ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County
Honorable Carmen T. Mullen, Circuit Court Judge
Appellate Case No. 2016-000379

THE STATE,

Respondent,

vs.

KEVIN ALSTON,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial judge properly denied Appellant's suppression motion because Appellant's illegal drugs were discovered during the course of a lawful, non-pretextual traffic stop initiated after a law enforcement officer observed Appellant commit multiple traffic law violations in his presence, and, even if Appellant had somehow been able to establish the stop was pretextual in nature, pretextual traffic stops are not constitutionally unreasonable under the South Carolina Constitution.

STATEMENT OF THE CASE

In March of 2012, Appellant Kevin Alston was arrested after law enforcement officers discovered a quantity of crack cocaine in his vehicle and an oxycodone pill in his pocket during the course of a traffic stop. In May of 2012, the Beaufort County Grand Jury indicted Appellant for one count of possession of cocaine and one count of possession of a controlled substance. Thereafter, in July of 2015, the Beaufort County Grand Jury issued an amended indictment charging Appellant with possession of crack cocaine instead of possession of cocaine. On December 14, 2015, a jury trial was commenced in the Beaufort County Court of General Sessions with the Honorable Carmen T. Mullen, circuit court judge, presiding. However, that trial ended in a mistrial. Subsequently, on January 19, 2016, another jury trial was commenced in the Beaufort County Court of General Sessions with Judge Mullen again presiding. At the conclusion of the second trial, the jury convicted Appellant as indicted. Following the verdict, Appellant pled guilty to an unrelated count of possession of crack cocaine. After Appellant entered that guilty plea, the trial judge sentenced Appellant to concurrent terms of imprisonment of three years for each count of possession of crack cocaine along with one year for possession of a controlled substance and suspended each of the terms of imprisonment to a three-year term of probation. Appellant then timely filed a notice of appeal.

STATEMENT OF FACTS

On the morning of March 7, 2012, Officer Richard Menedez of the Beaufort County Sheriff's Office was on his way to perform some work related to surveillance equipment when he observed a vehicle with a broken tail light travelling in the same direction as he was travelling in Beaufort County, South Carolina.[1] (R. pp. 7-8; pp. 37-38; pp. 79-80; p. 83). Upon observing the infraction, Officer Menedez elected not to initiate a traffic stop and, instead, continued travelling towards his destination while following behind the vehicle. (R. pp. 14-15; p. 80; p. 84; pp. 94-95). However, after doing so for several miles, Officer Menedez observed the driver of the vehicle commit another infraction by illegally making a right turn at a red light without coming to a complete stop just before driving onto the McTeer Bridge. (R. pp. 8-9; pp. 80-81; p. 84). Based on the second observed infraction, Officer Menedez decided to initiate a traffic stop of the vehicle, and he activated his vehicle's blue lights, alerted dispatch of the stop, and pulled the vehicle over "almost" two miles later when they reached a safe location on the other side of the bridge.[2] (R. pp. 8-9; p. 12; p. 15; p. 21; pp. 80-81; pp. 84-85; p. 95).

After stopping the vehicle, Officer Menedez approached it, made contact with the driver, Appellant Kevin Alston, and asked him for his driver's license.[3] (R. p. 9; pp. 79-80; pp. 84-85). In response, Appellant provided the officer with an employee identification card for the Marine Corps Recruit Depot located in the area, and Officer Menedez again asked Appellant for his

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[1] At the time of the traffic stop, Officer Menedez was a member of Beaufort County Sheriff's Office's bomb squad and was also responsible for maintaining surveillance equipment for all the investigative units in Beaufort County, including the drug task force unit. (R. pp. 18-19; p. 79). However, by the time of trial, Officer Menedez was working for the South Carolina State Law Enforcement Division. (R. p. 7; p. 79).

[2] During trial, Officer Menedez confirmed he "definitely" contacted dispatch when he initiated the traffic stop, but he further indicated it would not have been unusual for him to have contacted dispatch at an earlier point in order to "run a tag," to "identify whom [he] might be dealing with," and to ascertain whether there were any other issues with the vehicle he intended to stop. (R. pp. 84-85).

[3] Although Appellant was driving the vehicle on the date of the traffic stop, the vehicle was registered in Appellant's mother's name instead of Appellant's name. (R. p. 85).

driver's license. (R. p. 9; p. 80; p. 88). At that point, Appellant candidly acknowledged his driver's license had been suspended. (R. pp. 9-10; p. 80). Officer Menedez then returned to his unmarked law enforcement vehicle, contacted dispatch, verified Appellant's driver's license was suspended, and requested assistance with the stop from other officers with the Beaufort County Sheriff's Office. (R. p. 10; p. 18; pp. 21-22; p. 40; p. 80; p. 88).

Upon speaking with dispatch, Officer Menedez returned to Appellant's vehicle, asked him to step out of the car, and detained and arrested him for driving under suspension. (R. p. 10; p. 34; pp. 80-82). Shortly after that, Officer Kyle Strickland, who had responded to Officer Menedez's request for assistance, and Officer Dan Martin, who had been contacted by Officer Strickland, arrived at the location of the traffic stop.[4] (R. p. 10; pp. 23-24; pp. 27-28; pp. 32-33; pp. 37-40; pp. 80-81; pp. 87-89; p. 100; pp. 103-104; p. 108; p. 111; pp. 115-116; p. 126). After they arrived, Officer Strickland took over the stop, and Officer Martin deployed his trained and certified drug-detection dog, Nero, to perform a sniff search on Appellant's vehicle. (R. p. 10; pp. 23-24; p. 30; p. 33; p. 82; pp. 101-103). During the sniff search, Nero alerted to the presence of drugs inside Appellant's vehicle. (R. pp. 24-25; p. 33; p. 82; pp. 104-105). The officers then searched the vehicle and found a white powdery substance suspected to be cocaine, plastic bags consistent with a type of bag commonly used to store drugs, and a cup containing what appeared to be residue from crack cocaine. (R. p. 26; pp. 33-34; pp. 105-106; p. 116).

