STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KEVIN ALSTON,

APPELLANT

APPELLATE CASE NO. 2016-000739

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the court err by denying Appellant's motion to suppress evidence seized by law enforcement during a pretextual traffic stop in violation of Appellant's right to privacy under Article I, Section 10 of the South Carolina Constitution where a drug interdiction officer stopped Appellant's vehicle under the guise of a routine traffic stop after orchestrating the arrival of a drug detection drug before commencing the stop because he had a mere hunch Appellant was involved in criminal activity?

STATEMENT OF THE CASE

A Beaufort County Grand Jury indicted Appellant on May 31, 2012 for possession of a controlled substance and possession of cocaine base. R. 217. The indictment for possession of cocaine base was later amended on July 30, 2015 to reflect the correct statute. R. 221. Appellant's case was called to trial on December 14, 2015 before the Honorable Carmen T. Mullen, and a jury. R. 1. Assistant Solicitors Brian Hollen and Katherine Littleton represented the state, and Trasi Campbell represented Appellant. R. 2. Judge Mullen ultimately granted a mistrial after a juror disclosed for the first time during deliberations that she worked with the wife of one of the key law enforcement witnesses. R. 185, l. 1 – 187, l. 6.

Appellant's case was called to trial again on January 19, 2016 before Judge Mullen, and a jury. R. 1. Assistant Solicitors Brian Hollen and Alexandra Joseph represented the state, and Trasi Campbell represented Appellant. R. 2. The parties did not relitigate the pretrial motions held on December 14, 2015 before the first trial. R. 60, l. 4 – 62, l. 18. Judge Mullen stood by her ruling on Appellant's pretrial motion to suppress from the previous trial.[1] R. 63, ll. 5-8; R. 64, ll. 11-15.

On January 20, 2016, the jury found Appellant guilty. R. 180, ll. 12-20. He was sentenced to three years' imprisonment suspended upon the service of three years' probation for possession of cocaine base and one year suspended upon the service of three years' probation for possession of a controlled substance. R. 203, l. 15 – 204, l. 14.

This appeal follows.

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[1] Judge Mullen reviewed a transcript of the pretrial hearing on Appellant's motion to suppress before she announced she would stand by her previous ruling. R. 25, l. 5 – 26, l. 20.

STATEMENT OF THE FACTS

On March 7, 2012, Richard Menendez of the Beaufort County Sheriff's Office (BCSO) stopped Appellant's vehicle on Lady's Island.[2] Menendez "had just transitioned" from the Drug Task Force. R. 7, ll. 18-20. He was assigned to the bomb squad and was responsible for the "technical surveillance" for the BCSO. R. 7, ll. 20-22. At the time of the stop, Menendez was in route to set up a surveillance system.[3] He admitted he was not "working patrol" that day and was not specifically tasked with enforcing the traffic laws. R. 8, ll. 1-8; R. 86, ll. 2-5. He further acknowledged that during the entire year of 2012, the year in which Appellant was stopped, he made a total of three or four traffic stops. R. 86, ll. 9-15.

Menendez claimed he stopped Appellant's vehicle after he allegedly observed two traffic violations. The first was a broken tail light, which Menendez noticed when he first observed the vehicle at the intersection of Parris Island Gateway and Highway 802. The second alleged violation occurred *over four miles* later when Menendez claimed Appellant failed to come to a complete stop before turning right at a red light near the McTeer Bridge which leads to Lady's Island. Even after this second alleged traffic violation, Menendez continued to follow Appellant for approximately 1.4 miles before activating his blue lights and signaling Appellant to pull over. R. 9, ll. 6-18; R. 13, l. 19 – 14, l. 20; R. 83, l. 16 – 84, l. 23.

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[2] For whatever reason, Appellant's trial took place almost *four* years after his arrest. Menendez admitted he had little independent recollection of the traffic stop and, consequently, was forced to rely heavily on the incident report he completed shortly after the stop during his testimony. R. 12, ll. 12-18. Unfortunately, he could not provide a lot of detail about the circumstances surrounding the traffic stop because he could not remember. He repeatedly answered, "I don't recall."

