THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions
Carmen T. Mullen, Circuit Court Judge

Case No.: 2002-GS-23-4288; 2005-GS-23-3478
Appellate Case No.: 2011-192746

THE STATE,

RESPONDENT,

v.

KARRIEM PROVET,

PETITIONER.

BRIEF OF PETITIONER

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I. DID THE COURT OF APPEALS ERR IN AFFIRMING THE LOWER COURT'S DENIAL OF PETITIONER'S MOTION TO SUPPRESS THE EVIDENCE RESULTING FROM A TRAFFIC STOP WHEN PETITIONER ARGUED THAT HE WAS SUBJECTED TO AN UNREASONABLE SEARCH AND SEIZURE IN VIOLATION OF THE FOURTH AMENDMENT.

A. WHETHER THE COURT OF APPEALS ERRED IN FINDING THAT THE TRAFFIC STOP WAS NOT UNREASONABLY EXTENDED AND THAT CORPORAL OWENS HAD REASONABLE SUSPICION OF A SERIOUS CRIME.

B. WHETHER THE COURT OF APPEALS ERRED IN FINDING THAT PETITIONER GAVE VOLUNTARY CONSENT TO SEARCH THE VEHICLE.

STATEMENT OF THE CASE

During the November 2002 term of the Greenville County Grand Jury, Petitioner was indicted for Resisting Arrest (2002-GS-23-4288) and Trafficking Cocaine (2002-GS-23-4289). R. pp. 323-326. During the May 2005 term of the Greenville County Grand Jury, Petitioner was indicted for Trafficking Cocaine (2005-GS-23-3478). R. p. 327. On August 7-8, 2007, a jury trial was held in front of the Honorable Carmen T. Mullen at the Greenville County Courthouse. R. p. 1. Petitioner was represented by William B. Long, Jr., Esquire. The State was represented by John D. Newkirk, Esquire. R. p. 1.

At the close of the trial, the jury found Petitioner guilty as indicted. R. p. 310. The Honorable Carmen T. Mullen sentenced Petitioner to a term of twenty-five (25) years for trafficking (2005-GS-23-3478) and a concurrent term of one year for resisting arrest (2002-GS-23-4289). R. p. 318.

Following sentencing, trial counsel informed the court that that Petitioner would need the assistance of the Office of Appellate Defense. R. p. 318. A timely Notice of Intent to Appeal was submitted and an Initial Anders Brief was filed by the Office of Appellate Defense on July 3, 2008. On August 25, 2008, Tricia A. Blanchette, undersigned counsel, filed a Motion for Substitution of Counsel and Substitution of Brief of Appellant. The State submitted a Return to Motion for Substitution of Counsel and Substitution of Brief of Appellant on September 4, 2008. On September 19, 2008, the South Carolina Court of Appeals issued an Order granting Petitioner's Motion.

On April 14, 2009, the Final Brief of Appellant and Record on Appeal were filed with the Court of Appeals and served on opposing counsel. On May 21, 2011, the State filed and served on counsel the Final Brief of Respondent. Oral arguments were requested and heard by the Court of Appeals on May 18, 2010. Thereafter, the Court of Appeals affirmed Petitioner's

conviction and sentence. State v. Karriem Provet, Op. No. 4787 (S.C. Ct. App. filed January 31, 2011). App. p. 1.

On February 11, 2011, Petitioner, through counsel, filed a Petition for Rehearing and Petition for Rehearing *En Banc*. App. p. 14. On March 24, 2011, the Court of Appeals issued an Order Denying Petition for Rehearing, which was rescinded via Order on March 28, 2011. App. pp. 21, 23. On May 5, 2011, the Court of Appeals issued an Order Denying Petition for Rehearing and Order Denying Petition for Rehearing *En Banc*, from which this Petition for Writ of Certiorari follows. App. pp. 24, 26.

STATEMENT OF THE FACTS

After the jury was selected, the trial court heard Petitioner's motion to suppress "all evidence", which counsel explained as the highway patrol video, testimony of his client, and the drug evidence. R. p. 25. During the motion hearing, the State called Corporal J.D. Owens, South Carolina Highway Patrol, and Officer Eddie Aman, formerly with the South Carolina Highway Patrol.

On direct, Corporal Owens testified that he conducted a traffic stop for moving violations involving Petitioner on May 1, 2002. R. p. 28. The moving violations were following too closely (less than two car lengths) and a defective tag light. R. p. 28. When requested, Petitioner provided third party registration. R. p. 30. He further testified that Petitioner had "extreme hand-shaking" combined with "accelerated breathing", which is disputable by the video evidence. R. pp. 30-31. Petitioner agreed to step out of the vehicle and consented to a pat down. R. p. 31-32. After informing Petitioner that he would be issuing a warning citation, he questioned Petitioner, as reflected in the video, and determined the following information: 1) Petitioner had stayed with girl at Holiday Inn; 2) Vehicle belonged to a different girl; 3) Petitioner did not have a job; and 4) Petitioner was driving a sports utility vehicle. R. pp. 32-34. He further testified that his notes indicated "delaying tactics" by Petitioner, which are not evidenced in the video. R. p. 34.