Once Appellant's drugs were discovered, Officer Strickland spoke with Appellant, and Appellant denied having any knowledge of the drugs. (R. pp. 34-35; p. 42; pp. 117-119). Officer Strickland then conducted a search of Appellant's pockets and located an oxycodone pill. (R. p. 35; pp. 118-119). After finding the pill, Officer Strickland again spoke with Appellant,

[4] By the time of trial, Officer Strickland was no longer working for the Beaufort County Sheriff's Office and, instead, was self-employed. (R. p. 32; p. 115).

and Appellant initially claimed he had a prescription for the medication. (R. p. 35; p. 119). However, when confronted with the fact the existence of a prescription could be verified, Appellant recanted his prior claim and insisted a friend had given him the pill for a toothache. (R. p. 35; p. 119). Thereafter, Appellant was charged for the equipment violation, driving under suspension, and illegally possessing cocaine and oxycodone, Appellant's drugs were collected as evidence, and Appellant's vehicle was towed from the scene.[5] (R. p. 20; p. 26; pp. 35-36; p. 95; p. 97; pp. 116-117; pp. 120-122).

Subsequently, Appellant was indicted for possession of crack cocaine and possession of a controlled substance after his drugs were determined through laboratory analysis to be crack cocaine and oxycodone.[6] (R. pp. 3-4; p. 59; p. 142; p. 144; pp. 217-222). Prior to trial, defense counsel moved to suppress the incriminating evidence found during the course of the stop. (R. pp. 205-216). In support of the motion, defense counsel contended Officer Menedez's stop of Appellant's vehicle was not a routine traffic stop and, instead, was a racially-motivated and pretextual stop initiated for the purpose of conducting a criminal investigation unrelated to any driving offense. (R. pp. 209-216). As a result, defense counsel asserted the pretextual stop constituted an unreasonable invasion of Appellant's right to privacy pursuant to the state constitution.[7] (R. pp. 209-216).

Thereafter, Appellant proceeded forward to trial, and the trial judge conducted an in limine hearing on the suppression motion. (R. pp. 5-6). During the hearing, the officers involved in the traffic stop testified about the circumstances surrounding the stop and the

[5] As a result of the traffic stop, Appellant also received a warning ticket for illegally making a right turn at a red light without coming to a complete stop. (R. p. 20).

[6] In addition to those indicted offenses, Appellant was also charged with and convicted of driving under suspension and the equipment violation in connection to the traffic stop. (R. pp. 181-182).

[7] Furthermore, defense counsel asserted the incriminating evidence should be suppressed because the State had yet to prove the drug-detection dog involved in the stop was reliable. (R. pp. 205-208).

discovery of Appellant's drugs. (R. pp. 7-30; pp. 32-42). Specifically, Officer Menedez confirmed he decided to initiate the traffic stop based on the infractions he observed and not for drug interdiction purposes. (R. p. 15; p. 21). Additionally, he affirmed he did not have any contact with Officer Strickland until after the stop had been initiated. (R. pp. 21-22). Furthermore, Officer Menedez asserted he, at most, was familiar with Appellant's name but did not recognize him at the time of the traffic stop. (R. p. 8). Similarly, Officer Martin testified he was contacted by Officer Strickland – and not Officer Menedez – in regard to the traffic stop. (R. p. 24). Likewise, Officer Strickland stated he heard about the traffic stop initially through dispatch and responded to the stop because of his own personal familiarity with Appellant's name. (R. pp. 38-39). Officer Strickland further indicated Appellant was stopped because of the observed infractions instead of his criminal history. (R. p. 41).

At the conclusion of the hearing, defense counsel again moved for the evidence found as a result of the traffic stop to be suppressed. (R. p. 43). In support of that motion, defense counsel asserted the stop was for drug interdiction purposes and was not a routine traffic stop while claiming Appellant was allegedly followed for over ten minutes before he was stopped. (R. pp. 45-46). Based on those factors, defense counsel argued "it's" a violation of Appellant's state and federal constitutional rights. (R. p. 47). In rebuttal, the solicitor asserted the stop was not pretextual in nature while noting only Officer Strickland responded to the stop as a result of Appellant's identity. (R. pp. 47-48). However, the solicitor further noted pretextual stops had been recognized as permissible even assuming the stop had been pretextual, and she contended the testimony presented during the hearing established the stop and subsequent search were constitutionally proper. (R. pp. 48-49).

After considering the arguments of counsel, the trial judge denied the suppression motion and ruled the evidence discovered during the course of the traffic stop could be admitted during trial. (R. pp. 49-50). In denying the motion, the trial judge concluded the traffic stop of Appellant's vehicle was valid based on Officer Menedez's testimony regarding the observed equipment and driving violations. (R. p. 49). Additionally, the trial judge determined the sniff search was conducted within a reasonable time period during the course of the traffic stop and the drug-detection dog's alert – assuming she found the dog to be qualified – provided a valid basis for the ensuing search of the vehicle.[8] (R. pp. 49-50). Furthermore, the trial judge noted the search of the vehicle would have been conducted regardless of the drug-detection dog's alert in light of the fact Appellant was already under arrest and the vehicle was already going to be searched and impounded even before the sniff search was conducted.[9] (R. p. 50).