[3] During his testimony before the jury, Menendez said he "was going to do a site survey, or to a location to recover some camera equipment or something like that." R. 50, ll. 18-23. This is one of many examples where Menendez's testimony during the pretrial hearing and before the jury is inconsistent.

Menendez testified that it "was not unusual when [he] was working for [him] to run a [vehicle] tag before [he] pulled [an individual] over, to *identify whom [he] might be dealing with*, or if there's any other issues with the vehicle." However, Menendez, rather conveniently, could not recall whether he contacted dispatch at some point during the nearly five and a half miles he followed Appellant's vehicle. R. 84, l. 24 – 85, l. 14 (emphasis added). Nevertheless, he knew he "definitely contacted them [dispatch] and told them I'd be stopping" once he activated his blue lights. R. 85, ll. 4-7. While he claimed he did not recognize Appellant before he stopped him, Menendez admitted he "*may have known [Appellant's] name*" from his prior work with the Drug Task Force. R. 8, ll. 9-22 (emphasis added).

Sergeant Kyle Strickland, who was assigned to the Drug Task Force, admitted he was working drug interdiction that day and heard Menendez contact dispatch over the radio. Strickland further admitted he "had learned of Mr. Alston's [Appellant's] name" during prior investigations for the Drug Task Force. R. 38, l. 2 – 39, l. 22. At some point, although it is not clear when, Strickland and Menendez were in contact over the telephone. Strickland stated that "because [he] knew [Appellant's] name, [he] came over to the stop." R. 89, ll. 16-22. While he was "in route over there," he called Sergeant Dan Martin, who was a K9 handler with the Drug Task Force, and requested Martin report to the scene.[4] R. 39, l. 23 – 90. At the time, Martin was partnered with a dog detection dog named Nero. R. 23, ll. 2-19.

After Appellant pulled over, Menendez approached the vehicle, identified himself, and requested Appellant's driver's license and other documentation. Appellant presented a Parris Island employee identification card and admitted his license was suspended. Menendez called

[4] Menendez admitted that, before he was assigned to "technical surveillance," he was "a daily, integral part of the Drug Task Force" and "worked intimately" with Sergeants Martin and Strickland. R. 19, ll. 3-9.

dispatch to verify this information, and, shortly thereafter, asked Appellant "to step out of the vehicle" and "placed him under detention at that time." R. 9, l. 19 – 10, l. 6.

Sergeant Strickland arrived at the location of the traffic stop a "couple minutes" after Appellant pulled over. R. 32, l. 24 – 33, l. 2. He claimed Sergeant Martin arrived right after him. R. 33, ll. 12-13. When Strickland and Martin arrived at the scene, Appellant was allegedly standing outside his vehicle and had already been detained by Menendez. Martin, at the direction of Sergeant Strickland, who at this stage had taken over the investigation from Menendez, conducted a free air sniff of the exterior of Appellant's vehicle with his drug detection dog. On the "second pass" around the car, the dog alerted at the rear passenger door on the driver's side. Once the dog alerted to the exterior of the vehicle, Martin "opened the door and . . . allowed the dog in the car." The dog allegedly alerted again near the center console and ashtray area. Underneath a towel on top of the center console, Martin found a white powder substance he suspected was cocaine. R. 24, l. 11 – 24. He subsequently hand searched the rest of the vehicle and found a measuring cup in the rear of the vehicle that contained a white residue he likewise suspected was cocaine. R. 25, l. 25 – 26, l. 18.

Appellant was arrested for driving under suspension and possession of cocaine. During a search of his person incident to arrest, Strickland found a single pill of Oxycodone in Appellant's front pocket. Appellant was also charged with possession of a controlled substance. R. 35, ll. 2-8; R. 35, ll. 18-25.