Corporal Owens further recounted that he called Officer Aman (canine unit) for back-up and called dispatch for a license and registration check. R. pp. 36-37. When he conducted a vehicle identification number (VIN) check on the vehicle, he noticed fast food bags, a cell phone, air freshener(s), one luggage bag and receipts. R. p. 38. Corporal Owens stated: "All of these within the totality of the circumstances also with the questions or items that were related by the

defendant, all of these would indicated that there was other criminal activity being afoot." R. p. 38, lines 19-22. He went on to explain that the fast food bags were particularly suspicious because drugs are a fast food type of business. R. pp. 39-40.

After checking the VIN, Corporal Owens testified that Officer Aman and his canine arrived, which is disputable by the video evidence. R. p. 41. After Aman arrived, he returned Petitioners documents, gave him the citation, and asked for consent to search. R. p. 41. Prior to running the drug dog, Officer Aman approached the vehicle and removed a fast food bag. R. p. 44. Petitioner took off, and the Officer Aman caught him. R. p. 44.

When he returned to the scene, Corporal Owens further testified that another officer had arrived, which is captured by the video evidence. R. p. 44. Upon return, Officer Aman ran the drug dog and the drug evidence was located. R. p. 45.

On cross-examination, Corporal Owens admitted that Petitioner was under seizure until his documents were returned and the warning was issued. R. p. 55. He further testified that he did not tell Petitioner that he was "free to go." R. pp. 56, 65. He explained that the purpose of returning his documents was so he would feel free to go, but he was not free to go. R. pp. 61-62, 64-65. He specifically stated: "At the point where I asked for consent, I was not going to let him go." R. p. 62, lines 19-20.

When asked by defense counsel, Corporal Owens admitted that he did not take the fast food bags, air freshener(s), cell phone, receipts or luggage into evidence. R. p. 57. He further explained that Officer Aman did not open the fast food bag – he just removed it. R. p. 59.

On direct examination, Officer Aman testified that he pulled out the fast food bag and began to pull out a clear bag when Petitioner fled. R. p. 68. He further testified that Petitioner gave verbal consent to search the vehicle. R. p. 69.

During cross-examination, Officer Aman explained that the warning ticket had been issued when he arrived and that Corporal Owens was explaining the ticket to Petitioner[1]. R. p. 72. He further explained that he removed the food container because they had obtained verbal consent, without such consent he would have only conducted an exterior search. R. p. 73.

Following the testimony presented by the State, defense counsel argued that "there was no real reason to suspect that there were drugs involved other than the fact that this young black male with dread locks --- was alone in a vehicle." R. pp. 86-86, lines 24-25, 1-3. Counsel further argued that verbal consent was not audible on the video nor did the State meet the test for voluntary consent since the officers testified that Petitioner was never free to go. R. pp. 87-88, 95-96.

In response, the State argued that the secondary detention was not a consensual encounter but was a lawful detention due to the officer's reasonable suspicion. R. p. 91. The State explained that this reasonable suspicion was based upon a number of factors, not just nervousness since "overt nervousness is not enough." R. p. 93. Regarding the search, the Solicitor stated:

> Your Honor, if the detention is supported by reasonable suspicion which it is in this case, then we determine whether or not consent is voluntary. Both of these officers have testified that this Defendant was asked, they asked for consent to search and he granted them consent to search his vehicle.

R. p. 93, lines 16-22.

In making her ruling, the trial court noted that she looked at three questions: 1) Whether there was probable cause to make the initial traffic stop; 2)Whether there was reasonable suspicion to further detain Petitioner; and 3) Whether there was voluntary consent to search. R.

[1] On direct examination, Corporal Owens testified that Officer Aman arrived before he finished writing the warning ticket. R. p. 41.

pp. 102-107. The trial court held that there was probable cause for the initial traffic stop, reasonable suspicion to further detain, and voluntary consent to search. R. pp. 102-107.

After receiving the court's ruling, defense counsel stated that Petitioner would appeal the court's ruling. R. p. 111. Counsel further stated that Petitioner would not accept a plea since he did not want to waive his right to appeal the court's ruling on the suppression motion. R. p. 117.

During the trial, the State called Corporal Owens and Officer Aman to the stand. R. pp. 132, 168. The State also introduced the video into evidence, State's Exhibit #1. R. p. 149. The video was admitted into evidence and played for the jury.

STANDARD OF REVIEW

In State v. Brockman, 339 S.C. 57, 528 S.E.2d 661 (2000), this Court established the standard of review for cases involving Fourth Amendment search and seizure issues. Pursuant to Brockman, the trial court's factual rulings are reviewed under the "clear error" standard and will only be reversed if there is clear error. The trial court's rulings will be not reversed if there is any evidence to support the ruling. Id., State v. Green, 341 S.C. 214, 532 S.E.2d 896 (Ct. App. 2000). In State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 460 (2002), this Court clarified that Brockman does not hold that the appellate court may not conduct its own review of the record to determine whether the trial court's decision is supported by the evidence. See State v. Tindall, 388 S.C. 518, 698 S.E.2d 203 (2010) (Finding that the deferential standard of review does not bar the appellate court from conducting its own review of the record to determine whether the trial court's decision is supported by the evidence.).

