contraband on the grounds it exceeded the scope of a permissible Terry frisk, as noted by the Court of Appeals in its opinion.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests this Court to grant the State's petition for writ of certiorari. Should this Court see fit to grant the State's petition, the State respectfully requests permission to more fully brief the issues herein.

Respectfully submitted,

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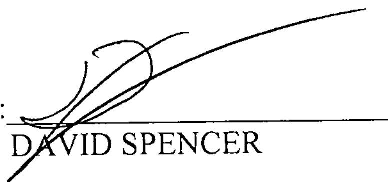

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September 20, 2017

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

Robert E. Hood, Circuit Court Judge

Opinion No. 5489 (S.C. Ct. App. filed May 31, 2017)
Appellate Case No. 2015-000390

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S.C. SUPREME COURT

THE STATE,

Petitioner,

vs.

ERIC TERRELL SPEARS,

Respondent.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the Petition for Writ of Certiorari and Appendix on Respondent 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.

This 20th day of September, 2017.

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