The suspected cocaine was analyzed by a forensic chemist at the BCSO. It tested positive for cocaine base with a weight of 0.05 grams. R. 142, ll. 8-11. The pill tested positive for oxycodone and acetaminophen, both a Schedule II substance. R. 142, ll. 12-20.

Arguments by Counsel

At the conclusion of the suppression hearing, defense counsel argued this was "drug interdiction" and not "a routine traffic stop." She asserted that Sergeants Menendez and Strickland, who was a member of the Drug Task Force, "conducted a drug interdiction stop masked as a traffic violation stop on Mr. Alston [Appellant]." She emphasized that Appellant "was followed for over ten minutes before he was actually blue-lighted by Officer Menendez." R. 76, l. 13 – 77, l. 15. Counsel further argued:

> But we, again, take the position that this was a concerted effort. This was orchestrated and manipulated so as to not violate the Caballes[5] and the Foreman[6] and the . . . Provet[7] rules on dog sniff situations, which are, the sniff is valid if it's performed during the lawful stop. We don't even concede the stop was lawful, but in any event, it was manipulated. You . . . may order the dog sniff if you have reasonable suspicion of criminal activity during the initial valid traffic stop. And you can't extend the stop. So, in order not to extend the stop, you have to have all the players in place, converging at the same time in order to not extend the stop.
>
> And so, we would assert to your Honor that it's a violation of most importantly, not just Mr. Alston's Fourth Amendment rights under the United States Constitution, but as we found, an interesting little situation here with the South Carolina Constitution giving us a broader protection and not actually being addressed fully by our State Supreme Court yet. We would rely on that and ask your Honor to suppress both the crack cocaine and the pill that were located on Mr. Alston.

R. 46, l. 16 – 47, l. 14.

Lastly, defense counsel told the court she was also relying on her written motions, which were marked as Court's Exhibit No. 1 and Court's Exhibit No. 2. R. 43, ll. 11-23; See R. 205 (Court's Exhibits Nos. 1-2).

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[5] Illinois v. Caballes, 543 U.S. 405 (2005).

[6] United States v. Foreman, 369 F.3d 776 (4th Cir. 2004).

[7] State v. Provet, 405 S.C. 101, 747 S.E.2d 453 (2013).

In his Motion to Suppress Evidence Seized in Violation of Defendant's Rights marked as Court's Exhibit No. 2, Appellant argued that the right to privacy provision found in Article I, § 10 of the South Carolina Constitution provides broader protections than the Fourth Amendment to the United States Constitution. Motion at 4. Appellant urged the court to find that, although federal courts construing the Fourth Amendment have concluded pretextual traffic stops do not violate the federal constitution, such stops violate our state constitution under Article I, § 10. Motion at 5.

Court's Ruling

The trial court found the traffic stop was "valid" since the officer observed a broken tail light, which is an equipment violation, and later a driving violation. R. 49, ll. 15-18.

However, the court stated, "Was it gratuitous? The canine was there, and I think maybe Ms. Campbell [defense counsel] has something as far as, you know, they [the officers] figured out so as not to reasonably extend the stop, they've got all their ducks in a row and are ready to go. But I think it was within the reasonable amount of time period. The dog did the sniff. From the sniff, that prompted the dog alert . . . I think that does allow for them to go on with the search. And also, too, . . . we know he [Appellant] was detained. He was under arrest [for driving under suspension]. They were going to take him in. And I heard [the officer] state something like we're going to have to impound the car anyway, and to impound the car, we're going to have to do a search as well." R. 49, l. 19 – 50, l. 12.

Consequently, the court denied the motion to suppress. R. 50, ll. 17-18. Appellant properly renewed his objection when the drugs were admitted during trial. R. 145, l. 23 – 146, l. 14; R. 149, l. 13 – 150, l. 6.