Following the trial judge's ruling, the trial proceeded forward, and the drugs found during the course of the traffic stop were admitted into evidence over defense counsel's objection. (R. p. 53). However, the trial ultimately ended in a mistrial after the trial judge received a jury note indicating one of the jurors worked with Officer Martin's wife and believed her and the officer to be "good people." (R. pp. 54-56).

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[8] During the in limine hearing, the solicitor presented the drug-detection dog's records and logs to the trial judge. (R. pp. 44-45). Likewise, during his subsequent trial testimony, Officer Martin confirmed the dog was certified in multiple areas, including "narcotics work." (R. p. 101).

[9] Specifically, the trial judge ruled: "I do find it was a valid stop. Obviously, he said that there was the broken tail light, which is an equipment violation. Then, the driving violation. Was it gratuitous? The canine was there, and I think maybe [defense counsel] has something as far as, you know, they 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. Provided that I find that Nero was a reliable dog – I haven't reviewed that yet – but provided that is the case, then, I think that does allow for them to go on with the search. And also, too, it doesn't – I see at that point that, at that point, he's already under arrest, from what I heard from the testimony of the officers. So, he was already – we know he was detained. He was under arrest. They were going to take him in. And I think I heard he also states 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. But whether or not that's here nor there, I think the alert, if the dog is good, if the dog is good, I think the alert is valid, and warrants the search. I think – I think that would be an exception. I think – I think it's – I think you can do it. Okay. So, I think it comes in." (R. pp. 49-50).

Subsequently, Appellant's case was again called to trial, and, at the outset of trial, the trial judge indicated she intended to stand by her earlier ruling regarding the suppression motion. (R. pp. 60-62; p. 63). Following that ruling, the trial proceeded forward, the officers involved in the traffic stop testified about the circumstances of the stop that led to Appellant's arrest along with the discovery of Appellant's drugs, and Appellant's crack cocaine and oxycodone were again admitted into evidence over defense counsel's objection.[10] (R. 79-97; pp. 100-111; pp. 115-130; pp. 139-146). Thereafter, at the conclusion of trial, the jury convicted Appellant as indicted. (R. p. 180). The trial judge then sentenced Appellant to an aggregate term of imprisonment of three years suspended upon the service of three years of probation based on Appellant's convictions during the trial along with a conviction on an unrelated drug charge. (R. pp. 197-204).

[10] Specifically, during his trial testimony, Officer Menedez noted vehicles were typically inventoried and impounded if their drivers were arrested and no one else was present to remove the vehicles from the area. (R. p. 97).

ARGUMENT

The trial judge properly denied Appellant's suppression motion because Appellant's illegal drugs were discovered during the course of a lawful, non-pretextual traffic stop initiated after a law enforcement officer observed Appellant commit multiple traffic law violations in his presence, and, even if Appellant had somehow been able to establish the stop was pretextual in nature, pretextual traffic stops are not constitutionally unreasonable under the South Carolina Constitution.

Appellant contends the trial judge should have suppressed the evidence discovered during the course of the traffic stop of his vehicle. In support of that contention, Appellant maintains the traffic stop was initiated in a pretextual manner and, as a result, should be found to be unreasonable under the South Carolina Constitution. To the contrary, the traffic stop conducted in Appellant's case was not pretextual in nature. However, even if it was so, pretextual traffic stops are not unreasonable under our state constitution so long as the officer who initiated the stop had an objectively-reasonable basis for doing so. Accordingly, because the traffic stop conducted in Appellant's case was only initiated after Appellant committed multiple infractions in the presence of a law enforcement officer, the stop was constitutionally reasonable and valid, and the trial judge committed no error in denying the suppression motion. Appellant's convictions should be affirmed.

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). In search and seizure cases, an appellate court in South Carolina is limited to determining if there is any evidence to support the trial court's findings and can only reverse due to clear error. State v. Flowers, 360 S.C. 1, 5, 598 S.E.2d 725, 727 (Ct. App. 2004); see State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000) ("[W]e will review the trial court's ruling like any other factual finding and reverse if there is clear error. We will affirm if there is any evidence to support the ruling."). The reviewing court may conduct its

own review of the record to determine whether the trial judge's ruling is supported by the evidence. State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 460 (2002). However, the appellate court must affirm the trial court if there is any evidence supporting the ruling. See State v. Moore, 415 S.C. 245, 251, 781 S.E.2d 897, 900 (2016) ("[A]ppellate courts must affirm if there is any evidence to support the trial court's ruling."); State v. Morris, 411 S.C. 571, 578, 769 S.E.2d 854, 858 (2015) (" 'When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling.' " (citation omitted)). Critically, the appellate court will not reverse merely because it would have reached a different conclusion than the trial judge. State v. Rivera, 384 S.C. 356, 361, 682 S.E.2d 307, 310 (Ct. App. 2009); see Khingratsaiphon, 352 S.C. at 70, 572 S.E.2d at 459 ("In State v. Brockman, . . . [w]e concluded the appellate court would not review the trial judge's ultimate determination de novo but, rather, would apply a deferential standard of review.").