ARGUMENT

I. The Court of Appeals Erred By Affirming the Lower Court's Denial of Petitioner's Motion To Suppress The Evidence Since Petitioner Was Subjected To An Unreasonable Search And Seizure in Violation of the Fourth Amendment.

The Fourth Amendment guarantees the right to be secure from unreasonable searches and seizures. U.S. Const. amend IV. The South Carolina Constitution provides similar protections against unlawful searches and seizures. See S.C. Const. art. I, §10. Evidence obtained in violation of the Fourth Amendment is inadmissible and subject to suppression by the trial court. See Pennsylvania v. Mimms, 434 U.S. 106, 98 S.Ct. 330 (1977), Ohio v. Robinette, 519 U.S. 33, 117 S.Ct. 417 (1996), State v. Williams, 351 S.C. 591, 571 S.E.2d 703 (Ct. App. 2002), State v. Pichardo, 367 S.C. 84, 623 S.E.2d 840 (Ct. App. 2005).

It is well established that temporary detention of a person during a traffic stop, even if for a brief period of time and limited purpose, constitutes a seizure under the Fourth Amendment. Whren v. United States, 517 U.S. 806, 116 S.Ct. 1769 (1996). A seizure that is lawful at its inception can violate the Fourth Amendment if its manner and execution unreasonably infringes on an interest protected by the Constitution. Petitioner submits that the Court of Appeals erred in finding that "the traffic stop was not unreasonably extended", that there was "reasonable suspicion of a serious crime" and that Petitioner's gave voluntary consent to search the vehicle.

A. The Court of Appeals erred in finding that the traffic stop was not unreasonably extended and that Corporal Owens had reasonable suspicion of a serious crime.

Petitioner submits that the Court of Appeals erred in finding that the traffic stop was not unreasonably extended and that Corporal Owens had reasonable suspicion of a serious crime. Under the clear error standard of review, Petitioner submits that the traffic stop was unreasonably extended after Corporal Owens informed Petitioner that he was issuing a warning

citation since he failed to articulate facts leading to the conclusion that an objective manifestation of criminal activity existed under the totality of the circumstances.

During a traffic stop, an officer may request a driver's license and vehicle registration, order the individual to step out the vehicle, run a computer check, and issue a citation. See United States v. Sullivan, 138 F.3d 126 (4th Cir. 1998), Mimms, 434 U.S. 106, 98 S.Ct. 330 (1977). Any further detention for questioning is beyond the scope of the stop and therefore illegal unless the officer has a reasonable suspicion of a serious crime. See Sullivan, 138 F.3d 126. A traffic stop cannot be used as a fishing expedition for unrelated criminal activity. See Williams, 351 S.C. at 599, 571 S.E.2d at 708. Reasonable suspicion requires a particularized and **objective** basis that would lead one to suspect another of criminal activity. State v. Woodruff, 344 S.C. 537, 546, 544 S.E.2d 290, 295 (Ct. App. 2001)(emphasis added). Recently in United States v. Foster, 623 F.3d 243, 248 (4th Cir. 2011), the Court addressed reasonable suspicion and explained:

> However, an officer and the Government must do more than simply label a behavior as "suspicious" to make it so. The Government must also be able to either articulate why a particular behavior is suspicious or logically demonstrate, given the surrounding circumstances, that the behavior is likely to be indicative of some more sinister activity than may appear at first glance. See Ornelas, 517 U.S. at 695 (defining reasonable suspicion as a "commonsense, nontechnical conception that deal[s] with 'the factual and practical considerations of everyday life'" (quoting Illinois v. Gates, 462 U.S. 213, 231, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)); United States v. Cortez, 449 U.S. 411, 417, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981) ("[I]nvestigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity.").

As was argued in the Petition for Rehearing, the Court of Appeals analysis pursuant to State v. Rivera, 384 S.C. 356, 682 S.E.2d 307 (Ct. App. 2009) and State v. Tindall, 388 S.C. 518, 698 S.E.2d 203 (2010) errantly distinguished Petitioner's case to support their ruling that the traffic stop was reasonable and passed constitutional muster. Petitioner submits that the proper

application of Rivera and Tindall actually support his position and demonstrate the erroneous ruling of the trial court.