ARGUMENT

The court erred by denying Appellant's motion to suppress evidence seized by law enforcement during a pretextual traffic stop in violation of Appellant's right to privacy under Article I, Section 10 of the South Carolina Constitution where a drug interdiction officer stopped Appellant's vehicle under the guise of a routine traffic stop after orchestrating the arrival of a drug detection drug before commencing the stop because he had a mere hunch Appellant was involved in criminal activity.

State Right to Privacy – Article I, Section 10 of the South Carolina Constitution

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. U.S. Cont. amend. IV. "In parallel with the protection of the Fourth Amendment, the South Carolina Constitution also provides a safeguard against unlawful searches and seizures." State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001) (citing S.C. Cont. art. I, § 10). "In addition to language which mirrors the Fourth Amendment, S.C. Cont. art. 1, § 10 contains an express right to privacy: The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and *unreasonable invasions of privacy* shall not be violated." Id. at 644, 541 S.E.2d at 840-841 (emphasis in original).

"The relationship between the two constitutions is significant because '[s]tate courts may afford more expansive rights under state constitutional provisions than the rights which are conferred by the Federal Constitution.'" Id. at 643, 541 S.E.2d at 840 (quoting State v. Easler, 327 S.C. 121, 131 n. 13, 489 S.E.2d 617, 625 n. 13 (1997)). "Therefore, state courts can develop state law to provide their citizens with a second layer of constitutional rights." Id. "This relationship is often described as a recognition that the federal Constitution sets the floor for

individual rights while the state constitution established the ceiling." Id.

In State v. Forrester, our Supreme Court concluded, "The South Carolina Constitution, with an express right to privacy provision included in the article prohibiting unreasonable searches and seizures, favors an interpretation offering a higher level of privacy protection than the Fourth Amendment." Id. at 645, 541 S.E.2d at 841. "By articulating a specific prohibition against 'unreasonable invasions of privacy,' the people of South Carolina have indicated that searches and seizures that do not offend the federal Constitution may still offend the South Carolina Constitution." State v. Weaver, 374 S.C. 313, 322, 649 S.E.2d 479, 483 (2007) (citing Forrester, 343 S.C. at 644-645, 541 S.E.2d at 841).

Several cases in South Carolina discuss the right to privacy contained in Article I, § 10 of our state constitution. The most comprehensive discussions of the right to privacy are contained in State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001), State v. Weaver, 374 S.C. 313, 649 S.E.2d 479, (2007), and State v. Counts, 413 S.C. 153, 776 S.E.2d 59 (2015). See Counts, 413 S.C. at 167, 776 S.E.2d at 67.

In Forrester, the defendant was approached by law enforcement for questioning after an officer observed her exhibiting suspicious behavior at a local train station. According to the officer, he identified himself to Forrester who agreed to let him search her luggage. Because Forrester was clutching her purse tightly, the officer asked to search the purse. Without surrendering possession, Forrester opened the purse to allow the officer to look inside. The officer took the purse and tore open the lining at which time he found crack cocaine. Forrester, 343 S.C. at 640-641, 541 S.E.2d at 839. On appeal, Forrester argued she had not given the officer consent to search her purse, and thus, the crack cocaine was discovered in violation of the right to privacy provision found in Article I, § 10 of our state constitution. She also argued that

the officer's failure to inform her of her right to refuse consent to a search of her purse invalidated the search. Id. at 641, 541 S.E.2d at 839.

Our Supreme Court reversed Forrester's conviction after finding the officer "exceeded the scope of Forrester's consent when he proceeded beyond visual inspection of the purse granted by Forrester to an intense physical examination of the purse." Id. at 648, 541 S.E.2d at 843. The Court emphasized that "[u]nder our state constitution, suspects are free to limit the scope of the searches to which they consent." Id. However, the Court found the state right to privacy does not require informed consent prior to government searches. Forrester, 343 S.C. at 647-648, 541 S.E.2d at 842-843. Specifically, the Court stated, "[W]hile our state constitution may provide a higher level of protection in the search and seizure context, it does not go so far as to require informed consent prior to government searches." Id.