ANALYSIS

In addition to the protections afforded by the United States Constitution, the South Carolina Constitution provides its own protections to the state's citizens against unreasonable searches and seizures. State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001); see S.C. Const. art. I, § 10 ("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[.]"); see also U.S. Const. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]"). Furthermore, primarily in order to guard against invasive technological advancements, the South Carolina Constitution also expressly protects our citizens from "unreasonable invasions of privacy." S.C. Const. art. I, § 10; see Forrester, 343 S.C. at 647, 541

S.E.2d at 842 ("[T]he drafters of our state constitution's right to privacy provision were principally concerned with the emergence of new electronic technologies that increased the government's ability to conduct searches.").

Through the additional provision regarding 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). Thus, "the South Carolina Constitution favors an interpretation offering a higher level of **privacy** protection than the Fourth Amendment." Id. (emphasis added). However, the South Carolina Constitution by its express language only forbids searches, seizures, and invasions of privacy that are **unreasonable**. S.C. Const. art. I, § 10; see State v. Foster, 269 S.C. 373, 378, 237 S.E.2d 589, 591 (1977) ("It is only unreasonable searches and seizures that are prohibited."); see also Maryland v. Buie, 494 U.S. 325, 331 (1990) ("It goes without saying that the Fourth Amendment bars only unreasonable searches and seizures[.]"); cf. State v. Snapp, 174 Wash. 2d 177, 194, 275 P.3d 289, 297-298 (Wash. 2012) (recognizing a provision of the Washington State Constitution that protects a person's private affairs from being disturbed without authority of law is – unlike the Fourth Amendment of the United States Constitution and Article 1, Section 10 of the South Carolina Constitution – **not** "grounded in notions of reasonableness"). Accordingly, just like the search and seizure protections offered by the federal constitution, the touchstone of our state constitution's search and seizure protections is reasonableness. Cf. Florida v. Jimeno, 500 U.S. 248, 250 (1991) ("The touchstone of the Fourth Amendment is reasonableness.").

Historically, in South Carolina, our courts – relying on guidance from the United States Supreme Court – have measured the reasonableness of a traffic stop, which constitutes a seizure

for constitutional purposes, along with the reasonableness of other searches and seizures in a purely objective manner. See State v. Williams, 351 S.C. 591, 600, 571 S.E.2d 703, 708 (Ct. App. 2002) ("Reasonableness 'is measured in objective terms by examining the totality of the circumstances.' " (quoting Ohio v. Robinette, 519 U.S. 33, 39 (1996)); see also State v. Maybank, 352 S.C. 310, 315, 573 S.E.2d 851, 854 (Ct. App. 2002) (recognizing a traffic stop of a vehicle constitutes a seizure); see generally Mack v. Lott, 415 S.C. 22, 23, 780 S.E.2d 761, __ (2015) (indicating "the proper standard for determining probable cause [to arrest] is an objective standard"). Critically, the underlying reason why our courts conduct an objective analysis when considering issues involving searches and seizures is the recognition " '[e]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.' " Jackson v. City of Abbeville, 366 S.C. 662, 667, 623 S.E.2d 656, 659 (Ct. App. 2005) (quoting Horton v. California, 496 U.S. 128, 138 (1990)).

Similarly, in South Carolina, our courts – again relying on guidance from the United States Supreme Court – have found the initiation of a traffic stop to be reasonable per se when either probable cause exists to believe a traffic violation has occurred **or** reasonable suspicion exists to believe the occupants of the vehicle are involved in criminal activity. See State v. Nelson, 336 S.C. 186, 193, 519 S.E.2d 786, 789 (1999) ("As a general matter, the decision to stop an automobile is reasonable where police have probable cause to believe that a traffic violation has occurred."); Knight v. State, 284 S.C. 138, 141, 325 S.E.2d 535, 537 (1985) ("[A] police officer may stop an automobile and briefly detain its occupants, even without probable cause to arrest, if he has a reasonable suspicion that the occupants are involved in criminal activity."); Williams, 351 S.C. at 598, 571 S.E.2d at 707 ("Where probable cause exists to

believe that a traffic violation has occurred, the decision to stop the automobile is reasonable per se."). Significantly, in determining whether such a stop is reasonable, our courts have consistently concluded the subjective motivations of the law enforcement officer initiating the stop are **irrelevant**. See Moore, 415 S.C. at 252, 781 S.E.2d at 901 (recognizing subjective motivations are irrelevant when analyzing the constitutionality of an officer's actions); State v. Provet, 405 S.C. 101, 108, 747 S.E.2d 453, 457 (2013) ("The test whether reasonable suspicion exists is an objective assessment of the circumstances; the officer's subjective motivations are irrelevant.").

Notably, in Whren v. United States, 517 U.S. 806, 808 (1996), the United States Supreme Court directly addressed the question of whether a pretextual traffic stop violates the federal constitution's prohibition against unreasonable searches and seizures. In that case, vice-squad officers in an unmarked vehicle were patrolling an area known for drug activity located in the District of Columbia and, during the patrol, drove past a vehicle that drew their suspicions. Id. Based on those suspicions, the officers turned around, and, when they did, the suspicious vehicle turned without signaling and drove off at an unreasonable speed, which were both acts that constituted civil traffic violations in Washington, D.C. Id. The officers then followed the suspicious vehicle, and, when it stopped in traffic, one of the officers approached it, identified himself, asked the driver to place the vehicle in park, and quickly observed bags of crack cocaine in the passenger's hands. Id. at 809. Subsequently, the driver and passenger were arrested, charged with several drug crimes, convicted, and appealed those conviction. Id. at 809. On appeal, their cases eventually made their way to the Supreme Court, and they raised constitutional challenges to the reasonableness of the stop. Id. Upon considering the matter, the Supreme Court **unanimously** affirmed their convictions. Id. at 819. In doing so, the Supreme