The Court of Appeals, explained and reasoned as follows:

> In Rivera, an officer stopped Rivera for following another vehicle too closely. Id. at 359, 682 S.E.2d at 309. During the stop, the officer asked Rivera to step out of the vehicle and asked where he and the passenger, Medero, were coming from, how long they had been there, where they were going, and the purpose of their trip. Id. Rivera and Medero gave conflicting stories regarding the purpose of their trip. Id. The officer informed Rivera he would receive a traffic warning citation and then proceeded to call for backup. Rivera, 384 S.C. at 359-60, 682 S.E.2d at 309. The officer then discussed the transport of drugs on the interstate and asked if any weapons, drugs, or large sums of money were in the vehicle. Id. Rivera replied in the negative. Id. at 360, 682 S.E.2d at 309. The officer subsequently asked for permission to search the vehicle, and Rivera consented. Id. The search revealed heroin in the vehicle's engine. Rivera, 384 S.C. at 360, 682 S.E.2d at 309.
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> At trial, Rivera and Medero moved to suppress the evidence on the basis that the traffic stop was unlawfully prolonged and the consent was invalid. Id. The trial court granted the suppression motion on the basis that the officer lacked "sufficient indicators of criminal activity to justify any continued detention" beyond the purpose of the traffic stop. Id. In granting deference to the trial court because of the "any evidence" standard of review, this court upheld the trial court's suppression of the evidence. Id. at 363, 682 S.E.2d at 311.
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> First, this court found the rental vehicle was lawfully detained and the officer's questioning of Rivera and Medero regarding the purpose, destination, and duration of their trip was reasonably related to the traffic stop. Rivera, 384 S.C. at 362, 682 S.E.2d at 310. However, this court found the purpose of the traffic stop was accomplished when the officer informed Rivera he would receive a warning citation. Id. As a result, our court concluded the officer's discussion concerning the transport of drugs on the interstate exceeded the scope of the traffic stop and constituted a second and illegal detention unless the continued detention was supported by reasonable suspicion. Id.
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> In analyzing whether the officer had reasonable suspicion, this court found Rivera and Medero's nervousness standing alone did not create suspicion of criminal behavior, and their stories were not so inconsistent as to indicate criminal behavior. Id. at 362-63, 682 S.E.2d at 310-11. Furthermore, this court found the absence of luggage in the back seat did not provide reasonable suspicion particularly when the trunk, the usual place for luggage, "was filled" with suitcases. Rivera, 384 S.C. at 363, 682 S.E.2d at 311. Finally, this court found

> that there was no evidence of air fresheners located in the vehicle based on the trial court's order. Id.

App. pp. 6-7.

Interestingly, the Court of Appeals noted that in Rivera it was held that the purpose of the traffic stop was accomplished when the officer informed Rivera he would receive a warning citation, yet the Court of Appeals failed to apply this standard in the instant case. It is clear from Corporal Owens' testimony and the car video, which was admitted at trial and provided to the Court of Appeals, that Corporal Owens informed Petitioner that he would receive a warning citation well before his questioning and observations that the Court of Appeals relied upon for their finding of reasonable suspicion.[2] Prior to informing Petitioner that he would be issuing a warning citation, the only factor Corporal Owens had was his own hunch or suspicion, which does not amount to reasonable suspicion. An officer's impression that a person is engaged in criminal activity without confirmation does not amount to an objective basis for reasonable suspicion. United States v. Sprinkle, 106 F.3d 613 (4th Cir. 1997). See State v. Woodruff, 344 S.C. 537, 544 S.E.2d 290 (Ct. App. 2001) (Finding that law enforcement officers are suspicious by training but are constrained by the courts objective analysis of reasonable suspicion.). Furthermore, Corporal Owens readily admitted that he was not going to let Petitioner leave nor was he ever free to leave. R. pp. 61-62, 64-65. As a result, Petitioner submits that the entire process was tainted by Corporal Owens personal and subjective determination that he was not going to let Petitioner continue on his way. In Foster, the Fourth Circuit Court of Appeals addressed a similar subjective determination made by an officer and held:

> In fact, although the reasonable suspicion standard is an objective test, Detective Ragland's initial comments to Foster, "Knowing you, you are up to something," clearly belie his stated reasons for initiating the stop. Accordingly, we apply the

[2] Officer Aman testified that the warning ticket had been issued when he arrived and Corporal Owens was explaining the ticket. R. p. 72.

> exclusionary rule here to continue to deter police from engaging in these types of unconstitutional seizures. We reverse the district court because, to do otherwise, would "invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches." Terry, 392 U.S. at 22.

Since the trial court must find that the law enforcement officer articulated specific factors amounting to reasonable suspicion and the trial court must consider the totality of the circumstances, by nature the review of Fourth Amendment search and seizure issues tend to be a fact driven analysis that require the appellate court to review the specific factors. See State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 460 (2002), Tindall, 388 S.C. 518, 698 S.E.2d 203. On appeal, Petitioner has argued that the trial court failed to consider the following factors that were given by Corporal Owens that are indicative of innocent travel: 1) the address Petitioner gave for his girlfriend checked out with dispatch, 2) Petitioner had been in no trouble with law enforcement, 3) Petitioner had recently graduated from tech school, 4) no hesitation by Petitioner, and 5) no negative information was reported by dispatch regarding Petitioner or the vehicle. R. pp. 34-35, 51. Instead of objectively addressing the true totality of the circumstances and the specific factors that were indicative of innocent travel, the Court of Appeals reasoned:

> Similar to Rivera, Owens' questions concerning Provet's destination and the purpose of his trip were reasonably related to the traffic stop, but unlike in Rivera, there are additional factors to be considered in this case. Owens testified Provet's vehicle contained several air fresheners. Additionally, Provet admitted he did not have any luggage for his two-day stay in Greenville.