Six years later, in State v. Weaver, our Supreme Court again acknowledged the higher level of privacy protection afforded by our state constitution. Weaver was convicted of murder following a shooting at a nightclub. Weaver, 374 S.C. at 317, 649 S.E.2d at 480. The investigation led law enforcement to the home of Weaver's cousin where they discovered the vehicle that had been driven by Weaver parked in the backyard. Id. at 317, 649 S.E.2d at 481. According to Weaver's cousin, Weaver had recently been at the home and asked for a change of clothes, some bleach, and a garbage bag. Weaver then left the home. Id. Upon finding the vehicle driven by Weaver, the investigating officer opened the door and discovered the inside of the vehicle was wet and smelled of bleach. Id. at 317-318, 649 S.E.2d at 481. Based on this evidence, the officers impounded the vehicle and processed it. They found blood in the vehicle that matched that of the shooting victim. Id. at 318, 649 S.E.2d at 481. On appeal, Weaver

argued the evidence found in the vehicle should have been suppressed as it was the product of an impermissible warrantless search. Id.

The Court rejected Weaver's argument, holding the warrantless search met the automobile exception to the Fourth Amendment. Id. at 319-321, 649 S.E.2d at 482. However, the Court also analyzed whether the search and seizure violated Weaver's right to privacy pursuant to the South Carolina Constitution. Id. at 321, 649 S.E.2d at 483. Citing Forrester, the Court noted the South Carolina Constitution affords a higher level of privacy protection than the Fourth Amendment. Id. Nevertheless, the Court held the privacy provision did not require a warrant before the search and seizure of a vehicle located in the backyard of a private residence. Id. at 322, 649 S.E.2d at 483. In so holding, the Court explained that "[t]he focus of the state constitution is on whether the invasion of privacy is reasonable, regardless of the person's expectation of privacy in the vehicle to be searched. Once the officers have probable cause to search a vehicle, the state constitution's requirement that the invasion of one's privacy be reasonable will be met." Id.

However, as later highlighted by our Supreme Court in State v. Counts, former Chief Justice Pleicones, in a concurring opinion in Weaver, emphasized that "[o]ur state constitution's provision protecting unreasonable invasions of privacy necessarily requires some analysis of the privacy interests involved when a warrantless seizure is made on private property." Weaver, 374 S.C. at 326, 649 S.E.2d at 485; See Counts, 413 S.C. at 170, 776 S.E.2d at 68-69. Under the facts in Weaver, Justice Pleicones found no state constitutional violation because Weaver was not the owner of the vehicle that was seized and the vehicle was not parked at Weaver's residence. Counts, 413 S.C. at 170, 776 S.E.2d at 69 (citing Weaver, 374 S.C. at 326, 649 S.E.2d at 485).

Most recently, in State v. Counts, our Supreme Court again reaffirmed the higher level of privacy protection afforded by our state constitution. In Counts, the police "received two separate anonymous tips from citizens who alleged that Counts was selling drugs. These tips also identified vehicles driven by Counts, his phone number, and his use of multiple identities." 413 S.C. at 173, 776 S.E.2d at 70. The police also "confirmed that Counts had two false identification cards on record and had prior drug convictions." Id. Based on this information, officers conducted a "knock and talk" at Count's residence. When Counts opened the door, the officers "immediately smelled 'the strong odor of marijuana'" and noticed "a 'rolled blunt' on the coffee table in the living room." Id. at 158, 776 S.E.2d at 62. One of the officers then observed a silver automatic gun in Counts' hand. The officers drew their guns and approached Counts who dropped his gun and was immediately detained. Id. Law enforcement then conducted a protective sweep of the residence during which they found a bag of marijuana and a scale in plain view. Id. A search warrant was later obtained. The search revealed approximately 800 grams of marijuana, a large sum of cash, and other incriminating evidence. Id. at 158-159.