Court thoroughly examined its prior decisions, which had consistently applied objective standards when analyzing search and seizures issues, and rejected any suggestion "the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved." Id. at 812-813. Instead, the Supreme Court concluded a traffic stop is reasonable for Fourth Amendment purposes when the police have probable cause to believe that a traffic violation has occurred. Id. at 810. Because the stop at issue in the petitioners' case was indisputably supported by probable cause to believe a traffic violation had occurred, the Supreme Court held the stop was constitutionally reasonable and the evidence found during the stop was properly admitted during the trial. Id. at 819. Furthermore, in attempting to assuage the concerns of the petitioners, the Supreme Court explained one of their chief concerns – the possibility law enforcement officers might conduct pretextual traffic stops based on impermissible factors like race – was already constitutionally prohibited by the Equal Protection Clause, which meant that concern provided no basis for reaching a contrary conclusion regarding the reasonableness of stops under the Fourth Amendment. Id. at 813

Subsequent to that decision, a very small number of state appellate courts have disagreed with the unanimous reasoning of the United States Supreme Court in Whren and have found pretextual traffic stops to be violative of their state constitutions. See State v. Heath, 929 A.2d 390, 402 (Del. Super. Ct. 2006) (holding "purely" pretextual stops are unconstitutional pursuant to the Delaware Constitution); State v. Ochoa, 146 N.M. 32, 45, 206 P.3d 143, 156 (N.M. Ct. App. 2008) (holding pretextual traffic stops violate the New Mexico Constitution); State v. Ladson, 138 Wash. 2d 343, 358, 979 P.2d 833, 842 (Wash. 1999) (holding, in a sharply-divided opinion, pretextual traffic stops violate the Washington Constitution "because they are seizures absent the 'authority of law' which a warrant would bring"); see also People v. Robinson, 97

N.Y.2d 341, 349, 767 N.E.2d 638, 642 (N.Y. 2001) ("More than 40 states and the District of Columbia have adopted the objective standard approved by Whren or cited it with approval."). However, of the few state court decisions rejecting the logic of Whren, several of those decisions have been either ignored or greatly limited subsequent to their issuance. See Turner v. State, 25 A.3d 774, 777 (Del. 2011) (declining to adopt the Delaware Superior Court's determination purely pretextual traffic stops violate the Delaware Constitution and noting the decision in which that determination was reached was not further appealed or subsequently followed); State v. Arreola, 176 Wash. 2d 284, 298-299, 290 P.3d 983, 991-992 (Wash. 2012) ("A mixed-motive stop does not violate article I, section 7 so long as the police officer making the stop exercises discretion appropriately. Thus, if a police officer makes an independent and conscious determination that a traffic stop to address a suspected traffic infraction is reasonably necessary in furtherance of traffic safety and the general welfare, the stop is not pretextual. That remains true even if the legitimate reason for the stop is secondary and the officer is motivated primarily by a hunch or some other reason that is insufficient to justify a stop. In such a case, the legitimate ground is an independent cause of the stop, and privacy is justifiably disturbed due to the need to enforce traffic regulations, as determined by an appropriate exercise of police discretion. Any additional reason or motivation of the officer does not affect privacy in such a case, nor does it interfere with the underlying exercise of police discretion, because the officer would have stopped the vehicle regardless.").

Beyond the appellate courts in Delaware, New Mexico, and Washington, the overwhelming majority of state appellate courts in our country have elected to follow the United States Supreme Court's purely objective analysis from Whren and have found traffic stops to be reasonable under their state constitutions so long as those stops are supported by probable cause

or reasonable suspicion. See State v. Harmon, 353 Ark. 568, 576, 113 S.W.3d 75, 79-80 (Ark. 2003) (holding pretextual stops are not invalid under the Arkansas Constitution); People v. Grenier, 200 P.3d 1062, 1069 (Colo. Ct. App. 2008) (instructing the subjective intentions of an officer are irrelevant when determining whether a traffic stop is reasonable under both the Colorado Constitution and the United States Constitution); Holland v. State, 696 So. 2d 757, 760 (Fla. 1997) (holding the objective test is the appropriate test for determining whether a stop is valid under Florida search and seizure law); Mitchell v. State, 745 N.E.2d 775, 787 (Ind. 2001) (concluding a pretextual traffic stop does not violate the Indiana Constitution); Commonwealth v. Murdough, 428 Mass. 760, 762, 704 N.E.2d 1184, 1186 (Mass. 1999) (holding an objectively-reasonable traffic stop does not violate the Massachusetts Declaration of Rights regardless of the subjective motivations behind the stop); State v. Farabee, 302 Mont. 29, __, 22 P.3d 175, 181 (Mont. 2000) (finding pretextual traffic stops that are otherwise valid are not precluded by the Montana Constitution); State v. Bartholomew, 258 Neb. 174, 179, 602 N.W.2d 510, 514 (Neb. 1999) (instructing a traffic stop is valid under the Nebraska Constitution regardless of the ulterior motivation of an officer so long as there is probable cause to believe a traffic violation has occurred); Gama v. State, 112 Nev. 833, 836-837, 920 P.2d 1010, 1013 (Nev. 1996) (instructing the United States Supreme Court's objective analysis should be applied to pretextual traffic stop claims raised pursuant to the Nevada Constitution); State v. McBreairty, 142 N.H. 12, 15, 697 A.2d 495, 497 (N.H. 1997) (adopting a purely objective test for determining whether the initiation of a traffic stop was reasonable under the New Hampshire Constitution); Robinson, 97 N.Y.2d at 349, 767 N.E.at 642 ("[W]here a police officer has probable cause to believe that the driver of an automobile has committed a traffic violation, a stop does not violate article I, § 12 of the New York State Constitution. In making that determination of probable cause, neither the