App. p. 7. The Court of Appeals found the instant case distinguishable due to two factors – the existence of air fresheners and the absence of luggage. The Court failed to acknowledge that Corporal Owens failed to take the air fresheners into evidence, which is factually similar to State v. Rivera, 384 S.C. 356, 363, 682 S.E.2d 307, 311 (Ct. App. 2009). Furthermore, as was noted by the Court of Appeals, Corp. Owens testified that there was a bag on the rear seat. App. p. 3.

Additionally, Petitioner submits that the Court of Appeals improperly distinguished

his case from this Court's ruling in Tindall. Turning to Tindall, the Court of Appeals explained:

> In Tindall, an officer stopped Tindall for speeding, following another vehicle too closely, and failing to maintain his lane. Tindall, 388 S.C. at 520, 698 S.E.2d at 204. The officer asked Tindall for his driver's license, registration, insurance, and the rental car agreement. Id. at 522, 698 S.E.2d at 205. The officer then asked Tindall to exit his vehicle and to sit in the patrol car. Id. While Tindall was exiting his vehicle, the officer testified that Tindall did a "felony stretch." Id. The officer subsequently patted down Tindall and placed him in the patrol car. Tindall, 388 S.C. at 522, 698 S.E.2d at 205. At this point, the officer questioned Tindall regarding his destination, and Tindall informed the officer he was visiting his brother in Durham, North Carolina. Id. The officer called in Tindall's driver's license and registration to dispatch. Id. Approximately three minutes later, dispatch reported no problems with Tindall's driver's license and vehicle, and the officer told Tindall he would write him a warning ticket. Id. However, the officer refused to issue the ticket at this point and continued to question Tindall for approximately another six to seven minutes regarding "where he was going," "the purpose of the trip," "what exit he would take to get to Durham," "whether he had ever been charged with any drug crimes," "what type of business he was in," and "various questions about his business." Tindall, 388 S.C. at 522, 698 S.E.2d at 205.
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> Approximately fifteen to twenty minutes into the traffic stop, the officer asked Tindall if he could search his vehicle, and Tindall replied, "I don't care" or "I don't mind." Id. at 520, 698 S.E.2d at 204. The search revealed a substantial amount of cocaine. Id. at 520-21, 698 S.E.2d at 204. Tindall was convicted of trafficking cocaine in excess of four hundred grams and assessed a $250,000 fine. Id. at 520, 698 S.E.2d at 204. On appeal to our supreme court, Tindall argued the court of appeals erred in affirming the trial court's denial of his motions to suppress the cocaine and his statement to the police. Tindall, 388 S.C. at 520, 698 S.E.2d at 204.
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> Our supreme court held the "officer's continued detention of Tindall exceeded the scope of the traffic stop and constituted a seizure for purposes of the Fourth Amendment." Id. at 522, 698 S.E.2d at 205. The court found the purpose of the traffic stop was accomplished when the dispatcher reported no problems with Tindall's driver's license and vehicle, and the only remaining task was the issuance of the warning ticket. Id. The court concluded the continued questioning of Tindall exceeded the scope of the traffic stop and constituted a seizure under the Fourth Amendment. Id. Specifically, the court stated, "[A] reasonable person in Tindall's position – seated in the front seat of the patrol car with two officers standing at his door, another officer to his left, and a police dog

in the back seat – would not have felt free to terminate the encounter." Tindall, 388 S.C. at 522-23, 698 S.E.2d at 205

Our supreme court next analyzed whether the officer had reasonable suspicion of a serious crime when he chose not to conclude the traffic stop, despite his stated intention to issue a warning ticket. At the time of the continued detention, the officer discovered the following: (1) "Tindall was driving to Durham to meet his brother"; (2) "Tindall was driving a rental car rented the previous day by another individual which was to be returned to Atlanta on the day of the stop"; (3) "Tindall did a 'felony stretch' on exiting the vehicle"; and (4) "Tindall seemed nervous." Id. at 523, 698 S.E.2d at 206. The court concluded these facts did not provide a sufficient basis for reasonable suspicion. Id. Therefore, the supreme court reversed the trial court's ruling on the motion to suppress the cocaine. Id. Additionally, the supreme court held Tindall's consent to the search of his vehicle was invalid because it was the product of an unlawful detention under the Fourth Amendment. Id.

App. pp. 7-9.

The Court of Appeals reasoned:

We conclude the present case is distinguishable from Tindall. In Tindall, the officer questioned Tindall for approximately six to seven minutes after the purpose of the traffic stop was accomplished, and thus, a continued detention occurred. Tindall, 388 S.C. at 522, 698 S.E.2d at 205. Conversely, Owens' series of questions and observations occurred prior to the conclusion of the traffic stop because Owens was waiting to hear from dispatch regarding Provet's license and registration and a warning citation had yet to be issued. We conclude Owens developed his reasonable suspicion as a result of additional factors that were not present in Tindall.