Counts moved to suppress the evidence arguing law enforcement's search of his home violated the Fourth Amendment of the United States Constitution and Article I, § 10 of the South Carolina Constitution. Id. at 157, 776 S.E.2d at 61. Counts further asserted that, pursuant to the right to privacy provision in our state constitution, law enforcement must have reasonable suspicion before they conduct a "knock and talk" at a person's residence. Id. at 161-162, 776 S.E.2d at 64. Our Supreme Court agreed. Recognizing that "the privacy interests in one's home are the most sacrosanct," the Court held "that law enforcement must have reasonable suspicion of illegal activity at a targeted residence prior to approaching the residence and knocking on the door." Id. at 172, 776 S.E.2d at 69-70. The Court noted, "Otherwise, we foresee the potential

for abuse if law enforcement targets a neighborhood and indiscriminately knocks on doors with hope of discovering contraband without a search warrant." Id.

Applying this rule to the facts presented in Counts, the Supreme Court held law enforcement had reasonable suspicion of illegal activity prior to conducting the "knock and talk" at Counts' residence. Id. at 173, 776 S.E.2d at 70. The Court held the specificity of the anonymous tips and the corroboration by law enforcement of the tips indicated "the officers were not randomly knocking on Counts' door but had reasonable suspicion to support their decision to approach Counts' residence and conduct the 'knock and talk.'" Id.

As demonstrated by our Supreme Court's opinions in Forrester, Weaver, and Counts, the Court has sought to guard the broader state constitutional right to privacy, but still give credence to the government's interest in conducting legitimate searches.

Pretextual Traffic Stops Violate Article I, Section 10

In Whren v. United States, 517 U.S. 806 (1996), the United States Supreme Court held that a traffic stop is reasonable under the Fourth Amendment where officers have probable cause to believe that a traffic violation has occurred regardless of the officers' subjective intent or actual motivation. Id. at 819. The Court exclaimed, "Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." Id. at 813. Thus, pretextual traffic stops are permitted under the federal constitution as long as officers have probable cause to believe a traffic violation has occurred.

Significantly, the United States Supreme Court's opinion in Whren "has suffered widespread criticism of its legal reasoning, policy choices, and consequences." State v. Ochoa, 206 P.3d 143, 148 (N.M. Ct. App. 2008) (citing Phyllis W. Beck & Patricia A. Daly, State Constitutional Analysis of Pretext Stops: Racial Profiling and Public Policy Concerns, 72 Temp.

L.Rev. 597, 597 (1999); David O. Markus, Whren v. United States: A Pretext to subvert the Fourth Amendment, 14 Harv. BlackLetter L.J. 91, 96-109 (1998); Patricia Leary & Stephanie Rae Williams, Toward a State Constitutional Check on Police Discretion to Patrol the Fourth Amendment's Outer Frontier: A Subjective Test for Pretextual Seizures, 69 Temp. L.Rev. 1007, 1025 (1996)).

While pretextual traffic stops do not violate the Fourth Amendment, such stops are unconstitutional under the right to privacy provision found in Article I, § 10 of the South Carolina Constitution. At least two states, Washington and New Mexico, have rejected the United States Supreme Court's holding in Whren and assess the reasonableness of a traffic stop based on the subjective motivations of the police. See State v. Ladson, 979 P.2d 833 (Wash. 1999) and State v. Ochoa, 206 P.3d 143 (N.M. Ct. App. 2008). Appellant urges this Court to do the same.