primary motivations of the officer nor a determination of what a reasonable traffic officer would have done under the circumstances is relevant."); State v. McClendon, 350 N.C. 630, 636, 517 S.E.2d 128, 132 (N.C. 1999) (holding an objective standard must be applied when determining the reasonableness of a traffic stop under the North Carolina Constitution); State v. Bjerke, 697 A.2d 1069, 1073 (R.I. 1997) (declining to hold pretextual traffic stops violate the Rhode Island Constitution and instructing a decision declaring such stops to be unconstitutional "would be unprincipled and unwarranted"); State v. Vineyard, 958 S.W.2d 730, 736 (Tenn. 1997) ("[P]robable cause justifies a traffic stop under Article I, Section 7 of the Tennessee Constitution without regard to the subjective motivations of police officers."); Fertig v. State, 146 P.3d 492, 501 (Wyo. 2006) ("[A] traffic stop initiated by a law enforcement officer after personally observing a traffic violation is supported by probable cause and does not violate Article 1, Section 4 of the Wyoming Constitution, regardless of the officer's primary motivation."). In adopting the objective analysis from Whren, courts have recognized it is inherently reasonable for an officer tasked with enforcing the law to respond to an observed traffic violation and for a motorist who commits a traffic violation to be held accountable for that offense regardless of what ulterior motive the officer might subjectively harbor. See Mitchell, 745 N.E.2d at 787 ("We find nothing unreasonable in permitting an officer, who may have knowledge or suspicion of unrelated criminal activity by the motorist, to nevertheless respond to an observed traffic violation. It is likewise not unreasonable for a motorist who commits a traffic law violation to be subject to accountability for said violation even if the officer may have an ulterior motive of furthering an unrelated criminal investigation."); Robinson, 97 N.Y.2d at 353-354, 767 N.E.2d at 645 ("A police officer who can articulate credible facts establishing reasonable cause to believe that someone has violated a law has established a reasonable basis to effectuate a stop.").

Likewise, courts have recognized the application of a subjective analysis in determining the reasonableness of a stop would be less sound, would require speculation and guesswork as to the actual motivations of an officer, would be difficult to consistently apply, would prevent uniform application of the law, and would illogically force courts to pick and choose which laws are actually worthy of enforcement and adherence. See Murdough, 428 Mass. at 765, 704 N.E.2d at 1187 (concluding an objective analysis is "the sounder rule and certainly invites less unanchored guesswork on the part of a motion judge"); Robinson, 97 N.Y.2d at 358, 767 N.E.2d at 648 ("How is a court to know which laws to enforce? . . . We are simply not free to pick and choose which laws deserve our adherence."); State v. Lopez, 873 P.2d 1127, 1140 (Utah 1994) ("[T]he [pretext] doctrine . . . offends the very equal protection policies it is touted to protect, because it permits the ordinary speeder to be successfully prosecuted for robbery based on evidence found in plain view during the stop, while the speeder suspected of robbery with similar evidence in plain view goes free."); see also United States v. Botero-Ospina, 71 F.3d 783, 787-788 (10th Cir. 1995) (abandoning a previously-adopted subjective analysis for determining the reasonableness of a traffic stop in favor of a purely objective one after concluding the subjective analysis was confusing, inconsistent, and unworkable in actual practice).

In the case sub judice, Appellant asserts the traffic stop of his vehicle was "clearly" pretextual because Officer Menedez followed him for a number of miles before initiating the stop for observed infractions, was not specifically assigned to conduct traffic enforcement on the date of the stop, only conducted a few traffic stops during the entire year the stop was made, and was familiar with his name from prior drug task force work. Because the stop was allegedly pretextual, Appellant argues this Court should – without offering any specific argument as to why it should do so – adopt a new constitutional rule in South Carolina, find pretextual traffic

stops violate the state constitutional right to privacy, and order courts in this state to consider the subjective intentions of law enforcement officers when determining the reasonableness of traffic stops. Appellant then requests this Court to apply that new rule to his case and reverse the denial of his suppression motion on the basis the traffic stop of his vehicle was allegedly motivated by a constitutionally-improper purpose.