In the case at hand, the trial court found reasonable suspicion existed to support Owens' further detention of Provet based on Owens ascertaining (1) Provet was nervous as displayed by extreme shaking of the hands and accelerated breathing, (2) third-party vehicle registration is very common in drug trafficking, (3) Provet's admission to visiting one girlfriend while driving a different girlfriend's vehicle, (4) Provet's claim he was coming from the Holiday Inn even though the traffic violation occurred prior to that hotel's exit, (5) Provet's presence in Greenville for two days without any luggage, (6) the presence of numerous fast food bags, a cell phone, and some receipts in Provet's vehicle, and (7) the presence of several air fresheners in the vehicle that produced a strong odor.

App. pp. 9-10. The Court of Appeals went on to acknowledge "that some of the items found in Provet's vehicle are commonplace and consistent with innocent travel", yet the Court of Appeals

failed to address those factors specifically, which are listed above.[3] In addition to the Court of Appeals failure to specifically address the totality of the factors that were indicative of innocent travel, the Court of Appeals also failed to acknowledge that a number of factors were present in Tindall that are not present in the instant case. These factors include the following: 1) Tindall was nervous even after receiving the warning; 2) Tindall was driving a rental car that he had not rented; 3) Tindall was driving only one way and then dropping the car off; 4) Tindall planned on driving approximately eighteen hours in one day; and, 5) the cities involved were both "drug hubs." See State v. Tindall, 379 S.C. 304, 665 S.E.2d 188 (Ct. App. 2008) *reversed by* 388 S.C. 518, 698 S.E.2d 203 (2010). Petitioner submits that the factors present in Tindall far exceed the factors set forth in the instant case and it appears that Court of Appeals decision stands to limit this Court's ruling in Tindall.

Additionally, the State has relied upon United States v. Branch, 537 F.3d 328 (4th Cir. 2008) and United States v. Arvizu, 534 U.S. 266, 122 S.Ct. 744(2002), in making their argument. Interestingly, the State has ignored the factors and reasoning set forth in each case that are clearly distinguishable from the instant case. In Branch, the following factors were present: 1) the officer knew defendant was the subject of two drug buys with a confidential informant, 2) dispatch informed the officer that the vehicle was previously in an accident and the officer remembered responding to the accident in a high drug area, 3) the presence of air fresheners and odor of detergent, 4) shaking hands and no eye contact 5) car not in defendant's name and would not give owners information 6) provided story regarding car owner being on her honeymoon, which was contradicted by information received from dispatch 7) defendant's home address was in high drug area, 8) officer was informed over the radio by another officer that defendant was

[33] The Court of Appeals only addressed the commonplace items (i.e. numerous air fresheners, fast food bags, and several receipts) in its analysis and failed to address the factors listed on page fourteen herein.

known to deal drugs, and 9) canine alerted before officer finished warning ticket. 537 F.2d at 332-4, 338-9. In their reliance on Arvizu, 534 U.S. 266, 122 S.Ct. 744, the State provides the following parenthetical explanation of the case: "similar facts constituted sufficient basis for reasonable suspicion of illegal activity." Return to Petition p. 13. In Arvizu, the defendant was traveling with a woman and children on an unpaved and rarely traveled road near the Mexican border that was commonly used by drug smugglers. Id. The Supreme Court of the United States held that the totality of the circumstances warranted the stop for further investigation regardless of whether the factors taken in isolation appeared innocent. Id. at 277, 122 S.Ct. at 752-3. The Court further held that it was reasonable for the agent to determine from common sense and his experience that the defendant was not taking his family on a recreational outing but he was attempting to avoid a checkpoint. Id. Here, Petitioner is not asking this Court to take the factors in isolation or completely disregard the officers use of common sense and his experience, but Petitioner is urging this Court to find that the Court of Appeals relied too heavily on the officers experience and failed to **objectively** review the totality of the circumstances, which includes the number of factors indicative of innocent travel.

Furthermore, the State has repeatedly relied upon United States v. Sokolow, 490 U.S. 1, 109 S.Ct. 1581 (1989) in making their arguments in support of the Court of Appeals' decision. Petitioner submits that the instant case is clearly distinguishable from the factors relied upon in Sokolow and that the dissent written by Justice Marshall contains a strong warning against the road the State is urging this Court to go down. In Sokolow, DEA agents stopped the defendant in the airport and discovered drugs in his luggage. 490 U.S. at 3, 109 S.Ct. at 1583. The Court analyzed whether the agents had reasonable suspicion that the defendant was transporting illegal

drugs when they stopped him at the airport. Id. The Court noted that the agents knew the following factors when they stopped the defendant:

> 1) he paid $2,100 for two airplane tickets from a roll of $20 bills; 2) he traveled under a name that did not match the name under which his telephone number was listed; 3) his original destination was Miami, a source city for illicit drugs; 4) he stayed in Miami for only 48 hours, even though a round-trip flight from Honolulu to Miami takes 20 hours; 5) he appeared nervous during his trip; and 6) he checked none of his luggage.