In State v. Ladson, the Supreme Court of Washington held pretextual traffic stops violate the Washington state constitution. Ladson, 979 P.2d at 842. The court emphasized that "the essence" of every "pretextual traffic stop is that the police are pulling over a citizen, not to enforce the traffic code, but to conduct a criminal investigation unrelated to the driving. Therefore the reasonable articulable suspicion that a traffic infraction has occurred which justifies an exception to the warrant requirement for an ordinary traffic stop does not justify a stop for criminal investigation." Id. at 979 P.2d at 837-838. The court further held, "Article I, section 7 [of the Washington state constitution], forbids use of pretext as a justification for a warrantless search or seizure because our constitution requires we look beyond the formal justification for the stop to the actual one. In the case of pretext, the actual reason for the stop is inherently unreasonable, otherwise the use of pretext would be unnecessary." Id. at 839. The

Washington court concluded, "When determining whether a given stop is pretextual, the court should consider the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer's behavior. Id. at 843.

In State v. Ochoa, the Court of Appeals of New Mexico likewise held pretextual traffic stops are not constitutionally reasonable in New Mexico. Ochoa, 206 P.3d at 146. In so holding, the court emphasized, "Although there may be a technical violation of the traffic law, the true reason for the stop lacks legal sufficiency. Thus, by definition, a pretextual stop raises . . . constitutional concerns . . . that police officers will abuse what is otherwise valid presence as a subterfuge to conduct an invalid investigation." Id. at 149-150. The court further stated:

> We believe that our constitutional requirement that searches and seizures be reasonable based on the particular facts of each case should preclude our adoption of the mechanical federal rule [announced in Whren] that a technical violation of the traffic code automatically legitimizes a stop. Further, . . . we do not believe that the federal bright-line rule is justified. The purpose of the reasonable suspicion/probable cause exception to the warrant requirement—to prevent officers from acting on unsupported hunches—is not furthered when our courts refuse to examine the unconstitutional hunch motivating the stop.

Id. at 153.

After holding pretextual traffic stops violate the New Mexico constitution, the court directed, "To determine whether a stop is a pretextual subterfuge, courts should consider the totality of the circumstances, judge the credibility of witnesses, weigh the evidence, make a decision, and exclude the evidence if the stop was unreasonable at its inception. The totality of the circumstances includes considerations of the objective reasonableness of an officer's actions and the subjective intent of the officer—the real reason for the stop." Id. at 155.

As evidenced by our Supreme Court's opinions in Forrester, Weaver, and Counts, the Court has gone to lengths to protect South Carolina citizens' constitutional right to privacy. In furthering this effort, this Court should hold pretextual traffic stops violate the right to privacy

provision contained in Article I, § 10 of our state constitution and order courts to consider both the subjective intent of the officer as well as the objective reasonableness of the officer's actions.

Here, Sergeant Menendez, who had recently transitioned from the Drug Task Force, stopped Appellant's vehicle after allegedly observing two traffic violations. However, the stop was clearly pretextual. Menendez admitted he was not tasked with enforcing the traffic laws that day and instead was in route to set up a surveillance system for the BCSO. He further acknowledged that during the entire year of 2012, the year in which Appellant was stopped, he only conducted three or four traffic stops. Moreover, and most significantly, Sergeant Menendez followed Appellant for more than five and a half miles before he initiated the traffic stop, and admitted that, while he did not recognize Appellant before the stop, he knew Appellant's name from his prior work for the Drug Task Force. It is obvious, as counsel argued below, that the officers had a hunch that Appellant may be involved in criminal activity, and orchestrated the stop in order to conduct a dog sniff without extending the traffic stop in violation of Illinois v. Caballes, 543 U.S. 405 (2005). Therefore, it is clear that Menendez stopped Appellant not merely to enforce the traffic laws, but to engage in drug interdiction. Because Menendez had a constitutionally invalid purpose for the traffic stop, which is not exempt from the warrant requirement, the stop violated the South Carolina constitution. Consequently, the evidence seized should have been suppressed by the trial court.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his convictions and sentence and suppress the evidence illegally seized by law enforcement in violation of Appellant's right to privacy pursuant to the Article 1, Section 10 of the South Carolina Constitution.

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ATTORNEY FOR APPELLANT

This 20th day of September, 2017.

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, 20014, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

September 20, 2017

Lara M. Caudy

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