Initially, despite Appellant's claim to the contrary, the traffic stop is his case was not pretextual – clearly or otherwise. Instead, as Officer Menedez explained during trial, the officer conducted the stop purely because he personally observed the driver of a vehicle with a broken tail light commit an unsafe traffic infraction by not coming to a complete stop before making a right turn at a red light, which meant the driver had committed multiple violations of South Carolina law in his presence. See S.C. Code Ann. § 56-5-970(C)(3) ("Except when a sign is in place prohibiting a turn, vehicular traffic facing any steady red signal may cautiously enter the intersection to turn right or to turn left from a one-way street into a one-way street **after stopping as required**[.]" (emphasis added)); S.C. Code Ann. § 56-5-4730 ("When a vehicle is equipped with a stop lamp or other signal lamps, such lamp or lamps shall at all times be maintained in good working condition."); S.C. Code Ann. § 56-5-5310 ("No person shall drive or move on any highway any vehicle unless the equipment thereon is in good working order and adjustment as required in this chapter and the vehicle is in such safe mechanical condition as not to endanger the driver or other occupant or any person upon the highway."); see generally United States v. Lopez-Moreno, 420 F.3d 420, 432 (5th Cir. 2005) ("[I]t was objectively reasonable for a police officer to suspect that the two non-functioning brake lights posed a danger to people and property."). Moreover, the fact Officer Menedez followed Appellant's vehicle for a number of miles in no way established the subsequent stop was pretextual as the officer explained he

initially was only following the vehicle since they were both travelling in the same direction and only followed the vehicle for another mile or so after deciding to initiate a traffic stop because he could not safely stop the vehicle on the bridge they were crossing at the time. Similarly, the facts Officer Menedez neither routinely conducted traffic stops nor was assigned to conduct traffic enforcement on the date of the stop did not establish the stop was based on a pretextual motive and, instead, supports a conclusion the officer, who was a member of the bomb squad and also provided technical assistance in regard to surveillance equipment, only conducted traffic stops on the limited occasions he both observed a traffic violation while on a roadway and was capable of conducting a stop in response, which logically would have arisen much less frequently for him than for an officer assigned with the primary task of enforcing traffic laws. Likewise, the fact Officer Menedez may have been familiar with Appellant's name prior to the stop in no way established the stop was pretextual as the vehicle Appellant was driving at the time of the stop was **not registered in Appellant's name**. Under those circumstances, there was nothing presented during trial establishing the decision to stop Appellant's vehicle was actually pretextual even assuming the subjective intentions of Officer Menedez could have properly been considered in determining the reasonableness of the stop.

However, even assuming Officer Menedez had a pretextual motive for initiating the stop of Appellant's vehicle, the officer's decision to do so was nonetheless entirely reasonable in South Carolina – and would have been so in virtually every other state in our country – based on the fact he observed Appellant commit violations of law in his presence before initiating the stop. Critically, just as the United States Supreme Court recognized in Whren, it cannot be constitutionally unreasonable to stop a person who violates a law, and an officer with probable cause to believe a law has been violated acts reasonably by enforcing the law and conducting a

stop. See State v. Vinson, 400 S.C. 347, 352, 734 S.E.2d 182, 184 (Ct. App. 2012) ("A traffic stop is not unreasonable if conducted with probable cause to believe a traffic violation has occurred, or when the officer has a reasonable suspicion the occupants are involved in criminal activity."); see also Whren, 517 U.S. at 818-819 ("[W]e are aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement. And even if we could identify such exorbitant codes, we do not know by what standard (or what right) we would decide . . . which particular provisions are sufficiently important to merit enforcement."). Furthermore, no drivers on our state's roadways would or could reasonably expect to maintain their privacy and not be stopped upon committing a traffic violation in a law enforcement officer's presence. See Farabee, 302 Mont. at __, 22 P.3d at 181 ("[T]here is no reason to believe that the right of privacy created by Article II, Section 10 of the Montana Constitution is implicated by these facts. Operating a vehicle without two operable headlights in violation of state law is certainly not one of the core individual interests protected by the right of privacy."); see also Ladson, 138 Wash. 2d at 363, 979 P.2d at 845 (Madsen, J. dissenting) ("[C]itizens who commit traffic infractions have privacy interests at issue when traveling in a vehicle, but those interests are not unreasonably intruded upon where the individual commits a traffic infraction in the presence of an officer and is therefore stopped for issuance of a citation and notice. Our expectations are that we will be stopped and cited for traffic infractions, and we cannot reasonably expect that we are protected from such a stop depending on the officer's other motives."). Accordingly, so long as there is an objective basis for a traffic stop to be conducted, such a stop cannot logically be deemed unreasonable. See Lopez, 873 P.2d at 1136 ("Drivers do

not have a constitutional right to violate any law enacted by the legislature. Any expectation to the contrary is unreasonable and need not be protected by the pretext doctrine.").

Significantly, demonstrating the fact a stop and detention for a violation of law – regardless of how significant or insignificant someone might believe such a violation to be – is reasonable as a matter of law in South Carolina, our legislature for more than a century has statutorily authorized law enforcement officers in our state to conduct warrantless **arrests** for any violations of criminal law committed within their view, including violations of our traffic laws, without placing any limitations on that authority based on what thoughts the officers may harbor at the time. See S.C. Code Ann. § 17-13-30 ("The sheriffs and deputy sheriffs of this State may arrest without warrant any and all persons who, within their view, violate any of the criminal laws of this State if such arrest be made at the time of such violation of law or immediately thereafter."); S.C. Code Ann. § 23-6-140 ("All officers and troopers shall have the same power to serve criminal processes against offenders as sheriffs of the various counties and also the same power as such sheriffs to arrest without warrants and to detain persons found violating or attempting to violate any laws of the State relative to highway traffic, motor vehicles or commercial motor carriers. These officers and troopers shall also have the same power and authority held by deputy sheriffs for the enforcement of the criminal laws of the State."); see also S.C. Code Ann. § 56-5-730 ("It is unlawful and, unless otherwise declared in [the Uniform Act Regulating Traffic on Highways] with respect to particular offenses, it is a misdemeanor for any person to do any act forbidden or to fail to perform any act required in this chapter."); see generally State v. White, 338 S.C. 56, 58, 525 S.E.2d 261, 263 (Ct. App. 1999) ("We, of course, must take the statute as we find it, giving effect to the legislative intent as expressed in its language. We cannot under our power of construction supply an omission in the statute."). In

light of the long-standing legislative authority permitting stops and arrests for **any** violations of law committed in an officer's presence, a traffic stop conducted with probable cause to believe a traffic violation has been committed is patently reasonable in South Carolina. Cf. Payton v. New York, 445 U.S. 573, 591 (2001) ("An examination of the common-law understanding of an officer's authority to arrest sheds light on the obviously relevant, if not entirely dispositive, consideration of what the Framers of the Amendment might have thought to be reasonable.").