Id. After a detailed analysis, the majority of the Court held that the DEA agents had sufficient reasonable suspicion to stop the defendant under the totality of the circumstances. Id. at 11, 109 S.Ct. at 1587. In his dissent, Justice Marshall addressed Terry v. Ohio, 392 U.S. 1, 14-15 (1968) and reasoned: "By requiring reasonable suspicion as a prerequisite to such seizures, the Fourth Amendment protects innocent persons from being subjected to 'overbearing or harassing' police conduct carried out solely on the basis of imprecise stereotypes of what criminals look like, or on the basis of irrelevant personal characteristics such as race." Id. at 12, 109 S.Ct. at 1588. Justice Marshall further reasoned, as follows:

> It is highly significant that the DEA agents stopped Sokolow because he matched one of the DEA's "profiles" of a paradigmatic drug courier. In my view, a law enforcement officer's mechanistic application of a formula of personal and behavioral traits in deciding whom to detain can only dull the officer's ability and determination to make sensitive and fact-specific inferences "in light of his experience," *Terry, supra*, at 27, particularly in ambiguous or borderline cases. Reflexive reliance on a profile of drug courier characteristics runs a far greater risk than does ordinary, case-by-case police work of subjecting innocent individuals to unwarranted police harassment and detention.

Id. at 13, 109 S.Ct. at 1588. Justice Marshall concluded that the factors taken singly or together were indicative of innocent travel and did not amount to reasonable suspicion. Id. at 15, 109 S.Ct. at 1590. Here, defense counsel argued that "there was no real reason to suspect that there were drugs involved other than the fact that this young black male with dread locks --- was alone in a vehicle." R. pp. 86-86, lines 24-25, 1-3. Petitioner would submit that defense counsel's

argument must be considered when the State is relying so heavily upon the officers training and experience. Similarly to Sokolow, Petitioner submits that this argument has been ignored by the Court of Appeals as it relates to the totality of the circumstance. Therefore, Petitioner would urge this Court to strongly consider the reasoning set forth by Justice Marshall regarding imprecise stereotypes in conjunction with the lack of objectivity admittedly exercised by Corporal Owens and affirmed by the lower courts.

B. The Court of Appeals erred in finding that Petitioner gave voluntary consent to search the vehicle.

Petitioner submits that the Court of Appeals erred in finding that he gave voluntary consent to search the vehicle. In State v. Williams, the Court of Appeals held that "when an officer asks for consent to search after an unconstitutional detention, the consent procured is per se invalid unless it is 'both voluntary and not an exploitation of the unlawful detention.'" 351 S.C. at 604, 571 S.E.2d at 710 (Ct. App. 2000). Even if this Court finds that there was not an unconstitutional detention, the burden is still on the State to prove the voluntariness of the consent. State v. Pichardo, 367 S.C. 84, 623 S.E.2d 840 (Ct. App. 2005).

In finding the search voluntary, the Court of Appeals relied upon State v. Pichardo, 367 S.C. 84, 623 S.E.2d 840 (Ct. App. 2005), but failed to recognize that it is analogous to the instant case. Interestingly, in Pichardo the Court of Appeals upheld the suppression of the evidence and reasoned that there was an immediate transition from the traffic stop to the search such that the defendants did not know the initial search was over and they were free to go. See State v. Pichardo, 367 S.C. 84, 623 S.E.2d 840. After acknowledging that Corporal Owens admitted that he was not going to let Petitioner leave when he asked for his consent to search, the Court of Appeals reasoned: "Provet should have felt free to go because his driver's license and vehicle registration were returned and his traffic warning citation was issued." App. p. 12. In complete contrast, in State v. Pichardo, the Court of Appeals reasoned that returning documents is not enough to demonstrate that an encounter has become consensual encounter. 367 S.C. at 102, 623 S.E.2d at 850. Interestingly, Corporal Owens testified that that the purpose of returning Petitioner's documents was for him to feel free to go, but he was not free to go. R. pp. 61-62, 64-65. Petitioner submits that Corporal Owens created the exact involuntary situation described by the Ohio Supreme Court, as follows:

> The transition between detention and a consensual exchange can be so seamless that the untrained eye many not notice that it has occurred. The undectability of that transition may be used by police officers to coerce citizens into answering questions that they need not answer, or to allow a search of a vehicle that they are not legally obligated to allow.

State v. Robinette, 80 Ohio St.3d 234, 685 N.E.2d 762, 770-71 (Ohio 1997). Petitioner submits that the Court of Appeals failed to address the seamless transition that occurred when Corporal Owens explained the citation and in the same breath inquired about illegal contents and asked to search the vehicle.

Even though the Court of Appeals concluded "based on the totality of the circumstances, the trial court did not err in concluding Provet voluntarily consented to the search of the vehicle." App. p. 12. It is clear their analysis only considered the officers actions and failed to consider the true totality of the circumstances. In State v. Williams, 351 S.C. 591, 571 S.E.2d 703 (Ct. App. 2002), the Court of Appeals set forth the factors for determining whether a reasonable person would feel free to leave:

1) The time and place of the encounter;
2) The number of officers present;
3) The length of detention;
4) Whether the officer moved the person to a different location;
5) Whether the officer informed the person he was free to leave;
6) Whether the officer indicated to the person that he was suspected of a crime, and
7) Whether the officer retained the person's documents.

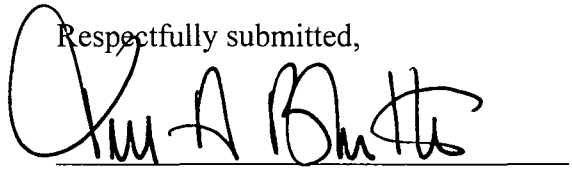
Here, the trial court merely noted that Petitioner's documents were returned and there were no threats or coercion, and the Court of Appeals failed to specifically address each factor. As was argued by Petitioner on rehearing, the trial and appellate court failed to consider significant

factors such as whether Petitioner was informed he was free to leave, as well as additional factors, including the characteristics of Petitioner – age, maturity, education, intelligence and experience – as set forth in United States v. Boone, 245 F.3d 352 (4th Cir. 2001), which were raised by defense counsel in his argument to the trial court. R. pp. 88-9. Clearly, the Court of Appeals overlooked the fundamental question of whether a reasonable person would have felt free to leave under the totality of the circumstances. Here the totality of the circumstance included the following: 1) a young black male out of state driver, 2) removed from his vehicle on the side of a dark busy interstate, 3) subjected to a pat down search 4) was not informed he was free to go after being told he would receive a warning citation, 5) was subjected to questions from the Aggressive Crime Enforcement Unit of the South Carolina Highway Patrol, which included the presence of a canine unit, and 6) was being questioned by an officer that readily admitted that Petitioner was not free to go. In contrast to the State's argument, these factors do not describe every nighttime traffic stop in this State. Upon proper consideration of these factors and those contained in the record and video, Petitioner submits that the Court of Appeals erred in finding that a reasonable person would have felt free to go and that Petitioner gave voluntary consent to search the vehicle.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that his Court reverse the decision of the Court of Appeals and reverse Petitioner's conviction and sentence.

Respectfully submitted,



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December 10, 2012

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
DEC 14 2012
S.C. Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

Carmen T. Mullen, Circuit Court Judge

Case No.: 2002-GS-23-4288; 2005-GS-23-3478
Appellate Case No.:2011-192746

THE STATE,

RESPONDENT,

v.

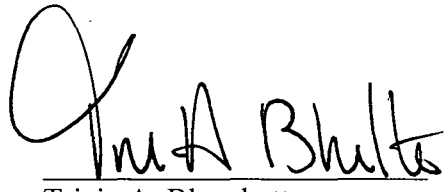
KARRIEM PROVET,

PETITIONER.

CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney for Petitioner, hereby certify that I placed in the United States Mail on the 14th day of December 2012, a copy of the Brief of Petitioner, with postage prepaid and the return address clearly shown on said envelope to the W. Walter Wilkins, Solicitor 13th Judicial Circuit, at:

W. Walter Wilkins
Solicitor, 13th Judicial Circuit
305 E. North Street, Suite 325
Greenville, SC 29601



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December 14, 2012

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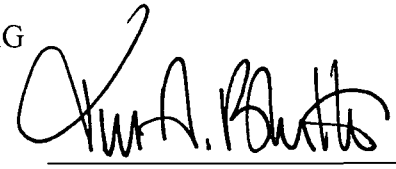
I, Tricia A. Blanchette, Attorney for Petitioner, hereby certify that I placed in the United States Mail on the 14th day of December 2012, a copy of the Brief of Petitioner, with postage prepaid and the return address clearly shown on said envelope to Deborah R.J. Shupe at the Office of the Attorney General, at:

Office of the Attorney General
ATT: Deborah R.J. Shupe, Ast. AG
P.O. Box 11549
Columbia, SC 29211-1549



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December 14, 2012

LAW OFFICE OF TRICIA A. BLANCHETTE

RECEIVED
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S.C. Supreme Court

December 14, 2012
VIA HAND DELIVERY

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

RE: State v. Karriem Provet; Appellate Case No. 2011-192746

Dear Sir:

For filing, I have attached an unbound original and fourteen copies of the Brief of Petitioner, thirteen copies of the Appendix, Record on Appeal, Brief of Appellant and Brief of Respondent, and the Certificate of Service.

Thank you for your assistance with this matter. Please feel free to contact me if you need any additional information.

Yours truly,

Tricia A. Blanchette
Attorney at Law

cc: Deborah R.J. Shupe, Assistant Attorney General
W. Walter Wilkins, Solicitor, 13th Judicial Circuit
Karriem Provet

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