Despite the fact a probable cause traffic stop is reasonable as a matter of law under both the state and federal constitution regardless of whether the officer who initiated the stop harbored an ulterior motive, a driver in South Carolina is nonetheless **not** lacking in protection from unconstitutional law enforcement action related to a traffic stop. Instead, an officer in our state is still constrained to act in a reasonable manner during the course of a stop and, in a case involving a stop of a purely pretextual nature, is prevented from measurably extending the duration of the stop or converting it into a criminal investigation unrelated to the initial purpose of stop absent at least reasonable articulable suspicion of some other criminal wrongdoing. See Rodriguez v. United States, __ U.S. __, 135 S. Ct. 1609, 1615 (2015) ("An officer . . . may conduct certain unrelated checks during an otherwise lawful traffic stop. But . . . he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual."); Illinois v. Caballes, 543 U.S. 405, 407 (2005) ("A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission."); see also State v. Tindall, 388 S.C. 518, 524, 698 S.E.2d 203, 206 (2010) ("We find the officer's actions after completion of the license and registration computer check exceeded the scope of the initial traffic stop. The continued stop beyond this point, without reasonable suspicion, constituted an illegal detention

and the evidence and statement should have been suppressed."); State v. Pichardo, 367 S.C. 84, 99, 623 S.E.2d 840, 848 (Ct. App. 2005) (instructing continued questioning beyond the duration of an initial traffic stop is lawful and permissible only when the officer has a reasonable articulable suspicion of other illegal activity or the traffic stop becomes a consensual encounter). Likewise, the citizens of our state and nation are shielded from discriminatory application of the law through sources independent of the Fourth Amendment of the United States Constitution and Article I, Section 10 of the South Carolina Constitution. See Whren, 517 U.S. at 813 ("We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause."); see also State v. Soto, 324 N.J. Super. 66, 69, 734 A.2d 350, 352 (N.J. Super. Ct. Law Div. 1996) (finding evidence discovered during the course of discriminatory traffic stops should be suppressed based on equal protection violations). As a result, South Carolina's citizens are already otherwise constitutionally protected from the risks and potential harms posed by pretextual traffic stops without the need for a new and illogical rule to be articulated based on our state constitution. See Mitchell, 745 N.E.2d at 787 ("The potential for unreasonable search and seizure associated with such a traffic stop is most likely to arise not in the routine handling of the observed traffic violation, **but in the ensuing police investigatory conduct that may be excessive and unrelated to the traffic violation**." (emphasis added)).

For all the foregoing reasons, this Court should decline Appellant's invitation to reject the unanimous guidance of the United States Supreme Court, to conclude traffic stops that are otherwise objectively reasonable are somehow unreasonable under the South Carolina Constitution, and to adopt an unworkable subjective analysis prohibiting an otherwise-valid

traffic stop in our state based purely on a judicial determination of the internal motivations of the officer initiating the stop. See Whren, 517 U.S. at 818 ("[T]here is no realistic alternative to the traditional common-law rule that probable cause justifies a search and seizure."); see also Horton, 496 U.S. at 138 ("[E]venhanded law enforcement is best achieved by the application of objection standards of conduct, rather than standards that depend upon the subjective state of mind of the officer."), cf. State v. Wright, 391 S.C. 436, 446, 706 S.E.2d 324, 328 (2011) ("[T]he better approach to the plain view doctrine is to discard the inadvertent discovery requirement as the United States Supreme Court did in Horton."). Furthermore, because the traffic stop conducted in Appellant's case was entirely proper and constitutional under both state and federal law based on the fact the officer who conducted the stop observed Appellant commit multiple traffic offenses in his presence, there are no proper grounds upon which to disturb the trial judge's denial of the suppression motion on appeal due to the purported reasonableness of the stop. See State v. Banda, 371 S.C. 245, 252, 639 S.E.2d 36, 40 (2006) ("The decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred."); see also Provet, 405 S.C. at 107, 747 S.E.2d at 456 (recognizing South Carolina appellate courts review search and seizure determinations under a clear error standard and will affirm if there is any evidence to support the trial court's ruling). Appellant's convictions should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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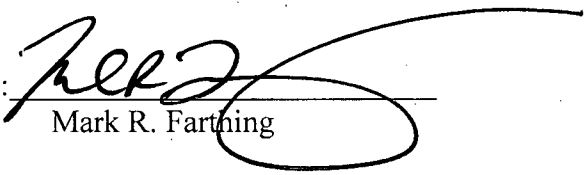
BY: 
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September 18, 2017

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County
Honorable Carmen T. Mullen, Circuit Court Judge
Appellate Case No. 2016-000379

THE STATE,

Respondent,

vs.

KEVIN ALSTON,

Appellant.

CERTIFICATE OF COUNSEL

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

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